

Honorable James McBride (Ret.)
ADR SERVICES, INC.
100 First Street, 27th Floor
San Francisco, California 94105
(415) 772-0900 PH
(415) 772-0960 FAX
judgemcbride@gmail.com

**ARBITRATION BEFORE
ADR SERVICES, INC.**

KENT ALLEN and JANE LAVELLE,)	ADR SERVICES NO. 22-3255-JJM
)	
Petitioners,)	
vs.)	INTERIM AWARD
)	
LISA NAGEL and AMY THORNE,)	
)	ARBITRATOR:
Respondents.)	HON. JAMES J. MCBRIDE (ret.)
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LISA NAGEL and AMY THORNE)	
)	
Cross-Petitioners,)	
vs.)	
)	
KENT ALLEN and JANE LAVELLE,)	
)	
Cross-Respondents.)	
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I. Introduction

The parties to this arbitration are the members of the 131-133 Belvedere Condominium Homeowner's Association.¹ The Association is governed by a Declaration of Conditions, Covenants and Restrictions² recorded in 1989 and Bylaws dated 1995. (Exhibits 102 and 101.) This arbitration is required by Article X of the Third Amendment to the Declaration of Covenants, Conditions and Restrictions 131-132 Belvedere Street, A Condominium. It is conducted pursuant to ADR Services Inc.'s Rules of Arbitration.

Evidence was taken on November 2, 3 and 4, 2022, and closing arguments heard on January 4, 2023. Following argument, the undersigned issued a Partial Interim Award that directed the HOA to conduct a meeting to vote on pending matters including commission of a reserve study. The parties agreed to a second phase of argument that was heard on March 3, 2023 at which time the matter was submitted for decision.

This is the Interim Award.

II. The Parties and the Property

Kent Allen and Jane Lavelle and Respondents Lisa Nagel and Amy Thorne are the owners of a building divided into three condominiums located at 131-133 Belvedere Street, San Francisco. Lavell and Allen own and reside in unit 133 which they acquired in 2002. Nagel has owned unit 131 since 1993, and Thorne acquired unit 131-A in 2007. Thorne and Nagel, formerly resided at the property but now live elsewhere and rent their units. The parties constitute the entire membership of the HOA and have each held various HOA offices.

This is a building, typical of the neighborhood, built in the early 1900's as two flats over a garage with a full attic. The attic of the building was converted to a living unit that is now 131-A. On the south side of the building, there is a light well that extends to the ground floor

¹ Hereafter, referred to as Association or HOA.

² Hereafter, referred to as Declaration or CC&Rs and, together with the Bylaws, the governing documents. The governing documents are out of date because they have not been amended to account for changes in Davis Stirling. Nonetheless, these out of date governing documents provide an adequate management framework for an HOA not infected with interpersonal paralysis.

1 and within the light well an exterior staircase connecting the original two units. At some point,
2 the light well was covered at the roof level with a skylight and the staircase enclosed from the
3 elements.

4 **III. Claims**

5 Petitioners' assert that Thorne and Nagel are neglectful absentee landlords who have
6 colluded to frustrate the efforts of Lavelle and Allen to maintain the property for the good of all.
7 Respondents claim that Allen and Lavelle are dissatisfied that they lack the votes to run the
8 HOA to their liking. They claim that Petitioners have harassed and bullied them, causing each
9 to abandon their units to rental. They assert that the inability to manage the HOA in conformity
10 with the governing documents is the fault of Petitioners.

11 Petitioners served their original demand for arbitration on April 22, 2022 and asserted a
12 general summary of their claim.

13 "Respondents are in complete control of the HOA; they do not
14 reside in the Property; they rent their condominiums to tenants and
15 thereby have little incentive to spend money to maintain the
16 Property beyond basic habitability levels; Petitioners actually live
17 at the Property and have been systematically ignored by
18 Respondents; Petitioners have watched the building that they live
19 in slowly fall into disrepair due to Respondents' inaction."

20 The issues Respondents sought to resolve in this arbitration are set forth in their First
21 Amended Statement of Nature of Dispute and Relief Sought (FAS).

