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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 JUDGE: HONORABLE RONALD L. STYN

DEFENDANTS BALBOA AVE COOPERATIVE, SAN DIEGO UNITED HOLDINGS GROUP, LLC, AND NINUS MALAN'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PRELIMINARY INJUNCTION

[IMAGED FILE]

DATE: September 8, 2017
TIME: 11:00 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 (collectively "Defendants") respectfully submit this supplemental brief in opposition to plaintiff Montgomery Field Business Condos Association's ("Association" or "Plaintiff") motion for preliminary injunction.

I. INTRODUCTION

On September 1, 2017, counsel for the parties appeared at the Association's hearing on its motion for preliminary injunction. The Court's tentative ruling was to deny the motion. After argument and oral testimony, the Court continued the hearing to September 8, 2017 at 11:00 a.m. and requested supplemental declarations related to the Association's insurance and asked the parties to meet and confer on the insurance issue and the validity of the 2015 Amendment prior to the hearing.

Since the September 1, 2017 hearing, Defendants have uncovered additional insurance related information that negates Plaintiff's purported harm and the Association's board produced an emergency executive board resolution purporting to give validity to the unlawful 2015 Amendment (the "September 2017 Resolution"). Defendants have also discovered additional documentary support that shows Peter Michelet was an officer and board member prior to, and during, the 2015 Amendment. For the reasons below, in addition to the argument and evidence submitted by Defendants in their opposition papers, the Court should deny the preliminary injunction.

II. THE 2015 AMENDMENT IS INVALID AND THE ASSOCIATION'S MOST RECENT ATTEMPT TO "FIX" THE INVALIDITY IS UNLAWFUL AND VIOLATES ITS INTERNAL GOVERNANCE DOCUMENTS AND CALIFORNIA LAW

The September 2017 Resolution follows the Association's pattern of utter failure to adhere to the Association's written governance documents (the CC&Rs and the Bylaws). Plaintiff continues to argue the repeated violations amount to an "oh well," that Defendants should get over it. Plaintiff's failure to follow its procedures is not an "oh well" or de minimis. As Defendants argued in their opposition points and authorities, Plaintiff's failure amounts to a due process violation and attempts to strip Defendants of a significant property right. Moreover,

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Plaintiff's most recent attempt to fix the 2015 Amendment amounts to a taking of what can be considered a vested right.

A. The 2015 Amendment Is Unlawful

As argued in the opposition papers, the 2015 Amendment is invalid for several reasons including the Association's failure to act in conformity with the CC&Rs. Plaintiff argues that Ed Quinn was an officer at that time and had authority to sign and certify the 2015 Amendment. Plaintiff has failed to submit any credible or reliable evidence that Ed Quinn was an officer or secretary. The Court, at the September 1 hearing, identified this deficiency and it is remains an incurable deficiency. However, Defendants have previously submitted credible evidence that Peter Michelet was the secretary and a board member along with Glenn Strand and Daniel Burkowski and submit the following additional evidence to show Peter Michelet was the secretary and that Ed Quinn was not an officer or board member.

As early as 2008, the same officers that existed for many years (Peter Michelet 2010-2017, Daniel Burakowski, and Glenn Strand) were engaged in Association business. (See Exhibit 6 of Austin Declaration.) This is more evidence that Peter Michelet was an officer at the time the 2015 Amendment was unlawfully passed.

The Association's sparse record keeping related to board meetings and member meetings evidences the same conclusion. Exhibit 3 to Gina Austin's supplemental declaration includes the only minutes San Diego United received in response to its records request and the Association has failed to produce any additional minutes that document its claims related to Ed Quinn. By way of summary, none of these minutes indicate who the board members and officers are except for those on pages 9, 10, and 12. On pages 9, 10, and 12 of Exhibit 3, it clearly states that Peter Michelet, Glenn Strand, and Daniel Burakowski are the officers and also states that Ed Quinn was in attendance *as an owner.*

The Association's record keeping related to reimbursements also supports the conclusion that Peter Michelet was an officer and board member and Ed Quinn was not. Exhibit 5 of Gina Austin's declaration contains a compilation of Peter Michelet's signature on Daniel Burakowski's reimbursements requests from late 2014. On pages 1 and 2 of Exhibit 5, are clear examples of

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Peter Michelet's signature (one from a declaration filed in this litigation and another on the Association's internal records). Pages 3-8 bear Peter Michelet's signature as approving Daniel Burakowski's reimbursement request. Plaintiff has attempted to argue that Peter Michelet was not an officer during this timeframe, which Defendants have vigorously disagreed with.

