IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FAMILIAN PRODUCTIONS, LLC, A NEVADA LIMITED LIABILITY COMPANY, Appellant, vs. KHT HOLDINGS, LLC, A NEVADA LIMITED LIABILITY COMPANY, Respondent.	No. 82793-COA ✓
FAMILIAN PRODUCTIONS, LLC, A NEVADA LIMITED LIABILITY COMPANY, Appellant, vs. KHT HOLDINGS, LLC, A NEVADA LIMITED LIABILITY COMPANY, Respondent.	No. 83520-COA

ORDER REVERSING (DOCKET NO. 82793-COA), VACATING (DOCKET NO. 83520-COA), AND REMANDING

Familian Productions, LLC, appeals from a district court order granting summary judgment and a permanent injunction in a real property and contract action (Docket No. 82793-COA), and a post-judgment order awarding attorney fees and costs (Docket No. 83520-COA). Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Familian and respondent KHT Holdings, LLC, became neighbors in a five-building industrial park in Henderson after Familian purchased its building from Steve Mevius in 2018.[1] Despite the sale of his property, Mevius remained a neighbor to both Familian and KHT because he still owned another industrial building within the same industrial park.

[1]We recount the facts only as necessary for our disposition.

The industrial park is a 2.5-acre subdivision of a larger 40-acre industrial park. Both the subdivision and the larger industrial park are managed by owners' associations and each association has its own set of covenants, codes, and restrictions (CC&Rs). The parties refer to the larger of the two associations as the Master Association and the smaller subdivision as the Sub Association.

Unlike the Master Association, the Sub Association is not professionally managed; it is a non-profit organization comprised of individual owners within the Sub Association. There are no common areas in the Sub Association and its only purpose is to "provide for reciprocal access, parking, and drainage easements among the [buildings]." The shared parking easement was created through Section 1.2 of the Sub Association CC&Rs, reserving

> for the benefit of all Parcels, a mutually reciprocal, non-exclusive, perpetual easement for parking over each of the Parcels in the areas that are (i) designated as parking spaces on the Site Plan and (ii) not otherwise reserved for the exclusive use of one or more Permitted Parties[2] . . . of a Parcel as provided in Section 2.5 below.

Section 2.5 outlines the duties of the Sub Association's Manager. One such duty, found under Section 2.5(e), includes the "designation of parking spaces, if any, appropriately located near the entrance to the building for the exclusive use of such building's Permitted Parties."

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[2]Owners, such as Familian and KHT, are "Permitted Parties" under the CC&Rs.

Shortly after Familian moved in, it sought to annex from the shared parking easement nine parking spaces near its rear gate to be redesignated for its exclusive use. Following annexation, Familian planned to put up a security fence around the nine parking spaces and use the area for storage, receiving shipments, and other activities related to its gaming machine refurbishment business. The location of the parking spaces was convenient for Familian's business activities, but it was an unfortunate location for KHT—the nine parking spaces were directly across the parking lot from its front door. The nine spaces did not connect to KHT's building or its sidewalk. Also, KHT would still retain the use of all parking spaces located on the east side of its building, which are connected to its building, its sidewalk, and adjacent to its front door.

Familian applied for approval to redesignate the nine parking spaces, but it is disputed if Familian applied to the Master or Sub Association. The processing of Familian's application was first handled by Mevius, who appears to have been the president of the Sub Association. Mevius met with Familian to discuss its proposed annexation, to view the anticipated storage area, and to request Familian submit a schematic of its plans, which Familian did. Afterwards, Mevius approved Familian's project and sent notice of the project and its approval to the Sub Association owners.

Mevius' role in the approval process is disputed. This dispute originates from the signature block used in his approval letter—the signature block appears to use the name of the Master Association. However, the name of the Master Association and the Sub Association are similar. Other than the signature block, there is nothing in the record to show Mevius was the president of the Master Association. Furthermore,

the record supports that the Master Association was run by a professional management company, not by any individual property owner.

Following Mevius' approval, Familian was also required to submit its plans to the Master Association's Architectural Review Committee for approval, which it did. Next, Familian had to apply for and receive a permit from the City of Henderson that certified sufficient parking would remain within the industrial park, which it also did.[3] The record is clear on each of the steps Familian took, but there is no documentary evidence appearing in the record that shows approval of Familian's project with the official name of the Sub Association on the document.

