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Attorneys for Defendant,

STRATOSPHERIC HOLDINGS 4, LLC, a Michigan limited liability company; Joshua Grossman

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF RIVERSIDE – HISTORIC COURTHOUSE

TRILOGY AT LA QUINTA MAINTENANCE ASSOCIATION, a California nonprofit mutual benefit corporation,

Plaintiff,

vs.

STRATOSPHERIC HOLDINGS 4, LLC, a Michigan limited liability company; CBGM, LLC a California limited liability company; JOSHUA GROSSMAN, an individual; THOMAS BROWN, an individual; and DOES 1 through 25 inclusive,

Defendants.

Case No. CVPS2103761

[Assigned for all purposes to the Hon. Carol A. Greene Department 2]

OPPOSITION BY DEFENDANT STRATOSPHERIC HOLDINGS TO EX PARTE APPLICATION BY PLAINTIFF TRILOGY AT LA QUINTA MAINTENANCE ASSOCIATION FOR ENFORCEMENT OF PRELIMINARY INJUNCTION AND FOR AN ORDER SHOW CAUSE RE CONTEMPT

Date: October 28, 2021
Time: 8:30 a.m.
Dept.: 5

Complaint Filed: July 22, 2021
Trial Date: none set

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TO: THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Defendant STRATOSPHERIC HOLDINGS, #4, LLC ("Stratospheric" or "Defendant"), hereby submits the following Opposition to the motion by Plaintiff TRILOGY AT LA QUINTA MAINTENANCE ASSOCIATION ("Trilogy" or "Plaintiff") alleging violations of the Preliminary Injunction requiring Defendants Stratospheric and CBGM, LLC to provide water to the subject golf course and seeking an order to show cause regarding contempt.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Trilogy burdens this Court with an unnecessary and baseless ex parte application seeking to invoke contempt procedures under C.C.P. §1209 for an alleged violation of the Court's existing preliminary injunction in this matter. That injunction requires the golf course owners, collectively Defendants Stratospheric and CBGM, LLC, to maintain the landscaping and lake areas of the golf course by watering them. While Plaintiff's moving papers vaguely assert that the course is not being watered adequately (without *any* supporting evidence), the primary thrust of Plaintiff's application concerns "overseeding" the golf course, which by Plaintiffs own admissions is an aesthetic issue (and not a nuisance one). Therefore, Plaintiff fails to demonstrate that the conduct alleged even violates the preliminary injunction at all.

Even so, neither Stratospheric nor CBGM are opposed to the overseeding of the golf course and in fact have been working diligently towards an agreement with the course maintenance company, Pro-Turf International, Inc. ("PTI"), that would accomplish the overseeding. The parties are working through the particulars of an agreement by which PTI would take over the operations of the golf course, complete the overseeding, and be paid the $150,000.00 for the overseeding from the profits of the golf course. Plaintiff's frivolous accusations of contempt boil down entirely to the fact that this isn't happening fast enough for Plaintiff's residents to immediately get to play golf.

II. SUMMARY OF FACTS

A. Factual History Regarding the Preliminary Injunction

Defendant CBGM, LLC ("CBGM") is the majority owner of a golf course located in Riverside County. Defendant Stratospheric, by foreclosing in June 2021 on a loan issued to

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CBGM, became the owner of a single parcel of the course. This parcel happens to contain the first hole of the golf course, the driving range, the parking lot, and a water pumping station that supplies water to the rest of the golf course and areas of the neighboring Homeowner's Association ("HOA"), Plaintiff Trilogy.

On July 23, 2021, the Court heard Plaintiff's ex parte application and issued the Temporary Restraining Order with a hearing on the preliminary injunction eventually set for September 9. Defendant Stratospheric did not oppose the issuance of a preliminary injunction to water the course per se; Defendant acknowledged the need of the golf course to be watered to avoid a hazardous nuisance. On September 9, the Court issued a ruling granting the preliminary injunction requiring jointly that Defendants water the golf course. The Court issued a thorough tentative ruling which ultimately became the ruling on the motion which is attached as **Exhibit 1** and is true and correct copy. Defendant Stratospheric submitted to the ruling understanding it to require the continued watering of the golf course.

