

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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2020-CV-0124

APPELLANT'S APPENDIX

VOLUME 10

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1 CASE NO. 2020-CV-00124

2 DEPT. NO. 1

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4 IN THE NINTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

5 IN AND FOR THE COUNTY OF DOUGLAS

6 BEFORE THE HONORABLE DISTRICT COURT JUDGE, NATHAN TOD YOUNG

7
8 K.J. BROWN, LLC AND TIMOTHY D.
9 GILBERT, ET AL.,

10 Plaintiffs,

11 vs.

12 ELK POINT COUNTRY CLUB, INC.,

13 Defendant.
14 _____/

15 TRANSCRIPT OF PROCEEDINGS

16 MOTION FOR PRELIMINARY INJUNCTION

17 FRIDAY, OCTOBER 23, 2020

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23 Reported By:

Kathy Jackson CSR
Nevada CCR #402
California CCR #10465

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1 FRIDAY, OCTOBER 23, 2020, MINDEN, NEVADA

2 -oOo-

3 THE COURT: Well, hello everyone. This is Case
4 20CV0124. And I'm just going to ask everyone up front to
5 introduce themselves for the court reporter please, beginning
6 with you, ma'am.

7 MS. GILBERT: Nancy Gilbert, Your Honor.

8 THE COURT: And I'm going to ask you to use your
9 big outdoor voices, okay, to help the court reporter. Thank
10 you.

11 Thank you, Ms. Gilbert.

12 MR. GILBERT: Tim Gilbert, Your Honor.

13 MR. BROWN: Kurt Brown, Your Honor.

14 THE COURT: Thank you, sir.

15 MS. KARADANIS: Sophe Karadanis, counsel for
16 plaintiffs.

17 MS. KERN: Gayle Kern, counsel for plaintiff.

18 THE COURT: Thank you.

19 MR. JONES: Prescott Jones, counsel for the
20 defendant.

21 THE COURT: Good morning.

22 MR. FELTON: Robert Felton, president of the
23 homeowner's association.

24 THE COURT: Thank you, sir. Good morning.

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1 MR. FELTON: Good morning.

2 THE COURT: So as we -- as we proceed today let
3 me just tell you, I know it's difficult to wear masks and
4 all. It's -- I don't have one on. That's why I have this
5 shield up, but I will tell you it's difficult to wear a
6 ventilator too, and you are required to have a mask on in
7 here.

8 But anyone who needs a break and if you need us
9 to break maybe a little bit more than we generally do just
10 let me know. I'm anticipating we may be here for quite a
11 while. I will tell you that generally my schedule is that I
12 try to look out for my clerk and my court reporter, and they
13 get a break about 10:15 or so in the morning, and they are
14 going to get that break and they will get a break in the
15 afternoon, and there's a break for lunch if we're going that
16 long and we may be as I anticipate.

17 So you'll know those breaks are coming up. But
18 if someone is feeling uncomfortable or needs a little bit
19 more of a break than that just let me know. We'll
20 accommodate you, and we'll work around this and we'll try to
21 make this as comfortable for everyone as we can.

22 Now, I received a -- a request for an order
23 shortening time and a motion to partially strike the
24 plaintiffs' reply in support of the motion for the

1 preliminary injunction. I think it's pretty clear that I did
2 not rule on the motion for an order shortening time because I
3 thought it was just too short, and I thought it just would be
4 unfair to the plaintiffs to do that to them, and so I just
5 let it sit until today and -- and obviously that motion was
6 denied then. It was a pocket veto, if you're familiar with
7 that term. I'm sure that you are.

8 Now, as to the motion to strike, I don't know
9 particularly that I need any argument on that. The motion is
10 denied, and I've looked at the reply in support of the motion
11 for preliminary injunction and your argument, sir, and the
12 motion is denied.

13 And so we're going to move forward with the
14 motion for the preliminary injunction. Who is going to be
15 handling that for us?

16 MS. KERN: I will be, Your Honor.

17 THE COURT: Very well, Ms. Kern. Thank you. And
18 you're welcome to make an opening statement if you would like
19 to do so.

20 And, Mr. Jones, you would also be welcome to do
21 so now.

22 MS. KERN: Thank you, Your Honor. I do think it
23 would be helpful because it is important to identify what the
24 issue is that we are going to be discussing today and that is

1 that we are requesting a preliminary injunction to protect
2 the country club and its members.

3 At the present time, as a result of the conduct
4 that has been allowed to occur over the recent past there is
5 a serious threat to a country club that was established in
6 1925 and it's really important to understand why it was
7 established.

8 It was established as a social club. It still
9 operates as a social club and its mandate or its requirement
10 is that it operates in order to allow its members to come
11 together to enjoy the fellowship and recreation and to
12 operate not as a commercial entity and not for providing any
13 income or profit to its owners. That is the key.

14 The problem that we have is that the owners are
15 operating and utilizing the social club facilities in order
16 to gain income, and that's a problem under a couple of
17 different areas. But most importantly and why we are here
18 today is because that operation affects and jeopardizes the
19 Internal Revenue Service social exemption that has been in
20 place since 1925.

21 What we know is that in order to preserve the
22 social club exemption that is granted by the IRS
23 substantially all of the activities must be for the purposes
24 of recreation and enjoyment of its members and no part of any

1 income or earnings can be enjoyed by its members.

2 What's happening is this is a beautiful area.
3 This is a pristine part of Lake Tahoe in which the social
4 club members enjoy a beautiful beach and facilities for which
5 they have been enjoying since 1925.

6 What is happening is those very same facilities
7 and recreational attributes of the beach and enjoying Lake
8 Tahoe are now being sold and generating income of thousands
9 of dollars a night and a million dollars a year to its
10 members by utilizing the social club facilities.

11 It's kind of like you belong to a golf club and
12 you had a membership with the golf club, and you were
13 entitled to utilize the clubhouse and you could go play golf,
14 it's for your purpose. It's for the members to enjoy. But
15 you decided, you know, I'm not going to play golf today so I
16 think I'll -- I think I'll make a little money on the side
17 and I'll sell it to John Doe and give me a credit card. I'll
18 take his credit card. I don't know John, but I'll let John
19 go play and enjoy the social club facilities, my membership
20 privileges for the day. That's what they're doing, and that
21 is what is putting at jeopardy the IRS exemption.

22 This lawsuit down the road will deal with a lot
23 of different issues, but for the purposes of Your Honor
24 today, what we are asking is to ensure that the board meet

1 its mandate and that the country club preserve the facilities
2 and the recreational amenities for its members and be
3 enjoined so that we do not face the jeopardy of the IRS
4 revoking a merely 100-year exemption because the members are
5 enjoying profits.

6 We will have testimony today and set for the
7 Court the understanding of the history of this country club,
8 how long it has been in existence, the social club aspect and
9 also addressing the very specific and real jeopardy that is
10 at risk if the club does not take control and ensure that the
11 recreational facilities are for its members enjoyment, not
12 for some stranger that gives a credit card and goes in and
13 enjoys those amenities.

14 The irreparable harm, of course, is not going to
15 be able to be compensated with damages. We need to preserve
16 that status. We need to make sure that there is nothing that
17 would come of jeopardy to that social club exemption that the
18 IRS has granted. Every single tax return is filed utilizing
19 that exemption.

20 If there is fraud involved or if the IRS
21 determines there is fraud involved there would also be the
22 risk that there would be additional penalties imposed if they
23 determined that the social club exemption should not have
24 been claimed because of these recent changed circumstances.

1 So our request for the Court at the end of the
2 day will be for the Court to enter an order to preserve and
3 make sure that the social club exemption is protected and
4 that there is no jeopardy because of the inappropriate
5 selling of the social club privileges that is solely for the
6 benefit of the members. Thank you.

7 THE COURT: Thank you, ma'am.

8 Mr. Jones?

9 MR. JONES: Good morning again, Your Honor.
10 Prescott Jones on behalf of the defendant.

11 THE COURT: Yes, sir.

12 MR. JONES: An initial matter, it's a pleasure to
13 be in front of Your Honor. It's a pleasure to be back in a
14 real court for the first time in quite a while.

15 THE COURT: I'm glad to have you here, all of
16 you.

17 MR. JONES: Thank you. Like last time we met
18 back in early March on the Moretto case which seems like ages
19 ago given everything that's happened since then.

20 THE COURT: It does, sir.

21 MR. JONES: We're before this Court on a motion
22 for preliminary injunction filed at the outset of a lawsuit.
23 Prior to any discovery taking place all my client has done in
24 this case is simply answered. And a preliminary injunction

1 by virtue of the fact that it's filed at the outset of the
2 case has a very high bar and a high burden for the plaintiffs
3 to prove for this Court to grant a preliminary injunction.

4 The standard, as Your Honor is familiar with, is
5 the moving party must show that my client's conduct if
6 allowed to continue will cause irreparable harm for which
7 compensatory relief is inadequate. And, of course, the
8 moving party must show a reasonable likelihood of prevailing
9 on the merits. That's the extent of this Court's
10 determination today are those factors.

11 And I'm going to try to keep this as brief as
12 possible because there's going to be a lot of testimony
13 today, a lot of discussion, a lot of exhibits.

14 THE COURT: I'll listen to whatever you want to
15 say. Don't worry, sir.

16 MR. JONES: I appreciate that, Your Honor. But
17 essentially the claimed irreparable harm is entirely
18 speculative, Your Honor. We just heard from the plaintiffs'
19 counsel that the linchpin of their argument is the claimed
20 threat to the IRS 501c7 nonprofit status of the HOA. The HOA
21 has maintained that nonprofit status for decades. That
22 nonprofit status has never been challenged by the IRS. That
23 nonprofit status is not pending a challenge by the IRS.

24 And, in fact, the plaintiffs as homeowners don't

1 even have standing to challenge the 501c7 nonprofit status of
2 the HOA. That can only be done by the IRS itself, and
3 there's going to be no evidence today that the IRS has taken
4 any action, is contemplating any action or that the HOA is
5 aware of any contemplated action by the IRS threatening that
6 501c7 status.

7 All we're going to hear today is that, well,
8 here's why based on our expert's take on the plaintiffs'
9 expert take on the tax code why it could be challenged if the
10 IRS decides to take action. That's speculative. At this
11 point of litigation that doesn't rise to the level of an
12 irreparable harm because it's entirely speculative.

13 If for some reason the HOA received a letter from
14 the IRS in a month saying Elk Point Country Club, your 501c7
15 status is being challenged. You have a hearing. Then
16 plaintiffs I think have a little bit better of an argument to
17 bring to this Court to say we have an irreparable harm. We
18 get a preliminary injunction right now. The HOA needs to
19 stop short of vacation rentals, but that's not happening
20 here, and that's not going to happen here because the tax
21 code specifically allows an HOA to allow its members to -- to
22 have some profit. That's allowed. It's substantially all of
23 the HOA's activities must be related to or not for the profit
24 of its members.

1 But regardless of that, it's the HOA itself who
2 is profiting. It's to the extent we even call it a profit,
3 it's the individual homeowners who are performing the
4 short-term vacation rentals. That money doesn't go to the
5 HOA. That money stays in the homeowners' pockets.

6 And counsel used the analogy of a country club
7 being akin to a 501c7 HOA. A country club is, of course,
8 different than single family residential homes. It's
9 different in that NRS 116.340 specifically allows homeowners
10 inside of a HOA to -- to rent out their homes for short-term
11 vacation rentals. There is no such statute for country club
12 members to rent out tee times. And, of course, it's
13 different because real estate is different, and Nevada has a
14 longstanding policy of allowing homeowners to do as they
15 please with their home subject, of course, to the bylaws and
16 other rules.

17 So we're going to talk obviously about a lot more
18 as we go on today, but the important point is that the harm,
19 much like the Moretto case that we dealt with back in March,
20 the harm is entirely speculative. There's no evidence of
21 harm is coming to the plaintiffs. A preliminary injunction
22 is completely inappropriate at this point in time. What's
23 more appropriate is for the Court to consider a preliminary
24 injunction after we go through discovery, after we produce

1 experts, after we have their testimony and either through
2 pretrial motions or trial resolve the potential of an
3 injunction at that point in time.

4 At this point in time the outside of litigation
5 with no concrete harm coming to the plaintiffs is completely
6 inappropriate, Your Honor.

7 THE COURT: Thank you.

8 MR. JONES: Thank you.

9 THE COURT: Call your first witness.

10 MS. KERN: Nancy Gilbert.

11 THE COURT: Do we have witnesses that are
12 appearing remotely?

13 THE CLERK: No.

14 MS. KERN: Not to my knowledge.

15 THE COURT: Ms. Gilbert, come on up.

16
17 NANCY GILBERT,
18 called as a witness on behalf of the
19 Plaintiff having been first duly sworn,
20 was examined and testified as follows:

21
22 DIRECT EXAMINATION

23 BY MS. KERN:

24 Q. Ms. Gilbert, can you state your name for the

1 court reporter, please.

2 A. Nancy Avanzino-Gilbert.

3 Q. Thank you. Ms. Gilbert, do you own any property
4 within the Elk Point Country Club?

5 A. My husband and I are the trustees of -- of a
6 trust that owns the property at Elk Point, 464 Elks.

7 Q. Can you please tell us how long you've owned the
8 property?

9 A. We purchased it in 2014.

10 Q. Can you describe what the area is. What the
11 country club is to the Court.

12 A. The country club is a community of approximately
13 100 lots with some old cabins still existing. It's
14 beautiful. It's a single-lane road. It has five streets on
15 it. It has a water tank that we put installed. It has a
16 gorgeous 13-acre beach. It has a marina. It has a
17 caretaker, full-time caretaker who lives there on site and
18 has his own property.

19 We own water rights, 89 units of water rights
20 that is protected under the social club's name. Property,
21 the common area property is held in the social club's name.
22 So it's -- it's pristine. It's beautiful. It is gated.

23 Q. Thank you. And can you describe how you utilize
24 the property. I mean, is it your primary residence? Is it a

1 vacation home? How do you utilize the property?

2 A. We -- we use it as a second home. It's a
3 historic house. It was built in 1929 from the first blasting
4 of Cave Rock. So it has rocks and old logs. We restore
5 historic homes and we were looking -- we spent four years
6 looking for something to, you know, to basically improve or
7 restore historic homes. So it's -- it's an old cabin, and so
8 it has the original Ice House that was moved onto the
9 property in the '50s from Zephyr Cove, and we restored that
10 as well.

11 So we go there. We used to go there quite often.
12 We go there less since about when my husband had a stroke and
13 after that we had some issues with the HOA.

14 Q. Okay. And when you refer to the HOA is that the
15 country club?

16 A. I apologize. Yes, it's the social club.

17 Q. Okay. And, again, you identified that to your
18 knowledge the property was owned by the social club. Is the
19 entity that owns it, what is that name?

20 A. From the recorded records it's Elk Point Country
21 Club Inc. It was originally the Elk Club in Reno and they
22 bought this peninsula. It was originally the Tahoe Nevada
23 Elks Club and they changed it in 1929 or 1925 to 1929 to Elks
24 Club Country Club Inc. So the social club is always Elks

1 Club Country Club Inc. and all the property, the common area
2 property is in that name.

3 Q. Since 2014 can you describe whether you had any
4 involvement in the government side of the country club or
5 involved in any kind of committee work or anything with the
6 country club?

7 A. Yes. In 2017 when Fred Hanker was the president,
8 who is here in the courtroom, he approached -- he was a
9 president at the time and approached me because of my
10 background in HOA work. I have represented homeowners
11 associations and also been involved in litigation to develop
12 some architectural review guidelines because they were having
13 issues with small cabins being torn down and big boxes being
14 put up that was not consistent with the community.

15 So I spent, along with a group of people, about a
16 year developing architectural guidelines, and those
17 eventually got adopted with the assistance of Mr. Cabella and
18 there was a vote by or not a vote a survey where the members
19 liked the guidelines.

20 And then I was asked to be part and chair the
21 security committee which was involved with enclosing the
22 perimeter and also assisting in fire prevention issues in
23 terms of an escape, an evacuation plan because our roads have
24 been narrowed from encroachment, and there's only one road

1 out. There's no second road out. So we -- I was asked to be
2 involved in that as well.

3 Q. Okay. In your work in connection with this have
4 you become familiar with the recorded documents of the
5 country club?

6 A. Yes.

7 Q. Okay. If I could have the following documents
8 provided to the witness or do I -- do you want me to take
9 them to her?

10 THE COURT: Counsel, feel free to move around the
11 courtroom as deemed necessary.

12 MS. KERN: Okay. I wasn't sure how you wanted us
13 to do that.

14 THE COURT: You're welcome to move about the
15 courtroom.

16 MS. KERN: If I could have Exhibits 1 through 9.

17 I am handing the witness Exhibits 1 through 9.

18 And for the record, Exhibit 1 is the 1925 Articles Of
19 Incorporation for Nevada Elks Tahoe Association.

20 THE COURT: Thank you, ma'am.

21 MS. KERN: Exhibit 2 is the 1927 Bylaws Of The
22 Nevada Elks Association.

23 THE COURT: Well, counsel, that's what it says on
24 top, but we don't know that because this witness hasn't

1 identified them, and you're not the identifying the witness.

2 MS. KERN: I was identifying them for the record.
3 If you would prefer I not do it that way.

4 THE COURT: Well, I don't know that you get to
5 identify them for the record.

6 MS. KERN: Okay.

7 THE COURT: They may not be what you say they
8 are.

9 MS. KERN: Okay.

10 THE COURT: So you can ask the witness what they
11 are.

12 MS. KERN: Okay. That's a little different than
13 I have done. I apologize.

14 THE COURT: It's quite all right.

15 Q. (BY MS. KERN:) Ms. Gilbert, will you take a look
16 at Exhibit Number 1, and will you identify for the record
17 what it is.

18 A. It's the Articles Of Incorporation for the Nevada
19 Elks Tahoe Association, and it's dated March 21st, 1925.

20 Q. And are you familiar with this as a result, both
21 of your ownership of a property, your membership in the
22 country club and your work in connection with the committee?

23 A. Yes.

24 MS. KERN: I would move for the admission of

1 Exhibit Number 1.

2 MR. JONES: No objection.

3 THE COURT: Let me ask counsel. Have you seen
4 her exhibits?

5 MR. JONES: Yes, Your Honor. Counsel provided
6 the exhibits to me two days ago.

7 THE COURT: So we have a lot of people here.

8 MR. JONES: Uh-huh.

9 THE COURT: We have a lot of money that we're
10 spending on lawyers. The attorneys in this case probably
11 should have discussed with each other an agreement that
12 certain exhibits will come in, and you can disagree on any of
13 them. But if you're going to stipulate to them I would like
14 to move this hearing along by having you just tell me what
15 you do agree to come in as far as the exhibits, and then we
16 can move this along.

17 So one is admitted, Ms. Clerk.

18 I see numbers 1 through 16 here. Do you have
19 some others that you're not going to oppose?

20 MR. JONES: I have no objection to Exhibit 1
21 through 9, Your Honor. The ones beyond that we'll probably
22 have to deal with on a case by case basis.

23 THE COURT: That may be. Okay. Very well.

24 Okay. And you intend to offer 1 through 9 at

1 some point; is that correct, ma'am?

2 MS. KERN: I will offer them right now if he is
3 not going to object and admit them.

4 THE COURT: There we go. Now we're moving along.
5 Thank you, counsel.

6 MR. JONES: Thank you.

7 THE COURT: 1 through 9 are admitted and you have
8 your foundation, and now you can talk about them all you
9 want.

10 MS. KERN: Thank you, Your Honor. I appreciate
11 that.

12 Q. Can you please take and look at Exhibit Number 6,
13 which are a set of recorded rules and regulations adopted
14 June 26th, 1988.

15 A. Yes.

16 Q. And can you explain when you received these?

17 A. I received them when we closed on our property in
18 2014. We got a set of the records, but then I received them
19 again from James Cabella, the general counsel. There was a
20 request for the governing documents came about as a result of
21 some information in the Moretto case, and we received it
22 then.

23 Q. Okay. And will you take a look at rule number
24 ten.

1 A. Yes.

2 Q. And can you read that into the record.

3 A. Yes. The Elk Country Club Inc. Rules and
4 Regulations Adopted June 26th, 2000 -- 1988. It says no
5 person shall operate any business on club properties nor on
6 their individual property within the club.

7 THE COURT: That's not what it says.

8 Q. (BY MS. KERN:) I think it says club premises.

9 THE WITNESS: Your Honor, you're correct. "No
10 person shall operate any business on the club premises nor on
11 their individual property within the club."

12 THE COURT: That is what it says.

13 THE WITNESS: Yes. Thank you. I apologize.

14 MS. KERN: Thank you.

15 Excuse me, Your Honor, I apologize.

16 THE COURT: Ma'am, take your time.

17 Q. (BY MS. KERN:) If I could also ask you to please
18 take a look at Exhibit Number 5. And if you could go to the
19 third page of that exhibit.

20 A. Page three on the bottom.

21 Q. No. The third page of the exhibit. It's one at
22 the bottom.

23 A. Thank you.

24 Q. And these are, as I understand it, and correct me

1 if I am incorrect, that these were the bylaws that were
2 recorded in 1995 as evidenced by the very last page of that
3 exhibit that they were recorded on September 18, 1995; is
4 that correct?

5 A. September 18th, 1995, correct.

6 Q. Okay. And page one of the bylaws but page three
7 of the exhibit there is a preamble, and could you look at the
8 third sentence of that preamble and read that into the
9 record.

10 A. Do you want it -- it's the primary purpose is
11 that the or --

12 THE COURT: It shall not.

13 Q. (BY MS. KERN:) It shall not.

14 A. Okay. "It shall not operate its properties or
15 facilities with the view of providing profit to its members
16 but rather -- rather such properties and facilities shall be
17 held, operated and made available for the use and enjoyment
18 of its members upon payment of such assessments and charges
19 as will fairly meet the cost of operation and provide a
20 reasonable accumulation of funds for repairs, replacements
21 and additions."

22 Q. And what is your understanding of the purpose of
23 the social club?

24 A. To socialize with your friends and people that

1 you meet there and to -- to enjoy the beach, to enjoy the
2 marina and to enjoy a gated private social club environment.

3 Q. And, in fact, the -- the second sentence of that
4 preamble talks about the primary purpose of the social club,
5 does it not?

6 A. Yes.

7 Q. Okay. And what does -- what do the bylaws
8 provide as the primary purpose?

9 A. This is the bylaws so it does say as a primary
10 purpose that it be for fellowship and recreation.

11 Q. And that would be consistent with what your
12 understanding was when you purchased the property in 2014?

13 A. Yes. In 2014 we received a book from the prior
14 owners, the Rotermans, and it was a basically a collage of
15 all of the social events and the history about Point, all of
16 the social events and kind of like the history of Elks and
17 all of the socialization of the members. It was a very
18 quaint little book that we got.

19 Q. Can you also take a look at Exhibit 7, which is
20 another recorded bylaw.

21 A. I'm there.

22 Q. This was recorded in 2000. And if you look at
23 the same page of those bylaws that is the first page of the
24 bylaw but I believe it's the fourth page of the exhibit. Did

1 anything change from your reading in the preamble or was the
2 primary purpose and the prohibition against operating for the
3 providing profit to any of the unit members? Did that remain
4 the same?

5 A. The language appears to be the same.

6 Q. And similarly Exhibit Number 8, which is recorded
7 bylaws from I believe 2001, if you could look at the preamble
8 on those bylaws and did anything change as to the purpose or
9 the prohibition against providing profit to its owners?

10 A. Let me get back to that page. No.

11 THE COURT: It's Bate Stamped 94.

12 THE WITNESS: Thank you, Your Honor. It appears
13 to be the same language.

14 Q. (BY MS. KERN:) And similarly Exhibit Number 9,
15 which is a recorded set of bylaws from 2005, and as the Court
16 aptly pointed out there's a bate stamp at the bottom of
17 plaintiffs' 128. Can you tell me whether or not the preamble
18 has remained the same.

19 A. It appears so.

20 Q. You mentioned earlier that there had been a
21 change in the name of the entity the country club. Can you
22 take me through your understanding of what those changes
23 were.

24 A. Yes. I spent about two days going through all of

1 the bylaws and changes and I graphed it out and it appears on
2 Elks Club Inc. went from or excuse me, 1929 and the name
3 continued until there was an amendment on November 8th, 2004,
4 recorded that changed the name to Elks Club Country Club
5 Homeowners Association. So the name was changed and recorded
6 but the -- that's just the name was changed.

7 Q. Okay. The purpose or the identification of the
8 prohibition with respect to profit, that did not change in
9 your review of the bylaws?

10 THE COURT: One minute. Don't answer.

11 MR. JONES: Objection, Your Honor. Assumes facts
12 not in evidence to the extent there's a prohibition. I don't
13 think there's been a discussion of any prohibition or is
14 there a reading of any of the bylaws that contain a
15 prohibition.

16 THE COURT: Sustained.

17 Q. (BY MS. KERN:) Can you tell me what is your
18 understanding of the phrase it shall not operate its
19 properties or facilities with the view of providing profit to
20 its unit owners but rather such properties and facilities
21 shall be held operated and made available for the use and
22 enjoyment of its unit owners. And if you could identify
23 whether or not as a homeowner and a member of the country
24 club you understood that to be a prohibition?

1 THE COURT: Well, one moment. That's a compound
2 question. But you have something to say.

3 MR. JONES: Objection, Your Honor. Calls for a
4 legal conclusion. Potentially also calls for an expert
5 opinion.

6 THE COURT: Overruled. This witness is
7 apparently a member of this association and so you're
8 overruled.

9 Now, you asked a compound question. I'm going to
10 ask you to ask a question at a time so that I understand
11 exactly which question this witness is answering. Thank you,
12 ma'am.

13 MS. KERN: Okay. Thank you, Your Honor.

14 Q. As a member of the country club did you
15 understand that because the preamble says that it shall not
16 operate any of the facilities with a view of providing profit
17 to the unit owners that that constituted a prohibition for
18 the unit owners to make profit off of the facilities?

19 A. Yes. That's what we understood when we bought.

20 MS. KERN: Okay. May I please have Exhibit
21 Number 10.

22 THE COURT: Just to be clear, Mr. Jones, she
23 testified that was her understanding. It may not be a
24 correct understanding.

1 MR. JONES: Understood, Your Honor.

2 Q. (BY MS. KERN:) Can you please describe and
3 explain what Exhibit Number 10 is?

4 A. Exhibit 10 is a photograph I took of the front
5 sign next to the gate at the social club.

6 Q. Do you recall when you took it?

7 A. It was definitely in the winter because there's
8 snow. I don't remember if it was this past winter or the
9 winter before.

10 MS. KERN: Okay. I would move for the admission
11 of Exhibit Number 10.

12 MR. JONES: No objection.

13 THE COURT: Ten is admitted.

14 MS. KERN: May I please have Exhibit Number 11.
15 Thank you.

16 Q. Handing the witness Exhibit Number 11,
17 Ms. Gilbert, can you explain or describe what this document
18 is.

19 A. This is a copy of the recorded plat off the
20 Douglas County Assessor's page that I printed.

21 Q. And what does it depict?

22 A. It depicts the lots and the common areas of the
23 social club.

24 MS. KERN: I would move for its admission.

1 MR. JONES: No objection.

2 THE COURT: 11 is admitted.

3 Q. (BY MS. KERN:) In particular can you please
4 explain or describe what we are looking at in more
5 particularity with respect to you said the common areas. Can
6 you identify which parcels those are and --

7 A. Yes.

8 Q. And then identify what is on them.

9 MR. JONES: Objection. Calls for an expert
10 opinion and a legal conclusion.

11 THE COURT: Well --

12 MS. KERN: I'm asking her --

13 THE COURT: No, ma'am. I don't think so.

14 Overruled.

15 MR. JONES: All right. Thank you.

16 THE WITNESS: If you're looking at Exhibit 11
17 you'll see in the center a 001 and a 13.08 acre or AC and
18 it's Lot Number 801. That's the -- the beach and the marina
19 area. What is not depicted is we have the marina out in the
20 water in a big bulkhead which it is the base of Lot 001 and
21 002. We also have the common area which is to the top right
22 which is Lot 053 and that is the caretaker's lot. It has a
23 house on it, a garage and working buildings, and Lot 45 next
24 to it is our lot.

1 And then also at -- if you look to the middle of
2 the page there is a common area identified as 052 and Lot
3 Number 110 or 110 part of the parcel, and that shows the
4 common areas through -- disbursed through the unit owners
5 lots.

6 Q. When you say unit owners are those the members of
7 the country club?

8 A. The members, yes.

9 Q. Okay. And who has access to the beach and
10 marina?

11 A. The members have access and their guests.

12 Q. Okay. And that would be consistent with the sign
13 that you, in Exhibit Number 10 where it identifies that it's
14 private members and guests only?

15 A. That's what we understood what we purchased.

16 Q. You mentioned a caretaker. Can you explain who
17 pays the caretaker?

18 A. It's part of our assessment that we have a full
19 time caretaker, Tom Marks, who lives there. He plows all of
20 the roads in the winter. He maintains the common areas, the
21 beach areas. He scrapes the beach or rakes the beach for
22 debris to remove it. So he works -- he participates in the
23 marina caretaking of that, the vegetation. I mean, he's the
24 pump house, the water tank, the roads.

1 Q. Has it been --

2 A. The gate.

3 Q. I'm sorry. I didn't mean to interrupt.

4 A. I was trying to remember all of the things. He
5 does a lot.

6 Q. How long has he been the caretaker for the
7 country club?

8 A. He's new. He's approximately two years. We had
9 David before but there's been a caretaker as long as we've
10 been there.

11 Q. And he actually lives onsite?

12 A. Correct. And it's part of the original social
13 club bylaws that there be a caretaker.

14 Q. Can you identify on Exhibit Number 11 which
15 membership property he occupies?

16 A. Sure.

17 Q. If you know?

18 A. I do. If you look at Exhibit 11, again, if you
19 look at ADJ 123 common area and it's identified as 053, that
20 is the caretaker's compound. Again, it has a house, garages,
21 work buildings and equipment.

22 Q. And is he there year-round or just during certain
23 periods of time?

24 A. He's there year-round. He has a two-week

1 vacation.

2 Q. Oh, okay.

3 A. Annually.

4 Q. We have used the term transient commercial use.
5 What is your understanding of transient commercial use?

6 A. It's essentially renting out property for less
7 than 28 days for a commercial purposes for income and profit.

8 Q. Has -- since 2014 has there become an issue with
9 transient commercial use?

10 A. Yes.

11 Q. And what are those issues?

12 A. There is -- there has been an outburst, a growth,
13 an expeditious growth of rentals, of VRBO's, Airbnb
14 advertising that we have a significant influx, increase in
15 people coming into the community that are unknowns, that are
16 -- the beach is packed with people we don't know. You
17 could -- we just don't even in the summertime go down and use
18 it because people are violating rules. We don't know them.
19 There are strangers and it's packed. So that has changed and
20 there's been a growth of members who do not rent complaining
21 and asking that this be addressed.

