No. _____

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF SAN RAFAEL, CALIFORNIA AND CONTEMPO MARIN HOMEOWNERS ASSOCIATION,

Defendants-Appellants,

versus

MHC FINANCING LIMITED PARTNERSHIP AND GRAPELAND VISTAS, INC.,

Plaintiffs-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, CASE NO. C 00-3785 VRW, HON. VAUGHN R. WALKER

APPELLANT CONTEMPO MARIN HOMEOWNERS ASSOCIATION'S MOTION FOR STAY OF INJUNCTION PENDING APPEAL

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I. INTRODUCTION

On June 30, 2009, the U.S. District Court for the Northern District of California issued a permanent injunction striking down the entirety of the City of San Rafael's (the "City") twenty-year-old mobilehome rent and vacancy control ordinance (the "Ordinance") as a regulatory and private taking. Premised on plaintiffs-appellees MHC Financing, Ltd. and Grapeland Vistas Inc.'s (collectively "MHC") challenge to a minor rate-altering amendment passed in 1999, this sweeping injunction strips mobilehome owners of long-established rights and affords the park's current owner, MHC, an unexpected windfall calculated by the District Court at $100 Million. Defendant-Intervenor Contempo Marin Homeowners' Association ("CMHOA"), on behalf of the residential mobilehomeowners of the Contempo Marin Mobilehome Park ("Contempo Marin"), hereby moves this Court for a stay of the District Court's injunction pending resolution of the appeal.

II. BACKGROUND

A. The Contempo Marin Park

Approximately 1,000 people live in Contempo Marin. (Dkt. #554: Findings of Fact and Conclusions of Law ("FFCL") p.4 ¶ 5.) Their tenure in the park averages ten years. (*Id.* p.6 ¶ 11.) These residents lease "pads" or

"spaces" for their mobilehomes from MHC. (*Id.* p.4 ¶ 7.) They pay monthly rent which, over the last decade, has averaged between $600 and $700. (*See id.* p.19 ¶ 50.) On the whole, they are significantly poorer and older than residents of San Rafael or Marin County (*see* Tr. Exhs. 1004-1017), and nearby housing is orders of magnitude more expensive. (Tr. Trans. 4/24/2007 at 590:18-591:18.) MHC has warned residents that if rent and/or vacancy control is eliminated, it will double or even triple current rates. [CITE]

B. Rent And Vacancy Control

"[B]ecause of the high cost of moving mobilehomes, the potential for damage resulting therefrom, the requirements relating to the installation of mobilehomes, and the cost of landscaping or lot preparation," California passed the Mobilehome Residency Law in 1978. (FFCL p.8 ¶ 17.) This statute granted park residents ongoing tenancies terminable only at their option or for cause and permitted "pad lessees to sell their [homes] in place to purchasers who [had to] be offered a tenancy for the pad." (*Id.* p.8 ¶¶ 17-18).

In 1989, the City enacted the Ordinance, joining a multitude of other California cities with mobilehome park rent control. The 1989 Ordinance permitted park owners annually to increase rents by no more than a graduated percentage of the California, All Urban Consumers, San Francisco-Oakland-

San Jose index ("CPI"). (*Id.* p.9 ¶ 20.) Specifically, rent could be increased the same percentage as the CPI if the CPI were 5% or less but a smaller percentage (from 66%-75% of the CPI) if the CPI were greater than 5%. (*Id.* p.9 ¶ 20.)

The City amended the Ordinance four years later, in 1993, to include vacancy control. (*Id.* p.10 ¶ 23.) The vacancy control provision prevents park owners from raising rents when a resident transfers his or her home to a third-party. (See id. p.10 ¶ 22; id. p. 88 (ordinance).)

C. MHC's Acquisition Of The Park

When the City passed the 1993 Amendment originally implementing vacancy control, Contempo Marin was owned by MHC's predecessor, De Anza Assets, Inc. ("De Anza"). (Id. p.12 ¶ 26.) De Anza filed suit in California Superior Court challenging the 1993 Amendment as a regulatory taking and appealed from the Superior Court's dismissal of its complaint. (Id. p.12 ¶ 29.)