B. <u>Factual History Regarding the Underlying, Fraudulent CC&R's</u>

Plaintiff's accusations of contempt all depend on the nebulous language Plaintiff shoehorned into the proposed order on the preliminary injunction concerning "material" changes to the "business" or "operations" of the golf course. It is therefore worth noting that, not only have the underlying CC&R's been at issue since their inception, the "business and operations" of the golf course have substantially changed over that time as well.

The Trilogy at La Quinta is a master planned community governed by a master Declarations of Covenants, Conditions and Restrictions recorded in March 2003. In May 2003, a separate Declaration of Covenants, Conditions and Restrictions and Reservation of Easements for the Trilogy Golf Course was recorded.

The Trilogy Golf Course was sold to a private entity in 2009, under whose management the golf course rapidly deteriorated and the home values were suffering. Then, in April 2015, CBGM, LLC (formed between Tom Brown and Richard Cushman) purchased the Trilogy Golf Course for $5.1 million with hopes to make improvements to the golf course to turn things around.

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In 2016, CBGM and the HOA Board began negotiations for an overall rehabilitation of the Perimeter Area of the golf course and maintenance. As a result, the parties began negotiations in contemplation of the drafting of the Restated CCRs and a Rehabilitation Project Agreement, which would provide that each party would pay 50% of the construction costs and 50% of the annual maintenance costs going forward. At a meeting on February 09, 2017, CBGM reviewed drafts of the Restated CCRs which were missing material items such as the Rehab Project Agreement, defining the scope, plant type, water, irrigation, and maintenance cost to the parties. However, CBGM was pressured by Guralnick and Gary Turner, the president of the HOA Board at the time, to sign the Restated CCRs by 4 pm that day upon being informed that the entire financial participation from the homeowners and the HOA Board would be lost otherwise.

CBGM was mainly concerned about the Restated CCRs granting the HOA Board complete control over the 61 acres of CBGM's golf course. In response to these concerns, Guralnick and Turner assured CBGM with representations, that (1) the total annual maintenance cost would not exceed approximately $221,000, (2) the HOA Board would ensure proper dust control measures to protect the wellbeing of the golf course itself during construction, (3) the HOA Board would only allow construction on two golf holes at a time so as to allow the Trilogy Golf Course to continue to earn revenue from golf players, (3) the Restated CCRs would not be recorded without the inclusion of the Rehab Project Agreement once it was approved by the board, CBGM, and the contractor, (4) the actual cost of the improvements would be "no more than $2.5 million," (5) the maintenance costs would not need to be paid by CBGM during the Perimeter Area construction, (6) and that the maintenance costs would not be included in the Rehab Project Agreement as a line item expense.

However, these assurances failed to be honored as the HOA Board maintained complete control over the rehabilitation plan. On April 05, 2017, despite these assurances, the Restated CCRs were recorded without completing the Rehab Project Agreement with the selected contractor. Thereafter, CBGM was excluded from pivotal meetings regarding construction plans with the contractor. In addition, in a subsequent board meeting, the HOA Board reversed the "hole by hole" construction plan and instead began negotiating a complete 18-hole plan, causing damage

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to the golf course over the 18-month duration of the project.

The dispute continued through subsequent years. On December 07, 2020, CBGM filed a Complaint against Guralnick and Turner for the misrepresentations. There is also separately pending an arbitration proceeding between CBGM and Trilogy regarding the enforceability of these CC&R's.

III. DISCUSSION OF LAW

An indirect contempt must be brought before the Court for trial through the presentation of an affidavit describing the nature of the disobedience or contempt of the Court's authority. (Code of Civ. Proc., § 1211(a); *Arthur v. Super. Ct. of Los Angeles County* (1965) 62 Cal.2d 404, 407-408.) "The affidavit is like a complaint in a criminal case; it frames the issues and must charge facts which show a contempt has been committed." (*Reliable Enterprises, Inc. v. Superior Court* (1984) 158 Cal.App.3d 604, 616.) It must state facts sufficient to show the commission of the contempt. (*In re Donovan* (1950) 96 Cal.App.2d 693, 698.) The Court may find the accused guilty of indirect contempt only if it is proved beyond a reasonable doubt that the accused knew of the order, had the ability to obey it, and willfully disobeyed it; the Court's order must recite the issuance of an order, the accused's knowledge of the order, the accused's ability to obey it, and the accused's willful disobedience. (*In re Jones* (1975) 47 Cal.App.3d 879, 881.)

