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DISTRICT COURT

CLARK COUNTY, NEVADA

MICHAEL KOSOR, JR., a Nevada resident; HOWARD CHARLES MCCARLEY, a Nevada resident; DOES I through X, inclusive,
Plaintiffs,
vs.
SOUTHERN HIGHLANDS COMMUNITY ASSOCIATION; SOUTHERN HIGHLANDS DEVELOPMENT CORPORATION; DOES I through X, inclusive,
Defendants.

Case No: A-20-825485-C

Dept. No: 30

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR VOLUNTARILY DISMISSAL WITHOUT PREJUDICE PURSUANT TO NRCP 41(a)(2) AND OPPOSITION TO DEFENDANTS' COUNTERMOTIONS FOR COSTS AND FEES

Hearing Date: July 20, 2022
Hearing Time: 9:00 a.m.

MEMORANDUM OF POINTS AND AUTHORITIES

I. PREFATORY STATEMENT

Plaintiff Michael Kosor Jr. is a retired hospital administrator and senior U.S. Air Force officer. He fought in the First Gulf War to defend and retain the rights of Americans, including their right to *elect* those who represent them. Now he finds that what he fought for is being wrongly denied in his own retirement home. Plaintiff Kosor also served *three* terms on the board of a Southern Highlands sub-association.

Southern Highlands Development Corporation (SHDC or Developer) has controlled the Southern Highlands Community Association (SHCA or Association)'s board for *more than twenty-*

two years—allowing homeowner elections for only a minority of board seats (the majority are employees/appointees of the Developer[1]). After discovering proof that Developer control should have terminated, Plaintiff Kosor inquired of the SHCA board who ignored his concerns. So, he began filing administrative complaints with Nevada Real Estate Division (NRED) in an effort to protect the rights and interests of the homeowners within his community in self-governance.

Instead of making any determination as to the merits of his concerns, NRED first closed Kosor's case no. 2016-1859 on grounds that it raised issues "not under the jurisdiction of the Division's Enforcement Section."[2] Then, NRED closed Kosor's case no. 2017-913 "***without prejudice***" on the timeliness of a tangential issue, finding that "there are no grounds to consider the [Third Amendment to the CC&Rs] for Southern Highlands invalid in the absence of a legal challenge to the amendment having been brought in accordance with NRS 116.2117(2) [1 yr. statute of repose]."[3] In other words, NRED determined that a statute of repose prevented it from investigating a part of his administrative claim—that a Third Amendment to the CC&Rs was made in violation of provisions of NRS 116.

Clearly desiring to stop Kosor's efforts to draw attention to the indications that Developer should have relinquished control over Southern Highlands, Garry Goett (president of Southern Highlands Development Corporation) and his company, Olympia Companies, LLC (parent entity for Southern Highlands's management company), commenced an illegal strategic lawsuit against public participation or SLAPP action (thinly disguised as a defamation action) against Plaintiff Kosor in late 2017 to silence his concerns about declarant control change and the way the master association was being operated. In that action, Goett and Olympia Companies, LLC sought to disparage and intimidate Kosor into submission by attempting to make an example of him for the community and

[1] Garry V. Goett owns and is president of SHDC; SHDC appoints/employs a majority of the SHCA board; and the SHCA board contracts OMS (a company also owned by Goett). In other words, the Defendants are extensively interrelated and Goett exercises unusually pervasive control over the community. Meanwhile, all other owners in SHCA have no real fiduciary or conflict-free compliance monitor within the community.

[2] *See* June 20, 2016 Correspondence from NRED, attached as **Exhibit A**.

[3] *See* January 8, 2018 Correspondence from NRED, attached as **Exhibit B**. Notably, neither NRED nor any court ever determined that the Developer and SHCA properly adopted the Third Amendment. Instead, they found and concluded that Kosor's challenge to the validity of the adoption was untimely.

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threatening him with financial ruin.

After a successful appeal to the Nevada Supreme Court,[4] the "defamation action" filed by Goett and Olympia Companies, LLC against Kosor was determined to have violated Nevada's anti-SLAPP laws and, consequently, *Kosor prevailed on all claims brought against him* by Mr. Goett and Olympia Companies, LLC.[5]

During the pendency of the anti-SLAPP litigation, Plaintiff Kosor sued NRED in the Eighth Judicial District Court (Case No. A-18-778387-C) seeking an order declaring that the Third Amendment was invalid *ab initio* and compelling NRED to re-open Kosor's administrative case no. 2017-913. But, *prior to allowing any discovery*, that district court dismissed Kosor's complaint by deferring to the decisions by NRED: "[NRED's] decision to dismiss the First and Second Complaints were proper under the relevant sections of NRS 116 as they were time barred." And so, Kosor appealed that district court's decision contending that both the court and NRED had misconstrued the text of the statute of repose.

On appeal, the Court of Appeals of Nevada affirmed the district court's decision agreeing with NRED and the district court's construction of NRS 116.2117(2) and concluded that "the 2005 [Third] amendment to the master declaration is presumptively valid after one year." No finding was made in any of that litigation that Kosor's claims about how many units had been conveyed to owners other than the Declarant lacked merit or were frivolous. Instead, the Court of Appeals specifically acknowledged the issue remained an open question, stating "[n]othing in [its] decision precludes Kosor from filing [another complaint] should the Declarant fail to relinquish control over SHCA once the terms and conditions of the 2005 amendment have been satisfied."[6]

Indeed, no adjudicating body ever made any determination on the merits of Plaintiff Kosor's claim that the terms and conditions requiring automatic termination of declarant control were met prior to October 1, 2015 (even assuming the Third Amendment is valid and unchallengeable). And,

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[4] Kosor v. Olympia Companies, LLC, 136 Nev. 705, 478 P.3d 390 (2020) ("[W]e easily conclude that all of the complained-of statements concerned matters of public interest[.]")

[5] Decision and Order in Case No. A-17-765257-C dated July 19, 2021 ("The Court concludes [Kosor]'s statements that Plaintiffs contend are defamatory are, for the most part, statements of evaluative opinions and premised on facts which are true or substantially true or those of which Defendant did not have knowledge of their falsehood."), attached as **Exhibit C**.

[6] Kosor v. Nevada Real Estate Div., 487 P.3d 397 n. 3 (Nev. App. 2021) (unpublished).

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every representation by Defendants to the contrary is indefensible and misrepresents the dispositions of those prior administrative and court cases. And, although Kosor filed other administrative complaints in 2018 with NRED relating to other concerns he had about how the Association conducted elections and provided access to information, those cases were also closed without any decision on the merits as to his concerns over declarant control.[7]

So, still possessing credible evidence and indications that control change should have automatically terminated (and having never been provided relevant information affecting control change from Defendants), Plaintiffs Kosor and McCarley (both retired homeowners) initiated the instant lawsuit against the Association seeking to compel it to conduct a full election for all SHCA board seats (not just the minority seats). *Plaintiffs Kosor and McCarley also knew that success in this lawsuit would never result in any monetary judgment in their favor*; rather, Plaintiffs believed this lawsuit could force compliance with long-existing laws intended to orderly protect homeowners (and contract provisions running with the land that mimic and must conform to the law). However, what Plaintiffs initially believed would be a short (and somewhat affordable for two retired homeowners) injunctive relief action swelled into more challenging and protracted litigation during which Defendants misrepresented the findings of NRED[8] and withheld obviously relevant information.

After approximately one year of litigation in the current case, Plaintiff Kosor was elected by homeowners as one of two minority board seats. And, he is currently serving his first term as a member of the board of the master association—outnumbered by Developer's appointees. This prompted significant settlement discussions, including between Goett and Kosor in person. However, settlement negotiations failed.

And, in light of the increasing length and cost of this self-funded lawsuit, as well as Plaintiff Kosor's new role on the board and changed goals, Plaintiffs have moved this Court for leave to voluntarily dismiss their complaint *without prejudice* (and without any condition of paying another

[7] *See* June 6, 2018 Correspondence from NRED, attached as **Exhibit D**.

