IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

DAVID DEZZANI and ROCHELLE DEZZANI,

Plaintiffs,

vs.

KERN & ASSOCIATES, LTD; GAYLE KERN; KAREN HIGGINS; JOHN DOES 1-10; JANE DOES 1-10; DOE BUSINESSES 1-5,

Defendants.
_____/

Sup. Ct. Case No. 69410
Case No. CV15-00826
Dept. 10

RECORD ON APPEAL

VOLUME 3 OF 4

DOCUMENTS

APPELLANT
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San Clemente, CA 92673

RESPONDENT
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2010

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

DAVID DEZZANI and ROCHELLE DEZZANI,

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Defendants.
_____/

CASE NO.: CV15-00826

DEPT. NO.: 10

MOTION FOR ATTORNEY'S FEES & COSTS

Defendants, Kern & Associates, Ltd. and Gayle Kern ("Kern"), by and through their counsel, Kern & Associates, Ltd., hereby submits the following Motion for Attorney's Fees and Costs pursuant to NRS 18.010, NRCP 11, and NRS 116.4117. As of November 25, 2015, Kern incurred attorney's fees and costs defending this action in the amount of $10,932.34.

This motion is based upon the accompanying Memorandum of Points and Authorities, the Affidavit of Gayle A. Kern attached hereto, all records, documents, pleadings, and papers on file or to be filed herewith, the arguments of counsel made herein or at a later date, and any other matters that may properly come before this Court in consideration of this motion.

DATED this 30th day of November, 2015.

KERN & ASSOCIATES, LTD.

By _____
GAYLE A. KERN, ESQ.
Attorneys for Kern & Associates, Ltd. and Gayle Kern

MEMORANDUM OF POINTS & AUTHORITIES

I. FACTS

On May 4, 2015,Plaintiffs David Dezzani and Rochelle Dezzani ("Dezzanis") commenced their unfounded complaint against Kern. A copy of the Dezzani's Complaint is attached as Exhibit "1". Upon being served the Complaint, Kern sent a Rule 11 letter to the Dezzanis dated September 9, 2015, advising the Dezzanis of the substantive deficiencies of the Complaint and providing an opportunity for them to remedy the erroneous and unjustifiable filing of the Complaint against Kern. The Dezzanis ignored the sound and appropriate discussion regarding the lack of merit of their claims. As a result of the Dezzani's failure to dismiss the Complaint, and as contemplated by Kern's Rule 11 letter, Kern filed the Motion to Dismiss, a copy of which was provided to the Dezzanis in the letter. A copy of Kern's Motion to Dismiss is attached as Exhibit "2". The claims presented to the Court in the Complaint were completely devoid of any legal merit.

Since the inception of this case, Plaintiffs failed to comply with the procedural rules of this Court and failed to follow the substantive law of Nevada. Kern has been forced to respond to unsubstantiated pleadings. The Court issued its Order granting Kern's Motion to Dismiss and denying Plaintiffs' Motion to Postpone and Temporarily Stay on November 19, 2015, a copy of which is attached as Exhibit "3". The Court confirmed that there is simply no legal authority for the position taken by the Dezzanis and dismissed the case in its entirety. Kern now seeks her attorney's fees and costs incurred in litigating this matter with the Dezzanis. The amount of attorney's fees incurred through November 25, 2015, is $10,580.00. *See* Exhibit "4" attached hereto, Affidavit of Gayle A. Kern. The amount of costs incurred is $352.34. *See Id.* The total amount of fees and costs is $10,932.34 through November 25, 2015, but this amount is subject to increase depending on the additional work which may be required defending this Motion. These fees and costs are reasonable and should be awarded.

II. ARGUMENT

The Nevada Supreme Court has consistently held an award of attorney's fees is available when authorized by a "rule, statute, or contract." *See e.g .Lubritz v. Circus Circus Hotels*, 101 Nev. 109, 112, 693 P.2d 1261, 1264 (Nev. 1985). Within the stated criteria, the decision to award reasonable attorneys' fees is left to the sound discretion of the Court. *See Barmettler v. Reno Air, Inc.,* 114 Nev. 441, 452, 956

P.2d 1382, 1389 (Nev. 1998); *County of Clark v. Blanchard Contr. Co.*, 98 Nev. 488, 492, 653 P.2d 1217, 1220 (Nev. 1982). An award of attorneys' fees will not be overturned absent a manifest abuse of discretion. *See Davidsohn v. Steffens,* 112 Nev. 136, 139, 911 P.2d 855, 857 (Nev. 1996); *University of Nevada v. Tartarian*, 110 Nev. 581, 590, 879 P.2d 1180, 1187 (Nev. 1994); *County of Clark v. Blanchard Constr. Co.,* 98 Nev at 492.

The determination of the award and amount of fees is based upon the pleadings, affidavits and exhibits the parties submit to the Court. *See Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 956 (Nev. 2001) *abrogated in part on other grounds by Horgan v. Felton*, 123 Nev. 577, 170 P.3d 982 (Nev. 2007). In order to determine the reasonable value of attorney's fees in a discretionary award, the Court should consider the following factors, "(1) the qualities of the advocate: his [her] ability, training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, intricacy, importance, the time and skill required, the responsibility imposed and the prominence and character of the parties when they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; and (4) the result: whether the attorney was successful and what benefits were derived." *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (Nev. 1969) (*quoting Schwartz v. Schwerin*, 336 P.2d 144, 146 (Ariz. 1959)); *See also Schouweiler v. Yancey Co.*, 101 Nev. 827, 833-34, 712 P.2d 786, 790 (Nev. 1985).

An analysis of all the relevant factors cited above leads to the conclusion that Kern's fees are reasonable and supports an award of the same. The superior experience and professional abilities of counsel in this matter and Ms. Kern's known expertise in the law governing community associations and the amount of time, work, and skill expended by counsel in all aspects of this litigation justify an award of attorney's fees and costs in the amount(s) requested. Further, while responding to Plaintiff's unsubstantiated claims, lengthy emails and unnecessary and unwarranted pleadings, Kern was unable to expend her time and resources to her many clients in need of her legal services. Ultimately, Kern was successful in dismissing the frivolous claims against her, skillfully performed her work and should be awarded reasonable costs and fees. In support of this request, Kern submits an Affidavit of Gayle A. Kern with detailed billing statements from September 2, 2015, through the present showing the legal services rendered, fees charged, and costs incurred for multiple communications with the Plaintiffs, and reviewing

researching and drafting the various pleadings, exhibits and documents associated with this case, attached hereto as Exhibit "5".

A. An Award of Attorneys Fees and Costs Is Supported by NRS 18.010(2)(b).

NRS 18.010(2)(b) provides that a court may award attorney's fees to a prevailing party "when the court finds that the claim ... was brought or maintained without reasonable ground or to harass the prevailing party." The statute specifically directs the Court to "liberally construe the provisions of this paragraph in favor of awarding attorneys' fees in all appropriate circumstances . . . to punish for and deter frivolous or vexatious claims and defenses because such claims and defenses overburden limited judicial resources, hinder the timely resolution of meritorious claims and increase the costs of engaging in business and providing professional services to the public." NRS 18.010(2)(b). In ruling on a motion for attorney's fees under NRS 18.010(2)(b), the Court "must determine whether the plaintiff had reasonable grounds for its claims." *Bergmann v. Boyce*, 109 Nev. 670, 675, 856 P.2d 560, 563 (Nev. 1993). Such a determination depends on the actual circumstances of the case. *Id.* (*citing Western United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1069 (Colo. 1984); *Fountain v. Mojo*, 687 P.2d 496, 501 (Colo. Ct. App. 1984)).

The statute clearly provides that litigants bringing claims that have no reasonable ground and that are not supported by existing law "shall have attorney fees imposed against them." *Lopez v. Corral*, 2010 Nev. LEXIS 69, 24 (Nev. 2010). Plaintiffs' claims fit expressly within the statute. This Court's Order dismissing the case in its entirety is clear. The Order states, "[t]he Court finds there is no basis in law or fact to support the causes of action alleged against Kern. The Court finds to permit such causes of action against Kern would result in a chilling effect on individuals' ability to hire and retain counsel." *See* Exhibit "3". The Dezzanis had no legal basis to support their claims against Kern directly. Further, the Dezzanis received ample warning that their claims had no merit, which they clearly ignored in an effort to continue their unlawful harassment of Kern. *See* Exhibit "2". Plaintiffs ignored the law, filed unnecessary pleadings, including a complaint that was unlawful, made unsupported factual statements, and generally acted in a manner that is a waste of this Court's time and limited resources. There should be consequences of such conduct. An award of attorney's fees is proper under NRS 18.010(2)(b).

B. An Award of Attorneys Fees and Costs is Supported by NRCP Rule 11(c).

Rule 11 (c) of the Nevada Rules of Civil Procedure provides further support for an award of attorney's fees and costs in favor of Kern. Under Rule 11, a party who presents a pleading, motion or

any other paper represents that it is " not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation," that the claims contained therein are "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law" and that "the allegations and other factual contentions have evidentiary support." NRCP 11(b). The Court may impose appropriate sanctions for a violation of Rule 11(b), including attorneys fees and other expenses incurred as a direct result of the litigation. NRCP 11(c)(2); *See also Bergmann v. Boyce*, 109 Nev. 670, 676, 856 P.2d 560, 564 (Nev. 1993). Attorney's fees are appropriate under Rule 11 when a claimant brings a "frivolous action;" one that is "both baseless and made without a reasonable and competent inquiry." *Id. (citing Marshall v. District Court*, 108 Nev. 459, 465, 836 P.2d 47, 52 (1992); *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th Cir. 1990)). In order to survive a Rule 11 challenge, the court must establish that (1) the pleadings were well grounded in fact and existing law, and (2) that the claimant made a reasonable and competent inquiry. *Id.*

An award of attorney's fees pursuant to Rule 11 is undoubtedly appropriate in this case. There is no question that the Dezzani's Complaint was not well grounded in fact and existing law. The only facts presented illustrate that Kern was, at all times relevant to the Complaint, acting as the attorney for the Association. Plaintiffs cite no legal authority for their claims against Kern directly. The only legal support the Dezzanis set forth in the Complaint consisted of various citations to Chapter 116 of the Nevada Revised Statutes. Chapter 116 does not provide for a cause of action against Kern as attorney for the Association. Kern advised Plaintiffs of this on multiple occasions. *See e.g.* Exhibit "2". Further, this Court noted in its Order dismissing all claims that "NRS 116.3118 does not permit attorneys to be personally liable for actions taken on behalf of an association." *See* Exhibit "3". Plaintiffs made no inquiry into relevant and pertinent legal authority supporting their position, presented baseless arguments to this Court and continued their attack against Kern in a serious of frivolous pleadings and communications. Plaintiffs should be sanctioned for such conduct.

As a retired attorney, Plaintiff David Dezzani is well acquainted with the high professional standard attorneys are held to and the expectation of integrity, honesty and diligence when engaging in litigation. The Dezzanis ignored their duty to the Court to conduct themselves appropriately. Pursuant

to Rule 11, this Court should award Kern her reasonable attorney's fees and costs incurred as a result of Plaintiffs reprehensible actions.

C. An Award of Attorneys Fees and Costs Is Supported by NRS 116.4117.

The Nevada legislature has provided in NRS 116.4117 that attorneys' fees may be awarded to the prevailing party where an action has been brought to enforce or interpret the governing documents of an association or for the failure to comply with Chapter 116. NRS 116.4117(2) authorizes civil actions by a homeowner for a failure or refusal to comply with any provisions of Chapter 116 or the governing documents of an association. [1] Pursuant to NRS 116.4117(6), the court may award reasonable attorneys' fees to the prevailing party.

The entire basis of the original Complaint filed by the Dezzanis concern the interpretation and enforcement of the CC&Rs. Kern's communications with the Dezzanis arose solely from the enforcement actions taken to address the violation of the CC&Rs on the Dezzanis' property. Though this Court ultimately determined that the Dezzanis failed to plead facts which authorize a cause of action against Kern, Plaintiffs sought damages against Kern for acting on behalf of the Association and pursing a violation of the CC&Rs on the Dezzanis' property. As such, Kern is entitled to her attorneys fees and costs pursuant Chapter 116, which supports an award of attorney's fees to a prevailing party where Chapter 116 is alleged to have been at issue. Dezzanis filed their Complaint asserting enforcement of Chapter 116. Kern was the prevailing party. Therefore, an award of attorney's fees and costs to the prevailing party is appropriate.

III. CONCLUSION

The Court may properly exercise its discretion and authority to award attorney's fees in this matter pursuant to the authority cited above. Kern's fees are reasonable and warranted in light of the *Brunzell* factors. Further, the award of attorney's fees is specifically authorized by statute. *See* NRS 18.010(2)(b), NRCP 11 and NRS 116.4117.

---

[1] Specifically, NRS 116.4117(2) authorizes a civil action by a unit's owner against the association. Despite the fact that NRS 116 does not authorize actions by a homeowner against an attorney for an association, the statute contemplates an award of attorneys fees to a prevailing party when issues regarding violations of the chapter are litigated. Plaintiffs attempted to use the provisions of Chapter 116 to hold Kern personally liable. To the extent Plaintiffs asserted violations of Chapter 116, Kern should be awarded her attorney's fees consistent with NRS 116.4117(6).

It is important to note that the Dezzanis were warned there was no valid cause of action after they filed their frivolous Complaint. *See* Exhibit "2". They ignored the sound advice and proceeded with the action against Kern. Such action should not be without consequence. The Dezzanis should be required to pay all of the attorney's fees and costs incurred by Kern for their unlawful, unprofessional, and unnecessary actions.

As set forth above, Nevada law supports an award of attorney's fees and costs to Kern. Therefore, Kern is entitled to an award of attorney's fees against the Dezzanis in the amount of $10,580.00, and costs in the amount of $352.34, for a total amount of $10,932.34. Interest should accrue at the statutory rate from the date judgment is entered. Kern requests such further relief the Court determines to be appropriate.

AFFIRMATION

Pursuant to NRS 239B.030

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

DATED this 30th day of November, 2015.

KERN & ASSOCIATES, LTD.

By _____
GAYLE A. KERN, ESQ.
Attorneys for Kern & Associates, Ltd. and Gayle Kern

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the law offices of Kern & Associates, Ltd., 5421 Kietzke Lane, Suite 200, Reno, NV 89511, and that on this date, I served the foregoing document(s) described as follows:

MOTION FOR ATTORNEY'S FEES & COSTS

On the party(s) set forth below by:

__X__ Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Reno, Nevada, postage prepaid, following ordinary business practices.

____ Personal delivery.

____ Facsimile (FAX).

____ Federal Express or other overnight delivery.

____ Reno-Carson Messenger Service.

addressed as follows:

David and Rochelle Dezzani
17 Camino Lienzo
San Clemente, CA 92673

DATED this 2nd day of December, 2015.

Teresa A. Gearhart
TERESA A. GEARHART

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Clerk of the Court
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EXHIBIT "1"

EXHIBIT "1"

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JACQUELINE BRYANT
CLERK OF THE COURT
BY R. Branum
DEPUTY

CODE
YOUR NAME David and Rochelle Dezzani
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CITY, STATE ZIP San Clemente, CA 92673
TELEPHONE NUMBER (808) 291-2302

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

DAVID DEZZANI and

ROCHELLE DEZZANI

Plaintiffs,

KERN & ASSOCIATES, LTD.,

GAYLE KERN,

KAREN HIGGINS

'JOHN DOES 1-10,

JANE DOES 1-10,

DOE BUSINESSES 1-5

Defendants

_____/

Case No.: CV15 00826

Dept. No. 10

COMPLAINT

DAVID DEZZANI and
ROCHELLE DEZZANI

vs.

KERN & ASSOCIATES, LTD.,

GAYLE KERN,
KAREN HIGGENS,
JOHN DOES 1-5,

JANE DOES 1-5 AND
DOE BUSINESS ENTITIES 1-5

COMPLAINT

Come now David Dezzani and Rochelle Dezzani, Plaintiffs, and for complaint against Defendants allege as follows:

Jurisdiction

1. Plaintiffs are residents of the State of California who own unit #211, in the McCloud Condominiums, a condominium development located in Incline Village, Nevada (hereinafter referred to simply as "McCloud").

2. Defendant Gayle Kern & Associates Ltd., is a business entity with offices located at 5421 Kietzke Lane in Reno, Nevada.

3. Defendant Gayle Kern is an attorney who dispenses legal advice in the State of Nevada.

4. Defendant Karen Higgins is a resident of the State of California who owns unit #20 in McCloud and who has been a member of the McCloud Condominium Homeowners Association Board of Directors since before 2013.

5. Defendants John Does 1-10, Jane Does1-10 and Doe Business entities 1-5

((hereinafter referred to individually and/or collectively as "Defendants Doe") are persons and/or business entities who are jointly, severally and/or contributorily liable to Plaintiffs for tortious acts and/or omissions in the State of Nevada, whose identities and/or activities are presently unknown but will become known through discovery.

Facts

6. On July 1, 2004, Plaintiffs purchased McCloud unit #211 and thereby became members of the McCloud Condominium Homeowners Association (hereinafter "McCloud HOA").

7. The McCloud HOA was established, exists and operates under the laws of the State of Nevada, including but not limited to the Nevada Uniform Common-Interest Ownership Act, NRS 116, and exercises power and authority through a Board of Directors (hereinafter the "Board").

8. Prior to Plaintiffs' purchase of unit #211, a previous owner had modified its rear deck, thereby making it larger than its original size.

9. The larger size of the rear deck of unit #211 was an important factor in Plaintiffs' decision to pay a higher price for that unit than they had been considering for similar units in McCloud.

10. Before finalizing their purchase of unit #211 in 2004, Plaintiffs sought, obtained and relied upon assurances that the previous owner's rear deck modification had been approved by the Board.

11. In 2013, more than eight years after they purchased unit #211, Plaintiffs received a NOTICE OF VIOLATION from the Board accusing them and/or their unit of violating two provisions of the McCloud CC&Rs (see Exhibit 1, attached, hereinafter "NOV").

12. The NOV alleged the purported violation to be "Unallowed(sic)/Unapproved Deck Extension" and cited "the following violation of the McCloud CC&Rs" quoting CC&Rs "12.5" and "13.8.2" (see Exhibit 1, page 1).

13. The NOV was drafted, edited, approved and/or authored, in whole or in part, by Defendants Gayle Kern & Associates, Ltd. and/or Gayle Kern (hereinafter referred to collectively as "Defendants Kern") and/or Defendant Higgins and/or Defendants Doe.

14. After receiving the NOV, Plaintiffs communicated with the Board on many occasions; challenging and criticizing not only the NOV's drafting, editing, authorship, reasoning, logic and legality, but also questioning the competency of the legal services provided to the Board by Defendants Kern (see e.g. Exhibit 2, attached).

15. Notwithstanding Plaintiffs' communications, the Board scheduled a hearing on the NOV, to take place in Incline Village on August 23, 2013.

16. More than one month prior to the scheduled hearing, Plaintiffs provided the Board with a letter and documents establishing, beyond doubt, that Unit #211's rear deck modification had been approved by an authorized representative of the McCloud HOA, in 2002 and Plaintiffs requested in writing that their letter be placed on the next Board meeting agenda. (see Exhibit 3, attached).

17. Notwithstanding the foregoing, Defendants Kern, Higgins and Does advised and/or urged the Board to decline Plaintiffs' request to place their letter on the Board's next meeting agenda, in violation of NRS 116.31087 and other provisions of Nevada law, and, further, advised and/or urged the Board to refuse Plaintiffs' request that the charges be withdrawn and , instead, to continue prosecuting the Plaintiffs and proceed with hearing the NOV, which advice and urging the Board accepted (see Exhibit 4, attached).

18. The Board proceeded with hearing the NOV on August 23, 2013, but did not state any findings until more then a year later, when it issued a titled 'RESULT OF HEARING", dated September 5, 2014, purportedly ruling on the NOV (see Exhibit 5, attached, hereinafter "RESULT").

19. The RESULT was drafted, edited, approved and/or authored, in whole or in part, by Defendants Kern and/or Defendant Higgins and/or Defendants Doe.

20. On December 29, 2014, Plaintiffs sent a letter to the Board contesting the RESULT and requesting that the letter be placed on the agenda for the next regularly scheduled Board meeting (see Exhibit 6, attached).

21. On February 2, 2015, the Board replied to Plaintiffs, endorsing the RESULT and, in violation of NRS116.31087 and/o other provisions of Nevada law, refusing, declining and/or failing to address Plaintiffs' request to place the subject of their written complaint on the agenda for its next regularly scheduled meeting (see Exhibit 7, attached).

22. The February 2, 2015 reply described in Paragraph 21 was drafted, edited, approved and/or authored, in whole or in part, by Defendants Kern and/or Defendant Higgins and/or Defendants Doe.

Claims for Relief

I.

23. Plaintiffs reassert and incorporate by reference the allegations of paragraphs 1 through 22, above.

24. On or about May 3, 2013, Plaintiffs sent a lengthy email to the Board describing Defendants Kern as possessing *"**faulty knowledge** of the facts and the law, **a propensity to presume matters without evidence** and **a willingness** to espouse*

legal opinions which ***ignore, overlook, misconstrue and/or fail to consider applicable Nevada laws.***" (see Exhibit 2, page 2, emphasis added)

25. In the above-quoted email and in other communications during the time and events described above, Plaintiffs requested to review books, records and other papers and complained about, questioned and criticized Defendants Kerns' legal abilities, competency, services, opinions, violations of the NRS and McCloud HOA governing documents, in good faith, both orally and in writing, while recommending replacement of Defendants Kern and/or selection of different legal counsel and/or recommending a second opinion from and/or by independent legal counsel.

26. As a result, Defendants Kern and/or Defendant Higgins and/or Defendants Doe undertook, directed and/or encouraged others to take retaliatory action against Plaintiffs, in violation of NRS116.31183 and other provisions of Nevada law, thereby causing damages to Plaintiffs and their property.

II.

27. Plaintiffs reassert and incorporate by reference the allegations of paragraphs 1 through 26, above.

28. Prior to and/or during the time referred to above, Defendant Higgins and/or a previous owner of McCloud unit #20 modified the rear deck thereof.

29. Modification of unit #20's rear deck enhanced Defendant Higgin's enjoyment of her unit and the potential market value thereof.

30. Modification of the rear deck of unit #20 did not comply with the McCloud CC&Rs in force at the time thereof.

31. Some or all of unit #20's rear deck modification encroaches into and/or utilizes common area.

32. Prior to and/or during the time referred to above, Defendant Higgins and/or a previous owner of unit #20 modified the common area around and/or in the vicinity of the unit's rear deck.

33. Modification of the common area around and/or in the vicinity of unit #20's rear deck was not in compliance with the McCloud CC&Rs in force at the time thereof.

34. As of March 18, 2013, Defendants Kern, Defendant Higgins and/or Defendants Does were and/or should have been aware of the modifications described in paragraphs 28, 29, 30, 31, 32 and 33 above.

35. Notwithstanding such awareness, Defendants Kern, Defendant Higgins and/or Defendants Does participated in meetings, discussions and hearings regarding issues

related to modification of McCloud unit rear decks and/or common area encroachment.

36. The actions of Defendants Kerns, Defendant Higgins and Defendants Does described above were in violation of NRS 116.31084 and other provisions of Nevada law and caused damages to Plaintiffs and their property.

III.

37. Plaintiffs reassert and incorporate by reference the allegations of paragraphs 1 through 36, above.

38. Defendants Kern, Defendant Higgins and/or Defendants Does acted and/or directed and/or encouraged others to act, negligently, wrongfully, wantonly, willfully and/or intentionally, in violation of NRS116.3108, .31083, .31084, .31085, .31087 and . 31175 and other laws of the State of Nevada, to deprive Plaintiffs of their right to due process and other legal protections and to punish Plaintiffs, thereby causing harm and damages to them and their property.

IV.

39. Plaintiffs reassert and incorporate by reference the allegations of paragraphs 1 through 38, above.

40. By and through other wrongful acts and omissions, currently unknown to Plaintiffs but which will become known through discovery, Defendants Kern, Defendant Higgins and/or Defendants Doe, jointly, severally and/or contributorily, caused and continue to cause, harm and damages to Plaintiffs and their property.

WHEREFORE, Plaintiffs request judgement against Defendants Kern, Defendant Higgins and Defendants Doe as follows:

A. On Claim I, for damages in excess of $10,000.00, the amount of which will be proven at trial, plus costs, attorneys fees and/or such other relief as the court and jury deem just.

B. On Claim II, for damages in excess of $10,000.00, the amount of which will be proven at trial, plus costs, attorneys fees and/or such other relief as the court and jury deem just.

C. On Claim III, for damages in excess of $10,000.00, the amount of which will be

proven at trial, plus costs, attorneys fees and/or such other relief as the court and jury deem just.

D. On Claim IV, for damages in excess of $10,000.00, the amount of which will be proven at trial, plus costs, attorneys fees and/or such other relief as the court and jury deem just.

Signed, in San Clemente, California, this 3rd day of May, 2015.

David Dezzani. Plaintiff

17 Camino Lienzo

San Clemente, CA 92673

cell: (808)291-2302

Rochelle Dezzani, Plaintiff

17 Camino Lienzo

San Clemente, CA 92673

cell: (760) 525-5143

SECOND JUDICIAL DISTRICT COURT
COUNTY OF WASHOE, STATE OF NEVADA

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, _____

Complaint

_____

(Title of Document)

filed in case number: _____

☒ Document does not contain the social security number of any person

-OR-

☐ Document contains the social security number of a person as required by:

☐ A specific state or federal law, to wit:

_____

(State specific state or federal law)

-or-

☐ For the administration of a public program

-or-

☐ For an application for a federal or state grant

-or-

☐ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230 and NRS 125B.055)

Date: May 4, 2015

_____
(Signature)

David Dezzani
(Print Name)

_____
(Attorney for)

Affirmation
Revised December 15, 2006

INDEX OF EXHIBITS

Exhibit Number 1 Number of Pages 2
Exhibit Description March 18, 2013 NOTICE OF VIOLATION

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Exhibit Description July 18, 2013 letter to McCloud Bd. of Dirs

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Exhibit Description July 31, 2013 letter to Plaintiffs from Defendant Kerns

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Exhibit Description February 2, 2015 letter from McCloud BD of Dirs

Exhibit Number _____ Number of Pages _____
Exhibit Description _____

EXHIBIT /

EXHIBIT /

McCloud Condominium Associationn
P.O. Box 3960
Incline Village, NV 89450

NOTICE OF VIOLATION

Sent Certified Mail with
Return Receipt

March 18, 2013

David & Rochelle Dezzani (211)
#13 Calle Altea
San Clemente, CA 92673

RE: Unit #211 Unallowed Deck Extension

Dear Mr. and Mrs. Dezzani;

This letter is to notify you that on March 14, 2013 an exterior inspection was conducted at your unit. At the time of inspection the following violation of the McCloud CC&Rs has been noted.

-Unallowed/Unapproved Deck Extension

> 12.5 Association Maintenance and Decoration Authority. The Board of Directors, or its duly appointed agent, including the manager, if any, shall have the exclusive right to paint, decorate, repair, maintain and alter or modify the exterior walls, balconies, railings, exterior door surfaces. roof, and all installations and improvements in the common area, and no owner of a condominium shall be permitted to do, or have done, any such work. The approval of the Board of Directors shall be required in writing for the installation of any awnings, sunshades, or screen doors, or any antennae or structures on the roof of any condominium building.
>
> 13.8.2 [An Owner] May not change the appearance of the Common Areas, the exterior appearance of a unit, any component that may be seen from the exterior of the building, or any other portion of the Project, or make any change or modification to that Owner's Unit, such as replacing carpeting with hardwood floors, without permission from the Board or the Architectural Control Committee, as applicable.

It is the desire of the Board to be fair and equitable when rendering decisions regarding Association matters, recognizing as an owner within the community you have a mutual interest in the development.

After deliberation the Board offers 2 options to resolve the violation:

1) Please submit an application to the Association providing for the restoration of the deck to its original condition in order to cure the violation, A blank application for the restoration is enclosed.

2) Please sign and submit the enclosed Covenant that states that the deck extension will be permitted to remain during your ownership and one subsequent conveyance of ownership. Upon conveyance of any kind whether consensual or not and at any time to a third party hereafter, the deck extension will be removed at the owner's expense.

If no action is taken to cure the violation, a hearing may be scheduled with the Board of Directors pursuant to NRS 116.31031. We hope this will not be necessary and would like to resolve the violation as soon as possible.

Thank you in advance for your attention in this matter. If you have any questions, please do not hesitate to

contact Integrity Property Management at 7 7 5 - 8 3 1 - 3 3 3 1

Sincerely,

McCloud Condominium Association, Board of Directors

Enclosure

EXHIBIT 2

EXHIBIT 2

From: David Dezzani [mailto:djdezzani@yahoo.com]
Sent: Friday, May 03, 2013 11:44 AM
To: dconway@integrityattahoe.com
Subject: Message to the Board of Directors regarding Unit #211 "Notice of Violation"

Dear Darcy,
Please forward the following message to the Board of Directors.
Thank you,
David and Shelly Dezzani

To: The Board of Directors, McCloud Condominium Association.
From: David and Rochelle Dezzani, Unit #211

We purchased our McCloud townhouse in 2004.

Its deck is the same size today as it was at the time of our purchase, in June 2004.

Before we actually saw our unit for the first time, we had been informed that it had an approved deck which was larger than other decks we had seen during our search for a McCloud townhouse.

When we first saw our unit's deck, in 2004, its appearance indicated it already had been in place for several years.

The fact that Unit #211 had an approved larger deck was an important factor in our decision to pay a higher price than we had been considering paying for other available townhouses.

Recently, at our home in San Clemente, California, ***nearly nine years after*** we purchased our townhouse, ***and many more years*** following the deck's construction, we received a NOTICE OF VIOLATION referencing: "Unit #211 Unallowed (sic) Deck Extension" (hereinafter the "NOV").

Although there is no signature on the NOV, its letterhead and content indicate it came from the McCloud Condominium Association's present Board of Directors.

The NOV states that, during an inspection of the exterior of our unit on March 14, 2013, a "violation of the McCloud CC&Rs has been noted".

The NOV cites and quotes sections 12.5 and 13.8.2 of the CC&Rs as authority for the alleged violation, then goes on to express the "desire of the Board to be fair and equitable", and to offer "2 options to resolve the violation".

Exhibit 2
V3. 207

Although the wording of the two options is vague*, each proposes the same outcome: our unit's deck must removed and reconstructed, to reduce its size from what it has been for many more than nine years.

The main differences between the two options relate to the timing and financial burden of removal and reconstruction.

After receiving the NOV via certified mail, we telephoned Integrity Property Management at the number suggested in the final paragraph and requested to see minutes of the board meetings when the issue of deck extensions had been discussed.

Integrity responded promptly, by providing minutes of board meetings on September 14, 2012, December 1, 2012 and February 27, 2013.

After receiving and reviewing those minutes, we telephoned and emailed additional requests and questions to Integrity, seeking further information regarding some of the entries recorded in those meeting minutes.

Instead of a response from Integrity, two letters arrived from an attorney in Reno, stating that she "represent[s]" the Association, had been "requested" by the Board to respond and we "will not receive any separate responses from the community manager".

The two letters from the attorney decline to provide any of the additional information or minutes we had requested.

Instead, as justification for not providing any further information or minutes, the two letters refer to Chapter 116 of the Nevada Revised Statutes ("NRS") and then go on to cite sections of that chapter as support for statements by the attorney regarding the reasons why the Board decided to issue NOVs to us and other homeowners.

After reading the minutes provided by Integrity and the statements in the attorney's two letters, it is clear that the Board's decision to issue NOVs to us and other McCloud owners, was based upon legal advice from an attorney who has faulty knowledge of the facts and the law, a propensity to presume matters without evidence and a willingness to espouse legal opinions which ignore, overlook, misconstrue and/or fail to consider applicable Nevada laws.

A. THE ATTORNEY'S LETTERS SHOW FAULTY KNOWLEDGE OF THE FACTS UNDERLYING THE DELIBERATIVE PROCESS WHICH PRECEDED ISSUANCE OF THE NOVs AND THE GRANTING OF PRIOR DECK EXTENSION REQUESTS.

1. The legal advice received by the Board was premised upon the attorney's erroneous understanding of "frequent homeowner involvement" in the deliberative process.

The attorney's first letter to us, dated April 4, 2013, clearly indicates that the legal

advice she provided to the Board was premised upon a faulty understanding of the deliberative process which led the Board to issue NOVs to multiple homeowners.

In the last paragraph of her first letter, directly above the her signature, the attorney describes the deliberative process erroneously, as having been "done at meetings with ***frequent homeowner involvement***" (emphasis added).

Contrary to the attorney's assertions, the minutes report ***only one instance*** of homeowner involvement, ***at only one meeting*** during the deliberative process, and that "homeowner involvement" was not only very brief but, apparently, ignored.

The instance of homeowner involvement reported in the minutes occurred during the September 2012 meeting, when Janice Bertozzi, of Unit 234 spoke up to say "the board will run into a lot of problems" and "the covenant that was written for her unit had been onerous and she didn't think many people would sign it".

We do not know if the attorney's erroneous understanding of "frequent homeowner involvement" was due simply to her not having attended two of the three meetings when deck extensions were discussed and, thereafter, failing to read the minutes of meetings she did not attend, or whether other factors caused her erroneous understanding.

However, since presumably our homeowner fees are being used to pay this attorney, it is important to note that, in addition to revealing the attorney's ignorance of the factual basis underlying her legal advice, the fact that she cited "frequent homeowner involvement" as an important factor to justify the Board's decision underscores the importance of *the true facts, i.e.* ***there was almost no homeowner involvement*** in the decision to issue the NOVs.

Therefore, the decision to issue the NOVs was based upon flawed legal advice and inadequate homeowner input.

Because the attorney's letters makes clear that her legal advice was premised upon erroneous understanding of the true facts and because adequate homeowner input was neither sought or received, the NOVs which were issued should be cancelled and/ or suspended, until such time as adequate and appropriate homeowner input and proper legal advice has been received and considered.

2. The attorney erroneously assumed the truth of crucial and contested facts, without supporting evidence, and rendered legal advice to the Board based upon probably untrue assumptions regarding those facts.

In the third paragraph of her first letter to us, the attorney states: "**While it is unfortunate the issue** (sic) **of deck extensions and the wrongful taking of common area was not addressed earlier,** the Association has properly taken action to protect

the integrity of the common area".(emphasis added)

The attorney's letter cites no source or support for the portion of her sentence emphasized above.

It appears she simply assumed that these issues were never addressed previously, in order to justify her legal recommendations regarding the propriety of of the present-day Board's issuance of the NOVs.

Because the factual assertions implicit in the emphasized words are probably incorrect, any action regarding the NOVs should be suspended and held in abeyance, until the true facts are known and proper legal advice can be obtained.

Even though our request to see past minutes was declined, the probable untruth of the attorney's statement that "deck extensions and wrongful taking" were "not addressed earlier" is clearly apparent from the first two sentences of the minutes that have been provided to us.

Page 11 of the minutes of the September 2012 meeting, under paragraph B, reports that discussion of the subject of deck extensions was first begun by the present-day Board with Mr. Price's commenting that "[t]wo of the [20] extensions were actually approved".

The remaining minutes of that meeting, and those for the December, 2012 and February, 2013 meetings, report much discussion concerning many extended decks at McCloud.

However, it appears no effort was made to ascertain what processes or procedures, if any, led to the two approvals described by Mr. Price or, for that matter, any of the 18 other extensions mentioned in the minutes.

Apparently, the Reno attorney simply chose to assume, blindly and without evidence, that past directors on past boards in past times, completely and utterly failed to take any steps, on behalf of the Association, "to protect the integrity of the common area" or "address" any of the issues regarding "deck extensions and wrongful taking of common area", either when the two extensions were "actually approved" and/or when the 18 additional decks were enlarged.

If, indeed, those past deck extensions were approved without process, procedure or legal advice, such lack of due diligence on the part of those former Directors and/or Boards who granted the approvals would not have been simply "unfortunate", as described by the attorney, but actually would have been extraordinary failures to act with reasonable care.

Frankly, what strikes us as "unfortunate", to the point of arrogance, is for an attorney who represents the Association and its present-day Board, to suggest without a shred of evidentiary support that former Board members were so careless, delinquent and

negligent, while carrying out their duties in years past, that they failed to "address" what the attorney calls "basic issues" when considering and approving deck extensions.

Our request to see the minutes of Board meetings when the two extensions were "actually approved" has been declined and, because the attorney's bald statement "the issue(sic) of deck extensions and wrongful taking of common area was not addressed" is completely unsupported, we have no way of knowing what processes, procedures and/or considerations, if any, were involved in those approvals.

However, because logic, common sense and reasonable respect for the work of past Directors and Boards mandate that the attorney's statement is probably untrue, actions by the present-day Board premised upon those untrue assumptions and faulty legal advice should be cancelled or, at least, suspended and held in abeyance, pending further consideration.

B. THE LEGAL ADVICE RECEIVED BY THE PRESENT-DAY BOARD IGNORED, MISCONSTRUED AND/ OR FAILED TO CONSIDER AND DISCUSS THE CC&RS AND APPLICABLE NEVADA LAW.

In addition to the attorney's erroneous understanding of the deliberative process and unsupported, probably false, assumptions regarding earlier extension approvals, the CC&Rs and Nevada laws referred to by the attorney in her letters indicate that her legal analysis was deficient, her discussion of applicable law inadequate and her advice not only incorrect but, if followed, likely to create substantial additional problems and generate increased costs for the Association and its members.

1. The NOV cites, quotes and relies upon CC&Rs 12.5, and 13.8.2, yet the Association's attorney does not even mention those sections when attempting to explain their legal basis to homeowners.

CC&R 12.5 states that "the Board of Directors ... shall have the exclusive right to ... alter or modify ... all installations and improvements in the common area ... ." and, stated obversely, 13.8.2, permits unit owners to make changes and modifications " ... with permission from the Board of Directors or the Architectural Control Committee, as applicable."

It is uncontested that at least two decks were altered and/or modified with approval by Directors having the "exclusive right" to do so at the time, and there is evidence that our unit's deck extension was approved more than nine years ago.

Therefore, any attorney's legal opinion advising the present-day Board to cite us and other owners for violating CC&R sections which specifically authorize such alterations and modifications is absurd.

And for the Association's attorney to subsequently write two letters to us, purportedly

explaining the legal basis for the NOVs without even mentioning the CC&Rs on which they are premised, is itself an implied admission that the CC&Rs do not support what is alleged in the NOVs.

2, The Nevada Revised Statutes referred to in the Reno attorney's letters were not cited as authority in the NOVs, nor mentioned by the attorney during the deliberative process and contradict the legal advice the attorney provided to the present-day Board.

As discussed above, although the NOV issued by the Board alleges violation of the CC&Rs and not only cited but even quoted sections 12.2 and 13.8.2, the attorney's letters contained no mention of the CC&Rs.

Rather than discussing the CC&R sections cited and quoted in the NOV, the attorney's letters refer to and rely upon Chapter 116 of the Nevada Revised Statutes" ("NRS"), initially to justify declining our requests for information and then as authoritative Nevada law purportedly supporting the NOV.

It is astonishing that an attorney representing the Association, providing her supposedly learned view of the legal basis for an NOV alleging violation of CC&Rs12.2 and 13.8.2, would ***not even mention the CC&Rs*** in her letters but would instead focus her response upon the NRS, *especially* ***when the NRS is not even referenced in the NOV, was not even discussed during the deliberative process nor even mentioned by the attorney when she approved the final draft of the NOV.***

It does not take a lawyer to recognize that the NRS sections referenced in the attorney's letters are mostly irrelevant to the issues involved in the NOVs nor to see that the Association's attorney improperly presupposed, without evidence, the existence of important facts and/or legal status when she chose which sections of the NRS to cite.

For example, in her April 4, 2013 letter, just before making her erroneous assertion of "frequent homeowner involvement", the attorney summarized her view of the basis for her recommendations in three declarative sentences, referencing a specific NRS section after the last sentence.

Those three declarative sentences are simply argumentative statements, devoid of facts but replete with legal terminology, totally unsupported except for a single reference, to NRS 166.3112:

"There is no question common area is not permitted to be given to any one owner for his/her exclusive use and enjoyment, thereby reducing the common area for the other homeowners. It is the wrongful conversion of common area that is the problem. Simply put, there is no lawful transfer of common area to individual owners absent a vote of the membership. *See* NRS 116.3112" (emphasis in original).

Sounds good, but when one actually reads NRS 116.3112, it becomes apparent that the cited section provides no support for the attorney's three argumentative statements, quoted above.

NRS 116.3112, which is entitled "**Conveyance or encumbrance of common elements**", is not a restrictive statute, as suggested by the attorney when attempting to support her argumentative statements.

Rather, NRS 116.3112 is a permissive statute, dealing with the power of condominium associations to convey and encumber common elements, not prohibiting such action as implied by the attorney's citation at the end of her three argumentative statements.

In fact, none of the eight subparts of NRS 116.3112 deals with situations like that presented by the current NOVs.

For an attorney to cite an irrelevant statute, as purported support for her legal opinions, while at the same time ignoring the very CC&Rs upon which the NOVs are based and to simultaneously fail to discuss other, actually relevant, sections of the NRS, which deal specifically with common property used exclusively by fewer than all homeowners, calls into question the attorney's competence.

We can think of no valid reason why the Association's attorney would direct us to an irrelevant section of the NRS like 116.3112, discussed above, without at least also referencing NRS 116.059 which, in conjunction with NRS116.059, specifically permit structures like decks, which are "designed to serve a single unit, but located outside the unit's boundaries, are ***limited common elements allocated exclusively to that unit.***" (emphasis added)

That the Association's attorney would not, at a bare minimum, have mentioned, discussed or even referenced the concept of "limited common elements", while advising the Board on deck extensions is incomprehensible.

In fact, because exclusive use of portions of common property is such a fundamental principle of property law, specifically defined and dealt with in both the CC&R and the NRS, it is mind-boggling that the attorney neither mentioned nor discussed that concept while advising the Board regarding such a potentially controversial and explosive issue as requiring homeowners to remove and rebuild deck structures that have been in place for many years, some with specific approval by the Board of Directors.

Similarly mind-boggling is that the Association's attorney would write letters to concerned homeowners like us, who simply requested further information, not only declining to provide that information but also purporting to justify the legal basis for the Board's action without mentioning, considering or discussing the CC&Rs or the "limited common elements", sections of the NRS.

We recognize that the above comments set forth harsh criticisms of the Association's attorney.

When we began drafting this email to the Board of Directors, after receiving the attorney's second letter, we thought most of our comments would be directed to responding to valid points asserted by the attorney.

However, once we looked closely at the letters and compared what is stated with what appears in the NOV, the minutes and the Nevada Revised Statutes, the attorney's misstatements and errors became so apparent that we decided to send the above.

We look forward to learning the attorney's response to what we have expressed.

We also look forward to learning what the attorney has told other Association Owner/ Members who may have inquired, protested and/or requested information regarding the deck extension issue.

We are hopeful that the Board will consider the above expression of our views in the spirit they are intended, as coming from concerned homeowners who love, and have loved, the deck that was in place when they purchased thier townhouse nearly nine years ago.

We also hope the Board will undertake action to cancel, suspend and hold in abeyance action on the NOVs, pending further consideration of homeowner input and consultation with competent legal counsel.

If the Board decides to proceed as threatened in the NOVs, it would be helpful to homeowners like us, who have received NOVs, to be informed thereof as soon as possible, so that we can take appropriate steps to defend ourselves and attempt to mitigate our damages.

In that regard, we hope that the Board has considered the probable adverse effect enforcement of the NOVs would likely have upon ***all*** McCloud condominium values, regardless which of the two offered options is accepted.

Under either option, all units would eventually have small decks.

Units with small decks can be expected to sell for lower prices than units with larger decks, as evidenced by our willingness to pay more for our unit *because it had an approved larger deck.*

Ordinarily, the monetary value of condominium units is related to, if not determined by, the sales price of other units in the same complex.

Therefore, if more units are sold with small decks, the value of ***all*** units in McCloud can be expected to be diminished over time, as the units with smaller decks sell for lower prices than would have been received with larger decks.

And, unless and until the threat posed by the NOVs has been resolved, the myriad enforcement difficulties, unknown risks, inherent costs and uncertain burdens of the poorly drafted covenant, potentially will cloud titles and inhibit sales throughout the complex.

