Case No. 70498

In the Supreme Court of Nevada

ALBERT THOMAS, individually; JANE DUNLAP, individually; JOHN DUNLAP, individually, *et al.*,

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 California limited liability company; AM-GSR HOLDINGS, LLC, a Nevada limited liability company,

Respondents,

APPEAL

from the Second Judicial District Court, Washoe County
The Honorable ELLIOT A. SATTLER, District Judge
District Court Case No. CV12-02222

RESPONDENTS' ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

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

1. Respondent MEI-GSR Holdings, LLC is a limited liability company.

2. Respondent Grand Sierra Resort Unit Owners' Association is a nonprofit corporation. No publicly traded company owns more than 10% of its stock.

3. Respondent Gage Village Commercial Development, LLC is a limited liability company.

4. Respondent AM-GSR Holdings, LLC is a limited liability company.

5. H. Stan Johnson of Cohen-Johnson, LLC and Mark Wray of The Law Offices of Mark Wray, Gayle Kern of Kern & Associates, Ltd., and Sean Browan of Brohawn Law represented respondent in the district court and have appeared in this Court.

6. Daniel F. Polsenberg, Joel D. Henriod and Dale Kotchka-Alanes of Lewis Roca Rothgerber Christie LLP have appeared before

this Court.

7. No publicly traded company has any interest in this appeal.

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

DATED this 3rd day of February, 2017.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

By: */s/ Daniel F. Polsenberg*
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This case is about whether courts must follow an unambiguous statutory mandate to dismiss an action filed in violation of the statute's alternative-dispute-resolution requirement. NRS 38.310 requires pre-suit mediation or arbitration of certain claims and expressly mandates that courts "shall dismiss any civil action" commenced in violation of the statute. In its ruling, the district court found that NRS 38.310 applies to Plaintiffs' claims and that the court lacked discretion to depart from the statute's mandate to dismiss the action. The district court's decision was correct and should be affirmed.

STATEMENT OF THE CASE

Plaintiffs are current or former owners of condominium units at the Grand Sierra Resort and Casino ("GSR") in Reno. Unhappy with the way the GSR's new owners were administering the unit owners' association and GSR's rental and maintenance programs following the lender's takeover and subsequent sale of the property, Plaintiffs-Appellants commenced suit against Defendants. (1 App. 1-22.)[1]

[1] The Defendants in this case are MEI-GSR Holdings, LLC ("MEI-GSR"), Grand Sierra Resort Unit Owners' Association ("GSR-UOA" or "Unit Owners' Association"), Gage Village Commerical Development, LLC ("Gage"), and AM-GSR Holdings, LLC ("AM-GSR"). MEI-GSR is the successor in interest to Grand Sierra Operating Corp., is the "Hotel

It is undisputed that Plaintiffs filed their lawsuit without first mediating or arbitrating their claims. Defendants filed a motion to dismiss the action based on NRS 38.310 (1 App. 120-40), which the district court granted (5 App. 1082-94). The district court properly found that Plaintiffs' claims all "require interpretation and application of the governing documents" pertaining to GSR[2] and that "the language of NRS 38.310 mandates the Court to dismiss this action." (5 App. 1087, 1093.) This appeal followed.

STATEMENT OF ISSUES PRESENTED

1. Whether the district court correctly concluded that NRS 38.310 applies to Plaintiffs' claims, all of which relate to documents governing the operation of a condominimum hotel and the accompa-

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Management Company" under the Seventh Amendment to Condominium Declaration of Covenants, Conditions, Restrictions and Reservations of Easements for Hotel-Condominiums at Grand Sierra Resort ("CC&Rs"), and is the "Company" under the Unit Maitenance Agreement and Unit Rental Agreement. (1 App. 200; 2 App. 245, 263; 3 App. 496; 5 App. 963-64, 975.) Gage and AM-GSR are successor Declarants under the CC&Rs and also own several of the GSR condominimum units. (2 App. 280-88; 5 App. 975.)

[2] As used herein, "the governing documents" refer to the CC&Rs, the Unit Maintenance Agreement, the Unit Rental Agreement, and the Purchase and Sale Agreement, all of which impose covenants, conditions, and/or restrictions on the GSR condominium units and/or relate to procedures for imposing assessments.

nying unit owners' association and none of which are claims for quiet title.

2. Whether the district court correctly concluded that it lacked discretion to alter the statutory mandate of NRS 38.310 to dismiss the action.

STATEMENT OF THE FACTS

Unlike Plaintiffs-Appellants' recitation of the facts, the following facts are those that are relevant to whether Plaintiffs' claims, as pled, are subject to NRS 38.310's requirements and thus whether they were properly dismissed. As discussed further below, what may have happened in the litigation after the action commenced is not relevant, nor is evidence submitted after the commencement of the action.

At the time the action was commenced, each of Plaintiffs' claims related to the interpretation or application of the governing documents.

I. GRAND SIERRA RESORT AND ITS GOVERNING DOCUMENTS

The condominium units at issue are located in the Grand Sierra Resort & Casino, are part of the Unit Owners' Association (1 App. 81, ¶ 106; 1 App. 101, ¶8), and are subject to the CC&Rs and other governing documents (*see, e.g.*, 2 App. 344-455 (CC&Rs); 2 App. 241 (signature

page acknowledging purchaser's receipt of certain governing documents). The GSR property is subject to the Uniform Common-Interest Ownership Act (NRS 116). (2 App. 348.)

i. Control and voting rights

The CC&Rs describe how the GSR-UOA is to be administered (2 App. 370-80, Art. 5) and state that "[t]here shall be one Voting Member for each Unit Ownership." (2 App. 371, § 5.3(a).) Thus, if one entity owns multiple units, it will have greater voting rights.

ii. Hotel expenses

In addition to other charges and assessments, the CC&Rs expressly permit the imposition of assessments for Hotel Expenses and allow for reserve expenses. (2 App. 387-90, § 6.10.) The Declarant has lien and foreclosure rights if assessments for Hotel Expenses are not timely paid. (2 App. 389-90, § 6.10(f).)

iii. Declarant's right of repurchase

The CC&Rs contain a detailed provision on the Declarant's right of repurchase and specify the time periods and prices at which any repurchase shall be effectuated. (2 App. 404-06, § 12.2.)

iv. Unit Maintenance Agreement

The CC&Rs define the Unit Maintenance Agreement as the "agreement that each Unit Owner of a Hotel Unit must enter into with the Hotel Management Company (and to which each Unit Owner of a Hotel Unit must remain a party) for so long as such Unit Owner owns a Hotel Unit in the Condominium." (2 App. 354.) As parties to the Unit Maintenance Agreement, owners agreed to pay Daily Use Fees and other charges imposed by the Company. (2 App. 202, 204, 209.)

The parties to the Unit Maintenance Agreement agree that it, "together with the CC&Rs and the Dispute Resolution Addendum . . . , constitutes the entire Agreement between the parties" and that there are no oral modifications or other representations. (1 App. 206, § 16(b).) Owners expressly acknowledge and warrant that neither the Company (MEI-GSR) nor its representatives have made any representations with respect to the economic benefits of unit ownership. (1 App. 205, § 14(A).)

v. Rental program

Purchasers of units acknowledged when they bought their units that they had been informed that the units were not suitable as an in-

vestment for people seeking primarily rental income and that no one represented they would derive a profit from participating in the rental program. (2 App. 242.)

Plaintiffs who participated in the rental program signed a Unit Rental Agreement. (2 App. 245-61 (2007 version); 2 App. 263-78 (2011 version).) In doing so, they acknowledged the rental program was completely voluntary. (2 App. 245, 257; 2 App. 263, 275.) Participants in the rental program agreed the "Company has the exclusive right to establish and adjust, from time to time, the rental rates for the Unit without notice to Owner, and to rent the Unit for the rates that it considers appropriate, in its discretion." (2 App. 248; 2 App. 266-67.)

The Unit Rental Agreement specified how rent would be calculated and described the limited duties of the Company. (2 App. 252-53, § 9; 2 App. 270-71, § 9.) The Unit Rental Agreement specifically allowed the Company to provide complimentary use of the unit for up to five nights per year. (2 App. 255, § 11; 2 App. 273, § 11.) No notice of reservations would be provided to the owners unless specifically requested. (2 App. 251, § 8(e); 2 App. 269, § 8(e).)

The Company had discretion to modify the Rotation System for renting the units, and unit owners expressly acknowledged they would have no claim based on failure to follow the Rotation System. (2 App. 251-52 § 8(a), (g); 2 App. 269-70 § 8(a), (g).) In the 2011 Rental Agreement, owners agreed that "Company owned units and hotel rooms" would "be rented prior to other owned Units." (2 App. 269, § 8(a).) The owners further agreed that their "sole and exclusive remedy" against the Company would be to "terminate this Agreement." (2 App. 256, § 16; 2 App. 274, § 16.)

The owners specifically acknowledged there was no guaranteed rental income. (2 App. 256, § 18; 2 App. 275, § 18 (emphasis added).) The owners again acknowledged that there were no oral modifications or representations apart from what was written in the Unit Rental Agreement and Unit Maintenance Agreement. (2 App. 259, § 21(b); 2 App. 276-77, § 21(b).)

vi. Unit Owners Knew Alternative Dispute Resolution Was Required

Disputes relating to the Unit Maintenance Agreement or Unit Rental Agreement were subject to a Dispute Resolution Addendum Agreement providing for mediation and arbitration of disputes worth

more than $5,000. (1 App. 207, 210-16; 2 App. 259, § 21(d); 2 App. 277, § 21(d).)[3] The Dispute Resolution Addendum Agreement contained an express limitation on liability: "THE TOTAL AGGREGATE LIABILITY OF GRAND SIERRA, ITS OWNERS, OFFICERS, DIRECTORS, PARTNERS, EMPLOYEES, CONTRACTORS, VENDORS, SUBCONSULTANTS, AND DESIGN PROFESSIONALS SHALL NOT EXCEED FIFTY THOUSAND DOLLARS ($50,000)." (1 App. 214.) This limitation was to "APPLY TO ANY AND ALL LIABILITY OR CAUSE OF ACTION AGAINST GRAND SIERRA HOWEVER ALLEGED OR ARISING." (1 App. 214.)

The Purchase and Sale Agreement also contained a Dispute Resolution Addendum Agreement governing disputes relating to the GSR property (2 App. 230-238). The parties again agreed that disputes involving more than $5,000 "shall first be submitted to non-binding mediation." (2 App. 234.) The $50,000 cap on liability was reiterated. (2 App. 236.) And the parties acknowledged there were no contradictory oral representations that could be relied on. (2 App. 237-38.)

