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 OPENING BRIEF

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Court of Appeal No. E078636

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Cal. Rules of Court, Rule 8.208)

This is the initial certificate of interested entities or persons submitted on behalf of defendant and appellant Arrowhead Lake Association in the case number listed above.

The undersigned certifies that there are no interested entities or persons that must be listed in this certificate under California Rules of Court, Rule 8.208.

Dated: September 30, 2022 BEST BEST & KRIEGER LLP

By: /s/ Gregg W. Kettles
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INTRODUCTION

Short term vacation rentals ("STRs") threaten to transform California residential communities into de facto hotel zones. This internet-fueled gold rush has reached Arrowhead Woods, a residential community where property owners enjoy "exclusive" access to Lake Arrowhead and its shoreline. The Lake and shoreline are owned by appellant Arrowhead Woods Association (the "Association" or "ALA"), whose primary mission is to promote the safety and security of people and vessels on the Lake. The two and half mile long lake has approximately 2,500 privately owned boat docks. The negative impacts of STRs have been documented in series of court decisions upholding local restrictions and outright prohibitions of STRs in a variety of communities, including, for example, the cities of San Francisco, Buena Park, and Santa Monica. The Association adopted a rule prohibiting STR clients who rent in Arrowhead Woods for less than 30 days ("Short Term Renters" or "Vacation Lodgers") from accessing the Lake and shoreline to avoid the negative impacts of STRs. To facilitate enforcement of safety rules, ALA also adopted a rule requiring those who use the Lake and shoreline to become ALA members. Membership may be had for as little as $105 per year.

Plaintiffs are Arrowhead Woods property owners who seek to cash in on their exclusive Lake and shoreline access by renting their homes to Vacation Lodgers.[1] Plaintiffs filed this lawsuit against the Association and certain individually named defendants, claiming that the Association's new rules were motivated by "racial and ethnic origin bias and misogyny."[2] Plaintiffs moved for a preliminary injunction. Plaintiffs argued that the Association's new rules violate a 1964 settlement agreement between the

[1] Plaintiffs are Vertical Web Ventures, Inc., Jackie McKinley, Seline Karakaya, and Christopher Lee.

[2] The Association categorically denies these allegations.

Association's predecessors in interest and certain other Arrowhead Woods property owners (the "1964 Agreement" or "Agreement"). The 1964 Agreement limits and regulates access to the Lake and shoreline, which consists of a number of parcels known as "Reserve Strips." The Agreement also provides that Arrowhead Woods property owners, "their lessees and house guests" have a right to access the Lake and Reserve Strips for reasonable recreation purposes, but not for business or commercial purposes. (1 AA 2:167-168, ¶3.)[3] The Association has the right "to promulgate and enforce reasonable regulations designed to promote the health, safety, comfort and convenience of persons in or upon the Lake or in the vicinity thereof with respect to the conduct of such activities." (*Ibid*.)

The trial court issued a preliminary injunction. It ruled that the term "lessees" in the 1964 Agreement is broad enough to encompass Short Term Renters, no matter how short their stay. The court preliminarily enjoined ALA from enforcing its bylaw amendment that precludes Short Term Renters from accessing the Lake and Reserve Strips (the "Bylaw Amendment" or "STR Bylaw"). The trial court also ruled that ALA did not have the authority under the Agreement to require users of the Lake and other ALA property to become ALA members. The court preliminarily enjoined ALA from enforcing the rule requiring membership (the "Membership Rule").

The trial court's preliminary injunction order should be reversed. Plaintiffs are unlikely to prevail on the merits. The Bylaw Amendment does not violate the 1964 Agreement. The STR Bylaw is a regulation, and "reasonable regulations" are expressly authorized under the 1964 Agreement. All properties in Arrowhead Woods are subject to covenants,

[3] Citations to the Appellants' Appendix are denoted "[volume] AA [tab]:[page(s)]."

conditions, and restrictions ("CC&Rs"). CC&Rs that apply to Plaintiff Jackie McKinley's property and nearly 100 other Arrowhead Woods properties prohibit transient uses. Those properties may be used for "residential purposes only" and not for any "tenement house, hotel, boarding and/or lodging house." (Motion for Judicial Notice ("RJN"), Ex. B at pp. 83-84.) These CC&Rs were put in place before the 1964 Agreement, and help interpret it. It would be unreasonable to interpret the 1964 Agreement to prevent ALA from prohibiting Vacation Lodgers from accessing the Lake and Reserve Strips when CC&Rs in place at that time prohibited nearly 100 Arrowhead Woods properties from being used for transient-serving uses. The STR Bylaw is also reasonable in light of the documented negative impacts that STRs have on residential communities.

Vacation Lodgers are neither "lessees" nor "house guests" and therefore have no rights to access the Lake and Reserve Strips under the 1964 Agreement. California law follows a 30-day "length of stay" test to determine whether someone in possession of real property is a transient, or "lodger," on the one hand, or a lessee, or "tenant," on the other hand, for several purposes. These purposes include determining who may be subject to a local public agency's transient occupancy tax (Rev. & Tax. Code, § 7280, subd. (a)) and determining who is entitled to various statutory protections from being removed from real property by the owner (Civ. Code, § 1940, subd. (b)(1)). The STR Bylaw follows this approach and bars access only by transients who are not lessees, that is, those who rent for less than 30 days. The Bylaw Amendment is also consistent with California's older "character of use" test for distinguishing between transients and lessees. Plaintiffs cite to Airbnb, a popular internet-based vacation lodging service. Airbnb guests have a right of use, subject to the owner's retention of control and right of access.

Nor do Plaintiffs' Vacation Lodgers have access rights under the

1964 Agreement as "house guests." The 1964 Agreement's reference to "house guests" should not be interpreted to refer to non-paying guests. Otherwise the term would be rendered meaningless.

ALA's Membership Rule does not violate the 1964 Agreement either. The Agreement authorizes ALA to "promulgate and enforce reasonable regulations." ALA has no practical means to enforce its regulations against non-ALA members. Requiring ALA to sue violators in trespass is not a practical alternative. The Agreement should not be read to frustrate one of its principal purposes—to enable ALA to adopt and enforce reasonable regulations on the use of the Lake and Reserve Strips for the safety and security of users. Doing so would risk reading ALA's right to "enforce" reasonable regulations out of the Agreement.

The balance of harms favors the Association and also requires the preliminary injunction be denied. Short Term Renters are non-parties to the lawsuit and any harm to them may not be considered. The only harm Plaintiffs have suffered is the right to rent their properties to Short Term Renters with the promise that those Short Term Renters will have access to the Lake and Reserve Strips. Plaintiffs admit that any lost rental income is speculative. Plaintiffs' losses are pecuniary anyway, and cannot constitute the requisite irreparable harm. By contrast, the preliminary injunction will cause the Association to suffer substantial harm. ALA is forced to allow unauthorized individuals to access ALA's property. This will increase ALA's burdens in seeking to enforce regulations on Lake and Reserve Strip use for the safety and security of users.

The trial court's order granting a preliminary injunction should be reversed.

STANDARD OF REVIEW

The ultimate questions on a motion for a preliminary injunction are (1) whether the plaintiffs are "likely to suffer greater injury from a denial of the injunction than the defendants are likely to suffer from its grant," and (2) whether there is "a reasonable probability that the plaintiffs will prevail on the merits." (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 408-409.) As a general proposition, the trial court's determination of these questions is subject to review for abuse of discretion. (*Ibid*.) "Insofar as the trial court's ruling depends on determination of the applicable principles of law, however, it is subject to independent appellate review." (*Ibid*.) The interpretation of a writing, such as written agreement or a deed, is a question of law, and thus subject to the appellate court's independent (de novo) interpretation. (*Bear Creek Master Assn. v. Southern California Investors, Inc*. (2018) 28 Cal.App.5th 809, 818-819.) This rule applies even where the parties present non-conflicting extrinsic evidence to aid in the interpretation of the writing. (*Abers v. Rounsavell* (2010) 189 Cal.App.4th 348, 357.)

Extrinsic evidence is admissible to prove a meaning to which the contract is reasonably susceptible. (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club* (2003) 109 Cal.App.4th 944, 955.) "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." (*Ibid*.) "The threshold issue of whether to admit the extrinsic evidence—that is, whether the contract is reasonably susceptible to the interpretation urged—is a question of law subject to de novo review." (*Ibid*.)

STATEMENT OF FACTS

"Not only is Lake Arrowhead a rare gem in Southern California's store of private recreational facilities, but it's even more . . . During the past 85 or more years, it is a community, fortunately limited in its geographical area, that has grown and urbanized around a man-made, alpine lake." --Ralph Wagoner, former president and board member, Arrowhead Lake Association (2 AA 5:339; 341).

