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

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

Case No. 2015-291

Petitioner,

vs.

ANTHEM HIGHLANDS COMMUNITY
ASSOCIATION, PENNIE PUHEK, JAMES
LAUTH, and CHARLES HERNANDEZ,

Respondents.

FILED

AUG 15 2016

NEVADA COMMISSION OF
COMMON INTEREST COMMUNITIES
AND CONDOMINIUM HOTELS

**SUPPLEMENTAL OPPOSITION TO RESPONDENT JAMES LAUTH'S
MOTION TO DISMISS AND COUNTERMOTION FOR PARTIAL SUMMARY JUDGMENT**

The Real Estate Division of the Department of Business and Industry, State of Nevada (the "Division"), by and through its counsel, Adam Paul Laxalt, Attorney General of the State of Nevada, and Michelle D. Briggs, Senior Deputy Attorney General, hereby files its Supplemental Opposition to Respondent James Lauth's Motion to Dismiss and Countermotion for Partial Summary Judgment. This supplemental opposition and countermotion is made and based on the following Memorandum of Points and Authorities as well as any and all pleadings on file herein and any oral argument that may be heard at the time of the hearing of this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

RESPONDENT CHARLES HERNANDEZ submitted his joinder to RESPONDENT JAMES LAUTH'S motion to dismiss, or in the alternative, for summary judgment after the Division filed its opposition to LAUTH'S motion. As acknowledged by HERNANDEZ, the claims and facts regarding HERNANDEZ and LAUTH are essentially the same. LAUTH and HERNANDEZ submitted substantially similar responses to the Division's investigation of

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1 RESPONDENT PUHEK'S retaliation against a homeowner.¹ Based on HERNANDEZ'S
2 joinder to LAUTH'S motion, the Division requests summary judgment against both LAUTH
3 and HERNANDEZ based on the facts and arguments set forth in the Division's opposition on
4 file herein and in this supplement. The Division submits this supplement to address among
5 other things misrepresented and unsupported facts raised by HERNANDEZ in his joinder.

6 II. FACTS

7 This matter concerns retaliatory action taken by RESPONDENT PUHEK that was
8 defended by RESPONDENTS HERNANDEZ and LAUTH. The retaliatory action was directed
9 at former homeowner, Robert Stern. On June 7, 2016, this Commission approved a
10 stipulated settlement between the Division and Mr. Stern for a separate disciplinary matter
11 which arose after Mr. Stern became a board member. The stipulation with Mr. Stern states
12 specifically that the parties do not assent to the claims or defenses of the other.² The
13 stipulation is not a finding by this Commission that Mr. Stern violated NRS 116, it is a
14 settlement of the claims made by the Division. On the other hand, in the same case in which
15 Mr. Stern agreed to a settlement with the Division, HERNANDEZ did not settle and chose to
16 have the matter heard by this Commission. This Commission found that HERNANDEZ
17 violated his fiduciary duty to the Association.³ In finding that HERNANDEZ violated his
18 fiduciary duty, this Commission found that all the factual allegations made by the Division in
19 the complaint were true. The Commission found that the Division issued letters of instruction
20 to the Association's board based on complaints filed by Mr. Stern. The Commission also
21 found that HERNANDEZ attended a meeting to persuade a fellow board member, Jody
22 Fassette, to vote a certain way outside the regular meeting and without notifying Ms. Fassette
23 that he would be there. HERNANDEZ failed to respond to questions regarding board matters
24 raised by Ms. Fassette. Ms. Fassette resigned from the board citing as her reason threats

25 _____
26 ¹ See Affidavits of Charles Hernandez and James Lauth attached to the Opposition at Ex. 6.

27 ² The Division asks the Commission to take administrative notice of the Stipulation on file, but
28 can provide a copy, if necessary.

³ The Division asks the Commission to take administrative notice of the Commission's
Findings of Fact, Conclusions of Law and Order regarding HERNANDEZ, but can provide a
copy, if necessary.

