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San Diego United Holdings Group, LLC, Ninus Malan
And Balboa Ave Cooperative

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO- CENTRAL DIVISION

MONTGOMERY FIELD BUSINESS CONDOMINIUMS ASSOCIATION, a California Nonprofit Mutual Benefit Corporation,

Plaintiff,

vs.

BALBOA AVE COOPERATIVE, a California corporation; SAN DIEGO UNITED HOLDINGS GROUP, LLC, a California limited liability company; NINUS MALAN, an individual; RAZUKI INVESTMENTS, LLC, a California limited liability company; SALAM RAZUKI, an individual; and DOES 1 through 25, inclusive;

Defendants.

CASE NO. 37-2017-00019384-CU-CO-CTL

ASSIGNED TO THE HONORABLE RONALD L. STYN

DEFENDANTS BALBOA AVE COOPERATIVE, SAN DIEGO UNITED HOLDINGS GROUP, LLC, AND NINUS MALAN'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

[IMAGED FILE]

DATE: September 1, 2017
TIME: 8:30 a.m.
DEPT: C-62

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Defendants San Diego United Holdings Group, LLC ("San Diego United"), Balboa Ave Cooperative ("Balboa") and Ninus Malan ("Malan") (collectively "Defendants") respectfully submit the following memorandum of points and authorities in opposition to plaintiff Montgomery Field Business Condominiums Association's ("Association" or "Plaintiff") order to show cause why a preliminary injunction should not be issued.

I. INTRODUCTION

"The business and governmental aspects of the association and the association's relationship to its members clearly give rise to a special sense of responsibility upon the officers and directors.…This special responsibility is manifested in the requirements of fiduciary duties and the requirements of due process, equal protection, and fair dealing." (*Cohen v. Kite Hill Community Assn* (1983) 142 Cal.App.3d 642, 651.) The Association's lawsuit, and its current request to enjoin Defendants, belies this special sense of responsibility and flies in the face of due process and fair dealing as the 2015 Amendment is specifically designed to take Defendants' property rights. As supported by the declarations of Ninus Malan, Gina Austin, and Peter Michelet, the Request for Judicial Notice, and the pleadings on file in this case, the Association attempts to impose a mandatory injunction on Defendants when it lacks standing to file this lawsuit, fails to make a sufficient showing of harm, and is unable to prevail on the merits as the amendment to the CC&R's ("2015 Amendment") it seeks to enforce is unlawful and was passed fraudulently and in violation of the Association's governing documents and the law.

The Association has failed to make the factual showing, through admissible evidence, that it is entitled to injunctive relief. Issuance of a preliminary injunction would be contrary to the equitable principles of California law and there is no immediate risk of irreparable harm. Further, the Association cannot demonstrate a likelihood of success on the merits so as to justify the issuance of a preliminary injunction and a balancing of the relative harms establishes that such relief must be denied.

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II. PLAINTIFF LACKS STANDING TO SUE AND ITS ATTEMPT TO ENJOIN DEFENDANTS CONSTITUTES A DUE PROCESS VIOLATION

Defendants anticipate Plaintiff will argue the following violations are de minimis and that Plaintiff's failure to adhere to its internal procedures essentially does not matter. This is not the case. Plaintiff's Motion asks the court to take away a fundamental property right without abiding by the procedures it is required to abide by- this is a due process violation and should be denied.

A conditional use permit ("CUP"), such as the MMCC CUP that runs with the Property, creates a property right which may not be revoked without constitutional rights of due process. (*Kerley Indus., Inc. v. Pima County* (9th Cir. 1986) 785 F.2d 1444, 1446.) Despite the requirements of due process and fair dealing, Plaintiff seeks to shut down a lawfully operating business without following the law. As a California non-profit corporation, and as a common interest development, the Association is subject to the Davis-Stirling Act, the Corporations Code, and its internal governance documents (in this case, CC&Rs and Bylaws). When it filed this lawsuit, the Association failed to govern itself in conformity with the Davis-Stirling Act, the Corporations Code, and the CC&Rs and Bylaws. Because it failed to act in conformance with its internal governance documents, the Corporations Code, and the Davis-Stirling Act, the Association lacks standing to prosecute this lawsuit and not only should the injunction be denied, the Association should be ordered to dismiss the lawsuit.

