In the

Court of Appeal

of the

State of California

FOURTH APPELLATE DISTRICT
DIVISION TWO

Case No. E078636

VERTICAL WEB VENTURES, INC., et al.,
Plaintiffs and Respondents,

v.

ARROWHEAD LAKE ASSOCIATION,
Defendant and Appellant.

APPEAL FROM THE SAN BERNARDINO COUNTY SUPERIOR COURT
SUPERIOR COURT CASE NO. CIVSB2120604,
THE HONORABLE GILBERT OCHOA, JUDGE PRESIDING

BRIEF OF RESPONDENTS VERTICAL WEB VENTURES, INC., JACKIE McKINLEY, SELINE KARAKAYA, AND CHRISTOPHER LEE

*JOHN P. ZAIMES (SBN 91993)
john.zaimes@afslaw.com
SARA T. SCHNEIDER (SBN 298103)
sara.schneider@afslaw.com
JESSICA B. DO (SBN 317517)
jessica.do@afslaw.com
ARENTFOX SCHIFF LLP
555 West Fifth Street, 48th Floor
Los Angeles, CA 90013
Telephone: 213.629.7400
Facsimile: 213.629.7401

Attorneys for Respondents
VERTICAL WEB VENTURES, INC., JACKIE McKINLEY, SELINE KARAKAYA, AND CHRISTOPHER LEE

TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL Fourth **APPELLATE DISTRICT, DIVISION** Two	COURT OF APPEAL CASE NUMBER: E078636
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: NAME: John P. Zaimes (SBN 91933); Sara T. Schneider (SBN 298103) FIRM NAME: ArentFox Schiff LLP STREET ADDRESS: 555 West Fifth Street, 48th Floor CITY: Los Angeles STATE: CA ZIP CODE: 90013 TELEPHONE NO.: 213 629-7400 FAX NO.: 213 629-7401 E-MAIL ADDRESS: john.zaimes@afslaw.com; sara.schneider@afslaw.com ATTORNEY FOR (*name*): Respondents Vertical Web Ventures, Inc., et al.	SUPERIOR COURT CASE NUMBER: CIVSB2120604
APPELLANT/ PETITIONER: Arrowhead Lake Association RESPONDENT/ REAL PARTY IN INTEREST: Vertical Web Ventures, Inc., et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Respondents Vertical Web Ventures, Inc., Jackie McKinley, Seline Karakaya, and Christopher Lee

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) Doug Miller	Owner of Respondent Vertical Web Ventures, Inc.
(2) Diane Miller	Owner of Respondent Vertical Web Ventures, Inc.
(3)	
(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: January 23, 2023

John P Zaimes
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF APPELLANT OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2017]
AFDOCS:26337245.3

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
www.courts.ca.gov

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. PRELIMINARY STATEMENT

This case presents a straightforward question with respect to the interpretation of a clear contract. The court injunction under review should be upheld because it was plain that respondents were likely to prevail on the merits and would face irreparable harm in the interim.

The four Respondents are owners of real property in Arrowhead Woods, a subdivision in the city of Lake Arrowhead. In 1964, nearly 60 years ago, Arrowhead Woods property owners were granted broad and specific property rights to use Lake Arrowhead ("the Lake") for recreational purposes in an agreement ("the '64 Agreement") that resolved a lawsuit brought by those owners against the developers of Lake Arrowhead. Those rights included unrestricted access to the Lake and its surrounding shoreline area ("Reserve Strips") not only for themselves, but for their successors, their lessees, and their guests.

Those rights remained unencumbered until 2020, when a newly-elected board of directors of Appellant Arrowhead Lake Association ("ALA"), decided to unlawfully interfere with and infringe those rights for the nefarious purpose of converting the Lake into a members-only private country club. The public statements made by the individual defendants, all ALA Board members at the time, make clear that the ALA's underlying goal was the exclusion of the ethnically and racially diverse population of lessees and property owners in Arrowhead Woods.

Their campaign resulted in the banning of Arrowhead Woods property owners who were not ALA members, as well as the banning of all lessees and guests of Arrowhead Woods property owners, in particular vacation renters, sometimes referred to as short term renters. The bans clearly violated the recorded property rights conferred by the '64 Agreement on Respondents and all other property owners in Arrowhead Woods. Respondents have suffered and will continue to suffer irreparable harm as a direct result of defendants' infringement of their rights, including the loss of use and enjoyment of the Lake and Reserve Strips and damage to the goodwill attendant to leasing their properties in Arrowhead Woods.

Respondents moved the court below for an order enjoining the ALA from enforcing: (1) rules and fines that prohibit Respondents and their lessees and guests from accessing the Lake and the Reserve Strips; and (2) other arbitrary, unnecessary, and unreasonable barriers that restrict Respondents', their guests', and their lessees' access to the Lake and Reserve Strips. The trial court granted Respondents' motion as to the first request and issued an injunction prohibiting Appellants from enforcing the ban on non-members of ALA and on vacation renters. As we will review in the balance of this brief, the injunction was properly issued, and none of the post-hoc rationalizations offered by Appellants below or in their opening brief here withstand closer analysis.

II. FACTUAL BACKGROUND

A. The '64 Agreement Granted Broad Rights in Perpetuity to Arrowhead Woods Property Owners, their Lessees, and Their Guests to Access the Lake and the Shore that Surrounds It

Access to Lake Arrowhead and the Reserve Strips has always been a major asset of property ownership in Arrowhead Woods. The Lake and the surrounding communities were first developed as a resort destination with Lake access a hundred years ago (circa 1921), and that has remained the primary attraction of the Lake and of the city of Lake Arrowhead ever since. (2 AA 344.)

In the early 1960's, the Lake was owned by the Lake Arrowhead Development Co. ("Development Co"), The shoreline of the Lake, referred to as the Reserve Strips, was owned by the Arrowhead Mutual Service Co., ("Service Co."). Sixty or so years ago, Development Co. and Service Co. were sued by certain Arrowhead Woods property owners seeking, *inter alia*, to establish their rights to access the Lake and Reserve Strips. In or about August 1964, the parties entered into a formal written settlement of that suit (the '64 Agreement). **(**2 AA 481-503.)

The clearly stated purpose of the '64 Agreement was and is "to establish certain rights" of property owners in Arrowhead Woods to the Lake and the Reserve Strips. (*Ibid.*) To that end, the '64 Agreement granted Arrowhead Woods property owners, and their lessees and guests,

"the following non-exclusive rights, easements, and servitudes in, over, upon and with respect to" the Lake and Reserve Strips:

> a. The right for *themselves*, their *lessees* and *house guests* to use the strips for private park and reasonable recreation purposes, and for ingress and egress by foot travel, but not for commercial or business purposes …
>
> c. The right for *themselves*, their *lessees* and *house guests* to use the Lake for reasonable recreational purposes, including but not limited to boating, fishing, swimming and bathing, but not business or commercial purposes, and subject to … the right in Development Co. and Service Co. or either of them to promulgate and enforce reasonable regulations designed to promote the safety, health, comfort and convenience of persons in or upon the Lake or in the vicinity thereof with respect to the conduct of such activities.

(2 AA 484 (emphasis added).)

Those rights were granted in perpetuity. The '64 Agreement unequivocally provided that future property owners in Arrowhead Woods, their guests, and their lessees would have the same unrestricted right to use the Lake and the Reserve Strips for reasonable recreational purposes and for ingress and egress. (*Ibid.*)

B. Ten Years After the '64 Agreement Was Entered into, Arrowhead Woods Property Owners Purchased the Lake and Reserve Strips

In or about 1974, ten years after the '64 Agreement was entered into, the dam that created the Lake needed to be rebuilt after studies following the 1971 Sylmar earthquake revealed it to be unsafe. By that time, Boise Cascade had succeeded Development Co. and Service Co., as owner of the

Lake and Reserve Strips, and Boise Cascade wanted the cost of the rebuild to be shared by Arrowhead Woods property owners. Arrowhead Woods property owners therefore financed a $7 million bond so that the dam could be rebuilt. (2 AA 351 at ¶ 2.)

