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

RECEIVED
JUN 03 2016
DEPT OF BUSINESS & INDUSTRY
REAL ESTATE DIVISION
ADMINISTRATIVE OFFICE-LV

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

Petitioner,

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

vs.

ANTHEM HIGHLANDS COMMUNITY
ASSOCIATION; ROBERT STERN;
CHARLES HERNANDEZ; AND RONNIE
YOUNG,

Respondents.

FILED

JUN 03 2016

NEVADA COMMISSION OF
COMMON INTEREST COMMUNITIES
AND CONDOMINIUM HOTELS

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**REPLY TO OPPOSITION TO MOTION TO DISMISS THE COMPLAINT IN ITS
ENTIRETY AND MOTION FOR PRE-HEARING CONFERENCE TO BRING A MORE
DEFINITIVE COMPLAINT OR, IN THE ALTERNATIVE, TO CLARIFY THE
COMPLAINT**

This Reply is hereby filed in response to the Division's Opposition to Anthem Highlands
Community Association's ("AHCA") Motions, received on May 12, 2016.

INTRODUCTION

Respondents AHCA's and Charles Hernandez's ("Charlie") basis for filing the Motion to
Dismiss was based on the Division's Complaint which on its face appears to be nothing more than
an over reaching effort to control the Association's internal activities and to pursue a vendetta
against Charlie.

This vendetta is based on a meeting that took place with Administrator Joseph Decker on
January 26, 2015 in which Decker stated that he would take the association to Commission "to prove
a point." Approximately an hour after this meeting, Administrator Decker attempted to coerce
Charlie into filing an unjustified complaint against another Board member and stating that "if the
Board filed a complaint against Pennie [Puhek], then the Division would not take action against
other Board members" and that the Division wanted "to take action against Pennie." Charlie and

1 other Board members refused to get involved in the Division's dispute with Ms. Puhek, and now
2 Charlie feels that this is the only reason the Complaint was filed against him.

3 The Division's response to the Motion to Dismiss is filled with evidence of its dislike for Ms.
4 Puhek, as well as evidence of its malicious and vitriolic narrative of Charlie's character.

5 The Division has no authority or jurisdiction to intervene in association matters unless they
6 involve a violation of NRS 116. See Attorney General Advisory Opinion, May 5, 2008. The Division
7 claims that it has spent an extraordinary amount of time dealing with the association and has received
8 over 1000 emails- the majority of which were generated by one Board member (Respondent Stern).
9 Only a handful of those emails were generated by Charlie, and were forwarded to the Division by
10 Stern. There is no evidence that Charlie is aware of that proves that the Division attempted to assist
11 the Association, but there appears to be overwhelming evidence that the Division's interference in
12 the internal activities of the Association, the Division's own personal vendettas against certain Board
13 members past and present, the Division's failure to follow the Intervention Affidavit process as
14 prescribed under NRS 116.760 and NRS 116.765, and the Division's failure to enforce equally NRS
15 116, is the reason for the Board chaos and dysfunction that has occurred over the past year.

16 FACTS

- 17 1. The Division has no evidence of any history of conflict between Charlie and Stern- indeed,
18 none existed. In fact, in the first two years that Charlie served on the Board, he did not
19 communicate even one time with Stern. After Stern was elected to the Board (during
20 Charlie's third year on the Board), Charlie only responded to emails that encompassed
21 information requests and items that were of general inquiry. Charlie refused to engage or
22 become involved in Stern's activities as Charlie believed this would only serve to create an
23 atmosphere of chaos.
- 24 2. Charlie never attempted to convince any Board member to take action on any agenda item.
25 The Division states that Charlie tried to convince Fassette to vote with him on a management
26 choice, or to vote against Stern. This is false as Stern voted in favor of changing the
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1 management contract and documented that it was Jody who was instrumental in facilitating
2 that change. Along with the Board majority, including Ms. Puhek, Charlie had the
3 opportunity to change management companies and approve the Earlstone Memorandum at
4 the May 2015 meeting, but instead voted to let the next Board decide. The Earlstone
5 memorandum did not provide ANY benefit to that community that other communities do not
6 receive and that is why the memorandum was approved as part of the initial RFP that was
7 sent out in April 2015, and unanimously approved by the Board. The memorandum simply
8 memorialized the duties the master association owes to a sub-association and that were
9 approved in various Board meetings through the years.