22 Q. And --

23 THE COURT: For the record VRBO is a vacation
24 rental by owner.

1 THE WITNESS: Yes, Your Honor.

2 THE COURT: Thank you. Go ahead.

3 Q. (BY MS. KERN:) And has this been fairly recent
4 or has this been going on the entire time you've been there?
5 Can you describe in a time frame --

6 A. Uh-huh.

7 Q. -- the issue with respect to transient commercial
8 use.

9 A. It became a growing problem in two -- beginning
10 of 2017. There's a historic house, Your Honor, across the
11 street from us that's a rock house that was built in 1927,
12 and the people that restored it sold it and the new owner
13 turned it into a rental and then so that was in '17, and we
14 were getting garbage, people parking in the roads.

15 But it became more so when another neighbor
16 across the street directly across from us in '18 applied for
17 a permit to rent and then those two became -- it became in
18 our face kind of how -- how problematic it was for us with
19 parking issues, with loud noise, parties, trash, people
20 stealing or taking our wood from our woodpiles. I mean, we
21 could go on, but so I think in '18 you can see in the
22 complaints by members to the board to address this issue I
23 think became more pervasive.

24 THE COURT: When you spoke of applied for a

1 permit, let's be clear, did not apply for a permit from the
2 association but from the county.

3 THE WITNESS: Your Honor, that's a good question.
4 What happens is a member writes to the board saying I'm
5 applying to Douglas County and they ask for a letter from
6 the -- from the board to -- that they -- they include I guess
7 with their packet that the board is essentially approving.
8 So I don't know how -- I know there's a permit through
9 Douglas County, but I don't know all of the details, but it
10 seems from what I've seen in the records that the homeowner
11 asked the board for a letter and that's all I know on that
12 issue.

13 THE COURT: Does the board profit from that
14 approval or denial? Is there a fee to the board?

15 THE WITNESS: That I don't know. I don't -- I
16 haven't served on the board to know if there is a fee.

17 THE COURT: Thank you.

18 Go ahead, ma'am.

19 Q. (BY MS. KERN:) In connection with the commercial
20 use are you aware of any advertisements by any of its members
21 with respect to the commercial rentals?

22 A. Yes.

23 MS. KERN: Okay. If I could have Exhibit Number
24 12. I handed the witness Exhibit Number 12.

1 Q. Can you explain what Exhibit Number 12 is.

2 A. Exhibit 12 is some vacation rental advertisements
3 on the internet. They are a snapshot of the day that we --
4 that I essentially printed these, meaning the rates change
5 and fluctuate but this -- this is on August 5th, 2020.

6 Q. Were you the one that went on to the internet and
7 pulled the advertisements that are included in Exhibit Number
8 12?

9 A. These appear to be my copies, yes.

10 MS. KERN: I would move for the admission of
11 Exhibit Number 12.

12 MR. JONES: Object to the extent there's a large
13 number of different advertisements in here. Is there a
14 motion to have all of these exhibited or admitted as a single
15 exhibit?

16 THE COURT: They are all one exhibit.

17 MR. JONES: Okay.

18 THE COURT: That's how they have been marked.

19 MR. JONES: I'm going to object. I don't think a
20 foundation has been laid for the entire exhibit.

21 THE COURT: Well, I think the witness said that
22 she did -- she pulled all of these from the internet.

23 MR. JONES: Uh-huh.

24 THE COURT: Now, do they all relate to rentals at

1 Elk Point?

2 THE WITNESS: Yes, Your Honor.

3 THE COURT: And you personally pulled all of
4 these off of the internet?

5 THE WITNESS: Yes, Your Honor.

6 THE COURT: The objection is overruled.

7 Q. (BY MS. KERN:) Can you identify or explain how
8 or what, and if you want to look at specific ones and
9 identify them, they are bate stamped in the lower right-hand
10 corner with respect to whether or not they identify the
11 members' recreational facilities in their advertisements. Do
12 you recall seeing that in any of them?

13 A. Yes. If you look at the headlines of every --
14 well, not every. I'll go through them but most of them.
15 They refer to in their headlines as that the pull or the draw
16 as being a private gated beach. This one, Elk Point, beach,
17 gated, gym.

18 THE COURT: Which one?

19 THE WITNESS: Oh, this would be Exhibit 11,
20 plaintiffs' 380.

21 MS. KERN: Actually, it's Exhibit 12 for the
22 record.

23 THE WITNESS: Yeah.

24 THE COURT: Exhibit 12, okay.

1 THE WITNESS: I apologize. I thought you're --
2 right. It's 12, Your Honor. I stand corrected. If you look
3 at Exhibit 12, plaintiffs' 390, charming Tahoe cabin with
4 lake view and private beach, meaning the headline or draw is
5 plaintiffs' 366, fabulous Lake Tahoe home with private beach
6 and gated community.

7 THE COURT: There's no need to go through each
8 one of these.

9 THE WITNESS: Yeah, I was going to say.

10 THE COURT: Let's move on.

11 THE WITNESS: Yeah. The focus of the
12 advertisements in terms of the draw --

13 THE COURT: There's no question pending, ma'am.

14 THE WITNESS: Okay.

15 THE COURT: Ask your next question.

16 Q. (BY MS. KERN:) When you were doing a search did
17 you have a specific search term that you used?

18 A. I think we put in Elk Point Country Club.

19 Q. And then when they came up and they identified
20 the private beach other than the beach that you described
21 that is the one that is owned by the Elk Point Country Club
22 Inc., is there any other private beach they could be talking
23 about?

24 A. I don't know. There's only one private beach in

1 the social club that is open to the public or open to us as
2 social members. I think I wanted to clarify that. Some of
3 the unit owners who are on the lakeside do have private coves
4 but those are not open to the members. They are owned by the
5 unit owners. So there are other beach areas but those are
6 exclusively owned by the owners on the lakeside.

7 Q. Okay. So if we were looking at Exhibit Number
8 11, am I correct that those would be those, it looks like
9 there's six properties that actually go to the water. Are
10 those the ones you're talking about?

11 A. There's actually a few more around the corner on
12 the top where the gray area is around the corner they
13 continue on.

14 Q. Oh, okay. But those are the ones that you're
15 talking about?

16 A. Okay. Those are the private beaches owned by
17 individual unit owners that have lake homes and that is not
18 available to all of the social members. The 13-acre beach
19 is -- is the community owned social club beach.

20 Q. Okay. And this might be an unfair question
21 because you might not have looked at this, did you look at
22 any of these advertisements as to whether or not they
23 involved those homes that have their own beach or did you
24 understand them to be the members' homes that would have

1 utilized the 13-acre country club beach?

2 A. I'm looking. There might be one home that also
3 had a, I'm trying to see if the Potts' house is in here. I'm
4 double checking. It appears that the advertisements in
5 Exhibit 12 do not adjoin the lake. So they would be
6 referring to the community beach.

7 Q. Do you have any knowledge whether or not the
8 commercial renters have any prohibitions from utilizing the
9 members' beach? Are you aware of any?

10 A. No. I think that's the problem, one of the
11 problems.

12 Q. As a member of the club do you have any opinion
13 as to whether stopping the generation of income in part from
14 the club properties would have any negative impact on the
15 club?

16 MR. JONES: Objection. Calls for an expert
17 opinion.

18 THE COURT: Overruled.

19 THE WITNESS: It would make the club better.

20 Q. (BY MS. KERN:) Would you perceive any problem in
21 taking away the jeopardy of losing the tax exempt status?
22 Would that be a problem as a member? Would you be concerned
23 that the tax exempt status would be preserved?

24 A. Okay. So could you restate that. I have a hard

1 time following that.

2 Q. I apologize. That's my problem.

3 As a member of the club do you have any concern
4 with respect to the potential loss of the social club tax
5 exempt status?

6 A. Yes.

7 Q. Can you explain what that concern is.

8 A. Yes. From my review of records of the
9 association and documents we are a social club. And the tax
10 returns, the 990's are filed as a social club. If the
11 property owned -- the common area property is owned by the
12 social club, if we lose that status I am concerned about the
13 IRS coming in and taking away that status and, therefore,
14 losing the tax exempt status and potentially exposing my --
15 myself or us to penalties, back interest because club
16 property is being used for a profit.

17 MS. KERN: Thank you. That's all, Your Honor.

18 THE COURT: All right. Mr. Jones, rather than
19 interrupt you doing your cross-examination I'm going to give
20 the clerk and the court reporter their morning break now, and
21 we'll take a 15-minute break.

22 Folks, I know that we started at 9:00 o'clock but
23 they have been, particularly my clerk has been working since
24 8:00 and she's entitled to a break, and we're going to honor

1 that. So we're going to take 15 minutes. We'll be back at
2 25 minutes after the hour. I would like you in your seats
3 and ready to go at that time. Thank you very much. Court is
4 in recess.

5 (Whereupon, a brief recess was taken.)

6 THE COURT: We are back in session in 20CV124.
7 Counsel?

8 MS. KERN: Your Honor, I asked Mr. Jones if I
9 could just do one little cleanup. I know that you overruled
10 the objection with respect to Exhibit 12 but I'm not sure
11 that it was formally admitted and I just want to request that
12 it be admitted as an exhibit.

13 THE COURT: Okay. Mr. Jones, you're standing.

14 MR. JONES: Your Honor, you already overruled my
15 objection. I will stipulate to its admission.

16 THE COURT: 12 is admitted. Thank you both very.
17 We'll move along.

18 MR. JONES: Thank you, Your Honor.

19 CROSS-EXAMINATION

20 BY MR. JONES:

21 Q. Ms. Gilbert, as you know, my name is Prescott
22 Jones. I represent the Elk Point Country Club. You and I
23 have met several times before. I must say it's a pleasure to
24 see you in person as opposed to over Zoom for the first time

1 in quite a while.

2 I just have a few questions I want to ask you
3 about your testimony today. I want to start with what's been
4 previously marked as Exhibit 9. Do you have a copy of that
5 in front of you?

6 A. I do.

7 Q. Okay. And it's my recollection that you read in
8 the preamble section what's been -- what's been labeled as
9 Plaintiffs' 12, you read a portion of the preamble in the
10 record. Do you recall that?

11 A. I read -- I was asked to read I believe a
12 sentence in that, yes.

13 Q. Okay. The third sentence of the paragraph
14 entitled Preamble reads it shall not operate its properties
15 or facilities with the view of providing profit to its unit
16 owners. Do you see where I'm referring to?

17 A. Yes.

18 Q. Do you believe that constitutes a prohibition on
19 unit owners earning a profit from their property?

20 A. Yes.

21 Q. How so?

22 A. Making a profit on the property of within the
23 association -- the association, the social club, yes. What
24 was your next question, sir?

1 THE COURT: Well, he only asked one not the next
2 question.

3 THE WITNESS: Okay. I apologize.

4 Q. (BY MR. JONES:) So could you identify which part
5 of the sentence constitutes a prohibition in your mind on
6 unit owners earning a profit from their property.

7 A. It shall not operate its properties or facilities
8 with the view of providing profit to its unit owners but
9 rather such property shall be held and operated and made
10 available for the use and enjoyment of the unit owners upon
11 the payment of such assessments and charges as will fairly
12 meet its cost of operation and provide a reasonable
13 accumulation of funds for repairs, replacements and
14 additions.

15 Q. Can you identify which portion of that sentence
16 constitutes a prohibition?

17 A. The whole sentence does.

18 Q. How so?

19 A. It prohibits unit owners from, shall not operate
20 its property facilities with a view providing profit to its
21 unit owners. It's prohibiting unit owners from profiting
22 from using the social club for profit.

23 Q. So I think I can get to the point of our
24 contention here. Do you believe the language it shall not

1 operate its properties or facilities with the view of
2 providing profit, you believe that's a constitute of
3 prohibition?

4 A. Yes. That's how I read it when we got the
5 original documents when we bought as well.

6 Q. There's been a lot of talk today about short-term
7 vacation rentals. Do you believe that long-term rentals are
8 allowed at the Elk Point Country Club? By long-term I mean
9 over 28 days.

10 A. NRS 116 provides that people can rent their units
11 for annually. So but I'm not -- I mean are you asking for a
12 legal opinion?

13 Q. I'll restate the question again. Do you believe
14 that there's more long-term rentals ongoing at the Elk Point
15 Country Club and by long-term I mean longer than 28 days?

16 A. Do I believe there are?

17 Q. Correct.

18 A. I would be guessing.

19 Q. So is it fair to say you're not aware of any unit
20 owner renting out their property for anything other than a
21 short-term vacation rental?

22 A. I'm aware that the board president has one of his
23 homes -- there's a person there that's been there whenever we
24 are up there because he has two homes that he owns there, and

1 one of them is -- there's a person there. I don't know if
2 it's a family member. I don't know who it is but somebody
3 lives there long-term there. I don't know if it's a tenant.
4 I don't know if it's a family member. So I would be
5 guessing.

6 Q. When did you move into your home at the Elk Point
7 Country Club?

8 A. We purchased in August of 2014.

9 Q. And did you occupy that residence at any time as
10 your primary residence?

11 A. No.

12 Q. It's been a second home, correct?

13 A. We live in Reno, so it's a second home.

14 Q. Okay. Do you rent out your property at all any
15 time that you don't occupy your residence?

16 A. Never.

17 Q. Okay. So in your time on, involved with the
18 board, involved with any of the executive functions of the
19 board that you discussed before did you ever discuss
20 long-term rentals beyond 28 days at the Elk Point Country
21 Club?

22 A. No. I was part of the committees that we worked
23 on specific issues like security or the architectural
24 guidelines. So that was a -- I was given directives because

1 I was the chair of those committees, and so I was given
2 directives through and --

3 THE COURT: So the answer is no. Thank you.

4 THE WITNESS: No.

5 MR. JONES: Thank you, Your Honor.

6 THE WITNESS: I apologize.

7 Q. (BY MR. JONES:) Sure. No problem. And do you
8 believe if a homeowner was to rent out their home for a term
9 of one year that they would make any profit off of that
10 rental?

11 A. I don't know what arrangements so I --

12 THE COURT: That would be speculation.

13 THE WITNESS: Yeah.

14 THE COURT: You provided no details and I'm not
15 going to allow that answer. You can provide a more detailed
16 question if you want, but she can't answer that.

17 MR. JONES: I think I can get to the point
18 quickly, Your Honor.

19 Q. Do you believe that a homeowner renting out their
20 property for a term longer than 28 days would be in violation
21 of the provisions that we've talked about in the bylaws that
22 you believe prohibit the unit owners from making a profit?

23 A. From -- you're asking me about the social club,
24 yes.

1 Q. Okay. So it's your testimony then that would
2 violate the preamble of the bylaws that we've discussed so
3 far?

4 A. Well, the bylaws that you're looking at say
5 homeowners association. The ones I'm talking about are the
6 social club ones so the social club ones, yes.

7 Q. Okay. And how so?

8 A. Because the preamble says that unit owners shall
9 not profit from use of any -- the properties in the social
10 club.

11 Q. The unit owner were to sell their property and
12 receive more in payment when they sold their property than
13 what they paid for, in other words the property appreciated
14 in value would that homeowner make a profit from the sale of
15 their home?

16 MS. KERN: I'm going to object. He's changing it
17 from operating to the purchase and sale of homes. I think
18 it's an ambiguous question. I would object.

19 THE COURT: Well, you're overruled. Go ahead.

20 THE WITNESS: Could you restate the question or
21 re-ask it again. I got a little bit -- go ahead.

22 Q. (BY MR. JONES:) Not a problem. If a homeowner
23 were to sell their property and receive more in sale price
24 than what they paid for, in other words there was an

1 appreciation of the value of the property, wouldn't that
2 selling homeowner then make a profit off of their property?

3 A. I don't know. There could be a lot of
4 contingencies. It could be underwater, and so that they
5 wouldn't make a profit. I don't know. I don't -- that's a
6 hypothetical that has a number of contingencies. So, and I
7 don't know. Are you talking about Elk Point? Are you
8 talking about generally? What are you talking about?

9 Q. I'm talking about Elk Point, and I'm assuming
10 that they received more money than they paid for it. So in
11 other words they got cash out of closing. Wouldn't that be a
12 profit?

13 A. It could be.

14 Q. And if it was would that violate then the
15 preamble to the bylaws and the social club rules that we
16 discussed before?

17 A. No. It's like selling your membership. If the
18 membership -- no. I don't know. I think that, no, that it
19 wouldn't be.

20 Q. Aren't they making a profit though off the
21 ownership of their home?

22 A. They are making a profit because they are selling
23 their property.

24 Q. Uh-huh. Isn't one of the points of a homeowners

1 association in Nevada to maintain the values of the homes
2 within that homeowners association?

3 MS. KERN: Object. Asking her generally or as an
4 attorney?

5 THE COURT: What is the legal objection?

6 MS. KERN: It's calling for a legal opinion the
7 way the question is asked.

8 THE COURT: So it calls for a legal conclusion is
9 your objection?

10 MS. KERN: Correct.

11 THE COURT: Overruled.

12 THE WITNESS: Could you ask the question again.

13 Q. (BY MR. JONES:) Is the court reporter able to
14 repeat the question.

15 (Whereupon, the record was read.)

16 THE WITNESS: Generally in homeowners association
17 you have governing documents to maintain the values in the
18 homeowners association by maintaining certain parameters,
19 like rules and architectural guidelines.

20 Q. (BY MR. JONES:) Wouldn't that, therefore --

21 THE COURT: So the answer was yes?

22 THE WITNESS: Yes, generally.

23 THE COURT: All right. That's the answer, yes.

24 MR. JONES: Thank you, Your Honor.

1 Q. Why don't we move on, Ms. Gilbert. I think I can
2 maybe cut through a lot of the foundation questions. Is it
3 your understanding the bylaws of the homeowners association
4 contemplate guests coming onto the property?

5 A. Are you talking about the bylaws of the social
6 club or the bylaws that are stated as a homeowners
7 association. Could you clarify.

8 Q. I'm referring generally to Exhibits 1 through 9
9 that we spoke about this morning.

10 A. Okay.

11 THE COURT: Why don't you ask her about one in
12 particular, sir.

13 MR. JONES: Sure.

14 THE COURT: Because otherwise it is a compound
15 question.

16 Q. (BY MR. JONES:) Why don't we turn to Exhibit 4,
17 and can you tell me when you have that exhibit in front of
18 you, Ms. Gilbert.

19 A. I'm there.

20 Q. I'm looking at page nine, what's also marked as
21 plaintiffs' 0038. Can you tell me when you're at that page.

22 A. Exhibit 4 only goes up to 27.

23 Q. I apologize. Exhibit 5. Sorry.

24 A. So 35?

1 Q. 38.

2 A. Okay. I'm there.

3 Q. On top of the page do you see paragraph G?

4 A. I do.

5 Q. Do you see any reference to guests or tenants in
6 this paragraph?

7 A. I do.

8 Q. So is it fair to say the rules or the bylaws
9 contemplate the existence of guests or tenants at the Elk
10 Point Country Club, correct?

11 A. These particular ones, yes.

12 Q. Okay. Return to Exhibit 10 next.

13 MS. KERN: I'm sorry. What exhibit did you say?

14 MR. JONES: Ten.

15 THE COURT: Ten, it's the photograph, ma'am.

16 THE WITNESS: I'm there.

17 Q. (BY MR. JONES:) Okay. Can you read the sign in
18 its entirety for the record, please.

19 A. Sure. "Elk Point Country Club private members
20 and guests only."

21 Q. Do you have an understanding as to what guests
22 refers to?

23 A. Are you asking me how I read it?

24 Q. Yes. As a homeowners what's your understanding

1 as to guests?

2 A. If I invite my friends they are my guests. If I
3 invite family members they are my guests.

4 Q. So earlier on today during your testimony you
5 referred to an influx of VRBO's of short-term vacation
6 renters. Do you recall that testimony?

7 A. Uh-huh. Yes.

8 Q. Were you ever -- did you ever quantify the influx
9 or increase in VRBO's?

10 A. Did I quantify them?

11 Q. Correct.

12 A. We watched the rental calendars and the calendars
13 from 2018 forward that we got -- we received access so we can
14 see a significant influx, and we look also on the internet.
15 We look at --

16 THE COURT: So the question is did you quantify
17 them, now how you did.

18 THE WITNESS: Okay. Yes.

19 Q. (BY MR. JONES:) Do you have any written
20 tabulation or computation of anything that shows an increase
21 in VRBO's?

22 A. We did not keep a tabulation.

23 Q. Okay. Earlier you testified that, and correct me
24 if I'm wrong, that you believe there was an increase in

1 people we don't know at the Elk Point Country Club. Does
2 that sound about correct?

3 A. Uh-huh.

4 Q. Okay.

5 THE COURT: The answer is yes.

6 THE WITNESS: Yes.

7 MR. JONES: Thank you.

8 THE COURT: Thank you, ma'am. It's hard. I
9 know.

10 THE WITNESS: I apologize.

11 THE COURT: It's okay.

12 Q. (BY MR. JONES:) Tell me more about what you
13 observed with the increase in people you don't know. In
14 other words, I want to hear a little bit more about that.

15 A. Okay. We would try to -- we would go to the
16 beach and the beach would be, instead when we first bought it
17 was in the summertime at least usable and it was open and we
18 could enjoy it. Now, there are tents literally and umbrellas
19 literally almost up to the waterline through all the way back
20 to the volleyball courts to the point where we turn around
21 and just we go -- if we try to go in we don't know people.

22 They have got -- it's large groups of people we
23 don't know. There -- we have glass bottles on the beach
24 which as we know they wouldn't be a member because that's

1 not -- that's prohibited. They are violating our rules on
2 the beach, dogs, various other issues. So it's uncomfortable
3 because when we try and use our beach it's difficult to even
4 get to the water when we've been down there so we leave. We
5 don't use the beach very often in the summertime. Maybe if a
6 family member comes to visit we take them to the beach, but
7 we will often times because it's so overcrowded we leave.

8 THE COURT: So, Ms. Gilbert, I'm going to ask you
9 to do me a favor here, please. I'm going to ask you to
10 listen to the question. Give the answer to the question and
11 not give us a speech.

12 THE WITNESS: Uh-huh.

13 THE COURT: Okay. You were asked specifically
14 that time to quantify, and so I understand that there's more
15 information you want me to have, but please just answer the
16 question and that way we can move along.

17 THE WITNESS: I thought he was asking for an
18 example. Okay. I apologize, Your Honor.

19 In terms of quantifying, the beach is difficult
20 to get to because of the number of people that are there.

21 THE COURT: Thank you.

22 Q. (BY MR. JONES:) Do you have any way of knowing
23 that these people at the beach that you're describing if they
24 are guests of homeowners?

1 A. Yes.

2 Q. Are you able to rule that out that they were
3 guests of homeowners?

4 A. I'm not able to rule it out but if -- I'm not
5 able to rule it out.

6 Q. So for example, if a homeowner were to be out of
7 town for a week on vacation, they let their nephew and their
8 family stay at the home for the weekend and they were at the
9 beach you would have no way to rule out whether this was a
10 situation involving people on the beach, would you?

11 A. No.

12 Q. Would you have any way to rule out if the people
13 on the beach that you described in your response before are
14 long-term tenants of any of the homeowners at the Elk Point
15 Country Club?

16 A. Other than I would recognize them.

17 Q. But it's possible that you wouldn't recognize
18 them, correct?

19 A. If I recognize them from seeing them because they
20 have been there for at the Point I would see -- I would know
21 what they look like.

22 Q. But it's possible that you wouldn't be able to
23 recognize them, correct?

24 A. Absolutely it would be possible.

1 Q. Can you tell me definitively that the problems
2 that you described before at the beach with increased numbers
3 of people are caused by short-term vacation renters?

4 A. From my observations from the calendars, rental
5 calendars, yes, the increase.

6 Q. But didn't you say before it could have been
7 guests of homeowners that were down at the beach causing the
8 problems you complained of?

9 A. You're asking me I believe from my opinion, and
10 if I misunderstood, no?

11 Q. No.

12 A. You're not asking for my opinion, okay. Could
13 you restate the question or re-ask the question.

14 Q. Sure. Why don't we step back a little bit. Can
15 you tell me definitively that the increase in people that
16 you're complaining of at the beach, the private beach are
17 caused by vacation rental -- short-term vacation renters. I
18 apologize.

19 A. In terms if you're excluding my observation I
20 can't say definitively but if you're asking me for my
21 observations I would say yes.

22 Q. I'm not asking for your observations. I'm asking
23 if you can definitively tell me the increase in people at the
24 beach that you described before are exclusively from

1 short-term vacation renters?

2 A. Well, if you use the word exclusively no.

3 Q. Thank you. Earlier you testified about loud
4 noises and people stealing your wood. Does that sound
5 familiar? Am I correctly stating your testimony?

6 A. Removal of our wood.

7 Q. Talk about that removal of your wood. Do you
8 know that the removal of the wood was caused by short-term
9 vacation renter?

10 A. It would have been somebody from the two rental
11 houses. I don't know if they -- if they -- if -- if it would
12 have been anyone else. Mr. Hanker has his own wood. He has
13 a huge mount. So it would be one of those two houses.

14 Q. Are you able to definitively testify today that
15 the person who stole your wood was a short-term vacation
16 renter?

17 A. No. There was somebody -- there was people there
18 that were there for a weekend when it was missing. I didn't
19 interview them to see if they were a short-term or a
20 transient commercial use owner or unit owner or renter.

21 Q. It could have been a guest?

22 THE COURT: Ma'am, did you see someone steal your
23 wood?

24 THE WITNESS: No. What --

1 THE COURT: Thank you.

2 THE WITNESS: Okay.

3 Q. (BY MR. JONES:) Thank you. I want to turn to
4 Exhibit 12. It was your testimony before that Exhibit 12 is
5 a series of advertisements for short-term vacation rentals,
6 correct?

7 A. Yes.

8 Q. Who put these advertisements on the internet to
9 your knowledge?

10 THE COURT: And if you don't know you can just
11 say that.

12 THE WITNESS: I don't know.

13 Q. (BY MR. JONES:) Do you believe it to be
14 homeowners?

15 MS. KERN: Objection. Speculation.

16 THE COURT: Sustained.

17 Q. (BY MR. JONES:) Do you have any reason to
18 believe that the HOA itself put any of these advertisements
19 that are included in Exhibit 12?

20 A. Again, I would be guessing.

21 Q. Does the HOA itself own any homes at the Elk
22 Point Country Club?

23 A. Yes.

24 Q. Which ones?

1 A. The caretaker's.

2 Q. Do you believe the caretaker's home to be
3 included in any of the homes listed in Exhibit 12?

4 A. It's not in this packet.

5 Q. Do you believe the caretaker's home was rented
6 out as a short-term vacation rental?

7 A. No. It's not -- I think you're asking me about
8 Exhibit 12. It's not in Exhibit 12.

9 Q. Do you have any reason to believe the caretaker's
10 home was listed as a short-term vacation rental at any point
11 in time?

12 A. I didn't find it on any kind of advertisement.

13 Q. Do you have any reason to believe that the HOA
14 itself listed any homes for --

15 THE COURT: So wait a minute. Wait a minute.
16 That answer was nonresponsive. Do you have any reason to
17 believe that the caretaker's home was listed as a short-term
18 rental. That's a yes or no question, not whether it's in
19 this packet. It's a yes or no question, ma'am.

20 THE WITNESS: I don't believe it's been listed
21 as --

22 THE COURT: So you have no reason to believe
23 that?

24 THE WITNESS: I have no reason to believe it.

1 THE COURT: That was the question. Thank you.
2 Now you have an answer. Now ask your next
3 question.

4 Q. (BY MR. JONES:) Thank you, Ms. Gilbert. Do you
5 have any reason to believe that the HOA has ever listed any
6 homes for rent as a short-term vacation rental?

7 A. I haven't seen any so no.

8 Q. Thank you. Do you have any reason to believe
9 that any of the rent obtained from short-term vacation
10 rentals has gone to the HOA?

11 A. I don't have any knowledge of that.

12 Q. Okay. Of course the rent would go to the
13 homeowner him or herself, correct?

14 A. I would -- I'm not involved in the board in terms
15 of what they do so I don't know.

16 Q. What's your understanding of the short-term
17 vacation rentals at the HOA that you've been testifying about
18 so far today? That money would go to the homeowner, correct?

19 MS. KERN: Objection. She's asked and answered
20 it. She doesn't know.

21 MR. JONES: I don't think we have an answer, Your
22 Honor.

23 THE COURT: She hasn't answered that one. So
24 that particular objection is overruled.

1 THE WITNESS: I would assume it goes to the money
2 from the transient commercial use would go to the unit owner.

3 Q. (BY MR. JONES:) Okay. Thank you, Ms. Gilbert.
4 I have no further questions.

5 THE COURT: Ms. Kern, do you have some other
6 questions you would like to ask, ma'am?

7 MS. KERN: No further questions, Your Honor.

8 THE COURT: Ms. Gilbert, you may step down.
9 Thank you very much. Would you hand me those exhibits,
10 please.

11 THE WITNESS: Yes.

12 THE COURT: Thank you, ma'am.

13 THE WITNESS: Uh-huh.

14 (Witness excused.)

15 THE COURT: Your next witness, ma'am?

16 MS. KERN: Kurt Brown.

17 THE COURT: Mr. Brown, come on up, sir. If you
18 would pause about right there, sir. Face the clerk and raise
19 your right hand. Thank you.

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KURT BROWN,

called as a witness on behalf of the
Plaintiff having been first duly sworn,
was examined and testified as follows:

THE COURT: Come on up.

DIRECT EXAMINATION

BY MS. KERN:

Q. Good morning, Mr. Brown. Could you please state
your name for the court reporter.

A. Kurt Brown.

THE COURT: Is that Kurt with a K or a C?

THE WITNESS: K-u-r-t.

THE COURT: Thank you very much, sir.

Q. (BY MS. KERN:) Mr. Brown, how long have you
lived in Nevada?

A. Almost 67 years.

Q. And where do you currently reside as your primary
residence?

A. Carson City, Nevada.

Q. Do you also own any property and a membership
with the Elk Point Country Club?

A. I do with my son and my daughter.

Q. Can you explain how that property came to be in

1 your family.

2 A. We bought into the Elk Point Country Club in 1979
3 I believe. There was a house on the property that we bought
4 from a Reno couple who were the original owners and had been
5 members of Elk Point since 1929.

6 Q. Okay.

7 A. And we tore that property down and rebuilt a
8 modern house that was used by our family, our grand kids, my
9 father, my mother, my son and my daughter, my cousins.