22 "(a) failure to hold quarterly meetings, (b) failure to create and distribute
23 annual budgets, (c) failure to conduct reserve studies, (d) failure to collect
24 reserve funds, (e) failure to deliver a reserve study, (f) failure to create a
25 reserve funding plan, (g) failure to review the Property's insurance policy
26 limits each year, (h) failure to deliver the HOA's discipline policy, (i)
27 failure to send the annual alternative dispute resolution procedure
28 disclosure, (j) failure to send a statement of assessment collection
policies, (k) failure to reimburse Petitioners for damage caused by water
leaks originating in Respondent Amy Thorne's condominium, and (l)
improper imposition of a special assessment against Petitioners. The
following issues have occurred in the intervening months: (a)
Respondents are now using HOA funds for personal, non-HOA expenses,

1 (b) Respondent Nagel's tenant is not currently abiding by the 75% floor
2 coverage requirements of the CC&Rs, (c) regular assessments need to be
3 monitored and increased on a more regular and routine basis so as to
4 confirm HOA operating funds are available when required, and (d) the
5 skylight and adjacent roofing areas are in need of re-repair because to
6 Respondents' choice of a contractor was inexperienced in the type of
7 repair initially required.

8 These issues are also mated with a disturbing lack of communication
9 from Respondents and outright lies about the management of the Property
10 perpetuated by Respondents. Above all else Petitioners seek for the HOA
11 to operate according to the CC&Rs and for there to be transparency in its
12 operation."

13 Respondents frame these grievances as claims for Breach of Contract, Breach
14 of the Covenant of Good Faith and Fair Dealing, Breach of Fiduciary Duty and
15 Declaratory Relief. Respondents Prayer for Relief seeks injunctive relief and
16 damages.

- 17 " 1. For general and special damages to Petitioners of approximately
18 \$171,000;
19 2. For general and special damages to the HOA of approximately
20 \$60,000;
21 3. For an accounting of the usage of HOA funds over the past ten years;
22 4. For disgorgement of sums taken without authorization from the
23 HOA;
24 5. For injunctive relief ordering that Respondents:
25 a. Distribute an annual budget each year,
26 b. Conduct a reserve study on the Property,
27 c. Create a reserve study plan for the Property,
28 d. Increase regular assessments to match the requirements of the
reserve study,
e. Review the Property's insurance policy limits each year,
f. Deliver the HOA's discipline policy each year,
g. Distribute the annual alternative dispute resolution procedure
disclosure each year,
h. Distribute the statement of assessment collection policies
each year,
i. Ensure the compliance of tenants with Section 7.8 of the
CC&Rs regarding floor coverings;
6. For declaratory relief determining that the HOA must conduct a
reserve study;

1 assigns the Board the duties of the HOA set forth in the CC&Rs. Article VIII calls for the
2 annual election of officers to be directed and supervised by the Board; a President and Vice
3 President (each of whom must be Board members) a Secretary and a Treasurer. The Treasurer
4 detailed and extensive duties are set forth in Article 8.8(d) *et seq.* Of particular note in this
5 dispute is the requirement that the Treasurer include in the annual budget “An itemized estimate
6 of the remaining life of, and the methods of funding to defray repair, replacement or additions
7 to, major components of the common areas and facilities for which the Association is
8 responsible.”

9 Article VI of the Bylaws requires the Board to hold a regular meeting each quarter.
10 Section 3.3 of Bylaws provides that the Board may call a special meeting of the HOA members
11 with the notice to include the purpose of the special meeting. All owners of a unit are members
12 of the HOA, but each unit holds only one vote, and any action of the Association that requires
13 approval of the membership requires the vote or “written assent” of two-thirds (2/3) of the
14 membership. (CC&Rs Section 3.4.) The CC&Rs may be amended by a two-thirds vote of the
15 Association membership. (CC&Rs Section 8.4.)

16 **B. Management in Practice**

17 The membership of the HOA totals four yet the Bylaws call for a three member Board of
18 Directors and four officers. Thus, at any given time, an HOA member should be either a Board
19 member or an officer or both. Predictably, such a structure invites management by the entire
20 membership; which is what happened. There is no evidence that the Association ever elected a
21 Board of Directors or recognized any real distinction (with the exception of Treasurer) between
22 Board members, officers and members.⁴ The members ignored Articles IV and VI of the

23
24 ⁴ Although the members referred to their meetings as meetings of the Board of Directors
25 (Exhibit 201) there was no real distinction drawn between the Board and members. The only
26 officer with any real responsibility was Treasurer. The abandonment of the distinction between
27 the Board and Officers is revealed in testimony by Respondent Thorne;

28 “Q: With regards to the HOA Board, **who holds which director positions**
currently?

A: Currently Kent Allen hold the vice president position, Lisa Nagel holds the
president position, Jane Lavelle holds the treasurer position and I hold the
secretary position.” (RT. 355:7-12, emphasis added.)

