

1 MICHAEL F. BOHN, ESQ.
Nevada Bar No.: 1641
2 mbohn@bohnlawfirm.com
LAW OFFICES OF
3 MICHAEL F. BOHN, ESQ., LTD.
2260 Corporate Circle, Ste. 480
4 Henderson, Nevada 89074
(702) 642-3113/ (702) 642-9766 FAX
5 Attorney for defendants/appellants

Electronically Filed
Sep 30 2021 04:37 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

8 SUPREME COURT

9 STATE OF NEVADA

11 NICKEL MINE AVENUE TRUST, a
Nevada irrevocable trust;
12 TRAVERTINE LANE TRUST, a
Nevada irrevocable trust; MAHOGANY
13 MEADOWS AVENUE TRUST, a
Nevada irrevocable trust; SATICOY
14 BAY LLC, a Nevada Limited Liability
Company,
15

No. 82205

16 Appellants,

17 vs.

18 COPPER CREEK HOMEOWNERS
ASSOCIATION,
19

20 Respondent.
21

22 **APPELLANTS' REPLY BRIEF**
23
24

25 Michael F. Bohn, Esq.
Law Office of
26 Michael F. Bohn, Esq., Ltd.
2260 Corporate Circle, Ste. 480
27 Las Vegas, Nevada 89119
(702) 642-3113/ (702) 642-9766 Fax
28 Attorney for defendants/appellants

1 **NRAP 26.1 DISCLOSURE STATEMENT**

2 Counsel for defendants/appellants certify that the following are persons and
3 entities as described in NRAP 26.1(a), and must be disclosed. These representations
4 are made in order that the judges of this court may evaluate possible disqualification
5 or recusal.
6

7 1. Defendant/appellant, Nickel Mine Avenue Trust, is a Nevada trust.
8

9 2. Defendant/appellant, Travertine Lane Trust, is a Nevada trust.

10 3. Defendant/appellant, Mahogany Meadows Avenue Trust, is a Nevada trust.

11 4. Resources Group, LLC, a Nevada limited-liability company, is the trustee for
12 the Nickel Mine Avenue Trust, Travertine Lane Trust, and Mahogany Meadows
13 Avenue Trust.
14

15 5. Iyad Haddad a/k/a Eddie Haddad is the manager for Resources Group, LLC.

16 6. Defendant/appellant, Saticoy Bay LLC, is a Nevada Limited Liability
17 Company.
18

19 7. The manager for Saticoy Bay LLC is the Bay Harbor Trust.

20 8. The trustee for the Bay Harbor Trust is Iyad Haddad a/k/a Eddie Haddad.
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

NRAP 26.1 DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
Cases	iv
Statutes and rules	iv
I. SUMMARY OF THE ARGUMENT.....	1
II. ARGUMENT	1
1. Plaintiff did not prove that it followed required procedures for issuing the fines that are the basis for plaintiff's complaint	1
2. The district court did not have subject matter jurisdiction over the claims asserted by plaintiff.	13
3. The amount of attorneys' fees awarded by the district court to plaintiff is not consistent with Nevada law	16
4. Plaintiff is not entitled to recover attorneys' fees under NRS 18.010(2)(b).	20
VII. CONCLUSION	21
CERTIFICATE OF COMPLIANCE	22
CERTIFICATE OF SERVICE.....	23

TABLE OF AUTHORITIES

CASES:

Nevada cases:

Breliant v. Preferred Equities Corp., 112 Nev. 663, 918 P.2d 314 (1996) 13

Brunzell v. Golden Gate National Bank,

85 Nev. 345, 455 P.2d 31 (1969) 16, 17

Sarman v. Goldwater, Taber & Hill, 80 Nev. 536, 396 P.2d 847 (1964). 17

Swan v. Swan, 106 Nev. 464, 796 P.2d 221 (1990). 16

Federal and other cases:

Bourne Valley Court Trust v. Wells Fargo Bank, N.A.,

137 S. Ct. 2296 (2017) 7, 18

STATUTES AND RULES:

Nev. R. App. P. 4 15

Nev. R. Civ. P. 56 5-6

NRS 18.010. 1, 20

NRS 116.31031. 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 18, 20, 21

NRS 116.335. 11

NRS 116.600. 14

SUMMARY OF THE ARGUMENT

Copper Creek Homeowners Association (hereinafter “plaintiff”) did not prove that it followed required procedures for imposing the fines that are the basis for plaintiff’s complaint.