In general, associations have standing to initiate legal action and to defend, settle, or intervene in litigation, arbitration, mediation, or administrative proceedings on behalf of the membership to, among other things, enforce its governing documents. (Civ. Code § 5980.) A lawsuit may be brought by the board of directors, and boards have discretion when it comes to the decision to litigate to enforce the governing documents. (*Beehan v. Lido Isle* (1977) 70 Cal.App.3d 858.) Boards can weigh the cost of litigation, the gravity of the violation, and the likely outcome of the litigation, and make a good faith determination to litigate or not to litigate a particular violation. (*Id.*) The holding in *Beehan* provides a level of care expected from a Board when making determinations involving litigation. Plaintiff contends that it has the requisite standing to bring this lawsuit, yet fails to offer sufficient evidentiary support that it exercised any level of care when it filed this lawsuit. This failure contravenes the Bylaws and shows that the

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Association sued Defendants without the necessary and appropriate approvals.

The Association Bylaws state that the Board shall enforce the Bylaws provisions, Declaration, and rules and regulations of the Association. (Plaintiff's NOL. Ex. D (Bylaws at Sec. 5.3(f)).) However, the Bylaws provide for specific methods by which the Board can carry out its enforcement. The Bylaws require either a meeting of the Board or an action in lieu of, when transacting any business:

> The transaction of any business at any meeting of the Board ... shall be as valid as though made at a meeting duly held ... if a quorum is present and if, either before or after the meeting, each of the directors not present signs a written waiver of notice, or a consent to the holding of such meeting, or an approval of the minutes thereof.

(Plaintiff's NOL. Ex. D (Bylaws at Sec. 5.11).) The Association Bylaws mirror the Davis-Stirling Act, codified in Civil Code section 4910(a), where "the board shall not take action on any item of business outside of a board meeting." Furthermore:

> Any action required or permitted to be taken by the Board may be taken without a meeting, if all members of the Board shall individually or collectively consent in writing to such action. Such written consent or consents shall be filed with the minutes of the proceedings of the Board, and shall have the same force and effect as a unanimous vote of such directors."

(Plaintiff's NOL, Ex. D (Bylaws at Sec. 5.12).) This section mirrors Civil Code section 7211(b) where "an action required or permitted to be taken by the board may be taken without a meeting, if all members of the board shall individually or collectively consent in writing to that action." The Association failed to abide by either of these prerequisites. When it filed this lawsuit, the Association's Board had not held a properly documented meeting nor did it acquire standing to sue through the unanimous written consent of all the Board members.

Plaintiff filed this lawsuit in May 2017, which it means it retained counsel and directed counsel to begin drafting this lawsuit prior to May 2017. At that time, Plaintiff's Board members were Daniel Burakowski, Glenn Strand, and Peter Michelet, who was also the Secretary. (Defs. RJN, Ex. 5.) Mr. Michelet, a Board member and the Association's secretary, did not receive notice of "any special meeting of the Board of Directors to discuss, or vote to authorize the filing of the Montgomery Field Business Condominiums Association vs. Balboa Ave Cooperative, et al. lawsuit." (Declaration of Peter Michelet In Support of Defendants Balboa Ave Cooperative and

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San Diego United Holdings Group, LLC's Ex Parte Application To Dissolve Temporary Restraining Order ("Michelet Decl.") ¶ 6.)[1] As the Secretary, Mr. Michelet would have been in possession of minutes from such a meeting or the unanimous written consent if the minutes, or any other documents, existed. No meeting or unanimous consent exist because there was never a meeting and never a unanimous consent. The Board cannot show it weighed litigation costs, the impact litigation costs might have on Members, the effect on the Association's operating and reserve accounts, or deliberation as to whether a special assessment would be levied against the Association members to pay for this litigation. (*Id.*) This lawsuit is solely the result Mr. Burakowski's unilateral decision to sue.

