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

APPELLANTS'

REPLY 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' REPLY BRIEF

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REPLY REGARDING RAB'S STATEMENT OF THE FACTS

The Statement of the Facts in Respondent's Answering Brief (RAB) is an incomplete recitation of factual information, with omissions that are critical in this court's analysis of the legal issues. The RAB even seems to portray defendants as the victims in this litigation. They were anything but victims. They abused their power, stole money, wrongfully occupied units, and forced owners to sell units to defendants at ridiculously low prices. During the lawsuit, they committed egregious and persistent litigation abuses. They cannot be considered victims here—by any stretch of the imagination.

ARGUMENT

A. NRS 38.310 does not apply.

1. The statute is not applicable because defendants are third parties.

The Appellants' Opening Brief (AOB) analyzed *Hamm v. Arrowcreek Homeowners' Ass'n,* 124 Nev. 290, 183 P.3d 895 (2008) (AOB 23), where homeowners sued an HOA and a collection agency (NAS). The district court dismissed the action under NRS 38.310. On appeal, the homeowners contended that the statute was not applicable to the claim against NAS. This court ruled that the statute *was* applicable, because NAS acted as an agent of the HOA, and

therefore, the "statute applies equally to the collection agency." *Id.* at 293, 183 P.3d at 898.

The RAB attempts to avoid *Hamm's* holding, arguing that the statute applies regardless of the identities of the parties. RAB 33-34. The RAB relies upon orders issued by three Nevada federal district judges. RAB 34-35. None of the orders cited or discussed *Hamm*. Additionally, in each federal case an HOA was the interested party that had foreclosed or moved to dismiss under the statute.

The RAB argues that *Hamm* did not consider whether the statute would have applied if NAS had not been the HOA's agent. But the *Hamm* court must have considered this issue. *Hamm* contained an entire discussion under the heading: "*Application of NRS 38.310 to an action against a collection agency working as an agent for a homeowners' association.*" 124 Nev. at 299, 183 P.3d at 902 (italics in original). *Hamm* then acknowledged the plaintiffs' argument that the statute did not apply because NAS was not an HOA; but NAS argued that the statute did apply, because NAS was the HOA's agent. *Id.* The court then discussed agency relationships between collection agencies and HOAs, finding that an agency relationship existed in *Hamm*. *Id.* at 300, 183 P.3d at 902. The court concluded: "As the Hamms' 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." *Id.* at 300, 183 P.3d at 902-03.

Under defendants' interpretation of *Hamm*, the opinion's entire discussion in this section was meaningless and superfluous dicta. In other words, if NAS had been entitled to the benefit of the statute, even if NAS had not been the HOA's agent—as the RAB argues—there would have been no reason for *Hamm* to address the issue. *Hamm* undeniably held that if NAS had not been the HOA's agent, the statute would have been inapplicable.

Here, for the reasons established in the AOB, defendants were not acting as agents of the UOA when defendants stole money from the UOA itself, and intentionally attempted to terminate the UOA.[1] AOB 24-26. And based upon other arguments in the opening brief on this point, the statute is not applicable to the non-HOA defendants.

2. Defendants' analysis of *McKnight*, which the district court accepted, is wrong.

NRS 38.310 only applies to "civil actions," and the statute defining "civil actions" exempts actions "relating to the title to residential property." NRS 38.300(3). The exemption only applies "if the action relates to an individual's right to possess and use his or her property." *McKnight Family, LLP v. Adept Mgmt. Servs.*, 129 Nev. Adv. Op. 64, __, 310 P.3d 555, 558 (2013). The district

[1] The RAB does not contend that defendants *were* acting as agents of the UOA that defendants were trying to destroy.

court rejected this language in *McKnight*. 5 A.App. 1087-88. And in this appeal, defendants also attempt to reject *McKnight*'s holding. RAB 38-39.

In *McKnight*, an HOA foreclosed on a homeowner's property, and the homeowner sued the HOA. The district court dismissed the suit under NRS 38.310. *McKnight* held that the district court erred by dismissing the quiet title claim. *McKnight* recognized that NRS 38.310 only applies to "civil actions," and such actions are defined in another statute, which excludes suits "relating to the title to residential property." *McKnight* at __, 310 P.3d at 558. *McKnight* interpreted this language to mean that a suit is exempt "if the action relates to an individual's right to possess and use his or her property." *Id.* This holding has never been overruled or disapproved.

Despite *McKnight's* holding, the RAB argues that "the only kind of claim excluded from NRS 38.310 is one for quiet title." RAB 38. In support, the RAB cites *Deutsche Bank Nat'l Trust Co. v. TBR I, LLC,* 2016 WL 3965195 (D.Nev. July 22, 2016). RAB 38. The RAB's parenthetical explanation of *Deutsche Bank* quotes part of a sentence in the federal judge's order, indicating "the Nevada Supreme Court has defined this exception [for an action relating to title] narrowly." RAB 38 (bracket portion in original). But the brief's parenthetical explanation omits the last part of the sentence, which actually says that "the Nevada Supreme Court has defined this exception narrowly, *noting that for the exception to apply*

the claim should directly relate 'to an individual's right to possession and use of his or her property.'" *Deutsche Bank* at *7 (emphasis added).

