

IN THE SUPREME COURT OF THE STATE OF NEVADA

ELK POINT COUNTRY CLUB
HOMEOWNERS, ASSOCIATION,
INC., also known as ELK POINT
COUNTRY CLUB, INC., a Nevada
non- profit, non-stock Corporation,

Appellant,

v.

K.J. BROWN, L.L.C., a Nevada limited
liability company; TIMOTHY D.
GILBERT and NANCY AVANZINO
GILBERT, as trustees of the TIMOTHY
D. GILBERT AND NANCY
AVANZINO GILBERT REVOCABLE
FAMILY TRUST DATED DECEMBER
27, 2013,

Respondent.

Electronically Filed
Oct 18 2021 06:55 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court Case No.: 82484

District Court Case Number:
2020-CV-0124

APPELLANT'S APPENDIX

VOLUME 3

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INDEX

<i><u>TITLE IN CHRONOLOGICAL ORDER</u></i>	<i><u>VOLUME</u></i>	<i><u>PAGE RANGE</u></i>
Motion for Preliminary Injunction	1	1- 42
First Amended Complaint	2	43- 63
Defendant Elk Point Country Club's Opposition to the Motion for Preliminary Injunction	3	64- 84
Defendant's Answer to First Amended Complaint	4	85- 95
Plaintiff's Reply in Support of Motion for Preliminary Injunction	5	96-187
Plaintiff's Hearing Exhibits	6 (Part 1)	188-237
Plaintiff's Hearing Exhibits	6 (Part 2)	238-337
Plaintiff's Hearing Exhibits	6 (Part 3)	338-362
Plaintiff's Hearing Exhibits	6 (Part 4)	363-388
Plaintiff's Hearing Exhibits	6 (Part 5)	389-541
Plaintiff's Hearing Exhibits	6 (Part 6)	542-591
Notice of Entry of Order Granting Preliminary Injunction	7	592-604
Plaintiff's Motion to Partially Strike Respondents' Reply in Support of Motion for Preliminary Injunction	8	605-616
Plaintiff's Notice of Appeal	9	617-633
Transcript of Proceedings for Motion for Preliminary Injunction	10	634-879

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BY _____ DEPUTY

12 **IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

13 **IN AND FOR THE COUNTY OF DOUGLAS**

14 K. J. BROWN, L.L.C., a Nevada limited
15 liability company; and TIMOTHY D.
16 GILBERT and NANCY AVANZINO
17 GILBERT, as trustees of the TIMOTHY D.
18 GILBERT AND NANCY AVANZINO
19 GILBERT REVOCABLE FAMILY TRUST
20 DATED DECEMBER 27, 2013,

21 Plaintiffs,

22 v.

23 ELK POINT COUNTRY CLUB
24 HOMEOWNERS, ASSOCIATION, INC., also
25 known as ELK POINT COUNTRY CLUB,
26 INC., a Nevada non-profit, non-stock
27 corporation; and DOES 1-50, inclusive;

28 Defendant.

CASE NO.: 2020-CV-0124

DEPT: 1

**DEFENDANT ELK POINT COUNTRY
CLUB HOMEOWNERS
ASSOCIATION, INC.'S OPPOSITION
TO PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

24 Defendant Elk Point Country Club Homeowners Association, Inc. (hereinafter "EPCC"
25 or "the HOA"), by and through its counsel of record, Prescott T. Jones, Esq. and Joshua Y. Ang,
26 Esq. of the law firm Resnick & Louis, P.C., hereby submits the Opposition to Plaintiff's Motion
27 for Preliminary Injunction.
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1 This Opposition is made and based upon the papers and pleadings on file with the Court,
2 the exhibits attached to the Request for Judicial Notice filed contemporaneously herein, the
3 Memorandum of Points and Authorities, and any oral argument the Court may entertain.

4 DATED this 3rd day of August, 2020.

5 RESNICK & LOUIS, P.C.

6 

7
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16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 **LEGAL ARGUMENT**

18 **I. Legal Standard For Issuance Of A Preliminary Injunction**

19 "A preliminary injunction is available when the moving party can demonstrate that the
20 nonmoving party's conduct, if allowed to continue, will cause irreparable harm for which
21 compensatory relief is inadequate and that the moving party has a reasonable likelihood of
22 success on the merits." *Boulder Oaks Cmty. Ass'n v. B & J Andrews*, 125 Nev. 397, 403, 215
23 P.3d 27, 31 (2009); NRS 33.010. In considering preliminary injunctions, courts also weigh the
24 potential hardships to the relative parties and others, and the public interest. *Clark Co. School
Dist. v. Buchanan*, 112 Nev. 1146, 1150, 924 P.2d 716, 719 (1996).

