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NEVADA COMMISSION OF
COMMON INTEREST COMMUNITIES
AND CONDOMINIUM HOTELS

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

JOSPEPH (J.D.) DECKER, Administrator, REAL ESTATE DIVISION, DEPARTMENT OF BUSINESS & INDUSTRY, STATE OF NEVADA, Petitioner. vs. ANTHEM HIGHLANDS COMMUNITY ASSOCIATION, PENNIE PUHEK, JAMES LAUTH, and CHARLES HERNANDEZ, Respondents.	Case No. 2015-291 **RESPONDENT PENNIE PUHEK'S OPPOSITION TO PETITIONER'S MOTION FOR PARTIAL SUMMARY JUDGMENT; REQUEST FOR TIME TO CONDUCT DISCOVERY PER *NRCP* § 56(f); DECLARATION OF JOHN B. MARCIN**

Respondent Pennie Puhek ("Respondent"), by and through her attorneys of record Marcin Lambirth, LLP, hereby files her Opposition to Petitioner's Motion for Partial Summary Judgement.[1]

[1] The tenor of this case is reflected in the Division's Motions: how many times has this Commission seen a Motion for Summary Judgment (or in the case against Anthem Highlands), a Motion for

This Opposition is made and based upon the pleadings and papers on file herein, the following memorandum of points and authorities, Declaration of John B. Marcin, Exhibits 1 & 2 and any oral argument the Commission may entertain at the time of the hearing on this matter.

STATEMENT OF FACTS

The Real Estate Division, Department of Business & Industry, State of Nevada ("Division") filed a Complaint for Disciplinary Action and Notice of Hearing ("Complaint") on March 23, 2016, alleging varies violations of Chapter 116 of the *Nevada Revised Statutes* ("*NRS*") against the Anthem Highlands Community Association ("Association"), James Lauth, Charles Hernandez and Respondent as it pertained to a complaint filed by Robert Stern ("Stern"). Respondent filed an Answer to the Complaint on June 20, 2016. On the same date, Respondent

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Disqualification? These kinds of motions evidence the Division's vitriol against a few (former) members of Anthem's board, and stretch the very limits of what is proper for this Commission to do and where judicial intervention is appropriate. With all respect, it is absurd for the Division to ask this Board to even be ruling on a Motion for Summary Judgment. What are the standards? What does it mean that "as a matter of law" something has been proven? What are the boundaries of First Amendment protection such that the envelope of that protection can be pierced when a governmental agency (after the fact) labels something to be "retaliation"? These respectfully are not questions that the legislature intended this Commission to address, and in any event would usurp the judiciary which is both improper and unconstitutional. From what Respondent can make of the Complaint, the essential charge seems to be: did Respondent "retaliate" against a homeowner by making a post on a public website. Aside from the reasons discussed herein which show that there is nothing actionable regarding what Respondent did, is this really the type of matter that the Division should be investing its time with pursuing? With the fraud, thefts, and dangerous conditions caused by mismanagement, and things of this nature prevalent in any number of associations, how possibly can the claims in this case warrant a moment's time by the Division, unless the prosecution is motivated by something more than just trying to enforce the law.

filed the pending "Motion for More Definite Statement."

The attorney handling this case for the Division has a tangible, vitriolic dislike of Respondent and has gone on a quest, in contravention of the law (and in an absolute violation of a prosecutor's duties to be fair and seek justice rather than seek to punish someone for punishment's sake) – an ironic twist as the Division charges Respondent with "retaliation," and yet retaliates against her and anyone who dares stick up for themselves.

In the complaint against Respondent, Ms. Briggs alleges that "RESPONDENT PUHEK was hostile and argumentative when the Administrator expressed concerns over her posts, and had to be asked to leave." Why in the world would this be put into a complaint other than to prejudice those that would read the complaint that Respondent is hostile, hotheaded and can't control herself. None of these are true, but it shows the depth to which OUR ASSISTANT ATTORNEY GENERAL will go to go after Respondent (doesn't a deputy attorney general have duties to appear fair and unbiased and that prosecutions or persecutions don't appear personal?)

The complaint goes on to acknowledge an unbelievable and unethical extortion attempt: "The Administrator informed RESPONDENT HERNANDEZ that the Association and other board members would not be included in the investigation if they provided a statement to the Division that they did not condone RESPONDENT PUHEK'S actions." It's one thing to encourage someone who says something in your favor, but to threaten someone to do something seems unethical, doesn't it? Maybe people feel that civil litigators will stretch the limits of ethical boundaries while representing their clients, but the Attorney General's Office? This matter is a stain on that good office.

The complaint goes on: "Instead of disavowing RESPONDENT PUHEK'S posts, RESPONDENT HERNANDEZ, as president of the Association, informed the Division that the Association does not have the authority to censure RESPONDENT PUHEK." So what? Was it worthy to prosecute him as well for this?