10 Q. So you and your family still utilize the property
11 at Elk Point?

12 A. Yes, we do, but with this Covis thing we occupy
13 it at separate times.

14 Q. Prior to that you occupied it or would enjoy the
15 area together?

16 A. The total family would be there all of the time.

17 THE COURT: And, sir, when you say Covis do you
18 mean COVID?

19 THE WITNESS: COVID. I'm sorry.

20 THE COURT: That's quite all right. I just want
21 the court reporter to get it right. Thank you.

22 Q. (BY MS. KERN:) Over the years since you have
23 been a member at Elk Point have you had any involvement with
24 the governance of the country club?

1 A. I was a member of the board and president --
2 member of the board from '94 to '98. I was president from
3 '96 to '98. I served on a couple of committees of the
4 security committee recently and the rules committee recently.

5 Q. In connection with your work on the board and
6 your long-term membership are you cognizant of the social
7 club exemption with the IRS?

8 A. Yes, I am.

9 Q. Can you explain some of the historical
10 functioning of the social club from your time with respect to
11 your membership?

12 A. From the time of my membership and historically
13 prior to that?

14 Q. Correct.

15 A. Based upon conversations I've had with members
16 and people who have been there when we bought into this
17 present date, this club was founded by the Reno Elks Club for
18 summer residence for their members to bring their families
19 and their guests there during the summertime.

20 When the club was first founded there was not
21 paved roads. There was no natural gas there. There was not
22 a water source there when it first started and over the years
23 the improvements have been made.

24 Q. At some point was the, for example was the entry

1 gated?

2 A. I was instrumental in getting that gate there
3 through Senator Bryan, who was a personal friend of mine,
4 when I was on the board.

5 Q. And can you explain --

6 THE COURT: And a great Nevadan.

7 MS. KERN: I agree.

8 Q. Can you explain the membership, how it works.
9 What is the -- we called it a membership but can you explain
10 what that membership is.

11 A. From me being familiar with on the board and a
12 member had -- a prospective member has to submit an
13 application to the board to be accepted by the board. They
14 have to read certain documents. They have to note -- they
15 have to certify that they read certain documents and they
16 have to be present at -- at a board meeting when they are
17 accepted and they have to pay a 20,000 dollar membership fee.

18 Q. Okay.

19 A. And that fee gives them the exclusive right to
20 the common areas of the Elk Point Country Club.

21 THE COURT: Is that a one-time fee, sir?

22 THE WITNESS: That's a one-time fee, yes.

23 THE COURT: Thank you, sir.

24 Q. (BY MS. KERN:) Has that fee ever increased or

1 has it been the same since the inception to your knowledge?

2 A. I believe from my recollection when I was on the
3 board the fee was \$10,000 at that point in time and it's
4 increased to the present date 20,000.

5 Q. Okay. And I want to follow-up on a question that
6 Your Honor asked. When -- when you pay that initial
7 membership fee, for example if it was \$10,000 when you were
8 granted membership and then it goes up to 20,000, are you
9 required to pay the additional amount if you have already
10 been a member?

11 A. No. The members -- the present members are not
12 required to pay that additional cost. It's the new members
13 coming in after the adoption of the new fee.

14 Q. Okay. And, again, what do you get for being a
15 member in the country club?

16 A. We get the exclusive right to our roads which are
17 private. We get exclusive rights to the water system which
18 was installed during me being a member of the board and
19 president at that point in time. We get exclusive right of
20 the harbor. We get exclusive rights of the boat storage
21 areas and I said the harbor.

22 Q. Do you consider the membership to be important?

23 MR. JONES: Object to form. Vague. Ambiguous.

24 THE COURT: It is indeed and -- and maybe not

1 relevant if he just personally considers it important in his
2 life, but I think you can refine that question and probably
3 get an answer.

4 Q. (BY MS. KERN:) Can you describe what the
5 membership means to you?

6 A. Oh, boy. From my perspective, and I'm going to
7 speak for my family based upon what they have given me in the
8 past. It's an area that's quiet. It's pristine, and the
9 people there are basically neighbors who we enjoy having
10 conversations with and so on and so forth, functions on the
11 barbecue deck.

12 Q. Have you ever profited from your membership?

13 A. No.

14 Q. Have you ever derived any income from your
15 membership?

16 A. No.

17 Q. You explained the community and the common areas
18 in general terms. Can you be a little bit more specific as
19 to what the -- for example, can you describe the beach and
20 what is on the beach?

21 A. The beach I believe is around 14 acres. It's
22 sandy. It has pine trees on it. It has a barbecue deck with
23 tables, garbage facilities, restroom facilities that are
24 portable, boat storage area, a harbor for boats to be docked.

1 I believe I've covered it.

2 Q. Okay. Would you say that those amenities are
3 designed to encourage fellowship and recreation among the
4 members?

5 MR. JONES: Objection. Leading.

6 THE COURT: Sustained.

7 Q. (BY MS. KERN:) Do you have an understanding of
8 the purpose of having those amenities within the common
9 areas?

10 A. With the common -- with the beach and the
11 barbecue area and the harbor, those are the amenities that we
12 use as a family and we greatly appreciate it.

13 Q. Do you ever use those amenities in connection
14 with your fellow members?

15 A. I meet fellow members down there for functions
16 such as the breakfast and a past president's functions that
17 we had.

18 Q. Are you familiar with any transient commercial
19 use being made of any of the properties by the members within
20 the country club?

21 A. Yes, I am.

22 Q. Can you explain or describe what that knowledge
23 is.

24 A. I know of two that are in my vicinity, okay. One

1 of which I have known has been rented to Aaron Rogers during
2 the golf tournament. One of which I know of because I've
3 interacted with one of the short-term rentals who I had a
4 conversation with about why he comes there and why he rents
5 on short-term.

6 Q. Have you noticed a difference in the number of
7 commercial use being made of the properties in your time
8 there? For example was it happening when you first bought
9 and it's just been consistent or has there been a change?

10 A. When I was on the board in the '90s I was
11 acquainted with almost every individual within Elk Point.
12 That is not true today.

13 Q. And is that because of the commercial use being
14 made of the properties?

15 A. Without knowing the individuals based upon past
16 experiences with them I'm a little shy about having
17 conversations with people I have not seen before and have not
18 talked to before.

19 Q. Are you noticing different people depending on
20 the weekend that you're there or is it the same person that
21 you don't know?

22 A. I notice different people.

23 Q. And has there been an increase in what you are
24 observing in connection with the comings and goings of the

1 people within the community?

2 A. I have noticed increased traffic on the road and
3 increased people within the Point itself.

4 Q. And do you attribute that to the commercial use?

5 A. I personally attribute that to the use but I
6 don't know that as a fact.

7 Q. So how would you describe then the, how the
8 commercial use has affected the community?

9 MR. JONES: Object to form. Vague and ambiguous
10 as to affected.

11 THE COURT: No. The question was how did he
12 observe that use changing. The objection is overruled.

13 THE WITNESS: From my personal point of view and
14 what I have observed is the social aspect of our community is
15 changed based upon the interaction of the people within the
16 Point that are there now and that were there in the past.
17 That's affected the social fabric of that community.

18 Q. Has it affected the fellowship of the club?

19 A. In my opinion, yes.

20 Q. Do you have any concern about the threat that the
21 commercial use may have to the social club?

22 A. From my point of view I have concerns about the
23 Elk Point Country Club losing its social status with the IRS
24 and the ramifications thereof in monetary value that may be

1 assessed against the members.

2 And I also have a concern about the potential
3 fraud that may have been perpetrated through the IRS filings
4 with our social club status through the IRS.

5 MR. JONES: Move to strike as nonresponsive to
6 the question.

7 THE COURT: Overruled. Those are his concerns.
8 They may or may not be legitimate, but they are certainly his
9 concerns, and that was the question about his concerns. So
10 the objection is overruled.

11 Q. (BY MS. KERN:) Did you have any of those
12 concerns prior to say 2018, 2019?

13 A. I never had those concerns until the short-term
14 rentals were getting significantly more and being part of the
15 Elk Point Country Club.

16 Q. In Ms. Gilbert's testimony she referred to
17 something called a rental report or renter report. I don't
18 know if I'm saying that correctly. Are you familiar with
19 that?

20 A. Not -- no.

21 Q. Okay. That's not something that you have
22 reviewed?

23 A. No.

24 MS. KERN: Okay. Those are all of the questions

1 I have, Your Honor. Thank you.

2 THE COURT: Sir, before Mr. Jones asks any
3 questions, there was a question that I didn't really
4 necessarily understand. I want to clear this up. If you --
5 if you sold your -- your home there, are you also selling
6 your membership? In other words, if you wanted to sell your
7 home to me and we agreed on a price of a \$1.27, am I also
8 buying your membership or do I -- when I come in do I then
9 have to pay that \$20,000?

10 THE WITNESS: You have to pay the \$20,000 and you
11 have to put -- you have to make application.

12 THE COURT: Now, can anyone buy that property and
13 then be denied a membership?

14 THE WITNESS: From my understanding, yes.

15 THE COURT: Has that ever happened?

16 THE WITNESS: Not to my knowledge.

17 THE COURT: So you and I, when we negotiate the
18 price of your home there, you're just selling me the home.
19 You're not selling me the membership.

20 THE WITNESS: That is correct.

21 THE COURT: So it is entirely possible for people
22 to buy property in Elks Point and not require membership?

23 THE WITNESS: They have to have certain documents
24 that they certified reading, and they have to be accepted as

1 a member prior to becoming and have the exclusive rights for
2 that social club.

3 THE COURT: That's for the social club but not to
4 own a home there, right?

5 THE WITNESS: I don't know that, okay.

6 THE COURT: Okay. So that -- that's -- that's
7 kind of what I'm getting at. So it is entirely possible that
8 someone -- and if I'm wrong you just tell me, sir, because
9 I'm not one of your neighbors right now but -- but I could
10 buy your home and then say I'm not going to read the
11 paperwork you want me to read or I might not be accepted into
12 the club. So I would not have access to the marina, the
13 harbor, as you put it I believe, sir, or the beach or the,
14 some of the common areas, but I could still own a home there,
15 correct?

16 THE WITNESS: My understanding after listening to
17 this and thinking about it.

18 THE COURT: Yes, sir.

19 THE WITNESS: If somebody buys a home in there
20 they have to be required to understand what the rules,
21 regulations and bylaws are because only members can own
22 property there. That's my understanding.

23 THE COURT: Okay. Now, there's your chicken and
24 egg.

1 THE WITNESS: Okay.

2 THE COURT: Do I have to become a member first
3 before I buy the property?

4 THE WITNESS: From my opinion, yes, you do have
5 to become a member first.

6 THE COURT: So someone could become a member and
7 then not buy property?

8 THE WITNESS: I suppose they could.

9 THE COURT: Yeah, these are not trick questions,
10 sir.

11 THE WITNESS: No.

12 THE COURT: I'm not trying to fool you or
13 anything. I'm trying to figure out how it works, and you've
14 been on the board and all like that.

15 THE WITNESS: But I don't think a member would
16 want to pay \$20,000 and not own property there.

17 THE COURT: They can come down and sit on the
18 beach, right?

19 THE WITNESS: They could.

20 THE COURT: Use the boat harbor, right?

21 THE WITNESS: If they have a boat.

22 THE COURT: Have a barbecue?

23 THE WITNESS: Yeah.

24 THE COURT: All right. Thank you very much.

1 So if my questions give rise to questions from
2 you, ma'am, I'm going to let you open that back up. And
3 then, Mr. Jones, we'll hear what you have to say after that.

4 MS. KERN: Thank you.

5 THE COURT: Go ahead. Please, ma'am.

6 MS. KERN: Because I'm a little bit confused. I
7 want to get some clarification from Mr. Brown. Thank you.

8 THE COURT: Yes, Ms. Kern.

9 Q. (BY MS. KERN:) The original question that the
10 judge asked you was you as the seller of property don't have
11 anything to do with the application for membership. Am I
12 understanding what you said? You said if you sell property
13 it's the country club that deals with the membership. You
14 don't do both, and you as the property owner when I use that
15 term.

16 A. From my recollection they are two separate
17 occasions or two separate entities.

18 Q. Right. So there's the property owner who sells
19 the property?

20 A. Right.

21 Q. And goes through escrow just like we do when we
22 buy property.

23 A. Right.

24 Q. When there's no membership. And then the

1 potential purchaser has to also submit an application to the
2 country club to obtain membership in the club. You as the
3 seller of the property do not facilitate that?

4 A. No.

5 Q. So if I'm going to purchase your property, we
6 enter into an agreement. It's up to me as the buyer to
7 figure out how to also couple that property with my
8 membership in the club? And I have to go to the board for
9 that, correct?

10 A. Yes.

11 Q. Okay. If you were going to sell your property
12 you can't guarantee to me, the purchaser, anything about that
13 membership because that's between me and the country club?

14 A. That is correct.

15 MS. KERN: Okay. Thank you, Your Honor.

16 THE COURT: Thank you, ma'am.

17 Mr. Jones?

18 MR. JONES: Thank you, Your Honor.

19 CROSS-EXAMINATION

20 BY MR. JONES:

21 Q. Good morning, Mr. Brown. I apologize. I think
22 we may have met briefly at a mediation before, but my name is
23 Prescott Jones. I represent the Elk Point Country Club. I
24 have just a few follow-up questions for you.

1 It was your prior testimony that you're not --
2 you don't know for a fact if the increase in people in the
3 HOA is as a result of the VRBO's, correct?

4 A. Yes.

5 Q. Okay. It was your later testimony though that
6 the social fabric of the club and the fellowship of the club
7 was affected by the VRBO's; is that correct?

8 A. I don't recall specifically but I said about
9 faces that I did not recognize.

10 Q. So I asked the same question of Ms. Gilbert
11 before. Is it possible that the faces you didn't recognize
12 were guests of the homeowners?

13 A. They could be.

14 Q. Is it possible that they were long-term tenants
15 of the homeowners?

16 A. I think that's a little more easily answered
17 because of their long-term tenant. I would recognize them as
18 long-term tenants.

19 Q. Well, it's possible?

20 A. Seeing their faces.

21 Q. Sure. It's possible though you would have to see
22 the long-term tenant's face for the first time, correct, and
23 you may not, in fact, recognize them then?

24 A. The first time but over time I would.

1 Q. Uh-huh, okay. But it's possible though, correct?

2 A. Yeah.

3 THE COURT: What's possible?

4 MR. JONES: That he wouldn't recognize the face
5 of a long-term tenant.

6 THE COURT: Okay.

7 THE WITNESS: If they are a long-term tenant I
8 would recognize them over time.

9 Q. (BY MR. JONES:) Sir, do you recall signing your
10 name to a declaration that was attached to the motion for
11 preliminary injunction?

12 A. I recall, yes.

13 Q. Do you recall making a statement that you believe
14 that a significant number of homeowners are opposed to
15 short-term vacation rentals?

16 A. I do.

17 Q. Do you still believe that to this day?

18 A. A significant number, yes.

19 Q. Do you believe it to be a majority of the
20 homeowners?

21 A. I don't know that for a fact.

22 Q. Do you recall there's an election that took place
23 for the HOA board on July 4, 2020?

24 A. Yes, I do.

1 Q. Do you recall whether or not short-term vacation
2 rentals were an issue in that election?

3 A. When you say issue what do you mean by issue?

4 Q. Do you recall if any of the candidates for the
5 HOA board made their positions known as to short-term
6 vacation rentals, whether they should be allowed or not?

7 A. There was discussion about the election -- about
8 short-term rentals and who supported what and where, yes.

9 Q. Mr. Felton, who is sitting next to me today, he's
10 the president of the HOA, correct?

11 A. That is correct.

12 Q. And he was the president of the HOA prior to
13 July 4, 2020, correct?

14 A. That is correct.

15 Q. So it's fair to say he ran for reelection and he
16 won, correct?

17 A. That is correct.

18 Q. Do you recall that Mr. Felton's position was as
19 to short-term vacation rentals prior to the election?

20 A. He was in favor of them, yes.

21 Q. Okay. Mr. Charles Jennings is the vice president
22 of the HOA. Do you believe that to be correct?

23 A. Yes.

24 Q. Okay. And he was also vice president of the HOA

1 prior to the July 4, 2020 election, correct?

2 A. Yes.

3 Q. And do you know Mr. Jennings' position as to
4 whether or not short-term vacation rentals --

5 A. I believe he was also in favor of short-term
6 rentals.

7 Q. Okay. And he was, of course, reelected correct?

8 A. That is correct.

9 Q. Okay. Mr. Brown, that's all of the questions I
10 have. Thank you for your time.

11 THE COURT: Thank you, Mr. Jones.

12 Do you have anything else, ma'am?

13 MS. KERN: No. The witness may be excused.

14 THE COURT: Sir, thank you very much. You may
15 step down.

16 (Witness excused.)

17 THE COURT: Your next witness, ma'am?

18 MS. KERN: Tim Gilbert.

19 THE COURT: Mr. Gilbert.

20

21 TIM GILBERT,

22 called as a witness on behalf of the
23 Plaintiff having been first duly sworn,
24 was examined and testified as follows:

1 THE COURT: Thank you, sir. Come on up and make
2 yourself comfortable.

3 DIRECT EXAMINATION

4 BY MS. KERN:

5 Q. Would you please state your name for the court
6 reporter.

7 A. Timothy Gilbert.

8 Q. Thank you. And are you the spouse of Nancy
9 Gilbert that testified earlier?

10 A. Yes.

11 Q. Okay. And you are owners of 464 Elks Avenue at
12 the country club?

13 A. Yes.

14 Q. Can you give a little background of your
15 education and work history.

16 A. I received a degree in mathematics with a minor
17 in computer science from the University of Nevada.

18 During that time I worked as a hotel night
19 auditor which is a bookkeeping job. Afterwards I worked for
20 31 years in gaming software. I did a variety of assignments,
21 slot machine accounting system software and software that
22 operates the slot machines and video poker machines
23 themselves.

24 Q. Are you aware whether the Elk Point Country Club

1 has a committee that oversees rentals?

2 A. Yes, they do.

3 Q. Can you describe that for me, please.

4 A. They are empowered by the Elk Point Board of
5 Directors to oversee short-term vacation rental activities
6 within the Elk Point Country Club.

7 Q. So what -- what oversight do they provide?

8 A. They -- they maintain a rental calendar which
9 enumerates occupancy for each one of the short-term vacation
10 rental properties within the Elk Point Community.

11 They also are charged with enforcing the rules of
12 Elk Point Country Club regarding the short-term vacation
13 rental customers who occupy those properties.

14 Q. Do you know when it was formed?

15 A. It was in existence when we purchased our
16 property in 2014. I don't know the formation date.

17 Q. Okay. When it was originally formed was it for
18 long-term renters or short-term renters?

19 A. I do not know.

20 Q. But to your knowledge at the present time it is
21 mainly involved in connection with short-term rentals. Was
22 that your testimony?

23 A. Correct, short-term rentals.

24 Q. Okay. So you also said that one of its function

1 was some enforcement. Have you been able to observe or are
2 you aware of what that enforcement is or isn't?

3 A. I am not aware of any enforcement activities on
4 the part of the rental committee. We have filed complaints
5 with board of directors regarding violation of rules by these
6 short-term rental motel customers, and at times those
7 complaints are ignored.

8 We've also attempted to enforce the rules of the
9 Elk Point Country Club regarding violations by short-term
10 rental motel customers, and those are usually ignored as
11 well.

12 THE COURT: Ignored by whom? And when you say
13 we, do you mean the committee, sir?

14 THE WITNESS: Oh, let me rephrase that. When my
15 wife and I have filed formal complaints with the Elk Point
16 Board, those complaints regarding short-term vacation rental
17 motel customers, we have not received a favorable response.
18 Those complaints are ignored.

19 THE COURT: Okay. But it's not the committee
20 filing those complaints?

21 THE WITNESS: No. It's us as --

22 THE COURT: Okay. As individuals.

23 THE WITNESS: As country club members, correct.

24 THE COURT: Yes, sir. Yes, sir.

1 THE WITNESS: Correct. Correct, Your Honor.

2 THE COURT: Okay. Thank you. I just needed to
3 know who the we was, sir.

4 THE WITNESS: Of course, it's a vague term.

5 THE COURT: Thank you, sir.

6 Q. (BY MS. KERN:) Have you done any analysis or
7 work to compare the advertisements that appear for example on
8 VRBO or Airbnb, those kind of websites with the
9 self-reporting on the rental reports that you referred to?

10 A. Yes.

11 Q. Have you made any observations about that?

12 A. I think the observations are somewhat anecdotal
13 but many of the short-term vacation rental motels are high
14 volume, high capacity, and the maintenance of the short-term
15 vacation rental calendar by the rental committee of Elk Point
16 Country Club is based on the honor system. So the individual
17 short-term vacation rental owners are on their honor to
18 volunteer that information to the committee.

19 Q. Did you ever observe or identify times where you
20 saw what appeared to have been a rental on the commercial
21 websites and there was no report on the rental report by the
22 owner?

23 A. Yes.

24 Q. Can you give some examples of those.

1 A. Everything would be at this point anecdotal. So
2 I can't give you specific calendar days or years of that
3 nature.

4 Q. But was that data something that you looked at?

5 A. Correct.

6 Q. Okay. Can you explain what -- what the
7 advertisement, what your investigation of those
8 advertisements included? What did you do?

9 A. Sure. The verbal descriptions of all of these
10 on-line advertisements for the short-term vacation rental
11 motels in Elk Point feature the amenities of the country
12 club, the social club. They don't discuss per se the
13 interior decor of these motels or the towels or the linens or
14 anything else. They are featuring the beach and the parking
15 and the amenities, the private gate, the gated community, all
16 of which are amenities that we as unit owners all own.

17 Now, the individual room rates are, they can be
18 quite high. But as an investigation I looked at the average
19 room rate for two adults and one child both in low season and
20 high season, and I came up with a ballpark figure of \$500 per
21 night for that occupancy for low season and \$1,000 per night
22 for that occupancy for high season.

23 MR. JONES: I object to the extent the witness is
24 providing an expert opinion.

1 THE COURT: Well, that's not an expert opinion,
2 sir. So your objection is overruled. Thank you.

3 Q. (BY MS. KERN:) Are the -- in looking at the
4 websites were the advertisements limited geographically in
5 any way? In other words could only people that live in
6 Nevada see them or something like that?

7 A. No. No. They are -- they are listed on such
8 international websites and national websites as Airbnb and
9 VRBO, and there's no screening process either. I
10 communicated with the board at one time that that poses a
11 danger to our unit owners.

12 THE COURT: Mr. Gilbert, you're going beyond the
13 answer to that question. So I'm going to ask you to stop.

14 THE WITNESS: Of course, Your Honor.

15 THE COURT: It's nonresponsive. Thank you.

16 Q. (BY MS. KERN:) When you were looking at the
17 websites how would a transaction be triggered from your
18 observation of how they worked?

19 THE COURT: Wait a minute, ma'am. He's -- he's
20 looked at a number of different websites here that he
21 indicates Airbnb. So that question could be multilayered.

22 MS. KERN: Okay.

23 THE COURT: And I think it's a little ambiguous.

24 MS. KERN: Okay. I'll narrow it down. Thank

1 you, Your Honor.

2 THE COURT: Thank you, ma'am.

3 Q. (BY MS. KERN:) Let's take for example looking at
4 the VRBO website. Can you explain what your process was to
5 investigate or look at how these transactions were conducted?

6 A. Yes. I decided to use a fictitious name to
7 reserve a weekend at one of the Elk Point short-term vacation
8 rental motels that's listed there. In fact, it was one right
9 across the street from us. So I used the occupancy level I
10 just described, two adults, one child, and everything was
11 accepted. All that was needed was a valid credit card, ID
12 and the transaction would be completed.

13 Q. Okay.

14 A. There was no screening. There was no questions
15 about criminal record or anything else or whether I had
16 COVID-19. I was accepted.

17 Q. If you -- if I could have Exhibits 13 and 14,
18 please. Thank you. I'm handing the witness Exhibits 13 and
19 14. Could you take a look at those, Mr. Gilbert, and when
20 you're done let me know.

21 A. I'm done.

22 Q. Is this -- are you familiar with these two
23 exhibits?

24 THE COURT: Let's do one at a time.

1 MS. KERN: I just --

2 THE COURT: Let's --

3 MS. KERN: I just corrected it.

4 THE COURT: And the poor judge.

5 MS. KERN: I caught that.

6 Q. As I said, could you please just look at
7 Exhibit 13.

8 A. Yes.

9 Q. Could you tell me what that is? Is that
10 something you prepared?

11 A. I did.

12 Q. And what does it represent?

13 A. There's two sources of data that were used to
14 compose this spreadsheet. The one source was the rental
15 calendar we just described, and the other source was my
16 observation of roommates that were advertised on-line for
17 these rental properties and so the figures --

18 THE COURT: You may not testify as to the
19 figures, sir.

20 THE WITNESS: I'm sorry, Your Honor.

21 THE COURT: That's okay, sir.

22 Q. (BY MS. KERN:) Were there any other records that
23 you reviewed in order to put this document together?

24 A. Those were the two sources of data, the rental

1 calendar composed by the Elk Point Rental Committee and my
2 observations of the on-line room rates advertised for an
3 occupancy of two adults, one child, both in low season and
4 high season.

5 Q. And what was the purpose of your compiling this
6 data? What were you trying to determine?

7 A. I was going to compare what I compiled with the
8 reports that I obtained from Douglas County through the
9 Freedom of Information Act on vacation rental room tax
10 revenue that was collected by Douglas County from Elk Point
11 Vacation Rental Properties only.

12 MS. KERN: Okay. I would move for the admission
13 of Exhibit 13.

14 MR. JONES: I'm going to object to that. The
15 document on its face is an expert opinion. The conclusions
16 regarding seasonal revenue and yearly revenue are expert
17 opinions. The computation of an average low season rental
18 rate and high season rental are expert opinions. And I think
19 even if we were to simply redact or remove those portions the
20 entire document should go as well.

21 THE COURT: Well, wait a minute. What he said he
22 did was just create some figures.

23 MR. JONES: Uh-huh.

24 THE COURT: Based on a calendar of rentals which

1 is records that apparently the rental committee keeps and
2 based on what the, what the rental rate was. Now, how is
3 that expert opinion?

4 MR. JONES: I have no objection to the number of
5 days each unit was rented because I agree with Your Honor
6 that that's publicly available data. What I object to is the
7 calculation of average room rental rate on a low season and a
8 rental rate in the high season. I don't have the data that
9 Mr. Gilbert used to calculate that, and I don't believe he's
10 been qualified as an expert anyway to make that
11 determination.

12 THE COURT: Yeah, but that doesn't require expert
13 opinion. If he just looked at the different costs and did
14 some math, any of us who got through fifth grade can do that
15 multiplication. That's not expert. So that particular
16 objection is overruled. And if that's your only objection
17 then 13 is admitted. I'm not -- I'm not sure how relevant
18 it's going to be, but that objection is overruled.

19 So what's your next question, ma'am?

20 Q. (BY MS. KERN:) Okay. I would also like to have
21 you take a look at Exhibit 14 and ask you is this the same
22 kind of information and data for the year 2019?

23 A. Correct. This is based on the rental calendar
24 maintained by the Elk Point Rental Committee for the year

1 2019.

2 MS. KERN: I would also move for the admission of
3 Exhibit 14.

4 MR. JONES: I'm going to object on relevance
5 grounds, Your Honor.

6 THE COURT: What is the relevance?

7 MS. KERN: The relevance is to demonstrate.
8 We've already looked at the advertisements. These
9 advertisements for the commercial use is you get to use my
10 membership facilities that I have as a result of being a
11 member of Elk Point Country Club.

12 THE COURT: Have a seat, sir. I only need one
13 lawyer standing at a time. Thank you very much, Mr. Jones.

14 MS. KERN: And as a result of being able to
15 market their property by being able to profit from those
16 amenities and recreational facilities we are now tying in
17 that the facilities are generating a tremendous amount of
18 income which will jeopardize the 501c7 social exempt status
19 and we will tie that in with -- with Michelle Salazar, who
20 will be testifying next.

21 THE COURT: Okay. So what you have is individual
22 properties that are creating revenue. You don't know that
23 they are creating profit and -- and it doesn't reflect any
24 profit to the -- to the association.

1 MS. KERN: Two responses to that, Your Honor. I
2 would agree that what we are showing is revenue rather than
3 necessarily profit. But with respect to your second concern
4 that's irrelevant because the IRS does not look at solely the
5 income that is generated by the entity.

6 The social club exemption is a specific benefit
7 for its members, and so the IRS, in fact, does look at what
8 the income generated by its members are when a social club
9 claims an exemption under 501c7.

10 THE COURT: Well --

11 MS. KERN: It is not separate.

12 THE COURT: We don't have that evidence yet, but
13 I will admit it pending that evidence.

14 MS. KERN: Thank you, Your Honor.

15 THE COURT: So 14 is admitted.

16 Q. (BY MS. KERN:) With respect to the conclusions
17 that you reached after identifying first if you could look at
18 Exhibit 13 for the year 2018, and I will note that
19 Mr. Gilbert correctly identified it as total revenue and it
20 is identified. Can you please explain now what the numbers
21 are that you extrapolated from the data that you described.

22 MR. JONES: Objection, Your Honor. Any use of
23 extrapolation turns into expert testimony. I don't believe
24 the witness has been qualified for that.

1 MS. KERN: Extrapolation is adding and
2 multiplying.

3 THE COURT: Well, why don't you ask it that way.

4 Q. (BY MS. KERN:) Okay. Can you please explain and
5 identify what you added together and multiplied in order to
6 get the revenue that you identify?

7 A. We can see from Exhibit 13 that the number, the
8 total revenue is lower than 2019, and it looks like 2019 was
9 a very good year for the vacation rental motels at Elk Point.

10 So what we can derive from these figures is
11 there's been an acceleration in the short-term vacation
12 rental motel business up there, and they all pay a 14 percent
13 room tax, and that is my answer.

14 Q. Okay. But I want a more specific so -- so that
15 we all can understand. For example, in the first line on
16 Exhibit 13 on the left side it has an identification of an
17 address.

18 A. Yes.

19 Q. And then you have an identification of the days
20 rented?

21 A. Yes.

22 Q. That's three?

23 A. Yes, for low season.

24 Q. And so in order to identify the revenue what did

1 you multiply or add?

2 A. Low season was multiplied by, I counted the
3 number from the vacation rental calendar. I counted the
4 number of days each individual property was rented. I
5 divided the calendar year into low season and high season.
6 High season being June, July, August. So after I completed
7 that count for each property I multiplied the days rented for
8 low season by \$500 per night, and I multiplied the days
9 rented during high season by \$1,000 per night, and then I
10 added those two figures together to come up with a total
11 revenue figure for each property. And then down at the
12 bottom --

13 THE COURT: Wait a minute. The \$500 per night,
14 is that what was actually, this place was actually rented
15 for? Is that a number you came up?