Soon thereafter, the Arrowhead Woods property owners formed the ALA, a non-profit mutual benefit corporation, and in 1975, they purchased the Lake and the Reserve Strip from Boise Cascade. Nothing in the purchase agreement between the Arrowhead Woods property owners and Boise Cascade, or in the ALA formation documents, altered the rights of Arrowhead Woods property owners, their lessees and their guests to unrestricted access to the Lake and the Reserve Strips for recreational purposes. (Of course, since the Arrowhead Woods property owners were purchasing the Lake and the Reserve Strips, there would have been no need to modify the terms of the '64 Agreement).

In fact, the formational documents of the ALA expressly confirm that those rights remained unimpaired by the formation of the ALA. The ALA's own Articles of Incorporation specify that the ALA's "specific purpose" is to "provide nonprofit recreational facilities and activities on and around Lake Arrowhead, exclusively for the use and enjoyment of the owners of real property in Arrowhead Woods, their families and *guests*." (2 AA 504-509 (emphasis added).) Moreover, the ALA's own Bylaws expressly recognize the ALA's obligation to comply with the '64

Agreement, as well as the primacy of the '64 Agreement. Article II, Section F, Number 8 of the Bylaws states: "In the event of a conflict between the ALA Bylaws and the language of the 1964 Agreement, the language of the 1964 Agreement shall control." (2 AA 298 at ¶ 8.)

Not surprisingly, then, the consistent conduct of the ALA over the course of more than 45 years since it was formed ratified the continued preeminence of Arrowhead Woods owners' property rights. No restrictions on Arrowhead Woods property owners like the ones at issue here have been placed on Arrowhead Woods property owners by the ALA or anyone else in the over five decades since the '64 Agreement was entered into—until now. (2 AA 286 at ¶ 9.) It is the particular collection of over-zealous board members of the ALA, sued here as Defendants, who have chosen to infringe those vested property rights.

It bears noting here that the complete absence for the past nearly 60 years of any infringement of Arrowhead Woods owners' property rights granted by the '64 Agreement includes the rights granted to those owners' lessees and guests, in particular vacation lessees, sometimes referred to as short term renters. Those lessees continued to make Lake Arrowhead the prime southern California vacation destination it had been for over 100 years. (2 AA 337-357.) Until the acts that led to this lawsuit, the ALA consistently recognized that vacation renters had full access rights to the Lake and Reserve Strips, not only by not placing any restrictions on them,

but by even granting them special permits to boat on the Lake. (2 AA 286 at ¶ 9.) In short, during that long period of time, the ALA honored the "lessees and house guests" provisions of the '64 Agreement in all respects and did not advance the hollow claims it advances here and in the court below, such as that a vacation lessee is not a lessee or is not a guest, or that when a vacation lessee even so much as walks on the shoreline or puts his or her toe in the Lake he or she is using the Lake for "commercial purposes." **(**2 AA 286 at ¶ 10.)

C. The ALA Amended Its Bylaws to Unlawfully Ban Arrowhead Woods Vacation Lessees

Despite the clear and unequivocal language in the '64 Agreement, as ratified by the ALA's long history of conduct, as well as by its own governing documents, the ALA and the individual Defendants chose to unlawfully ban and to otherwise restrict Arrowhead Woods property owners, their lessees, and their guests from accessing the Lake and Reserve Strips. Initially, in 2019, Appellants proposed to unilaterally amend the ALA Bylaws to ban vacation lessees from the Lake and Reserve Strips. (2 AA 286 at ¶ 11.) That proposal was met with strong opposition from Arrowhead Woods property owners, including Respondents, because it so clearly violated the '64 Agreement. (*Ibid*.)

In response, in 2020, Appellants tried to validate their proposed violation of the '64 Agreement by having members of the ALA—a small

subgroup (less than 50%) of Arrowhead Woods property owners—vote to ban Arrowhead Woods property owners' lessees and guests from accessing the Lake. (2 AA 287 at ¶ 13.) The Appellants had been campaigning for these restrictions for months and knew that banning lessees and guests ("outsiders" to the ALA membership) was an emotionally-charged issue that would almost certainly would result in a majority vote by ALA members in favor of the ban. (Most of the ALA members did not rent to vacationers and resented the fact that others did.)

The ALA membership voted just as expected, notwithstanding that neither that small subset of Arrowhead Woods property owners nor the ALA has the ability to override the '64 Agreement and infringe Arrowhead Woods owners' property rights. (2 AA 286-287 at ¶¶12-13.) It is important to note at this juncture that there was no data, let alone material evidence, showing that vacation renters, guests or non-ALA members who were Arrowhead Woods property owners created any material safety or health issues in accessing the Lake or that they interfered with the comfort or convenience of others on the Lake. And none was presented to the voters. They voted instead to ban "outsiders", as urged by the ALA board.

After the vote, the ALA Board of Directors amended the ALA Bylaws to add the following language to Section C of Article II thereof:

> "The clients of ALA members who rent their homes in Arrowhead Woods for less than a 30-day period ('Short Term Renters') cannot access Lake Arrowhead, the ALA Beach

> Clubs, the ALA trails, any other ALA facility and/or any dock on Lake Arrowhead owned by any ALA member renting a home in Arrowhead Woods to the Short Term Renter." (2 AA 297.)

Soon thereafter, on October 24, 2020, Appellants approved a further amendment to the Bylaws to create an excessive fine schedule to punish Arrowhead Woods property owners who are ALA members and whose lessees and guests violated the ban. (2 AA 287 at ¶ 15.) The ALA later expanded the restrictions to bar Arrowhead Woods property owners who were not ALA members from using the Lake or the Reserve Strips at all, including hiking trails along the shoreline that had long been accessed by those non-member Arrowhead Woods property owners. (2 AA 288 at ¶ 17; 2 AA 410-412.)

D. ALA Board Members Revealed their Discriminatory Intent

The Appellants' acts of suddenly banning and otherwise restricting Arrowhead Woods property owners and their lessees and guests from using the Lake and Reserve Strips are such clear violations of the '64 Agreement that they beg the question "why would Appellants' suddenly undertake such plainly violative and draconian measures, especially after nearly 60 years of custom and practice that ratified those property rights?" The ban and the restrictions are, after all, in no way supported by evidence that they were necessary for safety, health, comfort or convenience, which would have been permitted under the '64 Agreement. (2 AA 484 at ¶ (c).)

The answer is that those acts were motivated not by rational argument or legal justification, but by separatism based on racial and national origin animus. That animus is evidenced by the repeated use of code words and phrases by Appellants like "Keep Lake Arrowhead private" and "white is the color of purity," and by references to guests of Arrowhead Woods property owners as "those people" in phrases like "we don't want those people here." (2 AA 288 at ¶ 18.) These phrases harken back to the years when such language was used to bar members of certain racial and ethnic groups from restaurants, neighborhoods, recreational venues, clubs, public transportation and the like.

The discriminatory animus also manifests itself in other indirect but nonetheless insidious ways. The ALA enlisted a cadre of local "volunteers" to enforce its restrictions. That vigilante enforcement group regularly targets people of color for their enforcement efforts, whether at its beach clubs or elsewhere in and around the Lake. (2 AA 287 at ¶ 16.) Those vigilante group members are unabashed in their bigotry, regularly posting racially and ethnically insensitive comments on social media. (2 AA 288 at ¶ 19.) The Appellants have been made fully aware of those incidents yet have refused to address them. In so doing, they have endorsed and ratified that conduct.

