

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 07:04 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 7

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

10 **IN AND FOR COUNTY OF DOUGLAS**

11
12 K. J. BROWN, L.L.C., a Nevada limited
13 liability company; and TIMOTHY D.
14 GILBERT and NANCY AVANZINO
15 GILBERT, as trustees of the TIMOTHY D.
16 GILBERT AND NANCY AVANZINO
GILBERT REVOCABLE FAMILY TRUST
DATED DECEMBER 27, 2013,

17 Plaintiffs,

18 v.

19 ELK POINT COUNTRY CLUB
20 HOMEOWNERS, ASSOCIATION, INC., also
21 known as ELK POINT COUNTRY CLUB,
INC., a Nevada non-profit, non-stock
22 corporation; and DOES 1-50, inclusive,

23 Defendant.

CASE NO.: 2020 CV 00124

DEPT. NO.: I

**NOTICE OF ENTRY OF ORDER
GRANTING PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION**

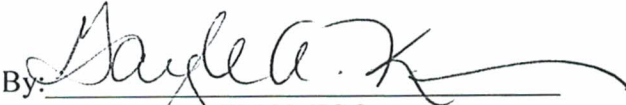
24 PLEASE TAKE NOTICE that on the 15th day of December 2020, an Order Granting
25 Plaintiffs' Motion for Preliminary Injunction ("Order") was entered in the above-captioned
26 matter. A copy of the Order is attached hereto.
27

28 ///

1 Pursuant to NRS 239B.030, the undersigned does hereby affirm that the *Notice of Entry*
2 *of Order Granting Plaintiffs' Motion for Preliminary Injunction* filed in the above-entitled case
3 (2020 CV 00124) does not contain the social security number of any person.
4

5 DATED this 5th day of January, 2021.

6 **LEACH KERN GRUCHOW ANDERSON SONG**

7
8 By: 

9 **GAYLE A. KERN, ESQ.**

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of the law offices of Leach Kern
3 Gruchow Anderson Song, and that on this date I served the foregoing document described as
4 follows:
5

6 ***NOTICE OF ENTRY OF ORDER GRANTING PLAINTIFFS'***
7 ***MOTION FOR PRELIMINARY INJUNCTION***

8 On the party(s) set forth below by:

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

11 Joshua Ang, Esq.
12 Prescott Jones, Esq.
13 c/o Resnick & Louis, P.C.
14 8925 W. Russell Road, Ste. 220
Las Vegas, NV 89148

- 15 ☐ Electronically filing the foregoing with the Clerk of the Court by using the
16 electronic filing system, which will send a notice of electronic filing to the
following:

- 17 ☐ Personal delivery.

- 18 ☐ FedEx, UPS, or other overnight delivery.
19

20 DATED this 5th day of January 2021.

21 
22 TERESA A. GEARHART

RECEIVED

DEC 15 2020

Douglas County
District Court Clerk

FILED

2020 DEC 15 AM 9:43

BOBBIE R. WILLIAMS
CLERK

BY ANCA DEPUTY

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

17 **IN AND FOR COUNTY OF DOUGLAS**

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

CASE NO.: 2020 CV 00124

DEPT. NO.: I

25 Plaintiffs,

26 v.

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

Defendant.

**ORDER GRANTING PLAINTIFFS'
MOTION FOR PRELIMINARY INJUNCTION**

On June 30, 2020, plaintiffs, K.J. BROWN, L.L.C. and TIMOTHY D. GILBERT and
NANCY AVANZINO GILBERT, as trustees of the TIMOTHY D. GILBERT AND NANCY

1 AVANZINO GILBERT REVOCABLE FAMILY TRUST DATED DECEMBER 27, 2013
2 (collectively referred to as "Plaintiffs"), by and through their undersigned counsel, Leach Kern
3 Gruchow Anderson Song, filed a Motion for Preliminary Injunction ("MFPI") in the above-
4 captioned case. The MFPI, once fully briefed, was submitted to this Court for decision on August
5 24, 2020.
6