A. Lake Arrowhead was created as a privately owned-lake and shoreline, and the area around it was developed as residential and resort community known as Arrowhead Woods, where property use is restricted by covenants, conditions, and restrictions ("CC&Rs")

Lake Arrowhead (the "Lake") is located in the mountains of San Bernardino County, California. (1 AA 2:134, ¶1.) The Lake traces its origins to 1891. That year a group of Ohio businesspersons, headed by J.M. Gamble of Proctor & Gamble, acquired the area to build a reservoir to supply irrigation water to citrus groves at lower elevation. (2 AA 5:342, 351-352.) Construction of the dam and tunnel systems that would create the Lake began that same year. (*Ibid*.) A court decree later prevented delivery of the stored water to users outside the natural drainage area. (2 AA 5:352.) A group of Los Angeles businesspersons, including J.B. Van Nuys and John O'Melveny, formed Arrowhead Lake Company, which acquired the Lake and surrounding properties. (*Ibid*.) The company raised the dam and started residential and resort development during the period 1921-1923. (2 AA 5:342, 352; 1 AA 2:136, ¶14.) Today the Lake is 2.2 miles long, and has 14 miles of shoreline. (3 AA 17:699, ¶5.)

The area surrounding the Lake became known as Arrowhead Woods. (1 AA 2:134, ¶3; 1 AA 2:181.) It consists of 4,886 acres of land. (2 AA 5:364.) Today the land is divided into approximately 10,000 parcels. (*Ibid*.) Early deed restrictions describe permissible site

development, architectural standards, building size, and control over trees, and provide for enforcement by an architectural committee. (2 AA 5:365.) "The Arrowhead Woods Architectural Committee was founded in 1923 to enforce the covenants, conditions and restrictions ("CC&Rs") attached to *all properties* in Arrowhead Woods." (2 AA 5:364, emphasis added; see also 2 AA 5:254 (map).) The CC&Rs impose minimum setbacks and square footage for structures erected in Arrowhead Woods. (2 AA 5:371, 384-387.)

The CC&Rs also limit use. For example, a 1935 grant deed for more than 100 lots in Arrowhead Woods limits most of the lots there to "residential purposes only." (RJN Ex. B ("1935 Grant Deed") at p. 83 ("First: That lots 1 to 61 both inclusive, 67 to 90 both inclusive, and 92 to 106 both inclusive of said tract, may be used for residential purposes only.").) The 1935 Grant Deed further prohibits transient-serving uses:

> Fourth: (I) That on lots 1, 5 to 61, 67 to 90 and 92-106 both inclusive, that such use is also limited by the specific condition that on said premises no store, business or profession of any kind shall be maintained or carried on; that *no tenement house, hotel, boarding and/or lodging house*, or any cesspool, vault or privy shall be erected, built or used."
>
> (*Id.*, p. 84, emphasis added.)

The 1935 Grant deed is in the chain of title of the property of at least one of the Plaintiffs, Jackie McKinley ("McKinley"). The 1935 Grant Deed states that it applies to Lots 1 through 90 and 92 through 106 in Tract 2500 in Arrowhead Woods. (Ex B, p. 80.) Another deed shows that McKinley acquired her property in 2015 (the "McKinley Grant Deed").

(5 AA 41:1162.) The McKinley Grant Deed states that McKinley's property is located at Lot 87 of Tract 2500. (*Ibid*.) The 1935 Grant Deed and its CC&Rs barring transient uses apply to McKinley's property and nearly 100 other lots in Arrowhead Woods.

Development of the Lake and Arrowhead Woods as a resort destination proceeded slowly at first. Arrowhead Lake Company built a nine-hole golf course and subdivided about 20% of the land before it sold its assets to the Los Angeles Turf Club in 1946. (2 AA 5:342, 352.) Resort and residential development continued. (*Ibid*.) The Turf Club sold its Lake Arrowhead holdings to Lake Arrowhead Development Company in 1960. (*Ibid*.) Residential subdivision development "now started in earnest." (2 AA 5:342.) This company subdivided an additional 30% of the land into residential tracts over the next seven years. (2 AA 5:353.)

B. Developer entities entered into a settlement agreement with certain property owners that defined rights to the Lake and shoreline

"Property ownership in Arrowhead Woods has always included a valuable and exclusive asset: access to the private Lake and shoreline surrounding the Lake (the "Reserve Strips")." (1 AA 2:134, ¶3.) In or before 1964 the Arrowhead Woods Property Owners Association and certain individuals filed suit against Lake Arrowhead Development Company ("Development Company") and Arrowhead Mutual Service Company ("Service Company"). (1 AA 2:166.) Service Company owned the Reserve Strips and owned certain rights in Lake Arrowhead. (*Ibid*.) The purpose of the lawsuit was two-fold. First, plaintiffs sought to establish the rights of property owners in Arrowhead Woods to "certificates of membership" in Service Company. (*Ibid*.) Second, plaintiffs sought to "impress a trust" on the Reserve Strips and on Service Company's rights in Lake Arrowhead. (*Ibid*.)

The parties to that lawsuit entered into a settlement agreement in 1964 (the "1964 Agreement" or "Agreement"). (1 AA 2:166.) The parties intended the Agreement to determine and establish certain rights in plaintiffs and other property owners in Arrowhead Woods in the Lake and the Reserve Strips. (1 AA 22:167.) The Agreement contains a number of provisions to preserve the "exclusive" nature of access to the Lake and Reserve Strips and limit use. In paragraph 3 of the Agreement, Development Company and Service Company grant whatever rights they had in the Lake and Reserve Strips to Arrowhead Woods property owners as follows:

> (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 purposes;
>
> (b) The right to have the strips be and remain free of any noxious thing and of any trade or business kept, maintained or permitted upon said premises; nor shall any livestock of any kind, including live poultry, be kept, permitted or maintained upon the strips.
>
> (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 for business or commercial purposes*, and subject to the rights expressed in paragraph 6 of this instrument, and the right in Development Co. and Service Co. or either of them to *promulgate and enforce reasonable regulations* designed to promote the health, safety, comfort and convenience of persons in or upon the

Lake or in the vicinity thereof with respect to the conduct of such activities.

(1 AA 2:167-168, ¶3, emphasis added.)

Paragraph 6 of the Agreement provides that the Development Company and Service Company "are entitled to charge lot owners reasonable fees for permitting piers and docks to be located and kept on the strips or any of them and/or the Lake." (1 AA 2:169.) It further provides that the Development Company and Service Company "are also entitled to charge reasonable fees for licensing of boats to be used on the Lake and for rental slips." (*Ibid*.) Paragraph 6 adds that "license agreements hereafter entered into between the parties covering boat or dock licenses shall be consistent with the terms of this Agreement." (*Ibid*.)

In addition to limiting and regulating access to the Lake and Reserve Strips, the 1964 Agreement puts a cap on the number of boat slips. (1 AA 2:169-172.) There were approximately 835 slips on the 2.2 mile long Lake shortly before the Agreement was entered. (1 AA 2:169; 3 AA 17:699 ¶5.) These 835 slips did not count the number of slips used or held for rental of boats to the public. (1 AA 2:169.) With 14 miles of shoreline, that worked out to an average of 60 slips per mile. The Agreement caps the number of slips at 1,285, subject to certain exceptions, and contains detailed provisions for the consolidation and placement of boat slips, docks, and piers. (1 AA 2:169-172.) The 1964 Agreement is largely about regulating and restricting access to the Lake and Reserve Strips, and preventing over-use.

The 1964 Agreement says nothing about the CC&Rs that attach to all properties in Arrowhead Woods. The CC&Rs' restrictions on the use of property in Arrowhead Woods, such as restrictions in the 1935 Grant Deed

mandating that property be used for "residential purposes only," and barring use as a "tenement house, hotel, boarding and/or lodging house," are left untouched. The Agreement does nothing to rescind the CC&Rs' prohibition against transient-serving uses. The Agreement does not purport to make any changes in the CC&Rs contained in the 1935 Grant Deed or other deeds.

C. Arrowhead Lake Association began managing the Lake, shoreline, and other improvements in 1975

Arrowhead Lake Association ("ALA" or the "Association") purchased the Lake and the Reserve Strips in 1975. (3 AA 17:699, ¶5.) ALA was organized as a 501(c)(7) non-profit corporation, the designation for a private club, the prior year. (3 AA 17:699, ¶6.) The Association still owns the Lake and Reserve Strips today. (3 AA 17:699, ¶5.) It is the only organization that has managed or operated the Lake, shoreline, and other ALA improvements made on and around the Lake since 1975. (3 AA 17:699, ¶5.)

