Case No. B216386

COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

ANDREW SHAYNE and TARZANA SHAYNE,

Plaintiffs-Respondents,

v.

SUNSET MESA PROPERTY OWNERS ASSOCIATION, INC.,

Defendant-Appellant,

APPELLANT'S OPENING BRIEF

APPEAL FROM THE SUPERIOR COURT FOR THE COUNTY OF LOS ANGELES,
CASE NO. BC 326556

The Honorable Terry A. Green Presiding

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, Second APPELLATE DISTRICT, DIVISION 8	Court of Appeal Case Number: B216386
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	FOR COURT USE ONLY
APPELLANT/PETITIONER: Sunset Mesa Property Owners Assn., Inc. RESPONDENT/REAL PARTY IN INTEREST: Andrew and Tarzana Shayne	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (*Check one*): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Sunset Mesa Property Owners Association, Inc.

2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☑ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (*Explain*):
(1) Sunset Mesa Property Owners Assn.	Appellant
(2) Andrew Shayne	Respondent
(3) Tarzana Shayne	Respondent
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: 1/21/2010

Joseph S. Klapach
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TREATISES

I. INTRODUCTION

This is an appeal from the denial of an anti-SLAPP motion filed by a homeowners' association not subject to the Davis-Sterling Act. The appeal raises two fundamental questions:

(1) Can a trial court invalidate a community's Covenants, Conditions, and Restrictions ("CC&Rs") without including as indispensible parties all of the homeowners who will lose property rights through the invalidation?

(2) Can a trial court impose its own standards for amending a community's CC&Rs beyond those provided in the CC&Rs?

Appellant Sunset Mesa Property Owners Association, Inc. (the "Association") submits that these questions must be answered "no" and, therefore, that the trial court erroneously denied the anti-SLAPP motion.

Although this Court has heard an earlier effort to appeal by the now-Respondents, it is important to understand the dispute's factual context. Sunset Mesa is a neighborhood near Malibu that sits on a terraced mesa overlooking the Pacific. The original developers carefully built the homes so that those higher up on the mesa would have an ocean view looking over the homes further down the mesa. Since its development in 1962, Sunset Mesa has been governed by CC&Rs imposing architectural limits, including a provision that prevents construction blocking the ocean views of other homeowners. For four decades, the community followed this rule and, as a result, there are still ocean views to protect.

In the early 2000s, Respondents claimed for the first time that the long-standing and universally-held view of the CC&Rs was absolutely wrong, and that the CC&Rs allowed homeowners to block their neighbors' ocean views. With their valuable and irreplaceable views threatened, Sunset Mesa's homeowners asked the Association for help. But the CC&Rs provided that only the *homeowners* could amend the CC&Rs; they gave the Association no role in amendments. So the Association did what it could: It

urged the homeowners to amend the CC&Rs to clarify beyond any doubt that homeowners could not build McMansions blocking their neighbors' ocean views. The Association presented a proposed amendment to the homeowners, advocated its approval, and published the results of their vote in a newsletter and then later in a publicly filed declaration.

In response, Respondents filed this litigation. From its inception, Respondents' primary goal has stayed the same: a declaration allowing them to add another story to their house, regardless of how many other homeowners their addition would deprive of ocean views. From 2004 through 2008, across their first five complaints, Respondents repeatedly insisted that every homeowner in Sunset Mesa must be a party to this action. In their sixth complaint, however, Respondents dramatically reversed course and alleged for the first time that they could obtain complete relief by suing only the Association. Respondents' new strategy is both obvious and improper: because they cannot prevail in a proper adjudication against the neighbors whose rights they seek to destroy, they seek to litigate against a straw man – the purportedly evil Association.

Respondents' new theory of the case suffers from two fatal flaws.

First, California law requires Respondents to join in this action all parties who have an interest that their claims would injure or affect. Respondents have long acknowledged that this action would "not only affect [appellants] but every other one of the four hundred and fifty households within Sunset Mesa." (*Farwell v. Sunset Mesa* (2008) 163 Cal.App.4th 1545, 1548, quoting Appellants' Brief.) Although Respondents still seek the same relief they have always pursued – an order allowing them to build up their home without regard to others' views – they now proceed only against the Association. Respondents have never explained how they can square this view with California law, for a simple reason: they cannot.

Second, and equally fatal to their claims, Respondents' desire to sue only the Association – a classic retaliation against an *organizer* of their opponents rather than the opponents themselves – has twisted their case into knots, forcing them to seek redress for the Association's speech through claims they can neither plead nor prove. Respondents do not contend that any signatures by individual homeowners approving the amended CC&Rs were defective, or that more signatures were necessary to create a majority. Respondents did not submit the declaration of a single homeowner stating that he or she was "misled" into voting for the proposed amendment by the Association's speech urging a "yes" vote. Instead, Respondents based their entire case on the legal opinions of two retained legal experts. One of these asserted experts "opined" on a pure question of law, arguing that no amendment to the CC&Rs could ever occur – despite the existence of an amendment provision – under her interpretation of the CC&Rs. The other asserted expert argued that the homeowners' amendment of the CC&Rs failed under the legal standards of state labor law and Davis-Stirling Act elections – even though neither standard applies to Sunset Mesa, and the CC&Rs themselves *do not even require a vote*.

The trial court erred in concluding that the Association's advocacy that the homeowners should amend the CC&Rs was not protected speech under the First Amendment. The trial court further erred in finding that Respondents had established a probability of ultimately prevailing based not on facts concerning the actual amendment but rather on the arguments of two experts who addressed only on pure issues of law.

The Association urged the homeowners to amend the CC&Rs, and a majority of the homeowners did so. Having lost the battle of public opinion, Respondents ask the courts to overturn the results. Respondents' claims not only arise from the Association's protected speech, but also they lack merit. The trial court erred in denying the Association's special motion to strike.

II. STATEMENT OF FACTS

A. The Developers Of Sunset Mesa Record CC&Rs To Protect The Community's Ocean Views

Sunset Mesa is a community of 451 homes near Malibu, California that overlooks the Pacific Ocean. 6AA1393. Since its founding in 1962, Sunset Mesa was developed, marketed, sold, and maintained as an ocean-view community. 6AA1393. The neighborhood sit on a terraced bluff, with each row of homes seeing over those beneath, like moviegoers at a modern theater, so that the greatest possible number of homes can each enjoy an ocean view. 3AA659. These ocean views are extremely valuable and are regularly used to promote Sunset Mesa homes. 5AA1245-50.

Sunset Mesa's developers recorded CC&Rs governing the planned development. 6AA1398-1405. The CC&Rs were recorded for nine separate tracts as each was completed and readied for sale. 6AA1393, 1411. Although there were nine separate sets of CC&Rs for the nine separate tracts, each provided explicit protection for the homeowners' ocean views, stating that "[i]n no event shall any fence, plants, hedges, or any other structure or device be placed on any lot or any part thereof if the placing thereon will interfere with ocean views." 6AA1400, 1411. The CC&Rs established an "Architectural Committee" to exercise architectural control and to approve any proposed additions or alterations. 6AA1400.

The CC&Rs allowed amendment by a majority of homeowners in each tract. 6AA1399. Specifically, they required that "an instrument signed by a majority of the then owners of the lots has been recorded agreeing to change [the covenants] in whole or in part." 6AA1399. They did not require anything more than a majority or specify how a majority should be obtained. 6AA1399. Three months after recording the CC&Rs, the developer in fact amended the ocean view protection provision of the CC&Rs for one of the Sunset Mesa tracts. 20AA5325-26.

B. The Sunset Mesa Homeowners Delegate The Authority To Exercise Architectural Control To Appellant Sunset Mesa Property Owners Association, Inc.

In 1963, residents of Sunset Mesa formed Appellant Sunset Mesa Property Owners Association, Inc. (the "Association"), a California non-profit mutual benefit association. 3AA663. The Association owns no real property or common facilities; it has no authority to assess, tax, or lien; and membership in the Association is voluntary. 3AA663. Because Sunset Mesa has no common areas, the Association is not subject to the Davis-Stirling Common Interest Development Act, Civil Code § 1350, *et seq.* 3AA663. The Association is neither a party to the CC&Rs nor mentioned anywhere in the CC&Rs. 6AA1398-1405.

The original members of the Architectural Committee described in the CC&Rs were affiliated with the developer. 3AA662. In 1965, with construction complete, the committee members resigned and appointed five homeowners to serve on the Architectural Committee. 3AA689. A year later, those members resigned and appointed the "Architectural Committee of the Sunset Mesa Property Owners Association" to serve in their place. 3AA690-91.

In 1982, the Association recorded a "Declaration of Delegation of Authority" stating that a majority of the owners of each tract in Sunset Mesa had voted to delegate the authority of the Architectural Committee described in the CC&Rs to the Association. 3AA692-95. The Declaration confirmed that the Association had "all rights, powers, duties, and authorities of the architectural committee described in the CC&Rs" for "each of the respective tracts within Sunset Mesa." 3AA695.

For forty years, the Association has exercised architectural control over Sunset Mesa . 6AA1393, 3AA 690-91, 695. Since its development, homeowners have commonly understood that Sunset Mesa's CC&Rs

prevented a homeowner from renovating his or her home in a way that would block another homeowner's ocean view. 6AA1393.

C. Respondents Argue That The CC&Rs Do Not Preclude Them From Blocking Their Neighbors' Ocean Views

In 1993, Respondent Andrew Shayne purchased a home in Sunset Mesa. 5AA1579; 14AA3753. In 2000, he moved to a different home in Sunset Mesa, which he would later share with his wife, Respondent Tarzana Shayne. 5AA1583; 14AA3753. Respondents' current home is located at the bottom of the mesa – *i.e.*, the "front row" of the terraced bluff. 14AA3753-54. Other homes cannot obstruct Respondents' ocean view, but Respondents can obstruct ocean views held by their neighbors above them on the terraced bluff. 14AA3753.