[3] Disputes worth $5,000 or less were to be submitted to Reno's Small Claims Court. (1 App. 212.)

II. PLAINTIFFS COMMENCE SUIT, FILING CLAIMS IMPLICATING THE INTERPRETATION, APPLICATION OR ENFORCEMENT OF THE GOVERNING DOCUMENTS

Plaintiffs commenced their action against Defendants[4] on August 27, 2012. (1 App. 1); NRCP 3 ("A civil action is commenced by filing a complaint with the court.").[5]

i. Plaintiffs allege Defendants applied the CC&Rs to advance their own economic interests

Plaintiffs alleged that "[b]ecause Defendants MEI-GSR and Gage Village control more units of ownership than any other person or entity, they effectively control the Unit Owners' Association." (1 App. 81, ¶¶110-11.) Plaintiffs alleged that because MEI-GSR and Gage control the Unit Owners' Association, the individual unit owners "effectively have no input or control" and MEI-GSR and Gage use their control to advance their own economic objectives to the detriment of Plaintiffs. (1

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[4] After this litigation had been commenced, MEI-GSR transferred its interests in certain condominium units to AM-GSR. The parties stipulated that AM-GSR would be added as a defendant subject to the same procedural posture as MEI-GSR. (7 App. 1413, ¶¶ 105-06.)

[5] Plaintiffs later filed a second amended complaint (1 App. 71-96), the operative pleading at the time of the district court's dismissal. The claims in the original complaint and the second amended complaint are the same. (1 App. 11-21; 1 App. 85-95.) In describing Plaintiffs' claims, this brief will cite to the second amended complaint.

App. 81, ¶¶112-13.)

ii. Plaintiffs allege improper charges and accounting under the Unit Maintenance Agreement

Plaintiffs acknowledged that under the CC&Rs, they were required to enter into a Unit Maintenance Agreement and participate in the Hotel Unit Maintenance Program. (1 App. 82, ¶116.) Plaintiffs alleged that MEI-GSR forced them "to pay capital reserve contributions in excess of what should have been charged" and failed to properly account for collected capital reserve contributions, Hotel Fees and Daily Use Fees. (1 App. 82-83, ¶¶119, 121, 124.) Plaintiffs alleged that MEI-GSR and Gage "have failed to pay proportionate capital reserve contribution payments" and proportionate Daily Use Fees in connection with their own condo units. (1 App. 82, ¶¶120, 123.)

According to Plaintiffs, "MEI-GSR has systematically endeavored to increase the various fees that are charged in connection with the use of the GSR Condo Units in order to devalue the units owned by" Plaintiffs. (1 App. 83, ¶126.) Plaintiffs alleged some of them have been effectively forced to sell their units to MEI-GSR and/or Gage for low prices "because the units fail to generate sufficient revenue to cover expenses." (1 App. 83, ¶¶128-29.)

iii. Plaintiffs allege manipulation and breach of the Unit Rental Agreement

Plaintiffs acknowledged they entered into a Unit Rental Agreement with MEI-GSR. (1 App. 84, ¶133.) Plaintiffs alleged that MEI-GSR manipulated the rental of hotel rooms and condo units to maximize MEI-GSR's profits and devalue the condo units owned by Plaintiffs. (1 App. 84, ¶134.) Plaintiffs alleged that "MEI-GSR has breached the Grand Sierra Resort Unit Rental Agreement with Individual Condo Unit Owners by failing to follow its terms, including but not limited to, the failure to implement an equitable Rotational System as referenced in the agreement." (1 App. 85, ¶144.) Plaintiffs also alleged that "MEI-GSR has failed to act in good faith in exercising its duties under the Grand Sierra Resort Unit Rental Agreements with the Individual Unit Owners." (1 App. 85, ¶145.)

iv. Plaintiffs bring claims relating to the governing documents and Defendants' procedures for imposing assessments

Based on the allegations above, Plaintiffs brought claims for (1) petition for appointment of receiver as to GSR-UOA, (2) intentional and/or negligent misrepresentation as to MEI-GSR, (3) breach of contract as to MEI-GSR, (4) quasi-contract/equitable contract/detrimental

reliance as to MEI-GSR, (5) breach of the implied covenant of good faith and fair dealing as to MEI-GSR, (6) consumer fraud/Nevada Deceptive Trade Practices Act against MEI-GSR, (7) declaratory relief as to MEI-GSR, (8) conversion as to MEI-GSR, (9) demand for accounting as to MEI-GSR and GSR-UOA, (10) NRS 116.1112, unconscionable agreement, (11) unjust enrichment/quantum meruit against Gage, and (12) tortious interference with contract and/or prospective business advantage against MEI-GSR and Gage. (1 App. 85-95.)

Defendants moved to dismiss based on NRS 38.310. (1 App. 120-40.)

III. THE DISTRICT COURT RECOGNIZES THAT NRS 38.310 IS MANDATORY AND DISMISSES PLAINTIFFS' COMPLAINT

A. The District Court Found that NRS 38.310 Applies to All of Plaintiffs' Claims

The district court recognized that the "governing documents in this matter are the" CC&Rs, the Unit Maintenance Agreement, the Purchase and Sale Agreement, and the Unit Rental Agreements, and that "[t]he fees imposed on the condominium owners, including those within the [Unit Maintenance Agreement], are controlled by the CC&Rs." (5 App. 1084-85.) The court recognized that "Gage and AM-

GSR are successor Declarants pursuant to the CC&Rs" and that the "liability of both Gage and AM-GSR to the Plaintiffs would be as Declarants under the CC&Rs relating to the operation and management of the units." (5 App. 1086.)

The district court rejected Plaintiffs' argument that NRS 38.310 did not apply because Plaintiffs' claims related to their "right to use and possess their property." (5 App. 1087.) As the district court pointed out, "none of the claims in the Second Amended Complaint would impact the owners' title to the units" and the "causes of action in this matter do not concern claims of superior title." (5 App. 1087.)

The district court further found that "the claims raised by the Plaintiffs require interpretation and application of the governing documents. The Plaintiffs' causes of action relate to matters provided for in the governing documents." (5 App. 1087.) As the district court explained, "[t]o determine whether there was interference with the use of the Plaintiffs' ability to use their condominiums necessarily requires interpretation of the CC&Rs." (5 App. 1087.) The district court found

that Plaintiffs' purported reliance on "*McKnight*'s[6] 'possession and use' language" was misplaced, as, "[p]ursuant to Plaintiffs' argument, almost any alleged violations of the CC&Rs could arguably be framed as interference with the use and possession of one's property." (5 App. 1087.) The district court pointed out that *McKnight* found only a quiet title claim exempt from NRS 38.310 and that a significant number of courts applying *McKnight* have likewise limited the exemption from NRS 38.310 to quiet title claims. (5 App. 1087-88 & n.1.)

B. The District Court Concluded that NRS 38.310 Mandated Dismissal of Plaintiffs' Claims

The district court concluded that "the language of NRS 38.310 mandates the Court to dismiss this action." (5 App. 1093.) The court noted Plaintiffs' argument that NRS 38.310 does not pertain to subject matter jurisdiction, but found Plaintiffs' "argument on this issue to be unpersuasive." (5 App. 1088.) The court noted that "[a]ccess to the courts has been limited by the legislature via requirements to exhaust available administrative remedies. '[W]hether couched in terms of subject-matter jurisdiction or ripeness, a person generally must exhaust all

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[6] *McKnight Family, L.L.P. v. Adept Mgmt.*, 129 Nev. Adv. Op. 64, 310 P.3d 555, 558 (2013).

available administrative remedies before initiating a lawsuit, and failure to do so renders the controversy nonjusticiable.'" (5 App. 1088 (quoting *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 571, 170 P.3d 989, 993 (2007)).)

The district court noted Nevada cases suggesting that parties can be estopped from raising lack of subject matter jurisdiction or be deemed to have waived the issue, but concluded these cases were not applicable. (5 App. 1091-93.) More to the point, the court noted that the statutory language "shall" "'is mandatory and does not denote judicial discretion.'" (5 App. 1090 (quoting *Washoe Med. Ctr. v. Second Judicial Dist. Court of State of Nev. ex rel. Cnty. of Washoe*, 122 Nev. 1298, 1303, 148 P.3d 790, 793 (2006)).) "'The Legislature's choice of the words "shall dismiss" instead of "subject to dismissal" indicates that the Legislature intended that the court have no discretion with respect to dismissal.'" (5 App. 1090 (quoting *Washoe*, 122 Nev. at 1303, 148 P.3d at 793).)

The district court found that "to act contrary to the mandates of NRS 38.310 would violate the separation of powers, whereby courts are bound to follow the laws passed by legislative bodies." (5 App. 1093.)

As the court noted, it could not "substitute its opinion of what should happen under these facts for the opinion of the people of this State as expressed by their elected legislators." (5 App. 1093.) The court accordingly granted Defendants' motion to dismiss. (5 App. 1094.)

SUMMARY OF THE ARGUMENT

All of Plaintiffs' claims implicate the governing documents and were properly dismissed pursuant to the unambiguous mandate of NRS 38.310(2). NRS 38.310 permits no exceptions and is not a judicially created doctrine subject to waiver or a court's discretion. Rather, NRS 38.310(1) imposes a mandatory, unwaivable condition precedent to suit in the form of pre-suit mediation or arbitration, and NRS 38.310(2) dictates the remedy for a party's failure to comply: "A court ***shall dismiss*** any civil action which is commenced in violation of the provisions of subsection (1)." NRS 38.310(2) (emphasis added).

Whether NRS 38.310 pertains to subject matter jurisdiction is unimportant. Regardless of whether it governs jurisdiction or justiciablity or is simply an obligatory condition precedent to filing suit, NRS 38.310 imposes a mandatory statutory limitation on the ability to proceed with a lawsuit. Because Plaintiffs did not comply with NRS 38.310, their

claims had to be dismissed. The district court properly held it had no discretion *not* to dismiss Plaintiffs' claims, and Plaintiffs' arguments to the contrary conflict with the clear language of the statute.

STANDARD OF REVIEW

Statutory interpretation is an issue of law subject to de novo review. *Washoe Med. Ctr. v. Second Judicial Dist. Court of State of Nev. ex rel. Cnty. of Washoe*, 122 Nev. 1298, 1302, 148 P.3d 790, 792 (2006). When interpreting a statute, "if 'the language . . . is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.'" *Hamm v. Arrowcreek Homeowners' Ass'n*, 124 Nev. 290, 295, 183 P.3d 895, 899 (2008) (quoting *State v. Jepsen*, 46 Nev. 193, 209 P. 501, 502 (1922)).

