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FILED

JUL 21 2016

**NEVADA COMMISSION OF
COMMON INTEREST COMMUNITIES
AND CONDOMINIUM HOTELS**

9 **COMMISSION FOR COMMON-INTEREST COMMUNITIES AND**
10 **CONDOMINIUM HOTELS**
11 **STATE OF NEVADA**

12 **JOSEPH (J.D.) DECKER, Administrator,**
13 **REAL ESTATE DIVISION, DEPARTMENT**
14 **OF BUSINESS & INDUSTRY, STATE OF**
15 **NEVADA,**

16 **Petitioner,**

17 **vs.**

18 **ANTHEM HIGHLANDS COMMUNITY**
19 **ASSOCIATION, PENNIE PUHEK, JAMES**
20 **LAUTH, and CHARLES HERNANDEZ,**

21 **Respondents.**

Case No. 2015-291

**RESPONDENT JAMES LAUTH'S
MOTION TO DISMISS OR, IN THE
ALTERNATIVE, MOTION FOR
SUMMARY JUDGMENT**

22 Respondent James Lauth ("Lauth"), by and through its attorney Gregory P. Kerr, Esq., of
23 WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP, hereby files this Motion to Dismiss
24 or, in the alternative, Motion for Summary Judgment based on the Memorandum of Points and
25 Authorities set forth below and any oral argument regarding the same:

26 **I. INTRODUCTION**

27 There is only one factual allegation in the Division's complaint against Mr. Lauth. That
28 sole allegation is as follows:

During the Division's investigation of the matter, the Association provided an affidavit from RESPONDENTS HERNANDEZ and LAUTH, and another board member Ronnie Young stating that "the board had no business or authority to censure her free speech rights as a private citizen."

(Complaint, ¶ 17).

1 Attached hereto as Exhibit A is a true and correct copy of the affidavit referred to in the
2 complaint, which is signed by Mr. Lauth and filed with the Division. The affidavit was signed and
3 filed by Mr. Lauth in response to an investigation opened by the Division in response to an
4 intervention affidavit filed by Mr. Robert Stern. That intervention affidavit of Mr. Stern was a
5 claim by Mr. Stern against Respondent Penny Puhek for her posts about Mr. Stern on a non-
6 Association affiliated website. It is important to note that Mr. Stern did not file his intervention
7 affidavit against Mr. Lauth and never asserted that Mr. Lauth participated in any way whatsoever
8 in any of the posts of Ms. Puhek. The decision to use Mr. Stern's intervention affidavit as an
9 excuse to file the pending complaint against Mr. Lauth was solely that of the Division and its legal
10 counsel. In no way whatsoever are the efforts of the Division to prosecute Mr. Lauth in this case
11 related to the claims of Mr. Stern, as he never asserted any wrongdoing against Mr. Lauth relating
12 to any of the purported internet posts of Ms. Puhek.

13 Solely from that one allegation against Mr. Lauth cited above, the Division states that Mr.
14 Lauth committed the following violation:

15 RESPONDENTS HERNANDEZ and LAUTH knowingly and
16 willfully violated NRS 116.3103 (through NAC 116.405(2)) by
17 failing to act in good faith and in the best interests of the
18 Association by acting for reasons of self-interest, gain, prejudice,
19 or revenge by failing to disavow the actions of RESPONDENT
20 PUHEK and placing the Association at risk for liability.

21 (*Complaint*, ¶ 23).

22 The Division's complaint against Mr. Lauth is absurd and its prosecution nothing short of
23 an abuse of power. The notion that Mr. Lauth has "knowingly and willfully" committed violations
24 of self-interest, personal gain and prejudice simply because he did not "disavow" Ms. Puhek's
25 comments—for which he had absolutely no responsibility for—makes no sense and has nothing to
26 do with the behavior that NRS 116.3103 via NAC 116.405(2) is concerned with. The Division
27 literally made up a violation against Mr. Lauth in an effort to punish him because he would not
28 succumb to demands of the Division that it had no authority to make. No facts are at issue here as
they relate to Mr. Lauth. All that needs to be decided by the Commission as to the complaint
against Mr. Lauth is whether or not Mr. Lauth's "failure to disavow"—with such purported failure

1 coming by way of his statement in a sworn affidavit filed with the Division—equates to acting in
2 self-interest, prejudice and personal gain. For the reasons set forth herein, the Commission should
3 dismiss the complaint against Mr. Lauth and find that there is no basis to support any allegation
4 that Mr. Lauth acted in self-interest, prejudice or personal by not reprimanding Ms. Puhek for
5 comments for which he had nothing to do with.

