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SUPERIOR COURT OF THE STATE OF CALIFORNIA

CITY AND COUNTY OF SONOMA, UNLIMITED JURISDICTION

JOSEPH ROMANO, individually and as trustee of THE JOSEPH AND PIXIE ROMANO LIVING TRUST,

Plaintiff,

vs.

FAIRWAY VIEW ESTATES HOMEOWNERS ASSOCIATION, and DOES 1-10,

Defendants.

FAIRWAY VIEW ESTATES HOMEOWNERS ASSOCIATION, a California Nonprofit Mutual Benefit Corporation,

Cross-Complainant,

vs.

JOSEPH ROMANO, individually and as trustee of THE JOSEPH ROMANO AND PIXIE ROMANO LIVING TRUST, and DOES 1-10,

Cross Defendant.

CASE NO: SCV-262714

PLAINTIFF JOSEPH ROMANO'S OPPOSITION TO DEFENDANT AND CROSS-COMPLAINANT'S ORDER TO SHOW CAUSE RE INJUNCTIVE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: April 7, 2021
Time: 3:00 p.m.
Dept: 18
Trial date: July 9, 2021

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Plaintiff and Cross-Defendant Joseph Romano hereby files his opposition to Defendant and Cross-Complainant's Order to Show Cause as to why an injunction should not issue.

I. INTRODUCTION

This unnecessary litigation stems from an unfortunate dispute between a Homeowners Association and a homeowner, Joseph Romano, resulting for the HOA's unreasonable refusal to allow improvements to his property. Defendant and Cross-Complainant, Fairway View Estates Homeowners Association ("FVEHOA"), now seeks to enjoin Mr. Romano from performing legal construction on his property, pursuant to plans approved by FVEHOA and with valid permits from the City of Santa Rosa. FVEHOA demands Mr. Romano follow its Board of Directors' biased and unreasonable interpretation of the Covenants, Conditions and Restrictions (the "CC&R's") and Architectural Guideline, despite this interpretation being contrary to the law and retroactively restricting Mr. Romano from performing construction that has been approved by FVEHOA.

The sole issue before the Court is whether or not FVEHOA can show a probability (not possibility) of prevailing in its claim for breach of equitable servitudes against Mr. Romano by demonstrating with competent evidence to this Court that Mr. Romano violated the CC&R's when, in the opinion of FVEHOA, Mr. Romano's current plans and designs were not approved. The specific allegations at paragraphs 27 through 38 of the Cross-Complaint are the only allegations that relate to actual, ongoing construction and are be the only portion of FVEHOA's Cross-Complaint that could possibly lead to injunctive relief after a trial on the merits. [1] FVEHOA is not entitled to injunctive relief because it fails to demonstrate a likelihood of prevailing on the merits, as the construction that is being performed has been approved by FVEHOA.

Moreover, FVEHOA cannot demonstrate a real and imminent threat of irreparable injury, as the purportedly offending construction has been ongoing and known to FVEHOA for several years, with no action being taken during the majority of the project, including the grading of the site, construction of the foundations and construction of a small deck, all of which had been completed long before

[1] FVEHOA does incorporate prior allegations in its trespass cause of action. However, a review of the preceding allegations demonstrates that none of the purported violations of equitable servitudes (solely as it relates to construction, which is the conduct to be enjoined) implicate a trespass to land owned by FVEHOA. Even the allegation of building beyond the "building envelope" (which is in dispute) would not give rise to a trespass since the land is owned and controlled by Mr. Romano, not FVEHOA, regardless of whether or not Mr. Romano may or may not build within that area that FVEHOA contends he may not.

FVEHOA sought its TRO. FVEHOA refused to bring this request for injunctive relief until the project was at a critical stage, causing as much damage as possible to Mr. Romano due to a stoppage of the construction. Conversely, should an injunction issue, Mr. Romano will suffer immediate and irreparable injury because halting construction at this time will cause building materials to be lost or damaged and existing contracts with workers to be broken.

Mr. Romano accordingly requests that the Court deny FVEHOA's request for injunctive relief in its entirety. If this Court decides that an injunction should be issued, FVEHOA must be required to post a bond to protect Mr. Romano against loss due to further delays in construction.