7 The matter came on for a scheduled hearing on October 23, 2020, before the Honorable
8 Nathan Todd Young. The Plaintiffs were represented by counsel, Gayle A. Kern, Esq., and Sophie
9 A. Karadanis, Esq., of the law firm Leach Kern Gruchow Anderson Song. The Defendant was
10 represented by counsel Prescott Jones, Esq., of Resnick & Louis, P.C. All parties appeared in
11 person. The Court having reviewed the papers and pleadings on file herein, and having
12 considered the documentary evidence, witness testimony, and the oral arguments offered by
13 counsel on the legal and factual issues, this Court makes the following Findings of Fact and
14 Conclusion of Law in support of this Order:
15

16 **FINDINGS OF FACT**
17

18 The Court finds the following facts:

19 1. Plaintiff, K.J. BROWN, LLC, is a Nevada limited liability company and the owner
20 of certain real property located with the Elks Point Subdivision, in Zephyr Cove, Douglas County,
21 Nevada.
22

23 2. Plaintiffs, Timothy D. Gilbert and Nancy Avanzino Gilbert, as trustees of the
24 Timothy D. Gilbert and Nancy Avanzino Gilbert Revocable Trust dated December 27, 2013, own
25 certain real property located within the Elk Point Subdivision, in Zephyr Cove, Douglas County,
26 Nevada.
27

28 3. Defendant, Elk Point Country Club, Inc., ("EPCC"), is a Nevada non-profit, non-
stock corporation and recognized as a social club by the Internal Revenue Service.

1 4. The evidence demonstrates EPCC was established in 1925 by filing its Articles of
2 Incorporation of Nevada Elks Tahoe Association, which articles were later amended to change
3 the name to Elk Point Country Club, Inc.¹

4 5. The evidence demonstrates that EPCC is a private, members-only gated
5 subdivision, which includes private property and facilities owned by EPCC, including the
6 following: private roads, private beach, marina, boat storage, a water system and water tank,
7 beach deck and barbeque area, water rights, water tank and water pumping system, and a
8 designated residential home for a full-time onsite caretaker.
9

10 6. The evidence demonstrates that purchasers of Units located within EPCC must
11 apply for and be accepted as an EPCC member and must pay an initial membership fee to EPCC,
12 which is currently \$20,000.00. In exchange for one's membership, EPCC members are permitted
13 exclusive access and use of EPCC's private property and facilities.
14

15 7. The evidence demonstrates that EPCC is subject to the certain Bylaws of Elk Point
16 Country Club, Inc. There are several such Bylaws recorded at various times, including but not
17 limited to those recorded on September 11, 2000, with the Douglas County Recorder as Document
18 No. 0499187, those recorded on August 1, 2001, with the Douglas County Recorder as Document
19 No. 0519700, and those recorded on August 26, 2005, with the Douglas County Recorder, as
20 Document No. 0653319 (collectively "Bylaws"), including all subsequent amendments
21 incorporate therein. The evidence shows the Bylaws Preamble states in pertinent part as follows:
22 "[EPCC's] primary purpose is hereby affirmed to be to provide its members the pleasure of
23 fellowship and recreation, and its corporate functioning shall be designed to achieve in highest
24
25

26
27 ¹ There was an amendment purportedly changing the name as Elk Point Country Club
28 Homeowners Association, Inc., but such change is irrelevant to the issues before the Court
because the club's property is owned by Elk Point Country Club, Inc., and the IRS exemption is
in favor of Elk Point Country Club, Inc.