6 II. HISTORY AND BACKGROUND

7 Robert Stern, a former board member and former owner in the Association, is at the center
8 of the strife and conflict that the Association and a number of its board members have endured
9 over the past few years. In addition to his recently published book that focuses on destroying
10 homeowners associations and wherein he levies personal attacks against board members,
11 managers and others associated with the operation of common interest communities, he also used
12 the Division as an institution to punish, harass and threaten various Association board members
13 and its former manager. As testified to by Administrator J.D. Decker at the Commission's hearing
14 on June 18, 2016, over the past few years, Robert Stern has filed approximately *40 different*
15 *intervention affidavits* against the Association, its board members and former manager. It is clear
16 that Mr. Stern used the Division and its grievance procedures as his own tool for attacks and
17 retaliation against the Association and certain board members when he was dissatisfied or
18 mistakenly believed that his rights were violated. What is important to note is that 38 of those
19 intervention affidavits were summarily disposed of as having no basis.

20 Moreover, counsel here for Mr. Lauth was also counsel for the Association's previous
21 community manager, Carmen Eassa. Ms. Eassa engaged this counsel to defend her against the
22 nasty and personal attacks levied against her by Mr. Stern and his continuous threats to file claims
23 against her with the Division. Mr. Stern constantly threatened the filing of an intervention affidavit
24 for everything Mr. Stern felt was a violation of law committed by Ms. Eassa. The attacks were
25 relentless and consisted of personal attacks against her by calling her incompetent, implying she
26 was stupid, accusing her of being grossly negligent, unqualified, informing her that he would
27 demand that the board replace her with a manager who knew what she was doing, among other
28 attacks, each usually followed up with a threat of another intervention affidavit against her.

1 Although counsel herein responded numerous times to Mr. Stern and regularly sought help from
2 the Division and its Ombudsman¹, Ms. Eassa could not take the attacks anymore and she finally
3 quit her employment with the management company that was under contract with the Association
4 at the time so as to escape Mr. Stern's treatment and threats.

5 Despite the behavior and actions of Mr. Stern and his plethora of intervention affidavits
6 against the Association and its representatives, Mr. Lauth is the one who has to account for why he
7 did not "disavow" internet comments for which he had nothing to do with. While one can agree or
8 disagree with Ms. Puhek's opinions of Mr. Stern as expressed in her internet comments
9 concerning him, there is no disagreement and no factual debate over the fact that those comments
10 were not approved by the Association board, were not made or issued on behalf of the Association
11 or its board, were only learned of by board members other than Ms. Puhek after the comments
12 were posted and were posted on a website not affiliated or controlled by the Association.

13 Yet, the Division, through the Administrator J.D. Decker, attempted to extort from other
14 named Respondents in this case a reprimand of Ms. Puhek's comments by threatening them with
15 an investigation and potential disciplinary action if they failed to issue that reprimand. The
16 allegations in the Division's complaint acknowledges the scheme² and states as follows:

17 The Administrator informed RESPONDENT HERNANDEZ that
18 the Association and other board members would not be included in
19 the investigation if they provided a statement to the Division that
20 they did not condone RESPONDENT PUHEK'S actions.

21 (*Complaint*, ¶ 15).

22 First of all, if there is a basis for the Division to investigate a violation committed by a

23 ¹ While defending Ms. Eassa against the actions of Mr. Stern, counsel herein sent numerous letters and
24 emails to and left multiple voice messages with Ombudsman Sharon Jackson in an effort to seek her assistance in
dealing with Mr. Stern. However, not a single one of counsel's letters or emails or voice messages were ever
responded to or returned.