Naturally, we hope the Board will act favorably upon our above-stated requests for cancellation, suspension and/or holding in abeyance further action on the NOVs, so that all concerned can avoid involving the Nevada Real Estate Division and Ombudsman and, further, to avert the potential of a legal dispute, with multiple attorneys making the situation even more costly for homeowners via lower property values and higher homeowner dues.

We look forward to hearing from you after you have had opportunity to consider the views expressed above.

Thank you for your attention to this matter.

Very truly yours,

David and Rochelle (Shelly) Dezzani
Unit #211n

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* Although the "2 options" are ambiguously worded and their phraseology makes it difficult to understand how they would be interpreted or implemented, both seem to have the same goal vis-a-vis the property (i.e. removal of currently large decks and replacement with decks of smaller size),

EXHIBIT 3

EXHIBIT 3

July 18, 2013

Dear Members of the Board of Directors,

In July, 2004, we purchased McCloud Unit #211 with an enlarged deck, which had been approved by the Board of Directors, according to representations made to us at that time.

In March, 2013, the Board of Directors sent us a "NOTICE OF VIOLATION, via certified mail, alleging that Unit #211's deck extension is "Unallowed (sic)/Unapproved".

Since receiving that certified mail, we have spent many hours communicating with the Board, its management company and its attorney, contesting the violation, requesting further information and explaining why we believe the allegation lacks merit.

Nevertheless, a hearing on the alleged violation is scheduled to take place in Incline Village on August 23, 2013.

Recently, while reviewing documents from the files of the HOA, we found two pages which prove conclusively that the claimed violation has no merit.

We are enclosing copies of these two pages from the HOA documents.

These enclosures confirm that, in May of 2002, the previous owner of our unit submitted an HOA "UNIT CHANGE/MODIFICATION FORM", with drawings, asking "to increase size of [the] deck and add steps".

These documents show that the request and drawings were **"approved"** on May 8,2002.

While visiting McCloud recently, we inspected and measured our unit's deck and steps and they conform exactly to what is designated "**Approved**" on the second page of the enclosed documents.

Therefore, there is absolutely no basis for the Board to continue with any aspect of what is alleged in the March 18, 2013 "NOTICE OF VIOLATION".

Unless we are informed, very soon, that those charges have been withdrawn and the August 23rd hearing cancelled, we will have no choice but to hire an attorney to represent us and travel to Nevada, to prepare for and participate in the proceedings.

We see absolutely no reason why we or the Association should be required to spend any further time, energy, effort or expense regarding this matter.

Indeed, the enclosed HOA records make clear that any continued effort to proceed with

Exhibit 3

these allegations would be completely unwarranted, to the point that any and all additional costs, time expenditures and emotional distress should be borne by those responsible for continuing to pursue the matter.

We have been informed that the next meeting of the Board of Directors is scheduled for August 1, 2013.

We request that this letter and its enclosures be placed on the agenda for that meeting, f*or consideration and appropriate action during that meeting.*

If, *by close of business on the day following that meeting*, we have not been informed that we no longer need be concerned about this matter, we will have no choice but to take appropriate action to defend ourselves and seek reimbursement, for all costs and damages, from those responsible.

Thank you for your attention to this matter.

Very truly yours,

David and Rochelle Dezzani
Unit #211

McCloud Condominium HOA

FILE COPY

UNIT CHANGE/MODIFICATION FORM

Owner Name: DAVID OLSON Unit #: 211 Date: 3/8/02 mcloud

Mailing Address: PO Box 3745 I.V. NV 89450

Telephone: Day # 775-831-1586 Evening # 775-831-1586

Tentative date of change/modification: ASAP

1) Location of change/modification (please describe in detail):
See Attached Drawing to increase size of Deck + add 5 steps. Rear Deck

2) *Description of change/modification to be made, in detail:
See attached Drawing

* 5 copies of detailed plans must accompany this form in order for any approvals to be made.

FOR OFFICE USE ONLY

Date

Approved/Denied

MCL\mcl-mod.frm Deck extension approved not to include back of bench. mcl 2H

David Olson
Unit #211 Alcoys
775-831-1886

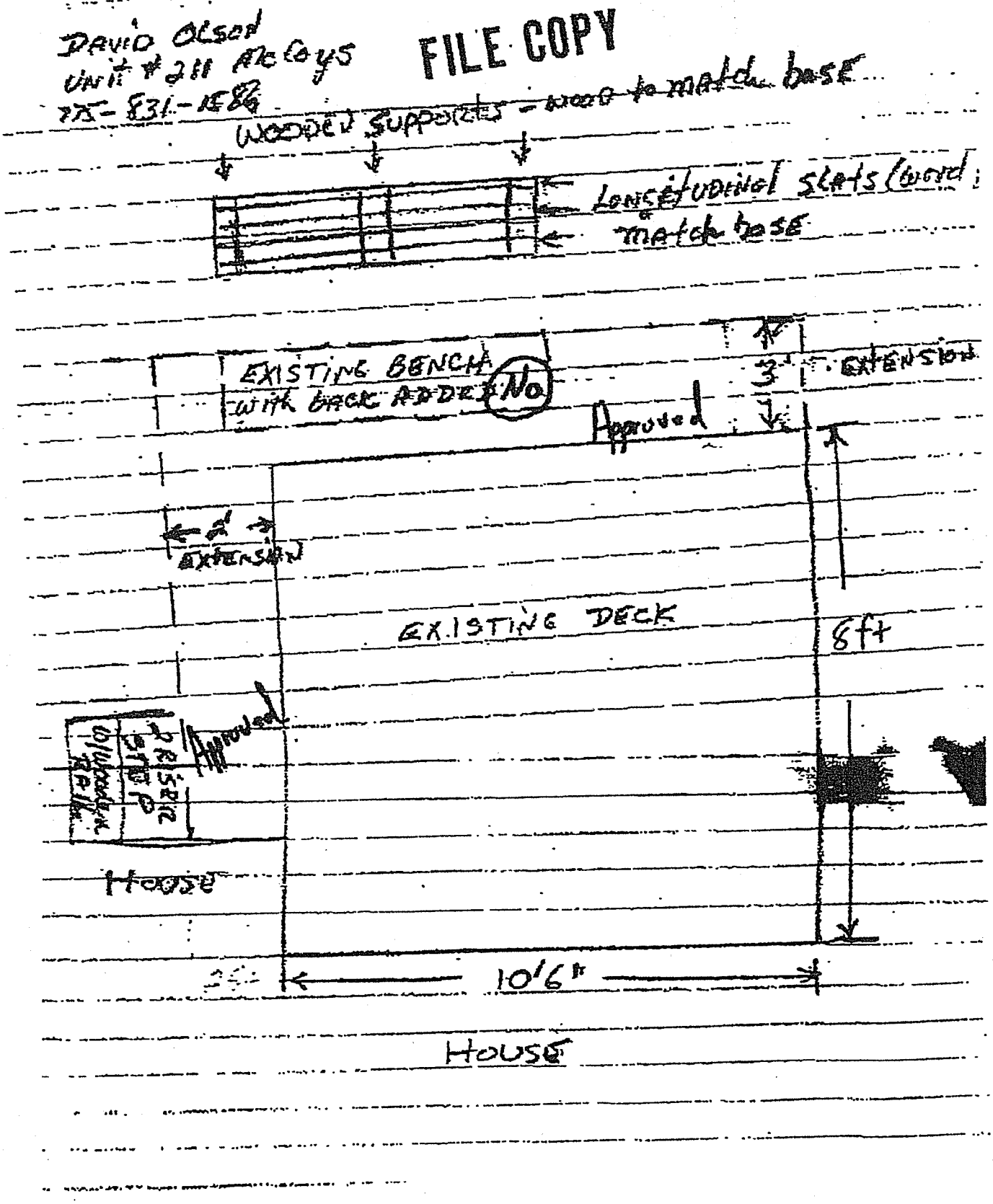

EXHIBIT 4

EXHIBIT 4

KERN & ASSOCIATES, LTD.
ATTORNEYS AT LAW

GAYLE A. KERN, ESQ.
gaylekern@kernltd.com

KAREN M. AYARBE, ESQ.
karenayarbe@kernltd.com

5421 KIETZKE LANE, SUITE 200
RENO, NEVADA 89511
TELEPHONE: (775) 324-5930
FACSIMILE: (775) 324-6173

July 31, 2013

David and Rochelle Dezzani
13 Calle Altea
San Clemente, CA 92673

Re: *McCloud Condominium Association*
Unit #211

Dear Mr. and Mrs. Dezzani:

This letter shall serve as the Association's response to your letter of July 18, 2013 with additional note dated July 19, 2013. As previously advised, the Board of Directors declines your request to place your alleged violation on the agenda for August 1, 2013. Pursuant to Nevada law, a hearing has been scheduled for quite some time and it was continued to August 23, 2013 at your request. It will be held on that day. It is inappropriate for the Board to make any decision outside of the scheduled hearing date. At the hearing, the Board will consider all information provided, including that contained in your recent letter, and make a decision after deliberation.

As previously advised, if it is difficult for you to attend this hearing, you are welcome to participate by phone. The number for you to call is as follows:

Conference Dial-In Number: 866-576-7975
Participant Access Code: 540006#

Your attorney may participate by phone as well.

If you have any further questions or wish any additional information to be considered by the Board, please do not hesitate to provide it to me.

Very truly yours,

KERN & ASSOCIATES, LTD.

Gayle A. Kern

c: Client

Exhibit 4
V3. 222

EXHIBIT 5

EXHIBIT 5

McCloud Condominium Association
P.O. Box 3960
Incline Village, NV 89450

RESULT OF HEARING

Sent Certified Mail with Return Receipt

September 5, 2014

David & Rochelle Dezzani
#13 Calle Altea
San Clemente, CA 92673

RE: McCloud Condominium Homeowners Association - Unit 211

Dear Mr. and Mrs. Dezzani:

The Board appreciates your participation in this process. We are very understanding of your distress over this matter and are sorry that it created such anxiety for you. It was not our intent to create any burden or disruption in your enjoyment of your property or your tenant's enjoyment of your property.

It is difficult for all involved and we carefully considered your evidence, written communications, comments made at the hearings by both of you, together with the comments and communications from your attorney. This letter is not an exhaustive discussion of all of the issues that have been the subject of numerous letters, emails and other forms of communication by and between you, your attorney, our attorney, and the Association. All of the documents and communications were specifically considered and provide the basis of our findings. We also carefully considered your assertion that we should obtain a second opinion regarding this matter. In fact, we had the benefit of that second opinion by reading and considering the legal arguments made by your counsel, Mr. Rogers. We respectfully considered his opinion. We believe that the reliance on our counsel's analysis in response to Mr. Rogers' letters better reflects Nevada law and application of our CC&Rs. We also are aware that there is no definitive Nevada case, but the cases identified by our counsel support the analysis that she provided to us. In comparing the two opinions, we find that it is appropriate to rely upon the opinion of our counsel who practices nearly exclusively in this area. While we understand you do not agree, we believe the evidence, information and record does support our determination that the expanded deck is a violation.

In addition, as previously advised, IVGID had identified McCloud as over-covered with regards to impervious coverage per TRPA. Subsequently the Board of Directors mandated that all deck extensions that were structural be removed. The Board then determined that use of a covenant which identified a timeframe for removal would be appropriate. The covenant was a sincere effort to reach a compromise between those affected homeowners and the Association.

We want to clarify the concern you have regarding the issue of the violation considered. The Board is required to address the encroachment in the common area and understand that the deck was installed by the prior owner upon receiving "approval" to do so. Unfortunately, as has been explained, such approval was not appropriate as it resulted in an allocation of common area for the exclusive use of your unit. Therefore, the Board considered its authority to resolve matters as allowed by the CC&Rs and Nevada law, including NRS 116.3102(3) and (4). It is with this consideration of the enforcement action to take that it has made the following conclusion.

The deck is an encroachment in the common area. There was no vote of the members to allow such use of the common area and the allocation of exclusive use of the greater area was not in the recorded map. Therefore, the additional portion of the deck is not in compliance with the governing documents. This result of hearing will be placed in the file for this unit.

We also want to take this opportunity to assure you that your refusal to execute the proposed covenant is not a violation. Rather, the execution of the covenant would have been in accordance with NRS 116.3102(3) and (4) and would have allowed a resolution that would have provided for compliance at a later time so that there would have been no impact on your enjoyment or your tenant's enjoyment of the property at McCloud. The Board is empathetic and sorry for the inconvenience this has caused. However, the Board must protect the common area for all members.

In addition, we appreciate the information you provided to us regarding possible other violations in the common area. Rest assured that the Board is addressing all additional violations as soon as possible. While the specifics of any enforcement action remain confidential unless the owner requests the hearing be in public as you did, the Board will proceed with appropriate action.

Sincerely,
McCloud Condominium Association Board of Directors

EXHIBIT 6

EXHIBIT 6

TO: The McCloud Condominium Association Board of Directors

FROM: David and Rochelle Dezzani, MCCloud Unit #211

This letter is being sent to you pursuant to the provisions of the Uniform Common-Interest Ownership Act of the State of Nevada ("NRS 116"), regarding several violations thereof by the McCloud Condominium Association Board of Directors, individually and as a group ("the Board"), which violations have caused and continue to cause serious damages to my wife, our property and me.

In September, we received a letter from the Board, dated September 5, 2014 entitled "RESULT OF HEARING" (the "RESULT"), alluding to a process (the "process) which began when the Board served us with a NOTICE OF VIOLATION, dated March 18, 2013 ("NOV"), regarding the rear deck of our unit.

The RESULT acknowledges the distress and anxiety the process caused my wife and me, and refers to the many written and oral submissions we made to the Board while defending ourselves against the charge originally levied against us and the Board's subsequent efforts to ignore and/or modify that original charge.

The RESULT also acknowledges that my wife and I have already set forth our objections and expressed our reasons for disagreeing with the Board's actions and the reasoning allegedly supporting its previous statements, findings and conclusions.

Therefore, for the sake of brevity, rather than repeating and rehashing what we previously have presented, my wife and I hereby reassert and incorporate by reference our submissions to the Board during the process, specifically including each and every document and/or tangible thing kept, maintained, filed and/or relied upon by the Association and/or by any representative thereof, regarding Unit #211 and/or any other McCloud unit with a deck which in any fashion and/or to any degree encroaches upon and/or into any portion of the common area.

Also, we specifically assert that the Board has treated us and our unit in a discriminatory fashion and we hereby request that all materials, files, documents and/or writings regarding and/or pertaining to the "process" be made available to us and to the Nevada Ombudsman, for review and consideration.

Additionally, because the RESULT makes several gratuitous statements, *raising new matters* ***for the first time*** while *purportedly deciding them adversely to us*, it thereby additionally violates our due process rights and other aspects of Nevada law and we therefore address those additional matters briefly below.

For clarity, we shall address each of the RESULT's seven paragraphs sequentially.

Paragraph 1 is mostly responded to by our above-stated reassertion and incorporation

by reference, except for that paragraph's final sentence, which gratuitously disavows any "intention" by the Board "to create any burden or disruption" of my wife's and my enjoyment of our property, whereas, in truth and in fact, for nearly two years the Board's efforts against us have been devoted to attempting to deprive us of our unit's rear deck, as approved in 2002, for which we paid a premium in 2004.

Paragraph 2 of the RESULT is so filled with misstatements and misguided legal conclusions as to render it nearly impossible to respond to, other than by our above-stated reassertion and incorporation by reference and pointing out the fallacy of the Board's claim that it received "the benefit of ...[a] second opinion", by considering and rejecting the arguments presented by the attorney we retained to defend us.

Almost every open-minded person would easily recognize the huge difference between seeking and obtaining an independent "second opinion", for guidance regarding disputed legal issues, and simply proceeding upon the advice of the same attorney who originally provided the disputed legal advice and disregarding the opinion of an attorney retained to advocate an opposing point of view.

To claim that the Board actually obtained the benefit of a second opinion, by considering and rejecting the opinion our attorney, makes a mockery of our multiple requests to the Board to obtain independent legal advice via a "second opinion".

Paragraph 3 of the RESULT states "as previously advised, IVGID had identified McCloud as over-covered with regards to impervious coverage per TRPA", whereas in truth and in fact the Board did not advise us of this issue during the process nor were TRPA coverage considerations a part of the proceedings against us.

For the Board to raise such a matter, for the first time, in the RESULT, as purported support for ruling adversely to us, is an additional violation of our due process rights and other provisions of NRS 116.

Paragraph 4 of the RESULT concedes that our unit's rear deck "was installed by the prior owner upon receiving 'approval'", but continues on to state that "such approval was not appropriate" and "the Board considered its authority to resolve matters", completely ignoring that the Board's own recently-approved covenants granting exclusive use of common area to at least thirteen previously unapproved deck extensions, presupposes the appropriateness of authority to grant such approval.

Paragraph 5 of the RESULT mostly rehashes earlier assertions by the Board, all amply addressed by the above-stated reassertion and incorporation by reference, except for the final sentence, which states: "This result will be placed in the file for this unit".

Assuming that the words "This result", as used in that sentence, are intended to refer to "the RESULT", as used herein, that final sentence of Paragraph 5 is both alarming and extremely upsetting to my wife and me because of the legal effect and practical implications of placing such a letter in our file.

It seems to us, and we hereby assert, that placing a copy of the RESULT in any file maintained by the Association would be an illegal attempt by the Board to place a damaging cloud on our title to our property, without due process of law and in violation of the protections afforded to homeowners by Nevada law.

Paragraph 6 of the RESULT is nearly incomprehensible but, at least, acknowledges clearly that "refusal to execute the proposed covenant is not a violation", contrary to previous statements and assertions by the Board's attorney during the proceedings.

That acknowledgement, when considered together with the fact that the Board's own records establish unequivocally that my wife and I were not guilty of violating the McCloud CC&Rs alleged, and specifically identified as 12.5 and 13.8, in the March 18, 2013 NOV establishes that the Board has absolutely no legal basis for any adverse action against us or our unit, including placing a letter such as the RESULT in our file.

Simply put, because neither my wife nor I, nor our unit, ever violated the CC&Rs, there never was any basis for any finding adverse to us or our unit.

Finally, although paragraph 7 of the RESULT urges us to "[r]est assured that the Board is addressing all additional violations as soon as possible", neither that paragraph nor any of the previous paragraphs nor any other communication from the board addresses the fundamental issue we have raised repeatedly i.e. *the conflict of interest, in violation of NRS 116.31084 and related provisions of Nevada law, on the part of at least one Board member.*

That Board member participated in the proceedings and the process which led to the current dispute, while having an ownership interest in a unit with a rear deck and patio which extend into and upon the common area.

Adding to the wrongness of participation in the proceedings and the process by the conflicted Board member is the fact that, as far as we can determine, the conflict was neither disclosed to nor considered by the Board.

Such a conflict of interest, whether disclosed or undisclosed, renders the process and the RESULT invalid and void.

Therefore we respectfully request the Board to issue a new finding, stating that neither my wife nor I violated the CC&Rs and, as stated in paragraph 4 of the RESULT, the rear deck of our unit was installed by the prior owner upon receiving approval to do so.

In closing, we request that this letter be considered a written complaint against the Board and placed on the agenda of the next regularly scheduled meeting.

Thank your for your attention to this matter.

Very truly yours,

December 29, 2014 December 29, 2014

EXHIBIT 7

EXHIBIT 7

McCloud Condominium Association
P.O. Box 3960
Incline Village, NV 89450

Sent Certified Mail with Return Receipt

February 2, 2015

David & Rochelle Dezzani
#13 Calle Altea
San Clemente, CA 92673

RE: McCloud Condominium Homeowners Association - Unit 211

Dear Mr. and Mrs. Dezzani:

Please note that the McCloud Board of Directors is in receipt of your letter dated 12-30-14. At this time, the board continues to have the same opinion that was stated in the Result of Hearing Notice dated September 05, 2014.

McCloud has scheduled a board meeting for February 20, 2015, which we invite you to attend if you feel that there is additional information to share with the board. If you decide to attend and want the deck encroachment addressed under owner's comments, you will be allowed three minutes to share your information. However, if you prefer to have your deck addressed in a closed executive session meeting, please advise Integrity Property Management at 775-831-3331 by February 09, 2015 to allow time for placing this item on the agenda.

As addressed in a previous meetings and letters, we the board understand your desire to address your deck encroachment with the Board of Directors and understand your concerns. Please let us know if you plan on attending the upcoming meeting, and we look forward to addressing any new items related to your deck concerns.

Sincerely,
McCloud Condominium Association Board of Directors

Exhibit 7

F I L E D
Electronically
2015-12-02 10:24:15 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 5259062 : mcholico

EXHIBIT "2"

EXHIBIT "2"

FILED
Electronically
2015-09-17 12:46:35 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5146157 : csulezic

2315
GAYLE A. KERN, ESQ.
Nevada Bar No. 1620
KERN & ASSOCIATES, LTD.
5421 Kietzke Lane Suite 200
Reno, Nevada 89511
Telephone: (775) 324-5930
Telefax: (775) 324-6173
E-mail: gaylekern@kernltd.com

Attorneys for Kern & Associates, Ltd. and Gayle Kern

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

DAVID DEZZANI and ROCHELLE DEZZANI,

Plaintiffs,

vs.

KERN & ASSOCIATES, LTD; GAYLE KERN; KAREN HIGGINS; JOHN DOES 1-10; JANE DOES 1-10; DOE BUSINESSES 1-5,

Defendants.
_____/

CASE NO.: CV15-00826

DEPT. NO.: 10

DEFENDANTS, KERN & ASSOCIATES, LTD. AND GAYLE KERN'S MOTION TO DISMISS COMPLAINT

Defendant GAYLE A. KERN, dba KERN & ASSOCIATES, LTD., ("Kern"), in *pro per*, moves this Court for an order dismissing the Complaint with Prejudice as to Kern pursuant to NRCP 12(b)(1), NRCP 12(b)(5), NRCP 12(h)(3), and NRS 38.310, for the reasons outlined in the following Memorandum of Points and Authorities, including but not limited to the following: (i) at all times material to the allegations of the Complaint, Kern was acting solely as an attorney for the governing body of the McCloud Condominium Association and as a matter of law, a third party cannot maintain a cause of action against another party's attorney; (ii) Plaintiffs failed to state a claim against Kern for which relief may be granted; and (iii) the court lacks subject matter jurisdiction over any legitimate claims against Kern becuase any legally cognizable claims against Kern must first be arbitrated or mediated in accord with the provisions of NRS 38.310-360.

///

This Motion to Dismiss is based upon the following Memorandum of Points and Authorities, all exhibits attached hereto, all pleadings and papers on file herein, and any oral argument the court deems necessary. All exhibits that are attached to this motion are referenced to and discussed in the Complaint on file. Therefore, they are not exhibits outside of the allegations of the Complaint and all matters discussed are within the Complaint and can be considered by the Court without converting the motion to dismiss into a motion for summary judgment.

DATED this 9th day of September, 2015.

KERN & ASSOCIATES, LTD.

GAYLE A. KERN, ESQ.
Attorneys for Kern & Associates, Ltd.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STANDARD FOR DISMISSAL

The Nevada Rules of Civil Procedure provide that the defense of lack of jurisdiction over the subject matter and the defense of failure to state a claim upon which relief may be granted may, at the option of the defendant, be made by motion. NRCP 12(b)(1); NRCP 12(b)(5). "If, on a motion . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in NRCP 56...." NRCP 12(b). "Documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) (analyzing similar federal rule). Recording of a document imparts constructive notice of its contents. NRS 111.315. The Court may take judicial notice of "facts in issue or facts from which they may be inferred. A judicially noticed fact must be . . . [c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned so that the fact is not subject to reasonable dispute." NRS 47.130.

///

NRCP 12(h)(3) provides that "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." The burden of proving the jurisdictional requirement is properly placed on the plaintiff. *See Morrison v. Beach City LLC*, 116 Nev. 34, 991 P.2d 982 (2000) *citing Nelson v. Keever*, 451 F.2d 289 (3d Cir. 1971).

Under NRCP 8(a), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." A complaint which fails to satisfy this standard is subject to dismissal for failure to state a claim upon which relief can be granted. NRCP 12(b)(5).

In determining whether this standard is met, the district court "considers all factual assertions in the complaint to be true and draws all reasonable inferences in favor of the plaintiff" *See Kahn v. Dodds (In re AMERCO Derivative Lit.)* 252 P.3d 681, 692 (Nev. 2011) citing *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 635, 137 P.3d 1171, 1180 (2006). The Nevada Supreme Court has reiterated, however, that "[t]o survive dismissal, a complaint must contain some 'set of facts, which, if true, would entitle [the plaintiff] to relief.'" *Kahn*, 252 P.3d at 692, citing *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224,228, 181 P.3d 670, 672 (2008). In fact, the allegations must give fair notice of a *legally sufficient claim. See Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 846, 858 P.2d 1258, 1260 (1993) (emphasis added), citing *Ravera v. City of Reno*, 100 Nev. 68, 70, 675 P.2d 407,408 (1984).

When ruling on a motion to dismiss, "the court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-755 (9th Cir. Cal. 1994) (analyzing similar federal rule). In the instant matter, not only have Plaintiffs attempted to assert claims against an adverse party's attorney, which they cannot do as a matter of law, the factual allegations of the Complaint are unsupported by the evidence provided by the Exhibits attached hereto which relate directly to Plaintiffs' allegations.

For the reasons set forth herein, the Court should dismiss each of Plaintiffs' causes of action against Kern, with prejudice, as Plaintiffs failed to assert any facts that give rise to any plausible claim against Kern for which relief can be granted pursuant to NRCP 12(b)(5). If the Court determines Plaintiffs asserted any legally sufficient claims against Kern, the Court should still dismiss all claims against Kern because the Court lacks subject matter jurisdiction over those claims. Any legally cognizable claims against Kern arise from the "interpretation, application and or enforcement" of the CC&Rs and, therefore,

those claims must be submitted to mediation or arbitration in accord with the mandatory requirements of NRS 38.310. If not otherwise dismissed pursuant to NRCP 12(b)(5), all claims against Kern should be dismissed in accordance with NRCP 12(b)(1), NRCP 12(h)(3), and NRS 38.310(1).

II. STATEMENT UNDISPUTED FACTS

Kern is a professional corporation providing legal services to a variety of clients in Northern Nevada including, but not limited to, over 250 common-interest community homeowner associations, including the McCloud Condominium Homeowners Association ("Association"). Complaint ¶ 2, 3. At all times material to the allegations of the Complaint, Kern was acting solely as attorney for the Association. Complaint ¶¶ 13, 14, 17, 19, 22, 35.

Plaintiffs David Dezzani and Rochelle Dezzani ("Plaintiffs" or "Dezzanis") are members of the Association and owners of Unit #211 in the Association (the "Unit" or "Property"). Complaint ¶¶ 1. The Association is governed by the Revised Declaration of Limitations, Covenants, Conditions and Restrictions of McCloud Condominium Homeowners' Association ("CC&Rs"), recorded January 28, 2008, as Document No. 3614779 with the Office of the Washoe County Recorder. Complaint ¶ 11, 12, 25, 30, 33; *See* Kern Exhibit "1". Plaintiffs purchased the Unit on July 1, 2004. Complaint ¶ 6. At the time Plaintiffs purchased the Property, the rear deck had been extended from its original dimensions by a previous owner. Complaint ¶ 8. The deck extension had been approved by the Association's Board of Directors in 2002. *See* Plaintiffs' Exhibit 3. Upon exterior inspection of the rear deck, the Association's Board of Directors issued the Dezzanis a "Notice of Violation" indicating that the deck extension was unapproved and unallowed pursuant to the CC&Rs. Complaint ¶ 11, 12, 13; Plaintiffs' Exhibit 1. The Notice of Violation proposed two options for the Plaintiffs to correct the violation - they could either submit an application for the restoration of the deck to its original condition OR could sign a Covenant stating that the deck extension in its current condition could remain on the Plaintiffs' Property during the entire course of their ownership but would be required to be removed at the owner's expense after three sucessive transfers of ownership. Plaintiffs' Exhibit 1. The pertinent provisions of the CC&Rs, as noticed in the Notice of Violation, provide as follows:

> 12.5 Association Maintenance and Decoration Authority. The Board of Directors, or its duly appointed agent, including the manager, if any, shall have the exclusive right to paint, decorate, repair, maintain and alter or modify the exterior walls, balconies, railings, exterior door surfaces, roof and all installations and improvements in the

> common area, and no owner of a condominium shall be permitted to do, or have done, any such work. The approval of the Board of Directors shall be required in writing for the installation of any awnings, sunshades, or screen doors, or any antennae or structures on the roof of any condominium building.
>
> 13.8.2 [An Owner] May not change the appearance of the Common Areas, the exterior appearance of a unit, any component that may be seen from the exterior of the building, or any other portion of the Project, or make any change or modification to that Owner's Unit, such as replacing carpeting with hardwood floors, without permission from the Board or the Architectural Committee, as applicable.

Kern Exhibit "1".

During the course of her representation of the Association, Kern advised the Association regarding the extension of multiple rear decks within the Community. Complaint ¶ 35; *See* Kern Exhibit "2". Kern assisted the Board of Directors in issuing the Notice of Violation to Plaintiffs. Complaint ¶ 13. Upon receiving correspondence from the Plaintiffs regarding the Notice of Violation, the Board of Directors requested Kern to reply to those communications. Complaint ¶ 14; Kern Exhibit "2". Kern communicated with the Dezzanis on behalf of the Association by letter dated April 4, 2013. *Id.* The letter clearly informed the Dezzzanis that Kern was acting as attorney for the Association. The letter states in pertinent part:

> "Dear Mr. And Mrs. Dezzani:
>
> I represent the McCloud Condominium Homeowners Association. The Board requested I respond to your email request to review communications and/or information related to another unit and Board minutes.

Kern Exhibit "2", pg. 1.

The letter outlined the Association's position regarding the deck extension, stating, "The Board understands your frustration and appreciates you are addressing the matter of the unapproved deck extension that wrongfully encroaches in the common area. There is no question the extension exists in the common area, as do the other extensions. The common area is owned in common by *all* owners of the community. While it is unfortunate the issue of deck extensions and the wrongful taking of common area was not addressed earlier, the Association has properly taken action to protect the integrity of the common area. There is no question common area is not permitted to be given to any one owner for his/her exclusive use and enjoyment, thereby reducing the common area for the other homeowners. It is the wrongful conversion of common area that is the problem. Simply put, there is no lawful transfer of common area to individual owners absent a vote of the membership. *See* NRS 116.3112; Kern Exhibit "2". On May 3, 2013, Plaintiffs emailed the Association's Board of Directors with a lengthy tirade of

accusations against the Association's Board of Directors, management company and Kern directly. *See* Plaintiffs' Exhibit 2. The email purported to justify the Dezzani's position regarding the deck and asserted that the impropriety of the Association's position. *Id.* In various places, the email refers to Kern's representation of the Association and the communications Kern had with the Plaintiffs on behalf of the Association. The email explicitly acknowledges that Kern communicated directly with the Dezzanis for the purpose of convening the association's legal position with regard to the deck extensions.

Kern responded by letter dated May 10, 2013, in which she clearly indicated that she represents the Association and that the Dezzanis should direct all further communication regarding the deck extension to Kern rather than directly to the Board of Directors. Specifically, the letter stated:

> The Board of Directors requested I respond to your various communications.... If you have any further communications, the Board request that you communicate with me. We appreciate your anticipated cooperation. If I have failed to address any of your communications, please advise me.

Kern Exhibit "3".

After a hearing on the matter, *attended by Kern on behalf of the Association*, the Board issued the Result of Hearing, dated September 5, 2014. Complaint ¶ 18; *See* Plaintiffs' Exhibit 5. Kern continued to receive and reply to communications regarding the deck extension from the Dezzanis. Complaint ¶ 20, 21, 22. At all times, Kern responded on behalf of her client, the Association, and asserted the legal positions she was retained to express by her client.

On May 4, 2014, Plaintiffs filed the Complaint in district court asserting claims against the Kern and Karen Higgens, an individual member of the Board. which have no basis in law or fact. The claims asserted against Kern were never submitted to the NRED as required by NRS 38.310(1). All claims against Kern must be dismissed in accord with NRCP 12(b)(5), and or NRCP 12(b)(1), NRCP 12(h)(3) and NRS 38.310(1).

III. AUTHORITIES AND LEGAL ARGUMENTS

A. Plaintiff Has Failed to Assert any Claims Against Kern For Which Relief May be Granted.

Even if the Complaint is not dismissed in its entirety based on the lack of any cognizable claim against the attorney for the Association, there are independent grounds for dismissal of each and every

claim for relief. The Complaint seeks four inarticulate claims for relief. Apparently, the Plaintiffs assert that Kern engaged in retaliatory action against them, threatened, harassed or otherwise caused emotional distress to them in violation of NRS 116.31183 and NRS 116.31184, and further acted and/or directed others to act negligently, wrongfully, wantonly, willfully and/or intentionally in violation of various provisions of Chapter 116 of the Nevada Revised Statutes governing the conducting of meetings and voting in a common-interest community. Complaint ¶¶ 26, 36, 38, 40. The Complaint acknowledges that Kern provided legal services and advice to the Board and drafted, edited and approved Board correspondence, yet seeks to hold Kern independently responsible for the acts of the Association. Complaint ¶¶ 13, 14, 17, 19, 22, 24, 25, 35. At all times, Kern was acting as agent for the Association, which Plaintiff does not contest. It is fundamental axiom of agency law that a principal is liable for the acts of its agent committed within the scope of the agency. Even if the fact that Kern was at all times acting as attorney for the Association were not determinative of all claims against Kern, there is no theory of liability by which Kern could be independently liable to the Dezzanis.

1. As A Matter of Law, No Cause of Action Can Be Asserted Against Kern Who Acted as Attorney For the Association.

As a matter of law, the Plaintiffs cannot assert any cause of action against Kern who was at all times material to the allegations of the Complaint, acting as attorney for the association and owed no duty to the Plaintiffs. The Dezzanis are suing Kern in her direct capacity as counsel for the Association, who took actions authorized by law, to correct a wrongful transfer of common area property to an individual unit owner without a vote of the majority of homeowners. Rather than asserting claims challenging the legality of the Association's position, the Plaintiffs are attacking Kern because of the legal advice she provided to her client. However the purported wrongful actions are characterized , it does not change the fact that Kern owed a duty to her client, the Association, and owed no duty to the Dezzanis in their individual capacity.

Regardless of Plaintiffs' opinions or interpretation of the CC&Rs or the provisions of NRS Chapter 116, only a client may maintain an action against an attorney for breach of contract, or negligence, or breach of fiduciary duty, or failure to adhere to a recognized standard of care. The Nevada Supreme Court has repeated held that no civil cause of action exists against an attorney based upon any violation of the Rules of Professional Conduct. *See Ricks v. Dabney (In re Jane Tiffiany Living Trust)*, 124 Nev.

74; 177 P.3d 1060 (2008); *see also, Mainor v. Nault,* 120 Nev. 750, 768-769; 101 P.3d 308, 320-321 (2004). Other jurisdictions are in accord. *See Ex. Parte Toler*, 710 So.2d 415, 416 (Ala. 1998); *Orsini v. Larry Moyer Trucking Inc.*, 310 Ark. 179, 184, 833 S.W.2d 366,369 (Ark 1992).

Furthermore, Plaintiffs cannot maintain an action sounding in tort against Kern, because as the attorney for the Association, Kern owed no duty to them. Any liability sounding in tort must be based upon an underlying duty owed to the aggrieved party. No such duty is present in here. In *B.L.M. v. Sabo & Deitsch*, 55 Cal. App. 4th 823, 64 Cal. Rptr. 2d 335 (1997), the California appellate court affirmed the granting of a motion for summary judgment against B.L.M because respondent law firm represented only its client, the City, and the law firm owed no duty to respondent as a third party beneficiary of that employment contract. The Dezzanis are clearly not a third party beneficiary to the employment contract between Kern and the Association, and as a matter of law, Kern did not owe a duty to them. The Dezzanis are individual members of the Association; however, Kern's duty is to the Association itself. She does not represent each and every owner as members of the Association. As such, the Plaintiffs may not bring a cause of action against her directly.

In *Bily v. Arthur Young & Co.*, 3 Cal 4th 370, 834 P.2d 745 (1992), the court addressed an auditor's liability and found no liability to third parties unless the employment contract specifically identifies the party as a third party beneficiary. As noted by the court in the *B.L.M. v Sabo* decision, to find that by entering into a contract to provide legal services, the attorney also owed a duty to the party against whom action was to be taken, is unworkable and undermines the very nature of the attorney-client relationship.

Numerous decisions have confirmed that an attorney for an adverse party cannot be liable to a third party because no duty is owed by the attorney to that third party. *See Norton v. Hines,* 49 Cal. App. 3d 917, 123 Cal. Rptr. 237 (1975); *Weaver v. Superior Court,* 95 Cal. App. 3d 166,180, 156 Cal. Rptr. 745 (1979); *Parnell v. Smart,* 66 Cal. App. 3d 833, 837-838, 136 Cal. Rptr. 246 (1977); *Omega Video Inc. V. Superior Court,* 146 Cal. App. 3d 470, 480, 194 Cal. Rptr. 574 (1983); *St. Paul Title Co. v. Meier,* 181 Cal. App. 3d 948, 952, 226 Cal. Rptr. 538 (1986).

To the extent Plaintiffs' claims sound in breach of contract, Plaintiffs simply may not assert them against Kern as the attorney for the Association. In Nevada, "[a] breach of contract may be said to be a material failure of performance of a duty arising under or imposed by agreement." *Bernard v. Rockhill*

Dev. Co., 103 Nev. 132, 135, 734 P.2d 1238, 1240 (1987). "A plaintiff in a breach of contract action must show (1) the existence of a valid contract, (2) a breach by the defendant, and (3) damage as a result of the breach." *Brown v. Kinross Gold U.S.A., Inc.*, 531 F.Supp. 2d 1234, 1240 (D.Nev. 2008)(internal quotations omitted), citing *Saini v. Int'l Game Tech.*, 434 F.Supp. 2d 913, 920-21 (D.Nev. 2006).

The essential element of a claim for breach of contract, i.e., a contract, is missing as to Kern. Kern is not personally bound by the CC&Rs. There is not now, and never was any contract between Kern and Plaintiff. Plaintiff was clearly not a third party beneficiary to any contract between Kern and the Association. Plaintiff does not even allege the existence of a contract between Kern and Plaintiff. As a matter of law, there can be no claim sustained against Kern for a breach of a non-existent contract.

Plaintiffs cite the "lengthy email" which they sent to the Board of Directors accusing Kern of possessing "faulty knowledge of the facts of the law, a propensity to presume matters without evidence and a willingness to espouse legal opinions which ignore, overlook, misconstrue and/or fail to consider applicable Nevada laws." Complaint ¶ 24. Besides being entirely unsubstantiated, these assertions provide no basis for a cause of action against Kern. Kern had no duty to provide legal opinions to Plaintiffs. Rather, any legal opinions Kern communicated to the Plaintiffs were on behalf of the Association. Plaintiffs apparently use this assertion to support a claim against Kern under NRS 116.31183, which prohibits retaliatory action by agents of the Association against owners. Again, Plaintiffs plead no set of facts which serve to prove that Kern in any way engaged in retaliatory actions towards the Plaintiffs. Plaintiffs were the party who went through great lengths to attack Kern's representation of the Association and her professional capabilities. Kern merely responded to the allegations contained in Plaintiffs' numerous emails and letters expressing the position of the Board.

Similarly, Plaintiffs point to NRS 116.31184 as an apparent source for their claim against Kern. Complaint ¶ 36. There are simply no facts in the Complaint that support Plaintiffs' reliance on this statute. NRS 116.31184 prohibits an agent of the Association from threatening, harassing or otherwise causing harm or serious emotional distress to an owner or creating a hostile environment for an owner. Nowhere in the Complaint do Plaintiffs assert any facts which, if true, would illustrate that Kern threatened or harassed Plaintiffs. Actually, it was the Plaintiffs who, by their own admission, "communicated with the Board on many occasions; challenging and criticizing not only the [Notice of Violation's] drafting, editing,

authorship, reasoning, logic and legality" and "questioning the competency of the legal services provided to the Board by Defendants Kern." Complaint ¶ 14. To survive dismissal, Plaintiff must assert some set of facts which, if true, would justify recovery. *Kahn*, 252 P.3d at 692. As Plaintiffs offer no facts which demonstrate that Kern threatened or harassed them in any way, their claim must fail.

Finally, Plaintiffs cite various other provisions of Chapter 116 of the Nevada Revised Statutes in support of their claims, including NRS 116.3108, 116.31083, 116.31084, 116.31085, and 116.31087. ¶ 38. These provisions deal with the meetings of unit owners, meetings of the executive board, voting by members of the executive board, the right of unit owners to speak at certain meetings, the right of unit owners to have certain complaints placed on the agenda of meetings and the maintenance and availability of Association books and records. These statutes provide no cause of action against Kern, as the attorney of the Association. Kern owed a duty to the Association by virtue of her representation. She fulfilled that duty by advising the Association regarding the multiple issues that arouse because of the deck modifications. However, that duty did not extend to the Plaintiffs as individual owners.

For all of the foregoing reasons, Plaintiff has failed to state a claim against Kern upon which relief may be granted and the Complaint must be dismissed in its entirety against Kern, with prejudice, in accord with NRCP 12(b)(5).

B. **Dismissal is Mandatory Where Plaintiff has Failed to Comply with NRS 38.310 and the Court Lacks Subject Matter Jurisdiction.**

NRCP 12(h)(3) provides that "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Even if the authorities and arguments set forth in Section A above did not otherwise require the dismissal of all claims against Kern, Plaintiffs' claims against Kern are not exempt from the requirements of NRS 38.310.

Nevada law requires that all claims involving the interpretation, application or enforcement of the governing documents applicable to residential property be mediated pursuant to the provisions of NRS 38.300 to 38.360, inclusive, before any action may be filed in this Court. Nevada law could not be clearer. NRS 38.310(1) provides in pertinent part:

> **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; ... **may be commenced in any court in this State unless the action has been submitted to mediation...**

NRS 38.310(1)(emphasis added).

NRS 38.320 states, in pertinent part: "Any civil action described in NRS 38.310 must be submitted to mediation or referred to a program by filing a written claim with the [NRED]." (Emphasis added.) Upon completion of the mediation or arbitration, NRED will issue a certificate. NAC 38.350(7).

NRS 38.300(3) defines a "civil action" as follows:

> "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).

The allegations of the Complaint and Plaintiffs' spurious claims against Kern rest entirely upon an interpretation of the provisions of the CC&Rs and whether the Association was entitled to issue the take enforcement action against the Plaintiffs for the deck extension as an unlawful allocation of common area property. Plaintiffs allege that the deck extension was lawful pursuant to the CC&Rs and that the Association and Kern's enforcement actions were unjustified. Complaint ¶¶ 25,

Articles 12.5 and 13.8.2 of the CC&Rs clearly provide that the Association has the exclusive authority to modify the common areas. Additionally, Section 4.1 provides that "The undivided, fractional interest a unit owner has in the Property's common areas... are established and are to be conveyed with the unit, and cannot be changed." *See* Kern Exhibit "1". Plaintiffs assert that the conveyance of common area property for their exclusive use, in the form of the rear deck extension, did not constitute a violation of the CC&Rs. The validity of Plaintiffs' claims, assuming that any could even be asserted against Kern as attorney for the Association, depend entirely upon an interpretation of the CC&Rs.

The assertion of a various violations of Chapter 116 of the Nevada Revised Statutes does not exempt Plaintiffs from mediating or arbitrating a *legally cognizable* claim asserted against Kern. However, for all of the reasons set forth in Section A above, Plaintiffs have no legally cognizable claim against Kern. Even if there were a legally cognizable claim asserted, the Nevada Supreme Court has previously ruled that all disputes involving the "interpretation, application or enforcement" of the CC&Rs must be submitted to mediation or arbitration under NRS 38.310 before a civil action may be filed. *See*

e.g. McKnight Family, L.L.P. v. Adept Mgmt., 129 Nev. Adv. Op. 64, 310 P.3d 555, 559 (2013) (a claim for wrongful foreclosure involved the interpretation of covenants, conditions, or restriction and the court had no jurisdiction to consider the dispute until a Chapter 38 action had been prosecuted).

This case similarly requires an interpretation of the Association's CC&Rs and must be submitted to mediation. The Plaintiffs' assertions are dependant on the interpretations of the CC&Rs. Kern was retained by the Board of Directors to enforce various provisions of the CC&Rs. The Plaintiffs are challenging that representation and the authority by which the Association took enforcement action against them and Kern aided with the execution of that enforcement action. The Court simply cannot address the merits of the Plaintiffs' claim without an analysis of the Association's CC&Rs.

