DISTRICT COURT GUNNISON COUNTY, COLORADO 200 E. Virginia Avenue Gunnison, CO 81230	
Plaintiffs: Kyle Ross Shannon and Laura Golden Shannon v. **Defendants:** Sebestien Gardner (deceased); The Board of County Commissioners of the County of Gunnison, State of Colorado; and all unknown persons who claim any interest in the subject matter of this action.	▲ COURT USE ONLY ▲
Attorney for Plaintiffs: LAW OF THE ROCKIES Kendall K. Burgemeister, Atty. Reg. #: 41593 525 North Main Street Gunnison, CO 81230 Telephone: 970.641.1903 kburgemeister@lawoftherockies.com	Case Number: 16CV___ Division: Courtroom:
DISTRICT COURT CIVIL (CV) CASE COVER SHEET FOR INITIAL PLEADING OF COMPLAINT, COUNTERCLAIM, CROSS-CLAIM, OR THIRD PARTY 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.

2. Check the boxes applicable to this case.

☒ Simplified Procedure under C.R.C.P. 16.1 **applies** to this case because this party does not seek a monetary judgment in excess of $100,000.00 against another party, including any attorney fees, penalties or punitive damages but excluding interest and costs and because this case is not a class action or forcible entry and detainer, Rule 106, Rule 120, or other expedited proceeding.

☐Simplified Procedure under C.R.C.P. 16.1, **does not apply** to this case because (check one box below identifying why 16.1 does not apply):

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

☐ This party is seeking a monetary judgment for more than $100,000.00 against another party, including any attorney fees, penalties or punitive damages, but excluding interest and costs (see C.R.C.P. 16.1(c)), **or**

☐ Another party has previously stated in its cover sheet 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.)

Date: June 28, 2016

LAW OF THE ROCKIES

By: S/ *Kendall K. Burgemeister*
Kendall K. Burgemeister

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WAIVER AND ACCEPTANCE OF SERVICE	

1. The undersigned, being duly authorized by Defendant The Board of County Commissioners of the County of Gunnison, State of Colorado ("BOCC"), hereby acknowledges the receipt of the following documents in the above-captioned matter: (1) Summons; (2) Complaint; and (3) Civil Cover Sheet.

2. The undersigned hereby accepts the documents listed above as if they had been personally served upon BOCC, and BOCC, through the undersigned, hereby waives any objection to the form or manner of service or the necessity of any other service.

Dated: July 5, 2016.

By: David Baumgarten

Print: David Baumgarten

Title: Gunnison County Attorney

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COMPLAINT	

COME NOW, Plaintiffs Kyle Ross Shannon and Laura Golden Shannon, and for their Complaint against Defendants, state as follows:

Jurisdiction and Venue

1. This Court has jurisdiction pursuant to Colo. Const. art. VI, § 9.

2. This case is an action affecting real property located in Gunnison County, Colorado. Therefore, venue is proper pursuant to C.R.C.P. 98(a).

Parties and Subject Matter

3. Plaintiffs are the owners, in joint tenancy, of the following real property situate in Gunnison County, Colorado ("Property"):

Beginning at the northeast corner of the southeast quarter of the southwest quarter (SE1/4SW1/4), Section 15, Township 15 South, Range 84 West, 6th P.M., and running

thence south 495 feet, thence west 1,320 feet, thence north 495 feet, thence east 1,320 feet to the place of beginning.

4. Plaintiffs are in possession of the Property.

5. The named Defendant Sebestien Gardner ("Gardner") is a former owner of the Property.

6. On information and belief, Gardner is deceased. He is named for the purpose of binding his heirs or other successors.

7. The Board of County Commissioners of the County of Gunnison, State of Colorado ("BOCC") is the local government body with the authority to regulate subdivisions of land within unincorporated areas of Gunnison County, Colorado. C.R.S. § 30-28-133. The BOCC may have or claim an interest which would be affected by the declaration sought in the second claim for relief. *See* C.R.S. § 13-51-115.

Factual Background

8. Gardner, as Grantor, sold the Property to Ray G. Williamson, as Grantee, by a Deed dated August 21, 1935, and recorded in the real property records of Gunnison County at Book 245, Page 268 (the "Gardner Deed").

9. The Gardner Deed includes the following covenant (the "Gardner Covenant"): "Grantee hereby covenants with the Grantor that neither he nor his successors in interest will divide or sell said lands in tracts smaller than the tract of land hereby conveyed."

10. On August 10, 1935, Gardner sold a 25 acre tract of land south of the Property to L.M. Thornton. The deed to Thornton included a covenant identical to the Gardner Covenant.

11. In 1992, the Thornton property was subdivided into Thornworth Estates, a residential subdivision containing 6 parcels of land, each 1.65 to 6.33 acres in size.

12. The 40 acres north of the Property has been subdivided into 20 lots, each 0.23 acres to 3.29 acres in size.

13. The 40 acres between the Property and Thornworth Estates has been subdivided into 19 residential lots, each 1.00 to 5.54 acres in size, plus a 19 unit condominium development.

14. At 15 acres in size, the Property is significantly larger than any other private parcel of land in the vicinity.

15. No evidence exists that the Gardner Covenant was intended to be appurtenant to any other parcel of land.

16. There is no evidence that Gardner ever attempted to assign the right to enforce the Gardner Covenant.

17. Gardner has not owned land in the vicinity of the Property, and on information and belief has been deceased, for many decades.