25 ² Attached hereto as Exhibit B is a copy of the letter sent by Respondent Hernandez to Administrator J.D.
26 Decker dated January 29, 2015. This letter was produced in discovery by the Division and is bated stamped
27 NRED0025. The letter clearly summarizes the threat made by the Division against the respondents that, if they do not
28 disavow Ms. Puhek's comments, they will face prosecution. It is clear from the letter that the Division's target was
Ms. Puhek and the Division was willing to coerce and unduly pressure the other respondents into assisting in building
a case against her.

1 Every defense, in law or fact, to a claim for relief in any pleading,
2 whether a claim, counterclaim, cross-claim, or third-party claim,
3 shall be asserted in the responsive pleading thereto if one is
4 required, except that the following defenses may at the option of
5 the pleader be made by motion:

6 (5) failure to state a claim upon which relief can be granted.

7 The Nevada Supreme Court has interpreted the above rule to mean that a complaint should
8 be dismissed only if it appears beyond a doubt that the complaining party could prove no set of
9 facts, which, if true, would entitle it to relief. *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev.
10 224, 228 (2008).

11 While the Nevada Rules of Civil Procedure apply to Nevada district courts, the reasoning
12 employed by the above rule should be applied by the Commission in this case. As such, the
13 Commission should dismiss the single basis for liability against Mr. Lauth due to the fact that
14 what the Division has alleged in its complaint against Mr. Lauth simply, as a matter of law, does
15 not constitute a violation of NAC 116.405(2). NAC 116.405(2) reads as follows:

16 In determining whether a member of the executive board has
17 performed his or her duties pursuant to NRS 116.3103, the
18 Commission may consider whether the member of the executive
19 board has:
20 2. Acted for reasons of self-interest, gain, prejudice or revenge;

21 In order for the Division to have any prospective merit in its claim against Mr. Lauth, this
22 Commission has to find that the mere act of Mr. Lauth (and other board members) deciding, after
23 deliberations amongst themselves, not disavowing Ms. Puhek's comments was an act of self-
24 interest or personal gain or prejudice. Yet, there is no conceivable way that the mere decision to
25 not disavow Ms. Puhek's comments could be seen as an act of self-interest, especially when the
26 board members knew that the failure to disavow the comments would lead to further investigation
27 by the Division. The decision to not disavow was precisely *not* in Mr. Lauth's or the other board
28 members' self-interest. For the same reason, there was no personal gain to be had in any way in
not disavowing Ms. Puhek's comments.

The fact remains that the Division's complaint against Mr. Lauth is simply baseless and
was filed against him out of retaliation for not complying with the Division's demand to disavow

1 comments for which he was not responsible for. Even assuming the sole allegation in the
2 complaint against Mr. Lauth as true, it does not constitute a breach of his fiduciary duty as a board
3 member by way of self-interest, personal gain or prejudice. As such, the Commission should
4 dismiss the Division's complaint against Mr. Lauth.

5
6 **B. In The Alternative to a Dismissal, The Commission Should Rule At The Prehearing**
7 **Conference in Favor of Mr. Lauth, As The Facts Are Not In Dispute And The Facts**
8 **Prove That Mr. Lauth Committed No Violation of NAC 116.405(2).**

9 The Nevada Rules of Civil Procedure, rule 56, provides, in pertinent part, as follows:

10 A party against whom a claim . . . is sought may, at any time, move
11 with or without supporting affidavits for a summary judgment in
12 the party's favor as to all of any part thereof . . . the judgment
13 sought shall be rendered forthwith if the pleadings, depositions,
14 answers to interrogatories, and admissions on file, together with
15 the affidavits, if any, show that there is no genuine issue as to any
16 material fact and that the moving party is entitled to a judgment as
17 a matter of law.

18 Summary judgment must be granted "if the pleadings, depositions, answers to
19 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
20 genuine issue as to any material fact and that the moving party is entitled to judgment as a matter
21 of law." NRCP 56(c). In *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121, P.3d 1026, 1031 (2005),
22 the Nevada Supreme Court embraced the summary judgment standard set forth in seminal United
23 States Supreme Court cases such as *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986),
24 *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio*
25 *Corp.*, 475 U.S. 574 (1986). Under this standard, summary judgment is designed to secure the
26 just, speedy, and inexpensive determination of every action where appropriate.