As the complaint noted: "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.'"[2] Again, if this was their belief, why wouldn't they have a right to say this?

Then the complaint notes that: "Board Member Ronnie Young later recanted his affidavit and provided an affidavit against RESPONDENT PUHEK'S conduct." What the complaint doesn't say is that after immediately providing the affidavit all claims against Mr. Young were dropped. How possibly can this be considered proper or ethical?

The mainstay of the allegations against Respondent are included in paragraphs 19-22:

> 19. RESPONDENT PUHEK knowingly and willfully violated NRS 116.31183 by posting disparaging comments on a community website about a unit owner who had complained about the Association multiple times.
>
> 20. RESPONDENT PUHEK knowingly and willfully violated NRS 116.3103 (through NAC 116.405(2)) by failing to act in good faith and in the

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[2] This fails to include a fourth (4th) board member (Linda Rich) who wrote an affidavit supporting Respondent. These are free-thinking individuals who Respondent has no control over. Why would they write these supporting affidavits unless they believed that Respondent had not acted inappropriately? And with the exception of Rich (who moved), and Young (who withdrew the affidavit), the board members who stuck to their principals were punished for this by being prosecuted? (Respondent realizes that this is not a criminal matter, but having the Attorney General's Office against you is no small matter, and where they seek to prevent you from public service or to fine you tens of thousands of dollars, it sure feels like a prosecution. This kind of continued misconduct by the Division will cause good, smart, free-thinking people to avoid serving on boards lest they offend an Assistant Attorney General or the Administrator.

best interests of the Association by acting for reasons of self-interest, gain, prejudice, or revenge when she posted disparaging comments about a unit owner on a community website.

21. RESPONDENT PUHEK knowingly and willfully violated NRS 116.3103 (through NAC 116.405(3)) by failing to act in good faith and in the best interests of the Association by committing an act or omission which amounts to incompetence, negligence or gross negligence when she posted disparaging comments about a unit owner on a community website.

22. RESPONDENT PUHEK knowingly and willfully violated NRS 116.3103 (through NAC 116.405(4)) by failing to act in good faith and in the best interests of the Association by disclosing confidential information relating to an owner's primary residence on a community website.

From the Complaint, page 4.

Each of these allegations will be shown to be unsupportable and un-actionable.

Per the Nevada Administrative Code ("NAC") NAC 116.405 Executive Board: Determination by Commission of whether members have performed their duties. (NRS 116.3103, 116.615) In determining whether a member of the executive board ***has performed his or her duties*** pursuant to NRS 116.3103, the Commission may consider whether the member of the executive board has:

1. Acted outside the scope of the authority granted in the governing documents;
2. Acted for reasons of self-interest, gain, prejudice or revenge;
3. Committed an act or omission which amounts to incompetence, negligence or gross negligence;

4. Except as otherwise required by law or court order, disclosed confidential information relating to a unit's owner, a member of the executive board or an officer, employee or authorized agent of the association unless the disclosure is consented to by the person to whom the information relates.

It can't possibly be argued that posting about an author's book regarding something of public interest on a public website is in the "performance of a board member's duties." If it is not, the inquiry ends there. This is not the polite police and this Commission was not tasked with this.

It can't possibly be argued that saying that someone lives in North Carolina is a "disclosure of confidential information," when this information was known by everyone, was actually published in a book by Mr. Stern, and this information was not alleged to have been obtained (nor was it) by some secret confidential HOA document, but rather through public communications by Mr. Stern himself. (Which is a "consent" in any event).

In any event, as the Division itself noted it is the ***misuse of a position as a board member*** in causing the retaliatory action which is improper under NRS 116.31183:

ADVISORY CONCLUSION:

Owners have the right to complain about the actions of the board, the community manager and any other vendor, and to request records. The misuse of a position as a board member, community manager, officer, agent or employee of an Association to impose any harmful, punitive action in response is retaliatory action and prohibited by NRS 116.31183.

JOSEPH DECKER
Administrator
Real Estate Division

See NRED "Advisory Opinion" 15-02, *http://red.nv.gov/uploadedFiles/rednvgov/Content/Publications/Division_Advisory_Opinions/15-02.pdf*

Examples given on the internet include refusing to allow a pet into a condominium in retaliation for a homeowner daring to suggest that a vendor be replaced. Or, imposing a late fee on an owner who has requested to see the books and records. For obvious reasons, even as Administrator Decker acknowledges, the law is not intended to be applied against someone who is not causing harm in his or her position of power as a board member, but rather who states truthfully that a fellow homeowner is a cancer (even the Division has acknowledged this) who, because of years of wholly unsupported costly litigious conduct (as acknowledged by investigator Sotelo (see below) because of Stern's "frivolous, false, and fraudulent claims," and the testimony by Administrator Decker in the last Anthem hearing before this board that Stern had filed forty (40) such claims and thirty-eight (38) of them were summarily dismissed:

14· · · A.· That's not actually -- that's not necessarily

15· ·correct.· I mean, there were 40 intervention affidavits

16· ·that Mr. Stern filed.