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1 **II. INTRODUCTION**

2 Plaintiffs have failed to fulfil the requisite criteria to procure their desired preliminary
3 injunction against short-term vacation rentals/transient commercial use occurring in the EPCC
4 community.

5 First of all, Plaintiffs have failed to demonstrate a reasonable likelihood of success on the
6 merits as to the issue of the permissibility of short-term vacation rentals/transient commercial
7 use, where their interpretation of the HOA's Bylaws contradicts the plain language of said
8 Bylaws, and runs afoul of NRS 116.340's plain language and the universal legal principles
9 underlying said statute's adoption favoring the free, unrestricted use of property- failing as a
10 matter of law.

11 Plaintiffs have also relied on misconstructions of law to wrongly allege that "an
12 irreparable harm for which compensatory relief is inadequate" is imminent due to endangerment
13 of the HOA's 26 USCS § 501(c)(7) tax-exempt status because of the short-term vacation
14 rentals/transient commercial use of private members- where federal tax law is only concerned
15 with the HOA itself being engaged in such business-for-profit activity, the short-term vacation
16 rentals/transient commercial use of private members for profit without any involvement of the
17 HOA itself being wholly irrelevant to the tax exempt analysis. In addition, the income of the
18 HOA, derived wholly from members alone, has been equitably utilized for ordinary maintenance
19 and has not inured to the benefit or profit of individual members who engage in short-term
20 vacation rentals/transient commercial use.

21 The various "pervasive and ongoing" harms caused by short-term vacation
22 rentals/transient commercial use alleged by Plaintiff due to alleged current adverse actions of the
23 HOA are also wholly speculative in nature; Defendant disputes that there are in fact such
24 "pervasive and ongoing" harms caused by short-term vacation rentals/transient commercial use
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at present; and maintains that it has strictly enforced all applicable rules. Such speculative potential future “harm” stemming from speculative future lax enforcement does not support the granting of a preliminary injunction.

III. EPCC Is Not In Violation Of Its Bylaws Or NRS 116.340 By Not Preventing Its Members From Engaging In Short Term Vacation Rentals; In This Manner, Plaintiffs Cannot Demonstrate A Reasonable Likelihood Of Success On The Merits

Plaintiffs cite to two parts of EPCC’s Bylaws in support of their false contention that short-term vacation rentals (“STVRs”)/transient commercial use (“TCU”) (used interchangeably by Plaintiffs in the subject motion) are prohibited thereby. First, Plaintiffs wrongly contend that Article XVI, Section 2 of the EPCC Bylaws forbid STVR/TCU activity thorough stating that, “The property of members shall be used for single family residential purposes only.” See **Exhibit 1** of subject motion [EPCC Bylaws]. In fact, Plaintiffs’ construction of this clause of EPCC’s Bylaws is in direct violation of NRS 116.340(1), which reads as follows:

“NRS 116.340. Transient commercial use of units within certain planned communities

1. Except as otherwise provided in subsection 2, a person who owns, or directly or indirectly has an interest in, one or more units within a planned community *that are restricted to residential use* by the declaration *may use that unit or one of those units for a transient commercial use* only if:

(a) *The governing documents of the association and any master association do not prohibit such use;*

(b) The executive board of the association and any master association approve the transient commercial use of the unit, except that such approval is not required if the planned community and one or more hotels are subject to the governing documents of a master association and those governing documents do not prohibit such use; and

(c) The unit is properly zoned for the transient commercial use and any license required by the local government for the transient commercial use is obtained.

...” See NRS 116.340(1) (*Emphasis provided*).

NRS 116.340(1), by its plain language, explicitly provides that regardless of and notwithstanding any “residential use ” only restrictions in the operative Bylaws of a community, TCU activity is permissible, unless there is an explicit and direct prohibition of such activity in the governing documents. This codified mandate of NRS 116.340(1), specifically overriding any

1 possible prohibition of TCU activity through vague "residential use" only clauses, reflects the
2 prevailing position of courts all across the United States that short-term vacation rentals do not
3 violate restrictive covenants requiring property to be used only for residential purposes and
4 prohibiting its use for business purposes. *See Santa Monica Beach Prop. Owners Ass'n v. Acord*,
5 219 So. 3d 111, 114-5 (Fla. 1st Dist. Ct. App. 2017) (Citing to a battery of about 17 cases from
6 disparate states with holdings consistent with the foregoing).