The racial and national origin animus is not limited to that group. It permeates the ALA:

a. Board members refer to Asian Americans as "those Orientals" and disparage them for "bad driving." (2 AA 288 at ¶ 20.)

b. ALA's vigilante enforcement group members post photos of African-American vacation lessees and describe them as "gang members." (2 AA 289 at ¶ 20.)

c. African-American guests have been harassed and denied access to the ALA beach club to such a degree that they have sued the ALA. (*Ibid*.)

d. At a pre-election ALA board candidate forum, then ALA board member and defendant Hall referred to an opponent of the ALA's breaches of the '64 Agreement who is ostensibly of middle eastern descent as a "terrorist," not once, not twice but three times in a single meeting. (*Ibid*.) No other board member made any effort to restrain him. (*Ibid.*)

These are just some of the indicia of discriminatory animus, and they go a long way toward explaining why, after nearly 60 years of allowing access to the Lake and shoreline for Arrowhead Woods property owners, their lessees and their guests—and without any material evidence of a safety, health or other legitimate basis for doing so—the Appellants would suddenly change course and so blatantly violate the '64 Agreement. But to be clear, this is not a case where Respondents need to prove such animus. They merely need to show that the '64 Agreement was violated and that injunctive relief was appropriate. We do that in the balance of this brief.

III. THE LEGAL STANDARD FOR INJUNCTIVE RELIEF

The purpose of a preliminary injunction is to preserve the status quo pending final resolution upon a trial. (*See Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 528.) The status quo means "the last actual peaceable, uncontested, status preceding the pending controversy." (*Voorhies v. Greene* (1983) 139 Cal.App.3d 989, 995 (internal citation omitted).) An injunction should issue upon a showing of: "(1) the likelihood that the moving party will ultimately prevail on the merits and (2) the relative interim harm to the parties from issuance or no issuance of the injunction. [Citation.]" (*McMackin v. Ehrheart* (2011) 194 Cal.App.4th 128, 135 (quoting *Butt v. State of California* (1992) 4 Cal.4th 668, 677–678); *see also* Code of Civ. Proc., § 526 (a).)

A "mix" of those two factors governs the decision; "the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction." (*Butt*, 4 Cal.4th at p. 678 (citing *King v. Meese* (1987) 43 Cal.3d 1217, 1227–1228).) Preliminary relief is appropriate where there is a "reasonable probability" that the plaintiff will be successful on his claims. (*See People v. Mobile Magic Sales, Inc.* (1979) 96 Cal.App.3d 1, 8.) Respondents more than meet this burden.

California law also recognizes that, where parties have contracted to provide for injunctive relief, "it is proper for the trial court to honor the parties' agreement unless it finds that to do so would be contrary to a rule

of law or public policy." (*DVD Copy Control Assn., Inc. v. Kaleidescape, Inc*. (2009) 176 Cal.App.4th 697, 725.) Here, the '64 Agreement itself expressly provides that a group of three or more Arrowhead Woods property owners may seek injunctive relief to enforce their rights, clearly authorizing injunctive relief as an appropriate remedy. The trial court honored that important contractual authorization, particularly since Respondents demonstrated that they had suffered and would continue to suffer ongoing irreparable harm. (5 AA 1222-1223.) The issuance of prohibitory injunctive relief here was consistent with contract, public policy, and the law. (*Kaleidescape*, 176 Cal.App.4th at p. 726 (holding that courts should enforce agreement providing for injunctive relief where a remedy at law is inadequate).)

IV. STANDARD OF REVIEW

The standard of review on this appeal is abuse of discretion. (*Dodge, Warren & Peters Ins. Services, Inc. v. Riley* (2003) 105 Cal.App.4th 1414, 1420.) Appellants carry the burden to show that the "[T]he law is well settled that the decision to grant a preliminary injunction rests in the sound discretion of the trial court. …. A trial court will be found to have abused its discretion only when it has exceeded the bounds of reason or contravened the uncontradicted evidence." (*ReadyLink Healthcare v. Cotton* (2005) 126 Cal.App.4th 1006, 1016 (internal citations and quotations omitted).)

Moreover, while issues of contract interpretation are questions of law generally subject to de novo review, (*Itv Gurney Holding v. Gurney* (2017) 18 Cal.App.5th 22, 29), a "substantial evidence" standard applies here: "where parties present conflicting evidence to resolve interpretation of a writing, so long as judgment is supported by substantial evidence, evidentiary conflict must be resolved in favor of the prevailing party and any reasonable construction of the writing by the trial court will be upheld." *Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 848. Appellants bear the burden "to make a clear showing" that the trial court abused its discretion in granting the injunction. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69.)

V. THE ALA HAS VIOLATED THE '64 AGREEMENT IN MULTIPLE RESPECTS

The '64 Agreement expressly provides that Arrowhead Woods property owners, their lessees, and their guests have broad rights to access the Lake and Reserve Strips for "ingress and egress and reasonable recreational purposes." (2 AA 484 at ¶ (a).) The intent of the parties to a contract "'is to be inferred, if possible, solely from the written provisions of the contract. [citations] 'If contractual language is clear and explicit, it governs.'" (*State of California v. Continental Ins. Co.* (2012) 55 Cal.4th 186, 195 (internal citation omitted); *see also* Civ. Code, §§ 1636, 1638, 1639.)

The contract language here is clear and explicit. The Appellants have chosen to ignore it and to reverse the ALA's own decades-old custom and practice, to impose new, entirely unjustified, unnecessary and arbitrary barriers to Lake access that infringe the rights granted by the '64 Agreement. The following are but three of the ALA's many new restrictions:

1. the ALA imposed a requirement that Arrowhead Woods property owners be ALA members in order to access trails within the Reserve Strips. That requirement infringes recreational access rights granted by the '64 Agreement to all Arrowhead Woods property owners without any membership requirements.

2. the ALA has banned all lessees of Arrowhead Woods property owners, i.e. vacation renters, from accessing the Lake and Reserve Strips. That directly violates the rights granted to Arrowhead Woods property owners and their lessees/guests by the '64 Agreement to access the Lake and Reserve Strips for reasonable recreational purposes. (2 AA 484 at ¶ (a).)

3. the ALA authorized an untrained vigilante patrol to enforce its overreaching rules and regulations, without authority to do so. Worse yet, the patrol has targeted people of color and individuals who have challenged ALA leadership, and they freely flaunt their bigotry on social media, with the implicit endorsement of the ALA. (2 AA 287 at ¶ 16.)

Such unlawful conduct lends ample support to Respondents' causes of action for: (1) breach of contract; (2) infringement of property rights; (3) breach of covenant of good faith and fair dealing; (4) interference with easement; (5) private nuisance; and (6) public nuisance. We discuss the ways in which it does so in greater detail next.

A. Appellants Cannot Limit Access to the Lake and the Reserve Strips to ALA Members

The charges an annual membership fee of several hundred dollars to Arrowhead Woods property owners who choose to join. (2 AA 286-287 at ¶ 6.) Arrowhead Woods property owners are not required to join, and most do not. (*Id*. at ¶¶ 12-13.) Membership or non-membership in the ALA has no bearing on the rights granted to all Arrowhead Woods property owners under the '64 Agreement. Nevertheless, the ALA's Bylaw amendment now categorically prohibits non-ALA members from accessing the Lake and Reserve Strips. (2 AA 288 at ¶ 17; 2 AA 410.) The Bylaw amendment should be enjoined for that reason alone.

The ALA did not even attempt to hide its improper, overreaching motive for interfering with Arrowhead Woods owners' property rights. The ALA's announcement itself states that the ALA wanted to increase ALA Membership and that it wanted to force non-members to join the ALA because it believed they should pay membership fees as a matter of "fairness" and so that the ALA would be able to more easily discipline them. (2 AA 410-411.) The ALA's disdain for the property rights granted by the '64 Agreement is palpable.