17· · · Q.· 40?

18· · · A.· Approximately 40 over the past few years.

24· · · Q.· Stern filed 40 intervention affidavits?

25· · · A.· Over the past few years, yes.

Transcript from Hearing 06/18/16, page 185.

It is upon these thread-bare allegations that this case against Respondent was filed.

In the rest of the complaint, the allegations in the Division's Complaint are too indefinite and lacking in specificity to allow the Respondent to prepare a cogent and organized defense.[3] Many of the allegations involve time periods in which the Respondent was not a Board member

[3] Hence Respondent has filed the pending Motion for More Definite Statement.

and not subject to the jurisdiction of the Division and also involve allegations in which the Respondent may have had knowledge of, but did not directly participate in the allegations asserted. Additionally, no facts, circumstances, or evidence are provided to demonstrate Respondent's "knowingly and willfully" violated *NRS* §§ 116.3103 or 116.31183 or, quite frankly, any statute under *NRS* Chapter 116 or the Association's governing documents.

Moreover, Respondent maintains and believes that the alleged violations cited in the complaint do not even constitute violations of any statute under *NRS* Chapter 116 and that one of the reasons that this complaint is being brought is because Respondent has been outspoken about the Divisions misconduct in violating its own statutes, that it is required to comply with, and that it regularly engages in unequal enforcement of *NRS* Chapter 116.

The Respondent believes the Complaint is nothing more than a retaliatory action by the Division which has been pursued with malicious intent in order for the Division to avoid personal liability for the actions of its Ombudsman and other staff involving its interactions with the Association and its various Board of Directors.

On June 29th, the Division served its Motion for Partial Summary Judgment (which surprisingly says that "there are no issues of material fact" – which anyone knowing even a small subsect of the history of the Division's proceedings vis-à-vis the Association would never call "undisputed) to which the Respondent now replies.

ARGUMENT

I. SUMMARY JUDGMENT MUST BE DENIED BECAUSE THE MOTION IS PREMATURE AND IT IS FATALLY PROCEDUARLY DEFECTIVE

A. THE COMMISSION HASN'T RULED ON RESPONDENT'S MOTION FOR MORE DEFINATE STATEMENT.

As demonstrated in Respondent's Motion for a More Definite Statement, the Complaint alludes to improper motivation on the part of the Respondent without alleging actual specific facts that would establish an improper motive. For example, the Complaint alleges that Respondent

"knowingly and willfully violated NRS 116.3103 (through NAC 116.405(2)) by failing to act in good faith and in the best interests of the Association by acting for reasons of self-interest, gain, prejudice, or revenge when she posted disparaging comments about a unit owner on a community website." (Complaint, ¶ 20)

The Complaint, however, does not allege any specific facts indicating what the Respondent's self-interest was, what she allegedly gained, her prejudice, or motive for revenge as it relates to the comments she posted pertaining to Stern.

There is simply no nexus between specific factual allegations and the alleged violations of any statute under *NRS* Chapter 116 because there are no specific factual allegations. Until the Commission addresses the valid points in Respondent's Motion for a More Definite Statement, a Motion for Partial Summary Judgment is premature.

B. THE DIVISION HAS FAILED TO COMPLY WITH A SIMPLE TENANT OF SUMMARY JUDGMENT LAW: THAT THERE BE A CONSISE STATEMENT SETTING FORTH EACH MATERIAL FACT THE MOVING PARTY BELIEVES IS UNDISPUTED

For now more than ten (10) years, it is the law of Nevada that a moving party must include a statement of each fact that it claims is undisputed. The Division, as moving party, completely fails to comply. In 2005, the Nevada Supreme Court amended *Nevada Rules of Civil Procedure* ("*NRCP*") § 56 to require such a statement in all state court actions. The revised *NRCP* § 56(c) now includes the following requirements for a legally sufficient motion:

> Motions for summary judgment and responses thereto shall include a concise statement setting forth each fact material to the disposition of the motion which the party claims is or is not genuinely in issue, citing the particular portions of any pleading, affidavit, deposition, interrogatory, answer, admission, or other evidence upon which the party relies. NRCP 56(c); *Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. Adv. Op. 42, 245 P.3d 542 (2010).

Thus, a concise statement is now required on a statewide basis for all district court actions in state, administrative hearings, and federal court.

In contravention of revised *NRCP § 56(c)*, the Division has failed to provide a concise statement setting forth each fact material to the disposition of the motion which the Division claims is or is not genuinely in issue, citing the particular portions of any pleading, affidavit, deposition, interrogatory, answer, admission, or other evidence upon which the party may rely.