Thus, the federal judge recognized the continued vitality of *McKnight*'s holding that the exemption applies to actions relating to an individual's "right to possess and use his or her property."

McKnight is clear. Actions relating to the right to a person's possession and use of property are outside of NRS 38.310. The district court erred by failing to apply *McKnight.*

3. Plaintiffs' claims are based upon possession and use of their property; thus, the statute is inapplicable.

Plaintiffs contended that defendants made false representations regarding "the use" of the units, and that defendants rented plaintiff's units that were not in the rental program. 8 A.App. 1434:16-24. Plaintiffs also contended that defendants improperly gave gaming customers possession of plaintiffs' units, without authority, and that defendants were "using plaintiffs' unit[s] without consent." 8 A.App. 1441:25-26; 1445:23.

Defendants also made misrepresentations in order to induce plaintiffs "to sell their units." 8 A.App. 1435:4-5. Plaintiffs who sold their units due to defendants' fraud requested the district court to "order the defendants to deed back these units." 8 A.App. 1438:3-4. As a result of defendants' misconduct, some

plaintiffs "decide[d] to, or [were] effectively forced to, sell their units." 8 A.App. 1448:3-5. Plaintiffs contended that those plaintiffs who sold their units to defendants, as a result of defendants' improper conduct, were "entitled to the return of their units" and "transfer back" of the units. 8 A.App. 1457, 1484, 1486, 1490-91.

Accordingly, plaintiffs' claims dealt with possession and use of their property, with the separate claims being discussed immediately below in this brief. Even if this court determines that some of plaintiffs' claims fell within NRS 38.310, not all of them did; and the district court erred by dismissing the entire case. *McKnight* at __, 310 P.3d at 558 ("The district court erred in dismissing McKnight's entire complaint," where some claims should have survived).

(a) Appointment of receiver.

The AOB argued that the request for a receiver was not subject to arbitration/mediation, because an arbitrator/mediator cannot appoint a receiver. AOB 26-27 (receiver may only be appointed by "court" or "judge" under NRS 32.010). The RAB fails to address NRS 32.010. Instead, the RAB argues that plaintiffs were required to exhaust all administrative remedies, even though the administrative entity would not have been authorized to provide the remedy. RAB 20-21. The brief relies on *Benson v. State Engineer,* 131 Nev. Adv. Op. 78, 358 P.3d 221 (2015). That case, however, held that exhaustion of administrative

remedies is not required when the agency lacks jurisdiction, or when administrative proceedings would be futile. 131 Nev. at _____, 358 P.3d at 224.

In the present case, neither an arbitrator nor a mediator had jurisdiction to appoint a receiver, pursuant to NRS 32.010. Accordingly, submitting the matter to pre-litigation mediation or arbitration would have been a futile act. Cf. *Southwest Gas Corp. v. Woods,* 108 Nev. 11, 14, 823 P.2d 288, 290 (1992) (court would not engage in "meaningless exercise" of requiring administrative appeals officer to refer worker to certain physician).

(b) Claim for misrepresentation.

The RAB contends that to resolve the plaintiffs' claim for misrepresentation, a court would have "to look at the governing documents to see what representations were made and whether Plaintiffs could justifiably rely on any alleged extra-contractual representations." RAB 21-22. The RAB then cites to integration clauses in the Unit Maintenance Agreement and CC&Rs, and a separate integration clause in the Unit Rental Agreement ("URA"), to misleadingly argue that the defendants' only representations are contained in the agreements. RAB at 22-23. This argument lacks merit.

The crux of the misrepresentation claim, established through monthly statements, is that the defendants issued false monthly statements to plaintiffs and

stole their money to: (1) profit off the scheme; *and* (2) force the plaintiffs to give up title to their units.

This fraud is not contingent upon any "interpretation" or "enforcement" of the agreements. Both the fraud and the resulting damages were proven through the monthly statements and the GSR's own accounting systems, which demonstrated the monthly statements were false.

Defendants here appear to argue that they could commit fraud with impunity because of the contracts' integration clauses. This is obviously wrong, because those integration clauses relate to promises prior to execution of the contracts, not post-execution fraud. No law supports the proposition that a party can obtain contractual immunity from *future* intentional and fraudulent acts – and, in fact, the integration clauses in the agreements do not attempt to do so.

Finally, the URA, which requires monthly account statements and certain rental income for plaintiffs' units, is not part of the CC&Rs (or the bylaws, rules or regulations adopted by an association). Thus, even if the misrepresentation claims required interpretation and enforcement of that document, which they do not, NRS 38.310 would still not apply.

(c) Breach of contract.

The RAB inaccurately suggests that if the plaintiffs' claims for breach of contract require interpretation of the URA, NRS 38.310 applies to their claims. Critically, the URA is not part of the CC&Rs.