The complete absence of a single document other than the 2015 Amendment that shows Ed Quinn is the secretary despite Defendants repeated requests for such documentation from the Association demonstrates that Ed Quinn was not an officer or board member. Defendants continue to uncover mounting evidence that supports the board members and officers were Peter Michelet, Daniel Burakowski, and Glenn Strand. The Association cannot fix this significant defect and the 2015 Amendment remains invalid and unenforceable.

B. San Diego United Acquired A Vested Right When The Conditional Use Permit Was Granted In May 2015 And The Association, As A Quasi-governmental Entity, Cannot Strip That Vested Right By Unlawful Action

It is well accepted that homeowners associations are quasi-governmental in nature. California courts have recognized that homeowners associations parallel in almost every case "the powers, duties, and responsibilities of a municipal government." *Chantiles v. Lake Forest II Master Homeowners Assn.* (1995) 37 Cal. App. 4th 914, 922. As a "mini-government," associations provide to members, in almost every case, utility services, road maintenance, street and common area lighting, and refuse removal. In many cases, associations also provide security services and various forms of communication within the community. There is, moreover, a clear analogy to the municipal police and public safety functions. All of these functions are financed through assessments or taxes levied upon the members of the community, with powers vested in the board of directors ... clearly analogous to the governing body of a municipality. *Cohen v. Kite Hill Community Assn.* (1983) 142 Cal. App. 3d 642, 651. As a quasi-governmental entity, the Association should not be permitted to engage in conduct that would be unlawful if the same conduct occurred by, for example, a municipality or county and the same rights that are applied to land use entitlements with respect to such governmental entities should be applied to the Association as a quasi-governmental entity. For example, the law of vested rights should be

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applied to a homeowners association.

A vested right is acquired when a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government. (*Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 791.) It is also well established that if a governmental agency applies a new law retroactively, the Courts will deem it unconstitutional, if it deprives a person of a vested right without due process of the law. (*Davidson v. County of San Diego* (1996) 49 Cal.App.4th 639, 646 [citing *Rosefield Packing Co. v. Superior Court* (1935) 4 Cal.3d 120].)

Here, it is uncontroverted that San Diego United has a permit issued by the government, the May 2015 conditional use permit for a medical marijuana dispensary. San Diego United, as the property owner, and Balboa, as the permit operator, have performed substantial work and incurred substantial liabilities in good faith reliance upon the conditional use permit issued by the City of San Diego in May 2015. When the conditional use permit was issued, Defendants believe that the 2015 Amendment was invalid and could not be enforced for purposes of depriving San Diego United of its property right and that right became a vested right.

The Association's attempt, in its quasi-governmental capacity, to use the September 2017 Resolution to deprive Defendant of its vested right to the May 2015 conditional use permit to legally operate a medical marijuana dispensary is unlawful. The Association is attempting to enforce a fraudulently passed, fraudulently certified amendment to its CC&Rs that will act as a de facto taking and a significant due process violation.

C. <u>The 2017 Board Resolution Was Not Done In Conformity With The Law And Nor With The Association's Internal Governance Documents</u>

Defendants believe Plaintiff will submit the 2017 Board Resolution in its supplemental papers and argue this 2017 Board Resolution effectuates the 2015 Amendment. Plaintiff's argument fails as outlined below.

1. <u>The "Emergency Executive" Session Was An Improper Forum</u>

On September 5, 2017, the Association's current board of directors held an "Emergency Executive Session." The action item from the meeting minutes read "[t]he Board discussed

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litigation matters and on a motion made, seconded, and unanimously carried, the Board agreed to adopt the resolution attached to these minutes."

Under the Davis-Stirling Act (codified in Civ. Code. §4935), a Board of Directors may adjourn to, or meet solely in, executive session to consider "litigation, matters relating to the formation of contracts with third parties, member discipline, personnel matters, or to meet with a member, upon the member's request, regarding the member's payment of assessments." (Civ. Code §4935.) Although the minutes state the Board discussed litigation, an enumerated action under Civil Code section 4935, it also adopted a resolution, which is not an enumerated item under Civil Code section 4935 that can be taken under an executive session.