II. STATEMENT OF FACTS

The parties have been actively involved in civil litigation involving disputes over numerous issues including the multiple construction projects on the property owned by Mr. Romano and his wife Pixie Romano, located at 4723 Muirfield Court, Santa Rosa, CA 95405 (the "Property"). The parties' dispute stems from the operation of the CC&Rs governing the activities of FVEHOA as it concerns the Mr. Romano's home, which is located in the Fairway View Estates ("FVE") subdivision operated by FVEHOA. The CC&R's which are attached and referred to in EXHIBIT 1.

The Subject Property

The Romano's purchased the Property in 2010 and have continuously lived there as their primary residence since their purchase. The Property is on nearly four (4) acres with two driveways and is fenced and gated. The Property is at the top of a private road, and surrounded by trees and other vegetation, such that the house itself and the building projects cannot be seen from the private road in front of the residence or from any public street. Landscaping and heavy tree cover will hide the buildings and vines will cover the retaining walls as shown on the plans submitted.

Approval of Mr. Romano's Initial Construction Projects

On August 8, 2013 Mr. Romano applied for FVEHOA's approval of building plans for a "Game Room" addition to the house, and to build two other stand-alone structures on the property, a "Garden Garage," and a "Main Garage". Mr. Romano met with the Chairman of FVEHOA's Architectural Control Committee (the "ACC") at the time, Mike Doyle, to discuss the plans. On August 18, 2013 FVEHOA approved the plans by providing a copy of the submitted plans to Mr. Romano with

a large HOA "Architectural Committee Approval Stamp" signed by Mr. Doyle. (EXHIBIT 2.) FVEHOA also noted the approval of these plans in its October 14, 2013 meeting. (EXHIBIT 3.)

The Garden Garage, Main Garage and the Game Room were approved by FVEHOA with a five (5) foot setback from the property line. The notes printed on the plans at the Game Room state, "Setback as determined by City of Santa Rosa Planning and owner agreement" and at the Garden Garage, the note on the plans state "Setback 15' +/- as determined by City of Santa Rosa Planning (deck accepted >5')". (See EXHIBIT 2.)

Once the plans were approved by FVEHOA, Mr. Romano was not able to immediately begin construction because building permits had to be obtained. Mr. Romano immediately began work on obtaining City of Santa Rosa Building permits, which is a complex issue involving hillside review and many other procedures. The City of Sana Rosa Planning Department issued the first building permits on July 31, 2017. The Garden Garage and Main Garage were permitted on Permit B16-3228 and Permit B16-3229. The Game Room was permitted on Permit B16-3218. During the processes of obtaining permits, the City suggested combining the main and garden garage structures into one structure with an Accessory Dwelling Unit ("ADU") on top (the "Garage/ADU"). The effect of combining these structures reduced the total on ground footprint of the structures by nearly 1,000 square feet and rotated it to be less visible from the private road. The setback from the property line did not change at all from the approved 2013 plans. (See EXHIBITS 2, 4, and 8.) Mr. Romano retained additional services of architects, engineers and other vendors in order to comply with the City's recommendations and requirements. The entire process required more than 150 meetings, phone calls, emails and letters from 2013 to July 13, 2017.

Beginning of Construction Work

On August 1, 2017, Mr. Romano began to grade the site for construction. On September 28, 2017, Mr. Romano began construction on the Garage/ADU by building a small deck under permit B16-3229 with the closet point on the deck to the property line being approximately eight (8) feet. This deck is the only part of the structure FVEHOA claims is violating the CC&Rs setback rules. However, the deck in dispute, has already been built (all ongoing construction on the Garage/ADU are not within the

CC&R's 15 foot setback), and the deck and the foundation was built under permits from the City and FVEHOA approved 2013 plans.