Plaintiff's motion fails to show contempt because it fails to show that the injunction encompasses overseeding; Plaintiff relies on insufficiently vague language in the signed order to expand the injunction beyond maintenance and repair of the course. Plaintiff further fails to show that Defendants ceased watering the course as required. Plaintiff also fails to show that Defendant Stratospheric had an ability to comply with the order. Finally, Plaintiff fails to show that not overseeding *yet* constitutes contempt; in fact, Defendants are actively negotiating an agreement regarding the overseeding process. Lastly, Plaintiff fails to demonstrate exigency regarding enforcement of the injunction as well as setting an OSC RE contempt.

A. The Scope of the Injunction Does Not Include Overseeding.

In considering Plaintiff's motion, it's worth first establishing the scope of the injunction in place which is limited to the maintenance and repair of the landscaping and lake areas. To that

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end, the Court's ruling has been attached as **Exhibit 1**. The operative language in the Court's ruling states:

> "Based on this evidence, it appears that both CBGM, LLC and Stratospheric are Course Owners under the Restated Declaration and are obligated to maintain the landscaping and lake facilities in the golf course." (Exhibit 1, p. 3).

That "evidence" referenced in the ruling is as follows:

> "Based on paragraphs 6(b) and 7 of the Restated Declaration, the Course Owner is required to maintain the lake facilities and the pump station facilities on the Golf Course. Landscaping within the Golf Course (except for certain excluded areas) must be continually maintained and repaired by the Course Owner. (Restated Declaration, ¶ 10.) The Course Owner is also required to "supply /provide irrigation water to the irrigation system installed within the Perimeter Landscape Area at no cost to Residential Declarant during installation / facilitation of the Rehab Project and thereafter during the period of time that this declaration is in effect." (Restated Declaration, ¶ 11(d))." (Exhibit 1, p. 3).

Therefore, the operative language on which the Court based the injunction was the requirement to "maintain the landscaping and lake facilities of the golf course." Plaintiff, in its proposed order on the preliminary injunction ruling, included the following language enjoining Defendants from:

> "1. Refusing to provide water service, sprinklers and irrigation to the Coral Mountain Golf Course at Trilogy and its adjoining areas and related improvements including but not limited to the so-called Perimeter Landscape Areas (collectively, the "Golf Course") at normal levels as previously performed prior to the inception of this dispute;
>
> 2. Refusing to maintain and operate the recirculating water pumps and related equipment at the lakes, ponds and other bodies of water on the Golf Course property; and
>
> 3. **Making any material changes to the Golf Course, its business or operations."**

As evidenced by the Court's ruling in Exhibit 1, the only "business or operations" at issue in the underlying preliminary injunction hearing were related to maintaining the landscaping and

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lake areas of the course. While in the context of the preceding provisions the bolded language is naturally understood to relate to the watering of the course, Plaintiff is now trying to capitalize on its vagueness language to include this "overseeding" process of the golf course. Even further, Plaintiff is trying to use said expansion as a basis to seek the extraordinary relief of contempt proceedings. Perhaps most telling that overseeding was not a consideration of the injunction proceedings is the fact that the Court required that Plaintiff only post a bond worth $100,000.00 to cover the anticipated costs of watering the course. Had this massive overseeding process been a consideration when issuing the injunction, which requires an immediate payment of $150,000.00, the bond amount set would clearly be entirely inadequate.

B. Vagueness In the Court's Order Supports Denial of an OSC RE Contempt.

"To hold a person in constructive contempt for wilful disobedience of a court order, the order must be in writing or must be entered in the court's minutes." (*Ketscher v. Super. Ct.* (1970) 9 Cal.App.3d 601, 604-605.) The order must be clear, specific, and unequivocal. (*Wilson v. Super. Ct.* (1987) 194 Cal.App.3d 1259, 1273.) "Any ambiguity in a decree or order must be resolved in favor of an alleged contemnor." (*In re Blaze* (1969) 271 Cal.App.2d 210, 212.) Punishment for contempt "can only rest upon clear, intentional violation of a specific, narrowly drawn order. Specificity is an essential prerequisite of a contempt citation." (*In re Marcus*, supra, 138 Cal.App.4th at p. 1016; Wilson v. Super. Ct. (1987) 194 Cal.App.3d 1259, 1273.) The acts constituting the contempt must be clearly and specifically prohibited by the terms of the underlying order. (*Brunton v. Super. Ct. of Los Angeles County* (1942) 20 Cal.2d 202, 205.)