If not otherwise dismissed pursuant to NRCP 12(b)(5), all claims against Kern must be dismissed pursuant to NRCP 12(b)(1), NRCP 12(h)(3) and NRS 38.310. The court lacks subject matter jurisdiction over those claims which must be mediated or arbitrated as required by NRS 38.310.

IV. CONCLUSION AND RELIEF REQUESTED

As a matter of law, Plaintiffs failed to assert any legally cognizable claim against Kern. Kern was not in privity of contract with Plaintiffs and Kern owed no duty to Plaintiffs. Kern acted solely as counsel for the Association and was under no statutory or contractual duty to Plaintiff. Kern's obligations were to the Association to assist in the enforcement of the CC&Rs and ensure that no individual owner was permitted to retain portions of the common area at the expense of other members' undivided interest in the common area.. Kern fulfilled her duties to the Association and Plaintiffs have no claim against Kern under any legal theory. Even after considering all allegations of the Complaint as true, Plaintiff has failed to state a cause of action against Kern for which relief may be granted and the Court must dismiss the complaint pursuant to NRCP 12 (b)(5).

For all of the foregoing reasons, all of Plaintiffs' claims, must be dismissed against Kern. Plaintiffs failed to state a cause of action against Kern for which relief may be granted, and the Complaint should be dismissed, with prejudice, as to Kern.

To the extent the court does not dismiss all claims against Kern under NRCP 12(b)(5), this Court lacks jurisdiction over any and all legally cognizable claims asserted by Plaintiffs against Kern. Those claims concern the application, enforcement, or interpretation of the CC&Rs. The Court must dismiss all

claims against Kern because any legally cognizable claim against Kern must first be mediated or arbitrated as required by NRS 38.310. This Court lacks subject matter jurisdiction over those claims.

AFFIRMATION

Pursuant to NRS 239B.030

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

DATED this 9th day of September, 2015.

KERN & ASSOCIATES, LTD.

By _____
GAYLE A. KERN, ESQ.
Attorneys for Kern & Associates, Ltd.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the law offices of Kern & Associates, Ltd., 5421 Kietzke Lane, Suite 200, Reno, NV 89511, and that on this date, I served the foregoing document(s) described as follows:

DEFENDANTS, KERN & ASSOCIATES, LTD. AND GAYLE KERN'S MOTION TO DISMISS COMPLAINT

On the party(s) set forth below by:

__X__ Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Reno, Nevada, postage prepaid, following ordinary business practices.

____ Personal delivery.

____ Facsimile (FAX).

____ Federal Express or other overnight delivery.

____ Reno-Carson Messenger Service.

addressed as follows:

David and Rochelle Dezzani
17 Camino Lienzo
San Clemente, CA 92673

DATED this 17th day of September, 2015.

Teresa A. Gearhart
TERESA A. GEARHART

INDEX OF EXHIBITS

Exhibit No.	Exhibit Description	No. of Pages in Exhibit
1	CC&Rs	46
2	Kern letter to Dezzanis dated April 4, 2013	2
3	Kern letter to Dezzanis dated May 10, 2013	1

FILED
Electronically
2015-09-17 12:46:35 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5146157 : csulezic

EXHIBIT "1"

EXHIBIT "1"

DOC # 3614779
01/28/2008 12:25:46 PM
Requested By
ROBERT C MADDOX & ASSOCIATES
Washoe County Recorder
Kathryn L. Burke - Recorder
Fee: $59.00 RPTT: $0.00
Page 1 of 46

APN: .

When Recorded, Mail to:

Name: ROBT C. MADDOX & ASSOCIATES
Addr: 10587 Double R Blvd, Ste 100
Reno NV 89521
775 322-3666

Space for Recorder's Use Only

Name of Document:

REVISED DECLARATION OF LIMITATIONS, COVENANTS, CONDITIONS AND RESTRICTIONS OF McCLOUD CONDOMINIUM HOMEOWNERS' ASSOCIATION

I the undersigned hereby affirm that the attached document, including any exhibits, hereby submitted for recording does not contain the personal information of any person or persons. (Per NRS 239B.030)

Dated January 24, 2008

(Signature)

ROBERT C. MADDOX, GENERAL COUNSEL

REVISED DECLARATION OF LIMITATIONS, COVENANTS, CONDITIONS, AND RESTRICTIONS OF McCLOUD CONDOMINIUM HOMEOWNERS' ASSOCIATION

This Revised Declaration of Limitations, Covenants, Conditions and Restrictions is made this 17th day of November, 2008, by McCloud Condominium Homeowners' Association, a Nevada Non-Profit Organization ("Declarant").

RECITALS:

1. McCloud Condominiums ("the Property") was created and developed by Embassy Estates, Ltd., a Canadian corporation, as a common interest condominium community pursuant to the then-applicable provisions of the Nevada Revised Statutes.

2. Embassy Estates, Ltd. sold and conveyed interests in the Property subject to a Declaration of Limitations, Covenants, Conditions, and Restrictions of McCloud Condominiums, dated April 29, 1982 ("the 1982 Declaration").

3. Ownership of the Property in its entirety is now vested in the members of the Association, and no longer under Declarant control or ownership.

4. In 2003, the Nevada Legislature enacted substantive and material changes to Nevada Law governing common interest communities.

5. Pursuant to Articles VI and XV of the 1982 Declaration, the McCloud Condominium homeowners approved a resolution to amend the 1982 Declaration to conform with the changes to Nevada Law governing common interest communities, as well as the current status of the McCloud Condominium community.

WHEREFORE, the McCloud Condominium Homeowners' Association adopts this Declaration in place and instead of the 1982 Declaration as the document that governs ownership in the McCloud Condominium complex.

DECLARATION:

The Property, which is more particularly described in Exhibit "A" to the 1982 Declaration and incorporated here by reference, shall be held, conveyed, sold, encumbered, leased, rented, used, occupied, improved, or otherwise affected in any

manner subject to the declarations, limitations, easements, covenants, conditions, and restrictions stated in this Revised Declaration of Limitations, Covenants, Conditions and Restrictions, which have been declared and agreed upon for the purpose of:

1. Enhancing, maintaining, and protecting the value, desirability and attractiveness of the Property, and to mutually benefit each of the condominiums located on the Property;

2. Creating mutual equitable servitudes upon each condominium in favor of each and all other condominiums on the Property;

3. Creating reciprocal rights and privity of contract and estate between all persons acquiring or owning an interest in the McCloud condominiums and their grantees, heirs, devisees, successors, and assigns, which shall be deemed to run with the land or any portion thereof or interest therein, and shall be of burden and benefit to all such persons, their grantees, heirs, devisees, successors, and assigns.

All provisions in this Revised Declaration shall be deemed to run with the land as covenants running with the land or as equitable servitudes, or as liens, as the case may be, and shall inure to the benefit of and be binding upon the heirs, personal representatives, grantees, lessees, successors and assigns of the owners, and to all who acquire or own any interest in the Property in whatever manner such interest may be obtained.

ARTICLE I

DEFINITIONS

Except where the context clearly indicates differently, certain terms used in this Declaration and in the Articles of Incorporation of McCloud Condominiums are defined and shall have meaning, as follows:

1.1 1982 Declaration. The "1982 Declaration" means the Declaration of Limitations, Covenants, Conditions and Restrictions dated April 29, 1982, and recorded against the Property.

1.2 Act. "Act" means Chapter 116 of the Nevada Revised Statutes, as the same may be amended from time to time.

1.3 Allocated Interests. "Allocated Interests" means the undivided interests in the common area and limited common areas, the liability for common expenses, and the votes in the Association, which are allocated to units on the Property pursuant to this Declaration.

1.4 Architectural Committee. "Architectural Committee" means the Board and those other persons acting as the architectural committee under this Declaration pursuant to Article XIII.

1.5 Architectural Committee Rules. "Architectural Committee Rules" means the rules, if any, adopted by the Architectural Committee.

1.6 Articles. "Articles" means the Articles of McCloud Condominium Homeowner's Association, as filed with the Secretary of State of the State of Nevada.

1.7 Association. "Association" means the McCloud Condominium Homeowners' Association, a non-profit corporation, incorporated pursuant to the laws of the State of Nevada, which manages and controls all of the common areas, including the limited common area, as more particularly defined and illustrated in Exhibit "A" to the 1982 Declaration.

1.8 Association Property. "Association Property" means all real and personal property now or hereafter owned by or leased to the Association or in which the Association has a recognizable legal or equitable present or future interest.

1.9 Beneficiary. "Beneficiary" means a beneficiary under a deed of trust or mortgagee under a mortgage, and/or the assignee of such beneficiary or mortgage.

1.10 Board. "Board" means the Board of Directors of the Association as duly elected or appointed pursuant to the Bylaws of the Association, and is synonymous with "Executive Board" as defined by the Act.

1.11 Bylaws. "Bylaws" means the Bylaws of the Association as they same may be amended, changed, or modified from time to time.

1.12 Common Area. "Common Area" means that portion of the project that is not located within any unit, including:

a. Sidewalks, shrubbery, and other plantings, parking area, garages,

and all other land included in the description of the project in Exhibit "A" to the 1982 Declaration, except the land under the buildings in which units are located;

b. The water supply system and the sewage disposal system located in the project including pipes, sewage lines, and other facilities;

c. Foundations, columns, girders, beams, and supports of the condominium buildings, the perimeter walls around each unit to the interior surfaces of each unit, and other walls that are not within a Unit;

d. Roofs, stairs, stairways, stairway landings, and corridors that are not within the unit;

e. Pipes, ducts, flues, chutes, conduits, wires and other utility installations to the outlets of the units;

f. All installations of power, lights, gas, water, and heating existing for common use; and

g. All other parts of the project, including personal property, necessary or convenient to its existence, maintenance, and safety, or normally in common use.

1.13 Common Expenses. "Common expenses" means all sums lawfully assessed against the owners by the Association, including both regular periodic assessments and special assessments as provided for in this Declaration.

1.14 Condominium. "Condominium" means a condominium as defined in NRS 117.010 and NRS 116.027, and shall be an estate and real property consisting of:

a. A separate fee simple interest in the space within a unit;

b. An undivided, fractional interest as a tenant in common in the building in which the unit is enclosed and that portion of the real property on which the building containing the unit is located, together with all applicable easements, rights, and appurtenances, which is equal to a fraction whose numerator is one (1) and whose denominator is the total number of units located in the building in which the

owner's unit is enclosed at any given time and from time to time; and

c. An undivided, fractional interest as a tenant in common in the Property's Common Area, together with all applicable easements, rights, and appurtenances, which is equal to a fraction whose numerator is one (1), and the whose denominator is the total number of units on the Property at any given time and from time to time).

1.15 Declarant. "Declarant" means the McCloud Condominium Homeowners' Association or its successors, assigns, or representatives in the event Declarant assigns or otherwise transfers its rights and obligations.

1.16 Declaration. "Declaration," or "this Declaration," means this instrument entitled Revised Declaration of Limitations, Covenants, Conditions and Restrictions of McCloud Condominiums, and any and all amendments thereto.

1.17 Deed of Trust. "Deed of Trust" means a deed of trust or a mortgage encumbering any portion or all of the Property.

1.18 Foreclosure. "Foreclosure" means a foreclosure under a Deed of Trust by judicial action or exercise of power of sale.

1.19 Improvements. "Improvements" means all structures and works of improvement of every type and kind, including, but not limited to, buildings, outbuildings, garages, carports, roads, driveways, parking areas, fences, screening walls, retaining walls, stairs, decks, patios, landscaping, sprinklers, hedges, windbreaks, planting, planted trees, shrubs, poles, signs, free-standing lighting fixtures, exterior air conditioning, and water softener fixtures or equipment, which have been or will be constructed on the Community.

1.20 Limited Common Area. "Limited Common Area" means that portion of the common area, such as garages, that is designated as reserved or designated by operation of NRS 116.2102(2) and/or (4) for the exclusive use of one or more, but fewer than all, of the units.

1.21 Manager. "Manager" means every person or entity designated or retained by the Board to manage the affairs of the Association and to perform various other duties assigned by the Board and by the provisions of this Declaration.

1.22 Member. "Member" means and refers to every person or entity who holds

membership in the Association by virtue of being an owner of one or more of the Property's units. If a unit has more than one owner, "Member" refers collectively to all of the owners of a unit.

1.23 Owner. "Owner" means any person or entity who owns a unit within the Property.

1.24 Plan. "Plan" means: (a) the Final Map; (b) those items set forth in NRS 116.2109(5), including drawings of improvements that are filed with agencies that issue permits for the Property, and all number and letter designations that identify the units; and (c) such other diagrammatic plans and information regarding the Property as may be required by the Act or other applicable law, or as may be included in the discretion of the Declarant, as each may be amended and supplemented from time to time, and all as recorded in the Office of the County Recorder, Washoe County, Nevada, all of which are incorporated here by reference.

1.25 Project. "Project" means the Property, as described in Exhibit "A" to the 1982 Declaration, including land, all buildings and other improvements and structures now or hereafter on the Property, all easements, rights and appurtenances belonging to the Property, and all personal property now or hereafter used in connection with the Property.

1.26 Rules and Regulations. "Rules and Regulations" means such rules and regulations as the Board from time to time may adopt pursuant to the terms of this Declaration concerning the use of the Property, or any part thereof.

1.27 The Property. "The Property" means McCloud Condominiums, as more particularly described in Exhibit "A" to the 1982 Declaration, together with all improvements now or hereafter located on the Property, and together with all easements, rights, and appurtenances belonging to the Property.

1.28 Unit. "Unit" means a physical portion of the Property designated for separate ownership or occupancy, as described in Article II. In interpreting deeds and plans, the existing physical boundaries of the unit reconstructed in substantial accordance with the original plans shall be conclusively presumed to be its boundaries, rather than metes and bounds, or other description, expressed in the deed or plan, regardless of settling or lateral movement of buildings and regardless of minor variance between boundaries shown on the plan or in the deed and those of the building.

ARTICLE II

DESCRIPTION OF LAND AND IMPROVEMENTS

2.1 Ownership of a Unit. Ownership of each individual unit on the Property shall consist of: (a) a fee simple interest in and to that particular unit; (b) an undivided fractional interest as a tenant in common in the building in which the unit is enclosed and the land under such building; (c) an undivided fractional interest as a tenant in common in the Common Area, as defined in this Declaration; (d) exclusive use of the limited common area designated for use by that unit; (e) the right to one garage; and (f) a membership in the Association.

2.2 Unit Boundaries. The boundaries of each unit are the interior surfaces of its perimeter walls, bearing walls, floors, ceilings, windows, and the portions of the building within those boundaries, except common areas or limited common areas. Each unit includes the spaces and improvements within those boundaries. Each unit has access to at least one entranceway, hallway, front porch, or stairway, which are common areas or limited common areas, and which connect with common grounds that constitute common areas.

2.3 Limited Common Area. Adjacent and appurtenant to any unit there may be limited common areas such as garages, balconies, porches, benches, storage lockers, entrance ways, and fireplace pods that are outside the perimeter walls of the unit but designated for the exclusive use of that unit.

2.4 Relocation and Amendment. Subject to the provisions of NRS 116.2112, the boundaries between adjoining units may not be relocated without the approval of the Board or the Architectural Control Committee. In addition to the plans and specifications required for approval under NRS 116.2112 and Article XIII of this Declaration, a request for a boundary adjustment must be accompanied by the written consent of all owners of the units affected by the relocation. If the owners of the adjoining units have specified a reallocation between their units of their allocated interests, the application shall state the proposed reallocation. In the event that the Board or the Architectural Control Committee approves the request for a boundary adjustment, the Association shall prepare an amendment that identifies the units involved, states the reallocations, and indicates the Association's consent (the consent of a majority of the members of the Association shall not be required). The amendment must be signed by those unit owners affected and contain words of conveyance between them. The approval of all holders of Deeds of Trust in the affected units shall be

endorsed on the conveyance. On recordation, the amendment shall be indexed in the name of the grantor and the grantee, and in the grantee's index in the name of the Association.

2.5 Recording Amendments. In accordance with NRS 116.2112, the Association shall prepare and record an amendment to the Plat and Plans as necessary to show the altered boundaries between adjoining units, along with the units' dimensions and identifying numbers. The applicants shall pay for the costs of preparation of the amendment and its recording, as well as any reasonable fees incurred by the Association related to the altered units boundaries so identified and recorded.

ARTICLE III

MEMBERSHIP

3.1 Members. The members of the Association shall be the owners of the units. Ownership of a unit entitles the record owner(s) of that unit to one (1) membership in the Association irrespective of the number of persons or entities that comprise the ownership of the unit (*i.e.*, one membership per unit), and is the sole qualification for membership. The number of memberships in the Association shall be equal to the number of units on the Property at any given time. Persons or entities holding a security interest in a unit for the performance of an obligation are not entitled to membership in the Association. Membership is appurtenant to and may not be separated from the ownership of any unit that is subject to assessment by the Association.

3.2 Transfer. An owner's membership shall not be transferred, assigned, pledged, hypothecated, conveyed, or alienated in any way, except upon the transfer of title of the unit, and then only to the transferee. Any attempt to make a prohibited transfer shall be void, and will not be reflected in the books and records of the Association. Any transfer of title to a unit shall operate automatically to transfer the appurtenant membership rights in the Association to the new owner. In the event the owner of any unit fails or refuses to transfer the appurtenant membership to the unit's transferee, the Association shall have the right to record the transfer upon the books of the Association and shall issue a new certificate to the purchaser, upon which the old certificate outstanding in the name of the seller shall be null and void as though the same had been surrendered. Prior to any transfer of title to a Unit (including the sale of a Unit under a recorded contract of sale), either the transferring owner or the

acquiring owner shall give notice to the Board of such transfer, including the name and address of the acquiring owner and the anticipated date of transfer. The Association shall have the right to charge a reasonable transfer fee payable to the Association on the date of transfer of title to the Unit.

ARTICLE IV

RIGHTS IN THE COMMON AND OPEN-SPACED AREAS

4.1 Undivided Interests. The undivided, fractional interests a unit owner has in the Property's common areas, in the building in which the unit is enclosed, and that portion of the real property on which the building containing the unit is located, as described and defined in Article I, Sections 1.11 and 1.13 of this Declaration, are established and are to be conveyed with the unit, and cannot be changed. A unit owner's undivided interests and the fee title to a unit shall not be separated or separately conveyed, and those interests shall be deemed to be conveyed or encumbered with the unit even though the description in the instrument of conveyance or encumbrance may refer only to the fee title to the unit.

4.2 Member's Easements of Use and Enjoyment. Each member shall, and the Association grants, a right and non-exclusive use of and enjoyment in and to the common areas, and an exclusive easement for the use and enjoyment of any Limited Common Areas appurtenant to the member's unit. Each member's easements of use and enjoyment shall be appurtenant to and shall pass with the title to every assessed condominium, subject to:

4.2.1 The right of the Association to establish, adopt, amend, and enforce uniform rules and regulations pertaining to the use of the common areas and limited common areas, including an assignment by the Association of a garage to each unit.

4.2.2 The right of the Association, in accordance with its Articles and Bylaws, to borrow money for the purpose of improving the common areas and their facilities.

4.3 Delegation of Use. In accordance with the Bylaws and subject to the provisions of this Declaration and any applicable Rules and Regulations, any unit owner may extend and delegate his/her rights of use and enjoyment in the Common

Areas and their facilities to that owner's guests and invitees. If an owner has rented the entirety of that owner's unit to a tenant or tenants, then the owner and the owner's family members, guests, and invitees shall not be entitled to use and enjoy the recreational facilities of the Common Areas while the owner's Unit is occupied by such tenant(s). Instead, the tenant(s), while occupying such unit and during the period of occupancy, shall be entitled to use and enjoy the Common Areas and facilities and is permitted to extend to other persons the rights of use and enjoyment in the same manner as if such tenant(s) were an owner. Each owner shall at all times be responsible for any and all activities of that owner's tenants, guests, and invitees using the Common Areas.

4.4 Waiver of Use. No member may exempt himself from personal liability for assessments duly levied by the Association, or release his unit from the liens and charges against it, by waiver of his use and enjoyment of the common areas and their facilities or by abandonment of his unit.

4.5 Additional Provisions Relating to Common Areas. The Association and all unit owners, by acceptance of their respective deeds, covenant and agree as follows:

4.5.1 In order to preserve the rights of the owners with respect to the operation and management of the project, the common areas shall remain undivided; no owner shall bring any action for partition, except as provided in Article XI of this Declaration.

4.5.2 In the event any improvement on the Property and within the project is partially or totally destroyed and then rebuilt, the units' owners agree that minor encroachments of parts of the common areas due to construction shall be permitted and that valid easements for those encroachments and the maintenance thereof shall exist.

4.5.3 A non-exclusive easement for ingress, egress, and support through the common areas is appurtenant to each unit, and the common areas are subject to such easements.

4.5.4 The Association shall have the responsibility to manage, control, and maintain all of the common areas and limited common areas including but not limited to the common stairways, the common walkways, the parking area, the private driveways, and the exterior of the building, and such maintenance shall be of a high quality so as to keep the entire project in first-class condition and a good state of

repair. The Association shall have a perpetual non-exclusive easement to make such use of the Common Areas as may be necessary or appropriate to perform the duties and functions which it is obligated or permitted to perform pursuant to this Declaration.

ARTICLE V

ASSOCIATION BOARD OF DIRECTORS; VOTING AND ELECTIONS

5.1 Board of Directors. The members of the Association shall elect a seven (7) member Board of Directors for two-year terms. Board of Directors members' terms shall be staggered such that no more than four expire in any year. At each annual meeting, the members shall elect, for a term of two (2) years, the number of Directors whose terms shall ordinarily expire at said annual meeting. All members of the Board of Directors shall be members of the Association.

5.2 Voting. Subject to the suspension of any voting rights of any units' owners as provided in this Declaration, each member of the Association shall be entitled to one (1) vote for each unit owned by that member. In the event a unit is owned by two (2) or more persons or entities, the voting power shall be exercised by only one of them.

5.3 Elections.

5.3.1 Eligibility. Not less than 30 days before the preparation of a ballot for the election of members of the Board of Directors, the secretary or other officer specified in the bylaws of the Association shall cause notice to be given to each unit's owner of his eligibility to serve as a member of the Board of Directors. Each unit's owner who is qualified, subject to the limitations stated in NRS 116.31034(6), to serve as a member of the Board of Directors may have his name placed on the ballot along with the names of the nominees selected by the members of the Board of Directors or a nominating committee established by the Association. Each person whose name is placed on the ballot as a candidate for a member of the Board of Directors must make a good faith effort to disclose any financial, business, professional or personal relationship or interest that would result or would appear to a reasonable person to result in a potential conflict of interest for the candidate if the candidate were to be elected to serve as a member of the Board. The candidate must make the disclosure, in writing, to each member of the association in the manner established in the bylaws.

5.3.2 Secret Ballot. Pursuant to NRS 116.31034, the election of any member of the Board of Directors must be conducted by secret written ballot, as follows:

5.3.2.1 The secretary or other officer specified in the bylaws of the Association shall cause a secret ballot and a return envelope to be sent, prepaid by United States mail, to the mailing address of each unit within the McCloud community, or to any other mailing address designated in writing by the unit's owner.

5.3.2.2 Each unit's owner must be provided with at least 15 days after the date the secret written ballot is mailed to the unit's owner to return the secret written ballot to the Association.

5.3.2.3 A quorum is not required for the election of any member of the Board.

5.3.2.4 Only the secret written ballots that are returned to the association may be counted to determine the outcome of the election.

5.3.2.5 The secret written ballots must be opened and counted at a meeting of the association. A quorum is not required to be present when the secret written ballots are opened and counted at the meeting.

5.3.2.6 The incumbent members of the Board and each person whose name is placed on the ballot as a candidate for a member of the Board may not possess, be given access to, or participate in the opening or counting of the secret written ballots that are returned to the association before those secret written ballots have been opened and counted at a meeting of the association.

5.4 Certification of Board Members. Each member of the Board shall, within 90 days after his appointment or election, certify in writing to the Association, on a form prescribed by the Nevada Real Estate Administrator, that he has read and understands the governing documents of the Association and the provisions of the Act to the best of his ability.

5.5 Election of Association Officers. The Board of Directors shall also elect from among them a president, two vice-presidents, a secretary, and a treasurer of the Association. The general powers and duties of the Board shall be as set forth in this Declaration, but may be more particularly defined by the Bylaws; provided, however, that this Declaration may not be amended directly or indirectly in any particular

manner by the enactment of any Bylaw or regulation, but only in the manner provided in this Declaration.

5.6 Vacancies. Vacancies on the Board of Directors caused by any reason other than removal of a Director by a vote of the Association shall be filled by vote of the majority of the remaining Directors, even though they may constitute less than a quorum, and each person so elected shall be a Director until a successor is elected at the next annual meeting of the Association.

ARTICLE VI

DUTIES AND POWERS OF THE ASSOCIATION AND ITS MEMBERS

6.1 Powers of the Association. The Association shall have all the powers of a nonprofit corporation organized under the laws of the State of Nevada and the powers conferred upon it pursuant to NRS 116.3102 and NRS Chapter 82, subject only to such limitations on the exercise of such powers as are set forth in the Articles, the Bylaws, and this Declaration. The Association, acting by and through the Board as authorized by NRS 116.3103, shall have the power to do take any lawful action that may be authorized, required, or permitted to be done by the Association under this Declaration, the Articles, and the Bylaws, to conduct all business affairs of common interest to all owners, and to do and perform any act that may be necessary or proper for or incidental to the exercise of any of the express powers of the Association, including, without limitation, the following:

6.1.1 Assessments. The Association shall have the power to establish, fix, and levy assessments as provided in this Declaration, and to enforce payment of assessments in accordance with the provisions of this Declaration.

6.1.2 Rules and Regulations. The Association shall have the power to adopt, amend, and repeal the rules and regulations governing the Common Area and its use, and for such other purposes as are expressly allowed by this Declaration or allowed pursuant to the Act. The Association shall also have the power to adopt, enact, and enforce the Rules and Regulations relative to the prohibitive and mandatory use restrictions set forth in Article XII in order to protect and enhance the value of the Property and the orderly functioning of the Community, and to adopt and respond to changing circumstances and times. A copy of any Rules and Regulations as adopted,

amended, or repealed shall be mailed or otherwise delivered to each member of the Association. In the case of any conflict between any provision of the Rules and Regulations and any provision(s) of this Declaration, the Articles, or Bylaws, the conflicting provision of the Rules and Regulations shall be superseded by the provisions of this Declaration, the Articles, or the Bylaws.

6.1.3 Enforcement. The Association, in its own name and on its own behalf or on behalf of the owners of two (2) or more units who consent, shall have the right to enforce, by any proceeding at law or in equity, all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by the provisions of this Declaration, the Articles, Bylaws, Rules and Regulations, resolutions of the Board, or any amendments thereto, and to intervene in litigation or administrative proceedings on matters affecting the community; provided, however, that the Association shall have the exclusive right to enforce assessment liens. The Court in any such action may award the successful party reasonable expenses in prosecuting such action, including reasonable attorneys' fees. Any failure by the Association or by any owner to enforce any covenant or restriction contained in this Declaration shall in no event be deemed a waiver of the right to do so at any time thereafter.

6.1.4 Imposition of Penalties for Violation or Failure to Pay Assessments. If a unit's owner or a tenant or guest of a unit's owner violates any provision of the governing documents of the Association, including the obligation to pay assessments, the Association, acting by and through its Board, in accordance with the notice and hearing requirements of this Declaration, and in the manner provided in the Act, may:

6.1.4.1 Suspend the voting rights of that unit's owner for a reasonable time not to exceed thirty (30) days for any single violation, or for any period during which any assessment against the unit's owner remains unpaid and delinquent, after notice and hearing is given and held in accordance with the Bylaws of the Association and NRS 116.31031.

6.1.4.2 Impose a fine against the unit's owner or the tenant or guest of the unit's owner for each violation. The fine must be commensurate with the severity of the violation as determined by the Board, but must not exceed the maximum permitted by NRS Chapter 116. The limitations on the amount of the fine do not apply to any interest, charges or costs that may be collected by the association pursuant to this section if the fine becomes past due.

If a fine is imposed pursuant to this section and the violation is not cured

within 14 days, the violation shall be deemed a continuing violation. Thereafter, the Association, acting by and through its Board, may impose an additional fine for the violation for each 7-day period, or portion thereof, that the violation is not cured. Any additional fine may be imposed without notice and an opportunity to be heard. All past due fines: (1) bear interest at the legal rate per annum; (2) will include any costs of collecting the past due fine, subject to the limitations stated in NRS 116.31031(8); and (3) will include any costs incurred by the association during a civil action to enforce the payment of the past due fine.

6.1.5 Delegation of Powers and Duties. The Association can delegate its powers, duties, and responsibilities to any committees, officers, employees, agents, and independent contractors of the Association, including a professional managing agent.

6.1.6 Services. The Association may obtain and pay for legal, accounting, and other services necessary and desirable in connection with the operation of the McCloud community and the enforcement of this Declaration.

6.1.7 Personal Property. The Association may purchase, acquire, and hold for the benefit of all the Owners and for the common areas necessary supplies and tangible and intangible personal property, and may dispose of the same by sale or otherwise.

6.1.8 Contracts. The Association may enter into a contract for a period not to exceed one (1) year.

6.2 Right of Action by Members of the Association. In addition to the rights of enforcement granted to the Association pursuant to section 6.1.3 of this Declaration, and subject to the provisions of NRS 116.745 – 116.795, any member of the Association shall have the right (but not the duty) to enforce any and all of the covenants, conditions, and restrictions now or hereafter imposed by this Declaration or the Act upon the Owners or upon any of the Property.

6.3 Duties of the Association. In addition to any other duties delegated to it by this Declaration, the Articles, or the Bylaws, the Association, acting by and through the Board, or other persons or entitles described in Section 6.1.5, has the obligation to conduct all business affairs of common interest to all members and to perform each of the following duties:

6.3.1 Management. The Association shall engage the services of a

professional manager to manage the Community, as provided in NRS 116.700.

6.3.2 Notice and Hearing for Imposition of Penalty. Pursuant to NRS 116.31031, the Association may not impose any penalty provided in section 6.1.4 of this Declaration unless:

6.3.2.1 Not less than thirty (30) days before the violation, the person against whom the fine will be imposed had been provided with written notice of the applicable provisions of the governing documents that form the basis of the violation; and

6.3.2.2 Within a reasonable time after the discovery of the violation, the person against whom the fine will be imposed has been provided with written notice specifying the details of the violation and the penalty to be imposed, the amount of the fine, if any, the date, time and location for a hearing before the Board on the violation, and a reasonable opportunity to contest the violation at the hearing. The hearing shall be conducted before three (3) members of the Board of Directors, a majority of whom must concur in the determination of whether a violation has been committed and whether a penalty should be imposed. A penalty may be imposed without a hearing only when the person against whom the penalty is proposed: (1) pays any proposed fine prior to the hearing; (2) executes a written waiver of the right to the hearing; or (3) fails to appear at the hearing after being provided with proper notice of the hearing.

6.3.3 Taxes and Special Assessments. The Association shall pay taxes and special assessments that are, or would become, a lien on the Property or common areas if, for any reason, the units and common areas are not separately assessed.

6.3.4 Insurance. The Association shall obtain and maintain, from reputable insurance companies, the insurance described in Article X.

6.3.5 Enforcement of Restrictions and Rules. The Association shall perform such other acts, whether or not expressly authorized by this Declaration, that may be reasonably necessary to enforce any of the provisions of this Declaration, the Articles, Bylaws, Rules and Regulations, or Board resolutions. By this provision and Declaration, the Association shall have reserved to it such easements as are necessary to perform its duties and obligations or to exercise its rights as set forth in this Declaration, the Bylaws, Articles, or the Architectural Control Committee Rules.

6.3.6 Association Property. The Association shall accept and exercise

jurisdiction over all property, real and personal, conveyed to the Association for which the Association has duties and obligations imposed upon it pursuant to this Declaration, including all common areas, easements for operation and maintenance purposes over any of the Property within the community, and easements for the benefit of Association members within the common areas.

6.3.7 Utilities. The Association shall acquire, provide, and pay for water, sewer, garbage disposal, refuse and other necessary utility services for the common areas.

6.3.8 Collection. The Association shall collect the monthly maintenance charge from all unit owners.

6.3.9 Fidelity Bonds. The Association shall purchase and pay for fidelity bonds for its officers and employees, the required sum of which shall not be less than $10,000 per covered officer or employee.

6.3.10 Reserve. The Association shall establish a reserve for replacements for the various components and elements of the common areas.

6.3.11 Garages. The Association shall assign one (1) garage to each unit, including the power and authority to reassign and transfer such garages among the various owners as their particular needs and circumstances reasonably warrant.

6.3.12 Title to Property Upon Dissolution. Upon dissolution of the Association, the Association shall convey the assets of the Association to an appropriate public agency or agencies or to a nonprofit corporation, association, trust or other organization organized and operating for purposes similar to those for which the Association was created, or in such other manner as may be proper for the Association so to do under applicable State of Nevada and Federal law.

6.4 Prohibited Actions. The Association and the Board shall have no authority to do the following:

6.4.1 Except by vote or written consent of a majority of the members of the Association, the Board shall be prohibited from entering into a contract with any third person by which the third person will furnish goods or services for the Common Area or the Association for a term longer than one (1) year, with the following exceptions: (1) a community management contract; (2) a contract with a public utility company if the rates charged for the materials or services are regulated by a Public

Utilities Commission, provided, however, that the term of the contract shall not exceed the shortest term for which the supplier will contract at the regulated rate; and (3) prepaid casualty and/or liability insurance policies of not to exceed three (3) years duration provided that the policy permits short rate cancellation by the insured.

6.4.2 Except by vote or written consent of a majority of the members of the association, the Board shall have no authority to acquire and pay anything out of common expenses, capital additions, or structural alterations (other than for purposes of replacing portions of common area or Association property, subject to the provisions of this Declaration) that has a cost, which, in the aggregate, exceeds five percent (5%) of the budgeted gross expenses of the Association for that fiscal year.

6.4.3 Except as otherwise provided in this Declaration, the Board shall have no authority to act on matters that are reserved exclusively for action by the members of the Association, as follows:

6.4.3.1 Amend or repeal this Declaration, the Bylaws, or any Rules and Regulations of the Association;

6.4.3.2 Recall any officer or member of the Board;

6.4.3.3 Determine not to rebuild improvements after partial or total destruction.

6.4.4 Except as otherwise permitted under the Act or by this Declaration, the Board may not commence a civil suit or arbitration on behalf of the Association. In the event the Act permits commencement of a civil suit or arbitration without the assent of a majority of the members of the Association, the Association may not maintain such an action and shall be required to dismiss the action within one hundred twenty (120) days after its commencement if the action is not ratified by a majority of the members of the Association within ninety (90) days after the commencement of the action (unless the action is to enforce the payment of an assessment, to enforce this Declaration, or to proceed with a counterclaim).

6.4.5 The Board shall not pay compensation of any kind to members of the Board or to officers of the Association for providing goods or services to the Association. However, the Board may cause a member of the Board or an officer to be reimbursed for actual and paid expenses incurred in carrying on the business of the Association; provided such expenses are pre-authorized by the Board.

6.4.6 No member of the Board, or of any committee of the Association or any officer of the Association, or any Manager, shall be personally liable to any Member, or to any other party, including the Association, for any damage, loss, or prejudice suffered or claimed on account of any act, omission, error, or negligence of any such person or entity if such person or entity has, on the basis of such information as may be possessed by him or it, acted in good faith without willful or intentional misconduct.

6.5 Maintenance of the Property. The Property shall be maintained as follows:

6.5.1 Condominium Exteriors. The Association shall maintain and manage the exterior of each condominium, as follows: paint, maintain, and repair and replace (if required because of normal wear and tear or deterioration) roofs, down spouts, balcony railings, exterior door surfaces, and exterior building surfaces. Condominium exteriors for which the Association is responsible for management and maintenance shall not include glass surfaces; landscaping within a private balcony, deck, or entry areas of the condominiums; patio covers or other additions built or maintained within an entry, deck or balcony areas by an owner; repairs or replacements arising out of or caused by the willful or negligent act of the owner, his family, guests, or invitees, or caused by earthquake or other acts of God to the extent they are not covered by insurance. Such excluded items shall be the responsibility of each condominium owner; provided, however, that if an owner shall fail to maintain or make repairs or replacements which are the responsibility of such owner, as provided above, then, upon a vote of a majority of the Board of Directors, and after not less than thirty (30) days notice to the owner, the Association shall have the right (but not the obligation) to enter the condominium and provide such maintenance or make such repairs or replacements, and the cost thereof shall be added to the assessments chargeable to such condominium and shall be payable to the Association by the owner of such condominium.

6.5.2 Common Areas. The Association shall operate, manage and control, or provide for the operation, management, and control of all common areas, common area facilities, limited common areas, and personal property belonging to the Association. The common areas include, but are not limited to:

6.5.2.1 Landscaping (including the trees, shrubs, grass and sidewalks on common area), garages, parking areas, driveways, private streets, and all other land included in the description of the project in Exhibit "A" attached to the 1982 Declaration or otherwise acquired by the Association, except the land under the

buildings containing the units;

6.5.2.2 The water supply system and the sewage disposal system located in the project, including pipes, sewage lines, and other facilities;

6.5.2.3 The foundations, columns, girders, beams, and supports of the buildings on the Property, the perimeter walls around each unit to its interior surfaces and other walls not within a unit;

6.5.2.4 The roofs, stairs, stairways, stairway landings, walkways, and corridors that are not within the unit, including the deck or porch leading to the main entrance of the unit but excluding balconies and other decks appurtenant to the unit;

6.5.2.5 The pipes, ducts, flues, chutes, conduits, wires and other utility installations to the outlets;

6.5.2.6 All installations of power, lights, gas, water, and heating existing for common use; and

6.5.2.7 All other parts of the project, including personal property, necessary or convenient to its existence, maintenance, and safety, or normally in common use.

The Association property shall be maintained in a good state of repair. The Association shall have the authority to obtain and pay for water service for the entire Project. The Association shall have the authority to obtain and pay for electric service, lighting facilities, fire extinguishers, and gardening and janitorial service for the common areas, and may grant easements where necessary for utilities and sewer facilities over the common areas to serve the common and open areas of the condominiums. The Association shall maintain any and all settling basins, percolation trenches and skimmer chambers as may be required by government regulatory agencies having jurisdiction over the property. The Association shall further provide for regular sweeping of drives and parking areas.

6.5.3 Owner Maintenance. If required, it shall be the obligation of each unit owner:

6.5.3.1 To maintain, repair, and replace, at his own expense, all internal installations and components of his unit, including but not limited to:

showers, baths, tiling, plumbing, sinks, toilets, electrical sockets, switches and wiring, heating units, outlets, apparatus, fans, windows (interior and exterior), sliding glass doors (interior and exterior) balcony decks, ceiling plaster, interior wall surfaces, interior floor surfaces, lighting installations, electrical appliances, and telephone equipment;

6.5.3.2 To remove snow, leaves and debris from all patios and balconies that are limited common areas appurtenant to the owner's unit. If any such limited common areas are appurtenant to two or more units, the owners of those unites shall be jointly responsible for such removal;

6.5.3.3 To pay for his own electricity, gas, cable television, and telephone service; and

6.5.3.4 To reimburse the Association for any expenditures incurred in repairing or replacing any part of or property on the common area belonging to the Association that the Association determines has been damaged through the fault of that owner.

A unit owner shall not be responsible for repairs to his unit that originate from a malfunction within the common area.

6.5.4 Right of Entry. Each owner shall grant the right of entry to the management agent or to any other person authorized by the Board in case of any emergency originating in or threatening his unit or garage, whether the owner is present at the time or not. Each owner shall permit the Association or its representatives, when so required, to enter his unit or garage for the purpose of performing installations, alterations, or repairs to the mechanical, plumbing, or electrical services, provided that requests for entry are made in advance and that such entry is at a time convenient to the owner. In case of an emergency, such right to entry shall be immediate.

6.6 Audit. Financial statements for the Association shall be regularly prepared and distributed by the Association to all members as follows:

6.6.1 A pro forma operating statement (budget) for each fiscal year shall be distributed not less than sixty (60) days before the beginning of the fiscal year.

6.6.2 An annual report shall be distributed within one hundred twenty (120) days after the close of the fiscal year. The annual report shall consist of:

6.6.2.1 A balance sheet as of the end of the fiscal year;

6.6.2.2 An operating (income statement) for the fiscal year;

6.6.2.3 A statement of changes in financial position for the fiscal year; and

6.6.2.4 Any information relating to any transaction or indemnification between the Association and any of its officers, directors or members which in the aggregate exceed forty thousand dollars ($40,000).

The annual report shall be prepared by an independent accountant for any fiscal year in which the gross income to the Association exceeds Seventy Five Thousand Dollars ($75,000). If the annual report is not prepared by an independent accountant, it shall be accompanied by a certificate of the treasurer of the Association that the statement was prepared without audit from the books and records of the Association.

6.7 Accounting and Collections. The Association, acting by and through its Board of Directors, may delegate to a bank or other qualified financial or accounting firm the collection and disbursement of maintenance charges and the preparation of annual financial statements. In such event, the Board of Directors shall be responsible to the owners for the accurate handling and accounting of such funds. Vouchers authorizing the payment of expenses from maintenance funds in excess of $2000 shall be approved in advance by a member of the Board of Directors. The $2000 limitation shall not apply to routine expenses, such as utilities and trash pickup, which are contained in the budget and paid using a bank auto-pay system.

6.8 Right of Inspection of Association Books and Records. The Association shall make available for inspection to any member of the Association or his duly appointment representative, or any mortgagee, the following:

6.8.1 All membership registers, accounting records, and minutes of meetings of the members of the Association, the Board, and committees of the Board, and all other books, documents and records of the Association, and the physical properties of the Association.

6.8.2 The financial statements and budgets of the Association.

6.8.3 The study of the reserves of the Association required to be

conducted pursuant to NRS 116.31152.

The right of inspection shall include the right to make copies of documents, and shall occur during regular working hours of the Association at the office of the Association or such other place as prescribed by the Board. The Board shall establish by resolution reasonable rules with respect to (a) notice to be given to the custodian of the records of the Association by the Member representative, or mortgagee desiring to make an inspection, and (b) payment of the actual cost (not to exceed .25 cents per page or such higher amount as allowed pursuant to the Act) of reproducing copies of documents requested by a Member or by a representative or mortgagee. The provisions of this paragraph do not apply to the personnel records of the Association or the records of the Association relating to another owner. The Board shall cause a copy of any of the records required to be maintained pursuant to subsections 6.7.2 and 6.7.3 to be provided to an Owner within, fourteen (14) days after receiving a written request for those records.

6.9 Notices. For the purpose of this Article, services of all notices and decisions shall be made by depositing in the United States mail, by certified mail, return receipt requested, the notices and/or decisions addressed to the owner at his address as shown on the official records of the McCloud Condominium Association.

6.10 Documentation. Any action to be taken by the Board of Directors as required or permitted by this Declaration that must be evidenced by a written document shall be executed by the President and one (1) other member of the Board of Directors.

6.11 Acquisition of Personal Property. The Board may acquire and hold, for the benefit of the owners, tangible and intangible personal property, and may dispose of the same by sale or otherwise. Title to such personal property shall be taken in the name of the Association, to wit: "McCloud Condominium Homeowners.". The beneficial interest in such personal property shall not be transferable by an owner except in connection with the sale of his condominium, or where such property is being disposed of for the benefit of the condominium owners. The sale of a condominium, as provided in this Declaration, shall transfer to the purchaser ownership of the transferor's beneficial interest in such personal property.

6.12 Release of Liability and Indemnity. Except as otherwise provided below, and except in instances of willful misconduct or bad faith by any Board member(s), the members of the Board shall not be liable to the owners for any mistake of judgment, negligence, or otherwise. Unless any contracts made by the Board shall have been

made in bad faith or contrary to the provisions of this Declaration, the Articles, Bylaws, or the Act, the unit owners shall indemnify and hold harmless each of the members of the Board against all contractual liability to others arising out of contracts made by the Board on behalf of the Association. The liability of any owner arising out of any contract made by the Board or of the indemnity in favor of the members of the Board shall be limited to such proportion of the total liability as the unit owner's interest in the Association bears to the interest of all the owners of the membership in the Association. The provisions of this paragraph do not apply to and shall not preclude claims for property damage and bodily injury by owners against the Board or any other insured of the liability insurance required by this Declaration.