ARGUMENT

I. NRS 38.310 APPLIES TO PLAINTIFFS' CLAIMS

The plain language of NRS 38.310 clearly applies to each of Plaintiffs' claims and mandates dismissal. Plaintiffs' proffered reasons for why NRS 38.310 does not apply all fail.

A. Each of Plaintiffs' Claims Relates to the CC&Rs, Other Governing Documents, or Procedures for Imposing Assesments

The language of NRS 38.310 is not ambiguous. At the time Plaintiffs commenced their lawsuit, NRS 38.310 read:

> 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 arbitration 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.

NRS 38.310 (version effective from Jan. 1 2008-Sept. 30, 2013).

All of Plaintiffs' claims seek money damages or equitable relief and therefore qualify as a "civil action." *See* NRS 38.300(3).[7] And they all relate to (a) the "interpretation, application or enforcement of any covenants, conditions or restrictions applicable to residential propery or any bylaws, rules or regulations adopted by an association" or (b) the "procedures used for increasing, decreasing or imposing additional assessments." NRS 38.310(1). The CC&Rs, Purchase and Sale Agreement, Unit Maintenance Agreement, and Rental Unit Agreement all contain "covenants, conditions or restrictions" applicable to the Plaintiffs' condo units. And the CC&Rs and Unit Maintenance Agreement contain procedures for imposing assessments.

1. Claim for receiver

Plaintiffs' claim for a receiver (count 1) is based on MEI-GSR and Gage allegedly controlling the Unit Owners' Association and advancing their own economic objectives to the detriment of Plaintiffs. (1 App. 85-86, ¶¶146-153.) But to determine the extent of MEI-GSR/Gage's permissible control over the Unit Owners' Association and whether they

[7] "'Civil action' includes an action for money damages or equitable relief. The term does not include an action in equity for injunctive relief in which there is an immediate threat of irreparable harm, or an action relating to the title to residential property." NRS 38.300(3).

were exceeding their authority, one would have to consult the governing documents. (*See, e.g.*, 1 App. 81, ¶¶110-11 (alleging MEI-GSR and Gage have control of the UOA because there is one voting member per unit of ownership under the CC&Rs); 2 App. 370-80, Art. 5 (CC&Rs specifying control and voting rights) 2 App. 387-90, § 6.10 (CC&Rs permitting MEI-GSR to impose assessments for hotel expenses); 1 App. 200-16 (Unit Maintenance Agreement allowing MEI-GSR to impose Daily Use Fees).)

If the Unit Owner's Association was being governed strictly in accord with its governing documents and the terms that Plaintiffs themselves agreed to, there would be no basis to appoint a receiver, an equitable remedy. *See* NRS 32.010 (providing, in relevant part, for the appointment of a receiver where "the property or fund is in danger of being lost, removed or materially injured" or "where receivers have heretofore been appointed by the usages of the courts of equity").

Plaintiffs argue that the cause of action for a receiver is exempt from NRS 38.310 because only courts—not arbitrators—can appoint receivers. (AOB at 26-27.) But this argument is misplaced. In *Benson v. State Engineer*, 131 Nev. Adv. Op. 78, 358 P.3d 221 (2015), this Court

ruled that a party was required to exhaust all administrative remedies as mandated by statute before seeking judicial review "even when the remedy that the State Engineer is authorized to provide is not the remedy that the party seeks." *Id.* at 222.

Even if true that an arbitrator "is not statutorily authorized to provide [Plaintiffs'] preferred remedy," *see id.*, the statutory requirements in NRS 38.310 must still be followed and the claim for a receiver must be "submitted to mediation or arbitration" before a judicial action is commenced.

2. Claim for misrepresentation

In their second claim for relief, Plaintiffs allege that "MEI-GSR made affirmative representations to Plaintiffs regarding the use, rental and maintenance of the Individual Unit Owners' GSR Condo Units," that these representations were false, and that "Plaintiffs justifiably relied upon the affirmative representations of Defendant MEI-GSR in contracting with Defendant MEI-GSR for the rental of their GSR Condo Units." (1 App. 86-87, ¶¶155-56, 159.)

To resolve this claim, a court would have to look at the governing documents to see what representations were made and whether Plain-

tiffs could justifiably rely on any alleged extra-contractual representations.

In executing the Unit Maintenance Agreement, Plaintiffs expressly agreed that it, "together with the CC&Rs and the Dispute Resolution Addendum . . . constitutes the entire Agreement between the parties with respect to the operation and maintenance of the Unit, and ***there are no Oral or written amendments, modifications, other agreements or representations***." (1 App. 206, § 16(b) (emphasis added).) Plaintiffs warranted that neither MEI-GSR nor anyone affiliated with it had

> (I) MADE ANY STATEMENTS OR REPRESENTATIONS WITH RESPECT TO THE ECONOMIC OR TAX BENEFITS OF OWNERSHIP OF THE UNIT; (II) EMPHASIZED THE ECONOMIC BENEFITS TO BE DERIVED FROM THE MANAGERIAL EFFORTS OF THE COMPANY OR MANAGER OR FROM PARTICIPATION IN THE UNIT MANAGEMENT PROGRAM; OR (III) MADE ANY SUGGESTION, IMPLICATION, STATEMENT OR REPRESENTATION, THAT OWNER IS NOT PERMITTED TO RENT THE UNIT DIRECTLY OR TO USE OTHER RESERVATIONS AGENTS TO RENT THE UNIT.

(1 App. 205, § 14(A).)

Plaintiffs made similar acknowledgments in the Unit Rental Agreement. (2 App. 259, § 21(b); 2 App. 276-77, § 21(b).) Plaintiffs ex-

pressly acknowledged that "THERE ARE NO RENTAL INCOME GUARANTEES OF ANY NATURE . . . AND NO REPRESENTATIONS OTHER THAN WHAT IS CONTAINED IN THIS AGREEMENT. **NEITHER THE COMPANY NOR MANAGER GUARANTEES THAT OWNER WILL RECEIVE ANY MINIMUM PAYMENTS** . . . OR THAT OWNER WILL RECEIVE RENTAL INCOME EQUIVALENT TO THAT GENERATED BY ANY OTHER UNIT . . . ." (2 App. 256, § 18; 2 App. 275, § 18 (emphasis added).)[8]

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[8] When purchasing their units, each owner also certified that:

> 3. he/she has been informed that Units are not suitable as an investment for persons seeking primarily rental income;
> . . . .
> 5. he/she has not discussed the Hotel's rental program for Units with any agent of the Hotel, has not received any information from any agent of the Hotel regarding the economic or tax benefits that may be derived by the Purchaser from the rental of the Unit, or any information regarding occupancy rates or hotel rental rates of comparable hotels, and has not received any projections or estimates of any economic benefits from ownership and/or rental of the Unit.
>
> 6. that neither Seller, nor any employee, agent, contractor or other person in any way related to Seller ever at any time a) suggested, stated or implied that the Purchased Unit, if placed by Purchaser in any Hotel rental program would earn a profit from such rental program, b) suggested, stated, implied or provided Pur-

This Court has ruled that "when a fraudulent inducement claim contradicts the express terms of the parties' integrated contract, it fails as a matter of law." *Rd. & Highway Builders v. N. Nev. Rebar*, 128 Nev. Adv. Op. 36, 284 P.3d 377, 378 (2012). Any resolution of Plaintiffs' mispresentation claim would thus require applying and enforcing the governing documents.

3. Breach of contract

In count 3, Plaintiffs allege that MEI-GSR breached the Unit Rental Agreement "by failing to follow its terms" and failing "to impletment an equitable Rotational System as referenced in the agreement." (1 App. 87, ¶¶164-65.) Such a claim obviously requires interpretation of the Unit Rental Agreement itself, which contains conditions and restrictions applicable to the subject property.

> chaser with any financial records, forecasts or projections for the Hotel or the Purchased Unit which information could in any way cause Purchaser to conclude that it would derive a profit by participating in any rental program offered by the Hotel, or c) in any other way induced or influenced Purchaser to participate in any rental program offered by the Hotel or induced Purchaser not to make the Purchased Unit available for rental by other means.

(2 App.242.)

The Unit Rental Agreement specified how rent would be calculated, and owners expressly acknowledged "that the Company owes no duties of any kind to Owner, including, without limitation, duties of a fiduciary nature, and the Company's non-fiduciary duties shall be limited to the payment of Rent to the extent and as and when due, and the maintenance of accurate books of account." (2 App. 252-53, § 9; 2 App. 270-71, § 9.) The owners agreed that their "sole and exclusive remedy" for any default that the Company failed to cure within 60 days of written notice, would be to "terminate this Agreement." (2 App. 256, § 16; 2 App. 274, § 16.)

Moreover, contrary to Plaintiffs' allegation that MEI-GSR breached the Unit Rental Agreement by failing "to implement an equitable Rotational Systemn," Plaintifss expressly acknowledged in the Rental Unit Agreement that they would have no claim based on the rotation system:

> The Company will establish the Rotation System for the purpose of renting all units in the Hotel on a rotating and equal basis. Owner acknowledges, however, that ***there can be no guarantee*** that either operation of the rotation system or hotel guest preference ***will not result in the Company's hotel rooms, or the units of other owners, being rented more often than Owner's Unit***. ***Owner hereby waives any***

> ***claim Owner may have for injury or damage under this Agreement arising from the rental of hotel rooms or units of other owners under the Rotation System***.

(2 App. 251, § 8(a) (emphases added); 2 App. 269, § 8(a).) And in the 2011 Rental Agreement, Owners expressly agreed that "***Company owned units and hotel rooms*** . . . will not be included in the Rotation System and ***will be rented prior to other owned Units***." (2 App. 269, § 8(a) (emphases added).) Plaintiffs' third count unquestionably requires interpretation of the Rental Unit Agreement.

4. Quasi-contract/equitable contract/detrimental reliance

In count 4, Plaintiffs allege that "MEI-GSR is contractually obligated to Plaintiffs. The contractual obligations are based upon the underlying agreements between Defendant MEI-GSR and Plaintiffs, and principles of equity and respresentations made by MEI-GSR." (1 App. 88, ¶171.) Plaintiffs allege that MEI-GSR's "refusals and failures" to perform its obligations "constitute material breaches of their agreements." (1 App. 89, ¶178.)

To determine the merits of such a claim, a court would have to look at the agreements themselves to determine what, again, conditions

or restrictions they place on the subject property and whether any procedures for imposing assessments were followed.

5. Breach of the implied covenant

Count 5 is based on the Unit Rental Agreement and again alleges that MEI-GSR intentionally made "false and misleading statements to Plaintiffs." (1 App. 89-90, ¶¶182, 186.) A resolution of Plaintiffs' claim would require referencing and applying the Unit Rental Agreement, including its express language that "***there are no Oral or written amendments, modifications, other agreements or representations***." (1 App. 206, § 16(b) (emphasis added).)