The district court did not have subject matter jurisdiction over the claims asserted by plaintiff.

The amount of attorneys’ fees awarded by the district court to plaintiff is not consistent with Nevada law.

Plaintiff is not entitled to recover attorneys’ fees under NRS 18.010(2)(b).

ARGUMENT

1. Plaintiff did not prove that it followed required procedures for imposing the fines that are the basis for plaintiff’s complaint.

At page 7 of its Brief, plaintiff states that “Plaintiff provided the Court with ample evidence to meet its burden of production and persuasion, including copies of various Fine Notices, Hearing Notifications, Penalty Notices, Notifications of Hearing Outcomes, Fine Ledgers and the Affidavit of Jeff Pope.”

The pleadings filed with the court instead prove that plaintiff attached redacted account statements as Exhibits 6, 7, 8, 9, 10 and 11 to its motion for summary

1 judgment (AA1, pgs. AA000130-AA000161), and plaintiff did not attach any Fine
2 Notices, Hearing Notifications, Penalty Notices, Notifications of Hearing Outcomes
3 as exhibits to its motion.
4

5 The various notices attached as Exhibit 12 to plaintiff's reply were not filed
6 until November 19, 2019. (AA1, pg. AA000201)
7

8 At page 13 of its Brief, plaintiff states that "Plaintiff submitted the Affidavit
9 of Jeff Pope, Plaintiff's community manager, who authenticated the documents as
10 true and correct copies. (AA1, pg. AA000208-AA000209)"
11

12 Like the notices attached as Exhibit 12 to plaintiff's reply, the affidavit of Jeff
13 Pope (*see* Exhibit 14 to plaintiff's reply at AA1, pgs. AA000207-AA000209) was
14 not filed with plaintiff's motion for summary judgment, but was only produced after
15 defendants objected that "the plaintiffs motion is not supported by any affidavit" and
16 that "none of the exhibits attached to the plaintiffs motion are authenticated by
17 affidavit." (AA1, pg. 163)
18

19 At page 13 of its Brief, plaintiff also states that "[t]here was no discussion or
20 arguments posited by Defendants regarding alleged deficiencies in the violation
21 notices or an issue surrounding the timing of a notice and/or hearing." On the other
22 hand, at pages 3 to 5 of their opposition (AA1, pgs. 164-165), defendants quoted each
23
24
25
26
27
28

1 of the notice provisions in NRS 116.31031 that plaintiff violated when it imposed the
2 fines upon which plaintiff based its complaint.
3

4 Defendants also stated that “[t]he plaintiffs motion for summary judgment
5 should be denied because the motion fails to demonstrate compliance with all the
6 statutory requirements as detailed herein.” (AA1, pg. AA000166)
7

8
9 In addition, at pages 2 to 4 of defendants’ evidentiary hearing brief, filed on
10 February 7, 2020. (AA1, pgs. AA000222-AA000224), defendants quoted each of the
11 notice provisions that were violated by plaintiff.
12

13 For example, at the bottom of page 4 and top of page 5 of their opposition
14 (AA1, pgs. AA000165-AA000166) and at the top of page 4 of defendants’
15 evidentiary hearing brief (AA1, pg. AA000224), defendants cited NRS 116.31031(5),
16 which provides:
17
18

19
20 The executive board **must schedule the date, time and location for**
21 **the hearing** on the alleged violation **so that the unit’s owner** and, if
22 different, the person against whom the fine will be imposed **is provided**
with a reasonable opportunity to prepare for the hearing and to be
present at the hearing. (emphasis added)

23 At page 13 of its Brief, plaintiff states that “Defendants provided no ‘contrary
24 evidence’ that created genuine material issues of facts on Plaintiff’s claim.” On the
25 other hand, Paragraph 9 of the Settlement Agreement, dated September 16, 2017,
26 expressly provided that “any fines that may be assessed against any of the Properties
27
28

1 related to the existing rental restriction will be waived within fifteen (15) days of
2 execution of this agreement.”
3

4 In addition, paragraph 1 of the Settlement Agreement, dated September 16,
5 2017, stated:
6

7 By executing this agreement, COPPER CREEK and the Trust hereby
8 agree **the Trust is permitted to rent the Properties as an approved**
9 **lease under the Governing Documents** until the earliest of the
following events. . . . (emphasis added)