Indeed, the Division has completely failed to even provide a statement of facts with citations to authorities and instead relies on the Complaint to provide a summary of relevant background. Because the Division has completely failed to set forth any facts central to the disposition of the Motion for Partial Summary Judgment, the Division's motion must be denied.

C. THE RESPONDENT MUST BE GIVEN ADEQUATE TIME TO CONDUCT DISCOVERY

Entry of summary judgment is proper only "after **adequate time for discovery** and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986).

NRCP § 56(f) allows the Court to refuse summary judgment, continue a hearing or "make such other order as is just" when a party opposing summary judgment demonstrates that it cannot "for reasons stated present by affidavit facts essential to justify the party's opposition." *NRCP* 56(f). See also *Aviation Ventures, Inc. v. Joan Morris, Inc.,* 121 Nev. 113 (Nev. 2005) (finding court abused its discretion by not permitting the non-movant to engage in discovery pursuant to *NRCP* § 56(f) to allow it an opportunity to marshal facts to oppose a motion for summary judgment).

Nevada courts readily find that it is an abuse of discretion to refuse a party discovery to oppose a summary judgment motion where either the requesting party has not been dilatory or the case is at an early stage of the proceedings. *Harrison v. Falcon Products, Inc.,* 103 Nev. 558, 560, 746 P.2d 642 (Nev. 1987). Here the parties are still in the early stage of the proceedings,

scheduling depositions, requesting documents, and such. For example, on July 14, 2016, Respondent's counsel requested production of the complete case file in this matter along with the case file of related complaints related to the Association. A request has also been made for all written correspondence, email, or other form of communication regarding this matter, as well as documents pertaining to all forms of communication related to the investigation of this matter and related complaints related to the Association. Also, the parties are attempting to finalize dates for the depositions of Darik Ferguson, Gina D'Alessandro, Joseph Decker and Sharon Jackson.

A *NRCP* § 56(f) request for time to conduct discovery should be granted where the party making the request: (1) submits an affidavit setting forth the specific facts that they hope to obtain from discovery (as Respondent has done here); (2) that the facts sought exist; and (3) that these facts are essential to oppose summary judgment (as is the case here). *State of Cal. v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998).

Respondent satisfy these requirements here. First, Respondent has submitted an affidavit by counsel describing the facts likely to be produced, namely facts that demonstrate the Respondent's posting of comments was not done in her capacity as a board member but in her role as a private citizen and that it is the Division that is acting in a retaliatory fashion. Second, the affidavit makes clear that it is very likely that facts supporting Respondent's position will be uncovered in the documents requested and depositions taken. Lastly, these facts would not only defeat the Partial Summary Judgment, it would fatally eviscerate the Division's Compliant. (See Declaration of John B. Marcin ¶¶ 4 -5)

II. SUMMARY JUDGMENT CAN NOT BE GRANTED IN THIS MATTER BECAUSE THERE ARE A MYRIAD OF FACTUAL DISPUTES AND LEGAL ISSUES, BOTH OF WHICH PRECLUDE A QUICK DISPOSTIION OF THIS MATTER

A. STANDARD FOR SUMMARY JUDGMENT

NRCP § 56(c) states in relevant part that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together

with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The party moving for summary judgment bears the initial burden or production to show the absence of a genuine issue of material fact. *Cuzze v. University & Comm. College System of Nevada*, 172 P.3d 131 (Nev. 2007).

When a summary judgment motion is made, **all of the opposing party's statements must be accepted as true**, all reasonable inferences that can be drawn from the evidence must be admitted, **and the trial court cannot decide issues of credibility based upon the evidence submitted in the motion**. *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 713, 57 P.3d 82, 87 (Nev. 2002). **In deciding whether summary judgment is appropriate, the evidence must be viewed in the light most favorable to the party against whom summary judgment is sought, and the factual allegations, evidence, and all reasonable inferences in favor of the nonmoving party must be presumed correct**. *NGA #2 Ltd. Liability Co. v. Rains*, 113 Nev. 1151, 1157, 946 P.2d 163, 167 (Nev. 1997). Case law firmly establishes that summary judgment is a drastic remedy and Courts are to exercise great caution in granting summary judgment, which is not to be granted if there is slightest doubt as to the operative facts. *Pine v. Leavitt*, 84 Nev. 507, 445 P.2d 942, (Nev. 1968); *Posadas v. City of Reno*, 109 Nev. 448, 851 P.2d 438, (Nev. 1993).

Trial court's reviewing record for issues of material fact upon motion for summary judgment should construe pleadings and documentary evidence in a posture most favorable to party against whom the motion for summary judgment is directed. *Butler v. Bogdanovich*, 101 Nev. 449, 705 P.2d 662 (Nev. 1985).