[8] Nowhere in any closing letter from NRED or dispositive order from any court, has any determination been made as to: (1) Whether builder units should be counted toward terminating Developer control? and (2) Whether the conveyed unit count reached the threshold for automatic termination of Developer control?

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party's attorney fees). In response, Defendants have filed limited oppositions and countermotions requesting that dismissal be conditioned on awarding their exorbitant claimed attorney fees (exceeding $79k for Developer and $67k for Association).

In attempting to condition dismissal on an award of exorbitant attorney's fees, Defendants once again resort to disparaging Kosor in a baseless attempt to portray him as a bad actor who should be punished for the audacity of challenging Defendants' control over the HOA board. Of course, similar disparagements were made against Kosor in the anti-SLAPP action, which the district court completely rejected, having found no evidence of defamation by Mr. Kosor and instead that Goett and Olympia Companies, LLC had improperly pursued an anti-SLAPP action against Kosor to silence him. However, the irony of the disparagement of Kosor in this action is lost on Defendants, as the only parties to have been adjudged to have engaged in improper or wrongful conduct are Developer's president (Goett) and Olympia Companies, LLC.

II. AN OVERVIEW OF PLAINTIFFS' LAWSUIT

A. The Good Faith Central Issue of this Case Should Have Been Resolved Quickly and Simply—Do Builder Units Count Toward Terminating Declarant Control and, If So, How Many Builder Units Were Conveyed to Owners Other than Declarant?

The case rests on the resolution of a simple question of whether or not "Builder Units"—units conveyed to builders and annexed in the Association who were, just like residential owners annexed and subjected to Association assessments—should be counted toward the termination of declarant control over the Association. No court or administrative body has formally decided this question or ruled on its merits. Nor is this issue barred or precluded.

Plaintiffs believe that "Builder Units" should be counted while Defendants contend that only "Residential Units" or "end users" (a non-statutory term) must be counted. If Plaintiffs are right, then the threshold for terminating SHDC's control over the Association was reached prior to October 1, 2015, which should have allowed homeowners to elect all of their representatives a few short months later.

As a reminder, the maximum number of units in Southern Highlands is **10,400 units**. Prior to October 2015, under NRS 116.31032, SHDC's control over the Association would *automatically* terminate upon the conveyance of 75% of those units (75% of 10,400 = **7,800 units**) to owners *other*

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than the declarant (SHDC).

Declarant owned ***less than five*** annexed units.[9] The Association further admits without objection "that each of the owners of the estimated 7,041 Residential Units reflected in the 2015 budget owned at least one unit (as defined by NRS 116.095) located within [the Association] and was consequently entitled to exercise voting rights."[10] The parties do not dispute that residential units are counted toward the issue of declarant control. Plaintiffs believe that the builder units reflected in the 2015 Budget (1,079 units) should also be counted. The combined residential and builder unit count provided in the 2015 Budget for Southern Highlands at the time that count was ratified by the Association's board on November 20, 2014 was 8,120 (320 units more than needed to automatically terminate declarant control).

Unwilling to accept the foregoing, Defendants contend that the 1,079 Builder Units count in the 2015 Budget is only an estimate. However, the 2016 Budget (ratified on November 19, 2015) further evidences the builder count can only be higher than reflected in the 2015 Budget. In the 2016 Budget the "2015 Annualized *Accrued*" "Monthly Assessments [for] Builders" total $889,079.40.[11] The 2016 Budget also reflects that the "Monthly Assessment per Unit" was $60.00. Accordingly, simple math shows that $889,079.40 (total monthly builder assessments for 2015 annualized accrued) divided by 12 (months)[12] and $60.00 (monthly assessment) equates to approx. 1,235 builder units *accrued* in 2015. And this was approved in November 2015—in close proximity to the time during which Plaintiffs contend that the threshold for terminating declarant control was met. In other words, the estimated 1,079 Builder Units was a low estimate.[13] Combining the

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[9] SHDC's Responses to Request for Admission Nos. 2 and 5; see also SHDC's Response to Request for Admission No. 4 (admitting that it owned less than five of the units listed in the 2015 Master Roster at the time that count was received by NRED on January 27, 2015), attached as **Exhibit E**.

[10] SHCA's Response to Request for Admission No. 7; see also SHCA's Response to Request for Admission No. 5 (admitting that on November 20, 2014, the total number of units owned by a person or entity possessing voter rights within the Association other than the Declarant exceeded 7,031 units), relevant portions attached as **Exhibit F**; accord Southern Highlands 2015 Ratified Budget, attached as **Exhibit G**.

[11] Southern Highlands 2016 Ratified Budget, Bates SHD000534, attached as **Exhibit H**.

[12] Id. Dividing by twelve gives the Declarant the benefit of the doubt and assumes that all builder units are annexed in for the entirety of 2015. If any builder units are annexed in for less than twelve months, then the resulting calculation would be an even higher number of builder units, exceeding the estimated 1,079 builder units.

[13] An exact total should be readily determinable by the financials.

Builder Units (approx. 1,235) with the 7,041 Residential Units, the total units conveyed far exceeded the 7,800 unit threshold (plus the 4 or fewer SHDC owned units).

To further investigate his concern that the threshold for terminating Declarant control had been reached, Plaintiff Kosor also went in person to the Clark County Recorder's Office in early 2016 and searched for conveyances to builders to confirm that declarant rights had not been simultaneously conveyed with parcels/developments. Kosor discovered 848 units sold to builders prior to September 2015 each lacking any mention of declarant rights being transferred. More specifically, he found conveyed to builder Lennar Homes 290 units in the Cortana gated community at Southern Highlands and 155 units in Legends at Southern Highlands.[14] He also found conveyed to builder Pulte Homes 403 units in The Cove at Southern Highlands. These 848 units combined with the Residential Unit would also exceed the threshold for automatic termination of declarant control.

Nevertheless, Defendants continue to contend that the approved budget estimate of Builder Units should not be included in the calculation of the declarant control threshold. However, their position is not supported by the controlling law. More specifically, the controlling law, NRS 116.31032 (2015), uses the statutory definition of "Unit" (NRS 116.093). Under NRS 116.093, a "unit" is defined as "a physical portion of the common-interest community designated for separate ownership or occupancy, the boundaries of which are described pursuant to paragraph (e) or subsection 1 of NRS 116.2105 [the boundaries of each unit created by the declaration are to be set forth in the declaration]."

Corresponding for NRED, Monique Williamson has confirmed to Plaintiff Kosor that "'Builder Units' are counted [for purposes of declarant control]."[15] Builder units—"even those not yet being used as a dwelling"—*are* a physical portion of the Association designed for separate

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[14] *See* February 2, 2016 Email to Christopher Communities HOA Board, attached as **Exhibit I**; Plaintiffs admit that it is entirely possible that Plaintiff Kosor did not count every builder unit and recently Plaintiff Kosor re-discovered correspondence previously sent to him from counsel for the Association, Michael Schulman, Esq., dated January 13, 2016 reflecting 535 builder units (without counting the 403 units that made up The Cove at Southern Highlands), attached as **Exhibit J**; see also October 2014 Deed of Sale for the 403 units of The Cove at Southern Highlands, attached as **Exhibit K**.

[15] September 23, 2021 Email sent at 9:13 a.m. by Monique Williamson (NRED), attached as **Exhibit L**.

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ownership or occupancy.[16] And, the Association regularly assesses Builder Units because they are physical portions of the Association and designated real property under the declaration.

Meanwhile Plaintiff Kosor was informed not only by NRED that builder units are counted, but by counsel for his sub-association (Christopher Communities at Southern Highlands HOA) in correspondence directed to the sub-association board (which included Plaintiff Kosor in early 2016) writing that "So long as declarant's rights had been assigned to a builder by means of a recorded instrument, the transfer of real property to that builder would not be considered a conveyance under the statute. Conversely, if such a recorded documents does not exist, *sales of lots to builders would, in my opinion, count toward reaching the 75%* (or 90% as may be applicable) threshold [for terminating declarant control]."[17]

In a desperate attempt to avoid termination of declarant control (and the consequences of the SHCA board's failure to act as fiduciaries), Defendants now dispute the accuracy of the Associations own 2015 and 2016 budget figures; however, they have yet to produce any evidence that those figures were incorrect. Instead, the Association appears to have confirmed by admission the 1,079 Residential Units reflected in the 2015 Budget and has withheld any evidence tending to rebut the evidence-based assertion that the number of Builder Units met or exceeded 1,079 units.