1 Bylaws, and dispensed with the Board and conducted its affairs by meeting of the entire
2 membership, all of whom were officers.

3 The parties ran the HOA's affairs informally and dealt with issues that were sufficiently
4 concerning as they arose. Apparently by mutual, tacit consent, the parties disregarded the
5 meeting notice requirements (Bylaws Sections 3.2 and 6.1) and the requirement that members
6 vote in person or by proxy (Bylaws Section 3.5). The membership did not hold quarterly
7 meetings but met as frequently or infrequently as circumstances dictated. At the times relevant
8 to this dispute, they met by telephone and frequently voted by email. This informal system
9 seems to have worked after a fashion to the extent that immediate maintenance needs were
10 addressed eventually. However, decisions on long range needs were avoided and mandated
11 HOA management tasks, such as an annual review of HOA insurance, ignored.⁵

12 Despite the fact that each unit holds only a single vote and two votes decides any issue,
13 it appears that the members tried to reach decisions by unanimous consent. A persistent theme
14 in the evidence was the failure of the parties to call a vote on a question. Typically the asserted
15 reason for the failure was the request of a member for more due diligence. Each side accuses
16 the other of using these tactics to obstruct proper management by refusing to vote. However,
17 the evidence leads to the conclusion that when there was lack of agreement, neither side
18 demanded a vote. It seems reasonable to conclude that the parties did not force issues to a vote
19 because, on the one hand, Thorne and Nagel wanted to avoid the unpleasant conflict that would
20 result from a two to one vote (witness the aftermath of the vote to replace the roof and skylight)
21 and, on the other hand, Allen and Lavelle did not want to lose. It is unlikely that if Thorne and
22 Nagel were in cahoots to dominate the HOA that they would avoid votes.

23 The parties' pattern of reaching the point of decision and then backing away from a
24 deciding vote was oft repeated. At one time, the HOA members had the opportunity to use
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26
27 ⁵ Because the quorum requirements for a Board meeting (Bylaws Section 6.3) section and a
28 membership meeting (Bylaws Section 3.4) are essentially the same, there is no claim or
evidence that this departure from the governing documents impaired the rights of any member.

scaffold erected by a neighbor in order to replace deteriorated exterior plumbing but did not vote, and the opportunity was lost. Petitioners point to this lost opportunity as an example of Ms. Thorne's obstruction of the HOA's duties and obligations. However, Ms. Thorne merely declined to vote on the \$30,000 proposal and, despite the fact both Nagel and Lavelle-Allen were in favor of proceeding and held the two votes necessary to decide the issue, no vote was held. In 2020, both a bid for a reserve study and a proposal for increased insurance limits were discussed, not put to a vote, tabled, and ultimately neglected because Petitioners refused to meet at all during the pendency of this arbitration.

V. Respondents Did Not Obstruct HOA Management

Petitioner's case depends a great deal on proof that Thorne and Nagel, sometimes acting separately and sometimes colluding together, frustrated the proper operation of the HOA, somehow to their advantage. There is none.

A significant allegation is that Thorne, during her 12 year term as Treasurer and presumably acting alone, failed to distribute an annual budget. Why that failure would be to her advantage is left to the imagination. The evidence, however, is that she distributed an annual budget that was an income and expense statement lacking the "itemized estimate" of future maintenance required by Bylaw Section 8.8. Nonetheless, the Thorne budget in evidence (Exhibit 104) includes a stab at that requirement, headed "List of Potential Projects."

The evidence is undisputed that Lavelle, who became Treasurer in 2019 did not prepare a budget at all explaining that she could not do so without a reserve study. Her inability to provide any estimate of future maintenance costs is belied by Allen who testified to a detailed list of needed projects and estimated the cost at \$60,000. (RT. 85:21- 87:10). The evidence is that no Treasurer has ever prepared a budget that met the requirements of Section 8.8, but that Thorne did a better job than Lavelle.

Finally, Petitioners have introduced no evidence that the flawed budgets prepared by Thorne or the absence of budgets under Lavelle caused Petitioners or the HOA any harm.

Another allegation is that Thorne and Allen refused to hold quarterly meetings and refused to vote on issues. As described, the membership as a whole disregarded the

1 requirement to hold quarterly meetings (a Board meeting requirement, not a membership
2 meeting requirement) and there is no evidence that either Thorne or Nagel or the two together
3 refused to vote or used their combined majority to block votes. Petitioners repeatedly allege
4 that Thorne and Nagel “ignored” their requests for action on HOA issues. However, the record
5 shows the responsibility for inaction and indecisiveness is shared among all three units. A prime
6 example would be Allen’s 2017 demand for a reserve study. (Exhibit 103.) There is no
7 evidence that any member did anything about it, Allen and Lavelle conspicuously included,
8 until Nagel came up with a proposal in 2020. Allen’s demand did not shift responsibility for the
9 reserves study to Respondents, and all members share the responsibility for its continued
10 neglect.

