Case No. E078636

IN THE CALIFORNIA COURT OF APPEAL

FOURTH APPELLATE DISTRICT

DIVISION TWO

VERTICAL WEB VENTURES, INC. et al.,

Plaintiff and Respondent,

v.

ARROWHEAD LAKE ASSOCIATION,

Defendant and Appellant.

On Appeal From the
San Bernardino County Superior Court
Case No. CIVSB2120604
Before the Honorable Gilbert Ochoa

APPELLANT ARROWHEAD LAKE ASSOCIATION'S REPLY BRIEF

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INTRODUCTION

Plaintiffs' respondents' brief puts out more heat than light. Trumpeting baseless claims of racism, Plaintiffs seek to prevent the Arrowhead Lake Association (the "Association" or "ALA") from following the lead of diverse communities across California in restricting short term vacation rental ("STR") activity. The 1964 Agreement granted Arrowhead Woods property owners, their "lessees," and "house guests" Lake access subject to ALA regulations. Plaintiffs essentially contend that "lessees" and "house guests" mean pretty much whomever Plaintiffs can find on Airbnb, no matter how short their stay, and that ALA's right to adopt regulations is meaningless. Plaintiffs' effort to cash in on their exclusive Lake access should be turned back, and the Association's efforts to protect the safety and security of people and vessels on the Lake upheld.

Plaintiffs pretend that the trial court made fact findings subject to a deferential standard of review. The record shows otherwise. The trial court did not resolve any fact disputes to (mis)interpret the 1964 Agreement. The interpretation of a contract is subject to de novo review by this Court.

Plaintiffs wrongly contend that the CC&Rs are irrelevant and may not be considered in interpreting the 1964 Agreement. The Association offers the CC&Rs not to alter or add terms to the 1964 Agreement, but rather to assist in interpreting that agreement in light of the parties' legal rights (which they are deemed to know) at the time they entered into that agreement. The CC&Rs prohibit all transient-serving uses. The CC&Rs show that the parties to the 1964 Agreement did not intend to grant Lake access rights to transients or lodgers. Plaintiffs' own treatises and other authorities confirm that the Agreement's terms "lessees" and "house guests" do not include transients or lodgers.

The Association's STR Bylaw Amendment restricts only transients from accessing the Lake. STRs are transient-serving uses under

California's "character of use" and the "length of stay" tests.

ALA did not waive its right to restrict STR clients from accessing the Lake. There is no evidence the STR clients have been accessing the Lake for "decades" as claimed by Plaintiffs. The widespread use of single family homes as short term vacation rentals is a relatively new phenomenon that did not exist before the internet and smartphones. Upholding the preliminary injunction would not be a return to the status quo.

Plaintiffs' claims that the STR Bylaw Amendment is unreasonable and the product of racism are meritless. On its face the STR Bylaw has a rational relationship to the safety, health, comfort, and convenience of people using the Lake. The only evidence supporting Plaintiffs' allegations that the STR Bylaw Amendment was motivated by racial animus is a single mostly conclusory declaration. The Bylaw Amendment was approved by the ALA membership, consisting of 4,890 members, with eighty-three percent in favor. Even assuming a handful of people associated with the ALA were motivated by racial animus, the Amendment's wide margin of voter approval shows their votes made no difference.

Even if Plaintiffs persuaded the Court that they are likely to prevail on the merits, an injunction would still be improper because Plaintiffs have not shown their legal remedies are inadequate. The only people denied access by the STR Bylaw Amendment are STR clients. Plaintiffs are not STR clients. Nor have Plaintiffs shown that damages would be exceptionally difficult to calculate. Like any business owner, Plaintiffs could establish their alleged lost profits, diminution of property value, and loss of goodwill, if any, through expert testimony.

ARGUMENT

A. The Court interprets the 1964 Agreement on de novo review

"Notwithstanding the applicability of the abuse of discretion

standard of review" in an appeal of a preliminary injunction, the "specific determinations underlying the superior court's decision are subject to appellate scrutiny under the standard of review appropriate to that type of determination." (*Itv Gurney Holding v. Gurney* (2017) 18 Cal.App.5th 22, 29.) Where the appeal turns on an interpretation of a contract, courts review the matter *de novo*. (*Id.*, citing *Taylor v. Nu Digital Marketing, Inc.* (2016) 245 Cal.App.4th 283, 288.) If a contract is ambiguous or a latent ambiguity is exposed, a party may introduce extrinsic evidence to aid the court in its interpretation of the contract.[1] (*Appleton v. Waessil* (1994) 27 Cal.App.4th 551, 554–555.)

Plaintiffs contend that the substantial evidence standard applies. (Respondent's Brief ("RB"), p. 22.) Plaintiffs improperly rely on an exception that applies only where the "interpretation of a contract turns on the *credibility* of conflicting extrinsic evidence which was *properly admitted* at trial." (*Morey v. Vannucci*, 64 Cal.App.4th at 913, emphasis added.) This exception does not apply when there is "*no* conflict" as to the credibility of the extrinsic evidence or the contract was interpreted "*without* the aid of extrinsic evidence." (*Id.*, emphasis in original.)