Finally:

> The Board may, with the approval of a majority of the directors present, vote to adjourn and reconvene the meeting in executive session provided the matters to be discussed are of a personal nature, involve existing or potential litigation or the like and such discussion matters are announced prior to the vote for adjournment.

Despite the fact that no records exist supporting the Association's decision to sue Defendants (two of which are not Members), as required under California law and the Association's governing documents, the Association relies on *Beehan v. Lido Isle Community Assn.* (1977) 70 Cal.App.3d 858, alleging that the Board's decision whether or not to file an action to enforce the CC&Rs is governed by the business judgment rule. In *Beehan,* a board of directors relied on the business judgment rule as a shield for electing not to sue after numerous board meetings discussing the issue that arose, and a special meeting "for the sole purpose" of reviewing the issue. Plaintiff's reliance on *Beehan* is misguided and case law is clear that conduct contrary to governing documents may fall outside the business judgment rule. (See, e.g., *Nahrstedt v. Lakeside Village* (1994) 8 Cal.4th 361, 374.)

In *Beehan*, after a special meeting, another meeting was held and "after an extensive discussion" the board acted. Unlike the board in *Beehan*, the Association's Board did not hold a single meeting (regular, annual, or special) or discussion and exercised no level of care or thought. Through the date of this opposition, the Association has failed to produce a single

[1] The Michelet Declaration is the same declaration that was used for the TRO Hearing and being attached hereto for convenience of the court.

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document memorializing any Board action related to this lawsuit despite San Diego United's request for such documentation. The absence of records is underscored by Mr. Michelet's declaration, as he was the secretary and Board member and presumably would have known of any Board action or discussion related to litigation. (Michelet Decl. ¶ 6.)

Plaintiff argues that Peter Michelet "lost his ability to have any say in whether a lawsuit would be filed as he was selling his unit to the Defendants." Plaintiff ignores its own governing documents by making that assertion. Article II, Section 2 of the CC&Rs states "[a]ll Memberships shall be appurtenant to the Unit conveyed ... a person or entity shall be deemed an Owner of a Unit only upon ***recordation of a deed*** conveying the Condominium to him." (emphasis added.) As Plaintiff correctly stated, this lawsuit was filed on May 26, 2017 and Mr. Michelet's recorded deed, transferring his interest, is dated June 2, 2017. (RJN Ex. 2.) Mr. Michelet was a Board member when the lawsuit was filed and had been a board member and the Association's secretary since 2010. (Michelet Decl. ¶ 2.) Thus the Association's argument that Mr. Michelet was not a member or Board member is inaccurate as Mr. Michelet was a record owner, a Board member, and the secretary, when this lawsuit was filed.

Plaintiff's attempt to use the business judgment rule as an excuse for failing to adhere to its corporate formalities, while trying to enforce them against Defendants, is hypocritical and contrary to the law and should not lie as a defense. Plaintiff seeks to enforce the Association's governing documents against Defendant but fails to abide by those very same documents. The gravity of this failure is significant because Plaintiff is asking the Court to take a vested property right from San Diego United without showing it took the necessary steps to take the property right. In sum, Plaintiff lacks standing to bring this lawsuit because there was never a Board meeting authorizing it and no written consent in lieu of a meeting. Furthermore, despite Plaintiff's belief, the business judgment rule does not give a Board member carte blanche to act as he pleases. Therefore, the court should find that Plaintiff lacked the requisite standing to bring this lawsuit and deny Plaintiff's Motion.

III. STANDARD FOR ISSUING A PRELIMINARY INJUNCTION

It is well settled that the purpose of an injunction is to preserve the status quo pending a

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trial on the merits. (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528.) Code of Civil Procedure section 526(a) sets forth the grounds under which an injunction will be granted. Section 526(a)(1) requires that the relief requested must consist of "restraining the commission or continuance of the act complained of, either for a limited time or perpetually." Injunctions will only be granted in instances of immediate risk of irreparable harm. (Code Civ. Proc. § 526(a)(2); *Korean Philadelphia Presbyterian Church v. California Presbytery* (2000) 77 Cal.App.4th 1069, 1084.) Relief is unlikely unless the moving party will be significantly hurt in a way which cannot later be repaired. (*People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater* (1981) 118 Cal.App.3d 863, 870-871.)