FVEHOA's Cease and Desist Letters

On March 14, 2018, one hundred sixty-seven (167) days after the "offending" small deck completion on September 28, 2017, FVEHOA sent a "Cease and Desist" letter to Mr. Romano to stop all construction on his property. (See EXHIBIT 5.) [2] Mr. Romano advised FVEHOA that he had approved plans from FVEHOA and provided a copy of the approved plans to FVEHOA. Mr. Romano continued construction based on the approved plans and City building permits. On July 29, 2018 Mr. Romano filed a civil action against FVEHOA alleging that FVEHOA failed to comply with its own CC&Rs in refusing to approve Mr. Romano's revised plans an at the same time the FVEHOA attempted to induce Mr. Romano give up the 5 foot setback approval he had already obtained from FVEHOA for the small deck and game room/gym

On October 9, 2018 Mr. Romano's counsel received another letter from FVEHOA demanding that he cease all work on his property. FVEHOA's October 9, 2018 letter stated, "Please have your client immediately cease further work until it is approved by the Association as required by the CC&Rs. If any further work is reported this week, we will file for a TRO." (See EXHIBIT 6.) Again, Mr. Romano advised FVEHOA he had approved plans and continued construction.

Thereafter, FVEHOA took no action with respect to seeking a TRO following the October 9, 2018 Cease and Desist Letter until they provided notice of the instant Application for TRO on February 9, 2021, an additional 2 years and 4 months (854 days). Therefore, FVEHOA's request for injunctive relief is not timely, and the delay demonstrates that the construction presents no actual risk of irreparable harm to FVEHOA.

Subsequent Plans Submitted by Mr. Romano

From the date he obtained building permits for these structures and began construction, Mr. Romano has been consistently submitting updated plans to FVEHOA to keep them fully appraised of his

[2] The FVEHOA did not calculate the lost construction time due to the October 8, 2017 Tubbs Fire, which decimated Sonoma County and caused pending construction to come to a virtual standstill for more than three weeks. The construction on Mr. Romano' property was halted by two fires the Tubbs Fire, (10/8/2017) and the Kincade Fire (11/23/2019). The Tubbs and Kincade fires required complete evacuation of the property for more than 3 weeks each.

construction. From December 20, 2017 to May 14, 2019, Mr. Romano submitted six separate sets of revised plans based on revisions recommended by the City of Santa Rosa and did not change the setback from the property line or substantially change the location of the structures. (See EXHIBITS 2 and 4.) Each of these plans had the exact same setbacks as in the approved 2013 plans and the City of Santa Rosa providing building permits for these revised plans. (See EXHBIT 8) FVEHOA summarily rejected the revised plans submitted on December 20, 2017 without providing the proper notice that the plans were complete under the CC&Rs section 17(e). It then rejected the next four sets of plans as "incomplete." Finally, on February 21, 2020, Mr. Romano submitted his revised plans (set 8 in total) to FVEHOA. In a letter on February 26, 2020, FVEHOA's attorney summarily rejected these plans herself, without review from FVEHOA's ACC. (See EXHIBIT 7.) The letter provides that the plan for a separate "sun room" project is being submitted to the ACC. However, the letter makes no mention that she was providing the Garage/ADU and Game Room to the ACC. Moreover, there are no FVEHOA records or minutes showing the ACC ever convened to review these plans from the date Mr. Romano submitted them to FVEHOA's attorney to the date of her summary rejection of these plans. This apparent "rejection" by the FVEHOA's attorney without review by the ACC is in violation of the CC&Rs. Moreover, FVEHOA failed to follow the CC&Rs section 17(e) by reviewing the plans and providing a letter advising whether the plans are complete. Thereafter, FVEHOA did not review the plans and did not provide any responses for over 45 days. As such these plans were approved by operation of the CC&Rs, Article 17(g) on April 6, 2020 (45 days after the plans were submitted). (See EXHIBIT 1.)

On May 13, 2020 Mr. Romano's attorney wrote to FVEHOA, indicating Mr. Romano's legal position that the most recent set of building plans submitted to HOA by Mr. Romano were approved by operation of the CC&Rs. Moreover, the plans were also consistent with Civil Code 4020, 4765 and 4025(a), City of Santa Rosa Title 20 of the Santa Rosa City Code and Gov. Code sections 65852.2(a)(1)(D)(vii) and 65852(a)(4), which set forth the requirements for an ADU. (See EXHIBIT 9.)

Mr. Romano has also received a letter from the California Department of Housing and Community Development advising Mr. Romano that the Government Codes cited above applies to not only to the Government but to HOA's as well. (See EXHIBIT 10.) On June 4, 2020 Mr. Romano provided a letter to FVEHOA restating Mr. Romano's legal position in the May 13, 2020 letter. Mr.

