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**IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF WASHOE**

**JOHN P. KERWIN, an individual; JOSEPH G. BOWER, as trustee of the Susan K and Joseph G. Bower Trust; GEOFFREY BROOKS, an individual; HAROLD C. CHOTINER and SUSAN R. CHOTINER, as trustees of the Chotiner Family Trust; HERBERT S. JAMES III and LINDA J. JAMES, individuals; STEPHEN D. KANYR and PATRICIA KANYR, as trustees of the Ann Kanyr Trust; RONALD C. TRACY, And JUTTA A. TRACY, individuals,**

**Case No. CV14-02166**

**Dept. No. 3**

**Plaintiffs,**

**vs.**

**SOMESERTT OWNERS ASSOCIATION, a Nevada non-profit corporation; DOES 1 through 10; and ROE CORPORATION 1 through 10, inclusive,**

**Defendants.**

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**ORDER DENYING ISSUANCE OF PRELIMINARY INJUNCTION**

A hearing on this matter was held on December 18, 2014 and evidence was presented by stipulation. The plaintiffs were represented by Sean L. Anderson, Esq. and Donna A. Zanetti, Esq. and the defendants were represented by John M. Samberg, Esq. and Christopher W. Mixson, Esq. The purpose of the hearing was to determine Plaintiffs'

1 request for a preliminary injunction which would extend the provisions of their TRO to the  
2 disposition of their case on its merits.

3           Plaintiffs are a group of homeowners suing the defendant homeowners association  
4 for what they perceive as improper action on behalf of the Board of Directors and a breach  
5 of their fiduciary duties involving two specific factors: a vote to amend the CC&Rs and a  
6 vote to approve a purchase agreement for a golf course located within the Somerset  
7 development. The purchase agreement involves the purchase of some 224 acres of land  
8 which is presently used as a golf course, some 500 acre-feet of water rights, and a  
9 leaseback provision for the operation of the golf course. The Association is a common  
10 interest community subject to chapter 116 of the Nevada Revised Statutes.

11           Plaintiffs' position in their lawsuit is that the defendants do not have the authority to  
12 make such a purchase and agreement and that the procedure they utilized to secure that  
13 authority was in violation of the law and deceitful. Plaintiffs secured a temporary  
14 restraining order halting the progress of the purchase pending this hearing. The parties  
15 advised the Court that the vote for the amendment to the CC&Rs had been completed as  
16 of September 8, 2014 and that the owners had approved the amendments.

17           By their complaint, plaintiffs are seeking monetary damages for the association's  
18 violation of Nevada law, the Board of Directors breach of its fiduciary duties, negligence  
19 and declaratory relief. It also wants an injunction preventing the association from  
20 recording the amendments to the Declaration that were approved by the homeowners.

21           The defendant's position is that they have the legal authority to purchase property  
22 based upon the association's governing documents and Nevada law and that, although  
23 there may have been some irregularities with the vote on the amendments to the CC&Rs,  
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1 they followed Nevada law concerning the purchase agreement. They argue that the  
2 pending purchase if approved, will add assets to the community whose value would be in  
3 excess of \$5 million at a cost of \$2.6 million and the association would gain control of  
4 property which lies within the confines of their development to the exclusion of any 3rd  
5 party. To them it is considered a win - win proposition. They argue that the irregularities  
6 surrounding the amendment vote process were inconsequential and as far as the  
7 purchase agreement irregularities if any, they were negligible, in light of the fact that the  
8 owners are sophisticated individuals and were in constant contact with each other and the  
9 membership via electronic technology to the extent that they were fully cognizant of the  
10 pros and cons of the proposed purchase agreement.  
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13 *Preliminary Injunctions.*

14           According to Nevada law an injunction may be granted (1) when it shall appear by  
15 the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part  
16 thereof, consists in restraining the commission or continuance of the act complained of,  
17 either for a limited period or perpetually; (2) when it shall appear by the complaint that the  
18 commission or continuance of some act, during the litigation, would produce great or  
19 irreparable injury to the plaintiff; (3) when it shall appear during the litigation that the  
20 defendant is doing, or threatens or is about to do, or is procuring or suffering to be done  
21 some act in violation of the plaintiff's rights respecting the subject of the action, and  
22 tending to render the judgment ineffectual. NRS 33.010. Put another way, a preliminary  
23 injunction is available upon a showing that the party seeking it enjoys a reasonable  
24 probability of success on the merits and that the defendant's conduct, if allowed to  
25 continue, will result in irreparable harm for which compensatory damages at law are an  
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1 inadequate remedy. *Sobol v. Capital Management Consultants, Inc.*, 102 Nev. at 446, 726  
2 P.2d at 337 (1986).