The Association is governed by documents that include its bylaws, rules, regulations, and policies. (3 AA 17:700, ¶7. See 1 AA 2:195-239 (bylaws).) The Association's governing documents are designed to ensure transparency and provide Association members with an opportunity to be heard on any matter that comes before the Association board before and prior to the board voting on the matter. (*Ibid.*) The board holds open meetings that all ALA members can attend. (*Ibid.*)

Only people and entities that own property in Arrowhead Woods are eligible to become Association members by paying annual dues. (1 AA 2:195, ¶8.) ALA is funded almost entirely by the annual dues it collects from its members. (*Ibid.*) There are three levels of ALA membership: General Members/$105 per year, Beach Club Members/$280 per year, and Dock Members/$700 per year. (*Ibid.*) Additional fees are charged to

register and permit watercraft for use on the Lake. (*Ibid*.) ALA's 2021 annual budget was $5,484,190. (*Ibid*.) Most of the Association's income is generated from membership fees. (*Ibid*.)

Since 1975 the Association has constructed many significant improvements on and around the Lake at its sole cost. (*Id*., ¶9.) These improvements include two beach clubs, two parks, miles of maintained hiking trails, the North Shore Marina, and a boat ramp. (*Ibid*.) ALA stocks the Lake with fish, puts on the annual fireworks show, regulates the use and ownership of approximately 2,500 privately owned boat docks on the Lake, and maintains the Lake and other ALA properties for the recreational use of its members. (*Ibid*.) The Association spends approximately $100,000 each year to stock the Lake with fish and another approximately $100,000 on the annual 4th of July fireworks show. (*Ibid*.) ALA also hosts many special events for its members, including the Junior Trout Rodeo, wine and cheese events, charity events, and other social gatherings. (*Ibid*.)

Safety is ALA's number one priority. (1 AA 2:195, ¶10) The Association owns and operates five Whaler Guardian Police style boats that are used by ALA's Lake Patrol staff. (*Ibid*.) They patrol the Lake up to 18 hours a day, seven days a week, to ensure the safety of people and vessels on the Lake and enforce ALA's Lake Safety Rules. (*Ibid*.)

ALA is also focused on security. (3 AA 17:700, ¶11; 3 AA 17:702, ¶14.) The Association works to protect the Lake, Reserve Strips, and ALA properties from vandalism, theft, and trespass, and responds to such incidents when they occur. (*Ibid*.) For example, in July of 2021, an unknown person or persons gained entry to the Lake and proceeded to light a fire on a large dock, burning ten slips with boats berthed in the slips. (3 AA 17:702, ¶14.) ALA's General Manager Robert Mattison was the primary contact with law enforcement in their investigation the fire. (*Ibid*.) He went to the scene of the fire multiple times. (*Ibid*.) He interacted with

Association members regarding property damages they suffered in the fire, and facilitated meetings with contractors for replacement of the dock. (*Ibid*.) The damage from the fire exceeded $1,000,000. (*Ibid*.) This is just one example of the security problems ALA faces at the Lake. (*Ibid*.)

D. The law distinguishing transients, or "lodgers," from lessees changed from a "character of use" test to a "length of stay" test for certain purposes in the 1960s and 1970s

Transients in possession of real property have long been treated differently than lessees in California law. (See *Stowe v. Fritzie Hotels, Inc*. (1955) 44 Cal.2d 416, 420 ("*Stowe*") (hotel proprietor generally owes guests or lodgers a higher standard of care than a landlord owes tenants).) The "distinction in law between a tenant and a lodger is a substantial one." (*Roberts v. Casey* (1939) 36 Cal.App.2d Supp. 767, 771 ("*Roberts*").) A tenant, unlike a lodger, may assert a claim for ejectment, is entitled to notice in an unlawful detainer action, and his or her personal property is not subject to a lien for unpaid rent. (See *id*. at pp. 774-775; see also Civil Code § 1161 (notice must be given in action for unlawful detainer where a tenancy was created); Civil Code § 1861 ("[h]otel, motel, inn, and boardinghouse keepers shall have a lien upon the baggage and other property" belonging to their guests).) A lodger, however, has no interest in the realty and instead inherits the rights of a mere licensee. (See *Roberts*, at p. 774.)

In the early and mid-twentieth century California courts used a "character of use" test to determine whether a person in possession of real property was a transient, or "lodger," or was instead a lessee, or "tenant." (See, e.g., *Stowe*, *supra*, 44 Cal.2d at p. 421.) The "chief distinction between a tenant and lodger lies in the character of possession;" a tenant has "exclusive legal possession of [the] premises and is responsible for [its] care and condition" whereas a lodger "has only the right to use the

premises, subject to the landlord's retention of control and right of access." (*Ibid*.) Other indicia demonstrating a proprietor-lodger relationship include: (1) that the owner retains keys to the premises; (2) the owner furnishes the premises; and (3) provides necessary utility services. (See *id.*, at pp. 421-22; *Roberts, supra,* 36 Cal.App.2d Supp. at p. 772; *Fox v. Windemere Hotel Apartment Co*. (1916) 30 Cal.App. 162, 165.)

In 1963 the Legislature added a Government Code section that authorized cities and counties to levy taxes on transient-serving uses. (RJN, Ex. D (CA Leg Hist 1963) at p. 164.) Transients were defined not by the "character of use" test used in *Stowe* and other cases, but rather by a new "length of stay" test. (*Ibid*.) Government Code section 51030 provided: "The legislative body of any city or county may levy a tax on the privilege of occupying a room or rooms in a hotel, inn, tourist home or house, motel or other lodging unless such occupancy is for any period of more than 30 days." (*Ibid*.) Today Government Code section 51030 is found at Revenue and Taxation Code section 7280(a). (Rev. & Tax. Code, § 7280, subd. (a) ("The legislative body of any city, county, or city and county may 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.").)

Civil Code chapter 2 provides various protections to "persons who hire dwelling units." (Civ. Code, §§ 1940-1954.06.) In 1976 the Legislature amended the law to incorporate the "length of stay" test to determine who would be subject to chapter 2's protections. (RJN, Ex. C (CA Leg Hist 1976 ch. 712) at pp. 104-107, section 1, 1940, subd. (b)(1).) The Legislature also characterized occupancy of 30 days or less as "transient occupancy." (*Id*. at p. 102.) The Legislature added Civil Code chapter 2, section 1940 to exclude from the definition of "persons who hire" a person who maintains "[t]ransient occupancy in a hotel, motel,

residence club, or other facility when such occupancy is or would be subject to tax under Section 7280 of the Revenue and Taxation Code." (*Ibid*.) That language remains substantially the same. (Civ. Code, § 1940, subd. (b)(1) ("[t]ransient occupancy in a hotel, motel, residence club, or other facility when the transient occupancy is or would be subject to tax under Section 7280 of the Revenue and Taxation Code.").)

E. Many California communities have recently sought to address the negative spillover effects of residences being used as short term vacation rentals ("STRs")

The emergence of internet sites like Airbnb and VRBO (Vacation Rentals by Owner) have led to many California homeowners operating their homes as short term vacation rentals ("STRs"). (See, e.g., 2 AA 6:435, ¶5 (declaration of Doug Miller, owner of plaintiff Vertical Web Ventures) ("I purchased a home in Arrowhead Woods with a dock to host gatherings with friends and family."); 2 AA 6:436, ¶8 ("I have also periodically leased my home in Arrowhead Woods to vacationers."); *id*., ¶9 ("The vast majority of rental activity this day and age takes place through internet sites like Airbnb and VRBO."); 1 AA 2:134, ¶2 (Plaintiffs each use "their property for vacation rentals."); 2 AA 7:440-474 (copies of Airbnb vacation home rental listings in Arrowhead Woods).) Plaintiffs also use their homes for vacation rentals. (1 AA 2:134, ¶2.)

These are hotel-like arrangements. Those who use Airbnb to secure vacation lodgings do not get a lease. Airbnb acknowledges that some jurisdictions have tenancy rights laws that "may apply to longer stays." (RJN, Ex. A, p. 30.) But under Airbnb's rules vacation lodgers are not considered tenants. The Airbnb Terms of Service Agreement (the "Airbnb Agreement") provides: "An Accommodation Reservation is a limited license to enter, occupy, and use the Accommodation." (*Id*. at p. 56.) The property owner is denominated "Host," and the vacation lodger "Guest."

(*Id*. at p. 57.) "The Host retains the right to re-enter the Accommodation during your stay" under certain circumstances, including when "it is reasonably necessary." (*Id*. at p. 27; see also *id*. at p. 29 ("When you [the Host] accept a booking request, or receive a booking confirmation through the Airbnb Platform, you are entering into a contract directly with the Guest…. Any terms, policies or conditions that you include in any supplemental contract with Guests must … be consistent with these Terms.").)