The defendants appear to contend that so long as any contract contains "conditions" or "restrictions" that apply to property, then NRS 38.310 applies. The defendants' position, if adopted, would vastly expand the scope of NRS 38.310 in ways the Nevada legislature never intended.

The URA's terms concerning the rental of units are not the type of covenants, conditions, and restrictions to which NRS 38.310 applies. Indeed, if they were, any dispute over an agreement concerning the use of real property would implicate NRS 38.310. NRS 38.310 applies to covenants, conditions and restrictions (i.e., "CC&Rs," as they are commonly understood) that become part of the title of the property, not any term of an agreement that could affect the use of real property. Indeed, the URA is an *optional* agreement and does not even involve the unit owners' association. As such, the plaintiffs' claim for breach of contract does not implicate NRS 38.310.

(d) Quasi-contract; equitable contract; detrimental reliance.

The RAB contends that plaintiffs' claim based upon quasi-contract, equitable contract, and detrimental reliance, is within the statute, because this claim relates to the governing documents. RAB 26-27. This claim, however, incorporated other allegations relating to defendants' efforts to force owners to sell their units. 1 A.App. 88-89. As such, this claim relates to possession, use and title to the property.

(e) Breach of implied covenant.

The defendants contend that the plaintiffs' claim for breach of the implied covenant of good faith and fair dealing would "require referencing and applying the Unit Rental Agreement." RAB at 27. The URA is not part of the covenants, conditions, and restrictions and is therefore not within the purview of NRS 38.310.

(f) Consumer fraud and deceptive trade practices.

The RAB argues that a resolution of the plaintiffs' claim for deceptive trade practices "would 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." RAB at 27. The defendants are wrong. Cf. *Bank of N.Y. Mellon v. Cape Jasmine CT Trust*, 2016 WL 3511253 (D. Nev. June 27, 2016) (court allowed deceptive trade

practices claims to proceed against HOA, without dismissing them under NRS 38.310).

The resolution of a deceptive trade practices claim does not turn on contracts or governing documents. NRS 41.600(4) provides that "[a]ny action brought pursuant to this section is not an action upon any contract underlying the original transaction." (Emphasis added.) Thus, such claims are not dependent upon any contractual agreement, and NRS 38.310 cannot apply to these claims.

Two examples illustrate this point. NRS 598.0915 states that a deceptive trade practice occurs when someone knowingly makes a false representation in a business. And NRS 598.0923 provides that a deceptive trade practice occurs when someone knowingly fails to disclose material facts. Here, plaintiffs established that defendants engaged in both of these deceptive trade practices by issuing thousands of knowingly false invoices. Resolution of this claim did not rely on any "interpretation" or "enforcement" of the CC&Rs. Indeed, as noted above, the URA is not even part of the CC&Rs.

(g) Declaratory relief.

The RAB contends that plaintiffs' request for declaratory relief relates to governing documents. RAB 28. The brief cites no Nevada case applying the statute to such a cause of action. In any event, the declaratory relief claim

incorporates other allegations relating to possession, use and title to the units. 1 A.App. 91-92.

(h) Conversion.

The RAB contends that plaintiffs' claim for conversion is within the statute, because the claim relates to certain governing documents. RAB 28-29. Again, the brief cites no Nevada opinions applying NRS 38.310 to conversion claims.

The complaint alleges that defendants wrongfully committed acts of dominion over the property, and that these acts "were in denial of, or inconsistent with, Plaintiffs title or rights therein," and that the acts were "in derogation, exclusion, or defiance of the Plaintiffs' title or rights therein." 1 A.App. 92. These claims are excluded from NRS 38.310, pursuant to *Hamm* and *McKnight.*

(i) Accounting.

The RAB's argument regarding this claim is moot. 2 A.App. 325:11-12.

(j) Unconscionability.

CC&Rs are recorded with (and burden) each plaintiff's title. By asking the court to find the CC&Rs unconscionable, this cause of action unquestionably "relat[es] to the title to residential property" under NRS 38.300(3), and is thus exempt from NRS 38.310.

This is why NRS 116.1112 provides a remedy for parties to ask *a court* to determine whether the CC&Rs or certain terms therein are unconscionable.

Indeed, the plaintiffs' claim does not require the interpretation, application or enforcement of CC&Rs–it seeks to unburden title from unconscionable CC&Rs.

(k) Unjust enrichment.

The defendants contend that the plaintiffs' claim for unjust enrichment "turns on the interpretation, application and enforcement of the Unit Rental Agreement." RAB at 32. Again, the URA is not part of the covenants, conditions and restrictions and is therefore not within the purview of NRS 38.310.

(l) Tortious interference.

Plaintiffs alleged tortious interference with contracts that some plaintiffs entered into with third parties, to market and rent their units. 1 A.App. 94-95. Defendants argue that this claim was based upon governing documents. RAB 32-33. The argument is incorrect. The defendants essentially drove the third-party rental agent out of business, effectively depriving several plaintiffs of the use of their units. AOB 9, 30. This was part of the overall scheme by defendants to purchase units back at nominal prices. As such, this claim was based upon denial of plaintiff's possession, use and title to the units.