KHT objected to Familian's annexation project nine months after Mevius' approval letter was sent but before Familian's fence was fully constructed. The basis for its objection was that its customers allegedly used the parking spaces that connected to Familian's back gate.[4] When it became clear that Familian would proceed with its project, KHT filed a lawsuit asserting claims for breach of contract and breach of the implied covenant of good faith and fair dealing. KHT's complaint also included requests for declaratory and injunctive relief. Familian responded by asserting a counterclaim for declaratory relief.

KHT sought a preliminary injunction to stop Familian from constructing the fence around the nine parking spaces, but the preliminary injunction was denied by the district court. In its denial, the court found

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[3]The Sub Association is made of five industrial buildings with 79-92 parking spaces. There is little retail, commercial, or public foot traffic.

[4]KHT is a door manufacturer, and the Sub Association is not a retail space, so it is unclear who KHT's customers are or how frequently they visit.

that Familian's proposed project did not violate the Sub Association's CC&Rs, nor was its approval improperly obtained. Furthermore, the court found that KHT suffered no harm because it still had use of the east side parking spaces, which were adequate for its customers' needs. The court also found that KHT was itself violating the shared parking easement by using its east side parking spaces for temporary storage, commercial trucking, and other business activities that obstructed the shared parking easement. However, the district court instructed Familian that it may be required to tear down the fence should it not prevail in the litigation.

Following its successful defense against KHT's motion for a preliminary injunction, Familian completed construction on the security fence surrounding the nine parking spaces while litigation continued in the discovery phase. The COVID-19 pandemic and pandemic-related administrative orders prevented the parties from conducting third-party discovery. Twice the parties stipulated to an order granting an extension of discovery deadlines. Each order highlighted the limits on third-party discovery in the pandemic administrative orders as a basis for requesting the extension.

About a month after the second discovery extension, KHT moved for summary judgment on each of its claims. Familian countermotioned, seeking declaratory relief. In its motion, KHT argued that Mevius was not the manager of the Sub Association and therefore had no authority to approve Familian's project under Section 2.5(e). KHT presented two alternative arguments that were independent of Mevius' managerial status. First, the CC&Rs restricted the annexation of

Familian's parking spaces without the vote of all owners under Section 5.3,[5] with a similar argument objecting to construction of the security fence under Section 1.6.[6] Finally, KHT argued that even if the CC&Rs do allow the Sub Association's manager to annex parking without owner approval, then Familian was still not allowed to convert the nine parking spaces into fenced storage, as Section 2.5(e)[7] anticipates that parking spaces will remain parking spaces.

Familian responded that the CC&Rs allow for two pathways for parking spaces to be annexed from the shared easement: manager approval under Section 2.5(e) or unanimous vote of the owners under Sections 1.6 or 5.3. Once either pathway is satisfied, the parking spaces are removed from the shared parking easement and an owner may convert the spaces in the manner that it indicated it would. Familian avers that Mevius was not just the president of the Sub Association, but also its manager. Thus, because it had received Mevius' approval, it satisfied Section 2.5(e) of the CC&Rs, and the nine parking spaces were no longer part of the shared easement.

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[5]Section 5.3 provides, in relevant part: "This Declaration may be amended or terminated, and any easement granted in this Declaration may be abandoned or terminated, only with the written consent of all Owners and the mortgagees and beneficiaries of all then-existing priority mortgages and deeds of trust on the Parcels."

[6]Section 1.6 provides: "No Permitted Party may (i) use . . . the easements . . . so as to unreasonably interfere with the use of any other Permitted Party, or (ii) create or permit any barricade on or obstruction of the easements, unless the Permitted Party has obtained the prior written consent of all Owners benefitted by such easements."

[7]Section 2.5(e) provides authority to the Sub Association's manager for the "designation of parking spaces, if any, appropriately located near the entrance to the building for the exclusive use of such building's Permitted Parties."

Therefore, Familian argued, it was allowed to convert the spaces into fenced storage, as it indicated it would in its application.

