MMG accepted service 8/15/19 9:15 AM

DISTRICT COURT, LAKE COUNTY, COLORADO 505 Harrison Ave., P.O. Box 55, Leadville, CO 80461	DATE FILED: August 7, 2019 11:00 AM FILING ID: 18B461623AA11 CASE NUMBER: 2019CV30016
LARREE MORGAN, an Individual, Plaintiff, v. **EMPIRE LODGE HOMEOWNERS ASSOCIATION, a Colorado Non-Profit Corporation,** Defendant.	
ROBINSON & HENRY, P.C. Mason C. Simpson, #50491 Erica A. Jacobson, #45874 900 Castleton Rd., Suite 200 Castle Rock, Colorado 80109 303-688-0944 (office) 303-284-2942 (fax) mason@robinsonandhenry.com erica@robinsonandhenry.com *Attorneys for Plaintiff*	▲COURT USE ONLY▲ Case No.: Division:

DISTRICT COURT CIVIL SUMMONS

TO THE ABOVE-NAMED DEFENDANT: **EMPIRE LODGE HOMEOWNERS ASSOCIATION, a Colorado Non-Profit Corporation**

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court an answer or other response to the attached Complaint. If service of the Summons and Complaint was made upon you within the State of Colorado, you are required to file your answer or other response within 21 days after such service upon you. If service of the Summons and Complaint was made upon you outside of the State of Colorado, you are required to file your answer or other response within 35 days after such service upon you. Your answer or counterclaim must be accompanied with the applicable filing fee.

If you fail to file your answer or other response to the Complaint in writing within the applicable time period, the Court may enter judgment by default against you for the relief demanded in the Complaint without further notice.

DATED and respectfully submitted this 7th day of August, 2019.

ROBINSON & HENRY, P.C.

By: */s/ Erica A. Jacobson*

Mason C. Simpson, #52384
Erica A. Jacobson, #45874
Attorneys for Plaintiff

Pursuant to C.R.C.P. 121, Section 1-26(7) a copy of this document with original or scanned signatures is maintained at the offices of Robinson & Henry, P.C., and will be made available for inspection by other parties or the court upon request.

This Summons is issued pursuant to Rule 4, C.R.C.P., as amended. A copy of the Complaint must be served with this Summons. This form should not be used where service by publication is desired.

WARNING: A valid summons may be issued by a lawyer and it need not contain a court case number, the signature of a court officer, or a court seal. The plaintiff has 14 days from the date this summons was served on you to file the case with the court. You are responsible for contacting the court to find out whether the case has been filed and obtain the case number. If the plaintiff files the case within this time, then you must respond as explained in this summons. If the plaintiff files more than 14 days after the date the summons was served on you, the case may be dismissed upon motion and you may be entitled to seek attorney's fees from the plaintiff.

TO THE CLERK: If the summons is issued by the clerk of the court, the signature block for the clerk or deputy should be provided by stamp, or typewriter, in the space to the left of the attorney's name.

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DISTRICT COURT CIVIL (CV) CASE COVER SHEET FOR INITIAL PLEADING OF COMPLAINT

1. This cover sheet shall be filed with the initial pleading of a complaint, counterclaim, cross-claim or third party complaint in every district court civil (CV) case. It shall not be filed in Domestic Relations (DR), Probate (PR), Water (CW), Juvenile (JA, JR, JD, JV), or Mental Health (MH) cases. Failure to file this cover sheet is not a jurisdictional defect in the pleading but may result in a clerk's show cause order requiring its filing.

2. Simplified Procedure under C.R.C.P. 16.1 **applies** to this case **unless** (check one box below if this party asserts that C.R.C.P. 16.1 **does not** apply):

   ☐ This is a class action, forcible entry and detainer, Rule 106, Rule 120, or other similar expedited proceeding, **or**

☐ This party is seeking a monetary judgment against another party for more than $100,000.00, including any penalties or punitive damages, but excluding attorney fees, interest and costs, as supported by the following certification:

By my signature below and in compliance with C.R.C.P. 11, based upon information reasonably available to me at this time, I certify that the value of this party's claims against one of the other parties is reasonably believed to exceed $100,000."

