

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

3 Sharath Chandra, Administrator, Real Estate Division, Department of Business &
4 Industry, State of Nevada,

Case Nos. 2018-952
2018-978
2019-409

5 Petitioner,

6 vs.

7 Gerald Marks,

8 Respondent.

FILED

SEP 11 2020

NEVADA COMMISSION FOR
COMMON INTEREST COMMUNITIES
AND CONDOMINIUM HOTELS

Kelly Valadez

9
10 **FINDINGS OF FACT,**
11 **CONCLUSIONS OF LAW AND ORDER**

11 This matter came on for hearing before the Commission for Common-Interest
12 Communities and Condominium Hotels, State of Nevada (the "Commission"), during a
13 regular agenda on August 4, 2020, via telephone and video with no physical public location
14 (as permitted by the Governor's Declaration of Emergency, Directive 006, as extended by
15 Directive 029). Respondent Gerald Marks ("RESPONDENT") did not appear in person or
16 otherwise, and Karissa D. Neff, Esq., Deputy Attorney General with the Nevada Attorney
17 General's Office, appeared by video on behalf of the Real Estate Division of the Department
18 of Business and Industry, State of Nevada (the "Division").

19 Ms. Neff moved to consolidate case numbers 2018-952, 2018-978, and 2019-409
20 (collectively "Marks Cases") which motion was granted by unanimous consent by the
21 Commission. In case number 2018-952 a Notice of Default was filed with the Division on
22 February 20, 2020, and properly served on RESPONDENT in accordance with NRS
23 116.770(6). In case number 2018-978 a Notice of Default was filed with the Division on
24 February 20, 2020 and properly served on RESPONDENT in accordance with NRS
25 116.770(6). In case number 2019-409 a Notice of Default was filed with the Division on
26 May 1, 2020 and properly served on RESPONDENT in accordance with NRS 116.770(6).

27 Ms. Neff presented testimony from Kelly Valadez, the Commission coordinator,
28 regarding service of the notices of the Complaints, hearing and documents for the Marks

1 Cases on RESPONDENT. The Commission, having determined that RESPONDENT was
2 properly served with the Complaints in the Marks Cases but that he failed to timely
3 respond as required by NRS 116.770(5), even after the notices of default were sent to him,
4 voted in favor of entering RESPONDENT's default and making a decision based on the
5 allegations in the complaints pursuant to NAC 116A.595(13).

6 The Commission, having considered the evidence introduced by the Division and
7 being fully advised, enters the following Findings of Fact, Conclusions of Law, and Order.
8 Under Nevada Revised Statutes (NRS) and Nevada Administrative Code (NAC) Chapter
9 116A, the Commission has legal jurisdiction and authority over this matter.

10 **FINDINGS OF FACT**

11 The Commission, based upon the filed complaint, finds that the following Findings
12 of Fact have been proven by a preponderance of the evidence in accordance with NAC
13 116A.595(13).

14 **Case No. 2018-952**

15 1. In July of 2018, the Division received a complaint alleging MARKS
16 misrepresented information provided to the Division regarding Morgyn Ridge Homeowners
17 Association (the "Association").

18 2. The complaint was filed by a board member of the Association.

19 3. He alleged MARKS provided inaccurate information on the Reserve Study
20 Summary form.

21 4. On August 28, 2018, the Division properly gave notice to MARKS that it
22 opened an investigation to determine whether MARKS provided inaccurate information on
23 the Reserve Study Summary form submitted to the division on February 12, 2018.

24 5. At the time, MARKS owned MP Association Management, Inc., a Nevada
25 corporation and managed the Association.

26 6. The Association consists of 157 condominium units.

27 ///

28 ///

1 7. On or about February 12, 2018, MARKS submitted the Association's Reserve
2 Study Summary Form 609 to the Division based on the Association's most recent reserve
3 study dated January 23, 2018.

4 8. MARKS reported the "Required reserve account balance at end of current
5 fiscal year based upon this reserve study" was \$190,150.