In other words, the evidence supports Plaintiffs' claims that declarant control should have automatically terminated prior to October 1, 2015 and Plaintiffs stand a very reasonable chance of prevailing, should this case proceed to trial.

B. Despite Extensive Resources, Defendants Withheld Highly Relevant Evidence to the Unfair Prejudice of Plaintiffs.

Counsel for each of the parties attended the early case conference on July 7, 2021. Under NRCP 16.1(a)(1)(C), the parties had a duty to disclose by July 21, 2021 a copy or description of all documents in its possession, custody, or control that it may use to support its claims or defenses and any unprivileged record concerning the incident that gave rise to the lawsuit. Remarkably, SHDC waited until *after* Plaintiffs filed the instant motion for voluntary dismissal on an order shortening

[16] Id.
[17] **Exhibit I**, February 2, 2016 Email from Matt Grode to CCHOA Board (emphasis added).

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time to supplement their initial disclosures and produced ***for the first time ever on June 9, 2022***,[18] highly relevant correspondence with references to other highly relevant documents. Although the correspondence indicates that the Association's board also received at least some of the documents—the Association never disclosed these documents either.

The newly disclosed correspondence had *never before been seen by Plaintiffs*[19] and includes one letter dated October 16, 2017 from counsel for SHDC to a heretofore unknown NRED investigation. In that letter, SHDC's counsel argues that declarant control had not terminated because builder units should not be counted toward declarant control, and on that basis represented that "only 7,157 units had been conveyed to unit's owners as of October, 2015. *See* VMS Log, enclosed herewith."[20] Neither SHDC nor the Association have *ever produced* the VMS Log referenced in the correspondence, even now.

In that correspondence, SHDC also disingenuously raises arguments about the validity of the Third Amendment of the CC&Rs—that it was an effort to correct an earlier scrivener's error made by SHDC, thus allowing SHDC to unilaterally amend the declaration increasing the maximum units from 9,000 to 10,400. Plaintiffs do not find credible the scrivener's error assertion changing such an important term of the declaration—the maximum units—more than five years after it was created, after approximately 7,000 units had been annexed, and following six prior amendments and/or supplemental changes.[21]

The timing of Defendants' disclosure reeks of concealment and obfuscation. Good cause exists to believe that had Defendants timely produced this evidence, it may have dynamically altered the course of litigation and helped inform Plaintiffs where to direct their discovery.

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[18] SHDC's Second Supplement to Initial Disclosure of Documents, attached as **Exhibit M**.

[19] This correspondence was also never part of the court record in Case No. A-18-778387-C (brought by Kosor against NRED) and its appeals.

[20] **Exhibit M**, Bates SHDC000643-SHDC000644 n.7.

[21] *See* **Exhibit M**, Bates SHDC000640-SHDC000641; Exhibit 1 to the Third Amendment adds six APN's to the list featured on Exhibit 1 of the Second Amendment, including the addition of APN 192-000-001 (a 318 acre parcel purchased in a BLM auction in Dec. 2004 for $50.5M). See Exhibit 1 to the Third Amendment, attached hereto as **Exhibit N.** The letter disingenuously claims that Declarant intended this parcel to be part of Southern Highlands at its inception, even though the parcel would not even be purchased for another 4 years. Moreover, Plaintiffs believe that APN-192-000-001 added more than "10% of the real estate described" in the CC&Rs in violation of NRS 116.2122.

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Additionally, prior to this litigation, Plaintiff Kosor requested the "Official Record of Owners" from the SHCA and was provided the attached *completely* redacted document (no names, addresses, unit numbers, etc.)[22] And, during the course of this litigation, Defendants have never produced *any* "Official Record of Owners" (redacted or not).

C. Plaintiffs Contend that Developer Commenced a Series of Misrepresentations that Have Developed Into Aspersions and Obfuscations—Instead of Simply Producing the Relevant Information.

A reading of the entire email exchange between Kosor and NRED's Monique Williamson provides a clear demonstration of Kosor's good faith inquiries to better understand the issue of declarant control in stark contrast to Defendants' claims and acts.[23]

Instead of forthrightly producing evidence of the actual Residential and Builder units (beyond the Association's budgets), Defendants leveraged their significant resources to obfuscate the issues and history of the litigants, attack and asperse Plaintiffs, and drive up litigation costs—in a concerted effort to force the Plaintiffs into submission. Defendants also fail to cite to any law that would support their position that builder units are not counted toward declarant control.

Plaintiffs now highlight certain misrepresentations by Defendants—

Misrepresentation #1: "NRED has approved Southern Highlands' unit count since 2010."[24] / "The Ombudsman approved the Board's calculations, and the same calculation has been used since."[25] Defendants have repeatedly argued and asserted that SHCA both provided NRED the relevant count and that NRED has never disputed its count. Defendants also repeatedly argued that they were audited. But, both of these arguments are disingenuous, red herring arguments.

In so arguing, Defendants knowingly conflate a count they are required to report to NRED

[22] *Completely Redacted* Official Record of Owners, representative pages (1, 2, and 198 of 198 pages) attached as **Exhibit O**.
[23] *See generally* September 22-23, 2021 Correspondence between Kosor and NRED, attached as **Exhibit L.**
[24] Developer's *Opp'n to MSJ* (e-filed 01/28/2022), 11:13; *see also* January 21, 2016 Board Meeting *Rough* Transcript, Bates SHD000302, relevant portions attached as **Exhibit P**.
[25] Developer's *Opp'n*, 5:23-25 (citing January 21, 2016 Board Meeting *Rough* Transcript and Gilliam Declaration).

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for purposes of NRS 116.31155(1)(a) (requiring payment of an administrative fee) with the relevant NRS 116.31032(1) count concerning declarant control. These two statutes are distinct—the former concerns "every unit in the association *used for residential use*" while the latter more broadly concerns all conveyed "units that *may be created to units' owners other than a declarant*." This statutory distinction is significant. The relevant count, conveyed "units that may be created to units' owners other than a declarant," is a broader term, that reaches even undeveloped dwelling places and physical portions of the community that are intended for only ownership (not occupancy).

For the "used for residential use" count, the Association reported to NRED in January 2015, on NRED Form 562, only the "Number of annexed units *with a Certificate of Occupancy.*"[26] Defendants know that this figure, as its title indicates, includes only occupied residential (and not builder units). But, no certificate of occupancy is required to be counted for purposes of NRS 116.31032(1) (determinative of declarant control).

Likewise, in its most recent audit, in 2010, the Association was examined for its compliance with NRS 116.31155(1)(a).[27] And the resulting NRED Audit Report dated September 29, 2010 is devoid of any determination that the Association was in compliance with NRS 116.31032. Likewise, the NRED Notification of Audit dated August 26, 2010 is also devoid of any reference to compliance with NRS 116.31032. Instead, the audit determined whether the association accurately accounted for "every unit in the association used for residential use" and fully paid the administrative fee required by NRS 116.31155(1)(a).

Accordingly, the Association did not report compliance with NRS 116.31032(1). If they had been audited for compliance with NRS 116.31032, Defendants would have and should have produced such clear and convincing records as evidence in this case. **They cannot and do not, because there was no such audit and they have *nothing* in writing from NRED confirming their count for purposes of declarant control.** Indeed, the letter closing Kosor's 2017 administrative complaint *without prejudice* does not cite any law or decision about whether builder units are counted toward declarant control. It also makes no finding or conclusion to that effect. Simply put, this is an unsupported assertion by Defendants.

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[26] 2015 Form 562, Bates PFF000249, attached as **Exhibit Q**.
[27] NRED Audit Report dated September 29, 2010, attached as **Exhibit R**.