10 As demonstrated at pages 12 to 26 of Appellant’s Opening Brief, **the notices**
11 **in Exhibit 12 to plaintiff’s reply** proved that every fine imposed by plaintiff after
12 the Settlement Agreement was executed was imposed for a time period when
13 defendants had the right to lease each property pursuant to the Settlement Agreement.
14
15

16
17
18 Exhibit 12 to plaintiff’s reply did not include any notices that were provided
19 to any defendant after June 26, 2018 – the deadline agreed to in the Settlement
20 Agreement, dated September 16, 2017. Consequently, even if a defendant leased a
21 property after June 26, 2018, the HOA could not impose a new fine against that
22 defendant unless the HOA first provided the defendant with the written notice
23 required by NRS 116.31031(1)(c) for that new violation.
24
25
26

27 Moreover, plaintiff never scheduled the hearing required by NRS 116.31031(5)
28

1 to consider any rental violations that allegedly occurred after the expiration of the
2 time period covered by the Settlement Agreement.
3

4 Plaintiff does not cite any authority that permits an HOA to fine a unit owner
5 for leasing a property during the time period expressly allowed by a written
6 agreement between the parties.
7

8
9 By its express terms, NRS 116.31031 only permits the Board of an HOA to
10 take action “if a unit’s owner or a tenant or an invitee of a unit’s owner or a tenant
11 violates any provision of the governing documents of an association.”
12

13 In the last paragraph at page 13 of its Brief, plaintiff states that “Defendants
14 have fabricated an entirely new argument on appeal” and that de novo review “does
15 not entitle appellants to provide brand new arguments on appeal that were never
16 presented to the lower court.”
17
18

19 On the other hand, plaintiff’s failure to comply with the notice requirements
20 in NRS 116.31031 is not an entirely new argument raised on appeal. This same
21 argument was raised at pages 3 to 6 of defendants’ opposition. (AA1, pgs.
22 AA000164-AA000166) and at pages 2 to 4 of defendants’ evidentiary hearing brief,
23 filed on February 7, 2020. (AA1, pgs. AA000222-AA000224)
24
25
26

27 Nev. R. Civ. P. 56 (c)(1)(A) expressly requires that “[a] party asserting that
28

1 **a fact cannot be . . . genuinely disputed must support the statement** by . . . citing
2 to particular parts of materials in the record, including depositions, documents,
3 electronically stored information, affidavits or declarations, stipulations (including
4 those made for purposes of the motion only), admissions, interrogatory answers, or
5 other materials” (emphasis added)
6
7

8
9 Because plaintiff had the burden to prove that defendants breached the
10 Governing Documents for the HOA and that plaintiff timely provided defendants
11 with each of the notices required by NRS 116.31031, Appellant’s Opening Brief did
12 not “fabricate[] an entirely new argument on appeal” by discussing in detail how
13 plaintiff failed to meet its burden of proof.
14
15

16 Plaintiff also refers to “Defendants’ brand-new arguments regarding the timing
17 of the violation notices,” but that description of defendants’ argument is inaccurate.
18 The notices attached as Exhibit 12 to plaintiff’s reply were not defective based only
19 on timing; the notices were also defective because they were issued and fines were
20 assessed on dates when each defendant had the right to lease its property pursuant to
21 the Settlement Agreement.
22
23
24
25

26 As noted above, the unredacted version of Exhibit 12 to plaintiff’s reply (*see*
27 redacted version of Exhibit 12 at AA1, pgs. AA000200-AA000201) does not contain
28

1 any of the notices required by NRS 116.31031 for the HOA to impose fines for
2 leasing any of the six properties after June 26, 2018.

3
4 At page 14 of its Brief, plaintiff states: “Although Defendants have stated that
5 they would have until June 26, 2018, to continue to rent/lease the Properties, that is
6 not entirely true.” Plaintiff then speculates that if a lease was entered on a date other
7 than June 26, 2017 (*i.e.*, the date that the U.S. Supreme Court rejected the petition for
8 writ of certiorari in Bourne Valley Court Trust v. Wells Fargo Bank, N.A., 137 S. Ct.
9 2296 (2017)), the time period when defendants could rent each property could expire
10 in only six (6) months, or December 26, 2017.