The negative impacts of STRs have been documented in a number of judicial decisions reviewing local community efforts to regulate or outright prohibit STRs. The California cities of San Francisco, Buena Park, and Santa Monica found that ordinances banning or restricting STRs were justified in part to ensure the long term availability of housing stock. (*Rosenblatt v. City of Santa Monica* (9th Cir. 2019) 940 F.3d 439, 454 ("*Santa Monica*"); *Airbnb, Inc. v. City & Cty. of San Francisco* (N.D. Cal. 2016) 217 F. Supp. 3d 1066, 1070 ("*San Francisco*"); *Nguyen v. City of Buena Park*, No. 8:20-cv-00348-JLS-ADS, 2020 U.S. Dist. LEXIS 188641, at *13 ("*Buena Park*") (C.D. Cal. Aug. 18, 2020).) The City of Carmel, California found that an ordinance restricting STRs was justified because STRs weaken community ties, and increase traffic, noise, and demand on parking and public services. (*Ewing v. City of Carmel-By-The-Sea* (1991) 234 Cal.App.3d 1579, 1589 ("*Carmel*"). See also *Mission Shores Assn. v. Pheil* (2008) 166 Cal.App.4th 789, 798 ("*Mission Shores*") (upholding restriction on short term rentals enacted to "ensure that the property would not become akin to a hotel [because the property] is a residential community").) Santa Monica found that an ordinance banning STRs was justified in order to help preserve the "cultural, ethnic, and economic diversity of its resident population." (*Santa Monica*, at p. 454.)

Communities throughout California have responded to the negative

impacts of STRs. (*Mission Shores, supra*, 166 Cal.App.4th at pp. 795-796 ("[T]here is a movement afoot to restrict homes from being on vacation rentals. It is not just in this project. It is throughout California.").) Some communities have chosen to regulate STRs. (See, e.g., *San Francisco, supra,* 217 F. Supp. 3d at p. 1070; *Protect Our Neighborhoods v. City of Palm Springs* (2022) 73 Cal.App.5th 667, 673; *Buena Park,* 2020 WL 5991616, at *1; 2020 U.S. Dist. LEXIS 188641, at *13; RJN, Ex. E, pp. 230-239 (San Bernardino County Municipal Code chapter 84.28: Short-Term Residential Rentals).) Others have chosen to ban STRs outright. (See, e.g., *Carmel, supra,* 234 Cal.App.3d at p. 1589; *Mission Shores, supra,* 166 Cal.App.4th at p. 798; *Santa Monica, supra,* 940 F.3d at p. 454 (prohibiting vacation rental unless primary resident remained in the dwelling).) Restrictions against STRs have been repeatedly upheld by the courts. (See, e.g., *ibid*.)

F. The Association adopted a bylaw amendment prohibiting STR clients from accessing the Lake, Reserve Strips, and other ALA property and a rule requiring ALA membership to access these things, following complaints about STR clients

The negative impacts associated with STRs in other California communities have also been felt in Lake Arrowhead. In or about 2019, some Association members who owned and operated STRs out of their Arrowhead Woods property began sending their STR clients to the Association to get boat licenses, which are required to operate boats on the Lake. (3 AA 17:702-703, ¶19.) They did so by telling Association staff that they were "personal friends" of the STR owners as opposed to STR clients. (*Ibid*.) The Association eventually discovered that certain STR owners included the use of the boat as part of their property rental, charging for the rental of a boat. (*Ibid*.) This is prohibited by the Association and creates safety concerns. (*Ibid*.) Before the Association discovered that it was being deceived, the Association had in some cases issued boat licenses

to over 50 different people for a household. (*Ibid*.) One STR owner who was also an Association member had boat driver's licenses issued to 99 purported "friends" of the STR owner before the Association discovered what he was doing. (*Ibid*.)

The Association promulgated a rule under the 1964 Agreement that requires people who want to use the Lake and Reserve Strips to become ALA members (the "Membership Rule"). (3 AA 17:703, ¶20.) The reason for the Membership Rule is to ensure that ALA can enforce its lake safety rules, bylaws, and governing documents for all people who use the Lake and the Reserve Strips. (*Ibid*.) The Association believes it is not fair for STR property owners to sell access to the Association, a 501(c)(7) private club, send their clients to use the Association's amenities, and not pay anything for the privilege of doing so. (*Ibid*.)

With the increasing dissatisfaction from the Association membership over safety and other problems with STR clients, the Association board considered what actions could be taken. (3 AA 17:703, ¶21.) It was decided that rather than the board acting on its own, the matter would be put to a vote by the ALA membership as part of the regular ALA election in 2020. (*Ibid*.) The vote occurred in September 2020. (*Ibid*.) Approximately 83% of members voted to deny access of STR clients to the Lake, Association property, and Association member docks. (*Ibid*.) The vast majority of STR owners were also ALA members and their vote was included in this election. (*Ibid*.)

The bylaw amendment defines an STR client the same way the Civil Code defines "transients." STR clients are those who rent "for less than a 30 day period." (AA 2:5:297 §C.) The bylaw amendment provides:

> SECTION C. Short Term Rentals
>
> 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 5:297 §C ("Bylaw Amendment" or "STR Bylaw").)

Following the membership vote, the Association board defined procedures for enforcing Bylaw Amendment and defined fines for violations. (3 AA 17:704, ¶22; see 2 AA 5:297 §C.) The amount of these fines is consistent with fines currently in place in San Bernardino County for other STR violations. (3 AA 17:704, ¶22.) The Association bylaws also provide for hearing procedures to be used in case of multiple violations of the STR Bylaw. (2 AA5:297 §C; 2 AA 5:301-302 §H.)

PROCEDURAL HISTORY

A. Plaintiffs filed a complaint

Plaintiffs filed their complaint against ALA and seven individually named defendants on July 23, 2021 (the "Original Complaint"). (1 AA 1:15.) The Original Complaint alleged thirteen causes of action: (1) breach of contract; (2) infringement of property rights; (3) breach of covenant of good faith and fair dealing; (4) interference with easement; (5) declaratory relief; (6) injunctive relief; (7) race and national origin discrimination and harassment; (8) gender discrimination and harassment; (9) retaliation in violation of public policy; (10) private nuisance; (11) public nuisance; (12) violation of corporations code section 7341; and (13) violation of corporations code section 7813. (1 AA 1:15.)

Plaintiffs filed a first amended complaint ("FAC"), the operative complaint. (1 AA 2:132.) Plaintiffs dropped the twelfth and thirteenth causes of action, for violation of the Corporations Code sections 7341 and 7813. The FAC alleges that each Plaintiff owns property in Arrowhead Woods. (1 AA 2:134 ¶2.) Each Plaintiff uses their property for their "own personal enjoyment, as well as the enjoyment of their family members, friends, [and] house guests." (*Ibid*.) Each Plaintiff also uses their property for vacation rentals. (*Ibid*.)

The FAC names as defendants the Association and seven individuals who are or were Association directors or employees (together, "Defendants"). (1 AA 2:135-136, ¶¶11-12.) Plaintiffs allege that Defendants have initiated, implemented and enforced restrictions on Plaintiffs and other Arrowhead Woods property owners in violation of the 1964 Agreement and other laws. (*Ibid*.) The FAC alleges that the Association's STR bylaw amendment prohibiting those who rent for 30 days or less—STR clients—from accessing the Lake and Reserve Strips violates the 1964 Agreement. (1 AA 2:135, ¶5.) The FAC alleges that Defendants' motives are "entirely nefarious, and are grounded in racial and ethnic origin bias and misogyny." (*Id*., ¶6.) The FAC alleges that the Association's rule requiring people who want to use the Lake and Reserve Strips to become ALA members—the "Membership Rule"—also violates the 1964 Agreement. (*Id*., ¶8.)

B. Plaintiffs sought a preliminary injunction

Plaintiffs filed a motion for preliminary injunction. (1 AA 3:255-258.) Plaintiffs argued that Defendants' violations of the 1964 Agreement were motivated "by racial and national origin discrimination." (1 AA 3:270-271.) The 1964 Agreement grants a right of access to "lessees" and "houseguests." (1 AA 2:167-168, ¶3.) Plaintiffs argued that these are broad terms that include STR clients, and that STR clients do not use the

Lake for "commercial purposes." (1 AA 3:274-276.) Plaintiffs argued that the Association's Bylaw Amendment violates the 1964 Agreement. (*Ibid*.) Plaintiffs argued that the membership or non-membership in the Association has no bearing on the rights granted to all Arrowhead Woods property owners under the 1964 Agreement. (1 AA 3:273.) Plaintiffs argued that the Membership Rule violates the 1964 Agreement. (*Ibid*.) Plaintiffs argued that they have no adequate remedy at law and will suffer irreparable harm in the absence of a preliminary injunction, and that the balance of harms weighed in their favor. (1 AA 3:277-279.) Plaintiffs filed evidence in support of their motion, including declarations and various documents. (2 AA 5-8; 2 AA 3:9.)