Romano further advised FVEHOA that the Civil Code 4765, FVEHOA CC&R's and ACC Guidelines controlled these issues, and under operation of the CC&Rs, the plans have been approved. (See EXHIBIT 11.)

Construction has consistently continued on the Garage/ADU on Mr. Romano's property for the last three-and-a-half-years (except for periods of time that work could not be performed due to weather, fires, and/or or labor shortages). Included in this construction included soil grading starting August 1, 2017, construction of the deck at the rear of the Garage completed on September 28, 2017, large material and equipment deliveries on January 2, 2018, pouring of concrete footings (130 yards of concrete) on July 31, 2020, and grading and building wall forms starting August 1, 2020. During this time period construction activities and noise have not been concealed from FVEHOA. Generators, compressors, excavation equipment and hoists have been operated on a daily basis, six days a week, and members of FVEHOA have been continually observing Mr. Romano's construction activities. (See EXHIBIT 12 and 13, showing photographs of ongoing construction and a timeline of relevant dates and construction that has been performed to date.) The City of Santa Rosa Building permits require constant progress in order for the permits to continue to be valid. Current City Permits are valid until at least December of 2021.

Construction by other FVEHOA Members

Mr. Romano is informed and believes and has notified FVEHOA that several members of FVEHOA are violating the "final map setback" from property line requirements that FVEHOA is attempting to use as the reason to prevent Mr. Romano from completing construction of the Garage/ADU and the Game Room. (See EXHIBIT 14, for a summary of other FVEHOA members' properties with setback violations that were approved by the FVEHOA or unenforced by the FVEHOA, allowing them to remain.

III. STANDARD FOR ISSUANCE OF INJUNCTIVE RELEIF

The court may only grant such a preliminary injunction where the requesting party has a right to equitable relief if the case goes to trial. *Voorhies v. Greene*, 139 Cal. App. 3d 989, 995-998 (1983). Code of Civil Procedure section 526 lists the specific circumstances where an injunction would be appropriate. These grounds include whether plaintiff appears entitled to the requested relief, whether the

requested relief includes a prayer to restrain the actions at issue, whether continued activity would create waste or great or irreparable injury to a party, and whether a party is about to do something regarding the subject matter of the action and tending to render judgment ineffectual, among others. Code of Civil Procedure section 526(a).

As is usual with all injunctions, a preliminary injunction will issue only if there is no adequate legal remedy. Code of Civil Procedure section 526. The party seeking the injunction must show an imminent threat of irreparable injury, often equated with an "inadequate legal remedy." Cal. Code Civ. Proc. § 526(a)(2); *Korean Philadelphia Presbyterian Church v. Cal. Presbytery*, 77 Cal. App. 4th 1069, 1084 (2000). The requirement that the injury be "imminent" means that the party to be enjoined is, or realistically is likely to, engage in the prohibited action. *Korean Philadelphia Presbyterian Church*, *supra*. The irreparable injury will exist if the party seeking the injunction will be seriously injured in a way that later cannot be repaired. *People ex rel. Gow v. Mitchell Bros., etc.*, 118 Cal. App. 3d 863, 870-871 (1981).

The party seeking a preliminary injunction must also demonstrate a reasonable probability of success. *See* Cal. Code Civ. Proc. § 526(a)(1); *San Francisco Newspaper Printing Co., Inc. v. Superior Court* ("*Miller*"), 170 Cal. App. 3d 438, 442 (1985). Plaintiff must make a prima facie showing that he is entitled to relief under these standards, but need not rise to the requirements for a final determination. *Triple A Machine Shop, Inc. v. State of California*, 213 Cal. App. 3d 131, 138 (1989). *Scaringe v. J.C.C. Enterprises, Inc.*, 205 Cal. App. 3d 1536 (1988) (at 1543) provides an example of how to determine whether the moving party has satisfied this requirement. The plaintiff in *Scaringe* sought to halt construction that would block his view. The court stated that in order to show a reasonable probability of success, the plaintiff had to demonstrate an enforceable servitude or CCRs.

