IN THE SUPREME COURT OF THE STATE OF NEVADA

ARTEMIS EXPLORATION COMPANY, a Nevada corporation, HAROLD WYATT, and MARY WYATT, individuals,

Appellants,

vs.

RUBY LAKE ESTATES HOMEOWNER'S ASSOCIATION,

Respondent.

Case No. 75323
District Court Case No. CV-C-12-175

RESPONDENT RUBY LAKE HOMEOWNER'S ASSOCIATION'S ANSWER TO PETITION FOR REHEARING

Respondent Ruby Lake Estates Homeowner's Association ("RLEHOA") files its *Answer to Petition for Rehearing* ("*Answer*").

I. INTRODUCTION

Appellants Artemis Exploration Company ("Artemis") and Harold and Mary Wyatt (collectively "Appellants") raised in their *Petition for Rehearing* ("*Petition*") purported errors, which this Court previously considered and rejected on appeal. Where this Court's decision in *Artemis Exploration Co. v. Ruby Lake Estates Homeowner's Ass'n,* 135 Nev. __, 449 P.3d 1256 (2019) (hereinafter "*Opinion*") illustrates that it previously considered and rejected the same contentions raised in the *Petition,* similar contentions on rehearing constitute improper re-arguments and can readily be dismissed for this reason alone.

Appellants nevertheless incorrectly contend that this Court purportedly "overlooked material facts and misapplied existing law, and failed to consider decisions directly controlling dispositive issues in the matter[.]" *Petition* at 1. As discussed at length in the *Answering Brief,* where neither the facts of this case nor the law support Appellants' arguments raised below before the district court, in

their *Opening and Reply Briefs,* and again in the *Petition*, this Court neither misapprehended nor misapplied the facts and controlling law.

The *Petition* is nothing more than Appellants' repeated requests that this Court disregard the facts of this case and controlling statutes set forth in Chapter 116 of the Nevada Revised Statutes ("Chapter 116"). This Court, however, properly considered the salient facts of this case and Chapter 116 in its *Opinion.* 135 Nev. at __, 449 P.3d at 1256.

The gravamen of the *Petition* is that RLEHOA failed to comply with statutes that were not in existence in 1989 and, therefore, the district court erred in granting summary judgment in RLEHOA's favor and this Court erred in affirming the district court's decision (the same arguments raised below, on appeal, and now in the *Petition*). There are no valid grounds for the *Petition.*

It is confounding why Appellants continue, with no factual and legal basis, to try to push water uphill. Appellants have attempted to no avail to do so for approximately 10 years. Throughout this 10 year period, the Office of the Ombudsman for Common-Interest Communities, State of Nevada Department of Business and Industry Real Estate Division ("Ombudsman"), Arbitrator Leonard Gang ("Arbitrator"), the district court, and now this Court all consistently and correctly found that RLEHOA is a common-interest community subject to Chapter 116, and that it was lawfully formed and authorized to impose assessments.

II. DISCUSSION

Appellants' *Petition* conveniently and conspicuously ignores the salient facts of this case and controlling statutes. The *Petition* cannot be addressed without a review of these undisputed facts and law:

1. Stephen and Mavis Wright ("the Wrights") formed Ruby Lake Estates ("RLE") in 1989 through the proper filing and recording of the Plat Map and the

Covenant, Conditions and Restrictions ("CC&Rs")[1], and there is no evidence in the record that the formation of RLE in 1989 failed to comply with the controlling laws in existence at the time. Volume 3 Appellants' Appendix 87-91 ("__AA__"); 5AA152-154; Volume 1 Respondent's Appendix 02-05 ("__RA__"). Appellants offered no such evidence before the district court and on appeal.