The ban on Arrowhead Woods property owners' vacation renters is equally contrary to the '64 Agreement. As discussed above, the '64 Agreement provides for access by Arrowhead Woods owners, their lessees and their guests to the Lake and Reserve Strips. (2 AA 484 at ¶ (a).) It makes no mention of limiting those lessees or guests to those who stay for at least 30 days, and no one has suggested anything like that in the 60 years since the '64 Agreement created those rights. Yet that is what the Bylaw amendment at issue here does, in direct violation of the '64 Agreement.

B. Vacation Lessees Are Lessees and House Guests Under the '64 Agreement

In the face of the clear language in the '64 Agreement that the property rights created therein extend to Arrowhead Woods owners' lessees and house guests, the ALA repeatedly argues that only vacation lessees who lease for at least 30 days are lessees, and that shorter term lessees are *not* lessees or house guests. There is no basis in law or fact for such an interpretation of the '64 Agreement.

a. First, a "lessee" is universally defined as a person with a right to a possessory interest in real or personal property pursuant to the terms of a lease. A lease is simply a legal agreement that conveys the right to use and occupy property in exchange for consideration. (§ 15:4. Lease distinguished, 6 Cal. Real Est. § 15:4 (4th ed.).) One can lease equipment

or real property for hours, weeks or months.

b. Black's Law Dictionary defines a lessee as "Someone who has a possessory interest in real or personal property under a lease," and it defines a lease as "A contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration, usu. rent. The lease term can be for life, for a fixed period, or for a period terminable at will." (LESSEE, LEASE, Black's Law Dictionary (11th ed. 2019).)

c. Miller and Starr define a lease as "an agreement that grants to the tenant the rights of exclusive possession and use of real property for a specified period of time. It creates a possessory estate in real property." (§ 15:4. Lease distinguished, 6 Cal. Real Est. § 15:4 (4th ed.).)

d. Merriam Webster Dictionary defines "lessee" as "one that holds real or personal property under a lease" and a "lease" as "a contract by which one conveys real estate, equipment, or facilities for a specified term and for a specified rent." (3 AA 583-608.)

In short, no recognized authority supports the ALA's self-serving, arbitrary distinction between a 29-day lessee and a 30-day lessee. None of the common definitions of "lessee" or "lease" make any reference to a minimum period of occupancy, much less a minimum of thirty days. (3 AA 583-608.)

The meaning of "guest" is similarly broad. For example, the California Department of Consumer Affairs' Legal Affairs division defines a "guest" as "a person who does not have the rights of a tenant, such as a person who stays in a transient hotel for fewer than seven days." (*See* California Tenants—A Guide to Residential Tenants' and Landlords' Rights and Responsibilities. [1]) Likewise, under the Cambridge Dictionary definition, a "houseguest" is commonly known as "a person who stays at someone else's house for one or more nights." (3 AA 609-615.) Vacation Lessees are precisely that.

In addition to the legal definition of "lessee" and "lease," the context of the use of those terms in the '64 Agreement makes clear that the drafters of the '64 Agreement intended to extend access to all vacationers who rent property in Arrowhead Woods. Lake Arrowhead was developed as a resort town, which naturally attracts tourists, weekend renters in particular, and of course the drafters and signatories of the '64 Agreement knew that, with the Lake and the city of Lake Arrowhead having been a southern California vacation destination for over 40 years prior to the '64 Agreement. Moreover, in the decades since the '64 Agreement was entered into and recorded, Arrowhead Woods property owners have leased their homes to vacationers for long and short terms. (2 AA 285-286 at ¶ 8.) That has been

[1] Available at https://www.courts.ca.gov/documents/California-Tenants-Guide.pdf.

the case for the nearly 60 years plus since the '64 Agreement was signed. The ALA itself has, therefore endorsed that interpretation for years and even decades.

The ALA itself has also affirmatively acknowledge the validity of such access by, for example, selling kayaking permits to weekend vacationers. (2 AA 286 at ¶ 9.) This longstanding custom and practice of the ALA is, of course, entirely contrary to their current made-up interpretation of the term. The absurdity of the ALA's interpretation is underscored by the fact that the ALA's Bylaw amendment even prohibits Arrowhead Woods property owners from allowing their lessees and house guests access to their *own* docks on the Lake, docks that Arrowhead Woods property owners own in fee.

C. Vacation Lessees Do Not Use the Lake for Commercial Purposes

The Appellants also contend that allowing vacation lessees access to the Lake and Reserve Strips constitutes a prohibited use for "commercial or business purposes" under the '64 Agreement. That interpretation is equally as empty as the claims that lessees must lease for at least 30 days and that guests are not really guests. First, the definition of commercial use must be understood in the context of the '64 Agreement. "[A] word takes meaning from the company it keeps." (*People v. Drennan* (2000) 84 Cal.App.4th 1349, 1355.) The '64 Agreement specifically provides that lessees may access the Lake and Reserve Strips for reasonable recreational,

but not business or commercial, use. If a lessee's use of the Lake and Reserve Strips were inherently commercial, this provision of the '64 Agreement would be nonsensical.

Furthermore, it is obvious that there is no commercial or business use when lessees use the Lake and Reserve Strips for the same purposes as the property owners – for recreation, i.e. boating, fishing, swimming, and hiking. And again, the ALA itself has long recognized and even welcomed vacationers renting in Arrowhead Woods, without any suggestion that their use of the Lake was "commercial".

Finally, as the Court below succinctly put it, "the fact a business or commercial transaction may exist between the Arrowhead Woods' property owner and the short-term renter in the transaction to rent the property that does not equate to the renter using the Lake or Reserve Strip in a commercial or business transaction." (5 AA 1219-1220.)

VI. APPELLANT ALA'S AFTER-THE-FACT ATTEMPTS TO JUSTIFY ITS CONDUCT ARE WELL WIDE OF THE MARK

Appellant ALA's opening brief presents a series of additional arguments and constructs to try to justify its violations of the '64 Agreement, but none of them withstand closer examination.

A. The CC&R Restrictions Applicable to One of Respondents' Properties Have No Bearing on the Issues Here

Appellant ALA's first attempt to undermine the unambiguous language of the '64 Agreement is to point to a restriction on operating

hotels, tenements and boarding houses buried in a 1935 CC&R applicable to some, but not all Arrowhead Woods property owners covered by the '64 Agreement. The ALA contends that those restrictions somehow constitute extrinsic evidence that the drafters of the '64 Agreement meant to exclude owners of short term rentals and their lessees from the property rights granted by the '64 Agreement. That assertion fails for multiple reasons.

1. The CC&R's Are Not Admissible Extrinsic Evidence

To begin with, Respondent misapprehends the extrinsic evidence rule. It is fundamental that the extrinsic evidence that can be used to interpret a contract must be extrinsic matter that was actually considered by the drafters in the drafting process. (*Bionghi v. Metropolitan Water District of Southern California* (1999) 70 Cal.App.4th 1358, 1367–1370; *see also Tuma v. Eaton Corp.* (S.D. Cal., May 23, 2011, No. 08CV792-BTM CAB) 2011 WL 2003349 at *5 (recognizing that extrinsic evidence must concern the "circumstances surrounding the making of the agreement" or allow the court to "place itself in the same situation in which the parties found themselves at the time of contracting" (internal citations and quotations omitted)).) Merely because a CC&R existed at the time is evidence of nothing when it comes to contract interpretation. There must be evidence that the parties to the contract actually considered the proffered evidence when they chose the words of the contract that are claimed to be

ambiguous. *Id.*

In *Bionghi*, for example, the parties disputed whether contract language stating that the defendant may terminate with 30 days' notice was reasonably susceptible to an interpretation also requiring the defendant to have good cause for the termination. (*Id.* at p. 1361.) In support of its claim that good cause was required, the plaintiff offered extrinsic evidence in the form of : statements by the principal engineer for defendant, as well as company manuals and other company contracts. (*Id.* at p. 1366.) However, the plaintiff failed to offer any facts showing that she had read or relied on the manuals or other contracts when she entered into the relevant contracts, and she offered no evidence that the engineer, who did not negotiate or sign either contract, had a position at the company that meant he could express the company's intent, or the meaning the company ascribed to words. (*Id.* at p. 1367.) The court held that the plaintiff's "evidence" did not concern the "circumstances surrounding the making or the argument" or allow the court to "place itself in the same situation in which the parties found themselves at the time of contracting" and was therefore inadmissible. (*Ibid.* (citing *Pac. Gas. & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 40 (en banc)).)