6 9. MARKS reported the "Projected reserve account balance at the end of current
7 fiscal year end" was \$200,836.

8 10. The board member questioned MARKS on the numbers provided in the form
9 and provided a portion of the reserve study entitled "Useful Information to Assist with
10 filling out: Nevada Reserve Study Summary Form 609."

11 11. This form states that the "Required reserve account balance at end of current
12 fiscal year based upon this study" is \$856,163.

13 12. The reserve study states that the Association is 22% funded.

14 13. MARKS responded to the board member that the Association uses threshold
15 funding and no change to the Association's Reserve Study Summary Form 609 was
16 necessary.

17 14. In response to the Division's investigation, MARKS provided a statement
18 saying the Association uses threshold funding and that he completed the form correctly.

19 15. On September 12, 2018, the Division requested evidence that the Association
20 adopted threshold funding, as well as information on reserved maintenance performed and
21 deferred.

22 16. On October 5, 2018, the Association's attorney, Edward Boyack, responded on
23 behalf of MARKS, but instead of providing the requested records, he objected to the
24 investigation and the complaint.

25 17. The Division responded and ultimately, Mr. Boyack provided a letter stating
26 MARKS would correct Form 609 and provide minutes and audio where the board discussed
27 the funding method.

28 ///

1 18. MARKS has not provided an updated Form 609 and he has not provided any
2 evidence that the Association adopted a threshold funding plan.

3 19. The Association's board did not adopt threshold funding as alleged by
4 MARKS.

5 **Case Nos. 2018-978**

6 20. RESPONDENT, at all relevant times, was the owner of MP Association
7 Management, Inc., a Nevada corporation ("MP Management") and was also the manager
8 of the Shadow Wood Homeowner's Association ("Shadow Wood" and/or "Association").

9 21. As background, prior to this investigation, Shadow Wood's president James
10 Ma ("Ma") filed a complaint with the Division leading to Commission Case No. 2017-1768
11 being brought against Shadow Wood's board members based in part, that board member
12 Jose Escalona ("Escalona") was being compensated to provide Association payroll services
13 through Escalona's company, JE & Associates.

14 22. Certain documents were produced in response to Commission Case No. 2017-
15 1768, leading to a subsequent case being brought by the Division against the Association
16 and board member Escalona as Commission Case No. 2018-680, where it was alleged in
17 part, that Escalona was being compensated for providing payroll services to Shadow Wood
18 through Escalona's company, JE & Associates.

19 23. Certain checks were produced in response to Commission Case No. 2018-680
20 leading to this action being brought against RESPONDENT.

21 24. Specifically, on September 19, 2018, the Division opened an investigation
22 against RESPONDENT to determine if RESPONDENT violated certain provisions of the
23 Nevada Revised Statutes or Nevada Administrative Code during his management of
24 Shadow Wood.

25 25. Notice of the investigation by the Division was properly sent to
26 RESPONDENT by certified mail on September 19, 2018.

27 26. In its investigation, the Division alleged that RESPONDENT did not exercise
28 reasonable care in his management of Shadow Wood because he permitted non-unit owner

1 George Bienkowski ("Bienkowski") to serve as an executive board member from 2008
2 through 2018.

3 27. NRS 116.31034 requires, in relevant part, that executive board members be
4 unit owners.

5 28. In response to the Division's investigation, RESPONDENT claimed that a
6 note attached as Exhibit "A" to his November 9, 2018 response letter to the Division showed
7 that Bienkowski is the owner of a unit located at 3609 Melonies Dr. #94, Las Vegas, NV
8 89103.

9 29. Exhibit "A" to RESPONDENT'S November 9th response letter to the Division
10 consists of an affidavit from Curtis Harmon ("Harmon Affidavit") stating that Harmon had
11 always known Bienkowski to live in unit 94 and "have now seen written proof that he does
12 own his condo."