2. Elko County has ***never*** accepted the roads within RLE for maintenance. 2AA108-109; 3AA87-91; 5AA152-154; 1RA02-16, 26-35. Elko County nevertheless requires the roadways and adjoining ditches and culverts to be maintained for health and safety reasons. 2AA60-61, 65-66, 108-109, 154-155, 174, 176, 211, 222, 251; 1RA02-16, 26-35. This is significant where the *RLE Fire Risk and Hazard Assessment Report* prepared as part of the Fire Plan for Elko County shows RLE to be in the "High Hazard" category for fire risk. 1RA74-82. Despite having numerous opportunities to do so, Appellants never once addressed the obvious before the district court and this Court: Who is or should be responsible for maintaining RLEHOA's roads and weed abatement for public health and safety reasons if RLEHOA does not maintain the roads and conduct the required fire hazard, weed abatement?

3. The CC&Rs "provide for the development and ***maintenance*** of an aesthetically pleasing and harmonious community of residential dwellings for the purpose of preserving a high quality of use and appearance . . ." and the creation of an Architectural Review Committee ("ARC") to ensure compliance with these provisions. 3AA87-91 (***emphasis added***).

4. In 1997 and after the Wrights sold the last lot, they formed Ruby Lake Estates Landowners Association ("the Association") to function as a common-

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[1] Covenants, conditions, and restrictions can be used interchangeably with "declaration."

interest community adopting budgets, collecting assessments, and maintaining roadways, perimeter fences, culverts, cattle guards entrance sign, and providing weed abatement. 1RA04-05. ARC, through the Association, assessed RLE lot owners for assessments, which were used to maintain roadways and perform weed abatement. 2AA108. RLEHOA holds title to real property deeded to it by the Wrights. 3AA119-122.

5. As noted by this Court, Elizabeth and George Essington (Mrs. Essington was the sole owner and/or director of Artemis) consistently and repeatedly recognized this collective responsibility well before RLEHOA's formation in 2006. 2AA110, 121-122, 161. Mr. Essington served on RLEHOA's Board of Directors ("Board") from 2007 to 2011 and in this capacity voted to levy assessments for roadway maintenance, weed abatement, and the repair of signs and culverts. 2AA137, 210-212, 220, 221-24, 250; 3AA1-11, 69-70. Both before and during his tenure on the Board, Mr. Essington wrote letters to RLEHOA members confirming the existence and necessity of RLEHOA, the necessity of enforcing the CC&Rs, the applicability of Chapter 116 to the RLEHOA common-interest community and to RLE, and the authority and responsibility of RLEHOA to levy and collect assessments for maintenance of the common elements. 2AA121-122, 161, 200, 202-204, 206, 214, 216-218, 220, 222-224, 226-229.

6. In 1991 (two years after the Wrights recorded the official Plat Map and the CC&Rs in 1989), the Legislature adopted the Uniform Common-Interest Ownership Act ("UCIOA") as Chapter 116. 1991 Nev. Stats., ch. 245 at 535. Chapter 116 did not become effective until 1992 (three years after the Wrights recorded the official Plat Map and the CC&Rs in 1989). *Id.*

7. Although it adopted the UCIOA in 1991, it was not until 1999 (10 years after the Wrights recorded the official Plat Map and the CC&Rs in 1989) when the Legislature made common-interest communities created by plat and

declaration prior to 1992 subject to Chapter 116. NRS 116.1201(1). When the Legislature did so, it also expressly made clear that pre-1992 common-interest communities are ***not*** required to comply with the provisions of NRS 116.2101 to NRS 116.2122: "The provisions of [NRS Chapter 116] do not . . . [r]equire a common-interest community created before January 1, 1992, to comply with the provisions of NRS 116.2101 to NRS 116.2122, inclusive . . ." NRS 116.1201(3)(b). Appellants did not address this controlling statute (or, if they did, in any meaningful manner) before the district court, on appeal, and now in their *Petition.*

8. While the Legislature recognized that Chapter 116 is a consumer protection statute and, as such, wanted all common-interest communities in Nevada to be subject to these protections, it concomitantly and pragmatically recognized that it was not feasible for common-interest communities created prior to 1992 to change all of their governing documents to meet the newly enacted statutory requirements. The Legislature, therefore, adopted certain exceptions and exemptions for communities formed prior to 1992. NRS 116.1201(3)(b) and NRS 116.1206(1).