27 Again, while the Nevada Rules of Civil Procedure govern Nevada district courts, the
28 Commission urged to apply the same concepts addressed in NRCP 56 to the Division's complaint
against Mr. Lauth. The Division's complaint alleges that because Mr. Lauth did not disavow Ms.
Puhek's comments long after the comments were posted online, Mr. Lauth's failure to disavow
constituted an act of self-interest, personal gain or prejudice. The undisputed and uncontroverted
facts of this case as they relate to Mr. Lauth are as follows:

- 1 1. Mr. Lauth had no knowledge that Ms. Puhek was going to post her comments online
2 prior to her doing so;
- 3 2. The Association Board of Directors did not, in any way, approve or authorize Ms.
4 Puhek's comments;
- 5 3. Ms. Puhek's comments as posted online do not purport in any way to be made on
6 behalf of the Association or any of its representatives;
- 7 4. The website on which Ms. Puhek posted her comments is not a website in any
8 affiliated, operated, governed or controlled by the Association;
- 9 5. Mr. Lauth, along with the other board members at the time, discussed and deliberated
10 the Division's demand that they "disavow" Ms. Puhek's comments or face further
11 investigation or prosecution from the Division if they chose not to disavow those
12 comments;
- 13 6. That there is nothing under any applicable law that requires or mandates that Mr. Lauth
14 or any other respondent in this matter to "disavow" the private statements of any other
15 person, whether they be a board member or otherwise.

16 Please review Mr. Lauth's affidavit that he filed with the Division in response to the
17 investigation that preceded the Division's complaint attached hereto as Exhibit A. As the
18 Commission will see, Mr. Lauth and the other board members fully discussed the threat made by
19 the Division—that they either disavow Ms. Puhek's comments or face investigation—and decided
20 that, because her comments were made on her own behalf, it would be inappropriate to censure
21 them and the board members did not want to be a part of any retaliation against Ms. Puhek or any
22 of its members.

23 This decision was perfectly reasonable and certainly was made in good faith. What the
24 decision was not was a decision that somehow would serve Mr. Lauth's self-interest or personal
25 gain. As discussed above, what is the personal gain or self-interest of Mr. Lauth in not disavowing
26 Ms. Puhek's comments? In fact, it would have been a far more self-interested act of Mr. Lauth to
27 disavow Ms. Puhek's comments in order to avoid the prospect of further investigation or
28 prosecution from the Division. Yet, Mr. Lauth chose not to act in his self-interest or for personal

1 CERTIFICATE OF SERVICE

2 I hereby certify that on this 21st day of July, 2016, a true and correct copy
3 of **RESPONDENT JAMES LAUTH'S MOTION TO DISMISS OR, IN THE**
4 **ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT** was placed in an envelope,
5 postage prepaid, addressed as stated below, in the basket for outgoing mail before 4:00 p.m. at
6 **WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP** and by electronic mail. The firm
7 has established procedures so that all mail placed in the basket before 4:00 p.m. is taken that same
8 day by an employee and deposited in a U.S. Mail box.

9
10 Common-Interest Communities and
11 Condominium Hotels
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18
19
20 By /s/ Nina Miller
21 Nina Miller, an Employee of
22 WOLF, RIFKIN, SHAPIRO, SCHULMAN &
23 RABKIN, LLP
24
25
26
27
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EXHIBIT "A"



Affidavit Form

STATE OF NEVADA

County of Clark

Affidavit of James Lauth

Date 3-25-15

Time Taken 1600 HRS O'Clock

City HENDERSON State NV

James Lauth _____ deposes and says:
Name

I freely and voluntarily give this affidavit to Gina M. D'Alessandro _____ who
is known to me as Compliance / Audit Investigator II _____ for the Nevada Real Estate Division.

Case No.: 2015-291

~~1. I am an adult resident of Clark County, Nevada, over the age of majority, and otherwise competent to testify as to the facts contained herein.~~

2. I am a current board member of Anthem Highlands Community Association [hereinafter "Anthem Highlands"].

3. All of the facts contained herein are true and correct to the best of my personal knowledge except those stated upon information and belief, and as to those matters, I believe them to be true.