Defendants conceded that there are circumstances where a Board is authorized to vote on certain items during an executive session. (See *Smith v. Laguna Sur Villas* (2009) 79 Cal.App.4th 639 where the court held a Board vote to bring a lawsuit against developers was proper in an executive session due to the fear of having to disclose privileged information to individual homeowners.) This is not such a case. The 2017 Board Resolution merits an open forum and full disclosure.

The Association Board secretly adopted a resolution that ratified the signing authority of Ed Quinn, who improperly signed and certified the 2015 Amendment as the Association's secretary. Defendants have submitted ample evidence that shows Ed Quinn was not the secretary in March 2015. Plaintiff, in an effort to end run its issues, has now taken the position that Ed Quinn was simply an "officer" and ratifies his signature on the 2015 Amendment.

This was an improper Board action as the actions that can be taken during executive session are statutorily defined and the 2017 Board Resolution is not one that falls under that category. If the 2017 Board Resolution to ratify Ed Quinn's signatory powers was within the Board's purview, the discussion, deliberation, and consideration taken by the Board should have been done in a Board meeting, open to all members and without secrecy.

2. The 2017 Board Resolution Violates Statutory Law And Case Law

The 2017 Board Resolution is based on inapplicable or distinguishable case law. The Board cites the Corporations Code two California cases in support of its authority to ratify Ed

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Quinn's fraudulent signature as the Association's secretary in 2015.

The 2017 Board Resolution states that Ed Quinn was an officer of the Board of Directors and had the legal authority to execute and bind the Association when he executed the 2015 Amendment. Plaintiff relies on *Consumers Salt Co. v. Riggins* (1929) 208 Cal. 537 ("Consumer Salt"). Plaintiff's reliance on Consumer Salt is misguided. The case, not involving a homeowner's association, revolved around a meeting with stockholders where, on the record and without objection, the stockholders elected a board of directors. That newly elected board of directors then chose a secretary – which was disputed at a later date. The Consumer Salt Court held "a director, as a de facto director[s], may bind the company by his acts, if allowed to continue in his position." (*Id.* at p.541.) The Consumer Salt facts are distinguishable.

There is no documentary support for Ed Quinn's selection as secretary, or even as an Association officer at any time. There is no documentary support for Ed Quinn as a director or a de facto director. Ed Quinn is not on the board and there is no evidence he ever has been. The Association's self serving proclamation dated yesterday does not make it legal or valid. Ed Quinn was not acting as a director or officer at the time he signed the 2015 Amendment as the secretary and has not been an officer or director since that time.

The second case Plaintiff relies upon is *Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, and similar to Riggins, is not analogous to this case and thus does not provide authority for the Board's action. The holding in *Snukal* is that a contract is not invalid because two officers with apparent authority signed the contract. As the court noted in its tentative ruling for the September 1 hearing, this is not a contract and the Association's submission of law related to contracts is inapplicable. The issue here is the invalidity of the 2015 Amendment and not a contract. Because this case does not involve a contract, the holding in *Snukal* is irrelevant.

Lastly, the Association relies on Corporations Code section 313 as support for its impropriety. Corporations Code section 313 has identical language to Corporations Code section 7214. This Court, in its tentative ruling, stated "the court is not persuaded by Plaintiff's reliance on Corporations Code §7214 because this section refers to contracts, etc. entered into by a corporation and "any other person." Plaintiff Board fails to articulate how this section applies to

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the 2015 Amendment." (August 31, 2017 Tentative Ruling of Hon. Ronald L. Styn.) Despite the Court's statement, the Association used this code section as a basis for the 2017 Board Resolution in contradiction to the Court's tentative findings.

Furthermore, item three of the resolution states "[t]he 2015 Amendment was executed and adopted in accordance with Civil Code 6620 and Corporations Code 7214." (September 5, 2017 Montgomery Field Board Resolution.) As stated, the Court has rejected Plaintiff's reliance on section 7214. Civil Code section 6620 provides when an amendment is effective, and Plaintiff cannot state that in 2015, that criteria was met.

At the time Ed Quinn signed and notarized the Amendment, he was neither a Board member of an officer. No evidence other than Daniel Burakowski's statements exists to support such a claim. In the few meeting minutes supplied by the Plaintiff, not once is a reference made to Ed Quinn as an officer or board member. In fact, in the recitation of members present, he is always noted as an owner. Moreover, the declaration of Salam Razuki identifies Ed Quinn's role with the Association by virtue of his nicer office and also states that he was bothered by Daniel Burakowski's request he sign the 2015 Amendment as he was never an officer or direction.