9. Appellants contend that the *Opinion* "selectively applies certain provisions of NRS Chapter 116 to [RLE], but refuses to apply others without explanation for why one provision is applied and not the other. The RLE Opinion applies the definition of NRS 116.021 retroactively to [RLE] in order to imply that [RLE] is a common-interest community, but refuses to apply NRS 116.3101(1) retroactively and thereby finds that RLEHOA is valid[,]". *Petition* at 5. This contention is entirely misplaced and conveniently ignores the express and unambiguous language of NRS 116.1201(3)(b) and NRS 116.1206(1).

10. In any event, the *Opinion* explains "why one provision is applied and not the other." By way of example, this Court wrote a lengthy discussion to

explain why NRS 116.3101(1) cannot be retroactively applied as a matter of law. __ Nev. at __, 449 P.3d 1259-1260. This Court correctly concluded that "it would be absurd for the Legislature to decide in 1999 to impose NRS Chapter 116's requirements on pre-1992 communities but only if they knew, before 1992, that they would later be required to formally create the unit-owners' association before selling the first unit." *Id.*, 449 P.3d at 1260. In other words, this Court correctly concluded that Appellants' argument "leads to the absurd result that pre-1992 communities were required to comply with a statute which did not exist when they were created." *Id.*, 449 P.3d at 1260. It was factually and legally impossible for the Wrights and RLE to comply with NRS 116.3101(1) in 1989. It is incomprehensible as to why and how Appellants can continue to insist that the Wrights and RLE had to comply, and could have complied, with ***any*** non-existent statutes in 1989.

11. Because the Plat Map and CC&Rs were recorded prior to 1992, RLEHOA was and is ***not*** required to comply with the provisions of NRS 116.2101 to NRS 116.2122. NRS 116.1201(3)(b).

12. NRS 116.2105, which the Legislature unambiguously declared has no application to pre-1992 common-interest communities and therefore no application to RLEHOA, specifies the contents of the covenants, conditions and restrictions. NRS 116.2105. NRS 116.2105(1)(a) provides for "[t]he names of the common-interest community and the association and a statement that the common-interest community is either a condominium, cooperative or planned community . . ." NRS 116.2105(1)(a). It would appear Appellants contend, that based upon this statutory provision, the declaration must expressly create or state a common-interest community. NRS 116.1201(3)(b), however, makes it abundantly clear that RLEHOA created ***prior to 1992*** is ***not required to comply*** with NRS 116.2105(1)(a). *See* NRS 116.1201(3)(b). NRS 116.1206(1) further provides that

any parts of RLEHOA's CC&Rs "that violates the provisions of [Chapter 116] . . . ***[s]hall be deemed to conform with those provisions by operation of law, and any such declaration, bylaw or other governing document is not required to be amended to conform to those provisions.***" NRS 116.1206(1) (***Emphasis added.***) Appellants' contention that the RLEHOA CC&Rs' purported failure to create expressly a common-interest community, therefore, fails as a matter of law. *Id.* Appellants never once addressed this controlling statute (or, if at all, in any meaningful manner) before the district court, on appeal, and now in their *Petition.*

13. Where RLEHOA is not required as a matter of law to comply with the mandates of NRS 116.2105, there is likewise no requirement that the CC&Rs contain a description of the real estate included in the common-interest community of RLEHOA or any real estate that is or must become common elements (even though the CC&Rs do). NRS 116.2105(1)(c) and (1)(f). Furthermore, NRS 116.1206(1)(a) provides that if RLEHOA's CC&Rs "violate" the provisions of Chapter 116, those provisions "...[s]hall be deemed to conform with those provisions by operation of law..." NRS 116.1206(1)(a). Stated yet another way, ***RLEHOA is a common-interest community governed by Chapter 116 because of legislative mandate and not because of any attempts by RLEHOA to add, change, or amend a covenant in the CC&Rs.***