11
12 On the other hand, in the unredacted version of page 4 of its motion for
13 summary judgment (*see* redacted version at AA1, pg. AA000101), plaintiff admitted
14 that “the latest period in which Defendants could have continued renting the
15 Properties without submitting a request pursuant to the protocol outlined in the
16 Governing Documents, was **June 26, 2018.**” (emphasis by plaintiff)

17
18 If plaintiff wanted the court to use an earlier date than June 26, 2018, plaintiff
19 was obligated to produce a copy of each lease agreement that supported using the
20 earlier date. Plaintiff did not support its motion for summary judgment with evidence
21 of any such lease agreements.

1 At page 15 of its Brief, plaintiff states that “Plaintiff followed the requisite
2 procedures to assess fines for Defendants’ unauthorized rental/lease of the
3 Properties.” On the other hand, even if the court uses the earlier date of December 26,
4 2017, as stated at page 14 of Appellants’ Opening Brief, only one (1) notice was
5 mailed to Nickel Mine Avenue Trust for the real property at 6838 Nickel Mine
6 Avenue after the Settlement Agreement, dated September 16, 2017, and prior to
7 December 26, 2017: a continuing violation/fine notice, dated November 15, 2017.
8
9 However, because there was no prior violation that could support the imposition of
10 a fine against Nickel Mine Avenue Trust for the real property at 6838 Nickel Mine
11 Avenue, the HOA could not legally impose a “continuing” fine pursuant to NRS
12 116.31031(7).
13
14
15
16
17

18 As stated at page 17 of Appellants’ Opening Brief, only one (1) notice was
19 mailed to Nickel Mine Avenue Trust for the real property at 6892 Nickel Mine
20 Avenue after the Settlement Agreement, dated September 16, 2017, and prior to
21 December 26, 2017: a continuing violation/fine notice, dated November 15, 2017.
22
23 However, because there was no prior violation that could support the imposition of
24 a fine against Nickel Mine Avenue Trust for the real property at 6892 Nickel Mine
25 Avenue, the HOA could not legally impose a “continuing” fine pursuant to NRS
26
27
28

1 116.31031(7).

2 As stated at page 19 of Appellants' Opening Brief, only one (1) notice was
3
4 mailed to Travertine Lane Trust for the real property at 6777 Travertine Lane after
5
6 the Settlement Agreement, dated September 16, 2017, and prior to December 26,
7 2017: a continuing violation/fine notice, dated November 15, 2017.

8
9 However, because there was no prior violation that could support the
10 imposition of a fine against Travertine Lane Trust for the real property at 6777
11 Travertine Lane, the HOA could not legally impose a "continuing" fine pursuant to
12 NRS 116.31031(7).
13
14

15 As stated at page 20 of Appellants' Opening Brief, three (3) notices were
16
17 mailed to Mahogany Meadows Avenue Trust for the real property at 6896 Mahogany
18 Avenue after the Settlement Agreement, dated September 16, 2017, and prior to
19 December 26, 2017: October 5, 2017, November 8, 2017 and December 5, 2017.
20
21 However, each of these fines was for "Maintenance & Repair" and not for improper
22 leasing of the property.
23

24 As stated at page 21 of Appellant's Opening Brief, for the real property at 6896
25 Mahogany Avenue, the notices related to leasing the property were not issued until
26 after plaintiff filed its complaint on March 13, 2019.
27
28

1 As stated at page 23 of Appellants' Opening Brief, only one (1) notice was
2 mailed to Saticoy Bay LLC for the real property at 6773 Granite River Lane after the
3 Settlement Agreement, dated September 16, 2017, and prior to December 26, 2017:
4 a continuing violation/fine notice, dated November 15, 2017.
5

6
7 However, because there was no prior violation that could support the
8 imposition of a fine against Saticoy Bay LLC for the real property at 6773 Granite
9 River Lane, the HOA could not legally impose a "continuing" fine pursuant to NRS
10 116.31031(7).
11

12
13 As stated at page 25 of Appellants' Opening Brief, only one (1) notice was
14 mailed to Saticoy Bay LLC for the real property at 6915 Silver State Avenue after the
15 Settlement Agreement, dated September 16, 2017, and prior to December 26, 2017:
16 a continuing violation/fine notice, dated November 15, 2017.
17

18
19 However, because there was no prior violation that could support the
20 imposition of a fine against Saticoy Bay LLC for the real property at 6915 Silver
21 State Avenue, the HOA could not legally impose a "continuing" fine pursuant to
22 NRS 116.31031(7).
23

24
25 Each notice that was mailed on November 15, 2017 stated that each defendant
26 was in violation of "Rental Restriction section R&R VI(a)" in the CC&Rs. On the
27
28