7
8 If a vacation renter uses a home for the purposes of eating, sleeping, and other residential
9 purposes, **this use is residential** (and thus consistent with any restrictions to "residential use"),
10 not commercial, no matter how short the rental duration, and the nature of the property's use is
11 not transformed from residential to business simply because the owner earns income from the
12 rentals. *See Id.* (Citing to *Wilkinson v. Chiwawa Communities Ass'n*, 327 P.3d 614, 620 (Wash.
13 2014) (en banc); *Slaby v. Mountain River Estates Residential Ass'n*, 100 So. 3d 569, 579 (Ala.
14 Civ. App. 2012)). Indeed, "[N]either [the] financial benefit nor the advertisement of the property
15 or the remittance of a lodging tax transforms the nature of the use of the property from
16 residential to commercial." *Santa Monica Beach Prop.*, 219 So. at 115 (Quoting *Slaby*, 100 So.
17 at 580 (Ala. Civ. App. 2012)). Thus, the fact that certain owner-members of the EPCC
18 community may derive financial benefit from the STVR/TCU activity (and the fact of any
19 advertisements by them of their homes for STVR/TCU activity) does not place them in violation
20 of EPCC's Bylaws' "residential use" only restrictions.
21

22
23 Indeed, this (accurate) construction of NRS 116.340(1) is wholly consistent with the
24 prevailing legal principle as to deed restrictions- that they should be interpreted in a manner
25 "favoring the free and unrestricted use of property," requiring explicit prohibition expressed in
26 clear, unambiguous, and peremptory terms for the preclusion of activities such as STVR/TCU;
27 the lack of such specificity of an alleged "prohibition" being fatal to the position of those seeking
28

1 to enforce it. *See* NRS 116.340(1); *Forshee v. Neuschwander*, 381 Wis. 2d 757, 764-6, 769 (Wis.
2 2018); *Santa Monica Beach Prop.*, 219 So. at 116.

3 Plaintiffs also falsely claims that the preamble of the association's bylaws forbids
4 STVR/TCU activity, through its language which reads as follows:

5 "It shall not operate its properties or facilities with the view of providing profit to its
6 members but rather such properties and facilities shall be held, operated, and made
7 available to the use and enjoyment of its members upon payment of such assessments and
8 charges as will fairly meet its costs of operation and provide a reasonable accumulation
9 of funds for repairs, replacements and additions." *See Exhibit 1* of subject motion [EPCC
Bylaws].

10 To begin with, **no plausible reading** of the **plain language** of this clause constitutes a
11 prohibition on members' STVR/TCU activities in the EPCC community. It merely prohibits the
12 HOA from operating its properties or facilities "*with the view of providing profit to its members*"
13 (e.g.; tailoring its operations of its properties or facilities with the intention to enhance its
14 members' profits from STVR/TCU activity [which the HOA does not do]); it does not oblige the
15 HOA to prevent individual members from engaging in activities such as STVR/TCU that may
16 generate profit or income for such members. EPCC is in full compliance with this aspect of its
17 Bylaws; it does not conduct operations of its properties or facilities in a manner to enhance its
18 members' profits from STVR/TCU activity (or any other sort of economic activity, for the
19 matter), but rather conducts ordinary maintenance and operation of such properties and facilities
20 in a manner consistent with facilitation of ordinary member use of these properties and facilities.
21 *See Exhibit A*, [Declaration of Robert Felton, EPCC President].

22 Furthermore, whatever tortured and tenuous construction of the EPCC Bylaws' preamble
23 clause employed by the Plaintiffs in the subject motion (wholly unarticulated and unexplained
24 therein) is **doubly** foreclosed by the aforementioned requirement that any alleged "restrictions"
25 on activities such as STVR/TCU be clear, specific, direct and unambiguous to be enforceable, in
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1 the interest of “favoring the free and unrestricted use of property” (implicitly acknowledged in
2 Nevada by the codification of NRS 116.340(1), as articulated above). *See* NRS 116.340(1);
3 *Forshee v. Neuschwander*, 381 Wis. 2d 757, 764-6, 769 (Wis. 2018); *Santa Monica Beach Prop.*,
4 219 So. at 116.