14. Because RLEHOA is a pre-1992 common-interest community and therefore NRS 116.1201 and NRS 116.1206(1) control the facts of this case, it is baffling how Appellants continue to insist that *Diaz v. Ferne,* 120 Nev. 70, 84 P.3d 664 (2004), and *Caughlin Ranch Homeowners Ass'n v. Caughlin Club,* 109 Nev. 264, 849 P.2d 310 (1993) control. Appellants made these same arguments to the district court and this Court in their *Opening* and *Reply Briefs.* Both the district court and this Court considered these same arguments and correctly rejected them.

15. The facts in both of those cases are markedly distinguishable from the instant case. Nothing in the facts of *Diaz,* 120 Nev. at 70, 84 P.3d at 664 and *Caughlin Club,* 109 Nev. at 264, 849 P.2d at 310 are remotely analogous to the facts of this case. Nothing in *Diaz,* 120 Nev. at 70, 84 P.3d at 664 and *Caughlin Club,* 109 Nev. at 264, 849 P.2d at 310 involve the same issues and statutory provisions of Chapter 116 that the district court and this Court addressed.

16. In *Diaz,* which does not even involve Chapter 116, the court addressed the issue of whether a manufactured home was a mobile home for purposes of the conditions, covenants, and restrictions prohibiting mobile homes on lots designated for single-family homes. 120 Nev. at 70, 84 P.3d at 664. That is not the issue currently before this Court. Before this Court is a pre-1992 common-interest community governed by Chapter 116 because of legislative mandate and not because of any attempts by RLEHOA to add, change, or amend a covenant or restriction in the CC&Rs.

17. *Caughlin Club* is equally inapplicable. 109 Nev. at 264, 849 P.2d at 310. In that case, the subdivision's original declaration imposed assessments only on residential lots, and years later the association ***amended*** the covenants to levy assessments against a commercial parcel that was developed ***after*** the declaration was recorded. *Id.*, 849 P.2d at 310. The issue was whether the amendment to the declaration was valid. *Id.,* 849 P.2d at 310. That is not the issue currently before this Court. Once again: Before this Court is a pre-1992 common-interest community governed by Chapter 116 because of legislative mandate and not because of any attempts by RLEHOA to add, change, or amend a covenant or restriction in the CC&Rs.

18. Even assuming for argument sake that RLEHOA had to comply with NRS 116.2105, the CC&Rs ***do include*** "common elements, other units or other real estate." NRS 116.2101 provides that a common-interest community is created

through the recording of the covenants, conditions and restrictions in the county in which any portion of the common-interest community is located. NRS 116.2101.

19. As recorded with Elko County, Article I of the CC&Rs provides:

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

5AA155 (***Emphasis added.***)

20. NRS 116.2109 provides that the Plat Map is deemed part of the covenants, conditions and restrictions. The Plat Map clearly depicts the common elements, including the roads that Appellants claim should not be maintained by RLEHOA or Elko County. 3AA87-91; 5AA152-154. The Plat Map for RLE establishes 51 residential lots, one commercial lot, roadways, easements, and set back requirements, as well as the lot which the Wrights deeded to RLEHOA as common area in 2007. 3AA87-91, 119-122; 5AA152-154. The roads in RLE, the same roads which Elko County rejected for maintenance purposes, are all clearly identified on the Plat Map as well as other common elements of the common-interest community RLEHOA is required to maintain. 3AA87-91; 5AA152-154. Sheets 2 and 3 of the Plat Map identify such common elements as the roadways, entrance sign, culverts, perimeter fencing, cattle guards, and a small lot which RLEHOA is required to maintain. 3AA87-91; 5AA152-154.