Here the rule rather than the exception applies. The parties did not even submit evidence that could present a theoretical conflict and require the court to resolve issues of credibility. While all parties submitted evidence to aid the trial court in determining the meaning of certain terms used in the 1964 Agreement, no party submitted evidence to alter or add terms to the 1964 Agreement. This dispute is narrow. It concerns only the interpretation of the terms "lessee" and "house guest" as used in the 1964

[1] "Even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which the language of the contract is yet reasonably susceptible." (*Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912.)

Agreement.

The parties submitted no contemporaneous evidence relating to the 1964 Agreement or any other extrinsic evidence that was intended to alter the substantive terms of the 1964 Agreement or its legal effect. Even if they had, none of the evidence presented a conflict whose resolution turned on the credibility of such evidence. For instance, the CC&Rs bar certain uses on Arrowhead Woods properties. They have no relation to dictionary definitions. This is not a case where one witness to a traffic accident testified that the light was green, while another witness testified that it was red. The trial court declined to take judicial notice of the CC&Rs anyway. De novo review is the standard of review on appeal.

B. The Court should consider the CC&Rs because they were part of the background law restricting the use of property owned by parties to the 1964 Agreement at the time it was entered

Plaintiffs object to the Court considering the CC&Rs. Plaintiffs contend that extrinsic evidence may only be considered, for purposes of interpreting a contract, when there is "evidence that the parties to the contract actually considered the proffered evidence when they chose the words of the contract." (RB, p. 30.) This principle does not apply here. The CC&Rs may and should be considered to interpret the 1964 Agreement.

Plaintiffs rely on *Bionghi v. Metro. Water Dist.* (1999) 70 Cal.App.4th 1358 ("*Bionghi*"), but it is inapposite. There plaintiff Abacus had a consultant contract with defendant, which defendant terminated. (*Id.* at 1361.) Abacus sued for breach, claiming the contract was improperly terminated, and attempted to offer extrinsic evidence for the purpose of adding a new term to the contract that termination was only permitted for good cause. (*Id.* at 1363.) The trial court held that because the "contract was integrated, extrinsic evidence was not admissible to vary the terms by

adding a requirement of good cause." (*Id.*) The Court of Appeal agreed: extrinsic evidence attempting to "add a term to an integrated contract" is improper for consideration. (*Id.*, at 1365.) The court held that the extrinsic evidence revealed no ambiguity in the employment contract itself. Nor did that evidence "allow a court to 'place itself in the same situation in which the parties found themselves at the time of contract.'" (*Id.*, at 1367, citing *Pac. Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 40 ("*PG&E*").)

Unlike the consultant contract in *Bionghi*, the 1964 Agreement does not have an integration clause. (*See generally* 1 AA 2:165-187.) Nor did the Association offer the CC&Rs to add a new term to the 1964 Agreement. The Association offered the CC&Rs because they reveal an ambiguity in the 1964 Agreement. In light of the property use restrictions placed on Arrowhead Woods properties years earlier, the parties to 1964 Agreement could not have reasonably intended to refer to transients or lodgers when they used the terms "lessee" and "house guest." As *Bionghi* recognized, an "ambiguity may be exposed by extrinsic evidence that reveals more than one possible meaning" to terms contained in a contract. (*Bionghi*, 70 Cal.App.4th at 1366, citing *PG&E*, 69 Cal.2d at 40, fn. 8 (holding that the "test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible").)

Even if *Bionghi* stood for the proposition Plaintiffs claim, that the parties must have actually considered the extrinsic evidence at the time of contract, that case would not prevent the Court from considering the CC&Rs. Courts are entitled to presume that certain extrinsic evidence was known to a party to a written instrument. For example, courts consider of

"[e]xisting statutory and case law" as an extrinsic aid and to inform the interpretation of a written instrument. (*Estate of Dye* (2001) 92 Cal.App.4th 966, 978.) Parties to the written instrument are "presumed to know the law." (*Ibid.*) In particular, property owners are presumed have actual knowledge of deed restrictions imposed on their property. (*Citizens for Covenant Compliance v. Anderson* (1995) 12 Cal.4th 345, 349 (acknowledging that property owners "are deemed to intend and agree to be bound by" deed restrictions).) Constructive notice "is the equivalent of *actual knowledge*; i.e., knowledge…is conclusively presumed." (*Id*., at 356, citing 4 Witkin, Summary of Cal. Law, § 203, p. 408, emphasis in original.)

Arrowhead Woods property owners and the Arrowhead Woods Property Owners Association were parties to the 1964 Agreement. They are presumed to have known about the CC&Rs at that time. As binding conditions, covenants, and restrictions, they constituted part of the law governing use of the Arrowhead Woods properties. And as recorded deed restrictions, the Arrowhead Woods Property owners are presumed to have had actual knowledge of them when they entered the 1964 Agreement. The CC&Rs are admissible because they allow the Court to "place itself in the same situation in which the parties found themselves at the time" of the 1964 Agreement. (*Bionghi*, 70 Cal.App.4th at 1367, citing *PG&E*, 69 Cal.2d at 40.)