6. Consumer fraud/Nevada Deceptive Trade Practices Act

Count 6 alleges false representations and that "MEI-GSR failed to represent the actual marketing and rental practices implemented by Defendant MEI-GSR, as the Defendant was contractually and legally required." (1 App. 90-91, ¶¶193-94.) A resolution of this claim would again turn on the representations and contractual obligations of MEI-GSR in the governing documents, including the integration clauses barring Plaintiffs from relying on any alleged extra-contractual representations.

7. Declaratory relief

In count 7, Plaintiffs seek declaratory relief "regarding the extent to which Defendant MEI-GSR has the legal right to control the Grand Sierra Resort Unit-Owners' Association to advance Defendant MEI-GSR's economic objectives to the detriment of Plaintiffs." (1 App. 91, ¶199.) The extent to which MEI-GSR has the legal right to control the Unit Owners Association is governed by the CC&Rs. (*See* 2 App. 370-80, Art. 5 (describing control and voting rights).)

8. Conversion

In Count 8, Plaintiffs allege that "MEI-GSR wrongfully committed a distinct act of dominion over the Plaintiffs' property by renting their GSR Condo Units both at unreasonably low rates so as to only benefit Defendant MEI-GSR, and also renting said units without providing any compensation or notice to Plaintiffs." (1 App. 92.)

Putting aside the fact that conversion applies only to personal, not real, property,[9] MEI-GSR's right to rent units, whether the rental rates

[9] *Lake Las Vegas Dev. Grp., LLC v. SRMOF II 2012–1 Trust*, No. 213CV02194GMNVCF, 2016 WL 4443158, at *4 (D. Nev. Aug. 18, 2016) ("[B]ecause a claim for conversion lies with personal property and not real property, the Court dismisses this claim."); *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 606, 5 P.3d 1043, 1048 (2000) ("Conversion

were "unreasonably low," and whether MEI-GSR was required to provide compensation or notice to Plaintiffs are matters directly governed by the CC&Rs and Unit Rental Agreement. (2 App. 390 (CC&Rs providing that "[a] Hotel Unit may be made available to the public for rental when not occupied by the Unit Owner"); 2 App. 252-53, § 9; 2 App. 270-71, § 9 (Unit Rental Agreement explaining how rent would be calculated); 2 App. 251, § 8(e); 2 App. 269, § 8(e) (providing that "[n]o notice of reservations secured by the Company for Guests will be provided to Owner, except by specific request").)

9. Demand for accounting

In count 9, Plaintiffs allege that the Unit Owners' Association and MEI-GSR "are required to prepare accountings of their financial affairs as they pertain to Plaintiffs" and that they "have failed to properly prepare and distribute said accountings." (1 App. 93, ¶¶211-12.) To determine the relationship between Defendants and Plaintiffs and Defendants' accounting duties, one would have to look to the governing documents. (*See, e.g.*, 2 App. 388, § 6.10 (Declarant under CC&Rs is to

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is a distinct act of dominion wrongfully exerted over another's ***personal property*** in denial of, or inconsistent with his title or rights therein or in derogation, exclusion, or defiance of such title or rights.") (internal quotation marks and citation omitted; emphasis added).

"supply to all Unit Owners an itemized accounting of the Hotel Expenses" and "segregate and maintain a special reserve account"); 1 App. 202, § 3; 1 App. 209 (describing Daily Use Fees imposed under the Unit Maintenance Agreement); 2 App. 252-53, § 9; 2 App. 270-71, § 9 (Unit Rental Agreement delimiting duty to maintain "accurate books of account with respect to Owner's Unit").)

Plaintiffs argue "the district court found that the ninth cause of action, for an accounting was moot," as if this should somehow excuse the requirements of NRS 38.310. (AOB at 27.) But what the district court may or may not have determined after the commencement of this action is not relevant, nor is evidence submitted after the commencement of this action. Under NRS 38.310, it is the claims at the time suit is commenced that are determinative; if they relate to covenants, conditions, restrictions, or assessments applicable to residential property and have not first been mediated, "[a] court shall dismiss" the claims. NRS 38.310(2).

10. Unconscionable agreement

In count 10, Plaintiffs allege that the Unit Rental Agreement and Unit Maintenance Agreement are unconscionable. (1 App. 93, ¶¶217-

18.) This claim obviously relates to the interpretation and enforcement of the agreements themselves.

In an effort to save this statutorily-barred claim, Plaintiffs argue that "only a 'court' may find that a contract or clause of a contract is unconscionable.'" (AOB at 33 (citing NRS 116.1112).) Even assuming Plaintiffs were right, the statutorily mandated procedure of mediation or arbitration *before* filing judicial claims must still be followed—even if the arbitrator "is not statutorily authorized to provide [Plaintiffs'] preferred remedy." *See Benson*, 131 Nev. Adv. Op. 78, 358 P.3d at 222.

But, as a matter of law, arbitrators *can* decide issues of unsconiability (and do all the time). *See, e.g.*, NRS 38.219 ("An arbitrator shall decide . . . whether a contract containing a valid agreement to arbitrate is enforceable."); *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 65-66, 72, 75 (2010) (where contract provided that arbitrator would have authority to resolve enforceability of agreement, the claim that the agreement was unconscionable had to be decided by the arbitrator).

NRS 38.310 applies to Plaintiffs' claim of unconscionability.

11. Unjust enrichment

In count 11, Plaintiffs allege that Gage "has unjustly benefited from prioritization of its GSR Condo Units under MEI-GSR's rental scheme to the immediate detriment of" Plaintiffs. (1 App. 94, ¶221.) Unjust enrichment requires some element of "unjustness"—there must be some "legal or equitable obligation to account" for the benefit received. *See Leasepartners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975*, 113 Nev. 747, 755, 942 P.2d 182, 187 (1997) (internal quotation marks and citation omitted). If the governing documents allowed MEI-GSR to prioritize the rental of Gage's condo units under the Unit Rental Agreement, then there was nothing unjust about Gage receiving that benefit. Plaintiffs' claim again turns on the interpretation, application and enforcement of the Unit Rental Agreement. (*See* 2 App. 269, § 8(a) (2011 Unit Rental Agreement expressly providing that "Company owned units and hotel rooms . . . will be rented prior to other owned Units").)

12. Tortious interference

In count 12, Plaintiffs allege that some of them contracted with third parties to rent their condo units and that MEI-GSR "has system-

atically thwarted the efforts of those third parties to market and rent" Plaintiffs' units by "prioritiz[ing] the rental" of units owned by Gage. (1 App. 94, ¶¶224-26.) Gage is alleged to have "worked in concert with Defendant MEI-GSR in its scheme to devalue the GSR Condo Units and repurchase them." (1 App. 95, ¶227.)

These allegations again turn on the governing documents. Whether MEI-GSR was allowed to prioritize the rental of certain units relates to the Unit Rental Agreement. (2 App. 269, § 8(a).) And Gage's ability to repurchase the condos and on what terms is expressly governed by the CC&Rs. (2 App. 404-06, § 12.2.)

All of Plaintiffs' claims relate to the governing documents and fall within the purview of NRS 38.310.

B. NRS 38.310 Contains No Exceptions Based on the Identity of the Parties

Relying on *Hamm v. Arrowcreek Homeowners' Ass'n*, 124 Nev. 290, 293, 183 P.3d 895, 898 (2008), Plaintiffs contend NRS 38.310 applies only if the party moving for dismissal is a homeowners' association or the agent of a homeowners' association. (AOB at 23-24.) NRS 38.310, however, contains no such limitation.

"Where the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." *Erwin v. State*, 111 Nev. 1535, 1538–39, 908 P.2d 1367, 1369 (1995) (internal quotation marks and citation omitted).

Federal courts have addressed the broad scope of NRS 38.310 in the wake of litigation involving HOA foreclosures. As they have correctly noted, the "statute's plain language does not allow for any exceptions based on the identity of the parties to the suit." *Nationstar Mortg., LLC v. Sundance Homeowners Ass'n, Inc.*, No. 215CV01310APGGWF, 2016 WL 1259391, at *4 (D. Nev. Mar. 30, 2016).

"Although[] § 38.310 does not explicitly state to whom its provisions apply, it unambiguously asserts the types of claims covered by the statute. . . . Had the legislature intended to limit the statute to individuals and their respective HOA disputes, it could easily have specified." *Nationstar Mortg., LLC v. Desert Shores Cmty. Ass'n*, No. 215CV01776KJDCWH, 2016 WL 4134538, at *3 (D. Nev. Aug. 1, 2016). In fact, the legislature did not limit the application of NRS 38.310 to certain parties, but rather "plainly and unambiguously drafted the

statute to cover 'civil actions.'" *Id.*; *see also, e.g.*, *Nationstar Mortg., LLC v. Springs at Spanish Trail Ass'n*, No. 215CV01217JADGWF, 2016 WL 1298106, at *3 (D. Nev. Mar. 31, 2016).

NRS 38.310 does not limit its application to only homeowners' associations or their agents, nor did *Hamm* so hold. *Hamm* noted that because the "claims against NAS arose from actions performed as Arrowcreek HOA's agent, NRS 38.310 applies to their claims against NAS just as it applies to their claims against Arrowcreek HOA." *Hamm*, 124 Nev. at 300, 183 P.3d at 902–03. But *Hamm* did not hold that the converse was true: i.e., that if the claims against NAS had *not* arisen from actions performed as the HOA's agent, NRS 38.310 would not have applied. The *Hamm* court did not consider that issue.

The clear and unambiguous language of NRS 38.310 contains no limitations based on the identity of the parties, and this Court should reject Plaintiffs' attempt to read into the statute a limitation that is not present. *See In re Parental Rights as to S.M.M.D.*, 128 Nev. Adv. Op. 2, 272 P.3d 126, 132 (2012) ("We presume that [the] legislature says in a statute what it means and means in a statute what it says there. Thus,

our inquiry begins with the statutory text and ends there, if the text is unambiguous.") (internal quotation marks and citation somitted).

In fact, this case demonstrates perfectly why the legislature did not limit NRS 38.310 to claims against homeowners' associations. Even though MEI-GSR, Gage, and AM-GSR are not homeowners' associations, Gage and AM-GSR are successor Declarants and therefore parties to the CC&Rs. (2 App. 280-88.) MEI-GSR is the owner of GSR, the "Hotel Management Company" under the CC&Rs, and the "Company" under the Unit Maintenance Agreement and Unit Rental Agreement. (3 App. 496; 2 App. 350; 2 App. 263; 5 App. 975.) As such, MEI-GSR was the one imposing assessments and collecting charges and fees under the governing documents. None of Defendants are attenuated "third parties," but rather are intimately involved in the ownership and operation of GSR. NRS 38.310 applies to claims against them.