The district court found for KHT and granted it summary judgment on its claim for breach of contract and request for declaratory relief.[8] Summary judgment on KHT's claim for breach of good faith and fair dealing was eventually denied without prejudice. The court largely based its order on two findings, with a third in the alternative. First was an erroneous finding of fact that Mevius was no longer a property owner in the Sub Association, so he could not be the president or manager of the Sub Association. Second, the court found that Section 1.6 prohibited Familian from building its fence absent the approval of all owners, because the fence was an obstruction or barricade of the shared parking easement. The alternative finding of the court was, assuming *arguendo* that the parking spaces were properly annexed for Familian's exclusive use via Mevius' managerial power under Section 2.5(e), the CC&Rs still required the nine parking spaces to remain parking spaces.[9]

Post-judgment motion practice ensued. In footnotes in its motions and at oral argument, Familian raised the need for further discovery, especially third-party discovery, to address the remaining material disputes such as who or what entity was the manager of the Sub Association. The district court did not reopen discovery. Instead, it issued

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[8]The court also denied Familian's countermotion for declaratory relief.

[9]It is not fully clear from the record what developed in the underlying litigation to change the district court's analysis between the time of the denial of KHT's motion for a preliminary injunction and the order granting KHT's motion for summary judgment.

an amended finding of fact, clarifying that Mevius was still an owner within the Sub Association. However, the court determined that this did not disturb its conclusions of law, because it found Mevius was the president of the *Master* Association based on the contested signature block in his approval letter. Without Mevius as the Sub Association manager, the court noted, there was nothing in the record to show that Familian had ever received Sub Association approval, so Familian could not prove that it had satisfied the pathway for the annexation of the parking spaces under Section 2.5(e) and was therefore in breach of the CC&Rs without the requisite owner approval.

In its amended order, the district court granted KHT's permanent injunction request. In granting the injunction, the court expressly enforced an injunctive relief clause found under Section 5.5 of the Sub Association CC&Rs. However, the court found that if it had instead chosen to engage in a traditional equitable analysis, Familian could not prevail because a balance of hardship review is only available to "innocent parties who proceed without knowledge or warning they are acting contrary to others' vested property rights."[10] In its alternative finding, the district court did not address equitable factors other than the balance of hardships. Familian removed the completed fence pursuant to the district court order. Thereafter, the district court entered a post-judgment order awarding attorney fees and costs to KHT. These appeals followed.

Familian raises four issues on appeal. First, the district court made a mistake of fact because Mevius was the Sub Association president

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[10]In support of this proposition, the district court cited *Gladstone v. Gregory*, 95 Nev. 474, 480, 596 P.2d 491, 495 (1979).

and manager, which shows Familian received Sub Association approval to construct its storage area. Second, the district court misinterpreted the CC&Rs by finding that a security fence around parking spaces that are no longer within the shared parking easement needed unanimous owner approval; and in finding that annexed parking spaces must remain parking spaces, even if designated for an owner's exclusive use. Third, the district court's injunction was improper because the court failed to consider equitable factors or KHT's unclean hands. Finally, the district court's award of attorney fees and costs to KHT must necessarily be vacated. We conclude that genuine disputes of material fact remain as to the issues raised by Familian, precluding summary judgment. We address each in turn.

We review de novo a district court's order granting summary judgment. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment requires us to view all evidence in the light most favorable to the nonmoving party, which in this case was Familian. *See id.*; *see also* NRCP 56. If there are no genuine disputes of material fact, and the "moving party is entitled to judgment as a matter of law," then this court will affirm the district court's grant of summary judgment. *Id.*

The interpretation of CC&Rs is a legal question that is also subject to de novo review. *Diaz v. Ferne,* 120 Nev. 70, 73, 84 P.3d 664, 665-66 (2004). When interpreting CC&Rs, we look to the same rules governing the construction and interpretation of contracts. *Tompkins v. Buttrum Constr. Co. of Nev.*, 99 Nev. 142, 144, 659 P.2d 865, 866 (1983). Contractual provisions should be harmonized whenever possible and construed to reach a reasonable solution. *Eversole v. Sunrise Villas VIII Homeowners Ass'n*, 112 Nev. 1255, 1260, 925 P.2d 505, 509 (1996).

We review the district court's decision to grant a permanent injunction for an abuse of discretion. *Sowers v. Forest Hills Subdivision*, 129 Nev. 99, 108, 294 P.3d 427, 433 (2013).