C. The CC&Rs bar all forms of transient-serving uses

The CC&Rs provide that "no tenement house, hotel, boarding and/or lodging house…shall be erected, built or *used*." (ALA's RJN Ex. B, p. 84, emphasis added.) Plaintiffs chiefly contend that "[t]here is no evidence in the record that any of the Plaintiffs have built such a structure or are using their single-family houses in that way." (RB, p. 32.) Plaintiffs' contention proves nothing, is a red herring, and reflects a misapprehension of the

import of the CC&Rs.

The intent of the CC&Rs is clear. The tenement houses, hotels, boarding houses, and lodging houses expressly prohibited by the CC&Rs all share a common attribute: they are transient-serving uses. Through an illustrative, non-exhaustive list of transient-serving uses, the CC&Rs prohibit not only the transient-serving uses specifically identified. The CC&Rs *prohibit all forms of transient-serving uses.* This includes STRs.

Plaintiffs contend that because STRs are not specifically called out by the CC&Rs they are not prohibited uses. This argument proves too much. By Plaintiffs' theory, an Arrowhead Woods property owner could build a motel because "motel" is not specifically enumerated in the CC&Rs' list of prohibited uses. Motels differ from hotels in some respects, but like hotels, tenement houses, boarding houses, and lodging houses, motels are transient-serving uses. STRs are the same.

It is not reasonable to say that the CC&Rs should have specifically identified "short term rentals" if the CC&Rs intended to prohibit them. There was no widespread practice of renting an entire single family home for less than 30 days when the CC&Rs were adopted in 1935. "Short term rentals" did not exist then. STRs are a modern phenomenon. Plaintiffs allege that they use their properties for vacation rentals and that the vast majority of such rental activity takes place on two platforms, Airbnb and VRBO. (See 2 AA 6:435-436, ¶¶ 5, 8-9; 1 AA 2:134, ¶2; 2 AA 7:440-474.) Airbnb was founded in 2008. VRBO was founded in 1995. Airbnb and VRBO are operated online, and have only recently become popular with the proliferation of smartphones. As an illustration, a Westlaw and Lexis Nexis searches of Airbnb reveal no litigation (whether related to STRs or

any other matter) prior to 2013.[2]

The CC&Rs bar transient-serving uses on Arrowhead Woods properties. Because this was part of the background law when Arrowhead Woods property owners entered into the 1964 Agreement, that Agreement's use of the terms lessee and houseguest should not be interpreted to include lodgers or other kinds of transients.

D. The terms Lessees and House Guests do not refer to Transients and Lodgers

Plaintiffs contend that the terms lessees and house guests should be interpreted broadly based on dictionaries, treatises, and other materials. (RB, pp. 25-28.) But Plaintiffs' own authorities show a clear distinction in the law between a lessee or tenant on the one hand, and a lodger or transient on the other hand. In other words, a transient or lodger can never be a lessee or tenant. And 1964 era legal decisions' interpretation of "house guest" is more persuasive than a contemporary general dictionary definition.

Plaintiffs cite the Miller & Starr California Real Estate law treatise for the proposition that a lease is "an agreement that grants to the *tenant* the rights of exclusive possession and use of real property" and that a lease "'creates a *possessory estate* in real property.' (§ 15:4. Lease distinguished, 6 Cal. Real Est. § 15:4 (4th ed.).)." (RB, p. 26, emphasis added.) Merriam Webster and Black's Law Dictionaries agree that a lessee is conveyed an interest or estate in real property. (*Ibid*.)

While not cited by Plaintiffs, additional excerpts from the same Miller & Starr treatise expand on this distinction:

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[2] In Lexis Nexis, using the search terms "Airbnb" or "Air bnb" the earliest case references (when sorted by date) are from 2013. In Westlaw, using the search terms "Airbnb" or "Air bnb" (and filtered for "all states" and "all" federal forums) the earliest case references are from 2013.

> A "licensee does *not hold any interest or estate in the property*," a license confers no interest in the land, is "only a personal right and *not a property interest*," and any right of possession "cannot be anything more than a mere license."

(§ 34:5. Other interests distinguished—License, 10 Cal. Real Est. § 34:5 (4th ed.), emphasis added.)

> A lease, conversely, "constitutes both a *conveyance of an estate in real property* to the tenant and a contract between the landlord and tenant that provides for possession…"

(§ 34:2. Lease as personal property or real property, 10 Cal. Real Est. § 34:2 (4th ed.), emphasis added.)

> A "*guest or lodger has no interest in the realty* and does not have an estate or interest in the property."

(§ 34:6. Other interests distinguished—Occupation by a guest or lodger, 10 Cal. Real Est. § 34:6 (4th ed.), emphasis added.)

Taken together, the definitions relied upon by Plaintiffs demonstrate that a lessee—unlike a lodger or transient—is conveyed an interest or estate in real property. Conversely, a lodger or transient is not a lessee because they are granted no interest in the realty and instead have the rights of a mere licensee. (*Roberts v. Casey* (1939) 36 Cal.App.2d Supp. 767, 774.)

Plaintiffs' citation to Miller & Starr also shows that the term lessee is synonymous with tenant. (RB, p. 26, citing § 15:4. Lease distinguished, 6 Cal. Real Est. § 15:4 (4th ed.).) For all of these reasons, a lodger or transient can never be a lessee or tenant.