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Furthermore, writing for NRED, its Education and Information Officer confirmed in correspondence about whether NRED monitors declarant control thresholds that, "*NRED does not monitor threshold percentages* . . . [NRED] do[es] not preemptively seek out associations who may be reaching the threshold for transition [from declarant controlled to homeowner controlled]."[28] Meanwhile, Defendants have produced *nothing* from NRED stating that it actually monitored or audited for declarant control. Accordingly, every time Defendants have asserted that NRED audited or approved of their calculations, they knowingly conflated the issue with knowledge that they had no proof to the contrary.

Misrepresentation #2: "Mr. Kosor was informed—back in 2016—that his interpretation of the unit count was incorrect."[29] Defendants have been quick to shift the focus from the lack of support for their position by framing the issue somehow as Kosor's failure. And they have been quick to malign Kosor and contend that his calculations and methodology are wrong—but very slow to provide evidence that his calculations or methodology is in fact wrong in any respect. Kosor did address the Association board on January 21, 2016 on the issue of declarant control. At that meeting, the board initially attempted to avoid providing any explanation as to Kosor's concerns. But, when Kosor and other attendees insisted on an explanation, his points were rebuffed with unproven assertions that NRED (or the Ombudsman) had approved their numbers, including by audit. This is the same disingenuous argument from Defendants described in detail above.

In keeping with that red hearing line, at that January 21, 2016 meeting, Angela Rock, President of Olympia Management Services (and SHCA attorney), rebuffed Kosor by asserting without proof: "The state has come and audited, as they do generally and occasionally. They have sent auditors out to go through each map and audit the unit count. This is an audit from the state. I just want to reclassify. It's not as if it's some made-up number from the declarant. These are numbers that then the per door fee is paid on and they calculate on."[30] Once again, she improperly conflates the "per door" fee (paid based on the "end user" aka "used for residential use" count) with

[28] **Exhibit L**, September 23, 2021 Email sent at 12:47 a.m. from Monique Williamson (NRED) (providing in-line responses to Kosor's inquiries).
[29] Developer's *Opp'n*, 5:19-21 (citing January 21, 2016 Board Meeting *Rough* Transcript and Gilliam Declaration).
[30] **Exhibit P** (*Rough* Transcript), Bates SHD000302.

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the declarant control threshold count. And the referenced audit concerned that same fee for residential use units, not the broader declarant threshold.

Ms. Rock wrongly asserted that the declarant control numbers had been audited and found to be proper. In fact, the audit she referenced was conducted in 2011 (see above reference)—years before the threshold in question. It was also intended to confirm the units count used to pay the "roof tax" aka administrative fee based on "end users". So, again, Ms. Rock misdirected Kosor, instead of responding to his reasonable inquiries with the relevant numbers.

Misrepresentation #3*: *"Mr. Kosor's relentless and aggressive demeanor."[31] Defendants have also repeatedly attempted ad hominem attacks against Mr. Kosor to further distract from Plaintiffs' credible claims. For example, Developer vaguely claims that Kosor's "aggressive demeanor led to many OMS employee complaints." This is simply a scapegoat argument and attempt to cast aspersions on Plaintiffs originally made in conjunction and likely to bolster the Declarant's SLAPP action against Kosor. During that SLAPP/defamation action, Goett and Olympia Companies, LLC made the same merit-less arguments using the same self-serving statements, in which the District Court determined that Goett and Olympia improperly commenced a SLAPP action to silence and intimidate Kosor. And Defendants cannot dispute that the OMS office has surveillance cameras, but that no footage depicting any harassment by Kosor has ever been discovered or produced. Nevertheless, OMS banned Kosor from coming to the office without any hearing by the board—seemingly in an effort to preclude, or at least complicate, his access to inspect documents concerning declarant control held at the OMS office.

In a meeting Kosor had with Rick Rexius (then-president of the Association), he informed Kosor that he did not believe the allegations related to Kosor's conduct around OMS staff. He had always seen Kosor act in a professional manner. Instead, the employees of OMS were hounding Mr. Goett, concerned that if Kosor (or one of his associates) were ever elected to the board, the contract with Southern Highlands central to their employment would be in jeopardy.

Likewise, Plaintiff McCarley testified in that previous lawsuit (to which he was not a party) that he was also accused of threatening a board member and "decided, Gee, whiz, I'm being set up

[31] Developer's *Opp'n*, 7:2.

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for another banning, same as Mike was, and I decided at that point to remove myself from the situation because I could see a threat, an allegation of a threat being made against me with no basis in fact that would result in considerable public embarrassment, among other things."[32]

Furthermore, the fact that Kosor was elected by his fellow owners to the Association board in the December 2021 election, runs counter to the fake persona Defendants maliciously seek to attach to Plaintiff Kosor. Owners didn't buy into the aggressive opposition and efforts to misinform them undertaken by Goett.[33] Owners share Plaintiffs' concerns, but fear reprisal like that levied against Kosor, and recently elected him to represent them on the Association board in one of only two seats.

Although the Association holds a fiduciary duty to all owners, instead of transparently addressing Plaintiffs' credible concerns, they have instead chosen to go to great lengths to avoid a complete response. And, using the purse of homeowners over years, the Defendants have sought time and again to discredit Plaintiff Kosor by *ad hominem* attacks—despite facts supporting his public concerns. Goett and the parent company for OMS even engaged in a frivolous SLAPP action against him that took more than three years to litigate and was eventually determined to be "a quint-essential SLAPP action."[34]

Misrepresentation #4*: *SHCA Budgets Reflect a "mere estimate." Defendants have repeatedly and duplicitously argued that that the 2015 SHCA unit counts are "mere estimates." But Defendants offer no proof that those budget count numbers are incorrect. In fact, they argue that a memorandum authored by counsel for NRED determined the merits of this case—and the referenced memorandum clearly relies on the 2015 Budget and its stated number of Residential Units. Defendants also continue to knowingly withhold VMS logs while offering no proof that the budgets are incorrect.

And, this Court should consider the discussion above concerning the 2015 accrued annualized figures. Even if the budget numbers are in any way imprecise, the accrued annualized budget figures indicate only that they must be underestimates.

***Misrepresentation #5*: *Plaintiffs' Serial Complaints Resulted in Special Assessments*.**[35]

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[32] Deposition of Howard McCarley, 25:17-26:6, relevant portion attached as **Exhibit S**.
[33] Gary Goett SHCA Board Election Correspondence and Kosor's Response, attached as **Exhibit T**
[34] Order dated December 21, 2021, 2:6-7, attached as **Exhibit U**.
[35] The Association's *Opp'n*, 3:25-28 (footnote 1).

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The Association's opposition baldly claims that "the overall costs to SHCA homeowners for Plaintiffs', frivolous serial complaints to NRED and other courts has caused more than $155,000 in charges to the Association, all of which results in increased special assessments to the community." This statement is riddled with fallacies. First, Plaintiff McCarley has not participated in any of the NRED complaints (only Plaintiff Kosor). Second, no government body including NRED or the courts has found any of Plaintiffs' claims about declarant control change to be frivolous. Third, although the Association claims (without any proof) that special assessments were levied, Plaintiffs can never recall ever having a single *special* assessment levied against them *as homeowners*—let alone one as a result of their claims. This is simply an inaccurate and unproven statement meant to (again) misdirect this Court from the real issue of this case—an issue on which Plaintiffs stand a very reasonable chance of prevailing should this matter continue to trial.