21. Of further significance is Sheet 1 of 3 of the Plat Map:

> At a regularly held meeting of the Board of Commissioners of Elko County, State of Nevada, held on the 5th day of July, 1989, this Plat was approved as a Final Plat pursuant to NRS 278,328. ***The Board***

> ***does hereby reject on behalf of the public all streets or roadways for maintenance purposes*** and does hereby accept all streets and easements therein offered for utility, draining and access purposes only as dedicated for public use.

3AA87-91; 5AA152-154 (***Emphasis added.***)

22. In summary, this case must be reviewed consistent with the express language of: (1) NRS 116.1201(3)(b) exempting pre-1992 common-interest communities from having to comply with NRS 116.2101 to NRS 116.2122 and (2) NRS 116.1206(1) providing that any parts of RLEHOA's CC&Rs "that violates the provisions of [Chapter 116] . . . ***[s]hall be deemed to conform with those provisions by operation of law, and any such declaration, bylaw or other governing document is not required to be amended to conform to those provisions.***" NRS 116.1206(1)(a) (***Emphasis added***). Appellants fail to address how these two controlling statutes have no application to the instant case. Instead, they continue to insist that the Wrights somehow could have and should have accomplished a ***factual and legal impossibility*** by complying with statutes not in existence at the time of RLE's formation as a common-interest community in 1989.

23. For the same reasons set forth in the above paragraphs and in the *Answering Brief,* this Court correctly ***"h[e]ld that RLE is a common-interest community under either version [of NRS 116.021]. The current language requires the declaration to describe the 'real estate' but does not require it to specify the payment obligation."*** *Opinion*, 135 Nev. at __, 449 P.3d at 1259 & n.4. (***Emphasis added.***)

24. Lastly, Appellants take issue with this Court's reliance upon *Evergreen Highlands Ass'n v. West,* 73 P.3d 1 (Colo. 2003) (hereinafter "*Evergreen*") and the RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 6.2 (2000) (hereinafter "the RESTATEMENT"). As an initial matter and for the reasons

set forth in the *Answering Brief* and this *Answer,* it was not necessary for this Court to do so. In any event, this Court did ***not*** "misapply" *Evergreen* and the RESTATEMENT.

25. As correctly noted by this Court, RLEHOA as a pre 1992 community is not required to comply with NRS 116.2105. *Opinion,* __ Nev. at __, 449 P.3d at 1259-1260 & n.5. As further correctly noted by this Court, ***nothing in NRS 116.2105 "require[s] a declaration to expressly explain that unit owners may be subject to assessments*** or otherwise be financially responsible for maintaining common elements, ***and we do not read NRS 116.021 as imposing such a requirement.***" *Id.*, 449 P.3d at 1259. (***Emphasis added.***)

26. This Court then proceeded to state that both *Evergreen* and the RESTATEMENT support the proposition that an implied obligation can be found: "An implied obligation may also be found where the declaration expressly creates an association for the purpose of managing common property ***or*** enforcing use restrictions and design controls, but fails to include a mechanism for providing the funds necessary to carry out its functions." *Id.*, 449 P.3d at 1259 (quoting the RESTATEMENT and ***emphasis added***).

27. As noted by this Court before, it cited to both the RESTATEMENT and *Evergreen, id.,* 449 P.3d at 1259: The CC&Rs "provide for the development and ***maintenance*** of an aesthetically pleasing and harmonious community of residential dwellings for the purpose of preserving a high quality of use and appearance . . ." and the creation of the ARC to "***maint[ain]*** . . . a high standard of architectural design, color and landscaping harmony and to preserve and enhance aesthetic qualities and high standards of construction in the development and ***maintenance*** of the subdivision." 3AA87-91. (***Emphasis added.***) Contrary to Appellants' incorrect contention, therefore, the CC&Rs expressly "creat[ed] an association for

the purpose of . . . enforcing use restrictions and design controls . . ." and for maintenance of the community. *Id.*

28. But even assuming for argument sake that the CC&Rs did not, NRS 116.1206(1) provides that any parts of RLEHOA's CC&Rs "that violates the provisions of [Chapter 116] . . . ***[s]hall be deemed to conform with those provisions by operation of law, and any such declaration, bylaw or other governing document is not required to be amended to conform to those provisions***." NRS 116.1206(1) (***emphasis added***).