ARTICLE VII

MEETINGS

7.1 Quorum. At all meetings of the members entitled to vote, a majority of such members, or their proxies, shall be necessary to constitute a quorum. If any meeting cannot be held because a quorum is not present, the owners present, either in person or by proxy, may adjourn the meeting to a time not less than forty-eight (48) hours and not more than thirty (30) days from the time the original meeting was called, at which time the quorum requirement shall be reduced to forty percent (40%) of the members entitled to vote. Except as provided below, if there is a quorum, a majority vote of the members present either in person or by proxy and entitled to vote shall be sufficient for the passage of any motion or the adoption of any resolution.

The following matters shall require a vote of at least a majority of members of the association entitled to vote, unless it is specifically indicated that a three-quarters (3/4) vote of the members is required:

7.1.1 The recall of any officer or member of the Board.

7.1.2 The levy of special assessments to defray the costs of any action or undertaking on behalf of the Association, which, in the aggregate, exceed five percent (5%) of the budgeted gross expenses of the Association for that fiscal year.

7.1.3 To amend or repeal this Declaration, the Articles, or the Bylaws.

7.2 Annual Meetings. Annual meetings of the condominium owners shall be held at such time as shall be determined by action of the Association's Board of

Directors. Meetings of members shall be held within the project or at a meeting place as close to the Property as possible. Unless unusual conditions exist, members' meetings shall not be held outside Washoe County. Written notice of annual meetings shall be mailed to members of the Association by the Board not less than ten (10) nor more than sixty (60) days before the date of the meeting. The notice shall: (1) specify the place, day and hour of the meeting; (2) include a copy of the agenda for the meeting, containing all information required by NRS 116.3108; and (3) provide notification of the right of a unit's owner to have a copy of the minutes or a summary of the minutes of the meeting provided to the unit's owner upon request and payment of any associated costs, and to speak to the Association or the Board, unless the Board is meeting in executive session.

7.3 Special Meetings. Special meetings may be called by the vote of a majority of a quorum of the Board or by any five percent (5%) of the total voting power of the Association that desire to meet, by written notice signed by those desiring to meet and sent by them to the Association members at least ten (10) days and not more than sixty (60) days before the meeting. Notice of any special meetings shall contain the same information required for annual meetings, as prescribed by NRS 116.3108, including the place, date and hour of the meeting, the general nature of the business to be transacted, and the notification to the members of their rights to a copy or summary of the minutes of the meeting and to speak to the Association.

7.4 Board Meetings. Meetings of the Board of Directors shall be held at least once every ninety (90) days, as required by NRS 116.31083. The Board shall mail written notice of any Board meetings to the Association members not less than ten (10) days prior to the date of the meeting of the Board of Directors. Notice of any meetings of the Board of Directors shall comply with NRS 116.31083, and include the place, date, and hour of the meeting, include a copy of the agenda for the meeting or the date on which and the locations where copies of the agenda may be obtained by the members of the Association, and the rights of an Association member to a copy or summary of the minutes of the meeting and to speak to the Association. The meetings of the Board of Directors shall review: (1) a current reconciliation of the operating account of the Association; (2) a current reconciliation of the reserve account of the Association; (3) the actual revenues and expenses for the reserve account, compared to the budget for that account for the current year; (4) the latest account statements prepared by the financial institutions in which the accounts of the association are maintained; (5) an income and expense statement, prepared on at least a quarterly basis, for the operating and reserve accounts of the association; and (6) the current status of any civil action or claim submitted to arbitration or mediation in which the association is a party.

ARTICLE VIII

COMMON EXPENSES AND ASSESSMENTS

8.1 Fiscal Year. The fiscal year of the Association shall be a twelve (12) month period running from October 1 to September 30 of each year.

8.2 Purpose of Assessments. Assessments levied by the Association shall be the amount estimated to be required, and shall be used exclusively to maintain, protect and enhance the welfare of members of the Association, for the performance of the duties of the Association as set forth in this Declaration, and for the repair, maintenance and upkeep of the common areas and any other Association Property.

8.3 Annual Assessments/Projected Common Expenses. On or prior to August 1 of each year, the Board shall meet for the purpose of estimating the common expenses to be required during and preparing the proposed budget for the subsequent twelve (12) month period, commencing with the following October 1. The projected common expenses, which are the Association's annual assessments, shall include:

8.3.1 The estimated annual revenue and expenditures of the Association;

8.3.2 A reasonable provision for contribution to a reserve for contingencies and replacements, plus any surplus in the common expense fund from the fiscal year just ended;

8.3.3 Any amounts necessary to make up any deficit from the fiscal year just ended;

8.3.4 Any amounts required by an excess of repair and restoration costs over insurance proceeds, and

8.3.5 Any other amounts required by the terms of this Declaration, or the Act.

The Association's common expenses are the expenditures made by the Association in the performance of its obligations under the Act and this Declaration, and the financial liabilities of the Association during the fiscal year, including the costs and expenses of the daily operation of the Association and an allocation for

reserves. The common expenses include, but are not limited to, expenditures (1) to operate, manage, maintain and repair the common areas and other Association property, and to administer the operation of the Association; (2) to provide for reasonable reserves consistent with sound business practice for the repair and replacement and restoration of improvements to the common areas and any Association property, and for such other purposes as are consistent with good business practice, and otherwise as required by NRS 116.3115 and this Declaration; (3) to provide for the possibility that some Assessments may not be paid on a current basis; and (4) to provide for the payment of the fee of a professional community manager.

Not less than thirty (30) nor more than sixty (60) days before the beginning of each fiscal year of the Association, the Board shall prepare and distribute to each member of the Association its projected common expenses, which shall be subject to change and approval at any meeting at which the projected common expenses is considered. Except for the common expense of insurance, paint reserve, and roof reserve, which shall be assessed to each owner of a unit in a fraction equal to the square footage floor area of an owner's unit divided by the total square footage floor area of all units, common expenses shall be assessed equally to the owners of all units as of the following October. If the estimated common expenses are inadequate for any reason, including nonpayment of any other owner's assessment, the Board may, at any time, levy further assessment.

8.4 Reserve Requirements. That portion of the projected common expenses specific to the reserve required by NRS 116.3115 must include, without limitation:

8.4.1 The current estimated replacement cost, estimated remaining life and estimated useful life of each major component of the common areas;

8.4.2 As of the end of the fiscal year for which the projected common expenses is prepared, the current estimate of the amount of cash reserves that are necessary and the current amount of accumulated cash reserves that are set aside, to repair, replace or restore the major components of the common areas;

8.4.3 A statement as to whether the Board has determined or anticipates that the levy of one or more special assessments will be required to repair, replace or restore any major component of the common areas or to provide adequate reserves for that purpose; and

8.4.4 A general statement describing the procedures used for the

estimation and accumulation of cash reserves, including, without limitation, the qualifications of the person responsible for the preparation of the study required below in this paragraph.

8.5 Reserve Study. In accordance with the requirements of NRS 116.31152, the Board shall:

8.5.1 Cause to be conducted at least once every five (5) years, a study of the reserves required to repair, replace and restore the major components of the common areas;

8.5.2 Review the results of that study at least annually to determine if those reserves are sufficient; and

8.5.3 Make any adjustments it deems necessary to maintain the required reserves.

The reserve study must be conducted by a person qualified by training and experience to conduct such a study, and may be a member of the Board, an owner, or the Association manager who is so qualified. The study must include: (1) a summary of an inspection of the major components of the common areas the Association is obligated to repair, replace or restore; (2) an identification of the major components of the common areas that the Association is obligated to repair, replace or restore which have a remaining useful life of less than thirty (30) years; (3) an estimate of the remaining useful life of each major component; (4) An estimate of the cost of repair, replacement or restoration of each major component during and at the end of its useful life; and (5) an estimate of the total annual assessments that may be required to cover the cost of repairing, replacement or restoration the major components after subtracting the reserves of the Association as of the date of the study.

Money in the reserve account required by provision may not be withdrawn without the signatures of at least two (2) members of the Board. The reserve account may be used *only* for Common Expenses that involve repairs, replacement or restoration of the major components of the common areas, including, without limitation, repairing and replacing roofs, roads and sidewalks, and must not be used for daily maintenance.

8.6 Assessments. Assessments are obligations of the Association members, as follows:

8.6.1 Each unit's owner covenants and agrees to pay to the Association any Assessments made pursuant to this Declaration. Payments for assessments shall be due in equal monthly installments on or before the first day of each month during the twelve (12) month period commencing with October 1, or in such other reasonable manner as the Board shall designate. Each assessment or installment thereof, together with any late charges, interest, collection costs, and reasonable attorneys' fees, shall be the personal obligation of the person or entity who owns the unit against which the assessments were made at the time the assessment (or installment) became due and payable. If more than one person or entity owns that unit, the personal obligation to pay the assessment (or installment) for that unit shall be joint and several. Unless otherwise provided in this Declaration, the purchaser of a unit shall be jointly and severally liable with the seller for all unpaid assessments against the unit, up to the time of the grant or conveyance, without prejudice to the purchaser's right to recover from the seller the amount paid by the purchaser for any such assessments. Suit to recover a money judgment for such personal obligation shall be maintainable by the Association without foreclosure or waiver of the lien securing the same. No Owner may avoid or diminish such personal obligation by non-use or abandonment of his Unit. In the event a condominium is rendered uninhabitable by fire or other casualty, the Board, in its discretion, may abate all or a portion of the common expenses assessed against the owner of that condominium while it remains uninhabitable.

8.6.2 The failure of the Board to fix the assessments for a twelve (12) month period prior to the commencement of that period shall not be deemed a waiver or modification in any respect of its right to do so or of the provisions of this Declaration, or a release of the owners from the obligation to pay the assessments, or any installment thereof for such that period. The assessment fixed for the preceding twelve (12) month period shall continue until a new assessment is fixed. No owner may exempt himself from liability for his assessment of any of the common area by waiver of his use and enjoyment of the common areas and their facilities or by abandonment of his unit.

8.7 Special Assessments. If the Board determines that the estimated total amount of funds necessary to defray the common expenses for a given fiscal year is or will become inadequate to meet the common expenses for any reason, including, but not limited to, delinquencies in the payment of Assessments, or in the event the Association has insufficient reserves to perform its obligations under this Declaration, then the Board shall determine the approximate amount of such shortfall, shall provide a summary thereof to all of the members of the Association

along with the Board's recommendation for a special assessment to meet such shortfall, and shall set a date for a meeting of the Owners which is not less than fourteen (14) nor more than thirty (30) days after the mailing of the summary. Unless at that meeting a majority of all members of the Association votes to reject the proposed special assessment, the proposed special assessment shall be deemed ratified by the members of the Association, whether or not a quorum is present at such meeting, and shall become a special assessment against, and allocated equally to, the owners of the units. The Board may, in its discretion, provide for payment of any special assessment in any number of installments or provide that it is payable in one (1) installment within such time period as the Board deems reasonable.

8.8 Liens for Assessments. Each owner shall pay all common expenses assessed against him and all other assessments made against him by the Board in accordance with the terms of this Declaration. Each assessment shall be separate and distinct of personal debts and obligations of the owner against whom the same are assessed.

8.8.1 Unpaid Fines and Assessments Constitute a Lien on Unit. The amount of any assessment to any unit, whether regular or special, plus interest at the maximum rate allowed by law, plus costs and a reasonable attorney's fees, plus any fines imposed by the Association against that unit, shall be secured by a lien on that unit in favor of the Association from the date the Assessment or fine becomes due. If an Assessment or fine is payable in installments, the full amount of the Assessment or fine is a lien from the time the first installment becomes due. Notice of any lien imposed against a unit under this provision shall be recorded in accordance with the Act, and may be enforced as provided in the Act for enforcement of such liens. Any lien imposed against a unit under this provision shall be prior to all other liens and encumbrances on that unit, except for: (a) valid tax and special assessment liens in favor of any governmental assessing authority; (b) liens and encumbrances recorded before the recordation of the Declaration; and (c) a First Deed of Trust recorded before the date on which the Assessment or fine sought to be enforced became delinquent. The lien created by this Declaration for unpaid Annual Assessments is also prior to a First Deed of Trust to the extent of the amount of such Annual Assessments which would have become due during the six (6) month period immediately preceding institution of an action to enforce the lien.

8.8.2 Release of Lien. Upon the timely curing of any default for which a notice of lien was filed or recorded by the Association, the Board shall file or record, or cause to be filed or recorded, an appropriate release of such notice or release of lien, upon payment by the defaulting owner of a fee, to be determined by the Board,

but not to exceed $100 to cover the costs of preparing the filing or recording such release.

8.8.3 Non-Exclusive Remedy. The assessment lien, and the rights to foreclose on and sale under an assessment lien, shall be in addition to and not in substitution of all other rights and remedies that the Association and its assigns may have under this Declaration and the Act, and according to law, including a suit to recover money judgment for any unpaid assessments.

8.9 Vesting of Voting Rights. Notwithstanding anything contained in this Declaration, voting rights attributable to condominiums shall not vest until assessments against those condominiums have been levied by the Association.

8.10 Increase in Annual Assessments. Notwithstanding any other provisions of this Declaration, the Board may not, without the vote or written consent of a majority of the members of the Association, impose a regular annual assessment per unit which is more than twenty percent (20%) greater than the regular assessment for the immediately preceding fiscal year.

ARTICLE IX

UTILITIES

9.1 Easement Granted to Units' Owners. Whenever any connection, or portion of any connection, for sanitary sewer, water, electricity, gas, cable TV, or telephone lines installed within the project lie in or upon any unit served by those connections, the owner of the unit served by those connections shall have the right, and are hereby granted an easement to the full extent necessary, to have utility companies, with proper notice and agreed scheduling, enter upon the unit in or upon which said connections, or any portion thereof, lie, to repair, replace, and generally maintain said connections as and when the same may be necessary.

9.2 Use and Enjoyment. Whenever sanitary sewer, water, electricity, gas, cable TV, or telephone lines are installed within the project, which connections serve more than one unit, the owner of each unit served by said connections shall be entitled to the full use and enjoyment of such portions of those connections that service his condominium.

9.3 Dispute Resolution. In the event of a dispute between unit owners with

respect to the repair or rebuilding of any utility connections, or with respect to the sharing of the costs thereof, upon written request by one of such owners addressed to the Association, the matter shall be submitted to the Board of Directors, which shall decide the dispute. The decision of the Board shall be final and conclusive on the parties. If any disputing owner is a member of the Board of Directors, he shall not be entitled to vote on the disputed issue. The remaining non-disputing Board members shall temporarily appoint another owner to serve on the Board solely for the purpose of voting on such dispute.

ARTICLE X

INSURANCE

10.1 Association Insurance. The Association shall obtain and maintain in full force and effect at all times and for the benefit of the condominium owners, the following: (a) adequate public liability insurance; (b) officers and directors liability insurance; (c) workers' compensation insurance; (d) fire and property damage insurance covering the entire project (except the personal property of the owners located within the project) and the encumbrances upon the project or any part thereof as their interests may appear. All insurance obtained by the Association shall meet the requirements of NRS 116.3113.

10.1.1 Adequate fire insurance shall mean coverage in an amount equal to full replacement value (exclusive of land, foundation, excavation and other items normally excluded from coverage), with an "agreed amount" endorsement or its equivalent, if available, or an "inflation guard" endorsement, payable to the Association, subject to the least deductible the insurer will permit or any other deductible the Board deems reasonable.

10.1.2 Insurance obtained by the Association pursuant to this provision shall comply as to form, content, and insurer with the requirements of the encumbrancers. The premiums for said insurance are to be paid out of the maintenance fund, with each condominium unit bearing an equal share of the cost thereof.

10.1.3 All insurance obtained by the Association shall be provided by companies duly authorized to do business in Nevada, and as required by any state or federal entities with which the Community has been qualified.

10.2 Owner Insurance. Each owner should provide adequate insurance, as follows:

10.2.1 Insurance, including insurance for loss of theft, on all personal property located on and within the owner's unit or stored by the owner in or on the common areas and any other portion of the Property.

10.2.2 Insurance for casualty and public liability coverage within each Unit to the extent not covered by the Association's insurance.

10.2.3 Insurance coverage for activities of the owner, not acting for the Association, with respect to the common areas.

10.2.4 Insurance against loss from theft on all personal property.

10.3 Authority to Negotiate Loss Settlements. The Board of Directors is hereby granted the authority to negotiate loss settlements with the appropriate insurance carriers with respect to loss or damage occurring on or to the common areas. Any two (2) members of the Board may sign a loss claim relating to Association insurance, and such signatures shall be binding on all the owners.

ARTICLE XI

NON-SEVERABILITY OF CONDOMINIUM INTEREST AND SUSPENSION OF PARTITION

11.1 Suspension of Right of Severability. No owner shall be entitled to sever, or bring any such action for partition of, (1) his unit from his pro-rated undivided interest in the building in which the owner's unit is located; (2) his interest in the real property under the building in which his unit is located; or (3) his interest in the Association. No such component interest may be severally sold, conveyed, transferred, encumbered, hypothecated, bequeathed, or otherwise dealt with, and any attempt to do so in violation of this provision shall be void and of no effect. The suspension of this right of severability shall in no event extend beyond the period in which the right to partition is suspended under NRS 117.050.

11.2 Suspension of Right of Partition. The right of partition of the common areas is suspended. The project may only be partitioned and sold as a whole upon a showing of the occurrence of any one of the events provided in NRS 117.050.

Additionally, partition may be available upon a showing that six (6) months from the date of any partial or total destruction of the project, a certificate or resolution to rebuild has not been filed of record, or if reconstruction has not actually commenced within said six (6) months. The suspension of the right of partition shall in no event extend beyond the period in which the right to partition is suspended under NRS 117.050. Nothing in this provision shall prevent the partition or division of interests between joint or common owners of one condominium unit.

11.3 Presumption of Entire Condominium Conveyance. Each unit and its appurtenant undivided interest in the Common Areas shall always be conveyed, transferred, devised, encumbered, bequeathed, and otherwise affected only as the entire Condominium.

ARTICLE XII

USE RESTRICTIONS

In addition to all other covenants contained in this Declaration, the use of the Property, each of its condominium units, and the common areas are subject to the following:

12.1 Residential Use Only. All condominiums on the Property shall be used for residential purposes only.

12.2 Business Usage Prohibited. No condominium or any part of the project shall ever be used or caused to be used or allowed or authorized in any way, directly or indirectly for any business, commercial, manufacturing, mercantile, storage, vending, or other such non-residential purposes; provided, however, that this provision shall not prohibit an owner from leasing or renting his unit or permitting its use by his guests.

12.3 Billboards and Signs Prohibited. Except for signs approved by the Board of Directors for the benefit of the entire project, and except for one (1) professional sign not exceeding 12 inches by 18 inches in size advertising a unit for sale or lease, no signs of any kind shall be displayed in the public view on or about the exterior of any unit.

12.4 Owner Structural Changes. No structural alterations to the interior of any Unit shall be made, and no plumbing or electrical work within any bearing or

party walls shall be made by an individual owner without the prior written consent of the Architectural Committee as provided in Article XIII of this Declaration.

12.5 Association Maintenance and Decoration Authority. The Board of Directors, or its duly appointed agent, including the manager, if any, shall have the exclusive right to paint, decorate, repair, maintain and alter or modify the exterior walls, balconies, railings, exterior door surfaces, roof, and all installations and improvements in the common area, and no owner of a condominium shall be permitted to do, or have done, any such work. The approval of the Board of Directors shall be required in writing for the installation of any awnings, sunshades, or screen doors, or any antennae or structures on the roof of any condominium building.

12.6 Children. All unit owners shall be accountable to the remaining owners, their families, visitors, guests, and invitees for the conduct and behavior of their children and any visiting children temporarily residing in or visiting their units.

12.7 Pets. Pets shall be permitted, subject to the Rules and Regulations adopted by the Board.

12.8 Offensive Activities. No owner shall permit or suffer anything to be done or kept upon or in his unit or the common areas that will increase the rate of insurance on the Property. No owner shall obstruct or interfere with the rights of other owners, their families, guests, and invitees, or in any way interfere with the quiet enjoyment by any other owner of his unit by: (1) annoying any other owner with unreasonable noises or otherwise; (2) committing or permitting any nuisance, noxious or offensive activity; or (3) committing any immoral or illegal act. Each owner shall comply with all of the requirements of the Local and State Boards of Health, and with all other governmental authorities with respect to the occupancy and use of the Property.

12.9 Owner Liability. Each owner shall be liable to the Association for any damage to the Association-owned areas or any equipment thereon which may be sustained by reason of the negligence of that owner, his family, guests, or invitees, to the extent that any such damage shall not be covered by insurance.

12.10 Garages. The garages are to be used for the parking of car They are not to be converted to any type of living space or used for recreational or business activities.

12.11 Rubbish. Each owner shall remove all rubbish, trash, and garbage from his unit. Rubbish, trash, and garbage shall not be allowed to accumulate on or within

any unit or the Property. All clothes lines, refuse containers, wood piles, storage areas, and machinery and equipment shall be prohibited upon or in any condominium, unless approved, in writing, by the Architectural Committee.

12.12 Snow and Ice. Snow and ice shall be removed from the Property without the use of any soluble toxic materials, and provisions must be made for maintenance of the siltation trenches and skimmer chambers in the drainage system.

12.13 Prohibited Restrictions. No condominium owner shall execute or file for record any instrument which imposes restrictions upon the sale, leasing, or occupancy of his condominium on the basis of race, color, creed, religion or sex.

12.14 Interval Ownership Prohibited. Legal title to any one condominium may not be held by any more than ten (10) unrelated persons at any one time. As used herein, a husband and wife shall be considered one "person", and "unrelated persons" shall mean persons not related within the third degree of consanguinity. Time-sharing, as defined by any applicable state or local ordinances, is prohibited.

12.15 Rules. The Board, from time to time, may adopt reasonable Rules and Regulations in furtherance of this Declaration, the Articles and Bylaws of the Association. These rules may be enforced as provided in this Declaration.

ARTICLE XIII

ARCHITECTURAL CONTROL COMMITTEE

13.1 Organization. There shall be an Architectural Control Committee comprised of the Board of Directors; provided, however, that the Board may appoint an Architectural Control Committee of three (3) or more members, none of whom need be members of the Board.

13.2 Duties. It shall be the duty of the Architectural Control Committee to consider and act upon any proposals or plans submitted to it pursuant to the terms of this Article, to adopt Architectural Control Committee Rules if it so chooses, to perform other duties delegated to it by the Association, and to carry out all other duties imposed upon it by this Declaration.

13.3 Meetings. The Architectural Control Committee shall meet from time to time as necessary to perform its duties as stated in this Article. The vote or

written consent of any two (2) members shall constitute an act by the Committee unless the unanimous decision of its members is otherwise required by this Declaration. The Architectural Control Committee may charge a filing fee to be used to pay an architect, who may or may not be a member of the Architectural Control Committee, to review any submitted plans and specifications. The Board may reimburse members for reasonable expenses incurred by them in the performance of any Architectural Committee function.

13.4 Architectural Control Committee Rules. The Architectural Control Committee may prepare and promulgate "Architectural Control Committee Rules" containing guidelines and review procedures on behalf of the Association. The Architectural Control Committee Rules shall be those of the Association, and the Architectural Control Committee shall have sole and full authority to prepare and to amend the Architectural Control Committee Rules, provided the Architectural Control Committee Rules are otherwise in compliance with the Articles, the Bylaws and this Declaration. The Architectural Control Committee shall make any Architectural Committee Rules available to Owners.

13.5 Approval by the Architectural Control Committee. No owner may make or commence any structural addition, structural alteration, or improvement on the Property or in his unit, including, without limitation, the alteration or construction of a building, fence, wall, or structure, or the placement, erection, or alteration of any Limited Common Areas, without the prior written consent of the Architectural Control Committee. The Architectural Control Committee and any of its members may consult with knowledgeable outsiders with respect to any plans, drawings, specifications, or any other proposal submitted to the Architectural Control Committee.

13.6 Requests for Approval. Any request by a unit owner for approval by the Architectural Control Committee for any improvements or work that requires Architectural Control Committee approval must be submitted in writing to the Architectural Control Committee. Any such submittal shall contain and set forth such information and in such detail as required by the Architectural Control Committee to reasonably inform the Architectural Control Committee of the proposed work of improvement for the purpose of determining its compliance with the terms and provisions of this Article and the propriety of granting or denying any such application. All improvements or modifications, if approved by the Architectural Control Committee, shall be undertaken, prosecuted and completed in full and timely compliance with all applicable zoning laws, building codes, and all other applicable laws, ordinances and regulations relating to the construction, use and occupancy of

the Improvements.

13.7 The Architectural Control Committee shall answer any written request for approval within sixty (60) days after receipt of the request. Any consent or approval by the Board or Architectural Control Committee shall be in writing. The failure of the Architectural Control Committee to answer the request within this time shall not constitute consent or approval by the Architectural Control Committee to the proposed action. Any such request shall be reviewed in accordance with any Architectural Committee rules then in effect.

13.8 Limitations on Improvements. Subject to the provisions of this Article, an owner:

13.8.1 May make any improvements or alterations to the interior of his unit that do not impair or lessen the structural integrity, mechanical systems, or support of any portion of the Property or Community, or otherwise alter, in any way, the condition of any component contained within the framing of the structure, provided that any such improvements or alterations to the interior of the unit do not result in a violation, in and of itself or as a result of the use thereof, of any other term or provision of this Declaration.

13.8.2 May not change the appearance of the Common Areas, the exterior appearance of a unit, any component that may be seen from the exterior of the building, or any other portion of the Project, or make any change or modification to that Owner's Unit, such as replacing carpeting with hardwood floors, without permission of the Board or the Architectural Control Committee, as applicable.

13.8.3 After acquiring an adjoining Unit, may not remove or alter any intervening partition or create apertures therein.

13.9 Right of Inspection. Any member or authorized consultant of the Board or the Architectural Control Committee, or any authorized officer, manager, employee or other agent of the Association, may enter upon any unit, as provided in paragraph 6.5.4, without being deemed guilty of trespass, in order to inspect any structural addition, alteration or improvement constructed or under construction in the Unit to determine whether the work has been or is being completed in compliance with the plans and specifications approved by the Board or the Architectural Control Committee. In case of an emergency, no request or notice is required and the right of entry shall be immediate, and with as much force as is reasonably necessary to gain entrance, whether or not the Owner is present at the time.

13.10 Effect on Insurance. Any additions, alterations, and improvements to the units and common areas shall not, except by prior approval of the Board, cause any increase in the premiums of any insurance policies carried by the Association or by the owners of any units other than those affected by the change.

13.11 Limitation on Liability of Architectural Control Committee. Provided that the Architectural Control Committee, or a particular member of the Architectural Control Committee, has acted in good faith on the basis of information as the Architectural Control Committee or the member, as the case may be, may possess, then neither the Architectural Control Committee nor any of its members shall be liable to the Association, to any Owner, or any other person for any damage, loss, or prejudice suffered or claimed on account of: (a) the approval or disapproval of any plans, drawings, and specifications, whether defective or not; or (b) the construction or performance of any work, whether or not pursuant to approved plans, drawings, and specifications.

13.12 Discretion of the Board of Directors and Architectural Control Committee. Except as may be expressly provided in this Declaration, any consent or approval of the Architectural Control Committee that is required under the provisions of this Article may be granted or withheld in the sole and absolute discretion of the Architectural Control Committee. In that regard, the granting or withholding of such consent or approval shall not be subject to any objective standards of "reasonableness" or otherwise. The approval of or consent to any matter shall not be deemed to be a waiver of the right to disapprove the same or similar matters in subsequent requests for consents or approvals from the same or other parties.

ARTICLE XIV

DESTRUCTION OF THE PROJECT OR ITS ELEMENTS

14.1 Partial Destruction of Common Areas. In the event of partial destruction of the common areas, the Association shall restore and repair the affected area to its former condition as promptly as practicable and in a lawful and workman-like manner.

14.1.1 Partial destruction shall mean any destruction that is less than that defined as total destruction in this Article.

14.1.2 The proceeds of any insurance shall be made available for such purpose subject to prior rights of beneficiaries of deeds of trust or mortgagees whose interests may be protected by said policies. In the event that the amount available from the proceeds of such insurance policies for such partial reconstruction shall be inadequate by more than the policy's deductible, the condominium owners shall proceed with such partial reconstruction unless by a three-fourths (3/4) vote of all the Owners, the Owners vote not to proceed with partial reconstruction. In the absence of a three-fourths (3/4) vote, a special assessment shall be levied against the owners of the common area partially destroyed upon the basis of the ratio of the square footage of the floor area of the unit to be assessed to the total square footage of floor area of all units which are to be assessed. In the event of the three-fourths (3/4) determination by the owners that it would not be in their best interests to proceed with the same, the owners may, in their discretion proceed as provided in this Article.

14.2 Total Destruction of Common Areas. In the event of the total destruction of the common areas ("total") being defined as sixty percent (60%) of the units, or a lesser percentage if the condominium owners, by a three-fourths (3/4) vote, have so agreed prior to the destruction, the owners shall have authority to determine whether said improvements shall be rebuilt, or whether said project shall be sold. Unless there is a determination by a three-fourths (3/4) vote not to rebuild, the necessary funds shall be raised as provided in this Article and the Association shall prepare the necessary documents to effect such reconstruction as promptly as practicable, in a lawful and workmanlike manner.

14.3 Destruction of Individual Unit. In the event of total or partial destruction of any individual unit not affecting any other unit or any portion of the common areas, it shall be the responsibility of that unit's owner to rebuild the unit using any insurance proceeds available and allocable for said purposes, and the same shall be done as promptly as practicable in a lawful and workmanlike manner. This section shall likewise apply unless there is a determination not to rebuild after partial or total destruction as defined in this Article.

14.4 Lapse of Covenant Against Partition. If, after eighteen months from the date of any partial or total destruction as defined in this Article, reconstruction be not actually commenced, the covenant against partition set forth in this Declaration shall terminate and be of no further force and effect.

14.5 Determination Not to Rebuild. In the event of a determination not to rebuild after partial or total destruction as defined in this Article, the Association

may: (1) bring an action for partition of the entire Project as provided in NRS 117.050; or (2) if, by a two-thirds (2/3) vote of members entitled to vote in person or by proxy the Association agrees, it may proceed to sell the entire project for the benefit of all the owners at public or private sale for the highest and best price obtainable, either in its damaged condition, or after the damaged structure has been razed. For the purpose of implementing this section, every owner of a condominium within the project shall be deemed to have consented to, authorized, and granted to the Association his, her, or its respective irrevocable power of attorney upon the delivery to such owner of his instrument of title.

14.5.1 Distribution of Proceeds. The net proceeds of any sale ordered by decree of court or by decision of the Association and the proceeds, if any, of insurance carried by the Association as a whole on the Property, plus any reserves, interest, and other funds, shall be divided among the owners of the affected units according to the respective fair market values of the units at the time of the destruction as determined by an independent appraisal to be conducted by an M.A.I. Appraiser selected by the Board, whose appraisal shall be final. The balance then due on any individual encumbrance executed in good faith and for value shall first be paid before the distribution of any proceeds to the owner whose condominium is still encumbered.

14.5.2 If the Project is destroyed or razed, it may be rebuilt only in conformity with the original recorded plans; otherwise, a new tract map and condominium plan shall be filed, approved and recorded. A new tract map and condominium plan may be filed and recorded only upon prior written approval of three-fourths (3/4) of the members entitled to vote.

ARTICLE XV

AMENDMENTS

Except as otherwise provided in NRS 116.2117 and in this Declaration, each provision and all of the provisions of this Declaration may be modified, amended, added to, or deleted from by a further Declaration or Agreement, in writing, properly executed and acknowledged by a fifty-one per cent vote of the members of the Association, and by appropriate governmental authority if such amendment would affect the obligation to maintain the common areas. Any such amendments shall be effective only upon recordation in the office of the Recorder of Washoe County. The prohibition against interval ownership cannot be amended deleted by the owners without the prior approval of Washoe County.

ARTICLE XVI

TERM OF DECLARATION: COMPLIANCE WITH THE RULES AGAINST PERPETUITIES AND WITH THE RULE AGANST RESTRAINT OF ALIENATION

The covenants contained in this Declaration shall run with the land and shall be binding on all parties and all persons claiming under them until January 1, 2020, after which time the covenants shall be automatically extended for successive periods of twenty-one (21) years, unless an instrument executed by not less than three-fourths (3/4) of the members of the Association entitled to vote shall be recorded canceling and terminating this Declaration on or after January 2, 2020.

ARTICLE XVII

CONDEMNATION

In the event of a taking by condemnation or by eminent domain of all or any part of the Community, the award made for such taking and the disbursement of the proceeds of that award shall be undertaken in accordance with NRS 116.1107. The Association is designated to represent the Owners in all proceedings (including negotiations and settlements) related to any condemnation, and each Owner appoints the Association as attorney-in-fact for this purpose. The proceeds of any settlement related to any condemnation of the Project shall be paid to the Association for the benefit of the Owners, as their interests may appear.

ARTICLE XVIII

MISCELLANEOUS PROVISIONS

18.1 Liberal Construction. All of the provisions of this Declaration shall be liberally construed to effectuate and promote the purpose of creating a uniform plan for the operation of McCloud Condominiums. No breach of any provision of this Declaration nor the enforcement of any assessment lien as provided in this Declaration shall defeat or render invalid the lien of any mortgage or deed of trust made in good faith and for value, but all of the provisions shall be binding upon and shall be effective against any owner whose title is derived through foreclosure or trustee's sale or otherwise.

18.2 Independent and Severable Provisions. The provisions of this

Declaration shall be deemed independent and severable, and the invalidity or partial invalidity or enforceability of any of this Declaration's provisions shall not affect the validity of the remaining provisions.

18.3 Notice of Transfer. Immediately after any transfer of title to any condominium, the transferring owner shall so advise the Board, giving the name and address of the new owner, and the effective date of the transfer.

18.4 Amendments to the Articles and Bylaws. The owners shall have the right to adopt reasonable amendments to the Articles and Bylaws. The Articles shall be amended by the vote or written assent of a majority of the Board and a majority of the Association members. The Bylaws shall be amended by the vote or written assent of a majority of the members of the Association. To the extent that any provision of the Articles or Bylaws that are or may be adopted by the owners shall conflict with the provisions of this Declaration, the provisions of this Declaration shall control.

18.5 Violations and Nuisance. Every act or omission by which a covenant, condition, or restriction of this Declaration is violated in whole or in part is considered a nuisance and may be enjoined or abated, whether or not the relief sought is for negative or affirmative action.

18.6 Violation of Law. Any violation of any state, municipal, or local law, ordinance, or regulation pertaining to the ownership, occupation, or use of any portion of the Property is a violation of this Declaration and subject to any or all of the enforcement procedures provided in this Declaration.

18.7 Cumulative Remedies. Each remedy provided in this Declaration is cumulative and not exclusive.

18.8 Nonwaiver. The failure to enforce the provisions of any covenant, condition, or restriction contained in this Declaration shall not constitute a waiver of any right to enforce any such provisions or any other provisions of this Declaration.

18.9 Notices. Unless this Declaration provides otherwise, all notices required under the provisions of this Declaration shall be as follows:

18.9.1 All notices to the Association or to the Board shall be sent by regular mail, registered mail, or certified mail, return receipt requested, addressed to the Board at the address of the Manager, or to such other place as the Board may designate from time to time by notice in writing to the Owners of all of the Units.

Until the Owners are notified otherwise, all notices to the Association or to the Board shall be addressed to:

McCloud Condominium Homeowners' Association
c/o Associated Management, Inc. 931 Tahoe Blvd., Ste 2, Incline Village NV 89451

18.9.2 All notices by the Association or the Board to any Owner shall be sent by regular mail, by registered mail, or certified mail, return receipt requested, to such Owner's Unit address or to such other address as may be designated by such Owner from time to time, in writing, to the Board.

18.9.3 All notices shall be deemed to have been received within seventy-two (72) hours after the mailing thereof, except notices of changes of address, which shall be deemed to have been given when actually received.

18.10 Termination of Former Owner's Liability for Assessments. Upon the conveyance, sale, assignment, or other transfer of a Unit to a new Owner, the transferring Owner shall not be liable for any Assessments levied with respect to such Unit after notification to the Association of such transfer and payment of any transfer fee that may be required. No person, after the termination of his status as an Owner and prior to his again becoming an Owner, shall incur any of the obligations or enjoy any of the benefits of an Owner under this Declaration.

18.11 Singular Includes Plural. Unless the context requires otherwise, the use of the singular in this Declaration shall include the plural, and the use of the plural shall include the singular.

18.12 Gender. Unless the context requires otherwise, the exclusive use of and reference to the masculine, feminine, or neuter in this Declaration is for convenience only, and shall each include the masculine, feminine, and neuter.

18.13 Captions. All captions or titles used in this Declaration are intended solely for convenience of reference and shall not affect that which is set forth in any of the provisions or of any paragraph.

18.14 This Declaration Supersedes Prior Declaration. This Declaration supersedes that certain Condominium Declaration of McCloud Condominiums, dated April 29, 1982. In the event of any conflict between the 1982 Declaration and this Declaration, the provisions of this Declaration shall control.

Certification

We, the undersigned officers of McCloud Condominium Homeowners' Association, hereby certify, under penalty of perjury, that the Declaration of Covenants, Conditions and Restrictions set forth herein was duly adopted with the vote or written consent of Members constituting at least seventy-five percent (75%) of the total voting power held by the membership of the Association.

McCLOUD CONDOMINIUM HOMEOWNERS' ASSOCIATION

Dated: Nov 17, 2007 By: _____

Print Name: Richard Edward Byfield

Its: President

Dated: Nov 17, 2007 By: _____

Print Name: KAREN D. [illegible]

Its: Secretary

Subscribed and sworn to before me

this 17 day of November, 2007.

_____ *SEAL:*

NOTARY

J. TARANTINO
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 98-49428-2 - Expires November 7, 2010

FILED
Electronically
2015-09-17 12:46:35 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5146157 : csulezic

EXHIBIT "2"

EXHIBIT "2"

KERN & ASSOCIATES, LTD.
ATTORNEYS AT LAW

GAYLE A. KERN, ESQ.
gaylekern@kernltd.com

KAREN M. AYARBE, ESQ.
karenayarbe@kernltd.com

5421 KIETZKE LANE, SUITE 200
RENO, NEVADA 89511

TELEPHONE: (775) 324-5930
FACSIMILE: (775) 324-6173

April 4, 2013

Via email [djdezzani@yahoo.com] and first class mail

David and Rochelle Dezzani
David J Dezzani Trust
13 Calle Altea
San Clemente, CA 92673

Re: *McCloud Condominium Association*
939 Incline Way

Dear Mr. and Mrs. Dezzani:

I represent McCloud Condominium Homeowners Association. The Board requested I respond to your email request to review communications and/or information related to another unit and Board minutes. First, it is my understanding you have been provided the requested minutes. If there are additional minutes you are requesting, please advise.

Further, with respect to your request for owner names, information or communications, the information Ms. Conway provided in her March 21, 2013 email to you is correct. All information related to another unit's owner is confidential pursuant to Chapter 116 of the Nevada Revised Statutes. *See* NRS 116.31175. The statute prohibits the Association from disclosing information relating to another unit, regardless of the reason for which it is requested. *Id.*

The Board understands your frustration and appreciates you are addressing the matter of the unapproved deck extension that wrongfully encroaches in the common area. There is no question the extension exists in the common area, as do the other extensions. The common area is owned in common by *all* owners of the community. While it is unfortunate the issue of deck extensions and the wrongful taking of common area was not addressed earlier, the Association has properly taken action to protect the integrity of the common area. There is no question common area is not permitted to be given to any one owner for his/her exclusive use and enjoyment, thereby reducing the common area for the other homeowners. It is the wrongful conversion of common area that is the problem. Simply put, there is no lawful transfer of common area to individual owners absent a vote of the membership. *See* NRS 116.3112.

My client has deliberated over this issue at length. It was done at meetings with frequent homeowner involvement. The Board feels the solution and options provided are fair and equitable and appropriately address the preservation of the common area.

Very truly yours,

KERN & ASSOCIATES, LTD.

Gayle A. Kern

c: Client

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Electronically
2015-09-17 12:46:35 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5146157 : csulezic

EXHIBIT "3"

EXHIBIT "3"

KERN & ASSOCIATES, LTD.
ATTORNEYS AT LAW

GAYLE A. KERN, ESQ.
gaylekern@kernltd.com

KAREN M. AYARBE, ESQ.
karenayarbe@kernltd.com

May 10, 2013

Via email only djdezzani@yahoo.com

David and Rochelle Dezzani
13 Calle Altea
San Clemente, CA 92673

Re: *McCloud Condominium Association*
Unit #211

Dear Mr. and Mrs. Dezzani:

The Board of Directors requested I respond to your various communications. First, the Board has granted your request to have the hearing re-scheduled. The next meeting is August 23, 2013. Therefore, the hearing will be continued to August 23, 2013 at 1:00 p.m. With respect to the upcoming hearing on the alleged violation of the governing documents and encroachment of the common area, this will acknowledge receipt of a certified letter received May 9, 2013. This communication will be placed in your file and will be considered by the Board when it deliberates following the hearing to be conducted on August 23, 2013. We acknowledge your request that the hearing conducted on August 23, 2013 be an open hearing rather than one in executive session as allowed by NRS 116.31085(4). Finally, this will acknowledge your May 6, 2013 request for documents of the Association pursuant to NRS 116.31175. We are assembling such documents responsive to your requests, if any there be and to the extent available for review by another unit's owner.

If you have any further communications, the Board requests that you communicate with me. We appreciate your anticipated cooperation. If I have failed to address any of your communications, please advise me.

Very truly yours,

KERN & ASSOCIATES, LTD.

Gayle A. Kern

c: Client

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2015-12-02 10:24:15 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 5259062 : mcholico

EXHIBIT "3"

EXHIBIT "3"

FILED
Electronically
2015-11-19 11:12:50 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 5243232

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

DAVID DEZZANI and ROCHELLE DEZZANI,

Plaintiffs,

vs.

KERN & ASSOCIATES, LTD; GAYLE KERN; KAREN HIGGINS; JOHN DOES 1-10; JANE DOES 1-10; DOE BUSINESSES 1-5;

Defendants.

_____/

Case No.: CV15-00826

Dept. No: 10

ORDER

Presently before the Court is DEFENDANTS, KERN & ASSOCIATES, LTD. AND GAYLE KERN'S MOTION TO DISMISS COMPLAINT ("the Motion") filed by Defendants GAYLE A. KERN, DBA KERN & ASSOCIATES, LTD. ("Kern") on September 17, 2015. Plaintiffs DAVID DEZZANI and ROCHELLE DEZZANI (collectively "the Plaintiffs") filed a MEMORANDUM IN DEFENDANTS, KERN AND GAYLE KERN'S MOTION[1] ("the Opposition") on October 6, 2015. Kern filed DEFENDANTS, KERN & ASSOCIATES, LTD.

[1]. The Reply asserts the Opposition was required to be filed no later than October 5, 2015, pursuant to WDCR 12(2). The Reply further argues the Opposition should not be considered by the Court for failure to contain a valid certificate of service. The Court finds refusing to consider the Opposition would be contrary to the strong policy in the State of Nevada to resolve cases on their merits. *Kahn v. Orme*, 108 Nev. 510, 516, 835 P.2d 790, 794 (1992); *Yochum v. Davis*, 98 Nev. 484, 487, 653 P.2d 1215, 1217 (1982) (holding "the court must give due consideration to the state's underlying basic policy of resolving cases on their merits wherever possible."). Accordingly, the Court will consider the Opposition.

AND GAYLE KERN'S REPLY IN SUPPORT OF MOTION TO DISMISS COMPLAINT on October 12, 2015. Kern submitted the matter for the Court's consideration on October 13, 2015.

The Plaintiffs filed a COMPLAINT ("the Complaint") on May 4, 2015. The Complaint alleges four causes of action for various violations of Chapter 116 of the Nevada Revised Statutes. The Complaint alleges Kern engaged in retaliatory action against the Plaintiffs. This case arises out of a dispute between the Plaintiffs and the McCloud Condominium Homeowner's Association ("the HOA"). The Plaintiffs' property contains a rear deck extended from original dimensions by a previous owner. The HOA cited the Plaintiffs for a violation indicating the deck extension was contrary to the Covenants Conditions and Restrictions ("CC&Rs") of the HOA. Kern engaged in correspondence between the Plaintiffs and the HOA as the HOA's counsel. A hearing regarding the violation was conducted and a RESULT OF HEARING was issued by the HOA on September 5, 2014. At all times relevant to this matter Kern was acting as an attorney for the HOA.