Or

☐ Another party has previously filed a cover sheet stating that C.R.C.P. 16.1 does not apply to this case.

3. ☐ This party makes a **Jury Demand** at this time and pays the requisite fee. See C.R.C.P. 38. (Checking this box is optional.)

DATED and respectfully submitted this 7th day of August, 2019.

ROBINSON & HENRY, P.C.

By: */s/ Erica A. Jacobson*

Mason C. Simpson, #52384
Erica A. Jacobson, #45874
Attorneys for Plaintiff

Pursuant to C.R.C.P. 121, Section 1-26(7) a copy of this document with original or scanned signatures is maintained at the offices of Robinson & Henry, P.C., and will be made available for inspection by other parties or the court upon request.

NOTICE
This cover sheet must be served on all other parties along with the initial pleading of a complaint, counterclaim, cross-claim, or third party complaint.

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VERIFIED COMPLAINT

Plaintiff, Larree Morgan ("Plaintiff"), by and through his counsel, Robinson & Henry, P.C., hereby submits the following Verified Complaint against Defendant, the Empire Lodge Homeowners Association ("Defendant" or "Association"), a Colorado non-profit corporation, and states and alleges as follows:

I. PRELIMINARY STATEMENT

Plaintiff owns a property located at 28 Rainbow Road, Leadville, CO 80461 (the "Property"). The Property is located within the Beaver Lakes Estates in Lake County, Colorado, and an Association was established in 1998 to manage the community. The Association recently purported to amend the community declaration to prohibit short-term rentals ("STRs").

The implementation of the STR prohibition was illegal as violative, inter alia, of C.R.S. § 38-33.3-217(4.5) and otherwise not in compliance with Association's governing documents. There are two fatal issues with respect to the amendment. First, the amendment did not pass with the approval of 67% of votes as required by CCIOA, and second, the voting procedure did not comply with the community declaration and bylaws and violated the restrictive covenants set forth therein.

II. PARTIES

1. Plaintiff, Larree Morgan, is an owner of and resides in a single-family home situated in Lake County, Colorado and described as LOTS 4, 5, & 6, BLK 11, BEAVER LAKES, which has a street address of 28 Rainbow Road, Leadville, CO 80461. Plaintiff holds the Property in joint tenancy with his wife, Katherine Morgan.

2. Defendant, Empire Lodge Homeowners Association, is a Colorado nonprofit corporation in good standing with a principal place of business located at 585 Empire Valley Drive, Leadville, CO 80461.

III. VENUE AND JURISDICTION

1. Venue is proper in Lake County pursuant to C.R.C.P. 398(a) because this is an action concerning real property located in Lake County, Colorado.

2. This Court has personal jurisdiction over Defendant as a result of the Defendant's transaction of business as a non-profit corporation within the State of Colorado. *See* C.R.S. § 13-1-124.

3. The District Court of Lake County in the State of Colorado possesses subject matter jurisdiction over this case pursuant to article 6, Section 9 of the Constitution of the State of Colorado.

IV. GENERAL ALLEGATIONS

A. Application of the Colorado Common Interest Ownership Act ("CCIOA")

1. The Empire Lodge Homeowners Association was established in 1998 with the filing of an Amended Declaration of Restrictive and Protective Covenants for the Area Known as Beaver Lakes Estates and Beaver Lakes Estates Filing No. 2 ("1998 Declaration") attached hereto as **Exhibit 1**.

2. Prior to the formation of the common interest community, an earlier common interest community, Empire Lodge, Inc. was created by way of a Declaration of Restrictive and Protective Covenants, Beaver Lakes Estates Filing No. 2 filed on October 21, 1976 (Attached hereto as **Exhibit 2**). Empire Lodge, Inc. was a common interest community affecting property in Beaver Lakes Estates Filing No. 2 only, not Beaver Lakes Estates.