A genuine dispute of material fact remains regarding whether Mevius was president and manager of the Sub Association

We first address the signature block in Mevius' approval letter as the district court found it showed that Familian received only Master Association approval. Familian argues that a dispute of material fact exists as to the identity of the president and manager of the Sub Association. We agree.

The name of the Master Association appears in the record as the "Sun Pac Owners Association," but is also referred to as the "Sunpac Owners Association," "the Association," and more. The name of the Sub Association is "The Corporate Center at Sunpac Owners Association," which also appears in the record as "The Corporate Center @Sunpac" and sometimes just the "Association," as is the case in its CC&Rs.

Mevius' signature block, which is not on any official letterhead and appears to be self-created, identifies him as the "President of the Sunpac Owners Association." KHT argues that this shows Mevius was the president of the *Master* Association instead of the Sub Association, which was an argument that persuaded the district court in its amended order. But KHT demands Mevius exercise a level of precision and attention to detail that it also has not met. In its answering brief, KHT claims that the name of the Master Association is both the "Sun Pac Industrial Park" and "Sun Pac Owners Association" with record cites to support both names. If the name of the Master Association is the former, then by KHT's own admission Mevius did not correctly name the Master Association or any association in his signature block. In sum, there are so many naming

conventions for both associations within the record that a material dispute of fact remains as to whether the signature block sufficiently proves Mevius was the president of the Master Association.

On the other hand, the record strongly supports Familian's claim that Mevius was president of the *Sub* Association. Many of the financial records addressed to the Sub Association were sent to the "Sunpac Owners Association," which is the same naming convention used by Mevius in his signature block. Also, Mevius was listed as the active President of the Sub Association on Nevada's Secretary of State website. Further, there is nothing in the record suggesting there was a different president of the Sub Association other than Mevius. Moreover, Familian has placed into the record over a quarter century of Nevada Secretary of State reports showing that Mevius never served as the president of the Master Association.

KHT argues that even if Mevius was president, it is not a material fact, because the president cannot be the manager since the Board is the manager. Or, in the alternative, the manager must be elected by the owners. KHT supports its claim with sections from the CC&Rs, bylaws, and Articles of Incorporation of the Sub Association. However, when read together, the CC&Rs can only be read cogently if the manager is a single, individual owner, like Mevius.

We begin with KHT's claim that the Board is the manager of the Sub Association. Both the bylaws and Articles of Incorporation appear to invest managerial power in the president and the Board. As for the president, under Article 9.8(a) of the bylaws he or she is given "general powers and duties of management [subject to the control of the Board]." But under Article 9 of the Articles of Incorporation the Board receives unqualified management powers: "the affairs of the Association shall be

managed and governed by a Board." Thus, management powers are seemingly given to both the Board and the president, albeit the president's managerial powers are subject to the control of the Board.

The issue with the Board being the manager of the Sub Association is that the parties agree that the Board has not convened since 2012. So, the Board has not exercised its own managerial powers, or subjected control over Mevius' putative presidential management powers, for years. Moreover, the record suggests that Mevius was the day-to-day manager and had actual authority to bind the Sub Association. Many of the financial records for the Sub Association were sent to Mevius' address and were directed to the attention of "Steve," Mevius' given name. Also, the record shows that Mevius collected the Sub Association's dues. Additionally, he sent invoices, hired landscapers and maintenance companies, managed the bank accounts, and signed the Sub Association's checks.

Familian argues that as an owner within the Sub Association since 2005, KHT has benefitted from Mevius performing managerial duties in the absence of Board management, and KHT has thus waived its right to argue that the Board is the manager. Familian argues that KHT "cannot wake a dormant board that had deferred to Mevius on *all matters* . . . to insist that KHT's one pet issue (parking recharacterization) out of hundreds [has] a special procedure used neither before nor since." (Emphasis in original.) KHT does not respond to Familian's argument that the Board's failure to act as manager of the Sub Association for at least eight years waived its right to now argue that the Board is the Manager. We treat this lack of response as a concession that Familian is correct. *See Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 563, 216 P.3d 788, 793 (2009) (treating

a party's failure to respond to an argument as a concession that the argument is meritorious).