The court must conduct a two-prong equitable balancing test, weighing the probability of prevailing on the merits against the determination as to who is likely to suffer greater harm. *Robbins v. Superior Court*, 38 Cal.3d 199, 206 (1985); *Shoemaker v. County of Los Angeles*, 37 Cal. App. 4th 618, 633 (1995). This determination involves a mix of the two elements, and the greater the moving party's showing on one element, the weaker it may be on the other. *Butt v. State of Calif.*, 4 Cal.4th 668, 678 (1992). Here, FVEHOA does not meet the standards for a preliminary injunction or any other

relief because (1) the FVEHOA does not face irreparable harm should the injunction not issue; (2) Mr. Romano will face irreparable harm should the injunction issue; (3) FVEHOA is unlikely to prevail on the merits; and (4) the public's interest in protecting a homeowner from a homeowners' association's biased and selective enforcement of its CC&Rs based on its Board's unlawful interpretation of the CC&Rs.

IV. LEGAL ARGUMENTS

A. FVEHOA CANNOT PROVE IRREPARABLE HARM

The first factor the court must consider in determining whether an injunction should issue is the interim harm that the applicant will sustain if the injunction is denied as compared to the harm to the defendant if the injunction issues. *Choice-In-Education League v. LA Unif. School Dist.* 17 Cal.App.4th 415, 422 . There is a threat of irreparable harm where there is an "inadequate legal remedy" or where the injury cannot be readily repaired or undone. Cal. Code Civ. Proc. § 526(a)(2); *see People ex rel. Gow v. Mitchell Brothers' Santa Ana Theater*, 118 Cal. App. 3d 863, 870-871 (1981).

1. FVEHOA WILL NOT SUFFER IRREPARABLE HARM IF THE INJUNCTION DOES NOT ISSUE

FVEHOA will not suffer imminent irreparable harm if the construction on the Garage/ADU and the Game Room is allowed to continue. FVEHOA knowingly waited over three-and-a-half years from when construction started to seek this injunction, despite ongoing and open construction during this period. FVEHOA has no competent evidence that the structures create a risk of damaging common areas or other properties. FVEHOA has no competent evidence that the structures are visible from other properties in the surrounding area. FVEHOA allowed structures on other properties to be built in the 15-foot setback that it now utilizes to prevent Mr. Romano from building.

The issues discussed in FVEHOA's request for a TRO and OSC have been in dispute for several years. It has now been over seven years since Mr. Romano's plans were first approved by FVEHOA and Mr. Romano began working with the City to obtain the necessary permits to start construction, and three-and-a-half years since Mr. Romano began construction on the Garage/ADU. Indeed, the majority of the purportedly offending portions of the structure have already been built. The deck that is the only portion within 15 feet from the property line, the grading, and the concrete foundation of the Garage/ADU have already been completed. Since construction started, FVEHOA board members have

been observed driving by and taking pictures and walking in the common area to view the ongoing construction work. They have also written to Mr. Romano complaining about construction and describing observations of Mr. Romano's construction activities in FVEHOA newsletter and minutes.

FVEHOA has also threatened to seek injunctive relief against Mr. Romano for more than three years four months, yet it took no steps to do so until construction on the Garage/ADU was at a critical point, where Mr. Romano would suffer the most harm due to ceasing construction. FVEHOA does not have any basis to take action at this time, except to try to cause Mr. Romano unjust and irreparable harm.

FVEHOA has not provided any competent evidence that irreparable harm to the surrounding areas will occur if the injunction does not issue. Initially, FVEHOA speculates, without factual support, that "it appears extensive grading has been done in this area and the hillside on which this work is being done is steep, indicating there may be slippage, landslides, and drainage issues as a result of this work." (See FVEHOA's ex parte application for TRO p.9:13-15.) FVEHOA has provided no evidence that there is any actual danger should Mr. Romano complete construction on the Garage/ADU. This argument amounts to nothing more than speculation by lay board members who are not contractors or engineers. Contrary to FVEHOA's unsupported claims, there is no danger of slippage, landslides or drainage issues. Consultant PJC & Associates, Inc. has inspected this property in connection with the planned construction of the Garage/ADU and the Game Room and found that the proposed building envelopes are located within a level to moderately sloping topography, and field investigations encountered no evidence of slope instability at the site and the risk of land sliding is low. [See EXHIBIT 15.] Additionally, PJC & Associates has reviewed the plans for the Garage/ADU and the Game Room, and conducted additional soil inspections, finding that there were no drainage issues based on the current plans. [See EXHIBIT 16.] Indeed, the City of Santa Rosa has reviewed all of these reports by PJC & Associates and issued building permits for these projects. Moreover, Mr. Romano's construction consultant Mr. Ed Nessinger, E West Construction has been observing construction on the Garage/ADU and Game Room, and has found no risk of slippage, landslides, or drainage issues associated with this construction. [See Declaration of Mr. Ed Nessinger, Paragraphs 4-8.)