1 measure such purpose. It shall not operate its properties or facilities with the view of providing
2 profit to its members but rather such properties and facilities shall be held, operated, and made
3 available to the use and enjoyment of its members . . .” The evidence further shows that the
4 Bylaws Preamble as set forth herein has been duplicated and repeated in every iteration of the
5 bylaws. The Bylaws also provide at Article III, Section 2: “The Executive Board shall have the
6 Power to conduct, manage and control the affairs and business of the Corporation and to make
7 rules and regulations not inconsistent with the laws of the State of Nevada, the Articles of
8 Incorporation and the Bylaws of the Corporation.” The evidence further shows that Article III,
9 Section 2 of the Bylaws has been duplicated and repeated in every iteration of the Bylaws
10 identified herein.
11

12
13 8. The evidence demonstrates that EPCC is subject to certain Rules and Regulations,
14 recorded with the Bylaws on September 18, 1995, in the Douglas County Recorder as Document
15 No. 370678 (“Rules”). The Rules provide at paragraph 10 that “[n]o person shall operate any
16 business on the Club premises, nor on their individual property, within the Club.”
17

18 9. The evidence shows that on September 14, 2019, the EPCC Board of Directors
19 adopted the Rules, Regulations and Guidelines (“Amended Rules”) which permit transient
20 commercial use of Units and long-term rentals of Units within EPCC. The Amended Rules were
21 not recorded.
22

23 10. The evidence shows that the Bylaws and Rules make references to both Tenants
24 and Guests. The evidence further shows that both the Bylaws and the Rules do not permit for-
25 profit use of EPCC property and facilities, including member Units.

26 11. The evidence shows that EPCC is an Internal Revenue Code (“IRC”) Section
27 501(c)(7) tax-exempt social club located in Zephyr Cove, Douglas County, Nevada. By way of
28

///

1 its tax-exempt status, EPCC has enjoyed its tax-exempt social club status and such status is an
2 important attribute of EPCC since 1925.

3 12. The evidence demonstrates that when determining an entity's IRC 501(c)(7) tax-
4 exempt status, the Internal Revenue Service ("IRS") looks at the following factors: (1) the social
5 club must have an established membership of individuals, commingling, and fellowship; (2) the
6 social club must be organized for pleasure, recreation and other non-profitable purpose, meaning
7 it does not provide pleasure and recreation on a commercial basis; and (3) substantially all of the
8 activities of the club are for such purposes and no part of the net earnings of which inures to the
9 benefit of any private club member.
10

11 13. The evidence demonstrates that the stated intent and purpose of EPCC Bylaws is
12 in conformance with IRC 501(c)(7), in that EPCC is not to engage in behavior which encourages
13 profit to its members, and that it was organized with the specific intent to provide its members
14 with fellowship and recreation.
15

16 14. The evidence shows that EPCC members are renting their Units for transient
17 commercial uses, *i.e.* rentals for less than 30 consecutive calendar days, and are also engaged in
18 renting their Units for long-term residential use, *i.e.* rentals for longer than 30 consecutive
19 calendar days.
20

21 15. The evidence demonstrates that the EPCC Board of Directors have failed, refused,
22 and declined to prohibit transient commercial use within EPCC and have, in fact, encouraged and
23 facilitated such use, including by way of example, adopting the Amended Rules, creating a rental
24 calendar identifying the dates the various Units are rented, and providing information to Douglas
25 County when an owner seeks to have a permit issued for transient commercial use of their Unit.
26

27 16. Plaintiffs initiated this action to enjoin Defendant from encouraging, facilitating,
28 and accommodating EPCC members from renting their Units for a profit, which use violates the
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1 Bylaws and puts EPCC's IRC 501(c)(7) tax-exempt status at risk. In addition, Plaintiffs requested
2 that the Defendant be required to enforce its recorded Bylaws and Rules in a manner that avoids
3 jeopardizing the tax-exempt status of EPCC.
4

5 17. The Court finds that EPCC members are engaged in transient commercial use
6 and/or long-term leasing of their properties and are thus, operating their Units for a profit. The
7 Court further finds that such use is directly contrary to, and in violation of, the language set forth
8 in the Bylaws and the Rules, which specifically prohibits EPCC from operating its properties and
9 facilities with the view of providing profit to its members.
10

11 18. The Court finds that EPCC members engaged in renting their Units to obtain
12 revenue constitutes a use of the Units for a profit, including both transient commercial use and
13 long-term rentals, and that use puts EPCC's IRC 501(c)(7) tax-exempt status at risk.