In 2001, Respondents publicly took the position that the CC&Rs allowed them to expand their home regardless of the ocean views of the neighboring homeowners. 6AA1393; 14AA3754-55. Respondents argued that, although the CC&Rs protect ocean views from obstruction by "any fence, plants, hedges, or any other structure or device," a house is not a "structure" and therefore can be freely expanded to block others' ocean views. 6AA1393.

D. The Association Advocates That The Homeowners Amend The CC&Rs, Circulates Ballots To The Homeowners, And Publishes The Results Of The Vote

In response to Mr. Shayne's statements regarding the CC&Rs, many homeowners contacted the Association to express concern that Respondent's interpretation would lead to blocking their ocean views and the destruction of Sunset Mesa as a community. 6AA1393. After much consideration, the Association determined that the best way to protect all Sunset Mesa homeowners would be to amend the CC&Rs to re-affirm, beyond any possible doubt, the long-held understanding that their ocean

views could not be obstructed by any structure, including a house. 6AA1394. The Association prepared Amended and Restated CC&Rs (hereafter, the "amended CC&Rs"), which provided that "no structure, including but not limited to dwellings, homes, residential structures and incidental structures, may be erected, altered or reconstructed so as to interfere with presently existing ocean views." 6AA1394.

Because only Sunset Mesa's homeowners could amend the CC&Rs, the Association presented its proposal to the homeowners for approval. 6AA1394. The CC&Rs allowed amendment upon recordation of "an instrument signed by a majority of the then owners of the lots … agreeing to change [the covenants] in whole or in part." 6AA1399. They imposed no other requirement. 6AA1399. The CC&Rs were silent, for example, regarding how a majority should be assembled; they did not require a formal "election," or indeed provide any specific process to follow. . 6AA1399. Although the Association had many other options, it deliberately chose an open, inclusive process designed to involve the entire Sunset Mesa community in this important discussion.

In June 2004, the Association held a widely attended annual meeting of the Sunset Mesa homeowners. 6AA1394-95. At this meeting, the Association gave a lengthy presentation on the proposed amendments and urged the homeowners to exercise their right to amend the CC&Rs. 6AA1394-95. Many homeowners spoke at this meeting both for and against the proposed amendment, including Respondent Andrew Shayne. 6AA1394-95. The Association also held other meetings in 2004 for the express purpose of discussing and urging amendment of the CC&Rs. 9AA2444; 1AA2758-59; 11AA 2781. During 2004, whether to amend the developer's CC&Rs was the most significant issue in the Sunset Mesa community. 6AA1394-95.

The Association circulated various drafts of the proposed amendments to the CC&Rs to Sunset Mesa homeowners. 9AA2431-2443, 2458-64; 10AA2747-49. Various homeowners responded to these drafts, some in written form. 9AA2444, 2446; 11AA2823, 2832-36. The Association responded with letters hand-delivered to Sunset Mesa residents. 9AA2444, 2446, 2449-61; 11AA2806-2812. The Association also published articles in the monthly community newsletter, arguing for the proposed amendment to the CC&Rs. 6AA1394.

In September 2004, the Association circulated ballots to the homeowners asking them amend the CC&Rs. 6AA1395; 16AA4317-38. The ballots required the voting homeowners to affirm that they were legal owners of a Sunset Mesa property, sign and date the ballot, and print the street address for their property. 16AA4323. Each ballot was accompanied by an information packet prepared by the Association. 16AA4317-38. In the information packet, the Association urged the homeowners to amend CC&Rs and explained why the Association believed that the amendment was necessary. 16AA4296-97, 4301. Because the CC&Rs required a majority of the properties in each tract, not a majority of the returned ballots, executing a "no" ballot had no effect greater than returning no ballot at all. 6AA1399. The Association nevertheless provided a "no" option, so that dissenting homeowners could register their objections; homeowners of 43 properties, including Respondents, did so. 16AA4323, 6AA1408.

The Association retained an accounting firm to collect and tabulate the ballots. 6AA1395. The Association periodically contacted the accounting firm to learn which ballots had been returned. 16AA4172-4294. Using this information, the Association contacted homeowners who had not yet returned ballots, and urged them to amend the CC&Rs. 16AA4433-34.

In December 2004, the accounting firm advised the Association that a majority of the lot owners in each of the eight voting tracts – 299 of the 342 voting homeowners and 299 of the 451 total properties in Sunset Mesa – had agreed to adopt the amended CC&Rs. 6AA1395, 1407-08. The Association published this news in a special edition of its community newsletter and informed the homeowners that formal recordation of the results would follow. 6AA1395.

In May 2005, the Association published the results of the vote in a Declaration recorded with the Los Angeles County Recorder's Office. 6AA1395-96. The Declaration stated that the Sunset Mesa homeowners had voted on whether to amend the CC&Rs, and that a majority of the lot owners had voted in favor of the amendment. 6AA1411-12. The Declaration attached the amended CC&Rs and ballots from each tract as exhibits. 6AA1416-1508. The Declaration also attached a copy of the accounting firm's summary of the results. 6AA1407-08.

E. Respondents File This Lawsuit Challenging The Association's Efforts To Persuade The Sunset Mesa Homeowners To Amend The CC&Rs

1. The First Five Complaints

In December 2004, Respondent Andrew Shayne and several other plaintiffs filed the original complaint in this action challenging the validity of the homeowners' vote and the amended CC&Rs. 1AA27. The complaint named as defendants the Association, four of its directors, and "Does 100-1,000," identified as the "other property owners within the Tracts." 1AA28. The Complaint stated that plaintiffs "will amend this Complaint to show the true names [of the Sunset Mesa homeowners] when same have been ascertained." 1AA28.[1] The complaint further alleged that,

[1] Respondent's counsel later repeated this representation to the Association's counsel and the court. 1AA123; 3AA868; 2 RT A-3.

absent the requested judicial relief, "plaintiffs will be required to engage in a multiplicity of actions on each occasion on which The Association … or other homeowners in the Tracts or Neighborhood Tracts purport to claim some right over plaintiffs' property or impose some limitation on plaintiffs' ability to improve their property." 1AA38.

The Association demurred to the complaint. 1AA68. In response, Respondents filed a First Amended Complaint ("First AC"), which was nearly identical to the original complaint except that it deleted allegations purporting to assert a derivative claim against the Association on behalf of its members. 1AA83-112. Like the original complaint, the First AC named the "other property owners within the Tracts" as "Doe" defendants and alleged that Respondents faced "a multiplicity of actions" from "other homeowners in the Tracts." 1AA84, 93.

In June 2005, Respondents' counsel stated at a Case Management Conference that he had just learned that the Association had recorded the amended CC&Rs, and that plaintiffs therefore would amend the complaint to allege new claims in response. (2 RT A-2.) Respondents then filed a Second Amended Complaint ("Second AC"), which repeated the Doe allegations about also named more than 200 Sunset Mesa homeowners as defendants to the action. 1AA128-33.

The Association moved to strike the punitive damages allegations from the Second AC. At the hearing, Respondents' counsel conceded that plaintiffs "have to sue every homeowner" because "these amended CC&R's have now clouded our title, have affected our relationship with every other homeowner in the community, and ha[ve] affected everyone's property value adversely at the same time." 2 RT B-6, B-7.

In June 2006, eleven of the named homeowners demurred to the Second AC on the ground that Respondents had failed to join all Sunset

Mesa homeowners as indispensable parties to the action. 1AA232-34. The trial court sustained the demurrer with leave to amend. 2AA318-19.

Respondents filed a Third Amended Complaint ("Third AC") in September 2006. 2AA320-79. The Third AC contained essentially the same allegations as the prior complaints, but re-cast the lawsuit as a defendant class action and named the Association as the putative class "representative." 2AA322-23. The Third AC also dropped the previously alleged cause of action for slander of title. 2AA333-37. In November 2006, the Association demurred to the Third AC on the ground that it was not a proper class representative. 2AA380-82. The trial court sustained the demurrer with leave to amend. 2AA484-87.

Respondents filed a Fourth Amended Complaint ("Fourth AC") in March 2007. The Fourth AC also alleged a defendant class action but, this time, Respondents named the Association's volunteer directors as class representatives. 2AA488-91. Once again, the Association demurred; once again, the trial court sustained the demurrer with leave to amend. 3AA647.

Instead of amending, however, Respondents filed a notice of appeal, claiming that the trial court's order sustaining the demurrer was a "death knell" to the asserted class action. 3AA648. This Court dismissed this appeal on June 18, 2008, for lack of jurisdiction. In a published opinion, the Court described Respondent's position in the lawsuit as follows: "Appellants 'seek a judicial declaration regarding the validity of the attempted amendments of covenants governing home building in their community, known as Sunset Mesa, and seek to quiet title to their real properties as the attempted amendments purport to prevent [appellants], or anyone else, from ever renovating or otherwise changing their own homes. As such, the attempted amendments not only affect [appellants] but every

other one of the four hundred and fifty households within Sunset Mesa.'" (*Farwell v. Sunset Mesa* (2008) 163 Cal.App.4th 1545, 1548.)

2. The Fifth Amended Complaint

On October 7, 2008, Respondents filed the operative Verified Fifth Amended Complaint ("Fifth AC"). 3AA658-720. Unlike the five prior complaints, the Fifth AC does not include the Sunset Mesa homeowners as defendants in any form – whether as Doe defendants, individually, or as members of a purported defendant class. Rather, the Fifth AC purports to obtain the requested relief by naming only the Association as a defendant. 3AA658-59. The Fifth AC also alleges new causes of action for slander of title and negligence and adds a new plaintiff, Tarzana Shayne. 3AA658.