Moreover, FVEHOA misrepresents the size and visibility of the Garage/ADU. The building is not 36 feet tall, as FVEHOA contends. The building is 27 feet tall, with one side of the structure that is approximately 60 feet long is being built on top of a retaining wall that is approximately 8 feet high at its tallest point. Majority of the Garage/ADU cannot be seen from the private road that leads to Mr. Romano's house or from the other properties. [See EXHIBIT 17.] The retaining wall will be covered in vines and the walls of the Garage will be blocked by tall existing trees, oleanders that will be planted, and other existing vegetation. [See EXHIBIT 18.]

Finally, FVEHOA is unable to demonstrate that the mere fact that structures on Mr. Romano's property are being built within the 15-foot setback would cause it irreparable harm. FVEHOA has allowed other members to build structures less than 15 feet, and as close as 5' from their property lines on the basis that a Santa Rosa building permit had been issued. It has done nothing to try to prevent those members from maintaining those projects. For example, FVEHOA approved the construction of a swimming pool on 4735 Golfview Ct. on June 20, 2012 that is only 5 feet from the property line because the City of Santa Rosa issued a building permit for a swimming pool at that property. [See EXHIBIT 14.] Additionally, Mr. Romano is informed and believes that there are at least 18 other "violations" of FVEHOA's setback requirements on other properties (including those owned by the FVEHOA President and Vice President) that FVEHOA has either approved or not enforced the setback requirements. [See EXHIBIT 14.] FVEHOA will not suffer irreparable harm merely due to a structure being built within the 15-foot setback, as such structures are commonplace in the FVE subdivision. As such, FVEHOA's injunction should not issue as FVEHOA has failed to demonstrate risk of irreparable harm.

2. DELAYS IN CONSTRUCTION AT THIS STAGE WILL CAUSE MR. ROMANO IRREPARABLE DAMAGES AND CANNOT BE FULLY RECOVERED.

The Garage/ADU is in a critical stage as the walls have been partially built and additional concrete necessary for supporting the walls must be poured to make them stable. Since the TRO was issued, Mr. Romano has been forced to construct temporary braces on the partially built walls to keep them from falling and causing damage to the surrounding area and/or causing injury to persons on the property. However, these braces are a temporary solution, and FVEHOA can see stopping construction

now will leave Mr. Romano with a partially finished and potentially dangerous structure on his property. Indeed, had FVEHOA truly believed it was in danger of suffering irreparable harm from Mr. Romano's construction, it should have sought injunctive relief as soon as this litigation began, when construction was at an initial stage. Instead, it allowed Mr. Romano to grade the slope, construct the foundation and begin construction on walls three-and-a-half years before seeking an injunction. FVEHOA is attempting to stop construction at the most critical point in order to try to cause further harm to Mr. Romano.

Mr. Romano's expenses for construction delays thus far are considerable and will continue to increase as long as construction is halted. Mr. Romano has expended at least $350,000 in plans, consultants, attorneys, and other professionals, and over $200,000 in materials and labor. Further delaying this project would likely cost Mr. Romano hundreds of thousands of dollars in increased costs due to labor shortages making it nearly impossible to obtain replacement workers at a comparable cost. Additionally, material costs are increasing daily for lumber, concrete, hardware, piping, wiring and most other building products and freight to bring inventory in from distant locations is also increasing. Moreover, further delays in building the garages will expose vehicles, equipment, and materials to winter weather. Building materials cannot be returned and there is no storage available at a reasonable cost. Mr. Romano has already expended $50,000 in storm mitigation and remobilization costs in the last two rainy reasons due to Cease-and-Desist related halts in work. Since construction has been halted again by the TRO, Mr. Romano will have to expend at least an additional $25,000 to cover excavated earth, surrounding slopes and materials. Mr. Romano also has current contracts with professional carpenters and tradespeople, material suppliers and others in which Mr. Romano is obligated to continue construction. (See Nessenger Decl. at paragraphs 9-18.)