Plaintiffs cite to what appear to be contemporary definitions of "guest" and "houseguest" in the Cambridge Dictionary and California Tenants, A Guide to Residential Tenants' and Landlords' Rights and Obligations (the "Tenants' Guide"). (RB, p. 27.) The Court should not rely on these authorities. General dictionaries such as the Cambridge Dictionary give definitions for use in everyday life. General dictionaries are not intended to give definitions for terms used in a legal agreement. The meaning of words can also change over time. The Cambridge Dictionary definition does not speak to the usage of the term "house guest" as used in 1964, much less its legal significance.

Case law from that time is a more reliable resource to determine the meaning of terms used in the 1964 Agreement, which is a legal document intended to give legal effect. Cases in and around 1964 show that a "house guest" does not pay rent and shares possession of a premises with the owner. (*Burge v. U.S.* (9th Cir. 1964) 333 F.2d 210, 218; *Pierce v. Bd. Of Nursing Educ. & Nurse Registration* (1967) 255 Cal.App.2d 463, 466.) Because STRs are a commercial enterprise, operated to generate profit for the proprietor, a STR client can never be a "house guest."

Even further afield, Plaintiffs cite to the Tenants' Guide for the proposition that "guests…do[] not have the rights of a tenant" and a "guest" includes "a person who stays in a transient hotel for fewer than seven days." (RB, p. 27.) The Tenants' Guide only undermines Plaintiffs' contention that "guests" have access rights under the 1964 Agreement. A "guest"—unlike a "house guest" or a tenant—is a transient or lodger, and the distinction turns on the occupant's length of stay. The 1964 Agreement

granted rights to "house guests," but not "guests." Again, this is consistent with the CC&Rs, which prohibit transient-serving uses.

E. STRs are transient-serving uses under the "character of use" and "length of stay" tests

1. Plaintiffs incorrectly contend that the character of use test should not be considered and favors them in any event

In its opening brief the Association argued that the "character of use" test for distinguishing between transients and lessees shows that STR clients should be characterized as transients. (Opening Brief ("OB"), pp. 37-38.) Plaintiffs contend that the character of use test should not be considered because there is "no evidence" that the parties considered the distinctions "between a 'lodger' and a 'tenant.'" (RB, p. 26.) A court may always consider "[e]xisting statutory and case law," as extrinsic evidence for purposes of interpreting the meaning of terms contained in a written instrument. (*Estate of Dye* (2001) 92 Cal.App.4th 966, 978.) A party to a written instrument is "presumed to know the law." (*Ibid.*) The character of use test existed in 1964 and the Court may consider it to help interpret the 1964 Agreement.

Plaintiffs also contend that because ALA did not discuss the character of use test's factor of "common amenities" in its opening brief, the character of use test somehow favors Plaintiffs. (RB, p. 26.) It does not. Plaintiffs have proffered no evidence regarding the way in which STRs are operated, including whether STR clients share amenities. The Association focused in its opening brief on the character of use test's principal factor, whether an occupant has been conveyed "exclusive legal possession of [the] premises and is responsible for [its] care and condition." (OB, p. 20, citing *Stowe v. Fritzie Hotels, Inc.* (1955) 44 Cal.2d 416, 420 ("*Stowe*"); OB, pp. 37-38.) A lodger or transient "has only the right to use the premises, subject to the landlord's retention of control and right of

access." (*Stowe*, at p. 420.)

The Airbnb Agreement and common experience regarding STRs demonstrate that this factor favors characterizing STR clients as lodgers or transients. The Airbnb Agreement unambiguously provides that all reservations grant to STR clients "a limited license to enter, occupy, and use" the property. (ALA RJN, Ex. A, p. 27.) The Airbnb Agreement is binding on all Airbnb STR clients, and the owner as STR host "retains the right to re-enter the Accommodation during [the lodger's] stay." (*Id.*, at pp. 27, 29.) Stated differently, STR clients have only the rights of a licensee subject to the owner's control and right of access. STR clients are not conveyed any interest or estate in real property granting them exclusive possession.

Courts consider additional factors under the character of use test that weigh in favor of finding STR clients to be lodgers or transients. (OB, p. 21, citing cases.) As STR hosts, owners pay utilities, retain keys, and furnish their homes. Even if the common amenities factor favored Plaintiffs (which it does not), that factor does not tilt the application of the character of use test in any significant way. On balance, given the weight of all other factors considered under the character of use test, STR clients are lodgers or transients.

2. Plaintiffs mischaracterize the import of the length of stay test

Plaintiffs argue that this Court should not consider statutory law such as Civil Code section 1940, Government Code section 37101, and Revenue and Taxation section 7280. (RB, pp. 36, 38-40.) Plaintiffs contend that the statutes are improper for consideration because they were not enacted contemporaneously with the 1964 Agreement and because they relate to discrete areas of law. In short, Plaintiffs contend that California statutory law is irrelevant to the Court's determination.

Plaintiffs mischaracterize the import of the foregoing statutes. A key issue in this appeal is whether the STR Bylaw Amendment violates the 1964 Agreement. Because the 1964 Agreement's terms "lessees" and "house guests" necessarily exclude transients or lodgers, the Court must determine whether the Bylaw Amendment impermissibly restricts the rights of tenants or lessees, or only transients and lodgers. The statutes demonstrate that—since as early as 1963—California law has used a 30-day "length of stay" test to distinguish a lodger or transient from a tenant or lessee. The statutes also demonstrate that the length of stay test was adopted in a variety of significant contexts including landlord-tenant and taxation law.