As with the five prior complaints, the Fifth AC alleges that the Association "presented the issues and conducted the balloting over the proposed CC&Rs amendment in an unlawful, illegitimate and unfair way, slanted in favor of amending the CC&Rs…." 3AA659-60. Respondents allege:

- "[T]he 'information' disseminated by the Association and the Directors was false, misleading and skewed towards the 'yes' vote under circumstances in which the 'no' camp was not given an equal or fair opportunity to offer or assert their arguments." 3AA667.
- "The 'independent accountant' … provided The Association with information regarding the ballots and balloting that the accountant refused to release to anyone else…. Based on this inside information, The Association systematically contacted the nonvoters (literally going door to door) and pressured them to vote 'yes.'" 3AA667-68.
- "The Association declared 8 of the 9 tracts had voted by a majority of the homeowners to amend the CC&Rs as recommended by the Board," when, in fact, the no-votes had prevailed. 3AA668.

- "The Association represented that it would not record the purported amended CC&Rs until this dispute had been resolved," yet did so anyway. 3AA670.

The Fifth AC alleges that these actions by the Association were "tantamount to unlawful electioneering, unfair, illegitimate and deprived Plaintiffs of due process of law." 3AA667-68. It further alleges that the CC&Rs were not properly amended in 1982 to empower the Association to exercise architectural control (3AA663-64); that the CC&Rs can never be amended except on the ten-year anniversary of their recording (3AA670); and that the CC&R's requirement of "an instrument signed by a majority of the then owners of the lots" (3AA671) actually required *notarized* signatures, despite the words of the provision (6AA1399).

The Fifth AC asserts four causes of action. The first cause of action is for declaratory relief. This claim asks the court to declare, among other things, that the vote approving the amended CC&Rs was invalid and that the Association has no power to enforce the amended CC&Rs or exercise any architectural control. 3AA672-73. The second cause of action is for quiet title. This claim alleges that "[t]he adoption of the Amended CC&R (the voting) was void" and that the resulting amended CC&Rs "are a cloud on Plaintiffs' property rights." 3AA674. The third cause of action is for slander of title. This claim alleges that the Association's litigation counsel represented that it would not record the amended CC&Rs while this lawsuit was pending, but the Association did so anyway. 3AA675. The fourth cause of action is for negligence. This claim alleges that the Association breached a "duty of reasonable care" by "failing to properly and fairly conduct the election." 3AA675-76.

As relief, Respondents seek an order declaring that the vote and the amended CC&Rs are invalid, a judgment expunging the amended CC&Rs

from Respondents' property, and compensatory and punitive damages. 3AA676-79.

F. The Trial Court Denies The Association's Demurrer And Anti-SLAPP Motion

In response to the Fifth AC, the Association filed a demurrer, a motion to strike, and an anti-SLAPP motion. The demurrer and motion to strike set forth the many deficiencies in the Fifth AC. 3AA721-42, 744-64. In the anti-SLAPP motion, the Association argued that Respondents' claims arose out of the Association's protected activity in advocating that the homeowners amend the CC&Rs. 4AA1168-69. Following its demurrer and motion to strike, the Association also argued that Respondents had failed to plead or prove their claims. The Association contended, among other things, that Respondents had failed to join the other Sunset Mesa homeowners as indispensable parties; Respondents' claims were barred by the statute of limitations; and the Sunset Mesa homeowners had complied with the minimal requirements governing the amendment of the CC&Rs. 4AA1169-72; 20AA5300-05.

On December 19, 2008, the trial court overruled the Association's demurrer and denied its motion to strike. 7AA1749A. The trial court focused on the Court of Appeal's opinion dismissing Respondents' prior appeal for lack of jurisdiction, even though that opinion specifically disclaimed any ruling beyond jurisdictional issues. (*Sunset Mesa*, *supra*, 163 Cal.App.4th at p. 1547, 1553.) The trial court stated that it was "trying to read the tea leaves" in the dismissal opinion, and stated that believed that "Division 8 was sending me a message" in its dismissal opinion, which was that "[t]hey were not at all hostile to plaintiffs' position." 3 RT G-32, G-33.

On May 4, 2009, the trial court denied the Association's anti-SLAPP motion. 20AA5492-97. The trial court concluded, as a threshold matter, that Respondents' claims did not implicate protected activity because the Fifth AC did not challenge "Defendant's advocacy of amending the CC&Rs, but the *way* in which Defendant went about doing so." 20AA5493. The trial court proceeded to analyze the Respondents' four causes of action, finding that Respondents had shown a probability of success on each. 20AA5494-96.

The trial court also overruled the Association's objections to the declarations offered by Respondents' two expert witnesses. 20AA5497. The first such witness was Susan French, a professor at UCLA Law School, who declared that "the validity of the Amendment of the [CC&Rs] is subject to serious challenge" on the various legal theories advanced by Respondents. 14AA3725. The second was Kenneth Mostern, an election administrator, who declared that the vote undertaken by the Association was not conducted according to "industry standards" that he derived from state labor and Davis-Stirling Act elections. 14AA3735, 3749-50. The Association had objected to Susan French's declaration on the ground that she sought to testify about legal issues that fall within the exclusive province of the court. 20AA5380-82. The Association had further objected to Mr. Mostern's declaration on the ground that (i) he was a non-lawyer purporting to opine about the "fairness" of an "election" based upon strictly legal standards; and (ii) he failed to demonstrate that the legal standards upon which he based his opinion (*i.e.*, labor elections and Davis-Stirling Act elections) applied to this matter, which involved neither type of election. 20AA5453-56.

On May 21, 2009, the Association filed a timely notice of appeal from the trial court's order denying the anti-SLAPP motion. 20AA5498.

III. STATEMENT OF APPEALABILITY

An order denying an anti-SLAPP motion is appealable under Code of Civil Procedure sections 425.16(i) and 904.1(a)(13).

IV. STANDARD OF REVIEW

This court reviews *de novo* an order denying an anti-SLAPP motion, after conducting an independent review of the record. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055; *Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 929.)

V. ARGUMENT

A. The Association Met Its Burden Under The First Prong Of The Anti-SLAPP Analysis Because Respondents' Claims Arise From The Association's Protected Activity Of Advocating That Homeowners Amend The CC&Rs

Respondents' claims arise entirely from the Association's protected speech in advocating that Sunset Mesa homeowners amend their CC&Rs. Respondents allege that the Association (i) advocated that homeowners exercise their right to amend the CC&Rs (3AA667-68); (ii) circulated forms for them to exercise that right (3AA667-68); and (iii) published the results in a publicly filed document (3AA670-71). The Association could do nothing more, as ***the Association had no power to amend the CC&Rs***. The Association could act *only* as an advocacy group – a fact which Respondents themselves admit and allege. 3AA659-60. Advocacy by a homeowners association on an issue of interest to the community falls squarely within the anti-SLAPP statute. The trial court thus erred in holding that Respondents' claims did not arise out of protected activity.

The trial court's contrary determination that the activity here involved a "mixture" of both protected and unprotected activities (20AA5493-94) improperly attempts to separate the Association's advocacy in urging the

homeowners to amend the CC&Rs from the method it used to engage in such advocacy. As demonstrated below, this effort to separate the Association's speech from the manner in which it spoke is futile. The trial court attempted to divide an undividable whole and ignored the gravamen of plaintiff's claim, which is that the Association unfairly presented the amended CC&Rs in a way that was biased in favor of the amendment.

Under the first prong of the anti-SLAPP analysis, a court looks at the words or conduct attacked by the plaintiff. "The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability – and whether that activity constitutes protected speech or petitioning." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92; see *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2003) 133 Cal.App.4th 658, 671.) Because courts must examine each cause of action individually (CCP § 425.16(b); *Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141, 150), Respondents' causes of action are discussed separately below.

1. <u>Negligence</u>

Respondents' negligence claim seeks recovery from the Association for "failing to properly and fairly conduct the election." 3AA676. This claim cannot survive substantive scrutiny because the Association was free to urge that the homeowners vote in favor of the amendment. But the first prong considers only whether the allegations arise from speech. The gravamen of Respondents' claim is that the Association unfairly influenced the homeowners by presenting the proposed amendment in an unbalanced manner. The Fifth AC alleges:

- The Association "presented the issues and conducted the balloting over the proposed CC&Rs amendment" in a way that was "slanted in favor of amending the CC&Rs." 3AA659-60.

- "[T]he 'information' disseminated by the Association and the Directors was false, misleading and skewed towards the 'yes' vote under circumstances in which the 'no' camp was not given an equal or fair opportunity to offer or assert their arguments." 3AA667.

- The Association used "inside information" to "systematically contact[] the nonvoters (literally going door to door) and pressure[] them to vote 'yes.'" 3AA667-68.

In short, Respondents claim that the Association "unfairly" influenced the homeowners *through its speech*, which violated a supposed duty to remain neutral. Everything the Association did to persuade the homeowners to approve the amendment – including the so-called "election" – was speech or acts in furtherance of speech.

Advocacy by a homeowners association or an individual homeowner on an issue important to the community is speech "in connection with a public issue or an issue of public interest" protected by the anti-SLAPP statute. (CCP § 425.16(e)(4).) Thus, in *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, the court held that statements by a group of homeowners encouraging the other homeowners to change the association's governance system and hire a professional management company were protected activity under the anti-SLAPP statute. (*Id*. at p. 479.) Similarly, in *Ruiz v. Harbor View Community Association* (2005) 134 Cal.App.4th 1456, the court held that statements by a homeowner as to "whether the architectural guidelines had been evenhandedly enforced" by the association related to a governance issue of potential interest to all homeowners and, therefore, constituted protected activity under the anti-SLAPP statute. (*Id*. at p. 1470; cf. *Macias v. Hartwell* (1997) 55 Cal.App.4th 669, 672 [distributing flyers to union members to influence election of its officers protected under anti-SLAPP statute].)

Although the trial court agreed that Respondents' claims implicated the Association's protected speech, it nevertheless declined to apply the anti-SLAPP statute. 20AA1393. The trial court distinguished between "Defendant's advocacy of amending the CC&Rs" and "the *way* in which Defendant went about doing so," and ruled that the anti-SLAPP statute protected the former but not the latter. 20AA1393. In so doing, the trial court misunderstood Respondents' claims and misread both this Court's precedent and the anti-SLAPP statute itself.