In light of the fact that Plaintiff's motion rests entirely on a vague reference to the "business or operations" of the course, it is hardly "clear, specific and unequivocal" that the Court's order would apply to the "overseeding" process of this golf course such that contempt could be found. This is particularly true given that there was no regular business or operation of the course at the time the injunction was issued. Defendant Stratospheric only acquired its parcel of the golf course in June 2021 (the TRO was issued in July 2021 and the injunction in September 2021). At that point, for the first time since the 2017 CC&R's at issue had been enacted, the golf course had two separate owners. At the center of this entire litigation is CBGM, the owner of the failing golf course and Stratospheric, the new owner to a single parcel via foreclosure, trying to figure out what the business operations of the golf course even should look

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like. Further taking into account the fact that the parties are actively working on an agreement for the overseeding, there is absolutely no basis for a finding of contempt.

C. There is No Evidence that the Course is Not Being Watered.

Plaintiff's ex parte application makes several substantial, overt misrepresentations to the Court even while asking the Court for contempt against these Defendants. The first is asserting multiple times in the moving papers that the course is not being watered without ever providing evidence under oath of this fact. (See Plaintiff's Ex Parte Application, p. 6, lines 8-9; p. 7, lines 16-17). All that is provided is citations to the self-serving Declaration of Brian Mooney, the head of the Plaintiff HOA, which never actually states the course is not being watered. Both assertions of the course not being watered refer to the Mooney Declaration, par. 3 which actually states:

> "From my perspective, it is apparent that the reseeding process is not moving in a normal time-frame and it is unlikely, based on my experiences as a Trilogy homeowner and consistent with past practice, that the Golf Course will be able to open in the normal course before mid- to late November. The Golf Course has been closed since September 20, 2021, yet the owners have not planted new seed as of October 26, 2021, *let alone commenced the rewatering process that would allow the winter grass to grow*."

What Mooney actually declares under oath is not that the golf course is not being watered pursuant to the injunction, but rather that there has yet to be a "rewatering" process that would usually take place only after an overseeding. Plaintiff deliberately misrepresents Mooney's statement to mislead the Court that the injunction is being violated. In reality, the golf course is being watered and maintained in full compliance with the injunction and Defendants continue to incur the costs of doing so.

Just as egregious is Plaintiff's misrepresentation that not overseeding the golf course will result in the Course "dying", causing "irreparable harm" to the golf course. Notably, Plaintiff provides a supporting Declaration by Jim Schmid holding himself out to essentially be an expert on the issue. Mr. Schmid's Declaration, unlike the moving papers, *never* states that lack of overseeding causes the grass to die because this would be a lie under oath. In actuality, the Bermuda grass simply goes dormant; courses that overseed do so because of the impact on the

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"appearance" of the golf course and simply place a grass that remains green in the winter over the dormant Bermuda. (See Schmid Declaration, par. 8). Similarly, Schmid's Declaration says nothing about allowing the grass to go dormant creating hazardous nuisance conditions or any irreparable harm; the Bermuda grass simply turns green again when back in season. Should Defendants be forced to undergo contempt proceedings (and Defendants actually have any reasonable notice to respond to Plaintiff's false claims), Defendants will readily expose clear misrepresentations by Plaintiff to the Court.

The only evidence Plaintiff does provide at all relates to the *aesthetics* of the golf course, not any actual irreparable harm. Plaintiff's true concern, to which Plaintiff overtly references multiple times, is that there would be some impact on property values from the golf course turning brown for the winter. This is substantially different from environmental hazards under consideration when the injunction issued. Rather than requiring Defendant to merely "maintain and repair" the lake and landscape areas as indicated in the Court's injunction ruling, Plaintiff is seeking to require Defendant to undergo a massive aesthetic renovation to the golf course. There is nothing in the ruling in Exhibit 1 considering the golf course being "unsightly" and further nothing indicating that Plaintiff Trilogy gets to make the determination of whether the course is being maintained.

D. Plaintiff Submits No Evidence that Stratospheric is Able to Comply with the Overseeding Demand; the Parties Have Generally Agreed to an Overseeding Solution.