B. MATERIAL ISSUES OF FACT AND LAW EXIST IN THIS MATTER, THEREFORE, PETITIONER'S PARTIAL SUMMARY JUDGMENT SHOULD BE DENIED.

The Division's argument that partial summary judgment is appropriate in this matter rests on the contention that the following assertions are undisputed:

1. Respondent posted the comments quoted in the Compliant,

2. Respondent was acting in her capacity as a board member when she posted the comments,

3. The posts was an act of revenge against Stern; and,

4. The Respondent disseminated confidential information regarding Stern.

Based on these contentions, the Division asserts that "(t)he only issues to be decided by this Commission are the legal questions of whether PUHEK was retaliating against Mr. Stern for filing complaints against the board and whether or not her actions violated her fiduciary duty to act in good faith and in the best interests of the Association." (Complaint, Page 3, Lines 14-17)

In reality the only contention that is undisputed is the fact that the Respondent posted the comments quoted in the Complaint. Respondent was not acting in her capacity as a board member when she posted the comments but acting as a private citizen, the comments were not an act of revenge against Stern and no confidential information regarding Stern was ever disseminated.

1. Respondent Was Not Acting In Her Capacity As A Board Member When She Posted the Comments, but Exercising Her First Amendment Rights as a Private Citizen.

The Division does not actually allege that the Respondent was acting her capacity as a Board Member in the Complaint nor does it allege such in the Summary Judgment Motion. Instead, the Division states that she "was a board member when she made the posts regarding Stern" thus, implying that the posted comments must have been in her capacity as a board member. (Summary Judgement Motion, Page 3, Lines 13-14).

Being a board member, however, does not automatically mean that any statements made by the Respondent, during her time as a board member, are statements made ***in her capacity*** as a board member any more than, for example, a statement made by an off-duty police officer cannot be assumed to be made in his or her capacity as a member of law enforcement.

The Division also conveniently overlooks the fact that its own Complaint ***alleges facts that directly contradicts any assertion that the Respondent was acting in her capacity as a board***

member. The Division's Complaint admits that the Division attempted to intimidate the Association's board members when "(t)he [Division's] Administrator informed RESPONDENT HERNADEZ [President of the Association] that the Association and other board members would not be included in the investigation if they provided a statement to the Division that they did not condone RESPONDENT PUHEK'S actions [i.e. posts]." (Complaint ¶ 15)

Instead of capitulating to the Division, Respondent Hernandez "informed the Division that the Association does not have the authority to censure RESPONDENT PUHEK" and "(d)uring 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 ¶¶ 16 - 17)

The Respondent is giving her opinion to other home owners as to who to vote for in an upcoming election which is one of the most valued forms of free speech a private citizen has in this Country. At the very least, a factual determination must be made as to whether the Respondent was acting in her capacity as an Association's board member; that allegation is certainly not "undisputed." These opinions that were formed based on the information and admissions that Stern himself published.

2. Respondent Was Not Retaliating Against Mr. Stern.

Not only does the Respondent deny that her posted comments were retaliation against Mr. Stern but the Division never actually alleges what actions or events the Respondent was retaliating against. In Paragraphs Nos. 3, 4 and 5, the Complaint does factually allege that the Association had contact with Mr. Stern regarding varies issues from February 2014 through October 2014. The Respondent, however, was not on the Board of Directors of the Association and had no decision-making authority regarding these events and, therefore, were not of her concern. (See Respondent's Answer, ¶¶ 4-6).

Also, the allegations in the Compliant that supposedly provoked the alleged retaliation (the Division never makes this clear in its Complaint) are denied by the Respondent in her Answer and contradicted by evidence provided with this Opposition. For example, the Division alleges that Respondent's assertion in one of her posts that "the 'state shut him down by basically dismissing his petty complaints,'" is inaccurate since "a large portion of Mr. Stern's complaints were resolved as part of the ICA [Informal Conference Agreement] settlement". (Complaint ¶ 12)

However, the Division's allegation in Paragraph No. 12 is contradicted but Joseph Decker, Administrator for the Nevada Real Estate Division, who testified at the Anthem Highlands Case, et al., heard on June 8, 2016 regarding the complaints filed by Mr. Stern and stated "the first set of complaints that I found during the review were a number of complaints filed by Robert Stern against the board, approximately 40 complaints. So I decided to meet with Mr. Stern, discuss his allegations and talk to him about what the Division could and could not do. Through that conversation I told him that I was going to be closing about 38 of those complaints." (Exhibit 1; June 8, 2016 Disciplinary Hearing, Day 2, Page 160, Lines 11-19)

Mr. Decker's testimony contradicts the Division's assertion that a large portion of Mr. Stern's complaints were resolved as part of an ICA settlement and lends credence to the Respondent's assertion that Mr. Stern's complaints were of no concern to her and the comments she posted were related to her exercising her right to give her opinion on a matter of public interest.