Furthermore, the CC&Rs seem to suggest the manager must be a single, individual owner. The CC&Rs, under Section 2.2, name the first manager as the Declarant, a single person. The document goes on, still under Section 2.2, to provide how the manager subsequent to the declarant, who is known in the CC&Rs as the "Second Manager," must be voted on by the owners once the original Declarant gives notice that he or she intends to relinquish the role. Because the Board is comprised of property owners, to adopt KHT's interpretation would create the improbable scenario of property owners voting for themselves collectively as the "Second Manager." Also, within Section 2.2, the CC&Rs appear to restrict the manager to being a single, individual owner as "only an owner may act as manager." None of these provisions can be interpreted cogently if the Board collectively is the manager. Thus, KHT's interpretation may not be reasonable.[11]

Turning to KHT's claim that a manager must be voted into the role, KHT asserts that Sections 2.2 and 2.3 of the CC&Rs clearly restrict the role of manager to an owner who was elected by majority vote of the other owners. So, because the record does not show Mevius was voted into the role, he cannot be the manager. The issue with KHT's interpretation of the CC&Rs is that it is not fully supported by the plain language of the CC&Rs. Section 2.2 outlines how the Sub Association should transfer power from the initial manager, which was the original Declarant of the CC&Rs,

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[11]*See Nev. State Educ. Ass'n v. Clark Cty. Educ. Ass'n*, 137 Nev. 76, 84, 482 P.3d 665, 673 (2021) (stating that an interpretation of a contract is not reasonable if it makes any provision meaningless or leads to an absurd result).

to a *second* manager by vote of the owners. As for how subsequent managers following the second manager are to be chosen, Section 2.2 is mute. It merely outlines when the duties of a subsequent manager begin, and how long the duties will last. Section 2.3 only provides how the percentage of votes are divided generally among the different buildings in the Sub Association, which is not limited to the election of a manager and is relevant to any time the Sub Association votes.

There is no express requirement that subsequent managers need to continue to be elected by the owners under the CC&Rs. While Section 2.2 may support an inference that voting is required, it is a muddy one. This is made even more obscure when we consider Section 2.4: "Conveyance of Property of Manager." Under this provision, if a manager sells his or her property, and is thereby no longer an owner inside of the Sub Association, the title of manager transfers with the sale of his or her property. Thus, the sale of property can apparently result in the replacement of a previous manager with a new one, absent any owner's vote. This provision also seems to further support that a manger must be a single, individual owner, as it would make no sense if the manager as used in Section 2.4 was the Board. KHT does not address how Section 2.4 affects its argument that a manager cannot become a manager unless by vote in its briefing here, nor did it in the proceedings below.

Thus, a genuine dispute of material fact remains as to whether Mevius had actual managerial authority to approve Familian's application, or at a minimum, apparent managerial authority.[12] Or, in the alternative,

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[12]Apparent authority is "that authority which a principal holds his agent out as possessing or permits him to exercise or to represent himself

there is a genuine dispute if the Board has waived its managerial authority and ratified Mevius as manager through its passivity.[13]

A genuine dispute of material fact remains as to the interpretation of Section 2.5(e)

Familian's interpretation of the CC&Rs is basically this: once the Sub Association's manager has designated parking spaces for the exclusive use of an owner, those spaces are outside of the shared parking easement and an owner is free to convert the parking spaces in the manner it indicated in its application. Familian is basing this interpretation on the harmonization of Sections 1.2 and 2.5(e). KHT argues that a plain reading of Section 2.5(e) requires any parking space annexed for an owner's exclusive use to remain a parking space, located near the front door of the building.

Section 1.2 provides that parking spaces which are reserved for the exclusive use of an owner are not within the shared parking easement. Section 2.5(e) outlines the duties of the manager and includes "designation of parking spaces if any, appropriately located near the entrance to the building for the exclusive use of such building's Permitted Parties." Familian argues that there is only one reasonable way to harmonize Sections 1.2 and 2.5(e): areas designated for exclusive use of an owner, by definition, fall outside the shared parking easement and are therefore free from the unanimous consent of owners required under Sections 5.3 and 1.6.

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as possessing, under such circumstances as to estop the principal from denying its existence." *Dixon v. Thatcher*, 103 Nev. 414, 417, 742 P.2d 1029, 1031 (1987) (citation omitted).

[13]A principal ratifies an agent's action by failing to repudiate it within a reasonable time after acquiring knowledge. *See, e.g., Edwards v. Carson Water Co.*, 21 Nev. 469, 24 P. 381 (1893).