1 other hand, the Settlement Agreement, dated September 16, 2017, expressly stated
2 that “the Trust is permitted to rent the Properties as an approved lease under the
3 Governing Documents.” On November 15, 2017, the HOA did not have any
4 authority to fine any defendant based on the Rental Restriction in the CC&Rs.
5

6
7 At page 15 of its Brief, plaintiff states that “one of the defendants, SATICOY
8 BAY, LLC, even had an attorney provide a response to one of the violation notices.”
9 That letter, however, was written in response to notice of a hearing to be held on
10 March 20, 2018 (AA1, pgs. 203-206), and that notice related only to the real
11 property at 6915 Silver State Avenue. The letter requested a hardship exemption to
12 allow leasing pursuant to NRS 116.335 and Section 9.13(g) of the CC&Rs.
13
14

15
16 The hearing scheduled for March 20, 2018 was not authorized because it was
17 based on a continuing violation/fine notice, dated November 15, 2017, which is a
18 date when Saticoy Bay LLC Series 6915 Silver State still had the right to lease the
19 property at 6915 Silver State Avenue.
20
21

22
23 Consequently, the evidence proves that plaintiff did not timely serve the
24 notices required by NRS 116.31031 in order to impose the \$28,321.00 in fines listed
25 at page 8 of the unredacted version of plaintiff’s motion for summary judgment.
26 (AA1, pg. 105)
27
28

1 At page 5 of its Brief, plaintiff states that “Plaintiff also pointed out that the
2 fines against Defendants would continue to increase as Defendants continued to
3 violate the terms of the Settlement Agreement by their unauthorized rental/lease of
4 the Properties. (AA1, pgs. AA000039).”
5

6
7 On the other hand, plaintiff did not identify any provision in the Settlement
8 Agreement that prohibited defendants from leasing each property prior to December
9 26, 2017. *See* page 2 of plaintiff’s request for exemption from arbitration (AA1, pg.
10 AA000039), and page 5 of plaintiff’s evidentiary brief (AA1, pg. AA000216).
11

12
13 Furthermore, at page 6 of plaintiff’s evidentiary brief regarding plaintiff’s
14 damages & injunction bond (AA1, pg. AA000217, ll. 24-26), plaintiff admitted:
15

16 A review of plain language of NRS 116.31031 and its applicable
17 statutory history provide that despite Copper Creek HOA having fines
18 over \$1,000.00 for each of the six (6) properties in question, these fines
19 should be limited to \$1,000.00 per home.

20 At the hearing held on February 25, 2020, the court and counsel for plaintiff
21 also stated:
22

23 THE COURT: Good morning. This is regarding the damages for breach
24 of the settlement agreement. I’ve read this stuff. You both agree that
25 the damages are capped at a thousand dollars, correct?

26 **MR. BRAY:** Correct, Your Honor. **I think there’s an agreement**
27 **between the parties that NRS 116.31031 does cap the association to**
28 **a thousand dollars of fines per individual home.**

AA, pg. AA000232, ll. 11-16. (emphasis added)

1 In Breliant v. Preferred Equities Corp., 112 Nev. 663, 918 P.2d 314, 317
2 (1996), this court stated:
3

4 "Under the doctrine of judicial estoppel a party may be estopped
5 merely by the fact of having alleged or admitted in his pleadings in a
6 former proceeding the contrary of the assertion sought to be made."
Sterling Builders, Inc. v. Fuhrman, 80 Nev. 543, 549, 396 P.2d 850, 854
(1964) (quoting 31 C.J.S. Estoppel § 121 at 649).

7
8 Having admitted that plaintiff's damages were capped at \$1,000.00 per home,
9 plaintiff is estopped from arguing otherwise in its Answering Brief.
10

11 **2. The district court did not have subject matter jurisdiction over**
12 **the claims asserted by plaintiff.**

13 As stated at page 29 of Appellant's Opening Brief, NRS 116.31031(1)(b)(2)
14
15 limited the maximum amount of fines that plaintiff could charge for each property
16 involved in the present action to \$1,000.00.
17

18 At page 15 of its Brief, plaintiff states that "NRS 116.31031 cap on damages
19 is not applicable when the violation is a continuing violation." In this regard, NRS
20
21 116.31031(7) states:
22