Since the issuance of the TRO, Mr. Romano has been diligently pursuing the shutdown of the Garage/ADU construction as ordered, as documented in Mr. Romano's letter dated February 12, 2021. [See EXHIBIT 19.] The total "button up and shutdown costs" will is estimated to be $6,500 for labor and $27,000 to $50,000 for materials depending on which solutions are adopted. In addition, the City of Santa Rosa building department requires non-working construction projects to be protected from rain, wind and storm damage and minimize fire risks. To try to mitigate damages to materials and

equipment, Mr. Romano proposed erecting a temporary storage tent on the property to keep materials and equipment from being damaged due to exposure. At this time, the FVEHOA has refused to allow a storage tent to be erected on the property to protect materials and equipment which is the most cost-effective mitigation available at this time even though the City of Santa Rosa has issued a building permit for the installation.

Mr. Romano's costs of building his approved projects have already increased dramatically due to delays caused by two fires, the Covid-19 pandemic and market factors. Mr. Romano estimates his construction costs have increased in excess of $2 million dollars, and they will continue to increase should FVEHOA's injunction issue. (See Romano Decl. at paragraph 42.) Therefore, Mr. Romano request the request for injunction be denied in its entirety.

B. FVEHOA IS UNLIKELY TO PREVAIL AT TRIAL ON THE MERITS

Here, FVEHOA is unlikely to prevail at trial on the merits because Mr. Romano has obtained valid approval of plans for all construction from FVEHOA, either by direct approval of FVEHOA itself or by operation of the CC&R'S.

1. FVEHOA IS UNABLE TO DEMONSTRATE A LIKELY OF PREVAILING ON ITS CLAIM THAT ROMANO BREACHED ANY EQUITABLE SERVITUDES RELATED SOLELY TO CONSTRUCTION AT THE PROPERTY

Where an association sues a homeowner to enforce its CC&R's and enacted rules, it bears the burden of showing it followed its own standards and procedures before pursuing such a remedy, and it must demonstrate that its procedures were fair and reasonable, its substantive decision was made in good faith and was reasonable, and its action was not arbitrary or capricious. *Friars Village Homeowners Assn. v. Hansing*, 220 Cal. App. 4th 405, 413 (2013).

FVEHOA approved the original plans in August 2013. FVEHOA argues that Mr. Romano failed to complete the construction within one year, under the CC&R's section 17(i). However, FVEHOA incorrectly states that the CC&Rs require completion within a year of approval. Rather, section 17(i) states, "The Owner shall in any event complete the construction, . . . within one year after commencing construction thereof, except and for so long as such completion is rendered impossible or would result in great hardship to the Owner due to strikes, fires, national emergencies, natural calamities or other supervening forces beyond the control of the Owner or his agents." Mr. Romano began construction

on the Garage/ADU on August 1, 2017 after the long process of obtaining building permits. Thereafter, he completed initial grading and construction of the deck area (the only area that is within the 15 foot setback from the property line). Subsequently, a major fire in 2017 forced a stoppage of construction, delaying the project, and FVEHOA began to send its initial, improper cease and desist letters within the initial year of construction, further delaying the project, while Mr. Romano paused construction to determine whether he could legally proceed. These events toll the one-year requirement as they certainly qualify as forces beyond the control of the Owner or his agents.

With regards to the revised February 21, 2020 plans, FVEHOA is obligated by law and the CC&Rs to conduct a review of the plans in a timely manner. FVEHOA did not do so with regards to the most recent revised plans, and therefore, the current plans have been deemed approved by the CC&Rs. Mr. Romano submitted his final set of revised plans to FVEHOA's attorney on February 21, 2020. In a letter on February 26, 2020, FVEHOA's attorney summarily rejected these plans herself, without review from FVEHOA's ACC. Moreover, FVEHOA failed to follow the CC&Rs section 17(e) by reviewing the plans and providing a letter advising whether the plans are complete. Thereafter, FVEHOA did not review the plans and did not provide any responses for over 45 days. As such these plans were approved by operation of the CC&Rs, Article 17(g) on April 6, 2020 (45 days after the plans were submitted). See Nahrstedt v. Lakeside Village Condominium Assn. (1994) 8 Cal.4th 361, 374 [33 Cal. Rptr. 2d 63, [*282] 878 P.2d 1275] (Nahrstedt) [finding "courts will uphold decisions made by the governing board of an owners association," where among other things, they "are consistent with the development's governing documents"]; Lamden v. La Jolla Shores Clubdominium Homeowners Assn. (1999) 21 Cal.4th 249, 253 [requiring that association board "exercise[] discretion within the scope of its authority under relevant statutes, covenants and restrictions" in order to merit judicial deference].