The Motion seeks an order from the Court dismissing the Complaint as to Kern pursuant to NRCP 12(b)(1), NRCP 12(b)(5), NRCP 12(h)(3), and NRS 38.310. The Motion alleges the Plaintiffs have failed to assert any claims against Kern for which relief may be granted because there is no theory of liability by which Kern could be independently liable to the Plaintiffs. The Motion asserts, as a matter of law, no cause of action can be asserted against her because she was acting as an attorney for the HOA and owed no duty to Plaintiffs in their individual capacities. Any communication between Kern and the Plaintiffs was communicated on behalf of the HOA, not for the benefit of the Plaintiffs.

The Opposition contends Kern mischaracterizes the claims as those which required privity of contract. The Opposition asserts NRS 116.3118 authorizes civil complaints against agents of an association. The Opposition asserts Kern admitted to being an agent of the HOA and therefore can be liable for retaliatory action. The Reply contends Kern cannot be liable for actions taken solely in connection with her representation of the HOA.

N.R.C.P. 12(b)(5) provides that a defendant may make a motion for dismissal on the grounds of failure to state a claim upon which relief can be granted. Nevada is a notice-pleading jurisdiction, and its "courts liberally construe pleadings to place into issues matters which are

fairly noticed to the adverse party." *Hay v Hay,* 100 Nev. 196, 198, 678 P.2d 672, 674 (1984). The Court must construe the pleadings liberally and draw every fair inference in favor of the non-moving party when considering a motion to dismiss on the grounds of failure to state a claim upon which relief can be granted. *Hampe v. Foote*, 118 Nev. 405, 408, 47 P.3d 438, 439 (2002), citing *Blackjack Bonding v. Las Vegas Mun. Ct.,* 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000).

The Court finds there is no basis in law or fact to support the causes of action alleged against Kern. The Court finds to permit such causes of action against Kern would result in a chilling effect on individuals' ability to hire and retain counsel. NRS 116.3118 does not permit attorneys to be personally liable for actions taken on behalf of an association.

IT IS HEREBY ORDERED the DEFENDANTS, KERN & ASSOCIATES, LTD. AND GAYLE KERN'S MOTION TO DISMISS COMPLAINT is GRANTED.

The Court notes the Plaintiffs filed a MOTION TO POSTPONE AND/TEMPORARILY STAY ("the Motion for Stay") on October 20, 2015. Kern filed DEFENDANTS, KERN & ASSOCIATES, LTD. AND GAYLE KERN'S OPPOSITION TO MOTION TO POSTPONE AND TEMPORARILY STAY PROCEEDINGS ("the Opposition to Stay") on October 22, 2015. The Plaintiff filed a REPLY IN SUPPORT OF MOTION TO POSTPONE AND/OR TEMPORARILY STAY PROCEEDINGS on November 5, 2015. The Plaintiffs submitted the matter for the Court's consideration on November 10, 2015.

The Motion for Stay seeks an order from the Court staying all proceedings until December 1, 2015, based upon the medical treatment of Plaintiff Mr. Dezzani. The Opposition to Stay contends there are no grounds on which this Court may render a decision to stay this matter. The Opposition to Stay asserts the Plaintiffs had ample opportunity to secure local counsel to ensure all proceedings in this matter could be conducted in a timely fashion. The Opposition to Stay further points out the Plaintiffs have not made any specified requests regarding what should be stayed.

The Court finds the Plaintiffs have not provided legal authority warranting a stay, or what proceedings the Plaintiffs seek to have stayed. Further, the Court finds Defendant KAREN HIGGINS has not been served in this matter. The 120 days for service has lapsed. NRCP 4(i).

IT IS HEREBY ORDERED the MOTION TO POSTPONE AND/TEMPORARILY STAY is denied. IT IS FURTHER ORDERED the above-captioned matter is DISMISSED in its entirety.

DATED this 19 day of November, 2015.

ELLIOTT A. SATTLER
District Judge

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 19 day of November, 2015, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

David and Rochelle Dezzani
17 Camino Lienzo
San Clemente, CA 92673

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 19 day of November, 2015, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

Gayle Kern, Esq.

Sheila Mansfield
Administrative Assistant

F I L E D
Electronically
2015-12-02 10:24:15 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 5259062 : mcholico

EXHIBIT "4"

EXHIBIT "4"

2010
GAYLE A. KERN, ESQ.
Nevada Bar No. 1620
KERN & ASSOCIATES, LTD.
5421 Kietzke Lane Suite 200
Reno, Nevada 89511
Telephone: (775) 324-5930
Telefax: (775) 324-6173
E-mail: gaylekern@kernltd.com

Attorneys for Kern & Associates, Ltd. and Gayle Kern

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

DAVID DEZZANI and ROCHELLE DEZZANI,

Plaintiffs,

vs.

KERN & ASSOCIATES, LTD; GAYLE KERN; KAREN HIGGINS; JOHN DOES 1-10; JANE DOES 1-10; DOE BUSINESSES 1-5,

Defendants.
_____/

CASE NO.: CV15-00826

DEPT. NO.: 10

AFFIDAVIT OF GAYLE A. KERN, ESQ. IN SUPPORT OF MOTION FOR ATTORNEY'S FEES & COSTS

STATE OF NEVADA)
: ss.
COUNTY OF WASHOE)

I, Gayle A. Kern, being first duly sworn do hereby swear under penalty of perjury as follows:

1. I am licensed to practice law in the state of Nevada.

2. Kern & Associates, Ltd. and Gayle Kern ("Kern") have been required to retain the services of Kern & Associates, Ltd. for the purpose of defending Plaintiffs' Complaint.

3. Pursuant to NRS 18.010, NRCP 11 and NRS 116.4117, Kern is entitled to reasonable attorney's fees incurred herein. A compilation of all fees and costs is attached hereto. Redaction has been made of any privileged communications.

4. I have been in practice for over 31 years. I have a general civil practice and have been engaged in all forms of litigation, bankruptcy, corporate and real property law. I provide all aspects of legal services upon request to my clients including interpretation of local, state and federal laws.

5. I am a past President of the Washoe County Bar Association, member of the Nevada State Bar, and California State Bar, member of the Real Estate Section of the Nevada State Bar. I serve on the Community Association Institute's Legislative Action Committee, which participates in review and comment on legislation affecting common-interest communities and regulations promulgated by the Ombudsman and Nevada Real Estate Division. I was a judicial law clerk for the late Edward C. Reed, Jr., U.S. District Court Judge. I was a Barrister with Inns of Court. I currently serve on the Bench/Bar Committee of the Second Judicial District Court.

6. Veronica Carter is an associate at Kern & Associates, Ltd. Ms. Carter is licenced to practice law in the State of Nevada, effective October 21, 2015. I bill Ms. Carter's services at an hourly rate of $250. This reduced hourly rate is reasonable for an associate.

7. The fees and costs billed in this matter are reasonable and appropriate. The time billed through November 25, 2015, was 36.52 hours, with hourly rates of $300.00 for my services and $250.00 for Ms. Carter's services, totaling $10,580.00. Costs through November 19, 2015, are itemized in the amount of $352.34, for an amount totaling $10,932.34.

8. These fees are reasonable and should be awarded. My hourly rate is reasonable given my experience practicing law in general.

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document filed in the above-entitled case does not contain the social security number of any person.

DATED this 30th day of November, 2015.

GAYLE A. KERN

SUBSCRIBED AND SWORN to before me
this 30th day of November, 2015.

NOTARY PUBLIC

TERESA A. GEARHART
NOTARY PUBLIC
STATE OF NEVADA
My Commission Expires: 09-10-18
Certificate No: 94-0132-2

Nickname	Kern/McCloud/Dezzani | Dezzani v.		
Full Name	Gayle A. Kern, Ltd. dba Kern & Associates, Ltd.		
Address			
Phone 1		Phone 2	
Phone 3		Phone 4	
In Ref To	Dezzani v. Kern & Associates, Ltd./Gayle Kern, et al. Case No. CV15-00826		
Fees Arrg.	By billing value on each slip		
Expense Arrg.	By billing value on each slip		
Tax Profile	Exempt		
Last bill			
Last charge	11/25/2015		
Last payment		Amount	$0.00

Date / ID	Attorney / Task	Rate / Markup %	Hours / DNB Time	Amount / DNB Amt	Total
9/2/2015	GAK	300.00	1.50	450.00	Billable
145296	Services				
	Reviewed Dezzani Complaint and case file, including communications with Dezzani and John Rogers.				
9/3/2015	GAK	300.00	4.00	1,200.00	Billable
145356	Services				
	Reviewed pleadings and communications with Dezzani and Rogers, reviewed Ombudsman documents, Association records pertaining to the deck extension; began drafting motion to dismiss.				
9/4/2015	GAK	300.00	4.00	1,200.00	Billable
145436	Services				
	Researched third party causes of action against attorney; drafted Motion to Dismiss Complaint.				
9/8/2015	GAK	300.00	2.00	600.00	Billable
145437	Services				
	Drafted Rule 11 letter in response to Complaint.				
9/9/2015	GAK	300.00	0.42	125.00	Billable
145499	Services				
	Revised Motion to Dismiss and list of Exhibits; researched Chapter 38 mediation cases.				
9/17/2015	GAK	300.00	0.40	120.00	Billable
145762	Services				
	Review email from Dezzani; draft and send response; provide a copy to Chris Phipps.				

Kern/McCloud/Dezzani:Gayle A. Kern, Ltd. dba Kern & Associates, Ltd. (continued)

Date / ID	Attorney / Task	Rate / Markup %	Hours / DNB Time	Amount / DNB Amt	Total
9/21/2015	GAK	300.00	0.70	210.00	Billable
145798	Services				
	Review yet another email from Dezzani; draft response; provide same to Mr. Phipps and my client.				
10/9/2015	GAK	300.00	5.00	1,500.00	Billable
146714	Services				
	Researched ex parte communications with judge, applicability of procedural rules to pre se litigants, motion to dismiss standard, pleading requirements, attorney liability to third party; began draft of Dezzani opposition to motion to dismiss.				
10/12/2015	GAK	300.00	1.20	360.00	Billable
146712	Services				
	Further revisions and finalize reply to opposition to motion to dismiss.				
10/12/2015	GAK	300.00	4.00	1,200.00	Billable
146716	Services				
	Continued draft of reply to opposition to motion to dismiss; researched NRS 116 applicability to attorneys for associations.				
10/13/2015	GAK	300.00	0.20	60.00	Billable
146731	Services				
	Prepare Request for Submission.				
10/20/2015	GAK	300.00	3.50	1,050.00	Billable
147030	Services				
	Read David Dezzani's Motion to Postpone and Temporarily Stay; researched authority of court to grant stay and any authority for a stay due to illness; began draft of Opposition to Motion.				
10/21/2015	VAC	250.00	1.00	250.00	Billable
147135	Services				
	Dezzani - Drafted Opposition to Motion for Stay.				
10/28/2015	GAK	300.00	0.30	90.00	Billable
147337	Services				
	Review additional unlawful emails by Dezzani.				
11/13/2015	GAK	300.00	0.30	90.00	Billable
147828	Services				
	Review Request for Submission notice of errata and correction filed by Dezzani.				

Kern/McCloud/Dezzani:Gayle A. Kern, Ltd. dba Kern & Associates, Ltd. (continued)

Date / ID	Attorney / Task	Rate / Markup %	Hours / DNB Time	Amount / DNB Amt	Total
11/19/2015 147988	GAK Services Review Order (dismissing case in its entirety); prepare Notice of Entry of Order; draft Memorandum of Costs.	300.00	0.50	150.00	Billable
11/23/2015 148192	VAC Services Reviewed Order dismissing case; conducted research for motion for attorney's fees and costs; began drafting Motion for Attorneys Fees and Costs.	250.00	4.00	1,000.00	Billable
11/24/2015 148193	VAC Services Continued draft of Motion for Attorneys Fees and Costs; drafted Affidavit in support.	250.00	2.50	625.00	Billable
11/25/2015 148240	GAK Services Finalize all pleadings.	300.00	1.00	300.00	Billable
TOTAL	Billable Fees		36.52		$10,580.00

Date / ID	Attorney / Expense	Price / Markup %	Quantity	Amount	Total
9/17/2015 145785	TAG Advanced Costs Second Judicial District Court - Electronic Filing Fee for MTD	243.00	1.000	243.00	Billable
9/30/2015 146160	TAG Photocopies Photocopy Charges	0.20	369.000	73.80	Billable
9/30/2015 146194	TAG Postage Postage Charges	24.34	1.000	24.34	Billable
10/31/2015 147098	TAG Photocopies Photocopy Charges	0.20	30.000	6.00	Billable
10/31/2015 147127	TAG Postage Postage Charges	1.69	1.000	1.69	Billable

Kern/McCloud/Dezzani:Gayle A. Kern, Ltd. dba Kern & Associates, Ltd. (continued)

Date / ID	Attorney / Expense	Price / Markup %	Quantity	Amount	Total
11/19/2015 148038	TAG Photocopies Photocopy Charges	0.20	14.000	2.80	Billable
11/19/2015 148039	TAG Postage Postage Charges	0.71	1.000	0.71	Billable
TOTAL	Billable Costs				$352.34

Calculation of Fees and Costs

	Amount	Total
Fees Bill Arrangement: Slips By billing value on each slip.		
Total of billable time slips	$10,580.00	
Total of Fees (Time Charges)		$10,580.00
Costs Bill Arrangement: Slips By billing value on each slip.		
Total of billable expense slips	$352.34	
Total of Costs (Expense Charges)		$352.34
Total new charges		$10,932.34
New Balance Current	$10,932.34	
Total New Balance		$10,932.34

F I L E D
Electronically
2015-12-02 10:27:38 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 5259070

Return Of NEF

Recipients

GAYLE KERN, ESQ. - Notification received on 2015-12-02 10:27:37.868.

****** IMPORTANT NOTICE - READ THIS INFORMATION *****

PROOF OF SERVICE OF ELECTRONIC FILING

A filing has been submitted to the court RE: CV15-00826

Judge:

HONORABLE ELLIOTT A. SATTLER

Official File Stamp:	12-02-2015:10:24:15
Clerk Accepted:	12-02-2015:10:26:53
Court:	Second Judicial District Court - State of Nevada Civil
Case Title:	DAVID DEZZANI ETAL VS. KERN & ASSOC (D10)
Document(s) Submitted:	Mtn for Attorney's Fee - **Continuation - **Continuation - **Continuation - **Continuation
Filed By:	Gayle Kern

You may review this filing by clicking on the following link to take you to your cases.

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The following people were served electronically:

GAYLE A. KERN, ESQ. for GAYLE A. KERN, KERN & ASSOCIATES, LTD

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

KAREN HIGGINS

ROCHELLE DEZZANI

DAVID DEZZANI

David and Rochelle Dezzani
17 Camino Lienzo
SanClemente, CA 92673
(808) 291-2302

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

DAVID DEZZANI and
ROCHELLE DEZZANI,
Plaintiffs

vs.

KERN &ASSOCIATES, LTD; GAYLE KERN;
KAREN HIGGINS; JOHN DOES 1-10;
JANE DOES 1-10; DOE BUSINESSES 1-5
_____/

Case No. CV15 00826
Dept. No. 10

MEMORANDUM OF ANSWERING POINTS AND AUTHORITIES IN OPPOSTION TO MOTION FOR ATTORNEY'S FEES AND COSTS; COUNTER-AFFICAVIT AND AFFIRMATION

After obtaining an ORDER granting dismissal of Plaintiffs' Complaint, two of the defendants, self-identified as "Kern & Associates, Ltd. and Gayle Kern ("Kern")", have filed a motion, purportedly "by and through their counsel, Kern & Associates, Ltd.", asking this Court to award them nearly $11,000, for "incurred attorneys fees and costs defending this action". (MOTION FOR ATTORNEY'S FEES AND COSTS, p.1:17-20).

The MOTION for an award of attorney's fees must be denied, especially in light of the fact that defendants Kern, like plaintiffs herein, were self-represented throughout this matter and, as self-represented parties, are not entitled to be awarded attorney's fees for the following reasons:

I. SELF-REPRESENTED PARTIES, INCLUDING ATTORNEYS WHO CHOOSE TO REPRESENT THEMSELVES, ARE NOT ENTITLED TO AN AWARD OF ATTORNEYS FEES.

The fact that defendants Kern added the words "*Attorneys for Kern & Associates, Ltd. and Gayle Kern*" to their filings herein, and assert that their present motion is submitted "by and through their consul, Kern & Associates Ltd", does not alter the fact that these defendants did not retain legal counsel or incur legal fees in the defense of this matter.

Plaintiffs' limited research capabilities have yielded no Nevada authority discussing the issue of attorney's fees in matters concerning attorney self-representation, however, a decision by the Supreme Court of the United States, in the case of *Kay v. Ehrler Et. Al.*, 499 US 432 (1991), is instructive.

In *Ehrler*, a licensed attorney who had successfully represented himself in an action, requested attorney's fee pursuant to a federal statute.

The question before the Court was whether an attorney who has successfully represented himself in a action based upon a federal statute should be awarded attorneys fees.

In affirming the Court of Appeals' denial of the self-represented attorney's claim for fees, Justice Stevens pointed that "A rule that authorizes awards of consul fees to pro se litigants – even if limited to those who are members of the bar – would create a disincentive to avoid consul whenever such a plaintive considered himself competent to litigate on his own behalf".

In the present case, Kern chose to be self-represented and, in truth and in fact, incurred no attorney's fees.

Therefore, even if the present case merited an award of attorneys fees, which it does not, as more fully discussed below, the fact that Kern chose to proceed in proper person means that no such fees can be awarded.

II. IN ANY EVENT, AN AWARD OF ATTORNEY'S FEES IS NOT MERITED AGAINST PLAINTIFFS IN THIS CASE.

In addition to the fact that the issue of attorney self-representation is not addressed in Kern's MEMORANDUM OF POINTS AND AUTHORITIES, it should be noted that the entirety of its section entitled "ARGUMENT" concedes that any award of attorney's fees should be "left to the sound discretion of the Court" *Id.* at 3.

Most of what appears under the MEMORANDUM'S heading "FACTS", presumably offered as support for the Court to exercise discretion, is simply hyperbole i.e. employing phrases such as "unfounded complaint", "erroneous and unjustifiable filing", "completely devoid of any legal merit", "unsubstantiated pleadings", etc. without any reference to any actual facts in the record.

Because there is no factual basis to support the hyperbole, Plaintiffs will not address it here, other than simply to point out that defendants would have the Court overlook that, as indicated by the record and the attached Counter-Affidavit of David Dezzani, nearly two years elapsed before Plaintiffs filed their Complaint herein, during which Plaintiffs sought to achieve an amicable and mutually-satisfactory resolution of disputed matters and that their Complaint contained forty paragraphs and was accompanied by numerous exhibits and cited specific provisions of the Nevada Revised Statutes .

That this Court dismissed Plaintiff's Complaint based upon an interpretation of the cited NRS statutes contrary to that urged by Plaintiffs does not mean that contentions in the Complaint were "frivolous" (MEMORANDUM at p.3) or "brought or maintained without reasonable ground or to harass" (Id. at p.4) or were "baseless and made without a reasonable and competent inquiry" (Id. at p.5); it simply means that the Court's interpretation of the cited statutes differs from Plaintiffs'.

As indicated in the Complaint, and as stated in the attached Counter-Affidavit, Plaintiffs" factual allegations against defendants were made in good faith, based upon knowledge and belief obtained over many months.

Plaintiffs' Complaint sets forth their view that Kern violated specific provisions of Nevada law, focusing its first claim for relief upon NRS 116.31183, which specifically authorizes legal actions against "an agent of an association" for retaliatory action against homeowners.

Because, until this Court's ruling, Plaintiffs were unaware of any Nevada law or case authority interpreting NRS116.31183 as providing immunity to agents of an association who happen to be attorneys, and because plaintiffs believe that Kern's actions were motivated by an intention to retaliate against them for their good faith complaints to the association and their recommendations Kerns be replaced and because, prior to this Court's ruling, Plaintiff's did not know that Kern would be deemed to have blanket immunity from the legal action authorized by NRS116.31183, it would be unfair for this Court to grant an award of attorneys fees, even if Kern had not chosen to self-represent.

Accordingly, for the reasons stated above, in the attached Counter-Affidavit and for reasons of fairness and appropriate Nevada law, Plaintiffs request that Kern's MOTION FOR ATTORNEY'S FEES AND COSTS be denied.

Signed and dated this 9th day of December, 2015.

David Dezzani

COUNTER-AFFIDAVIT

I, David Dezzani, being first duly sworn does hereby swear under penalty of perjury as follows:

1. I am one of the plaintiffs herein.

2. Co-plaintiff Rochelle Dezzani and I have been married since 1967 and we live in San Clemente, California.

3. I am 79 years old and have been retired for more than 10 years.

4. Before retirement, I practiced law in the State of Hawaii for 40 years but, during that time, had no occasion to consider or deal with issues related to Nevada law.

5. In 2004, after departing Hawaii, my wife and I purchased a condominium townhouse in Incline Village, Nevada, which was our residence until 2010.

6. In March, 2013, after moving to California, we became involved in a disagreement with our homeowners' association regarding the size of our unit's deck.

7. After becoming aware of that disagreement, we sent communications to the association's Board of Directors, complaining in good faith views regarding violations of the NRS and association documents, requesting to review files of the association and recommending replacement of the attorney for the association, defendant Gayle Kern.

8. In addition to describing our perception of violations of the NRS by the association, our communications were harshly critical of defendants Kern, ~~and~~ alluding to said defendants' "faulty knowledge", "erroneous understanding" and "flawed legal advice" and recommending replacement of defendants as the association's attorney, for having "erroneously assumed the truth of crucial and contested facts, without supporting evidence, and rendered legal advice to the Board based upon probably untrue assumptions regarding those facts". (Complaint, Exhibit 2, attached to Kern's MOTION)

9. In May, 2013, after sending our harsh criticism, request and recommendation for replacement, we received a letter from Kern indicating awareness thereof. (MOTION, Exhibit 3)

10. In and after May, 2013, I personally spent many hours reviewing records, documents, minutes and recordings pertaining to events prior and subsequent to the initial dispute and spoke with and/or exchanged emails with people who were involved with and/or knowledgable regarding Kern's actions following receipt of the communications referred to above.

11. Based upon knowledge and information obtained in the manner described above, I

believe that, after becoming aware of our complaints, requests and recommendation that Kern bd replaced as attorney for the association, and especially because of the harsh and unflattering wording thereof, defendants Kern intentionally, and motivated by a desire to retaliate against us rather than in fulfillment of professional responsibilities as an attorney, undertook and/or directed and/or encouraged retaliatory action against my wife and me.

12. At the time I handed the Complaint herein to the Clerk of the Second District Judicial Court, on May 4, 2015 and asked that it be filed, I believed in good faith, as I still believe, that my wife and I had were retaliated against, in violation of Nevada law and entitled to bring our claims for relief to the Court pursuant to the provisions of the Nevada Revised Statutes cited therein.

I hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 9th day of December, 2015.

David Dezzani

SUBSCRIBED AND SWORN to before me
this 9th day of December, 2015.

NOTARY PUBLIC

JAMES PAK
Commission # 2016799
Notary Public - California
Orange County
My Comm. Expires May 6, 2017

NOTARY CERTIFICATE ATTACHED

V3-322

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

JURAT

State of California
County of Orange } ss.

Subscribed and sworn to (or affirmed) before me on this 9th day of December, 2015, by David Dezzani and _____, proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

JAMES PAK
Commission # 2016799
Notary Public - California
Orange County
My Comm. Expires May 6, 2017

(seal)

Signature of Notary
Name of Notary: **James Pak**

(seal)

OPTIONAL INFORMATION

Date of Document: Dec 09, 2015

Type or Title of Document: Counter - Affidavit

Number of Pages in Document: 2

Document in a Foreign Language: N/A

Capacity of Signer:
- X Individual
- _____ Corporate Officer – Title(s):_____
- _____ Partner – □ Limited □ General
- _____ Attorney In Fact
- _____ Trustee
- _____ Guardian or Conservator
- _____ Other: _____

Signer Is Representing:_____

V3-322

David and Rochelle Dezzani
17 Camino Lienzo
SanClemente, CA 92673
(808) 291-2302

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

DAVID DEZZANI and
ROCHELLE DEZZANI,
Plaintiffs

vs.

KERN &ASSOCIATES, LTD; GAYLE KERN;
KAREN HIGGINS; JOHN DOES 1-10;
JANE DOES 1-10; DOE BUSINESSES 1-5
/

Case No. CV15 00826
Dept. No. 10

NOTICE OF APPEAL

Notice is hereby given that David Dezzani and Rochelle Dezzani, Plaintiffs above named, hereby appeal to the Supreme Court of Nevada from the ORDER signed by District Judge Elliot Sattler on November 19, 2015, entered in this action on the 19th day of November, 2015.

Signed, in San Clemente, California, this 10 day of December, 2015.

David Dezzani, in proper person

Rochelle Dezzani, in proper person

David and Rochelle Dezzani
17 Camino Lienzo
SanClemente, CA 92673
(808) 291-2302

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

DAVID DEZZANI and
ROCHELLE DEZZANI,
Plaintiffs

vs.

KERN &ASSOCIATES, LTD; GAYLE KERN;
KAREN HIGGINS; JOHN DOES 1-10;
JANE DOES 1-10; DOE BUSINESSES 1-5

Case No. CV15 00826
Dept. No. 10

PLAINTIFF ROCHELLE DEZZANI"S JOINDER IN MEMORANDUM OF ANSWERING POINTS AND AUTHORITIES IN OPPOSTION TO MOTION FOR ATTORNEY'S FEES AND COSTS; COUNTER-AFFICAVIT AND AFFIRMATION

Plainfiff Rochelle Dezzani hereby joins in the **MEMORANDUM OF ANSWERING POINTS AND AUTHORITIES IN OPPOSTION TO MOTION FOR ATTORNEY'S FEES AND COSTS, COUNTER-AFFICAVIT** (sic) **AND AFFIRMATION** filed by Plaintiff David Dezzani herein.

DATED this 11th day of December, 2015.

Rochelle L Dezzani
Rochelle Dezzani

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Electronically
2015-12-15 02:21:31 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5279713

Code 1310

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

DAVID DEZZANI and ROCHELLE DEZZANI,

Plaintiffs,

vs.

KERN & ASSOCIATES, LTD; GAYLE KERN; KAREN HIGGINS; JOHN DOES 1-10; JANE DOES 1-10; DOE BUSINESSES 1-5,

Defendants.

Case No. CV15-00826

Dept. No. 10

_____/

CASE APPEAL STATEMENT

This case appeal statement is filed pursuant to NRAP 3(f).

1. Appellants are David Dezzani and Rochelle Dezzani.
2. This appeal is from an order entered by the Honorable Judge Elliott Sattler.
3. Appellants are representing themselves in Proper Person on appeal, the Appellant's address is:

   David and Rochelle Dezzani

   17 Camino Lienzo

   San Clemente, CA 92673
4. Respondents are Kern & Associates, LTD and Gayle Kern. Respondents were represented in District Court by:

   Gayle A. Kern, Esq. #1620
   5421 Kietzke Lane Suite 200
   Reno, Nevada 89511

5. Respondent's attorney is not licensed to practice law in Nevada: n/a
6. Appellants were not represented by counsel in District Court.
7. Appellants are not represented by counsel on appeal.
8. Appellants were not granted leave to proceed in forma pauperis in the District Court.
9. Proceeding commenced by the filing of a Civil Complaint filed on May 4, 2015.
10. This is a civil proceeding and the Appellants are appealing the Order filed November 19, 2015.
11. The case has not been the subject of a previous appeals to the Supreme Court.
12. This case does not involve child custody or visitation.
13. It is unknown if the case involves the possibility of a settlement.

Dated this 15th day of December, 2015.

Jacqueline Bryant
Clerk of the Court

By: /s/ Yvonne Viloria
Yvonne Viloria
Deputy Clerk

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Electronically
2015-12-15 02:21:31 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5279713

Code 1350

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

DAVID DEZZANI and ROCHELLE DEZZANI,

Plaintiffs,

vs.

KERN & ASSOCIATES, LTD; GAYLE KERN; KAREN HIGGINS; JOHN DOES 1-10; JANE DOES 1-10; DOE BUSINESSES 1-5,

Defendants.
_____/

Case No. CV15-00826

Dept. No. 10

CERTIFICATE OF CLERK AND TRANSMITTAL – NOTICE OF APPEAL

I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on the 15th day of December, 2015, I electronically filed the Notice of Appeal in the above entitled matter to the Nevada Supreme Court.

I further certify that the transmitted record is a true and correct copy of the original pleadings on file with the Second Judicial District Court.

Dated this 15th day of December, 2015

Jacqueline Bryant
Clerk of the Court

By /s/ Yvonne Viloria
Yvonne Viloria
Deputy Clerk

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2015-12-15 02:22:29 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5279714

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GAYLE KERN, ESQ. - Notification received on 2015-12-15 14:22:29.071.

****** IMPORTANT NOTICE - READ THIS INFORMATION *****

PROOF OF SERVICE OF ELECTRONIC FILING

A filing has been submitted to the court RE: CV15-00826

Judge:

HONORABLE ELLIOTT A. SATTLER

Official File Stamp:	12-15-2015:14:21:31
Clerk Accepted:	12-15-2015:14:21:57
Court:	Second Judicial District Court - State of Nevada Civil
Case Title:	DAVID DEZZANI ETAL VS. KERN & ASSOC (D10)
Document(s) Submitted:	Case Appeal Statement Certificate of Clerk
Filed By:	Deputy Clerk YViloria

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The following people were served electronically:

GAYLE A. KERN, ESQ. for GAYLE A. KERN, KERN & ASSOCIATES, LTD

The following people have not been served electronically and must be served by traditional means (see Nevada Electronic Filing Rules.):

KAREN HIGGINS

ROCHELLE DEZZANI

DAVID DEZZANI

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2015-12-21 02:43:19 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5288465 : mcholico

3870
GAYLE A. KERN, ESQ.
Nevada Bar No. 1620
KERN & ASSOCIATES, LTD.
5421 Kietzke Lane Suite 200
Reno, Nevada 89511
Telephone: (775) 324-5930
Telefax: (775) 324-6173
E-mail: gaylekern@kernltd.com

Attorneys for Kern & Associates, Ltd. and Gayle Kern

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

DAVID DEZZANI and ROCHELLE DEZZANI,

Plaintiffs,

vs.

KERN & ASSOCIATES, LTD; GAYLE KERN; KAREN HIGGINS; JOHN DOES 1-10; JANE DOES 1-10; DOE BUSINESSES 1-5,

Defendants.
_____/

CASE NO.: CV15-00826

DEPT. NO.: 10

REQUEST FOR CORRECTION TO CASE APPEAL STATEMENT

Respondents, Kern & Associates, Ltd. and Gayle Kern, hereby request that Paragraph 4 of the Case Appeal Statement be corrected to read:

"4. Respondents are Kern & Associates, Ltd. and Gayle Kern.

Respondents were represented in District Court by:

Gayle A. Kern, Esq. #1620
Kern & Associates, Ltd.
5421 Kietzke Lane, Suite 200
Reno, Nevada 89511"

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the preceding document filed in the above-entitled case does not contain the social security number of any person.

DATED this 21st day of December, 2015.

KERN & ASSOCIATES, LTD.

By _____
GAYLE A. KERN, ESQ.
Attorneys for Kern & Associates, Ltd. and Gayle Kern

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the law offices of Kern & Associates, Ltd., 5421 Kietzke Lane, Suite 200, Reno, NV 89511, and that on this date, I served the foregoing document(s) described as follows:

REQUEST FOR CORRECTION TO CASE APPEAL STATEMENT

On the party(s) set forth below by:

__X__ Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Reno, Nevada, postage prepaid, following ordinary business practices.

____ Personal delivery.

____ Facsimile (FAX).

____ Federal Express or other overnight delivery.

____ Reno-Carson Messenger Service.

addressed as follows:

David and Rochelle Dezzani
17 Camino Lienzo
San Clemente, CA 92673

DATED this 21ST day of December, 2015.

Teresa A. Gearhart
TERESA A. GEARHART

FILED
Electronically
2015-12-21 04:41:50 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 5289206 : ccovingt

3795
GAYLE A. KERN, ESQ.
Nevada Bar No. 1620
KERN & ASSOCIATES, LTD.
5421 Kietzke Lane Suite 200
Reno, Nevada 89511
Telephone: (775) 324-5930
Telefax: (775) 324-6173
E-mail: gaylekern@kernltd.com

Attorneys for Kern & Associates, Ltd. and Gayle Kern

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

DAVID DEZZANI and ROCHELLE DEZZANI,

Plaintiffs,

vs.

KERN & ASSOCIATES, LTD; GAYLE KERN; KAREN HIGGINS; JOHN DOES 1-10; JANE DOES 1-10; DOE BUSINESSES 1-5,

Defendants.
_____/

CASE NO.: CV15-00826

DEPT. NO.: 10

REPLY TO MEMORANDUM OF ANSWERING POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR ATTORNEY'S FEES & COSTS; COUNTER-AFFICAVIT [SIC] AND PLAINTIFF ROCHELLE DEZZANI'S JOINDER THERETO

Defendants, Kern & Associates, Ltd. and Gayle Kern ("Kern"), by and through their counsel, Kern & Associates, Ltd., hereby submits the following Reply to Memorandum of Answering Points and Authorities in Opposition to Motion for Attorney's Fees & Costs; Counter-Afficavit [Sic] and Plaintiff Rochelle Dezzani's Joinder Thereto.

This Reply is based upon the following points and authorities, all records, documents, pleadings, and papers on file or to be filed herewith, the arguments of counsel made herein or at a later date, and any other matters that may properly come before this Court in consideration of this motion. Plaintiffs contend that Defendants are not entitled to an award of attorney's fees and costs because they are self-represented and because Plaintiffs' actions do not merit an award of attorney's fees and costs. Kern hereby asserts that she is entitled to an award of attorney's fees and costs on the basis of her representation of Kern & Associates, Ltd. and based on the fact that Plaintiffs filed

the Complaint without any reasonable basis or supporting law or fact. Kern hereby respectfully requests this Court enter an award of attorney's fees and costs in the amount of $10,932.34, plus the fees and costs for filing this Reply.[1]

1. The Supreme Court's Holding in *Kay v. Ehrler* Does Not Preclude an Award of Attorney's Fees and Costs.

Plaintiffs contend that the United State Supreme Court's ruling in *Kay v. Ehrler*, 499 U.S. 432 (1991), precludes an award of attorney's fees and costs to Kern. Plaintiffs assert that Kern proceeded in proper person and, as a result, an award of attorney's fees and costs would be improper under *Kay*. Plaintiffs ignore, however, the clear implications of Kay as it relates to Kern's defense of the law firm itself. Pursuant to clear language in *Kay*, Kern is entitled to an award of attorney's fees and costs incurred as a result of her defense of the law firm Kern & Associates, Ltd. ("Kern & Associates"). Further, sanctions have also been requested under Nev.R.Civ.P. 11.

A. Kern is Entitled to Reasonable Attorney's Fees in Costs Incurred as a Result of Defending the Law Firm Kern & Associates, Ltd.

Throughout the litigation, Kern represented herself and the law firm Kern & Associates. Plaintiffs chose to file their Complaint against Kern directly ***and*** the law firm Kern & Associates. There are consequences to such a choice. While Plaintiffs correctly assert that an individual attorney proceeding *pro se* is not entitled to an award of attorney's fees and costs under *Kay*, that result is not the same when the attorney represents the law firm.[2] In *Kay*, the Supreme Court noted that "the word 'attorney' assumes an agency relationship" and that such a relationship was the predicate to an award of attorneys fees and costs under the civil rights statute. *Kay*, 499 U.S. at 435-36. Except as for sanctions, to the extent Kern's Motion attempts to recover any fees for the defense of Defendant

---

[1] A supplemental affidavit for final attorney's fees and costs will be filed on December 22, 2015.

[2] The Nevada Supreme Court has similarly held that "attorneys who represent themselves in litigation generally may not recover attorney fees for doing so." *Frank Settelmeyer & Sons, Inc. v. Smith & Harmer, Ltd.*, 124 Nev. 1206, 1221, 197 P.3d 1051, 1061 (Nev. 2008); *Sellers v. Dist. Ct.*, 119 Nev. 256, 259, 71 P.3d 495, 498 (2003). In *Smith & Harmer*, the Nevada Supreme Court found that the law firm represented itself in the attorneys fees litigation and was not entitled to an award of attorneys fees. The Court did not squarely address the narrow issue of the law firm organization as a client represented by in-house counsel. Rather, *Kay* is instructive on this point.

Kern individually, Kern acknowledges that the Court may decline to award such fees in accordance with *Kay*. However, the Court in *Kay* distinguished between individual *pro se* litigants and organizations. The Court recognized the difference between an individual attorney who represents themselves and an organization that is represented by in-house counsel as it relates to whether attorney's fees were actually incurred to justify an award of attorney's fees and costs. The Court stated:

> Petitioner argues that because Congress intended organizations to receive an attorney's fee even when they represented themselves, an individual attorney should also be permitted to receive an attorney's fee even when he represents himself. ***However, an organization is not comparable to a pro se litigant because the organization is always represented by counsel, whether in-house or pro bono, and thus, there is always an attorney-client relationship.***

Kay v. Ehrler, 499 U.S. 432, 436 at n. 7 (U.S. 1991).

The Supreme Court "made crystal clear, however, that the exception for individual plaintiffs who represent themselves does not apply to organizations." *Baker & Hostetler LLP v. United States DOC*, 473 F.3d 312 (D.C. Cir. 2006). The Court made no distinction between law firms and any other type of organization. *Id.* The reasoning behind the Court's reluctance to award attorney's fees to *pro se* attorney litigants is inapplicable to situations in which an organization is the client because of the agency relationship inherently present in the latter situation.

Other courts have similarly held that an organization is entitled to an award of reasonable attorney's fees and costs based on the existence of an agency relationship. Specifically, courts have held that law firms are eligible for attorney's fees awards even when represented by an attorney employed by the organization. *See Dipaolo v. Moran*, 277 F. Supp. 2d 528, 536 (E.D. Pa. 2003) (holding that attorney who represented himself and law firm was entitled to "incremental fees incurred as a result of defending his law firm" and that "by representing his law firm, [the attorney] created an attorney-client relationship."); *Baker & Hostetler LLP v. United States DOC*, 473 F.3d 312 (D.C. Cir. 2006) (holding that law firm that represents itself remains eligible for attorney's fees because "the exception to fees statutes for individual litigants who represent themselves does not extend to organizational litigants."); *Bond v. Blum*, 317 F.3d 385, 399 (4th Cir. 2003) (finding "[w]hen a member of an entity who is also an attorney represents the entity, he is in an attorney

client relationship with the entity" and "[t]hough representation of a law firm by one of its members presents an increased risk of emotional involvement and loss of independence, the law firm still remains a business and professional entity distinct from its members, and the member representing the firm as an entity represents the firm's distinct interests in the agency relationship inherent in the attorney-client relationship."); *Gold, Weems, Bruser, Sues & Rundell v. Metal Sales Mfg. Corp.*, 236 F.3d 214, 218-19 (5th Cir. 2000) (holding "when an organization is represented by an attorney employed by the organization, the attorney has a status separate from the client."); *Treasurer v. Goding*, 692 F.3d 888, 898 (8th Cir. 2012) (holding "where an attorney represents his or her own firm, *Kay* does not forbid the award of attorneys' fees. We agree that there is no meaningful distinction between a law firm and any other organization on the issue of whether there exists an attorney-client relationship between the organization and its attorney."); *Fontanillas-Lopez v. Morel Bauza Cartagena & Dapena LLC*, 2015 U.S. Dist. LEXIS 137066 (D.P.R. Sept. 30, 2015).

There is clear authority for the proposition that an attorney representing a law firm has an attorney-client relationship with the law firm as an organization and is thus entitled to an award of reasonable attorney's fees and costs. Attorney's fees and costs are actually incurred by the law firm as the client. There is a separate and distinct relationship present when a member attorney represents the law firm. In representing the law firm as an entity, the agency relationship is created. Even when holding that an attorney proper person litigants are not entitled to an award of attorney's fees and costs, the Nevada Supreme Court noted that, as a prerequisite to an award of attorney's fees and costs, a party must actually incur an obligation to pay fees or costs." *Sellers*, 119 Nev. at 259-60. As stated above, such obligation is created when an individual attorney represents the law firm.

Pursuant to the above-cited cases, Kern is entitled to an award of her attorney's fees and costs in representing the law firm Kern & Associates. Kern & Associates, Ltd. is a dba for a Nevada corporation (Gayle A. Kern, Ltd.) duly created under the laws of the state of Nevada. *See* Nevada Secretary State Business Entity Information for Gayle A. Kern, Ltd. attached as Exhibit "1" and Washoe County Certificate of Business: Fictitious Firm Name attached as Exhibit "2". Regardless of the fact that Kern is an attorney with Kern & Associates, there exists an attorney-client relationship. Kern as the attorney has an independent status from the law firm. Because Kern &

Associates is a law firm organization, the rule that attorney *pro se* litigants may not recover attorney's fees and costs is inapplicable. To apply the rule for individual applicants to the law firm would be to deny the actual costs incurred by the organization to have representation by counsel in this matter. Kern & Associates was successfully represented by Kern in this litigation and is entitled to an award for the actual and reasonable attorney's fees and costs incurred as a result of Plaintiffs' bringing this action which was entirely unsupported by law or fact. Kern respectfully requests this Court award reasonable attorney's fees and costs incurred by Defendant Kern & Associates.

B. <u>This Court May Impose Appropriate Sanctions on Plaintiffs Pursuant to its Inherent Power.</u>

This Court may impose sanctions pursuant to its inherent judicial power. The Nevada Supreme Court has consistently held that district courts have the inherent power to impose sanctions. *See Emerson v. Eighth Judicial Dist. Court*, 263 P.3d 224, 229 (Nev. 2011); *Young v. Johnny Ribeiro Bldg.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (Nev. 1990); *S. Fork Band of the Te-Moak Tribe v. State Eng'r (in Re Determination of Relative Rights of Claimants & Appropriators of Waters of the Humboldt River Stream Sys.)*, 118 Nev. 901, 59 P.3d 1226, 1229 (Nev. 2002). "[T]hese powers may permit sanctions for discovery and other litigation abuses not specifically proscribed by statute." *Young*, 106 Nev. at 92.

The Court's inherent power is an independent basis for assessing sanctions against a party to litigation. *See Pickholtz v. Rainbow Techs., Inc.*, 284 F.3d 1365, 1377 (Fed. Cir. 2002). In *Pickholtz*, the court found that the Supreme Court's ruling in *Chambers v. NASCO, Inc.*, 501 U.S. 32 (U.S. 1991), requires a court to separately consider a motion for attorney fees under its inherent power. *Id.* The court noted that sanctions have been imposed under a court's inherent power and that sanctions have been imposed in favor of a pro se attorney independent of a court's inherent power. It follows, the court continued, that "in proper circumstances" a court may use its inherent power to apply sanctions in favor of a *pro se* attorney.

Even if the Court finds that the statutory authority cited in Kern's Motion for Attorney's Fees and Costs is insufficient to support an award of attorney's fees and costs to Kern, the Court may use its inherent power to impose a sanction on Plaintiffs in the amount of Kern's attorney's fees and

costs. As articulated in the Motion, sanctions under NRCP 11 are appropriate in this situation. There is no question that Plaintiffs' Complaint was not well grounded in fact or existing law. The Court agreed and found "to permit such causes of action against Kern would result in a chilling effect on individuals' ability to hire and retain counsel." *See* Order dismissing claims in their entirety, filed November 19, 2015, page 3, lines 7-10. The Court may use its inherent authority to impose sanctions against Plaintiffs for pursuing this unsupported and inappropriate lawsuit against Defendants. Not only are such sanctions supported by NRCP 11, they may be imposed in favor of Defendants pursuant to this Court's inherent authority. Kern acknowledged this Court's inherent authority in the Motion by requesting "such further relief the Court determines to be appropriate."