Here, there is no evidence in the record before this court that any drafter of the '64 Agreement considered, or was even aware of, the subject CC&R's, let alone that any of them intended to exclude the Arrowhead

Woods owners who had those CC&R's attached to their property from the '64 Agreement – none. Neither is there any evidence in the record that any drafters of the '64 Agreement took that position in the years following the execution of the '64 Agreement when vacation renters continued to access the Lake and Reserve Strips. The trial court's finding that the CC&Rs presented by Appellant are not relevant to the interpretation of the '64 Agreement should be upheld because it is supported by substantial evidence. (*Benach*, 149 Cal.App.4th at p. 848; *see also* 5 AA 1216.)

2. The CC&R's Are Not Applicable to Vacation (Short Term) Rentals

Neither is there merit in the ALA's assertion that the subject CC&R's would have any bearing on the issues here even if the drafters had considered them. The CC&Rs prohibit certain Arrowhead Woods lots from maintaining a "store, business or profession" on them, and they further prohibit the following from being *erected, built or used* on them:

"[A] tenement house, hotel, boarding and/or lodging house, or any cesspool, vault or privy . . ." (Appellant's Request for Judicial Notice ("Appellant's RJN"), Ex. B at p. 193.)

There is no evidence in the record that any of the listed structures has been erected, built or used on the subject property. For example, in 1935, the legal definition of "tenement house" was limited to a multi-story house or building "any building, or portion thereof, more than one story in

height, which is designed, built, rented, leased, let or hired out to be occupied, or which is occupied as the home or residence of three or more families living independently of each other and doing their cooking in the said building." (*Biber v. O'Brien* (1934) 138 Cal.App. 353, 356 (citing to Tenement House Act of the State of California: Approved June 13, 1913); *see also,* Black's Law Dictionary definition of "tenement house" ("A low-rent apartment building, usu. in poor condition and often meeting only minimal safety and sanitary conditions.").) There is no evidence in the record that any of the Respondents have built such a structure or are using their single-family houses in that way.

The same is true of Appellant's inference that the Respondent covered by the CC&R in are operating a hotel. The definition of hotel in the 1960s was restricted to lodging with a minimum of six guest rooms. (*See Berall v. Squaw Val. Lodge of Tahoe* (1961) 189 Cal.App.2d 540, 543.) There is no evidence in the record of any such structure having been built by any of the Respondents.

There is also no evidence in the record that anyone affiliated with the entity charged with enforcing the subject CC&R's, the Arrowhead Woods Architectural Committee ("AWAC"), has ever claimed that homes that are rented to vacationers are tenements, hotels, boarding or lodging houses at any time in the 85 years since the CC&R took effect. Nor could the AWAC do so with respect to hotels, because the County of San

Bernardino has already made it clear in multiple ways that vacation rentals of homes are entirely different from hotels:

1. Vacation rentals and hotels are separately defined under the San Bernardino County Ordinance Code ("SBCOC"). A vacation rental, or "Short-Term Residential Rental Unit" ("STR") under the SBCOC is:

> "A residential dwelling unit or portion thereof rented or otherwise used for transient occupancy, as defined in County Code § 14.0203." (SBCOC § 84.28.030(i).)

A hotel is defined as:

> "An establishment that provides guest rooms or suites for a fee. Access to units is primarily from interior lobbies, courts, or halls. Related accessory uses may include conference and meeting rooms, restaurants, bars, and recreational facilities. Guest rooms may or may not contain kitchen facilities for food preparation (i.e., refrigerators, sinks, stoves, and ovens). Hotels with kitchen facilities are commonly known as extended stay hotels. A hotel operates subject to taxation under Revenue and Taxation Code § 7280. Note: A residential care facility is not a HOTEL, or vice versa." (SBCOC § 810.01.100(y).)

2. Vacation rentals are only allowed in "Rural Living" and "Single Residential" areas. (SBCOC § 82.04.040.) No such restrictions exists for hotels. Rather, hotels must be in commercial areas. (SBCOC § 82.05.040.)

3. Vacation rentals are, not surprisingly, also treated separately with respect to obtaining authorization to operate by the County. STRs are permitted under SBCOC §§ 82.04.040 and 84.28.040, entitled "Residential

Land Use Zoning District Allowed Uses and Permit Requirements."[2] (SBCOC § 82.04.04.) Hotels are licensed under SBCOC § 82.05.040, which is entitled "Commercial Land Use Zoning District Allowed Uses and Permit Requirements."[3] (*Ibid*.)

4. Notably, in addition to vacation rentals only requiring a permit while hotels require a license, the former are allowed in Residential Zones, while the latter only in Commercial Zones. (SBCOC §§ 82.04.040 and 82.05.040.)

5. Finally, per the San Bernardino County's website for STRs, only the following structures are allowed to be vacation rentals[4]:

a. A single family dwelling
b. A duplex
c. A room in a dwelling
d. A guest house
e. Some ADUs (accessory dwelling units)

Hotels are obviously a horse of a different color.

And of course, none of those arguments was ever the basis for the ALA creating the restrictions in the first place. They are simply a *post hoc* attempt to justify the ALA's egregious actions.

---

[2] https://wp.sbcounty.gov/ezop/permits/special-use-permit-short-term-rental-application/

[3] https://wp.sbcounty.gov/ezop/permits/hotel-motel-business-license-application/

[4] https://str.sbcounty.gov/about-str/

B. Appellant's "Transient Occupancy" Construct Is Also Misguided

Appellants know the facts and law discussed in section V. above, so they engage in repeated exercises in misdirection in the hope that this Court will lose sight of them. This includes presenting an argument based on the "character of use" test that was in effect in when the '64 Agreement was drafted and then implying that that test was supplanted by an unrelated Revenue and Taxation provision enacted in 1963. (ALA Opening Brief p. 20.) It was not, as we will discuss further below.

But in the first instance, as with the CC&R argument discussed above, the term "lessee" in the '64 Agreement is unambiguous on its face. But even if that term were ambiguous such that extrinsic evidence was necessary to prove the meaning that the parties intended, that extrinsic evidence must be connected to the parties to the contract. They must have considered it or must be shown to have at least been aware of it. There is no evidence here that the parties to the '64 Agreement considered the fine distinctions between a "lodger" and a "tenant" when they agreed that Arrowhead Woods owners' "lessees" and "guests" were entitled to access the Lake and Reserve Strips. Thus, neither the character of use test nor the 1963 addition to the Revenue and Taxation Code are admissible extrinsic evidence. And certainly Civil Code § 1940, added in 1976, twelve years after the '64 Agreement, is even less relevant or admissible. (*Bionghi*,

supra, 70 Cal.App.4th at 1367–1370.)

But even if the "character of use" test had been considered by the parties, it does not change the meaning of "lessee" in the '64 Agreement. That is because that test considers a number of factors in determining whether one is a lodger or tenant, factors that Appellant fails to mention in its brief. Those include whether the occupants share common toilets, bathrooms, kitchens or dining rooms as lodgers do, as compared to whether they occupy separate homes and apartments, as tenants, including short term renters, do. (*Fox v. Windmere Hotel Apartment Co.* (1916) 30 Cal.App. 162, 164; *Roberts v. Casey* (1939), 36 Cal.App.2d Supp. 767, 769.) The evidence before the Court is that Respondents rent out their single family homes to families vacationing in the area, as Respondent Doug Miller does. (2 AA 436 at ¶ 9.) There is no evidence, or even suggestion, that the rentals in Arrowhead Woods are communal lodging houses where occupants share common areas. Neither is there any evidence that Respondents provide laundry services or daily room cleaning as hoteliers do.