In August, 1994, while the appeal was pending, MHC purchased Contempo Marin from De Anza, paying just under $20 Million. (Id. p.12 ¶ 30; TT 11/5/2002 p. 83:15-17.) The park was already subject to rent and vacancy control, which had been judged constitutional by a California trial

court, and it was already designated as a "mobilehome park" by the City's "general plan," which proscribed any other use of the land. (Id. p.26 ¶ 74; MHC Trial Exh. 301.)

In resolving the outstanding appeal, the California appellate court concluded that "the [1993] Amendments do not constitute a taking" but remanded for further proceedings. (FFCL p.13 ¶ 31.) Evidently realizing its inherited takings claim faced a steeply uphill battle in the state courts, MHC decided not to pursue the matter, and the case was dismissed for failure to prosecute. (*Id.* p.13 ¶ 32.)

D. The 1999 Amendments

In 1999 the City again amended the Ordinance ─ albeit in a very minor way ─ and it was this amendment MHC challenged here. (*Id.* p.13 ¶ 34; *id.* at 80-98 (showing all alterations from 1999 Amendment).) The 1999 Amendment merely altered the formula for allowable rent increases, replacing the graduated percentage of the CPI (as established by the 1989 Ordinance) with a flat rate of 75% of CPI. (*Id.* p.13 ¶ 34.) The 1999 Amendment made *no changes whatsoever* to the vacancy control portion of the Ordinance, which two California courts had already found to be constitutional. (*Id.* p.87-88 (showing alterations)).

III. PROCEDURAL HISTORY

A. The Complaint And Early Conditional Settlement

MHC brought this action to challenge the 1999 Amendment. (Dkt. #1.) It premised each of its three takings causes of action on the "substantially advances" theory enunciated in *Richardson v. City of Honolulu*, 124 F.3d 1150 (9th Cir. 1997). (Id.) Though established law at the time permitted regulatory takings claims (under *Penn Central Transp. v. City of New York*, 438 U.S. 104 (1978)), and/or private takings claims (under *e.g.*, *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984)), MHC forewent both of those avenues of challenge in favor of the "substantially advances" test.

Before bringing the case, MHC did *nothing* to exhaust its administrative remedies. Ignoring the administrative procedure provided by the Ordinance for ensuring park owners a "just and reasonable return" (FFCL 92:16; *id.* p.60 ¶ 8), MHC instead charged into court.

Nonetheless, the City and MHC entered into an early conditional settlement agreement and, on July 11, 2001, the District Court stayed proceedings to allow for potential resolution. (Dkt. #10.) After required public hearings, however, the City Council elected not to repeal vacancy

control, as it was entitled to do under the terms of the conditional settlement agreement.

B. The Bifurcated Trial

MHC then brought a motion to "enforce" the settlement agreement, asserting it unconditionally required the City to repeal vacancy control. (*Id.* #99 at 3-4.) Finding the terms of the settlement ambiguous (*id.* at 9-10), the court proceeded with a bifurcated trial in late 2002: (i) the alleged breach of the settlement agreement was tried to a jury, and (ii) the constitutional claims were tried to the court after MHC took the extraordinary step of waiving damages to avoid a jury trial. (*E.g.*, 10/16/02 Tr. pp. 37-38.)

C. Post-Trial Amendment And New Trial

The jury returned a unanimous verdict for the City. (Dkt. #350.) Following trial on the constitutional issues, however, the court stayed proceedings without rendering findings for roughly 20 months, waiting for issuance of the Ninth Circuit's and then the Supreme Court's decisions in *Lingle v. Chevron*, 544 U.S. 528 (2005). (*Id.* ##412, 437.)

The Supreme Court issued its opinion in *Lingle* on May 23, 2005, eviscerating the "substantially advances" theory upon which MHC solely had relied. Over defendants' strenuous objections, the court then afforded MHC

leave to amend its complaint to raise *Penn Central* and private takings claims for the first time. (*Id.* #468.) Another trial schedule was prepared, and these "new" claims were tried to the court in April-May of 2007. (*Id.* ##509, 517, 524, 526-27.)