2. An Award of Attorney's Fees and Costs is Merited.

Plaintiffs contend that the allegations and claims in the Complaint were not baseless or frivolous and were made in good faith. Plaintiffs further assert that they "did not know that Kern would be deemed to have blanket immunity from the legal action authorized by NRS 116.31183." *See* Memorandum page 3. To the contrary, Plaintiffs were given clear and sufficient warning that such claims were without merit. Kern sent Plaintiffs a Notice Pursuant to NRCP 11(b) and (c) which outlined the deficiencies of Plaintiffs' claims and set forth an overwhelming amount of legal authority as support. The letter, dated September 9, 2015, is attached as Exhibit "3". Plaintiffs chose to ignore the clear implications of the legal authority cited in the letter and proceeded to file its baseless Complaint against Kern. Such actions constitute bad faith and entitle Kern to an award of attorney's fees and costs as set forth in the Motion and this Reply.

3. Conclusion.

The Court may properly exercise its discretion and authority to award attorney's fees in this matter pursuant to the authority cited above and the authority cited in Defendants' Motion for Attorney's Fees and Costs. The authority set forth by Plaintiffs does not necessitate the result it requests. Rather, this Court may award Kern reasonable attorney's fees and costs as a result of her representation of the law firm Kern & Associates. There exists an attorney-client relationship between Kern and the law firm and, as a result, an award of attorney's fees and costs is proper and warranted. Further, this court may impose attorney's fees and costs as a sanction in Kern's favor

pursuant to its inherent authority. Finally, an award of attorney's fees and costs is merited against Plaintiffs as a result of their baseless claims against Defendants. Plaintiffs were warned there was no valid cause of action after they filed their frivolous Complaint. *See* Exhibit "3". They ignored the sound advice and proceeded with the action against Kern. Such action should not be without consequence. Plaintiffs should be required to pay all of Kern's attorney's fees and costs for their unlawful, unprofessional, and unnecessary actions. All fees and costs sought were necessary and reasonably incurred in the defense of Kern & Associates.

Kern respectfully requests an award of attorney's fees against the Plaintiffs in the amount of $10,580.00, and costs in the amount of $352.34, for a total amount of $10,932.34, plus the fees and costs for this Reply. Interest should accrue at the statutory rate from the date judgment is entered. Kern requests any further relief the Court determines to be appropriate.

AFFIRMATION

Pursuant to NRS 239B.030

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

DATED this 21st day of December, 2015.

KERN & ASSOCIATES, LTD.

By _____
GAYLE A. KERN, ESQ.
Attorneys for Kern & Associates, Ltd. and Gayle Kern

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the law offices of Kern & Associates, Ltd., 5421 Kietzke Lane, Suite 200, Reno, NV 89511, and that on this date, I served the foregoing document(s) described as follows:

REPLY TO MEMORANDUM OF ANSWERING POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR ATTORNEY'S FEES & COSTS; COUNTER-AFFICAVIT [SIC] AND PLAINTIFF ROCHELLE DEZZANI'S JOINDER THERETO

On the party(s) set forth below by:

__X__ Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Reno, Nevada, postage prepaid, following ordinary business practices.

____ Personal delivery.

____ Facsimile (FAX).

____ Federal Express or other overnight delivery.

____ Reno-Carson Messenger Service.

addressed as follows:

David and Rochelle Dezzani
17 Camino Lienzo
San Clemente, CA 92673

DATED this 21st day of December, 2015.

Teresa A. Gearhart
TERESA A. GEARHART

INDEX OF EXHIBITS

Exhibit No.	Exhibit Description	No. of Pages in Exhibit
1	Nevada Secretary of State Business Entity Information for Gayle A. Kern, Ltd.	3
2	Washoe County Certificate of Business: Fictitious Firm Name	1
3	September 9, 2015, Rule 11 Letter	72

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Jacqueline Bryant
Clerk of the Court
Transaction # 5289206 : ccovingt

EXHIBIT “1”

EXHIBIT “1”

GAYLE A. KERN, LTD.

Business Entity Information

Status:	Active	File Date:	7/17/2003
Type:	Domestic Professional Corporation	Entity Number:	C17144-2003
Qualifying State:	NV	List of Officers Due:	7/31/2016
Managed By:		Expiration Date:	
NV Business ID:	NV20031405227	Business License Exp:	7/31/2016

Additional Information

Central Index Key:	

Registered Agent Information

Name:	GAYLE A. KERN, LTD.	Address 1:	5421 KIETZKE LANE SUITE 200
Address 2:		City:	RENO
State:	NV	Zip Code:	89511
Phone:		Fax:	
Mailing Address 1:		Mailing Address 2:	
Mailing City:		Mailing State:	NV
Mailing Zip Code:			
Agent Type:	Commercial Registered Agent		
Status:	Active		

Financial Information

No Par Share Count:	100.00	Capital Amount:	$ 0

No stock records found for this company

Officers

☐ Include Inactive Officers

President - GAYLE A KERN			
Address 1:	5421 KIETZKE LANE SUITE 200	Address 2:	
City:	RENO	State:	NV
Zip Code:	89511	Country:	USA
Status:	Active	Email:	
Secretary - GAYLE A KERN			
Address 1:	5421 KIETZKE LANE SUITE 200	Address 2:	
City:	RENO	State:	NV
Zip Code:	89511	Country:	USA
Status:	Active	Email:	
Treasurer - GAYLE A KERN			

Address 1:	5421 KIETZKE LANE SUITE 200	Address 2:	
City:	RENO	State:	NV
Zip Code:	89511	Country:	USA
Status:	Active	Email:	

Director - GAYLE A KERN

Address 1:	5421 KIETZKE LANE SUITE 200	Address 2:	
City:	RENO	State:	NV
Zip Code:	89511	Country:	USA
Status:	Active	Email:	

Actions\Amendments

Action Type:	Articles of Incorporation		
Document Number:	C17144-2003-001	# of Pages:	5
File Date:	7/17/2003	Effective Date:	

(No notes for this action)

Action Type:	Initial List		
Document Number:	C17144-2003-004	# of Pages:	1
File Date:	8/29/2003	Effective Date:	

(No notes for this action)

Action Type:	Registered Agent Address Change		
Document Number:	C17144-2003-003	# of Pages:	7
File Date:	10/9/2003	Effective Date:	

GAYLE A. KERN SUITE 202 JPH

499 WEST PLUMB LANE RENO NV 89509 JPH

Action Type:	Annual List		
Document Number:	C17144-2003-002	# of Pages:	1
File Date:	6/14/2004	Effective Date:	

List of Officers for 2004 to 2005

Action Type:	Annual List		
Document Number:	20050286303-29	# of Pages:	1
File Date:	7/13/2005	Effective Date:	

(No notes for this action)

Action Type:	Registered Agent Address Change		
Document Number:	20050489870-83	# of Pages:	2
File Date:	10/6/2005	Effective Date:	

(No notes for this action)

Action Type:	Annual List		
Document Number:	20060318881-27	# of Pages:	1
File Date:	5/17/2006	Effective Date:	

(No notes for this action)

Action Type:	Annual List		

Document Number:	20070360890-45	# of Pages:	1
File Date:	5/23/2007	Effective Date:	
(No notes for this action)			
Action Type:	Annual List		
Document Number:	20080333211-83	# of Pages:	1
File Date:	5/14/2008	Effective Date:	
(No notes for this action)			
Action Type:	Annual List		
Document Number:	20090394399-38	# of Pages:	1
File Date:	5/6/2009	Effective Date:	
(No notes for this action)			
Action Type:	Annual List		
Document Number:	20100498731-05	# of Pages:	1
File Date:	7/7/2010	Effective Date:	
(No notes for this action)			
Action Type:	Annual List		
Document Number:	20110522523-33	# of Pages:	1
File Date:	7/15/2011	Effective Date:	
(No notes for this action)			
Action Type:	Annual List		
Document Number:	20120339599-63	# of Pages:	1
File Date:	5/14/2012	Effective Date:	
(No notes for this action)			
Action Type:	Annual List		
Document Number:	20130454330-95	# of Pages:	1
File Date:	7/10/2013	Effective Date:	
(No notes for this action)			
Action Type:	Annual List		
Document Number:	20140325992-87	# of Pages:	1
File Date:	5/1/2014	Effective Date:	
(No notes for this action)			
Action Type:	Annual List		
Document Number:	20150219299-50	# of Pages:	1
File Date:	5/14/2015	Effective Date:	
(No notes for this action)			

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Clerk of the Court
Transaction # 5289206 : ccovingt

EXHIBIT "2"

EXHIBIT "2"

CORPORATION, LLC, BUSINESS TRUST & LEGAL ENTITIES
CERTIFICATE OF BUSINESS: FICTITIOUS FIRM NAME
** * *THIS CERTIFICATE EXPIRES 5 YEARS FROM FILE DATE * * **
(If renewing, expires 5 years from original file date unless it has lapsed)

FILED
2015 JUL 17 AM 9:31
NANCY PARENT
WASHOE COUNTY CLERK
BY _____ DEPUTY

(●) Renewal ( ) New Filing *Contact Number:* (775) 324-5930 *Email:* gakltd@kernltd.com

THE UNDERSIGNED does hereby certify that _____ IT IS conducting a Law Office business at

5421 Kietzke Lane, Suite 200 (Physical street address), Reno (City), NV (State) 89511 (Zip code)

under the fictitious firm name of: Kern & Associates, Ltd.

and that said firm is composed of the following *legal entity* (or entities)* whose mailing address, signing officer's name, and title are as follows:

Legal Entity Name: Gayle A. Kern, Ltd.
(Legal entity must state name exactly as it is on file in state of incorporation)

Entity Mailing Address: 5421 Kietzke Lane, Suite 200 (Physical street address), Reno (City), NV (State), 89511 (Zip code)

Signing Officer Name: Gayle A. Kern

Signing Officer Title: President

FOR ADDITIONAL OWNERS, PLEASE USE ADDITIONAL PAGES

Alternate Mailing Address: _____ (P.O. Box or Physical street address other than listed above), _____ (City), _____ (State), _____ (Zip code)

Prior Related DBA Filing (if applicable): July 20, 2010

WITNESS my hand this 8th day of July, 20 15.

The undersigned hereby swears under penalty of perjury that he/she has authority to sign on behalf of and to bind the above-named legal entity to a contract.

x Gayle A. Kern
Signature of authorized officer

STATE OF NEVADA
COUNTY OF WASHOE } ss.

On this 8th day of July, 20 15 personally appeared before me, a Notary Public,

Gayle A. Kern
(Name of individual whose signature is being notarized)

who acknowledged that he/she executed the above instrument.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official stamp at my office in the County of Washoe the day and year in this certificate first above written.

Teresa A. Gearhart
Signature of Notary Public

TERESA A. GEARHART
NOTARY PUBLIC
STATE OF NEVADA
My Commission Expires: 09-10-18
Certificate No: 94-0532-2

For office use only

IF SUBMITTING A NOTARIZED DOCUMENT, PLEASE PROVIDE AN ORIGINAL AND 3 COPIES, A SELF-ADDRESSED STAMPED ENVELOPE AND $20.00 FILING FEE TO:
WASHOE COUNTY CLERK
P.O. BOX 11130
RENO, NV 89520

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Clerk of the Court
Transaction # 5289206 : ccovingt

EXHIBIT "3"

EXHIBIT "3"

KERN & ASSOCIATES, LTD.
ATTORNEYS AT LAW

GAYLE A. KERN, ESQ.
gaylekern@kernltd.com

KAREN M. AYARBE, ESQ.
karenayarbe@kernltd.com

5421 KIETZKE LANE, SUITE 200
RENO, NEVADA 89511

TELEPHONE: (775) 324-5930
FACSIMILE: (775) 324-6173

September 9, 2015

VIA EMAIL: djdezzani@yahoo.com
ORIGINAL VIA CERTIFIED MAIL
& COPY VIA FIRST CLASS MAIL

David Dezzani
Rochelle Dezzani
17 Camino Lienzo
San Clemente, CA 92673

Re: *Dezzani v. Kern & Associates, Ltd., et al.*
Case No. CV 15-00826 | Second Judicial District Court | Washoe County

NOTICE PURSUANT TO NRCP 11(b) and (c)

Dear Mr. and Mrs. Dezzani:

As you know, this firm represents the McCloud Condominium Association (the "Association"). Our office was served a copy of your Complaint, filed on May 4, 2015, in the above referenced matter against Ms. Karen Higgins ("Ms. Higgins"), a board member of the Association, and counsel for the Association Kern & Associates, Ltd. ("K&A") and Ms. Gayle Kern ("Ms. Kern").

Be advised this letter is sent in compliance with NRCP 11(c) for purposes of providing notice and an opportunity for you to respond to and remedy the substantive deficiencies of the above referenced Complaint as outlined below. Such deficiencies are in clear violation of NRCP 11(b)(1)(2)and (3).[1]

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[1] NRCP 11(b)(1)(2) and (3) provide:

...[b]y representing to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney...is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, -

Significantly, ***as a matter of law***, you cannot assert any cause of action against K&A or Ms. Kern. ***At all times material*** to the allegations of the Complaint, K&A and Ms. Kern were acting as counsel for the Association and owed no duty to you. To this point, the Honorable Janet Berry, district court judge in the Second Judicial District, County of Washoe, State of Nevada, recently ruled in a similar action that the prior owner of a property located in one of the associations ("HOA") represented by K&A and Ms. Kern could not maintain an action against K&A. In *Vainuku v. Highland Ranch Homeonwers Association, et al.*, Case No. CV14-02399, Second Judicial District Court, the plaintiff asserted various claims against K&A as counsel for the HOA, with such claims sounding in breach of contract, tort, unjust enrichment, injunctive relief, declaratory relief/quiet title, and all arising from a prior foreclosure. Judge Berry dismissed plaintiff's complaint against K&A ***with prejudice,*** ruling

> ...The Court finds ***there is no basis in law or fact to support the causes of action alleged against Kern.*** There are no issues of material fact which preclude summary judgement [sic]. Additionally, ***the Court finds that to permit such causes of action against Kern would result in a chilling effect on individuals' ability to hire and retain counsel.*** Accordingly,and good cause appearing, Kern's Motion to Dismiss Verified Complaint for Quiet Title, Declaratory Judgment and Damages is ***GRANTED***. All claims against Kern are hereby dismissed ***with prejudice***.

See Judge Berry's May 13, 2015 Order, p. 4, ll. 16-22, a copy of which is enclosed. (***Emphasis added.***)

Here, you are attempting to do precisely what plaintiff in the *Vainuku* case cited above did, i.e. sue the attorneys for the Association, over the issues related to enforcement of the governing documents and application of Chapter 116 related to the common area encroachment. Amongst the allegations of the Complaint include criticism of Ms. Kern and her legal advice, competence, services, and opinions to her client, ***the Association.*** In addition, you allege violations of various provisions of NRS Chapter 116 and the Association's governing documents, including its CC&Rs.

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(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
(2) the claims, defenses, and other legal contentions therein are warranted by existing law...
(3) the allegations and other factual contentions have evidentiary support...

Further, 11(c) states "...[i]f after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may...impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation."

Additional allegations are made that Ms. Kern (as well as Ms. Higgins) acted "negligently, wrongfully, wantonly, willfully and/or intentionally in violation of..." various provisions of Chapter 116.

Regardless of your opinions or interpretations of the Association's governing documents and NRS Chapter 116, only ***a client*** may maintain an action against an attorney for claims sounding in contract, tort, negligence, breach of fiduciary duty, or a failure to adhere to a recognized standard of care.[2] To the extent your claims allege tortuous conduct on the part of Ms. Kern and/or K&A, they are barred by law. K&A, as attorneys for the Association, owed no duty to you individually as members of the Association. Any liability sounding in tort must be based upon some underlying duty owed to the aggrieved party. No such duty is present here. Rather, K&A owed a duty to its client, the Association.

In *B.L.M. v. Sabo & Deitsch*, 55 Cal. App. 4th 823, 64 Cal. Rptr. 2d 335 (1997), the California appellate court affirmed the granting of a motion for summary judgment against B.L.M. because respondent law firm represented only its client, the City, and the law firm owed no duty to respondent as a third party beneficiary of that employment contract. *See also Bily v. Arthur Young & Co.*, 3 Cal 4th 370, 834 P.2d 745 (1992),wherein the court addressed an auditor's liability and found no liability to third parties unless the employment contract specifically identifies the party as a third party beneficiary. As noted by the court in the *B.L.M. v. Sabo* decision, to find that by entering into a contract to provide legal services, the attorney also owed a duty to the party against whom action was to be taken, is unworkable and undermines the very nature of the attorney-client relationship. [3]

It is a fundamental principle of law that a lawyer representing an organization as a client

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2

Under Nevada law, no civil cause of action even exists against an attorney for any violation of the Rules of Professional Conduct. *See Ricks v. Dabney (In re Jane Tiffany Living Trust)*, 124 Nev. 74; 177 P.3d 1060 (2008); *see also, Mainor v. Nault,* 120 Nev. 750, 768-769; 101 P.3d 308, 320-321 (2004). Other jurisdictions are in accord. *See Ex. Parte Toler*, 710 So.2d 415, 416 (Ala. 1998); *Orsini v. Larry Moyer Trucking Inc.*, 310 Ark. 179, 184, 833 S.W.2d 366,369 (Ark 1992).

3

Numerous other decisions have confirmed that an attorney for an adverse party cannot be liable to a third party because no duty is owed by the attorney to that third party. *See Norton v. Hines,* 49 Cal. App. 3d 917, 123 Cal. Rptr. 237 (1975); *Weaver v. Superior Court,* 95 Cal. App. 3d 166,180, 156 Cal. Rptr. 745 (1979); *Parnell v. Smart,* 66 Cal. App. 3d 833, 837-838, 136 Cal. Rptr. 246 (1977); *Omega Video Inc. v. Superior Court,* 146 Cal. App. 3d 470, 480, 194 Cal. Rptr. 574 (1983); *St. Paul Title Co. v. Meier,* 181 Cal. App. 3d 948, 952, 226 Cal. Rptr 538 (1986).

represents the entity itself rather than the individual constituents who make up the organization. The Nevada Rules of Professional specifically provide as much. [4] Throughout the course of her representation of the Association, Ms. Kern's primary obligation has been to the Association itself. All members collectively constitute third party beneficiaries of Ms. Kern's representation of the Association. Not only is protecting your interests as individual property owners not the primary purpose and intent of the attorney-client relationship between K&A and the Association, it is often the case that your interest will be contrary to the interests of the Association. As a result, it is clear that you are not a third party beneficiary to any contract ***between K&A and its client the Association.***[5]

There is no question that you were made aware of Ms. Kern's status as counsel for the Association during the extensive communications between you and K&A. The documents in the Complaint and upon which the allegations of the Complaint are apparently based specifically identify K&A as ***attorneys*** for the Association. You acknowledge the representation directly in your allegations. You are not, and have never been, in privity of contract with K&A nor (as established above) did K&A owe any duty to you as an individual owner in the Association. K&A's duties were, and still are, owed only to its client, the Association.

While it is unclear whether your complaint asserts any action against K&A for breach of

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[4] Rule 1.13. Organization as Client.

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) ***If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.*** Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

...

(f) ***In dealing with an organization's*** directors, officers, employees, ***members***, shareholders or other constituents, ***a lawyer shall explain the identity of the client to the constituent and reasonably attempt to ensure that the constituent realizes that the lawyer's client is the organization rather than the constituent.*** In cases of multiple representation such as discussed in paragraph (g), the lawyer shall take reasonable steps to ensure that the constituent understands the fact of multiple representation.

[5] *See Pelham v. Griesheimer*, 92 Ill. 2d 13, 21 (Ill. 1982), holding that "for a nonclient to succeed in a negligence action against an attorney, he must prove that the primary purpose and intent of the attorney-client relationship itself was to benefit or influence the third party."

contract, any attempt to that effect would be unsubstantiated. In Nevada, "[a] breach of contract may be said to be a material failure of performance of a duty arising under or imposed by agreement." *Bernard v. Rockhill Dev. Co.*, 103 Nev. 132, 135, 734 P.2d 1238, 1240 (1987). "A plaintiff in a breach of contract action must show (1) the existence of a valid contract; (2) a breach by the defendant, and (3) damage as a result of the breach." *Brown v. Kinross Gold U.S.A., Inc.*, 531 F.Supp. 2d 1234, 1240 (D.Nev. 2008) (internal quotations omitted), citing *Saini v. Int'l Game Tech.*, 434 F.Supp. 2d 913, 920-21 (D.Nev. 2006).

The essential element of a claim for breach of contract, i.e., a contract, is missing as to K&A. K&A is not a party to or bound by the CC&Rs. There is not now, and never was, any contract between you and K&A. Furthermore and as stated above, you are not a third party beneficiary to any contract between K&A and the Association. You do not even allege the existence of a contract between yourself and K&A, because one simply does not exist. As a matter of law, there can be no claim sustained against K&A for a breach of a non-existent contract.

You cite various provisions of Chapter 116 of the Nevada Revised Statutes to justify your direct claims against Ms. Kern and K&A. Not only are the allegations in your Complaint factually insufficient to justify your reliance on these statutes, they simply do not provide an avenue by which you may sue Ms. Kern and K&A for any actions during the course of representation of the Association. As stated above, K&A owed you no duty and there was no contractual relationship between you and K&A such that direct claims are warranted.

In short, your attempt to sue K&A as attorneys for the Association is legally and fundamentally flawed, and can only be viewed as a strong armed, warrantless litigation tactic used for improper purposes. Judge Berry's Order in *Vainuku* establishes as much. There is absolutely no cognizable claim for relief against another party or entity's counsel by a third party with the potential exception of fraud or unfair debt collection. Even as to such claims, no facts whatsoever exist here to support these claims and/or withstand Rule 11 scrutiny as well, especially as to fraud which ***must*** be pled with particularity and be based upon clear and convincing evidence. Furtherance of any such spurious claims against K&A as counsel for the Association by you will be met with an immediate and proportionate response including, but not limited to, a request for sanctions and attorney's fees and costs. (*See* further discussion below.)

Additionally, NRCP 12(h)(3) provides that "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. Assuming ***solely for the sake of argument*** that a claim may be stated against K&A (which it cannot), the court has no subject matter jurisdiction over the Association or K&A due to the fact that your claims are not exempt from the mediation requirements of NRS 38.310. As such, they are subject to dismissal under NRCP 12(h)(3).

More specifically, Nevada law requires that all claims involving the interpretation,

application or enforcement of the governing documents applicable to residential property be mediated pursuant to the provisions of NRS 38.300 to 38.360, inclusive, before any action may be filed in this Court. *See* NRS 38.310(1).

The allegations of the Complaint and the spurious, non-cognizable claims asserted against K&A and Ms. Kern rest entirely upon an interpretation of the provisions of the CC&Rs and whether the Association was entitled to take enforcement action for the modifications made to your rear deck and the resulting taking of common area. The Complaint alleges the Association and/or K&A failed to follow the provisions of the CC&Rs and NRS Chapter 116 while taking enforcement action and while negotiating a resolution to the significant issue raised by the modification of your deck. Again, while you contest the Association's authority to take the actions it did, K&A at all times advised the Association regarding what would be in the best interest of the Association itself and the members collectively. There is no question that permitting the taking of common area for the exclusive use of individual members is not in the best interest of the Association because each owner owns an undivided interest in the common area that may not be reallocated without adhering to the specific procedures provided for in the CC&Rs.

Clearly, the validity of the claims contained in your Complaint depend entirely upon an interpretation, application, and/or enforcement of the CC&Rs. The Nevada Supreme Court has made clear that when resolving the merits of a complaint requires a court to interpret the meaning of an association's CC&Rs to determine if the association's actions were proper, the complaining party must first submit their claims to mediation before instituting an action in district court. *Hamm v. Arrowcreek Homeowners' Ass'n,* 124 Nev. 290, 295 (Nev. 2008). It is apparent, therefore, that the claims asserted against Ms. Kern and K&A would be dismissed under NRCP 12(h)(3) and NRS 38.310. There is simply no subject matter jurisdiction.

Based upon the foregoing, you must dismiss your claims against Ms. Kern and K&A. Be advised that K&A is prepared to file the attached Motion to Dismiss. Additionally, should the issues presented in this letter not be addressed and corrected, and the Association and/or K&A are required to prepare and file any necessary pleadings with the Court, we will seek sanctions, including all attorneys' fees and costs incurred in connection therewith, in accordance with NRCP 11(c)(1)(a).

Very truly yours,

KERN & ASSOCIATES, LTD.

Gayle A. Kern

Enclosure
c: Client (w/enc.)

2315
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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

DAVID DEZZANI and ROCHELLE DEZZANI,

Plaintiffs,

vs.

KERN & ASSOCIATES, LTD; GAYLE KERN; KAREN HIGGINS; JOHN DOES 1-10; JANE DOES 1-10; DOE BUSINESSES 1-5,

Defendants.
_____/

CASE NO.: CV15-00826

DEPT. NO.: 10

DEFENDANTS, KERN & ASSOCIATES, LTD. AND GAYLE KERN'S MOTION TO DISMISS COMPLAINT

Defendant GAYLE A. KERN, dba KERN & ASSOCIATES, LTD., ("Kern"), in *pro per*, moves this Court for an order dismissing the Complaint with Prejudice as to Kern pursuant to NRCP 12(b)(1), NRCP 12(b)(5), NRCP 12(h)(3), and NRS 38.310, for the reasons outlined in the following Memorandum of Points and Authorities, including but not limited to the following: (i) at all times material to the allegations of the Complaint, Kern was acting solely as an attorney for the governing body of the McCloud Condominium Association and as a matter of law, a third party cannot maintain a cause of action against another party's attorney; (ii) Plaintiffs failed to state a claim against Kern for which relief may be granted; and (iii) the court lacks subject matter jurisdiction over any legitimate claims against Kern becuase any legally cognizable claims against Kern must first be arbitrated or mediated in accord with the provisions of NRS 38.310-360.

///

This Motion to Dismiss is based upon the following Memorandum of Points and Authorities, all exhibits attached hereto, all pleadings and papers on file herein, and any oral argument the court deems necessary. All exhibits that are attached to this motion are referenced to and discussed in the Complaint on file. Therefore, they are not exhibits outside of the allegations of the Complaint and all matters discussed are within the Complaint and can be considered by the Court without converting the motion to dismiss into a motion for summary judgment.

DATED this 9th day of September, 2015.

KERN & ASSOCIATES, LTD.

GAYLE A. KERN, ESQ.
Attorneys for Kern & Associates, Ltd.

MEMORANDUM OF POINTS AND AUTHORITIES

I. STANDARD FOR DISMISSAL

The Nevada Rules of Civil Procedure provide that the defense of lack of jurisdiction over the subject matter and the defense of failure to state a claim upon which relief may be granted may, at the option of the defendant, be made by motion. NRCP 12(b)(1); NRCP 12(b)(5). "If, on a motion . . . to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in NRCP 56...." NRCP 12(b). "Documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) (analyzing similar federal rule). Recording of a document imparts constructive notice of its contents. NRS 111.315. The Court may take judicial notice of "facts in issue or facts from which they may be inferred. A judicially noticed fact must be . . . [c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned so that the fact is not subject to reasonable dispute." NRS 47.130.

///

NRCP 12(h)(3) provides that "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." The burden of proving the jurisdictional requirement is properly placed on the plaintiff. *See Morrison v. Beach City LLC*, 116 Nev. 34, 991 P.2d 982 (2000) *citing Nelson v. Keever*, 451 F.2d 289 (3d Cir. 1971).

Under NRCP 8(a), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." A complaint which fails to satisfy this standard is subject to dismissal for failure to state a claim upon which relief can be granted. NRCP 12(b)(5).

In determining whether this standard is met, the district court "considers all factual assertions in the complaint to be true and draws all reasonable inferences in favor of the plaintiff" *See Kahn v. Dodds (In re AMERCO Derivative Lit.)* 252 P.3d 681, 692 (Nev. 2011) citing *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 635, 137 P.3d 1171, 1180 (2006). The Nevada Supreme Court has reiterated, however, that "[t]o survive dismissal, a complaint must contain some 'set of facts, which, if true, would entitle [the plaintiff] to relief.'" *Kahn*, 252 P.3d at 692, citing *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224,228, 181 P.3d 670, 672 (2008). In fact, the allegations must give fair notice of a *legally sufficient claim. See Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 846, 858 P.2d 1258, 1260 (1993) (emphasis added), citing *Ravera v. City of Reno*, 100 Nev. 68, 70, 675 P.2d 407,408 (1984).

When ruling on a motion to dismiss, "the court is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-755 (9th Cir. Cal. 1994) (analyzing similar federal rule). In the instant matter, not only have Plaintiffs attempted to assert claims against an adverse party's attorney, which they cannot do as a matter of law, the factual allegations of the Complaint are unsupported by the evidence provided by the Exhibits attached hereto which relate directly to Plaintiffs' allegations.

For the reasons set forth herein, the Court should dismiss each of Plaintiffs' causes of action against Kern, with prejudice, as Plaintiffs failed to assert any facts that give rise to any plausible claim against Kern for which relief can be granted pursuant to NRCP 12(b)(5). If the Court determines Plaintiffs asserted any legally sufficient claims against Kern, the Court should still dismiss all claims against Kern because the Court lacks subject matter jurisdiction over those claims. Any legally cognizable claims against Kern arise from the "interpretation, application and or enforcement" of the CC&Rs and, therefore,

those claims must be submitted to mediation or arbitration in accord with the mandatory requirements of NRS 38.310. If not otherwise dismissed pursuant to NRCP 12(b)(5), all claims against Kern should be dismissed in accordance with NRCP 12(b)(1), NRCP 12(h)(3), and NRS 38.310(1).

II. STATEMENT UNDISPUTED FACTS

Kern is a professional corporation providing legal services to a variety of clients in Northern Nevada including, but not limited to, over 250 common-interest community homeowner associations, including the McCloud Condominium Homeowners Association ("Association"). Complaint ¶ 2, 3. At all times material to the allegations of the Complaint, Kern was acting solely as attorney for the Association. Complaint ¶¶ 13, 14, 17, 19, 22, 35.

Plaintiffs David Dezzani and Rochelle Dezzani ("Plaintiffs" or "Dezzanis") are members of the Association and owners of Unit #211 in the Association (the "Unit" or "Property"). Complaint ¶¶ 1. The Association is governed by the Revised Declaration of Limitations, Covenants, Conditions and Restrictions of McCloud Condominium Homeowners' Association ("CC&Rs"), recorded January 28, 2008, as Document No. 3614779 with the Office of the Washoe County Recorder. Complaint ¶ 11, 12, 25, 30, 33; *See* Kern Exhibit "1". Plaintiffs purchased the Unit on July 1, 2004. Complaint ¶ 6. At the time Plaintiffs purchased the Property, the rear deck had been extended from its original dimensions by a previous owner. Complaint ¶ 8. The deck extension had been approved by the Association's Board of Directors in 2002. *See* Plaintiffs' Exhibit 3. Upon exterior inspection of the rear deck, the Association's Board of Directors issued the Dezzanis a "Notice of Violation" indicating that the deck extension was unapproved and unallowed pursuant to the CC&Rs. Complaint ¶ 11, 12, 13; Plaintiffs' Exhibit 1. The Notice of Violation proposed two options for the Plaintiffs to correct the violation - they could either submit an application for the restoration of the deck to its original condition OR could sign a Covenant stating that the deck extension in its current condition could remain on the Plaintiffs' Property during the entire course of their ownership but would be required to be removed at the owner's expense after three sucessive transfers of ownership. Plaintiffs' Exhibit 1. The pertinent provisions of the CC&Rs, as noticed in the Notice of Violation, provide as follows:

> 12.5 Association Maintenance and Decoration Authority. The Board of Directors, or its duly appointed agent, including the manager, if any, shall have the exclusive right to paint, decorate, repair, maintain and alter or modify the exterior walls, balconies, railings, exterior door surfaces, roof and all installations and improvements in the

> common area, and no owner of a condominium shall be permitted to do, or have done, any such work. The approval of the Board of Directors shall be required in writing for the installation of any awnings, sunshades, or screen doors, or any antennae or structures on the roof of any condominium building.
>
> 13.8.2 [An Owner] May not change the appearance of the Common Areas, the exterior appearance of a unit, any component that may be seen from the exterior of the building, or any other portion of the Project, or make any change or modification to that Owner's Unit, such as replacing carpeting with hardwood floors, without permission from the Board or the Architectural Committee, as applicable.

Kern Exhibit "1".

During the course of her representation of the Association, Kern advised the Association regarding the extension of multiple rear decks within the Community. Complaint ¶ 35; *See* Kern Exhibit "2". Kern assisted the Board of Directors in issuing the Notice of Violation to Plaintiffs. Complaint ¶ 13. Upon receiving correspondence from the Plaintiffs regarding the Notice of Violation, the Board of Directors requested Kern to reply to those communications. Complaint ¶ 14; Kern Exhibit "2". Kern communicated with the Dezzanis on behalf of the Association by letter dated April 4, 2013. *Id.* The letter clearly informed the Dezzzanis that Kern was acting as attorney for the Association. The letter states in pertinent part:

> "Dear Mr. And Mrs. Dezzani:
>
> I represent the McCloud Condominium Homeowners Association. The Board requested I respond to your email request to review communications and/or information related to another unit and Board minutes.

Kern Exhibit "2", pg. 1.

The letter outlined the Association's position regarding the deck extension, stating, "The Board understands your frustration and appreciates you are addressing the matter of the unapproved deck extension that wrongfully encroaches in the common area. There is no question the extension exists in the common area, as do the other extensions. The common area is owned in common by *all* owners of the community. While it is unfortunate the issue of deck extensions and the wrongful taking of common area was not addressed earlier, the Association has properly taken action to protect the integrity of the common area. There is no question common area is not permitted to be given to any one owner for his/her exclusive use and enjoyment, thereby reducing the common area for the other homeowners. It is the wrongful conversion of common area that is the problem. Simply put, there is no lawful transfer of common area to individual owners absent a vote of the membership. *See* NRS 116.3112; Kern Exhibit "2". On May 3, 2013, Plaintiffs emailed the Association's Board of Directors with a lengthy tirade of

accusations against the Association's Board of Directors, management company and Kern directly. *See* Plaintiffs' Exhibit 2. The email purported to justify the Dezzani's position regarding the deck and asserted that the impropriety of the Association's position. *Id.* In various places, the email refers to Kern's representation of the Association and the communications Kern had with the Plaintiffs on behalf of the Association. The email explicitly acknowledges that Kern communicated directly with the Dezzanis for the purpose of convening the association's legal position with regard to the deck extensions.

Kern responded by letter dated May 10, 2013, in which she clearly indicated that she represents the Association and that the Dezzanis should direct all further communication regarding the deck extension to Kern rather than directly to the Board of Directors. Specifically, the letter stated:

> The Board of Directors requested I respond to your various communications.... If you have any further communications, the Board request that you communicate with me. We appreciate your anticipated cooperation. If I have failed to address any of your communications, please advise me.

Kern Exhibit "3".

After a hearing on the matter, *attended by Kern on behalf of the Association*, the Board issued the Result of Hearing, dated September 5, 2014. Complaint ¶ 18; *See* Plaintiffs' Exhibit 5. Kern continued to receive and reply to communications regarding the deck extension from the Dezzanis. Complaint ¶ 20, 21, 22. At all times, Kern responded on behalf of her client, the Association, and asserted the legal positions she was retained to express by her client.

On May 4, 2014, Plaintiffs filed the Complaint in district court asserting claims against the Kern and Karen Higgens, an individual member of the Board. which have no basis in law or fact. The claims asserted against Kern were never submitted to the NRED as required by NRS 38.310(1). All claims against Kern must be dismissed in accord with NRCP 12(b)(5), and or NRCP 12(b)(1), NRCP 12(h)(3) and NRS 38.310(1).

III. AUTHORITIES AND LEGAL ARGUMENTS

A. Plaintiff Has Failed to Assert any Claims Against Kern For Which Relief May be Granted.

Even if the Complaint is not dismissed in its entirety based on the lack of any cognizable claim against the attorney for the Association, there are independent grounds for dismissal of each and every

claim for relief. The Complaint seeks four inarticulate claims for relief. Apparently, the Plaintiffs assert that Kern engaged in retaliatory action against them, threatened, harassed or otherwise caused emotional distress to them in violation of NRS 116.31183 and NRS 116.31184, and further acted and/or directed others to act negligently, wrongfully, wantonly, willfully and/or intentionally in violation of various provisions of Chapter 116 of the Nevada Revised Statutes governing the conducting of meetings and voting in a common-interest community. Complaint ¶¶ 26, 36, 38, 40. The Complaint acknowledges that Kern provided legal services and advice to the Board and drafted, edited and approved Board correspondence, yet seeks to hold Kern independently responsible for the acts of the Association. Complaint ¶¶ 13, 14, 17, 19, 22, 24, 25, 35. At all times, Kern was acting as agent for the Association, which Plaintiff does not contest. It is fundamental axiom of agency law that a principal is liable for the acts of its agent committed within the scope of the agency. Even if the fact that Kern was at all times acting as attorney for the Association were not determinative of all claims against Kern, there is no theory of liability by which Kern could be independently liable to the Dezzanis.

1. As A Matter of Law, No Cause of Action Can Be Asserted Against Kern Who Acted as Attorney For the Association.

As a matter of law, the Plaintiffs cannot assert any cause of action against Kern who was at all times material to the allegations of the Complaint, acting as attorney for the association and owed no duty to the Plaintiffs. The Dezzanis are suing Kern in her direct capacity as counsel for the Association, who took actions authorized by law, to correct a wrongful transfer of common area property to an individual unit owner without a vote of the majority of homeowners. Rather than asserting claims challenging the legality of the Association's position, the Plaintiffs are attacking Kern because of the legal advice she provided to her client. However the purported wrongful actions are characterized , it does not change the fact that Kern owed a duty to her client, the Association, and owed no duty to the Dezzanis in their individual capacity.

Regardless of Plaintiffs' opinions or interpretation of the CC&Rs or the provisions of NRS Chapter 116, only a client may maintain an action against an attorney for breach of contract, or negligence, or breach of fiduciary duty, or failure to adhere to a recognized standard of care. The Nevada Supreme Court has repeated held that no civil cause of action exists against an attorney based upon any violation of the Rules of Professional Conduct. *See Ricks v. Dabney (In re Jane Tiffiany Living Trust)*, 124 Nev.

74; 177 P.3d 1060 (2008); *see also, Mainor v. Nault,* 120 Nev. 750, 768-769; 101 P.3d 308, 320-321 (2004). Other jurisdictions are in accord. *See Ex. Parte Toler*, 710 So.2d 415, 416 (Ala. 1998); *Orsini v. Larry Moyer Trucking Inc.*, 310 Ark. 179, 184, 833 S.W.2d 366,369 (Ark 1992).

Furthermore, Plaintiffs cannot maintain an action sounding in tort against Kern, because as the attorney for the Association, Kern owed no duty to them. Any liability sounding in tort must be based upon an underlying duty owed to the aggrieved party. No such duty is present in here. In *B.L.M. v. Sabo & Deitsch*, 55 Cal. App. 4th 823, 64 Cal. Rptr. 2d 335 (1997), the California appellate court affirmed the granting of a motion for summary judgment against B.L.M because respondent law firm represented only its client, the City, and the law firm owed no duty to respondent as a third party beneficiary of that employment contract. The Dezzanis are clearly not a third party beneficiary to the employment contract between Kern and the Association, and as a matter of law, Kern did not owe a duty to them. The Dezzanis are individual members of the Association; however, Kern's duty is to the Association itself. She does not represent each and every owner as members of the Association. As such, the Plaintiffs may not bring a cause of action against her directly.

In *Bily v. Arthur Young & Co.*, 3 Cal 4th 370, 834 P.2d 745 (1992), the court addressed an auditor's liability and found no liability to third parties unless the employment contract specifically identifies the party as a third party beneficiary. As noted by the court in the *B.L.M. v Sabo* decision, to find that by entering into a contract to provide legal services, the attorney also owed a duty to the party against whom action was to be taken, is unworkable and undermines the very nature of the attorney-client relationship.

Numerous decisions have confirmed that an attorney for an adverse party cannot be liable to a third party because no duty is owed by the attorney to that third party. *See Norton v. Hines,* 49 Cal. App. 3d 917, 123 Cal. Rptr. 237 (1975); *Weaver v. Superior Court,* 95 Cal. App. 3d 166,180, 156 Cal. Rptr. 745 (1979); *Parnell v. Smart,* 66 Cal. App. 3d 833, 837-838, 136 Cal. Rptr. 246 (1977); *Omega Video Inc. V. Superior Court,* 146 Cal. App. 3d 470, 480, 194 Cal. Rptr. 574 (1983); *St. Paul Title Co. v. Meier,* 181 Cal. App. 3d 948, 952, 226 Cal. Rptr. 538 (1986).

To the extent Plaintiffs' claims sound in breach of contract, Plaintiffs simply may not assert them against Kern as the attorney for the Association. In Nevada, "[a] breach of contract may be said to be a material failure of performance of a duty arising under or imposed by agreement." *Bernard v. Rockhill*

Dev. Co., 103 Nev. 132, 135, 734 P.2d 1238, 1240 (1987). "A plaintiff in a breach of contract action must show (1) the existence of a valid contract, (2) a breach by the defendant, and (3) damage as a result of the breach." *Brown v. Kinross Gold U.S.A., Inc.*, 531 F.Supp. 2d 1234, 1240 (D.Nev. 2008)(internal quotations omitted), citing *Saini v. Int'l Game Tech.*, 434 F.Supp. 2d 913, 920-21 (D.Nev. 2006).

The essential element of a claim for breach of contract, i.e., a contract, is missing as to Kern. Kern is not personally bound by the CC&Rs. There is not now, and never was any contract between Kern and Plaintiff. Plaintiff was clearly not a third party beneficiary to any contract between Kern and the Association. Plaintiff does not even allege the existence of a contract between Kern and Plaintiff. As a matter of law, there can be no claim sustained against Kern for a breach of a non-existent contract.

Plaintiffs cite the "lengthy email" which they sent to the Board of Directors accusing Kern of possessing "faulty knowledge of the facts of the law, a propensity to presume matters without evidence and a willingness to espouse legal opinions which ignore, overlook, misconstrue and/or fail to consider applicable Nevada laws." Complaint ¶ 24. Besides being entirely unsubstantiated, these assertions provide no basis for a cause of action against Kern. Kern had no duty to provide legal opinions to Plaintiffs. Rather, any legal opinions Kern communicated to the Plaintiffs were on behalf of the Association. Plaintiffs apparently use this assertion to support a claim against Kern under NRS 116.31183, which prohibits retaliatory action by agents of the Association against owners. Again, Plaintiffs plead no set of facts which serve to prove that Kern in any way engaged in retaliatory actions towards the Plaintiffs. Plaintiffs were the party who went through great lengths to attack Kern's representation of the Association and her professional capabilities. Kern merely responded to the allegations contained in Plaintiffs' numerous emails and letters expressing the position of the Board.

Similarly, Plaintiffs point to NRS 116.31184 as an apparent source for their claim against Kern. Complaint ¶ 36. There are simply no facts in the Complaint that support Plaintiffs' reliance on this statute. NRS 116.31184 prohibits an agent of the Association from threatening, harassing or otherwise causing harm or serious emotional distress to an owner or creating a hostile environment for an owner. Nowhere in the Complaint do Plaintiffs assert any facts which, if true, would illustrate that Kern threatened or harassed Plaintiffs. Actually, it was the Plaintiffs who, by their own admission, "communicated with the Board on many occasions; challenging and criticizing not only the [Notice of Violation's] drafting, editing,

authorship, reasoning, logic and legality" and "questioning the competency of the legal services provided to the Board by Defendants Kern." Complaint ¶ 14. To survive dismissal, Plaintiff must assert some set of facts which, if true, would justify recovery. *Kahn*, 252 P.3d at 692. As Plaintiffs offer no facts which demonstrate that Kern threatened or harassed them in any way, their claim must fail.

Finally, Plaintiffs cite various other provisions of Chapter 116 of the Nevada Revised Statutes in support of their claims, including NRS 116.3108, 116.31083, 116.31084, 116.31085, and 116.31087. ¶ 38. These provisions deal with the meetings of unit owners, meetings of the executive board, voting by members of the executive board, the right of unit owners to speak at certain meetings, the right of unit owners to have certain complaints placed on the agenda of meetings and the maintenance and availability of Association books and records. These statutes provide no cause of action against Kern, as the attorney of the Association. Kern owed a duty to the Association by virtue of her representation. She fulfilled that duty by advising the Association regarding the multiple issues that arouse because of the deck modifications. However, that duty did not extend to the Plaintiffs as individual owners.