An injunction is an extraordinary power, to be exercised with great caution and, should rarely, if ever, be exercised in a doubtful case. "The right must be clear, the injury impending and threatened, so as to be averted only by the protective preventive process of injunction." (*City of Tiburon v. Northwestern Pac. R. Co.* (1970) 4 Cal.App.3d 160, 179, quoting *Schwartz v. Arata* (1920) 45 Cal.App. 596, 601.) "[I]t is clear that a plaintiff must make some showing which would support the exercise of the rather extraordinary power to restrain the defendant's actions prior to a trial on the merits." (*Tahoe Keys Property Owners' Ass'n. v. State Water Resources Control Board* (1994) 23 Cal.App.4th 1459, 1471 (*Tahoe Keys*).)

When deciding whether to grant preliminary injunctive relief, the trial court considers two interrelated factors: (1) the interim harm that the applicant will sustain if the injunction is denied as compared to the harm to the defendant if the injunction issues; and (2) the likelihood of success on the merits at trial. (*Choice-In-Education League v. Los Angeles Unified School District* (1993) 17 Cal.App.4th 415, 422.) The Court must also engage in a balancing of the respective harm to the parties from grant or denial of the injunction. (*Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528.) The court may deny a preliminary injunction either (1) on its finding irreparable injury will not result to the party seeking the injunction, or (2) that the party has failed to demonstrate a reasonable probability of success on the merits. (*People v. Pacific Lan Research Co.* (1977) 20 Cal.3d 10, 21.)

Before the trial court can exercise its discretion the applicant must make a prima facie

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showing of entitlement to injunctive relief. The applicant must demonstrate a real threat of immediate and irreparable injury [citations] due to the inadequacy of legal remedies." (*Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131, 138); see also *Tahoe Keys, supra,* 23 Cal.App.4th at 1471 (interim harm by denial of preliminary injunctive relief assessed before reaching the potential merits).) It is also well settled that the plaintiff bears the burden of producing evidence of irreparable interim injury. (*Loder v. City of Glendale* (1989) 216 Cal.App.3d 777, 782-783.) "

IV. PLAINTIFF'S REQUEST FOR MANDATORY INJUNCTIVE RELIEF SHOULD BE DENIED

Plaintiff requests a mandatory injunction in that it seeks to compel an affirmative act that changes the position of the parties. (*Davenport v. Blue Cross of Calif.* (1997) 52 Cal.App.4th 435, 448.) When a preliminary injunction "mandates an affirmative act that changes the status quo," it is subject to closer scrutiny for abuse of discretion. (*Board of Supervisors v. McMahon* (1990) 219 Cal.App.3d 286, 295.) Mandatory relief "is not permitted except in extreme cases where the right thereto is clearly established and it appears that irreparable injury will flow from its refusal." (*Id.*, quoting *Hagen v. Beth* (1897) 118 Cal.330, 331.) Granting a mandatory injunction pending trial is not permitted except in extreme cases where the right is clearly established and it is Plaintiff's burden to establish this is one of those extreme cases where the right is clearly established. (*Teachers Insurance & Annuity Assoc. v. Furlotti* (1999) 70 Cal.App.4th 1487.) Plaintiff cannot meet that burden.

Here, Plaintiff's request for mandatory injunctive relief, if granted, seeks to strip San Diego United's Constitutional property right, the MMCC CUP. (Plaintiff's Motion, page 10, lines 13-24.) Plaintiff's proposed order makes clear this is a mandatory injunction because the request compels Defendants to cease performance and it changes the relative positions of the parties. As explained in the accompanying declarations and request for judicial notice, Plaintiff's requested injunctive relief requires Defendants to cease operating, let go of employees, and takes away a property right that runs with the land; Balboa was open and operating when Plaintiff filed this lawsuit and San Diego United possessed, and continues to possess the MMCC CUP, when

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Plaintiff filed this lawsuit. Plaintiff's motion, and the proposed order, mandate affirmative action or change the status of the parties' claimed rights by mandating Defendants go out of business. Plaintiff has failed to show this is an extreme case requiring an injunction and therefore it should be denied.

V. PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION SHOULD BE DENIED BECAUSE PLAINTIFF FAILS TO MAKE THE REQUISITE SHOWING UNDER CALIFORNIA LAW

Plaintiff's requested injunctive relief must be denied because it fails to meet the standards for injunctive relief. Injunction applications generally require a balancing of (1) the harm to plaintiff if the injunction does not issue with (2) the harm to defendant if the injunction does issue; and then a weighing of that result against the probability of plaintiff's ultimate success. (*Law School Admission Council, Inc. v. State of Calif.* (2014) 222 Cal.App.4th 1265, 1280.) Thus pre-judgment injunctive relief is only warranted where the legal remedy is inadequate, the moving party will suffer irreparable harm if an injunction is not issued, and it is "reasonably probably that the moving party will prevail on the merits." (*Decision Sciences Corp. v. Sup. Ct. (Maudin)* (2004) 121 Cal.App.4th 1100, 1110.)

Here, Plaintiff's requested injunctive relief must be denied because Plaintiff has failed to show harm and any purported harm Plaintiff claims pales in comparison to Defendants' harm if the injunction does issue; the injunction will irrevocably strip Defendants of a vested property right and will force dozens of people to lose their jobs. This is troublesome because Plaintiff cannot show success on the merits. Plaintiff failed to pass the 2015 Amendment in conformity with the law and it filed this lawsuit lacking adherence to the law and its internal corporate governance procedures. On balance, the harm is severe and significant to Defendants because Plaintiff's request for injunctive relief fails to meet the standards for injunctive relief and the harm to Defendants is insurmountable.

A. Plaintiff's "Harm" In The Absence Of An Injunction Is Minimal

At a minimum, "the moving party must demonstrate a significant threat of irreparable injury." (*Arcamuzi v. Continental Air Lines, Inc.* (9th Cir. 1987) 819 F.2d 935, 937.) "Issuing a

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preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." (*Winter v. NRDC, Inc.* (2008) 555 U.S. 7, 7.) If the moving party fails to meet the "minimum showing" of a likelihood of irreparable injury, a court "need not decide whether [the movant] is likely to succeed on the merits." (*Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.* (9th Cir. 1985) 762 F.2d 1374, 1377.)

Plaintiff has not submitted credible evidence demonstrating immediate irreparable injury. Plaintiff has stated the possibility it will lose its insurance in the future as harm. Plaintiff's only evidence of this future harm is a notice from Farmers Insurance, submitted through the declaration of Christine Vargas (not a Farmer's Insurance representative). Plaintiff has not stated that the insurance is cancelled nor has Plaintiff explained if cancellation will occur if the 2015 Amendment is invalid. Plaintiff has failed to indicate if there are other alternatives in the event its insurance is cancelled because there are other alternatives and doing so would obviate Plaintiff's claim of future harm.

Mr. Malan has inquired into insurance alternatives and has found at least one company that will insure legally licensed dispensaries, such as Balboa. (Malan Decl. ¶ 12.) This company is working on a policy to cover the Association in the event the Association chooses to accept such policy and admit that does not have harm. (*Id.*) Defendants, particularly San Diego United, also have the ability to self-insure and can self-insure. (*Id.*) Both of these alternatives eliminate the Association's claimed harm. The Association's CC&Rs contemplate a situation where a member engages in a business that increases the premium and puts the responsibility on the member to pay the difference, which San Diego United has offered to do.

Issuing a preliminary injunction based only on a possibility of harm to Plaintiff is inconsistent here and Plaintiff has failed to meet the minimum showing of a likelihood of irreparable injury such that the Court here need not decide whether Plaintiff is likely to succeed on the merits.