C. NRS 38.310 Is Not Limited to "Small" Disputes

Plaintiffs again invite this Court to ignore the plain language of the statute and look to its "intent" when they appeal to legislative history to argue that NRS 38.210 "was intended to deal with 'small and persistent squabbles,' not complex disputes like this case." (AOB at 31.)

The plain language of NRS 38.310 does not impose any such limitation based on the size or complexity of the claims involved.

Because NRS 38.310 is unambiguous, it would be error to consult the legislative history to alter the statue's meaning.[10] "In the absence of an ambiguity, we do not resort to other sources, such as legislative history, in ascertaining that statute's meaning." *Williams v. United Parcel Servs.*, 129 Nev. Adv. Op. 41, 302 P.3d 1144, 1147 (2013). A court's "duty is to interpret the statute's language; this duty does not include expanding upon or modifying the statutory language because such acts are the Legislature's function." *Id.*

D. Plaintiffs' Argument About "Use and Possession" Is Belied By the Statute's Plain Language and Creates an Exception that Would Swallow the Rule

Plaintiffs argue that NRS 38.310 does not apply because their claims relate to their "right to possess and use their properties." (AOB at 27-31). Plaintiffs rely on a distortion of this Court's case law to reach their erroneous conclusion.

NRS 38.310 applies to "civil actions." "Civil action," in turn, is defined as including "an action for money damages or equitable relief.

[10] In any case, as Defendants explained below, the legislative history supports application of the statute in this case. (*See* 5 App. 959-60.)

The term does not include . . . an action relating to the title to residential property." (NRS 38.300.) This Court made it abundantly clear in *McKnight Family, L.L.P. v. Adept Mgmt.*, 129 Nev. Adv. Op. 64, 310 P.3d 555, 558-60 (2013), that the only kind of claim excluded from NRS 38.310 is one for quiet title and that injunctive relief, negligence, breach of contract, statutory, slander of title, and wrongful foreclosure claims were all properly dismissed under NRS 38.310.

As the district court pointed out, many cases have applied NRS 38.310 since *McKnight* but none have "expanded this exemption beyond causes of action for quiet title." (5 App. 1088, n.1); *see, e.g.*, *Carrington Mortg. Servs., LLC v. Saticoy Bay, LLC*, No. 215CV01852APGPAL, 2016 WL 4051268, at *2 (D. Nev. July 25, 2016) (dismissing bad faith, wrongful foreclosure, unjust enrichment, and tortious interference claims based on NRS 38.310); *Deutsche Bank Nat'l Trust Co. v. TBR I, LLC*, No. 315CV00401LRHWGC, 2016 WL 3965195, at *7 (D. Nev. July 22, 2016) (holding that while quite title claim was exempt, cause of action for equitable indemnity was barred as "the Nevada Supreme Court has defined this exception [for an action relating to title] narrowly").

McKnight noted that a quiet title claim "directly relates to an individual's right to possess and use his or her property" and that such claims are exempt from NRS 38.310. *McKnight*, 129 Nev. Adv. Op. 64, 310 P.3d at 559. Seizing on this language, Plaintiffs argue that all their claims relate to their "right to possess and use their properties." (AOB at 28.) But this is not accurate. Plaintiffs claim that Defendants' actions resulted in Plaintiffs receiving less rent and lowering the *value* of their condo units, but no one ever disputed Plaintiffs' *title* to the units and their accompanying right to use and possess them within the limitations they themselves agreed to under the governing documents.

That Plaintiffs' claims are not "an action relating to the title to residential property" is further evidenced by their prayer for relief. They never ask for a declaration that they hold proper title or that title should be transferred back to them; rather, they sought a receivership, damages, and an accounting, making their action one "for money damages or equitable relief." NRS 38.300(3). (1 App. 95.)

As the district court correctly found, none of Plaintiffs' claims "would impact the owners' title to the units," and taking Plaintiffs' argument at face value, "almost any alleged violations of the CC&Rs could

arguably be framed as interference with the use and possession of one's property." (5 App. 1087.) CC&Rs, like the CC&Rs and other governing documents here, often place certain restrictions on the use of one's property—hence the name covenants, conditions, and *restrictions*—but NRS 38.310 would be meaningless if claims relating to restrictions on the use of one's property could not qualify as a "civil action." The exception would swallow the rule. This is clearly not what the statute says or means.

Whether Defendants' actions impacted the use and possesion[11] of their units is immaterial. *See, e.g.*, *Abet Justice LLC v. First Am. Tr. Servicing Sols., LLC*, No. 214CV908JCMGWF, 2016 WL 1170989, at *3 (D. Nev. Mar. 23, 2016) (dismissing negligence, negligence per se, breach of contract, and wrongful foreclosure claims under NRS 38.310, as "these claims '[exist] separate from the title to land'" (quoting *McKnight*, 129 Nev. Adv. Op. 64, 310 P.3d at 559)). Plaintiffs' argu-

[11] Plaintiffs' reliance on the district court's "findings" in its order after imposing case-terminating sanctions is misplaced. (AOB at 28-31.) Plaintiffs' claims at the time they commenced their action are determinative, not what the court may have later found. Moreover, while Plaintiffs purport to rely on the court's "findings," these were issued in the context of the court's order imposing a default against Defendants. The "findings" are mere repetitions of Plaintiffs' allegations. (*Compare, e.g.*, 7 App. 1413-17, ¶¶108-147, *with* 1 App. 81-85, ¶¶106-145.)

ment that their claims are exempt from NRS 38.310 is based on an erroneous and overbroad reading of *McKnight*, is at odds with the statute, and should be rejected.

E. The Condo Units at Grand Sierra Resort Qualify as Residential Property within the Meaning of NRS 38.300

Plaintiffs further argue that NRS 38.310 is inapplicable based on their apparent belief that a definition from the Reno Municipal Code trumps Nevada's statutes. (AOB at 34-35.) Reno has no power to circumvent laws passed by the state legislature, and in actuality the state and municipality provisions are not in conflict.

Plaintiffs rely on a line from Reno Muncipal Code defining a hotel condominium as "a commercial condominium development." Reno Muncipal Code ("RMC") 18.24.203.2690. On this basis, they argue that GSR cannot qualify as "residential property" within the meaning of NRS 38.310. But the RMC explains that the provisions in Title 18 apply to the development of land "within the corporate limits of the City of Reno, ***except as expressly or specifically provided otherwise*** in this title ***or pursuant to Nevada Revised Statute***." RMC 18.02.104 (emphasis added).

NRS 38.300 has its own definition of residential property for purposes of NRS 38.310, and that definition expressly includes "real estate within a planned community subject to the provisions of chapter 116 of NRS." *See* NRS 38.300(6) ("'Residential property' includes, but is not limited to, 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."). The GSR condo units at issue are "real estate within a planned community subject to the provisions of chapter 116 of NRS" and thus are residential property. *See* NRS 38.300(6); (2 App. 348 (CC&Rs submitting the property "to the provisions of the Uniform Common-Interest Ownership Act of the State of Nevada, as amended from time to time (hereinafter called the 'Act')").).[12] NRS 38.310 squarely applies to all of Plaintiffs' claims.

II. The District Court Correctly Held that Dismissal Was Mandatory under the Plain Language of the Statute

[12] Plaintiffs argue that the "GSR condominimums are not subject to the provisions of NRS 116B . . . because the condominiums were created prior to January 1, 2008." (AOB at 35 n.4 (citing NRS 116B.290(3)(c).) But whether they are subject to NRS 116B is immaterial, as they are clearly subject to NRS 116 and thus qualify as residential property.

Given that all of Plaintiffs' claims fall within the scope of NRS 38.310 and that Plaintiffs did not mediate their claims before bringing suit, Plaintiffs' claims were properly dismissed.

NRS 38.310 is not ambiguous concerning the remedy for failure to mediate. The statute's language is not suggestive or subject to the discretion of courts. Rather, it speaks in clear and mandatory terms: "A court ***shall dismiss*** any civil action which is commenced in violation of the [mandatory mediation and arbitration] provisions of subsection 1." NRS 38.310(2) (emphasis added). The district court correctly determined that "the language of NRS 38.310 mandates the Court to dismiss this action." (5 App. 1093.)[13]

A. NRS 38.310 Unambiguously Mandates the Dismissal of Claims That Have Not Been Mediated

[13] Plaintiffs argue that even if dismissal of their claims is affirmed, "the dismissal should not have the effect of unwinding the district court's orders and judgments entered prior to the dismissal." (AOB at 40 n.6.) But any orders and judgments making factual findings or touching on the merits of the case must be vacated. *Cf. Willy v. Coastal Corp.*, 503 U.S. 131, 138 (1992) (while Rule 11 sanctions could survive later determination that court lacked subject matter jurisdiction, this was because imposition of Rule 11 sanctions "'does not signify a district court's assessment of the legal merits of the complaint'" (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990))). It would make no sense, and blatantly circumvent the statue, to dismiss Plaintiffs' claims, yet have orders making findings about those non-existent claims remain in effect.

As numerous courts have recognized, the statutory command of NRS 38.310 is not vague or ambiguous. "If a party institutes a civil action in violation of NRS 38.310(1), the district court ***must dismiss*** it pursuant to NRS 38.310(2)." *Hamm*, 124 Nev. at 295, 183 P.3d at 900 (emphasis added). The Nevada legislature has even enacted a statute explaining what it means when it uses the word "shall." NRS 0.024 ("'Shall' imposes a duty to act.").

Plaintiffs' argument that the court should not have dismissed their complaint after years of litigation "is meritless because NRS 38.310(2)'s language ***does not determine when*** a court can dismiss a civil action; rather, it ***mandates*** the court to dismiss any civil action initiated in violation of NRS 38.310(1)." *McKnight*, 129 Nev. Adv. Op. 64, 310 P.3d at 558 (emphases added).

Both this Court and the United States Supreme Court have recognized that the word "shall" "is mandatory and does not denote judicial discretion." *Washoe Med. Ctr. v. Second Judicial Dist. Court of State of Nev. ex rel. Cnty. of Washoe*, 122 Nev. 1298, 1303, 148 P.3d 790, 793 (2006) (holding that the "Legislature's choice of the words 'shall dismiss' instead of 'subject to dismissal' indicates that the Legislature intended

that the court have no discretion with respect to dismissal"); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (recognizing that the term "shall" is "mandatory" and "normally creates an obligation impervious to judicial discretion").

"In the absence of any indication that there might be circumstances in which" the court would *not* have to dismiss a complaint filed in violation of NRS 38.310(1), Plaintiffs' argument that the district court had discretion *not* to dismiss their claims "stands flatly at odds with" the actual "statutory instruction." *Lexecon*, 523 U.S. at 35-36 (emphasizing statute's "unconditional command").