An essential element of a claim for contempt is that Defendant had the ability comply with the order at issue, and Plaintiff provides zero evidence or even analysis with respect to Stratospheric that this was the case. The reality is that Stratospheric only recently came to own a single hole on an eighteen-hole golf course. The notion that, despite it never being raised at all in the injunction papers or hearing, Stratospheric would suddenly be able to pay $150,000.00 to overseed the entire course is ludicrous. In fact, given that Stratospheric only owns one parcel of the course, its unconscionable that Stratospheric could be expected to make decisions about what happens on the other 17 holes including a complete overseeding that would require shutting down of operations on parcels it doesn't own. On the ownership issue alone Stratospheric cannot be held in contempt for not authorizing trespass and extensive renovations, let alone the denial of use of the land to the actual owner on parcels it doesn't own.

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At the heart of the problem here ultimately is that Trilogy (without willing to pay anyone other than their lawyers) wants to jointly force the golf course owners to maintain a pristine, PGA tour-quality golf course in the desert while CBGM tends towards bankruptcy and Stratospheric only recently owns a single hole. Doing so with this litigation has only impeded the ability of the owners to reaching a solution. Nonetheless, CBGM, Stratospheric, and maintenance company PTI (collectively the "Parties"), are actively negotiating the details of an agreement that would accomplish the overseeding of the course.

The Parties have generally agreed to an arrangement such that PTI would complete the overseeding for $150,000.00, take over the operations (and expenses of the golf course), and be repaid it's $150,000.00 (as well as obtain additional profits) through the net profits of running the course. Under this arrangement, CBGM would receive 20 percent of the net profits that PTI receives from running the course. What's left to negotiate between the parties is what share of the profits Stratospheric would receive for the use of its parcel, which, in addition to first hole, contains the necessary driving range and parking lot for the course.

E. Plaintiff Fails to Demonstrate Exigency Regarding Enforcement of the Injunction as Well as an OSC RE Sanctions.

As a final note, Plaintiff's motion fails to show demonstrate any exigent need such that it should be heard on ex parte basis with respect to both the request to enforce the injunction as well as an OSC RE sanctions. As such, Defendant has been substantially prejudiced in attempting to oppose the voluminous filings of Plaintiff which included two separate ex parte applications and four separate Declarations barely served at noon the day before the hearing.

Regarding exigency for enforcement of the injunction, Plaintiff fails to meet its burden to show that irreparable harm will occur should the motion not be granted. The only evidence provided is the Declaration by the CEO of PTI, Mickey Brown, opining that an overseeding may not be effective should it not take place in the next 3-5 days. It's worth noting that Mr. Brown's company stands to gain $150,000.00 immediately should the ex parte application be granted. However, more significantly, no evidence at all is provided that not overseeding would result in any irreparable harm. Plaintiff's evidence in fact explicitly omits this argument because it can't be honestly made; not every course in the desert overseeds and not doing so simply results in the

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grass going dormant for the winter which Plaintiff considers aesthetically unacceptable.

Regarding exigency for the OSC RE sanctions, it is especially inappropriate. Given the vagueness of the language at issue in the injunction order and the significant distinction between an environmental hazard as a result of failure to water versus an aesthetic issue as a result of a failure to pay for substantial, course-wide renovation, there is no likelihood of finding that Defendants willfully disobeyed the order. Even so, Defendants should be given adequate opportunity to present evidence to oppose the issuance of an OSC for the quasi-criminal contempt proceedings. Plaintiff has presented no facts whatsoever to indicate that contempt proceedings on an ex parte basis would serve the interests of justice.

IV. CONCLUSION

Plaintiff's motion fails to show contempt because it fails to show that the injunction encompasses overseeding; Plaintiff relies on insufficiently vague language in the signed order to expand the injunction beyond maintenance and repair of the course. Plaintiff further fails to show that Defendants ceased watering the course as required. Plaintiff also fails to show that Defendant Stratospheric had an ability to comply with the order. Finally, Plaintiff fails to show that not overseeding *yet* constitutes contempt; in fact, Defendants are actively negotiating an agreement regarding the overseeding process. Lastly, Plaintiff fails to demonstrate exigency regarding enforcement of the injunction as well as setting an OSC RE contempt.