5 In short, Plaintiffs’ contention that EPCC has wrongfully failed to prevent its members
6 from engaging in STVR/TCU activity in violation of its Bylaws **fails as a matter of Nevada**
7 **law**, by and through NRS 116.340(1) and its foundational legal principles. Thus, the probability
8 of Plaintiffs’ success on the merits is nil, and no preliminary injunction is warranted, failing the
9 pre-requisite therefor that there be a “reasonable likelihood of success on the merits.”

10
11 **IV. STVR/TCU Cannot Result In Revocation Of The HOA’s 26 USCS § 501(c)(7) Tax-**
12 **Exempt Status; Plaintiffs Cannot Show In This Manner That A Preliminary**
13 **Injunction Is Needed To Prevent “Irreparable Harm For Which Compensatory**
14 **Relief Is Inadequate”**

15 Plaintiffs’ contention that the occurrence of STVR/TCU activity within the EPCC
16 community could result in revocation of the HOA’s 26 USCS § 501(c)(7) tax-exempt status is an
17 illusory, legal impossibility, cutting strongly against their position that a preliminary injunction is
18 needed to prevent “irreparable harm for which compensatory relief is inadequate.” Plaintiffs’
19 interpretation of 26 USCS § 501(c)(7) is grossly incorrect, failing to look to the United States
20 Code of Federal Regulations and corresponding caselaw, which expand upon and clarify the
21 meaning of 26 USCS § 501(c)(7), revealing that under the proper construction of said statute,
22 there is no way for the HOA to be subject to revocation its 26 USCS § 501(c)(7) Tax-Exempt
23 Status based upon the private STVR/TCU business activity of individual members, with which
24 the HOA has no involvement whatsoever.

25
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1 **A. Private STVR/TCU Activity And Advertising Of Individual Members Is Irrelevant**
2 **As To Determining EPCC's 26 USCS § 501(c)(7) Tax-Exempt Status**

3 26 USCS § 501(c)(7) reads as follows:

4 “(7) Clubs organized for pleasure, recreation, and other nonprofitable purposes,
5 substantially all of the activities of which are for such purposes and no part of the net
6 earnings of which inures to the benefit of any private shareholder.”

7 The subject motion by Plaintiffs implicitly misconstrues this statute to impute the
8 separate and distinct economic activity of private, individual members engaging in STVR/TCU
9 to the HOA (which plays no role in such STVR/TCU activity of individual members) for the
10 purposes of evaluating whether the HOA qualifies for 26 USCS § 501(c)(7) tax exempt status.
11 However, the United States Code of Federal Regulations and corresponding caselaw are clear
12 that federal tax law is only concerned with business/economic activity that the HOA/tax-exempt
13 cub/organization *itself* engages in. The relevant Federal Regulations are 26 CFR 1.501(c)(7)-1,
14 which read as follows:

15 **“§ 1.501(c)(7)-1 Social clubs.**

16 (a) The exemption provided by section 501(a) [26 USCS § 501(a)] for organizations
17 described in section 501(c)(7) [26 USCS § 501(c)(7)] applies only to clubs which are
18 organized and operated exclusively for pleasure, recreation, and other non-profitable
19 purposes, but does not apply to any club if any part of its net earnings inures to the
20 benefit of any private shareholder. In general, this exemption extends to social and
21 recreation clubs which are supported solely by membership fees, dues, and assessments.
22 However, a club otherwise entitled to exemption will not be disqualified because it raises
23 revenue from members through the use of club facilities or in connection with club
24 activities.

25 (b) ***A club which engages in business, such as making its social and recreational
26 facilities available to the general public or by selling real estate, timber, or other
27 products, is not organized and operated exclusively for pleasure, recreation, and other
28 non-profitable purposes, and is not exempt under section 501(a) [26 USCS § 501(a)].***
Solicitation by advertisement or otherwise for public patronage of its facilities is prima
facie evidence that the club is engaging in business and is not being operated exclusively
for pleasure, recreation, or social purposes. However, an incidental sale of property will
not deprive a club of its exemption.” ...” See 26 CFR 1.501(c)(7)-1 (***Emphasis provided***).