29. As set forth in paragraphs 1 through 4 and 18 through 21, the CC&Rs and Plat Map undeniably and expressly created an association and contained an obligation to be financially responsible for maintaining common elements. Without the authority to levy assessments, RLEHOA will be placed in the untenable position of being obligated to maintain facilities and infrastructure without any viable economic means by which to do so (to the detriment of the homeowners and public safety). Such a result directly conflicts with the Legislative history and mandate of Chapter 116 as discussed extensively in the *Answering Brief.*

30. In conclusion, conspicuously absent before the district court and absent in Appellants' *Opening* and *Reply Briefs,* and once again in the *Petition,* is a discussion as to how the Wrights could have factually and legally complied with statutes that were not in existence in 1989. That is because it was both ***factually and legally impossible*** for the Wrights to comply with statutes that were not in existence at the time of RLE's formation as a common-interest community. The Legislature recognized this when, in 1999, it made Chapter 116 applicable to pre-1992 communities, but did not require those communities to comply with all of Chapter 116's requirements.

31. This Court correctly determined this case consistent with the express language of: (1) NRS 116.1201(3)(b) exempting pre-1992 common-interest communities from having to comply with NRS 116.2101 to NRS 116.2122 and (2) NRS 116.1206(1) providing that any parts of RLEHOA's CC&Rs "that violates the provisions of [Chapter 116] . . . ***[s]hall be deemed to conform with those provisions by operation of law, and any such declaration, bylaw or other governing document is not required to be amended to conform to those provisions.***" NRS 116.1206(1) (***emphasis added***).

32. The *Petition* should be denied in its entirety. It is time for Appellants to accept they should not and cannot keep trying to push water uphill. This dispute and attendant litigation have gone on for nearly 10 years. Throughout this 10-year period, numerous decisions have been entered in favor of RLEHOA by the Ombudsman, the Arbitrator, the district court, and now this Court. It is time for Appellants to recognize that RLEHOA is a lawfully formed NRS Chapter 116 common-interest community, authorized to impose assessments under Nevada law.

III. VERIFICATION

Under the penalty of perjury, the undersigned declares that she is the attorney for Respondent named in the instant Brief and knows the contents of the Brief. The pleading and facts stated therein are true of her own knowledge, excepts as to those matters stated on information and belief, and that as such matters she believes them to be true. This verification is made by the undersigned attorney pursuant to NRAP 21(a)(5).

IV. CERTIFICATE OF COMPLIANCE

1. I 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 it has been prepared in proportionally spaced typeface using Word in 14 point Times New Roman font.

2. I further certify that this Brief complies with the page-or type-volume limitations of NRAP 40, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionally spaced, has a typeface font of 14 points or more, and contains 3,599 words.

3. I certify that I have read this 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, 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 this 22nd day of January 2020.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c)(1), I certify that I am an employee of the law firm of Leach Kern Gruchow Anderson Song, and that on this day I served the foregoing document described as ***RESPONDENT RUBY LAKE HOMEOWNER'S ASSOCIATION'S ANSWER TO PETITION FOR REHEARING*** on the parties set forth below, at the address listed below by:

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

Travis W. Gerber, Esq.
Zachary A. Gerber, Esq.
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☒ NEFCR 9 Electronic notification will be sent to the following:

Travis W. Gerber, Esq.
Gayle A. Kern, Esq.

DATED this 22nd of January 2020.

/s/ Teresa A. Gearhart
TERESA A. GEARHART