Respectfully submitted,

Date: October 28, 2021

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By: _____

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EXHIBIT 1

SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE

Historic Court House
Hearing on Preliminary Injunction

09/09/2021
8:30 AM
Department 2

CVPS2103761
TRILOGY AT LA QUINTA MAINTENANCE ASSOCIATION vs STRATOSPHERIC HOLDINGS 4, LLLC

Honorable Carol A. Greene, Judge
C. Marias, Courtroom Assistant
Court Reporter: None

APPEARANCES:

TRILOGY AT LA QUINTA MAINTENANCE ASSOCIATION represented by ANTHONY CAPOBIANCO appearing telephonically in court.
STRATOSPHERIC HOLDINGS 4, LLLC; JOSHUA GROSSMAN represented by JACOBY PEREZ appearing telephonically in court.
CBGM, LLC; JOSHUA BROWN represented by BRENDAN OZANNE appearing telephonically in court.

At 08:41 AM, the following proceedings were held:
The Hearing on Preliminary Injunction is called for hearing.
The Court notes its Tentative Ruling was posted, and oral argument was timely requested.
Argument presented by Defendants.
Court and counsel confer regarding bond amount.
Court makes the following order(s):
Tentative ruling shall become the ruling of the court.

The purpose of a preliminary injunction is to preserve the status quo pending trial on the merits. The Court does have the power to issue a preliminary injunction that requires a party to take affirmative steps and change the status quo. Integrated Dynamic Solutions, Inc. v. VitaVet Labs, Inc. (2016) 6 Cal.App.5th 1178, 1184. However, such orders are only appropriate in extreme cases where the right to such action is clearly established. Id.

In order to issue a preliminary injunction, the Court must balance the parties' interests. In balancing the parties' interests, the Court must exercise discretion "in favor of the party most likely to be injured . . . ." Robbins v. Superior Court (1985) 38 Cal.3d 199, 205. The Court is to consider two interrelated factors: 1) the injury to plaintiff in absence of the injunction verses the injury the defendant is likely to suffer if an injunction is issued (Shoemaker v. County of Los Angeles (1995) 37 Cal.App.4th 618, 633); and, 2) is there a reasonable probability that plaintiffs will prevail on the merits at trial. Robbins,

supra, 38 Cal.3d at 206. “The trial court’s determination must be guided by a ‘mix’ of the potential-merit and interim-harm factors; the greater the plaintiff’s showing on one, the less must be shown on the other to support an injunction.” Butt v. State of California (1992) 4 Cal.4th 668, 678. It is the plaintiff’s burden to “show all elements necessary to support issuance of a preliminary injunction.” O’Connell v. Superior Court (2006) 141 Cal.App.4th 1452, 1481. A party’s fears that some bad act may happen in the future is not sufficient to support a preliminary injunction. Korean Philadelphia Presbyterian Church v. California Presbytery (2000) 77 Cal.App.4th 1069, 1084. “It must be supported by actual evidence that there is a realistic prospect that the party enjoined intents to engage in the prohibited activity.” Id. “An injunction properly issues only where the right to be protected is clear, injury is impending and so immediately likely as only to be avoided by issuance of the injunction.” E. Bay Mun. Util. Dist. v. Cali. Dep’t of Forestry & Fire Prot. (1996) 43 Cal.App.4th 1113, 1126.

It appears that there is a reasonably probability that Plaintiff will prevail on its breach of declaration of conditions, covenants and restrictions and nuisance causes of action. Breach of contract requires (1) a contract, (2) plaintiff’s performance or excuse of performance under the contract, (3) breach of the agreement by the defendant, and (4) damages to plaintiff. Abdelhamid v. Fire Ins. Exchange (2010) 182 Cal.App.4th 990, 999. The elements of a nuisances are: (1) the defendant’s conduct obstructs the free use of property, so as to interfere with the comfortable enjoyment of life or property, (2) an ordinary person would be reasonably disturbed or annoyed by the defendant’s conduct, (3) the seriousness of the harm outweighs the social utility of the defendant’s conduct, (4) the plaintiff owned, leased, occupied or controlled real property, (5) the plaintiff did not consent to defendant’s conduct, (6) plaintiff suffered injury, and (7) the defendant’s conduct was a substantial factor in causing said harm. Department of Fish & Game v. Superior Court (2011) 197 Cal.App.4th 1323, 1352. A public nuisance includes the requirement that the defendant’s conduct affects a substantial number of people and the plaintiff’s harm is substantially different from that suffered by the general public. Id.

