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**JUSTICE COURT, HENDERSON TOWNSHIP
CLARK COUNTY, NEVADA**

Gary Solomon
[REDACTED]
[REDACTED]

Plaintiff,

v.

Desert HOA Management, Inc.; River Landing
Homeowners Association
P.O. Box 750639
Las Vegas, NV 89136

Defendants.

Case No.: 12AH341
Department: I

**DEFENDANT'S MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER
JURISDICTION**

**Hearing Date : 02/20/13
Hearing Time: 8:00 a.m.**

COMES NOW Defendants Desert HOA Management and River Landings Homeowners Association, by and through their attorneys of record LEACH JOHNSON SONG & GRUCHOW, and hereby brings this Motion to Dismiss Plaintiff's Complaint pursuant to NRCP 12(b)(1), and NRS 38.310, and in the alternative moves the Court for a more definite statement pursuant to JCRCP12(e)..

This Motion is made and based on all the papers and pleadings on file herein, the attached Memorandum of Points and Authorities, together with such other and further evidence

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1 and argument as may be presented and considered by this Court at any hearing of this Motion.

2 Dated this 12th day of February, 2013.

3 **LEACH JOHNSON SONG & GRUCHOW**

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11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 **I. INTRODUCTION**

13 This Court lacks subject matter jurisdiction hear this action. It is believed that Plaintiff's
14 Complaint emanates from a dispute regarding the fines that were levied against Plaintiff's
15 property that is located at 834 Anchor Drive, Henderson, Nevada (the "Subject Property"). The
16 fines were based upon a continuing violation of the Association's governing documents that
17 pertain to the requirement that the condition of the exterior of the Subject Property be
18 maintained. Accordingly, Plaintiff's claim arises from the Association's application,
19 interpretation and enforcement of its governing documents. Nevada case law has held that an
20 action arising from the enforcement and/or application of an association's governing documents
21 must proceed through the Nevada Real Estate Division's Alternative Dispute Resolution
22 Program in compliance with NRS 38.310. *See, Hamm v. Arrowcreek Homeowners Association,*
23 *124 Nev. 28, 183 P.3d 895, 902 (2008).*

24 Furthermore, as to Defendant Desert HOA Management, Inc., Plaintiff is prohibited from
25 bringing any action against the Community Manager as a single Owner within the Community,
26 pursuant to NRS 116.4117.

27 As stated herein it is believed that Plaintiff's Complaint arises from the dispute over the
28 assessment of fines against the Subject Property for violation of the Association's governing
documents. However, based upon the language contained in the Plaintiff's complaint the cause

of action is unclear and should the Court choose not to dismiss the Complaint, Defendant moves the Court to order that Plaintiff provide a more definite statement regarding the basis for his Complaint.

II. ARGUMENT

A. This Court Lacks Subject Matter Jurisdiction to Entertain this Action

The Plaintiff's cause of action against the Defendant arises from the Association's interpretation, application and enforcement of the restricted covenants set forth in the Declaration.

Pursuant to NRS § 38.310:

No civil action based upon a claim relating to:

- (a) the interpretation, application or enforcement of any covenants, conditions or restrictions applicable to residential property or any bylaws, rules or regulations adopted by an association; or
- (b) the procedures used for increasing, decreasing or imposing additional assessments upon residential property, may be commenced in any court in this state unless the action has been submitted to mediation or arbitration pursuant to the provisions of NRS 38.300 to 38.360, inclusive, and, if the civil action concerns real estate within a planned community subject to the provisions of Chapter 116 of NRS all administrative procedures specified in any covenants, conditions or restrictions applicable to the property in any bylaws, rules and regulations of an association have been exhausted.

2. *A court shall dismiss any civil action which is commenced in violation of the provisions of Subsection 1.*

Pursuant to NRS § 38.320, any civil action described in NRS 38.310 must be submitted for mediation or arbitration by filing a written claim with the Nevada Real Estate Division ("NRED"). A civil action is defined in NRS § 38.300 as an action for money damages or equitable relief. The term does not include an action and equity for injunctive relief in which there is an immediate threat of irreparable harm, or an action relating to the title to residential property.

In this instance there is no immediate threat of irreparable harm to the Plaintiff. Most

1 importantly this matter arises out of the Association's application and enforcement of its
2 governing documents. The Nevada Supreme Court has held that "if a party institutes a civil
3 action in violation of NRS §38.310(1) the district court must dismiss it pursuant to NRS
4 §38.310(2). *See, Hamm v. Arrowcreek Homeowners Association, 124 Nev. 28, 183 P.2d 895*
5 *(2008)*.