3. The property at issue is situated in Beaver Lakes Estates and was not part of the previous common interest community.

4. Although Empire Lodge, Inc. did not record a Declaration of Restrictive and Protective Covenants for Beaver Lakes Estates, Empire Lodge, Inc. did have an interest in Beaver Lakes Estates. Empire Lodge, Inc. later conveyed its interest in Beaver Lakes Estates and Beaver Lakes Estates Filing No. 2 to the Empire Lodge Homeowners Association, Inc. in a Deed and Assignment recorded on June 7, 1993. *See* ELHA, Inc. Deed attached as **Exhibit 3**.

5. Pursuant to C.R.S. § 38-33.3-201 (1), "A common interest community may be created pursuant to this article only by recording a declaration executed in the same manner as a deed and, in a cooperative, by conveying the real estate subject to that declaration to the association." (emphasis added).

6. After the property was conveyed to the Association, the Association filed Articles of Incorporation with the Colorado Secretary of State on April 29, 1991, but the Association did not file a declaration until December 31, 1998. Therefore, for the purposes of determining the application of CCIOA, the formation date was December 31, 1998, so the community must comply with the entire framework established by CCIOA. *See* C.R.S. § 38-33.3-117(3).

7. The 1998 Declaration purported to amend the 1976 Declaration, but, in fact, it created an entirely new community, now including Beaver Lakes Estates. Therefore, the 1998 Declaration must be considered the original declaration for the purposes of determining the applicability of the CCIOA. It is unclear whether EHLA, Inc. properly terminated the existing common interest community pursuant to C.R.S. § 38-33.3-218 prior to creating a new community including a new subdivision. However, if so, the failure to properly dissolve the prior common interest community pursuant to § 38-33.3-218 does not render the creation of the new common interest community invalid.

8. The 1998 Declaration was amended on December 20, 2012 with the filing of the Amended and Restated Declaration of Restrictive and Protective Covenants for Beaver Lakes Estates and Beaver Lakes Estates Filing #2 ("2012 Declaration" attached hereto as **Exhibit 4**). The recitals acknowledge that a new common interest community was formed in 1998, with reference to the 1998 Declaration as the "Original Declaration" for the community.

9. On April 22, 2019, the Association filed a Full Amended and Restated Declaration of Restrictive and Protective Covenants for Beaver Lakes Estates and Beaver Lakes Estates Filing #2 ("Amended Declaration" attached hereto as **Exhibit 5**) with the Lake County Clerk and Recorder.

10. Pursuant to C.R.S. § 38-33.3-201 (1), "A common interest community may be created pursuant to this article only by recording a declaration executed in the same manner as a deed and, in a cooperative, by conveying the real estate subject to that declaration to the association."

B. ***The Amended Declaration is Invalid because it Violated C.R.S. § 38-33.3-217(4.5) Requiring 67% Owner Approval to Amend the Declaration to Restrict Usage***

1. In *Houston v. Wilson Mesa Ranch Homeowners Ass'n*, 360 P.3d 255 (Colo. App. 2015), the Colorado Court of Appeals held that, when the covenants of a common in interest community do not prohibit STRs, but the Association wishes to prohibit STRs, the covenants must be amended to prohibit short-term vacation rentals; simply creating a rule or bylaw will not suffice.

2. Because a prohibition of short-term vacation rentals is considered a restriction of use, the procedure required to amend the covenants is set forth in C.R.S. § 38-33.3-217 (4.5), and the restrictions on the use, occupancy, and alienation of units must be contained in the recorded declaration. C.R.S. § 38-33.3-205(1)(l).

3. The 2012 Declaration does not restrict the use of the units as STRs. In fact, the Controlling Declaration expressly allows STRs. Section 7.2 designates permitted land use, including "one new single-family residence for private use or vacation rental." Additionally, Section 6.3 states, "This provision shall in no way be deemed to restrict or prevent short term vacation style rentals of the Lots within the Community."