13 30. Exhibit "A" to RESPONDENT'S November 9th response letter also contains a
14 limited power of attorney dated August 12, 2013 ("Limited Power of Attorney") from
15 Khamphanh Ennis to Bienkowski with respect to 3609 Melonies Drive, Unit 94.

16 31. Additionally, as part of Commission Case No. 2017-1768, the Division was
17 provided with two unrecorded promissory notes where Bienkowski was the promisor and
18 Khamphand Ennis was the promisee (the "Notes"), to support that Bienkowski owned 3609
19 Melonies Drive, Unit 94.

20 32. Neither the Harmon Affidavit, Limited Power of Attorney, nor Notes convey
21 any ownership interest of 3609 Melonies Drive, Unit 94 to Bienkowski.

22 33. Clark County Assessor's records show that 3609 Melonies Dr. #94 is presently
23 owned by the Ennis Family Trust – not Bienkowski.

24 34. The Division also alleged in its investigation that RESPONDENT failed to
25 exercise reasonable care in managing Shadow Wood by permitting board member Escalona
26 to be compensated by Shadow Wood for providing payroll services to the Association,
27 through Escalona's company, JE & Associates.

28 ///

1 35. In response to the Division's investigation, RESPONDENT admitted that
2 Escalona was compensated by Shadow Wood through Escalona's company, JE &
3 Associates.

4 36. NRS 116.31187 provides that in general, a member of an executive board or
5 officer of an association shall not enter into a contract or renew a contract with the
6 association to provide services or otherwise accept any personal profit or compensation
7 from the association for providing said services.

8 37. The Division further alleged that RESPONDENT co-signed, or sole signed, all
9 checks from the Association to JE & Associates for payroll services from November 2016
10 until at least April 2018.

11 38. In response to the Division, RESPONDENT claimed that he was authorized
12 to sign the checks from the Shadow Wood to JE & Associates because he was an authorized
13 signer on the Association's bank account.

14 39. To support his contention that he was an authorized signer on Shadow Wood's
15 bank account, RESPONDENT provided a document titled Community Association Account
16 Agreement & Resolution ("CAA Agreement"),

17 40. The CAA Agreement provided by RESPONDENT authorizes only the
18 following individuals to sign checks on behalf of the Association: Ma, Escalona, and Leslie
19 Hall.

20 41. The Division also alleged in its investigation that RESPONDENT co-signed
21 association checks from April 2017 through February 2018 despite that his Management
22 Agreement with Shadow Wood did not give RESPONDENT any authority to sign checks
23 on behalf of the Association.

24 42. In response, RESPONDENT denied that a management agreement must
25 authorize a community manager to sign checks on behalf of the Association.

26 43. In a subsequent letter dated November 19, 2018, the Division informed
27 RESPONDENT that NRS 116A.620(1)(p) requires that a management agreement, "state
28 the extent, if any, of the authority of a community manager to sign checks on behalf of the

1 client in an operating account.”

2 44. In the Division’s November 19th letter to RESPONDENT, the Division also
3 requested RESPONDENT provide the Division with copies of his management agreements
4 with Shadow Wood from April 2017 through March 2018.

5 45. The Division never received the requested management agreements or any
6 further response from RESPONDENT regarding the allegation that he improperly signed
7 Association checks in violation of the Management Agreement.

8 46. The Division later obtained the Management Agreement from the
9 Association’s successor community manager.

10 47. Section 9 of Article II of RESPONDENT’s Management Agreement with the
11 Association provides:

12 Section 9. Account Signatory

13 The withdrawal of funds from the Association’s Accounts or
14 Certificate(s) of Deposit shall require the signatures of at least
15 two (2) Board members, usually the President and the Treasurer.
The Vice President will be a stand-in signer in the event on of the
other signatory is not available.

16 48. Never-the-less RESPONDENT co-signed, or sole signed, checks from the
17 Association contrary to the terms of the CAA Agreement and in violation of the
18 Management Agreement.