1 and retaliatory actions for voting/not voting a certain way. When Ms. Fassette wanted to
2 withdraw her resignation to avoid a deadlocked board, HERNANDEZ refused to allow her to
3 return and instead personally pursued an ADR filing to prove she had resigned.
4 HERNANDEZ refused to attend an informal conference with the Division to help resolve a
5 complaint filed by Mr. Stern regarding Ms. Fassette's resignation. HERNANDEZ agreed to
6 allow a vote on whether to allow Ms. Fassette to return if Mr. Stern's on-line postings were
7 restricted and certain other things would be approved. The deadlocked board resulted in no
8 meetings taking place for several months, no budget being adopted timely, and no action
9 taken regarding other Association business. Based on all of these facts and others outlined in
10 the order, the Commission found that HERNANDEZ violated his fiduciary duty to the
11 Association. The Commission made no such finding as to Mr. Stern. HERNANDEZ was
12 removed from the board and ordered to pay the costs of the hearing.

13 III. LEGAL ARGUMENT

14 A. A BOARD MEMBER'S FIDUCIARY DUTY DOES NOT APPLY ONLY WHEN 15 BOARD MEMBERS AND OWNERS GET ALONG.

16 Similarly to LAUTH, HERNANDEZ'S joinder blames Mr. Stern for PUHEK'S actions.
17 HERNANDEZ'S joinder misrepresents this Commission's findings regarding Mr. Stern.
18 HERNANDEZ alleges this Commission found Mr. Stern failed to participate in the mandatory
19 referee program. The Commission made no such finding. HERNANDEZ'S joinder states that
20 Mr. Stern admitted to intimidating board members. This is also not true. The settlement
21 included no admissions of fact and no findings were made by the Commission in accepting
22 the settlement with Mr. Stern. Not only does HERNANDEZ'S joinder fail to represent the facts
23 correctly, it fails to acknowledge that the only finding by this Commission of a violation of law
24 was against HERNANDEZ. The Commission's only finding that a board member from the
25 Association violated his fiduciary duty was against HERNANDEZ. But still, HERNANDEZ
26 misrepresents the facts that are actually very clear to the Commission just to try to confuse
27 the issues. This Commission should understand how easily facts are misstated and
28 misrepresented by HERNANDEZ as it pertains to Mr. Stern.

1 HERNANDEZ responded to the Division's investigation of this matter just like LAUTH.
2 HERNANDEZ supports PUHEK'S free speech rights and does not think she was acting in her
3 capacity as a board member when she made the comments about Mr. Stern. HERNANDEZ
4 believes his actions are appropriate, because he, like PUHEK and LAUTH, dislikes Mr. Stern.
5 In taking this position, HERNANDEZ fails to see how his actions are in conflict with his
6 obligations to the Association.

7 Board members are obligated by the requirements of NRS 116 to act on an informed
8 basis, in good faith and in the honest belief that their actions are in the best interests of the
9 association.⁴ The provisions of NRS 116 do not say that these duties are limited to
10 circumstances when the board members like a homeowner. HERNANDEZ, like LAUTH,
11 takes the position that attacking Mr. Stern to make him look bad somehow relieves them of
12 their fiduciary duty to the Association. Their representations about Mr. Stern are not even
13 accurate, as can be seen by both the motion by LAUTH and the joinder by HERNANDEZ.
14 The actual facts do not support their positions. But it is clear that they are both motivated
15 based on their personal feelings for Mr. Stern.

16 The Division believes and the law requires that LAUTH and HERNANDEZ must
17 always act in the best interests of the Association, especially when they dislike a homeowner.
18 In fact, it is a given that retaliatory action comes from a personal vendetta. It is clear in
19 PUHEK'S posting that she made the post because she hates Mr. Stern. Board member and
20 homeowner conflicts are why NRS 116.31183 exists. The Nevada Legislature explained in
21 detail what board members cannot do when they dislike a homeowner. Just as PUHEK
22 should not have retaliated against Mr. Stern, the other board members should not take the
23 position that she is free to say whatever she wants about a homeowner and direct other
24 homeowners, not only to dislike him also, but to not vote for him or anyone he supports.