The Association and the individually named defendants filed separate sets of papers in opposition to Plaintiffs' motion. (3 AA 9-20; 4 AA 22-27; 5 AA 41.) Defendants categorically denied Plaintiffs' charges of racism, sexism, and bigotry. (3 AA 10:622; 3 AA 17:690-692, ¶¶3-8; 3 AA 17:704, ¶¶23-26.) The Association argued that the STR Bylaw does not run afoul of the access rights granted by the 1964 Agreement. (3 AA 10:628-631.) The Association argued that STRs are hotels and businesses. (*Ibid*.) STR clients are neither "lessees" nor "house guests," and the 1964 Agreement confirms that ALA has a right to prohibit business use on its property. (*Ibid*.) The Association argued that the Membership Rule does not violate the 1964 Agreement. (3 AA 10:631-632.) The Membership Rule is an example of a "reasonable regulation" expressly authorized by the Agreement. (*Ibid*.) ALA argued that Plaintiffs have failed to show urgency or irreparable injury, and that the balance of harms favors ALA. (3 AA 10:632-636.) The individual defendants made similar arguments. (4 AA 22.) Defendants filed objections to Plaintiffs' evidence and offered their own evidence in opposition to Plaintiffs' motion, including declarations and several documents. (3 AA 9; 11-20; 4 AA 23-27; 5 AA 41.)

Plaintiffs filed papers in reply, including a brief, evidentiary objections, and additional evidence in support of their motion. (4 AA 30-37; 5 AA 43.)

C. The trial court issued a preliminary injunction barring the Association from enforcing its bylaw amendment on STRs and the Association's rule requiring membership to access the Lake and other ALA property

The trial court issued a tentative ruling granting in part and denying in part Plaintiffs' Motion. (5 AA 44:1181-1191.) The tentative ruling enjoined Defendants from: (a) precluding short-term lessees within Arrowhead Woods accessing the Lake and surrounding shoreline area; and (b) precluding Arrowhead Woods property owners, whether ALA members or not, and their lessees and guests from accessing the Lake and surrounding shoreline area. (5 AA 44:1190-1191.) The tentative ruling granted in part and denied in part the Association's request for judicial notice. (5 AA 44:1182-1183, 1191.)

At the hearing the Association asked for clarification whether the court was issuing a mandatory injunction or a prohibitory injunction, and asked for a ruling on the Association's evidentiary objections. (RT 5:22-8:7.)[4] The Association pointed out that only owners, lessees, and house guests have rights to access the Lake under the 1964 Agreement. (RT 8:8-11:14.) The Association argued that a person who rents a dwelling for less than 30 days is not a tenant, but rather a "transient" or "lodger." (*Ibid*.) Lodgers are neither owners, lessees, nor houseguests, and thus have not rights to access the Lake. (*Ibid*.)

The Association also argued that the deeds to Plaintiffs' properties contained covenants and restrictions ("CC&Rs") that predate the 1964 Agreement and prohibit commercial uses, including any "tenement house,

[4] Citations to the Reporter's Transcript are denoted, "RT [page:line]."

hotel, boarding house or lodging house." (RT 11:15-13:23.) The CC&Rs bar Plaintiffs from using their properties for STRs. (*Ibid*.) The 1964 Agreement should be interpreted consist with this prohibition. (*Ibid*.)

The Association further argued that the tentative ruling misapplied the test for determining whether a person occupying a dwelling is a lessee or lodger. (RT 13:28-14:28.) The Airbnb website shows that rentals listed there operate like hotels. (*Ibid*.) Plaintiffs submitted no evidence to the contrary. (*Ibid*.)

The trial court ruled on certain evidentiary objections and otherwise adopted the tentative ruling as its final ruling. (5 AA 47:1214-1225.) The court denied the Association's request for judicial notice of San Bernardino County Ordinances 14.0203 and 84.01.06(c) (the "County Ordinances") on the ground that they were passed after the 1964 Agreement. (5 AA 47:1224.) The court denied the Association's request for judicial notice of the CC&Rs on the ground that the copy of one of the CC&Rs was illegible and both CC&Rs were irrelevant. (*Ibid*.)

The court ruled that the FAC's causes of action for nuisance, declaratory relief, easement interference, and breach of contract (i.e., breach of the 1964 Agreement) could afford injunctive relief. (5 AA 47:1216-1217.) The court then addressed the Association's bylaw amendment that precluded Short Term Renters from accessing the Lake and Reserve Strip. The court stated that a "lessee" means any person who has an agreement that allows the use of a house for a period in exchange for a payment, citing Merriam-Webster Online Dictionary. (5 AA 47:1218.) Under this definition a Short Term Renter is a lessee. (5 AA 47:1219.) The court stated that the Short Term Renters renting from Plaintiffs were not "lodgers" but rather "tenants" under *Stowe v. Fritzie Hotels, Inc*. (1955) 44 Cal.2d 416, 421. (5 AA 47:1219.) The court reasoned that "[t]he short term renter obtains exclusive access to the home during the short term-stay

with all the obligations to maintain the premises during the stay. The short-term lessees here are not lodgers at a bed and breakfast within Arrowhead Woods." (*Ibid*.) The court added that the 1964 Agreement does not limit the lease term of any lessee. (*Ibid*.) The court stated that the fact there was a commercial transaction to rent the property did not mean that the renter was using the Lake or Reserve Strip in a commercial or business transaction. (5 AA 47:1219-1220.) The court ruled that Plaintiffs have a likelihood of establishing that Defendants' preclusion of Short Term Renters from using the Lake and Reserve Strip is a breach of the 1964 Agreement. (5 AA 47:1220.)

The court then addressed the Association's position that only Association members may access the Lake and Reserve Strip. The court determined that the Association's right to promulgate rules and regulations did not give the Association the right to exclude a person who otherwise has a contractual right of access. (5 AA 47:1220.) The court ruled that Plaintiffs have a likelihood of prevailing on their argument that Defendants breached the 1964 Agreement by precluding Arrowhead Woods' owners, guests, and lessees from accessing the Lake and Reserve Strip unless they are also Association members. (5 AA 47:1220-1221.) The court rejected Plaintiffs' argument that they were entitled to a preliminary injunction against certain other Association actions relating to access cards, guest registration, rule enforcement, and fences and gates. (AA 5:47:1221-1222.)

The court discussed the balance of harms. The court stated that, "[i]n weighing precluding those who have a contractual right of access and use against a potentially affected [Association] budget, the harm weighs in Plaintiffs' favor." (5 AA 47:1223.)

The court issued an order granting Plaintiffs' motion for preliminary injunction. (5 AA 47:1209-1210.) The court enjoined the Association from enforcing the Association's STR Bylaw Amendment or any other

regulation prohibiting Arrowhead Woods' vacation guests and lessees from accessing the Lake and Reserve Strips. (5 AA 47:1210.) The court also enjoined the Association from restricting Arrowhead Woods property owners, "their guests," and their lessees who are not Association members from accessing the Lake and Reserve Strips. (5 AA 47:1210.)

STATEMENT OF APPEALABILITY

Notice of entry of the court's order was given on January 31, 2022. (5 AA 47:1205-1226.) "An order granting or denying a preliminary injunction is appealable, as being within the meaning of the provision for appeals in cases involving injunctions." (*Valley Casework, Inc. v. Comfort Construction, Inc*. (1999) 76 Cal.App.4th 1013, 1019 fn. 4, internal quotation marks omitted; Code Civ. Proc., § 904.1, subd. (a)(6).) The Association timely noticed an appeal on March 8, 2022. (5 AA 48:1228-1233.)

DISCUSSION

A. Plaintiffs are unlikely to prevail on the merits

1. The Bylaw Amendment does not violate the 1964 Agreement

a. The Bylaw Amendment is a regulation, which is expressly authorized under the 1964 Agreement

Nothing in the 1964 Agreement prohibits the Association from promulgating regulations. To the contrary, the 1964 Agreement expressly authorizes the Association to "promulgate and enforce reasonable regulations designed to promote the safety, health, comfort and convenience of person in or upon the Lake." (1 AA 2:168.) Plaintiffs have a limited right of recreation and access to the Lake and the Reserve Strips "subject to" the Association's rights. (*Ibid*.) Plaintiffs' right of recreation and access is also limited in other ways. As property owners Plaintiffs'

recreational uses must be "reasonable," and they may not cause a "noxious" thing or maintain a trade or business on the premises, or keep livestock or poultry on the premises. (*Ibid*.) Plaintiffs' contention that the 1964 Agreement grants them an unconditional right of access is demonstrably false. (Cf. 1 AA 4:273 (Plaintiffs argue that "[t]he restrictions imposed by [ALA] that limit in any way Arrowhead Woods property owners' rights to the Lake and to the Reserve Strips should be enjoined…").)

b. The CC&Rs confirm that the Bylaw Amendment is reasonable

Plaintiffs acknowledge that "restrictive covenants" regarding hotels and similar uses are in at least "some" of Plaintiffs' deeds. (4 AA 31:991.) Plaintiffs did not refute the validity of the CC&Rs the Association proffered in support of its opposition to the preliminary injunction motion. (*Ibid*.) The CC&Rs limit the use of Plaintiff McKinley's property and nearly 100 other Arrowhead Woods properties: they may be used for "residential purposes only" and not for any "tenement house, boarding and/or lodging house." (RJN, Ex. B at p. 84.)