Misrepresentation #6*: *Plaintiffs "Dragged" SHDC into This Lawsuit. Context on this issue is key. Developer contends that Plaintiffs dragged them into this lawsuit. However, the Court will recall that Plaintiff's initial complaint did not name Developer as a defendant (only the Association). And, Plaintiffs actively opposed in briefing and oral argument to the Court the Association's assertion that Developer was an indispensable party to this litigation. This was a coordinated effort by Defendants to drive up the cost of prosecuting this case—raising the number of filings and associated legal fees by causing Plaintiffs to face multiple defendants. Developer currently seeks to recover attorney fees incurred while coordinating with the Association, before even the Association was even served with a summons and complaint—months prior to the Developer becoming a party. Plaintiffs believed that the Association could produce evidence of the unit count sufficient to allow the Court to grant declaratory relief and compel the Association to conduct a new election.[36]

Also, relevant portions of NRS 116 (including NRS 116.31032) clearly intend that the Association should fight for their owners' representation when a developer resists the automatic termination of its control. Instead, the Court concluded "that Plaintiffs' claims implicate rights and interests of the Declarant under NRS Chapter 116, so that proceeding in Declarant's absence will, as

[36] *See Plaintiff's Opp'n to Defendant's Motion to Dismiss* (e-filed 12/08/2020) and *Errata* (e-filed 12/14/2020) on file herein.

a practical matter, impair and/or impede its ability to protect that interest . . . and threaten to leave the Association subject to a substantial risk of multiple or inconsistent legal obligations" and then "*order[ed] Plaintiffs* to amend their complaint to join the Declarant pursuant to NRCP 19(a)(2), within ten days[.]" Left with no other path forward to adjudication on the merits of their claims, Plaintiffs joined the Developer.

III. LEGAL ARGUMENT

A. Defendants Fail to Show that They Will Suffer Some Plain Legal Prejudice If Leave Is Granted for Voluntary Dismissal *Without Prejudice*.

Federal precedent generally holds that a "district court should grant a motion for voluntary dismissal under Rule 41(a)(2) unless a defendant can show that it will suffer some plain legal prejudice as a result."[37] This is still true where dismissal is sought *without prejudice*.[38] Legal prejudice is "prejudice to some legal interest, some legal claim, some legal argument" (i.e., loss of a federal forum, or the right to a jury trial, or a statute-of-limitations defense).[39] But, legal prejudice is **not** the incurrence of attorney fees and costs.[40] Nor does it result "when defendant faces the prospect of a second lawsuit."[41]

Here, Defendants offer no argument they would suffer some plain legal prejudice if voluntary dismissal without prejudice is granted. And, there are no pending dispositive motions and no threat of jury waiver or a loss of forum or a statute-of-limitations defense. Instead, Plaintiffs brought their claims in good faith and have shown diligence in pursuing a resolution of their claims—including disclosing documents, seeking summary judgment, propounding written discovery, and engaging in extensive settlement negotiations. Plaintiffs have also offered

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[37] Smith v. Lenches, 263 F.3d 972, 975 (9th Cir. 2001). As noted in Plaintiffs' motion, NRCP 41(a)(2) is verbatim identical to Fed. R. Civ. P. 41(a)(2) and Nevada courts look to federal case law for guidance in interpreting rules of civil procedure that mirror federal rules. Exec. Mgmt. Ltd. v. Ticor Title Ins. Co., 118 Nev. 46, 53, 38 P.3d 872, 876 (2002); *see also* Stevenson v. State, 131 Nev. 598, 602-03, 354 P.3d 1277, 1280 (2015).

[38] *E.g.,* Hamilton v. Firestone Tire & Rubber Co., Inc., 679 F.2d 143, 145 (9th Cir. 1982) (affirming grant of voluntary dismissal without prejudice).

[39] Smith v. Lenches, 263 F.3d 972, 975 (9th Cir. 2001) (quoting Westlands Water Dist. v. United States, 100 F.3d 94, 97 (9th Cir. 1996)).

[40] Westlands Water Dist. v. U.S., 100 F.3d 94, 97 (9th Cir. 1996) (but holding that "[u]ncertainty because a dispute remains unresolved is not legal prejudice").

[41] Hamilton v. Firestone Tire & Rubber Co., Inc., 679 F.2d 143, 145 (9th Cir. 1982) (affirming grant of voluntary dismissal without prejudice).

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explanations of their need for dismissal (which would also favor judicial economy). And, trial is sufficiently far away that Defendants have not yet prepared for it.

Ultimately, it is undisputed that Defendants will suffer no plain legal prejudice should this matter be dismissed without prejudice. Accordingly, this Court should grant Plaintiffs' motion for voluntary dismissal without prejudice.[42]

And, although a district court possesses discretion to set conditions to a grant of voluntary dismissal, federal precedent is clear that "imposition of costs and fees as a condition for dismissing without prejudice is **not** mandatory," in any circuit.[43] Indeed, district courts retain discretion to grant dismissal without prejudice absent any condition and do make such rulings.

Plaintiffs Kosor and McCarley maintain that this Court should likewise grant dismissal without prejudice and without any conditions. The disparity of wealth between these parties is undeniable (Plaintiffs are individual, retired homeowners both approaching their 70's while Defendants are large entities with extensive monetary resources, insurance coverage, and management and legal teams). But even more significant is that Plaintiffs brought and pursued their claim in good faith—even as the landscape dynamically changed when Plaintiff Kosor was elected to the Association's board by his fellow members of the Association based on his platform, which raised concerns over declarant control.

Furthermore, the Plaintiffs have a realistic chance of success if this case were to go to trial. The language of NRS 116.31032(1) is clearly more inclusive than certified occupied units and an employee for NRED had confirmed that builder units should be counted toward Declarant control. Also, builders are assessed identically to residents. Plus, the record is clear that the declarant owned 4 or fewer units and that residential units exceeded 7,041—meaning that if more than 759 builder units exist and are counted (the budget estimated more than 1,000), then Plaintiffs should prevail at

[42] Because Plaintiffs moved for dismissal without prejudice, the Court cannot order dismissal with prejudice without giving Plaintiffs an opportunity to proceed with litigation. Lau v. Glendora Unified School Dist., 792 F.2d 929, 930 (9th Cir. 1986).

[43] Westlands Water Dist. v. U.S., 100 F.3d 94, 97 (9th Cir. 1996) (citing Stevedoring Servs. of Am. v. Armilla Int'l B.V., 889 F.2d 919, 921 (9th Cir. 1989) (affirming grant of voluntary dismissal without prejudice absent any imposition of an award of attorney fees and noting that "no circuit court has held that payment of the defendant's costs and attorney fees is a prerequisite to an order granting voluntary dismissal")).

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trial.

It is also worth noting that the imposition of attorney fees may discourage future plaintiffs from pursuing meritorious claims under similar circumstances.

B. Defendants are Not "Prevailing Parties"—They Obtained *No* Monetary or Dispositive Judgments and Plaintiffs Seek Only *Voluntary* Dismissal *Without Prejudice*.

Both Defendants erroneously argue that each is a "prevailing party" entitled to an award of attorney fees. But neither defendant successfully obtained any dismissal on grounds that Plaintiff's claims were vexatious and neither received any monetary judgment in this case to render it "prevailing party" status. Instead, Plaintiffs unilaterally motioned this Court for leave to voluntarily dismiss this case (and their meritorious claims) only *without* prejudice. Consequently, there are no grounds upon which Defendants might recover an award of attorney fees.

First, generally speaking, a district court may not award attorney fees absent authority under a statute, rule, or contract.[44] This is because under the common law, the American Rule, each party is to bear its own attorney fees.

Second, Plaintiff's voluntary motion seeks dismissal without prejudice. The Nevada Supreme Court recently distinguished between voluntary dismissal *with* prejudice and *without* prejudice, holding consistent with U.S. Court of Appeals for the Ninth Circuit precedent that "a voluntary dismissal *with* prejudice generally equates to a judgment on the merits sufficient to confer prevailing party status upon the defendant."[45] Because Plaintiffs seeks dismissal only without prejudice (not with prejudice), Defendants cannot be prevailing parties and cannot show a material change in the positions of the parties.

Moreover, binding Nevada Supreme Court precedent also makes an award of a money

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[44] *See* Albios v. Horizon Communities, Inc., 122 Nev. 409, 132 P.3d 1022, 1028 (2006), *citing* State Dep't. of Human Resources v. Fowler, 109 Nev. 782, 784, 858 P.2d 375, 376 (1993).

[45] 145 E. Harmon II Tr. v. Residences at MGM Grand - Tower A Owners' Ass'n, 136 Nev. 115, 120, 460 P.3d 455, 459 (2020) (emphasis added) (holding that "a voluntary dismissal *with* prejudice generally conveys prevailing party status upon the defendant" but that "district courts should consider the circumstances surrounding the voluntary dismissal *with* prejudice in determining whether the dismissal conveys prevailing party status").

judgment a *prerequisite* to any award of attorney's fees based upon NRS 18.010(2)(a).[46] When no monetary damages judgment has been granted, a district court cannot award attorney's fees under NRS 18.010(2)(a).[47] Because Defendants have obtained no monetary judgment, they cannot claim prevailing party status and cannot be awarded attorney fees under NRS 18.010.