10 3. Charlie's frustration at the June 3rd meeting was due to Fassette asking him to agree to
11 change to First Service, and then voting NO when he introduced the motion. He did not even
12 realize the memo was an issue until Fassette brought it up at the meeting to justify not voting
13 on the matter.

14 4. The Earlstone memo stayed on the agenda for June 12, 2015, because that was the agenda
15 item that was carried over as Unfinished Business. It is Charlie's understanding of agenda
16 creation that the Unfinished Business must move forward on the agenda as presented in the
17 last meeting and the Motion is what controls the outcome of that agenda item. Charlie
18 explained this to Fassette and discussed with her that she could simply make two motions
19 regarding the agenda item. Fassette agreed to this, as evidenced in the June 12, 2015 minutes.

20 5. Ms. Puhek did not send a threatening email to the Board. The email from Ms. Puhek was
21 informational regarding Earlstone's position as it relates to the assessments paid by Earlstone
22 to the master association. This email simply stated that the assessments paid related to
23 common expenses enjoyed by other communities and that if Earlstone were disenfranchised
24 it would seek legal remedies. This email was based on the public postings of Stern
25 encouraging the master Board to ignore any responsibility it has to the sub-association.

26 6. Ms. Fassette knew Charlie could not attend the meeting and was told the day before by
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1 Charlie that she would need to chair the meeting. Charlie could not attend in person because
2 he had taken the prior two months off to be with his terminally ill wife. Any additional time
3 off would result in Charlie being subject to disciplinary action and possible termination.

4 7. Fassette agreed to chair and make the motions regarding the agenda items. Ms. Fassette is
5 required as Vice-President to run the meetings if the President is unavailable. Fassette made
6 all the motions regarding the management contract and the Earlstone memo. Charlie and
7 Brensinger approved her motions as presented which included postponing the Earlstone
8 memo approval until she could research it further.

9 8. Ms. Fassette never accused another Board member of threatening or defaming her. In her
10 own words she said it was members of the community who allegedly committed these
11 actions based on the public postings on Nextdoor made or posted by Stern.

12 9. Charlie has no control over what other members in the community do, and is only
13 responsible for his own actions.

14 10. Based on the emails and conversations involving other Board members, Charlie was
15 challenged with making decisions about the effect of Fassette's resignation. He did not feel
16 comfortable making a decision that could have legal consequences and therefore, under the
17 authority granted to the Board president at the January 24, 2013 meeting, Charlie sought
18 advice from association legal counsel.