6 In Hamm, a delinquent assessment lien was filed with the county recorder against the
7 homeowners' property. The Hamms filed a complaint, in district court, for (1) declaratory
8 judgment interpreting the CC&R's; (2) release of the lien; (3) permanent injunction against
9 further assessments and liens; (4) breach of contract damages including attorneys fees; (5)
10 slander of title damages, including punitive damages for allegedly filing the lien in bad faith; and
11 (6) special damages, including attorney fees and costs. The district court dismissed the Hamms'
12 complaint. On appeal the Nevada Supreme Court held that since the Hamms did not first submit
13 their claims against the homeowners' association to mediation or arbitration as required by NRS
14 38.310, the district court properly dismissed their complaint. *See, Hamm v. Arrowcreek*
15 *Homeowners Association, 124 Nev. 28, 183 P.3d 895 (2008)*.

16 In this instance it is believed that the dispute arises over the findings of the Board that the
17 Subject Property was in violation of the Association's governing documents, and the subsequent
18 levying of fines for that violation. It has been held that in instances where resolving the merits of
19 the action would require the court to interpret the meaning of the governing documents the
20 matter must be dismissed. Any and all such claims must be submitted to arbitration or mediation
21 with the Nevada Real Estate Division before an action can be instituted in court. *See, Hamm v.*
22 *Arrowcreek Homeowners Association, 124 Nev. 28, 183 P.3d 895, 900 (2008)*.

23 Accordingly, Plaintiff is required to submit his claims to the NRED for arbitration. Until
24 such time as the arbitrator renders a final decision, this Court lacks subject matter jurisdiction to
25 hear this matter.
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B. Plaintiff is Prohibited from Bringing a Private Cause of Action Against Defendant Desert HOA Management, Inc., Pursuant to NRS 116.4117(2).

NRS 116.4117(2) provides that:

Subject to the requirements set forth in NRS 38.310 and except as otherwise provided in NRS 116.3111, a civil action for damages or other appropriate relief for a failure or refusal to comply with any provision of this chapter or the governing documents of an association may be brought:

(a) By the association against:

- (1) A declarant;
- (2) A community manager; or
- (3) A unit's owner.

(b) By a unit's owner against:

- (1) The association;
- (2) A declarant; or
- (3) An other unit's owner of the association.

(c) By a class of units' owners constituting at least 10 percent of the total number of voting members of the association against a community manager.

Accordingly, civil actions against a community manager for violation of the Association's governing documents or NRS Chapter 116, may be brought by either the Association or by ten percent (10%) of the membership. Plaintiff is not the Association and as a single owner, does not constitute ten percent of the Association's membership and therefore may not institute a civil action against Defendant Desert HOA Management. Accordingly, any such action against Defendant Desert HOA Management must be dismissed.

C. Plaintiff Should Provide a More Definite Statement as to the Basis /Claim for Relief of the Complaint

JCRCP 12(e) provides that:

If a pleading to which a responsive pleading is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading.

Plaintiff's Complaint states that Defendant owes Plaintiff \$287.50 for:

Inspection, court cost, legal fees & mail for my rental property at 834 Anchor Court Henderson, Nevada 89015.

1 Based upon Plaintiff's statement it is not clear as to the basis of Plaintiff's contentions
2 that monies are owed to him by Defendants. As such, Defendants are prejudiced as to how to
3 form a response or defend themselves in this matter. Accordingly, Defendants move the Court
4 for a more statement as to the basis of Plaintiff's claim for monetary damages against
5 Defendants.

7 IV. CONCLUSION

8 This Court lacks subject matter jurisdiction to hear this matter. Plaintiff's proper
9 recourse would be to file a complaint with the NRED requesting mediation or arbitration. As no
10 irreparable harm can be shown in this instance the proper venue for these matters brought forth
11 by Plaintiff is the NRED. Furthermore, pursuant to NRS 116.4117 (2) Plaintiff may not bring a
12 civil action against Defendant Desert HOA Management and such an action must be dismissed.
13 In the alternative Defendants move the Court for a more definite statement as to the basis of
14 Plaintiff's claim for monetary damages pursuant to JCRCP 12(e).

15 Based on the foregoing Points and Authorities, Defendants ask that this Court dismiss
16 this action.

17 Dated this 12th day of February, 2013.

18 LEACH JOHNSON SONG & GRUCHOW

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