First, the trial court's asserted distinction finds no support in Respondents' own allegations. The Fifth AC does not confine itself to "the *way* in which" Appellant spoke; it directly attacks Appellant's speech itself. Even the trial court recognized this. In ruling on Appellant's demurrer, the trial court stated that the "gravamen" of the negligence claim was that the Association engaged in "unlawful electioneering" by "present[ing] the issues" in a way that was "slanted in favor of amending the C.C. and R.s," and by disseminating "information" that "was false, misleading, [and] skewered towards the yes-vote." 3 RT G-3. The Fifth AC did not change between the demurrer and anti-SLAPP hearings; the trial court erred by inventing a distinction absent from Respondents' own allegations.

Second, even if Respondents had sought to separate the Association's speech from "the *way* in which" it spoke, the law allows for no such distinction. The controlling decision by Division Seven of this Court in *Roberts v. Los Angeles County Bar Association* (2003) 105 Cal.App.4th 604, squarely rejects any attempt to distinguish between the Association's "advocacy" and the "process" underlying it. 20AA5493. In *Roberts*, a judicial candidate received a "not qualified" rating from Los Angeles County Bar Association and then filed suit claiming the evaluation process was unfair. (*Id.* at p. 611-12.) The trial court found that anti-SLAPP statute did

not apply because "this case is not about the Bar Association's evaluation, but rather, is about the process of that evaluation." (*Id.* at p. 614.) But the court rejected that distinction – the same distinction drawn here. The court held that "although [plaintiff's] action was an attack on the process of the evaluations, that process was inextricably intertwined with and part and parcel of the evaluations." (*Id.* at p. 615.) Thus, because "the action arose from the Bar Association's exercise of its constitutional right of free speech in connection with a public issue, … the trial court erred in finding the anti-SLAPP statute did not apply." (*Ibid.*)

Just as *Roberts* found no distinction between the Bar Association's ultimate speech and the process used to reach it, there can be no distinction between Appellant's speech and its decision to send ballots to each home. Instead, the Association's so-called "means" of speaking was *itself* speech. The CC&Rs did not require that any specific procedure be followed to effect an amendment. 6AA1399. The Association could have gathered the required signatures from individual homeowners by going door-to-door, without holding a public meeting or even telling Respondents. Such conduct would plainly constitute protected activity. (*Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, 908-09; *Meyer v. Grant* (1988) 486 U.S. 414, 421-22.) The Association's decision to engage in a collaborative, open process, and to send each homeowner a "ballot" and a statement urging them to amend the CC&Rs was *itself speech* advocating the proposed amendment through an open process in which all members could air their views. (*Macias*, *supra*, 55 Cal.App.4th at p. 674 [protected activity includes "speech by mail, *i.e.*, the mailing of a campaign flyer"].) As in *Roberts*, Respondents cannot challenge the so-called "election process" without challenging the Association's advocacy of the amended CC&Rs.

Third, even if Respondent's negligence claim could be read to target some conduct other than the amendment process which is part of the

Association's protected free speech, the anti-SLAPP statute would still apply under the rules governing "mixed" causes of action. "[W]here a cause of action alleges both protected and unprotected activity, the cause of action will be subject to section 425.16 'unless the protected conduct is "merely incidental" to the unprotected conduct.'" (*Gallanis-Politis v. Medina* (2007) 152 Cal.App.4th 600, 614; see *Peregrine Funding*, *supra*, 133 Cal.App.4th at p. 672; *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1287-88.) The Association's advocacy – *i.e.*, its allegedly improper presentation of the issues – is not "incidental" to Respondents' claim; it is the principal thrust of Respondents' claim for the reasons noted above.

The trial court's contrary finding that the Association's free speech claims were merely "incidental" to the allegations of the Fifth AC does not withstand de novo scrutiny. The trial court pointed to two items that made the speech claims "incidental" – allegations related to the "process" and allegations that the subsequent "recording of the Amended CC&Rs" was "improper." 20AA5493. For the reasons stated in *Roberts*, the trial court cannot divide Respondents' claims taking issue with the Association's advocacy from those claims taking issue with the Association's provision of a written ballot (replete with an advocacy message in the ballot package). As to the claim that recording the amended CC&Rs was not speech, the trial court offered neither reasoning nor legal citation for the proposition that publicly disclosing the results of an admittedly "public issue" constitutes something less than speech. The trial court's attempt to segregate the Association's advocacy from the means that it chose to engage in that advocacy and its subsequent "proclamation" of the results of the vote is without legal support.

2. Slander Of Title

Respondents' slander of title claim seeks to punish Appellant for statements allegedly made by its counsel to Respondents' counsel during

and regarding this lawsuit – speech so central to the anti-SLAPP statute that it is specifically enumerated within it. (CCP § 425.16(e)(2).) Respondents allege that the Association "represented that it would not record the purported amended CC&Rs until this dispute had been resolved," and that an "understanding was reached between Plaintiffs and The Association, through counsel, that the purported amended CC&Rs would not be recorded until this action was resolved." 3AA660-61, 670. Respondents submit a declaration from their litigation counsel, who asserts that the Association's attorney "assured me that the Amended CC&Rs would not be recorded while the litigation was pending." 14AA3704-05.

These alleged statements fall squarely within the statute's definition of protected activity, which explicitly includes "any written or oral statement or writing made in connection with an issue under consideration or review by a … judicial body, or any other official proceeding authorized by law." (CCP § 425.16(e)(2).) The courts have repeatedly held that statements by counsel or litigants in connection with pending or threatened litigation are protected by the statute. (*Genethera, Inc. v. Troy & Gould Professional Corp.* (2009) 171 Cal.App.4th 901, 909-10; *Healy v. Tuscany Hills Landscape & Recreation Corp.* (2006) 137 Cal.App.4th 1, 5-6.)

The trial court declined to apply the anti-SLAPP statute to this cause of action. In so doing, it made two errors.

First, the trial court failed to analyze the allegations in just this cause of action and, instead, suggested that the claim that "Defendant recorded the Amended CC&Rs despite entering into an 'understanding' with Plaintiffs is just one facet of Plaintiffs' claims against Defendant in this action." 20AA5493. But a court cannot disregard a core allegation of a cause of action that directly implicates protected speech by suggesting that it is merely part of the complaint "read as a whole."

The trial court also ignored critical elements of Respondents' claim, unilaterally narrowing it to focus solely upon the recording of the amended CC&Rs, and concluding that the claim (as reinterpreted) did not implicate speech. 20AA5493. Slander of title does not allow liability for any recording; the recording must be *wrongful*: that is, the statements complained of must have been "maliciously made with the intent to defame and thereby disparage the title involved." (*Howard v. Schaniel* (1980) 113 Cal.App.3d 256, 263.)

Here, Respondents alleged the Association's recordation was wrongful because it violated the purported "understanding" between counsel in this action. 3AA660-61, 670. Respondents conceded in their opposition papers below that "the gravamen of the complaint is that defendant recorded purportedly amended CC&Rs *in violation of an agreement with plaintiffs*…." 14AA3690; cf. 2 RT B-4.) Respondents alleged an "understanding" between litigation counsel and relied on that allegation to satisfy the wrongfulness element. The trial court cannot avoid applying the anti-SLAPP statute by ignoring this critical part of Respondents' claim.

Second, recording the Declaration was itself an act of protected speech. The Declaration was nothing more than a statement that (i) a majority of the homeowners had approved the Association's proposed amendment to the CC&Rs, and (ii) copies of the amendment and approving signatures were attached. 6AA1411-1508. The public filing of this statement did not alter its fundamental character as speech, just as a declaration filed in litigation retains its character as speech. (CCP § 425.16(e)(1); see *Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 35.) Indeed, Respondents themselves allege that the Declaration was a "publication" and, therefore, protected speech. The elements of a slander of title claim include proof of a "publication," and the Fifth AC's allegations make clear that the

"publication" upon which Respondents base their slander of title claim is the Association's publicly filed Declaration. 3AA674-75.

Finally, the application of the anti-SLAPP statute to a claim for ***slander*** of title should come as no surprise. The anti-SLAPP statute has consistently been applied to claims for all types of defamatory conduct, including slander of title. (E.g., *Damon*, *supra*, 85 Cal.App.4th at p. 479 [defamation]; *Macias*, *supra*, 55 Cal.App.4th at p. 672 [libel]; *Rosenaur v. Scherer* (2001) 88 Cal.App.4th 260, 269, 273 [slander of title].) A slander of title claim is, by necessity, an attack on speech because it is a claim that the defendant maliciously made defamatory statements about a property's title. (E.g., *Howard*, *supra*, 113 Cal.App.3d at p. 263.)

Rosenaur is instructive. There, the plaintiff brought a slander of title claim after the defendants circulated a campaign flyer opposing an initiative to allow development of plaintiff's property. The campaign flyer stated, incorrectly, that the property was owned by out-of-town speculators. (88 Cal.App.4th at pp. 268-69.) The Court of Appeal held that the anti-SLAPP statute applied to the plaintiff's slander of title claim, noting that "[i]t is well settled that section 425.16 applies to actions arising from statements made in political campaigns by politicians and their supporters, including statements made in campaign literature." (*Id.* at pp. 273-74.)

Even as reinterpreted by the trial court, Respondents' slander of title claim is – at most – that the Association made false statements in a publicly filed document about the results of a vote to amend the CC&Rs. This, too, is protected speech.

3. Declaratory Relief and Quiet Title Causes of Action

Respondents' claims for declaratory relief and quiet title are based upon the allegations discussed above and are largely derivative of the other two causes of action. 3AA672-74. The declaratory relief cause of action is a jumble of various alleged wrongdoings going back as far as 1963.