And the factors that the Appellant does mention in its brief: whether the owner retains keys to the premises, whether the premises are furnished, and whether utilities are provided, have no impact one way or the other here. Both lessors and owners of hotels, boarding houses and the like do that.

Again, these facts demonstrate that the trial court relied on substantial evidence finding: "The short-term renter obtains exclusive access to the home during the short-term stay with all obligations to maintain the premises during that stay. The short-term lessees here are not lodgers at a bed and breakfast within the Arrowhead Woods." (5 AA 1886.) This factual determination is entitled to deference and consistent with San Bernadino's own regulations, which permit STRs, but not hotels, in residential dwellings. (*IT Corp. v. County of Imperial* (1983), 35 Cal.3d 63, 69; SBCOC §§ 82.04.040 and 82.05.040.)

Appellants also ask this Court to rely on the later enacted definition of "transient occupancy" in Section 1940 of the Civil Code to argue that vacation lodgers do not constitute "lessees" or "houseguests." That statute has no applicability here. It does not define either term and was passed in 1976, more than a decade after the ALA's predecessor-in-interest entered into the 1964 Agreement. (*See* Appellant's RJN, Ex. C.) A statute and its legislative history from a different decade have no rational relationship to what the parties meant when they used terms like "lessees" and "houseguest" when they drafted and signed the '64 Agreement in 1964. (*See* Civ. Code, § 1636.)

Accordingly, the lower court determined that:

[T]he 64 Agreement does not limit the term of any lease. . . .

> [T]he 64 Agreement contemplates [that] any person who is allowed exclusive use of Arrowhead Woods' property for any period, regardless of how short that period may be, is a lessee.

(5 AA 1219.) The trial court's finding that this extrinsic evidence is not persuasive is entitled to deference. (*Benach*, 149 Cal.App.4th at p. 848.)[5]

'"""""'

Finally, Appellant's further reliance on the taxation code in effect in 1963, Revenue and Taxation Code section 7280 (a), which is derived from Government Code section 37101, is also unavailing, because the cited provision relates only to city and county taxation power. Specifically, it permits cities and counties to levy a "tax on the privilege of occupying a room or rooms, or other living space, in a hotel, inn, tourist home or house, motel, or other lodging unless the occupancy is for a period of more than 30 days." (*Ibid*.) Appellant offers no coherent explanation of how the California Legislature's discussion of the taxing powers of cities and counties has any potential bearing on the interpretation of the terms "lessee" or "house guest" as used by private parties in a settlement agreement. Neither the statute nor the cited legislative history of Section

[5] Moreover, the Legislature's use of the term "transient" in Civil Code Section 1940 is tied to taxation matters under section 7280 of the Revenue and Tax Code. As reflected in the letters of support contained in the Legislative History of Section 1940, one of the primary concerns was affording protections to elderly long-term hotel and motel residents. That legal distinction regarding transients in that context simply has no relevance to the definition of "lessee" in the '64 Agreement. (Appellant's RJN, Ex. C at p. 129.)

37101, define either term, and there is no extrinsic evidence that the parties to the '64 Agreement considered them or were even aware of them when they used the terms "lessee" and "house guest" in the '64 Agreement.[6]

C. Appellant's *Ad Hominem* References to Restrictions on Short Term Rentals Being Upheld in Vastly Different Contexts Are Unavailing

In another attempt at misdirection, Appellant ALA tries to color its arguments with a series of *ad hominem* references to situations in which short term rentals have been banned or otherwise restricted because they had negative impacts on other communities.

In the first instance, there is no evidence in the record before this court that the short-term rentals in Lake Arrowhead targeted by the ALA in its restrictions had any negative impact on the "safety, health, comfort and convenience of persons in or upon the Lake or in its vicinity thereof." Neither is there any evidence in the record that those impacts were the basis for the restrictions at issue. (2 AA 484 at ¶ (c).) They were not, and that is

[6] The individual Appellants' citation Civil Code section 1865 is equally irrelevant because it was not enacted until 1999 and therefore has no bearing on what the drafters of the '64 Agreement intended. Further, the right conveyed by Civil Code section 1865 to evict does not apply to all transient occupants. To proceed with an "eviction," the "innkeeper" must also satisfy certain other conditions, including providing written notice and having a contractual obligation to provide the guest room to an arriving person. (See Civ. Code § 1865 (c) (setting forth specific contractual conditions required to maintain a right of eviction). Appellants have not and cannot show that vacation rentals in Arrowhead Woods meet these criteria to invoke Section 1865. Their reliance on this statute is misplaced.

critically important because those are the only bases upon which the ALA is allowed to regulate access to the Lake and Reserve Strips. (*Ibid.*)

The lack of such evidence is confirmed by the Mattison Declaration submitted by Appellants, which is notably vague on this subject. The most that Mattison says is that there was a fire incident at the Lake in July of 2021 which resulted in damage to the dock and a number of boats. (3 AA 702 at ¶ 14.) There is no evidence linking this singular incident to STRs in Lake Arrowhead. In fact, it occurred after the vote which led to the ALA imposing the ban on STRs in the fall of 2020. (2 AA 287 at ¶ 13.) Appellant's weak attempt to attribute this unfortunate incident to STRs falls short.

In the second instance, the ALA does not have the broad authority that cities like Carmel-by-the Sea, Santa Monica and San Francisco had to promote a sense of community, etc. The ALA's authority is to enact regulations that address safety, health, comfort and convenience of Arrowhead Woods property owners nothing more. (2 AA 484 at ¶ (c).) And there is no evidence before this Court that the ALA's acts were based on issues of safety, health or the like. They were instead based on taking the temperature of a minority of Arrowhead Woods property owners who were known to be anti-short-term rentals.

And to be clear, there are any number of published cases that have struck down attempts to ban or otherwise restrict short term vacation

rentals, usually because they infringe property rights. (*See e.g., People v. Venice Suites, LLC* (2021) 71 Cal.App.5th 715 (affirming grant of summary judgment in favor of the defendant operator of an apartment building where the Los Angeles Municipal Code was silent as a length of occupancy for an "Apartment house"); *Protect our Neighborhoods v. City of Palm Springs* (2022) 73 Cal.App.5th 667 (upholding a City of Palm Springs Ordinance permitting short term rentals in the face of plaintiffs' assertions that they were an improper "commercial" use); *Greenfield v. Mandalay Shores Community Association* (2018) 21 Cal.App.5th 896 (recognizing that STRs have been historically allowed in Oxnard Shores).)

D. The Airbnb Agreement Introduced by Appellant Actually Rebuts Its Argument

Appellate ALA offers an exemplar of an Airbnb Agreement and argues that that agreement somehow shows that under the character of use test, vacation lessees are lodgers, not tenants. In the first place, there is no proper foundation laid for that agreement – no showing that that version was ever used even once by any of the Respondents, just a claim that some vacation rentals use Airbnb and that the agreement it was in effect somewhere for some owners at a particular point in time.

But even if there were evidence that one of the Respondents used the form of Airbnb Agreement, it does not show that short term renters are "lodgers." Selectively quoting from the case law, Appellants argue that the

host's right to re-enter, under limited circumstances, retaining keys, furnishing of premises and provision of utilities qualifies vacation lessees as "lodgers." (*See* Respondent ALA Brief at p. 38 (quoting *Stowe v. Fritizie Hotels, Inc.* (1955) 44 Cal.2d 416, 421– 22; *Roberts, supra,* 36 Cal.App.2d Supp. 767, 772; *Fox, supra, v. Windmere Hotel Apartment Co.* (1916) 30 Cal.App. at p. 162, 165).) But as discussed in Section VI. B. above, those are rights and practices of lessors as well.