B. <u>The Likely Harm To Defendants From An Injunction Is Overwhelming</u>

In addition to Plaintiff's failure to show harm, the harm Defendants will suffer if the

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preliminary injunction is granted is fatal. If the injunction is granted, Defendants will be forced to shut down, San Diego United will lose a Constitutional property right in the MMCC CUP without sufficient due process. (Malan Decl. ¶¶ 10-18.) Approximately 60 people will immediately lose their jobs and the patients that use Balboa will be unable to get their medicines. (*Id*.)

C. Plaintiff Fails To Show Likelihood Of Success On The Merits

Although the Court need not analyze success on the merits because Plaintiff failed to meet the minimum showing of a likelihood of irreparable injury, Plaintiff cannot show success on the merits of its claim for breach of the governing documents and private nuisance.

1. San Diego United Did Breach The CC&Rs Because The 2015 Amendment Was Obtained By Fraud And Is Therefore Voidable And Unenforceable

In March 2015, the Association recorded an amendment purporting to prohibit businesses like Balboa, with the San Diego County recorder. The 2015 Amendment is unenforceable and voidable because there was fraud involved and it was enacted in a manner that failed to conform to the Association's governing documents. (See, e.g., *Costa Serena Owners Coalition v. Costa Serena Architectural Com.* (2009) 175 Cal.App.4th 1175 where a challenge to an Amendment was considered voidable.)

i. Plaintiff Recorded The 2015 Amendment Knowing It Was Not Certified By Two Officers

The Association's CC&R's require an amendment to be certified by at least two officers. At the time the 2015 Amendment was recorded, the Association had three officers: Daniel Burakowski (President), Glenn Strand (Chief Financial Officer), and Peter Michelet (Secretary). (Defs. RJN Ex. 4; Michelet Decl. ¶ 2.) Peter Michelet had been the secretary since 2010. (Michelet Decl. ¶ 2.) The 2015 Amendment was not signed by two of these three officers. (Austin Decl. ¶ 5.) The 2015 Amendment was signed by one officer, Daniel Burakowski as the President, and a man named Edward Quinn who signed as the Secretary when he was not the Association's Secretary. (Plaintiff's NOL, Ex. H, page 4; Austin Decl. ¶ 5; Defs. RJN Ex. 4.) Mr.

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Burakowski was well aware that Mr. Michelet, not Edward Quinn, was the Association's secretary, yet Mr. Burakowski had Edward Quinn sign on behalf of the Association knowing that was improper.

ii. Plaintiff Failed To Keep Documents Related To The 2015 Amendment And Cannot Support The Methodology And Basis For The 2015 Amendment

Plaintiff failed to keep documents related to the 2015 Amendment. The Association's Bylaws, Section 5.4(a), state that it shall be the duty of the Board to cause to be kept a complete record of all of its acts and corporate affairs and to present a statement to the Members at the annual meeting of the Members or at any special meeting when such is requested in writing by any member. (Plaintiff's NOL, Ex. D.)

San Diego United, as the Owner and Member, received over 1,000 pages of documents. (Austin Decl. ¶ 6.) There is no documentation regarding the minutes from any meeting to discuss amending the CC&Rs and it is impossible to ascertain the procedures the Association used to amend the CC&R's. This failure is significant because what the Association attempts to impose upon Defendants is complete shutdown and the Association does this without adequate evidentiary support or record keeping that demonstrates how this happened.

iii. Plaintiff's 2015 Amendment Involved Fraud In the Voting Process Such That The Results Are Invalid

Defendants believe the Association counted votes for units knowing the votes did not count and without these votes, Plaintiff does not have the required supermajority to amend the CC&Rs. Special meeting minutes dated February 13, 2015 stated that 700 of 740 total votes were received from owners entitled to vote…and that to pass the amendment, the Association needed 555 "Yes" votes." (Austin Decl. Ex. 6 page 1.) The minutes state that of the 700 votes, 660 votes were in favor of the 2015 Amendment and 40 votes were against the 2015 Amendment. (*Id.*) Defendants believe this number is incorrect and the 2015 Amendment failed to have a supermajority. First, San Diego United's suites (8863 E and 8861 B) had 40 "no" votes which takes the total to 660.