3AA662-64. At its core, however, the declaratory relief cause of action seeks a judicial declaration "[t]hat the Amend[ed] CC&Rs have no force and effect as to Plaintiffs' property inasmuch as the purported voting process engaged in by The Association to approve the purported Amended CC&Rs was unfair…." 3AA673. As noted above, the "voting process" was an essential component of the Association's speech to advocate a change to the existing CC&Rs and to hold a vote to determine whether the homeowners would support such a change.

Likewise, the quiet title cause of action seeks to expunge the amended CC&Rs from the record of Respondents' property because "[t]he adoption of the Amended CC&R (the voting) was void." 3AA674. This request to "quiet title" also appears in various aspects of Respondents' declaratory relief cause of action. 3AA672-73. Because these claims arise from the same protected activity as the negligence and slander of title claims, they too are covered by the anti-SLAPP statute.

B. Respondents Have Failed To Plead A Legally Sufficient Complaint

Under the second prong of the anti-SLAPP analysis, the burden shifts to Respondents, who must show they successfully pleaded, and can reasonably prove, each of their causes of action. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) The "pleading" component of this analysis requires Respondents to "demonstrate that the complaint is … legally sufficient." (*Ibid.*) Respondents have not adequately pleaded their claims.

1. Respondents Have Failed To Join As Parties The Sunset Mesa Homeowners Whose Valuable Property Rights They Seek to Extinguish

a. The Other Sunset Mesa Homeowners Are Indispensable Parties Because The Relief Sought Would Affect Their Interests

Due process dictates that courts may not decide anyone's rights without giving them an opportunity to defend themselves. California implements this principle through Code of Civil Procedure section 389, which states that a person shall be joined as a party if "(1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest." The controlling test is whether "the plaintiff seeks some type of affirmative relief which, if granted, would injure or affect the interest of a third person not joined." (*Liang v. San Francisco Residential Rent Stab. & Arb. Bd.* (2004) 124 Cal.App.4th 775, 778.) Thus, an indispensable party is one whose rights will be affected by a judgment granting plaintiff its requested relief. (*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 808-09.) If such parties exist, the action cannot proceed without them. (*Liang*, *supra*.)

In this case, Respondents' requested relief includes, among many other things, a judicial declaration that the amended CC&Rs are invalid. If granted, this relief would harm everyone who benefits from those CC&Rs, which is *every homeowner* in Sunset Mesa.

Respondents have openly and repeatedly conceded this point in this lawsuit. For four years, Respondents acknowledged that they seek relief that would injure or affect all of the homeowners in Sunset Mesa and, therefore, required their joinder. Respondents named the homeowners as either "Doe" defendants, individual defendants, or members of a purported "defendant class" in the first *five* complaints (1AA28, 84, 128-33; 2AA322-23, 488-91); Respondents alleged that, absent the requested relief, plaintiffs would face "a multiplicity of actions" from the "other homeowners in the Tracts" (1AA38, 93, 147; 2AA336, 504); Respondents' counsel conceded on the record that "they have to sue every homeowner" because "these amended CC&R's have now clouded our title, have affected our relationship with every other homeowner in the community" (2 RT B-6, B-7); and Respondents argued to this Court that "the attempted amendments not only affect [appellants] but every other one of the four hundred and fifty households within Sunset Mesa.'" (*Farwell v. Sunset Mesa* (2008) 163 Cal.App.4th 1545, 1548.)

Now, Respondents do a complete about face. In their Fifth AC, Respondents name only the Association as a party and claim that they do not need to join (and have apparently never needed to join) the other homeowners because they seek an order expunging the amended CC&Rs only "as against Plaintiffs' property." 3AA672-74. This nonsensical recasting of their claims cannot cure the defects in the Fifth AC.

First, there is no such thing as a "partial expungement" of CC&Rs as to only one homeowner. If the relief sought would invalidate the amended CC&Rs, the law requires that all of the homeowners who have rights under those amended CC&Rs be joined as "indispensable parties," otherwise the resulting judgment would be unenforceable against everyone. *Washington Mutual Bank v. Blechman* (2007) 157 Cal.App.4th 662, is controlling.

There, the court rejected a nearly identical argument that a court could grant a "piecemeal foreclosure" by validating a Trustee's sale "as to one party participant [the buyer] but not as to another [the seller]…." (*Id.* at p. 668.) Respondents' effort to obtain a "piecemeal expungement" invalidating the CC&Rs as to one homeowner but not others fares no better.

Second, even a "partial expungement" would still "injure or affect" all of the Sunset Mesa homeowners. CC&Rs are equitable servitudes; to enforce CC&Rs from one property to another, they must be recorded against both properties. (*Citizens for Covenant Compliance v. Anderson* (1995) 12 Cal.4th 345, 352-55; *Nahrstedt v. Lakeside Village Condominium Association, Inc.* (1994) 8 Cal.4th 361, 379-80.) Because the other homeowners have a property interest *in Respondents' property* by virtue of the amended CC&Rs, a "partial expungement" of the amended CC&Rs from Respondents' property would bar the other Sunset Mesa homeowners from ever asserting their current rights under the amended CC&Rs against Respondents. As Respondents concede, such relief would injure or affect the interest of every Sunset Mesa homeowner. 2 RT B-6, B-7.

Third, the Fifth AC violates the sham pleading doctrine, which prevents them "from amending complaints to omit harmful allegations, without explanation, from previous complaints to avoid attacks raised in demurrers or motions for summary judgment." (*Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 425; see Hon. Robert I. Weil & Hon. Ira A. Brown et al. (Rutter Group 2009) California Practice Guide: Civil Procedure Before Trial, ¶ 6:708.) After alleging that the other homeowners were necessary parties in the first five complaints, the Fifth AC simply deletes the reference to the other homeowners and alleges that Respondents "will be required to engage in a multiplicity of actions on each occasion on which The Association purports to claim some right over plaintiffs'

property." 3AA674. Nowhere do Respondents explain why the relief that they seek in this action no longer affects the other homeowners.[2]

Finally, Respondents ignore the breath-taking scope of their own declaratory relief claim. They seek (in part) a declaration that the "[p]urported election by the purported majority of homeowners is void and invalid for the reasons alleged herein." 3AA673. If a court were to set aside the 2004 vote as "void and invalid," how could any homeowner in any part of Sunset Mesa ***not*** be affected by such relief?

A recent case from the Colorado Court of Appeals, *Good v. Bear Canyon Ranch* (Co. Ct. App. 2007) 160 P.3d 251, is on point. In *Good* – as in this action – homeowners in a planned development exercised their right to amend their CC&Rs, and there, as here, "Plaintiff sought a declaratory judgment that the amendment was invalid." (*Id.* at p. 253.) The court ruled that the plaintiff's complaint affected "the interests of all the individual homeowners," and that "although plaintiff commenced this suit only against the Association, the individual homeowners of the Association had potentially conflicting interests with one another and with the Association itself." (*Id.* at p. 257.) In this case, as in *Good*, Respondents seek relief that would prevent every homeowner from enforcing his or her rights under the amended CC&Rs. Each homeowner must, therefore, be joined.

Additionally, Respondents seek to eliminate the provision in the CC&Rs that bars construction without prior written approval from the Association's Architectural Committee. This claim, too, affects all of the homeowners. Respondents allege that neither Sunset Mesa's Architecture Committee nor any other body has the authority to review renovation plans for compliance with the CC&Rs before construction. 3AA661-65, 671-72. In their view, a homeowner can commence construction, and the only

[2] This "amended" allegation also makes no sense. How could Respondents face a multiplicity of actions from the Association *alone*?

remedy to other homeowners would be through *ex post* litigation, not the *ex ante* approval process contemplated by the CC&Rs. 6AA1400.

If Respondents prevail on this point, they will eviscerate the other homeowners' ability to protect their rights under the CC&Rs. A homeowner could no longer object to potential renovations before the Architectural Committee, but would be forced to file a lawsuit, which is far more burdensome. Accordingly, Respondents' request for a declaration that the Association "does not have the power to assert architectural control over Plaintiffs' property" (3AA672) is relief that, if granted, would "injure or affect the interest" of all Sunset Mesa homeowners. (*Liang*, *supra*.)

b. The Sunset Mesa Homeowners Are Indispensable Parties Because They Are Parties To The CC&Rs

Apart from the general requirements for joinder, Respondents have failed to meet specific joinder requirements in cases involving contracts. CC&Rs are considered contracts between homeowners in the community. (*Villa Milano Homeowners Ass'n v. Il Davorge* (2000) 84 Cal.App.4th 819, 825; *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 512.) "'Ordinarily where the rights involved in litigation arise upon a contract, courts refuse to adjudicate the rights of some of the parties to the contract if the others are not before it.'" (*Deltakeeper v. Oakdale Irrigation Dist.* (2001) 94 Cal.App.4th 1092, 1096, quoting *National Licorice Co. v. NLRB* (1940) 309 U.S. 350, 363.)

Here, Respondents' claims require the interpretation of the CC&Rs. For example, Respondents claim that the amended CC&Rs are invalid because they did not comply with the requirements for amendment imposed by the CC&Rs. But Respondents cannot ask the court to interpret the CC&Rs without joining all of the parties to that contract – *i.e.*, the other

homeowners. Indeed, the Association is *not* a party to the CC&Rs, which means that Respondents are asking the Court to interpret a contract while professing to join *none of the other parties* to that contract.

