IN THE SUPREME COURT OF THE STATE OF NEVADA

ELK POINT COUNTRY CLUB HOMEOWNERS', ASSOCIATION, INC., AKA ELK POINT COUNTRY CLUB, INC., A NEVADA NON-PROFIT, NON-STOCK CORPORATION,
Appellant,
vs.
K. J. BROWN, L.L.C., A NEVADA LIMITED LIABILITY COMPANY; AND TIMOTHY D. GILBERT AND NANCY AVANZINO GILBERT, AS TRUSTEES OF THE TIMOTHY D. GILBERT AND NANCY AVANZINO GILBERT REVOCABLE FAMILY TRUST DATED DECEMBER 27, 2013,
Respondents.

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Supreme Court No. 82484
District Court Case No. 2020-CV-00124

APPEAL
From the Ninth Judicial District Court, Department 1
The Honorable Nathan Tod Young, District Court Judge

RESPONDENTS' REPLY IN SUPPORT OF MOTION TO LIFT STAY OF PRELIMINARY INJUNCTION

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Respondents submit this Reply ("Reply") in Support of their Motion to Lift Stay of Preliminary Injunction ("MLS") requesting this Court lift the Order Granting Elk Point Country Club Homeowners Association, Inc.'s ("EPCC") Motion to Stay Matter Pending Interlocutory Appeal ("Stay Order").

POINTS AND AUTHORITIES

This Court granted Respondents the opportunity to request relief from the Stay Order in its Order Dismissing Appeal No. 82824. Therein the Court said to Appellants therein (in Appeal No. 82824) and to Respondents herein (Appeal No. 82484), that they "may move for relief in regard to the stay of the injunction in the context of the appeal in Docket No. 82484, if deemed necessary." *See* MLS, Exhibit 3. Regardless of whether this Court found that the district court's flawed and unsupported reasoning was not independently an appealable issue under NRAP 3A(b), there are still valid grounds to lift the Stay Order in its entirety. The district court did not consider any evidence to justify the stay imposed by granting the Injunction Order nor complete a proper analysis of the required NRAP 8(c) factors. Appellant correctly identified the procedural history below in which the district court declined to address or resolve the deficiencies in the Stay Order. Thus, NRAP 8(a)(2)(A)(i) and (ii) specifically grant Respondents an opportunity to seek this relief because it is abundantly clear that it is impracticable for Respondents to move the district court to lift the stay at this juncture. Appellant failed to offer anything to

show this Court that the district court's Stay Order was supported by any evidence, nor did Appellant resolve or explain the Court's flawed legal analysis in its Stay Order.

ARGUMENT AND ANALYSIS

First, there is no evidence in the record to support the district court's conclusion that EPCC would suffer irreparable or serious injury if the Stay Order was not granted. Appellant asserts that it is an "abhorrently incorrect statement" that it did not offer any evidence for the district court to justify the Stay Order. *See* Appellant's Opposition to MLS ("Opp."), p. 3. Curiously however, Appellant fails to cite to whatever *evidence* it purportedly offered. The obvious presumption for this glaring omission is because it must concede that there is no *evidence* other than counsel's own speculative complaints of injury, which is *not* evidence of injury to Appellant. In fact, Appellant later contradicts itself and argues the alleged injuries to EPCC are "all intuitively self-evident, needing no further evidence in support." *See* Opp., p. 6. This is blatantly an absurd position that any court can make findings based solely on its own "intuition." It also flies in the face of evidentiary standards, burdens of proof, and ignores black letter law. A decision that is not supported by substantial evidence is arbitrary and capricious. *State Emp't Sec Dep't v. Hilton Hotels*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986). In order for a district court to exercise proper discretion when making a decision, it must give "appropriate,

careful, correct and express consideration of the factual and legal circumstances before it." *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 93-94, 787 P.2d 777, 780 (1990). When there is no evidence to support a decision, that constitutes a plain error. *See Patterson v. State*, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995) **(**Plain error is "error [that] is so unmistakable that it reveals itself from a casual inspection of the record.") An injured party bears the burden of proving it has been damaged. *Chicago Title Agency of Las Vegas, Inc. v. Schwartz*, 109 Nev. 415, 418, 851 P.2d 419, 421 (1993). No amount of posturing by Appellant or its counsel will change the fact that the Stay Order was not supported by any actual evidence.