11 The parties may have had difficulty selecting dates for meetings, and the minimum of a
12 meeting once a quarter requirement was abandoned, but there is no evidence that Thorne or
13 Nagel obstructed scheduling of meetings or blocked votes on issues. In the one instance that
14 Thorne abstained from a vote she participated in in the meeting by cell phone while she was
15 about to board a plane. As she pointed out, that meeting could have continued after she left it
16 with a quorum and a vote could have been taken. There was no vote.

17 Before the January 4, 2023 meeting ordered by the undersigned, the last meeting of the
18 HOA was in July 2020. Responsibility for that two and one-half year lapse cannot be assigned
19 to Respondents. The disputes between the parties came to a head in late 2019 when the HOA
20 finally addressed the long deferred need to replace the leaky roof and skylight. Thorne and
21 Nagel voted to accept a bid that Allen and Lavelle opposed. Shortly after that, Petitioners
22 started the process that lead to this arbitration.

23 The CC&Rs require arbitration of HOA disputes but not mediation. By letter dated
24 December 17, 2019 Petitioners’ suggested voluntary mediation as a process “less expensive and
25 less formal.” (Exhibit 263.) The offer demanded a reply within 6 days after which time
26 Petitioners would demand arbitration. (Id.)

27 The parties did not enter mediation, so Petitioners demanded arbitration. Receiving no
28 response, they filed a Petition to Compel Arbitration that Respondents did not oppose. The

1 order granting the Petition was entered on February 9, 2021. (Exhibit 260.) Respondents agreed
2 to the undersigned as arbitrator by letter dated April 18, 2021. (Exhibit 230). However,
3 Petitioners' Demand for Arbitration Before ADR Services, Inc. was not made until a year later,
4 April 22, 2022.

5 In the time between the order compelling arbitration and the Demand, the parties had an
6 HOA meeting on July 28, 2020. By that time, the roof and skylight had been replaced, although
7 Respondents continued to object to the manner by which the vote was held, the quality and
8 legality of the skylight replacement, and reserved their rights to withhold payment for future
9 repairs. (Exhibit 222, November 14, 2019 letter,) At the July 28 meeting, the members
10 discussed, among many other issues, proposals for increased insurance limits and the long
11 neglected issue of a reserve study. As usual, no decisions were made on these two long
12 deferred HOA obligations, but the discussion on these topics seems to have continued.
13 (Exhibits 224, 234, 240 and 261.)

14 In an exchange of emails dated March 9 and 10, 2021, Respondents asked for dates to
15 have an HOA meeting and circulated agenda items. Petitioners agreed to check their calendars
16 but the exchange ended with no date selected. (Exhibit 226.) Instead, in a letter dated March
17 18, 2021 counsel for Petitioners wrote to counsel for Respondents about the topics to be
18 arbitrated. Included in the letter was a response to the attempt to set up an HOA meeting.

19
20 "The association meeting proposed by your clients appears to be a clear
21 attempt to make an end run around the court order compelling arbitration.
22 No association meeting should happen prior to the arbitration as the petition
23 was filed due to the systemic HOA governance issues. My clients are not
24 opposed to resolving certain issues outside of arbitration, however, any
25 attempt by you clients to unilaterally address pending issues and claim
26 resolution ahead of arbitration is a clear violation of the court's order."
27 (Exhibit 260.)

28 Obviously, counsel sought to prevent Thorne and Nagel from using their two to one
majority to eliminate arbitration claims for which Petitioners were seeking damages and
injunctive relief. The wisdom of this tactic is not for decision here. Suffice to say this letter
ended any effort to have HOA meetings before the arbitration hearing, and Thorne and Nagel

1 bear no responsibility for the fact that no meetings took place between July of 2020 and January
2 of 2023.

3 Another allegation is that Thorne placed unreasonable time limits on meetings. The
4 evidence is that occasionally she had a limited time for a meeting but there is no reason that
5 meetings could not continue without her. Provided she was in attendance at the commencement
6 of the meeting, her withdrawal would not destroy the quorum regardless of whether the meeting
7 was characterized as a Board or membership meeting. (Bylaws Sections 3.4 and 6.3.)