D. The Findings, Stay Request, And Injunction

On January 29, 2008, the court issued its findings of fact and conclusions of law. The court found that reductions in rent attributable to the Ordinance were nearly 100% capitalized into higher mobile home prices. (FFCL p.17, ¶ 46.) After finding the Ordinance as a whole effectuated a *Penn Central* and private taking, (*id.* p.34 ¶ 105; p.51 ¶ 158), the court returned its focus to the 1999 Amendment actually challenged ─ which effectuated only a minor rate change ─ and found it was not severable. (*Id.* at 74.) It thus struck down the entire Ordinance. (*Id.* at 79.) According to the District Court, the decision immediately sextupled the value of the park to MHC (which it acquired for under $20 Million) to $120 Million. (*See id.* p.25 ¶ 72.)

In response to the City's and CMHOA's motions for stay pending appeal, the court settled on a peculiar injunction. The court denied any stay but ordered that existing residents remain rent-protected for 10 years or until a home sale, whichever comes first. (Dkt. #612 at 3.) Vacancy control, which

formed no part of the 1999 Amendment challenged in this action, was thus immediately enjoined.

The court issued its final judgment and injunction on June 30, 2009. (Dkt. #619.) The City filed its notice of appeal on July 8, 2009, and CMHOA filed a notice of appeal on July 27, 2009.

IV. LEGAL STANDARD

In determining whether to issue a stay, the Court should consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Golden Gate Rest. Ass'n v. City & County of S.F.*, 512 F.3d 1112, 1115 (9th Cir. 2008) (citing *Hilton v. Braunskill*, 481 U.S. 770 (1987)). The "irreparably-injured" and "likelihood-of-success" factors are considered on a "sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." *Golden Gate*, 512 F.3d at 1116. Apart from and in addition to this "continuum," the "public interest is a factor to be strongly considered." *Lopez v. Heckler*, 713 F.2d 1432, 1435 (1983) (citations omitted).

V. DISCUSSION

A. There Is A Strong Likelihood That The District Court's Injunction Will Be Overturned On The Merits

1. Exhaustion

MHC was required to exhaust available state procedures for redress before turning to court. *See Williamson Cty Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-95 (1985); *Equity Lifestyle Props., Inc. v. County of San Luis Obispo*, 548 F.3d 1184, 1190 (9th Cir. 2008). Exhaustion is a two-step inquiry: the litigant must (1) obtain a "final decision from the governmental authority charged with implementing the regulations," and (2) pursue "compensation through state remedies unless doing so would be futile." *Ventura Mobilehome Communities Owners Ass'n v. City of Buenaventura*, 371 F.3d 1046, 1053 (9th Cir. 2004).

To assure landowners a "just and reasonable return," the Ordinance provides a procedure for landowners to request additional rent increases. (FFCL 92:16-22; 96:15-97:15.) Even if relief is denied under that mechanism in the first instance by the City, the landowner is entitled to review by the Superior Court. (*Id.* at 97:14-16; 94:4-6; Cal. Code Civ. Pro. 1094.5.) MHC never even requested — and thus was never denied — a fair return increase. (TT 11/5/2002 p. 147:6-19; TT 4/11/2007 p. 359:5-12, 360:24-361:15.)

Bypassing "unavailable or inadequate" procedures is permissible if the landowner has "utilized" them and "has shown pursuit of such remedies would be futile." *Equity Lifestyle Props., Inc.*, 548 F.3d at 1191 (citations omitted). Stretching to hold that exhaustion would have been futile, the District Court relied on (1) the City's decision not to repeal vacancy control at the public hearings on the 2002 conditional settlement, and (2) the City's decision not to intervene in an unrelated lawsuit involving MHC and Contempo residents. Neither decision involved any attempt to "utilize" the fair return procedures of the Ordinance, and neither even remotely suggests those procedures were "unavailable or inadequate," particularly given the availability of review (also never pursued) before the Superior Court.