F. The Association did not waive its right to restrict transients such STR clients from accessing the Lake; there is no evidence that STR clients have been accessing the Lake for "decades"

Plaintiffs appear to argue that ALA waived its right to adopt and enforce the STR Bylaw Amendment because ALA has not historically regulated STRs or STR clients. Plaintiffs contend "Arrowhead Woods property owners have leased their homes to vacationers for long and short terms" and "ALA itself has also affirmatively acknowledge[d] the validity of [STR] access" by selling kayaking permits to STR clients. (RB, p. 28.) Plaintiffs claim they merely seek a return to the status quo that has prevailed at "the Lake for decades." (*Id*. at p. 52.)

There is no waiver unless a party intentionally relinquishes a right. (*Stewart v. Seward* (2007) 148 Cal.App.4th 1513, 1524.) The "party claiming waiver has a heavy burden; and a waiver will not be lightly inferred." (*Thorup v. Dean Witter Reynolds, Inc.* (1986) 180 Cal.App.3d 228, 234.) There is no evidence in the record for how long Plaintiffs have been using their properties as vacation rentals. Plaintiff Selene Karakaya does state in her conclusory declaration that she is "informed and believe[s]

in that the decades since the ’64 Agreement was recorded, Arrowhead Woods property owners have leased their homes to vacations for long and short terms.” (2 AA 5:285-286, ¶8.) But the trial court properly sustained defendants’ objections to the assertion on grounds of hearsay and lack of foundation, among other things. (3 AA 13:671; 4 AA 23:863; 5 AA 47:1224.) Plaintiffs did not appeal, and this Court should decide the appeal without considering that testimony. (*Valentine v. Plum Healthcare Group, LLC* (2019) 37 Cal.App.5th 1076, 1090 fn. 4 (“a respondent who has not appealed from the judgment may not urge error on appeal”). *See also Roe v. McDonald’s Corp.* (2005) 128 Cal.App.4th 1107, 1113-1114 (“Where a plaintiff does not challenge the superior court’s ruling sustaining a moving defendant’s objections to evidence offered in opposition to the summary judgment motion, any issues concerning the correctness of the trial court’s evidentiary rulings have been waived.”) (internal quotation marks omitted).)

Even if Arrowhead Woods property owners had leased their homes for long and short terms since 1964, it would not show any intentional relinquishment by ALA relevant to this dispute. The STR Bylaw Amendment does not prohibit Arrowhead Woods property owners from operating STRs. It just bars STR clients from accessing the Lake.

Plaintiffs’ contention that ALA has “affirmatively acknowledged the validity” of STR clients’ access to the Lake by “selling kayaking permits to weekend vacationers” is not supported by record. (RB, p. 28, citing 2 AA 5:286 ¶9.) The trial court correctly sustained objections to the evidence Plaintiffs cite in support—a portion of Plaintiff Selene Karakaya’s declaration. (3 AA 13:671-672; 4 AA 23:863; 5 AA 47:1224.) Plaintiffs offer no other evidence in support of this contention.

What the record does show is that the Association has always prioritized safety. (1 AA 2:195, ¶10.) ALA has long imposed conditions

on Lake access and use, owns and operates five Whaler Guardian boats for purposes of patrolling the Lake, employs security staff, and promulgates rules that regulate Lake activities. (*Ibid*.) ALA has never knowingly issued boat or kayak licenses to STR clients. (3 AA 17:702-703 ¶19.) To the extent any STR clients obtained kayaking licenses, it was under a false pretense that they were "'personal friends' of the STR owners as opposed to STR clients." (*Ibid*.) ALA has not *intentionally* relinquished any rights relating to STR clients' access to the Lake.

The status quo is not and cannot be any circumstance in which STR clients, as transients or lodgers, are granted access to the Lake. Not only are STRs a new phenomenon, the CC&Rs prohibit transient-serving uses.

G. Plaintiffs' claim that the STR Bylaw Amendment is unreasonable and racially motivated is meritless

Plaintiffs contend that the STR Bylaw Amendment was in "no way supported by evidence that [it] was *necessary* for safety, health, comfort or convenience." (RB, p. 18, emphasis added.) Plaintiffs argue that the STR amendment was motivated not by "rational argument or legal justification, but by separatism based on racial and national origin animus." (*Ibid*.) Plaintiffs' contentions are meritless.

The 1964 Agreement grants limited rights to certain parties "*subject to*" the regulations of the ALA. (2 AA 484, emphasis added.) The 1964 Agreement authorizes the ALA to promulgate "*reasonable* regulations *designed* to promote the safety, health, comfort and convenience" of people using the Lake. (2 AA 5:484, emphasis added.) A regulation need not be *necessary* to be valid. It need only be reasonable and designed to promote one of the Agreement's four expressly stated objectives, one of which is merely the *convenience* of people using the Lake. The correct standard of review is akin to the standard used when a municipality's exercise of its police power is challenged on substantive due process grounds: rational

basis review. An enactment will survive rational basis review if the enactment is "rationally related" to the enactment's purpose. (*E.g.*, *Hobbs v. City of Pac. Grove* (2022) 85 Cal.App.5th 311, 327-28 (acknowledging that under rational basis review legislative acts are "presumed valid," "[t]he test is extremely deferential," and it is improper for the court to "inquire into the wisdom of [the] action").)