There is a second reason for requiring joinder in this case – the avoidance of a waste of judicial resources. If *only* the Association is enjoined from enforcing the amended CC&Rs because of its alleged improper advocacy of the amendments, the ultimate judgment of the court is binding upon *none of the homeowners* in Sunset Mesa. A homeowner whose view is obstructed by Respondents' new McMansion would continue to have a cause of action under the amended CC&Rs. Respondents could not invoke the doctrines of res judicata or collateral estoppel in a further lawsuit by a homeowner because they would have just finished arguing that the other homeowners need not be parties to this lawsuit against the Association. This Court would have decided two separate appeals, and the trial court would have to resolve innumerable motions, discovery matters, and ultimately a trial, without accomplishing anything binding on the homeowners in Sunset Mesa.

c. Respondents Must Join The Sunset Mesa Homeowners Under The Statutory Requirements For Quiet Title Claims

Respondents also fail to satisfy the statutory joinder requirements for actions to quiet title. In such actions, "the plaintiff shall name as defendants the persons having adverse claims that are of record or known to the plaintiff or reasonably apparent from an inspection of the property." (CCP § 762.060(b); see Weil & Brown, *supra*, ¶¶2:184.15, 2:207.5 ["plaintiff *must* name as defendants all persons having an adverse claim…. Such persons are thus regarded as 'indispensable' party defendants."].) As defined, a "claim" includes any "legal or equitable right, title, estate, lien, or interest in property or cloud upon title." (CCP § 760.010(a).) Failure to

join an adverse claimant voids any resulting order. (*Carr v. Kamins* (2007) 151 Cal.App.4th 929, 934.)

Respondents' quiet title claim requires joinder of the other Sunset Mesa homeowners. The CC&Rs are enforceable as equitable servitudes upon Respondents' land in favor of all of the other residents of Sunset Mesa. (*Citizens for Covenant Compliance*, *supra*, 12 Cal.4th at pp. 352-55; *Nahrstedt*, *supra*, 8 Cal.4th at pp. 379-80.) As such, all of the other residents of Sunset Mesa have a "legal or equitable right" with respect to Respondents' property for purposes of the quiet title statute. (*Marra v. Aetna Construction Co.* (1940) 15 Cal.2d 375, 377.) Respondents concede this point in the Fifth AC, which alleges that "any change to the roof line … would affect some other homeowner's view," and that the amended CC&Rs "restrict[] Plaintiffs … from ever changing their roof line in favor of the views of other homeowners on the inside of the mesa." 3AA671-73.

To avoid naming the homeowners, Respondents claim to seek only "to quiet title against the claims of The Association." 3AA674. This approach cannot save their claim. First, it is not true. Respondents ask the court for the "extinguishment, declaration of invalidity and expungement from the record of Plaintiffs' property" of the amended CC&Rs. 3AA674. Because each homeowner has rights under the amended CC&Rs, any relief extinguishing those rights would necessarily affect them. Second, even if Respondents wished to quiet tile only against the Association, they could not do so: quiet title plaintiffs cannot choose their adversaries but "shall name as defendants the persons having adverse claims that are of record or known to the plaintiff…." (CCP § 762.060(b).)

d. The Trial Court Erred In Denying The Anti-SLAPP Motion Despite Its Conclusion That One Of Respondents' Claims Required That The Other Sunset Mesa Homeowners Be Joined As Indispensable Parties

Finally, the trial court erred in denying the Association's anti-SLAPP motion after it expressly determined that one of Respondents' claims required joinder of the other homeowners. The declaratory relief claim alleges in part that "the Amended CC&Rs are invalid on their face because CC&Rs in general cannot be amended to take away property rights from the minority." 20AA5494-95. The trial court held that this "broad theory" for invalidating the amended CC&Rs "implicat[ed] the rights of all the other Sunset Mesa homeowners" and that "Plaintiffs cannot prevail on this theory without bringing in all indispensable parties." 20AA5494-95.

Despite this conclusion, the trial court *denied* the Association's motion as to all of Respondents' claims, including the very declaratory judgment claim that it had found to be infirm. 20AA5497. This was clear error. Once the trial court concluded that one of Respondents' claims required the joinder of indispensable parties, the trial court was required to *grant* the anti-SLAPP motion as to that claim. If a party is indispensable to a particular claim, the party must be joined "to the action," and the failure to join such a party requires that the claim be dismissed. (CCP § 389; see *Patrick v. Alacir Corp.* (2008) 167 Cal.App.4th 995, 1015-16.) The trial court could not ignore this fatal defect – and the Association's well-taken motion to strike the claim – by looking to other parts of the claim.

2. Respondents Have Failed To Plead A Duty Owed Them By The Association

"The threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion." (*Desert Healthcare Dist.*

v. PacifiCare FHP, Inc. (2001) 94 Cal.App.4th 781, 791.) A duty of care is usually created by a statutory standard or by a long-standing doctrine of common law designed to prevent a personal injury. (*J'Aire Corp. v. Gregory* (1979) 24 Cal.3d 799, 803.)

Respondents have not identified any statute or common law doctrine that supports the Association's alleged "duty of reasonable care in conducting the purported election." 3AA675-76. The Association is *not* subject to the Davis-Stirling Act, so the Act's provisions do not apply here. 3AA663. Nor have Respondents cited any authority which holds that a homeowners association has a common law duty of care in conducting a vote on an amendment to the CC&Rs.

Respondents' negligence claim rests entirely upon the unstated assumption that the CC&Rs required *specific voting procedures* to be followed before they could be amended. But this assumption is dispelled by the text of the CC&Rs, which allow for the CC&Rs to be amended merely by recording "an instrument signed by a majority of the then owners of the lots." 6AA1399. The CC&Rs do not impose any additional requirements or regulate the manner in which those signatures may be gathered (so long, of course, that the signatures obtained are the real signatures of Sunset Mesa homeowners). There is not even a requirement that the homeowners hold a vote at all – much less a vote conducted in a neutral or unbiased manner or in compliance with specified regulatory standards. All that is necessary to effect an amendment is the recording of "an instrument signed by a majority of the then owners of the lots." 6AA1399. That the Association complied with the amendment clause is fatal to a purported tort duty. When parties modify a contract using the procedures set forth in the contract, they have acted "pursuant to and in conformity with the agreement" because "the method of modifying the

contract was provided for therein and followed by the parties." (*Busch v. Globe Industries* (1962) 200 Cal.App.2d 315, 320.)

In its ruling, the trial court derived a duty of care in conducting the vote on the amendment from the "expert" testimony of Kenneth Mostern. 20AA5496. But the existence of a legal duty is a question of law for a court to decide and, as such, is not the proper subject of expert testimony. (*Shin v. Kong* (2000) 80 Cal.App.4th 498, 505; *Benavidez v. San Jose Police Department* (1999) 71 Cal.App.4th 853, 865; *Padgett v. Phariss* (1997) 54 Cal.App.4th 1270, 1274.)

Moreover, even Mr. Mostern's declaration fails to provide a basis for imposing a duty upon the Association. Although Mr. Mostern purports to describe "the standards of professional election administration," the sources from which he derives those standards – *i.e.*, the Davis-Stirling Act and Department of Labor regulations – have no application here. 14AA3735, 3749-50. The Association is neither a labor union nor a Davis-Stirling Act association. 3AA663. These regulatory schemes cannot, therefore, provide the basis for imposing the proposed duty.

The trial court acknowledged that some of "Dr. Mostern's statements are objectionable"; it nonetheless held in a curiously truncated statement that he "also provides general statements about elections and the design of this election" that could be credited by a "trier of fact." 20AA5496. A proposed expert must demonstrate a "reasonable basis" for his opinion before it can be offered to the trier of fact. (Evid. Code § 801(b).) "Matter that provides a reasonable basis for one opinion does not necessarily provide a reasonable basis for another opinion. Evidence Code section 801, subdivision (b), states that a court must determine whether the matter that the expert relies on is of a type that an expert reasonably can rely on 'in forming an opinion *upon the subject to which his testimony relates.* We construe this to mean that the matter relied on must provide a

reasonable basis for the particular opinion offered." (*In re Lockheed* (2004) 115 Cal.App.4th 558, 564, emphasis added.)

In this case, Mr. Mostern cannot testify about "general" election standards unless he can demonstrate that he has a reasonable basis for applying those standards to *this case* – a vote conducted by a homeowners association that is neither a labor union nor a Davis-Sterling Association. The trial court erroneously allowed this testimony to be considered as something that "might" go to a trier of fact without applying Evidence Code section 801(b)'s strict standard.

C. Respondents Have Failed To Meet Their Burden Of Proving Their Claims Under The Second Prong Of The Anti-SLAPP Statute

1. Respondents' Slander Of Title And Negligence Claims And Parts Of Their Declaratory Judgment Claim Are Barred By The Statute Of Limitations

a. Respondents' Slander Of Title Claim Is Barred By The Statute Of Limitations

The statute of limitations for slander of title is three years. (CCP § 338(g).) "A cause of action for slander of title accrues, and the statute begins to run, when plaintiff could reasonably be expected to discover the existence of the claim." (*Stalberg v. Western Title Ins. Co.* (1991) 230 Cal.App.3d 1223, 1230.) The Court need not speculate as to when Respondents discovered their claim, as we know precisely when they did. At a status conference held on June 9, 2005, Respondents' counsel told the trial court that "[j]ust yesterday, I got the news that the CC&R's were recorded," and "[t]hat's going to require us to amend the complaint to allege a cause of action … for slander of title." (6/9/05 Tr. at pp. 1-2.) Respondents were, therefore, required to file a slander of title claim by June 8, 2008; the Fifth AC was not filed until October 2008 – four months late.

Respondents cannot save their slander of title claim by arguing that it relates back to their other claims. "The relation-back doctrine requires that the amended complaint must (1) rest on the same general set of facts, (2) involve the same injury, and (3) refer to the same instrumentality, as the original one." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 408-09.)

Respondents can establish none of these elements.

New and Different Facts. Respondents' slander of title claim rests on the Association's alleged misrepresentation that it would not record the amended CC&Rs while the action was pending (3AA670-71), whereas the original complaint was based upon the homeowners' vote to amend the CC&Rs (1AA34-38).

Different Injury. As a common-law tort, slander of title is an injury distinct from Respondents' statutory claim for declaratory relief. (*Brumley v. FDCC California, Inc.* (2007) 156 Cal.App.4th 312, 324-25; *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1278.)