4. The statute was never intended for such cases.

The AOB demonstrated legislative history showing that NRS 38.310 was intended to deal with small squabbles, not complex disputes such as this case.

AOB 31-32. The RAB's only response is that resort to legislative history is inappropriate, because the statute is unambiguous. RAB 36-37.

The statute *is* ambiguous, to the extent that it does not clearly identify the cases for which it applies. In such a case, the court determines legislative intent by looking to legislative history, reason and considerations of public policy. *Horizons at Seven Hills v. Ikon Holdings,* 132 Nev. Adv. Op. 35, 373 P.3d 66, 69 (2016).

5. This action was commenced under NRS 116.1112(1).

The AOB also argued that part of plaintiffs' claim was that the contracts were unconscionable. AOB 33. The district court agreed. 7 A.App. 1420:26-28. Under NRS 116.1112(1), only a *court* may find a contract unconscionable, and only a *court* may refuse to enforce a contract. Thus, neither an arbitrator nor a mediator could have decided unconscionability and enforceability. AOB 33.

Defendants argue that plaintiffs were required to submit their disputes to arbitration, even if an arbitrator would not have been authorized to provide the remedy plaintiffs were seeking, such as an unconscionability determination. RAB 31. Defendants rely on *Benson*, but *Benson* only held that administrative remedies must "ordinarily" be exhausted. The court recognized that exhaustion is *not* required when administrative proceedings would be futile, or when the agency lacks jurisdiction. *Benson* at ____, 358 P.3d at 224.

Here, neither an arbitrator nor a mediator had jurisdiction to find the agreements unconscionable (as the district court ultimately found). Therefore, compliance with NRS 38.310 was not required.

6. The statute is not applicable because of the Reno Municipal Code.

NRS 38.310 is inapplicable because under NRS 38.300(6), "residential property" does "not include commercial property if no portion thereof contains property which is used for residential purposes." RMC § 18.24.203.2690 restricts the use of the units, making them "commercial condominiums" that cannot be used by the plaintiff investors for truly "residential" purposes. Under NRS 116.1106(3), local ordinances can supersede the statute. Thus, because these units are not "residential property," the statute is inapplicable.

B. Subject matter jurisdiction is not implicated, and defendants are barred from asserting the statute.

1. Defendants essentially concede that subject matter jurisdiction is not involved.

Defendants' motion to dismiss was entitled: "DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION." 1 A.App. 120 (capitalization in original). The first paragraph of the motion asked for dismissal "for lack of subject matter jurisdiction." 1 A.App. 121:4. The next page

argued that "this Court lacks subject-matter jurisdiction over Plaintiffs' claims." 1 A.App. 122:12-13. Similarly, defendants' reply consistently argued that the statute involved subject matter jurisdiction. E.g., 5 A.App. 951:6-7, 952:2-3, 953:23-24, 954:1-4. At the hearing on the motion, defense counsel also repeatedly argued that the statute dealt with subject matter jurisdiction. E.g., 6 A.App. 1147:10-12, 1155:16-18, 1160:17-18.

The district court expressly rejected plaintiffs' argument that NRS 38.310 does not pertain to subject matter jurisdiction. 5 A.App. 1088:4-5, 14 (finding that plaintiffs' "argument on this issue [is] unpersuasive"). The district court then went on to rule: "Lack of subject matter jurisdiction can be raised at any time during the proceedings and is not waivable." 5 A.App. 1091:1-2. And the district court repeatedly referred to the statute and case law as imposing a jurisdictional requirement. 5 A.App. 1091-93.

Ignoring this history, defendants have now changed their theory; they have all but abandoned their argument based upon lack of subject matter jurisdiction. Now, defendants state: "Whether NRS 38.310 pertains to subject matter jurisdiction is unimportant." RAB 16. The RAB does not contend that NRS 38.310 imposes a subject matter jurisdictional requirement, and the brief even suggests that the district court's order was not really based upon lack of subject matter jurisdiction. RAB 14-16. It is noteworthy that several federal cases cited in

the RAB hold that NRS 38.310 is *not* a jurisdictional statute. E.g., *Bank of N.Y. Mellon v. Castle Bay Shore Vill. of Los Prados Homeowners Ass'n,* 2016 WL 5867417, at *3 (D. Nev. Oct. 6, 2016) (holding that NRS 38.310 is "not a jurisdictional statute"). RAB 48, fn. 14.

Therefore, defendants have failed to support the district court's holding that the statute imposes a subject matter jurisdiction requirement.