a. The 2002 Proposed Settlement

The District Court found that by "reversing" itself at the public hearings regarding the 2002 conditional settlement agreement, the City implicitly signaled that a discretionary rent increase would never have been granted if sought by MHC prior to the lawsuit. (FFCL pp. 61-62 ¶ 8.) The District Court's conclusion defies logic: the 2002 proposed settlement agreement post-dated initiation of this action and involved *repealing vacancy control entirely*. [Dkt. #23 at 5:9-16; *id.* #99.] The City's decision not to

completely repeal legislation says *nothing* about whether the City would have entertained ─ before being sued ─ a specific, properly-documented fair return application (or, if the City denied such an application, whether the Superior Court would have upheld that decision).

b. The 1996 Inverse Condemnation Suit

The District Court also relied on the City's actions related to a 1996 lawsuit between MHC and Contempo residents over a lagoon upgrade in the park. MHC filed a petition to allow recovery of capital expenditures related to the lagoon, to which the residents objected. Pursuant to the Ordinance's dispute resolution process, the residents and MHC took the pass-through request to arbitration, then reached a settlement. (Stipulation on Park Lagoon Transfer Litigation ("Lagoon Stip,") at ¶¶ 1, 3.) Nearly three years later, to resolve a dispute regarding interpretation of the settlement agreement, MHC and the residents agreed to return to the same arbitrator for a "mediation/arbitration," which both parties considered non-binding. (*Id.* at ¶¶ 5-8, 10.) This resulted in an interpretation MHC disliked, so MHC creatively attempted to utilize the Ordinance's appeal process to obtain review of the arbitrator's interpretation by the City. (*Id.* at ¶ 9.) The City properly dismissed MHC's appeal: the "mediation/arbitration" regarding the

residents' and MHC's *contractual dispute* was not a rent dispute hearing authorized and conducted under the Ordinance upon which an appeal to the City would lie. (*Id.* at ¶ 10.) In litigation that followed, MHC cross-complained against the City for inverse condemnation, arguing the City improperly dismissed its appeal. (*Id.* at ¶ 12.) The City's demurrer to the cross-complaint was sustained, and the decision affirmed on appeal. (*Id.* at ¶¶ 12-16.)

The District Court's reliance on these events as establishing futility again defies logic. As the parties stipulated, neither MHC nor the residents considered the "mediation/arbitration" to be a binding rent dispute hearing. The Ordinance required the City to intervene in rent disputes, but it had no authority to intrude into a private contractual dispute over a settlement agreement. Even if the City legally could have chosen to review the arbitrator's decision, its decision not to intrude into a contractual dispute says nothing at all about whether it would have granted (or whether the Superior Court would have required it to grant) a rent increase based on fair return.

All told, the District Court's reliance on unrelated past proceedings was entirely unjustified. As this Court recently held (in another case involving MHC), a "property owner cannot claim a violation of the Just Compensation

Clause until it has used the procedure and been denied just compensation." *Equity Lifestyle Props., Inc.*, 548 F.3d at 1192.[1] Here, as there, MHC "did not seek such compensation," *id.*, so its claims were not ripe for adjudication.

2. Statute of Limitations

All parties agree that in 2000, when this action was filed, the statute of limitations for a section 1983 action in California was one year. *See McDougal v. County of Imperial*, 942 F.2d 668, 672 (9th Cir. 1991). A statute of limitations begins to run "when a potential plaintiff knows or has reason to know of the asserted injury." *De Anza Properties X, Ltd. v. County of Santa Cruz*, 936 F. 2d 1084, 1086 (9th Cir. 1991). An ordinance's amendment does not create a new limitations period if the plaintiff experiences "substantially the same injury" as it did under the previous ordinance. *Id.*

Contrary to the District Court's finding, two uncontroverted facts show that MHC's injury from the 1999 Amendment—if any—was substantially the same as it MHC under the previous version of the ordinance. First, the 1999

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[1] MHC changed its name to Equity Lifestyle Properties during the pendency of this litigation.

amendments merely replaced a sliding-scale formula for rent increases (66%-100% of CPI) with a fixed formula (75% of CPI) and had *no* effect on vacancy control. (FFCL at 80-98.) In fact, MHC's own expert testified that the premium on which MHC's takings theories are based was created in 1993 when vacancy control was enacted. (Dkt. #547 at ¶¶ 8-14); TT 11/25/2002 at 221:10-223:7.) Second, any injury caused by the 1999 Amendment was remediable under the Ordinance's fair return procedure.