3           This case presents a mixture of elements for the Court to consider. Based upon a  
4 review of all the documents, exhibits and arguments that have been presented the Court  
5 makes the following findings: there is a reasonable probability that the plaintiffs will prevail  
6 on most of their claims for relief since it is apparent that the Board did not follow the  
7 requirements of NRS 116.31035 nor NRS 116.311(9) as they pertained to the vote on the  
8 CC&Rs' amendment and the Board was less than straightforward in regards to the  
9 statute's requirements with regards to the opposing views to the proposed purchase.  
10 That being noted, however, the Court has difficulty in recognizing irreparable harm as a  
11 result of the defendant's actions. The obvious remedy would be to void the elections'  
12 results and have them redone with the direction that the Association follow the statutes  
13 and an award of damages. The response of the Board to the plaintiffs' repeated requests  
14 for equal time to present their positions, in the Court's opinion, was disingenuous,  
15 apparently done with the goal of obviating opposition to the amendments. Nevertheless  
16 even if both elections were voided and the Association was forced to sell the property and  
17 the water rights, the recoupment would be in excess of any probable award for the  
18 violation by the Board. So the question is where is the irreparable damage to the plaintiffs?  
19

20           As for the breach of fiduciary duty claim. The elements of such a cause of action are  
21 the defendant owed a fiduciary duty to plaintiff; defendant breached that duty and the  
22 plaintiff sustained damages as a proximate cause of the breach. *Mosier v. S. Cal.*  
23 *Physicians Ins. Exch.*, 74 Cal. Rptr. 2nd 550 (1998); *Powers v. United Servs. Auto.*  
24 *Association*, 114 Nev. 690, 979 P.2d 1286 (1999). Again, the issue becomes one of  
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1 damages and the Court recognizes that the plaintiffs have an available legal avenue for  
2 redress. On the one hand there is the technical argument about a violation of statutory  
3 obligations and on the other, it appears that the deal the association wants to enter has a  
4 good chance to double its investment to the benefit of all the homeowners. The  
5 unresolved issue is the claim for damages and the Court is convinced that a monetary  
6 award can adequately compensate the plaintiffs should they prevail on their claims.  
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8 As far as the negligence claim, the plaintiffs did not demonstrate a reasonable probability  
9 that they would prevail on that claim but nevertheless if they can establish the claim, they  
10 have an adequate legal remedial avenue to pursue. As our Supreme Court has said if the  
11 plaintiff has an adequate remedy at law, the harm is not 'irreparable.' *Number one Rent-A-*  
12 *Car v. Ramada inns, Inc.*, 94 Nev. 779, 587 P.2d 1329 (1978). The Court is not persuaded  
13 that the principle expressed in *Gladstone v. Gregory*, 95 Nev. 474, 596 P.2d 491(1979)  
14 covers this situation especially since the weighing of the relative interests of the parties  
15 favors the Association in the Court's view. There is no permanent injury threatened, no  
16 structure to remove; there is an apparent dispute as to value and as to how the plaintiffs  
17 were treated by their association. To be sure, this is not a determination of a motion to  
18 dismiss or for summary judgment; it is for a preliminary injunction. Equity acts when the  
19 law is unavailable or cannot adequately address the injury. Here that is not the problem;  
20 there is an adequate remedy at law should the plaintiffs prevail on the merits.  
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24 Therefore the request for the preliminary injunction is denied.

25 IT IS SO ORDERED.

26 Dated this 22<sup>d</sup> day of December, 2014.

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28 JEROME POLAHA  
DISTRICT JUDGE

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**CERTIFICATE OF MAILING**


Pursuant to NRCp 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this \_\_\_\_ day of December, 2014, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

NONE

**CERTIFICATE OF ELECTRONIC SERVICE**

I hereby certify that I am an employee of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe; that on the 22 day of December, 2014, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which will send a notice of electronic filing to the following:

- DONNA ZANETTI, ESQ.
- CHRISTOPHER MIXSON, ESQ.
- JOHN SAMBERG, ESQ.

  
Sheila Mansfield  
Administrative Assistant