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16 EIGHTH JUDICIAL DISTRICT COURT
17 CLARK COUNTY, NEVADA
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19

20 MICHAEL KOSOR, JR., a Nevada resident,

21 Plaintiff,

22 vs.

23 SOUTHERN HIGHLANDS COMMUNITY
24 ASSOCIATION, a Nevada Non-Profit
25 Corporation; SOUTHERN HIGHLANDS
26 DEVELOPMENT CORPORATION, a
27 Nevada Corporation; CHRIS ARMSTRONG,
28 an individual; RICK REXIUS, an individual;
MARC LIEBERMAN, an individual;

Defendants.

Case No.: A-23-881474-W

Dept. No.: 31

**PLAINTIFF/COUNTER-DEFENDANT'S
MOTION TO DISMISS DEFENDANT/
COUNTERCLAIMANT'S
COUNTERCLAIMS**

HEARING REQUESTED

**Consolidated with:
Case No. A-24-886317-C**

21
22 Plaintiff MICHAEL KOSOR, JR. ("Plaintiff" or "Col. Kosor"), by and through his
23 counsel of record, Hutchison & Steffen, PLLC, files this Motion to Dismiss
24 Defendant/Counterclaimant SOUTHERN HIGHLANDS COMMUNITY ASSOCIATION's
25 ("SHCA") Counterclaims for failure to state a claim upon which relief can be granted pursuant
26 to NRCP 12(b)(5).

27 The relief sought is based upon this Motion, the attached exhibits, and such argument as
28 the Court may allow.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This case arises from a dispute regarding Defendants' collective authority to act under
4 NRS 116 on behalf of homeowners within the Southern Highlands Community Association.
5 Plaintiff Michael Kosor, Jr. ("Plaintiff") hereby incorporates, by reference, all prior factual
6 allegations and representations included in all his prior pleadings and filings with this Court (as
7 well as those filings in consolidated action (Case No. A-24-886317-C).

8 While Plaintiff vehemently disagrees with the allegations contained in
9 Defendant/Counterclaimant Southern Highlands Community Association's ("HOA" or
10 "SHCA") Counterclaims, he nonetheless accepts those allegations as true for purposes of the
11 instant Motion. Even if true, however, SHCA's Counterclaims fail for the following reasons:
12 (1) SHCA's first, second, and third causes of action must be dismissed because SHCA has failed
13 to allege any actual damages as a result of Plaintiff's alleged violations of NRS 116.31034;
14 (2) Plaintiff could not have violated NRS 116.31034(13) by SHCA's own allegations; and
15 (3) SHCA's separate causes of action for attorneys' fees and punitive damages, respectively, are
16 improper and do not qualify as standalone causes of action. For these reasons, this Court should
17 dismiss Defendant/Counterclaimant's specified claims against Plaintiff.

18 **II. LEGAL STANDARD**

19 The Court should grant a motion to dismiss when a pleading -- in this case counterclaims
20 -- fail to state a claim for relief. NRCP 12(b)(5). While the Court "accepts the plaintiffs' factual
21 allegations as true, . . . the allegations must be legally sufficient to constitute the elements of the
22 claim asserted." *Sanchez ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 823 (2009). A
23 "court is not required to accept legal conclusions cast in the form of factual allegations if those
24 conclusions cannot reasonably be drawn from the facts alleged." *Monroe v. State ex rel. Nevada*
25 *Dep't of Corrections*, 2015 WL 3369611, at *1 (Nev. May 20, 2015) (emphasis added and
26 internal citations and quotations omitted).

27 Moreover, dismissal is proper "if it appears beyond a reasonable doubt that [plaintiffs]
28 could prove no set of facts, which, if true, would entitle it to relief." *Buzz Stew, LLC v. City of*

1 *N. Las Vegas*, 124 Nev. 224, 228 (2008). A court will not generally consider matters outside the
2 pleadings being attacked, but the court is permitted to consider matters of public record, orders,
3 items present in the record of the case, and any exhibits attached to the complaint when ruling
4 on a motion to dismiss for failure to state a claim upon which relief can be granted. *Breliant v.*
5 *Preferred Equities Corp.*, 109 Nev. 842, 847, 848 P.2d 1258, 1261 (1993) (citations omitted).

6 As detailed below, the Court should grant the instant Motion because SHCA fails to meet
7 its burden under this standard.

