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

8 **SUPERIOR COURT OF CALIFORNIA**
9 **COUNTY OF SAN DIEGO**

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

15 Plaintiff,

16 v.

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

22 Defendants.

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ELECTRONICALLY FILED
Superior Court of California,
County of San Diego

08/03/2017 at 01:25:00 PM

Clerk of the Superior Court
By Cody Newlan, Deputy Clerk

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

**MEMORANDUM OF POINTS AND
AUTHORITIES SUPPORTING
DEFENDANTS' MOTION TO MODIFY
THE TEMPORARY RESTRAINING
ORDER**

ASSIGNED TO: Honorable Ronald L. Styn

DATE: August 4, 2017

TIME: 2:00 p.m.

DEPT: C-62

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Defendants Balboa Ave Cooperative, San Diego United Holdings Group, LLC, and Ninus
4 Malan ("Balboa Ave, et al." or collectively as "Defendants") respectfully asks the Court to
5 modify its August 2, 2017 temporary restraining order. Balboa Ave, et al. asks the Court to grant
6 its request because it will suffer irreparable injury if unable to complete the widening of the roll-
7 up door at 8863 Balboa Ave.

8 **STATEMENT OF FACTS**

9 On August 2, 2017, the Court granted Plaintiff Montgomery Field Business
10 Condominiums Association's ("Montgomery Field or "Plaintiff" or "Association") request for a
11 temporary restraining order enjoining Balboa Ave, et al. from completing construction on the
12 widening of its roll-up door. Balboa Ave, et al. was attempting to complete the construction
13 pursuant to its Conditional Use Permit plans, approved by the City of San Diego on or around
14 July of 2015.

15 At the Ex Parte Hearing, the Hon. Ronald L. Styn granted the temporary restraining order,
16 however he requested Balboa Ave, et al. provide further proof of the statements contained in the
17 Opposition Declaration of Gina M. Austin.

18 Upon further and adequate proof of said claims, Judge Styn would consider modifying
19 and/or dissolving the temporary restraining order.

20 **ARGUMENT**

21 **1. The Board of Directors Lacks Standing To Bring This Action**

22 Ms. Austin's declaration in opposition stated that: Plaintiff's Board of Directors lacks
23 standing to bring this action and lacks standing to file this lawsuit as it was done so in
24 contravention of the bylaws and without appropriate approvals.

25 When a homeowners' association seeks to enforce the provisions of its CCRs to compel an
26 act by one of its member owners, it is incumbent upon it to show that it has followed its own
27 standards and procedures prior to pursuing such a remedy, that those procedures were fair and
28 reasonable and that its substantive decision was made in good faith, and is reasonable, not

1 arbitrary or capricious. *Ironwood Owners Assn. IX v. Solomon*, 178 Cal.App.3d 766, 772 (1986).

2 Defendants Balboa Ave, et al. believes that the Montgomery Field Business
3 Condominiums Association's Board of Director's improperly brought the TRO, as the Board of
4 Director's does not meet the minimum guidelines pursuant to its formation documents. Balboa
5 Ave, et al. believes that Mr. Daniel Burakowski sought the TRO, not due to any claims of
6 malfeasance by other owners or by collective agreement of the Board of Directors, but rather out
7 of a personal issue with Balboa Ave, et al.

8 Article V, Section 5.1 of the Bylaws of Montgomery Field state that the number of
9 directors of the Association shall be three (3). Directors shall be elected or removed by
10 cumulative vote of the Members. Election of directors by the Members shall be by secret ballot.
11 The number of directors may be increased or decreased from time to time, but in no event shall
12 there ever be less than three (3) directors..."

13 Article V, Section 5.2 states that, "Vacancies in the Board shall be filled by a majority of
14 the remaining directors, any such appointed director to hold office until his successor is elected
15 by the Members, who may make such election at the next annual meeting of the Members or at
16 any special meeting duly called for that purpose."