16 THE WITNESS: No, that's a generalization because
17 the room rates vary depending on holidays seasons.

18 THE COURT: So these are not real figures.

19 THE WITNESS: They are estimates, sure.

20 THE COURT: Well, it's completely irrelevant
21 then.

22 MS. KERN: Well, can I respond to that?

23 THE COURT: Yeah. He's made up the numbers.

24 MS. KERN: No, he has not made up the numbers.

1 He said that he looked at the advertisements. So the actual
2 -- he took an average. So these rentals might be from 400 a
3 night to 600 a night and he averaged it at 500. You're
4 right. It's not the actual number, but it is based upon the
5 actual numbers and an average that was made.

6 THE COURT: I can't -- I can't find that that's
7 acceptable evidence. You know, if he used the actual numbers
8 and knew what the rooms were rented for, I understand these
9 numbers, but coming up with an average that's hard for me to
10 rely on.

11 MS. KERN: Even if it is based on the actual
12 advertisements that are being made for this particular club.

13 THE COURT: He would have to go through each
14 number and verify that for me, how he came up with each
15 particular number.

16 MS. KERN: Okay.

17 THE COURT: You know, different -- these are --
18 these are all different properties, ma'am, and some of them
19 may have one bed or some may have two beds. Some of them may
20 sleep two people. Some of them may sleep eight people. I
21 can't rely on these numbers.

22 MS. KERN: And that's why he did it as an
23 average.

24 THE COURT: Well, they are not acceptable to

1 provide me with any information that I can really rely on,
2 other than the fact that this witness believes that there was
3 income generated. How much income was generated? It simply
4 cannot be proven by Exhibit 13 and 14. You may have some
5 other way to do that.

6 MS. KERN: Can I ask one other question?

7 THE COURT: Sure you can.

8 Q. (BY MS. KERN:) You testified that you also
9 looked at the Douglas County records in which taxes were paid
10 for revenue that was generated from Elk Point Country Club;
11 is that correct?

12 A. Correct.

13 Q. Okay. I want to make sure I was remembering
14 correctly.

15 THE COURT: That's a different way to approach
16 it, ma'am.

17 Q. (BY MS. KERN:) Did you cross-check if they paid,
18 was it, did you tell me 14 percent is the tax?

19 A. Yes. There's a room tax collected of 14 percent
20 on each one of these short-term vacation rental motels. So
21 it's the same tax that's collected from hotel rooms and let's
22 say Harrah's Casino or Hard Rock Casino.

23 Q. Okay. But, in fact, you saw and obtained the
24 public records to look at those taxes that were paid?

1 A. Correct.

2 Q. From the -- if they were paying 14 percent could
3 you multiply and determine at least what revenue was being
4 reported to Douglas County that had been generated from the
5 commercial motel rentals within Elk Point?

6 A. Yes.

7 THE COURT: Now, that's a more accurate way to do
8 this, ma'am. That's not based on estimates and averages.
9 That's based on income.

10 Q. (BY MS. KERN:) Did you compare that number to
11 what you had estimated?

12 A. Yes.

13 Q. Was there a difference?

14 A. Yes.

15 Q. Can you tell me what the difference was?

16 A. I don't have that figure in front of me but it
17 was a significant difference.

18 THE COURT: 13 and 14 are no longer admitted.

19 Q. (BY MS. KERN:) Okay. Do you have a recollection
20 of what the revenue was that was reported to Douglas County?

21 A. I think it was around \$145,000 for one of the two
22 calendar years, either 2018 or 2019.

23 Q. Do you have a recollection of the revenue that
24 was generated for the other year or is that the only one that

1 you recall?

2 A. That's the only one I recall.

3 Q. Okay. Thank you.

4 THE COURT: Give me that number again.

5 THE WITNESS: I think it was around 145,000 but I
6 don't -- I don't have it right in front of me.

7 THE COURT: In total revenue?

8 THE WITNESS: Correct.

9 THE COURT: Thank you.

10 Q. (BY MS. KERN:) Did that correlate to the
11 information that was within the association as to when there
12 had been the actual commercial rental of those properties?

13 MR. JONES: Objection. Vague and ambiguous as to
14 correlate.

15 THE COURT: Rephrase it.

16 Q. Okay. Did they identify days rented to the
17 country club?

18 THE COURT: The country club rental calendar?

19 Q. (BY MS. KERN:) On the country club rental
20 calendar that would be equal to more or less than would it
21 appear they were reporting to Douglas County?

22 A. The room rate would have to be quite low to
23 really correlate. So it would not be -- it would not be \$500
24 per night. It would be something significantly less.

1 Q. When you were looking at the advertisements on
2 VRBO, for example, did you find any rental rates that were
3 significantly less than 500?

4 A. Describe significantly less.

5 Q. I used your word. What did you mean by
6 significantly less?

7 A. There's no 20 dollar a night room rates up there
8 at Elk Point. So \$500 was -- was arranged between 400 and
9 600.

10 Q. My question -- let me go back to what my
11 question was. Did the report to Douglas County, was it
12 consistent?

13 THE COURT: The taxes paid to Douglas County?

14 MS. KERN: Well --

15 THE COURT: Based on the reporting.

16 MS. KERN: Correct.

17 THE COURT: Reported rentals.

18 Q. (BY MS. KERN:) Was that consistent with the
19 number of nights that were being reported to the rental
20 committee, if you know?

21 A. I can't --

22 THE COURT: I don't know how he can answer that,
23 ma'am.

24 MS. KERN: Well, if he had looked at both records

1 and he recalled.

2 Q. That's why I said if you know?

3 A. No. I can't -- I can't answer that question.

4 Q. Okay.

5 THE COURT: So here's the question, sir. When
6 you looked at the tax revenue.

7 THE WITNESS: Uh-huh.

8 THE COURT: And the 14 percent.

9 THE WITNESS: Uh-huh.

10 THE COURT: And that gets, as Ms. Kern was
11 saying, reported to Douglas County.

12 THE WITNESS: Correct.

13 THE COURT: Let's use that phrase, okay.

14 Included in that report is the report of the number of nights
15 that are rented.

16 THE WITNESS: No.

17 THE COURT: Thank you.

18 MS. KERN: No further questions, Your Honor.

19 THE COURT: Mr. Jones?

20 MR. JONES: Thank you, Your Honor.

21 CROSS-EXAMINATION

22 BY MR. JONES:

23 Q. Good morning, Mr. Gilbert. My name is Prescott
24 Jones. I represent the Elk Point Country Club. I believe

1 you and I also met at a previous NRED mediation. It's good
2 to see you again in person.

3 A. Good morning, Mr. Jones.

4 Q. I have just a few questions for you today.

5 THE COURT: Lawyers always say that and you
6 should never believe them, sir.

7 THE WITNESS: Thank you, Your Honor. This is my
8 first time on the witness stand.

9 THE COURT: I want you to be comfortable, sir.

10 MR. JONES: And I agree.

11 Q. Mr. Gilbert, you spoke earlier this morning about
12 the lack of screening of short-term vacation renters, and I
13 believe you included that these renters were not screened for
14 a criminal record. They were not screened for COVID. Do you
15 recall that testimony?

16 A. Yes, I do.

17 Q. Do you have any reason to believe that the guests
18 of members of the Elk Point Country Club are screened for
19 either a criminal record or screened for COVID?

20 A. There's an implicit screening based on their
21 relation to members of the country club who have to go
22 through an initiation process, membership process.

23 MR. JONES: Move to strike as nonresponsive.

24 THE COURT: Oh, it's responsive. It may not be

1 beneficial but it's responsive.

2 Q. (BY MR. JONES:) Can you explain what you mean by
3 implicit screening?

4 THE COURT: Your objection is overruled.

5 MR. JONES: Thank you.

6 THE WITNESS: Sure. Country club members have to
7 apply for membership and there should be or there is
8 documents, a set of documents they must read. And, well, it
9 could possibly -- it's in within the realm of possibilities
10 that criminals and COVID-19 carriers could be invited as
11 guests to a member's cabin.

12 Q. So the -- so what is the implicit screening that
13 you referenced? I'm not sure I understood your response.
14 What is the implicit screening you're referred to in your
15 prior response to my question?

16 A. Members don't have the volume and capacity, the
17 occupancy levels that the short-term vacation rentals have
18 so it's a matter of frequency. If you have a rental occupied
19 every weekend the chances of having a criminal or COVID-19
20 carrier in your cabin are much higher than if occasionally
21 you let a family member use your cabin.

22 MR. JONES: Your Honor, I move to strike as
23 nonresponsive again.

24 THE COURT: Overruled.

1 Q. (BY MR. JONES:) So what's your basis for your
2 statement that the volume and frequency of guests of members
3 is less than the volume and frequency of short-term vacation
4 renters?

5 A. Looking at the vacation rental calendar again,
6 it's vacation rentals are frequently occupied. Many of these
7 cabins are just used occasionally by family members that
8 don't rent. So, again, it's a matter of frequency both in
9 terms of volume and occupancy.

10 Q. What's your basis for your statement that -- that
11 guests are not frequently on the member's property, if I said
12 that right. If I did not please correct me.

13 A. Based on my observations while I've been at the
14 Elk Point Country Club.

15 Q. Your observations walking around the community?

16 A. Correct.

17 Q. So you really have no way to know for sure what
18 the volume of guests attending the Elk Point Country Club
19 really is, correct?

20 A. Based on the observations of the rental calendar
21 I can compare it to how frequently these vacation rentals are
22 occupied. So the -- the members that do not rent, occupy and
23 do not live there year-round occupy their cabins less
24 frequently than these vacation rental business owners who are

1 turning over a great deal of volume and occupancy.

2 Q. Let's get back to maybe my initial question about
3 the screening. What were to happen if a guest of a member of
4 the Elk Point Country Club had a criminal record, what would
5 happen to the owner?

6 A. I would imagine if the guest who had a criminal
7 record committed a crime at Elk Point Country Club there
8 would be some liability on the part, personal liability on
9 the part of the unit owner.

10 Q. What about if a short-term vacation renter were
11 to have a criminal record wouldn't there be the same issue
12 involving the homeowner?

13 A. Oh, there would be the same issue, and that
14 brings up an interesting question, Mr. Jones. Many of these
15 commercial business operations, these transient commercial
16 use operations at Elk Point are seriously under-insured. So
17 if a -- if a motel customer at one of these establishments
18 injures himself on Elk Point Country Club property the Elk
19 Point Country Club is liable not the individual owner.

20 Q. I appreciate that response, Mr. Gilbert.

21 Your Honor, I'm going to move to strike a portion
22 of his response that was nonresponsive.

23 THE COURT: Sustained.

24 MR. JONES: Thank you.

1 THE COURT: It's stricken.

2 Q. (BY MR. JONES:) I apologize, Mr. Gilbert. One
3 moment. I want to take a look at my notes here.

4 THE COURT: Take your time, sir.

5 Q. (BY MR. JONES:) All right. Mr. Gilbert, I think
6 I stayed true to my promise for just a few questions for you.
7 That's all I have. Thank you, sir.

8 A. Thank you, Mr. Jones.

9 THE COURT: It may be my comment that made him do
10 that. We'll see.

11 Ms. Kern, do you have further questions, ma'am?

12 MS. KERN: No further questions, Your Honor.

13 THE COURT: Mr. Gilbert, you may step down.
14 Thank you very much.

15 THE WITNESS: Thank you, Your Honor.

16 (Witness excused.)

17 THE COURT: Ms. Kern, you've been really good on
18 getting your witnesses on and off, but we're nine minutes
19 until noon, and I really suspect that you can't get a witness
20 on in nine minutes.

21 MS. KERN: No. It is our last witness, I will
22 tell Your Honor.

23 THE COURT: You have one witness left?

24 MS. KERN: I have one witness but it is not ten

1 minutes.

2 THE COURT: Okay. So what I would like to do is
3 to break for the noon hour and allow everybody to have lunch
4 and then come back, and I would like to see you at 1:30 and
5 we'll resume.

6 Mr. Jones, how many witnesses do you anticipate,
7 sir?

8 MR. JONES: Maximum of one, Your Honor.

9 THE COURT: Okay. All right. Well, very well.
10 We'll get through all of this this afternoon one way or
11 another, and I will see you at 1:30. I appreciate it.

12 MR. JONES: Thank you, Your Honor.

13 THE COURT: Could I have all these exhibits back.
14 Thank you, deputy. Would you provide those
15 exhibits to the clerk. Deputy Addington helps me in a 1,000
16 ways.

17 (Whereupon, a lunch recess was taken.)

18 THE COURT: Very well. So you're next witness,
19 please, ma'am.

20 We are, by the way, back in session in 20CV124.

21 MS. KERN: Thank you, Your Honor.

22 THE COURT: It looks like everyone is here.

23 Did you need something, ma'am? You were --

24 THE WITNESS: No.

1 THE COURT: Okay. All right. Are you okay?

2 THE WITNESS: Yes. Thank you.

3 THE COURT: Very well. I'm sorry, Ms. Kern. I
4 apologize for interrupting.

5 MS. KERN: No, no worries at all. Before I call
6 my next witness if I might be heard and make a record just
7 very briefly on Exhibits 13 and 14.

8 THE COURT: Yeah.

9 MS. KERN: Not as to the numbers or the amounts,
10 but with respect to one of the categories that Mr. Gilbert
11 testified he obtained and wrote down the number of days
12 rented by the units on the -- from the rental report that is
13 the country club's records. That is that first category
14 where it says days rented for the season and it identifies
15 three in what he identifies as the low season and days
16 represented high season 28.

17 THE COURT: I see that.

18 MS. KERN: Those records -- those numbers were --
19 are specific and were from the rental reports, and if we
20 could introduce or admit 13 and 14 for the purposes of those
21 columns.

22 THE COURT: Do you want to recall your witness?

23 MS. KERN: Okay.

24 THE COURT: And lay a foundation for that and

1 then offer the exhibits.

2 MS. KERN: Okay.

3 THE COURT: I think that's a better way to do it.

4 MS. KERN: I thought he had already testified to
5 that.

6 THE COURT: Well, let's make it clear.

7 MS. KERN: Okay. Thank you.

8 THE COURT: Mr. Gilbert, would you come back up
9 for us, please, sir. It's a long way to walk after a big
10 lunch, but you're still under oath. Please have a seat.

11 We'll see if you have an objection for this
12 purpose.

13 REDIRECT EXAMINATION

14 BY MS. KERN:

15 Q. First with respect to Exhibit 13, Mr. Gilbert.

16 A. Yes.

17 Q. Under the column that is identified days rented
18 low season, can you tell me where you got, for example for
19 402 Elks Avenue, where you got the number three?

20 A. I reviewed the rental committee's rental
21 occupancy calendar, and I counted the number of days that 402
22 Elks Avenue was rented for the months of January through May
23 and September through December.

24 Q. Okay. And is that similar for each of the

1 addresses that are listed on the left -- on the left column?

2 A. Correct.

3 Q. And then under days rented high season by way of
4 example under 402 Elks Avenue it identifies 28. How did you
5 get that number?

6 A. I counted the number of days of 402 Elks Avenue
7 was rented according to the rental committee occupancy
8 calendar for the months of June, July and August.

9 Q. Thank you. And would that be the same for each
10 of the addresses that are identified on that exhibit?

11 A. Yes.

12 MS. KERN: For purposes of that information in
13 connection with Exhibit 13 I would move to admit Exhibit 13.

14 MR. JONES: I have no objection to the
15 introduction of just the limited portion of data identified
16 by counsel.

17 THE COURT: Well, I have to introduce the entire
18 exhibit, but I will indicate that none of the other material
19 in there is actually going to be considered by the Court but
20 just those numbers.

21 Sir, I can also ask you, if someone has a long --
22 a longer term rental of more than 28 days, let's say six
23 months I lease my home or a year I lease my home, is that
24 reflected in the rental committee's numbers?

1 THE WITNESS: No.

2 THE COURT: And is it reflected anywhere?

3 THE WITNESS: Not to my knowledge.

4 THE COURT: Not on the exhibit but do you keep
5 track of that sort of thing?

6 THE WITNESS: Not to my knowledge.

7 THE COURT: Thank you, sir.

8 Do you want to ask him about 14?

9 MS. KERN: Yes, I do.

10 Q. If you could turn to Exhibit 14 and with respect
11 to the column that identifies days rented low season are the
12 numbers that are in that column reflected and consistent with
13 your review of the rental report that you obtained from the
14 rental committee?

15 A. Yes. That reflects the number of days 402 Elks
16 Avenue was rented during the low season of 2019. Where the
17 low season is defined as January through May and September
18 through December.

19 Q. And similarly for the column that says days
20 rented high season?

21 A. Yes. The same procedure was used to -- to derive
22 the 30-day occupancy for months of June, July and August.

23 Q. Okay.

24 A. For 402 Elks Avenue.

1 Q. Okay.

2 A. And the same procedure for every number down each
3 one of those columns.

4 Q. On this exhibit at the bottom, at for 440 Center
5 and 454 Lakeview you have some question marks. Can you
6 explain what those are.

7 A. Those are properties which we suspect are rentals
8 but do not have a license with Douglas County.

9 Q. And you did not see any rental dates on the
10 rental report so there's no number correlated with those?

11 A. Correct.

12 Q. Okay.

13 A. And I might add that if the maintenance of this
14 rental calendar is -- is dependent on every -- every property
15 owner submitting days of occupancy. So if they did not
16 submit some occupancy days they would not be reflected in the
17 two columns we just discussed.

18 Q. Okay. So this is based upon the actual numbers
19 submitted by the members?

20 A. Correct.

21 MS. KERN: Okay. With that I would move to admit
22 Exhibit 14 for the purpose of identified days rented in low
23 season and high season.

24 MR. JONES: My only objection, Your Honor, would

1 be to the last two properties, 440 Center and 454 Lakeview to
2 the extent they contain speculation by the witness they are
3 being rented out without approval.

4 THE COURT: Well, you should have objected to his
5 testimony previously. You didn't do that. Your objection is
6 overruled. There's no information on this chart as to
7 those -- those addresses, and I'm not going to consider that
8 they were rented out. There's no evidence that they were.
9 This is just offered for the number of days this witness
10 believes that these units were rented out according to the
11 information that he garnered. I'm going to admit 14 for the
12 same reason I did for 13.

13 I'm only going to consider the days rented
14 columns to whatever relevancy that may have, and I'm not sure
15 it will have any but it's admitted for that purpose.

16 MS. KERN: Thank you, Your Honor. That's all I
17 have.

18 THE COURT: And none of the other information
19 will be considered by the Court.

20 Mr. Gilbert, thank you for coming back up, sir.
21 May I please have those exhibits.

22 THE WITNESS: Yes, Your Honor.

23 THE COURT: It's like going to the bank these
24 days, huh, you have to slide everything under.

1 THE WITNESS: Yes.

2 THE COURT: Thank you, sir.

3 THE WITNESS: You're welcome. Thank you, Your
4 Honor.

5 (Witness excused.)

6 THE COURT: Your next witness, please, ma'am?

7 MS. KERN: Michelle Salazar.

8 THE COURT: Would you pause right there, ma'am.
9 Pause right there. Face the clerk. Thank you.

10

11

MICHELLE SALAZAR,

12

called as a witness on behalf of the

13

Plaintiff having been first duly sworn,

14

was examined and testified as follows:

15

16

THE COURT: Ms. Salazar, come on up. Have a

17

seat. Please make yourself comfortable.

18

THE WITNESS: Thank you.

19

MS. KERN: Thank you.

20

DIRECT EXAMINATION

21

BY MS. KERN:

22

Q. Will you please state your name and publicly

23

spell your last for the court reporter.

24

A. Yes. Michelle Lynn Salazar, S-a-l-a-z-a-r.

1 Q. Ms. Salazar, can you identify for the Court what
2 your profession is.

3 A. Yes. I am a certified public accountant
4 specializing in forensic accounting, economic loss, business
5 valuation and general litigation services. I am also a
6 certified valuation analyst. I am a certified fraud
7 examiner. I'm an accredited in business valuation, and I'm
8 also a certified divorce financial analyst.

9 Q. Have you ever been qualified as an expert witness
10 in any proceeding before?

11 A. Yes, I have.

12 Q. Can you identify for the Court what those have
13 been.

14 A. Yes. I've been qualified on 57 different
15 occasions. 32 of those occasions were during trials and 25
16 in various depositions.

17 MS. KERN: I would like to move for the Court to
18 recognize Ms. Salazar as an expert with respect to the tax
19 information that she will be testifying to.

20 THE COURT: Well, ma'am, that's -- I see
21 attorneys do that all of the time and it's really not
22 necessary.

23 MS. KERN: Oh, okay.

24 THE COURT: So what -- you lay a foundation for

1 her credentials and then you go ahead and then you ask her
2 the questions.

3 MS. KERN: Okay. Is that old school?

4 THE COURT: That's the rules of evidence.

5 MS. KERN: Okay.

6 THE COURT: And so -- and so you really don't
7 need to do that. And then you just ask the questions and if
8 there's an objection based on her not being an expert I'll
9 hear that.

10 MS. KERN: Okay. Thank you, Your Honor. I
11 apologize.

12 THE COURT: No, ma'am. That's quite all right.

13 MS. KERN: 36 years I still learn.

14 THE COURT: And I believe I would happen to be
15 something called old school.

16 MS. KERN: No. No. What I was doing was old
17 school. No. No.

18 May I please have Exhibit 16. This is a large
19 one. Thank you.

20 Q. Could you describe briefly what Exhibit 16
21 encompasses?

22 A. Yes. Exhibit 16 is the federal income tax return
23 for Elk Point Country Club Inc. which is Form 990 filed with
24 the Internal Revenue Service.

1 Q. And it is -- if you could thumb through and
2 identify whether or not there are similar returns for a
3 period of some time, 2004, 2007, 2008, 2009.

4 A. Yes. There are multiple years of tax returns in
5 this exhibit.

6 MS. KERN: Okay. I would move for their
7 admission.

8 MR. JONES: Object. I think that lacks
9 foundation.

10 THE COURT: Sustained.

11 Q. (BY MS. KERN:) Where did you -- were these
12 provided to you by our office?

13 A. Yes.

14 Q. Okay. And do they purport to be having been
15 received and filed with the IRS, can you tell? For example
16 on plaintiffs' page 159.

17 A. Yes.

18 Q. Is the -- does the stamp that appears there, is
19 that similar to what you are familiar with which would have
20 been received by the IRS?

21 A. Yes, it is.

22 Q. And does the form comport with what your
23 understanding a Form 990 with the IRS, is it consistent with
24 what you understand that form to be?

1 A. Yes.

2 Q. If you will turn to page, plaintiffs' page 168.
3 Does this appear to be an accurate copy of the Form 990 for
4 2006 for the Elk Point Country Club Inc.?

5 A. Yes. It also has a receive stamp from the
6 Internal Revenue Service.

7 Q. So do each one of these represent accurate copies
8 of what would be submitted by an entity like the Elk Point
9 Country Club to the IRS in reporting as required in
10 connection with a Form 990?

11 THE COURT: Wait a minute. Don't answer.

12 MR. JONES: Objection. Lacks foundation. Calls
13 for speculation.

14 THE COURT: I agree. And I think -- I think you
15 need to go through the various forms and have some
16 authentication or foundation of each of them. They are a
17 number of different years here and different forms, and so
18 that's one of the hazards of taking multiple documents and
19 trying to admit them all as one exhibit.

20 MS. KERN: Well, it was -- yes.

21 Q. If you could go to plaintiffs' 180. Can you
22 review that and does that appear to be an accurate
23 identification of a Form 990 for the Elk Point Country Club
24 Inc.?

1 MR. JONES: Object to form. Same objection.
2 Lacks foundation. Calls for speculation as to the second
3 part of her question regarding --

4 THE COURT: Sustained.

5 MR. JONES: Thank you.

6 Q. (BY MS. KERN:) What is a Form 990?

7 A. A Form 990 is the income tax form that is
8 prepared and filed with the Internal Revenue Service for a
9 tax exempt organization.

10 Q. Does every tax exempt organization, are they
11 required to file a Form 990 with the IRS?

12 A. Not every tax exempt organization, but in this
13 case Elk Point Country Club as a 501c7 is required to file a
14 Form 990, and on page one of the 990 it indicates that
15 organization type.

16 Q. Okay. So have you ever reviewed or seen a Form
17 990 that was completed by any entity and filed with the IRS?

18 A. Yes.

19 Q. Does for example plaintiffs' 180, is that similar
20 to a Form 990 that you would be familiar with that would need
21 to be required to be filed with the IRS?

22 THE COURT: Ma'am, this is your problem, and so
23 to kind of just tell you where the problem is. This form
24 does not seem to have that same stamp as having been received

1 by the Internal Revenue Service.

2 Now, unless this witness can say that she has
3 reviewed this business' tax return and that this is
4 consistent with that tax return, she's going to be
5 speculating as to whether this is their tax return or just a
6 document that somebody filled out.

7 MS. KERN: If I --

8 THE COURT: So that's where you need to go with
9 this.

10 Q. (BY MS. KERN:) Can you look at the left-hand
11 side of plaintiffs' 180 where it says scanned where there's
12 some writing. Does that look familiar to you? Is that
13 similar to what is done by the IRS at any time?

14 A. I don't recall seeing a postmark date or a scan
15 date, but I think what we would look at is if you turn to
16 plaintiffs' 188, as an example this income tax return was
17 signed by Richard Jaret, the president, on April --

18 THE COURT: Ma'am, did you witness that
19 signature?

20 THE WITNESS: I did not.

21 THE COURT: Then you don't know that he signed
22 it, do you?

23 THE WITNESS: No, I do not.

24 THE COURT: Okay. Well, let's not go to what we

1 don't know.

2 Q. (BY MS. KERN:) Is there -- is there any other
3 way that you can determine an entity status other than
4 evaluating the or determining if the Form 990 is filed to
5 evidence a 501c7 exemption?

6 A. You could look at evidence that was submitted to
7 like Douglas County for property taxes indicating their tax
8 exempt status which would be 501c7.

9 Q. And did you do that?

10 A. I spoke with Douglas County and they did indicate
11 that Elk Point Country Club is a 501c7 according to their
12 records.

13 MR. JONES: Object. Hearsay.

14 THE COURT: Sustained. There's no such thing as
15 speaking with Douglas County. Douglas County is a political
16 subdivision in the State of Nevada. It does not speak.

17 Q. (BY MS. KERN:) Did you see any records of
18 Douglas County that identified the 501c7 status of Elk Point
19 Country Club?

20 A. I did not.

21 Q. In your determination or your conclusion that it
22 was a 501c7, would you have relied upon for example
23 plaintiffs' 159 that identifies that the Form 990 was
24 received by the IRS?

1 MR. JONES: Objection. Leading the witness.

2 THE COURT: Sustained.

3 Q. (BY MS. KERN:) Can you turn to page -- to
4 plaintiffs' 159.

5 A. Yes.

6 Q. Is there anything in connection with this
7 document that would lead to your conclusion that Elk Point
8 Country Club is a 501c7?

9 THE COURT: Okay. Hold on, ma'am. So the
10 problem, Ms. Kern, is you're asking her to testify from the
11 document that's not in evidence and she cannot do that.
12 This -- you know, again, you submitted, you know, 100 pages
13 or more. I don't know how many. I haven't counted them but
14 at least an inch worth of paper as a single exhibit and --
15 and it's not in evidence. She cannot testify from the
16 substance of the document that is not in evidence.

17 MS. KERN: I appreciate that, but can I make an
18 offer of proof?

19 THE COURT: Well, you're always allowed to make
20 an offer of proof but that -- go ahead.

21 MS. KERN: Okay. I would like to call one of the
22 plaintiffs who obtained these documents directly from the Elk
23 Point Country Club.

24 THE COURT: Are you asking this witness to step

1 down?

2 MS. KERN: I am asking you if that -- I am
3 identifying that as an offer of proof and asking you if I may
4 have leave of the Court to do that. It -- I will be honest.
5 It didn't even cross my mind that Elk Point Country Club
6 would try to deny that they were a 501c7 tax exempt.

7 THE COURT: Do you want to ask them to stipulate
8 to that?

9 MS. KERN: Will you stipulate that these are?

10 THE COURT: Well, wait a minute. Now you're
11 saying something different entirely. First of all, you said
12 it didn't cross your mind that Elk Point would deny that they
13 were a 501c7. Now you're asking them to stipulate to the
14 admission here. Those are two different things.

15 MS. KERN: The reason that these are submitted is
16 just to establish it is a 501c7 --

17 THE COURT: So, ma'am, again, if you're asking
18 them for a stipulation that they are a 501c7 organization you
19 may ask for that stipulation.

20 MS. KERN: So asked.

21 MR. JONES: So stipulated.

22 THE COURT: Done. And the Court assumes that as
23 a fact that's true.

24 Q. (BY MS. KERN:) Are you familiar with a 501c7

1 entity?

2 A. Yes.

3 Q. Okay. Can you explain what that is.

4 MR. JONES: Objection, Your Honor. I believe the
5 witness has not been qualified to testify as an expert as it
6 relates to tax exempt entities or qualifications where stated
7 as valuation and fraud examiner. I don't recall any
8 discussion of tax exempt entities.

9 THE COURT: She's a certified public accountant.
10 Your objection is overruled.

11 THE WITNESS: Yes, I am familiar with 501c7
12 organizations.

13 Q. (BY MS. KERN:) Can you explain what they are.

14 A. They are social clubs that are tax exempt by --
15 exempted from tax by the Internal Revenue Service.

16 Q. What is the central purpose of a social club
17 according to the IRS?

18 A. According to the IRS the central purpose of a
19 social club is to provide benefits to its members, including
20 social and recreational benefits such as a marina or private
21 beach and also to provide equal benefits to all members.

22 Q. What's the rationale for providing tax exempt to
23 such a club?

24 MR. JONES: Calls for speculation.

1 THE COURT: Well, I don't know that that's true.
2 She may have studied the legislation and she can tell me if
3 she knows.

4 MR. JONES: I would be okay with that.

5 THE WITNESS: According to the IRS the rationale
6 for the tax exempt status is that the private members will be
7 in the same financial position with or without the club.

8 MR. JONES: Objection, Your Honor. I think that
9 response lacks foundation. There's no reliance -- according
10 to the IRS doesn't constitute sufficient foundation for that
11 opinion.

12 THE COURT: Overruled.

13 Q. (BY MS. KERN:) What information or documents did
14 you review from the IRS or have you reviewed to support your
15 conclusion or your identification of what the rationale is?

16 A. I have reviewed many documents that have been
17 published by the Internal Revenue Service, including
18 documents such as continuing education memorandums that are
19 published by the Internal Revenue Service. I have also
20 reviewed the internal revenue website which provides guidance
21 specific to social clubs, and I have reviewed various tax
22 court documents just to get an understanding of the IRS
23 treatment of a social club 501c7 organization.

