

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.

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Clerk of Supreme Court

Supreme Court Case No.: 82484

District Court Case Number:
2020-CV-0124

APPELLANT'S APPENDIX

VOLUME 8

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Elk Point Country Club Homeowners Assn., Inc.

IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

K. J. BROWN, L.L.C., a Nevada limited liability company; and 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,

Plaintiffs,

v.

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

Defendants.

CASE NO.: 2020-CV-0124

DEPT: I

DEFENDANT ELK POINT COUNTRY CLUB HOMEOWNERS ASSOCIATION, INC.'S EX PARTE REQUEST FOR AN ORDER SHORTENING TIME AND MOTION TO PARTIALLY STRIKE PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Defendant Elk Point Country Club Homeowners Association, Inc. (hereinafter "EPCC" or "the HOA"), by and through its counsel of record, Prescott T. Jones, Esq. and Joshua Y. Ang, Esq. of the law firm Resnick & Louis, P.C., hereby submits DEFENDANT ELK POINT COUNTRY CLUB HOMEOWNERS ASSOCIATION, INC.'S EX PARTE REQUEST FOR

1 AN ORDER SHORTENING TIME AND MOTION TO PARTIALLY STRIKE PLAINTIFFS'
2 REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION.

3 This motion is made and based upon the papers and pleadings on file with the Court, the
4 exhibits attached, the Memorandum of Points and Authorities, and any oral argument the Court
5 may entertain.

6 DATED this 15th day of October, 2020.

8 RESNICK & LOUIS, P.C.

9 

10 _____
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15 8925 W. Russell Road, Suite 220
16 Las Vegas, NV 89148
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18 Elk Point Country Club Homeowners Ass'n, Inc.

16 **MEMORANDUM OF POINTS AND AUTHORITIES**

17 **A. Ex Parte Request That This Motion Is Heard On Order Shortening Time**

18 Defendant respectfully requests that the Court issues an order granting the attached
19 proposed Order shortening time. See **Exhibit B**, [Proposed Order]. Per the timeline stated in said
20 order, the Court would decide the subject motion to partially strike Plaintiffs' Reply in support of
21 their motion for preliminary injunction during the same October 23, 2020 hearing set for said
22 motion for preliminary injunction. See *Id.* There is good cause to support an order shortening
23 time, as the issues impacted by this motion are simple and discrete in a legal sense (whether the
24 new evidence/legal arguments in Plaintiffs' Reply at issue were improper), but need to be
25 decided prior to the Court ruling on a the underlying motion for preliminary injunction, as it will
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1 determine the extent to which the subject Reply's contents may be considered by the Court. See
2 **Exhibit A**, [Counsel's Declaration].

3 Thus, undersigned counsel respectfully requests that the Court signs the attached
4 proposed order and decides the concurrent motion to partially strike Plaintiffs' Reply in support
5 of their motion for preliminary injunction during the October 23, 2020 hearing, prior to engaging
6 in proceedings related to Plaintiffs' motion for preliminary injunction. See **Exhibit B**, [Proposed
7 Order].

8 **B. Motion (On Order Shortening Time) To Partially Strike Plaintiffs' Reply In**
9 **Support Of Motion For Preliminary Injunction**

10 **i. Legal Standard**

11 It is a well-known and fundamental rule that Reply briefs should not raise new claims
12 (legal or factual), but rather is limited to addressing new matters raised in the answering brief
13 (i.e., the preceding opposition). See *Browning v. State*, 120 Nev. 347, 368 n.53 (2004). A
14 succinct, clear statement of this rule is as follows:

15 "A reply brief is generally limited to addressing matters presented in a motion and
16 response. See *Petty v. Portofino Council of Coowners, Inc.*, 702 F. Supp. 2d 721, 730 n.3
17 (S.D. Tex. 2010) ("[T]he scope of the reply brief must be limited to addressing the
18 arguments raised by the [response].") (citation omitted); see also *AAR, Inc. v. Nunez*, 408
19 F. App'x 828, 830 (5th Cir. 2011) ("Generally, and for obvious reasons, a reply brief is
20 limited to addressing matters presented by appellant's opening brief and by appellee's
21 response brief, and **"is not the appropriate vehicle for presenting new arguments or
22 legal theories to the court."**) *Lynch v. Union Pac. R.R. Co.*, 2015 U.S. Dist. LEXIS
23 152674 at pg. 2 (N.D. Tex. 2015) (**Emphasis added**).

24 Nevada-specific application of this standard include the matter *MG&S* where the Nevada
25 Court of Appeals declined to consider arguments about concealment of a policy limit that were
26 raised for the first time in a Reply brief. See *MG&S Enter., LLC v. Travelers Cas. Ins. Co. of*
27 *Am.*, 2017 Nev. App. Unpub. LEXIS 673 at pg. 11 n.9 (2017).

28 ///

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1 **ii. Plaintiffs' Reply In Support Of Their Motion For Preliminary Injunction Is Replete**
2 **With Inappropriate New Arguments And New Legal Theories**

3 Plaintiffs' Reply at issue attaches a declaration (essentially an expert report) of Michelle
4 L. Salazar, a Certified Public Accountant (Exhibit 2 of said Reply), which constitutes a
5 comprehensive, all-new set of legal theories regarding the application of the Federal Tax Code to
6 the subject preliminary injunction dispute. *See Exhibit C*, [Subject Reply by Plaintiffs with All
7 Exhibits]. In addition to being a set of all-new set of legal theories, this declaration also relies
8 upon voluminous new documentation, most of which was never attached to any previous brief in
9 this chain (It appears that only the Bylaws were previously attached as an exhibit to the initial
10 motion for preliminary injunction filed on 6/29/20). *See Exhibit C*, [Subject Reply by Plaintiffs
11 with All Exhibits (At Exhibit 2, pg. 2-3)]. In other words, this declaration/expert report is a
12 textbook example of inappropriate "new arguments or legal theories" presented to the Court, and
13 should be stricken from the record, alongside all portions of the Reply relying on it, to prevent
14 prejudice to Defendant which has been wholly deprived of a chance to address these new legal
15 theories and arguments (to say nothing of the fact that these new legal theories and arguments
16 were formulated based upon voluminous documents that were never provided to Defendant).