Moreover, FVEHOA's required 15-foot setback for the Garage/ADU is contrary to the law. Civil Code 4765(a)(3) bars CC&R's from violating any governing provision of law, including but not limited to …. a building code or other applicable law governing land use…." Gov. Code, §65852.2(a)(1)(D)(vii) states: "[A] setback of no more than four feet from the side and rear lot lines shall be required for an accessory dwelling unit that is not converted from an existing structure or a new

structure constructed in the same location and to the same dimensions as an existing structure." This section, which provides that the setback required for an ADU shall be "no more than four feet" from the property line clearly conflicts with FVEHOA's setback requirement that is more than four feet from the property line. As such, Civil Code section 4765(a)(3) prohibits FVEHOA from refusing to approve the Garage/ADU plans on the basis that it does not comply with the FVEHOA's setback of more than four feet.

Therefore, all of Mr. Romano's current construction of the Garages/ADU and anticipated construction of the Game Room, have been approved by FVEHOA and comply with all applicable codes and regulations.

2. IF AN INJUNCTION ISSUES, FVEHOA SHOULD BE REQUIED TO FURNISH AN UNDERTAKING FOR DAMAGES AND COSTS INCURRED BY MR. ROMANO

Code of Civil Procedure section 529 provides that the Court must require an undertaking on the part of the party requesting the injunction to cover any damages that the enjoined party may sustain due to the injunction should the court ultimately decide that the injunction was not proper. (Code of Civ. Proc. § 529(a).) While Mr. Romano asserts that an injunction should not issue, if the Court decides to grant FVEHOA's request for an injunction, FVEHOA must be required to post a bond to cover Mr. Romano's damages and costs should the Court subsequently determine at trial that the injunction was not proper.

Mr. Romano's construction expert's opinion is that the cost per sq ft would rise from the original estimated cost of the garage and game room on 1/14/2014 of $1,465,398 for 8200 sq ft is $178 per sq ft. by December of 2020 costs of materials and labor have risen to $560 per sq ft for 8200 sq ft or $4,592,000. On February 1, 2021 the cost per sq ft increased by over 67% in one month due to material shortages and labor cost increases and still climbing. (Nessinger Decl. at paragraphs 9-18.) Based on the 1/14/2014 to 2/1/2021, alone the cost per sq ft has increased from, $177 to $560 per sq ft. which is $382 per sq. ft. increase. This totals approximately $3,026,602 and does not consider delays from the TRO to trial date or to completion of construction. (Nessinger Decl. paragraph 12.)

As such, Mr. Romano requests that FVEHOA be required to post a bond of no less than $500,000 would be reasonable since construction might not be able to resume until January 15, 2022

because of the delays thus far and the coming heavy winter expected. This bond would partially protect Mr. Romano up to the date of trial date on July 9, 2021, should the injunction issue.

V. CONCLUSION

FVEHOA has failed to meet its burden to show that it would suffer irreparable harm if an injunction does not issue. Conversely, Mr. Romano will suffer substantial harm should the injunctive relief be granted. Moreover, FVEHOA is unlikely to prevail on the merits at trial as the work Mr. Romano is performing is being done pursuant to plans approved by the FVEHOA with valid City permits. Moreover, even if FVEHOA can show that the plans were not approved, the construction work that is being performed is in compliance with the California Government Code, which renders the contradictory provisions in the CC&Rs null and void. Therefore, Mr. Romano requests FVEHOA's request for an injunction be denied in its entirety.

Dated: March 24, 2021

By: Josph Romano
JOSEPH ROMANO, Plaintiff In Pro Per

Dated: March 24, 2021

PHILLIPS, SPALLAS & ANGSTADT LLP

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