C. Defendants Are Not Entitled to Attorney Fees Under Section 19.7 of the CC&Rs.

Defendants claim entitlement to attorney fees under section 19.7 of the CC&Rs. But by its express terms, section 19.7 only entitles a "prevailing party" in an action to enforce any of the provisions contained in the Governing Documents, "as part of the judgment," to recover "reasonable attorney's fees and costs." Again, Defendants are not prevailing parties nor have they obtained any judgment against Plaintiffs, whether monetary or injunctive. Accordingly, Defendants are not entitled to a recovery of reasonable attorney fees under the CC&Rs.

Additionally, Developer drafted the CC&Rs and they contain terms that are ambiguous, as they may be subject to more than one interpretation. For example, Section 19.7 refers to a singular "Prevailing Party" but does not define that term. Not only are there two Defendants here (not one), but different interpretations exist as to the meaning of "Prevailing Party."

Nevertheless, Defendants argue that this clause entitles them to attorney fees, even if the Court grants Plaintiffs' motion for voluntary dismissal. But Defendants would not even qualify as prevailing parties for purposes of NRS 18.010, if Plaintiffs' motion for voluntary dismissal without prejudice is granted, as they have not received any money judgment. Plaintiffs contend that Defendants' position is fundamentally flawed, as their suggested construction of Section 19.7 is not supported by its own terms or Nevada law, and does not accurately reflect the intent of the parties.

Likewise, Section 19.7 refers to a singular "Judgment" without defining that term. Once again, this term is subject to multiple interpretations. Both Defendants assert they would be entitled to their attorney fees—even though the Court would not be granting a motion brought by them and

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[46] *E.g.,* Smith v. Crown Fin. Services of Am., 111 Nev. 277, 285, 890 P.2d 769, 774 (1995) (per curiam) ("We hold that the recovery of a money judgment is a prerequisite to an award of attorney fees pursuant to NRS 18.010(2)(a)."); *see also* Key Bank v. Donnels ,106 Nev. 49, 53, 787 P.2d 382, 385 (1990) (per curiam).

[47] Singer v. Chase Manhattan Bank, 111 Nev. 289, 294, 890 P.2d 1305, 1308 (1995) (per curiam) (reversing district court award of attorney's fees under NRS 18.010 where the district court did not award the defendant a money judgment and citing cases with consistent holdings).

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even though they have received no money judgment. Defendants' assertion is simply without merit, as it not supported by the plain language of section 19.7 and Nevada law, nor does it accurately reflect the intent of the parties.

And, in Nevada, any ambiguity shall be construed against the drafter.[48] Thus, this Court must construe such undefined terms in Section 19.7 in favor of the less sophisticated Plaintiffs. Accordingly, it would be improper to award Defendants their attorney fees under Section 19.7 of the CC&Rs in this case.

Also, Plaintiffs' claims could be adjudicated and resolved in their favor simply by focusing on the relevant sections of NRS Chapter 116. Although Plaintiffs' complaint references clauses in certain governing documents, enforcement of the provisions of those documents is tangential. In fact, the provisions of those governing documents must conform by operation of law to NRS Chapter 116 and thus were expressly written to set the same thresholds and requirements. Accordingly, the gravamen of Plaintiffs' claims is that the Defendants are in violation of provisions of NRS Chapter 116 (and, tangentially, they are also in violation of the standards the governing documents). And, in the end, it would be unfair to award attorney fees to the Defendants when they appear to have violated statutory law and withheld homeowner rights.

D. Defendants Do Not Require an Award of Attorney Fees for their Future Protection

It is ironic that the Association should claim that they need future protection from the efforts of their homeowners (and board member) to require the Association to comply with the requirements of enacted law (NRS Chapter 116). Likewise, it is incredible that the Developer should claim that it requires future protection from the efforts of homeowners (and a board member) to require it to comply with the requirements of the same enacted law.

Although the need for protection is dubious, under NRS 116.31032, a developer's control over an HOA may terminate in only limited ways. In addition to conveyance of a threshold of units to owners other than a declarant, a declarant's control automatically terminates just *five years after* (1) all declarants have ceased to offer units for sale in the ordinary course of business or (2) any right to add new units was last exercised. Accordingly, there is already a limited window remaining

[48] Anvui, LLC v. G.L. Dragon, LLC, 123 Nev. 212, 215, 163 P.3d 405, 407 (2007).

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for Plaintiffs to re-file similar litigation seeking turnover of control over the Association.

Additionally, NRCP 41(d) allows the court to require Plaintiffs to pay all or part of the costs of a previous action *prior to filing a second time*. This requirement would provide the Defendants a reasonable degree of protection. Nevertheless, as a practical matter, this is an instance when the corporate parties with insurance policies, teams of attorneys on regular retainer, and deep pockets are hardly the parties requiring protection. Indeed, it is the homeowners who have and must face substantial financial risk in bringing their claims—knowing that even if they prevail, they will not receive monetary compensation for their years of stress, expense and work.

E. Defendants Should Not Receive Any Attorney Fees; Moreover, Defendants' Requests for Attorney Fees are Unreasonable and Unjustified.

The Association's opposition/countermotion claims that it has incurred attorney fees through May 31, 2022 totaling $67,527.25. This amount is grossly inflated for a party that during the course of this case has (1) propounded no written discovery, (2) issued no subpoenas, (3) participated in no depositions, (4) served just one set of Rule 16.1 disclosures, (5) disclosed no expert witnesses, and (5) filed joinders to all four filings by its co-defendant.

The Developer's opposition claims that it has incurred attorney fees through May 31, 2022 totaling $79,637.50. Once again, these amounts are grossly inflated for a party that has (1) issued no subpoenas, (2) participated in no depositions, (3) served just one supplementation to its Rule 16.1 disclosures, and (4) disclosed no expert witnesses. Although the Developer has propounded some written discovery requests, most of those requests were unnecessary and disproportionate to the needs of this case, as the information sought was already available to their counsel of record as a result of the earlier SLAPP lawsuit brought by Mr. Goett and Olympia Companies, LLC against Kosor. Instead, such written discovery was almost certainly intended to drive up litigation costs for the Plaintiffs—and were made even while the parties attempted to negotiate a settlement.

Nevertheless, Defendants have delayed or minimized their discovery efforts and trial preparation to date. In any event, both Defendants seek bloated figures that far surpass the bills charged by the Plaintiffs' attorneys for the same case. Indeed, it is notable that the Association claims to have incurred fees from approx. 7 different attorneys (Schulman, Schrager, Kerr, Bravo, Guigcangco, Stern, and Bonds) and the Developer claims to have incurred fees from approx. 4

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different attorneys (Jones, Rulis, Florence, Switzler) in defending this matter. Such widespread involvement of attorney's often results in higher costs of litigation rather than efficiency.

1. The Rates for Fees are Excessive under *Brunzell*.

To determine whether the party pursuing an award of attorney fees is seeking reasonable fees, the district court must consider the factors set forth in Brunzell v. Golden Gate National Bank, 85 Nev. 345, 455 P.2d 31 (1969) irrespective of the method chosen to analyze attorney fees.[49] The *Brunzell* factors used to determine the reasonable value of an attorney's services are: (1) the qualities of the advocate; (2) the character of the work to be done; (3) the work actually performed; and (4) the results achieved.[50] "[G]ood judgment would dictate that each of these factors be given consideration by the trier of fact and that no one element should predominate or be given undue weigh."[51] Ultimately, "[t]he district court need only demonstrate that it considered the required factors, and the award must be supported by substantial evidence."[52]

a. Defendants Fail to Provide Sufficient Information for the First *Brunzell* Factor for a Majority of Their Advocates/Paralegals.