26 It should be quite clear from the plain language of this Regulation that the 26 USCS §
27 501(c)(7) is only concerned with business that the 26 USCS § 501(c)(7) tax-exempt
28

1 club/HOA/organization itself **engages** in; i.e., *transacts itself*, and that the STVR/TCU activity of
2 private members which said tax-exempt club/HOA/organization does not itself **engage** in is
3 *irrelevant* for 26 USCS § 501(c)(7)'s purposes. This construction of said Regulation is further
4 supported by corresponding caselaw. *See e.g.; Augusta Golf Ass'n v. United States*, 338 F. Supp.
5 272, 275-6 (S.D. Ga. 1971) (Holding that activities are not inconsistent with the enumerated 26
6 USCS § 501(c)(7) purposes of "pleasure, recreation, and other nonprofitable purposes" as long as
7 such activities did not amount to the **conducting of business for profit**/a situation where
8 business is **being transacted** with the general public); *Pittsburgh Press Club v. United States*,
9 615 F.2d 600, 606 (3rd Cir. 1980) (Engaging in exclusive analysis of the proportion of member
10 and non-member monetary receipts of the subject tax-exempt club itself, in evaluating whether it
11 engaged in business that would make it non-exempt).

12
13 The HOA in this matter is not **engaged in, and does not transact**, any STVR/TCU
14 business activity whatsoever (for a profit or otherwise); such activity is conducted wholly
15 independently of the HOA by individual members. The HOA derives no income or profit from
16 the private STVR/TCU activity of its individual members. *See Exhibit A*, [Declaration of Robert
17 Felton, EPCC President]. Nor does the HOA transact business and derive incidental income or
18 profit from STVR/TCU visitors to the community by permitting them to utilize its facilities for a
19 fee (which would violate 26 CFR 1.501(c)(7)-1 (...engages in business, such as making its social
20 and recreational facilities available to the general public...)). *See Id.* Thus, per 26 USCS §
21 501(c)(7) and 26 CFR 1.501(c)(7)-1, concerned only with transactions of/engagement business
22 by the HOA/club itself, it is beyond dispute that EPCC has not engaged in any conduct that
23 would jeopardize its tax-exempt status under said statutes in this manner.
24
25

26 And while advertisements for STVR/TCU activity in the EPCC community do exist, the
27 HOA has no involvement whatsoever with such advertisements, which are put **072** by private
28

1 members without any input or involvement of the club/HOA. *See Id.* Defendants reiterate that
2 per 26 CFR 1.501(c)(7)-1, and cases like *Augusta Golf Ass'n*, 338 F. Supp. at 275-6 and
3 *Pittsburgh Press Club*, 615 F.2d at 606, federal tax law is only concerned with the subject tax-
4 exempt club/organization itself engaging in the transaction of business/itself engaging in
5 transacting advertising activity in furtherance thereof, constituting prima facie evidence of such
6 impermissible transactions of profitable business. *See* 26 CFR 1.501(c)(7)-1, (A club which
7 **engages in business**...Solicitation by advertisement or otherwise for public patronage of its
8 facilities is prima facie evidence that **the club is engaging in business** and is not being operated
9 exclusively for pleasure, recreation, or social purposes.; i.e., per this Regulation in and of itself,
10 solicitation by advertisement, like business activities, must be directly transacted by the club
11 itself to be disqualifying as to 26 USCS § 501(c)(7) tax-exempt status). Thus, there can be no
12 advertising-based presumption of a prima facie case that Defendant has engaged in
13 impermissible business transactions, where like here, Defendant has had zero involvement in
14 advertisements for STVR/TCU activity in the EPCC community. *See Exhibit A*, [Declaration of
15 Robert Felton, EPCC President]. Indeed, even if hypothetically, Defendant had itself transacted
16 advertisements for STVR/TCU activity, any presumption of impermissible business activity
17 arising therefrom would be immediately rebutted, by virtue of the fact that the HOA does not
18 transact/engage in STVR/TCU business activity and derives no economic/financial benefit
19 whatsoever from it (where as articulated above, 26 USCS § 501(c)(7) and 26 CFR 1.501(c)(7)-1
20 are only concerned with actual transactions of/engagement business by the HOA/club itself). *See*
21 *Id.*

22 ///

23 ///

24 ///

B. The HOA's Wholly Member-Derived Income Does Not Inure To The Benefit of Any Private Shareholder With Regard To STVR/TCU Activity