4. C.R.S. § 38-33.3-217 (4.5) provides that no amendment may change the uses to which any unit is restricted in the absence of a vote or agreement of at least sixty-seven percent (67%) of owners, or any larger percentage specified in the declaration. The declaration may specify a smaller percentage only if all of the units are restricted exclusively to nonresidential use, which is not the case here.

5. According to the vote tally provided to Plaintiff, the Association counted 93 votes in favor of the amendment, which is only 52% of the 179 total owner votes. The vote tally was invalid for the reasons described below. However, even if all 93 votes counted in favor of the amendment were valid, the amendment still fails to meet the requirements set forth in C.R.S. § 38-33.3-217 (4.5).

6. Regardless of whether the community is found to be a pre-CCIOA community, C.R.S. 38-33.3-117 (1.5) provides that C.R.S. § 38-33.3-217(1) applies to pre-CCIOA communities. The Colorado Court of Appeals has ruled that, because C.R.S. § 38-33.3-217(1) references C.R.S. § 38-33.3-217(4), that Section 4 also apply to pre-CCIOA communities. *See Francis v. Aspen Mountain Condominium Association, Inc.*, 401 P.3d 125 (Colo. App. 2017) and *DA Mountain Rentals, LLC v. The Lodge at Lionshead Phase III Condominium Association Inc.*, 409 P.3d (Colo. App. 2016). It logically follows that the sister provision, Section 4.5 will also be held to apply to pre-CCIOA communities.

C. ***Voting Procedure Was Not Compliant with the Controlling Declaration or Bylaws and The Purported Amendment Violates the Restrictive Covenants of the Community***

1. In addition to the failure to obtain the votes necessary to amend the Controlling Declaration pursuant to CCIOA, the voting procedure also failed to comply with the requirements set forth in the 2012 Declaration and the Amended and Restated Bylaws of Empire Lodge Homeowners Association ("Bylaws" attached as **Exhibit 6**), adopted October 3, 2018.

2. Section 4.10 of the Bylaws provides the procedure required for mail-in ballots. Specifically, Section 4.10 requires that, in the case of a vote by mail or electronic means, the secretary shall mail or deliver a notice to all members that includes the following:

a. A proposed written resolution setting forth a description of the proposed action;

b. A statement that members are entitled to vote by mail or electronic means for or against the proposal;

c. A date at least 10 days after the date of such notice shall be given on or before which all votes must be received; and

d. The number of votes which must be received to meet the quorum requirement and the percentage of votes necessary to carry the vote.

3. The notice provided to homeowners failed to meet the basic requirements detailed in the Bylaws. The notice does not provide a date by which all of the votes must be received, nor does it include the number of votes that must be received to meet the quorum requirement. It did include the statement, "The proposed amendments shall be approved if at least a majority of all Owners (greater than 50%) of Lots in the community." However, the sentence fragment and created additional confusion, and the specific number of votes is missing from the ballot.

4. A total of 91 votes were necessary for the Proposed Amendment to pass. The Association alleges 93 votes were case in favor of the amendment.

5. Additionally, the ballot stated, "The Board of Directors has already approved the Proposed Amendment and has submitted it to you for your approval." The fact that the ballot stated the proposed amendment was approved by the Board suggests that the amendment was supported by the Board. By giving the appearance of Board support, the Board's ballot was not drafted in a fair and impartial manner.

6. Upon information and belief, the Board of Directors provided a list of members to the group supporting the Amendment but declined to provide the list to an opponent of the Amendment, directing the member to obtain the list from Lake County, in violation of C.R.S. § 7-127-201(2). This biased action supported members' efforts to campaign for the Amendment, while hindering the ability of the members in opposition to do the same.