This standard is easily met here. The Association prioritizes safety and the prevention of vandalism, theft, and trespass. (3 AA 17:700-01 ¶¶10, 11.) ALA was informed of "increasing dissatisfaction from the ALA membership regarding safety and other problems with STR clients." (3 AA 17:703 ¶21.) These concerns implicate all four of the valid bases for which a regulation can validly be enacted (i.e., safety, health, comfort, and convenience). The ALA Board "considered what actions could be taken" and determined that the STR Bylaw Amendment could address the concerns of the ALA membership. (*Id.*) The Board presented a ballot to the ALA membership so that the 4,890 members could decide the issue. (2 AA 5:359.) Eighty-three percent of the ALA membership voted to deny STR lodgers access to the Lake. (3 AA 17:703 ¶21.) These circumstances demonstrate that the Bylaw Amendment was reasonably designed to promote the safety and convenience of those with Lake access and is thus valid and enforceable.

Plaintiffs do not argue that the Bylaw Amendment is facially discriminatory, and Plaintiffs could not reasonably argue that it is. Instead, Plaintiffs claim that the STR Bylaw Amendment was motivated by racial and national origin animus. (RB, pp. 17-20.) But Plaintiffs' evidence consists of a single declaration submitted by Plaintiff Selene Karakaya. Karakaya's largely conclusory testimony falls short of establishing that the STR Bylaw was adopted because of racial and national origin animus.

Karakaya claims that ALA has "deputized" volunteers to enforce

restrictions and these volunteers have done so in a discriminatory manner, but fails to explain how they were "deputized," who they are, what they did, the circumstances, or how these individuals were involved in the STR Bylaw Amendment's adoption. (2 AA 5:287 ¶16.) She contends that ALA and individual defendants use racial code words or phrases, but fails to indicate who made these statements, the circumstances, or when the statements were made. (2 AA 5:288 ¶18.) She also claims that enforcement officers of the ALA are bigoted, but fails to indicate which officers are bigoted, the evidence in support of such bigotry, or their involvement in the enactment of the STR Bylaw. (*Id*. at ¶19.) And even when Karakaya's declaration purports to set out five "examples" of animus, her declaration falls short of connecting these examples to the STR Bylaw's adoption. (2 AA 5:288-289 ¶20.)

The Association and the individual defendants submitted declarations denying racial or national origin animus. (3 AA 14:686-692; 3 AA 15:704 ¶¶23-26.) They pointed out that Karakaya's single example of supposed animus by an ALA board member concerned a previous board member in 2016 (years before the STR amendment was adopted), when none of the existing board members were even on the board. (*Ibid*.) Even assuming *arguendo* that the incidents claimed by Karakaya occurred or reflect the animus alleged (which they do not), they do not establish that the majority of the eighty-three percent of the Association members who approved of the STR Bylaw Amendment were motivated by similar animus.

Cases adjudicating discrimination claims challenging legislative enactments confirm that the motives of a few should not be imputed to the whole. The "Supreme Court has cautioned" against "attribut[ing] the unjust prejudices of certain legislators to an entire legislative body." (*United States v. Machic-Xiap*, 552 F.Supp.3d 1055, 1061 (D. Or. 2021),

citing *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *See also United States v. Muñoz-De La O*, 586 F.Supp.3d 1032, 1049 (E.D. Wash. 2022) (holding that even discriminatory motivations by some legislators failed to "establish any procedural or substantive departures" sufficient to show "a discriminatory motivation by Congress as a whole").)

For example, the Court of Appeal upheld a California ballot proposition that amended the equal protection clause of the California Constitution against an equal protection challenge. (*Tinsley v. Superior Court* (1983) 150 Cal.App.3d 90, 103.) "The purposes of the Proposition are stated in its text and are legitimate, nondiscriminatory objectives. In these circumstances, we will not dispute the judgment of the Court of Appeal or impugn the motives of the State's electorate." (*Id*. at 102 (internal quotation marks omitted), *quoting Crawford v. Board of Education* (1982) 458 U.S. 527, 545 (internal quotation marks omitted).)

These principles are particularly apt here. On their face, the STR Bylaw Amendment's purposes are legitimate and nondiscriminatory. The ALA board put the matter to a vote by the ALA membership as a bylaw amendment rather than the Board trying to act on its own. (3 AA 17:703 ¶21.) Bylaw amendments require "approval by a majority of a quorum of the Residential Members." (2 AA 5:303 §K, ¶5.) Eighty-three percent of the Association's membership, which includes nearly 5,000 members, approved of the STR Bylaw Amendment. (3 AA 17:703 ¶21.) This vote exceeds even a super-majority tally. Even if the handful of votes that Plaintiffs allege were motivated racial or national origin animus (which ALA vigorously denies) are not counted, the STR Bylaw Amendment would have been approved anyway. (*Compare Legal Servs. for Prisoners with Children v. Bowen* (2009) 170 Cal.App.4th 447, 453 (in an equal protection challenge, "[i]f the facts and circumstances show that racial

discrimination was a 'substantial' or 'motivating' factor behind the enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor") (dicta).)