26 USCS § 501(c)(7) also requires that “no part of the net earnings...” of organizations/clubs exempt from tax under it (such as EPCC) “...inures to the benefit of any private shareholder.” The case *Rochester* stated that a club’s funds that were derived from profitable transactions with the general public improperly inured to the benefit of its members/private shareholders in violation of 26 USCS § 501(c)(7) if the members/private shareholders obtained some sort of financial benefit from said income that the public did not, such as lower dues or better club operations; conversely no inurement occurs if funds raised exclusively from member activity is used to benefit members. *See Rochester Liederkrantz, Inc. v. United States*, 456 F.2d 152, 155-7 (2nd Cir. 1972). I.e.; there is no improper inurement to private shareholders under 26 USCS § 501(c)(7) so long as a club’s funds are not used to preferentially benefit a subset of private shareholders/members smaller than the total pool of individuals from which such funds are procured. *See Id.*

No such impropriety has occurred here. The HOA derives no income from non-members or the general public, its only sources of income being its yearly assessment fee that all members must pay, initial membership fees that every new buyer of a home in the EPCC community must pay, and rental fees charged to members for rental of boathouses/places to park their boats (only members are permitted to use/rent these facilities). *See Exhibit A*, [Declaration of Robert Felton, EPCC President]. Such funds are utilized equitably for the normal upkeep of the HOA’s facilities for the benefit and use of its members. *See Id.* No special improvements, maintenance or other types of activities, have been conducted by the HOA to facilitate, encourage or assist private members engaged in STVR/TCU activity, using the aforementioned member-derived funds or otherwise. Thus, no preferential benefit has inured towards any subset of private members

engaged in STVR/TCU activity out of the HOA's funds; the HOA has not engaged in any activity or expenditures for the aid or profit of private members engaged in STVR/TCU activity.

Consequently, no inurement "to the benefit of any private shareholder" in violation of 26 USCS § 501(c)(7) has occurred, and the HOA has not endangered its tax-exempt status in this manner.

C. The HOA's 26 USCS § 501(c)(7) Tax-Exempt Status Is Not Endangered

It is thus clear that EPCC's tax-exempt status under 26 USCS § 501(c)(7) is in no danger from the private STVR/TCU activity of individual members. There is simply no imminent "irreparable harm for which compensatory relief is inadequate" of this nature (or indeed any sort of possible imminent harm at all) to justify a preliminary injunction.

V. The Request for Preliminary Injunction is Based Upon Speculative Conduct of the HOA and is Therefore Improper

A court cannot consider arguments based upon a hypothetical set of facts, as that would constitute an improper advisory opinion. *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877, 889 (2006); *see also* Nev. Const. art. 6, § 6. Indeed, preliminary injunctions are appropriate only when "the nonmoving party's conduct, **if allowed to continue**, will cause irreparable harm for which compensatory relief is inadequate..." *Boulder Oaks*, 125 Nev. at 403 (emphasis added).

Here, there is no "conduct" of the HOA that has actually occurred; rather, Plaintiffs seek an injunction to prevent speculative, hypothetical misconduct of the HOA with regard to STVR/TCU activity. Among other things, Plaintiffs claim that there are pervasive, commonplace ongoing problems peculiar to short term vacation renters in the EPCC community due to wrongful inaction of the HOA with regard to STVR/TCU activity, including but not limited to: excessive noise and parties by renters after curfew; inappropriate trash storage and trash disposal; overuse of the common area beach system; illegal parking in designated fire lanes; high

1 volume parking shortages; high volume parking road blockages; pedestrian-vehicle proximity on
2 narrow roads; lack of speed controls upon the narrow roadway system with the influx of renters
3 into the association; additional wear and tear upon the single lane roadway system; increased
4 wear and tear upon the front gate system; parking violations blocking narrowed common area
5 roadways which directly interferes with fire, medical, or other emergency services;
6 overcrowding of the beach system; common area facilities are being unreasonably worn down by
7 the influx of transient commercial use; and exposure to potential liability due to a watercraft
8 accident in the (alleged) absence of applicable insurance.