14 19. The Court finds that Plaintiff has demonstrated a likelihood of success on the
15 merits that EPCC members engaged in transient commercial use and long-term rental use of their
16 Units violates the Bylaws and Rules.
17

18 20. The Court concludes that the unrecorded Amended Rules are in violation of and
19 contrary to the Bylaws of EPCC, in that they permit, facilitate, and encourage renting Units to
20 generate revenue for profit, and as a result, they are not enforceable as they relate to any rental
21 activity for profit within EPCC.
22

23 21. The Court finds that EPCC members engaged in renting their Units for profit
24 constitutes an immediate threat of permanent damage to EPCC and its members through the loss
25 of its IRC 501(c)(7) tax-exempt status, and the loss of the character of the community.

26 22. The Court finds that EPCC members engaged in renting their Units for profit
27 constitutes an immediate threat of permanent damage to EPCC by causing a change in the nature
28 of the entity as a private social club designed to promote the social and recreational benefit to
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1 those who are members. Specifically, the Court finds that allowing members to engage in renting
2 their Units for profit changes the nature of the organization to that of a commercial organization.

3 23. The Court finds a bond in the amount of \$5,000.00 is appropriate and supported
4 by the facts.

5 24. If any finding of fact above is, in fact, a conclusion of law, it should be regarded
6 as such.

7 CONCLUSIONS OF LAW

8 This Court concludes the following as the controlling law in this matter:

9 A. A party seeking the issuance of a preliminary injunction under NRCP 65 and NRS
10 33.010 bears the burden of establishing (1) a likelihood of success on the merits, and (2) a
11 reasonable probability that the non-moving party's conduct, if allowed to continue, will cause
12 irreparable harm for which compensatory damages is an inadequate remedy. *S.O.C., Inc. v.*
13 *Mirage Casino-Hotel*, 117 Nev. 403, 408, 23 P.3d 243 (2001).

14 B. Interpretation of a contract's terms is question of law. *Shelton v. Shelton*, 119 Nev.
15 492, 497, 78 P.3d 507, 510 (2003). Contractual provisions should be harmonized whenever
16 possible. *Eversole v. Sunrose villas VIII Homeowners Ass'n*, 112 Nev. 1255, 1260, 925 P.2d 505,
17 509 (1996), and no provisions should be rendered meaningless. *Musser v. Bank of Am.*, 114 Nev.
18 945, 964 P.2d 51, 54 (1998).

19 C. This Court concludes that a consistent reading of the Bylaws that gives meaning
20 to all provisions included therein is that members are not permitted to operate their Units or any
21 EPCC property and facilities in order to generate revenue or for a profit.

22 D. This Court finds that any use of a Unit within EPCC to generate revenue or for a
23 profit, including both transient commercial use and long-term rental use, is in violation of the
24 clear and unambiguous terms of the Bylaws, and recorded Rules.

1 E. This Court finds that any use of a Unit within EPCC to generate revenue or for a
2 profit, including both transient commercial use and long-term rental use, jeopardizes the tax-
3 exempt social club status under the IRC.

4 F. This Court concludes that it would lead to inconsistent and contradictory results
5 if, as suggested by Defendant, the references to the term "tenant" within the Bylaws and the Rules
6 was used as a means to justify allowing EPCC members to rent their Units to generate revenue or
7 for a profit. This Court finds that there are many different classifications of tenancies recognized
8 by the State of Nevada, including joint tenancies, tenancies in common, life tenancies, and
9 tenancies for years. Thus, the plain language of the Bylaws, reading it in context and construing
10 it so as to render each word, phrase and term meaningful, unambiguous, and harmonious with the
11 whole, requires a finding that EPCC is not entitled to operate its properties and facilities to
12 generate revenue or for a profit, which necessarily includes any rental of a Unit or EPCC property
13 and facilities for either long-term rental or transient commercial use.