Even the former investigator Al Sotelo said of Mr. Stern's complaints that "Stern's complaints over a twenty month period might be frivolous, false, or fraudulent." From *HOA Wars*, by Robert Stern, Kate Publishing (2015):

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on the same agenda

Also in May, I received two letters from Al Sotelo, an investigator from the Compliance Section, regarding two matters on which I had filed intervention affidavits. Mr. Sotelo couldn't have gotten his facts and the law more wrong. I was incredulous. He attacked me, suggesting that my complaints over twenty months might be frivolous, false, or fraudulent. I went after him by writing a letter to Governor Sandoval asking that they discipline him and remove him from any cases involving me and not allow any future cases I filed to be given to him. I urged them to back it up or back off. The result was Mr. Sotelo no longer being assigned to any of my

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3. The Respondent Did Not Disseminate Confidential Information regarding Stern.

The Division alleges that the Respondent disseminated confidential information regarding Stern, i.e., that Stern's primary residence is North Carolina. In reality, Stern is the person who disseminated this information.

On Page 170 -172 of Stern's book, "HOA WARS What Happens in Vegas Can Happen Anywhere", Stern reprints an August 2, 2014 letter he sent to the Board of Directors of a North Carolina Homeowner's Association located in Ocean Isle Beach, North Carolina which discusses complaints he and his neighbors allegedly have. (Exhibit 2; HOA WARS What Happens in Vegas Can Happen Anywhere, Pages 170-172). On Page 172, the letter specifically says "Randy and I spend six months in Ocean Ridge and six months elsewhere."

The Respondent cannot disseminate confidential information if it is not, in fact, confidential but made public knowledge by Mr. Stern in a book he is trying to sell to the public.

CONCLUSION

Based on the foregoing, it is clear that there are, at the very least, material issues of fact regarding the Division's allegations that: (1) Respondent was acting in her capacity as a board member when she posted the comments; (2) that the comments were an act of revenge against Stern; and, (3) that Respondent disseminated confidential information regarding Stern to the public. The Commission should deny Petitioner's Motion for Partial Summary Judgment and urge the Division to stop this proceeding now.

DATED: July 18, 2016

Respectfully submitted,

MARCIN LAMBIRTH, LLP

By: _____
John B. Marcin, Esq.
Attorneys for Respondent Pennie Puhek

DECLARATION OF JOHN B. MARCIN

I, John B. Marcin, declare as follows:

1. I am an attorney at law duly licensed to practice before all courts of this state. I am a partner at Marcin Lambirth, LLP, which is counsel for Respondent Pennie Puhek ("Respondent"). The following facts are within my personal knowledge, and if called upon to testify, I would, and could, competently testify as follows:

2. Attached hereto as **Exhibit "1"** is a true and correct copy of the relevant, excerpted portions of Joseph Decker's testimony at the June 8, 2016 Disciplinary Hearing, Page 159-160.

3. Attached hereto as **Exhibit "2"** (to my understanding) are true and correct copies of excerpted portions of Robert Stern's 2015 book "HOA WARS What Happens in Vegas Can Happen Anywhere", Pages 96, and 170-72.

4. Regarding discovery, I have already requested production of the complete case file in this matter along with the case file of related complaints related to the Association. I have also requested all written correspondence, email, or other form of communication regarding this matter, as well as documents pertaining to all forms of communication related to the investigation of this matter and related complaints related to the Association. Also, the parties are attempting to finalize dates for the depositions of Darik Ferguson, Gina D'Alessandro, Joseph Decker and Sharon Jackson.

5. Once discovery has been completed in this matter, it is very likely that facts will be uncovered will demonstrate the Respondent's posting of comments was not done in her capacity as a board member but in her role as a private citizen and that it is the Division that is acting in a retaliatory fashion.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct, and that this declaration was executed this 18th day of July, 2016 in Las Vegas, Nevada.

JOHN B. MARCIN

EXHIBIT 1

1 Okay. We'll take the last Division witness at exactly
2 nine minutes to 2:00. We'll be in recess.
3 (A break was taken from 1:46 p.m. through
4 1:52 p.m.)
5 CHAIRMAN BRESLOW: Ms. Briggs, if you could
6 please call your next witness.
7 MS. BRIGGS: Joseph Decker.
8 CHAIRMAN BRESLOW: Mr. Decker, please raise
9 your right hand.
10 Do you swear or affirm the testimony you're
11 about to give in this matter will be the truth, the
12 whole truth, and nothing but the truth?
13 THE WITNESS: I do.
14 CHAIRMAN BRESLOW: Thank you. Please have a
15 seat. State your name and spell your last name for the
16 record.
17 THE WITNESS: Joseph Decker, D-E-C-K-E-R.
18 CHAIRMAN BRESLOW: Thank you.
19 Ms. Briggs.
20 DIRECT EXAMINATION
21 BY MS. BRIGGS:
22 **Q. Could you state your occupation for the record,**
23 **please?**
24 A. Administrator for the Nevada Real Estate
25 Division.