19 11. The Division uses wording such as filing a "claim" regarding Charlie's choice to utilize the
20 mediation program to have a third party resolve the matter as a weapon against him and also
21 says he used the association attorney for this "claim". Charlie felt that having a third party
22 mediate and decide the issue was in the best interest of the community, because he did not
23 want to make a decision unilaterally where Board members had differing opinions on the
24 validity of the resignation. Fassette submitted a written complaint to the association stating
25 that she felt Charlie was retaliating against her "in his position as Board President." Because
26 of this allegation and the legal implications to the Association, Charlie made AHCA's
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- 1 attorney the point of contact on the matter as he is entitled to do under the governing
2 documents. If Fassette had not complained that actions were taken in Charlie's position as
3 an officer, there would not have been a need to involve the Association's general counsel.
- 4 12. The July meeting was abruptly adjourned because Charlie felt that the emails and postings
5 made by Stern (prior to the meeting, and included in the evidence) strongly suggested the
6 possibility for violence. When he saw the meeting getting out of control with homeowners,
7 and Board members screaming at each other, he adjourned it because he felt there was a
8 genuine and unreasonable risk to the health, safety, and welfare of the membership.
- 9 13. The Division sent correspondence regarding this complaint to Charlie via Terra West on
10 September 3rd. Charlie did not receive this correspondence, however, because Terra West
11 was not the management company. First Service had also failed to file the required
12 Registered Agent information until October 13, 2015, further frustrating the matter.
- 13 14. The Division also sent correspondence dated October 5, 2015 regarding Intervention
14 Affidavit ADR 16-13 to AHCA's counsel even though the mediation was closed and
15 association counsel was no longer authorized to participate in the matter. The Division never
16 sent the management company or Charlie this correspondence and Charlie did not know it
17 existed until the filing of this Complaint. As soon as he saw it, he contacted Sharon Jackson
18 to accept her invitation to mediate with Fassette. Ms. Jackson was dismissive and said that
19 Charlie needed to contact Fassette himself and that it was not her problem that he was not
20 properly noticed.
- 21 15. The Division alleges the lack of quorum was "caused in part by Ms. Fassette not being
22 allowed to return to the Board." The reason that the lack of quorum existed is because the
23 Division pursued an Intervention Affidavit in which they claimed that "the Division takes
24 no position regarding her resignation or withdrawal", and while there were two pending ADR
25 mediation claims to resolve the matter. Once the matter was referred to investigations in
26 September 2015 (as stated in Stern's email), Stern withdrew his ADR request and Fassette
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1 refused to respond to Charlie's ADR request. In fact, Stern states that until the matter is
2 resolved through investigations that no meetings will take place (exhibit). The Division in
3 effect sabotaged Charlie's efforts to resolve the matter.

4 16. Charlie's initial response to the matter was submitted as he felt appropriate because he did
5 not understand the Complaint and it was not served in a timely manner. Many of the alleged
6 factual allegations had nothing to do with his actions, were false, unreliable, and speculative,
7 and were an attempt to discredit himself and other past and present Board members before
8 the Commission. In fact, it is plainly evident that the majority of the factual allegations have
9 nothing to do with the Complaint. Charlie was unaware that he had to respond to each factual
10 allegation, and especially in light of the fact that the majority of them did not apply either to
11 the Complaint, to the remedies sought by the Division, or to him personally.

12 LEGAL ARGUMENT

13 The Division states in its motion that "the Association's problems detailed in the factual
14 allegations of the complaint go much further than an association that can't have meetings because
15 two board members won't attend". There is no evidence to support such a statement and their very
16 inclusion of this statement tends to indicate that this action is being brought so that the Division can
17 wash its hands of having to do the sometimes-unpleasant job it is expected and tasked to do. Unless
18 those "problems" the Division refers to are a violation of NRS 116, the Division has no jurisdiction
19 to intervene.

20 The audio of Board meetings of the last three years (and all meetings except the July 22, 2015
21 meeting), show that the Board acted appropriately and in the best interests of AHCA. There is no
22 documented actual harm to the association by any actions or lack of actions by Charlie. Furthermore,
23 the Business Judgment Rule prevents precisely the type of hindsight-based, "Monday Morning
24 Quarterback" inquiry that the Division has applied and continues to apply throughout this ordeal.

25 Boards argue, and sometimes the individual members do not get along. It can be frustrating
26 for those involved, but it is precisely why the executive boards of common interest communities
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1 have multiple members, and *vote* on what actions will or will not be undertaken by their respective
2 associations. None of this means that the Board, or its membership, is violating their fiduciary duty.
3 The Division was not elected by the membership of the Association and has no right to interject its
4 opinion of what is good faith on the part of any Board member, or what actions constitute the best
5 interests of the Association. Indeed, the Division's actions here suggest that it feels empowered to
6 question each and every action of an association's Board, to examine thoroughly each and every
7 vote, and to threaten with reprisal any such member of an executive board if and when the Division
8 feels such a board member did not measure up to some arbitrary and capricious standard of second-
9 guessing.

10 Charlie followed the advice of legal counsel, conducted himself in a professional matter,
11 performed his managerial duties as President even as the Board could not get along, and acted in
12 good faith and in the best interests of the association according to his judgment. The Division has
13 no evidence of harm to the community caused by Charlie's actions, or by his inability to act based
14 on the conspiratorial efforts of two Board members. Nor does the Division have the authority to sit
15 in judgement and claim that Charlie's actions were inappropriate or in violation of his fiduciary duty
16 simply because it feels that he should have acted differently, or that the situation was a burden for
17 the Division. Such a retrospective intervention is precisely what the Business Judgment Rule is
18 designed to prevent.