A desire to regulate STRs is not inherently unlawful or discriminatory. As explained in the Association's opening brief, the negative spillover effects of STRs have lead diverse communities throughout California to restrict STRs. (OB, pp. 23-24.) STR restrictions have been repeatedly upheld against legal challenge. (*Ibid*. (citing authorities).) Are Plaintiffs saying that the Association should not be allowed to join these other communities in restricting STR activity just because a few ALA community members are alleged to have racial animus?

H. Plaintiffs fail to demonstrate a threat of irreparable injury

For an injunction to issue, a plaintiff must establish that their legal remedy is inadequate. (Code Civ. Proc. § 526(a); *Thayer Plymouth Ctr., Inc. v. Chrysler Motors Corp.* (1967) 255 Cal.App.2d 300, 306 (holding that "if monetary damages afford adequate relief and are not extremely difficult to ascertain, an injunction *cannot be granted*") (emphasis added).) An injunction will also not issue unless the threat of irreparable injury is imminent. (*E. Bay Mun. Util. Dist. v. Dep't of Forestry & Fire Prot.* (1996) 43 Cal.App.4th 1113, 1126 ("An injunction properly issues only where the right to be protected is clear, injury is *impending* and *so immediately likely as only to be avoided by issuance of the injunction*") (emphasis added).) Plaintiffs have not shown this.

1. Plaintiffs have not shown that their legal remedies are inadequate

By every measure, the STR Bylaw Amendment does not pose a threat of irreparable, imminent injury. The STR amendment restricts only STR clients' access to the Lake, not Plaintiffs' access. Plaintiffs do not

refute this point. Nor could they. The STR amendment does not restrict Plaintiffs from renting their homes to STR clients. Plaintiffs have not lost the right to enjoy any part of their property or their Lake access. The STR Bylaw Amendment would only prevent Plaintiffs from selling Lake access to an STR client as part of a vacation rental of one of Plaintiffs' homes. Even assuming this is a breach of the 1964 Agreement, Plaintiffs have an adequate remedy at law: money damages.

Plaintiffs do not have standing to sue for any injury suffered by would-be STR clients who cannot access the Lake. Plaintiffs may sue only for Plaintiffs' own injury. In a sleight of hand, Plaintiffs attempt to combine STR clients' use and enjoyment of the Lake with Plaintiffs' own property rights to argue that the Bylaw Amendment "impairs not only the value of property rights, but also the use and enjoyment of those rights." (RB, p. 47.) STR clients have no property interest in the Lake. STR clients' have no property rights that the Bylaw Amendment is preventing STR clients from using and enjoying. Plaintiffs cannot show a loss of use and enjoyment of property rights as a basis for injunctive relief.

Plaintiffs cite to *Clear Lake Riviera Comm. Assn. v. Cramer* (2010) 182 Cal.App.4th 459 ("*Cramer*"), but it does not help them. (RB, pp. 47-48.) There the Court of Appeal affirmed the trial court's order granting injunctive relief in favor of a community association against defendant homeowners, the Cramers, who had knowingly violated building height restrictions. (*Id*. at 473.)

> Two neighbors testified at trial that their prior unobstructed views had been blocked by the Cramers' home, resulting not only in a diminution in value of their homes but also a substantial loss of their enjoyment in them. Where previously the neighbors were able to enjoy views of the

> nearby lake, they now saw only the walls of the Cramers' home. For both neighbors, this was compounded by a loss of privacy, since the Cramers' home looked onto theirs. (*Id.*)

There is nothing in *Cramer* to suggest that the neighbors were using their homes for any purpose other than as residences, as opposed to transient-serving uses such as STRs. (*Id.*) It was the neighbors' own use and enjoyment that was impacted. Here, in contrast, Plaintiffs are not prevented from using their homes or accessing the Lake. Nor are Plaintiffs' house guests or Plaintiffs' tenants staying 30 days or more prevented from doing so. Only STR clients—those staying less than 30 days—are impacted by the STR Bylaw Amendment. *Cramer* is distinguishable.

Plaintiffs' citation to *Grey v. Webb* (1979) 97 Cal.App.3d 232 is similarly unavailing. (RB, pp. 48-49.) There buyers sued in specific performance for breach of a contract for a new home. (*Id.* at 234-236.) The seller sold the new home to a third party, and the buyers sought a preliminary injunction to prevent that third party from moving in pending the lawsuit's outcome. (*Id.* at 235-236.) The Court of Appeal affirmed the trial court's order granting a preliminary injunction. (*Id.* at 238.) Like *Cramer*, there is no indication that the buyers were going to use the home for anything other than a residence for the buyers to live in. The court emphasized that the buyers had invested thousands of dollars in custom drapes, floor coverings, and furniture. (*Id.* at 236, 238.)