23 **If a fine is imposed pursuant to subsection 1 and the violation is not**
24 **cured within 14 days**, or within any longer period that may be
25 established by the executive board, **the violation shall be deemed a**
26 **continuing violation.** Thereafter, the executive board may impose an
27 additional fine for the violation for each 7-day period or portion thereof
28 that the violation is not cured. Any additional fine may be imposed
without providing the opportunity to cure the violation and without the
notice and an opportunity to be heard required by paragraph (b) of
subsection 4. (emphasis added)

1 In the present case, however, plaintiff did not prove that the HOA properly
2 imposed any fine “pursuant to subsection 1” because each notice, dated November
3 15, 2017, was issued on a date when each defendant had the authority to lease the
4 property owned by the defendant.
5

6
7 At pages 16 and 17 of its Brief, plaintiff quotes from the *Frequently Asked*
8 *Questions: Living in a Common-Interest Community (HOA)* section of the website
9 maintained by the Nevada Real Estate Division. The language quoted at page 17 of
10 plaintiff’s Brief, however, does not state that a continuing violation can occur when
11 the initial notice is provided on a date when the unit owner is not in violation of the
12 governing documents.
13
14

15
16 The language quoted by plaintiff from the Nevada Real Estate Division’s
17 website is not an Advisory Opinion issued by the Commission for Common-Interest
18 Communities and Condominium Hotels created by NRS 116.600, so the language
19 quoted by plaintiff has no persuasive value.
20
21

22
23 At page 2 of the judgment entered against Saticoy Bay, LLC (AA2, pg.
24 AA000364), the district court limited the amount of plaintiff’s damages to \$2,000.00.
25

26 At page 2 of the judgment entered against Mahogany Meadows Avenue Trust
27 (AA2, pg. AA000426), the district court limited the amount of plaintiff’s damages
28

1 to \$1,000.00.

2 At page 2 of the judgment entered against Travertine Lane Trust (AA2, pg.
3
4 AA000460), the district court limited the amount of plaintiff's damages to \$1,000.00.

5 At page 2 of the judgment entered against Nickel Mine Avenue Trust (AA2,
6
7 pg. AA000477), the district court limited the amount of plaintiff's damages to
8
9 \$2,000.00.

10 On December 7, 2020, defendants filed a notice of appeal from each of the four
11
12 (4) judgments entered on November 6, 2020.

13 Plaintiff chose not to file a notice of appeal pursuant to Nev. R. App. P.
14
15 4(a)(2).

16 As a result, this court does not have jurisdiction to grant plaintiff's request that
17
18 "Plaintiff's fines should not have been capped at the \$1,000.00 and the District
19
20 Court's holding should be overturned." (pg. 17, ll. 18-21 of Answering Brief)

21 This court also does not have jurisdiction to grant plaintiff's request that "this
22
23 Court should instruct the District Court to remove the cap placed on Plaintiff's
24
25 damages as it is not in accordance with the statute." (pg. 18, ll. 6-9 of Answering
26 Brief)

27 In the last paragraph at page 18 of its Brief, plaintiff states that "Plaintiff's
28

1 damages should not have been capped at all” and that “Plaintiff had a good faith
2 belief that its damages would exceed \$15,000.00.” Plaintiff does not cite any
3 authority that a “good faith belief” can confer subject matter jurisdiction when the
4 controlling statute limited plaintiff’s damages to \$6,000.00.
5
6

7 At page 19 of its Brief, plaintiff states that “Defendants failed to raise any
8 objections to the ADR commissioner’s decision to exempt Plaintiff’s matter from
9 arbitration.” On the other hand, plaintiff does not cite any authority that contradicts
10 the holding in Swan v. Swan, 106 Nev. 464, 796 P.2d 221, 224 (1990), that “[a]
11 court's lack of subject matter jurisdiction can be raised for the first time on appeal.”
12
13
14

15 **3. The amount of attorneys’ fees awarded by the district court to**
16 **plaintiff is not consistent with Nevada law.**

17 At page 20 of its Brief, plaintiff states that “the District Court clearly
18 demonstrated that it considered each of the *Brunzell* factors.” On the other hand,
19 page 2 of the district court’s order granting plaintiff’s motion for an award of
20 attorney’s fees and costs (AA2, pg. AA000348) merely quotes the four (4) factors
21 identified in Brunzell v. Golden Gate National Bank, 85 Nev. 345, 455 P.2d 31, 33
22 (1969), and page 3 of the order (AA2, pg. AA000349) finds “the *Brunzell* analysis
23 in Plaintiff’s Motion and Affidavit to be reasonable and adopts the same.”
24
25
26
27