"[T]he Legislature's use of 'shall' . . . demonstrates its intent to prohibit judicial discretion and, consequently, mandates automatic dismissal if" the civil action is commenced in violation of NRS 38.310(1). *Otak Nevada, LLC v. Eighth Judicial Dist. Court of State, ex rel. Cnty. of Clark*, 127 Nev. 593, 598, 260 P.3d 408, 411 (2011) (construing nearly identical mandatory dismissal provision regarding nonresidential construction defect claims served without an attorney affidavit and expert report); *see also Liberty Mut. v. Thomasson*, 130 Nev. Adv. Op. 4, 317 P.3d 831, 834-35 (2014) ("[T]he word 'must' . . . imposes a mandatory

requirement") (holding that provision of Nevada's Administrative Procedure Act (APA) requiring aggrieved party to file petition for judicial review in county of residence was "mandatory and jurisdictional" and "failure to strictly comply . . . requires dismissal").

The United States Supreme Court recently considered a similar issue under the False Claims Act. While the Court decided that a party's violation of a sealing requirement in a False Claims Act case did not mandate dismissal, it did so because the "statute says nothing . . . about the remedy for a violation of that rule." *State Farm Fire & Cas. Co. v. U.S ex rel. Rigsby*, 137 S. Ct. 436, 442 (2016). It contrasted the sealing requirement with "provisions that do require, in express terms, the dismissal of a[n] . . . action." *Id.*

Here, NRS 38.310(2) is just such a provision that requires, in express terms, the dismissal of an action. Unlike *Rigsby*, the Nevada Legislature took care to specify the remedy for a violation of NRS 38.310(1); it said in unambiguous terms that dismissal is required. *Cf. Rigsby*, 137 S. Ct. at 443 ("It is proper to infer that, had Congress intended to require dismissal for a violation of the seal requirement, it would have said so.").

"Because the phrase 'shall dismiss' is clear and unambiguous, we must give effect to that meaning and will not consider outside sources beyond that statute." *Otak*, 127 Nev. at 598, 260 P.3d at 411 (internal quotation marks and citations omitted).

B. Both State and Federal Decisions Interpreting NRS 38.310 Indicate That Dismissal Is Mandatory

This Court has previously indicated that dismissal is mandatory under NRS 38.310. *See McKnight*, 129 Nev. Adv. Op. 64, 310 P.3d at 558 ("NRS 38.310(2)'s language does not determine when a court can dismiss a civil action; rather, it mandates the court to dismiss any civil action initiated in violation of NRS 38.310(1)."); *Hamm*, 124 Nev. at 295, 183 P.3d at 900 ("If a party institutes a civil action in violation of NRS 38.310(1), the district court must dismiss it pursuant to NRS 38.310(2)."); *Moffatt v. Giglio*, No. 08A574317, 2009 WL 10655826, at *1 (Nev. Dist. Ct. Nov. 6, 2009) (recounting how this Court granted writ petition and instructed the district court to dismiss claims under NRS 38.310 based on "Plaintiffs' failure to comply with this statutory requirement").

A plethora of federal decisions from the District of Nevada are in accord.[14]

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[14] *Bank of N.Y. v. Highland Ranch Homeowners Ass'n*, No. 316CV00436RCJWGC, 2016 WL 7116010, at *4 (D. Nev. Dec. 6, 2016); *U.S. Bank Nat'l Ass'n v. Woodland Vill.*, No. 316CV00501RCJWGC, 2016 WL 7116016, at *4 (D. Nev. Dec. 6, 2016) ("Plaintiff has not exhausted its administrative remedies and must mediate its wrongful foreclosure claim prior to initiating an action in court."); *Bank of Am., N.A. v. Ann Losee Homeowners Ass'n*, No. 216CV407JCMCWH, 2016 WL 6122933, at *6 (D. Nev. Oct. 18, 2016); *Bank of N.Y. Mellon v. Castle Bay Shore Vill. of Los Prados Homeowners Ass'n*, No. 216CV416JCMGWF, 2016 WL 5867417, at *4 (D. Nev. Oct. 6, 2016); *Carrington Mortg. Servs., LLC v. Saticoy Bay, LLC*, No. 215CV01852APGPAL, 2016 WL 4051268, at *2 (D. Nev. July 25, 2016) (holding that "claims for bad faith, wrongful foreclosure, and unjust enrichment must be dismissed because they were not first submitted to mediation as required under § 38.310"); *The Bank of N.Y. Mellon fka The Bank of N.Y. v. Cape Jasmine CT Trust*, No. 2:16-CV-0248-JAD-GWF, 2016 WL 3511253, at *3 (D. Nev. June 27, 2016) (dismissing bad faith and wrongful foreclosure claims, noting, "*McKnight* demonstrates that the Nevada Supreme Court broadly interprets NRS 38.310 to require pre-litigation dispute resolution of claims relating to the interpretation, application, or enforcement of laws governing residential property, not just claims relating to the HOA's CC&Rs and governing documents"); *HSBC Bank, Nat'l Ass'n v. Stratford Homeowners Ass'n*, No. 215CV01259JADPAL, 2016 WL 1555716, at *2–3 (D. Nev. Apr. 14, 2016); *Nationstar Mortg., LLC v. Sundance Homeowners Ass'n, Inc.*, No. 215CV01310APGGWF, 2016 WL 1259391, at *4 (D. Nev. Mar. 30, 2016) (dismissing bad faith and wrongful foreclosure claims under NRS 38.310, as "the court must dismiss 'any civil action' that is commenced without prior resort to ADR"); *Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, No. 2:15-CV-0693-GMN-VCF, 2016 WL 389981, at *2 (D. Nev. Jan. 31, 2016) (dismissing "claims for breach of contract, breach of the covenant of good faith and fair dealing, wrongful foreclosure, breach of Nev. Rev. Stat. § 116.1113, and negligent misrepresentation" under

C. Terminology Is Unimportant— Plaintiffs' Claims Must Be Dismissed

Plaintiffs spend a great deal of time arguing that NRS 38.310 is not jurisdictional (AOB at 36-48), but whether it is or not is unimportant. The statutory requirements of NRS 38.310 are mandatory and

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NRS 38.310, stating that "the Court lacks subject matter jurisdiction"); *Saticoy Bay, LLC Series 1702 Empire Mine v. Fed. Nat'l Mortg. Ass'n*, No. 214CV01975KJDNJK, 2015 WL 5709484, at *3-4 (D. Nev. Sept. 29, 2015) (dismissing wrongful foreclosure, slander of title and unjust enrichment claims, as NRS 38.310(2) "states, '[a] court shall dismiss any civil action which is commenced in violation of the provisions of subsection 1'"); *1597 Ashfield Valley Trust v. Fed. Nat. Mortg. Ass'n Sys.*, No. 2:14-CV-2123 JCM, 2015 WL 4581220, at *5–6 (D. Nev. July 28, 2015); *Layton v. Green Valley Vill. Cmty. Ass'n*, No. 2:14-CV-01347-GMN, 2015 WL 1961134, at *2 (D. Nev. Apr. 29, 2015) ("Plaintiff must first submit his claims to the NRED before this Court may exercise jurisdiction."); *Anderson v. Assessment Mgmt. Servs.*, No. 2:13-CV-02185-GMN, 2015 WL 1530601, at *3 (D. Nev. Apr. 6, 2015); *Karimova v. Alessi & Koenig, LLC*, No. 2:13-CV-151 JCM CWH, 2013 WL 3678091, at *3 (D. Nev. July 11, 2013) (dismissing claims and finding "the parties must first mediate or arbitrate according to the statute"); *Taulli v. Rancho Nevada-Nevada Estates Homeowners Ass'n, Inc.*, No. 2:11-CV-01760-KJD, 2012 WL 2105889, at *3 (D. Nev. June 8, 2012) ("'A court shall dismiss any civil action which is commenced in violation of [NRS 38.310(1)].' Nev. Rev. Stat. § 38.310 (2011). Accordingly, all claims against all parties must be dismissed."); *Moulton v. Eugene Burger Mgmt. Corp.*, No. 3:08CV00176BES-VPC, 2009 WL 2004373, at *4 (D. Nev. July 9, 2009) ("In this matter, the Court must dismiss Plaintiff's state law claims because they arise from the 'interpretation, application, or enforcement of homeowners' associations' covenants, conditions and restrictions.' . . . . Thus, Plaintiff's state law claims are dismissed pursuant to the mandate of NRS 38.310(2)." (quoting *Hamm v. Arrowcreek Homeowners' Ass'n*, 124 Nev. 290, 293, 183 P.3d 895, 898 (2008))).

unconditional—a court cannot hear claims that have not first been mediated.

"[W]hether couched in terms of subject-matter jurisdiction or ripeness, a person generally must exhaust all available administrative remedies before initiating a lawsuit, and failure to do so renders the controversy nonjusticiable." *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 571, 170 P.3d 989, 993 (2007). Here, Plaintiffs' claims are nonjusticiable because they have not been mediated.

Whether NRS 38.310 affects subject matter jurisdiction or not, it is nonetheless mandatory. *See Forest Guardians v. U.S. Forest Serv.*, 641 F.3d 423, 432 (10th Cir. 2011) ("We need not resolve [whether statutory provision requiring administrative exhaustion prior to bringing suit, is jurisdictional]. Regardless of whether it is jurisdictional, the explicit exhaustion requirement . . . is, nonetheless, mandatory."); *see also Mesagate Homeowners' Ass'n v. City of Fernley*, 124 Nev. 1092, 1101, 194 P.3d 1248, 1254 (2008) ("judicial review is improper" and issues are "nonjusticiable" where party fails to comply with statutory procedure); *Cnty. of Washoe v. Golden Rd. Motor Inn, Inc.*, 105 Nev. 402, 404, 777 P.2d 358, 359 (1989) ("[I]f a statutory procedure exists . . . , *that proce-*

dure must be followed.") (internal quotation marks and citation omitted).