1 **Q. When did you become the administrator for the**
2 **Division?**
3 A. August of 2014.
4 **Q. When did you first become aware of issues with**
5 **Anthem Highlands?**
6 A. It would have been early 2015 during a review of
7 the enforcement sections pending cases.
8 **Q. In that review what did you determine would be a**
9 **good course of action with reference to the complaints**
10 **that had been submitted to the Division?**
11 A. So the first set of complaints that I found
12 during that review were a number of complaints filed by
13 Robert Stern against the board, approximately 40
14 complaints.
15 So I decided to meet with Mr. Stern, discuss his
16 allegations and talk to him about what the Division
17 could and could not do. Through that conversation I
18 told him that I was going to be closing about 38 of
19 those complaints; that investigation wasn't in
20 appropriate forum, and he brought to my attention two
21 specific allegations that I found to meet our standard
22 of good cause for further investigation.
23 **Q. Did you stay involved in those cases? Did you**
24 **refer them to the investigation section?**
25 A. I referred them to the investigation section.

EXHIBIT 2

On behalf of Randy and myself, I sent off the following certified letter to the ORMA board.

August 2, 2014

Board of Directors
Ocean Ridge Master Association
351 Ocean Ridge Parkway
Ocean Isle Beach, North Carolina 28469

VIA CERTIFIED MAIL

Gentlemen:

On behalf of Randy Rutkin and myself, each 50% owners of max Sedgefield Place, enclosed please find a check for $125 for the month of September 2014 for Landscape Maintenance for our property.

Based on the facts, we should all be able to agree that matters caused by the dysfunctional Sedgefield Landscape Committee's lack of appropriate contract enforcement and liaison have created a difficult situation for everyone. Our property was being neglected. From topsoil to disease to edging and more, the Sedgefield Landscape Maintenance Specifications and Schedules were not being adhered to. Mr. Johnson's July 11, 2014 letter to you that defamed me caused you to take action. We were not even given an opportunity to address the matter with you prior to you taking action.

We have consulted counsel and our Sedgefield neighbors and friends in the Community. While most are happy with Phoenix, there seems to be unanimous agreement that the Sedgefield Landscape Maintenance committee is dysfunctional and lacks adequate leadership to fulfill its responsibilities.

ORMA is responsible for vendor selection. We regret the choice the board made in directing Randy and me to go find our own vendor subject to Board approval, as ORMA

abandoned its responsibility. We ask that you reexamine and reconsider your decision. We believe your action was inappropriate and inconsistent with our governing documents, due process and fair play to homeowners.

In good faith and in communication with John Wehner we got Prestige Landscaping involved who began maintaining our property. The board chose not to approve them, and John Wehner in meeting with me on Thursday July 31 said they couldn't find 'information to evaluate despite the fact that they currently service 17 Ocean Ridge properties. John further stated that the board insisted on a liability certificate of insurance made out to ORMA. He also made reference to behavior concerns as the board in back channels appeared to be labeling me" a trouble maker." I was also handed a copy of the Sedgefield Landscape Maintenance Specifications and Schedules and directed that it was my responsibility to ensure compliance. I bristled at what was coming down. How ironic. The "trouble maker" had tried to follow the rules and get the dysfunctional Sedgefield Landscape Committee to get Phoenix to follow through and perform services on our property as required by the contract. It was I who printed out the document and reviewed it line item by line item wanting nothing more than to have our neglected property receive the services it was paying for. And the board President who was really trying to make the situation better doesn't see that now I am being directed to ensure that a new vendor maintain the standards that Phoenix wasn't even being held to. And anyone who speaks up is a "trouble maker." My neighbor at xxxx Sedgefield told me when he was labeled a "trouble maker" in some eyes after his intense disagreements with another Sedgefield resident who at the time headed up the Sedgefield Landscape Committee. He by his own admission "dummied up" and pays others to perform services he believes are Phoenix responsibilities.

John wanted to focus on "recovery" as he calls it and move forward. So on Friday I contacted the owner of Prestige and discussed with him the certificate of insurance requirement for ORMA and he indicated that based on legal advice he could not do this with me as the contracting party and he explained North Carolina law. This was getting too complicated so we agreed to terminate service.

As an accommodation to the board as John requested, Prestige will continue maintaining through August to give the board adequate time to address its next step. After that it is up to the is board to have a vendor in place as is its responsibility. I suggest one of two possibilities. Either get Phoenix back on board and let's move on or the board can choose and manage a vendor specifically for our property consistent with the current Sedgefield Landscape Committee oversight. Regardless of choice I urge the board to examine its responsibility in fixing the current Sedgefield system. It is broken. You shouldn't have to fill out a work order to have the vendor fulfill its normal basic duties. A phone call or email to the committee should suffice.

