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

Sharath Chandra, Administrator, Real Estate Division, Department of Business & Industry, State of Nevada, Petitioner, vs. Gerald Marks, Respondent.	Case Nos. 2018-978

FILED
OCT 30 2019
NEVADA COMMISSION OF COMMON INTEREST COMMUNITIES AND CONDOMINIUM HOTELS

COMPLAINT FOR DISCIPLINARY ACTION AND NOTICE OF HEARING

The Real Estate Division of the Department of Business and Industry, State of Nevada (the "Division"), by and through its counsel, Aaron D. Ford, Attorney General of the State of Nevada, and Michelle D. Briggs, Esq., Senior Deputy Attorney General, hereby notifies Respondent Gerald Marks ("RESPONDENT" or "MARKS") of an administrative hearing before the Commission for Common-Interest Communities and Condominium Hotels, State of Nevada, which is to be held pursuant to Chapters 233B and Chapters 116 and 116A of the Nevada Revised Statutes ("NRS") and Chapter 116 and 116A of the Nevada Administrative Code ("NAC"). The purpose of the hearing is to consider the allegations stated below and to determine if an administrative penalty will be imposed on the RESPONDENT pursuant to the provisions of NRS and NAC including, but not limited to, NAC 116A.360.

JURISDICTION AND NOTICE

1. During all relevant times mentioned in this complaint, RESPONDENT held, an active supervisory community manager certificate from the Division (CAM.0000086-SUPR) and is, therefore, subject to the jurisdiction of the Division and the provisions of NRS Chapters 116 and 116A and NAC Chapters 116 and 116A. RESPONDENT'S certificate is currently in "inactive" status.

. . .

FACTUAL ALLEGATIONS

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

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

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

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

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

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

8. In its investigation, the Division alleged that RESPONDENT did not exercise reasonable care in his management of Shadow Wood because he permitted non-unit owner George Bienkowski ("Bienkowski") to serve as an executive board member from 2008 through 2018.

9. NRS 116.31034 requires, in relevant part, that executive board members be unit owners.

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

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

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

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

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

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

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

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

18. NRS 116.31187 provides that in general, a member of an executive board or officer of an association shall not enter into a contract or renew a contract with the

association to provide services or otherwise accept any personal profit or compensation from the association for providing said services.

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

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

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

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

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

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

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

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

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

28. The Division later obtained the Management Agreement from the Association's successor community manager.

29. Section 9 of Article II of RESPONDENT's Management Agreement with the Association provides:

> Section 9. Account Signatory
>
> The withdrawal of funds from the Association's Accounts or Certificate(s) of Deposit shall require the signatures of at least 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.

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

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

32. In response, RESPONDENT blamed the bank, stating that the bank should not have accepted the checks with only RESPONDENT's signature.

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

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

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

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

37. In response, RESPONDENT contended that he based the Association's budget on tiered assessments because the Association's assessment system was always

structured on a tiered basis and that no one ever requested a change in how the assessments were calculated.

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

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

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

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

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

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

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

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

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

VIOLATIONS OF LAW

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

48. RESPONDENT violated NRS 116A.630(1)(b) by failing to exercise ordinary and reasonable care in the performance of his duties by permitting board member Escalona to be compensated by Shadow Wood for providing payroll services for Shadow Wood, through Escalona's company, JE & Associates in violation of NRS 116.31187.

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

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

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

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

53. RESPONDENT violated NRS 116A.630(1)(b) by failing to exercise ordinary care and reasonable care in the performance of his duties by violating NRS 116.31034(4)

by failing to give unit owners notice of eligibility to serve as a member of the executive board in 2013, 2015, and 2016.

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

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

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

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

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

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

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

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

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

DISCIPLINE AUTHORIZED

Pursuant to the provisions of NAC 116A.360 the Commission has discretion to impose discipline as it deems appropriate, including, but not limited to one or more of the following actions:

1. Revoke or suspend the certificate;
2. Refuse to renew or reinstate the certificate;
3. Place the community manager on probation;
4. Issue a reprimand or censure to the community manager;
5. Impose a fine of not more than $5,000 for each violation of a statute or regulation;
6. Require the community manager to pay restitution;
7. Require the community manager to pay the costs of the investigation and hearing;
8. Require the community manager to obtain additional education relating to the management of common-interest communities; and
9. Take such other disciplinary action as the Commission deems appropriate.