14 G. This Court concludes that the Amended Rules adopted by EPCC on September 14,
15 2019, as they relate to rental activity within EPCC, are in violation of the Bylaws, and are
16 therefore unenforceable to the extent they permit members to derive revenue or a profit through
17 the rental of their Units for both transient commercial use and long-term rentals.

18 H. This Court concludes that Plaintiffs have met their burden of proving they have a
19 likelihood of success on the merits. Based on the evidence presented, the intent under the Bylaws
20 was for EPCC to be formed as a social club, to maintain that status as a IRC 501(c)(7) tax-exempt
21 social club, and that, under the Bylaws, any use or operation of a Unit within EPCC, or any EPCC
22 property and facilities, by any member, to generate revenue or for a profit, is strictly prohibited.

23 I. Irreparable harm is that harm for which compensatory damages would be
24 inadequate. *Dixon v. Thatcher*, 103 Nev. 414, 415, 742 P.2d 1029, 1029-30 (1987).

1 J. Plaintiffs have met their burden, in demonstrating to the satisfaction of this Court,
2 that there is a threat of permanent and irreparable harm if EPCC's IRC 501(c)(7) tax-exempt
3 status is lost in the event EPCC is not immediately enjoined from allowing, facilitating and
4 encouraging EPCC members in renting their Units or any other EPCC property and facilities,
5 and deriving revenue or a profit from such use. An award of compensatory damages would be a
6 futile act by this Court for this type of damage, because, in addition to the loss of the tax-exempt
7 status, such irreparable harm includes a change in the overall nature and character of the
8 community, from one originally designed to promote the social and recreational benefit to those
9 who are members, to simply a commercial organization.
10

11 K. Plaintiffs are entitled to injunctive relief requiring EPCC to enforce its Bylaws,
12 and to prohibit the use of any Unit, and any other portion of EPCC's property and facilities, to
13 generate revenue or for profit, during the pendency of this case.
14

15 L. The purpose of posting security bond is to protect a party from damages incurred
16 as a result of a wrongful injunction, not from damages existing, if any, before the injunction was
17 issued. *See American Bonding Co. v. Roggen Enterprises*, 109 Nev. 588, 854 P.2d 868 (1993).
18 A bond in the amount of \$5,000.00 is appropriate under the circumstances.
19

20 L. If any conclusion of law above is, in fact, a finding of fact, it will be treated as
21 such.
22

23 ORDER

24 Upon the foregoing facts and controlling law, the Court enters the following Order:

25 ***IT IS HEREBY ORDERED, ADJUDGED AND DECREED*** that Plaintiffs' Motion for
26 Preliminary Injunction is GRANTED.
27

28 ///

1 **IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED** that EPCC is
2 required to enforce its Bylaws, specifically as the Bylaws prohibit EPCC and its members from
3 deriving any revenue or profit through the operation of its properties and facilities.
4

5 **IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED** that EPCC
6 shall within 90 days from the date of this Order prohibit, prevent, and enjoin and any rental use
7 of any portion of EPCC's property and facilities, including member's Units, and that said use
8 expressly incudes both transient commercial use and long-term rental use of any Unit.
9

10 **IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED** that Plaintiff
11 shall post a bond in the amount of \$5,000.00 in accordance with NRCP 65(c) as security.
12

13 **IT IS SO ORDERED.**

14 DATED this 15 day of December, 2020.

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DISTRICT COURT JUDGE

Respectfully Submitted
this 3rd day of November, 2020, by:

LEACH KERN GRUCHOW
ANDERSON SONG

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