17 Article V, Section 5.12 states that, "Any action required or permitted to be taken by the
18 Board may be taken without a meeting, if all members of the Board shall individually or
19 collectively consent in writing to such action. Such written consent or consents shall be filed with
20 the minutes of the proceedings of the Board..."

21 Article V, Section 5.13 states that, "A majority of the Board shall constitute a quorum
22 thereof. Every act or decision done or made by a majority of the directors present at a meeting
23 duly held at which a quorum is present, shall be regarded as the act of the Board."

24 Article VI, Section 6.1 states that, "Any person may hold two (2) or more offices except
25 that the same person may not serve as president and secretary. The president, vice president and
26 secretary shall be members of the Board."

27 Article VI, Section 6.6 states that, "The secretary shall be ex-officio the secretary of the
28 Board, shall record the votes and keep the minutes of all proceedings in a book to be kept for that

1 purpose. He shall keep the records of the Association.”

2 Article VII, Section 7.1 states that, “The books, records, membership register, minutes and
3 papers of the Association shall be kept at the principal place of business of the Association, and
4 shall at all times, during reasonable business hours, be subject to inspection by any Member or by
5 his duly-appointed representative for a purpose reasonably related to his interest as a Member.
6 [...] Members and directors shall have the right to make copies of such documents.”

7 Article IX states, “The Board shall have the power and authority to enforce the provisions
8 of the Declaration [CC&Rs], these Bylaws and any rules and regulations promulgated by the
9 Board.”

10 Montgomery Field’s President Daniel Burakowski, as a member of the Board, is acting
11 unilaterally by filing this TRO. The Board, per Article IX, has the authority to bring this TRO to
12 enforce certain provisions. However, in order to exercise said authority, the Board must comply
13 with its own Bylaws. Therefore in order to properly exercise its authority, there must be at least 3
14 Board members at any given time (section 5.1), two of the minimum 3 Board members must be
15 the President and Secretary (section 6.1), and the Secretary is required to record the votes,
16 maintain the minutes, and keep the records of the Association (section 6.6).

17 Balboa Ave, et al., through co-defendant Ninus Malan, exercised its right to inspect the
18 books, records, minutes and papers of the Association, at the Association’s principal place of
19 business, during reasonable business hours. There, Mr. Malan was provided only three
20 documents: Special Meeting Minutes dated February 13, 2015, Board Meeting Minutes dated
21 June 10, 2015, and Board Meeting Minutes dated September 17, 2015. He was informed that the
22 records, included presumably the most recent records pertaining to the authorization of this TRO,
23 were kept in off-site storage. It is questionable that the Association would have only three Board
24 meeting minutes from 2015 on hand, whereas the Board records authorizing the filing of the TRO
25 were not on hand. Mr. Malan attests to this in his attached declaration.

26 Balboa Ave, et al. questions the validity of the Montgomery Field Board of Directors
27 status, in that it has obtained a declaration from former Board member and Secretary, Peter
28 Michelet. Mr. Michelet’s Declaration provides he resigned from both roles effective June 3, 2017.

1 Montgomery Field, after June 3, 2017, had no Secretary and did not have a third Board member,
2 both required by the Bylaws.

3 Due to Montgomery Field being unable to produce the required documents authorizing the
4 filing of the TRO, being unable to produce the required documents providing that the Board had
5 the required three members, and being unable to produce the required documents showing a
6 Secretary was appointed in the interim, it believes that Daniel Burakowski is acting unilaterally in
7 making decision on behalf of Montgomery Field – in violation of the Bylaws.

8 **2. Legal Bills For Restraining Order**

9 Ms. Austin’s declaration in opposition stated that Daniel Burakowski is acting as
10 President with unclean hands by using the association’s money as his own personal bank account.

11 Article V, Section 5.6 of the Montgomery Field Bylaws states, “No director shall receive
12 any compensation for the services rendered as a director to the Association; provided, however,
13 directors shall be reimbursed for reasonable expenditures incurred in connection with the business
14 of the Association.