The types of uses prohibited by the CC&Rs implicate transient lodging. Under California law, the possession of property for thirty days or less is a transient use. (Civ. Code, §§ 1940-1954.06 (establishing tenant protections and determining that only individuals who occupy property for thirty days or more are eligible for such protections); Rev. & Tax Code § 7280 (authorizing the levy of taxes on transient use, defined as the possession of property for thirty days or less).) A contract must have a lawful object. (*Koenig v. Warner Unified School Dist.* (2019) 41 Cal.App.5th 43, 55 ("*Koenig*"); Civ. Code, § 1596.) It would be unreasonable to interpret the 1964 Agreement as intending to authorize STRs, let alone grant a right of access and recreation to vacation lodgers, when those uses are prohibited by CC&Rs on nearly 100 Arrowhead

Woods properties. (See *Koenig*, at p. 55 ("a contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties").) The CC&Rs lend support for the legality and reasonableness of the Bylaw Amendment.

The CC&Rs are relevant to prove that the Bylaw Amendment's use of the term "lessees" does not extend to Short Term Renters. The trial court erred in denying the Association's request for judicial notice of the CC&Rs. (See *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club* (2003) 109 Cal.App.4th 944, 955.)

c. The Bylaw Amendment is reasonable

The Association has a right to promulgate and enforce regulations pursuant to the 1964 Agreement. (1 AA 2:168.) As a result of repeated abuses of dock and boating privileges, Appellant proposed a bylaw amendment that would restricted vacation lodgers from accessing the Lake. (3 AA 17:702-703.) By an overwhelming vote of the Association's membership including STR owners, the proposed bylaw amendment was approved. (3AA 17:703.) Because ALA owns the Lake and Reserve Strips and the support for the Bylaw Amendment and process given to its members, the Bylaw Amendment is valid and duly authorized.

Vacation lodgers who occupy property for thirty days or less have no access rights under the 1964 Agreement. Even assuming *arguendo* that such vacation lodgers were granted rights under the Agreement, the Bylaw Amendment is nonetheless a reasonable regulation authorized by the 1964 Agreement. Most of the 1964 Agreement is about regulating and restricting access to the Lake and Reserve Strips, and preventing over-use. (See, e.g., 1 AA 2:169-172 (restricting boat slips and docks.) The Bylaw Amendment only restricts the access of a narrow group of lodgers, those who occupy property for a period of thirty days or less. Tenants who rent property from

Plaintiffs for sixty days, one year, or even longer are not restricted by the bylaw amendment. The restriction is in accord with the CC&Rs and thus is consistent with the most persuasive indicator of the parties' intentions at the time of the 1964 Agreement.

Plaintiffs admit that access to the private Lake and Reserve Strips have always been understood to be an "exclusive" benefit of property ownership in the Arrowhead Woods community (1 AA 2:134, ¶3.) Allowing Short Term Renters to access threatens to upset the benefits of these community resources. Repeated and reciprocal interactions between neighbors bring about cooperation. This can take the form of bringing your neighbor's garbage cans to the curb when they are out of town, keeping noise under control when hosting a party, and picking up litter at the neighborhood pocket park. Short term users lack these same incentives to cooperate and play by the rules.

The negative impacts of STRs in California are well-documented. Courts have upheld CC&R amendments restricting STRs that were enacted to "ensure that the property would not become akin to a hotel (since the property) is in a residential community." (*Mission Shores Assn. v. Pheil* (2008) 166 Cal.App.4th 789, 798.) Such restrictions are "very common" because "essentially when you rent for less than 30 days" an owner of an STR "operat[es] a hotel in a residential district." (*Ibid*.) Likewise in *Ewing v. City of Carmel-By-The-Sea* (1991) 234 Cal.App.3d 1579, 1589, the court upheld STR restrictions based on the city council's findings:

> the use of single-family residential property for transient lodging was a commercial use inconsistent with the purpose of the R-1 District. Moreover, commercial use of the single-family property for such purposes create unmitigatable,

> adverse impacts on surrounding residential uses including, but not limited to, increased levels of commercial and residential vehicle traffic, parking demand, light and glare, and noise…[and] increase[d] demand for public services, including, but not limited to, police, fire, and medical emergency services, and neighborhood watch programs.

(*Id*. at p. 1589, internal quotation marks omitted.)

The court agreed, holding STRs "undoubtedly affect the essential character of a neighborhood and the stability of the community." (*Id*. at p. 1591.)

Given the unique character of Arrowhead Woods, the Association's rights under the 1964 Agreement, the overwhelming support for the Bylaw Amendment and degree of process afforded to members, and the CC&Rs restrictions on nearly 100 Arrowhead Woods properties the Bylaw Amendment is reasonable.

d. Vacation lodgers are neither "lessees" nor "house guests" and therefore have no rights under the 1964 Agreement

Because a determination of whether an occupant is a lessee or lodger has a variety of implications, California courts apply one of two tests to determine occupant status. California courts have more recently and consistently applied the length of stay test, particularly to determine tax treatment and occupant rights. For instance, a tenant—unlike a lodger—is entitled to statutory notice before a landlord commences eviction proceedings. (See, e.g., Code Civ. Proc., § 1161.) Section 1161 excludes, as tenants, "those persons whose occupancy is described in subdivision (b) of Section 1940 of the Civil Code." (Code Civ. Proc., § 1161, subd. (5).) Section 1940, subdivision (b) expressly excludes "transient

occupancy…when the transient occupancy is or would be subject to tax under Section 7280 of the Revenue and Taxation Code" and "[o]ccupancy at a hotel or motel where the innkeeper retains a right to access and control…" (Civ. Code, § 1940, subd. (b)(1) and (2).) Under section 7280[5], a municipality may levy a tax "on the privilege of occupying a room or rooms, 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." (Rev. & Tax Code, § 7280, subd. (a).)

The Bylaw Amendment follows this distinction between transients on the one hand and tenants or lessees on the other. The Bylaw Amendment only restricts the rights of transients who are not lessees. It employs the same "length of stay" test to distinguish a transient from a lessee or tenant. (See 2 AA 5:297 §C.) The Bylaw Amendment only restricts access of transients, defined in California statutory law as a person who occupies property for less than thirty days. (*Ibid*.) The 1964 Agreement grants rights only to owners, their house guests, and lessees. (1 AA 2:167-168, ¶3.) Not transients. (*Ibid*.) The Bylaw Amendment does not violate the 1964 Agreement.

Even under the "character of use" test, the Bylaw Amendment does not conflict with the 1964 Agreement. Plaintiffs repeatedly allege that they contract with vacation lodgers through Airbnb. (1 AA 4:279; 2:6:436; 2:7:442-73.) The Airbnb Terms of Service Agreement (the "Airbnb Agreement") mandates: "An Accommodation Reservation is a limited license to enter, occupy, and use the Accommodation." (RJN, Ex. A, p. 27.) "The Host [owner] retains the right to re-enter the Accommodation during your stay," under certain circumstances, including to the extent "it is

[5] Section 7280 was derived from Government Code 51030, which was enacted in 1963. (RJN Ex. C.)

reasonably necessary." (*Ibid*.) Any supplemental contract between the owner and the guest must be "consistent with these Terms." (*Id*. p. 29.)

Under the character of use test, the "chief distinction between a tenant and lodger lies in the character of possession." (See, e.g., *Stowe, supra,* 44 Cal.2d at p. 421.) A tenant has "exclusive legal possession of [the] premises and is responsible for [its] care and condition" whereas a lodger "has only the right to use the premises, subject to the landlord's retention of control and right of access." (*Ibid*.) Other indicia demonstrating a proprietor-lodger relationship include: (i) that the owner retains keys to the premises; (ii) the owner furnishes the premises; and (iii) provides necessary utility services. (*See Stowe*, at pp. 421-22; *Roberts, supra,* 36 Cal.App.2d at p. 772; *Fox v. Windemere Hotel Apartment Co.* (1916) 30 Cal.App. 162, 165.) A lodger, however, has no interest in the realty and instead inherits the rights of a mere licensee. (*See Roberts, supra,* 36 Cal.App.2d at p. 774.)