2. Plaintiffs have not shown that it would be exceptionally difficult to calculate damages

Plaintiffs also claim that a preliminary injunction is warranted because their damages cannot be accurately calculated. (RB, pp. 49-50.) It is well settled, however, that business damages, predicated on lost profits,

can be compensated by legal remedy "even though they may not be capable of exact determination." (*Robert L. Cloud & Assocs. v. Mikesell* (1999) 69 Cal. App. 4th 1141, 1151.) There is no need to identify which STR clients were discouraged by the Bylaw Amendment or undertake similar inquires as suggested by Plaintiffs. An expert witness need only calculate the amount of profits Plaintiffs could have obtained but did not as a result of the STR amendment. (*Id*.) Lost profits, as well as diminution in value, may be calculated through expert testimony. (*Weiss v. People ex rel. Dep't of Transp.* (2020) 9 Cal.5th 840, 854, 265 (acknowledging that for purposes of "valu[ing] the property" in "both eminent domain actions and inverse condemnation actions," the "key evidence" is "expert testimony").)

Plaintiffs also suggest that a loss of goodwill justifies the issuance of an injunction. (RB, p. 49.) "[L]oss of business goodwill," however, may also be calculated through expert testimony. (*Redevelopment Agency of San Diego v. Attisha* (2005) 128 Cal.App.4th 357, 362.) Plaintiffs cite to *Donahue Schriber Realty Group, Inc. v. Nu Creation Outreach* (2014) 232 Cal.App.4th 1171 ("*Donahue*") for the proposition that there can be a finding of irreparable harm if there are "wrongs of a repeated and continuing character, or which occasion damages *estimable only by conjecture* and not by any accurate standard." (RB, p. 49, emphasis in original.) In *Donahue* a shopping center owner sued in trespass to enjoin defendants from soliciting charitable donations or other expressive activities on sidewalks adjacent to store entrances. (232 Cal.App.4th at 1174, 1177.) The Court of Appeal affirmed the trial court's grant of a preliminary injunction. (*Id*. at 1175.)

Donahue is distinguishable. The court was compelled to follow the established rule, where a case "pits the defendant's liberty of speech rights against the plaintiff's property rights, a showing that the plaintiff is likely to prevail on the merits establishes that it will be irreparably harmed if the

injunction is not granted." (*Id*. at 1185.) The instant lawsuit involves the lake access rights of plaintiffs and defendants under an agreement, a completely different kind of dispute.

CONCLUSION

Plaintiffs claim that ALA has lost sight of its mission. (RB, p. 51.) Plaintiffs are the ones who have lost sight of what it means to be an Arrowhead Woods property owner. Activity in the Lake and surrounding Arrowhead Woods Community is not a free-for-all. ALA owns the Lake to which Arrowhead Woods property owners enjoy recreational access. (1 AA 2:134 ¶3.) The 2.2 mile long Lake is home to approximately 2,500 boat docks, and ALA adopts and enforces rules to protect the safety and security of Lake users. (1 AA 2:195 ¶¶9, 10; 3 AA 17:700 ¶11; 3 AA 17:702 ¶14.) Arrowhead Woods property owners seeking to improve their property are subject to the jurisdiction of an architectural committee. (2 AA 5:364-365.) Property use is restricted by CC&Rs. (E.g., 2 AA 5:371, 384-387; ALA RJN Ex. B at p. 83.) Property owners give up the right to do whatever they want in exchange for the benefits that come when the community adopts rules for everyone to follow.

Plaintiffs claim that ALA has adopted rules to discourage use of the Lake by an "increasingly diverse community," in favor of a "minority" of people who want to turn the Lake into a "members-only" country club. (RB 51.) But Plaintiffs' own complaint admits that Lake access has always been a "valuable and exclusive asset." (1 AA 2:134 ¶3.) Lake Arrowhead was created as a privately-owned lake and shoreline more than 100 years ago. (2 AA 5:342, 351-352.) Plaintiffs admit that "property ownership in Arrowhead Woods" is what entitles them to access the Lake. (*Id*.) When Plaintiffs and others capitalized on the STR boom to sell their exclusive access as part of renting out their properties to vacationers, 83% of ALA's membership voted to approve a bylaw amendment that prohibits STR

clients from accessing the Lake. (3 AA 17:703 ¶21.) Far from discouraging Lake use by an "increasingly diverse community," the STR Bylaw Amendment and ALA's other regulations are reasonably aimed at enhancing the safety and security of all Lake Arrowhead community members. The trial court's order granting a preliminary injunction should be reversed.

Dated: February 24, 2023 BEST BEST & KRIEGER LLP

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CERTIFICATE OF COMPLIANCE

The text of this brief was created using 13 point font and consists of 7,055 words according to the word count feature of the computer program used to prepare this brief.

Dated: February 24, 2023

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PROOF OF SERVICE

Vertical Web Ventures, Inc., et al.
v.
Arrowhead Lake Association

I, Tatiana Palomares, declare:

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 300 South Grand Avenue, 25th Floor, Los Angeles, California 90071. On February 24, 2023, I served a copy of the within document(s):

APPELLANT'S REPLY BRIEF

☒ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, the United States mail at Los Angeles, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ **BY ELECTRONIC SERVICE:** I electronically filed the document(s) with the Clerk of the Court by using the Truefiling system. Participants in the case who are registered users will be served by the Truefiling system. Participants in the case who are not registered users will be served by mail or by other means permitted by the court rules.

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

Executed on February 24, 2023, at Los Angeles, California.

/s/ Tatiana Palomares
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