15 Balboa Ave, et al. believes that Daniel Burakowski has either used Association funds or
16 been reimbursed by the Association for legal fees associated with a permanent restraining order
17 filed and granted against him. On July 21, 2017, Anthony Avila, an employee of Balboa Ave, et
18 al., was successful in obtaining a permanent restraining order against Mr. Burakowski. Mr. Avila
19 appeared pro per, whereas Mr. Burakowski was represented by Mandy D. Hexom, the same
20 attorney of record on this TRO. The Hon. Frederick Mandabach found Mr. Avila’s fear was
21 “reasonable”, a “credible threat of violence”, and that Mr. Burakowski “was very active in
22 making this a miserable place.”

23 It is a stretch to believe that intimidation and the credible threat of violence from Mr.
24 Burakowski was related to his role as President of the Association. Therefore it is unreasonable to
25 believe that the legal expenditures he’s made in the defense of himself were for the betterment of
26 or in connection with the business of the Association.

27 Mr. Burakowski’s acts are akin to an employee of a company that is being sued under a
28 theory of vicarious liability. Mr. Burakowski’s actions were more of a frolic, whereby he was

1 acting in his own right causing Mr. Avila's fears and actively creating a miserable place; rather
2 than a mere detour in carrying out his role as President of Montgomery Field.

3 **3. Waiver of Rights**

4 Ms. Austin's declaration in opposition stated that Montgomery Field waived its rights to a
5 temporary restraining order to stop the widening of Balboa Ave, et al.'s existing roll-up door
6 because the Board had previously allowed another resident to widen its exterior opening.
7 Furthermore, Montgomery Field's request for a TRO was an arbitrary and capricious act by Mr.
8 Burakowski, not a reasonably calculated decision by the Board of Directors.

9 The holding in *Ironwood* applies here as well; the Board is seeking to enforce its CC&Rs
10 to compel Balboa Ave, et al. from completing construction on its roll-up door. However, the
11 Board has not shown it went through its own standards and procedures prior to pursuing the TRO.
12 The Association has not shown that its procedures were fair and reasonable. Instead, Mr.
13 Burakowski is operating the Board of Directors in a unilateral matter; there are no records
14 available to show an interim Secretary was appointed, or a record indicating the Board is
15 operating with the minimum three directors required. Lastly, there is no record showing a special
16 meeting called to authorize the filing of this TRO. Mr. Burakowski complains that Balboa Ave, et
17 al. has not complied with the CC&Rs, all the while, operating the Board of Directors in violation
18 of the Bylaws and CC&Rs.

19 Instead, the Association's counsel stated it would not approve the construction, despite the
20 admission that it has not seen plans. Furthermore, the Board's own actions have acted as a waiver
21 to approval of these matters. Balboa Ave, et al. believes that the Board, whether through proper
22 mechanism or not, allowed for the widening of a similar roll-up door of another unit.

23 **4. Defendants Have Appropriate Permits And This Is Not An Emergency As Plaintiff Has** 24 **Been Aware of The Conditional Use Permit Since 2015**

25 Ms. Austin's declaration in opposition stated that Balboa Ave, et al. can show that it has
26 the appropriate building permits and City of San Diego authorization to complete the construction
27 on its unit, as well as Plaintiff having been aware of the Conditional Use Permit since 2015.

28 Defendants have provided declarations from Ninus Malan and Michael Rene Morton that

1 support Ms. Austin’s declaration. The Board of Directors has been on notice since 2015 and
2 Defendants have operated with legal permits from the City of San Diego.

3 **5. Permanent Restraining Order**

4 Ms. Austin’s declaration in opposition stated that there is an existing permanent
5 restraining order issued against Association President and resident Daniel Burakowski.

6 Defendants have provided the transcript from the permanent restringing order hearing, where
7 the Honorable Frederick Mandabach found there to be a “credible threat of violence” and that Mr.
8 Burakowski was “very active in making this a miserable place.” The transcript has been attached
9 to Ms. Austin’s declaration dated August 3, 2017.