2. The statute is not mandatory in every case.

Defendants argue that even if NRS 38.310 does not affect subject matter jurisdiction, it is nonetheless mandatory.[2] RAB 47-52. The RAB relies upon *Allstate Ins. Co. v. Thorpe,* 123 Nev. 565, 170 P.3d 989 (2007). RAB 50. That opinion couched the failure to exhaust administrative remedies as a justiciability issue. *Id.* at 571, 170 P.3d at 993-94. *Thorpe* did not address estoppel or waiver. And *Thorpe* did *not* hold that a plaintiff must always exhaust administrative remedies before initiating a lawsuit; instead, the court only held that a plaintiff "generally" must exhaust administrative remedies. *Id.* The word "generally"

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[2] The RAB cites to *Moffatt v. Giglio,* 2009 WL 10655826 (Nev. Dist. Ct. Nov. 6, 2009), as "recounting" how this court granted a writ petition in a similar case. RAB 47. *Moffatt*, which is not readily available on Westlaw, was apparently a state court judge's unpublished order issued in 2009. The RAB's parenthetical reference to an order by *this* court is an end-run around the clear prohibition against citations to pre-2016 unpublished Nevada appellate court orders. NRAP 36(c)(3). This court should ignore the citation to *Moffatt* and the indirect reference to an unidentified pre-2016 unpublished order of this court.

means "most of the time (but not always) and necessarily implies exceptions." *Drzala v. Horizon Blue Cross Blue Shield*, 2016 WL 2932545 *4 (D. N.J., May 18, 2016) (parenthetical "(but not always)" in original).

Defendants also rely on *Mesagate Homeowners' Ass'n v. City of Fernley,* 124 Nev. 1092, 194 P.3d 1248 (2008). RAB 50. Although *Mesagate* held that the plaintiffs needed to exhaust administrative remedies, the court also noted that the exhaustion doctrine "conserves judicial resources, so its purpose is valuable." *Id.* at 1099, 194 P.3d at 1252. This rationale is clearly not applicable in the present case, where the parties litigated the case for almost four years—with extensive discovery, numerous motions consuming countless hours of judicial time, and a three-day evidentiary hearing—all of which occurred before defendants filed their motion to dismiss. Applying the exhaustion doctrine in this case would be the antithesis of conserving judicial resources. *Mesagate* also did not involve any discussion of waiver, estoppel or stipulations.

The RAB contains an entire section arguing that dismissal "furthers sound policy." RAB 52-59. This section is devoted almost entirely to *Hallstrom v. Tillamook Cnty.,* 493 U.S. 20 (1989). *Hallstrom* dealt with a federal statute. But federal courts have limited jurisdiction granted by Congress, resulting in strict compliance in federal courts. This is not applicable in Nevada, where district court jurisdiction is established by the Constitution.

In *Hallstrom,* the defendants moved for summary judgment only a few months after the suit was filed. The district court denied the motion, and the case went to trial. The Supreme Court held that the case should have been dismissed. The result in *Hallstrom* would probably have been far different if: (1) the defendants filed the suit first; (2) the defendants stipulated to jurisdiction; (3) the defendants waited nearly four years before asserting the statute; (4) the defendants engaged in persistent litigation abuse, resulting in sanctions and striking their answer; (5) the district court held a hearing on the merits and entered a judgment for compensatory damages; (6) the only remaining procedure was a hearing on punitive damages; and (7) the plaintiffs had already spent $1.4 million in costs and attorneys' fees by the time the defendants' motion was filed. All of these factors exist in the present case.

Hallstrom also held: "*As a general rule*, if an action is barred by the terms of a statute, it must be dismissed." 493 U.S. at 31 (emphasis added). The Court did not say that an action should "always" be dismissed. Instead, dismissal is only the "general rule." If *Hallstrom* intended an absolute rule for every case, with no exceptions, the Court would have said "always" or "without exception." See *Drzala*, *supra*, 2016 WL 2932545 at *4 (the word "generally" "necessarily implies exceptions").

Even if the statute imposes a "justiciability" prerequisite, lack of justiciability is a defense that may be waived. See *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 660 (Tex. App. 2010) (lack of a justiciable interest to intervene is a defense that can be waived). The doctrine of justiciability is designed to promote judicial economy and the wise exercise of judicial power. *Cathcart v. Meyer,* 88 P.3d 1050, 1061 (Wyo. 2004). The concept of standing, which implicates subject matter jurisdiction [see AOB 49], involves justiciability, which is a defense that can be waived. See *Cissne v. Robertson,* 782 S.W.2d 912, 917 (Tex. App. 1989).

Finally, the RAB argues that a "plethora of federal decisions from the District of Nevada are in accord" with the view that NRS 38.310 mandates dismissal. RAB 48-49. The brief supports this statement with footnote citations to 16 federal cases. RAB 48, fn. 14. Almost all of these cases involved claims of wrongful foreclosure, in which an HOA foreclosed due to a homeowner's failure to pay dues/assessments pursuant to CC&Rs, with issues relating to HOA foreclosure under NRS Chapter 116. The vast majority of the federal cases in the footnote fail to cite or discuss *Hamm*, where this court held that the statute is limited to claims against HOAs or their agents, and the statute is not applicable to claims that "relate to" title to residential property.

The federal cases cited at RAB 48, footnote 14, also take an unreasonably broad view of *McKnight,* largely ignoring *McKnight's* holding that NRS 38.310

does not apply "if the action relates to an individual's right to possess and use his or her property." *McKnight*, 129 Nev. at ___, 310 P.3d at 558. Additionally, those cases that do not involve foreclosures are direct lawsuits between HOAs and homeowners, involving CC&R disputes that had nothing to do with title, possession and use of the property.