8 **VI. Summary of the Events that Precipitated Arbitration**

9 At arbitration, the parties did not go into great detail about the history of bad feelings
10 among them, but what evidence there is establishes that each side regards the other with
11 profound dislike and mistrust. It is useful to summarize the deterioration in the parties'
12 relationship and how the management of the HOA went from merely poor, to impasse, to
13 arbitration.

14 When Thorne first purchased her unit in early 2007, Allen and Lavelle met with her and
15 gave her "negative information" about Nagel, then the Treasurer, and asked Thorne to accept
16 the position at the next HOA meeting. She did and remained Treasurer until 2019 when she
17 resigned. At least at the outset, she was aligned with Allen and Lavelle, but by October, 2008,
18 she had moved and rented her apartment, a decision she attributed to unspecified harassment by
19 Allen and Lavelle. In 2007 or 2008, a meeting was held in the garage of the property during
20 which Allen yelled in Nagel's face. Thereafter, with one exception, all meetings were held by
21 telephone.

22 In 2017, Nagel and Thorne consulted an attorney about amending the CC&Rs to
23 conform to the current version of Davis-Stirling and permit short term rentals, i.e. Airbnb. This
24 apparently prompted Lavelle and Allen to see a lawyer and in an April 17, 2017 email to the
25 members Allen presented Unit 133's position on amendment and enforcement of the CC&Rs.
26 (Exhibit 103.) Included with an extensive list of complaints, he noted their opposition to short
27 term rentals and pointed out that the building, particularly the roof system, was not being
28

1 maintained and he officially requested a reserve study be undertaken as soon as possible.⁶ It is
2 important to note that at this point in 2017 if Nagel and Thorne wanted to gang up to run the
3 HOA without regard to the interests of Allen and Lavelle, e.g. to permit short term rentals, they
4 held the two-thirds majority to amend the CC&Rs as they saw fit. They did not exercise that
5 power.

6 The decision to replace the roof and skylight was the event that precipitated this
7 arbitration. The tortured history of that project and its aftermath is a microcosm of what is
8 wrong with the management of this HOA.

9 As early as 2015 the parties agreed that the roof was worn out and leaking and needed
10 replacement. In 2015, Lavelle took the lead in obtaining bids but her effort stalled and no
11 progress occurred until Nagel stepped in 2018. Nagel obtained several bids and Thorne
12 assembled all bids and Lavelle's notes into a detailed spread sheet so the members could
13 conveniently compare them. (Exhibits 204 and 205.) Complicating the replacement of the roof,
14 was the replacement of the large custom built skylight. The bid from Standard Roofing was one
15 that included skylight replacement in its scope of work. The Standard bid was discussed at an
16 October 2018 HOA meeting. Allen and Lavelle had valid concerns about the skylight
17 replacement and asked many questions of a Standard representative. In a November 9, 2018
18 email, Thorne called for a vote and Nagel joined her in accepting the Standard bid. (Exhibits
19 208 and 264.) Lavelle and Allen did not vote, but instead called for a phone meeting that took
20 place on November 18, 2018. At that meeting, they suggested a patch to the roof, a suggestion
21 that Thorne and Nagle rejected. Petitioners have asserted that they were ambushed by
22 Respondents' vote to accept the Standard bid at this November 18 meeting, and that the issue
23 was brought to a vote without notice, in violation of the governing documents. Their testimony
24 and the evidence is to the contrary. It is clear that the Standard bid was discussed at the October
25 meeting, and a vote called and held on November 9. The November 18 was after the fact, and
26

27 ⁶ A glimpse into the long simmering resentment harbored by Allen and Lavell against Nagel is
28 found in the demand that Nagel comply CC&Rs Section 7.8 requiring 75% floor covering to
"eliminate the nuisances that 133 has been subjected to regularly for more than a decade. . . ." (Exhibit 103.) This claim was part of the arbitration demand but abandoned at hearing.

1 in testimony Lavelle admitted as much. The October meeting and subsequent vote were both
2 handled in the same way the members of this HOA had handled such thing for years.
3 Petitioners are estopped from asserting that the meeting or vote violated the governing
4 documents, and indeed they offer no coherent statement as to what specific provision of the
5 governing documents can be invoked to invalidate the vote.