Different Instrumentality. The slander of title claim alleges claims against the Association for the Association's alleged violation of an "understanding" reached between counsel during the course of litigation that it would not record the amended CC&Rs. 3AA670-71. The original complaint sought declaratory relief concerning the CC&Rs (1AA34-38), under which Respondents allege the Association has no authority (3AA659-60).

Even if the elements of the relation back doctrine were otherwise satisfied, the doctrine would still not apply here because the Fifth AC adds a new plaintiff, Tarzana Shayne. An "amended pleading that adds a new plaintiff will not relate back to the filing of the original complaint if the new party seeks to enforce an independent right or to impose greater

liability against the defendants." (*San Diego Gas & Elec. Co. v. Superior Court* (2007) 146 Cal.App.4th 1545, 1550.) Certainly, the Fifth AC seeks to "impose greater liability" on the Association – two new causes of action! – which it cannot do while adding a new plaintiff.

b. Respondents' Negligence Claim Is Barred By The Statute Of Limitations

The statute of limitations for negligence is two years. (CCP § 335.1.) Respondents first raised their negligence claim in the Fifth AC, which was filed nearly four years after the homeowners voted to amend the CC&Rs. 3AA658. Respondents' negligence claim is thus time-barred for the same reasons as their slander of title claim.

c. Respondents' Claim That The CC&Rs Were Breached Between 1965 And 1982 Is Barred By The Statute Of Limitations

In their declaratory relief claim, Respondents' challenge to the Association's authority to act relies upon a series of alleged breaches of the CC&Rs between 1965 and 1982. 3AA661-63. "[I]f declaratory relief is sought with reference to an obligation which has been breached and the right to commence an action for 'coercive' relief upon the cause of action arising therefrom is barred by statute, the right to declaratory relief is likewise barred." (*Maguire v. Hibernia S. & L.* (1944) 23 Cal.2d 719, 734.) Because Respondents target alleged breaches dating back more than 40 years, they are barred by the statute of limitations.

The Court of Appeal's recent decision in *Costa Serena Owners Coalition v. Costa Serena Architectural Committee* (2009) 175 Cal.App.4th 1175, is squarely on point. There, the homeowners of a planned community amended the CC&Rs in 1986, 1987, and 1999 to change the process for future amendments. (175 Cal.App.4th at pp. 1181-84.) In 2006, a coalition of opposing homeowners filed a declaratory judgment

action alleging that the prior amendments were void because they were not signed by the homeowners. (*Id.* at p. 1191.) The Court of Appeal held that these claims were barred by the four-year statute of limitations applicable to actions seeking to set aside an instrument. It reasoned that "[i]f the Amendments were, in fact, ineffective as a result of being enacted/adopted in a manner that did not comply with the amendment provisions of the [CC&Rs]," the statute of limitations began to run "at the time that each of the Amendments was recorded and thereby made effective." (*Id.* at p. 1196.) The Court thus concluded that "the Coalition's claims challenging the 1986, 1987, and 1999 Amendments brought 20, 19, and seven years, respectively, after the Amendments were passed and recorded – are time barred." (*Id.* at p. 1197.)

Here, as in *Costa Serena*, Respondents challenge the 1965, 1966, and 1982 declarations on the ground that they failed to comply with the provisions outlining how the CC&Rs could be amended. 3AA661-63. And, as in *Costa Serena*, this claim seeks to invalidate documents that were recorded long before the four-year limitations period. The statute of limitations was designed to avoid the disturbance of long-settled rights, which is precisely what Respondents seek to do here.

2. The Trial Court's Holding That The CC&Rs Allow Amendments Only Once Every Ten Years Is Contrary To The CC&Rs' Language And The Clearly Expressed Intent Of The Developers

The trial court held that Respondents were likely to prevail on their claims because the Sunset Mesa homeowners could not amend the CC&Rs until 2012. This reading of the CC&Rs ignores both the plain language and the clear intent of the developers of the Sunset Mesa community.

CC&Rs are to be construed as contracts, subject to the general rules governing the interpretation of contracts. (*Homeowners Ass'n v. Il*

Davorge (2000) 84 Cal.App.4th 819, 825; *Village Green Owners Assn.*, *supra*, 42 Cal.3d at p. 512.) The CC&Rs in this case provide in relevant part: "All of the herein [covenants] shall be binding on all parties … until January 1, 1992, after which time said [covenants] shall be automatically extended for successive periods of ten (10) years *unless an instrument signed by a majority of the then owners of the lots has been recorded agreeing to change said [covenants] in whole or in part*." 6AA1399.

The plain meaning of these words is that the CC&Rs will continue to be binding upon the parties, extended for ten-year periods, unless a majority of the homeowners vote to amend them. This interpretation gives meaning to each part of the provision, as courts must do. (Civ. Code § 1641.) It is consistent with the general rule that the parties to a contract are free, by subsequent agreement, to modify their rights or to add new terms to the contract. (Civ. Code § 1531; *Hannagan v. Feather River Pine Mills* (1953) 121 Cal.App.2d 758, 760; *Paterson v. Board of Trustees of Montecito Union School Dist.* (1958) 157 Cal.App.2d 811, 829.) It is also consistent with the apparent purpose of the automatic renewal provision, which was to protect the CC&Rs from a challenge that they violated the rule against perpetuities. (E.g., *Beets v. Tyler* (Mo. 1956) 290 S.W.2d 76, 82 [holding similarly worded CC&Rs did not violate rule against perpetuities]; RESTATEMENT (THIRD) OF SERVITUDES § 6.10 cmt. b ["Modern declarations … provide for automatic extension" to avoid "possible invalidation of affirmative covenants with indefinite duration … or for violation of the rule against perpetuities"].)

Moreover, any question about the meaning of the amendment clause has been conclusively resolved by the developers who drafted it. A contract must be interpreted to give effect to the intention of the parties "as it existed at the time of contracting" (Civ. Code § 1636); the best evidence of that intention is a practical construction of the contract given by the

parties through their conduct. (*Heston v. Farmers Ins. Group* (1984) 160 Cal.App.3d 402, 414; *Universal Sales Corp. v. Cal. Press Mfg. Co.* (1942) 20 Cal.2d 751, 761.) The developers who drafted the CC&Rs invoked the amendment clause to amend the view protection provision covering one tract of Sunset Mesa ***a mere three months after those CC&Rs had been recorded***. 20AA5325-26. This amendment is conclusive evidence that the developers intended to allow amendment of the CC&Rs at any time.

In its ruling, the trial court reasoned that the Association's interpretation rendered the "automatic renewal" clause superfluous. 20AA5495. But the Association's interpretation gives both clauses meaning. The CC&Rs were to continue in effect under the "automatic renewal" clause, extended each ten years to avoid a rule against perpetuities problem, *unless* a majority of the homeowners amended the CC&Rs under the amendment clause.

Ironically, it is the trial court's interpretation of the CC&Rs that renders the amendment clause superfluous. In the trial court's view, each ten-year period automatically succeeds the prior ten-year period at the stroke of midnight of the anniversary of the recording. 20AA5495. If the trial court were correct, there would *never* be a proper "time" for amendment because a ten-year extension would always be in place, each one immediately succeeding the next. The trial court tried to avoid this conundrum by inferring that a "rational reading" of the provision "would allow amendment in the 10th year, to take effect at the end of the 10th year." 20AA5495. But the trial court may not rewrite the CC&Rs by adding a provision that it does not contain. (*Moreno v. Jessup Buena Vista Dairy* (1975) 50 Cal.App.3d 438, 446-47; *Moss Dev. Co. v. Geary* (1974) 41 Cal.App.3d 1, 9.) If the drafters of the CC&Rs had wanted to include such a provision, they could have done so. (E.g., *Costa Serena Owners Coalition*, *supra*, 175 Cal.App.4th at 1181.)

The trial court also incorrectly dismissed the developer's 1962 amendment of the CC&Rs as having "little importance" because it occurred "less than 3 months after the original CC&Rs were recorded." 20AA5495. Precisely the opposite is true. A court must give effect to the intention of the parties "as it existed *at the time of contracting*." (Civ. Code § 1636, emphasis added.) The fact that the developers amended the view-protection provision of the CC&Rs less than three months after it was recorded is of *great* importance because it occurred so close to "the time of contracting." If the trial court were correct, the developer's amendment would have been impossible since it occurred during the initial 30-year term. 6AA1399. Clearly, the developers who drafted the CC&Rs did not share the trial court's interpretation.

Finally, the trial court mistakenly held that Respondents could prove their claim through an adverse evidentiary inference arising out of allegedly missing minutes from the Association's 2004 board meetings. 20AA5495. Respondents argued that these minutes would have shown that the Association was advised by its attorneys that the CC&Rs could not be amended in the manner proposed by the Association. 14AA3695-98. First, even assuming the missing minutes contained such advice, they would be protected by the attorney-client privilege and therefore inadmissible at trial. (Evid. Code § 952; *In re Ford Motor Co.* (3d Cir. 1997) 110 F.3d 954, 966.) Second, any interpretation of the CC&Rs by the Association's attorney 40 years after the CC&Rs were drafted would be irrelevant and therefore inadmissible. The interpretation of a contract by a non-party (such as the Association here) is irrelevant. (*Interpane Coatings, Inc. v. Australia and New Zealand Banking Group* (N.D. Ill. 1990) 732 F. Supp. 909, 916.) An undisclosed interpretation of a contract is irrelevant under the objective theory of contracting. (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109

Cal.App.4th 944, 960.) And an interpretation of the CC&Rs 40 years after they were drafted is irrelevant to what the parties intended "at the time of contracting." (Civ. Code § 1636.)

The relevant inquiry is what the developers intended when they drafted the CC&Rs in 1962. *That* intention is best demonstrated by the plain language of the CC&Rs and the developer's conduct in amending the CC&Rs less than three months after they were recorded. 20AA5325-26.