10 Defendant disputes that the above alleged problems have been “persistent and pervasive”
11 by any definition of said terms. *See Exhibit A*, [Declaration of Robert Felton, EPCC President].
12 Certainly, there are occasional issues with some things such as noise, trash, and parking that any
13 HOA would normally expect, but such sporadic occurrences are not endemic to renters; being
14 attributable to both renters and owners. *See Id.* Also, there are relatively few short-term vacation
15 renters in the EPCC community at any one time, with only 16/91 members’ units being used for
16 STVR/TCU activity. *See Id.* The HOA enforces its rules equally as to both renters and owners,
17 for the benefit of its members. *See Id.* There are simply no such “pervasive problems” as alleged
18 in the subject motion at present, where the HOA has strictly enforced all applicable rules. Thus,
19 Plaintiffs’ allegations that such problems are “ongoing” and “pervasive” are in actuality, wholly
20 speculative as to continuous, adverse and problematic conditions that do not exist at present,
21 where the HOA has not neglected its duties to protect the community from such nuisances,
22 occasionally originating from owners and renters alike. *See Id.* The same applies doubly to any
23 exposure of the HOA to potential liability due to watercraft accident involving short term
24 vacation renters in the (alleged) absence of applicable insurance; which is something that may
25 well never happen and is thoroughly speculative in nature. *See Id.*

1 Notably, not a single one of these alleged bases for a preliminary injunction (allegations
2 of pervasive, continuous and ongoing problems) listed herein **has actually occurred**
3 **(demonstrating in turn that no adverse action on the part of Defendant in dereliction of its**
4 **duties to protect the community from such matters has occurred, and that any such future**
5 **alleged dereliction is also speculative)**, despite Plaintiff's contrary contentions. *See Id.* Indeed,
6 Plaintiff is basing this entire critical aspect of their request for a preliminary injunction on
7 nothing more than wild speculation. This is a completely improper basis by which to seek an
8 injunction, and must be denied on these grounds alone.

9
10 **VI. Restricting STVR/TCU Activity Is Not In The Public Interest/Is Against Public**
11 **Policy**

12 One factor that Courts must consider when determining whether to grant a preliminary
13 injunction is whether doing so would be in the public interest. *See Buchanan*, 112 Nev. at, 1150.
14 Restrictions on STVR/TCU activity is not in the general public interest of the EPCC community,
15 because STVR/TCU activity is in fact supported by a majority of the EPCC community. Thus,
16 this factor also cuts against granting a preliminary injunction. *See Exhibit A*, [Declaration of
17 Robert Felton, EPCC President]. If Plaintiffs desire to restrict STVR/TCU activity in the EPCC
18 community, litigation is not the proper forum. Instead, Plaintiffs should endeavor to advance this
19 agenda through the proper, democratic forum- that is, running for the HOA Board to gain control
20 thereof, and/or engaging in democratic voting/opinion-gauging process(es) for members that
21 inform/are the basis of these types of rules/decisions. This issue of restrictions on STVR/TCU
22 activity is an internal problem of the EPCC community, which should also be resolved
23 internally; to permit Plaintiffs to undemocratically override the will of the majority of EPCC
24 members flies in the face of the public interest of said community members, and public policy
25 considerations, which strongly favor democratic decision-making in this regard.
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1 **VII. CONCLUSION**

2 Based on the foregoing, Plaintiffs' Motion for Preliminary Injunction must be denied in
3 its entirety.

4 DATED this 3rd day of August, 2020.

5
6 **RESNICK & LOUIS, P.C.**

7 

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12 8925 W. Russell Road, Suite 220
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15 *Elk Point Country Club Homeowners Ass'n, Inc.*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing **DEFENDANT ELK POINT COUNTRY CLUB HOMEOWNERS ASSOCIATION, INC.'S OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** was served this 3rd day of August, 2020, by:

☒ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada, addressed as set forth below.

☐ **BY FACSIMILE:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document.

☐ **BY PERSONAL SERVICE:** by causing personal delivery by an employee of Resnick & Louis, P.C. of the document(s) listed above to the person(s) at the address(es) set forth below.

JOHN E. LEACH, ESQ.

Nevada Bar No. 1225

GAYLE A. KERN, ESQ.

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Attorneys for Plaintiffs


An Employee of Resnick & Louis, P.C.

079

Exhibit A

Exhibit A

080

DECLARATION OF ROBERT FELTON
(PRESIDENT OF THE ELK POINT COUNTRY CLUB HOMEOWNERS
ASSOCIATION, INC.)