3. The Association's Attempt To Retroactively Ratify Ed Quinn's Signature Is Improper

The Association's attempt to ratify Ed Quinn's authority is invalid. Item 1 of the 2017 Board Resolution states, "[o]n February 26, 2017, Ed Quinn was an officer of the Association's Board of Directors and had the legal authority to execute and bind the Association when he executed the 2015 Amendment." (September 5, 2017 Board Resolution.) Assuming, arguendo that Plaintiff meant to state Mr. Quinn was an officer on February 26, 2015, the Board's ratification does not make it factual.

Ratification typically involves giving validity to the act of another. (See *McCracken v. San Francisco* (1860) 16 Cal. 591, 623.) Here, Plaintiff, through the 2017 Board Resolution, is attempting to give validity not only to Ed Quinn's signing authority but also to him as an officer. Plaintiff failed to provide evidence that Ed Quinn was the Secretary. Now, Plaintiff provides case law that infers that Ed Quinn was a *de facto* officer. As previously shown, the case law in the

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Resolution is irrelevant and does not support Plaintiff's assertion.

Plaintiff's Resolution cannot ratify Ed Quinn as an officer because no such act occurred that made him an officer. The Board did not improperly appoint Ed Quinn as Secretary or as an officer because it never appointed Ed Quinn as a secretary, officer or board member. No evidence exists that the Board ever contemplated, let alone acted, to appoint Mr. Quinn as an officer of the Board. Furthermore, no evidence exists to show that Mr. Quinn acted in the capacity of an officer, outside of his fraudulent signature on the 2015 Amendment. The facts Defendants have submitted show that Ed Quinn was nothing more than an owner. The Association cannot ratify his role as an officer because there was never an act appointing Ed Quinn as an officer, to ratify.

Plaintiff has failed to present a shred of reliable and credible evidence that Ed Quinn was an Association officer when he signed the 2015 Amendment and that he had the authority to sign the 2015 Amendment. Plaintiff failed to pass this according to its governing documents originally and seeks to put a band-aid on that failure by passing this resolution. There are multiple issues with the Association's attempt to remedy the failure including the impropriety according to the CC&Rs and California law.

III. THE ASSOCIATION IS INSURABLE AND PLAINTIFF'S CLAIM TO THE CONTRARY SHOULD BE DISREGARDED

Defendants concurrently submit the declaration of Louie Avila to show that the Association is insurable. Louie Avila's declaration is not contradicted and the Association. The Association claims it is uninsurable because of Balboa. Defendants had an opportunity to discuss the Association's current insurance with Arthur Hopkins; the information Mr. Hopkins provided was illuminating and painted a far different picture than what the Association would have the Court believe.

Mr. Hopkins stated that the Association has a variety of issues that impeded its insurablility including mid-term cancellation due to multiple risk factors including the "armed guards" required by the conditional use permit. Mr. Hopkins also stated that he does not think the

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notice of cancellation can be rescinded and the coverage reinstated but he could contact Farmers underwriting for additional clarification. Mr. Hopkins concluded by stating that there are a variety of factors including, but not limited to, prior claims settled by the insurance carrier, current pending litigation, and a current restraining order against one of the directors/officers that have impacted the Association's insurance.

Defendants have requested Mr. Hopkins oral testimony as Mr. Hopkins' employer will not allow him to submit a written declaration. Mr. Hopkins has a family event this Friday and Plaintiff has not agreed to continue the hearing to allow for his testimony.

The gist of his testimony is that the Association will lose its insurance regardless of the dispensary and that there are a host of other issues unrelated to the dispensary. Defendants have submitted evidence that the Association is insurable and Defendants are also willing to self insure. Defendants also have a policy that has been approved for Balboa and the rest of the Association excluding the claims against Daniel Burakowski and the other open claims.

IV. CONCLUSION

The Association has shown repeated and flagrant disregard for its internal procedures and California law as it relates, at a minimum, to the 2015 Amendment. Daniel Burakowski is using the Association for his own personal agenda and his actions have caused board members to resign and have culminated in a civil restraining order against an employee that has now impacted the Association's ability to bind insurance. The Association has not shown it can prevail on the merits nor has it shown it has any harm. Its attempts to fix the 2015 Amendment are further evidence of its willingness to end run around its procedure and the law and its statement about the insurance border on the patently false. For those reasons, Defendants respectfully request the Court deny the preliminary injunction.

Dated: September 6, 2017

Respectfully submitted,
Austin Legal Group, APC.

Tamara M. Leetham

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