3. The Trial Court's Reading Of The CC&Rs To Require That The Homeowners' Signatures Be Notarized Is Contrary To The Language Of The CC&Rs And The Recent Decision In *Costa Serena Owners Coalition v. Costa Serena Architectural Committee* (2009) 175 Cal.App.4th 1175

The trial court further erred in reading an additional "notarization" requirement into the CC&Rs. 20AA5496. The CC&Rs allow an amendment when "an instrument signed by a majority of the then owners of the lots has been recorded agreeing to change said [covenants] in whole or in part." 6AA1399. The plain language of this provision requires only that an "instrument" be recorded that is "signed by a majority of the then owners." It does *not* require that these signatures be notarized. Nor can such a requirement be inferred – as the trial court did here – as a basis for invalidating the amended CC&Rs.

The Court of Appeal in *Costa Serena* recently rejected such an inference in a case involving similarly worded CC&Rs. Like the CC&Rs in this case, the CC&Rs in *Costa Serena* authorized an extension where "the owners of a majority of said lots have executed and recorded … ***in the manner required for a conveyance of real property***, a writing in which they agree that said [CC&Rs] shall continue for a further specified period…." (175 Cal.App.4th at p. 1181, emphasis added.)

The Architectural Committee in *Costa Serena* collected signed and notarized forms consenting to the extension of the CC&Rs from the property owners. (*Id*. at p. 1184.) It then recorded a document entitled, "Extension of Declaration of Restrictions." (*Id*. at p. 1200.) Like the Declaration in this case, the "Extension" was signed and notarized by members of the Architectural Committee, represented that a majority of the owners had consented to the extension, and attached the consent forms as exhibits. (*Id*. at p. 1200-01.)

A coalition of dissenting homeowners filed a lawsuit claiming that the Extension Document was invalid. The coalition argued that the CC&Rs' requirement that "the extension be executed 'in a manner required for a conveyance of real property" meant that "each owner had to consent in a separate document identifying the owner and property in the manner required for a deed." (*Id*. at p. 1198-99.) The trial court granted summary judgment in favor of the dissenting homeowners.

On appeal, the Fourth District reversed and ordered that judgment be entered in favor of the Architectural Committee. The Court of Appeal held that "[t]he most reasonable interpretation of this provision is that the [CC&Rs] require[] that the owners execute and record 'in the manner required for a conveyance of real property' a single 'writing' that in some way evidences that a majority of the owners have agreed to the proposed extension." (*Id*. at p. 1199.) The Court of Appeal elaborated:

> This requirement may be met by a document that certifies that a majority of owners of lots in the Costa Serena community have agreed to extend the [CC&Rs]. … As long as ***that instrument*** is executed and recorded in the same manner in which a deed or other instrument conveying real property would be executed and recorded, all of the requirements of paragraph 16 of the [CC&Rs] are met.

(*Ibid*., emphasis added.) The Court of Appeal held that the extension filed by the Architectural Committee satisfied the CC&Rs. "The

document was executed and recorded in 'the manner required for the conveyance of property' since it included all of the necessary formalities: it contained a sufficient description of the properties affected by the extension, identified the restrictions on the properties that were being extended, was signed and notarized, and was recorded at the county recorder's office." (*Id*. at p. 1201.)

The Declaration filed by the Association in this case meets the requirements imposed by the CC&Rs and those set forth in *Costa Serena*. The Declaration certifies that a majority of the lots in the Sunset Mesa community agreed to amend the CC&Rs (6AA1411-12); it contains the signatures of a majority of the lot owners (6AA1432-1508); it identifies the amendments to the CC&Rs and the properties affected by the amendment (6AA1411-13); it is signed and notarized by members of the Association's Board of Directors (6AA1412-14); and it was recorded with the Los Angeles County Recorder's Office (6AA1411). The Declaration, therefore, satisfies all of the requirements necessary to affirm its validity. Indeed, the CC&Rs here are even less onerous than those in *Costa Serena*; they do not require the amendment be recorded "in the manner required for the conveyance of property," but that it be "signed by a majority of the then owners of the lots."

4. Respondents Have Failed To Plead Or Prove Their Declaratory Judgment Claims

a. Respondents' Claim For Declaratory Relief Fails With Respect To The Claims Not Directed Against The Association

Respondents' allegations of wrongdoing in 1965 and 1966 fail to state a claim because they are not directed against the Association. Respondents allege that the three original members and the five subsequent members of the Architectural Committee recorded documents in 1965 and

1966 in violation of the CC&Rs. 3AA662-63. Respondents cannot call the Association to account for wrongs it did not commit.

b. Respondents Cannot State A Claim For Declaratory Relief Against The Association Because It Is Not A Party To The CC&Rs

Respondents' claim for declaratory relief also fails for another, independent reason: the Association is not a party to the CC&Rs. A party cannot "maintain an action against … defendants for a declaration of his rights under a contract to which these defendants are not parties and are alleged to have no legal rights or duties." (*Oppenheimer v. General Cable Corp.* (1956) 143 Cal.App.2d 293, 297.) The Association is not a party to the CC&Rs, and Respondents allege that the Association has no legal rights or duties under the CC&Rs. 3AA658-59, 660. Respondents cannot, therefore, assert a claim for declaratory relief against the Association.

c. Respondents Claims Are Barred Because They Voluntarily Purchased Home With Knowledge Of CC&Rs

Finally, Respondents' historical claims fail because they purchased their home with notice of, and subject to, the recorded restrictions in their chain of title. (Civ. Code § 1213; see *id.*, § 1215; *Citizens for Covenant Compliance v. Anderson* (1995) 12 Cal.4th 345, 355.) Having been "deemed to intend and agree to be bound by the written and recorded CC&R's," Respondents cannot claim they suffered harm as a result of them. (*Villa Milano Homeowners Ass'n*, *supra*, 84 Cal.App.4th at p. 825.)

5. <u>Respondents Have Failed To Plead Or Prove Their Slander Of Title Claim</u>

The elements of a slander of title claim require a publication made falsely and maliciously with the intent to defame the title of the subject property, the absence of privilege, and reliance by a third party that results

in a pecuniary loss. (*Smith v. Commonwealth Land Title Ins. Co.* (1986) 177 Cal.App.3d 625, 630; *Howard*, *supra*, 113 Cal.App.3d at 263.)

a. Respondents' Slander Of Title Claim Is Barred by Litigation Privilege

Respondents' slander of title claim is based upon statements allegedly made by counsel during litigation, which are absolutely privileged from tort liability under Civil Code § 47(b). The litigation privilege "applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that has some connection or logical relation to the action." (*Action Apartment Ass'n v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1241.) "[A]s long as the statement is *relevant* to the litigation, it is absolutely privileged … regardless of defendant's selfish or evil motives." (Weil & Brown, *supra*, ¶ 1:607; *Action Apartment*, 41 Cal.4th at p. 1241.)

Respondents' slander of title claim is based upon alleged statements made during judicial proceedings ("through counsel," no less) relating to those judicial proceedings. 3AA661, 670. Such a claim falls squarely within the litigation privilege.

b. Respondents Have Failed To Plead Or Prove Reliance Or Loss

Respondents have failed to plead or prove that they have been harmed by the allegedly improper recordation of the amended CC&Rs. The Fifth AC contains no allegation that third parties have relied upon the amended CC&Rs. Nor can Respondents prove that they have suffered any of the alleged harms as a result of the Association's conduct. Recording the amended CC&Rs did not force "Plaintiffs to retain attorneys and to bring this action for declaratory relief and to quiet title" (3AA675); they filed this action *five months* before the amended CC&Rs were recorded. 1AA27.

The amended CC&Rs also did not require Respondents to file "a lawsuit against approximately 800 Defendants" (3AA675). Respondents sued the homeowners *before* the amended CC&Rs were recorded and would have had to sue the homeowners in any event for the reasons noted above.

6. Respondents Have Failed To Plead Or Prove Their Negligence Claim

"The elements of a cause of action for negligence are: duty; breach of duty; legal cause; and damages." (*Friedman v. Merck & Co.* (2003) 107 Cal.App.4th 454, 463.) As noted above, Respondents have failed to plead or prove that the Association owed them a duty of care in conducting the vote on the amended CC&Rs.

Respondents also have failed to show how the Association's alleged negligence caused the asserted harm. When "parties make a contract, they agree upon the rules and regulations which will govern their relationship," including "the risks inherent in the agreement." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 517.) Here, Respondents accepted the risk that the CC&Rs could be amended when they bought their homes subject to those CC&Rs. Respondents' complaint is not with the Association, but with how the CC&Rs were drafted.

VI. CONCLUSION

For the reasons set forth above, the Court should vacate the trial court's order denying the Association's anti-SLAPP motion and direct the trial court to strike the Fifth AC.

DATED: January 21, 2010

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CERTIFICATE OF WORD COUNT

(California Rules of Court, Rule 8.204(c)(1))

Counsel hereby certifies that pursuant to Rule 8.204 of the California Rules of Court, the foregoing Appellants Opening Brief is produced using 13-point Roman type and contains approximately 13,997 words, including footnotes, which is fewer than the 14,000 words permitted by rule for this brief. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: January 21, 2010

KLAPACH & KLAPACH

By: 
Joseph S. Klapach

Attorneys for Appellant-Defendant

PROOF OF SERVICE

Re: Andrew Shayne et al. v. Sunset Mesa Property Owners Association, Inc., Case No. B216386

I, Joseph Klapach, declare that I am over 18 years old, and not a party to the within action; my business address is 8200 Wilshire Boulevard, Suite 300, Beverly Hills, CA 90211-2328.

On January 21, 2010, I served a true copy of **Appellant's Opening Brief**, on the following parties, in the manner described below:

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California Supreme Court
(by email through the Court's website, as provided by CRC 8.212)

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 21, 2010, at Beverly Hills, California.

Joseph S. Klapach