24 Q. Did you review any documents with respect to the

1 organization of the Elk Point Country Club?

2 A. I did.

3 Q. Can you identify what those documents were.

4 A. Yes. I reviewed the federal income tax returns
5 Forms 990 that was provided to me by your office. I reviewed
6 the various organization documents of the Elk Point Country
7 Club. I reviewed the rules and regulations of Elk Point
8 Country Club. I reviewed various VRBO advertisements for the
9 various properties within Elk Point Country Club, and I am
10 physically familiar with the location.

11 Q. Okay. Did you form an opinion as to whether the
12 Elk Point Country Club was organized in accordance with IRS
13 requirements for a social club and exempt entity?

14 A. Yes. In reviewing the preamble to the bylaws of
15 Elk Point Country Club it indicates that the purpose of the
16 club is to provide pleasure, recreation and other
17 non-profitable purposes. And it also indicates in those
18 bylaws that the intent of the country club is to not provide
19 a profit to the unit owners, to the members.

20 Q. And are those factors consistent with what the
21 IRS identifies as necessary factors for a social exempt club?

22 A. Yes.

23 Q. Can you identify other factors the IRS looks at
24 in determining tax exempt status?

1 A. Yeah. There's -- there's three main factors.
2 The first factor is you have an organization that consists of
3 individual members and that they are commingling and have
4 common interest, that's number one.

5 And number two is that a tax exempt club provide
6 pleasure, recreation and other non-profitable purposes not on
7 a commercial basis.

8 And number three is that none of the net earnings
9 inure to the private benefit of the members or the
10 shareholders.

11 Q. Are the activities of the individual members of
12 the club relevant to the IRS in reviewing a tax exempt
13 entity?

14 A. Yes. Based upon the criteria that the IRS looks
15 at I believe that the individual members' activities are very
16 relevant because if a member is generating income or profit
17 from the use of the private tax exempt facilities that could
18 jeopardize the entity's tax exempt status.

19 MR. JONES: Object to the witness' response to
20 the extent that it uses speculation, her use of the term
21 could jeopardize tax exempt status.

22 THE COURT: You'll be able to cross-examine her
23 on it.

24 MR. JONES: Thank you.

1 Q. (BY MS. KERN:) Would the -- in your opinion
2 would the IRS look at any revenue being generated by the
3 individual members?

4 A. The IRS cares about inurement to the private
5 members of the organization, and so if they are generating
6 income as a result of the benefit of using the private
7 facilities I believe that they would.

8 Q. Can you explain what inurement means as you are
9 using it.

10 A. Yeah. A inurement is not necessarily just
11 specific to a member receiving distributions from the entity.
12 It can also include distribution or earnings that are not
13 distributed to the members. And so an example of that would
14 be if the entity is providing additional services to the
15 members but is not increasing the membership dues, that would
16 be an example of a inurement.

17 And then secondly if the members are receiving
18 income or profit from the use of the private facilities that
19 could also be inurement. So really in this context we're
20 looking at are the members privately benefiting from the use
21 of the Elk Point Country Club facilities.

22 Q. And does --

23 THE COURT: Privately financially benefiting.

24 THE WITNESS: Privately financially benefiting,

1 yes.

2 THE COURT: Because it's got to be a financial
3 benefit. Every one of the members of the organization would
4 say that they receive a benefit by having a membership there
5 and the opportunity to use the marina or the harbor or the
6 beach or whatever facilities that there are?

7 THE WITNESS: Yes. So private financial benefit,
8 yes.

9 Q. (BY MS. KERN:) Could an increased amount of
10 rental being received for a property within Elk Point
11 constitute that financial benefit?

12 A. It can.

13 THE COURT: Wait a minute. An increase from
14 what? That question is ambiguous. You said an increase from
15 the rent. Refine that question a little bit.

16 MS. KERN: Okay.

17 THE COURT: Because I don't know what you're
18 increasing.

19 MS. KERN: Okay. I'll rephrase. Thank you, Your
20 Honor.

21 THE COURT: Thank you.

22 Q. (BY MS. KERN:) Could you -- would based upon
23 your review of the advertisements that you looked at?

24 A. Yes.

1 Q. Could obtaining income from the rental of the
2 properties constitute a financial benefit?

3 A. Yes.

4 Q. Why?

5 A. Because the individual members or the unit owners
6 are generating income or profit from the rental of their
7 units while advertising for the use of the private benefits
8 the Elk Point Country Club owns.

9 Q. So for example if I could give a contrast. If I
10 rent and I say but there's this really beautiful private
11 beach there but you don't get to use it. You just can use my
12 house. They are not utilizing any -- their renter is not
13 going to be utilizing any of the common facilities. So they
14 wouldn't in that case would I be correct that they wouldn't
15 be getting a financial benefit from the club facilities?

16 A. Correct.

17 Q. But if I instead offer my property and the
18 benefit is you get this private exclusive beach I am now
19 gaining some financial benefit from the facility?

20 MR. JONES: Objection. Calls for speculation.
21 Relevance.

22 THE COURT: Overruled. You can answer that, and
23 then I'm going to ask you something.

24 THE WITNESS: In my experience and based upon

1 involvement in various real property appraisals with other
2 experts, a vacation rental that includes a private beach and
3 facility like Elk Point Country Club would rent for a higher
4 value per night than the similar property.

5 THE COURT: You weren't asked that, ma'am. I
6 don't think that's what you were asking.

7 MS. KERN: I was asking if there was an
8 additional financial benefit as a result of having the club
9 facilities.

10 THE COURT: Okay. Go ahead. I'm sorry.

11 THE WITNESS: Okay. As compared to having that
12 same property without access to the private beach
13 recreational area.

14 THE COURT: What about access to a private road?
15 The road to the cabin is private and it belongs to the
16 organization.

17 THE WITNESS: Correct.

18 THE COURT: So if you get to use the road to come
19 into the house that's using the association's property, isn't
20 it?

21 THE WITNESS: Yes.

22 THE COURT: And that would be the same as using
23 the beach, right?

24 THE WITNESS: I would have to -- I would have to

1 speculate on that answer, but.

2 THE COURT: Well, so but it becomes critical
3 here.

4 THE WITNESS: Okay.

5 THE COURT: Because you are -- you're then
6 quantifying --

7 THE WITNESS: Uh-huh.

8 THE COURT: -- how much extra utility there is to
9 renting this home.

10 THE WITNESS: Okay.

11 THE COURT: Via the beach via the barbecue,
12 patio, via the harbor or via the road?

13 THE WITNESS: Correct.

14 THE COURT: And so what if you only get to use
15 the patio that belongs to the association? Does that
16 increase the value?

17 THE WITNESS: I think that we would have to
18 analyze specific transactions wherein there is a difference
19 in the advertisement of the different amenities throughout
20 the country club.

21 THE COURT: Well, I'm not asking you about
22 advertisement.

23 THE WITNESS: Okay.

24 THE COURT: Because I don't think the IRS really

1 cares about advertisement. They care about value, right?

2 THE WITNESS: Correct.

3 THE COURT: Okay. So it's a value added, right?

4 THE WITNESS: Right. We're trying to see whether
5 the criteria of if the member is in the same position they
6 would be without the benefits of the club. So that's why the
7 IRS permits tax exempt status is because they say whether we
8 have the club that provides these services or not as long as
9 the financial transaction is the same with or without the
10 club then it's tax exempt.

11 THE COURT: Well, what if you had to park up at
12 the edge of the road and walk down to the cabin?

13 THE WITNESS: Yeah.

14 THE COURT: So using the road is a value.

15 THE WITNESS: Uh-huh.

16 THE COURT: Yes?

17 THE WITNESS: I don't know that answer.

18 THE COURT: You've never had to pack in.

19 MS. KERN: If I could follow-up on that question
20 a little bit.

21 THE COURT: Go ahead.

22 Q. (BY MS. KERN:) If you rent a property without
23 the private beach, those amenities, you always have access to
24 the unit somehow, whether it's by a road or walking in,

1 correct? I mean, and I guess let me ask a better question.

2 Parsing out access from the beach facilities
3 really is apples and oranges, is it not?

4 MR. JONES: Object to form. Vague. Ambiguous.

5 THE COURT: Yeah. I'm not sure I understand it.

6 MS. KERN: I guess I --

7 THE COURT: I might have thrown her off with my
8 road usage, but.

9 MS. KERN: And I wanted to follow-up on that.

10 Q. Because do you see a distinction between parsing
11 out a road as adding value as opposed to looking at a beach
12 and a marina and access to like private access to Lake Tahoe?
13 Do you see that as the same kind of value?

14 A. I see that as if I'm renting a VRBO property I
15 would expect to have access somehow and that would be part of
16 its value. But if I had access to a private beach and
17 private facilities that would be added value in addition to
18 the access value.

19 Q. And that added value is what you were talking
20 about with concerns about inurement to the owners that were
21 renting and advertising the private access?

22 A. Yes.

23 Q. Okay. Therefore, I guess the next question then
24 is does that commercial transient use that's being

1 advertised, does that give an extra benefit to those owners
2 versus the other members within the social club?

3 A. Can you ask that question again.

4 Q. Yes.

5 A. Okay.

6 Q. Does the rental by a member on one of the
7 websites and actually renting it with private access, does
8 that create an inequality with the members that are not doing
9 that?

10 MR. JONES: Object to form. Vague ambiguous as
11 to inequality.

12 THE COURT: Sustained. And there's no
13 evidentiary foundation for that.

14 Q. (BY MS. KERN:) Can I -- I thought that you
15 testified that one of the factors that the IRS looks at is
16 whether or not the members were treated equally.

17 A. That is one of the factors, yes.

18 Q. Okay. So my question is does the ability to
19 transient commercial rent their properties create an
20 inequality among the members?

21 THE COURT: Well, the problem there is there's
22 not evidence that all of the members don't have that same
23 ability. So if you're talking -- you know, some may choose
24 not to, but how does that create an inequality? And this

1 witness wouldn't be able to testify to that I don't think.

2 MS. KERN: I'm talking about reality. We haven't
3 identified that -- we have identified that there are -- we've
4 already had testimony that some people do not rent.

5 THE COURT: But that's a choice, ma'am. That's a
6 choice.

7 MS. KERN: But that's a different issue than
8 whether or not the fact that it is occurring is creating an
9 inequality that jeopardizes the tax exempt status. That's
10 the question that I'm asking.

11 THE COURT: I don't see that, ma'am.

12 MS. KERN: Well, okay. So --

13 THE COURT: You know, I don't regard it as an
14 inequality. It is choice as to how to use that property.
15 Now, it may be that some individuals are engaging in behavior
16 that -- that they shouldn't be allowed to engage in, but
17 everybody is allowed to engage in that same behavior
18 apparently up until now until I get done.

19 MS. KERN: Okay.

20 THE COURT: And maybe once I get done they won't
21 be allowed to. Maybe they will. We're not done with our
22 hearing yet.

23 MS. KERN: Okay.

24 THE COURT: But they all have the same

1 opportunity.

2 Q. (BY MS. KERN:) In your opinion can the Elk Point
3 Country Club tax exempt status still be jeopardized if it's
4 not the Elk Point Country Club that's actually doing the
5 renting?

6 A. Doing the advertising and the soliciting?

7 Q. Yes.

8 A. In my opinion based upon the fact that Elk Point
9 Country Club is encouraging and facilitating the unit owners
10 in renting their properties to the public that would be
11 providing pleasure and recreation on a commercial basis, and
12 so I think that it does jeopardize the tax exempt status of
13 Elk Point Country Club.

14 THE COURT: What if their bylaws allow for
15 tenants?

16 THE WITNESS: Their bylaws do allow for tenants.

17 THE COURT: Right. So that would be for profit,
18 right, within the bylaws?

19 THE WITNESS: But we're specifically -- I mean,
20 that's outside of what I've been asked to testify on.

21 THE COURT: Not now it isn't.

22 THE WITNESS: In regards to the 501c7
23 organization the requirements are that they do not provide
24 pleasure, recreation and non-profitable purposes for a

1 commercial basis.

2 THE COURT: So could it be that their bylaws are
3 not consistent with a 501c7?

4 THE WITNESS: It could be, yes.

5 THE COURT: That could very well be the case.

6 THE WITNESS: Yes. So they have to be organized
7 for a non-exempt purpose and they have to operate in that
8 fashion. That's one of the things that the IRS says.

9 THE COURT: Okay. And so, ma'am, I'm going to
10 let you pick back up here. But there are issues that we're
11 trying to guide us to here, and I'm not trying to try your
12 case, and you'll get to it when you do.

13 But does it matter how long the rental is for if
14 it's done for profit?

15 THE WITNESS: Not from the IRS 501c7 standpoint.

16 THE COURT: Thank you.

17 Go ahead, Ms. Kern.

18 Q. (BY MS. KERN:) But from the standpoint of the
19 county for example there is a distinction as to what is
20 commercial rental and what is non-commercial rental. The
21 short-term or transient commercial use rental are required to
22 pay taxes, correct?

23 MR. JONES: Objection. That's a very leading
24 question, Your Honor.

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THE COURT: Sustained.

Q. (BY MS. KERN:) Do you know whether or not if you transient commercial use you have obligations to pay tax to the county entity?

A. You do, yes.

Q. And if you have -- if you have a tenant on a long-term basis does Douglas County require that you pay taxes?

A. It does not.

Q. So it views the motel type transactions where it's a day or two or a week or two, anything less than 28 days it is treated as a commercial venture and you have to pay taxes?

A. Yes.

Q. And so would the IRS take that into consideration when looking at what kind of a tenant it is?

A. The IRS doesn't care about what kind of tenant it is, but it does care about inurement and the factors that I've already testified to.

Q. Okay. In your review of the advertisements were you able to reach an opinion whether you could make more money on those short-term motel type rentals?

MR. JONES: Objection. Vague and ambiguous.

MS. KERN: Than -- I wasn't finished.

1 MR. JONES: My apologies, counsel.

2 Q. (BY MS. KERN:) More income or rental revenue
3 than you could from a long-term rental arrangement?

4 A. I didn't do a comparison of the advertisements on
5 the short-term versus the long-term basis. So I can't answer
6 that.

7 Q. Did you see any advertisements on VRBO or other
8 sites like that for long-term rentals?

9 A. I don't recall seeing any.

10 Q. So the only ones that you saw were the ones that
11 were for the transient commercial use that is less than
12 28 days?

13 A. Yes.

14 Q. Okay. I want to explore a little bit more your
15 opinions with respect to whether the tax exempt status could
16 be jeopardized if the Elk Point Country Club is not deriving
17 income from the rentals. Do you believe that that could
18 happen?

19 A. Yes. So the -- what it comes back down to the
20 private benefit that's generated by the members. So the IRS
21 says that the members cannot privately benefit nor receive
22 income or a profit from the activities of a non-exempt
23 organization. And then the IRS goes into identify what they
24 call non-related income.

1 And specifically in regards to non-related income
2 they identify factors such as solicitation of the public for
3 a fee. Recurring activities or activities that are intended
4 to generate income or a profit, and so those factors call
5 into question the tax exempt status of the organization.

6 MR. JONES: Object to the witness' response, Your
7 Honor, to the extent that it calls for speculation. There's
8 no pending IRS action. The question even was phrased could
9 the IRS take a certain action if this were to occur.

10 THE COURT: Overruled. The argument here is that
11 that is the concern of these homeowners and members of the
12 organization, and they fear the prospect of the IRS taking
13 action and, therefore, it's very relevant and thank you.

14 Go ahead.

15 Q. (BY MS. KERN:) Can you give examples or would
16 you identify examples specific to Elk Point Country Club of
17 unrelated business income or non-traditional business
18 activities that you said were something that would be looked
19 at?

20 A. Yeah. I mean following that criteria the
21 generation of net income or a profit to the members would be
22 part of that.

23 Also because they are soliciting fees from
24 nonmembers from members of the public that also falls within

1 that same criteria, and the vacation rentals or the
2 short-term transient rentals are on a recurring basis, and
3 the purpose of the short-term rentals is to generate a profit
4 for the unit owners, and so I think that those fall within
5 the criteria that the IRS says this entity is no longer a
6 non-exempt entity.

7 MR. JONES: Your Honor, objection to the extent
8 that the purpose of the -- the testimony regarding the
9 purpose of the rentals is to generate a profit for the unit
10 owners. There's no foundation for that and it calls for
11 speculation.

12 THE COURT: I understand it. You'll get to
13 cross-examine her.

14 Q. (BY MS. KERN:) With respect to you testified
15 that there was some involvement by the country club in
16 connection with the rentals, either condoning or
17 facilitating. Can you identify what activity you believe the
18 Elk Point Country Club is doing to facilitate or condone it?

19 A. It's my understanding that Elk Point Country Club
20 and its board members are facilitating and encouraging the
21 use of the units for transient rental units because they have
22 a calendar in which they track the rentals of the properties.

23 And also they are aware that the unit owners are
24 renting their units to nonmembers and allowing the use of the

1 private facilities of Elk Point Country Club?

2 Q. And you did not find or were provided anything
3 that would suggest that they were trying to prevent it or do
4 any enforcement to stop it? You weren't aware of any of
5 that?

6 A. I didn't see anywhere where they were trying to
7 stop it, no.

8 Q. In your opinion what could happen if the IRS
9 discovered that this transient commercial use was taking
10 place at the Elk Point Country Club?

11 MR. JONES: Objection. Calls for speculation.

12 THE COURT: Sustained, but I think you can
13 rephrase that and probably get the same answer that you want.

14 MS. KERN: Okay.

15 Q. What do you see as the possible consequences with
16 respect to the tax exempt status if the IRS were to determine
17 that the transient commercial use was occurring?

18 MR. JONES: Same objection, Your Honor.

19 THE COURT: Sustained. Ms. Kern, you'll get
20 there.

21 Q. (BY MS. KERN:) What happens? Let's say the IRS
22 determines that the TCU would affect their tax exempt status,
23 what are the things that the IRS could do?

24 A. The IRS could take away their tax exempt status.

1 The IRS could start a tax fraud investigation if they wanted
2 to. They could require an opening of the tax files from the
3 inception of the entity which is over 100 years ago. But
4 really the exact damage from that is unknown because, one, we
5 don't know what the Internal Revenue Service would do,
6 whether they would consider this to be tax fraud and if so
7 what years they would consider.

8 And then also we don't have current financial
9 information for Elk Point Country Club to see how they --
10 what they have submitted to the Internal Revenue Service over
11 the past couple of years and for 2020.

12 Q. Okay. Do you have an opinion as to whether or
13 not the information that you have reviewed could give rise to
14 the IRS determining that they would revoke the tax exempt
15 status?

16 MR. JONES: Objection. Calls for speculation.
17 Lacks foundation.

18 THE COURT: Well, it is speculation. Her opinion
19 as to whether they might do something is --

20 MS. KERN: That's not the question. The question
21 is whether or not based upon the information that she has
22 reviewed she has determined that it is more likely than not
23 or possible, her words, I don't want to -- I don't want to
24 imply words, whether or not it could lead to the IRS revoking

1 the tax status. I want -- I want her to be able to testify
2 to that. I don't want to ask the question in a way that is
3 suggesting what the answer is.

4 THE COURT: Well, you've just suggested it
5 several times there.

6 MS. KERN: Well, I didn't make the objection. I
7 had to answer the objection.

8 THE COURT: Ma'am, do you have any reason to
9 believe that the Internal Revenue Service is engaging in an
10 investigation of this organization?

11 THE WITNESS: I'm not aware of an investigation
12 by the IRS, no.

13 THE COURT: Do you have any reason to believe
14 that you know what the outcome of such an investigation would
15 be or what -- what the potential penalty would be? You just
16 named several.

17 THE WITNESS: Right.

18 THE COURT: Do you have any reason to believe you
19 could pick one that is more likely than not would happen?

20 THE WITNESS: I think the IRS would look at
21 criteria for being a tax exempt -- tax exempt entity, and so
22 by looking at the documents and the transactions that are
23 occurring I think that Elk Point Country Club has not met the
24 criteria becoming a tax exempt entity. So I think that the

1 IRS would look at those factors that they have created to
2 determine whether Elk Point Country Club can remain tax
3 exempt or not, but I think that their exempt status is
4 jeopardized.

5 THE COURT: Thank you.

6 Q. (BY MS. KERN:) And is it your opinion that an
7 entity should wait until there's an investigation to do
8 something about the conduct that might jeopardize their tax
9 exempt status?

10 MR. JONES: Objection. Leading.

11 THE COURT: No doctor encourages people to keep
12 smoking until they get a lung problem. I already understand
13 that as a CPA she would encourage people to take care of the
14 problem before -- to slow down before they get pulled over,
15 right?

16 THE WITNESS: Yes.

17 MS. KERN: Thank you. I needed testimony of that
18 because there's been a lot of argument that it's all
19 speculation and we shouldn't worry about it. There's no
20 investigation.

21 THE COURT: I get it.

22 MS. KERN: And I think -- I wanted the record to
23 reflect that with testimony that, in fact, that's not what
24 should occur.

1 THE COURT: You think someone ought to fix
2 something?

3 THE WITNESS: I think if there's a potential
4 issue it needs to be figured out and addressed before the IRS
5 becomes aware of it.

6 MS. KERN: Thank you. Those are all my
7 questions.

8 THE COURT: Thank you, ma'am.

9 CROSS-EXAMINATION

10 BY MR. JONES:

11 Q. Good afternoon, Ms. Salazar. My name is Prescott
12 Jones. I represent the Elk Point Country Club. I don't
13 believe you and I have ever met before.

14 A. We have not.

15 Q. I have a few follow-up questions for you. How
16 many instances are you aware of where an HOA's 501c7 status
17 has been revoked by the IRS due to short-term vacation
18 rentals?

19 MS. KERN: Objection. It is an inaccurate
20 statement of the law. There's not an HOA social club
21 exemption. The IRS has a social club exemption.

22 THE COURT: Modify your question.

23 MR. JONES: Well, I think the question is fair,
24 Your Honor. We can start with the broader.

1 THE COURT: Go ahead.

2 Q. (BY MR. JONES:) Ms. Salazar, how many instances
3 are you aware of a 501c7 nonprofit organization having their
4 tax exempt status revoked as a result of short-term vacation
5 rentals?

6 A. I am not -- I have never been personally involved
7 in a 501c7 that had their tax exempt status revoked.

8 Q. Did you review IRS guidance, rulings or other
9 documents of the IRS to determine whether or not, in fact, a
10 501c7 tax exempt status has been revoked as a result of
11 short-term vacation rentals?

12 A. I did read various guidance from the Internal
13 Revenue Service in which they were talking about social
14 clubs, soccer clubs, but I don't recall the final opinion
15 being the revocation of the 501c7 status in those instances.

16 Q. So just to summarize your testimony now, it's
17 fair to say you have never seen an instance where 501c7 tax
18 exempt status has been revoked due to short-term vacation
19 rentals?

20 A. I did not specifically research that issue, and
21 if I did research that issue I would be able to, you know,
22 answer that, but I didn't specifically try to figure out how
23 many 501c7 organizations were revoked.

24 Q. I'm not sure that's the question I was asking.

1 Is it fair to say you have not encountered an instance where
2 501c7 tax exempt status has been revoked as a result of
3 short-term vacation rentals?

4 MS. KERN: I'm going to object. She answered the
5 question. He doesn't like her answer.

6 THE COURT: Overruled.

7 MS. KERN: But she answered it.

8 THE COURT: Overruled.

9 THE WITNESS: I have not.

10 MR. JONES: Thank you.

11 Q. In your opinion can an individual member of a
12 501c7 organization ever financially benefit from the
13 organization?

14 MS. KERN: I'm going to object. That's vague as
15 to what financially benefit is.

16 THE COURT: I think all of her testimony has been
17 about financial benefits and I asked her about that
18 specifically. Go ahead and answer the question.

19 THE WITNESS: In order for a 501c7 entity to
20 remain tax exempt they have to be a membership with
21 individuals participating commingling with common benefit or
22 common purposes. They have to provide pleasure, recreation
23 and other non-profitable purposes not commercially benefiting
24 and, three, the members cannot inure a benefit from the net

1 earnings of the Elk Point Country Club.

2 Q. (BY MR. JONES:) So is it fair to say your
3 response to my question is you believe that, no, an
4 individual member can never financially benefit from a 501c7
5 organization?

6 A. The tax exempt status requires that the
7 individual members do not privately benefit, and also there's
8 that criteria of all members should be treated equally. So
9 the purpose is that the entity is not generating income
10 otherwise it wouldn't be a tax exempt status.

11 Q. Isn't it true though that IRS guidance does allow
12 a 501c7 nonprofit organization to derive some profit from its
13 common element as long as it doesn't constitute substantially
14 all of its earnings?

15 A. A 501c such as Elk Point Country Club generates
16 membership dues, and Elk Point Country Club specifically also
17 generates investment income in which they pay taxes on, but
18 they are not supposed to -- the members of Elk Point Country
19 Club are not supposed to derive a private benefit from the
20 use of the private facilities of Elk Point Country Club.

21 MR. JONES: Your Honor, I move to strike the
22 response as nonresponsive.

23 THE COURT: Well, I think it was very responsive.
24 That motion is denied.

1 MR. JONES: I apologize for cutting you off, Your
2 Honor.

3 THE COURT: It's okay.

4 Q. (BY MR. JONES:) So it's your opinion then that
5 despite the substantially all test that I described in my
6 last question, the benefit the individual owners of and
7 members of the Elk Point Country Club cannot have any
8 financial benefit whatsoever from renting their property; is
9 that correct?

10 MS. KERN: I'm going to object. Asked and
11 answered.

12 THE COURT: No. Overruled. No. It's a
13 different question.

14 THE WITNESS: You have to still follow the
15 criteria of the tax exempt organization under the IRS rules.
16 So what I think that you're asking is there is the issue of
17 the nontax exempt related income. So it's when you're
18 soliciting the public for a fee it is the recurring
19 activities such as a recurring vacation rental and then also
20 generating activities that are intended to generate an income
21 or a profit, and if those nonbusiness or nonentity related
22 transactions are happening then they are no longer considered
23 tax exempt.

24 Q. So your answer to my question would be then, no,

1 there's not an instance where a member of a 501c7
2 organization like the Elk Point Country Club can profit off
3 of their ownership of a house; is that correct?

4 MS. KERN: I'm going to object. He wants to
5 pigeonhole it into a different portion, but she's answering
6 it in connection with the criteria. I'm going to object that
7 he's asking and answering and misstating her testimony.

8 THE COURT: That objection is overruled. It's
9 cross-examination. He needs to do this.

10 THE WITNESS: Under the IRS rules, if the members
11 are receiving private benefit from the facilities offered by
12 Elk Point Country Club it calls into question their tax
13 exempt status.

14 Q. (BY MR. JONES:) So it's fair to say then your
15 testimony is that, no, the private member cannot benefit from
16 their ownership of a property within the Elk Point Country
17 Club under your opinion regarding 501c7; is that correct?

18 A. Under the guidelines set forth by the Internal
19 Revenue Service they say that the private member should not
20 receive any inurement from the earnings of the Elk Point
21 Country Club.

22 Q. In your opinion that would encompass short-term
23 vacation rentals, correct?

24 A. Yes.

1 Q. That would also encompass longer term rentals
2 such as leases of the property longer than 28 days, correct?

3 A. I think you have to look at the specifics of
4 those transactions though because it has to encompass the
5 utilization of the private facilities offered by Elk Point
6 Country Club. So you can't just take a broad, you know,
7 hypothetical question. You have to specifically relate it to
8 the use of those private facilities.

9 Q. Well, are you assuming all short-term vacation
10 renters are utilizing the common areas of the Elk Point
11 Country Club?

12 A. I am not.

13 Q. Are you assuming that none of the long-term
14 renters would be utilizing the common elements?

15 A. I'm not.

16 Q. So why the delineation between short-term
17 vacation renters and longer term more traditional tenants?

18 A. I didn't do an analysis of short-term versus
19 long-term.

20 Q. Well, as you sit here today do you believe there
21 would be a difference between the two as it relates to the
22 analysis of whether or not the Elk Point Country Club would
23 be able to remain a 501c7 tax exempt organization?

24 A. The 50 -- the IRS doesn't care about whether it's

1 short-term or long-term. They care about the private benefit
2 to the individual owners.

3 Q. Okay. So in your opinion then the Elk Point
4 Country would be in violation and perhaps putting its tax
5 exempt status in jeopardy by allowing not only short-term
6 vacation renters but also long-term renters too, correct?

7 A. It depends on if the renters are, if the
8 advertisement for those renters includes the use of the
9 private facilities offered by Elk Point Country Club.

10 THE COURT: No. Wait a minute, ma'am. It
11 doesn't depend on the advertisement at all.

12 THE WITNESS: The use of.

13 THE COURT: It depends on the actual use.

14 THE WITNESS: Right.

15 THE COURT: The advertisement --

16 THE WITNESS: Right.

17 THE COURT: May be evidence of that use.

18 THE WITNESS: The access and the use of.

19 THE COURT: Right.

20 THE WITNESS: Right.

21 THE COURT: It does depend it all on
22 advertisement.

23 THE WITNESS: Correct. You're right. Yep.

24 THE COURT: Thank you. Go ahead.

1 Q. (BY MR. JONES:) Okay. And it would be fair to
2 say the use of the roads would also be encompassed within the
3 common elements as well, correct?

4 A. I would expect access to the roads to have entry
5 into a property at Elk Point, yes.

6 Q. Ms. Salazar, are you retained by the plaintiffs
7 in this case as an expert witness?

8 A. I have been retained to assist in the
9 determination of whether the tax exempt status is at question
10 or not.

11 Q. Do you recall when you were retained by the
12 plaintiffs in this case?

13 A. Yes, March of 2020.

14 Q. There's a declaration that was attached to the
15 plaintiffs' reply in support of the preliminary injunction.
16 Do you recall that declaration?

17 A. Yes.

18 Q. Did you draft that declaration?

19 A. I assisted in the drafting of that declaration,
20 yes.

21 Q. Do you recall when you drafted that declaration?

22 A. August of two -- it was filed on August 24th of
23 2020.

24 Q. You said your retention date was back in March.

1 Do you recall the exact date? I apologize if you already
2 testified to that.

3 A. I don't recall the exact date. It was March,
4 mid-March.

5 MR. JONES: Your Honor, I would like to renew my
6 request to strike the expert's testimony as it relates to the
7 fact that the preliminary injunction was filed on June 29th,
8 2020, without any opinion of the expert. The expert's
9 opinion was only included in the reply brief which was
10 contemporaneously submitted with a motion or request for
11 submission of the briefing which does not allow my client to
12 retain an expert and file an expert opinion in order to rebut
13 this expert's opinion that she is presenting today. I
14 believe it's improper gamesmanship and shouldn't be tolerated
15 by this Court.