Accordingly, the district court erred by accepting defendants' argument that NRS 38.310 imposes a subject matter jurisdiction requirement, and further erred by ruling that doctrines of waiver and estoppel cannot apply in this case.

3. Defendants stipulated to proceed in district court.

The opening brief discussed the fact that defendants filed justice court lawsuits against plaintiffs first, then defendants stipulated that all claims between the parties would be resolved in this district court action. AOB 10-12, 16-17, 41-43, 45. The defendants' justice court lawsuits expressly relied upon CC&Rs and other governing documents, even attaching exhibits consisting of these documents. 4 A.App. 744-47. When defendants filed their justice court lawsuits, defendants never suggested applicability of statutory mediation requirements; nor did they allege compliance with such statutes. After plaintiffs filed lawsuits in district court, the parties stipulated that defendants' justice court lawsuits would be dismissed, and "all claims between the parties can be resolved in the District Court action." 4 A.App. 791.

The RAB ignores this stipulation. The RAB cites no case for the proposition that a defendant can file lawsuits for alleged violations of CC&Rs, without complying with statutory mediation requirements; the defendant can then stipulate to proceed with its lawsuits in district court (as a counterclaim); and the defendant can subsequently obtain dismissal on the ground that the parties did not mediate their disputes. Cf. *Principal Investments v. Harrison*, 132 Nev. Adv. Op. 2, 366 P.3d 688, 696-98 (2016) (lenders sued borrowers in justice court, without complying with contractual arbitration prerequisite; borrowers then sued lenders in district court, and lenders demanded arbitration; court held that lenders waived contractual arbitration regarding borrowers' district court claims, because lenders had sued borrowers first in justice court).

Additionally, the AOB emphasized that defense counsel expressly acknowledged, in open court, that "[t]he Court retains jurisdiction" in this action. AOB 15, 17, 43 (citing 4 A.App. 892:13). The RAB ignores this admission by defendants' counsel in district court.

In short, defendants filed the first lawsuits, without complying with mediation requirements; defendants stipulated to move the litigation to district

court, without any mediation requirement; and defendants' counsel conceded that the district court "retains jurisdiction" in this action. The RAB offers no response.[3]

4. Defendants' stipulation, coupled with the striking of their answer, provide grounds for estoppel.

This case is unique. Defendants filed their lawsuits first, eventually stipulating to move the litigation to district court, and later conceding that the district court had jurisdiction. Defendants' answer was stricken as a result of unstoppable litigation abuses. When an answer is stricken due to abuse, allegations in the complaint are deemed admitted, including jurisdiction. In *Paradigm Oil v. Retamco Operating,* 242 S.W.3d 67 (Tex. App. 2007), the answer was stricken due to discovery abuses. The day before a hearing on damages, the defendant filed a motion to dismiss for lack of subject matter jurisdiction, i.e., lack of standing. The court held that when the default was rendered against the defendant, all allegations in the complaint were deemed admitted, and the defendant was estopped from challenging the jurisdictional standing requirement.

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[3] Although the RAB fails to address the parties' specific stipulation regarding consolidation of the justice court and district court cases, the brief does contain one paragraph discussing stipulations, generally. RAB 63-64. The brief's only argument is that defendants did not stipulate to any "facts" regarding jurisdiction. The argument fails to address the actual stipulation in this case.

Id. at 71-72. See also *Shepherd v. Ledford,* 962 S.W.2d 28, 33 (Tex. 1998) (defendant was estopped from challenging jurisdictional standing).[4]

Accordingly, under the circumstances in this case—including initiation of litigation by defendants, the stipulation for jurisdiction, defendants' litigation abuses resulting in striking of their answer, and defense counsel's express concession that the district court had jurisdiction—the doctrine of estoppel should apply.

5. Even without the stipulations, the sanctions provide a basis for estoppel.

(a) Sanctions.

As the AOB explained, defendants engaged in persistent and severe litigation misconduct over a lengthy time frame. AOB 12-15. Plaintiffs brought this misconduct to the district court's attention, and the district court entered an order for sanctions, without striking the answer. 4 A.App. 878. After defendants' misconduct remained undeterred, plaintiffs filed another motion for sanctions, and this time the district court granted it. 4 A.App. 877-88. The district court's lengthy order recited a litany of severe litigation abuses. *Id.* The district court

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[4] The second amended complaint in the present case did not contain a specific allegation of jurisdiction. 1 A.App. 71-95. But jurisdictional facts may be implied from a complaint's allegations. See *Giannoni v. Commissioner of Transp.,* 141 A.3d 784, 789 (Conn. 2016).

struck defendants' answer and scheduled a prove-up hearing for compensatory damages. 4 A.App. 888. In this appeal, defendants have not attempted to challenge the sanctions order.