17 This similarly applies to all other documentation newly attached to the subject Reply
18 brief. This includes a photo of a signboard, a declaration by one of the Plaintiffs (Timothy
19 Gilbert) alongside two Short-Term Vacation Rental Revenue Estimate spreadsheets prepared by
20 Mr. Gilbert, various Short-Term Vacation Rental listings online for the Elk Point community,
21 and EPCC Board Candidate survey documentation. *See Exhibit C*, [Subject Reply by Plaintiffs
22 with All Exhibits]. Plaintiffs have (again) relied upon these documents to assert inappropriate
23 new legal arguments and theories. For example, a new legal theory regarding and surrounding
24 Short-Term Vacation Rentals competing with other tax-burdened commercial enterprises was
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1 asserted based upon Timothy Gilbert's Declaration and Spreadsheet. *See Exhibit C*, [Subject
2 Reply (at pg. 7) by Plaintiffs with All Exhibits]. Plaintiffs have also newly asserted an "unclean
3 hands" legal theory based upon newly attached EPCC Board Candidate survey documentation.
4 *See Exhibit C*, [Subject Reply (at pg. 14) by Plaintiffs with All Exhibits].

5 As Plaintiffs have inappropriately asserted the aforementioned inappropriate new legal
6 theories and arguments, and others, based upon the Exhibits newly attached to the subject Reply,
7 all of these exhibits should be stricken, alongside all parts of said Reply containing inappropriate
8 new legal theories and arguments based thereupon.
9

10 **iii. Conclusion**

11 After granting the OST request and signing it into order, the Court should grant the
12 accompanying motion and strike all documents attached to Plaintiffs' Reply in support of
13 thereof, as well as all inappropriate new legal theories and arguments asserted in the body of said
14 Reply. None of these documents or arguments should be considered by the Court in deciding
15 Plaintiffs' motion for preliminary injunction.
16

17 DATED this 15th day of October, 2020.

18 **RESNICK & LOUIS, P.C.**

19
20 By: 

21 PRESCOTT JONES
22 Nevada Bar No. 11617
23 JOSHUA ANG
24 Nevada Bar No. 14026
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27 *Attorneys for Defendant,*
28 *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 EX PARTE REQUEST FOR AN ORDER SHORTENING TIME AND MOTION TO PARTIALLY STRIKE PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** was served this 15th day of October, 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.

Gayle A. Kern, Esq.

Sophie A. Karadanis, Esq.

LEACH KERN GROCHOW ANDERSON SONG

5421 Kietzke Lane, Ste. 200

Reno, Nevada 89511

Attorneys for Plaintiffs


An Employee of Resnick & Louis, P.C.

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Exhibit A

Exhibit A

DECLARATION OF JOSHUA Y. ANG

I, JOSHUA Y. ANG, being first duly sworn according to law, deposes and says:

1. That I am the current counsel for the Elk Point Country Club Homeowners Association, Inc., the Defendant in this matter, from the law firm Resnick & Louis, P.C.
2. I am making this declaration based upon my own personal information, and/or based upon my review of documents.
3. That there is good cause to support an order shortening time, as the issues impacted by this motion to strike are simple and discrete in a legal sense (whether the new evidence/legal arguments in Plaintiffs' Reply at issue were improper), but need to be decided prior to the Court ruling on a the underlying motion for preliminary injunction, as it will determine the extent to which the subject Reply's contents may be considered by the Court.
4. Thus, undersigned counsel respectfully requests that the Court signs the attached proposed order and decides the concurrent motion to partially strike Plaintiffs' Reply in support of their motion for preliminary injunction during the October 23, 2020 hearing, prior to engaging in proceedings related to Plaintiffs' motion for preliminary injunction.
5. Further, Declarant sayeth naught.

DATED this 15th day of October, 2020.



Joshua Y. Ang, Esq.

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Exhibit B

Exhibit B

RESNICK & LOUIS, P.C.

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IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF DOUGLAS

K. J. BROWN, L.L.C., a Nevada limited liability company; and 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.

Plaintiffs,

v.

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

Defendants.

CASE NO.: 2020-CV-0124

DEPT: I

ORDER SHORTENING TIME

The Court finding good cause hereby grants Defendant's request for an order shortening time and mandates that the "Motion to Strike" component of "DEFENDANT ELK POINT COUNTRY CLUB HOMEOWNERS ASSOCIATION, INC.'S EX PARTE REQUEST FOR AN ORDER SHORTENING TIME AND MOTION TO PARTIALLY STRIKE PLAINTIFFS"

1 REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION” served on October
2 15, 2020 will be decided during the October 23, 2020 hearing. Plaintiff’s opposition, if any, is
3 due by October 20, 2020 and any Reply by Defendant is due by October 22, 2020.

4 All briefs must be served to opposing counsel and the Court by email and mail on their
5 due dates.

6 Dated this _____ day of _____, 2020.

7
8
9 _____
10 Hon. Nathan Tod Young
11 District Court Judge, Dept. I
12 9th Jud. Dist. Of Nevada
13

14 Submitted by:

15 RESNICK & LOUIS, P.C.

16 By: 

17 PRESCOTT JONES

18 Nevada Bar No. 11617

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Exhibit C

Exhibit C

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