7. These procedural irregularities are significant because they act to further the goals of the members pursuing the amendment. By not restricting the amount of time to vote, the Board of Directors ("Board") created an impermissible procedural mechanism to harness additional votes to reach a quorum that would not have been possible if the procedural requirements of the Bylaws had been observed.

8. Eventually, the Board communicated an arbitrary voting deadline of April 14, 2019 during the March HOA meeting, as reflected in the meeting notes. However, even after the deadline passed, they continued to count votes received. Leaving the voting open in this manner to continue to try to garner every last vote is an obvious reflection of the Board's bias. The decision to continue to leave voting open to obtain additional votes was not fair and impartial because without the additional votes solicited, the amendment was poised to fail.

9. Additionally, several ballots were resubmitted to change an abstention vote to a vote in favor of the amendment, as noted below. The ballot clearly states that, "Pursuant to the terms of the Colorado Revised Nonprofit Corporation Act, a written ballot may not be revoked." However, the Association allowed the owners to change their vote. Our clients believe that the voters that abstained were contacted to cast a vote in favor or against the amendment, as it is unlikely that these voters would have decided to resubmit their ballot without being prompted. If so, the decision to contact these voters was similarly biased, when not doing so was going to result in a rejection of the amendment.

10. Additionally, there are several issues with many of the ballots that were counted in favor of the Amendment. If these votes had not been counted in favor of the amendment, it would have failed regardless of whether the Association applied the 50% or 67% voting threshold.

a. Lot 34: Vote was changed with white out.
b. Lot Unknown for Molly and John Anderson: Ballot is not dated with a year.
c. Lot 117: This ballot is not signed by the owner of the property as titled, the Kaldany Family Living Trust, and is not signed as a trustee.
d. Lots 12 and 13: John and Aagje Barber cast their vote in abstention and signed their ballots on February 18, 2019. On March 11, 2019, presumably at the request of the Board, a second ballot was cast by John and Aagje Barber in favor of the amendment.
e. Lot 39: Jefferey Anderson and Margaret Sjoden abstained with their first vote dated February 21, 2019, and they cast a second ballot in favor on March 14, 2019.
f. Lot 52: The ballot is not signed by an owner/authorized trustee. Dan Byrne is the Trustee for the Barbara L. Beach Family Trust, and the ballot is signed by Laurie Byrne.
g. Lots 2 and 20: One ballot was submitted for two lots and the owner was given two votes.

h. Lot 76: The ballot was not signed as trustees and was received after the April 14, 2019 deadline. Envelope stamp from Altitude Community Law clearly indicates that the ballot was received on April 15, 2019.

11. Had these 9 deficient votes not been counted in favor of the Proposed Amendment, the total votes in favor of the Proposed Amendment would have been 84, 7 fewer than the 91 required for the Proposed Amendment to pass.

V. FIRST CLAIM FOR RELIEF
(Declaratory Judgment)

1. Plaintiff incorporates all foregoing allegations as though set forth fully herein.

2. The Amendment is invalid, and the Court should so declare pursuant to the Colorado Uniform Declaratory Judgments Law, C.R.S. §§ 13-51-101, et seq., and C.R.C.P. 57.

3. This court has the power to declare the rights, status, and other legal relations of the Plaintiff and Defendant regarding the community declarations and amendments at issue.

4. An actual controversy within the jurisdiction of this court exists between Plaintiff and Defendant regarding (1) the date of formation of the common interest community and the applicability of CCIOA; and (2) the validity of the amendment banning STRs.

5. As an owner of lots within Beaver Lakes Estates, Plaintiff is an interested person entitled to obtain a declaration of rights, status, and legal relations within the meanings of C.R.S. § 13-51-106 and C.R.C.P. 57.

6. Plaintiff respectfully requests a Declaratory Judgment that (1) the Association is subject to CCIOA; and (2) the Amendment is invalid.