Defendants' oppositions/countermotions for costs and fees fail to even argue the qualities of a majority of the advocates for whom they seek to recover attorney fees. More specifically, Developer failed to set forth any of the qualities of Madison S. Florance; Lexi J. Kim; Breanna K. Switzler; or Lexi Anderson, even though they claim entitlement to $44,925.00 (of $79,637.50) for work performed by these individuals per the bills they produced.

Likewise, the Association failed to set forth any of the qualities of Gregory P. Kerr; Daniel Bravo; A. Jill Guingcango; David Stern; Nina Stone; and Kurt Bond, even though they claim entitlement to $22,652.50 (of $67,521.25) for work purportedly performed by these individuals—without even producing any bills.

b. Defendants Exaggerate the Character of the Work Done and Cannot Satisfy the Second *Brunzell* Factor

[49] Shuette v. Beazer Homes Holdings Corp., 121 Nev. 837, 865, 124 P.3d 530, 549 (2005).
[50] Brunzell, 85 Nev. at 349, 455 P.2d at 33.
[51] Brunzell, 85 Nev. at 349–50, 455 P.2d at 33.
[52] Logan v. Abe, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015).

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This case should have been simple and focused on just a few key unit counts. Instead of simply producing evidence to prove or disprove Plaintiffs' claims—evidence that Defendants alone have unfettered access to and were responsible for monitoring, Defendants have misdirected this case and propounded excessive and unnecessary written discovery to the Plaintiffs.

However, Kemp Jones (counsel for the Developer and its president, Gary Goett) unsuccessfully contended in prior lengthy litigation for Mr. Goett and Olympia Companies, LLC that Plaintiff Kosor's statements concerning declarant control were false and defamatory. Accordingly, it had already spent extensive time investigating what Plaintiff Kosor knew and believed on the subject of declarant control. Still, Defendants withheld information (and evidence) about the actual unit counts.

Nevertheless, Developer's counsel claims complexity where none should exist. For example, he asserts that "SHDC was required to thoroughly research and understand Section 116 of the Nevada Revised Statute[s] . . . Specifically, SHDC had to determine what is considered a 'unit' under NRS 116.093 and NRS 116.31032. . . Due to the extensive research and time spent on this matter, all briefing prepared by SHDC was thorough, well drafted, and supported by accompanying exhibits."[53] Developer's counsel may have felt the need to brush up on NRS Chapter 116, but such fees were not reasonably incurred. And, framing this act as a significant indication of the complexity of the character of the work is, frankly, incredible as the sole purpose of NRS 116.093 is to provide the definition of "Unit" for all of NRS Chapter 116. In other words, by simply reading NRS 116.093 once, a person should learn the definition of "Unit" for NRS 116.31032 (and the remaining provisions in NRS Chapter 116).

Defendants or their counsel have endeavored to build up this case and bloat their attorney fees instead of simply producing evidence in their control concerning the number of Builder Units, Residential Units, and Declarant Units prior to October 1, 2015. Armed with just that information, this Court could interpret NRS 116.093 and NRS 116.31032 and find in Plaintiffs' favor.

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[53] SHDC's *Opp'n*, Exhibit A, 5:22-6:3.

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c. Defendants Performed Relatively Uncomplicated and Limited Work (Third *Brunzell* Factor) and Plaintiffs Delays Relating to Resolving Discovery Disputes were Based on Good Cause.

Defendants argue that they were forced to do more work because of delays from Plaintiffs. Specifically, the Developer argues that Plaintiffs' counsel indicated that Plaintiffs' intended to circulate a stipulation to amend their amended complaint to make clear that focus of the litigation was the issue of whether declarant control should have terminated prior to October 1, 2015 (and not any time subsequent). This intention was repeatedly communicated to defense counsel in brief telephone calls and discussion occurred that this might resolve any perceived deficiencies in Plaintiffs' responses to Developer's written discovery requests.[54]

Unfortunately, Plaintiffs' counsel's office experienced an unusual season of hardship over the past year that contributed to the delayed circulation of the stipulation and order for leave to amend Plaintiffs' amended complaint (and certain other discovery). More specifically, throughout all of 2020 and until mid-September 2021, Joseph Meservy, Esq.'s 2 yr. old daughter was fighting a brain tumor—requiring his family to make monthly trips out of state to a research hospital until she eventually passed away as a result of that cancer. Subsequently, in November, his grieving family contracted COVID-19 (despite being fully vaccinated) and became quite ill for multiple weeks. Then, William Pruitt, Esq.'s family caught COVID-19 in late December causing them to be ill for multiple weeks. And, in March 2022, Mr. Pruitt's mother passed away leading to an out-of-state funeral. Then, in late March 2022, Barron & Pruitt, LLP experienced the sudden and unexpected death of John Barron, Esq. (aged 38), the son of name partner David Barron and also a long-time associate of the firm. This too resulted in an out-of-state funeral, as well as a redistribution of case work within the small firm. All of these events justifiably contributed to the delays of which Defendants complain.

[54] Plaintiffs maintained that their responses were never deficient and that Developer or its counsel already had all of the information it sought available to it.

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But, again, the underlying issue in this case had little to do with what Plaintiffs knew and everything to do with what Defendants knew—for it was Defendants' job to facilitate and monitor the conveyance of units to owners other than the Developer. It was Developer's job to turn over control. And, it was the Association's job to notice and hold appropriate elections. Moreover, Mr. Kosor had tried to share what he knew and how he knew it in public board meetings for the Association (and sub-association), multiple prior administrative complaints served on Defendants, and his public campaign materials. It was Defendants who categorically rejected his findings without producing any credible evidence to the contrary.

d. Defendants Did Not Obtain Any Significant Results (Fourth *Brunzell* Factor)

It cannot be stated too clearly that Defendants have not prevailed in this matter. Indeed, their motions for dismissal were not granted (except as to require the amendment of the complaint to add the Developer and as to the previously adjudicated Third Amendment). Nor has any determination been made that Plaintiffs brought a frivolous or vexatious claim (nor could such an assertion survive). Furthermore, there is no pending motion for dispositive relief brought by either Defendant. And, there remains a significant chance that Plaintiffs could prevail if they withdrew this motion and went to trial. Indeed, the discovered evidence demonstrates that declarant-owned units amounted to less than five of the total conveyed units, while residential units exceeded 7,000 prior to October 1, 2015. And, a credible argument exists that builder units (exceeding 1,000 units) should be counted—meaning that declarant control should have automatically terminated.

Instead, Plaintiffs brought the pending motion seeking a dismissal without prejudice to their claims because their own goals have changed. In other words, Plaintiffs are still steering this case.

2. Defendants Also Fail to Properly Justify Their High Hourly Rates

Furthermore, Defendants respective legal teams fail to justify charging such high hourly rates. When Plaintiff Kosor prevailed on the SLAPP action brought by Mr. Goett and the parent company for OMS entitling him to an award of attorney fees after prevailing at the Nevada Supreme Court resulting in the creation of new precedent on novel issues of law, his attorneys requested attorney fees at the following rates based on the lodestar method: $400/hr. (name partner); $300/hr. (associate); and $125/hr. (paralegal/law clerk). Counsel for Mr. Kosor even provided case law indicating that these rates were reasonable for the community. But the Court declined to award such

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rates and, instead, determined that a reasonable award of attorney fees for the community would be limited to the contracted $165/hr. (name partner); $145/hr. (associate); and $95/hr. (paralegal/law clerk).[55]

Remarkably, the only evidence presented be either Defendant in support of its counsel's rates (that substantially exceed the community standard) was an affidavit executed by its own counsel.[56] Such affidavits are insufficient to support rates higher than the community standard.

As the U.S. Supreme Court explained, the petitioning party bears the burden of establishing "sufficient evidence" that the requested rates are "in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation."[57] Counsel's use of self-serving affidavits cannot provide this "sufficient evidence" of a reasonable hourly rate for comparable work by comparable attorneys.[58]

Third-party attorneys' affidavits are the proper way to provide independent verification of prevailing rates for similar work in Las Vegas.[59] Plaintiff's failure to include any citation to third-party affidavits, or even any attorney fee award precedents, weighs against Plaintiff's hourly rate request.