28 The court, however, did not identify any evidence that supports applying the

1 Brunzell factors to award \$40,714.06 in attorneys' fees and costs to a party that
2 recovered a judgment for only \$6,000.00.
3

4 The court's order also does not acknowledges that judgment was entered in
5 plaintiff's favor for only \$6,000.00 of the \$28,321.00 in fines claimed in plaintiff's
6 request for exemption from arbitration. (AA1, pgs. AA000038-AA000073) The
7 factors in Brunzell v. Golden Gate National Bank do not support granting one
8
9 hundred percent (100%) of the fees incurred by a party that recovers only twenty-one
10
11 percent (21%) of the amount claimed.
12

13 In Brunzell, for example, counsel was awarded \$5,000 in attorneys' fees for
14 obtaining a judgment for \$39,300 plus interest, which was the balance owed on a
15 \$40,000 note after deducting a single payment of \$700. Brunzell, 455 P.2d at 32.
16
17

18 In Brunzell, the court quoted from Sarman v. Goldwater, Taber & Hill, 80 Nev.
19 536, 542, 396 P.2d 847, 850 (1964), regarding "the exercise of sound discretion by
20 the trier of the facts," but in that case, counsel for a guardian was awarded \$65,790
21 for an estate that included 500 acres of real property valued at \$2,000,000. In the
22 present case, the district court abused its discretion by awarding \$38,458.00 in
23 attorney's fees to plaintiff's counsel for prosecuting a claim that was limited by
24 statute to only \$6,000.00.
25
26
27
28

1 Moreover, as discussed above, the judgment for \$6,000.00 is itself not
2 appropriate because plaintiff did not comply with the mandatory notice requirements
3 in NRS 116.31031 to impose the fines that make up the judgment.
4

5 At page 21 of its Brief, plaintiff states that the attorneys' fees were awarded
6 to plaintiff "as the prevailing party, under the terms of the Settlement Agreement."
7 On the other hand, plaintiff did not identify any language in the Settlement
8 Agreement that was breached by defendants. All damages claimed by plaintiff
9 instead arose from fines imposed by the HOA because defendants allegedly breached
10 the rental restrictions in the Governing Documents for the HOA.
11
12
13
14

15 The notices in Exhibit 12 to plaintiff's reply prove that plaintiff breached the
16 Settlement Agreement by imposing fines upon the defendants
17 during the time period between September 16, 2017 (the date of the Settlement
18 Agreement) and June 26, 2018 (the date one year after the United States Supreme
19 Court denied the petition for writ of certiorari filed in Bourne Valley Court Trust v.
20 Wells Fargo Bank, N.A., 137 S. Ct. 2296 (2017)) even though the parties expressly
21 agreed that defendants could rent each of the six properties during that time period.
22
23
24
25

26 In addition, in paragraph 2 of the Settlement Agreement, the parties agreed that
27 after the one (1) year period in paragraph 1 expired, the Trust could "submit a/the
28

1 lease for approval according to the Governing Documents, including but not limited
2 to any Resolution(s) and/or Regulation(s) adopted and in force at the time regarding
3 the approval of a submitted lease, including those related to the number of allowed
4 leases.”
5

6
7 At page 21 of its Brief, plaintiff states that plaintiff’s counsel only billed an
8 average of twelve (12) hours per month during a sixteen (16) month period, but
9 stretching the fees out over time does not make it any more reasonable to spend
10 \$38,458.00 in attorney’s fees to prosecute a claim that was limited by statute to only
11 \$6,000.00.
12
13

14
15 Plaintiff states that the hourly rates charged by plaintiff’s counsel were
16 reasonable, but the number of hours spent by plaintiff’s counsel was not.
17

18 Plaintiff also states that “Plaintiff was the prevailing party in the matter, as it
19 was able to enforce the terms of the Settlement Agreement, obtain an order from the
20 District Court that Defendants breached the Settlement Agreement and also received
21 a permanent injunction that ordered Defendants to cease and desist the renting/lease
22 of the Properties.”
23
24

25
26 As discussed above, however, the Settlement Agreement did not prohibit
27 defendants from renting and/or leasing each property, but instead expressly
28