The district court then held a three-day evidentiary prove-up hearing on compensatory damages, resulting in a judgment for approximately $8 million. 7 A.App. 1403-25. The RAB contends that the district court's findings after the prove-up hearing were "mere repetitions of Plaintiffs' allegations." RAB 40, fn. 11. This is not correct. For each claim, the plaintiffs were required, and did, establish a prima facie case by substantial evidence. *Young v. Johnny Ribeiro Bldg.*, 106 Nev. 88, 94, 787 P.2d 777, 781 (1990). Indeed, the district court's findings resulted from the lengthy evidentiary hearing, which included detailed expert testimony. 7 A.App. 1405:16-27. The district court also rendered its own numerous conclusions of law, with recitations of numerous grounds for the judgment for compensatory damages totaling approximately $8 million. 7 A.App. 1418-24. Thus, the court should disregard defendants' attempt to minimize the district court's findings.

When the district court entered its judgment for approximately $8 million in compensatory damages, the district court ordered a subsequent hearing for punitive damages. 7 A.App. 1425. A week before the punitive damages hearing, defendants filed their motion to dismiss. 1 A.App. 120. Like a "Hail Mary" pass

by a football team that is losing in the last seconds of a game, defendants' desperate motion came after years of flagrant litigation abuses, after an order striking defendants' answer, after entry of a judgment for approximately $8 million in compensatory damages, and on the brink of punitive damages.

The RAB ignores this history of litigation abuse and sanctions. Where a defendant engages in litigation misconduct that is repetitive, abusive and recalcitrant, a district court has discretion to strike the defendant's pleadings, enter a default, and hold a prove-up hearing to determine damages. *Foster v. Dingwall,* 126 Nev. 56, 64-66, 227 P.3d 1042, 1047-49 (2010). Severe sanctions, including striking a defendant's answer, are appropriate to deter the parties and future litigants from similar litigation abuses, and to preserve the integrity of the judiciary. See *Bahena v. Goodyear Tire & Rubber Co.,* 126 Nev. 243, 252, 235 P.3d 592, 598 (2010) (affirming $30 million default judgment after answer was stricken).

The AOB provided a three-page discussion of this court's decision in *North American Properties (NAP) v. McCarran International Airport,* 2016 WL 699864 (Nev., February 19, 2016; unpublished; No. 61997), where the plaintiff's litigation abuses outweighed a subject matter jurisdictional problem (plaintiff's lack of standing). AOB 48-51. The RAB ignores *NAP*, neither citing nor attempting to distinguish it.

Despite their history of litigation abuse and sanctions, defendants now ask for judicial absolution, with no consequences. They want no sanctions for their abusive and recalcitrant misconduct; no deterrent for themselves or future litigants; no responsibility for the $1.4 million in attorneys' fees and expert costs incurred by plaintiffs; no liability for the $8 million in actual damages suffered by plaintiffs; and no liability for punitive damages.[5]

The result sought by defendants would be an affront to the Nevada judiciary. The Legislature cannot have intended such an absurd result. See *Griffith v. Gonzales-Alpizar,* 132 Nev. Adv. Op. 38, 373 P.3d 86, 88 (2016) (in reviewing statutes, this court will "consider the policy and spirit of the law and will seek to avoid an interpretation that leads to an absurd result.") The RAB cites no case in which a defendant was allowed to prevail on a motion to dismiss after the trial court had already sanctioned the defendant for relentless litigation abuses, and after the trial court already struck the answer. Our research has revealed no such case. Nor does the RAB cite any case in which a defendant was allowed to prevail on a motion to dismiss filed after the trial court already entered a default judgment for

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[5] Defendants assure this court that "dismissal of Plaintiff's complaint will not deprive Plaintiffs of their day in court," because plaintiffs can engage in mediation "and then re-file any unresolved claims." RAB 58-59. This consolation prize for plaintiffs is largely meaningless, in light of footnote 15, at RAB 59, where the brief states: "Defendants reserve the right to raise any statute of limitations defense against future-filed claims."

compensatory damages, where the only procedure remaining was a determination of punitive damages. Again, our research has revealed no such case.

(b) *Gamble.*

The district court rejected application of estoppel, because the district court viewed NRS 38.310 as establishing a subject matter jurisdictional barrier to which estoppel cannot apply. 5 A.App. 1091-92. As the AOB observed, *Gamble v. Silver Peak Mines,* 35 Nev. 319, 133 P. 936 (1913) held that a party *can* be estopped from raising a jurisdictional question. AOB 45. *Gamble* held that "it is also settled in this court that a party may, by his conduct, become estopped to raise such a [jurisdictional] question." *Id.* at 319, 133 P. at 937.

Here, the district court distinguished *Gamble*, because in *Gamble* there was a final judgment. 5 A.App. 1091-93. In this appeal, however, defendants' RAB makes no attempt to support the district court's refusal to apply *Gamble*; nor does the RAB itself make any attempt to distinguish, or even discuss, *Gamble*'s holding. If estoppel applies in a last-minute jurisdictional challenge on appeal (as in *Gamble*), the doctrine should also apply to a last-minute challenge after case-ending sanctions and a compensatory damages judgment in the district court. There are no compelling reasons to distinguish *Gamble* or to refuse to apply estoppel in this situation. The RAB offers no such reasons.