19 The Division's response to AHCA's motions is filled with vitriol and contempt when
20 speaking of Charlie. It alleges that Charlie's agreeing to a compromise presented by the Board
21 Secretary was an attempt to manipulate. In other words, the Division is suggesting that compromise
22 is now manipulation- a position that, if permitted, would serve only to create a chilling effect for any
23 executive board seeking to resolve an impasse, or other contentious agenda items. Often times, it is
24 this type of give-and-take that gets business accomplished- especially where voting is stalled due to
25 an impasse or a fundamental disagreement.

1 The Division alleges that Charlie contributed to the reasons Fassette resigned. This is not
2 only false, but was never even alleged by Fassette herself.

3 The Division alleges that Charlie tried to convince Fassette to vote "secretly" with him. In
4 fact, it was Fassette that discussed with Charlie voting in favor of the management change even
5 though he did not feel a change was necessary- Fassette made the motions and Charlie voted in favor
6 of the judgments she was making. Despite this, the Division cannot identify any of its alleged
7 retaliation for Fassette not voting the same way.

8 The Division alleges that Charlie did not have any reason to prevent Fassette from returning
9 to the Board, or to refuse the withdrawal of her resignation. The Division further alleges that any
10 such inaction on Charlie's part had to do with, or stemmed from, a dislike for Stern. The fact is that
11 Charlie had no strong opinion about Fassette one way or the other, and had no relationship with
12 Stern. There is no evidence suggesting Charlie liked or disliked Stern, or that any decision Charlie
13 made had anything to do with his personal feelings. Charlie ignored Stern as much as he could,
14 because Charlie wished to remain neutral in the matter and to avoid causing harm to the Association
15 of the type that Stern was causing by his deliberate refusal to attend Board meetings. To maintain
16 his professional bearing, and to avoid any inference of impropriety, bias, or retaliation, Charlie
17 sought the advice of legal counsel on how to handle the matter and conducted himself accordingly
18 in light of that advice.

19 Rather than laud this decision and effort to maintain neutrality, the Division seeks to hold
20 Charlie accountable for it.

21 The majority of the alleged factual allegations are taken from emails Stern sent, or from
22 postings that Stern made on a public website. Most of these are word-for-word, verbatim, and true
23 representations of Stern's allegations. There is no indication that the Division ever investigated these
24 allegations for their truthfulness or accuracy. In fact, the actual investigation into the matter never
25 requested clarification or comment on the majority of these allegedly-factual allegations, and Charlie
26 was unaware that they were even issues or that the Division was secretly working against him. More
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1 importantly, the investigative letter did not even address the filed complaint and instead the Division
2 created its own allegation (this is not the first time). As the Division knows, Charlie blocked Stern's
3 emails because he was tired of the harassment and bullying. Stern was directed by Charlie to send
4 all communications that were of Board relevance to the manager and those emails would be
5 responded to accordingly. Charlie did everything he could think of to stay out of the conflicts Stern
6 had created, and continued to create, and that is why Charlie rarely corresponded with him except
7 to address Association business.

8 As expressed at last year's Commission meetings, the AHCA membership requested that the
9 Division get involved *only* to force attendance at meetings and nothing else. The Board is capable
10 of handling its own business as long as it has the ability to do so. The Division is over-reaching and,
11 for reasons unknown, is involving itself in matters that it has no statutory authority over. The fact
12 that Stern has moved from the community has already led to progress- the Board is once again
13 holding regular meetings and conducting Association business.

14 DATED this 27th day of May, 2016.

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16 BOYACK ORME & TAYLOR
By: /s/ Edward D. Boyack
EDWARD D. BOYACK
17 Nevada Bar No. 005229
18 401 N. Buffalo Drive #202
19 Las Vegas, NV 89145
20 Attorney for Respondents
21
22
23
24
25
26
27
28