The Commission may order one or any combination of the discipline described above.

NOTICE OF HEARING

PLEASE TAKE NOTICE, that a disciplinary hearing has been set to consider this Administrative Complaint against the above-named RESPONDENT in accordance with Chapters 233B and 116 and 116A of the Nevada Revised Statutes and Chapters 116 and 116A of the Nevada Administrative Code.

THE HEARING WILL TAKE PLACE at the Commission meeting scheduled for December 3-5, 2019, beginning at approximately 9:00 a.m. each day, or until such time as the Commission concludes its business. The Commission meeting

will be held at the Nevada State Business Center, 3300 W. Sahara Avenue, Nevada Room, Suite 400, Las Vegas, Nevada 89102 with videoconferencing to Division of Insurance, 1818 E. College Parkway, Ste. 103, Carson City, Nevada 89706.

STACKED CALENDAR: Your hearing is one of several hearings that may be scheduled at the same time as part of a regular meeting of the Commission that is expected to take place on December 3-5, 2019. Thus, your hearing may be continued until later in the day or from day to day. It is your responsibility to be present when your case is called. If you are not present when your hearing is called, a default may be entered against you and the Commission may decide the case as if all allegations in the complaint were true. If you need to negotiate a more specific time for your hearing in advance because of coordination with out of state witnesses or the like, please call Teralyn Lewis, Administration Section Manager, at (702) 486-4036.

YOUR RIGHTS AT THE HEARING: Except as mentioned below, the hearing is an open meeting under Nevada's open meeting law, and may be attended by the public. After the evidence and arguments, the commission may conduct a closed meeting to discuss your alleged misconduct or professional competence. You are entitled to a copy of the transcript of the open and closed portions of the meeting, although you must pay for the transcription.

As a RESPONDENT, you are specifically informed that you have the right to appear and be heard in your defense, either personally or through your counsel of choice. At the hearing, the Division has the burden of proving the allegations in the complaint and will call witnesses and present evidence against you. You have the right to respond and to present relevant evidence and argument on all issues involved. You have the right to call and examine witnesses, introduce exhibits, and cross-examine opposing witnesses on any matter relevant to the issues involved.

You have the right to request that the Commission issue subpoenas to compel witnesses to testify and/or evidence to be offered on your behalf. In making this request,

you may be required to demonstrate the relevance of the witness's testimony and/or evidence. Other important rights and obligations, including your obligation to answer the complaint, you have are listed in NAC 116A.560 through NAC 116A.655, NRS Chapter 233B, and NRS Chapters 116 and 116A and NAC 116 and 116A. Note that under NAC 116A.585, not less than five (5) working days before a hearing, RESPONDENT must provide to the Division a copy of all reasonably available documents that are reasonably anticipated to be used to support his or her position, and a list of witnesses RESPONDENT intends to call at the time of the hearing. Failure to provide any document or to list a witness may result in the document or witness being excluded from RESPONDENT'S defense. The purpose of the hearing is to determine if the RESPONDENT has violated any of the provisions of NRS and NAC Chapters 116 and 116A, and to determine what administrative penalty is to be assessed against RESPONDENT, if any, pursuant to NAC 116A.360.

DATED: October 28, 2019.

REAL ESTATE DIVISION,
DEPARTMENT OF BUSINESS &
INDUSTRY, STATE OF NEVADA

By: _____
Sharath Chandra, Administrator
3300 W. Sahara Avenue, Suite 350
Las Vegas, Nevada 89104
(702) 486-4033

AARON D. FORD
Attorney General

By: _____
Michelle D. Briggs, Esq. (Bar No. 7617)
Senior Deputy Attorney General
555 E. Washington Avenue, Suite 3900
Las Vegas, Nevada 89101
(702) 486-3420
Attorneys for the Division