Stratospheric owns lot 141 of Tract No. 300231. Under the Restated Declaration of Covenants, Conditions and Restrictions and Reservation of Easements for Golf Course (“Restated Declaration”), the owner of the Golf Course is CBGM, LLC. The Restated Declaration provides that CBGM, referred to as “Course Owner”, “owns certain real property located in the City of La Quinta, California, more fully described in Exhibit A, hereto, which is improved, with an 18-hole golf course and appurtenant

Improvements located thereon ('Golf Course'), Course Owners and any successor owner of the Golf Course may also be referred to herein as 'Course Owner.'" (Restated Declaration, ¶ A.) Exhibit A includes the lot currently owned by Stratospheric. Based on paragraphs 6(b) and 7 of the Restated Declaration, the Course Owner is required to maintain the lake facilities and the pump station facilities on the Golf Course. Landscaping within the Golf Course (except for certain excluded areas) must be continually maintained and repaired by the Course Owner. (Restated Declaration, ¶ 10.) The Course Owner is also required to "supply / provide irrigation water to the irrigation system installed within the Perimeter Landscape Area at no cost to Residential Declarant during installation / facilitation of the Rehab Project and thereafter during the period of time that this declaration is in effect." (Restated Declaration, ¶ 11(d).) The water to the golf course was shut off on July 20, 2021. (Declaration of Eric Angle, ¶ 11.) Doing so has "choked off all water to the Golf Course and PLA, which are rapidly drying out and dying." (Id.) The well pump that provides the water to the golf course was padlocked to prevent anyone from reactivating it and a "No Trespassing" sign and surveillance cameras were placed near the well. (Id.) The water pump is on Stratospheric' s property. The golf course is located in the Coachella Valley where temperatures regularly rise to over 110 degrees and at time reaches 120 degrees. (Declaration of Jim Schmid ¶ 6.) After the water was shut off the vegetation on the golf course started to dry out and die, creating a fire risk. (Declaration of Eric Angle, ¶¶ 12 and 13; Declaration of Jim Schmid, ¶¶ 8 and 9.) Additionally, the shutoff of the water supply has also stopped the circulation of water in the lake facilities on the golf course, creating a breeding ground for mosquitos and possibly leading to algae bloom or bacteria potentially toxic to humans and wildlife. (Declaration of Eric Angle, ¶ 14; Declaration of Jim Schmid, ¶ 10.)

Based on this evidence, it appears that both CBGM, LLC and Stratospheric are Course Owners under the Restated Declaration and are obligated to maintain the landscaping and lake facilities in the golf course. Stratospheric has failed to provide any authority or evidence to the contrary. While Stratospheric only owns one parcel of property that makes up the golf course, there is nothing in the Restated Declaration that indicates there is a minimum number of parcels an entity has to own before it can be considered a golf course owner. The Restated Declaration indicates that successors to CBGM constitute Course Owners. Since Stratospheric is a successor to CBGM to one of the properties that makes up the golf course, it appears that it is one of the Course Owners. CBGM and Stratospheric have breached the Related Declaration by failing to maintain the golf course (the dying plants and stagnant water). Since these issues have created a health and safety problem, it appears

that Plaintiff has been damaged.

The conduct also appears to fit within the elements of nuisance. The Defendants' conduct is interfering with Plaintiff's comfort and enjoyment of its property; an ordinary person would be annoyed or disturbed by Defendants' conduct; the harm of Defendants' conduct outweighs the social utility of Defendants' conduct; Plaintiff owns or controls real property; Plaintiff did not consent to Defendants' conduct; and the conduct can cause harm to Plaintiff and its property.

Stratospheric contends that the damages it would suffer would outweigh the damages to Plaintiff, if the preliminary injunction is granted. If the preliminary injunction is granted, Stratospheric would have to pay for the water to maintain the golf course. This is not due to anything Plaintiff has done. Stratospheric appears to be bound by the Restated Declaration, if CBGM is not paying for its share of the water used for the golf course, this is not Plaintiff's fault. Stratospheric has legal recourse against CBGM. If Stratospheric is allowed to shut off the water supply to the golf course, this would create a health and safety risk. As such, the risk to Plaintiff and the public as a whole appears greater than the risk to Stratospheric.