Given the evidence, the District Court erred in holding that the 1999 amendments constituted a new injury, and not "substantially the same injury" as the 1993 amendments, thus renewing the limitations period.

3. Res Judicata

Under California's "primary rights" test for applying the doctrine of res judicata, "[a] party may bring only one cause of action to vindicate a primary right." *Manufactured Home Communities Inc. v. City of San Jose*, 420 F.3d 1022, 1031 (9th Cir. 2005) (quoting *Mycogen Corp. v. Monsanto Co.*, 28 Cal.4th 888, 904 (2002)) (footnote omitted)). The primary right is the plaintiff's right to be free from the injury suffered. *See Alpha Mech., Heating & Air Conditioning, Inc. v. Travelers Cas. & Sur. Co. of Am.*, 133 Cal.App.4th 1319, 1327 (2005). The District Court denied the City's res

judicata defense on the ground that the *De Anza* litigation concerned different primary rights. (FFCL p. 71 ¶ 44.)

At bottom, MHC seeks to vindicate the right to be free from an unconstitutional taking. The relevant portions of the Ordinance affecting MHC's rights – vacancy control and rent control – were enacted prior to the present litigation and unsuccessfully challenged in the *De Anza* litigation. At most, the de minimus 1999 Amendment gave MHC additional information about the extent of their alleged injury. *Cf. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1079 & n.12 (9th Cir. 2003). Accordingly, MHC should have been barred from bringing this case.

B. CMHOA, the City, and the public will be irreparably harmed if this Court refuses a stay

In evaluating the harm potentially incident to a stay, the "real issue" is the "degree of harm that will be suffered by the [appellant] or [appellee] if the [stay] is *improperly* granted or denied." *Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 284 (4th Cir. 2002) (emphasis in original).[2] Thus, the task is

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[2] Relevant principles are appropriately taken from the law governing preliminary injunctions. *See, e.g.*, *Lopez*, 713 F.2d at 1435 ("The standard for evaluating stays pending appeal is similar to that employed by district courts

"to minimize errors: the error of denying [a stay] to one who will in fact (though no one can know this for sure) go on to win the case on the merits, and the error of granting [a stay] to one who will go on to lose." *Lawson Prods., Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1433 (7th Cir. 1986); *see also Golden Gate*, 512 F.3d at 1125-26 (analyzing irreparable harm to stay-seeker under assumption that stay is denied but seeker was correct on merits, and analyzing irreparable harm to opposing party under assumption that stay is granted but opposing party was correct on merits).

1. Effect Of The District Court's Ruling On Selling Homeowners

Because the District Court was incorrect on the merits, homeowners in Contempo Marin who must sell their homes within the next 18-24 months will be irreparably harmed in the absence of a stay. (*See, e.g.*, Decl. of L. Carnes at ¶¶ 7-9).

Prospective purchasers will be incredibly reluctant to buy in the absence of a stay. MHC has made absolutely clear its intention to triple pad

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in deciding whether to grant a preliminary injunction." (citations omitted)).

rents for all new owners. (Decl. of C. Clarke at ¶ 6; Decl. of K. Gallagher at ¶ 7; Wagstaffe Decl. at ¶ 27.) These increased rents will remain at the new, elevated levels even if the Ordinance is reinstated, unless this Court is inclined to order MHC to reopen its new leases, or unless the City legislates some form of rent-rollback (which undoubtedly would induce further litigation). *Cf., e.g.*, *Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 136 (1976) (striking down rent roll-back law). Prospective purchasers therefore have no incentive to forego the potential benefits of reversal by buying in the interim.