25 In terms of HERNANDEZ and LAUTH, the Division only wanted them to respond to the
26 Division's investigation with what they already believed to be their fiduciary duty as evidenced
27

28 ⁴ See NRS 116.3103(1).

1 by the board's resolution on Directors Fiduciary Duty and Ethical Responsibility.⁵ By not
2 responding that way, HERNANDEZ and LAUTH are effectively saying certain homeowners
3 can be treated differently based on whether or not the board members like them. The
4 problem with this approach to PUHEK'S post is that they fail to see what is best for the
5 Association as a whole. Taking the position that a board member can say whatever they want
6 about another homeowner outside a meeting of the board is not good for the Association.
7 Allowing such behavior causes confusion, hostility, and division within the Association. How
8 could anyone think that was best for the Association?

9 **B. HERNANDEZ'S REASONS FOR SUPPORTING PUHEK ARE CONTRARY TO HIS**
10 **OBLIGATIONS TO THE ASSOCIATION.**

11 HERNANDEZ lists his three reasons for responding to the Division's investigation the
12 way he did. First and foremost, he blames Mr. Stern's book saying Mr. Stern "defamed the
13 Anthem Association."⁶ HERNANDEZ states that it was Mr. Stern who "acted out of reasons of
14 self-interest, gain, prejudice, or revenge."⁷ This is particularly interesting, because it shows
15 the complete lack of understanding of what it means to be a fiduciary. Acting out of reasons
16 of self-interest, gain, prejudice, or revenge violates a board member's fiduciary duty.
17 Mr. Stern was not a board member. HERNANDEZ does not understand that his obligations to
18 the Association are paramount as a board member.

19 HERNANDEZ is basically saying Mr. Stern started the disparaging comments to justify
20 PUHEK'S retaliatory actions. The "he started it" defense is childish. It should also be noted
21 that Mr. Stern's book does not mention Anthem Highlands or PUHEK, HERNANDEZ, or
22 LAUTH by name. The book is about Mr. Stern's experience when he was sued by the
23 Association, but actual names were not used. It is a matter of public record that the
24 Association initiated a civil action against him. He was forced to hire an attorney to defend
25 himself, and he wrote a book about it. He has every right to write a book. As is clear from the

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27 ⁵ See Association Directors Fiduciary and Ethical Responsibility Resolution attached to the
Opposition at Ex. 7.

28 ⁶ See Joinder at 3, ln 16-17.

⁷ Id.

1 ICA, the Association agreed to return his attorneys fees to him and waive assessments
2 placed on his account for the attorneys' fees the Association incurred.⁸ HERNANDEZ argues
3 that Mr. Stern can be retaliated against, because he wrote a book about his fight with the
4 Association, who is not mentioned specifically. That is wrong and not what is best for the
5 Association.

6 In addition to the book, HERNANDEZ says his position is due to his relationship with
7 PUHEK. HERNANDEZ actually says he did not want to disavow PUHEK'S comments,
8 because he feared Mr. Stern would seek retaliation against PUHEK. HERNANDEZ fails to
9 see that his loyalty should be to the Association, not PUHEK. PUHEK violated the board
10 resolution regarding fiduciary duty and NRS 116.31183. HERNANDEZ has an obligation to
11 protect the Association by acknowledging her conduct is not appropriate. By not doing so, he
12 subjected the Association to liability, along with PUHEK.

13 Finally, HERNANDEZ asserts that his reason for not disavowing PUHEK'S comments
14 is because he really thinks she was not acting as a board member when she made the
15 comments. The Division investigated the matter as retaliatory conduct. HERNANDEZ did not
16 say PUHEK was acting in her individual capacity and not as a board member, but the board
17 would not condone such behavior based on their resolution. He said she was acting in her
18 individual capacity and her free speech rights prevail. This certainly sounds like an attempt to
19 support not only PUHEK, but the comments she made. Of course, the comments represent
20 the board members' feelings toward Mr. Stern. HERNANDEZ'S and LAUTH'S entire defense
21 to this case is to blame Mr. Stern. It is also disingenuous to say PUHEK'S free speech rights
22 prevail especially given HERNANDEZ'S history.