Second, the record owners for 8855 Suites A-H were not entitled to vote and Plaintiff

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improperly counted 84 votes attributable to 8855 Balboa, Suites A-H ("8855 Balboa"). (Austin Decl. ¶ 7; Austin Decl. Exhibits 1 and 2.) Subtracting 84 from 660 leaves 576 "yes" votes. The record owners of 8855 Balboa were not entitled to vote for the Amendment as they were in a Chapter 7 bankruptcy from October 2013 to April 2015, which was after the Association reported the 2015 Amendment passed. (RJN Exs. 5-10.) Commencement of a bankruptcy case under 11 U.S.C. § 301 (voluntary cases) creates a bankruptcy "estate" by operation of law, which consists of various types of property, including real property. Filing the bankruptcy petition immediately creates a bankruptcy estate comprised of the debtor's legal and equitable property interests. (*In re Friedman* (9th Cir. BAP 1998) 220 BR 670, 671.) Federal bankruptcy law governs the extent to which a debtor's property is included in the bankruptcy estate. (*In re Farmers Markets, Inc.* (9th Cir. 1986) 792 F.2d 1400, 1402.)

Once a petition is filed, property that belonged to the debtor under state law is transformed into property of the estate to include all of the debtor's legal and equitable interests in property at commencement of the bankruptcy and federal bankruptcy law governs the extent to which a debtor's property is included in the bankruptcy estate. (11 U.S.C § 541(a)(1); See *Koch Refining v. Farmers Union Central Exchange, Inc.* (7th Cir. 1987) 831 F.2d 1339, 1343.) The federal district court in which a bankruptcy proceeding is commenced has exclusive jurisdiction over property of the estate. (28 U.S.C. § 1334(e).) Consequently, *debtors relinquish their rights and interests in estate property* upon commencement of a Chapter 7 case, including title and the right to sell or transfer the property. (11 U.S.C. § 521(a)(4).)

In October, 2013, Myounghun Kim and Sherry Yogim Kim jointly filed a petition for Chapter 7 bankruptcy in the Southern District of California and Gerald Davis was appointed the Chapter 7 trustee. (RJN Ex. 5) The joint debtors listed 8855 Balboa Ave, Suites A-H on Schedule A as property of the bankruptcy. (RJN Ex. 6.) At the point the Kim's filed Chapter 7, their status as "record owner" ceased. The Association knew the Kims were in Chapter 7 as the Association was listed on the creditor's matrix. (RJN Ex 5.) This bankruptcy continued through 2014 and into mid-2015 when on April 4, 2015, the Honorable Laura Taylor entered a minute order on the docket that the Chapter 7 estate had been administered thereby concluding the Kim's bankruptcy.

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(RJN Exs. 8-10.)

Third, the record owner for 8861 A did not sign the proxy or the ballot and the Association counted the votes for this unit, or 19 votes. (Austin Decl. ¶ 7; Austin Decl. Exhibits 1 and 2; RJN Ex. 3.) 8861 A's 19 votes must be subtracted from the 576 remaining "yes" votes, which leaves 557.

Fourth, a ballot came in later than February 6 which it appears the Association also counted in its total. (Austin Decl. Ex. 4.) There are no units with less than two votes which means that the supermajority vote failed.

The Association knew it did not have enough votes and actively engaged in fraud in order to pass the 2015 Amendment. These are the instances Defendants have become aware of. Erroneously counting these votes, coupled with the Association's failure to keep records and failure to properly certify the 2015 Amendment shows that the 2015 Amendment was improper and the Association is unlikely to show success on the merits.

2. Plaintiff's Cause Of Action For Nuisance Fails Because The 2015 Amendment Fails

Plaintiff cannot show success on its cause of action for private nuisance. Plaintiff's nuisance claim is predicated on the validity of the 2015 Amendment. Because the 2015 Amendment is invalid and unenforceable, Plaintiff cannot show success on its cause of action for private nuisance.