Stratospheric contends that if the court grants this motion, it should require Plaintiff to post a bond. Under C.C.P. § 529(a), "[o]n granting an injunction, the court or judgment must require an undertaking on the part of the applicant to the effect that the applicant will pay to the party enjoined any damages, not exceeding an amount to be specified, the party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled to the injunction. If the court determines that the applicant's undertaking is insufficient and a sufficient undertaking is not filed within the time required by statute, the order granting the injunction must be dissolved." Plaintiff contends that no bond should be required because it is clear that Plaintiff will prevail in this matter. However, Plaintiff cites to no authority that this is a basis to deny a bond. Some bond should be posted. However, the $500,000.00 is excessive. The documentation and the estimates provided by Stratospheric are a little on the vague side and it is unclear whether the charges set forth are outside of running the water pump/irrigation system. The Court requests input from the parties as to the proper amount of the bond that will be required.

It should be noted, for the first time in reply, Plaintiff provided the deed of trust indicating that

SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE

Historic Court House
Hearing on Preliminary Injunction

09/09/2021
8:30 AM
Department 2

CVPS2103761
TRILOGY AT LA QUINTA MAINTENANCE ASSOCIATION vs STRATOSPHERIC HOLDINGS 4, LLLC

Honorable Carol A. Greene, Judge
C. Marias, Courtroom Assistant
Court Reporter: None

Stratospheric owned lot 141. It is improper for a party to offer evidence for the first time in reply. Jacobs v. Coldwell Banker Residential Brokerage Co. (2017) 14 Cal.App.5th 438, 449-450 and is not being considered by the Court.

Plaintiff objects to Josh Grossman's declaration. The Court sustains objections nos. 1 through 8. Mr. Grossman fails to set forth any foundation for this testimony.

Preliminary Injunction granted.
Undertaking/Bond to be posted in the amount of $100,000 by Plaintiff
Notice to be given by prevailing party.

PROOF OF SERVICE
C.C.P. §1013(a)(3)
STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 90 Discovery, Irvine, California 92618.

On October 28, 2021, I served the foregoing document described as: **OPPOSITION BY DEFENDANT STRATOSPHERIC HOLDINGS TO EX PARTE APPLICATION BY PLAINTIFF TRILOGY FOR ENFORCEMENT OF PRELIMINARY INJUNCTION AND OSC RE CONTEMPT** on the interested parties in this action:

Anthony Capobianco Derek Wallen Capobianco Law Offices, P.C. 41990 Cook Street, Bldg. F, Suite 2006 Palm Desert, CA 92211	Attorneys for Plaintiff Trilogy at La Quinta Maintenance Association T: (760) 568-6500 F: (760) 568-0100 Email: acapobianco@capobiancolaw.com Email: dwallen@capobiancolaw.com
Brendan Ozane Dawson & Ozane 5755 Oberlin Drive, Suite 301 San Diego, CA 92121	Email: brendan@dawson-ozanne.com
Edwin Cottone Cottone & Moon 5000 Birch Street, Suite 3000 Newport Beach, CA 92660	Email: ed@cottonemoon.com

[] **BY MAIL:** I deposited such envelope in the mail at Irvine, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U. S. postal service on that same day with postage thereon fully prepaid at Irvine, California 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 OVERNIGHT DELIVERY:** I placed the sealed envelope(s) or package(s) designated by the express service carrier for collection and overnight delivery by following the ordinary business practices of Geraci Law Firm. I am readily familiar with the firm's practice for collecting and processing of correspondence for overnight delivery, said practice being that, in the ordinary course of business, correspondence for overnight delivery is deposited with delivery fees paid or provided for at the carrier's express service offices for next-day delivery the same day as the correspondence is placed for collection.

[ ] **BY FACSIMILE TRANSMISSION:** Based on agreement of the parties to accept service by facsimile transmission, I transmitted said documents to the offices of the addressee(s) listed above via facsimile. No error was reported by the facsimile machine that I used.

[x] **BY ELECTRONIC MAIL [EMAIL]:** I served the foregoing document by electronic mail (email) to the addressee(s) listed above.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed October 28, 2021, in Irvine, California.

By: _____
JACOBY PEREZ

Geraci Law Firm
90 Discovery
Irvine, California 92618
T: (949) 379-2600; F: (949) 379-2610