6 Thereafter, counsel for Petitioners registered their strong objections, (Exhibit 222) but
7 participated in further meetings with Standard Roofing and even agreed to an expanded scope of
8 work that increased the price and triggered a second special assessment. Petitioners paid, under
9 protest, their \$8,476 share of the first special assessment, and the work was completed in the fall
10 of 2019. Petitioners have refused to pay their share of the second special assessment and also
11 claim that the skylight is defective and leaks.⁷ If that is so, Standard provided a warranty for the
12 roof and skylight, and the HOA should call upon Standard to honor it.

13 **VII. Disposition of Petitioners' Claims**

14 **A. Breach of Contract.**

15 In their claim for breach of contract, Petitioners lump together allegations that
16 Respondents violated the CC&Rs, enforceable as equitable servitudes, and the Bylaws
17 enforceable as breach of contract. They allege that Respondents held the voting majority and,
18 apparently acting in concert, committed the following breaches of the governing documents.

- 19 1) Failed to hold quarterly Board of Directors. Bylaws Section 6.1.
- 20 2) Failed to distribute an annual budget. Bylaws Section 8.8(d)(i).
- 21 3) Failed to collect regular assessments sufficient to provide for maintenance and
22 reserve funds. CC&Rs Section 4.3.
- 23 4) Failed to review insurance limits annually. CC&Rs Section 5.1(b)(i).
- 24 5) Failed to enforce against Nagel the requirement that carpet cover 75% of her unit's
25 floor. CC&Rs Section 7.8.

26
27
28 ⁷ At the hearing, Petitioners attempted to prove that the skylight leaks, but their evidence was
less than persuasive.

1 6) Failed to distribute insurance proceeds for damage caused to the Allen-Lavelle unit
2 by a leak form Thorne's unit. CC&Rs Section 8.9.

3 7) Failed to distribute annual statement of the Association's policies and practices in
4 enforcing its remedies against members for defaults. Bylaws Section 8.8(d)(iv).

5 They claimed that Respondents' "actions or inaction" caused Petitioners to suffer
6 approximately \$11,000 in damages and the HOA approximately \$60,000.

7 Petitioners also requested specific performance of certain sections of the governing
8 documents in the form of an injunction requiring the for the HOA to: (1) begin holding
9 quarterly meetings, (2) begin distributing an annual budget, (3) conduct a reserve study; (4)
10 begin collecting adequate reserve funds to maintain the Property, (5) begin reviewing the HOA
11 insurance policy annually, and (6) begin distributing policies and practices in enforcing its
12 remedies against members for defaults.

13 While there is no dispute that, as Petitioners allege, the HOA failed in its obligations to
14 1) conduct a reserve study, 2) maintain adequate reserves, 3) review insurance annually, 4)
15 prepare budgets, 5) distribute its discipline policy, alternative dispute procedures and
16 assessment collection policy, Petitioners have not proved that responsibility for these failures
17 can be assigned to Respondents exclusively. The evidence establishes that both Petitioners and
18 Respondents continuously breached the governing documents by disregarding them and running
19 the HOA on an as needed basis. Petitioners have offered no evidence that either they or the
20 HOA suffered any damage as a consequence of anything Thorne or Nagel did or neglected to
21 do.

22 Respondents request an injunction requiring the HOA and its members to 1) distribute
23 an annual budget, 2) conduct a reserve study, 3) increase assessments to meet reserve needs, 4)
24 review insurance policy limits each year, 5) deliver the HOA's discipline policy, 6) distribute
25 the alternative dispute resolution procedure, and disclosure each year, and 7) distribute the
26 statement of assessment collection policies.

27 It is tempting to order the HOA and its members to do their job. In fact, the
28 undersigned ventured a step or two down that path by ordering that an HOA meeting

1 be held with an agenda of matters to be voted on. That was a limited, interim order
2 for the purpose of ending the hiatus in meetings that endured during the pendency of
3 this arbitration. The relief sought by Petitioners would be a mandatory injunction
4 requiring supervision over an indefinite time. It is a dis-favored remedy and not one
5 justified by the facts of this case.

6 The four members of this HOA have failed to make essential decisions about the
7 management of their three-unit building because they abandoned the governing documents that
8 define the Association's obligations and decision making process; and, without that structure,
9 have not overcome their personal disharmony to reach common sense decisions. That being
10 said, the evidence suggests that even if the parties were ordered to carry out the duties and
11 procedures established by the Bylaws and Declaration, their inability to deal with one another
12 personally suggests that common sense might still lose out to dysfunction. It seems a very bad
13 idea to arm the parties to this dispute with an injunction that would tempt them to involve the
14 court in every disagreement among the HOA members.