8 **III. ARGUMENT**

9 **A. SHCA has failed to allege any actual damages as a result of Plaintiff’s alleged** 10 **violations of NRS 116.31034.**

11 The SHCA has failed to sufficiently plead its first, second, and third claims for relief.
12 Specifically, NRS 116.4117(1) conditions claims for alleged breaches of NRS 116 to those
13 “suffering **actual damages** from the failure to comply [with the provisions of NRS 116]”
14 (Emphasis added). Thus, any cause of action predicated on Plaintiff’s alleged breach of NRS
15 116 must contain allegations of “actual damages” suffered from the alleged breach. *Id.* Notably,
16 *none* of the SHCA’s first three claims for relief meet this preliminary threshold.

17 While each claim alleges that Plaintiff’s purported breach of NRS 116 was “willful and
18 material” for purposes of seeking *punitive* damages, *see e.g.*, SHCA Counterclaim at ¶¶ 29, 40,
19 and 51, there are no other “actual damages” claimed within the SHCA’s pleading. Without more,
20 the Court must dismiss SHCA’s first, second, and third counterclaims because they are critically
21 flawed: they are devoid of the indispensable element of **actual damages**. *See id.*

22 **B. Plaintiff’s Alleged Breach of NRS 116.31034(13) Is Not Justiciable.**

23 The SHCA’s Third Claim for Relief for “Breach of NRS 116.31034(13) by Being
24 Uninsurable” should be dismissed. First, as explicitly stated in the statute, NRS 116.31034(13)
25 applies specifically *and exclusively* to the duties of a homeowners’ association (i.e., the SHCA),
26 *not* a homeowner (i.e., Plaintiff) to act.

27 If a person is not eligible to be a candidate for or member of the executive board or an
officer of the association pursuant to any provision of this chapter, **the association**:

28 (a) Must not place his or her name on the ballot; and

(b) Must prohibit such a person from serving as a member of the executive board or an officer of the association.

NRS 116.31034(13) (emphasis added). NRS 116 does not impose any duty or obligation on a homeowner running for election to do or not do anything. This provision relates solely to the duties of the SHCA and imposes no duties upon Plaintiff. To suggest otherwise is both disingenuous and legally flawed.

As alleged *by the SHCA*, Plaintiff's "position was deemed vacant" in May 2023. *See* SHCA's Counterclaims, at ¶ 7. Plaintiff's alleged breaches of NRS 116 came *after* Plaintiff's Board seat was relinquished. *See id.* at ¶¶ 8-21 (referring to all actions taking place in or after December 2023—seven (7) months *after* Plaintiff was removed from the Board). That is, NRS 116.31034(13) does not impose any kind of duty upon Plaintiff to act or not act. It applies exclusively to the association's duties to act and therefore cannot be applied to Plaintiff for purposes of a breach. As such, it is a legal impossibility that Plaintiff violated NRS 115.31034(13).

Second, NRS 116.31034(13) has nothing to do with insurance; thus, SHCA's insinuation and/or interpretation that this section of NRS 116 should be read to somehow apply to insurance coverage is both illogical and wholly unsupported in the law. The SHCA seems to ask this Court to relinquish insurance coverage from Plaintiff as it relates to this case (a decision that lies more with an insurance carrier than with the SHCA -- or this Court, for that matter).¹ There is no legal basis for this position, and none of the statutes cited or upon which SHCA relies in its claims support that position. Moreover, SHCA appears to claim that Plaintiff's *attempt* to run for the Board -- as a non-Board member homeowner in the community, *see* SHCA's Counterclaims at ¶ 7 -- somehow constitutes a violation of NRS 116.31034(13). There is no logical tie between those two allegations. Thus, based on this flawed logic, the SHCA's Third Claim for Relief should be dismissed.

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¹ Concerningly, the SHCA's allegations that insurance coverage should be relinquished for Plaintiff supports an argument that the SHCA's Counterclaims are retaliatory in nature against Plaintiff. Plaintiff hereby reserves the right to seek to preclude such attempts in the future, including through anti-SLAPP special motion(s).

As noted above, the plain language of NRS 116.31034(13) applies exclusively to homeowners' associations to prevent Board applicants from running for board elections when certain breaches of NRS 116 have occurred. No duty for a homeowner exists within NRS 116.31034(13). Thus, any action or inaction on Plaintiff's part has nothing to do with NRS 116.31034(13). SHCA's claim is therefore legally deficient and cannot be cured. It must be dismissed.

Even if the Court determined that somehow the legal basis was sufficient for the SHCA to claim that its membership should not be required to provide indemnification and defense, the SHCA improperly invokes the language of NRS 116.31034(13), which has nothing to do with insurance.