16 MS. KERN: We didn't even think that we would
17 need to have that testimony until we saw the opposition. The
18 opposition ended up going into a great deal of what we was in
19 our opinion inaccurate description of what the IRS would look
20 at and what the IRS would do. And as a result that is when
21 we determined that it would be necessary to counter what the
22 opposition. If you look at the reply it is solely related to
23 the assertions and arguments that --

24 THE COURT: I've already ruled on this issue and

1 my ruling stands.

2 MR. JONES: Thank you, Your Honor.

3 Q. I apologize, Ms. Salazar. I need to review my
4 notes.

5 THE COURT: Sir, you take your time.

6 MR. JONES: Thank you.

7 Q. Ms. Salazar, is it fair to say based on your
8 testimony earlier today that you didn't see any evidence
9 whatsoever that the HOA received any proceeds of any
10 short-term vacation rentals?

11 A. The only access to financial information that I
12 have is the income tax returns that we initially talked
13 about. And on the income tax returns it just shows
14 membership dues and assessments and then interest from the
15 investment income that I discussed.

16 Q. Do you have any reason to believe that the HOA
17 received any of the proceeds of the short-term vacation
18 rentals that have been discussed so far today?

19 MS. KERN: Objection. Speculation.

20 THE COURT: Overruled. The question is whether
21 she has any reason to believe that.

22 THE WITNESS: I don't have any reason to believe
23 that Elk Point Country Club received income from the vacation
24 rentals.

1 Q. (BY MR. JONES:) And I apologize. When I refer
2 to the HOA I'm, of course, talking about the Elk Point
3 Country Club, but I appreciate your clarification on your
4 response. Thank you.

5 A. Sure.

6 Q. Do you have any opinion as to whether or not
7 appreciation of the value of a home would constitute an
8 inurement to an individual member of the HOA?

9 A. The IRS guidelines that I looked at didn't talk
10 about appreciation of real property, and so I didn't see
11 anything in that regard as it relates to inurement.

12 Q. Well, the guidelines that you looked at also
13 didn't mention anything about short-term vacation rentals
14 too; isn't that the case?

15 A. It didn't specifically address short-term
16 vacation rentals, no.

17 Q. All right. Ms. Salazar, I don't think I have any
18 other questions. Thanks so much.

19 A. Thank you.

20 THE COURT: Ms. Kern, I have a few questions, and
21 you might want to wait until I'm done so you can incorporate
22 mine into yours.

23 MS. KERN: Thank you, Your Honor.

24 THE COURT: Ms. Salazar, you're familiar with the

1 term, just to follow up on these last questions, income
2 property.

3 THE WITNESS: Yes.

4 THE COURT: What if someone were to purchase
5 units, a unit or units there or income property to rent for
6 long-term rental, say six months or a year or longer and it's
7 an income property, would that violate these rules?

8 THE WITNESS: Under the guidelines that the IRS
9 provides for social club 501c7 status I think it would
10 jeopardize the tax exempt status of the organization.

11 THE COURT: Okay. Now, moving from the idea of
12 income property to someone who owns a home there and owns a
13 home in another place.

14 THE WITNESS: Uh-huh.

15 THE COURT: Suppose they decide, you know, we
16 really don't use it during the winter.

17 THE WITNESS: Uh-huh.

18 THE COURT: So let's have a long-term lease, six
19 months.

20 THE WITNESS: Uh-huh.

21 THE COURT: And pay our mortgage and pay our dues
22 and that sort of thing. That would violate it also, wouldn't
23 it?

24 THE WITNESS: Are those -- in that scenario are

1 they renting that unit and then also allowed access to the
2 private beach?

3 THE COURT: Yes.

4 THE WITNESS: Or are they just --

5 THE COURT: Yes.

6 THE WITNESS: So they are allowed access to all
7 of the amenities?

8 THE COURT: Yes.

9 THE WITNESS: Then I think, yes, it does.

10 THE COURT: Now, one of -- when you -- so when
11 you talk about recurring.

12 THE WITNESS: Yes.

13 THE COURT: Is there some guideline with the IRS
14 as to how frequently that recurrence has to be?

15 THE WITNESS: No, it didn't define that.

16 THE COURT: So it could be, you know, every week
17 for a rental, every two-week rental or it could be a
18 six-month rental or a year rental. It's just recurring that
19 we lease it again when that --

20 THE WITNESS: Right. It just says recurring,
21 correct.

22 THE COURT: Okay. Now, the distinction between
23 reporting to Douglas County and the Douglas County taxes and
24 the IRS, the IRS doesn't -- is not dependent on what Douglas

1 County does.

2 THE WITNESS: They are not, correct.

3 THE COURT: And they make an independent
4 decision?

5 THE WITNESS: Yes.

6 THE COURT: All right. And when you say inuring
7 to the several times, and what I wrote down, if I got it
8 wrong you tell me.

9 THE WITNESS: Okay.

10 THE COURT: But you spoke about the social club
11 having income that inures to the benefit of the individual?

12 THE WITNESS: Correct.

13 THE COURT: But if the social club isn't getting
14 income from it.

15 THE WITNESS: Uh-huh.

16 THE COURT: And -- and only the individual is,
17 that inures to the benefit of the individual, does that still
18 violate the rule?

19 THE WITNESS: The issue there is that the country
20 club and the board members are encouraging and facilitating
21 the use of their private facilities, thereby allowing the
22 members to privately benefit.

23 THE COURT: How are they doing that? Tell me how
24 they are doing that.

1 THE WITNESS: So they are -- it's my
2 understanding that the members are required to include any
3 vacation, upcoming vacation rentals on the calendar of, you
4 know, I'm going to rent out my --

5 THE COURT: What if they don't?

6 THE WITNESS: I think that that's required under
7 the rental committee requirements of the bylaws.

8 THE COURT: But they don't have to do a long-term
9 rental, right?

10 THE WITNESS: I don't know that. Yeah. So they
11 are not stopping it or preventing and they are continuing to
12 offer services, and I haven't seen any information that says
13 they are trying to stop it.

14 THE COURT: Well, what if their bylaws -- again,
15 we'll go back to this.

16 THE WITNESS: Uh-huh.

17 THE COURT: What if the bylaws talk about, you
18 know, allowing tenants?

19 THE WITNESS: Right. So their bylaws, the
20 purpose of the organization is consistent with what the IRS
21 is looking for a tax exempt organization. But if the bylaws
22 also talk about the vacation rental, which it does, then I
23 think that that's contrary to the tax exempt status that the
24 IRS is offering.

1 THE COURT: So the problem might be that the
2 bylaws need to be amended.

3 THE WITNESS: Yes.

4 THE COURT: In order to prevent the rental.

5 THE WITNESS: Yes.

6 THE COURT: Of tenancy.

7 THE WITNESS: Yes.

8 THE COURT: However intermittent that is.

9 THE WITNESS: Yes.

10 THE COURT: And it could be with the very
11 foundation of the organization?

12 THE WITNESS: Yes.

13 THE COURT: Which is the bylaws.

14 THE WITNESS: Correct.

15 THE COURT: Okay.

16 THE WITNESS: Uh-huh.

17 THE COURT: Thank you.

18 THE WITNESS: Thank you.

19 THE COURT: I appreciate that.

20 Now you may.

21 MS KERN: You addressed a couple of things that I
22 was going to ask about that the --

23 THE COURT: I'm so sorry.

24 MS. KERN: No, it's good. I wanted to -- I

1 wanted to address that, but I do have a question about the
2 bylaws that you just asked.

3 REDIRECT EXAMINATION

4 BY MS. KERN:

5 Q. You referred to the purpose of the preamble of
6 the bylaws. Is that language consistent with the IRS tax
7 exempt status?

8 A. It is, yes.

9 Q. Okay.

10 A. Exactly consistent with the criteria.

11 Q. So when you responded to the judge with respect
12 to perhaps changing some of the bylaws, it wasn't the very
13 basis of the purpose of the entity. It was as it relates to
14 having any language in there that would suggest the tenants
15 may be okay?

16 A. Yes. Exactly.

17 Q. Okay. I just wanted to make that distinction
18 because it was my understanding that you had testified
19 earlier that the purpose and the documents, such as the rules
20 that said no individual owner can generate any profit or have
21 any commercial business.

22 A. And that's right in the preamble and that is
23 consistent with the IRS tax exempt entity requirements.

24 Q. Okay. Thank you.

1 That's all I have, Your Honor.

2 THE COURT: Well, and I'll give you a turn in a
3 minute.

4 The preamble says it, referring to the country
5 club?

6 THE WITNESS: Yes.

7 THE COURT: It shall not operate its properties
8 or facilities with the view of providing profit to its
9 members but rather such properties, facilities be held,
10 operated, made available for use of enjoyment of its members.
11 Operate its properties or facilities with the view of
12 providing profit to its members. Is that what you're talking
13 about?

14 THE WITNESS: So just above -- I don't know if
15 you have the most current bylaws. There are several of them.

16 THE COURT: It's the same in every preamble.

17 THE WITNESS: Okay. So at the top of the
18 preamble it talks about pleasure, recreation and another
19 non-profitable purposes, and then a little bit down further
20 down it talks about that its intent is not to provide a
21 profit to its unit owners.

22 THE COURT: Well, it doesn't say that.

23 THE WITNESS: Okay. What does it say?

24 THE COURT: It does have the statement it's

1 hereby affirmed to provide its members the pleasure.

2 THE WITNESS: Uh-huh.

3 THE COURT: Of fellowship and recreation.

4 THE WITNESS: Right.

5 THE COURT: And it's corporate function shall be
6 designed to achieve in highest measures said purpose.

7 THE WITNESS: Yes.

8 THE COURT: Now, rather than what you said it
9 says what I said a moment ago. It shall not operate its
10 properties or facilities with the view of providing profits
11 to its members.

12 THE WITNESS: Okay.

13 THE COURT: Is that what you mean?

14 THE WITNESS: Yes.

15 THE COURT: So you can't operate with the view
16 but how -- but that's just the preamble. Then in the -- in
17 the -- in the actual duties or I mean in the actual body of
18 the -- of the bylaws there's a reference to tenancy, and I
19 forget where that is but I can find it.

20 THE WITNESS: Uh-huh.

21 THE COURT: So and I don't think you get to weigh
22 in on this as to which is more dispositive under the law.

23 THE WITNESS: Uh-huh.

24 THE COURT: But do you have an opinion as to what

1 the IRS would view as more dispositive either a preamble or a
2 substance of the -- of the bylaws which appears to allow
3 tenancy.

4 THE WITNESS: I don't know what the IRS would do.

5 THE COURT: And that is that the duties of the
6 directors are to adopt rules for the conduct and government
7 of the members, their guests and tenants.

8 THE WITNESS: Uh-huh.

9 THE COURT: So clearly the duties of the
10 directors specifically within this -- within this document
11 are to create rules for tenants.

12 THE WITNESS: Uh-huh.

13 THE COURT: Now, that's fairly -- fairly
14 specific. Would you agree?

15 THE WITNESS: Yes.

16 THE COURT: All right. Thank you. I'm not going
17 to ask you for a legal opinion on what the IRS would view as
18 more -- more relevant, the general or the specific, but I
19 think I have an idea as to that.

20 Do you have questions?

21 MR. JONES: I don't, Your Honor. Thank you.

22 THE COURT: Do you have questions?

23 MS. KERN: I do.

24 Q. My understanding from your testimony was what the

1 IRS is going to look at is whether or not the conduct of the
2 club and the conduct of its members meets that criteria; is
3 that correct?

4 A. That's true, yes.

5 MR. JONES: Leading question, Your Honor.

6 THE COURT: But I overruled it. I'm trying to
7 get to it.

8 Q. (BY MS. KERN:) So the extent there is some
9 inconsistency with the documents is it your opinion the IRS
10 would base its determination to revoke an exemption based
11 upon some inconsistency in the documents if it didn't have
12 conduct that called into question that criteria that they
13 look at for the social exemption?

14 A. They look at what is actually taking place in the
15 organization, yes.

16 Q. Okay. And they are going to base it on their
17 criteria as to what you have to comply with in order to get
18 the social exemption?

19 A. Yes.

20 Q. Okay. Thank you.

21 THE COURT: Thank you. Anything based on that?

22 RECROSS-EXAMINATION

23 BY MR. JONES:

24 Q. There was discussion a second bag about

1 inconsistency. Can you tell me what that inconsistency is
2 that was being referred to?

3 A. The inconsistency is in relation to the judge's
4 question regarding the bylaws.

5 Q. Well, are the bylaws inconsistent in your
6 opinion?

7 A. The preamble of the bylaws is consistent with
8 what the IRS indicates for a tax exempt entity, but Your
9 Honor referenced a section in the bylaws that talks about
10 tenants and the duties of a director.

11 Q. So how is it that the bylaws reference to tenants
12 is inconsistent with the preamble?

13 A. I did not make that conclusion and that really
14 requires a legal conclusion.

15 Q. Do you believe that the preamble is inconsistent
16 with the bylaws and the reference to tenants?

17 MS. KERN: I'm going to object. She was not
18 asked to -- in fact, Your Honor specifically said I'm not
19 going to ask you the legal conclusion of that. She wasn't
20 testifying as to that.

21 THE COURT: Yeah.

22 MS. KERN: She was answering your questions.

23 THE COURT: That's -- that objection is
24 sustained. I think that is up to me to determine if there is

1 any inconsistency.

2 Q. (BY MR. JONES:) So a portion of the preamble we
3 spoke about before reads "Its primary purpose is hereby
4 affirmed to provide its unit owners with the pleasure of
5 fellowship and recreation." Do you recall that discussion
6 before?

7 A. Yes.

8 Q. And that portion of the preamble. I apologize.

9 A. Yes.

10 Q. So wouldn't the language "primary purpose" imply
11 that there could be secondary purposes?

12 A. The -- I mean, if you follow the criteria that
13 we've talked about and the reason why the IRS allows for
14 social clubs it's to provide members to, benefits to members
15 which includes social and recreation for which includes
16 commingling and common interests, and so that's the exact
17 language essentially as what the preamble says.

18 Q. Correct. I agree but wouldn't imply though that
19 there could be secondary purposes if the preamble states a
20 primary purpose?

21 MS. KERN: I'm going to object. That calls for a
22 legal conclusion. She is here to testify as to what the IRS
23 views with respect to social exempt status.

24 THE COURT: With all due respect, she is an

1 accountant, not an English teacher. I understand what
2 primary means.

3 MR. JONES: Okay. Thank you, Your Honor. I have
4 no further questions.

5 THE COURT: Thank you.
6 Although, you may very well be.

7 THE WITNESS: Not today.

8 THE COURT: I don't know what you do in your
9 spare time, ma'am. Thank you for being here.

10 THE WITNESS: Thank you very much.

11 (Witness excused.)

12 MS. KERN: Your Honor, the plaintiffs rest for
13 this portion of the hearing reserving any rights to call
14 impeachment.

15 THE COURT: Yes, ma'am.

16 MR. JONES: Your Honor, at this point I would
17 like to move for whatever the equivalent of a directed
18 verdict would be in a preliminary injunction evidentiary
19 hearing. The plaintiffs have not met their burden under the
20 rules for a preliminary injunction.

21 There has been, for example the moving party
22 hasn't shown that there's an irreparable harm that would be
23 suffered by the plaintiffs in the event that the preliminary
24 injunction is not granted. There's no pending IRS action.

1 There's no threat of IRS action. In fact, there's no
2 delineation between -- there's no difference between
3 short-term vacation rentals and long-term rentals and
4 appreciation value of the homes and investment properties as
5 testified to by the witness a few minutes ago.

6 There's no reason to -- to say that if only
7 short-term rentals were to continue plaintiff would suffer
8 irreparable harm. The damage to the property testified by
9 Ms. Gilbert and some of the other plaintiffs' witnesses
10 regarding violations of rules, damage to the property,
11 overcrowding the beaches, there was no discussion as to and
12 no evidence that this was caused by short-term vacation
13 renters. There's discussion it could have been caused by
14 guests. It could have been caused by long-term renters. It
15 could have been caused by workers that are arriving on the
16 property. It could have been caused by people that are
17 entering the property uninvited following for perhaps someone
18 behind the gate, someone walking through the gate.

19 There's absolutely no evidence to show, to
20 justify a preliminary injunction at this stage of the case.
21 Certainly some discovery needs to be done. We can talk about
22 this again a few months down the road. At this stage of the
23 litigation no irreparable harm at this point int time, Your
24 Honor.

1 THE COURT: Anything else, sir?

2 MR. JONES: No, sir.

3 THE COURT: Do you wish to respond to that
4 motion?

5 MS. KERN: The suggestion that you have to wait
6 until the IRS is actually going to do an investigation or has
7 issued some kind of violation that would revoke the tax
8 exempt status is exactly what we're trying to prevent. That
9 is the irreparable harm. This is an entity that has existed
10 for nearly 100 years. The tax exempt status has been in
11 place for nearly 100 years. It has not been at risk until
12 there was an issue with the benefits and the inurement and
13 the selling of the common area for a greatly increased
14 amount. As Ms. Salazar testified, it is the recurring
15 activity that causes the issue and the problems.

16 I would agree perhaps we need, we will be looking
17 at whether or not long-term and short-term are going to be an
18 issue but for purposes of this hearing it is the short-term
19 transient commercial use, utilizing these properties as a
20 motel and having people utilize the common area that is owned
21 by the social club. It is not owned by any other entity.
22 It's owned by the social club, and the social club is made up
23 of those members that paid a membership fee and are required
24 to comply with all of the criteria and requirements of the

1 IRS.

2 And the only testimony Your Honor has is from
3 Ms. Salazar in which it is her opinion that as a result of
4 that activity that she saw that activity with respect to the
5 rentals that are occurring on a short-term basis that she
6 feels and has concluded that there is a risk that the IRS
7 will determine the tax exempt status could be revoked. It's
8 not speculation. You have an uncontroverted evidence that
9 that is a consequence because the conduct is inuring to the
10 benefit of those members. They are basically selling their
11 rights in associated -- associated with those short-term
12 rentals.

13 You have in evidence the advertisements which
14 show that the people that are doing this are getting 600 or
15 they are advertising for \$600 a night for \$375 a night or
16 \$1,000 a night for \$452 a night. That is because they are
17 advertising it as Elk Point, beach, bated -- excuse me, Elk
18 Point, beach, gated gem. I apologize.

19 THE COURT: Yes, ma'am.

20 MS. KERN: And they consistently are identifying
21 that that is an extra value. Ms. Salazar, again,
22 uncontradicted testimony that in her experience that value
23 added to those VRBO's, to those Airbnb's, to that commercial
24 use of the properties is why they can get more money for it,

1 and that is the risk that is against this -- against this
2 country club.

3 And keep in mind what we are asking for is simply
4 to impose an injunction that would preserve what was the
5 status quo for 90 years. The testimony which is
6 uncontradicted is that the issue of these transient
7 commercial use has exploded in the last couple of years.
8 This isn't something that's been going on for a really long
9 time. It's something that is being taken advantage of now
10 and it -- the plaintiffs simply want to preserve the
11 character as this club was originally designed for the
12 purpose of the recreation and fellowship of its members.

13 That is the very simple relief that is requested
14 to preserve what was in place for over 90 years and has
15 recently been put into jeopardy and the tax exempt status put
16 into jeopardy as a result of this recent conduct and activity
17 that is occurring in order -- as a result of being able to
18 utilize those club facilities.

19 So we certainly have met our burden that there is
20 irreparable harm to have the jeopardy to have the tax exempt
21 status in jeopardy for over -- that has been in place for
22 over 90 years cannot be replaced with damages. That is
23 irreparable harm.

24 THE COURT: That's not the only -- that's not the

1 only burden you have to meet, ma'am. You also have to show a
2 likelihood of prevailing in this.

3 MS. KERN: And the only testimony that you have
4 is that it is that jeopardy against the tax exempt status.

5 THE COURT: That's not the only problem and --
6 and so I'm going to -- to give you a fair opportunity to
7 address that. The problem that you have is an inherent
8 conflict in these bylaws that the members of the community
9 have apparently never attempted to fix or change, and the
10 preamble is one thing, but the body of the bylaws
11 specifically reference tenancy, renting this property out.

12 And, I mean, that's -- that's part of the bylaws
13 here, and that seems to be that that's going to be a
14 substantial burden for you to prevail at trial, and I think
15 you really need to address that because this is -- this is a
16 problem for you and it -- you know, I -- I'm very
17 sympathetic. I don't want to -- personally I don't want to
18 live next to people who are coming in and out every week. I
19 understand that, and I'm extremely sympathetic with that for
20 every one of those people.

21 But the problem is the evidence that I have is
22 that there was recently an election. The choice that the
23 election was to elect people who were in favor of short-term
24 rental. The evidence that I have is that there is no

1 evidence of an attempt to change these bylaws, to eliminate
2 tenancy as one of the things that people can do with their
3 property and -- and it specifically -- and the duties of the
4 directors to make rules for tenants, and one of those rules
5 seems to be to have a list of who you're renting to. So it
6 seems like they have that rule that's consistent with
7 tenancy.

8 And it may be as I asked Ms. Salazar that your
9 bylaws, your bylaws are inconsistent with a 501c7 and she
10 acknowledged that. That -- now, you have to show me today in
11 order to be successful today that you have a likelihood of
12 prevailing on that and that, you know, way more than the --
13 the difficulty posed and the damage done if, in fact, you're
14 stripped of this tax exempt status, you have to show me
15 you're likely to prevail on this and how do you overcome
16 that.

17 MS. KERN: May I respond?

18 THE COURT: I'm done, ma'am.

19 MS. KERN: Okay.

20 THE COURT: But I wanted to guide you there so
21 that you know that that's where I'm concerned.

22 MS. KERN: And I very much appreciate it because
23 I think you flipped us on its side.

24 THE COURT: All right.

1 MS. KERN: The issue isn't whether or not --
2 first of all we know that the IRS doesn't really care what
3 the bylaws say. What the IRS cares about is the criteria and
4 whether you have met the social exempt status.

5 So to the extent that there is an inconsistency
6 in the bylaws, we don't have to meet the burden that we can
7 somehow prevail that it is violated or that it is prohibited
8 by the bylaws. That's not the argument that was made. The
9 argument that was made was that by continuing to allow it we
10 are triggering the criteria to be evaluated by the IRS and to
11 lose the 501c7 status.

12 THE COURT: But maybe you're not entitled to
13 501c7 status. So if you lose it that might just be fair.
14 Maybe you're not entitled to that.

15 MS. KERN: But to your point shouldn't that be a
16 vote of the members to actually take away that tax exempt
17 status? You can't allow that risk to occur without giving an
18 opportunity for the community to understand what that would
19 mean. Under -- so and let me take your -- your --

20 THE COURT: Yeah.

21 MS. KERN: Your --

22 THE COURT: Help me out.

23 MS. KERN: -- evaluation of the bylaws. The
24 bylaws clearly in the preamble are completely consistent with

1 the concept of a 501c7 social club. They want the fellowship
2 and the relationships and it's the Elks Club. I mean, all of
3 us of a certain age I think have heard of the Elks' Club.

4 THE COURT: My dad was an Elk.

5 MS. KERN: I told her about it. I don't know if
6 she knew about it.

7 THE COURT: Where you played poker every Thursday
8 night.

9 MS. KERN: You know, my father, my uncle, they
10 were all in it. So that was established in 1925 and it -- I
11 guarantee you its purpose back then, I mean I don't think
12 anybody even contemplated the concept of somebody renting out
13 their house for a day or two like a motel, but its purpose
14 was to provide a place of fellowship for its members. It
15 applied for and obtained a social exempt status from the IRS.
16 Every year they submit and they utilize that tax exempt
17 status when they file their tax returns.

18 If you -- the determination that there might be a
19 conflict in the bylaws is irrelevant to what the IRS is going
20 to look at as to whether the tax exempt status is -- is
21 honored.

22 What you're suggesting is that perhaps the
23 members need to take a good hard look and evaluate whether or
24 not they are willing to give that up, but that should be a

1 conscious decision not a decision made because the IRS might
2 trigger it through a revocation.

3 And what we are looking at and what we are
4 arguing is that preserve the status quo so that we don't
5 trigger any jeopardy with respect to that 501c7 status. And
6 if we need to go suggest an amendment or we need to do
7 something and that's the way we solve this problem, maybe
8 that's what we do, but right now the issue before the Court
9 is is there a jeopardy to the 501c7 status and can you avoid
10 that jeopardy simply by preserving the status quo that was in
11 place for over 90 years.

12 THE COURT: But, Ms. Kern, part of the status quo
13 that is in place now, status quo meaning now, is that there
14 are short-term rentals and there are -- and there are
15 tenancies that are consistent with this -- with these bylaws
16 too. The status quo is that there are tenancies. The status
17 quo is that you have a special classification under the
18 federal tax code. That's one part of the status quo and you
19 have an inconsistent apparently, I don't know. I'm not the
20 IRS, and this is -- and my ruling is not any guidance on the
21 IRS.

22 But it appears that you also have as status quo
23 rentals. Now, maybe they have increased recently. That's
24 the testimony that I've heard. I've heard that they have

1 blown up and -- and I believe that to be true, and I find
2 that as fact that's true because that's the only evidence
3 that I have, but I also find this fact that it is part of the
4 bylaws that those tenancies are envisioned within the
5 creation of this organization.

6 MS. KERN: Well, some tenancy is envisioned.
7 There's nothing in the bylaws nor in the rules that talk
8 about commercial use.

9 THE COURT: Can you tell me what that tenancy
10 would be referring to? Can you give me any guidance as to
11 anywhere in the bylaws, any evidence how I can interpret the
12 word tenancy differently?

13 MS. KERN: Yes.

14 THE COURT: Okay, great.

15 MS. KERN: Because we know from the testimony
16 that Douglas County requires a permit if you are going to
17 rent your property for less than 28 days because they
18 consider it to be commercial use.

19 THE COURT: But Ms. Salazar says it doesn't
20 matter, short-term, long-term. Now, your clients don't like
21 people coming in short-term. They just don't like it.

22 MS. KERN: No. I'm responding to your question
23 about tenancy.

24 THE COURT: Okay.

1 MS. KERN: You said can I -- is there a
2 distinction. I think that there is a very fair reading of
3 the governing documents that tenancy under the bylaws does
4 not mean the commercial short-term use of units.

5 THE COURT: What if it means commercial long-term
6 use?

7 MS. KERN: Long-term use is not viewed as
8 commercial use. It's not viewed by Douglas County. It's not
9 viewed in the law.

10 THE COURT: No. Douglas County -- the evidence
11 is very clear from Ms. Salazar. What Douglas County thinks
12 is irrelevant to the IRS. So don't tell me what Douglas
13 County thinks because you're arguing to me about IRS, and her
14 testimony was that a tenancy longer than 28 days is just the
15 same to the IRS.

16 MS. KERN: I'm responding to your question, Your
17 Honor. You asked a question about how do --

18 THE COURT: It's all tenancy.

19 MS. KERN: But I'm suggesting, Your Honor -- if I
20 can just finish.

21 THE COURT: Sure. Go ahead.

22 MS. KERN: I'm suggesting that the term tenancy
23 in the bylaws can clearly be viewed and defined as a
24 long-term tenancy. I agree. We gotta deal with whether or

1 not that might also be a jeopardy under the criteria of the
2 IRS, but I'm just talking about the bylaws. The bylaws
3 provide that you cannot or should not or shall not have any
4 business or profits within the community and it's not just
5 the bylaws. The 1988 rules specifically say --

6 THE COURT: Tell me what exhibit you're looking
7 at.

8 MS. KERN: It is Exhibit Number 6, and it was
9 reported in Douglas County. There's recording information at
10 the bottom.

11 THE COURT: And you're looking at number ten.

12 MS. KERN: Number ten.

13 THE COURT: A person operating any business.

14 MS. KERN: "No person shall operate any business
15 on the club premises nor on their individual property within
16 the club." If you take that and you couple it with the
17 definition that Douglas County views, if it's less than
18 28 days it is a commercial use of a property. It is a
19 rental, correct. You have a tenant, correct, but it's
20 commercial. It is operating a business on their individual
21 property.

22 So if you couple that with the term tenancy
23 which -- which you are suggesting might include any kind of a
24 tenant, short-term or long-term, I would suggest that's not

1 consistent with the governing documents. The governing
2 documents make a distinction. We have determined that we
3 being Douglas County, Douglas County has determined that
4 renting for less than 28 days constitutes commercial use.
5 It's a business. We're going to tax you for it. So it is
6 consistent to make a decision even under the bylaws separate
7 from whether we need to make a distinction in connection with
8 the IRS, but we certainly need to make a distinction.

9 We can make a distinction under the bylaws and it
10 can be entirely consistent. It's not inconsistent. There is
11 the same consistency that this is a social club. It's for
12 recreation. It's for the members and still allow them to
13 rent their units as long as it is not a commercial rental.
14 That is what is I would argue consistent with the prohibition
15 that the IRS may look at when looking at the criteria of
16 whether or not there are members benefiting running their
17 property as a commercial entity by utilizing the social club
18 property.

19 If we didn't have the specific statements within
20 the rules or within the bylaws that made a distinction
21 between the commercial use of property I would agree with you
22 that the word tenancy may be ambiguous.

23 THE COURT: Commercial is not -- not in the
24 preamble.

1 MS. KERN: Well --

2 THE COURT: -- or profit.

3 MS. KERN: For profit, business, okay.

4 THE COURT: Which may be something different.

5 MS. KERN: Okay. But clearly the concept that we
6 are not going to be profiting, I mean to me profit is the
7 equivalent of running a business. I mean I don't profit from
8 something I'm not trying to generate or it's not a commercial
9 venture.

10 And so it is consistent and it -- it doesn't
11 require you to find that they absolutely have to allow
12 short-term rentals, especially when you are faced with the
13 uncontradicted evidence that by allowing it it is going to --
14 I'm sorry. It could trigger an evaluation by the IRS that
15 the criteria has not been met.

16 THE COURT: I just have to tell you I'm not
17 particularly persuaded by that. Your better argument has to
18 deal with paragraph ten of the rules.

19 MS. KERN: Well -- well, I wasn't rejecting that
20 argument. I had that one too.

21 THE COURT: Of course you weren't. All right.
22 Thank you.

23 So if -- Mr. Jones, if the -- if the rule
24 specifically prohibit operating a business how do you get

1 around that?

2 MR. JONES: I think the issue --

3 THE COURT: How do you get around that?

4 MR. JONES: Well, the question is is it a
5 business? What is a business? Their own expert testified a
6 few minutes ago it doesn't matter if it's a short-term
7 rental, if it's a long-term rental, if it's an investment
8 property, whatever, it could be potentially run afoul of IRS
9 guidance as it relates to 501c7.