We can all agree that this has gone too far and I ask the board not to escalate this further and please solve this matter consistent with our governing documents. I have served on a number of HOA/POA boards over the years with a couple of years as President. I understand the problems and effort of volunteers such as yourselves. Thank you for your service. I explained to John that I am currently finishing a book entitled HOA WARS What Happens in Vegas Can Happen Anywhere. Randy and I spend six months in Ocean Ridge and six months elsewhere. We love it here and want to be good neighbors and a positive force in the community.

In doing my research for the book I interviewed many homeowner advocates including one who resides in Wilmington and learned quite a bit about North Carolina's

laws and problems. I have seen how HOA WARS get started and then take on a life of their own as everyone defends their position not wanting to be wrong. I tell the story of my own personal experience in Vegas in an HOA of 1600 homeowners where I served as a board member and was wrongfully sued by the board as I was protecting and defending homeowners' rights to surplus funds. As a result of the fight nearly $1.2 million was credited back to homeowners. So I am a "troublemaker" when I see something unjust. Our property was underserved and the Sedgefield Landscape Committee system is dysfunctional.

In my view, Ocean Ridge is very well run. I respect the civility of the South and do my best to honor that culture. We are all flawed. I do not want Ocean Ridge to become a contaminated community. This situation is not good and it has gone too far already. John asked me to be reasonable. I make the same request of the board as Randy and I are the injured parties. We are now completing a 19 week visit and will be away August, September, October, January and February and most of March. Hopefully you can find a solution that works for the board as well as us.

We wish you well.
Sincerely

ORMA has a seven-person board and I sent them each an email with this letter attached offering them an opportunity to communicate with us if they wanted any first hand information. No one took us up on that offer.

On Tuesday, August 5, Randy and I flew back to Las Vegas.

had put together a slate that I would support that I believed would be fiscally conservative and pledge to protect homeowners' rights.

The candidate placing fourth would serve only one year. The top three would get two-year terms. Slicko, Freddy Fudd, and Lonestar were all on the ballot. I was supporting four other candidates. I was hoping to get a sensible majority of three to end all of the nonsense by curtailing Cybil's power. The election and annual meeting were slated for May.

May and June 2013

Miranda had been serving Desert Acres for only eight months and the board voted her a $5,000 bonus. It reeked of political corruption. She was clearly Cybil's stooge and they were fearful that they might lose the majority in the election, so before a new board came into power, they wanted to reward her for her loyalty to the evildoers. It was an unbudgeted and nonratified expenditure. Laws, governing documents, and common sense did not play a part in this board's actions. Clearly the $5,000 bonus to Miranda was an abuse of power costing homeowners. They also acknowledged the auditor's report for the 2012 calendar year. That is significant because the auditor cautions the board not to make unbudgeted expenditures as it is not lawful. Both matters on the same agenda were a weird juxtaposition in my eyes.

Also in May, I received two letters from Al Sotelo, an investigator from the Compliance Section, regarding two matters on which I had filed intervention affidavits. Mr. Sotelo couldn't have gotten his facts and the law more wrong. I was incredulous. He attacked me, suggesting that my complaints over twenty months might be frivolous, false, or fraudulent. I went after him by writing a letter to Governor Sandoval asking that they discipline him and remove him from any cases involving me and not allow any future cases I filed to be given to him. I urged them to back it up or back off. The result was Mr. Sotelo no longer being assigned to any of my

AFFIRMATION
Pursuant to N.R.S. 239B.030

The undersigned does hereby affirm that the preceding **RESPONDENT PENNIE PUHEK'S OPPOSITION TO PETITIONER'S PARTIAL SUMMARY JUDGMENT MOTION AND REQUEST FOR TIME TO CONDUCT DISCOVERY PER *NRCP* § 56(f); DECLARATION OF JOHN B. MARCIN** filed in or submitted:

■ Does not contain the social security number of any person.

OR

☐ Contains the social security number of a person as required by:

A. A specific state or federal law, to wit:

(State specific law)

or

B. For the administration of a public program or for an application for a federal or state grant.

MARCIN LAMBIRTH, LLP

/s/ John B. Marcin
John B. Marcin, Esq.
Nevada Bar No. 7078
3960 Howard Hughes Parkway, 5th Floor
Las Vegas, Nevada 89169
(702) 893-2060

Date: July 18, 2016

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18th day of July, 2016, I served a true and correct copy of the **RESPONDENT PENNIE PUHEK'S OPPOSITION TO PETITIONER'S PARTIAL SUMMARY JUDGMENT MOTION AND REQUEST FOR TIME TO CONDUCT DISCOVERY PER *NRCP* § 56(f); DECLARATION OF JOHN B. MARCIN**, by e-mail to the following party(ies):

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/s/ John Marcin
An employee of Marcin Lambirth, LLP