15 Petitioners having failed to offer any evidence that they or the HOA suffered
16 any damages as a result of the parties' collective breach of the governing documents,
17 have likewise failed to establish that an award of damages would be inadequate to
18 compensate for such a breach.

19 In summary, there is no basis for injunctive relief, and the claim is denied.

20 **B. Breach of the Covenant of Good Faith and Fair Dealing**

21 The implied covenant of good faith and fair dealing operates as a
22 supplement to express contractual covenants, to prevent a contracting party from
23 engaging in conduct which, while not technically transgressing express covenants,
24 frustrates the other party's rights to the benefits of the contract.

25 In their claim for breach of the implied covenant of good faith and fair
26 dealing, Petitioner's allege that Respondents brought the operation of the HOA to a
27 halt, interfered with Petitioners' enjoyment of the Property and undermined
28 Petitioners' right to the quiet enjoyment. They further allege that Respondents' refusal

1 to maintain the Property and to operate the HOA according to the CC&Rs and Bylaws
2 have undermined the value of the Allen-Lavelle Unit to the tune of approximately
3 \$160,000.

4 The damage claim was completely abandoned at the hearing. It seems that this
5 claim depends entirely on evidence that Respondents frustrated the operation of the
6 HOA in ways not specifically spelled out in the governing documents, e.g. refusing to
7 vote on matters or placing unreasonable time limits on meetings. While there is clear
8 evidence that each side violated the governing documents, there is no evidence that
9 Respondents acted either individually for in concert to deprive Petitioners of the
10 benefits conferred on them by the governing documents.

11 **C. Breach of Fiduciary Duty**

12 The FAS correctly asserts that “Board members as representatives of the
13 HOA owe a fiduciary duty to uphold the CC&Rs and Bylaws.” The claim then goes
14 on to allege that Nagel and Thorne “failed to act in a reasonable and careful manner in
15 operating the HOA.” The flaw in the claim is that there is no evidence that Board of
16 Directors was ever elected. This HOA operated without a Board, and its four
17 members rotated the four officer positions. Further, even were there authority
18 presented for the proposition that Nagel and Thorne owed a fiduciary duty to
19 Respondents or the Association as officers or members, there is no evidence that they
20 breached such a duty.

21 **D. Declaratory Relief**

22 In their FAS, Petitioners seek a declaration that there is an actual
23 controversy in need of resolution because Respondents have asserted that there is no
24 need for the reserve study required by Civil Code §5550 and have refused to vote on
25 the matter. The evidence is entirely to the contrary. The claim is denied.

26 **E. Respondent’s Counter Claim for Delinquent Assessment**

27 Petitioners have wrongly asserted that the vote to hire Standard Roofing and for a
28 special assessment was in violation of the governing documents. They apparently rely on this

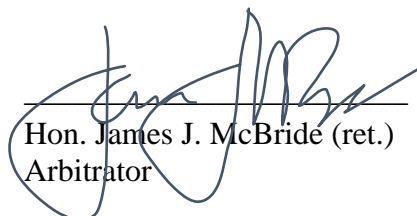
1 assertion as the reason for not paying the subsequent special assessment of \$3,267.31. Allen
2 testified the he intended to pay the assessment but had so far refused to do so “on advice of
3 counsel.”

4 Despite this concession, Petitioners raise as a defense Civil Code §§5660 and
5 5670 that require notice and procedures for the recording a lien against a condominium
6 to enforce a delinquent assessment; a remedy not at issue in this arbitration.

7 As authorized by Section 8.1 of the CC&Rs, Respondents are seeking to collect
8 the delinquency as the personal obligation to the HOA of Lavelle and Allen. CC&Rs
9 Section 4.10(a) provides “A regular or special assessment and any late charges, and
10 interest assessed in accordance with Section 1366, shall be a debt of the owner of the
11 separate interest at the time the assessment or other sums are levied.” Bylaws Article
12 XI provides that in order to collect a delinquent assessment “The Association may
13 bring an action at law or in equity against the Owner personally obligated to pay the
14 same **or** record a notice of assessment pursuant to Civil Code Section 1367 and
15 foreclose the lien against the condominium” (emphasis added.) This squares
16 with current §5650 which provides in relevant part, “(a) A regular or special
17 assessment and any late charges, reasonable fees and costs of collection, reasonable
18 attorney's fees, if any, and interest, if any, as determined in accordance with
19 subdivision (b), shall be a debt of the owner of the separate interest at the time the
20 assessment or other sums are levied.