Pursuant to the Airbnb Agreement, hosts grant vacation lodgers a limited license to possess property subject to the host's right of re-entry. (RJN, Ex. A, p. 27.) Also like a hotel, hosts typically pay the utilities at the property, furnish the property, and retain access and keys to the property. Plaintiffs failed to offer evidence that demonstrates that it is more likely than not that the Bylaw Amendment violates the 1964 Agreement.

Vacation lodgers are also not "house guests" under the 1964 Agreement. The fundamental distinction between a "house guest" and a vacation lodger is that a "house guest" is a non-paying guest. (*Burge v. U.S.* (9th Cir. 1964) 333 F.2d 210, 218 (distinguishing between a "house guest" and a tenant or lodger on the basis that rent is paid by lodgers and tenants, but not a "house guest").)

There are other distinctions. Unlike a vacation lodger, the owner and "house guest" concurrently share possession of the premises. (See,

e.g., *Pierce v. Bd. of Nursing Educ. & Nurse Registration* (1967) 255 Cal.App.2d 463, 466 (house guest sharing possession of the premises with host); *Linsk v. Linsk* (1969) 70 Cal.2d 272, 281; *People v. MacInnes* (1973) 30 Cal.App.3d 838, 841. Airbnb is a commercial platform in which hosts offer accommodations for purposes of generating revenue. Plaintiffs specifically allege pecuniary loss as a result of the Bylaw Amendment. To interpret the 1964 Agreement's use of the term "house guest" to embrace Vacation Lodgers would render the term meaningless. Vacation Lodgers are not "house guests."

2. The Membership Rule does not violate the 1964 Agreement because it too is reasonable

The trial court erred in ruling that, while it "*may be reasonable*" for ALA to condition the right of access and recreation on membership, the rule is nonetheless "counter to the language of the 64 Agreement." (1 AA 5:1187, emphasis in the original.) The trial court reasoned that "[n]othing in [the] language [of the 1964 Agreement] indicates or requires that [an] owner must first be a member of the organization holding title to the Lake and Reserve Strip." (*Ibid*.) The trial court mis-interpreted the 1964 Agreement.

The "[i]nterpretation of a contract 'must be fair and reasonable, not leading to absurd conclusions" and a "contract must receive such an interpretation as it will make it lawful, operative, definite, reasonable, and capable of being carried into effect." (*ASP Props. Grp., L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1269.) The purpose of the 1964 Agreement is to "determine and establish certain rights" of the Association on the one hand, and Arrowhead Woods property owners on the other hand. (1 AA 1:166-67.) The 1964 Agreement contains fifteen subdivisions, each subdivision addressing an aspect of the parties' compromise. The vast majority of these subdivisions reflect a shared interest in regulating use of

the Lake and Reserve Strips, including avoiding slip and docking congestion. For illustration, the 1964 Agreement provides:

> On December 31, 161 there were approximately 835 slips on the Lake, in addition to slips used or held for rental of boats to the public. Development Co. and/or Service Co. shall never permit the total number slips on the Lake at any one time to increase over 1285… (1 AA 2:169.)

> Each owner of such improved lot…may transfer such right…subject to the right of Development Co. and/or Service Co. to require the relocation and/or alteration…when reasonably necessary for improvement of docking facilities or access to the Lake… (1 AA 2:170.)

> Any pier or dock hereafter installed on the reserve strip additions shall be so located as to preserve at the 5,100 foot elevation a clear separation of at least 8 feet between such pier or dock and any pier or dock existing on January 1, 1962… (1 AA 2:172.)

> Development Co. is and shall only be permitted to voluntarily and intentionally reduce the level of Lake Arrowhead below 5,100 feet…for certain restricted purposes…(1 AA 2:173.)

In contrast, a single subdivision of the 1964 Agreement addresses lake access and recreation. Subdivision three of the 1964 Agreement grants the owners, their lessees, and their house guests a limited right of access and recreation. (1 AA 2:167-168, ¶3.) The Agreement prohibits access and

recreation "for business or commercial purposes" or that constitutes a "noxious thing." (1 AA 2:168, ¶3.) The owners' right to access and recreation is further restricted, "subject to" Appellant's "right…to promulgate and enforce reasonable regulations designed to promote the safety, health, comfort and convenience of person in or upon the Lake." (*Ibid*.)

The Association's Membership Rule complies with the 1964 Agreement. One of the stated purposes of the 1964 Agreement was to establish the rights of Arrowhead Woods property owners to "certificates of membership" in the entity that owned the Reserve Strips and owned certain rights in Lake Arrowhead, ALA's predecessor in interest. (1 AA 2:166.) The 1964 Agreement grants limited rights to owners subject to reasonable regulations by the Association. (1 AA 2:167-168, ¶3.) The Membership Rule is a reasonable regulation. Plaintiffs ignore the Association's right to regulate use when they assert that "restrictions imposed by the [Association] *that limit in any way* Arrowhead Woods property owners' rights to the Lake and to the Reserve Strips should be enjoined…" (1 AA 4:273, emphasis added.)

The Membership Rule is not only reasonable, it is indispensable to the performance of the 1964 Agreement. ALA cannot effectively promulgate and enforce reasonable regulations against non-members because it would have no authority to do so. (See 3 AA 17:703, ¶20.) Stated differently, without a membership rule ALA cannot promulgate and enforce any regulation against a non-member. (See *id*.) This would be an absurd result. It would also directly contravene the parties' intent reflected in the 1964 Agreement that the Association manage the Lake and Reserve Strips by enforcing regulations "designed to promote the safety, health, comfort and convenience" of the owners.

It is axiomatic that the management of a resource costs money. Like

most membership organizations, ALA is funded by and through membership dues. If ALA cannot condition access on membership, owners will have a reduced incentive to join the Association, which again would render performance of the 1964 Agreement as written impossible. The trial court's ruling violates a well-settled principle of contract law that a "contract includes not only the promises set forth in express words, but, in addition, all such implied provisions as are indispensable and as arise from the language of the contract and circumstances which it was made…" (*Sacramento Navigation Co. v. Salz* (1927) 273 U.S. 326, 329.)

Plaintiffs may argue that the Association does not need the Membership Rule to promote safety, and that the Association could instead sue safety rule violators for trespass. This is not a practical alternative. The 1964 Agreement is a settlement agreement. It was intended to resolve disputes, not increase the likelihood of further litigation on the same issues. An action for trespass is not only an impractical means for carrying out the purpose of the 1964 Agreement, it would render express covenants authorizing reasonable regulations meaningless. An action for trespass only lies where there is a "lack of permission for entry or acts in excess of permission." (*Ralphs Grocery Co. v. Victory Consultants, Inc.* (2017) 17 Cal.App.5th 245, 262.) A claim for trespass is not a proper tool to manage the Lake and reserve strips because it concerns unlawful conduct after the fact that results in damages. Litigation cannot easily deter prospective unlawful conduct, and certainly unlawful conduct that fails to result in compensable injury. A claim for trespass cannot easily be asserted to enforce day-to-day rules promulgated for purposes of safety, comfort, and convenience. The trial court's ruling must be reversed to avoid an unreasonable interpretation of the 1964 Agreement.

B. The balance of harms favors the Association and denial of the preliminary injunction

An injunction will only issue if the moving party (i) demonstrates a likelihood of prevailing on the merits and (ii) the relative balance of interim harms that would be sustained if the motion were granted or denied favors the movant. (*Loder v. City of Glendale* (1989) 216 Cal.App.3d 777, 782.) While the grant or refusal of a preliminary injunction is within the discretion of the trial court, it is a "delicate power requiring great caution and sound discretion, and rarely, if ever, should be exercised in a doubtful case." (*Ancora-Cintronelle Corp. v. Green* (1974) 41 Cal.App.3d 146, 148.) A "reviewing court does have broad powers of review to ensure that the trial court has not overstepped the proper limits of equitable relief" because an "injunction…is probably the most onerous relief which a trial court can give." (*City of San Jose v. Superior Court* (1995) 32 Cal.App.4th 330, 342.)

Plaintiffs allege irreparable harm on several grounds. Plaintiffs claim that the Bylaw Amendment's access restrictions have infringed their property rights. Plaintiffs allege that the restrictions have been "deprived and continue to deprive Plaintiffs of their fundamental property rights to access the Lake and Reserve Strips." (1 AA 4:277.) Plaintiffs also allege that the short term rental prohibition "altered" the "character" of their property because their property "no longer ha[s] the same appeal as a gathering place for them or their guests." (1 AA 4:277-78.) Plaintiffs allege that they have suffered pecuniary injury in the form of lost goodwill, and that such injury is not ascertainable. (*Ibid*.) The trial court ruled, "[i]n weighing precluding those who have a contractual *right of access and use* against a potentially affected budget, the harms weigh in Plaintiffs' favor." (5 AA 47:1223, emphasis added.)