1 authorized each defendant to rent each property during the time period between
2 September 16, 2017 and June 26, 2018. In addition, any fines imposed for renting
3 a property after June 26, 2018 would not arise from a breach of any language in the
4 Settlement Agreement, but would instead arise from defendants' breach of the
5 Governing Documents and the HOA complying with the notice requirements in NRS
6 116.31031.
7
8
9

10 **4. Plaintiff is not entitled to recover attorneys' fees under**
11 **NRS 18.010(2)(b).**

12 At page 22 of its Brief, plaintiff states that the district court did not grant
13 plaintiff's request for attorney's fees pursuant to NRS 18.010(2)(b), so that basis for
14 awarding attorney's fees is "moot and irrelevant."
15
16

17 Plaintiff also quotes the court's finding that "Plaintiff is the prevailing party
18 in this case given the Court's ruling that Defendants breached the settlement
19 agreement" and that "Plaintiff is entitled to an award of attorney's fees and costs as
20 the prevailing party." (AA2, pg. AA000348)
21
22

23 However, neither plaintiff nor the the District Court identified any language
24 in the Settlement Agreement that was breached by the defendants.
25

26 As set forth above, paragraph 2 of the Settlement Agreement expressly
27 authorized each defendant to "submit a/the lease for approval according to the
28

1 Governing Documents” after the one (1) year period in paragraph 1 expired. The
2 Settlement Agreement is silent and does not authorize any damages to be awarded
3 against a defendant when a lease is not approved according to the Governing
4 Documents.
5

6
7 Neither the court nor the plaintiff identified any language in the Settlement
8 Agreement that was breached by defendants. Consequently, there was no basis for
9 the District Court to award any amount of attorney’s fees to plaintiff based on the
10 language in paragraph 13.7 of the Settlement Agreement.
11

12
13 In addition, NRS 116.31031 prescribes the notices that must be provided to
14 defendants before defendants could be fined for leasing a property after the one (1)
15 year period in paragraph 1 of the Settlement Agreement expired. Because plaintiff
16 did not prove that it complied with these mandatory notice requirements, the
17 judgment for \$6,000.00 in damages imposed by the District Court should be set aside.
18
19
20

21 CONCLUSION

22
23 By reason of the foregoing, defendants respectfully request that this court
24 reverse each judgment entered by the district court on November 9, 2020 and remand
25 this case to the district court with instructions to enter judgment in favor of
26 defendants.
27
28

1 DATED this 30th day of September, 2021.

2
3 LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

4
5 By: / s / Michael F. Bohn, Esq. /
6 Michael F. Bohn, Esq.
2260 Corporate Circle, Ste. 480
7 Henderson, Nevada 89074
Attorney for defendants/appellants

8 **CERTIFICATE OF COMPLIANCE**

9
10 1. I hereby certify that this brief complies with the formatting requirements of
11 NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(6) because this brief has
12 been prepared in a proportionally spaced typeface using Word Perfect X6 14 point
13 Times New Roman.
14

15
16 2. I further certify that this brief complies with the page or type-volume
17 limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by
18 NRAP 32(a)(7) it is proportionately spaced and has a typeface of 14 points and
19 contains 4,880 words.
20
21

22 3. I hereby certify that I have read this appellate brief, and to the best of my
23 knowledge, information, and belief, it is not frivolous or interposed for any improper
24 purpose. I further certify that this brief complies with all applicable Nevada Rules
25 of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion
26
27
28

1 in the brief regarding matters in the record to be supported by a reference to the
2 page of the transcript or appendix where the matter relied on is to be found.
3

4 DATED this 30th day of September, 2021.

5
6 LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

7
8 By: /s/ Michael F. Bohn, Esq. /
9 Michael F. Bohn, Esq.
10 2260 Corporate Circle, Ste. 480
Henderson, Nevada 89074
11 Attorney for defendants/appellants

12 **CERTIFICATE OF SERVICE**

13 In accordance with N.R.A.P. 25, I hereby certify that I am an employee of the
14 Law Offices of Michael F. Bohn, Esq., Ltd., and that on the 30th day of September,
15 2021, a copy of the foregoing **APPELLANT'S REPLY BRIEF** was served
16 electronically through the Court's electronic filing system to the following
17 individuals:
18
19
20

21 David M. Bray, Esq.
22 BRAY LAW GROUP, LLC
1180 N. Town Center Drive, Ste. 100
23 Las Vegas, NV 89144

24 /s/ /Maurice Mazza/
25 An Employee of the LAW OFFICES OF
26 MICHAEL F. BOHN, ESQ., LTD.
27
28