VI. THE COURT SHOULD DENY THE INJUNCTION BECAUSE DEFENDANTS ARE MOST LIKELY TO BE INJURED

In deciding whether to grant a temporary restraining order or preliminary injunction, the Court not only assesses the likelihood that plaintiff will prevail at trial, but also the interim harm each party will bear should the injunction be granted. The Court's discretion should be exercised in favor of the party most likely to be injured. (*Flavio v. McKenzie* (1960) 177 Cal. App. 2d 274, 279.) In making this determination, the Court will evaluate factors such as (1) the inadequacy of legal remedies; (2) the threat and/or degree of irreparable injury; and (3) preservation of the status quo. (*Vo. v. City of Garden Grove* (2004) 115 Cal.App.4th 425.)

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Here, the Court should deny the preliminary injunction because Defendants, in particular San Diego United, is the party most likely to be injured. San Diego United will experience irreparably injury if the injunction is granted. It will lose the MMCC CUP as a vested property right without due process and will almost certainly never acquire another MMCC CUP. Individuals will immediately lose their jobs, and members are left without a place to get their medicines. Moreover, preserving the status quo also favors denying the injunction. Balboa is open and operating and has been open and operating since before Plaintiff sued Defendants. Granting the injunction alters the status quo and delivers a death sentence to the Defendants.

VII. IF THE COURT GRANTS INJUNCTIVE RELIEF, PLAINTIFF MUST BE REQUIRED TO POST A BOND

Code of Civil Procedure section 529 states that "[o]n granting an injunction, the court or judge must require an undertaking on the part of the applicant to the effect that the applicant will party to the party enjoined any damages…the party may sustain by reason of the injunction…" The amount of the bond is fixed by the judge, exercising sound discretion, based on the probably damage that the enjoined party may sustain because of the injunction. (Code Civ. Proc. § 529; *Asevado v. Orr* (1893) 100 Cal. 293, 298.)

VIII. EVIDENCE NOT SUBMITTED WITH MOVING PAPERS SHOULD NOT BE CONSIDERED

Defendants anticipate Plaintiff will file a reply and submit new evidence with its reply brief. Defendants object. It is improper and violative of motion practice and Defendants' due process rights for Plaintiff to submit new evidence with the reply. (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-1538.) This is not the "exceptional case" referenced in the *Jay* case that would require presenting such additional evidence. Plaintiff has had ample opportunity to develop its arguments, including those against Defendants, prior to submitting its briefing on the September 1, 2017 injunction. Prior to the deadline to file and serve its moving papers, Plaintiff appeared ex parte for a temporary restraining order, Plaintiff opposed Defendants request to dissolve the temporary restraining order, and Plaintiff opposed Defendants request to compel production of certain unredacted documents. Through its participation in these hearings, Plaintiff

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became aware that Plaintiff questioned multiple aspects of its claims including its ability to enforce the 2015 Amendment due to its failure to comply with the Bylaws and CC&Rs including counting erroneous votes and failing to follow internal procedures. Plaintiff also became aware that Defendants questioned Plaintiff's standing because it failed to follow its internal procedures in filing the lawsuit and filed this lawsuit unilaterally and without member knowledge. Defendants respectfully request the Court disregard any new evidence Plaintiffs files in its reply. To the extent the Court considers any newly presented evidence, Defendants request an opportunity to respond with evidence of their own. (*Plenger v Alza Corp.* (1992) 11 Cal.App.4th 349, 362 n. 8; *Alliance Insurance Services Inc. v. Gaddy* (2008) 159 Cal.App.4th 1292, 1307-1308.)

IX. CONCLUSION

Plaintiff requests the Court issue a mandatory injunction shutting Defendants down. Plaintiff makes this request without standing, without demonstrating tangible immediate harm, and with an amendment passed by fraud. Defendants respectfully request the Court deny this request and preserve the status quo by allowing Balboa to continue operating.

DATED: August 21, 2017

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By: _____
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