23 The board's adoption of a resolution on fiduciary duty requires board members to treat
24 owners with respect and not to participate in name calling.⁹ The resolution HERNANDEZ
25 approved a few months prior to PUHEK'S posts is contrary to HERNANDEZ'S free speech
26

27 ⁸ See Informal Conference Agreement (ICA) attached to the Opposition at Ex. 10.

28 ⁹ See Association Directors Fiduciary and Ethical Responsibility Resolution ("Board Resolution") attached to the Opposition at Ex. 7.

1 defense. HERNANDEZ also tried to limit Mr. Stern's posts on the same website when
2 Mr. Stern was a board member.¹⁰ The agreement HERNANDEZ signed to allow Ms. Fassette
3 a chance to come back to the board specifically provides that:

4
5 Mr. Stern agrees to cease using the Nextdoor public website to send mass
6 emails regarding board business or his personal opinions regarding the
7 association or individual board members...¹¹

8 If it were true that HERNANDEZ thought free speech rights prevail or that posting on
9 Nextdoor is not in a board members' capacity as a board member, why then was it
10 reasonable for HERNANDEZ to demand this of Mr. Stern when he was a board member?

11 The double standard can only be due to HERNANDEZ'S dislike of Mr. Stern and
12 favoritism of PUHEK. His change in positions based on the person involved equates to a
13 misapplied duty of loyalty and a failure to act in good faith and in the best interests of the
14 Association.

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27 ¹⁰ See Agreement Between Parties signed by HERNANDEZ October 8, 2015, attached
28 hereto as Ex. 11.

¹¹ Id. no. 7.

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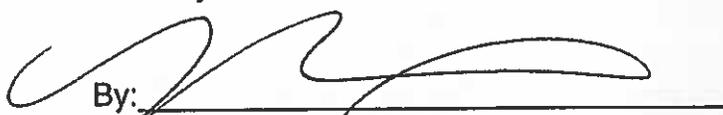
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IV. CONCLUSION

For all the reasons outlined above and in the Division's opposition to LAUTH'S motion, joined by HERNANDEZ, the motion to dismiss should be denied and summary judgment should be granted in the Division's favor. HERNANDEZ failed to act in good faith and in the best interests of the Association when he refused to disavow disparaging comments and retaliatory action taken by PUHEK. HERNANDEZ was motivated by his personal feelings for PUHEK and his dislike of Mr. Stern to the detriment of the Association.

DATED this 12th day of August, 2016.

ADAM PAUL LAXALT
Attorney General



By: _____
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the Office of the Attorney General and that on the 15th day of August, 2016, I served the foregoing SUPPLEMENTAL OPPOSITION TO RESPONDENT JAMES LAUTH'S MOTION TO DISMISS AND COUNTERMOTION FOR PARTIAL SUMMARY JUDGMENT by causing a true and correct copy thereof to be served via U.S. Mail, Postage Prepaid (and via e-mail as requested by Mr. Marcin) addressed to the following:

Edward D. Boyack, Esq.
Boyack Orme & Taylor
401 N. Buffalo Drive #202
Las Vegas, Nevada 89145
Attorney for Anthem Highlands Community Association and Charles Hernandez
US Certified Mail Number: 7012 1010 0000 1176 5378

Gregory P. Kerr, Esq.
3556 E. Russell Rd., 2nd Floor
Las Vegas, NV 89120
Attorney for James Lauth
US Certified Mail Number: 7012 1010 0000 1176 5385

