

1 **BEFORE THE COMMISSION FOR COMMON-INTEREST**
2 **COMMUNITIES AND CONDOMINIUM HOTELS**
3 **STATE OF NEVADA**

4 JOSEPH (J.D.) DECKER, Administrator,
5 REAL ESTATE DIVISION, DEPARTMENT
6 OF BUSINESS & INDUSTRY, STATE OF
7 NEVADA,

8 Petitioner,

9 vs.

10 ANTHEM HIGHLANDS COMMUNITY
11 ASSOCIATION; ROBERT STERN;
12 CHARLES HERNANDEZ; AND RONNIE
13 YOUNG,

14 Respondents.

Case Nos. 2015-3615; 2015-2155;
2015-3100; 2015-2207

FILED

APR 29 2016

NEVADA COMMISSION OF
COMMON INTEREST COMMUNITIES
AND CONDOMINIUM HOTELS

15 **RESPONSE TO COMPLAINT FOR DISCIPLINARY ACTION AND NOTICE OF**
16 **HEARING**

17 This Response is submitted by BOYACK ORME & TAYLOR, counsel for the Respondent
18 ANTHEM HIGHLANDS COMMUNITY ASSOCIATION ("Anthem"), and counsel for Respondent
19 CHARLES HERNANDEZ in his capacity as a Board Member for Anthem. As of the time of this
20 Response, Respondents ROBERT STERN and RONNIE YOUNG have indicated that they will
21 retain separate counsel to represent them in this matter.

22 The Complaint for Disciplinary Action and Notice of Hearing ("Complaint"), filed December
23 31, 2015, makes several allegations, titled as "Violations of Law" ("Violations"). See Complaint at
24 7-8. Each of these are repeated and addressed below.

25 **VIOLATION 1**

26 This Violation alleges that "RESPONDENTS STERN, YOUNG, and HERNANDEZ
27 knowingly and willfully violated NRS 116.3103 (through NAC 116.405(2)) by failing to act in good
28 faith and in the best interests of the Association by acting for reasons of self-interest, gain, prejudice,

1 or revenge.” *Id.*

2 NRS 116.3103 imposes upon Board members a fiduciary duty- specifically, to “act on an
3 informed basis, in good faith and in the honest belief that their actions are in the best interest of the
4 association.” NRS 116.3103(1). Furthermore, NRS 116.3103(2) imposes only four restrictions
5 against Board members: they may not amend the declaration; they may not terminate the common-
6 interest community; they may not elect members of the Board (other than to fill vacancies, subject
7 to the declaration); and they may not determine the qualifications, powers, duties or terms of office
8 for Board members. The only positive duty imposed by NRS 116.3103 (other than fiduciary duty)
9 is that Board members shall adopt budgets for the Association. NRS 116.3103(3).

10 The Complaint is word so as to suggest a breach of a fiduciary duty- a breach which was
11 calculated “for reasons of self-interest, gain, prejudice, or revenge.” No other facts, circumstances,
12 or allegations are present to suggest what the Commission believes constituted a breach, what motive
13 Respondent Hernandez may have been acting under (self-interest, gain, prejudice, or revenge), or
14 any other indicia of the exact violation. In fact, the Complaint fails to tie this nebulous language to
15 any of the Factual Allegations contained therein.

16 Without more information, Respondent Hernandez is unable to respond with specificity to
17 this Violation. Substantively, Respondent Hernandez denies the allegations suggested in this
18 Violation by maintaining that at all times he acted in Anthem’s best interests, and that any decisions
19 or omissions he made were done so in good faith, and on an informed basis. As to the language of
20 both NRS 116.3103 and NAC 116.405(2), specifically, Respondent Hernandez maintains that he did
21 not commit any of the four proscribed behaviors contained in NRS 116.3103(2). Finally, Respondent
22 Hernandez maintains that any violation of NRS 116.3103(3)–failure to adopt a budget–is due to
23 Anthem’s inability to reach a quorum to conduct business, owing to Respondents Stern and Young’s
24 lack of appearance/participation.

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26 **VIOLATION 2**

1 Violation 2 alleges that “RESPONDENTS, STERN, YOUNG and HERNANDEZ knowingly
2 and willfully violated NRS 116.3103 (through NAC 116.405(3)) by failing to act in good faith and
3 in the best interests of the Association by committing an act or omission which amounts to
4 incompetence, negligence or gross negligence.” See Complaint at 8.

5 Respondent Hernandez maintains that this Violation is ambiguous and without specificity
6 sufficient to form a cogent response to, as with Violation 1. Accordingly, Respondent Hernandez
7 repeats and maintains his defenses put forth in response to Violation 1, and with the following
8 remarks.

9 NAC 116.405(3) makes actionable any failure of duty by an executive Board member
10 stemming from an act or omission amounting to incompetence, negligence, or gross negligence. The
11 wording of Violation 2 ties NAC 116.405(3) to NRS 116.3103, which again refers to a generalized
12 fiduciary duty, four proscribed behaviors, and a positive duty to adopt a budget. Without more
13 information or specific allegations, Respondent Hernandez is unsure whether the Complaint alleges
14 a breach of fiduciary duty generally (and if so, what acts or omissions constituted such a breach), that
15 Respondent Hernandez committed one of the four proscribed actions, or that Respondent Hernandez
16 was somehow singularly responsible and accountable for the failure to adopt a budget. Furthermore,
17 Respondent Hernandez is unsure what acts or omissions, if any, the Complaint is alleging constituted
18 incompetence, negligence, or gross negligence.