To adopt KHT's interpretation of Sections 5.3 and 1.6 could render Section 2.5(e) a nullity. Section 5.3 prohibits the abandonment or termination of a shared easement without the unanimous consent of all owners. Yet, the shared parking easement was likely not terminated nor abandoned, as evidenced by the City of Henderson certifying that ample parking remained within the shared easement. Additionally, to conclude that Section 5.3 applies to the annexation of parking spaces via managerial approval could plausibly render both Sections 2.5(e) and 1.2 null. As to Section 1.6, it prohibits an owner from barricading or obstructing an easement without the written consent of all owners. To adopt KHT's interpretation of Section 1.6—that it applies to parking spaces designated for the exclusive use of an owner via managerial authority under Section 2.5(e)—would presumably render Section 1.2's provision that such spaces fall outside of the easement nonsensical. KHT's interpretation of Section 1.6 would disharmonize it with other sections of the CC&Rs.[14]

The proper interpretation of Section 2.5(e), the section which vests the manager with the power to designate "parking spaces if any, appropriately located near the entrance to the building for the exclusive use of such building's Permitted Parties," is arguably a closer call. KHT contends that if this court should conclude that the CC&Rs do allow for a manager to remove parking spaces from the easement, then the nine parking spaces annexed by Familian were improperly removed for three reasons. First, Section 2.5(e) requires a manager to designate parking spaces for exclusive use near the "entrance" of the building, and common usage of the word "entrance" means the front of the building where

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[14]*See Eversole*, 112 Nev. at 1260, 925 P.2d at 509.

customers would access the space. Second, Section 2.5(e) allows for the manager to designate exclusive use "parking spaces," not storage areas. So, even if there was manager approval for the exclusive use of the parking spaces, conversion to a storage area is not anticipated or allowed under the CC&Rs. Finally, Section 2.5(e) restricts the designation of exclusive use parking spaces to those "*appropriately* located near the entrance" and because of the amount of parking spaces Familian has converted to storage, some are not appropriately near any entrance. (Emphasis added.)

While it is a reasonable inference that the Declarant's intent when drafting the CC&Rs was for parking spaces to remain parking spaces, it is not expressed within the document. The phrase "parking spaces" appears in Section 2.5(e) before the phrase "exclusive use." So, Familian did not seek "exclusive use parking spaces," but "parking spaces for exclusive use." Thus, there are two potentially different meanings for the same phrase, rendering the CC&Rs ambiguous on this point. *See Nev. State Educ. Ass'n,* 137 Nev. at 83, 482 P.3d at 673 (noting that a contract is ambiguous if its terms may be reasonably interpreted in more than one way).

Therefore, the nature of this Sub Association—which covers only five buildings, all zoned exclusively for industrial use—must be considered. Given the day-to-day happenings of an industrial park, without evidence of intent, we cannot assume the CC&Rs require that the parking spaces reserved for an owner's exclusive use can only be used exclusively for parking, or that exclusive-use parking must be located solely at the front entrance. It is reasonable that the Declarant could foresee that industrial businesses would likely need to use their parking spaces for non-parking purposes. For example, an industrial company may need areas of loading

and unloading where it would be inconvenient, or even dangerous, to find a neighbor's parked car. Furthermore, the record shows that KHT has also regularly used the east side parking spaces connected to its building for non-parking purposes such as temporary storage, forklift operations, and loading. In sum, a genuine dispute of material fact remains as to whether a parking space, separated from the shared easement for an industrial building owner's exclusive use via Section 2.5(e), must remain solely a parking space for conventional-sized vehicles near an industrial building's commercial entrance, away from the loading and unloading areas, thereby precluding summary judgment.[15]

The district court abused its discretion by granting KHT a permanent injunction to remove Familian's fence without exercising its discretion by considering traditional equitable factors

The district court's order for a permanent injunction was an explicit enforcement of the Sub Association's injunctive relief clause found under Section 5.5 of the CC&Rs, which Familian argues was improper. The Sub Association's CC&Rs contain an injunctive relief clause under Section 5.5: "in the event of a violation or threatened violation in this Declaration, any Owner . . . shall have the right to enjoin such violation or threatened violation in a court of competent jurisdiction." The district court found that the injunctive relief clause "must" be enforced.[16] But private parties cannot

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[15]Further discovery, such as inquiries into the Sub Association's previous course of performance under Section 2.5(e) or a deposition of the original Declarant, could potentially resolve the ambiguity of Section 2.5(e).