19 49. In its investigation, the Division also alleged that Defendant was the sole
20 signer of Association check nos. 45822, 45823, 45825, and 45826.

21 50. In response, RESPONDENT blamed the bank, stating that the bank should
22 not have accepted the checks with only RESPONDENT’s signature.

23 51. In its investigation, the Division also alleged that RESPONDENT improperly
24 signed check number 1034 dated May 9, 2017 from the Association’s reserve account.

25 52. In response, RESPONDENT admitted that he mistakenly signed this check.

26 53. In its investigation, the Division also alleged that RESPONDENT failed to
27 exercise reasonable care in managing Shadow Wood by failing to abide by its governing
28 documents by creating the Association’s budgets since 2009 based on tiered assessments.

1 54. The Association's governing documents do not permit the Association's
2 budget to be based on tiered assessments.

3 55. In response, RESPONDENT contended that he based the Association's
4 budget on tiered assessments because the Association's assessment system was always
5 structured on a tiered basis and that no one ever requested a change in how the
6 assessments were calculated.

7 56. In addition, with respect to Commission Case No. 2017-1777, the law firm of
8 Boyak Orme & Anthony ("Law Firm") sent correspondence on September 8, 2017 to Shadow
9 Wood to RESPONDENT's attention at RESPONDENT's email address, advising the
10 Association that RESPONDENT was entitled to indemnification and defense through
11 Shadow Wood's legal counsel (the Law Firm), but that a potential conflict could exist
12 representing both RESPONDENT and Shadow Wood.

13 57. The letter stated that Shadow Wood's board had two options: (1) permit Law
14 Firm to go forward and represent RESPONDENT as an agent of the association, or (2) hire
15 outside counsel to represent RESPONDENT.

16 58. The letter stated if Law Firm did not hear from Shadow Wood's board by
17 September 14, 2017, then Law Firm would proceed to represent RESPONDENT.

18 59. The Board meeting records reflect that following RESPONDENT's receipt of
19 the September 8, 2017 Law Firm letter, the next board meeting was held on November 14,
20 2017.

21 60. The November 14, 2017 board meeting packet does not contain the September
22 8th Law Firm letter, nor does it indicate that the Board made any decision regarding
23 choosing one of the two options set forth in the Law Firm letter.

24 61. Board members advised they were not made aware of the September 8th letter
25 by RESPONDENT.

26 62. As a result, Law Firm charged Shadow Wood \$18,000 dollars in attorneys'
27 fees to represent RESPONDENT prior to the board even deciding whether or not
28 RESPONDENT should have separate counsel.

1 63. Association agendas and minutes obtained from the successor community
2 manager, also show that although executive sessions were being held since 2009, there
3 were only five minutes recorded from these executive sessions.

4 64. Association election materials obtained through the successor community
5 manager also show that there were no notices of eligibility to serve as a member of the
6 executive board sent to unit owners in 2013, 2015, and 2016.

7 **Case No. 2019-409**

8 65. RESPONDENT, at all relevant times, was the owner of MP Association
9 Management, Inc., a Nevada corporation ("MP Management") and was also the manager
10 of the Shadow Wood Homeowner's Association ("Shadow Wood" and/or "Association").

11 66. In 2017, Myra Lay-Beng Yung ("Yung") purchased a condominium in Shadow
12 Wood.

13 67. During Yung's purchase of the condominium, a lawsuit was pending captioned
14 *NY Community Bank v. Shadow Wood*, Clark County Case No. A-12-660328-C (the
15 "Lawsuit").

16 68. The resale package provided by the Association to Yung did not reflect the
17 pending Lawsuit.

18 69. A letter from RESPONDENT provided to Yung in her resale package stated,
19 "there is no pending/current litigation or pending/current judgments."

20 70. On April 17, 2019, Yung filed a complaint with the Division, claiming that the
21 Association failed to properly notify her of the Lawsuit in the resale package provided to
22 her when she purchased her condominium.