Unknown Persons

18. There may be persons interested in the subject matter of this action whose names cannot be inserted herein because said names are unknown to Plaintiffs although diligent efforts have been made to ascertain the names of said persons; such persons have been made defendants and designated as "all unknown persons who claim any interest in the subject matter of this action." So far as Plaintiffs' knowledge extends, any such interest(s) of the unknown parties are derived through Gardner.

First Claim for Relief: Quiet Title

19. The allegations set forth above are incorporated herein by this reference.

20. This action is brought pursuant to C.R.C.P. 105(a), which authorizes actions to be "brought for the purpose of obtaining a complete adjudication of the rights of all parties thereto, with respect to any real property…The court in its decree shall grant full and adequate relief so as to completely determine the controversy and enforce the rights of the parties…"

21. Plaintiffs see a complete adjudication of the rights of the parties hereto with respect to the Property, under any and all applicable legal doctrines, whether or not expressly incorporated into this Complaint. *See Board of County Comm'rs of Pitkin County v. Timroth*, 87 P.3d 102, 105 (Colo. 2004) ("After the enactment of Rule 105…even though the pleadings do not raise a particular issue, if the evidence before the court makes the issue apparent, the court must reach that issue in order to grant full and appropriate relief.").

22. Specifically, Plaintiffs seek to quiet title to the Property as against Gardner, in order to terminate the Gardner Covenant as a cloud on the Plaintiffs' title to the Property.

23. A court of equity has "the power and authority to remove or cancel the restrictive covenants as clouds on the plaintiffs' title…when, as here, it is shown that the restrictive covenants no longer serve the purpose for which they were imposed and are no longer beneficial to those claiming under them." *Zavislak v. Shipman*, 362 P.2d 1053, 1055 (Colo. 1961).

24. Similarly "a court may exercise its equitable powers when a restrictive covenant…when the circumstances have changed and the enforcement would impose an oppressive burden without any substantial benefit." *Schneider v. Drake*, 44 P.3d 256, 261 (Colo. App. 2001).

25. "In the case of protective covenants, it has sometimes been held that changes within the affected area may result in modification or removal of the covenant because the changes were within the control of those entitled to enforce the covenant. In other words, the doctrines of abandonment, estoppel and waiver are applicable." *West Alameda Heights Homeowners Association v. The Board of County Commissioners of the County of Jefferson, State of Colorado*, 458 P.2d 253, 257 (Colo. 1969).

26. The Gardner Covenant no longer serves the purpose for which it was imposed and is no longer beneficial to any person who may claim a right under it. It has been decades since Gardner owned property in the vicinity of the Property. There is no plausible benefit to the heirs or other successors in leaving the Gardner Covenant in place.

27. Circumstances have changed and enforcement would impose an oppressive burden without any substantial benefit. The residential lots in the vicinity of the Property are significantly smaller than the Property. The Property is bisected by a County Road right of way, making it infeasible to use the entire Property for a single residential use.

28. The right to enforce the Gardner Covenant has been terminated by abandonment, estoppel, or waiver. Gardner imposed an identical restrictive covenant on a nearby parcel of land, which was subdivided without objection almost 25 years ago.

Second Claim for Relief: Declaratory Judgment

29. The allegations set forth above are incorporated herein by this reference.

30. "Courts of record within their respective jurisdictions have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." C.R.S. § 13-51-105.

31. "Any person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder." C.R.S. § 13-51-106.

32. In the alternative to the First Claim for Relief, and for the reasons set forth in the Factual Background and First Claim for Relief, Plaintiffs seek a judgment declaring that the Gardner Covenant is null and void, and unenforceable.

Prayer for Relief

WHEREFORE, Plaintiffs pray for a Decree determining that Defendants have no interest, estate, or claim of any kind whatsoever in the Property, and forever barring and enjoining Defendants from asserting any claim or title thereto, in particular, determining that the Gardner Covenant has been terminated, quieting title to the Property in the name of the Plaintiffs, and

adjudging that Plaintiffs are the owners in fee simple as set forth herein and are entitled to possession and beneficial use of the Property and for such other relief as the Court may deem proper. Plaintiffs do not seek to actually subdivide the Property in this case. Rather, they seek to remove the Gardner Covenant so that, upon completion of this case, the Plaintiffs may seek to subdivide the Property pursuant to the Gunnison County Land Use Resolution.

Respectfully submitted this 28th day of June, 2016.

LAW OF THE ROCKIES

By: S/ *Kendall K. Burgemeister*
Kendall K. Burgemeister

Plaintiffs' Address:

4946 S 73RD West Ave.
Tulsa, OK 74107-8273

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SUMMONS	

THE PEOPLE OF THE STATE OF COLORADO TO THE ABOVE NAMED DEFENDANTS:

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 twenty-one (21) days after such service upon you. If service of the summons and Complaint was made upon you outside the State of Colorado, you are required to file your answer or other response within thirty-five (35) days after such service upon you. If you fail to file your answer or other response 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 the 28th of June, 2016.

Law of the Rockies

By: *S/ Kendall K. Burgemeister*
Kendall K. Burgemeister