Accordingly, even if Defendants were entitled to recover attorney fees, which they are not, the hourly rates charged by their attorneys and paralegals should be reduced to rates similar to those awarded Mr. Kosor's counsel in his defense against Mr. Goett's SLAPP action. The following attorney rates are unreasonably high: Messrs. J. Randall Jones ($700); Nathaniel Rulis ($375-475); Michael T. Schulman ($375); Bradley S. Schrager ($375); Gregory P. Kerr ($350); Daniel Bravo ($325); David Stern ($275); and Kurt Bond ($225) as well as Mss. Madison S. Florance ($300); Breanna K. Switzler ($275); A. Jill Guigcangco ($275) and should be reduced. Likewise, the following paralegal rates are unreasonably high: Lexi Anderson ($175); Lexi Kim ($175); and Nina

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[55] *See* **Exhibit U**.
[56] *See* SHDC's *Opp'n*, Exhibit A; SHCA's *Opp'n*, Exhibit A.
[57] Blum v. Stenson, 465 U.S. 886, 895 n. 11 (1984); see also Camacho v. Bridgeport Fin., Inc., 523 F.3d 973, 979 (9th Cir. 2008) ("Generally, when determining a reasonable hourly rate, the relevant community is the forum in which the district court sits.")
[58] See, e.g., Henry v. Webermeier, 738 F.2d 188, 193 (7th Cir. 1984) (when substantial fees are involved, market rates should be proved up by affidavits from *other* attorneys in the community).
[59] *See* id.

Stone ($125-150).

3. The Alleged Number of Hours Spent are Insufficiently Documented and are Excessive.

a. Developer Seeks Recovery for Fees Incurred Before the Court Ordered Plaintiffs' to Amend Their Complaint and Add Developer as a Party (And Before Developer was Served with Process).

Developer seeks recovery of attorney fees for services beginning on November 27, 2020. However, no summons for Developer even issued until nearly four months later (March 17, 2021) and service was not made on Developer until March 23, 2021. Accordingly, Developer inappropriately seeks recovery of $2,352.50 of attorney fees incurred prior to the Developer even being served with a summons and complaint.

b. Defendants' Time Entries are Impermissibly Vague

Defendants are not entitled to any award of fees. Moreover, the Association provides no invoices to confirm that the fees it claims are justified. Accordingly, both Plaintiffs and this Court cannot know with any certainty whether Plaintiffs' claim is bloated (as it appears on its face). Because their time entries are so vague as to have been lumped together entirely into one sum per individual for all work performed, the Court lacks sufficient evidence to determine a reasonable fee.

Although the Developer attached as an exhibit invoices for legal fees, its invoices contain numerous entries that are imprecise or vague. Imprecise or vague billing is disfavored because it makes it difficult to review time records in any meaningful way.[60] When time entries are vague, fee reductions are warranted.[61] These include numerous redacted references to reviews of unknown documents for unknown purposes, as well as research of redacted and unknown topics for unknown purposes. Examples include, "Review email regarding [redacted]; review documents provided"; "Review emails and research regarding [redacted]"; and "Research law regarding [redacted]; draft memo regarding the same; correspondence with Nate Rulis regarding the same." There are also

[60] *See* Hensley v. Eckerhart, 461 U.S. 424, 434 (1983).

[61] *See, e.g.,* Banas v. Volcano Corp., 47 F. Supp. 3d 941, 969 (E.D. Cal. 2014); U.S. v. $ 167,070.00 in U.S. Currency, No. 3:13-cv-00324-LRH-VPC, 2015 WL 5057028, at *5–*6 (D. Nev. Aug. 25, 2015) (reducing fee in civil forfeiture case because of vague entries that recorded "meeting with client" or "conference with client" without additional information).

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numerous vague references to conferences "regarding case strategy." Such billing entries are impermissibly vague and cannot be used to determine reasonable attorney fees. Moreover, Defendants are not entitled to an award of attorney fees.

c. Exorbitant or redundant amounts of time spent on particular tasks

Plaintiff's invoices also include entries for unreasonable amounts of time. Courts, of course, will not award fees for hours that are "in excess of the norm."[62] The declaration of counsel for the Developer indicates that an enormous amount of time was spent researching the meaning of "unit" under NRS Chapter 116—despite the fact that NRS 116.093 defines "unit" for that entire chapter. Because Developer's invoices are redacted, it is difficult to know precisely how many hours were spent on that task; however, every indication is that such time was exorbitant.

In light of these deficiencies in the invoices, if this Court does grant an attorney fees award (which it should not do), only a fraction of the fees requested may be awarded. First, the hourly rates of Developer's proven qualified attorneys should be reduced to the community standard rate. And as no paralegal has been proven qualified, no award should be made for any paralegal work performed.

Second, Developer should not be entitled to recover for fees incurred prior to its being a party in the litigation nor should it be entitled to recover for its impermissibly vague or exorbitant time entries. Also, "if the district court decides that it should condition dismissal on the payment of costs and attorney fees [(it should not)], the defendants should only be awarded attorney fees for work which cannot be used in any future litigation of these claims."[63]

Third, the Association should not be entitled to any recovery, as it has failed to produce any invoices or similar proof of its itemized bills and has also failed to prove the qualifications of most of the individuals for whom it seeks to recover.

Because of the other deficiencies articulated above, most of which *evade meaningful review*, the remainder of the fees should be reduced by no less than 40%. This is in keeping with court

[62] Gudenkauf v. Stauffer Commc'ns, Inc., 158 F2d 1074, 1077 (10th Cir. 1998).
[63] Westlands Water Dist. v. U.S., 100 F.3d 94, 97 (9th Cir. 1996) (citing Koch v. Hankins, 8 F.3d 650, 652 (9th Cir. 1993); Davis v. USX Corp., 819 F.2d 1270, 1276 (4th Cir. 1987)).

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rulings for similar attorney fee deficiencies.[64] The 40% number is also in line with what other courts have held.[65]

Nevertheless, as Plaintiffs' moved for dismissal without prejudice (with each party to bear its own costs), if this Court were to condition Plaintiffs' dismissal on a payment of fees and costs, Plaintiffs would be entitled to the right to withdraw their motion and proceed to trial.[66] This is significant because despite the fact that Plaintiffs are the movants for this dismissal, the Defendants seek awards of fees totaling in excess of $145k—a condition that would pose a significant hardship to Plaintiffs and very likely dwarf any cost of proceeding to trial.

IV. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that this Honorable Court grant their motion and dismiss their complaint without prejudice, with each party to bear its own fees and costs. Accordingly, Plaintiffs further request that this Honorable court deny Defendants' countermotions for fees and costs in their entirety.

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[64] *See, e.g.,* Gates v. Deukmejian, 987 F.2d 1392, 1398 (9th Cir.1992) (noting that district courts may "make across-the-board percentage cuts either in the number of hours claimed or in the final lodestar figure as a practical means of trimming the fat from a fee application."); Heller v. District of Columbia, 832 F.Supp.2d 32, 50–51 (D.D.C.2011) (though declining a percentage reduction across the board, nevertheless applying a 25% reduction to the fees of one attorney because of "vague and inadequate descriptions contained in his timesheets"); Gaines ex rel. Gaines v. Douglas Cnty. Sch. Dist., 2009 WL 2710063 at *6 (D. Nev.) (noting that a district court can make an "across-the-board" reduction in the total amount of hours claimed by the moving party when faced with a "massive fee application.").

[65] *See, e.g.,* Sound v. Koller, 2010 WL 1992194, at *7 (D. Haw.) (reducing attorney fee award by 30%).

[66] Lau v. Glendora Unified School Dist., 792 F.2d 929, 930 (9th Cir. 1986).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 5th day of July, 2022, I served the attached **PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR VOLUNTARILY DISMISSAL WITHOUT PREJUDICEPURSUANT TO NRCP 41(a)(2) AND OPPOSITION TO DEFENDANTS' COUNTERMOTIONS FOR COSTS AND FEES** as follows:

☒ BY ELECTRONIC SERVICE: by electronically serving the document(s) listed above with the Eighth Judicial District Court's e-filing system upon the following:

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