4. Ms. Pennie Puhek is currently serving as Vice President of Anthem Highlands.

5. Based on information and belief, Ms. Puhek has posted comments on certain website about the book of a homeowner of Anthem Highlands, Mr. Robert Stern.

6. Prior to Ms. Puhek's postings, Anthem Highlands had no knowledge of her plans to post the comments.

7. Ms. Puhek posted the comments as a private citizen and individual resident/homeowner.

8. Ms. Puhek did not post her comments in her capacity as Vice President or other agent of Anthem Highlands.

9. Ms. Puhek did not seek permission from Anthem Highlands' board of directors to post her comments.

10. Ms. Puhek does not need the board's permission to make comments as an individual homeowner/resident of Anthem Highlands.

11. We the board members discussed whether a letter of reprimand or a complaint to the Nevada Real Estate Division was appropriate to address Ms. Puhek's actions.

12. After consulting with other board members, we as a board felt that a Division complaint or a letter of reprimand to Ms. Puhek was inappropriate.

13. We believed that Ms. Puhek's comments were directed to Mr. Stern promotion of his book signing as a private citizen, not a board member.
14. We did not feel that Ms. Puhek was acting in her capacity as a board member or vice president of Anthem Highlands.
15. We believed that the board had no business or authority to censure her free speech rights as a private citizen.
16. Furthermore, the board had no interest in being part of any retaliation or attempt to censure any of its membership.

(Use additional pages if necessary)

I have read the foregoing affidavit consisting of 2 pages, and it is true and correct to the best of my knowledge and belief.

I AGREE THAT IF REQUESTED BY THE NEVADA REAL ESTATE DIVISION, I WILL VOLUNTARILY APPEAR AS A WITNESS IN ANY PROCEEDING RELATING TO THE ABOVE MATTER WITHOUT THE NECESSITY OF BEING SERVED WITH A SUBPOENA.

Subscribed before me this 25 day of MARCH, 2015 in the

County of Clark

State of NEVADA

Stuart F. Berman
Signature of Notary

James Lauth
Signature

Name James Lauth

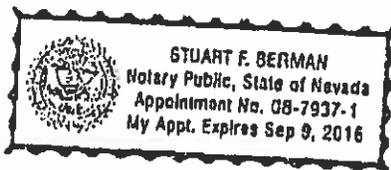
Address 2672 LOCHLEVEN WAY

HENDERSON NV 89044

City State Zip

Area Code 702 Phone 979-9036

09/25/09



652

NRED0044

EXHIBIT "B"

January 29, 2015

J.D. Decker
Nevada Real Estate Division
2501 E. Sahara Ave #303
Las Vegas, NV 89104

VIA FAX AND CERTIFIED MAIL

Mr. Decker,

I am writing this letter in regards to the proposal you presented to me in our phone conversation on January 26th. When I returned your call after you left me a voice message, you stated that after doing some research and having spoken to the Divisions attorney, if the Board of Directors would agree to write a letter of reprimand, in addition to filing a complaint with the Division against fellow Board member Pennie Puhek for comments she made on a public website as a private person, that you "would not take any actions against the Board." You also stated that this "might all go away if she were gone." I faxed you the letter of reprimand that you proposed we issue to Ms. Puhek on Tuesday, January 27th. After consulting with other Board members, we feel that a reprimand would be inappropriate, since we do not feel that Ms. Puhek's comments to a posting by the author of a recently published book advertising his book signing was acting in her capacity as a Board member and the Board has no business or authority to censure her free speech rights as a private citizen. It appears that you feel otherwise based on your statement "we are going to take action against Pennie." Please be advised that this Board will not be part of any retaliation or attempt to censure any of its membership and it is our sincere hope, since we declined your proposal, that the Board will not face any retaliatory actions from the Division. As a reminder, we are not a sub association of Sun City Anthem as was your belief. Should you have any further questions or requests, I feel its best at this time for you to speak directly with our association legal counsel Ted Boyack who can be reached at ted@edblaw.net.

Sincerely,
Charles Hernandez
President, Anthem Highlands Community Association

NRED0025