First, there is no evidence that any injury would occur if EPCC *speculatively* had to engage in some unarticulated "tumultuous rule/practice change" relating to rental activities. *See* Opp., p. 4. There has been no *evidence* provided that EPCC would be threatened with any harm by simply enforcing a court order. Again, it defies logic that EPCC would be forced to engage in "contentious" and "litigious" evictions because of the simple reason that it is not a unit owner engaged in rental activity. *See* Opp., p. 5. Any argument to the contrary is based on pure speculation. EPCC offered no qualified witness testimony or documentary support to validate its claim of injury. The likely reason is because there is not any evidence of same. Further, it seems highly unlikely that any unnamed, unknown long-term renters, whoever they are, would sue EPCC for merely enforcing the Injunction Order, which

was entered by the district court *almost a year ago.* These unknown long-term renters have been "on notice" for some time.

Second, Respondents' request to lift the Stay Order is because the district court failed to properly analyze the four factors set forth in NRAP 8(c) and *Fritz Hansen v. Eighth Jud. Dist. Ct.*, 116 Nev. 650 (2000). Appellant failed to resolve the illogical reasoning offered by the district court in support of its Stay Order.

As to the first NRAP 8(c) factor, Appellant attempts to obscure the obvious purpose of the appeal by claiming its goal is to prevent "rule changes," "evictions" and "superfluous discovery." *See* Opp., p. 3. However, those "objects" are nothing more than red herrings when the Stay Order completely halted the operation of the Injunction Order, essentially granting Appellant the relief it hoped to accomplish. Thus, the district court's analysis of NRAP 8(C)(1) was in error.

As to the second NRAP 8(c) factor, Appellant has failed to offer any *evidence* demonstrating how it will suffer "irreparable harm" by enforcing the district court's well-reasoned Injunction Order. The Injunction Order was entered by the district court almost one year ago. All members had also been given 90-days' notice therefrom before EPCC was to begin prohibiting for-profit rental activities (had the stay not been entered). *See* Exhibit 1 to MLS, p. 10, ll. 4-8. To the extent any member would seek to complain about any interference in their rental contracts with non-parties to this litigation, their complaints would be the result of their own business

decision to continue to rent their units, at their own risk, in violation of the Injunction Order. This is not a valid basis to stay the Injunction Order.

Appellant also completely ignores the controlling Nevada law that the time and expense of engaging in discovery is neither irreparable nor serious. *See Fritz Hansen,* 6 P.3d at 986-87. It remains a complete mystery how the "entire case" will be "flood[ed] with tons of irrelevant materials and information" with the "potential for an entire universe of discovery." *See* Opp., p. 6.While Appellant clearly has a flair for the dramatic, its argument simply does not make sense, and is contradicted by the very fact that Appellant simply sought a stay of discovery as to the narrow issue of long-term rentals. Despite Appellant's narrow request, the district court exceeded Appellant's request and stayed all discovery in the entire case, without any explanation or justification. That is more evidence of the lower court's error.

As to the third and fourth NRAP 8(c) factors, it is undisputed that the district court confirmed the social club, inclusive of Respondents, *will* suffer irreparable harm if EPCC does not prohibit members from engaging in for-profit rental use of their units.

CONCLUSION

For the reasons stated in Respondents' MLS and in this Reply, they respectfully submit that pursuant to NRAP 8(a)(1)(2) and NRAP 27(a)(2) good cause exists to lift the district court's Stay Order in its entirety.

DATED this 2nd day of December, 2021.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25(c), I certify that I am an employee of the law firm of Leach Kern Gruchow Anderson Song, and that on this day I served the foregoing document described as ***RESPONDENTS' REPLY IN SUPPORT OF MOTION TO LIFT STAY OF PRELIMINARY INJUNCTION*** on the parties set forth below, at the address listed below by:

X Electronic means to registered user of the Court's electronic filing system consistent with NEFCR 9:

Prescott Jones, Esq. | Resnick & Louis, P.C. | Las Vegas

Gayle A. Kern, Esq. | Leach Kern Gruchow Anderson Song | Reno

X Notification by traditional means must be sent to the following:

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DATED this 2nd day of December 2021.

/s/ Sylvia Baldemor
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