[16]The district court noted that "[t]here is no question NRS 33.010 identifies the cases where an injunction may be granted; however, in this case, [the injunctive relief clause] specifies when injunctive relief must be afforded."

bind a court's equitable powers by contract.[17] We note by analogy that noncompete clauses do not bind a court's equitable power by private contract. In such circumstances, the court still weighs traditional equitable factors before enforcing such a clause through an injunction.[18]

The district court gave an alternative path to the injunction, but it was incomplete. The court found that if it had reviewed KHT's request for injunctive relief under equitable factors, Familian would not have been able to show the balance of hardships weighed in its favor since it was not an innocent party proceeding without warning that it was acting contrary to KHT's vested property rights, citing as authority *Gladstone v. Gregory*, 95 Nev. 474, 480, 596 P.2d 491, 495 (1979).

There are two issues with the district court's analysis: first, the court's reliance on *Gladstone* is misplaced; second, there are other equitable factors a court must consider beyond balancing hardships. As to the first, the *Gladstone* court restricted a landowner from arguing relative hardship. Crucially, however, the court indicated that this was because the landowner failed to contend that the other party had acted inequitably. *Gladstone*, 95 Nev. at 480, 595 P.2d at 495. Here, in contrast, Familian did and does argue that KHT engaged in inequitable conduct by obstructing parking spaces and

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[17]*See, e.g., Dice v. Clinicorp, Inc.*, 887 F. Supp. 803, 810 (W.D. Pa. 1995) (stating a "contractual provision simply cannot act as a substitute for a finding by this Court that it would be appropriate to invoke its equitable powers"); *Fireman's Ins. Co. v. Keating,* 753 F. Supp. 1146, 1154 (S.D.N.Y. 1990) ("[T]he parties to a contract cannot, by including certain language in that contract, create a right to injunctive relief where it would otherwise be inappropriate.").

[18]*See Excellence Cmty. Mgmt. v. Gilmore*, 131 Nev. 347, 351 P.3d 720 (2015).

using those spaces as temporary storage. Furthermore, the district court itself also found KHT to be in violation of the CC&Rs in its denial of KHT's motion for a preliminary injunction against Familian's fence, and it is unclear from the record what changed the court's opinion.

An owner cannot seek an injunction against another owner for violating the same restrictive covenant he seeks to enforce.[19] However, the defense of unclean hands requires the party asserting it to prove the degree of the violation and the harm that it caused.[20] Familian provided photographs of KHT using the east side parking as temporary storage and obstructing the use of the parking spaces with its trucks. The evidence in the record is that these were frequent and somewhat lengthy practices by KHT.

The issue here is that Section 1.6 prohibits an owner from using the parking easement "so as to reasonably interfere with the use of any other" owner, or from creating or permitting "any barricade on or obstruction of" the parking easement without "the prior written consent of all Owners benefitted by such easements." In its order granting KHT summary judgment, the court found that KHT's use of the parking spaces was "not the same behavior exhibited by [Familian]." It is true the behavior of the parties has not been the same, but Section 1.6 does not appear to provide any qualifications as to what degree of use by an owner will result in a violation of its terms. KHT's use of the east side parking spaces could

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[19]*See Tracy v. Capozzi*, 98 Nev. 120, 122-23, 642 P.2d 591, 593 (1982).

[20]The unclean hands analysis requires a court to consider: (1) the egregiousness of the misconduct, and (2) the seriousness of the harm caused by it. *Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.*, 124 Nev. 272, 276, 182 P.3d 764, 767 (2008).

reasonably be called an "obstruction," "an interference," and a "barricade" to the use of other owners. Thus, a genuine dispute of material fact remains as to whether KHT's use of the east side parking violated Section 1.6, and if so, to what degree.

As to the second issue, the alternative equitable analysis by the district court was not complete. There are other factors a court must consider before issuing an injunction aside from a balance of hardships, such as the adequacy of monetary compensation and irreparable injury.[21] Additionally, a district court's reason for issuing an injunction must be sufficiently clear to permit meaningful appellate review.[22] Here, because a full equitable analysis is not within the record, we cannot conduct a meaningful review.