The trial court's ruling misapplies the law. The trial court—

apparently in finding Plaintiffs were deprived a right of access—incorrectly considered the rights of third parties who are strangers to this lawsuit. The Bylaw Amendment only restricts the access of a vacation lodger or individual who is not a member of the Association. (1 AA 2:200 ("[t]he clients of ALA members who rent their homes in Arrowhead Woods for less than a 30-day period cannot access Lake Arrowhead, the ALA Beach Clubs, the ALA trials, any other ALA facility and/or any dock on Lake Arrowhead…").) Despite naming four Plaintiffs to this action, only two have filed declarations in support of the preliminary injunction motion. Both of these declarants, Seline Karakaya and Doug Miller, indicate that they are members of the Association and owners of real property in Arrowhead Woods. (2 AA 5:285; 6:435.) Based on the evidence before the trial court, it must have determined that rights of vacation lodgers, who are not parties to this suit, may be considered when evaluating the irreparable injury prong. This is not appropriate. (*Wooten v. BNSF Ry. Co.*, No. CV 16-139-M-DLC-JCL, 2017 U.S. Dist. LEXIS 40551, at *8 (D. Mont. Mar. 16, 2017) (holding that movant must "demonstrate that he will suffer irreparable harm" and "[a]ny harm to a third party…is not relevant for purposes of the irreparable harm inquiry").) Any consideration of non-party harm is especially improper in this case. The reviews attached to the Declaration of Sarah T. Schneider show that these vacation lodgers had notice of the fact that they were not purchasing a stay with a right of Lake access. (2 AA 7:441, 443, 454, 465.) Plaintiffs admit this. (1 AA 4:278.)

Plaintiffs' contention that the Lake access restriction resulted in a change in "character" of their property also lacks merit. (1 AA 4:277-78.) Plaintiff's reliance on *Grey v. Webb* (1979) 97 Cal.App.3d 232, 238 is misplaced. In *Grey*, a plaintiff entered into a contract for the sale of real property. A defendant, the seller of real property, sold the property to a purchaser other than the plaintiff notwithstanding the defendant's prior sale

agreement with the plaintiff. The plaintiff moved to enjoin the subsequent purchaser from possessing the home on the ground that it would suffer irreparably injury if the defendant moved into the home. The court noted the applicable standard, plaintiff demonstrates a threat of irreparable injury by showing (i) a "serious change of, or is destructive to, the property it affects, either physically or in the character in which it has been held and enjoyed" and (ii) the "property [has] some peculiar quality or use such that its pecuniary value as estimated by a jury, will not fairly recompense the owner for the loss of it." (*Grey*, at p. 238.) Plaintiff argued that a "new house has a particular and unique character which is destroyed when the house has been occupied by others." (*Ibid*.) The court held that the "question is a close one" but found that there is a difference "between a new house and used one…[which] is a difference of character and not merely value." (*Ibid*.)

The situation here is very different. The Bylaw Amendment's lake-access restriction applies only to Vacation Lodgers. (2 AA 5:297 §C.) It does not limit access to anyone else. (*Ibid*.) The Bylaw Amendment does not restrict access to Plaintiffs' homes. (*Ibid*.) It merely restricts Vacation Lodgers' access to the Lake, Reserve Strips, and other ALA property. (*Ibid*.) Unlike the "new home" character that is altered as soon as a buyer takes possession of a home, Plaintiffs' homes are unchanged by the lake-access restriction.

Plaintiffs claim that they have suffered irreparable harm in the form of lost goodwill is also unavailing. In support of this purported injury, Plaintiffs proffer a single declaration from Doug Miller, principal of plaintiff Vertical Bridge Ventures, Inc., and numerous Airbnb reviews. (2 AA 5:434-37, 6:440-474.) According to Plaintiffs, the reviews refer to vacation rental properties in Arrowhead Woods. (1 AA 6:441.) Plaintiffs do not indicate that the reviews refer to any of their properties. Miller

states that he has "periodically leased [his] home…to vacationers" and that he does not know and "cannot know which renters declined to rent [his] cabin." (1 AA 5:436.) Miller states that he is "aware of negative reviews on some Arrowhead Woods properties that specifically reference lack of Lake access," but admits that the "lasting impact of negative reviews on popular vacation rental websites such as Airbnb…i**s** difficult or impossible to calculate because so many subjective factors influence the determination whether to rent a particular property." (*Ibid*.)

Plaintiffs have failed to show they have suffered irreparable harm. "To qualify for preliminary injunctive relief plaintiffs must show irreparable injury, either existing or threatened." (*Loder, supra,* 216 Cal.App.3d at p. 783, citations omitted.) Pecuniary harm cannot constitute irreparable harm. (*Tahoe Keys Property Owners' Ass'n v. State Water Resources Control Bd.* (1994) 23 Cal.App.4th 1459, 1471 (irreparable injury is a harm that cannot be fully compensated by money damages); *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League* (9th Cir. 1980) 634 F.2d 1197, 1202 (holding that "diminution of revenues, a diminution of the market value of plaintiff's property and the loss of substantial goodwill normally attached to a profitable enterprise" did not constitute irreparable harm because it could be remedied by a damage award).) Plaintiffs' harm is only pecuniary. It is also speculative, and does not constitute a real, immediate threat of harm. It is worth noting that Plaintiffs do not allege specific injury in the form of any loss of goodwill, but rather generally refer to a loss of goodwill suffered by vacation rental owners. (1 AA 4:278.)

It is not even clear if all Plaintiffs host vacation lodgers regularly. Only Doug Miller testifies that he lists his property as a vacation rental, and he indicates that he only do so, "periodically." (2 AA 6:436 ¶8.) In addition, the reviews attached to the Declaration of Sara T. Schneider, if anything, undermine Plaintiffs' claims. (2 AA 7:432-474.) The nearly

1,000 reviews demonstrate that Vacation Lodgers are not discouraged from renting the properties notwithstanding their lack of lake access. (*Ibid*.) For example, one vacation lodger wrote "[t]his house is so charming and well located. We loved our stay here. The only issue is that you can't access the lake…" (1 AA 7:443.) That property had more than 100 reviews, with an aggregate rating of 4.90 out of 5.0 stars. (*Ibid*.) The numerous and overwhelmingly positive reviews reinforce Doug Miller's testimony that many "subjective factors influence the [Vacation Lodger's] determination whether to rent a particular property." (1 AA 6:436.)

Plaintiffs also improperly focus their harm analysis on past harms rather than prospective harms. Rather than identify a real, impending threat of irreparable injury, Plaintiffs point only to the fact that some vacation lodgers have expressed displeasure with their lack of access to the Lake. These statements are inadequate and speculative, and fail to evidence a threat of irreparable harm. Nevertheless, to the extent Plaintiffs have (or will) suffer real and actual harm in the form of a compensable, pecuniary loss, it is measurable and improperly alleged as a form of irreparable harm. Therefore, Plaintiffs have failed to make a sufficient showing to warrant injunctive relief.

In contrast, the preliminary injunction will cause the Association to suffer substantial harm. Like Plaintiff, ALA risks having certain, bargained-for rights improperly infringed. However, unlike Plaintiffs, where only their vacation lodgers face access restrictions, the preliminary injunction requires ALA to allow unauthorized individuals to access ALA's property. (*Presidio Components, Inc. v. Am. Tech. Ceramics Corp*. (Fed. Cir. 2012) 702 F.3d 1351, 1363 (acknowledging that it is appropriate to consider the right to exclude within the irreparable injury analysis).) The increased access by unauthorized individuals will cause the Association to bear greater management burdens and incur increased costs. (See generally

3 AA 17:700-702, ¶¶9-14.) These burdens are not speculative. They are an unavoidable consequence of the preliminary injunction allowing access to ALA property by people who, not being residents, lack the incentive to be good neighbors to those who live there. In addition, if the Membership Rule is deemed unlawful, the Association will have no way to carry out its purpose of managing the Lake and Reserve Strips for the benefit of its members. As set forth above, ALA will be unable to promulgate and enforce reasonable regulations—for the health, safety, comfort and convenience of owners—as set forth expressly in the 1964 Agreement. The balance of harms favors the Association.

CONCLUSION

For the foregoing reasons, the trial court order issuing a preliminary injunction should be reversed.

Dated: September 30, 2022 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 12,122 words according to the word count feature of the computer program used to prepare this brief.

Dated: September 30, 2022

By: /s/ Gregg W. Kettles
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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 September 30, 2022, I served a copy of the within document(s):

APPELLANT'S 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 September 30, 2022, at Los Angeles, California.

/s/ Tatiana Palomares
Tatiana Palomares