'""The Airbnb agreement itself limits the host's right to re-enter during the stay to the extent: "(i) it is reasonably necessary, (ii) permitted by your contract with the Host, and (iii) consistent with applicable law." (Appellant's RJN, Ex. A at p. 27.) Such a limitation is more akin to the right to reenter afforded to landlords under California law, which permits access in case of emergency or (with reasonable notice given) to make repairs). (*See* Civ. Code § 1954(a)(1), (2).)

Moreover, entities that have lodgers do not use agreements like this. Hotel lodgers, for example, merely check in and check out, without any such written agreement. Neither is there any evidence in the record before this Court that any agreement used by hoteliers is similar to the Airbnb Agreement.

Rather, the Airbnb Agreement more closely resembles a standard lease agreement. For instance, Airbnb hosts retain keys to the dwelling, as do lessors under standard lease agreements. (Appellant's RJN, Ex. A, at p.

27, *cf.* 4 Miller & Starr, Cal. Real Estate Forms, § 2.79, Section 9 (2d ed 2022).) Airbnb hosts provide utilities and furnishings, as do many landlords under the terms of standard leases. (4 Cal. Real Est. Forms § 2:79, Section 5 (2d ed.) (sample lease providing that utilities to be paid by landlord); 4 Cal. Real Est. Forms § 2:79, Section 8 (2d ed.) (sample lease referencing furniture provided by landlord).)

Further, as noted earlier, Appellants conveniently omit to mention that the "character of use test" also considers whether the occupants share common toilets, bathrooms, kitchens or dining rooms as lodgers do, or occupy separate homes and apartments, as tenants do. (*Fox, supra*, 30 Cal.App. at pp. 164-165; *Roberts,* 36 Cal.App.2d Supp. at p. 769.) The evidence before the Court is that Respondents rent out their single family homes to families vacationing in the area, as Respondent Doug Miller does. (2 AA 436 ¶ 8.) There is no evidence, or even suggestion, that the rentals in Arrowhead Woods are communal lodging houses where occupants share common areas.

Again, these facts demonstrate that the trial court relied on substantial evidence finding: "The short-term renter obtains exclusive access to the home during the short-term stay with all obligations to maintain the premises during that stay. The short-term lessees here are not lodgers at a bed and breakfast within the Arrowhead Woods." (5 AA 1886.) This factual determination is entitled to deference and consistent

with San Bernadino's own regulations, which permit STRs, but not hotels, in residential dwellings. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69; SBCOC §§ 82.04.040 and 82.05.040.)

E. Appellant's Assertion That They Must Ban Arrowhead Woods Owners Who Are Not ALA Members Because The ALA Otherwise Lacks an Ability to Enforce Their Rules Against Them is Nonsensical

Finally, the ALA advances the fanciful claim that it must ban Arrowhead Woods owners who are not ALA members from the Lake and Reserve Strips because it otherwise has no means to enforce its rules against non-members. Nothing could be further from reality.

The ALA has multiple remedies available to it should non-members violate its rules. It can pursue claims of trespass (civil and/or criminal), theft, property damage, environmental law violations, health and safety law violations and nuisance claims, among others. In that regard, the ALA is not materially different from the private country clubs it so desperately seeks to become. Those clubs have the same legal rights and remedies with respect to non-members. So too do shopping malls, grocery stores, and amusement parks (*Donahue Schriber Realty Group, Inc. v. Nu Creation Outreach* (2014) 232 Cal.App.4th 1171 (shopping center asserting claim of trespass against solicitors); *Trader Joe's Co. v. Progressive Campaigns, Inc.* (1999) 73 Cal.App.4th 425 (grocery store asserting claim of trespass against activists who were disrupting their store business); (*Park*

Management Corp. v. In Defense of Animals (2019) 36 Cal.App.4th 649 (owner and operator of Six Flags amusement park bringing trespass cause of action against animal rights group).)

None of those businesses take the position that only members can use their facilities because they cannot enforce their rules against non-members, because the reality is that they have broad rights to pursue non-compliant individuals, irrespective of whether they are members. So does the ALA.

F. Contrary to the Individual Appellants' Contention, the Admissible Evidence before this Court Confirms that Respondents Own Property in Arrowhead Woods

In a separate opening brief, the individual Appellants', all of whom are current or former ALA Board members who imposed the subject restrictions, contend that Respondents have not submitted admissible evidence showing that they are Arrowhead Woods property owners. That contention is demonstrably false.

First, Respondents submitted declarations attesting to their ownership based on their own personal knowledge. (2 AA 285 at ¶ 2; 2 AA 435 at ¶¶ 2-3.) Moreover, separate and apart from those declarations, the ALA itself has cured any potential evidentiary defect by filing a request that the Court judicially notice Plaintiffs' respective deeds. (*See* Appellant's RJN, Ex. B.)

The attempts at misdirection by Appellants just reviewed are utterly lacking in substance and should be disregarded. The '64 Agreement is clear that Respondents and other Arrowhead Woods property owners have vested property rights that grant them, their lessees and their guests access to the Lake and Reserve Strips for reasonable recreational purposes. The ALA's Bylaw amendment banning Arrowhead Woods owners' lessees and guests blatantly violates that agreement, as do the additional restrictions imposed on Arrowhead Woods owners detailed above.

VII. RESPONDENTS HAVE NO ADEQUATE REMEDY AT LAW AND WILL SUFFER IRREPARABLE HARM ABSENT THE ISSUANCE OF A PRELIMINARY INJUNCTION

To qualify for a preliminary injunction, a moving party may show that "pecuniary compensation would not afford adequate relief" or that "it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief." (Code Civ. Pro., § 526(a)(4), (5).) Here, Appellants have deprived and continue to deprive Respondents of their fundamental property rights to access the Lake and Reserve Strips, and there is no adequate remedy at law to compensate Respondents.

A. Money Damages Do Not Adequately Compensate for Loss of Use and Enjoyment of the Lake and Reserve Strips

California law is clear that money damages do not suffice where the defendants' wrongdoing impairs not only the value of property rights, but also the use and enjoyment of those rights. (*See e.g., Clear Lake Riviera*

Community. Assn. v. Cramer (2010) 182 Cal.App.4th 459, 473 (finding irreparable harm where defendant blocked lake views).) Here, Respondents are suffering just such losses. They purchased homes in Arrowhead Woods as a gathering place for them and their guests and lessees to enjoy the unique beauty and activities offered by the Lake and the surrounding shoreline, including its trails. (2 AA 284 at ¶ 2; 2 AA 435 at ¶ 5.) These restrictions are more than mere inconveniences—they make owners, lessees and guests feel unwelcome, create fear and apprehension, and disrupt every aspect of using and accessing the Lake and trails around it. (2 AA 435-436 at ¶¶ 5-7.)

A further consideration in awarding injunctive relief where monetary damages are unavailing is whether property rights infringements result in "a difference of character and not merely of value." (*Grey v. Webb* (1979) 97 Cal.App.3d 232, 238 [affirming grant of preliminary injunction, noting that the difference between a new house and a used house *is a difference of character and not merely of value*. which establishes "substantial evidence" of "irreparable injury"].) Respondents' homes in Arrowhead Woods plainly now have a different character. They no longer have the same appeal as a gathering place for themselves or their lessees or their guests. Their character has been materially altered. Their character has also been changed because the ALA wants to force them to become members of an organization that they do not wish to support in order to avail themselves of

their existing property rights. Such an offense cannot be so easily reversed by reimbursement of their membership fees, as the individual Appellants argue. (Individual Appellants' Brief at p. 51.) Neither should the ALA be allowed to violate the '64 Agreement so blatantly and then tell non-ALA members "just give us your money now, and maybe we'll give it back later."