Even if subject matter jurisdiction is not implicated, the district court still reached the correct conclusion that Plaintiffs' claims had to be dismissed. *See Bank of Am., N.A. v. Mesa Verde Homeowners Ass'n*, No. 216CV498JCMNJK, 2016 WL 5929333, at *5 (D. Nev. Oct. 11, 2016) (agreeing that "NRS 38.310 is an exhaustion statute that creates prerequisites for filing certain state-law claims, not a jurisdictional statute," but nevertheless dismissing breach of good faith and wrongful foreclosure claims "for failure to comply with the mediation requirement set forth in NRS 38.310"); *Bank of Am., N.A. v. Monte Bello Homeowner's Ass'n, Inc.*, No. 216CV456JCMVCF, 2016 WL 5796859, at *4 (D. Nev. Sept. 30, 2016) (same); *Nationstar Mortg., LLC v. Desert Shores Cmty. Ass'n*, No. 215CV01776KJDCWH, 2016 WL 4134538, at *2-4 (D. Nev. Aug. 1, 2016) (same); *The Bank of N.Y. Mellon fka The Bank of N.Y. v. Cape Jasmine CT Trust*, No. 2:16-CV-0248-JAD-GWF, 2016 WL 3511253, at *2-3 & n.11 (D. Nev. June 27, 2016) (dismissing bad faith and wrongful foreclosure claims under NRS 38.310, noting, "The Bank's argument that NRS 38.310 'cannot affect' federal subject-matter juris-

diction misses the point. . . . NRS 38.310 is not a jurisdictional statute; it is an exhaustion statute that creates prerequisites for filing certain state-law claims."); *Carrington Mortg. Servs., LLC v. Absolute Bus. Sols., LLC*, No. 215CV01862JADPAL, 2016 WL 1465339, at *3 (D. Nev. Apr. 14, 2016) (same).

D. Analogous Federal Authority Illustrates That Dismissal Furthers Sound Policy

In an analogous case, the United States Supreme Court has held that a statutory pre-suit requirement was a mandatory precondition to suit that could not be disregarded by the district court at its discretion. *See Hallstrom v. Tillamook Cnty.*, 493 U.S. 20 (1989). At issue in *Hallstrom* was a statutory provision mandating that "[a]t least 60 days before commencing suit, plaintiffs must notify the alleged violator, the State, and the Environmental Protection Agency (EPA) of their intent to sue." *Id.* at 22. The petitioners in *Hallstrom* only notified the respondent of their intention to file suit, and commenced their action a year later. *See id.* at 23. Nearly 11 months later, "respondent moved for summary judgment on the ground that petitioners had failed to notify [the state agency] and the EPA of their intent to sue, as required by

the statute." *Id.* at 23-24. Petitioners notified the agencies of the suit the next day. *Id.* at 24.

The district court denied the respondents' motion for summary judgment, reasoning that "petitioners had cured any defect in notice by formally notifying the state and federal agencies" a day after the motion was filed, and that because "neither the state nor the federal agency expressed any interest in taking action against respondent . . . dismissing the action at this stage would waste judicial resources." *Id.* at 24. The action proceeded to trial, and the District Court held that respondent had violated the environmental statute at issue. *Id.*

The Supreme Court began its analysis with the statutory language that "'No action may be commenced'" prior to 60 days after the plaintiff has given notice to the EPA, the state, and the alleged violator. *See id.* at 25-26 (quoting 42 U.S.C. § 6972(b)(1)); *compare with* NRS 38.310(1) ("No civil action . . . may be commenced . . . unless the action has been submitted to mediation").

The High Court held that the "language of this provision could not be clearer. A plaintiff may not commence an action under RCRA until 60 days after notifying the EPA, the State in which the alleged violation

occurred, and the alleged violator." 493 U.S. at 26. The statute acted "as a specific limitation on" the right to bring suit; "[u]nder a literal reading of the statute, compliance with the 60–day notice provision is ***a mandatory, not optional, condition precedent for suit***." *Id.* (emphasis added).

Petitioners acknowledged that the statutory language was not ambiguous, but nevertheless argued that "it should be given a flexible or pragmatic construction." *Id.* at 26. They argued that a 60-day stay of the lawsuit "would serve the same function as delaying commencement of the suit" by giving the Government an opportunity to take action against the alleged violator and giving the violator an opportunity to bring itself into compliance. *Id.* The Court rejected the argument:

> Whether or not a stay is in fact the functional equivalent of a precommencement delay, such an interpretation of § 6972(b) ***flatly contradicts the language of the statute***. Under Rule 3 of the Federal Rules of Civil Procedure, "[a] civil action is commenced by filing a complaint with the court." Reading § 6972(b)(1) in light of this Rule, a plaintiff may not file suit before fulfilling the 60-day notice requirement.

Id. (emphasis added).

The Supreme Court pointed out that "Congress could have excepted parties from complying with the notice or delay requirement," but

the statute "contains no exception applicable to petitioners' situation; **we are not at liberty to create an exception where Congress has declined to do so**." *Id.* at 26-27 (emphasis added). Here, too, NRS 38.310 contains no exceptions from mandatory dismissal for failure to comply with the statutory mediation requirement.

The *Hallstrom* petitioners, like Plaintiffs here, argued that the statutory "60-day notice provision should be subject to equitable modification and cure" akin to a Title VII time requirement that the Supreme Court had held "was not a jurisdictional prerequisite to suit but was subject to waiver, estoppel, and equitable tolling." *Id.* at 27.

The Supreme Court, however, rejected the *Hallstrom* petitioners' argument. While statutes of limitations are traditionally subject to equitable tolling, the "60-day notice provision is not triggered by the violation giving rise to the action. Rather, petitioners have full control over the timing of their suit: they need only give notice to the appropriate parties and refrain from commencing their action for at least 60 days." *Id.* Here, too, Plaintiffs were in full control over whether they submitted their claims to mediation before bringing suit. "The equities do not weigh in favor of modifying statutory requirements when the procedur-

al default is caused by petitioners' failure to take the minimal steps necessary to preserve their claims." *Id.* (internal quotation marks and citation omitted). The Court concluded that "**it is not unfair to require strict compliance with statutory conditions precedent to suit**." *Id.* at 28 (emphasis added).

The Court similarly rejected reliance on legislative history to defeat the plain language of the statute. *See id.* ("[a]bsent a clearly expressed legislative intention to the contrary, the words of the statute are conclusive") (internal quotation marks and citation omitted).

And the Court rejected petitioners' argument that "giving effect to the literal meaning of the notice provisions would compel 'absurd or futile results.'" *Id.* at 29 (citation omitted); (*compare with* AOB at 51 (arguing that dismissal of Plaintiffs' claims "would be an absurd application of NRS 38.310")). Despite petitioners' argument "that a strict construction of the notice provision would cause procedural anomalies," "***none of petitioners' arguments requires us to disregard the plain language*** of [the statute]. [I]n the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the

law." *Id.* at 30-31 (internal quotation marks and citation omitted) (emphasis added).

The Supreme Court held "that the notice and 60-day delay requirements are ***mandatory conditions precedent to commencing suit***," and "***a district court may not disregard these requirements at its discretion***." *Id.* at 31 (emphases added).

The Court noted that it did not matter whether the mandatory statutory requirement was termed jurisdictional or not:

> The parties have framed the question presented in this case as whether the notice provision is jurisdictional or procedural. In light of our literal interpretation of the statutory requirement, we need not determine whether §6972(b) is jurisdictional in the strict sense of the term. See *Fair Assessment in Real Estate Assn., Inc. v. McNary,* 454 U.S. 100, 137, 102 S.Ct. 177, 196, 70 L.Ed.2d 271 (1981) (BRENNAN, J., concurring in judgment) ("In 1937 the requirement of exhaustion of state administrative remedies was certainly a mandatory precondition to suit, and in that sense a 'jurisdictional prerequisite'").

Id.

"**As a general rule, if an action is barred by the terms of a statute, it must be dismissed**." *Id.* (emphasis added). Regardless of whether failure to comply with the statute would have a minimal impact in a particular case, the statutory language was clear, and enforc-

ing it would "further judicial efficiency; courts will have no need to make case-by-case determinations of when or whether failure to fulfill the notice requirement is fatal to a party's suit." *Id.* at 32. The same is true here: this Court should reject Plaintiffs' attempt to paint this case as an exceptional one. Judicial efficiency is promoted by a consistent application of a statute's plain language.

Finally, the *Hallstrom* petitioners urged the Supreme Court "not to require dismissal of this action after years of litigation and a determination on the merits. They contend that such a dismissal would unnecessarily waste judicial resources." *Id.* The Supreme Court stated it was "sympathetic to this argument," but nevertheless rejected it. *Id.* The "statute itself put petitioners on notice of the requirements for bringing suit," and dismissal of the action would not deprive petitioners of their right to a day in court. *Id.* Rather, "[p]etitioners remain free to give notice and file their suit in compliance with the statute." *Id.*

Here, too, NRS 38.310 specified precisely what Plaintiffs needed to do before commencing their suit. And here, too, dismissal of Plaintiffs' complaint will not deprive Plaintiffs of their day in court. They are free

to engage in mandatory mediation as required by NRS 38.310 and then re-file any unresolved claims.[15]

E. Statutory Requirements Like NRS 38.310 Are Strictly Enforced and Are Not Subject to Waiver

This Court has previously explained, in connection with a statutory scheme providing for judicial review, that "a right of review has been created in the district court—and that right only comes into existence *after* the governing board's decision has been properly challenged through, and reviewed by, the governing board's internal appellate procedure." *Mesagate Homeowners' Ass'n v. City of Fernley*, 124 Nev. 1092, 1100–01, 194 P.3d 1248, 1254 (2008). Where the statutory procedure is not followed, the right to be heard in a judicial forum does not exist. Failure to follow the statutory procedure precludes a court's consideration of the dispute, and the issues raised are "nonjusticiable" until the statutory procedure is complied with. *See id.*, 124 Nev. at 1101, 194 P.3d at 1254.

NRS 38.310 not only specifies a statutory procedure that must be complied with, but it specifically limits courts' powers to hear a case in

[15] Defendants reserve the right to raise any statute of limitations defense against future-filed claims.

the absence of compliance. *See* NRS 38.310(2) ("A court ***shall dismiss*** any civil action which is commenced in violation of the provisions of subsection 1."). Such statutory limitations cannot be waived. *See Clark Cnty. Sch. Dist. v. Richardson Const., Inc.*, 123 Nev. 382, 389, 168 P.3d 87, 92 (2007) (rejecting argument that party "waived any defense based on the statutory damages cap by failing to assert the defense below," as the statutory "limitation cannot be waived").

While judicially imposed (i.e. common law) "exhaustion doctrine provides that courts may, in their discretion, waive administrative exhaustion under certain circumstances," reliance on those exceptions is "unavailing" "where, as here, a clear statutory exhaustion requirement exists." *Bastek v. Fed. Crop Ins. Corp.*, 145 F.3d 90, 95 (2d Cir. 1998). "Statutory exhaustion requirements are mandatory, and courts are not free to dispense with them." *Id.* at 94. Where the text of a statute clearly "command[s] that an 'action shall not be instituted . . . unless'" certain conditions are complied with, courts "are not free to rewrite the statutory text." *McNeil v. United States*, 508 U.S. 106, 111 (1993).