23 71. On April 26, 2019, the Division properly notified RESPONDENT that it was
24 opening an investigation based on Yung's complaint.

25 72. In response to the Division, RESPONDENT did not deny that he had failed to
26 disclose the Lawsuit to Yung in her resale package.

27 73. Rather, in his response to the Division, RESPONDENT stated that during the
28 time period of September 8, 2017, that he was ill and not working and that, "the staff at

1 MP Association Management under stressful situations handled to the best of their ability
2 all correspondence between MP Association Management and it's [sic] associations
3 including emails mail and phone messages."

4 74. RESPONDENT also denied having any access to the documentation
5 requested by the Division during its investigation of Yung's complaint and stated that any
6 documents remained with the Association's current management company.

7 75. Board member James Ma ("Ma's) provided an affidavit to the Division
8 regarding the Division's investigation of Yung's complaint.

9 76. Ma's affidavit states that homeowners were not made aware of the Lawsuit
10 until late 2017, despite that the lawsuit had been pending for seven years.

11 CONCLUSIONS OF LAW

12 Based on the foregoing findings of fact, the Commission concludes by unanimous
13 vote that RESPONDENT committed the following violations of law:

14 Case No. 2018-952

15 1. MARKS violated NRS 116A.630(1)(a) by failing to act as a fiduciary in his
16 relationship with the Association when he misrepresented the Association's required
17 reserve funding under penalties of perjury.

18 2. MARKS violated NRS 116A.630(1)(b) by failing to exercise ordinary and
19 reasonable care in the performance of his duties.

20 3. MARKS violated NRS 116A.630(2)(a) and NAC 116A.320 by failing to comply
21 with state laws.

22 4. MARKS violated NRS 116A.630(10) by failing to cooperate with the Division
23 in resolving the complaint against him.

24 5. MARKS violated NRS 116A.640(2)(a) and NAC 116A.345(2)(a) by impeding or
25 otherwise interfering with an investigation of the Division by failing to comply with a
26 request of the Division to provide documents.

27 ///

28 ///

1 6. MARKS violated NRS 116A.640(2)(b) by impeding or otherwise interfering
2 with an investigation of the Division by providing false or misleading information to an
3 investigator.

4 7. MARKS violated NRS 116A.640(2)(c) and NAC 116A.345(2)(c) by impeding or
5 otherwise interfering with an investigation of the Division by concealing facts or documents
6 relating to the business of the Association.

7 8. MARKS violated NAC 116A.355(1)(a)(1) (through NAC 116A.355(2)(f)) by
8 committing unprofessional conduct by failing to cooperate with the Division in the
9 investigation of a complaint including, without limitation, failure to produce any document,
10 book or record in the possession or control of the community manager after the Division
11 requests the production of such document, book or record in the course of an investigation
12 of a complaint.

13 9. MARKS violated NAC 116A.355(1)(a)(2) (through NAC 116A.355(3)(a)) by
14 committing professional incompetence by demonstrating a significant lack of ability,
15 knowledge or fitness to perform a duty or obligation owed to a client.

16 10. MARKS violated NAC 116A.355(1)(a)(2) (through NAC 116A.355(3)(b)) by
17 committing professional incompetence by failing to exercise reasonable skill and care with
18 respect to a duty or obligation owed to a client.

19 11. MARKS violated NAC 116A.355(1)(a)(1) and (2) (through NAC
20 116A.355(4)(g)) by committing unprofessional conduct or professional incompetence by
21 failing to act in the best interests of the Association.

22 **Case No. 2018-978**

23 12. RESPONDENT violated NRS 116A.630(1)(b) by failing to exercise ordinary
24 and reasonable care in the performance of his duties by allowing Bienkowski, who was not
25 a unit owner, to serve on the executive board in violation of NRS 116.31034(1).

26 13. RESPONDENT violated NRS 116A.630(1)(b) by failing to exercise ordinary
27 and reasonable care in the performance of his duties by permitting board member Escalona
28 to be compensated by Shadow Wood for providing payroll services for Shadow Wood,

1 through Escalona's company, JE & Associates in violation of NRS 116.31187.