10 THE COURT: It may. But how do you get around
11 the club allowing people to run a business when the rules you
12 can't run a business? Now, you know, that's -- that's your
13 problem. Certainly Ms. Kern heard me tell her I think I know
14 what her problem is with the argument. But, you know, you've
15 got to be able to -- they have a right to enforce the rules
16 of the organization.

17 MR. JONES: Uh-huh.

18 THE COURT: So, you know, short-term rentals are
19 a business. Long-term rentals may be a business. All of
20 those rentals may be a business, and it may be these rules
21 which were enacted after the bylaws prohibit or define that
22 and maybe tenancy means life tenancy. I didn't hear that,
23 but there are a number of different tenancies that we all
24 remember from property law class, don't we, and so maybe a

1 life tenancy.

2 And so how do you get around that the board seems
3 to be allowing through, you know, having a rental calendar
4 and that sort of thing, allowing rentals or allowing a
5 business to happen in violation of its own rules? Tell me
6 how that works. How is that okay?

7 MR. JONES: Well, I think that the definition of
8 a business as it relates to section ten of the rules is in my
9 opinion more of a traditional business. It's different when
10 you're dealing with real estate. If someone --

11 THE COURT: Come on, sir. You and I both know
12 many people are in the business of renting property out.

13 MR. JONES: Certainly, on a short-term basis. A
14 long-term basis, there's people that are in the business --

15 THE COURT: Right. It's a business.

16 MR. JONES: -- of investing properties.

17 THE COURT: You get \$600 a night that's a
18 business.

19 MR. JONES: Sure. There's people who operate,
20 who own these homes as a second or third home or an
21 investment home. All of these are generally permitted uses
22 in Nevada. It's permitted under NRS 116.340 as well. NRS
23 116.340 sets forth the policy of the State of Nevada that's
24 been interpreted --

1 THE COURT: No. No. No. Sir, there's a policy
2 of this club. There's a policy of this club that says you
3 can't run a business out of this place. It doesn't mean a
4 7-11.

5 MR. JONES: Well, I think the fact that it was an
6 issue going into the election this past July whereas was
7 testified by some of the plaintiffs' witnesses earlier that
8 this was an issue that was decided as one of the main issues
9 that was voted on.

10 THE COURT: Oh, did you hear me suggest to the
11 other side that maybe they need to amend their bylaws? You
12 were here. Yeah, you heard it. Well, maybe if -- if the
13 people who won that election want to amend something they
14 need to amend these rules to allow for a business. I mean,
15 you know, you got rules, sir.

16 MR. JONES: Uh-huh.

17 THE COURT: And there's not -- you point me to an
18 exception in these rules that says except you can rent your
19 house out as a business I'll read it.

20 MR. JONES: Well, it's the contemplation of
21 tenancy, Your Honor. It's the plaintiffs' position that any
22 tenancy would constitute a business. The rules absolutely
23 contemplate tenancy, and I think that's how you delineate it.

24 THE COURT: Does life tenancy constitute a

1 business?

2 MR. JONES: Well, we don't know. It's a tenancy.

3 THE COURT: If I leave my place to you for life
4 and then to someone else, that's a life tenancy, right?

5 MR. JONES: Sure.

6 THE COURT: Is that a business? I'm dead.

7 MR. JONES: I don't believe it is.

8 THE COURT: No, it isn't. So not every tenancy
9 is a business.

10 MR. JONES: I'm not saying every tenancy is, but
11 the fact that the rules contemplate tenancy to be allowed I
12 think delineates what I would consider to be a more
13 traditional business and then what's at issue here which is
14 short-term vacation rentals which, again, I believe it's
15 allowed. It's the policy of the State of Nevada of 116.340
16 to allow for vacation rentals. It's an issue that is my
17 understanding being contemplated by Douglas County as we
18 speak right now. This isn't something that --

19 THE COURT: It is.

20 MR. JONES: And I think that unless you had a
21 ruling by Douglas County saying no short-term rentals are
22 allowed within Douglas County that's a whole different issue
23 obviously, but that's not the case right now, Your Honor.

24 THE COURT: Well, your motion is denied. Do you

1 have any witnesses?

2 MR. JONES: May I have a minute, Your Honor?

3 THE COURT: You certainly may, sir.

4 MR. JONES: Do you mind if we take a quick break?

5 THE COURT: Well, I got to tell you it's time for
6 the break for my clerk and the court reporter anyway. So we
7 are going to do that. So we're going to take a 15-minute
8 break and let them get up and walk around and -- and, ma'am,
9 I'm telling you don't go back to your office and just work
10 again because that's what she does. I want you to know I
11 have the best employees in this court. They are wonderful.
12 So take a little break. We'll be back in 15 minutes.

13 MR. JONES: Thank you, Your Honor.

14 (Whereupon, a brief recess was taken.)

15 THE COURT: All right. We're back in session in
16 20CV124. The parties and their attorneys are all here.

17 Sir?

18 MR. JONES: Thank you, again, Your Honor. I
19 would like to call Robert Felton.

20 THE COURT: Absolutely. Would you come up,
21 please, sir.

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ROBERT FELTON,

called as a witness on behalf of the
Plaintiff having been first duly sworn,
was examined and testified as follows:

THE COURT: You have to wait until she finishes
asking you the question before you jump into the answer.

Sir, your collar is bent up a little bit. I'm
not usually one to fix anyone's sartorial splendor there.

THE WITNESS: Thank you.

THE COURT: You look much better now I assure
you. Have a seat and relax.

DIRECT EXAMINATION

BY MR. JONES:

Q. Good afternoon, Mr. Felton. Could you please
spell your name for the record.

A. Robert Wayne Felton, F-e-l-t-o-n.

Q. Mr. Felton, are you on the board of the Elk Point
Country Club?

A. Yes.

Q. What is your position?

A. President.

Q. What do your duties involve as president?

A. To hear the agenda, to be in charge of the

1 meeting and to have a fiduciary duty and a duty to make our
2 decisions for the community as a whole.

3 Q. As part of your duties as the president of the
4 Elk Point Country Club HOA are you familiar with what the
5 current version of the rules and regulations of the HOA are?

6 A. I am.

7 MR. JONES: Okay. Your Honor, may I approach the
8 witness?

9 THE COURT: You may, sir.

10 Q. (BY MR. JONES:) Mr. Felton, I presented you with
11 what's been marked as Exhibit 17. Have you seen this
12 document before?

13 A. Yes.

14 Q. What do you understand the document to be?

15 A. It's the homeowners association rules,
16 regulations and guidelines.

17 Q. And what is the effective date of this document,
18 sir?

19 A. 9-14 2019.

20 MR. JONES: Your Honor, I would like to move to
21 admit this into evidence.

22 MS. KERN: We object. There's no evidence that
23 they are recorded. There is no identification of any indicia
24 with respect to the other rules which were clearly recorded

1 with Douglas County. There's nothing on the copy that I was
2 provided that shows any recording information. So I would
3 object. They are not valid or in effect to change any rules
4 that are recorded and are of -- and run with the land and our
5 covenant and conditions that apply to the various properties
6 within Elk Point.

7 THE COURT: Well, your objection is overruled.
8 He said these are the regulations. We'll see whether they
9 are valid or not, but that's what the witness' testimony.
10 He's identified them. So the objection is overruled. 17
11 will be admitted.

12 MR. JONES: Thank you, Your Honor.

13 Q. Mr. Felton, I want to turn your attention to page
14 three of Exhibit 17.

15 THE COURT: Sir? Sir? Mr. Felton?

16 THE WITNESS: Yeah.

17 THE COURT: Do not lick your finger and then put
18 it on a document that you intend to hand back to the clerk.

19 THE WITNESS: Sorry.

20 THE COURT: Do not do that again.

21 THE WITNESS: I'm trying to get the page. Page
22 three.

23 Q. (BY MR. JONES:) Mr. Felton, do you see a
24 paragraph 14 on page three?

1 A. Yes.

2 Q. Can you please read that in its entirety.

3 THE COURT: Do you have the same document right
4 there in front of you?

5 MR. JONES: I do, Your Honor. Would you like me
6 to --

7 THE COURT: Provide it to the clerk.

8 17 is stricken and 17 -- this will be 17A and it
9 is going to be admitted if it's the exact same document.

10 MR. JONES: It is, Your Honor.

11 THE COURT: I'm not going to ask the clerk to
12 handle that.

13 MR. JONES: Am I able to present the page we just
14 discussed to the witness, Your Honor, on Exhibit 17A?

15 THE COURT: Is the one he has the exact same?

16 MR. JONES: It is, Your Honor.

17 THE COURT: I'll allow him to testify from 17A.

18 MR. JONES: Thank you, Your Honor.

19 THE COURT: Or 17. Let me have 17A. Thank you,
20 ma'am.

21 Q. (BY MR. JONES:) Mr. Felton, can you please read
22 paragraph 14.

23 A. "14, business operations. Unit owners may engage
24 in a business activity within their residence as long as

1 there is no customer-employee contact within EPCC. EPCC
2 facilities including the beach and beach deck shall not be
3 used for any business activity."

4 Q. Thank you, Mr. Felton. That's all of the
5 questions that I have.

6 THE COURT: Do you have questions, ma'am?

7 CROSS-EXAMINATION

8 BY MS. KERN:

9 Q. Were the rules identified in Exhibit 17, did you
10 cause them to be recorded?

11 A. I don't know.

12 Q. The document that has been presented to the Court
13 has no recording information. Do you any information that
14 they were ever recorded?

15 A. They were approved by the board. I don't know if
16 they were recorded or not.

17 Q. When were they approved?

18 A. I would have to check the board meeting we did it
19 on. It was done at a board meeting. I don't know if that
20 board meeting was August 17th or not.

21 Q. Where did you get the date August 17th?

22 A. Top of the document.

23 Q. The top of your document says August 17th?
24 That's a different document.

1 A. I'm sorry, September 14th. I'm sorry. I don't
2 have any glasses on. September 14, 2019.

3 Q. So you adopted these after this litigation was
4 commenced and after the motion for preliminary injunction was
5 filed?

6 MR. JONES: Objection. I don't believe that's
7 the case at all.

8 MS. KERN: Oh, it's 2019. I apologize. It's
9 late in the day. I'm sorry. I wish it were still.

10 THE COURT: It's late in 2020 too.

11 MS. KERN: I know. Very much apologize. I was
12 thinking it was right now.

13 Q. So if you'll look at that number 14 that
14 Mr. Jones asked you to look at.

15 A. Yep.

16 Q. On page three.

17 A. Yes.

18 Q. So this business activity is the type of business
19 activity that would have a customer or an employee?

20 A. I don't understand the question. The statement
21 says may have a business activity within the residence as
22 long as there is no customer employee contact within EPCC.

23 Q. So it would be business activity that had a
24 customer or employee involved?

1 A. I don't know if that means that or not.

2 Q. Well, it doesn't say anything about tenants, does
3 it?

4 A. No.

5 Q. And it doesn't say anything about transient
6 commercial use, does it?

7 A. No.

8 Q. It talks about business activities that might
9 have a customer or an employee?

10 A. No.

11 Q. Well, it says if, and tell me if I'm not reading
12 this correctly. Unit owners may engage in a business
13 activity within their residence as long as there is no
14 customer employee contact within EPCC?

15 A. That's what it says.

16 Q. In September of 2019 were you aware that there
17 was a concern with the short-term transient commercial use
18 within the association?

19 A. Probably.

20 Q. As a director did you request or obtain any kind
21 of an opinion from the CPA for the association as to whether
22 or not you were jeopardizing the 501c7 exempt status by
23 including that provision in your rules?

24 A. No.

1 MS. KERN: Your Honor, if I may have some lead to
2 go beyond direct since there was only one or two questions?
3 It would be within the scope of his service as a board
4 member.

5 MR. JONES: I'm going to object to that, Your
6 Honor.

7 MS. KERN: Then I would ask for leave to be able
8 to call him on redirect or on direct.

9 THE COURT: As a rebuttal witness?

10 MS. KERN: Yes.

11 THE COURT: Why don't we save time and you just
12 do it now, and I'll object to that or I'll overrule your
13 objection. She would be calling him as a rebuttal witness if
14 it's related to that sort of thing.

15 Q. (BY MS. KERN:) In or about August of 2018 were
16 you on the board?

17 A. Yes.

18 Q. At that time was there a request by some of the
19 members of the social club to send out for a vote of bylaw
20 amendment to address the issue of transient commercial use?

21 A. I recall there was some request to send out a
22 survey. I don't remember if it was bylaw amendment or not.

23 Q. Would you disagree that -- do you actually recall
24 that it was not a request for bylaw or are you just not

1 remembering?

2 A. I don't recall.

3 Q. Okay. So it's very possible that there was a
4 request of the board to send out a bylaw amendment to address
5 the transient commercial use?

6 A. I don't believe you can come to that conclusion.
7 I don't recall whether it was or not, and I think that that's
8 where I have to leave it.

9 Q. You certainly didn't do so, did you?

10 A. We discussed the survey and the board and decided
11 not to do it.

12 Q. And you certainly didn't send out a bylaw
13 amendment for a vote of the membership to address the
14 transient commercial use, did you?

15 A. No.

16 Q. Are you aware that four out of the five members
17 currently rent either their property or the use?

18 THE COURT: Four out of the five members of what,
19 ma'am?

20 Q. (BY MS. KERN:) I'm sorry. Four of the five
21 board members. I thought I said board members. I apologize
22 if I did not. Are you aware that four of the five board
23 members currently rent their properties or rent the social
24 club facilities?

1 A. That's an incorrect statement.

2 Q. So you're not aware?

3 MR. JONES: Object.

4 THE COURT: That's not what he said.

5 THE WITNESS: That's not what I said. Your
6 statement is incorrect.

7 Q. (BY MS. KERN:) What is incorrect?

8 A. The number of board members that rent property.

9 Q. What is the correct number?

10 A. Three.

11 Q. Can you identify them?

12 A. Yes. Mark Marouski, Rick Laramacino. No,
13 there's only two. Mark Marouski and Rick Laramacino. Three
14 of us do not rent.

15 Q. I thought -- do you have two properties within
16 Elk Point?

17 A. No.

18 Q. Oh, you do not?

19 A. No. My wife has one, but I do not.

20 Q. Thank you for the distinction. Are you aware
21 that of a rental by Mr. Goslin of the beach areas to any
22 individual?

23 A. No.

24 Q. Would you be concerned that Mr. Goslin was

1 renting the ability to use the social club beach areas for
2 \$100 a month?

3 MR. JONES: Objection. Calls for speculation.
4 Lacks foundation.

5 THE COURT: That objection is overruled.

6 THE WITNESS: I'm not aware of it.

7 Q. (BY MS. KERN:) No. I didn't ask you if you were
8 aware. I said would you be concerned if that occurred?

9 A. Yes.

10 THE COURT: Does your wife rent her property?

11 THE WITNESS: She does. Long-term rental. She's
12 done it for eight years.

13 THE COURT: How long have you been married?

14 THE WITNESS: Four.

15 THE COURT: Four years?

16 THE WITNESS: Yes. Obviously, it's not our first
17 marriage but we've been together 16.

18 THE COURT: You could have just been holding out.

19 THE WITNESS: We did.

20 MS. KERN: I apologize, Your Honor. If you would
21 give me just a few moments.

22 Q. Is there an individual on the board by the name
23 of Chuck Jennings?

24 A. There is.

1 Q. And you are not aware that he is advertising on
2 Expedia to rent his property as recently as August 5th of
3 2020?

4 A. I'm aware that he advertised and got put in. It
5 was not by him and he does not rent his property and he's
6 here.

7 Q. You're aware that it was not posted by him?

8 A. Not posted by him. He told me that, and he also
9 said has not rented the property since they moved in
10 permanently I think three years ago.

11 Q. Did he speculate or know who had posted it?

12 A. No.

13 Q. Do you or will you realize any financial interest
14 as a result of the outcome of this hearing?

15 A. No.

16 MS. KERN: No further questions.

17 THE COURT: Mr. Jones?

18 MR. JONES: Thank you, Mr. Felton. I have no
19 questions.

20 THE WITNESS: Sorry about this.

21 THE COURT: That's okay. Sir, leave it right
22 there.

23 Is the -- your wife's property, is it community
24 property between the two of you?

1 THE WITNESS: No.

2 THE COURT: It's separate property?

3 THE WITNESS: Separate property.

4 THE COURT: Thank you. You can leave the exhibit
5 there.

6 THE WITNESS: Okay.

7 THE COURT: Take your time now.

8 THE WITNESS: It's late.

9 THE COURT: Yes, sir. Do you have any other
10 witnesses here?

11 MR. JONES: No, Your Honor. We'll rest.

12 THE COURT: Do you have any other witnesses?

13 MS. KERN: No, Your Honor.

14 THE COURT: Thank you. All right. Do you have
15 closing argument?

16 MS. KERN: I apologize if some of my argument
17 overlaps some of the discussion that we had.

18 THE COURT: Ma'am, you've thought this out. I
19 have thrown you off that train of thought. You get back on
20 board anywhere you would like.

21 MS. KERN: No. I appreciate it. I actually very
22 much appreciate the argument that we had or I shouldn't say
23 argument, the discussion that we had with respect to the
24 distinction between the bylaws and the criteria that the IRS

1 is going to evaluate.

2 I do want to briefly address before I talk about
3 the standard and the discussion of the legal analysis with
4 respect to this hearing. The exhibit that was introduced
5 through Mr. Felton, as the Court is aware, the --

6 THE COURT: Before you get into that, let me make
7 clear what the exhibit is. The exhibit is 17A that is
8 admitted. 17 the Court has ordered stricken. The Court --
9 the record will reflect that 17 constitutes biohazard that
10 this Court is not going to require the clerk to handle, and
11 unless there's an objection I intend to have it destroyed.
12 Any objection from counsel?

13 MR. JONES: No, Your Honor.

14 THE COURT: And you would agree that 17A is an
15 exact duplicate?

16 MR. JONES: Agreed.

17 THE COURT: 17A is all the clerk will have to
18 handle. I'll take care of 17.

19 MS. KERN: Okay. With that correction the
20 Exhibit 17A that was reviewed is not recorded. And as basic
21 or real property law says that if there is a recorded
22 document it becomes a covenant and exception against the real
23 property that is at issue.

24 In this case the only recorded rules and

1 regulations which have not been changed, this document, 17A,
2 cannot change the recorded rules and regulations that were
3 admitted into evidence. And I do want to make a confession
4 that --

5 THE COURT: This is the room for that, ma'am.

6 MS. KERN: Exhibit Number 6, which are the
7 recorded rules and regulations are actually two rules and
8 regulations. One was recorded as Document 370678 which is
9 identified as plaintiffs' 0054. And the other one was a
10 recorded Document 70784 as plaintiffs' 55. I apologize for
11 combining those two. I, quite frankly, did not realize that
12 they had been combined. I don't think it is of any import.
13 The page plaintiffs' 54, which is the first page of that
14 exhibit, Document 370678 is the one we were talking about and
15 was later recorded.

16 The paragraph in that was important and that we
17 were talking about is the same in both, but I did want to
18 bring that to the Court's attention, especially because we
19 have had a little bit of an issue with combining documents.
20 That one was not intentional. So I do apologize.

21 Those rules that were recorded are the ones that
22 the homeowner's are entitled to rely upon and are
23 encumbrances upon their property. You cannot change
24 something that is recorded without recording something

1 subsequently.

2 So for purposes and to the extent it is relevant
3 for any evaluation or analysis by the Court the rule that
4 provided and is consistent I would suggest with the bylaws
5 that no person shall operate any business on the club
6 premises nor in their individual property within the club is
7 the controlling rule.

8 Even if you consider the attempted change by the
9 board in 2019 in 17A to change that with the adoption of Rule
10 14, that rule does not and is limited to business activity
11 where there is a customer or an employee. It doesn't talk
12 about tenants. It doesn't talk about transient commercial
13 use. It talks about a particular type of business activity
14 that has customers and employees and those customers and
15 employees cannot have any contact with EPCC.

16 But to the point of the motion that is before the
17 Court by the plaintiffs, the issue and the requested relief
18 is to prevent and enjoin the defendant from allowing or
19 facilitating the commercial use of properties within Elk
20 Point in order to maintain what had been in existence for
21 many years.

22 In order to prevent the impermissible inurement
23 to the members who are utilizing their property for
24 commercial activity that would run afoul of the criteria that

1 is evaluated by the IRS in determining whether or not an
2 entity can continue to enjoy its social exempt status.

3 The likelihood of success on the merits as far as
4 the Court has heard evidence is uncontradicted. There was no
5 contradiction to Ms. Salazar's conclusion and opinion as to
6 the risks that are associated with continuing to allow
7 inurement to the benefit of the members in conducting
8 commercial activity. That also is part and parcel of the
9 irreparable harm.

10 A tax exempt status carries with it several
11 different components. One of the major components is that a
12 representation has been made to the IRS that they are
13 entitled to that social exempt status that has been granted
14 and that they want to enjoy all of the benefits of that
15 exempt status.

16 If that is jeopardized the possible consequences
17 are revocation. The possible consequences are a
18 determination that there is fraud. Based upon the fact that
19 the board has apparently been facilitating it and I'm sure
20 you are going to hear argument that Exhibit 17A is evidence
21 that the board has changed the rule and decided that we can
22 have commercial use of individual residences, so it kind of
23 cuts two ways against them. Now, we've got a board that is
24 actively facilitating the ability for its members to generate

1 income in direct violation of the criteria of the IRS.

2 Coupled with the fact that they facilitated in
3 connection with, as I recall and I apologize, I believe it
4 was Mr. Brown or it might have been Mr. Gilbert that the,
5 when the permit is submitted to Douglas County there has to
6 be some kind of a letter from the country club with respect
7 to the transient commercial use, as well as the rental
8 committee that actually keeps track of and facilitates the
9 information about those that are renting for the motel and
10 commercial use.

11 The practical considerations is that by imposing
12 the injunction it's actually protecting the entity. It is
13 avoiding any possible adverse consequences that would occur
14 should there be any evaluation or review of whether or not
15 the tax exempt status should be revoked and/or whether or not
16 there has been any fraud in continuing to submit Form 990's
17 and submit to the IRS that they are entitled to that social
18 club exemption.

19 THE COURT: You know, ma'am, you consistently use
20 the word fraud, and you've talked about it all day long.
21 Fraud is quite a reach here. It's -- no, it's really quite a
22 reach, and the difficulty that you and your client may have
23 is probably much less about fraud than just about some maybe
24 back taxes, but and it is -- it is really difficult for me,

1 and I need to tell you this because you keep using this word
2 and -- and it paints a really ugly picture about people when
3 we talk about them engaging in fraud because fraud is a
4 crime.

5 And -- and it may be that the loss of an exempt
6 tax status could have some great consequences economically.
7 They may be fairly limited also, but the notion of fraud is
8 I've seen no evidence of actual fraud here, and I need you to
9 quit saying that because it's -- I think that it paints
10 people with a brush that is just not realistic based on the
11 evidence I've heard and I don't -- I don't hear any intent to
12 defraud, and I don't find that there's evidence of that.
13 I'll be clear with you.

14 Now, there may be a tax problem and the IRS can
15 come in and assess back taxes, and the IRS can come in and
16 impose a penalty without a finding of fraud, but fraud
17 requires a particular mens rea that I don't know that we've
18 got evidence of, and I think we need to be really careful
19 when we use language that sounds like we're accusing people
20 of a crime as opposed to mismanagement.

21 MS. KERN: May I respond to that?

22 THE COURT: You can.

23 MS. KERN: I actually did not think I was
24 accusing them. I thought what I intended to do was identify

1 that that is one of the potential consequences.

2 THE COURT: Yeah, but you've used it all day long
3 but you have presented no evidence of it.

4 MS. KERN: No. No. No. But I'm not -- I would
5 agree. I wasn't trying to argue that the Court could find
6 that. I was identifying that if the IRS does an
7 investigation, as I understood Ms. Salazar's testimony, that
8 is something they could look at and if they did find it it
9 would have different consequences.

10 THE COURT: Well, I hear you.

11 MS. KERN: If the word if was not broad enough I
12 apologize, but I was not intending to --

13 THE COURT: Well, let's move on from fraud.

14 MS. KERN: Okay.

15 THE COURT: I think that there are other problems
16 here and -- and they may be very real, but I don't see that
17 as a real one based on what I heard.

18 MS. KERN: Okay. But I do want to make it clear
19 I was not suggesting it. I agree with you. I didn't
20 introduce evidence for it.

21 THE COURT: Then let's move on.

22 MS. KERN: Thank you. The practical
23 considerations are that there will be no harm to the country
24 club by stopping the commercial use of residences for

1 short-term motel purposes.

2 The only thing that will happen is we will remove
3 a risk and we will be able to proceed through the course of
4 the litigation as to whether or not it should be permanent
5 but as a -- as an initial -- as an initial determination. In
6 fact, the entry of the injunction clearly is something that
7 my clients want very much, but it also inures to the benefit
8 of the defendants. It takes away the risk that they are now
9 facing.

10 In addition there are some board members that are
11 also engaging in the rental or the benefits from the
12 transient commercial use that can be considered by the Court.

13 The final element that the Court must evaluate is
14 whether --

15 THE COURT: When you talk about those board
16 members, let's be really clear about who is in this
17 litigation right now. They are not named individually.

18 MS. KERN: Absolutely not but the corporation
19 acts through its board of directors.

20 THE COURT: So property owners who are renting
21 out property are not in this litigation. You're asking me to
22 order the association to prohibit or to not facilitate the
23 short-term rentals. It's not an order to those property
24 owners.

1 MS. KERN: Correct. And that's a very good
2 distinction.

3 THE COURT: It's a big distinction.

4 MS. KERN: It is, absolutely, and the reason that
5 the Court would be able to do that is the following. The
6 country club is required to enforce its governing documents.
7 The recorded governing documents prohibit commercial activity
8 on the individual residences so they would simply be
9 enforcing. It's the same thing as if they were -- the
10 governing documents said you can't paint your house purple
11 and somebody painted their house purple. We would be able to
12 require that the -- the entity do something to stop that
13 purple -- to do something and change and enforce and make
14 sure that the house wasn't purple anymore.

15 THE COURT: How would -- how would the entity
16 here, how would you have them engage in that? What do you
17 want them to do should you prevail here? No longer publish a
18 calendar?

19 MS. KERN: They need to enforce and require that
20 those owners that are, in fact, using their property for
21 commercial use face -- I mean, and you are right. An entity
22 has limited hammers, but we have hammers. What they can do
23 is they can bring them to a hearing. They can fine them.
24 They can inform Douglas County that those individuals --

1 THE COURT: How do they get to fine them?

2 MS. KERN: Pardon?

3 THE COURT: How do they get to fine them?

4 Where's that in the rules for this? And, you know, how do
5 you want this -- them to have to enforce this? Do they have
6 to seek an injunction against the property owner?

7 MS. KERN: No, I don't believe they have to.
8 They just simply have to enforce the obligation that there
9 cannot be transient commercial use, and they can do it in
10 enforcement mechanisms that they do for all kinds of rules
11 within the country club.

12 THE COURT: How would they enforce this?

13 MS. KERN: By a notice and a hearing and fines
14 and sanctions. Can you revoke privileges for somebody who is
15 in violation of the governing documents. You can revoke the
16 privileges of utilizing the facilities or the recreational
17 facilities.

18 THE COURT: Where -- where are those rules set
19 forth, the authority of the -- of the board to impose some
20 punishments? And I haven't looked at these rules. So tell
21 me where they are.

22 MS. KERN: In the bylaws, if you look at, and
23 hopefully I'm in the correct bylaws. Number eight has
24 penalties by action, the executive board. And, I'm sorry,

1 this is Exhibit 8, plaintiffs' 119. It's Article 20, and
2 this is also referenced in the recorded rules.

3 THE COURT: Because the new rules have rules all
4 about vacation rental in 17A. There's a whole series of
5 rules about vacation rentals.

6 MS. KERN: Well, since it's the first time that
7 I've seen is today and the only rule that was identified by
8 Mr. Jones was 13. I apologize, but I --

9 THE COURT: Do you need a moment to look at it?
10 I'll give you time if you want.

11 MS. KERN: Well, I suppose that's another reason
12 why this document is not enforceable and it's not an
13 appropriate governing document.

14 THE COURT: I don't know. I haven't ruled on
15 that yet.

16 MS. KERN: But can I answer the first question
17 and then go back to the second question if I could.

18 THE COURT: Yes.

19 MS. KERN: Your first question is how do you
20 enforce and it's in Article 20 of the bylaws. It's page 119
21 to 120 and it specifically provides and gives authority to
22 the board of directors to enforce any documents to suspend,
23 to -- to, it also has a provision for attorney's fees and
24 costs.

1 If they are operating under 116, 116.31031
2 provides for notice and hearing and fines and revocation of
3 privileges and revocation of voting.

4 THE COURT: Where are you reading? Where are you
5 reading? I'm looking at the page you referred to, 119.

6 MS. KERN: If there is a violation --

7 THE COURT: Where are you reading?

8 MS. KERN: "By action of the executive board the
9 unit's owner's rights shall be suspended for any of the
10 following causes. A, violation or failure of any unit owner
11 to comply with any corporation."

12 THE COURT: Well, wait a minute. Or the tenant
13 or the guest. So, again, under these rules it refers to
14 tenants. Go ahead.

15 MS. KERN: Correct, or guests of the unit owner
16 to comply with any corporation, bylaw, articles of
17 incorporation or any of the rules and regulations promulgated
18 by the executive board after due notice and hearing by the
19 executive board. NRS 116.31031 also provides for fines.

20 THE COURT: Where does it say that?

21 MS. KERN: Pardon?

22 THE COURT: Are you reading something different
23 now?

24 MS. KERN: I am referencing the Nevada Revised

1 Statutes 116.31031.

2 THE COURT: What does this say about penalties
3 though? Don't skip around because I want you to look at the
4 rules. You want me to enforce these rules. So it just says
5 the rights shall be suspended for any of the following causes
6 and that seems to be the penalty that -- that the board could
7 impose is suspension of the unit owner's rights.

8 MS. KERN: Which would include the use of the --

9 THE COURT: Beach.

10 MS. KERN: -- beach.

11 THE COURT: The harbor.

12 MS. KERN: The harbor and also voting rights.

13 THE COURT: Picnic area.

14 MS. KERN: Those are the rights of a membership
15 of a member. During the period of suspension the suspended
16 unit owner shall not be entitled to any services from the
17 corporation nor from its caretaker.