Robert Felton, pursuant to NRS 53.045, declares:

1. I am over the age of 21, am the current President for the Defendant in this matter, Elk Point Country Club Homeowners Association, Inc. (hereinafter "EPCC" or "the HOA") and have personal knowledge about facts stated below, except where stated upon information or belief.
2. EPCC does not, and has never conducted the operations of its properties or facilities in a manner to enhance its members' profits from short-term vacation rentals ("STVRs")/transient commercial use ("TCU") (or from any other sort of economic activity, for the matter), but rather conducts ordinary maintenance and operation of such properties and facilities in a manner consistent with facilitation of ordinary member use of these properties and facilities.
3. EPCC itself is not engaged in, and does not transact, any STVR/TCU business activity whatsoever (for a profit or otherwise), such activity is conducted wholly independently of the HOA by individual members.
4. The HOA derives no income or profit from the private STVR/TCU activity of its individual members.
5. Nor does the HOA transact business and derive incidental income or profit from STVR/TCU visitors to the community by permitting them to utilize its facilities for a fee.
6. While advertisements for STVR/TCU activity in the EPCC community do exist, the HOA has no involvement whatsoever with such advertisements, which are put out by private members without any input or involvement of the club/HOA.

- 1 7. The HOA derives no income from non-members or the general public, its only sources of
2 income being its yearly assessment fee that all members must pay, initial membership fees
3 that every new buyer of a home in the EPCC community must pay, and rental fees charged
4 to members for rental of boathouses/places to park their boats (only members are permitted
5 to use/rent these facilities).
- 6 8. Such funds are utilized equitably for the normal upkeep of the HOA's facilities for the
7 benefit and use of its members.
- 8 9. No special improvements, maintenance or other types of activities, have been conducted by
9 the HOA to facilitate, encourage or assist private members engaged in STVR/TCU activity,
10 using the aforementioned member-derived funds or otherwise. The HOA has not engaged in
11 any activity or expenditures for the aid or profit of private members engaged in STVR/TCU
12 activity.
- 13 10. There are no pervasive/common/ongoing problems in the community caused by short term
14 vacation renters as falsely alleged by the Plaintiffs, including but not limited to: excessive
15 noise and parties by renters after curfew; inappropriate trash storage and trash disposal;
16 overuse of the common area beach system; illegal parking in designated fire lanes; high
17 volume parking shortages; high volume parking road blockages; pedestrian-vehicle
18 proximity on narrow roads; lack of speed controls upon the narrow roadway system with the
19 influx of renters into the association; additional wear and tear upon the single lane roadway
20 system; increased wear and tear upon the front gate system; parking violations blocking
21 narrowed common area roadways which directly interferes with fire, medical, or other
22 emergency services; overcrowding of the beach system; common area facilities are being
23 unreasonably worn down by the influx of transient commercial use; and injuries due to
24 watercraft accidents exposing the HOA to potential liability.

082

- 1 a. The HOA has strictly enforced all applicable rules.
- 2 b. Only 16 of about 91 members' units are currently being used for STVR/TCU
- 3 activity.
- 4 c. Plaintiffs' allegations that such problems are "ongoing" and pervasive are wholly
- 5 speculative; the alleged "persistent and pervasive" adverse, problematic conditions
- 6 simply do not exist at present. There are the occasional issues with noise, trash, and
- 7 parking that any HOA would expect and that are attributable to both renters and
- 8 units' owners. They are certainly not persistent and pervasive. The HOA Rental
- 9 Committee works with those units' owners who do rent their property, to ensure that
- 10 they and their renters are following all of the rules. If there is an infraction, the
- 11 Rental Committee helps the unit's owner ensure that it is not repeated. If a complaint
- 12 is filed concerning either a renter or homeowner, it is reviewed by the Board in
- 13 accordance with the EPCC process which is dictated by NRS 116 and action taken
- 14 as appropriate.
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17 11. A majority of the EPCC community supports STVR/TCU activity.

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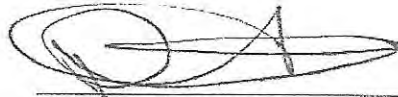
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12. I declare under the penalty of perjury that the foregoing is true and correct, to the best of my understanding, memory and knowledge.

Dated this 3rd day of August, 2020.



ROBERT FELTON
President, Elk Point Country Club
Homeowners Association, Inc.