C. Neither Attorneys' Fees nor Punitive Damages Are Valid Causes of Action.

The SHCA improperly included Attorneys' Fees and Punitive Damages as separate, standalone causes of action. *See* SHCA's Counterclaims, at pp. 19-20. Awards of attorneys' fees and punitive damages are not independent causes of action but must be pled as special damages within the prayer for relief.

First, as to punitive damages, the Nevada Supreme Court has repeatedly noted that "punitive damages is a remedy, not a cause of action." (citing 22 Am. Jur. 2d Damages § 567 (2013) which states, "[A]s a rule, there is no cause of action for punitive damages by itself; a punitive-damage claim is not a separate or independent cause of action). *Droge v. AAAA Two Star Towing, Inc.*, 136 Nev. 291, 313, 468 P.3d 862, 881 (Nev. App. 2020). Moreover, punitive or "exemplary" damages are not recoverable without a judgment for *actual* damages. *See Wolf v. Bonanza Inv. Co.*, 77 Nev. 138, 143, 360 P.2d 360, 362 (1961).

As noted in Section III.A, *supra*, glaringly missing from SHCA's counterclaims is a claim for any actual damages. Because SHCA fails to make *any* allegation of actual damages in its counterclaims, not only do its first three causes of action fail, but it will be impossible to ever recover punitive damages as a result. The Court should therefore dismiss SHCA's Sixth Claim for Relief.

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1 Similarly, the SHCA's standalone cause of action for attorneys' fees is improper.
2 "Generally, attorney fees are not recoverable 'absent authority under a statute, rule, or contract.
3 But, [a]s an exception to the general rule, attorney fees may be awarded as special damages in
4 limited circumstances. *Liu v. Christopher Homes, LLC*, 130 Nev. 147, 151, 321 P.3d 875, 878
5 (2014) (all internal quotations and citations omitted) (citing *Albios v. Horizon Communities, Inc.*,
6 122 Nev. 409, 417, 132 P.3d 1022, 1028 (2006) *Horgan*, 123 Nev. at 583, 170 P.3d at 986).
7 Notably, NRS 116.4117(1) creates the specific relief available in a cause of action arising from
8 a breach of NRS 116, including attorneys' fees. But those attorneys' fees are limited to the
9 ***prevailing party***. *See id.* As the condition suggests, the necessary prerequisite to awarding
10 attorney's fees is that there must be a prevailing party, which can only occur ***after*** the case is
11 heard and decided.

12 No authority has been cited -- and none exists -- to allow the SHCA to seek attorneys'
13 fees and punitive damages as separate, standalone causes of action rather than as part of the
14 damages sought in its prayer for relief. Allowing such claims to endure would be improper. This
15 Court should therefore dismiss SHCA's Fifth and Sixth Claim for Relief as premature and
16 inappropriate.

17 **IV. CONCLUSION**

18 Based on the foregoing, this Court should dismiss the SHCA's first, second, third, fifth
19 and sixth causes of action pursuant to NRCP 12(b)(5). SHCA has failed to allege actual
20 damages, which are indispensable to bringing a claim for violations of NRS 116; By SHCA's
21 own admission, Plaintiff could not have violated NRS 116.31034(13), necessitating dismissal of
22 SHCA's third cause of action. Finally, as detailed above, SHCA's separate, standalone causes
23 of action for attorneys' fees and for punitive damages are improper. Attorneys' fees, while
24 permitted for the prevailing party, are premature at this stage; SHCA's fifth cause of action must
25 therefore be dismissed. and do not qualify as standalone causes of action. Punitive damages, in
26 addition to requiring a finding of actual underlying damages, which actual damages SHCA failed
27 to alleged in its counterclaims, likewise are improperly pled as a standalone cause of action in
28 Nevada.

1 Plaintiff respectfully requests that this Court grant the instant Motion.

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3 DATED this 21st day of May, 2024.

HUTCHISON & STEFFEN, PLLC

4 */s/ Ariel C. Johnson*

5

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of Hutchison & Steffen, PLLC
3 and that on this 21st day of May, 2024, I caused the above and foregoing documents entitled
4 **PLAINTIFF/COUNTER-DEFENDANT’S MOTION TO DISMISS DEFENDANT/**
5 **COUNTERCLAIMANT’S COUNTERCLAIMS** to be served through the Court's mandatory
6 electronic service system, per EDCR 8.02, upon the following:

7 **ALL PARTIES ON THE E-SERVICE LIST**

8
9 /s/ Kaylee Conradi
An employee of Hutchison & Steffen, LLC