18 THE COURT: And you can shut off their water.

19 MS. KERN: I'm not positive that's legal, but I
20 won't comment on that.

21 THE COURT: I'm not positive a lot of this is
22 legal.

23 MS. KERN: But, and also voting privileges could
24 be denied.

1 THE COURT: Okay.

2 MS. KERN: And I will note that in the rules that
3 are recorded, plaintiffs' 054, Exhibit Number 6 it
4 specifically references Article 20 of the bylaws in Rule 15
5 and provides for as we discussed the suspension of the rights
6 of the member if there is any kind of violation and it also
7 discusses assessment which is irrelevant to this.

8 So from our standpoint the board could do several
9 things. It could proceed with enforcement. It could
10 communicate to Douglas County that commercial use for rentals
11 of less than 28 days for which the county gives a permit is
12 not allowed in Elk Point, and it could consider fines under
13 116.31031.

14 So I do -- it is my opinion that just as they are
15 allowing it they can also disallow it and comply with the
16 Court's order that the Elk Point Country Club is not allowed
17 to have transient commercial use within the club. And the
18 reason that it has to be directed at the country club is that
19 it is the country club that has the tax exempt status. The
20 individual members do not. It is the country club that has
21 that tax exempt status.

22 THE COURT: I hear that.

23 MS. KERN: And we were going to talk about
24 another and I --

1 THE COURT: We're going to talk about the fact
2 that 17A specifically talks about vacation rentals.

3 MS. KERN: Thank you.

4 THE COURT: Which --

5 MS. KERN: And as I said, this is the first time
6 I've seen this.

7 THE COURT: Do you want me to --

8 MS. KERN: So it would appear that I guess this
9 is further evidence that the board is facilitating and
10 encouraging vacation renters because they actually have a
11 form for having the primary renter execute it. It provides
12 for a contact number. They are not to have utilized the
13 caretaker. So, I mean, these clearly contradict the recorded
14 rules.

15 The recorded rules say you can't have commercial
16 activity within a unit, and a vacation renter -- rental
17 pursuant to the laws of Douglas County are clearly a
18 commercial activity which is taxed, and now they are adopting
19 rules that are contradicting the recorded covenants that run
20 against the land of all of the owners within the Elk Point
21 Country Club, and documents that are recorded would need a
22 vote of the membership. So, again, I -- this is clearly
23 catching me off guard. I will be very frank. He never
24 provided these rules to us.

1 THE COURT: Ma'am, if you need a moment to think
2 about this I'll give you a few minutes. Why don't you take
3 five minutes. I think it's only fair that you read through
4 this. We'll be in recess for five minutes.

5 (Whereupon, a brief recess was taken.)

6 THE COURT: Did you have time?

7 MS. KERN: I will confess I did not review the
8 entire document. I reviewed the sections that talk about
9 rentals.

10 THE COURT: All right.

11 MS. KERN: And here's my argument. First of all,
12 I do not -- it is my opinion that this document cannot change
13 the recorded rules that prohibit commercial use. But even if
14 it does, even if you find that this somehow or that this did
15 revise and amend the recorded rules that have been
16 encumbering everybody's real property at Elk Point Country
17 Club, I would argue that this actually creates a bigger
18 problem under the IRS.

19 Because now the IRS is going to review and
20 determine that those criteria that they are going to find as
21 so important as to whether or not the club is organized for
22 pleasure, recreation and other not profitable purposes,
23 meaning it does not provide pleasure and recreation on a
24 commercial basis.

1 In this document 17A, they specifically reference
2 that the purpose of this, the introduction says that they
3 wish to establish requirements for transient commercial use
4 of units. So what this is going to do is give the IRS
5 another reason for determining that the criteria that they
6 are looking at has not been met, and that the exemption will
7 be revoked.

8 This is evidence that will be used against the
9 association, and I find it very compelling that when they
10 adopted this they didn't bother to consult with their CPA to
11 determine whether or not it would have created an issue or a
12 problem with the social club's tax exempt status. That at
13 the very least should have been done as an entity. They are
14 obligated and required to preserve and to ensure that what
15 they are doing is consistent with the reporting that they are
16 making to the IRS. This actually demonstrates that they are
17 not.

18 That is why the plaintiffs had to come to court
19 to ask for this injunction because we cannot depend or rely
20 upon the board to take action that's in the best interest of
21 the country club, and it is in the country club's best
22 interest to preserve and not jeopardize its tax exempt
23 status, and most certainly it is not the board that should be
24 taking action that adds to the evidence that may be evaluated

1 to determine whether or not the criteria is met or has been
2 violated that would result in that revocation.

3 Based upon the uncontradicted evidence that the
4 Court has there is no question that commercial use is being
5 made of the units within Elk Point Country Club. Not only
6 was their testimony to that, not only do you have evidence of
7 exhibits that are advertising it as such but now you have a
8 document that was apparently adopted by the board that
9 specifically addresses the transient commercial use of units.
10 No dispute they are being used for commercial use. That is a
11 direct jeopardy to the social club tax exempt status of this
12 entity.

13 The final issue that the Court would have to
14 address if it determined that it would be granting the
15 requested relief is whether or not -- actually, let me go
16 back before I talk about the bond. Let me talk about that.

17 You did ask about the enforcement and that it may
18 be difficult. In our pleadings we actually suggested to the
19 Court that a third party administrator may be appropriate to
20 be appointed. I have had experience with and I have a great
21 deal of respect for Master McMorris, and I would certainly
22 suggest that if the Court were so inclined appointing Master
23 McMorris as the special administrator to ensure the
24 enforcement and to facilitate that enforcement would be

1 something that we certainly would be in favor of and would
2 support and that would assist in ensuring that the Court's
3 order for injunction to require that the board take action to
4 prevent and stop the commercial use of units within Elk Point
5 would be complied with.

6 The final issue for the Court's review, of
7 course, is whether or not the amount of a bond that would be
8 posted by the plaintiffs. We suggested in our pleadings a
9 bond in the amount of \$500, and the reason that we did that
10 is because a nominal bond is clearly appropriate because as I
11 argued before it is the benefit of not having its tax exempt
12 status as clearly the benefit will inure to the social club,
13 and the purpose of posting a security bond is to protect a
14 party from damages occurred as a result of a wrongful
15 injunction.

16 Let's say we get down the road and you determine
17 that this -- that you no longer find that the injunction is
18 appropriate and you dissolve, there are no damages to the
19 country club, none. The only thing --

20 THE COURT: What about if they get sued by
21 homeowners who they are trying to enforce? They are trying
22 -- I ordered them to enforce this. Let's say we go there. I
23 don't know that we will but let's say that we do and -- and
24 so they do something to enforce this because I asked you

1 about enforcement and say how are you going to enforce it,
2 and they are going to be required to do something. Maybe
3 suspend memberships, suspend voting. I don't know if they
4 will turn off somebody's water but who knows what they will
5 do.

6 MS. KERN: I hope not.

7 THE COURT: Because the language in the, that you
8 referred to me that's on in the bylaws on page 119 says
9 shall. I think it says shall. So it's mandatory. So they
10 have to do something. Let's say they do something. Now,
11 wait a minute. Listen up. And they get sued by somebody who
12 could have rented their property for \$1,500 a night and they
13 had -- you know, they had the next 16 nights rented out, \$500
14 ain't going to cover that.

15 MS. KERN: Those are not damages that are going
16 to be incurred by the country club.

17 THE COURT: Really?

18 MS. KERN: The country club is -- well, the
19 attorney's fees. But \$1,500 a night are not damages
20 necessarily that are going to be incurred by the country
21 club. What you're identifying is by stopping the commercial
22 activity the member of the club no longer gets to make money
23 off of its unit.

24 THE COURT: And maybe it's -- maybe they are able

1 to come out and show that it was wrongful that they got
2 prohibited from doing that and they want damages for the days
3 that they could have rented. Is that a stretch?

4 MS. KERN: That's a pretty far stretch. You're
5 saying that a Court would find that an entity is liable for
6 following a lawful order. I mean, I haven't done any
7 research on this, but I have a hard time that there would not
8 be some kind of a shield. If I'm following a Court order I
9 am entitled to some protection against liability for
10 following that Court order.

11 THE COURT: All right. Thank you.

12 Mr. Jones?

13 MR. JONES: Thank you, Your Honor. Thank you for
14 your attention during which turned out to be a pretty full
15 day. I think both the plaintiffs' counsel and I and everyone
16 in the room appreciates that.

17 THE COURT: Well, that's my job, sir. You're
18 welcome.

19 MR. JONES: Certainly, Your Honor.

20 Your Honor, the question I think for this Court
21 is what is the conduct of my client that if allowed to
22 continue will cause imminent harm to the plaintiffs? What I
23 just heard counsel say is that conduct is continued allowance
24 of short-term vacation rentals and the harm being, of course,

1 potentially losing the HOA's tax exempt status over 501c7.

2 They requested a preliminary injunction, this
3 Court preventing short-term vacation rentals from occurring.
4 The problem is if this Court was inclined to grant that order
5 the testimony of their own expert says that's not enough.
6 That's not enough to stop the potential loss of tax exempt
7 status. You have to ban short-term vacation rentals,
8 long-term rentals, investment properties. All of those
9 things have to go in order to guarantee that the tax exempt
10 status of the HOA will be continued and allowed.

11 I think if we start looking at that the analysis
12 of the Court should be, well, what's the harm to the
13 association then if they have to kick out all of their
14 investment owners. They have to stop all long-term tenancy
15 and they have to stop short-term vacation rentals. It's
16 massive, Your Honor.

17 THE COURT: What is the harm? How does that harm
18 the association? It might harm an individual renter. How
19 does it harm the association?

20 MR. JONES: Well, Your Honor, it's not hard to I
21 guess conclude that if a homeowner who was renting or who
22 owned a home has an investment property likely has a primary
23 a residence somewhere else.

24 THE COURT: Okay.

1 MR. JONES: Suddenly is not allowed to rent out
2 that property they -- if it's financed, they potentially lose
3 the ability to pay their mortgage.

4 THE COURT: How does that hurt the association?

5 MR. JONES: I'm getting there. To pay the
6 association fees as well, Your Honor. The association fees
7 are not nominal and the community is beautiful as the Elk
8 Point Country Club.

9 THE COURT: Yeah, but if they bought it for a
10 purpose that's inconsistent with having a home there then
11 they ought to lose the home. So too bad. It will go to
12 somebody who is going to live there.

13 MR. JONES: Well, the issue though, Your Honor, I
14 mean, the HOA I don't believe has the authority to order or
15 to enforce or to have its homeowners sell their property.

16 THE COURT: They don't have to sell their
17 property. They just don't have to rent it. They have to go
18 get the money for their mortgage somewhere else under your
19 scenario.

20 MR. JONES: Uh-huh, but the issue is the
21 plaintiffs requested relief isn't just -- isn't all of those
22 things. It's limited to short-term vacation rentals.

23 THE COURT: I don't have to limit it to that. We
24 have had pretty spirited discussion here.

1 MR. JONES: Uh-huh.

2 THE COURT: I could prohibit any leasing of any
3 of the property.

4 MR. JONES: And it would go beyond leasing though
5 as well, Your Honor. It would also go to investment
6 properties, appreciation.

7 THE COURT: I don't know. I think -- I don't
8 think that that's included here.

9 MR. JONES: Well, I think even beyond that
10 though, Your Honor, is that the imminent harm that would be
11 suffered is it just simply hasn't been shown anywhere else.
12 The plaintiffs' own expert, the accounting expert testified
13 that there is not a single instance in the years of
14 short-term vacation rentals have been around where the IRS
15 has revoked tax exempt status.

16 The fear that the plaintiffs are trying to
17 instill on this Court has never happened before. Short-term
18 vacation rentals are not a brand new thing. Yes, they peaked
19 in popularity in the past few years, but they have been
20 around for quite a while, Your Honor.

21 THE COURT: Granted, but you can't -- you still
22 haven't told me any damage to your client. Maybe damage to a
23 homeowner but not to your client.

24 MR. JONES: Well --

1 THE COURT: Tell me how is your client damaged.

2 MR. JONES: Well, Your Honor, my client, it's
3 certainly a corporate entity but it's an entity that's
4 composed of its members.

5 THE COURT: It's an entity that's separate from
6 the individual members, and the individual members aren't
7 being sued here. Your client is being sued to enforce its
8 own bylaws.

9 MR. JONES: Uh-huh.

10 THE COURT: How is your client damaged by having
11 to enforce its own rules?

12 MR. JONES: Well, I mean, assuming for the sake
13 of example that to enforce its own rules it has to stop all
14 leasing on the property.

15 THE COURT: Okay.

16 MR. JONES: One of the goals of an HOA, as we
17 discussed before, is to maintain property values. It's to --
18 that's why the example we talked about, you can't paint your
19 house purple. Why is this? Well, because who wants to buy a
20 house next to someone who paints their house purple.

21 THE COURT: Who wants to buy a house next to one
22 that's being rented out to somebody different every week?

23 MR. JONES: Well, that was something that was
24 discussed and voted on at the July 24th, 2020 election. The

1 majority of the homeowners decided that, yes, I'm someone who
2 wants to, first of all, be able to rent out my house.

3 THE COURT: Ma'am, I'm not talking to you. You
4 stop.

5 MR. JONES: They voted and agreed, a majority on
6 a two to one margin.

7 THE COURT: But so what? Do they -- they didn't
8 amend the bylaws. They didn't amend the bylaws that say you
9 can't do this.

10 MR. JONES: Well, I don't believe that the bylaws
11 state that you can't do a short-term vacation rental. The
12 argument is that potentially the tax exempt status of the HOA
13 is in doubt if short-term vacation rentals are allowed to
14 move.

15 THE COURT: That's not what the bylaws say. In
16 the preamble to the bylaws it says that the association can't
17 take action and essentially, I'm not quoting it, take action
18 that allows the -- the individual members to act for profit
19 within that property.

20 MR. JONES: Well, it was -- the preamble to the
21 bylaws say that the rules and bylaws are not -- I probably
22 should quote it, but it's with a view -- with a view towards
23 or I should probably quote the exact same, Your Honor.

24 THE COURT: You can quote exactly what it says.

1 MR. JONES: Sure. It operates it into properties
2 or facilities with the view of providing profit to its
3 members.

4 THE COURT: Right.

5 MR. JONES: With the view doesn't foreclose the
6 possibility of members profiting off of their properties.

7 THE COURT: Well, you can't operate -- you can't
8 operate the bylaws with that view.

9 MR. JONES: Correct. But with the view towards,
10 shall not with the view of providing the profit.

11 THE COURT: So how do you -- so how do you -- how
12 do you allow people then to rent for profit?

13 MR. JONES: Well --

14 THE COURT: How can you be consistent with that?

15 MR. JONES: Well, because it's -- it's with the
16 view toward providing a profit. That doesn't -- again, that
17 doesn't foreclose the possibility, but it's also tenancy is
18 contemplated throughout. And I know Your Honor, you noted
19 the fact that there could be a life tenancy. It's
20 contemplated.

21 THE COURT: Well, there are a number of different
22 kinds of tenancies in Nevada. So it could be a joint
23 tenancy.

24 MR. JONES: Uh-huh.

1 THE COURT: It could be a tenancy in common. It
2 could be a tenancy for years. Nevada recognizes all of those
3 tenancies in addition to a life tenancy. So tenancy doesn't
4 necessarily mean a rental. There are a number of different
5 kinds of tenancies recognized within the Nevada Revised
6 Statutes, and nowhere does it say a rental tenancy.

7 MR. JONES: Sure.

8 THE COURT: It says tenancy.

9 MR. JONES: Sure. I make reference to some
10 language that's present throughout I believe each of the
11 bylaws. I'm looking at --

12 THE COURT: Site to me a particular exhibit,
13 please, sir.

14 MR. JONES: I'm looking at Exhibit 4, plaintiffs'
15 0038.

16 THE COURT: I'm looking at the same one. 38 you
17 said, sir?

18 MR. JONES: Correct, 0038.

19 THE COURT: I don't think that's in four. I
20 think that's in five, sir.

21 MR. JONES: That may be the page, Your Honor. My
22 apologies. Yeah, you're correct. Exhibit 5, 0038.

23 THE COURT: All right.

24 MR. JONES: Your Honor, this is under duties of

1 the directors and subsection G, towards the top of the page
2 reads to adopt annually rules for the conduct and government
3 of the members comma their guests and tenant. To me that --

4 THE COURT: It says members comma tenants and
5 guests.

6 MR. JONES: Well, correct. To me that delineates
7 between the members, the owners of the HOA and their guests
8 and their tenants. That's something separate then.

9 THE COURT: So -- so I could -- we heard the
10 evidence is and I don't mean to keep interrupting you, but we
11 need to be clear here. The evidence is that you can own
12 property without being afforded a membership and that was the
13 evidence because I asked that.

14 So you can -- I could buy that property from you
15 and then I have to apply for the membership, but I could -- I
16 guess I could also have the membership. Suppose I have the
17 membership and then I grant you a life tenancy. Now you
18 would be the tenant. I could still have the membership. You
19 can read that. That's -- that provision consistent with
20 that. I could have the membership and I could get married
21 and have a tenancy in common.

22 MR. JONES: Correct, Your Honor. I think the way
23 that that particular provision is written.

24 THE COURT: Uh-huh.

1 MR. JONES: And the plain reading of that would
2 be if we were to present it to a jury, the plain reading of
3 that would be their guest and their tenants. That implies it
4 separate and apart from membership, and I'm not certain that
5 it was established through the evidence that you can actually
6 be a member and not an owner of just some sort of two
7 different classes of ownership or membership in the HOA. I'm
8 not sure that was completely established, and I'm certain
9 that it wasn't established that there actually exists out
10 there members who are owners or owners that aren't members.

11 THE COURT: Well, I didn't ask that question.

12 MR. JONES: Of course.

13 THE COURT: I did ask after I buy the property
14 then I have to apply to be a member.

15 MR. JONES: Uh-huh.

16 THE COURT: And that's the second thing that I
17 have to do.

18 MR. JONES: Correct.

19 THE COURT: And if I don't do it then I don't get
20 to use the beach and the harbor and all of that stuff. I
21 just get to have the house.

22 MR. JONES: I think there was also evidence
23 though that there's not a single instance where someone
24 applied for membership and was denied. I mean, it seems to

1 me it's a rubber stamp formality if anything from what we've
2 seen.

3 THE COURT: No, I believe it's a 20,000 dollar
4 stamp formality, sir.

5 MR. JONES: It's a very expensive stamp, Your
6 Honor. It's a very expensive stamp, but over the 95 years of
7 existence of the Elk Point Country Club not a single --
8 there's not evidence of a single owner who applied for
9 membership who was denied. And I realize it's not in
10 evidence but there's contemplation of being rid of that
11 requirement because of the implication of that denial of the
12 membership and exposures to the association that could exist.

13 THE COURT: Sir, you own property up there and
14 you're a member. You purchased the membership. You're a
15 single gentleman, living the good life, living at Elks Point.
16 You meet someone just down the road at what used to be the
17 old Sam's Club and now it's something else, and you wander in
18 there and you wander out. It turns out you have fallen in
19 love and you get married.

20 Now, you -- you have someone who lives with you
21 and you've got a partner. That partner isn't a member. That
22 could very easily happen. And what sort of tenancy that
23 person may have depends on how you change the deed to your
24 property, whether you do a quitclaim deed and give someone a

1 joint tenancy in your property, but they are not a member.
2 It's not hard to imagine.

3 MR. JONES: It might be hard for my wife to
4 imagine at this point.

5 THE COURT: It's hard to imagine you've got a
6 wife. I apologize.

7 MR. JONES: A second wife unfortunately, Your
8 Honor.

9 THE COURT: We are all blessed in one way or
10 another.

11 MR. JONES: Sure. And to respond to your
12 question though, Your Honor, it's not contemplated that the
13 tenancy would be exclusively the scenario that you described.
14 Just simply because it says tenancy to me allows for both the
15 joint tenancy, tenancy in common, all of the various
16 tenancies that the State of Nevada allows or tenancy in the
17 sense of a renter, a short-term vacation rental, a long-term
18 vacation rental. It's not exclusive of the situation you
19 described. We have to read the rules to say what they are,
20 and it says tenancy which the plain reading of that rule
21 offer all types of tenancy not just simply one type of
22 tenancy or another.

23 The rules do not delineate or do not exclude
24 short-term renters or long-term renters. In fact, the rules

1 that we saw in Exhibit 17A specifically allow for short-term
2 rentals, specifically contemplate short-term rentals. So
3 that would be my response to that, Your Honor.

4 And regardless though I want to talk about just
5 one more issue in closing, sir.

6 THE COURT: Please do.

7 MR. JONES: That relates to the second prong of
8 this Court's analysis for the preliminary injunction and that
9 is compensatory damages not being sufficient to remedy the
10 plaintiffs' situation.

11 Now, if for instance, for example if the worst
12 case scenario happens, this Court denies injunction, the
13 short-term vacation rentals continue, the IRS finds out. The
14 IRS -- someone in here works for the IRS. Hey, I think I
15 should tell my boss and does an investigation. Ultimately
16 determine that the first time ever a homeowner association
17 loses its tax he exempt status because of short-term vacation
18 renters. What are the damages to the plaintiffs? The
19 damages are taxes presumably divided up into assessments,
20 compensatory damages, Your Honor. That's it. There's
21 nothing that compensatory damages can't fix even in the worst
22 case scenario of the association's tax exempt status being
23 revoked which I'll submit to this Court is pure speculation.

24 But regardless, even assuming the worst case

1 scenario, being the compensatory damages are adequate to fix
2 what the plaintiffs are complaining of.

3 So with that said, Your Honor, I don't believe
4 that the plaintiffs have met their burden of establishing
5 entitlement to the extraordinary relief of a preliminary
6 injunction at this point in time.

7 THE COURT: Thank you very much.

8 MR. JONES: Thank you, Your Honor.

9 THE COURT: Do you have any rebuttal and by that
10 I mean brief?

11 MS. KERN: I can take a hint, Your Honor. The
12 only thing that I would like to respond to is the issue of
13 compensatory damages. The entire character of this entity
14 established in 1995 is a social club, consistent with that
15 social club exemption from the IRS. I know you don't want me
16 to talk about all of the particular consequences that might
17 apply if the IRS revoked that, but we -- but that would not
18 be covered with compensatory damages.

19 And on the flip side there is absolutely no
20 damage to the Elk Point Country Club to make sure that we
21 preserve that tax exempt status. Thank you.

22 THE COURT: Thank you very much.

23 All right. Counsel, here's what I'm going to do.
24 Let me first tell you, Ms. Kern, and, Mr. Jones, I greatly

1 appreciate your arguments today and your skill as advocates.
2 I've enjoyed talking with you and questioning you, and I
3 appreciate your preparedness in this.

4 Ms. Karadanis, I appreciate your arguments too.
5 You talk to Ms. Kern and the next time you come back you get
6 a speaking role.

7 MS. KARADANIS: I hope I didn't tear your ear off
8 too mch.

9 THE COURT: Slip her a five out in the parking
10 lot.

11 But I do appreciate good lawyers and I -- and
12 it's just a pleasure to see you, but I will tell you that
13 this is -- this is how I see this thing. When I came into
14 the room this morning I was very skeptical of the notion of
15 issuing a preliminary injunction here and -- and that was for
16 a lot of reasons.

17 I read your documents obviously. I think you
18 probably know that, and -- and it seemed to me there were
19 some really significant hurdles that the plaintiffs would
20 have to surmount in order to get what they were asking for.
21 I think that, frankly, throughout the course of the day I
22 continued to have those questions, but eventually it became
23 clear to me that, in fact, here's where we are.

24 There are bylaws of this association, and those

1 bylaws make it clear to me that the intent of -- of this
2 association, in fact, is to be a social club.

3 Now, I don't want to comment on this -- on this
4 business that makes it sound like the social club wants to
5 exclude people who aren't like us or who are just, you know,
6 on a vacation or something like that and that they are not as
7 good of people and I don't find that at all.

8 But what I do find is the members of the
9 association organized this to be, in fact, a social club
10 and -- and that the application, although there's not
11 evidence of a history of people being denied the ability to
12 join, there is an application process and a requirement that
13 they make certain commitments to the social club.

14 And while there are things like the past
15 President's Breakfast and whatever other social events
16 happen, it's been a nonprofit 501c7 and it is apparently the
17 intention under the bylaws that it maintain that status, and
18 it is also clear from the preamble that has been duplicated
19 and repeated in every iteration of the bylaws that I have
20 that the organization be for the specific purpose of the
21 pleasure, of fellowship and recreation, and its corporate
22 function and design to achieve in highest measure said
23 purpose.

24 It shall not operate its properties or facilities

1 with a view of providing profit to its members but rather
2 such properties and facilities shall be held, operated and
3 made available for the use and enjoyment of its members on
4 payment of such assessments and charges as fairly meet the
5 cost.

6 And -- and it is clear that the intent is that
7 the -- that the association not engage in behavior which
8 encourages a particular profit to its members. Now, I don't
9 know -- you know, the evidence -- there's no evidence that
10 17A has been recorded. And, in fact, Mr. Felton told me he
11 didn't know that it ever was recorded. But I will tell you
12 this, whether it was recorded or not it is completely at odds
13 with the bylaws, and those rules which allow vacation rental
14 are absolutely contrary to the bylaws of this organization as
15 I can read the preamble and the rest of the bylaws.

16 Now, I have to go back and say Mr. Jones makes
17 this great point, and I made the point several times as we
18 went through this, the discussion about tenants and guests.
19 I am obligated to read the documents in a manner that is
20 consistent with upholding them, and it's the same way that I
21 would interpret a statute. If you can read a statute in two
22 different ways, and one which makes it unconstitutional and
23 one which makes it constitutional you have to read it in a
24 constitutional fashion.

1 I have to read the bylaws in a way that makes
2 them upheld if there is such a way, and I read the term
3 tenants, as I've discussed with you. There are a number of
4 different tenancies recognized by the State of Nevada. The
5 joint tenancy, a tenancy in common, a life tenancy, a tenancy
6 for years and -- and that all applies.

7 That statute or that part of the bylaws which is
8 in Article 5G and it's on page nine in one iteration and on
9 another page it's another iteration of the bylaws but it's
10 consistent throughout. If you read it consistent with that
11 then it is consistent with not operating the units within the
12 association for profit. If you read it any other way it is
13 inconsistent with that.

14 Whether it be long-term rental or short-term
15 rental, people who rent for the short-term by Airbnb or
16 vacation rental by owner, all of the other methodologies are
17 not lesser people. They are not worse people. They are not
18 bad people, but I don't think they are allowed to rent at Elk
19 Point because now it can't be for a business. It can't be
20 for purpose here. If any homeowner wants to give their
21 property out and allow somebody to stay there they can do
22 that, but it doesn't appear to me that it can be done for
23 profit.

24 And as I look at 17A, all of these rules are

1 about renting for profit which is directly contrary to the
2 bylaws, and this rule can't be enforced. It simply can't be,
3 and I find that there is a likelihood that the plaintiffs
4 will prevail in this matter.

5 And I also find that there is a threat of
6 permanent damage to them through the loss of the tax exempt
7 status but also through the change in the nature of the very
8 corporation itself, the very association itself. If the
9 association is as it is purported to be, one that is designed
10 to promote the social and recreational benefit to those who
11 are members it changes the nature of that organization to
12 become a commercial organization.

13 And the Elk Point Country Club Homeowners is
14 ordered to enforce its bylaws.

15 Ms. Jones -- or I mean, Ms. Kern, with
16 Ms. Karadanis' help, you're to prepare this order.

17 MS. KERN: Yes, Your Honor.

18 THE COURT: I have thought about the bond in this
19 case, and I think that the bond should -- needs to be
20 something more than \$500 that is suggested. I recognize that
21 there's a benefit to the Country Club Association to not lose
22 its tax status, but it seems to me that the bond should be in
23 the amount of \$5,000.

24 And what you would have to do if the association

1 were not enforcing the bylaws and if it were allowing and not
2 doing something to enforce those bylaws to prevent rentals,
3 either short-term or long-term, because as the Court has made
4 clear, I see them the same way, then you'll have to request
5 the Court to order that those be enforced.

6 That's the ruling. I really do appreciate you
7 being here, and I appreciate your argument. I appreciate
8 members of the community coming in and listening. I know you
9 all have an interest in this, and you all see it different
10 ways, but it is clear to me that you can't make rules that
11 are in violation of your bylaws, and you can't engage in
12 behavior that's in violation of your bylaws.

13 Either side to this can have a meeting and change
14 the bylaws, and that's done by a vote, and that might work
15 for you, and I made that clear on your side too. If you see
16 an ambiguity in that word tenancy you need to change it. And
17 if you want to change the bylaws to allow rentals you need to
18 change them, but you may lose your tax exempt status, and it
19 would be really silly to go make some big changes without
20 talking to your accountant.

21 We're in recess. And I thank you all very much.
22 I kept you all a little bit past 5:00 o'clock. To all of you
23 in the audience drive home carefully.

24 But most specifically to the staff that works for

1 me, the court reporter, the deputy, I really appreciate you
2 staying on a Friday evening to allow us to finish this. You
3 have my appreciation very much. Thank you, and we are in
4 recess.

5 Oh, and, Ms. Kern, thank you for the souvenir,
6 but I'm returning to this to you.
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1 STATE OF NEVADA,)
2 CARSON CITY.) ss.
3

4 I, KATHY JACKSON, Nevada Certified Court Reporter
5 Number 402, do hereby certify:

6 That I was present in the District Court in Minden on
7 Friday, October 23, 2020, for the purpose of reporting in
8 verbatim stenotype notes the within-entitled hearing;

9 That the foregoing transcript, consisting of pages 1
10 through 244, is a full, true and correct transcription of
11 said hearing.

12
13 Dated at Carson City, Nevada, this 26th day
14 of October, 2020.

15
16
17 /s/ Kathy Jackson
18 KATHY JACKSON, CCR
19 Nevada CCR #402
20
21
22
23
24

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3

4 THE NINTH JUDICIAL DISTRICT COURT
IN AND FOR THE COUNTY OF DOUGLAS
5

6 K.J. BROWN, LLC AND TIMOTHY Case No. 2020-CV-00124
D. GILBERT, ET AL.,
7 Plaintiffs,
v. Dept. No. 1
8 ELK POINT COUNTRY CLUB, INC.,
9 Defendant.

10 AFFIRMATION
Pursuant to NRS 239B.030
11

12 The Undersigned does hereby affirm that the following
document **DOES NOT** contain the social security number of any
person: (List of document(s) attached below)
13

14 1) Hearing -- 10/23/20

15 -or-

16 The undersigned does hereby affirm that the document
named below **DOES** contain the social security number of a
person as required by state or federal law or for the
17 administration of a public program or for an application for
a federal or state grant: (List of document(s) attached
containing social security number information below)
18

19 1) _____

20 2) _____

21 (Your signature) Kathy Jackson Kathy Jackson (Date) 11/3/20
22
23
24