The district court's award of attorney fees and costs to KHT is no longer appropriate because KHT may not be the prevailing party

Because genuine disputes of material fact remain, KHT may not ultimately be the prevailing party and the district court's order awarding it attorney fees and costs may no longer be appropriate. *See Cain v. Price*, 134 Nev. 193, 198, 415 P.3d 25, 30 (2018) (explaining that where a district court's order granting summary judgment is reversed, it is no longer appropriate to consider the respondents the prevailing party, and an award of attorney fees is inappropriate).

Accordingly, we

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[21]*See, e.g., Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters., LLC*, 125 Nev. 397, 403, 215 P.3d 27, 31 (2009); *State Farm Mut. Auto. Ins. Co. v. Jafbros Inc.*, 109 Nev. 926, 928, 860 P.2d 176, 178 (1993).

[22]*See Las Vegas Novelty, Inc. v. Fernandez*, 106 Nev. 113, 118, 787 P.2d 772, 775 (1990).

REVERSE the judgment of the district court in Docket No. 82793-COA, VACATE the order granting KHT attorney fees and costs in Docket No. 83520-COA, and REMAND for proceedings consistent with this order.[23]

_____, C.J.
Gibbons

_____, J.
Tao

BULLA, J., concurring:

I concur in reversing and remanding the grant of summary judgment and permanent injunctive relief as well as necessarily vacating the award of attorney fees and costs. I also agree that there are a number of genuine disputes of material fact to be resolved, making summary judgment inappropriate.

I write separately because all that is required of us at this time is to remand this case to the district court, directing the court to allow the parties to complete the four months of discovery remaining pursuant to the extension of the discovery deadline previously agreed to by the parties and approved by the court. In addition to the time remaining for discovery

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[23]Insofar as the parties have raised any other arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

pursuant to the scheduling order, at the time of the summary judgment hearing, the appellants also made a request to be able to complete discovery of necessary third parties before the district court decided the summary judgment motion. While it appears that the district court agreed that Familian had properly made its discovery request, the court found that further discovery was unnecessary as no genuine disputes of material fact remained. I would note the denial of Familian's discovery request is not addressed in the district court's order but was nevertheless discussed and denied by the district court at the hearing. The outstanding discovery to be completed most likely includes the depositions of Steve Mevius and the other property owners, whose testimony may be helpful in resolving many of the genuine factual disputes. Thus, it appears that the district court erred in granting summary judgment without allowing appellants to complete discovery, particularly when the controlling discovery deadline had not yet expired. The district court may also have abused its discretion in denying relief under NRCP 56(d); however, it is unclear from a review of the record if appellants followed the proper procedure in bringing a motion to request such relief.

Although the majority order is thorough and provides significant direction to the district court, I remain concerned that we have delved too far into the application of underdeveloped facts to address the correct legal analysis that should be addressed by the district court in the first instance—after all relevant facts become known. While I do not necessarily find fault with the district court's alleged differences in its analysis denying the preliminary injunction from its analysis granting the permanent injunction, I agree with the majority that the district court must engage in an equitable analysis of several factors—not only relative

hardship—*after* all of the relevant facts are developed in discovery. Further, upon remand, the time to complete discovery will necessarily be required to be extended by four months, or as otherwise agreed to by the parties and the district court. *See DeChambeau v. Balkenbush*, 134 Nev. 625, 630, 431 P.3d 359, 363 (Ct. App. 2018) (citing to *Douglas v. Burley*, 134 So. 3d 692, 697 (Miss. 2012)) (holding that "upon remand, prior orders governing discovery remain in place absent a party's motion to extend deadlines and a subsequent order by the trial court").

To do more at this point, and in particular addressing the application of the controlling CC&Rs to the facts at hand, to the extent that they are definitive, is premature since necessary discovery has not yet been completed. And, in doing so, the majority may have supplanted this court's judgment for that of the district court's without having the benefit of relevant facts yet to be discovered.

_____, J.
Bulla

cc: Hon. Susan Johnson, District Judge
Hon. Kathleen M. Paustian, Settlement Judge
Lewis Roca Rothgerber Christie LLP/Las Vegas
Reisman Sorokac
Charles L. Geisendorf, Ltd.
Eighth District Court Clerk