For all of the foregoing reasons, Plaintiff has failed to state a claim against Kern upon which relief may be granted and the Complaint must be dismissed in its entirety against Kern, with prejudice, in accord with NRCP 12(b)(5).

B. Dismissal is Mandatory Where Plaintiff has Failed to Comply with NRS 38.310 and the Court Lacks Subject Matter Jurisdiction.

NRCP 12(h)(3) provides that "whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Even if the authorities and arguments set forth in Section A above did not otherwise require the dismissal of all claims against Kern, Plaintiffs' claims against Kern are not exempt from the requirements of NRS 38.310.

Nevada law requires that all claims involving the interpretation, application or enforcement of the governing documents applicable to residential property be mediated pursuant to the provisions of NRS 38.300 to 38.360, inclusive, before any action may be filed in this Court. Nevada law could not be clearer. NRS 38.310(1) provides in pertinent part:

> **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; ... **may be commenced in any court in this State unless the action has been submitted to mediation...**

NRS 38.310(1)(emphasis added).

NRS 38.320 states, in pertinent part: "Any civil action described in NRS 38.310 must be submitted to mediation or referred to a program by filing a written claim with the [NRED]." (Emphasis added.) Upon completion of the mediation or arbitration, NRED will issue a certificate. NAC 38.350(7).

NRS 38.300(3) defines a "civil action" as follows:

> "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).

The allegations of the Complaint and Plaintiffs' spurious claims against Kern rest entirely upon an interpretation of the provisions of the CC&Rs and whether the Association was entitled to issue the take enforcement action against the Plaintiffs for the deck extension as an unlawful allocation of common area property. Plaintiffs allege that the deck extension was lawful pursuant to the CC&Rs and that the Association and Kern's enforcement actions were unjustified. Complaint ¶¶ 25,

Articles 12.5 and 13.8.2 of the CC&Rs clearly provide that the Association has the exclusive authority to modify the common areas. Additionally, Section 4.1 provides that "The undivided, fractional interest a unit owner has in the Property's common areas... are established and are to be conveyed with the unit, and cannot be changed." *See* Kern Exhibit "1". Plaintiffs assert that the conveyance of common area property for their exclusive use, in the form of the rear deck extension, did not constitute a violation of the CC&Rs. The validity of Plaintiffs' claims, assuming that any could even be asserted against Kern as attorney for the Association, depend entirely upon an interpretation of the CC&Rs.

The assertion of a various violations of Chapter 116 of the Nevada Revised Statutes does not exempt Plaintiffs from mediating or arbitrating a *legally cognizable* claim asserted against Kern. However, for all of the reasons set forth in Section A above, Plaintiffs have no legally cognizable claim against Kern. Even if there were a legally cognizable claim asserted, the Nevada Supreme Court has previously ruled that all disputes involving the "interpretation, application or enforcement" of the CC&Rs must be submitted to mediation or arbitration under NRS 38.310 before a civil action may be filed. *See*

e.g. McKnight Family, L.L.P. v. Adept Mgmt., 129 Nev. Adv. Op. 64, 310 P.3d 555, 559 (2013) (a claim for wrongful foreclosure involved the interpretation of covenants, conditions, or restriction and the court had no jurisdiction to consider the dispute until a Chapter 38 action had been prosecuted).

This case similarly requires an interpretation of the Association's CC&Rs and must be submitted to mediation. The Plaintiffs' assertions are dependant on the interpretations of the CC&Rs. Kern was retained by the Board of Directors to enforce various provisions of the CC&Rs. The Plaintiffs are challenging that representation and the authority by which the Association took enforcement action against them and Kern aided with the execution of that enforcement action. The Court simply cannot address the merits of the Plaintiffs' claim without an analysis of the Association's CC&Rs.

If not otherwise dismissed pursuant to NRCP 12(b)(5), all claims against Kern must be dismissed pursuant to NRCP 12(b)(1), NRCP 12(h)(3) and NRS 38.310. The court lacks subject matter jurisdiction over those claims which must be mediated or arbitrated as required by NRS 38.310.

IV. CONCLUSION AND RELIEF REQUESTED

As a matter of law, Plaintiffs failed to assert any legally cognizable claim against Kern. Kern was not in privity of contract with Plaintiffs and Kern owed no duty to Plaintiffs. Kern acted solely as counsel for the Association and was under no statutory or contractual duty to Plaintiff. Kern's obligations were to the Association to assist in the enforcement of the CC&Rs and ensure that no individual owner was permitted to retain portions of the common area at the expense of other members' undivided interest in the common area.. Kern fulfilled her duties to the Association and Plaintiffs have no claim against Kern under any legal theory. Even after considering all allegations of the Complaint as true, Plaintiff has failed to state a cause of action against Kern for which relief may be granted and the Court must dismiss the complaint pursuant to NRCP 12 (b)(5).

For all of the foregoing reasons, all of Plaintiffs' claims, must be dismissed against Kern. Plaintiffs failed to state a cause of action against Kern for which relief may be granted, and the Complaint should be dismissed, with prejudice, as to Kern.

To the extent the court does not dismiss all claims against Kern under NRCP 12(b)(5), this Court lacks jurisdiction over any and all legally cognizable claims asserted by Plaintiffs against Kern. Those claims concern the application, enforcement, or interpretation of the CC&Rs. The Court must dismiss all

claims against Kern because any legally cognizable claim against Kern must first be mediated or arbitrated as required by NRS 38.310. This Court lacks subject matter jurisdiction over those claims.

AFFIRMATION

Pursuant to NRS 239B.030

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

DATED this 9th day of September, 2015.

KERN & ASSOCIATES, LTD.

By_____
GAYLE A. KERN, ESQ.
Attorneys for Kern & Associates, Ltd.

INDEX OF EXHIBITS

Exhibit No.	Exhibit Description	No. of Pages in Exhibit
1	CC&Rs	46
2	Kern letter to Dezzanis dated April 4, 2013	2
3	Kern letter to Dezzanis dated May 10, 2013	1

EXHIBIT "1"

EXHIBIT "1"

DOC # 3614779
01/28/2008 12:25:46 PM
Requested By
ROBERT C MADDOX & ASSOCIATES
Washoe County Recorder
Kathryn L. Burke - Recorder
Fee: $59.00 RPTT: $0.00
Page 1 of 46

APN: .

When Recorded, Mail to:

Name: ROBT C. MADDOX & ASSOCIATES
Addr: 10587 Double R Blvd, Ste 100
Reno NV 89521
775 322-3666

Space for Recorder's Use Only

Name of Document:

REVISED DECLARATION OF LIMITATIONS, COVENANTS, CONDITIONS AND RESTRICTIONS OF McCLOUD CONDOMINIUM HOMEOWNERS' ASSOCIATION

I the undersigned hereby affirm that the attached document, including any exhibits, hereby submitted for recording does not contain the personal information of any person or persons. (Per NRS 239B.030)

Dated January 24, 2008

(Signature)

ROBERT C. MADDOX, GENERAL COUNSEL

3614779 Page 2 of 46 01/28/2008 12:25:46 PM

REVISED DECLARATION OF LIMITATIONS, COVENANTS, CONDITIONS, AND RESTRICTIONS OF McCLOUD CONDOMINIUM HOMEOWNERS' ASSOCIATION

This Revised Declaration of Limitations, Covenants, Conditions and Restrictions is made this 17th day of November, 2008, by McCloud Condominium Homeowners' Association, a Nevada Non-Profit Organization ("Declarant").

RECITALS:

1. McCloud Condominiums ("the Property") was created and developed by Embassy Estates, Ltd., a Canadian corporation, as a common interest condominium community pursuant to the then-applicable provisions of the Nevada Revised Statutes.

2. Embassy Estates, Ltd. sold and conveyed interests in the Property subject to a Declaration of Limitations, Covenants, Conditions, and Restrictions of McCloud Condominiums, dated April 29, 1982 ("the 1982 Declaration").

3. Ownership of the Property in its entirety is now vested in the members of the Association, and no longer under Declarant control or ownership.

4. In 2003, the Nevada Legislature enacted substantive and material changes to Nevada Law governing common interest communities.

5. Pursuant to Articles VI and XV of the 1982 Declaration, the McCloud Condominium homeowners approved a resolution to amend the 1982 Declaration to conform with the changes to Nevada Law governing common interest communities, as well as the current status of the McCloud Condominium community.

WHEREFORE, the McCloud Condominium Homeowners' Association adopts this Declaration in place and instead of the 1982 Declaration as the document that governs ownership in the McCloud Condominium complex.

DECLARATION:

The Property, which is more particularly described in Exhibit "A" to the 1982 Declaration and incorporated here by reference, shall be held, conveyed, sold, encumbered, leased, rented, used, occupied, improved, or otherwise affected in any

manner subject to the declarations, limitations, easements, covenants, conditions, and restrictions stated in this Revised Declaration of Limitations, Covenants, Conditions and Restrictions, which have been declared and agreed upon for the purpose of:

1. Enhancing, maintaining, and protecting the value, desirability and attractiveness of the Property, and to mutually benefit each of the condominiums located on the Property;

2. Creating mutual equitable servitudes upon each condominium in favor of each and all other condominiums on the Property;

3. Creating reciprocal rights and privity of contract and estate between all persons acquiring or owning an interest in the McCloud condominiums and their grantees, heirs, devisees, successors, and assigns, which shall be deemed to run with the land or any portion thereof or interest therein, and shall be of burden and benefit to all such persons, their grantees, heirs, devisees, successors, and assigns.

All provisions in this Revised Declaration shall be deemed to run with the land as covenants running with the land or as equitable servitudes, or as liens, as the case may be, and shall inure to the benefit of and be binding upon the heirs, personal representatives, grantees, lessees, successors and assigns of the owners, and to all who acquire or own any interest in the Property in whatever manner such interest may be obtained.

ARTICLE I

DEFINITIONS

Except where the context clearly indicates differently, certain terms used in this Declaration and in the Articles of Incorporation of McCloud Condominiums are defined and shall have meaning, as follows:

1.1 1982 Declaration. The "1982 Declaration" means the Declaration of Limitations, Covenants, Conditions and Restrictions dated April 29, 1982, and recorded against the Property.

1.2 Act. "Act" means Chapter 116 of the Nevada Revised Statutes, as the same may be amended from time to time.

1.3 Allocated Interests. "Allocated Interests" means the undivided interests in the common area and limited common areas, the liability for common expenses, and the votes in the Association, which are allocated to units on the Property pursuant to this Declaration.

1.4 Architectural Committee. "Architectural Committee" means the Board and those other persons acting as the architectural committee under this Declaration pursuant to Article XIII.

1.5 Architectural Committee Rules. "Architectural Committee Rules" means the rules, if any, adopted by the Architectural Committee.

1.6 Articles. "Articles" means the Articles of McCloud Condominium Homeowner's Association, as filed with the Secretary of State of the State of Nevada.

1.7 Association. "Association" means the McCloud Condominium Homeowners' Association, a non-profit corporation, incorporated pursuant to the laws of the State of Nevada, which manages and controls all of the common areas, including the limited common area, as more particularly defined and illustrated in Exhibit "A" to the 1982 Declaration.

1.8 Association Property. "Association Property" means all real and personal property now or hereafter owned by or leased to the Association or in which the Association has a recognizable legal or equitable present or future interest.

1.9 Beneficiary. "Beneficiary" means a beneficiary under a deed of trust or mortgagee under a mortgage, and/or the assignee of such beneficiary or mortgage.

1.10 Board. "Board" means the Board of Directors of the Association as duly elected or appointed pursuant to the Bylaws of the Association, and is synonymous with "Executive Board" as defined by the Act.

1.11 Bylaws. "Bylaws" means the Bylaws of the Association as they same may be amended, changed, or modified from time to time.

1.12 Common Area. "Common Area" means that portion of the project that is not located within any unit, including:

a. Sidewalks, shrubbery, and other plantings, parking area, garages,

and all other land included in the description of the project in Exhibit "A" to the 1982 Declaration, except the land under the buildings in which units are located;

b. The water supply system and the sewage disposal system located in the project including pipes, sewage lines, and other facilities;

c. Foundations, columns, girders, beams, and supports of the condominium buildings, the perimeter walls around each unit to the interior surfaces of each unit, and other walls that are not within a Unit;

d. Roofs, stairs, stairways, stairway landings, and corridors that are not within the unit;

e. Pipes, ducts, flues, chutes, conduits, wires and other utility installations to the outlets of the units;

f. All installations of power, lights, gas, water, and heating existing for common use; and

g. All other parts of the project, including personal property, necessary or convenient to its existence, maintenance, and safety, or normally in common use.

1.13 Common Expenses. "Common expenses" means all sums lawfully assessed against the owners by the Association, including both regular periodic assessments and special assessments as provided for in this Declaration.

1.14 Condominium. "Condominium" means a condominium as defined in NRS 117.010 and NRS 116.027, and shall be an estate and real property consisting of:

a. A separate fee simple interest in the space within a unit;

b. An undivided, fractional interest as a tenant in common in the building in which the unit is enclosed and that portion of the real property on which the building containing the unit is located, together with all applicable easements, rights, and appurtenances, which is equal to a fraction whose numerator is one (1) and whose denominator is the total number of units located in the building in which the

owner's unit is enclosed at any given time and from time to time; and

c. An undivided, fractional interest as a tenant in common in the Property's Common Area, together with all applicable easements, rights, and appurtenances, which is equal to a fraction whose numerator is one (1), and the whose denominator is the total number of units on the Property at any given time and from time to time).

1.15 Declarant. "Declarant" means the McCloud Condominium Homeowners' Association or its successors, assigns, or representatives in the event Declarant assigns or otherwise transfers its rights and obligations.

1.16 Declaration. "Declaration," or "this Declaration," means this instrument entitled Revised Declaration of Limitations, Covenants, Conditions and Restrictions of McCloud Condominiums, and any and all amendments thereto.

1.17 Deed of Trust. "Deed of Trust" means a deed of trust or a mortgage encumbering any portion or all of the Property.

1.18 Foreclosure. "Foreclosure" means a foreclosure under a Deed of Trust by judicial action or exercise of power of sale.

1.19 Improvements. "Improvements" means all structures and works of improvement of every type and kind, including, but not limited to, buildings, outbuildings, garages, carports, roads, driveways, parking areas, fences, screening walls, retaining walls, stairs, decks, patios, landscaping, sprinklers, hedges, windbreaks, planting, planted trees, shrubs, poles, signs, free-standing lighting fixtures, exterior air conditioning, and water softener fixtures or equipment, which have been or will be constructed on the Community.

1.20 Limited Common Area. "Limited Common Area" means that portion of the common area, such as garages, that is designated as reserved or designated by operation of NRS 116.2102(2) and/or (4) for the exclusive use of one or more, but fewer than all, of the units.

1.21 Manager. "Manager" means every person or entity designated or retained by the Board to manage the affairs of the Association and to perform various other duties assigned by the Board and by the provisions of this Declaration.

1.22 Member. "Member" means and refers to every person or entity who holds

membership in the Association by virtue of being an owner of one or more of the Property's units. If a unit has more than one owner, "Member" refers collectively to all of the owners of a unit.

1.23 Owner. "Owner" means any person or entity who owns a unit within the Property.

1.24 Plan. "Plan" means: (a) the Final Map; (b) those items set forth in NRS 116.2109(5), including drawings of improvements that are filed with agencies that issue permits for the Property, and all number and letter designations that identify the units; and (c) such other diagrammatic plans and information regarding the Property as may be required by the Act or other applicable law, or as may be included in the discretion of the Declarant, as each may be amended and supplemented from time to time, and all as recorded in the Office of the County Recorder, Washoe County, Nevada, all of which are incorporated here by reference.

1.25 Project. "Project" means the Property, as described in Exhibit "A" to the 1982 Declaration, including land, all buildings and other improvements and structures now or hereafter on the Property, all easements, rights and appurtenances belonging to the Property, and all personal property now or hereafter used in connection with the Property.

1.26 Rules and Regulations. "Rules and Regulations" means such rules and regulations as the Board from time to time may adopt pursuant to the terms of this Declaration concerning the use of the Property, or any part thereof.

1.27 The Property. "The Property" means McCloud Condominiums, as more particularly described in Exhibit "A" to the 1982 Declaration, together with all improvements now or hereafter located on the Property, and together with all easements, rights, and appurtenances belonging to the Property.

1.28 Unit. "Unit" means a physical portion of the Property designated for separate ownership or occupancy, as described in Article II. In interpreting deeds and plans, the existing physical boundaries of the unit reconstructed in substantial accordance with the original plans shall be conclusively presumed to be its boundaries, rather than metes and bounds, or other description, expressed in the deed or plan, regardless of settling or lateral movement of buildings and regardless of minor variance between boundaries shown on the plan or in the deed and those of the building.

ARTICLE II

DESCRIPTION OF LAND AND IMPROVEMENTS

2.1 Ownership of a Unit. Ownership of each individual unit on the Property shall consist of: (a) a fee simple interest in and to that particular unit; (b) an undivided fractional interest as a tenant in common in the building in which the unit is enclosed and the land under such building; (c) an undivided fractional interest as a tenant in common in the Common Area, as defined in this Declaration; (d) exclusive use of the limited common area designated for use by that unit; (e) the right to one garage; and (f) a membership in the Association.

2.2 Unit Boundaries. The boundaries of each unit are the interior surfaces of its perimeter walls, bearing walls, floors, ceilings, windows, and the portions of the building within those boundaries, except common areas or limited common areas. Each unit includes the spaces and improvements within those boundaries. Each unit has access to at least one entranceway, hallway, front porch, or stairway, which are common areas or limited common areas, and which connect with common grounds that constitute common areas.

2.3 Limited Common Area. Adjacent and appurtenant to any unit there may be limited common areas such as garages, balconies, porches, benches, storage lockers, entrance ways, and fireplace pods that are outside the perimeter walls of the unit but designated for the exclusive use of that unit.

2.4 Relocation and Amendment. Subject to the provisions of NRS 116.2112, the boundaries between adjoining units may not be relocated without the approval of the Board or the Architectural Control Committee. In addition to the plans and specifications required for approval under NRS 116.2112 and Article XIII of this Declaration, a request for a boundary adjustment must be accompanied by the written consent of all owners of the units affected by the relocation. If the owners of the adjoining units have specified a reallocation between their units of their allocated interests, the application shall state the proposed reallocation. In the event that the Board or the Architectural Control Committee approves the request for a boundary adjustment, the Association shall prepare an amendment that identifies the units involved, states the reallocations, and indicates the Association's consent (the consent of a majority of the members of the Association shall not be required). The amendment must be signed by those unit owners affected and contain words of conveyance between them. The approval of all holders of Deeds of Trust in the affected units shall be

endorsed on the conveyance. On recordation, the amendment shall be indexed in the name of the grantor and the grantee, and in the grantee's index in the name of the Association.

2.5 Recording Amendments. In accordance with NRS 116.2112, the Association shall prepare and record an amendment to the Plat and Plans as necessary to show the altered boundaries between adjoining units, along with the units' dimensions and identifying numbers. The applicants shall pay for the costs of preparation of the amendment and its recording, as well as any reasonable fees incurred by the Association related to the altered units boundaries so identified and recorded.

ARTICLE III

MEMBERSHIP

3.1 Members. The members of the Association shall be the owners of the units. Ownership of a unit entitles the record owner(s) of that unit to one (1) membership in the Association irrespective of the number of persons or entities that comprise the ownership of the unit (*i.e.*, one membership per unit), and is the sole qualification for membership. The number of memberships in the Association shall be equal to the number of units on the Property at any given time. Persons or entities holding a security interest in a unit for the performance of an obligation are not entitled to membership in the Association. Membership is appurtenant to and may not be separated from the ownership of any unit that is subject to assessment by the Association.

3.2 Transfer. An owner's membership shall not be transferred, assigned, pledged, hypothecated, conveyed, or alienated in any way, except upon the transfer of title of the unit, and then only to the transferee. Any attempt to make a prohibited transfer shall be void, and will not be reflected in the books and records of the Association. Any transfer of title to a unit shall operate automatically to transfer the appurtenant membership rights in the Association to the new owner. In the event the owner of any unit fails or refuses to transfer the appurtenant membership to the unit's transferee, the Association shall have the right to record the transfer upon the books of the Association and shall issue a new certificate to the purchaser, upon which the old certificate outstanding in the name of the seller shall be null and void as though the same had been surrendered. Prior to any transfer of title to a Unit (including the sale of a Unit under a recorded contract of sale), either the transferring owner or the

acquiring owner shall give notice to the Board of such transfer, including the name and address of the acquiring owner and the anticipated date of transfer. The Association shall have the right to charge a reasonable transfer fee payable to the Association on the date of transfer of title to the Unit.

ARTICLE IV

RIGHTS IN THE COMMON AND OPEN-SPACED AREAS

4.1 Undivided Interests. The undivided, fractional interests a unit owner has in the Property's common areas, in the building in which the unit is enclosed, and that portion of the real property on which the building containing the unit is located, as described and defined in Article I, Sections 1.11 and 1.13 of this Declaration, are established and are to be conveyed with the unit, and cannot be changed. A unit owner's undivided interests and the fee title to a unit shall not be separated or separately conveyed, and those interests shall be deemed to be conveyed or encumbered with the unit even though the description in the instrument of conveyance or encumbrance may refer only to the fee title to the unit.

4.2 Member's Easements of Use and Enjoyment. Each member shall, and the Association grants, a right and non-exclusive use of and enjoyment in and to the common areas, and an exclusive easement for the use and enjoyment of any Limited Common Areas appurtenant to the member's unit. Each member's easements of use and enjoyment shall be appurtenant to and shall pass with the title to every assessed condominium, subject to:

4.2.1 The right of the Association to establish, adopt, amend, and enforce uniform rules and regulations pertaining to the use of the common areas and limited common areas, including an assignment by the Association of a garage to each unit.

4.2.2 The right of the Association, in accordance with its Articles and Bylaws, to borrow money for the purpose of improving the common areas and their facilities.

4.3 Delegation of Use. In accordance with the Bylaws and subject to the provisions of this Declaration and any applicable Rules and Regulations, any unit owner may extend and delegate his/her rights of use and enjoyment in the Common

Areas and their facilities to that owner's guests and invitees. If an owner has rented the entirety of that owner's unit to a tenant or tenants, then the owner and the owner's family members, guests, and invitees shall not be entitled to use and enjoy the recreational facilities of the Common Areas while the owner's Unit is occupied by such tenant(s). Instead, the tenant(s), while occupying such unit and during the period of occupancy, shall be entitled to use and enjoy the Common Areas and facilities and is permitted to extend to other persons the rights of use and enjoyment in the same manner as if such tenant(s) were an owner. Each owner shall at all times be responsible for any and all activities of that owner's tenants, guests, and invitees using the Common Areas.

4.4 Waiver of Use. No member may exempt himself from personal liability for assessments duly levied by the Association, or release his unit from the liens and charges against it, by waiver of his use and enjoyment of the common areas and their facilities or by abandonment of his unit.

4.5 Additional Provisions Relating to Common Areas. The Association and all unit owners, by acceptance of their respective deeds, covenant and agree as follows:

4.5.1 In order to preserve the rights of the owners with respect to the operation and management of the project, the common areas shall remain undivided; no owner shall bring any action for partition, except as provided in Article XI of this Declaration.

4.5.2 In the event any improvement on the Property and within the project is partially or totally destroyed and then rebuilt, the units' owners agree that minor encroachments of parts of the common areas due to construction shall be permitted and that valid easements for those encroachments and the maintenance thereof shall exist.

4.5.3 A non-exclusive easement for ingress, egress, and support through the common areas is appurtenant to each unit, and the common areas are subject to such easements.

4.5.4 The Association shall have the responsibility to manage, control, and maintain all of the common areas and limited common areas including but not limited to the common stairways, the common walkways, the parking area, the private driveways, and the exterior of the building, and such maintenance shall be of a high quality so as to keep the entire project in first-class condition and a good state of

repair. The Association shall have a perpetual non-exclusive easement to make such use of the Common Areas as may be necessary or appropriate to perform the duties and functions which it is obligated or permitted to perform pursuant to this Declaration.

ARTICLE V

ASSOCIATION BOARD OF DIRECTORS; VOTING AND ELECTIONS

5.1 Board of Directors. The members of the Association shall elect a seven (7) member Board of Directors for two-year terms. Board of Directors members' terms shall be staggered such that no more than four expire in any year. At each annual meeting, the members shall elect, for a term of two (2) years, the number of Directors whose terms shall ordinarily expire at said annual meeting. All members of the Board of Directors shall be members of the Association.

5.2 Voting. Subject to the suspension of any voting rights of any units' owners as provided in this Declaration, each member of the Association shall be entitled to one (1) vote for each unit owned by that member. In the event a unit is owned by two (2) or more persons or entities, the voting power shall be exercised by only one of them.

5.3 Elections.

5.3.1 Eligibility. Not less than 30 days before the preparation of a ballot for the election of members of the Board of Directors, the secretary or other officer specified in the bylaws of the Association shall cause notice to be given to each unit's owner of his eligibility to serve as a member of the Board of Directors. Each unit's owner who is qualified, subject to the limitations stated in NRS 116.31034(6), to serve as a member of the Board of Directors may have his name placed on the ballot along with the names of the nominees selected by the members of the Board of Directors or a nominating committee established by the Association. Each person whose name is placed on the ballot as a candidate for a member of the Board of Directors must make a good faith effort to disclose any financial, business, professional or personal relationship or interest that would result or would appear to a reasonable person to result in a potential conflict of interest for the candidate if the candidate were to be elected to serve as a member of the Board. The candidate must make the disclosure, in writing, to each member of the association in the manner established in the bylaws.

5.3.2 Secret Ballot. Pursuant to NRS 116.31034, the election of any member of the Board of Directors must be conducted by secret written ballot, as follows:

5.3.2.1 The secretary or other officer specified in the bylaws of the Association shall cause a secret ballot and a return envelope to be sent, prepaid by United States mail, to the mailing address of each unit within the McCloud community, or to any other mailing address designated in writing by the unit's owner.

5.3.2.2 Each unit's owner must be provided with at least 15 days after the date the secret written ballot is mailed to the unit's owner to return the secret written ballot to the Association.

5.3.2.3 A quorum is not required for the election of any member of the Board.

5.3.2.4 Only the secret written ballots that are returned to the association may be counted to determine the outcome of the election.

5.3.2.5 The secret written ballots must be opened and counted at a meeting of the association. A quorum is not required to be present when the secret written ballots are opened and counted at the meeting.

5.3.2.6 The incumbent members of the Board and each person whose name is placed on the ballot as a candidate for a member of the Board may not possess, be given access to, or participate in the opening or counting of the secret written ballots that are returned to the association before those secret written ballots have been opened and counted at a meeting of the association.

5.4 Certification of Board Members. Each member of the Board shall, within 90 days after his appointment or election, certify in writing to the Association, on a form prescribed by the Nevada Real Estate Administrator, that he has read and understands the governing documents of the Association and the provisions of the Act to the best of his ability.

5.5 Election of Association Officers. The Board of Directors shall also elect from among them a president, two vice–presidents, a secretary, and a treasurer of the Association. The general powers and duties of the Board shall be as set forth in this Declaration, but may be more particularly defined by the Bylaws; provided, however, that this Declaration may not be amended directly or indirectly in any particular

manner by the enactment of any Bylaw or regulation, but only in the manner provided in this Declaration.

5.6 Vacancies. Vacancies on the Board of Directors caused by any reason other than removal of a Director by a vote of the Association shall be filled by vote of the majority of the remaining Directors, even though they may constitute less than a quorum, and each person so elected shall be a Director until a successor is elected at the next annual meeting of the Association.

ARTICLE VI

DUTIES AND POWERS OF THE ASSOCIATION AND ITS MEMBERS

6.1 Powers of the Association. The Association shall have all the powers of a nonprofit corporation organized under the laws of the State of Nevada and the powers conferred upon it pursuant to NRS 116.3102 and NRS Chapter 82, subject only to such limitations on the exercise of such powers as are set forth in the Articles, the Bylaws, and this Declaration. The Association, acting by and through the Board as authorized by NRS 116.3103, shall have the power to do take any lawful action that may be authorized, required, or permitted to be done by the Association under this Declaration, the Articles, and the Bylaws, to conduct all business affairs of common interest to all owners, and to do and perform any act that may be necessary or proper for or incidental to the exercise of any of the express powers of the Association, including, without limitation, the following:

6.1.1 Assessments. The Association shall have the power to establish, fix, and levy assessments as provided in this Declaration, and to enforce payment of assessments in accordance with the provisions of this Declaration.

6.1.2 Rules and Regulations. The Association shall have the power to adopt, amend, and repeal the rules and regulations governing the Common Area and its use, and for such other purposes as are expressly allowed by this Declaration or allowed pursuant to the Act. The Association shall also have the power to adopt, enact, and enforce the Rules and Regulations relative to the prohibitive and mandatory use restrictions set forth in Article XII in order to protect and enhance the value of the Property and the orderly functioning of the Community, and to adopt and respond to changing circumstances and times. A copy of any Rules and Regulations as adopted,

amended, or repealed shall be mailed or otherwise delivered to each member of the Association. In the case of any conflict between any provision of the Rules and Regulations and any provision(s) of this Declaration, the Articles, or Bylaws, the conflicting provision of the Rules and Regulations shall be superseded by the provisions of this Declaration, the Articles, or the Bylaws.

6.1.3 Enforcement. The Association, in its own name and on its own behalf or on behalf of the owners of two (2) or more units who consent, shall have the right to enforce, by any proceeding at law or in equity, all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by the provisions of this Declaration, the Articles, Bylaws, Rules and Regulations, resolutions of the Board, or any amendments thereto, and to intervene in litigation or administrative proceedings on matters affecting the community; provided, however, that the Association shall have the exclusive right to enforce assessment liens. The Court in any such action may award the successful party reasonable expenses in prosecuting such action, including reasonable attorneys' fees. Any failure by the Association or by any owner to enforce any covenant or restriction contained in this Declaration shall in no event be deemed a waiver of the right to do so at any time thereafter.

6.1.4 Imposition of Penalties for Violation or Failure to Pay Assessments. If a unit's owner or a tenant or guest of a unit's owner violates any provision of the governing documents of the Association, including the obligation to pay assessments, the Association, acting by and through its Board, in accordance with the notice and hearing requirements of this Declaration, and in the manner provided in the Act, may:

6.1.4.1 Suspend the voting rights of that unit's owner for a reasonable time not to exceed thirty (30) days for any single violation, or for any period during which any assessment against the unit's owner remains unpaid and delinquent, after notice and hearing is given and held in accordance with the Bylaws of the Association and NRS 116.31031.

6.1.4.2 Impose a fine against the unit's owner or the tenant or guest of the unit's owner for each violation. The fine must be commensurate with the severity of the violation as determined by the Board, but must not exceed the maximum permitted by NRS Chapter 116. The limitations on the amount of the fine do not apply to any interest, charges or costs that may be collected by the association pursuant to this section if the fine becomes past due.

If a fine is imposed pursuant to this section and the violation is not cured

within 14 days, the violation shall be deemed a continuing violation. Thereafter, the Association, acting by and through its Board, may impose an additional fine for the violation for each 7-day period, or portion thereof, that the violation is not cured. Any additional fine may be imposed without notice and an opportunity to be heard. All past due fines: (1) bear interest at the legal rate per annum; (2) will include any costs of collecting the past due fine, subject to the limitations stated in NRS 116.31031(8); and (3) will include any costs incurred by the association during a civil action to enforce the payment of the past due fine.

6.1.5 Delegation of Powers and Duties. The Association can delegate its powers, duties, and responsibilities to any committees, officers, employees, agents, and independent contractors of the Association, including a professional managing agent.

6.1.6 Services. The Association may obtain and pay for legal, accounting, and other services necessary and desirable in connection with the operation of the McCloud community and the enforcement of this Declaration.

6.1.7 Personal Property. The Association may purchase, acquire, and hold for the benefit of all the Owners and for the common areas necessary supplies and tangible and intangible personal property, and may dispose of the same by sale or otherwise.

6.1.8 Contracts. The Association may enter into a contract for a period not to exceed one (1) year.

6.2 Right of Action by Members of the Association. In addition to the rights of enforcement granted to the Association pursuant to section 6.1.3 of this Declaration, and subject to the provisions of NRS 116.745 – 116.795, any member of the Association shall have the right (but not the duty) to enforce any and all of the covenants, conditions, and restrictions now or hereafter imposed by this Declaration or the Act upon the Owners or upon any of the Property.

6.3 Duties of the Association. In addition to any other duties delegated to it by this Declaration, the Articles, or the Bylaws, the Association, acting by and through the Board, or other persons or entitles described in Section 6.1.5, has the obligation to conduct all business affairs of common interest to all members and to perform each of the following duties:

6.3.1 Management. The Association shall engage the services of a

professional manager to manage the Community, as provided in NRS 116.700.

6.3.2 Notice and Hearing for Imposition of Penalty. Pursuant to NRS 116.31031, the Association may not impose any penalty provided in section 6.1.4 of this Declaration unless:

6.3.2.1 Not less than thirty (30) days before the violation, the person against whom the fine will be imposed had been provided with written notice of the applicable provisions of the governing documents that form the basis of the violation; and

6.3.2.2 Within a reasonable time after the discovery of the violation, the person against whom the fine will be imposed has been provided with written notice specifying the details of the violation and the penalty to be imposed, the amount of the fine, if any, the date, time and location for a hearing before the Board on the violation, and a reasonable opportunity to contest the violation at the hearing. The hearing shall be conducted before three (3) members of the Board of Directors, a majority of whom must concur in the determination of whether a violation has been committed and whether a penalty should be imposed. A penalty may be imposed without a hearing only when the person against whom the penalty is proposed: (1) pays any proposed fine prior to the hearing; (2) executes a written waiver of the right to the hearing; or (3) fails to appear at the hearing after being provided with proper notice of the hearing.

6.3.3 Taxes and Special Assessments. The Association shall pay taxes and special assessments that are, or would become, a lien on the Property or common areas if, for any reason, the units and common areas are not separately assessed.

6.3.4 Insurance. The Association shall obtain and maintain, from reputable insurance companies, the insurance described in Article X.

6.3.5 Enforcement of Restrictions and Rules. The Association shall perform such other acts, whether or not expressly authorized by this Declaration, that may be reasonably necessary to enforce any of the provisions of this Declaration, the Articles, Bylaws, Rules and Regulations, or Board resolutions. By this provision and Declaration, the Association shall have reserved to it such easements as are necessary to perform its duties and obligations or to exercise its rights as set forth in this Declaration, the Bylaws, Articles, or the Architectural Control Committee Rules.

6.3.6 Association Property. The Association shall accept and exercise

jurisdiction over all property, real and personal, conveyed to the Association for which the Association has duties and obligations imposed upon it pursuant to this Declaration, including all common areas, easements for operation and maintenance purposes over any of the Property within the community, and easements for the benefit of Association members within the common areas.

6.3.7 Utilities. The Association shall acquire, provide, and pay for water, sewer, garbage disposal, refuse and other necessary utility services for the common areas.

6.3.8 Collection. The Association shall collect the monthly maintenance charge from all unit owners.

6.3.9 Fidelity Bonds. The Association shall purchase and pay for fidelity bonds for its officers and employees, the required sum of which shall not be less than $10,000 per covered officer or employee.

6.3.10 Reserve. The Association shall establish a reserve for replacements for the various components and elements of the common areas.

6.3.11 Garages. The Association shall assign one (1) garage to each unit, including the power and authority to reassign and transfer such garages among the various owners as their particular needs and circumstances reasonably warrant.

6.3.12 Title to Property Upon Dissolution. Upon dissolution of the Association, the Association shall convey the assets of the Association to an appropriate public agency or agencies or to a nonprofit corporation, association, trust or other organization organized and operating for purposes similar to those for which the Association was created, or in such other manner as may be proper for the Association so to do under applicable State of Nevada and Federal law.

6.4 Prohibited Actions. The Association and the Board shall have no authority to do the following:

6.4.1 Except by vote or written consent of a majority of the members of the Association, the Board shall be prohibited from entering into a contract with any third person by which the third person will furnish goods or services for the Common Area or the Association for a term longer than one (1) year, with the following exceptions: (1) a community management contract; (2) a contract with a public utility company if the rates charged for the materials or services are regulated by a Public

Utilities Commission, provided, however, that the term of the contract shall not exceed the shortest term for which the supplier will contract at the regulated rate; and (3) prepaid casualty and/or liability insurance policies of not to exceed three (3) years duration provided that the policy permits short rate cancellation by the insured.

6.4.2 Except by vote or written consent of a majority of the members of the association, the Board shall have no authority to acquire and pay anything out of common expenses, capital additions, or structural alterations (other than for purposes of replacing portions of common area or Association property, subject to the provisions of this Declaration) that has a cost, which, in the aggregate, exceeds five percent (5%) of the budgeted gross expenses of the Association for that fiscal year.

6.4.3 Except as otherwise provided in this Declaration, the Board shall have no authority to act on matters that are reserved exclusively for action by the members of the Association, as follows:

6.4.3.1 Amend or repeal this Declaration, the Bylaws, or any Rules and Regulations of the Association;

6.4.3.2 Recall any officer or member of the Board;

6.4.3.3 Determine not to rebuild improvements after partial or total destruction.

6.4.4 Except as otherwise permitted under the Act or by this Declaration, the Board may not commence a civil suit or arbitration on behalf of the Association. In the event the Act permits commencement of a civil suit or arbitration without the assent of a majority of the members of the Association, the Association may not maintain such an action and shall be required to dismiss the action within one hundred twenty (120) days after its commencement if the action is not ratified by a majority of the members of the Association within ninety (90) days after the commencement of the action (unless the action is to enforce the payment of an assessment, to enforce this Declaration, or to proceed with a counterclaim).

6.4.5 The Board shall not pay compensation of any kind to members of the Board or to officers of the Association for providing goods or services to the Association. However, the Board may cause a member of the Board or an officer to be reimbursed for actual and paid expenses incurred in carrying on the business of the Association; provided such expenses are pre-authorized by the Board.

6.4.6 No member of the Board, or of any committee of the Association or any officer of the Association, or any Manager, shall be personally liable to any Member, or to any other party, including the Association, for any damage, loss, or prejudice suffered or claimed on account of any act, omission, error, or negligence of any such person or entity if such person or entity has, on the basis of such information as may be possessed by him or it, acted in good faith without willful or intentional misconduct.

6.5 Maintenance of the Property. The Property shall be maintained as follows:

6.5.1 Condominium Exteriors. The Association shall maintain and manage the exterior of each condominium, as follows: paint, maintain, and repair and replace (if required because of normal wear and tear or deterioration) roofs, down spouts, balcony railings, exterior door surfaces, and exterior building surfaces. Condominium exteriors for which the Association is responsible for management and maintenance shall not include glass surfaces; landscaping within a private balcony, deck, or entry areas of the condominiums; patio covers or other additions built or maintained within an entry, deck or balcony areas by an owner; repairs or replacements arising out of or caused by the willful or negligent act of the owner, his family, guests, or invitees, or caused by earthquake or other acts of God to the extent they are not covered by insurance. Such excluded items shall be the responsibility of each condominium owner; provided, however, that if an owner shall fail to maintain or make repairs or replacements which are the responsibility of such owner, as provided above, then, upon a vote of a majority of the Board of Directors, and after not less than thirty (30) days notice to the owner, the Association shall have the right (but not the obligation) to enter the condominium and provide such maintenance or make such repairs or replacements, and the cost thereof shall be added to the assessments chargeable to such condominium and shall be payable to the Association by the owner of such condominium.

6.5.2 Common Areas. The Association shall operate, manage and control, or provide for the operation, management, and control of all common areas, common area facilities, limited common areas, and personal property belonging to the Association. The common areas include, but are not limited to:

6.5.2.1 Landscaping (including the trees, shrubs, grass and sidewalks on common area), garages, parking areas, driveways, private streets, and all other land included in the description of the project in Exhibit "A" attached to the 1982 Declaration or otherwise acquired by the Association, except the land under the

buildings containing the units;

6.5.2.2 The water supply system and the sewage disposal system located in the project, including pipes, sewage lines, and other facilities;

6.5.2.3 The foundations, columns, girders, beams, and supports of the buildings on the Property, the perimeter walls around each unit to its interior surfaces and other walls not within a unit;

6.5.2.4 The roofs, stairs, stairways, stairway landings, walkways, and corridors that are not within the unit, including the deck or porch leading to the main entrance of the unit but excluding balconies and other decks appurtenant to the unit;

6.5.2.5 The pipes, ducts, flues, chutes, conduits, wires and other utility installations to the outlets;

6.5.2.6 All installations of power, lights, gas, water, and heating existing for common use; and

6.5.2.7 All other parts of the project, including personal property, necessary or convenient to its existence, maintenance, and safety, or normally in common use.

The Association property shall be maintained in a good state of repair. The Association shall have the authority to obtain and pay for water service for the entire Project. The Association shall have the authority to obtain and pay for electric service, lighting facilities, fire extinguishers, and gardening and janitorial service for the common areas, and may grant easements where necessary for utilities and sewer facilities over the common areas to serve the common and open areas of the condominiums. The Association shall maintain any and all settling basins, percolation trenches and skimmer chambers as may be required by government regulatory agencies having jurisdiction over the property. The Association shall further provide for regular sweeping of drives and parking areas.

6.5.3 Owner Maintenance. If required, it shall be the obligation of each unit owner:

6.5.3.1 To maintain, repair, and replace, at his own expense, all internal installations and components of his unit, including but not limited to:

showers, baths, tiling, plumbing, sinks, toilets, electrical sockets, switches and wiring, heating units, outlets, apparatus, fans, windows (interior and exterior), sliding glass doors (interior and exterior) balcony decks, ceiling plaster, interior wall surfaces, interior floor surfaces, lighting installations, electrical appliances, and telephone equipment;

6.5.3.2 To remove snow, leaves and debris from all patios and balconies that are limited common areas appurtenant to the owner's unit. If any such limited common areas are appurtenant to two or more units, the owners of those unites shall be jointly responsible for such removal;

6.5.3.3 To pay for his own electricity, gas, cable television, and telephone service; and

6.5.3.4 To reimburse the Association for any expenditures incurred in repairing or replacing any part of or property on the common area belonging to the Association that the Association determines has been damaged through the fault of that owner.

A unit owner shall not be responsible for repairs to his unit that originate from a malfunction within the common area.

6.5.4 Right of Entry. Each owner shall grant the right of entry to the management agent or to any other person authorized by the Board in case of any emergency originating in or threatening his unit or garage, whether the owner is present at the time or not. Each owner shall permit the Association or its representatives, when so required, to enter his unit or garage for the purpose of performing installations, alterations, or repairs to the mechanical, plumbing, or electrical services, provided that requests for entry are made in advance and that such entry is at a time convenient to the owner. In case of an emergency, such right to entry shall be immediate.

6.6 Audit. Financial statements for the Association shall be regularly prepared and distributed by the Association to all members as follows:

6.6.1 A pro forma operating statement (budget) for each fiscal year shall be distributed not less than sixty (60) days before the beginning of the fiscal year.

6.6.2 An annual report shall be distributed within one hundred twenty (120) days after the close of the fiscal year. The annual report shall consist of:

6.6.2.1 A balance sheet as of the end of the fiscal year;

6.6.2.2 An operating (income statement) for the fiscal year;

6.6.2.3 A statement of changes in financial position for the fiscal year; and

6.6.2.4 Any information relating to any transaction or indemnification between the Association and any of its officers, directors or members which in the aggregate exceed forty thousand dollars ($40,000).

The annual report shall be prepared by an independent accountant for any fiscal year in which the gross income to the Association exceeds Seventy Five Thousand Dollars ($75,000). If the annual report is not prepared by an independent accountant, it shall be accompanied by a certificate of the treasurer of the Association that the statement was prepared without audit from the books and records of the Association.

6.7 Accounting and Collections. The Association, acting by and through its Board of Directors, may delegate to a bank or other qualified financial or accounting firm the collection and disbursement of maintenance charges and the preparation of annual financial statements. In such event, the Board of Directors shall be responsible to the owners for the accurate handling and accounting of such funds. Vouchers authorizing the payment of expenses from maintenance funds in excess of $2000 shall be approved in advance by a member of the Board of Directors. The $2000 limitation shall not apply to routine expenses, such as utilities and trash pickup, which are contained in the budget and paid using a bank auto-pay system.

6.8 Right of Inspection of Association Books and Records. The Association shall make available for inspection to any member of the Association or his duly appointment representative, or any mortgagee, the following:

6.8.1 All membership registers, accounting records, and minutes of meetings of the members of the Association, the Board, and committees of the Board, and all other books, documents and records of the Association, and the physical properties of the Association.