19 Without more information, Respondent Hernandez is unable to respond to Violation 2, other
20 than to repeat and maintain his substantive denial, and to remind the Commission that without proper
21 quorum no business could be conducted, thus Respondent Hernandez’s ability to meet his duty was
22 substantially impaired.

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24 **VIOLATION 3**

25 Violation 3 alleges that the above-named Respondents “knowingly and willfully violated
26 NRS 116.3103 (through NAC 116.405(8)(a)) by failing to act in good faith and in the best interests
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1 of the Association by failing to cause the Association to comply with all applicable federal, state and
2 local laws and regulations and the governing documents of the Association.” *See* Complaint at 8.

3 Again, the Complaint fails to specify the grounds for this allegation by citing to any facts or
4 circumstances to support this alleged violation. Without such information, Respondent Hernandez
5 is unable to respond to this allegation other than to repeat and maintain his defense to the prior
6 Violations, above, and substantively and categorically to deny the allegation. As to a knowing and
7 willful failure to comply with federal, state, and local laws, and with the governing documents,
8 Respondent Hernandez repeats his defense that Anthem was unable to achieve a quorum to conduct
9 business, despite Respondent Hernandez’s presence and willingness to do so at every scheduled
10 Board meeting.

11
12 **VIOLATION 4**

13 This Violation states that the above-named Respondents “knowingly and willfully violated
14 NRS 116.3103 (through NAC 116.405(8)©) by failing to act in good faith and in the best interests
15 of the Association by failing to cause the Association to hold meetings of the Executive Board with
16 such frequency as to properly and efficiently address the affairs of the Association.” *See* Complaint
17 at 8.

18 Again, the Complaint fails to specify the grounds for this allegation by citing to any facts or
19 circumstances to support this alleged violation. Without such information, Respondent Hernandez
20 is unable to respond to this allegation other than to repeat and maintain his defense to the prior
21 Violations, above, and substantively and categorically to deny the allegation. As to a knowing and
22 willful failure to hold meetings as required, Respondent Hernandez repeats his defense that Anthem
23 was unable to achieve a quorum to conduct business, despite Respondent Hernandez’s presence and
24 willingness to do so at every scheduled Board meeting.

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26 **VIOLATION 5**

1 This allegation states that the above-named Respondents “knowingly and willfully violated
2 NRS 116.31083(1) by failing to have a meeting of the Board at least once each quarter, and not less
3 than once every 100 days.” *See* Complaint at 8.

4 Respondent Hernandez repeats and maintains his defense to each Violation above, and
5 incorporates the same as to Violation 5. Furthermore, Respondent Hernandez maintains that the lack
6 of meetings of the Board stem from the Board’s inability to reach quorum due to Respondents Stern
7 and Young’s refusal to attend. At all times, Respondent Hernandez was present for scheduled
8 meetings and prepared to conduct business. Any inability to hold meetings for the benefit of the
9 Association, and as required by law, was not owing to any failure or refusal on Respondent
10 Hernandez’s part.

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12 **VIOLATION 6**

13 This Violation alleges that the above-named Respondents “knowingly and willfully violated
14 NRS 116.31083(6) by failing to have a meeting of the Board at least once every quarter, and not less
15 than once every 100 days, to review financial statements, revenues and expenses, operating and
16 reserve accounts, or financial statements.” *See* Complaint at 8.

17 Respondent Hernandez repeats and maintains his defense to each Violation above, and
18 incorporates the same as to Violation 6.

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20 **VIOLATION 7**

21 This Violation alleges that the above-named Respondents “knowingly and willfully violated
22 NRS 116.31151(1) by failing to prepare and distribute to each unit’s owner a copy of the operating
23 and reserve budget not less than 30 days or more than 60 days before the beginning of the
24 Association’s fiscal year.” *See* Complaint at 8.

25 Respondent Hernandez repeats and maintains his defense to each Violation above, and
26 incorporates the same as to Violation 7. Furthermore, Respondent Hernandez maintains that without
27

1 quorum, a budget cannot be drafted, prepared, and adopted as required by NRS Chapter 116,
2 generally. Quorum was impossible due to the refusal to attend of Respondents Stern and Young. At
3 all times, Respondent Hernandez was present for meetings and stood ready to conduct business on
4 behalf of the Association, as required and directed by Nevada law.

5
6 **CONCLUSION**

7 Respondent Hernandez substantively and categorically denies each of the Violations put forth
8 in the Complaint. Respondent Hernandez maintains that at all times he acted in the best interest of
9 the Association, in accordance with his duty as a fiduciary and under all applicable Nevada law.
10 Respondent Hernandez's duty was impaired by—and any prohibited acts, or other omissions alleged
11 in the Complaint were owing to—the inability to reach a quorum during Board meetings. This lack
12 of quorum stemmed from events beyond Respondent Hernandez's foreseeability or control, and thus
13 Respondent Hernandez maintains that he was under no duty, and had no ability, to correct the
14 deficiencies.