10 **6. The Secondary Evidence Rule Required Montgomery Field To Provide Documentary**
11 **Evidence Of Writings Described In Mr. Daniel Burakowski’s Declaration**

12 The secondary evidence rule permits the introduction of otherwise admissible secondary
13 evidence to prove the contents of a writing. It does not excuse the proponent of the evidence from
14 complying with other rules of evidence, most notably the hearsay rule. A writing that passes
15 muster under the secondary evidence rule is not necessarily admissible. The writing still may be
16 inadmissible because of other exclusionary rules of evidence, such as hearsay, opinion, privilege,
17 or irrelevancy. *Molenda v. Dep’t of Motor Vehicles*, 172 Cal. App. 4th 974, 975, 91 Cal. Rptr. 3d
18 792, 797 (2009).

19 Writings must be authenticated before they are received into evidence or before secondary
20 evidence of their contents may be received. (Evid. Code, § 1401.) Authentication means either the
21 introduction of evidence sufficient to sustain a finding that the writing is what the proponent
22 claims it is, or “the establishment of such facts by any other means provided by law” (e.g., by
23 stipulation or admissions). (Evid. Code, § 1400.) The party offering the writing has the burden of
24 presenting sufficient evidence of its authenticity to sustain a finding of fact to that effect. (Evid.
25 Code, § 403, subd. (a)(3).) *Midland Funding LLC v. Romero*, 5 Cal. App. 5th Supp. 1, 8, 210 Cal.
26 Rptr. 3d 659, 664 (2016).

27 Here, Daniel Burakowski (“Burakowski”) is the Board President of Plaintiff, Montgomery
28 Field Business Condominiums Association and at all relevant times he was responsible for

1 carrying out and enforcing the governing documents of the Association, including its CC&Rs and
2 all amendments therein. Daniel Burakowski claims that the 2015 Amendment was created as a
3 result of a vote, which passed with a 94% vote in favor of prohibiting the marijuana activity.
4 Pursuant to Evid. Code, § 1401, Burakowski is required to provide authenticated written
5 documentation of their evidence before Plaintiff's contents may be received.

6 Burakowski, however, has failed to provide any documentation proving that there was a
7 vote, that the vote was for the prohibition of marijuana activity, or that the vote passed with a
8 94% of voters in favor of prohibiting marijuana activity. Burakowski has failed to meet the
9 burden of finding a sufficient evidence of authenticating the existence of a valid amendment to
10 the Association's CC&Rs because he has not provided any written documentation to support a
11 finding that a vote ever occurred.

12 Authenticity of this said "vote" cannot be found on the basis of sufficient evidence that the
13 writing is what Burakowski claims it is without any written evidence documenting Burakowski's
14 claims. Not only has Burakowski failed to provide the original documentary evidence of the
15 Association's vote, he has also failed to provide any copies, recordings, or testimonies as
16 evidentiary proof that a vote even occurred. Absent any written document evidencing the
17 existence of a vote that created the 2015 Amendment, there cannot be a finding that Burkowski's
18 assertions are what he claims them to be.

19 20 CONCLUSION

21 The Court should dissolve Plaintiff's TRO because sufficient evidence has been presented
22 that shows the Plaintiff has operated outside its own operating documents while attempting to
23 arbitrarily and capriciously enforce them. Sufficient evidence has been presented through
24 declarations and attached exhibits that the Plaintiff lacks standing to bring the action, that it was
25 done in contravention of its operating documents, that the President is operating with unclean
26 hands, that Defendants' have placed Plaintiff on notice of construction months before
27 construction began, and that the President of the Association has a personal vendetta against
28 Defendants. We respectfully request the Court to dissolve the TRO for the aforementioned

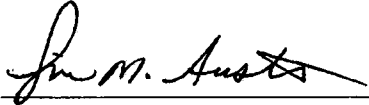
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reasons.

DATED: August 3, 2017

AUSTIN LEGAL GROUP, APC

By: 

Gina Austin/Tamara Leetham
Attorneys for Defendants Balboa Ave
Cooperative, San Diego United Holdings
Group, LLC and Ninus Malan