VI. SECOND CLAIM FOR RELIEF
(Injunctive Relief)

1. Plaintiff incorporates all foregoing allegations as though set forth fully herein.

2. Plaintiff seeks an order to preserve the status quo by enjoining Defendant from enforcing the STR ban until the court hears the issue on the merits.

3. Defendant's enforcement of the STR ban is imminently threatening and threatens to cause future damages to Plaintiff including interference with Plaintiff's ability to earn rental income from his property as expressly allowed under Section 7.2 and Section 6.3 of the 2012 Declaration.

4. The Defendants' actions violate the Association's governing documents and the valid 2012 restrictive covenants concerning land use, and the Plaintiff is entitled to injunctive relief.

5. Irreparable harm will come to Plaintiff, during the most popular STR season, if immediate action is not taken. Plaintiff relies on reviews of renters of the property, and the interference with prospective renters will irreparably harm Plaintiff's ability to attract future renters. Thus, Plaintiff's injuries cannot be adequately compensated solely by an award of financial damages.

6. The Plaintiff has a reasonable probability of success on the merits as the Defendant is in clear violation of the covenants.

7. There is a danger of real, immediate and irreparable injury which may be prevented by injunctive relief, and there is no plain, speedy, or adequate remedy.

8. Injunctive relief sought by the Plaintiff will not disserve the public interest.

9. The granting of an injunction will not disserve the public interest and the balance of equities favors the injunction, which will preserve the status quo pending a trial on the merits.

VII. THIRD CLAIM FOR RELIEF
(Breach of Fiduciary Duty)

7. Plaintiff incorporates all foregoing allegations as though set forth fully herein.

8. The Association acts as a fiduciary for Plaintiffs and owes fiduciary duties to Plaintiff including, without limitation, the duties of care and loyalty. A homeowner's association has a fiduciary duty to act solely for the benefit of the beneficiary. *Woodmoor Imp. Ass'n v. Brenner*, 919 P.2d 928, 933 (Colo. App. 1996). This includes a duty of loyalty and a duty that all beneficiaries are dealt with impartially. *Id.*

9. The Association breached its fiduciary duty to Plaintiffs by, among other things, failure to comply with the 2012 Declaration and Bylaws concerning the voting procedure for amendment of the community Declaration and failing to act impartially in regard to the STR ban.

10. Any and all attempts to enforce the illegal prohibition on STRs will be, at a minimum, a breach of the Association's fiduciary duties.

11. Plaintiff suffered damages as a result of the Association's breach of fiduciary duty in an amount to be determined at trial, including, without limitation, lost rental income.

12. Plaintiff is further entitled to recover attorney fees and costs as a result of the Association's breach of its fiduciary duties.

VIII. REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the court:

1. Enter judgment against the Defendants, in favor of the Plaintiff, on all of Plaintiff's claims;
2. Grant a temporary injunction prohibiting the enforcement of the amendment to the Declaration until the court may hear the merits of the case at trial.
3. Enter a declaratory judgment that the community is a CCIOA community and the amendment to the Declaration is invalid and of no force or effect;
4. Award Plaintiff damages against the Association in an amount to be determined at trial;
5. Award Plaintiff his attorney fees, costs, expert witness fees, and pre- and post-judgment interest; and
6. For such relief as may be necessary or proper under the circumstances, as provided in C.R.C.P. 57(h).

DATED and respectfully submitted this 7th of August, 2019.

ROBINSON & HENRY, P.C.

Mason C. Simpson, #52384
Erica A. Jacobson, #45874
Attorneys for Plaintiff

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VERIFICATION

STATE OF COLORADO }
} SS.
COUNTY OF Douglas }

I, Larree Morgan, hereby certify that the contents of the foregoing are true and correct to the best of my knowledge and belief.

Larree Morgan

The foregoing was acknowledged before me this 26 day of July 2019.

Witness my hand and official seal.

My commission expires: 11/30/2021

ABIGAIL LEWIS
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 20174049144
MY COMMISSION EXPIRES 11/30/2021

Notary Public