2 14. RESPONDENT violated NRS 116A.630(1)(b) by failing to exercise ordinary
3 and reasonable care in the performance of his duties by failing to abide by the signatory
4 requirements set forth in the Management Agreement.

5 15. RESPONDENT violated NRS 116A.630(1)(b) by failing to exercise ordinary
6 and reasonable care in the performance of his duties by violating NRS 116.31153(2) by
7 being the sole signer of Association check nos. 45822, 45823, 45825, and 45826.

8 16. RESPONDENT violated NRS 116A.630(1)(b) by failing to exercise ordinary
9 and reasonable care in the performance of his duties by violating NRS 116.31153(1) by
10 withdrawing money from the reserve account without at least two members of the executive
11 board's signatures or at least one member of the executive board and one officer of the
12 association who is not a member of the executive board.

13 17. RESPONDENT violated NRS 116A.630(1)(b) by failing to exercise ordinary
14 and reasonable care in the performance of his duties by creating Shadow Wood's budget
15 based on tiered assessments when the Association's governing documents did not permit
16 tiered assessments.

17 18. RESPONDENT violated NRS 116A.630(1)(b) by failing to exercise ordinary
18 care and reasonable care in the performance of his duties by violating NRS 116.31034(4)
19 by failing to give unit owners notice of eligibility to serve as a member of the executive
20 board in 2013, 2015, and 2016.

21 19. RESPONDENT violated NAC 116A.355(1)(a)(1) (through NAC
22 116A.355(2)(b)) by committing unprofessional conduct by failing to disclose the Law Firm
23 letter to the board for a decision before the Association incurred \$18,000 in attorneys' fees.

24 20. RESPONDENT violated NRS 116A.630(2)(a) by failing to comply with state
25 laws.

26 21. RESPONDENT violated NRS 116A.630(10) by failing to cooperate with the
27 Division in resolving the complaint against him.

28 ///

1 22. RESPONDENT violated NRS 116A.640(2)(a) and NAC 116A.345(2)(a) by
2 impeding or otherwise interfering with an investigation of the Division by failing to comply
3 with a request of the Division to provide documents.

4 23. RESPONDENT violated NRS 116A.640(2)(b) by impeding or otherwise
5 interfering with an investigation of the Division by providing false or misleading
6 information to an investigator.

7 24. RESPONDENT violated NAC 116A.355(1)(a)(1) (through NAC
8 116A.355(2)(f)) by committing unprofessional conduct by failing to cooperate with the
9 Division in the investigation of a complaint including, without limitation, failure to produce
10 any document, book or record in the possession or control of the community manager after
11 the Division requests the production of such document, book or record in the course of an
12 investigation of a complaint.

13 25. RESPONDENT violated NAC 116A.355(1)(a)(2) (through NAC
14 116A.355(3)(a)) by committing professional incompetence by demonstrating a significant
15 lack of ability, knowledge or fitness to perform a duty or obligation owed to a client.

16 26. RESPONDENT violated NAC 116A.355(1)(a)(2) (through NAC
17 116A.355(3)(b)) by committing professional incompetence by failing to exercise reasonable
18 skill and care with respect to a duty or obligation owed to a client.

19 27. RESPONDENT violated NAC 116A.355(1)(a)(1) and (2) (through NAC
20 116A.355(4)(g)) by committing unprofessional conduct or professional incompetence by
21 failing to act in the best interests of the Association.

22 **Case No. 2019-409**

23 28. RESPONDENT violated NRS 116A.630(1)(b) by failing to exercise ordinary
24 and reasonable care in the performance of his duties by failing to furnish Yung a resale
25 package that stated any pending legal actions against the Association and the status of
26 such litigation in violation of NRS 116.4109.

27 29. RESPONDENT violated NRS 116A.630(2)(a) by failing to comply with state
28 laws.