6. Defendants' counterclaim precludes application of the statute.

As established in the AOB, defendants' counterclaim was another reason to preclude application of NRS 38.310. AOB 41-43. Defendants' only response is that a mandatory mediation requirement does not apply to a counterclaim. RAB 64-65.

The RAB relies on an Iowa opinion for the proposition that defendants' counterclaim cannot be used as an admission of the district court's jurisdiction. RAB 64-65. But our opening brief discussed a Nevada opinion directly on point, *Boisen v. Boisen,* 85 Nev. 122, 451 P.2d 363 (1969). AOB 44. *Boisen* applied estoppel against a defendant who was arguing that the district court lacked subject matter jurisdiction. The estoppel was based, in part, on the fact that the defendant had counterclaimed, thereby "assuming the jurisdiction of the [district] court." *Id.* at 124, 451 P.2d at 364. AOB 44. The RAB fails to cite, discuss or attempt to distinguish *Boisen*, essentially ignoring the Nevada opinion and asking this court to apply an Iowa opinion.

Other cases in the RAB are also not applicable. This is not a situation where defendants were dragged into court involuntarily, then forced to file compulsory counterclaims, as suggested at RAB 64-65. Here, defendants themselves initiated the litigation by filing lawsuits in justice court against unit owners. When other

owners sued defendants in district court, defendants *stipulated* to consolidate their justice court claims into the district court case. Consequently, the justice court claims were dismissed without prejudice, and defendants asserted counterclaims in the district court, with essentially the same claims defendants had asserted against unit owners in defendants' justice court lawsuits.

The RAB contends that mandatory pre-suit mediation requirements do not apply to compulsory counterclaimants (i.e., defendants) "who do not start civil actions." RAB 65. This is obviously not applicable in the present case, where defendants themselves started the civil litigation in justice court, then continued their litigation by filing the counterclaim in district court, pursuant to stipulation. Neither their justice court lawsuits nor their district court counterclaims—all of which were based upon CC&Rs and maintenance agreements—alleged any compliance with mediation requirements. This should be deemed an admission of the district court's jurisdiction.

C. Contract arbitration clauses are not applicable.

The opening brief established that governing document ADR provisions were waived. AOB 51-53. Defendants now concede that this case is *not* governed by ADR provisions in the governing documents. RAB 62 ("This case deals not with a private, contractual condition precedent...."). Therefore, the court should ignore any contractual ADR provisions in this case.

D. The prior orders and judgment should be enforced.

The AOB argued that even if this court affirms the dismissal, this should not have the effect of eliminating or unwinding the various district court orders and the judgment entered before the dismissal. AOB 40, fn. 6. The RAB responds by arguing that it "would make no sense" to dismiss the case, yet allow prior orders to remain in effect. RAB 43, fn. 13.

The RAB itself cites *Willy v. Coastal Corp.*, 503 U.S. 131 (1992). RAB 43, fn. 13. Yet *Willy* did exactly what defendants ask this court *not* to do. In *Willy*, the district court awarded sanctions for litigation abuses, before a determination that the district court lacked subject matter jurisdiction. *Willy* unanimously affirmed the sanctions, holding that a determination of lack of jurisdiction "does not automatically wipe out all proceedings had in the district court at a time when the district court operated under the misapprehension that it had jurisdiction." *Id.* at 137. To hold otherwise would have given the offending party a free pass for litigation abuse. Thus, "the maintenance of orderly procedure, even in the wake of a jurisdiction ruling later found to be mistaken—justifies the conclusion that the sanction order here need not be upset." *Id.* Even if a court eventually determines that it lacks jurisdiction, parties appearing in courts must "conduct themselves in compliance with the applicable procedural rules in the interim," and they are subject to "sanctions in the event of their failure to do so." *Id.* at 139.

Here, defendants engaged in years of litigation abuses resulting in striking the answer and entry of an $8 million judgment for compensatory damages. Like *Willy*, the defendants here should not get a free pass, with exoneration from any consequences of their persistent failure to obey rules and orders—particularly in light of the fact that plaintiffs spent approximately $1.4 million in attorneys' fees and litigation expenses before defendants filed their eleventh-hour motion to dismiss. 2 A.App. 335:1-2. At the very least, this case should be remanded for imposition of appropriate monetary sanctions against defendants, including an award of plaintiffs' attorneys' fees and costs, even if the dismissal is upheld and the judgment for compensatory damages is set aside. Otherwise, years of severe litigation abuses will go unpunished, and there will be no deterrent in future cases.

CONCLUSION

For the reasons established in the AOB and in this brief, the dismissal should be reversed. This case should be remanded for the proceeding that remained at the time of the dismissal, i.e., the hearing on punitive damages.

Dated: May 1, 2017

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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, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 6,957 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: May 1, 2017

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CERTIFICATE OF SERVICE

I certify that I am an employee of Lemons, Grundy & Eisenberg and that on this date Appellants' Reply 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:

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