6.8.2 The financial statements and budgets of the Association.

6.8.3 The study of the reserves of the Association required to be

conducted pursuant to NRS 116.31152.

The right of inspection shall include the right to make copies of documents, and shall occur during regular working hours of the Association at the office of the Association or such other place as prescribed by the Board. The Board shall establish by resolution reasonable rules with respect to (a) notice to be given to the custodian of the records of the Association by the Member representative, or mortgagee desiring to make an inspection, and (b) payment of the actual cost (not to exceed .25 cents per page or such higher amount as allowed pursuant to the Act) of reproducing copies of documents requested by a Member or by a representative or mortgagee. The provisions of this paragraph do not apply to the personnel records of the Association or the records of the Association relating to another owner. The Board shall cause a copy of any of the records required to be maintained pursuant to subsections 6.7.2 and 6.7.3 to be provided to an Owner within, fourteen (14) days after receiving a written request for those records.

6.9 Notices. For the purpose of this Article, services of all notices and decisions shall be made by depositing in the United States mail, by certified mail, return receipt requested, the notices and/or decisions addressed to the owner at his address as shown on the official records of the McCloud Condominium Association.

6.10 Documentation. Any action to be taken by the Board of Directors as required or permitted by this Declaration that must be evidenced by a written document shall be executed by the President and one (1) other member of the Board of Directors.

6.11 Acquisition of Personal Property. The Board may acquire and hold, for the benefit of the owners, tangible and intangible personal property, and may dispose of the same by sale or otherwise. Title to such personal property shall be taken in the name of the Association, to wit: "McCloud Condominium Homeowners." The beneficial interest in such personal property shall not be transferable by an owner except in connection with the sale of his condominium, or where such property is being disposed of for the benefit of the condominium owners. The sale of a condominium, as provided in this Declaration, shall transfer to the purchaser ownership of the transferor's beneficial interest in such personal property.

6.12 Release of Liability and Indemnity. Except as otherwise provided below, and except in instances of willful misconduct or bad faith by any Board member(s), the members of the Board shall not be liable to the owners for any mistake of judgment, negligence, or otherwise. Unless any contracts made by the Board shall have been

made in bad faith or contrary to the provisions of this Declaration, the Articles, Bylaws, or the Act, the unit owners shall indemnify and hold harmless each of the members of the Board against all contractual liability to others arising out of contracts made by the Board on behalf of the Association. The liability of any owner arising out of any contract made by the Board or of the indemnity in favor of the members of the Board shall be limited to such proportion of the total liability as the unit owner's interest in the Association bears to the interest of all the owners of the membership in the Association. The provisions of this paragraph do not apply to and shall not preclude claims for property damage and bodily injury by owners against the Board or any other insured of the liability insurance required by this Declaration.

ARTICLE VII

MEETINGS

7.1 Quorum. At all meetings of the members entitled to vote, a majority of such members, or their proxies, shall be necessary to constitute a quorum. If any meeting cannot be held because a quorum is not present, the owners present, either in person or by proxy, may adjourn the meeting to a time not less than forty-eight (48) hours and not more than thirty (30) days from the time the original meeting was called, at which time the quorum requirement shall be reduced to forty percent (40%) of the members entitled to vote. Except as provided below, if there is a quorum, a majority vote of the members present either in person or by proxy and entitled to vote shall be sufficient for the passage of any motion or the adoption of any resolution.

The following matters shall require a vote of at least a majority of members of the association entitled to vote, unless it is specifically indicated that a three-quarters (3/4) vote of the members is required:

7.1.1 The recall of any officer or member of the Board.

7.1.2 The levy of special assessments to defray the costs of any action or undertaking on behalf of the Association, which, in the aggregate, exceed five percent (5%) of the budgeted gross expenses of the Association for that fiscal year.

7.1.3 To amend or repeal this Declaration, the Articles, or the Bylaws.

7.2 Annual Meetings. Annual meetings of the condominium owners shall be held at such time as shall be determined by action of the Association's Board of

Directors. Meetings of members shall be held within the project or at a meeting place as close to the Property as possible. Unless unusual conditions exist, members' meetings shall not be held outside Washoe County. Written notice of annual meetings shall be mailed to members of the Association by the Board not less than ten (10) nor more than sixty (60) days before the date of the meeting. The notice shall: (1) specify the place, day and hour of the meeting; (2) include a copy of the agenda for the meeting, containing all information required by NRS 116.3108; and (3) provide notification of the right of a unit's owner to have a copy of the minutes or a summary of the minutes of the meeting provided to the unit's owner upon request and payment of any associated costs, and to speak to the Association or the Board, unless the Board is meeting in executive session.

7.3 Special Meetings. Special meetings may be called by the vote of a majority of a quorum of the Board or by any five percent (5%) of the total voting power of the Association that desire to meet, by written notice signed by those desiring to meet and sent by them to the Association members at least ten (10) days and not more than sixty (60) days before the meeting. Notice of any special meetings shall contain the same information required for annual meetings, as prescribed by NRS 116.3108, including the place, date and hour of the meeting, the general nature of the business to be transacted, and the notification to the members of their rights to a copy or summary of the minutes of the meeting and to speak to the Association.

7.4 Board Meetings. Meetings of the Board of Directors shall be held at least once every ninety (90) days, as required by NRS 116.31083. The Board shall mail written notice of any Board meetings to the Association members not less than ten (10) days prior to the date of the meeting of the Board of Directors. Notice of any meetings of the Board of Directors shall comply with NRS 116.31083, and include the place, date, and hour of the meeting, include a copy of the agenda for the meeting or the date on which and the locations where copies of the agenda may be obtained by the members of the Association, and the rights of an Association member to a copy or summary of the minutes of the meeting and to speak to the Association. The meetings of the Board of Directors shall review: (1) a current reconciliation of the operating account of the Association; (2) a current reconciliation of the reserve account of the Association; (3) the actual revenues and expenses for the reserve account, compared to the budget for that account for the current year; (4) the latest account statements prepared by the financial institutions in which the accounts of the association are maintained; (5) an income and expense statement, prepared on at least a quarterly basis, for the operating and reserve accounts of the association; and (6) the current status of any civil action or claim submitted to arbitration or mediation in which the association is a party.

ARTICLE VIII

COMMON EXPENSES AND ASSESSMENTS

8.1 Fiscal Year. The fiscal year of the Association shall be a twelve (12) month period running from October 1 to September 30 of each year.

8.2 Purpose of Assessments. Assessments levied by the Association shall be the amount estimated to be required, and shall be used exclusively to maintain, protect and enhance the welfare of members of the Association, for the performance of the duties of the Association as set forth in this Declaration, and for the repair, maintenance and upkeep of the common areas and any other Association Property.

8.3 Annual Assessments/Projected Common Expenses. On or prior to August 1 of each year, the Board shall meet for the purpose of estimating the common expenses to be required during and preparing the proposed budget for the subsequent twelve (12) month period, commencing with the following October 1. The projected common expenses, which are the Association's annual assessments, shall include:

8.3.1 The estimated annual revenue and expenditures of the Association;

8.3.2 A reasonable provision for contribution to a reserve for contingencies and replacements, plus any surplus in the common expense fund from the fiscal year just ended;

8.3.3 Any amounts necessary to make up any deficit from the fiscal year just ended;

8.3.4 Any amounts required by an excess of repair and restoration costs over insurance proceeds; and

8.3.5 Any other amounts required by the terms of this Declaration, or the Act.

The Association's common expenses are the expenditures made by the Association in the performance of its obligations under the Act and this Declaration, and the financial liabilities of the Association during the fiscal year, including the costs and expenses of the daily operation of the Association and an allocation for

reserves. The common expenses include, but are not limited to, expenditures (1) to operate, manage, maintain and repair the common areas and other Association property, and to administer the operation of the Association; (2) to provide for reasonable reserves consistent with sound business practice for the repair and replacement and restoration of improvements to the common areas and any Association property, and for such other purposes as are consistent with good business practice, and otherwise as required by NRS 116.3115 and this Declaration; (3) to provide for the possibility that some Assessments may not be paid on a current basis; and (4) to provide for the payment of the fee of a professional community manager.

Not less than thirty (30) nor more than sixty (60) days before the beginning of each fiscal year of the Association, the Board shall prepare and distribute to each member of the Association its projected common expenses, which shall be subject to change and approval at any meeting at which the projected common expenses is considered. Except for the common expense of insurance, paint reserve, and roof reserve, which shall be assessed to each owner of a unit in a fraction equal to the square footage floor area of an owner's unit divided by the total square footage floor area of all units, common expenses shall be assessed equally to the owners of all units as of the following October. If the estimated common expenses are inadequate for any reason, including nonpayment of any other owner's assessment, the Board may, at any time, levy further assessment.

8.4 Reserve Requirements. That portion of the projected common expenses specific to the reserve required by NRS 116.3115 must include, without limitation:

8.4.1 The current estimated replacement cost, estimated remaining life and estimated useful life of each major component of the common areas;

8.4.2 As of the end of the fiscal year for which the projected common expenses is prepared, the current estimate of the amount of cash reserves that are necessary and the current amount of accumulated cash reserves that are set aside, to repair, replace or restore the major components of the common areas;

8.4.3 A statement as to whether the Board has determined or anticipates that the levy of one or more special assessments will be required to repair, replace or restore any major component of the common areas or to provide adequate reserves for that purpose; and

8.4.4 A general statement describing the procedures used for the

estimation and accumulation of cash reserves, including, without limitation, the qualifications of the person responsible for the preparation of the study required below in this paragraph.

8.5 Reserve Study. In accordance with the requirements of NRS 116.31152, the Board shall:

8.5.1 Cause to be conducted at least once every five (5) years, a study of the reserves required to repair, replace and restore the major components of the common areas;

8.5.2 Review the results of that study at least annually to determine if those reserves are sufficient; and

8.5.3 Make any adjustments it deems necessary to maintain the required reserves.

The reserve study must be conducted by a person qualified by training and experience to conduct such a study, and may be a member of the Board, an owner, or the Association manager who is so qualified. The study must include: (1) a summary of an inspection of the major components of the common areas the Association is obligated to repair, replace or restore; (2) an identification of the major components of the common areas that the Association is obligated to repair, replace or restore which have a remaining useful life of less than thirty (30) years; (3) an estimate of the remaining useful life of each major component; (4) An estimate of the cost of repair, replacement or restoration of each major component during and at the end of its useful life; and (5) an estimate of the total annual assessments that may be required to cover the cost of repairing, replacement or restoration the major components after subtracting the reserves of the Association as of the date of the study.

Money in the reserve account required by provision may not be withdrawn without the signatures of at least two (2) members of the Board. The reserve account may be used *only* for Common Expenses that involve repairs, replacement or restoration of the major components of the common areas, including, without limitation, repairing and replacing roofs, roads and sidewalks, and must not be used for daily maintenance.

8.6 Assessments. Assessments are obligations of the Association members, as follows:

8.6.1 Each unit's owner covenants and agrees to pay to the Association any Assessments made pursuant to this Declaration. Payments for assessments shall be due in equal monthly installments on or before the first day of each month during the twelve (12) month period commencing with October 1, or in such other reasonable manner as the Board shall designate. Each assessment or installment thereof, together with any late charges, interest, collection costs, and reasonable attorneys' fees, shall be the personal obligation of the person or entity who owns the unit against which the assessments were made at the time the assessment (or installment) became due and payable. If more than one person or entity owns that unit, the personal obligation to pay the assessment (or installment) for that unit shall be joint and several. Unless otherwise provided in this Declaration, the purchaser of a unit shall be jointly and severally liable with the seller for all unpaid assessments against the unit, up to the time of the grant or conveyance, without prejudice to the purchaser's right to recover from the seller the amount paid by the purchaser for any such assessments. Suit to recover a money judgment for such personal obligation shall be maintainable by the Association without foreclosure or waiver of the lien securing the same. No Owner may avoid or diminish such personal obligation by non-use or abandonment of his Unit. In the event a condominium is rendered uninhabitable by fire or other casualty, the Board, in its discretion, may abate all or a portion of the common expenses assessed against the owner of that condominium while it remains uninhabitable.

8.6.2 The failure of the Board to fix the assessments for a twelve (12) month period prior to the commencement of that period shall not be deemed a waiver or modification in any respect of its right to do so or of the provisions of this Declaration, or a release of the owners from the obligation to pay the assessments, or any installment thereof for such that period. The assessment fixed for the preceding twelve (12) month period shall continue until a new assessment is fixed. No owner may exempt himself from liability for his assessment of any of the common area by waiver of his use and enjoyment of the common areas and their facilities or by abandonment of his unit.

8.7 Special Assessments. If the Board determines that the estimated total amount of funds necessary to defray the common expenses for a given fiscal year is or will become inadequate to meet the common expenses for any reason, including, but not limited to, delinquencies in the payment of Assessments, or in the event the Association has insufficient reserves to perform its obligations under this Declaration, then the Board shall determine the approximate amount of such shortfall, shall provide a summary thereof to all of the members of the Association

along with the Board's recommendation for a special assessment to meet such shortfall, and shall set a date for a meeting of the Owners which is not less than fourteen (14) nor more than thirty (30) days after the mailing of the summary. Unless at that meeting a majority of all members of the Association votes to reject the proposed special assessment, the proposed special assessment shall be deemed ratified by the members of the Association, whether or not a quorum is present at such meeting, and shall become a special assessment against, and allocated equally to, the owners of the units. The Board may, in its discretion, provide for payment of any special assessment in any number of installments or provide that it is payable in one (1) installment within such time period as the Board deems reasonable.

8.8 Liens for Assessments. Each owner shall pay all common expenses assessed against him and all other assessments made against him by the Board in accordance with the terms of this Declaration. Each assessment shall be separate and distinct of personal debts and obligations of the owner against whom the same are assessed.

8.8.1 Unpaid Fines and Assessments Constitute a Lien on Unit. The amount of any assessment to any unit, whether regular or special, plus interest at the maximum rate allowed by law, plus costs and a reasonable attorney's fees, plus any fines imposed by the Association against that unit, shall be secured by a lien on that unit in favor of the Association from the date the Assessment or fine becomes due. If an Assessment or fine is payable in installments, the full amount of the Assessment or fine is a lien from the time the first installment becomes due. Notice of any lien imposed against a unit under this provision shall be recorded in accordance with the Act, and may be enforced as provided in the Act for enforcement of such liens. Any lien imposed against a unit under this provision shall be prior to all other liens and encumbrances on that unit, except for: (a) valid tax and special assessment liens in favor of any governmental assessing authority; (b) liens and encumbrances recorded before the recordation of the Declaration; and (c) a First Deed of Trust recorded before the date on which the Assessment or fine sought to be enforced became delinquent. The lien created by this Declaration for unpaid Annual Assessments is also prior to a First Deed of Trust to the extent of the amount of such Annual Assessments which would have become due during the six (6) month period immediately preceding institution of an action to enforce the lien.

8.8.2 Release of Lien. Upon the timely curing of any default for which a notice of lien was filed or recorded by the Association, the Board shall file or record, or cause to be filed or recorded, an appropriate release of such notice or release of lien, upon payment by the defaulting owner of a fee, to be determined by the Board,

but not to exceed $100 to cover the costs of preparing the filing or recording such release.

8.8.3 Non-Exclusive Remedy. The assessment lien, and the rights to foreclose on and sale under an assessment lien, shall be in addition to and not in substitution of all other rights and remedies that the Association and its assigns may have under this Declaration and the Act, and according to law, including a suit to recover money judgment for any unpaid assessments.

8.9 Vesting of Voting Rights. Notwithstanding anything contained in this Declaration, voting rights attributable to condominiums shall not vest until assessments against those condominiums have been levied by the Association.

8.10 Increase in Annual Assessments. Notwithstanding any other provisions of this Declaration, the Board may not, without the vote or written consent of a majority of the members of the Association, impose a regular annual assessment per unit which is more than twenty percent (20%) greater than the regular assessment for the immediately preceding fiscal year.

ARTICLE IX

UTILITIES

9.1 Easement Granted to Units' Owners. Whenever any connection, or portion of any connection, for sanitary sewer, water, electricity, gas, cable TV, or telephone lines installed within the project lie in or upon any unit served by those connections, the owner of the unit served by those connections shall have the right, and are hereby granted an easement to the full extent necessary, to have utility companies, with proper notice and agreed scheduling, enter upon the unit in or upon which said connections, or any portion thereof, lie, to repair, replace, and generally maintain said connections as and when the same may be necessary.

9.2 Use and Enjoyment. Whenever sanitary sewer, water, electricity, gas, cable TV, or telephone lines are installed within the project, which connections serve more than one unit, the owner of each unit served by said connections shall be entitled to the full use and enjoyment of such portions of those connections that service his condominium.

9.3 Dispute Resolution. In the event of a dispute between unit owners with

respect to the repair or rebuilding of any utility connections, or with respect to the sharing of the costs thereof, upon written request by one of such owners addressed to the Association, the matter shall be submitted to the Board of Directors, which shall decide the dispute. The decision of the Board shall be final and conclusive on the parties. If any disputing owner is a member of the Board of Directors, he shall not be entitled to vote on the disputed issue. The remaining non-disputing Board members shall temporarily appoint another owner to serve on the Board solely for the purpose of voting on such dispute.

ARTICLE X

INSURANCE

10.1 Association Insurance. The Association shall obtain and maintain in full force and effect at all times and for the benefit of the condominium owners, the following: (a) adequate public liability insurance; (b) officers and directors liability insurance; (c) workers' compensation insurance; (d) fire and property damage insurance covering the entire project (except the personal property of the owners located within the project) and the encumbrances upon the project or any part thereof as their interests may appear. All insurance obtained by the Association shall meet the requirements of NRS 116.3113.

10.1.1 Adequate fire insurance shall mean coverage in an amount equal to full replacement value (exclusive of land, foundation, excavation and other items normally excluded from coverage), with an "agreed amount" endorsement or its equivalent, if available, or an "inflation guard" endorsement, payable to the Association, subject to the least deductible the insurer will permit or any other deductible the Board deems reasonable.

10.1.2 Insurance obtained by the Association pursuant to this provision shall comply as to form, content, and insurer with the requirements of the encumbrancers. The premiums for said insurance are to be paid out of the maintenance fund, with each condominium unit bearing an equal share of the cost thereof.

10.1.3 All insurance obtained by the Association shall be provided by companies duly authorized to do business in Nevada, and as required by any state or federal entities with which the Community has been qualified.

10.2 Owner Insurance. Each owner should provide adequate insurance, as follows:

10.2.1 Insurance, including insurance for loss of theft, on all personal property located on and within the owner's unit or stored by the owner in or on the common areas and any other portion of the Property.

10.2.2 Insurance for casualty and public liability coverage within each Unit to the extent not covered by the Association's insurance.

10.2.3 Insurance coverage for activities of the owner, not acting for the Association, with respect to the common areas.

10.2.4 Insurance against loss from theft on all personal property.

10.3 Authority to Negotiate Loss Settlements. The Board of Directors is hereby granted the authority to negotiate loss settlements with the appropriate insurance carriers with respect to loss or damage occurring on or to the common areas. Any two (2) members of the Board may sign a loss claim relating to Association insurance, and such signatures shall be binding on all the owners.

ARTICLE XI

NON-SEVERABILITY OF CONDOMINIUM INTEREST AND SUSPENSION OF PARTITION

11.1 Suspension of Right of Severability. No owner shall be entitled to sever, or bring any such action for partition of: (1) his unit from his pro-rated undivided interest in the building in which the owner's unit is located; (2) his interest in the real property under the building in which his unit is located; or (3) his interest in the Association. No such component interest may be severally sold, conveyed, transferred, encumbered, hypothecated, bequeathed, or otherwise dealt with, and any attempt to do so in violation of this provision shall be void and of no effect. The suspension of this right of severability shall in no event extend beyond the period in which the right to partition is suspended under NRS 117.050.

11.2 Suspension of Right of Partition. The right of partition of the common areas is suspended. The project may only be partitioned and sold as a whole upon a showing of the occurrence of any one of the events provided in NRS 117.050.

Additionally, partition may be available upon a showing that six (6) months from the date of any partial or total destruction of the project, a certificate or resolution to rebuild has not been filed of record, or if reconstruction has not actually commenced within said six (6) months. The suspension of the right of partition shall in no event extend beyond the period in which the right to partition is suspended under NRS 117.050. Nothing in this provision shall prevent the partition or division of interests between joint or common owners of one condominium unit.

11.3 **Presumption of Entire Condominium Conveyance.** Each unit and its appurtenant undivided interest in the Common Areas shall always be conveyed, transferred, devised, encumbered, bequeathed, and otherwise affected only as the entire Condominium.

ARTICLE XII

USE RESTRICTIONS

In addition to all other covenants contained in this Declaration, the use of the Property, each of its condominium units, and the common areas are subject to the following:

12.1 **Residential Use Only.** All condominiums on the Property shall be used for residential purposes only.

12.2 **Business Usage Prohibited.** No condominium or any part of the project shall ever be used or caused to be used or allowed or authorized in any way, directly or indirectly for any business, commercial, manufacturing, mercantile, storage, vending, or other such non-residential purposes; provided, however, that this provision shall not prohibit an owner from leasing or renting his unit or permitting its use by his guests.

12.3 **Billboards and Signs Prohibited.** Except for signs approved by the Board of Directors for the benefit of the entire project, and except for one (1) professional sign not exceeding 12 inches by 18 inches in size advertising a unit for sale or lease, no signs of any kind shall be displayed in the public view on or about the exterior of any unit.

12.4 **Owner Structural Changes.** No structural alterations to the interior of any Unit shall be made, and no plumbing or electrical work within any bearing or

party walls shall be made by an individual owner without the prior written consent of the Architectural Committee as provided in Article XIII of this Declaration.

12.5 Association Maintenance and Decoration Authority. The Board of Directors, or its duly appointed agent, including the manager, if any, shall have the exclusive right to paint, decorate, repair, maintain and alter or modify the exterior walls, balconies, railings, exterior door surfaces, roof, and all installations and improvements in the common area, and no owner of a condominium shall be permitted to do, or have done, any such work. The approval of the Board of Directors shall be required in writing for the installation of any awnings, sunshades, or screen doors, or any antennae or structures on the roof of any condominium building.

12.6 Children. All unit owners shall be accountable to the remaining owners, their families, visitors, guests, and invitees for the conduct and behavior of their children and any visiting children temporarily residing in or visiting their units.

12.7 Pets. Pets shall be permitted, subject to the Rules and Regulations adopted by the Board.

12.8 Offensive Activities. No owner shall permit or suffer anything to be done or kept upon or in his unit or the common areas that will increase the rate of insurance on the Property. No owner shall obstruct or interfere with the rights of other owners, their families, guests, and invitees, or in any way interfere with the quiet enjoyment by any other owner of his unit by: (1) annoying any other owner with unreasonable noises or otherwise; (2) committing or permitting any nuisance, noxious or offensive activity; or (3) committing any immoral or illegal act. Each owner shall comply with all of the requirements of the Local and State Boards of Health, and with all other governmental authorities with respect to the occupancy and use of the Property.

12.9 Owner Liability. Each owner shall be liable to the Association for any damage to the Association-owned areas or any equipment thereon which may be sustained by reason of the negligence of that owner, his family, guests, or invitees, to the extent that any such damage shall not be covered by insurance.

12.10 Garages. The garages are to be used for the parking of car They are not to be converted to any type of living space or used for recreational or business activities.

12.11 Rubbish. Each owner shall remove all rubbish, trash, and garbage from his unit. Rubbish, trash, and garbage shall not be allowed to accumulate on or within

any unit or the Property. All clothes lines, refuse containers, wood piles, storage areas, and machinery and equipment shall be prohibited upon or in any condominium, unless approved, in writing, by the Architectural Committee.

12.12 Snow and Ice. Snow and ice shall be removed from the Property without the use of any soluble toxic materials, and provisions must be made for maintenance of the siltation trenches and skimmer chambers in the drainage system.

12.13 Prohibited Restrictions. No condominium owner shall execute or file for record any instrument which imposes restrictions upon the sale, leasing, or occupancy of his condominium on the basis of race, color, creed, religion or sex.

12.14 Interval Ownership Prohibited. Legal title to any one condominium may not be held by any more than ten (10) unrelated persons at any one time. As used herein, a husband and wife shall be considered one "person", and "unrelated persons" shall mean persons not related within the third degree of consanguinity. Time-sharing, as defined by any applicable state or local ordinances, is prohibited.

12.15 Rules. The Board, from time to time, may adopt reasonable Rules and Regulations in furtherance of this Declaration, the Articles and Bylaws of the Association. These rules may be enforced as provided in this Declaration.

ARTICLE XIII

ARCHITECTURAL CONTROL COMMITTEE

13.1 Organization. There shall be an Architectural Control Committee comprised of the Board of Directors; provided, however, that the Board may appoint an Architectural Control Committee of three (3) or more members, none of whom need be members of the Board.

13.2 Duties. It shall be the duty of the Architectural Control Committee to consider and act upon any proposals or plans submitted to it pursuant to the terms of this Article, to adopt Architectural Control Committee Rules if it so chooses, to perform other duties delegated to it by the Association, and to carry out all other duties imposed upon it by this Declaration.

13.3 Meetings. The Architectural Control Committee shall meet from time to time as necessary to perform its duties as stated in this Article. The vote or

written consent of any two (2) members shall constitute an act by the Committee unless the unanimous decision of its members is otherwise required by this Declaration. The Architectural Control Committee may charge a filing fee to be used to pay an architect, who may or may not be a member of the Architectural Control Committee, to review any submitted plans and specifications. The Board may reimburse members for reasonable expenses incurred by them in the performance of any Architectural Committee function.

13.4 Architectural Control Committee Rules. The Architectural Control Committee may prepare and promulgate "Architectural Control Committee Rules" containing guidelines and review procedures on behalf of the Association. The Architectural Control Committee Rules shall be those of the Association, and the Architectural Control Committee shall have sole and full authority to prepare and to amend the Architectural Control Committee Rules, provided the Architectural Control Committee Rules are otherwise in compliance with the Articles, the Bylaws and this Declaration. The Architectural Control Committee shall make any Architectural Committee Rules available to Owners.

13.5 Approval by the Architectural Control Committee. No owner may make or commence any structural addition, structural alteration, or improvement on the Property or in his unit, including, without limitation, the alteration or construction of a building, fence, wall, or structure, or the placement, erection, or alteration of any Limited Common Areas, without the prior written consent of the Architectural Control Committee. The Architectural Control Committee and any of its members may consult with knowledgeable outsiders with respect to any plans, drawings, specifications, or any other proposal submitted to the Architectural Control Committee.

13.6 Requests for Approval. Any request by a unit owner for approval by the Architectural Control Committee for any improvements or work that requires Architectural Control Committee approval must be submitted in writing to the Architectural Control Committee. Any such submittal shall contain and set forth such information and in such detail as required by the Architectural Control Committee to reasonably inform the Architectural Control Committee of the proposed work of improvement for the purpose of determining its compliance with the terms and provisions of this Article and the propriety of granting or denying any such application. All improvements or modifications, if approved by the Architectural Control Committee, shall be undertaken, prosecuted and completed in full and timely compliance with all applicable zoning laws, building codes, and all other applicable laws, ordinances and regulations relating to the construction, use and occupancy of

the Improvements.

13.7 The Architectural Control Committee shall answer any written request for approval within sixty (60) days after receipt of the request. Any consent or approval by the Board or Architectural Control Committee shall be in writing. The failure of the Architectural Control Committee to answer the request within this time shall not constitute consent or approval by the Architectural Control Committee to the proposed action. Any such request shall be reviewed in accordance with any Architectural Committee rules then in effect.

13.8 Limitations on Improvements. Subject to the provisions of this Article, an owner:

13.8.1 May make any improvements or alterations to the interior of his unit that do not impair or lessen the structural integrity, mechanical systems, or support of any portion of the Property or Community, or otherwise alter, in any way, the condition of any component contained within the framing of the structure, provided that any such improvements or alterations to the interior of the unit do not result in a violation, in and of itself or as a result of the use thereof, of any other term or provision of this Declaration.

13.8.2 May not change the appearance of the Common Areas, the exterior appearance of a unit, any component that may be seen from the exterior of the building, or any other portion of the Project, or make any change or modification to that Owner's Unit, such as replacing carpeting with hardwood floors, without permission of the Board or the Architectural Control Committee, as applicable.

13.8.3 After acquiring an adjoining Unit, may not remove or alter any intervening partition or create apertures therein.

13.9 Right of Inspection. Any member or authorized consultant of the Board or the Architectural Control Committee, or any authorized officer, manager, employee or other agent of the Association, may enter upon any unit, as provided in paragraph 6.5.4, without being deemed guilty of trespass, in order to inspect any structural addition, alteration or improvement constructed or under construction in the Unit to determine whether the work has been or is being completed in compliance with the plans and specifications approved by the Board or the Architectural Control Committee. In case of an emergency, no request or notice is required and the right of entry shall be immediate, and with as much force as is reasonably necessary to gain entrance, whether or not the Owner is present at the time.

13.10 Effect on Insurance. Any additions, alterations, and improvements to the units and common areas shall not, except by prior approval of the Board, cause any increase in the premiums of any insurance policies carried by the Association or by the owners of any units other than those affected by the change.

13.11 Limitation on Liability of Architectural Control Committee. Provided that the Architectural Control Committee, or a particular member of the Architectural Control Committee, has acted in good faith on the basis of information as the Architectural Control Committee or the member, as the case may be, may possess, then neither the Architectural Control Committee nor any of its members shall be liable to the Association, to any Owner, or any other person for any damage, loss, or prejudice suffered or claimed on account of: (a) the approval or disapproval of any plans, drawings, and specifications, whether defective or not; or (b) the construction or performance of any work, whether or not pursuant to approved plans, drawings, and specifications.

13.12 Discretion of the Board of Directors and Architectural Control Committee. Except as may be expressly provided in this Declaration, any consent or approval of the Architectural Control Committee that is required under the provisions of this Article may be granted or withheld in the sole and absolute discretion of the Architectural Control Committee. In that regard, the granting or withholding of such consent or approval shall not be subject to any objective standards of "reasonableness" or otherwise. The approval of or consent to any matter shall not be deemed to be a waiver of the right to disapprove the same or similar matters in subsequent requests for consents or approvals from the same or other parties.

ARTICLE XIV

DESTRUCTION OF THE PROJECT OR ITS ELEMENTS

14.1 Partial Destruction of Common Areas. In the event of partial destruction of the common areas, the Association shall restore and repair the affected area to its former condition as promptly as practicable and in a lawful and workmanlike manner.

14.1.1 Partial destruction shall mean any destruction that is less than that defined as total destruction in this Article.

14.1.2 The proceeds of any insurance shall be made available for such purpose subject to prior rights of beneficiaries of deeds of trust or mortgagees whose interests may be protected by said policies. In the event that the amount available from the proceeds of such insurance policies for such partial reconstruction shall be inadequate by more than the policy's deductible, the condominium owners shall proceed with such partial reconstruction unless by a three-fourths (3/4) vote of all the Owners, the Owners vote not to proceed with partial reconstruction. In the absence of a three-fourths (3/4) vote, a special assessment shall be levied against the owners of the common area partially destroyed upon the basis of the ratio of the square footage of the floor area of the unit to be assessed to the total square footage of floor area of all units which are to be assessed. In the event of the three-fourths (3/4) determination by the owners that it would not be in their best interests to proceed with the same, the owners may, in their discretion proceed as provided in this Article.

14.2 Total Destruction of Common Areas. In the event of the total destruction of the common areas ("total") being defined as sixty percent (60%) of the units, or a lesser percentage if the condominium owners, by a three-fourths (3/4) vote, have so agreed prior to the destruction, the owners shall have authority to determine whether said improvements shall be rebuilt, or whether said project shall be sold. Unless there is a determination by a three-fourths (3/4) vote not to rebuild, the necessary funds shall be raised as provided in this Article and the Association shall prepare the necessary documents to effect such reconstruction as promptly as practicable, in a lawful and workmanlike manner.

14.3 Destruction of Individual Unit. In the event of total or partial destruction of any individual unit not affecting any other unit or any portion of the common areas, it shall be the responsibility of that unit's owner to rebuild the unit using any insurance proceeds available and allocable for said purposes, and the same shall be done as promptly as practicable in a lawful and workmanlike manner. This section shall likewise apply unless there is a determination not to rebuild after partial or total destruction as defined in this Article.

14.4 Lapse of Covenant Against Partition. If, after eighteen months from the date of any partial or total destruction as defined in this Article, reconstruction be not actually commenced, the covenant against partition set forth in this Declaration shall terminate and be of no further force and effect.

14.5 Determination Not to Rebuild. In the event of a determination not to rebuild after partial or total destruction as defined in this Article, the Association

may: (1) bring an action for partition of the entire Project as provided in NRS 117.050; or (2) if, by a two-thirds (2/3) vote of members entitled to vote in person or by proxy the Association agrees, it may proceed to sell the entire project for the benefit of all the owners at public or private sale for the highest and best price obtainable, either in its damaged condition, or after the damaged structure has been razed. For the purpose of implementing this section, every owner of a condominium within the project shall be deemed to have consented to, authorized, and granted to the Association his, her, or its respective irrevocable power of attorney upon the delivery to such owner of his instrument of title.

14.5.1 Distribution of Proceeds. The net proceeds of any sale ordered by decree of court or by decision of the Association and the proceeds, if any, of insurance carried by the Association as a whole on the Property, plus any reserves, interest, and other funds, shall be divided among the owners of the affected units according to the respective fair market values of the units at the time of the destruction as determined by an independent appraisal to be conducted by an M.A.I. Appraiser selected by the Board, whose appraisal shall be final. The balance then due on any individual encumbrance executed in good faith and for value shall first be paid before the distribution of any proceeds to the owner whose condominium is still encumbered.

14.5.2 If the Project is destroyed or razed, it may be rebuilt only in conformity with the original recorded plans; otherwise, a new tract map and condominium plan shall be filed, approved and recorded. A new tract map and condominium plan may be filed and recorded only upon prior written approval of three-fourths (3/4) of the members entitled to vote.

ARTICLE XV

AMENDMENTS

Except as otherwise provided in NRS 116.2117 and in this Declaration, each provision and all of the provisions of this Declaration may be modified, amended, added to, or deleted from by a further Declaration or Agreement, in writing, properly executed and acknowledged by a fifty-one per cent vote of the members of the Association, and by appropriate governmental authority if such amendment would affect the obligation to maintain the common areas. Any such amendments shall be effective only upon recordation in the office of the Recorder of Washoe County. The prohibition against interval ownership cannot be amended deleted by the owners without the prior approval of Washoe County.

ARTICLE XVI

TERM OF DECLARATION: COMPLIANCE WITH THE RULES AGAINST PERPETUITIES AND WITH THE RULE AGANST RESTRAINT OF ALIENATION

The covenants contained in this Declaration shall run with the land and shall be binding on all parties and all persons claiming under them until January 1, 2020, after which time the covenants shall be automatically extended for successive periods of twenty-one (21) years, unless an instrument executed by not less than three-fourths (3/4) of the members of the Association entitled to vote shall be recorded canceling and terminating this Declaration on or after January 2, 2020.

ARTICLE XVII

CONDEMNATION

In the event of a taking by condemnation or by eminent domain of all or any part of the Community, the award made for such taking and the disbursement of the proceeds of that award shall be undertaken in accordance with NRS 116.1107. The Association is designated to represent the Owners in all proceedings (including negotiations and settlements) related to any condemnation, and each Owner appoints the Association as attorney-in-fact for this purpose. The proceeds of any settlement related to any condemnation of the Project shall be paid to the Association for the benefit of the Owners, as their interests may appear.

ARTICLE XVIII

MISCELLANEOUS PROVISIONS

18.1 Liberal Construction. All of the provisions of this Declaration shall be liberally construed to effectuate and promote the purpose of creating a uniform plan for the operation of McCloud Condominiums. No breach of any provision of this Declaration nor the enforcement of any assessment lien as provided in this Declaration shall defeat or render invalid the lien of any mortgage or deed of trust made in good faith and for value, but all of the provisions shall be binding upon and shall be effective against any owner whose title is derived through foreclosure or trustee's sale or otherwise.

18.2 Independent and Severable Provisions. The provisions of this

Declaration shall be deemed independent and severable, and the invalidity or partial invalidity or enforceability of any of this Declaration's provisions shall not affect the validity of the remaining provisions.

18.3 Notice of Transfer. Immediately after any transfer of title to any condominium, the transferring owner shall so advise the Board, giving the name and address of the new owner, and the effective date of the transfer.

18.4 Amendments to the Articles and Bylaws. The owners shall have the right to adopt reasonable amendments to the Articles and Bylaws. The Articles shall be amended by the vote or written assent of a majority of the Board and a majority of the Association members. The Bylaws shall be amended by the vote or written assent of a majority of the members of the Association. To the extent that any provision of the Articles or Bylaws that are or may be adopted by the owners shall conflict with the provisions of this Declaration, the provisions of this Declaration shall control.

18.5 Violations and Nuisance. Every act or omission by which a covenant, condition, or restriction of this Declaration is violated in whole or in part is considered a nuisance and may be enjoined or abated, whether or not the relief sought is for negative or affirmative action.

18.6 Violation of Law. Any violation of any state, municipal, or local law, ordinance, or regulation pertaining to the ownership, occupation, or use of any portion of the Property is a violation of this Declaration and subject to any or all of the enforcement procedures provided in this Declaration.

18.7 Cumulative Remedies. Each remedy provided in this Declaration is cumulative and not exclusive.

18.8 Nonwaiver. The failure to enforce the provisions of any covenant, condition, or restriction contained in this Declaration shall not constitute a waiver of any right to enforce any such provisions or any other provisions of this Declaration.

18.9 Notices. Unless this Declaration provides otherwise, all notices required under the provisions of this Declaration shall be as follows:

18.9.1 All notices to the Association or to the Board shall be sent by regular mail, registered mail, or certified mail, return receipt requested, addressed to the Board at the address of the Manager, or to such other place as the Board may designate from time to time by notice in writing to the Owners of all of the Units.

Until the Owners are notified otherwise, all notices to the Association or to the Board shall be addressed to:

McCloud Condominium Homeowners' Association
c/o Associated Management, Inc. 931 Tahoe Blvd., Ste 2, Incline Village NV 89451

18.9.2 All notices by the Association or the Board to any Owner shall be sent by regular mail, by registered mail, or certified mail, return receipt requested, to such Owner's Unit address or to such other address as may be designated by such Owner from time to time, in writing, to the Board.

18.9.3 All notices shall be deemed to have been received within seventy-two (72) hours after the mailing thereof, except notices of changes of address, which shall be deemed to have been given when actually received.

18.10 **Termination of Former Owner's Liability for Assessments.** Upon the conveyance, sale, assignment, or other transfer of a Unit to a new Owner, the transferring Owner shall not be liable for any Assessments levied with respect to such Unit after notification to the Association of such transfer and payment of any transfer fee that may be required. No person, after the termination of his status as an Owner and prior to his again becoming an Owner, shall incur any of the obligations or enjoy any of the benefits of an Owner under this Declaration.

18.11 **Singular Includes Plural.** Unless the context requires otherwise, the use of the singular in this Declaration shall include the plural, and the use of the plural shall include the singular.

18.12 **Gender.** Unless the context requires otherwise, the exclusive use of and reference to the masculine, feminine, or neuter in this Declaration is for convenience only, and shall each include the masculine, feminine, and neuter.

18.13 **Captions.** All captions or titles used in this Declaration are intended solely for convenience of reference and shall not affect that which is set forth in any of the provisions or of any paragraph.

18.14 **This Declaration Supersedes Prior Declaration.** This Declaration supersedes that certain Condominium Declaration of McCloud Condominiums, dated April 29, 1982. In the event of any conflict between the 1982 Declaration and this Declaration, the provisions of this Declaration shall control.

Certification

We, the undersigned officers of McCloud Condominium Homeowners' Association, hereby certify, under penalty of perjury, that the Declaration of Covenants, Conditions and Restrictions set forth herein was duly adopted with the vote or written consent of Members constituting at least seventy-five percent (75%) of the total voting power held by the membership of the Association.

McCLOUD CONDOMINIUM HOMEOWNERS' ASSOCIATION

Dated: Nov 17, 2007 By: _____

Print Name: Richard Edward Byfield

Its: President

Dated: Nov 17, 2007 By: _____

Print Name: KAREN D. ~~Wilkins~~

Its: Secretary

Subscribed and sworn to before me

this 17 day of November, *2007.*

_____ *SEAL:*

NOTARY

J. TARANTINO
Notary Public - State of Nevada
Appointment Recorded In Washoe County
No: 98-49428-2 - Expires November 7, 2010.

EXHIBIT "2"

EXHIBIT "2"

KERN & ASSOCIATES, LTD.
ATTORNEYS AT LAW

GAYLE A. KERN, ESQ.
gaylekern@kernltd.com

KAREN M. AYARBE, ESQ.
karenayarbe@kernltd.com

5421 KIETZKE LANE, SUITE 200
RENO, NEVADA 89511
TELEPHONE: (775) 324-5930
FACSIMILE: (775) 324-6173

April 4, 2013

Via email [djdezzani@yahoo.com] and first class mail

David and Rochelle Dezzani
David J Dezzani Trust
13 Calle Altea
San Clemente, CA 92673

Re: *McCloud Condominium Association*
939 Incline Way

Dear Mr. and Mrs. Dezzani:

I represent McCloud Condominium Homeowners Association. The Board requested I respond to your email request to review communications and/or information related to another unit and Board minutes. First, it is my understanding you have been provided the requested minutes. If there are additional minutes you are requesting, please advise.

Further, with respect to your request for owner names, information or communications, the information Ms. Conway provided in her March 21, 2013 email to you is correct. All information related to another unit's owner is confidential pursuant to Chapter 116 of the Nevada Revised Statutes. *See* NRS 116.31175. The statute prohibits the Association from disclosing information relating to another unit, regardless of the reason for which it is requested. *Id.*

The Board understands your frustration and appreciates you are addressing the matter of the unapproved deck extension that wrongfully encroaches in the common area. There is no question the extension exists in the common area, as do the other extensions. The common area is owned in common by *all* owners of the community. While it is unfortunate the issue of deck extensions and the wrongful taking of common area was not addressed earlier, the Association has properly taken action to protect the integrity of the common area. There is no question common area is not permitted to be given to any one owner for his/her exclusive use and enjoyment, thereby reducing the common area for the other homeowners. It is the wrongful conversion of common area that is the problem. Simply put, there is no lawful transfer of common area to individual owners absent a vote of the membership. *See* NRS 116.3112.

My client has deliberated over this issue at length. It was done at meetings with frequent homeowner involvement. The Board feels the solution and options provided are fair and equitable and appropriately address the preservation of the common area.

Very truly yours,

KERN & ASSOCIATES, LTD.

Gayle A. Kern

c: Client

EXHIBIT "3"

EXHIBIT "3"

KERN & ASSOCIATES, LTD.
ATTORNEYS AT LAW

GAYLE A. KERN, ESQ.
gaylekern@kernltd.com

KAREN M. AYARBE, ESQ.
karenayarbe@kernltd.com

May 10, 2013

Via email only djdczzani@yahoo.com

David and Rochelle Dezzani
13 Calle Altea
San Clemente, CA 92673

Re: *McCloud Condominium Association*
Unit #211

Dear Mr. and Mrs. Dezzani:

The Board of Directors requested I respond to your various communications. First, the Board has granted your request to have the hearing re-scheduled. The next meeting is August 23, 2013. Therefore, the hearing will be continued to August 23, 2013 at 1:00 p.m. With respect to the upcoming hearing on the alleged violation of the governing documents and encroachment of the common area, this will acknowledge receipt of a certified letter received May 9, 2013. This communication will be placed in your file and will be considered by the Board when it deliberates following the hearing to be conducted on August 23, 2013. We acknowledge your request that the hearing conducted on August 23, 2013 be an open hearing rather than one in executive session as allowed by NRS 116.31085(4). Finally, this will acknowledge your May 6, 2013 request for documents of the Association pursuant to NRS 116.31175. We are assembling such documents responsive to your requests, if any there be and to the extent available for review by another unit's owner.

If you have any further communications, the Board requests that you communicate with me. We appreciate your anticipated cooperation. If I have failed to address any of your communications, please advise me.

Very truly yours,

KERN & ASSOCIATES, LTD.

Gayle A. Kern

c: Client