"When, as here, the exhaustion requirement is established by statute . . . the requirement is 'mandatory, and courts are not free to

dispense with [it].'" *Escaler v. U.S. Citizenship & Immigration Servs.*, 582 F.3d 288, 292 (2d Cir. 2009) (quoting *Bastek v. Fed. Crop Ins. Corp.*, 145 F.3d 90, 94 (2d Cir. 1998)); *see also Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 61 F. Supp. 3d 1013, 1020 (D.N.M. 2014) (dismissing claim "because the [statutory] administrative-exhaustion requirement is mandatory and thus not subject to judicial waiver"), *amended in part on other grounds*, No. CIV. 12-0069 JB/KBM, 2015 WL 5138286 (D.N.M. Aug. 26, 2015).

As explained by the *Jarita* court, "[m]uch of the confusion about the applicability of judicial waiver to exhaustion requirements stems from uncertainty regarding what 'mandatory' means. The Court concludes that mandatory has its plain meaning, which permits of no exceptions." *Jarita*, 61 F. Supp. 3d at 1080.

Here, NRS 38.310(2) admits of no exceptions and mandates dismissal of claims brought in violation of NRS 38.310(1).

F. Nothing Defendants Did Allowed (or Could Have Allowed) the District Court to Ignore NRS 38.310's Command to Dismiss

1. Plaintiffs' analogy to waiver of private contractual provisions is inapt

Plaintiffs' attempted reliance on the fact that *contractual* conditions precedent can be waived is misplaced. (*See* AOB at 43 (citing *Summa Corp. v. Richardson*, 93 Nev. 228, 234, 564 P.2d 181, 184 (1977)).) This case deals not with a private, contractual condition precedent, but rather a mandatory, statutory condition precedent to bringing suit. NRS 38.310 is not waivable or subject to judicial discretion; rather, it mandates dismissal based on Plaintiffs' failure to comply with its statutory command. *See McNeil v. United States*, 508 U.S. 106, 113 (1993).

In *McNeil*, the Supreme Court considered a statute providing that an "'action shall not be instituted . . . unless the claimant shall have first presented the claim to the appropriate Federal agency.'" *See id.* at 107 & n.1 The Supreme Court rejected the argument that an action could be maintained as long as the claimant exhausted administrative remedies "before substantial progress was made in the litigation" and reasoned that while the burden on the judicial system "may be slight in an individual case, the statute governs the processing of a vast multitude of claims. The interest in orderly administration of this body of litigation is best served by ***adherence to the straightforward statuto-***

ry command." *Id.* at 112 (emphasis added). Because the statute demanded administrative exhaustion and "[b]ecause petitioner failed to heed that clear statutory command, the District Court properly dismissed his suit." *Id.* at 113. The same result obtains here.

The question before this Court is not whether Defendants waived a purely contractual right to arbitrate their claims. Rather, NRS 38.310 mandates that Plaintiffs' claims be dismissed because (1) they were not submitted to mediation or arbitration and (2) all administrative procedures specified in the governing documents were not exhausted. *See* NRS 38.310(1)(b). NRS 38.310(1)(b) in effect turns the "administrative procedures" in the governing documents into a statutory exhaustion requirement. But the Court need not reach that issue, as Plaintiffs' clearly did not comply with the statute's basic requirement to submit their claims to "mediation or arbitration pursuant to the provisions of NRS 38.300 to 38.360." NRS 38.310(1)(b).

2. Defendants did not stipulate to any "facts" that could circumvent NRS 38.310's statutory mandate

Plaintiffs argue that "[e]ven if parties cannot stipulate to confer subject matter jurisdiction, they can admit to facts that establish subject matter jurisdiction." (AOB at 40.) But Plaintiffs point to no such

"facts" admitted by Defendants; rather, they point only to statements that the district court had jurisdiction. The only stipulated "fact" that could conceivably exempt this case from NRS 38.310's mandatory dismissal provision would be if Defendants had admitted that Plaintiffs mediated their claims and complied with all the alternative dispute resolution provisions in the governing documents prior to bringing suit. Of course, Defendants never stipulated to such a fact because it is not true.

Plaintiffs claim that "Defendants' counterclaim is another admission of the district court's jurisdiction." (AOB at 41.) But NRS 38.310 governs the commencement of an action—not whether counterclaims can subsequently be maintained by a defendant. *Cf. State, By & Through Welfare Div. of Dep't of Health, Welfare & Rehab. v. Capital Convalescent Ctr., Inc.*, 92 Nev. 147, 151–52, 547 P.2d 677, 680 (1976) ("It would be anomalous to hold that a defendant, in court in an action he did not bring, is required to plead a [compulsory] counterclaim . . . but once pled, his counterclaim is subject to dismissal on the ground that he had not, before being sued, taken affirmative action as set forth" in statute requiring administrative exhaustion.); *Schaefer v. Putnam*, 841 N.W.2d 68, 78-79 (Iowa 2013) (holding that mandatory pre-suit me-

diation requirement was jurisdictional, but that the "statute by its terms inhibits only a creditor's ability to initiate a proceeding" and "poses no impediment to a creditor asserting a compulsory counterclaim . . . without first seeking mediation"). NRS 38.310 likewise "has no effect on compulsory counterclaimants, who do not start civil actions." *Schaefer*, 841 N.W.2d at 78.

G. Nevada Strictly Enforces Pre-Suit Statutory Requirements

NRS 38.310(1) is a "pre-litigation statutory obligation." *HSBC Bank Nat'l Ass'n v. Stratford Homeowners Ass'n*, No. 215CV01259JADPAL, 2016 WL 3200106, at *3 (D. Nev. June 7, 2016). Nevada has a long history of strictly enforcing such pre-suit statutory requirements.

When there are specific statutory prerequisites to filing suit, even substantial compliance is not enough to allow the claims to proceed in court—exact compliance is necessary. *See Cnty. of Washoe v. Golden Rd. Motor Inn, Inc.*, 105 Nev. 402, 403-04, 777 P.2d 358, 359 (1989). Where a statutory "condition precedent to filing suit" admits of no exceptions, this Court will not impose one. *First Am. Title Co. of Nevada v. State*, 91 Nev. 804, 805, 543 P.2d 1344, 1345 (1975).

In *Washoe Medical Center*, this Court concluded that "a complaint filed without a supporting medical expert affidavit is void ab initio and must be dismissed. Because a void complaint does not legally exist, it cannot be amended." *Washoe Med. Ctr. v. Second Judicial Dist. Court of State of Nev. ex rel. Cnty. of Washoe*, 122 Nev. 1298, 1300, 148 P.3d 790, 792 (2006). In that case, the "complaint *was dismissed by operation of law* when it was filed without a supporting expert affidavit." *Id.*, 122 Nev. at 1302, 148 P.3d at 793 (emphasis added).

Here, too, Plaintiffs' claims were subject to automatic dismissal. *Compare* NRS 41A.071 ("If an action for professional negligence is filed in the district court, the district *court shall dismiss* the action . . . if the action is filed without an affidavit . . . .") (emphasis added), *with* NRS 38.310(2) ("A *court shall dismiss* any civil action which is commenced in violation of the provisions of subsection 1.") (emphasis added).

In *Wheble*, a complaint was filed without the requisite expert affidavit on November 22, 2006; an errata with the expert affidavit was filed 5 days later. *Wheble v. Eighth Judicial Dist. Court of State ex rel. Cnty. of Clark*, 128 Nev. Adv. Op. 11, 272 P.3d 134, 135 (2012). ***Three years later***, on "July 20, 2009, defendants moved for summary judg-

ment, arguing that plaintiffs' failure to attach an expert affidavit to their initial complaint rendered the entire complaint void." *Id.*, 128 Nev. Adv. Op. 11, 272 P.3d at 136. The district court denied the motion, but this Court granted a writ petition and ruled that the district court was ***required to dismiss*** the medical malpractice claims, notwithstanding the time lag in raising the issue. *Id.* Then, when plaintiffs filed a new complaint reasserting the dismissed medical malpractice claims, defendants argued they were barred by the statute of limitations. *Id.* The district court found that the claims could proceed, but this Court again reversed. *See id.* This Court ruled that "an action must have been 'commenced' in order for it to be refiled under NRS 11.500(1) after the statute of limitations for the claim has passed," but here, the original complaint was void ab initio and therefore did not legally exist. *Id.*, 128 Nev. Adv. Op. 11, 272 P.3d at 136-37. "[B]ecause the complaint never existed, the action was never 'commenced' . . . the district court must dismiss the plaintiffs' January 21, 2010, complaint as it was brought beyond the expiration of the statute of limitations for the plaintiffs' claims." *Id.*, 128 Nev. Adv. Op. 11, 272 P.3d at 137. The

clear statutory language was applied, even if it resulted in the denial of any relief.

Plaintiffs argue that "although this court's prior decisions strictly applied the medical malpractice affidavit statute, recent decisions are more forgiving." (AOB at 47 (apparently referring to *Zohar v. Zbiegien*, 130 Nev. Adv. Op. 74, 334 P.3d 402 (2014) and *Baxter v. Dignity Health*, 131 Nev. Adv. Op. 76, 357 P.3d 927 (2015)). But *Zohar* merely established that "the district court should read a medical malpractice complaint and affidavit of merit together when determining whether the affidavit meets the requirements of NRS 41A.071." *Zohar*, 130 Nev. Adv. Op. 74, 334 P.3d at 403. And *Baxter* again held that "the district court should have considered the complaint and the declaration together." *Baxter*, 131 Nev. Adv. Op. 76, 357 P.3d at 928 (holding that a medical malpractice affidavit was incorporated into the complaint by reference, even though it was not physically filed until the next morning). *Baxter* may have indicated greater flexibility in considering a later-filed affidavit already incorporated by reference, *see id.*, 131 Nev. Adv. Op. 76, 357 P.3d at 931 & n.5, but it did not suggest the Court was any less strict

about the requirement that there be a medical affidavit or that this was anything other than an unwaivable statutory requirement.

Here, Plaintiffs did not merely initiate suit and forget to include a sworn statement that the claims had been mediated. Plaintiffs did not mediate the claims at all. Mediation was a substantive requirement applicable at the time Plaintiffs filed their complaint, and their failure to follow the statutorily prescribed procedure for filing suit mandates the dismissal of their claims.

CONCLUSION

The plain language of NRS 38.310(2) mandated the dismissal of all of Plaintiffs' claims. The district court did not err when it simply complied with the unambiguous statuory command.

Dated this 3rd day of February, 2017.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, except as exempted by NRAP 32(a)(7)(C), it contains 13,928 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

DATED this 3rd day of February, 2017.

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