B. The Loss in Value as a Result of the ALA's Restrictions is also Difficult, if not Impossible, to Accurately Calculate

"Irreparable harm" does not mean "injury beyond the possibility of repair or beyond possible compensation in damages." (*Wind v. Herbert* (1960) 186 Cal.App.2d 276, 285.) Rather, it means "wrongs of a repeated and continuing character, or which occasion damages *estimable only by conjecture* and not by any accurate standard....' (*Donahue Schriber Realty Group, Inc.,*232 Cal.App.4th at p. 1184 (internal citation omitted, emphasis added).) Here, Respondents can only offer conjecture as to the precise monetary impact of the ALA's unlawful restrictions.

Most obviously, the ban on vacation lessees decreases the value of Arrowhead Woods properties as rentals because it impairs the goodwill associated with the rentals. (*Id.* at pp. 1184-1185 [property owners suffered irreparable harm to the goodwill of their businesses as a result of defendants' disruptive activity that dissuaded customers from returning to their stores].) But determining damages flowing from that impairment is all

but impossible. A comparison of rental values and rates before and after the ban is inherently imprecise, particularly in light of the fact that the pandemic has made the Lake all the more attractive to local visitors whose options to travel elsewhere have been significantly restricted.

Moreover, Respondents do not and cannot know which renters declined to rent because of lack of Lake access. (2 AA 436 at ¶¶ 8-9.) The vast majority of rental activity in this day and age takes place through internet sites like Airbnb and VRBO, where considerations of possibly renting or not renting are made electronically and anonymously. (2 AA 436 at ¶ 9.) Some listings mention restrictions on Lake access and some do not, so determining which potential renters were lost because of the ban on Lake access would be speculative at best. And Respondents have no means of determining which vacationers did not even inquire because they had heard about ALA restrictions beforehand. (*Ibid.*)

In other instances, rentals were booked but later cancelled when the restrictions on Lake and Reserve Strip access were discovered, usually with negative reviews left online. (2 AA 436 at ¶ 10.) The lasting impact of negative reviews on popular vacation rental websites such as Airbnb and VBRO is difficult or impossible to calculate accurately because so many subjective factors and variables influence the impact of ratings left by guests. (2 AA 436 at ¶ 9.) The attached example reviews reflect the multitude of influences on guest ratings. (2 AA 440-474.)

VIII. THE BALANCE OF HARMS WEIGHS IN RESPONDENTS' FAVOR

The California Supreme Court has set a low threshold for injunctive relief in situations like the one presented here:

> "[I]f it appears fairly clear that the plaintiff will prevail on the merits, a trial court might legitimately decide that an injunction should issue even though the plaintiff is unable to prevail in a balancing of the probable harms."

(*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 72-73.) In deciding whether to grant a preliminary injunction, California courts exercise discretion "in favor of the party most likely to be injured. If denial of an injunction would result in great harm to the plaintiff, and the defendants would suffer little harm if it were granted, then it is an abuse of discretion to fail to grant the preliminary injunction." (*Robbins v Superior Court* (1985) 38 Cal.3d 199, 205 (internal citations omitted).) Here, the balance of harm clearly favors Respondents. Appellant ALA offers a string of supposed harms that would flow to it, but there is no evidence before this Court to support those assertions.

IX. CONCLUSION

Appellant ALA has lost sight of its mission of maintaining the Lake for Arrowhead Woods property owners and their guests. Instead, Appellants have created and enforced increasingly draconian measures designed to discourage use and enjoyment of the Lake and trails by the increasingly diverse community of Arrowhead Woods owners and their lessees and guests

in favor of a minority of people who share their separationist values and want to now turn the Lake into a members-only country club. Respondents merely seek a return to the status quo that attracted Respondents and thousands of other Arrowhead Woods property owners and their lessees and guests to the Lake for decades.

Respondents have demonstrated here, as they did below, that defendants have violated their rights under the '64 Agreement, that they are therefore highly likely to prevail on the merits and that they will suffer ongoing irreparable harm in the absence of an injunction. Accordingly, Respondents respectfully request that this Court affirm the order issued below enjoining the ALA from the conduct specified therein.

Dated: January 19, 2023

ARENTFOX SCHIFF LLP

By: _____

John P. Zaimes
john.zaimes@afslaw.com
Sara T. Schneider
sara.schneider@afslaw.com
Jessica B. Do
jessica.do@afslaw.com
555 West Fifth Street, 48th Flr
Los Angeles, CA 90013
Telephone: 213.629.7400
Facsimile: 213.629.7401
Attorneys for Respondents
VERTICAL WEB VENTURES, INC., JACKIE McKINLEY, SELINE KARAKAYA, AND CHRISTOPHER LEE

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.520(c)(1), the undersigned hereby certifies that this Answer Brief on the Merits contains 10,192 words, exclusive of the cover page, tables, statement of the issue for review, signature block, and this certification, as counted by the Microsoft Word word-processing program used to general it.

Dated: January 19, 2023

By: _____
John P. Zaimes
Attorneys for Plaintiffs and Respondents

Vertical Web Ventures, Inc. et al., *v.* Arrowhead Lake Association
California Court of Appeal 4th District – 2nd Division Appellate
Case No. E078636
[Appeal from San Bernardino Sup. Court
Case No. CIVSB2120604]

PROOF OF SERVICE

I am a citizen of the United States. My business address is ArentFox Schiff LLP, 555 West Fifth Street, 48th Floor, Los Angeles, California 90013-1065. I am employed in the County of Los Angeles where this service occurs. I am over the age of 18 years, and not a party to the within cause.

On the date set forth below, according to ordinary business practice, I served the foregoing document(s) described as:

BRIEF OF RESPONDENTS VERTICAL WEB VENTURES, INC., JACKIE McKINLEY, SELINE KARAKAYA, AND CHRISTOPHER LEE

☒ (BY E-SERVICE) On this date, I personally transmitted the foregoing document(s) via TrueFiling portal to the e-mail address(es) of the person(s) on the attached service list.

☒ **(**BY MAIL**)** I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the U.S. Postal Service, and that practice is that correspondence is deposited with the U.S. Postal Service the same day as the day of collection in the ordinary course of business. On this date, I placed the document(s) in envelopes addressed to the person(s) on the attached service list and sealed and placed the envelopes for collection and mailing following ordinary business practices.

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

Executed on January 19, 2023, at Garden Grove, California.

Katryn F. Smith

Vertical Web Ventures, Inc. et al., *v.* Arrowhead Lake Association
California Court of Appeal 4th District – 2nd Division Appellate
Case No. E078636
[Appeal from San Bernardino Sup. Court
Case No. CIVSB2120604]

SERVICE LIST

Michael A. Scafiddi Megan E. Scafiddi Law Offices of Michael A. Scafiddi 432 North Arrowhead Avenue San Bernardino, CA 92401	Attorney for Arrowhead Lake Association Phone: 909.381.1000 Fax: 909.383.1077 Emails: megan@scafiddilaw.com michael@scafiddilaw.com
D. Wayne Leech 11001 Main Street, Ste 200 El Monte, CA 91731	Attorney for Defendants Gary Clifford, Robert Mattison, Alan B. Kaitz, Eran Heissler, Anthony O'Keefe and Christopher Wilson Phone: 626.443.0061 Fax: 626.443.1165 Email: wayne@leechlaw.com

Greg William Kettles Scott W. Ditfurth Dustin J. Nirschl Best Best & Krieger, LLP 3390 University Avenue, 5th Floor Riverside, CA 92501	Attorneys for Arrowhead Lake Association Phone: 951.686.1450 Email: gregg.kettles@bbklaw.com scott.ditfurth@bbklaw.com dustin.nirschl@bbklaw.com
Gregory M. Garrison Gregory M. Garrison, APC Post Office Box 131025 Carlsbad, CA 92013	Attorneys for Defendant Arrowhead Lake Association Phone: (619) 708-1628 Email: greg@garrisonapc.com
The Hon. Gilbert Ochoa Superior Court of California County of San Bernardino San Bernardino District – Civil Division 247 West Third Street San Bernardino, CA 92415-0210	**Via U.S. Mail**