John B. Marcin, Esq.
jbm@marcin.com
Attorney for Pennie Puhek


An Employee of the Office of the Attorney General

EXHIBIT 11

EXHIBIT 11

AGREEMENT BETWEEN PARTIES

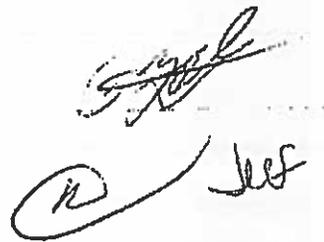
The parties listed below, by their signature, agree to the following conditions in order to proceed with appointing previously resigned Board member Jody Fassette to the vacant position on the Anthem Highlands Community Association Board of Directors for the term ending May 2016. The following stipulations are agreed to by all parties;

- 1) Once the appointment of Ms. Fassette takes place on October 28, 2015 a reorganization of officers will take place with the following positions being appointed. Once this organization is approved, all parties agree that no further re-organizations of the Board will take place until the election of May 2016 unless a resignation of the Board of Directors takes place prior to then.
President-Jody Fassette
V-President & Secretary-Ronnie Young
Treasurer-Robert Stern
Director-Charles Hernandez
Director-Ken Brensinger
- 2) All parties agree to rescind the July 22nd motion regarding terminating the legal services of Boyack, Taylor, and Orem as general counsel of the association. As documented in the minutes and audio of the meeting, two Board members attempted under Roberts Rules of Order to reconsider the motion and claimed a point of order at the time when it was expressed that there was confusion about the motion due to the noise and discussions with homeowners present.

The President serves as legal liaison of the association and the parties agree to appoint a co-legal liaison which will either be Charles Hernandez or Ken Brensinger. This appointment will serve until the May 2016 elections and the motion will be made prior to the appointment of Ms. Fassette.

All parties agree to allow Mr. Boyack to continue to serve as general counsel for at least 6 months from October 28th, 2015 to conclude all association business he has been assigned to date. Any further legal matters assigned to Mr. Boyack will need to be approved by the Board majority.

Robert Stern agrees to cease his retaliation and threats to Mr. Boyack of filing malpractice claims against him and to not attempt to contact or harass Mr. Boyack by seeking a refund of fees paid to him for Mr. Stern's opinion that the Board was improperly advised. The prior Board of Directors was fully informed of its options and takes full responsibility for the direction it provided Mr. Boyack regarding all legal matters.



Handwritten signatures of Robert Stern and Jody Fassette.

- 3) Ronnie Young and Robert Stern agree to attend the executive session of October 28th from 4:30pm-6:00pm and to participate in good faith either in person or by phone. If they do not attend the entire executive session, this agreement is void.
- 4) Charles Hernandez agrees to bring the motion to appoint Jody Fassette and the motion to re-organize when the unfinished business part of the agenda begins, but not prior to the first unfinished agenda item which will be to rescind the motion of July 22nd, 2015 regarding the legal services of Mr. Boyack .
- 5) The management contract liaison provision will not be amended. It will be the duty of President and Vice-president as co-liaisons to communicate with the Board on any information requests they may have. Any changes to the management company contract can be considered at the renewal in July of 2016.
- 6) Robert Stern agrees to cease threatening or filing Statement of Facts against the community manager as it may cause the manager to quit and leave the association in a management crisis.
- 7) Mr. Stern agrees to cease using the Nextdoor public website to send mass emails regarding Board business or his personal opinions regarding the association or individual Board members as it is an attempt to circumvent the Settlement Agreement that prohibits sending more than 5 email blasts at a time. The posting on the Nextdoor website constitutes a mass email blast of more than 450 people at one time.
- 8) Ken Brensinger, Charles Hernandez, and Ronnie Young will vote to immediately remove the approximate \$18,000 in assessments for misconduct and court costs that are currently on Robert Stern's account and agree to take all appropriate actions to resolve the ADR complaint 14-126. This vote will take place in executive session and announced in the open regular session.

Conditions 1-8 must be agreed upon in order for the appointment of Ms. Jody Fassette to the vacant position on the Board of Directors.

Charles Hernandez _____	Date <u>10/8/15</u>
Ken Brensinger _____	Date <u>10/7/15</u>
Ronnie Young _____	Date _____
Robert Stern _____	Date _____
Jody Fassette (Appointee) <u>Jody Fassette</u>	Date <u>10/7/15</u>