Consequently, homeowners whose life circumstances require them to move will be forced to sell their homes at fire-sale prices. By the district's court's analysis, Contempo homeowners owe some portion of their equity to the existence of rent and vacancy control. Moreover, because the average homeowner purchased within the past 10 years (FFCL p.6 ¶ 11), the current homeowners bought that portion of equity from the previous owners in the form of a premium. As a population that is significantly older and poorer than the surrounding areas, many of the current homeowners have little or no life savings outside their equity, which they could lose forever if forced to sell during the pendency of this appeal. (*See* FFCL p.46 at ¶ 143.)

2. Effect Of The District Court's Ruling On The City And Public

For the same reason, the injunction during appeal will directly harm the public interest by reducing the affordable housing stock in San Rafael, given that each house sold will be subject to dramatically higher rent. Allowing MHC to double or triple pad rents for new owners also will irreparably change the character of the Contempo Marin park, as families and individuals on fixed incomes will be unable to afford the new rents. Where, as here, the order to be stayed directly and profoundly affects the public interest, irreparable harm to the public can suffice *alone* to justify relief. *See Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618 (5th Cir. 1985) (holding that the "public interest involved in protecting consumers of [defendant] against the harmful effect of overcharges establishes the requisite apprehension of irreparable injury and warranted the . . . relief"); *see also United States v. First Nat'l City Bank*, 379 U.S. 378, 383 (1965) ("[C]ourts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."). Such harm is all the more compelling where, as here, it will affect a working class population living in the midst of an exceedingly wealthy county. *Lopez*, 713 F.2d at 1437 ("Our

society as a whole suffers when we neglect the poor, the hungry, the disabled, or when we deprive them of their rights or privileges.").

Moreover, the Court's independent consideration of where the public interest lies is "constrained," for the "public officials in [San Rafael] have already considered that interest." *Golden Gate Rest. Ass'n*, 512 F.3d at 1126-27. "Perhaps [the Court] could conclude that the public interest is not served" by the Ordinance, but only "if it were obvious that the Ordinance was unconstitutional or preempted by a duly enacted federal law, in which elected federal officials had balanced the public interest differently." *Id.* at 1127. Neither is the case here.

Finally, the public confusion accompanying an interim period under the District Court's nuanced injunction, with differing complex regulatory standards applicable in rapid succession, should be avoided. *See McConnell v. Fed. Election Comm'n*, 253 F. Supp. 2d 18, 21 (D.D.C. 2003) (three-judge panel) (granting stay pending Supreme Court appeal "to prevent the litigants from facing potentially three different regulatory regimes in a very short time span").

C. MHC Will Not Be Irreparably Harmed Or Face Significant Hardship From The Stay

By contrast, if a stay is improperly issued, and the judgment is upheld,

MHC will face no meaningful hardship. Any incremental rent MHC otherwise might charge new buyers is pittance when compared to the $100 million dollar windfall MHC will reap if the injunction is affirmed; moreover, the financial risk of an error is more easily borne by a multi-billion dollar company than by the poor and elderly residents of a mobilehome park.

Moreover, MHC's own conduct militates against a finding of irreparable harm. A party's unavailed "ability to take self-protective measures" works against a finding of irreparable harm to that party. *Lawson Prods., Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1440 (7th Cir. 1986). In this regard, MHC failed even to attempt the required administrative procedures for obtaining remuneration, and MHC strategically waived damages to obtain a bench trial, including the interest that otherwise would accrue on appeal. Moreover, any delay in implementation of the District Court's 10-year plan pales in comparison to the delay MHC itself caused by waiting until post-trial to bring its regulatory and private takings claims.

VI. CONCLUSION

For the foregoing reasons, CMHOA respectfully requests that the Court issue an order staying the District Court's injunction pending appeal.

Dated: _____, 2009 COOLEY GODWARD KRONISH LLP

By:_____
Gordon C. Atkinson

Attorneys for
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CERTIFICATE OF SERVICE

I certify that on July ___, 2009, a copy of the foregoing **APPELLANT CONTEMPO MARIN HOMEOWNERS ASSOCIATION'S MOTION FOR STAY OF INJUNCTION PENDING APPEAL** was served by U.S. Mail delivery on the following:

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

Executed this __th day of July 2009, at San Francisco, California.

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Tammy Zughayer