21 In this arbitration, Respondents are not seeking to foreclose a lien, they are
22 seeking to collect a debt owed to the HOA. Respondents prevail on this claim and
23 Petitioners shall pay the HOA \$3,267.31 plus interest at 10 per cent per annum from
24 November 9, 2019.

25
26 Dated: April 12, 2023

27
28 
Hon. James J. McBride (ret.)
Arbitrator

PROOF OF SERVICE

State of California
County of Santa Clara

I certify that I am employed in the County of Santa Clara, State of California. I am over the age of 18 and not a party to the within action; my business address is 96 North 3rd Street, Suite 350, San Jose, California, 95112.

On April 14, 2023, I served the foregoing document described as the **INTERIM AWARD** on the interested parties in this action as follows:

SEE SERVICE LIST

- ☐ **BY ELECTRONIC SERVICE:** I caused the document(s) to be sent to the offices of the addresses via File & ServeXpress Electronic Service pursuant to the terms of the Case Management Order/Pre-Trial Order(s). The transmission was reported as complete and without error.
- ☒ **BY EMAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s) to be sent from sejla@adrservices.com to the persons at the email addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.
- ☐ **BY U.S. MAIL:** I caused such envelope with postage thereon to be placed in the United States mail in San Jose, California.
- ☐ **BY FACSIMILE:** I caused such to be faxed to the attorneys on April 14, 2023.
- ☐ **BY PERSONAL SERVICE:** I caused such envelope to be delivered by hand to the attorneys on April 14, 2023.
- ☒ **STATE:** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
- ☐ **FEDERAL:** I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.
- ☐ **BY CERTIFIED MAIL:** I caused such envelope with postage thereon to be placed in the United States mail in San Jose, California.

Executed on April 14, 2023 in San Jose, California by



Sejla Garbo

PROOF OF SERVICE

State of California

County of Los Angeles

I certify that I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1900 Avenue of the Stars, Suite 200, Los Angeles, California, 90067.

On April 14, 2023, I served the foregoing document described as the **INTERIM AWARD** on the interested parties in this action as follows:

SEE SERVICE LIST

☐

BY ELECTRONIC SERVICE: I caused the document(s) to be sent to the offices of the addresses via File & ServeXpress Electronic Service pursuant to the terms of the Case Management Order/Pre-Trial Order(s). The transmission was reported as complete and without error.

☐

BY EMAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from krista@adrservices.com to the persons at the email addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

☐

BY U.S. MAIL: I caused such envelope with postage thereon to be placed in the United States mail in Los Angeles, California.

☐

BY FACSIMILE: I caused such to be faxed to the attorneys on April 14, 2023.

☐

BY PERSONAL SERVICE: I caused such envelope to be delivered by hand to the attorneys on April 14, 2023.

☒

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

☐

FEDERAL: I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

☒

BY CERTIFIED MAIL: I caused such envelope with postage thereon to be placed in the United States mail in Los Angeles, California.

Executed on April 14, 2023 in Los Angeles, California by

Krista Butenschoen

Krista Butenschoen

REQUEST FOR CERTIFIED MAIL

Case Name:	Allen, et al. v. Nagel, et al. Case: #22-3255-JJM
Addressee:	Denise Leadbetter, Esq. Thomas Koster, Esq. 870 Market Street, Suite 450, San Francisco, California, 94102
AFFIX LABEL HERE:	7021 1970 0001 5432 0312
Case Manager:	Sejla Garbo & Joanna Barron
Date:	April 14, 2023

REQUEST FOR CERTIFIED MAIL

Case Name:	Allen, et al. v. Nagel, et al. Case: #22-3255-JJM
Addressee:	Curtis Dowling, Esq. 625 Market Street, Fourth Floor, San Francisco, California, 94105
AFFIX LABEL HERE:	7021 1970 0001 5432 0305
Case Manager:	Sejla Garbo & Joanna Barron
Date:	April 14, 2023



Date: April 14, 2023

Service List

RE: ALLEN, et al. v. NAGEL, et al.

ADRS Case No. 22-3255-JJM

COUNSEL

REPRESENTING

Denise Leadbetter, Esq., Thomas Koster, Esq.
KOSTER & LEADBETTER, LLP
870 Market Street, Suite 450
San Francisco, California 94102
denise@kosterleadbetterlaw.com, thomas@kosterleadbetterlaw.com
(415) 713-8680, (415) 680-0023

Representing Claimant, Kent Allen, Jane Lavelle

Curtis Dowling, Esq.
DOWLING & MARQUEZ, LLP
625 Market Street, Fourth Floor
San Francisco, California 94105
curtis@dowlingmarquez.com
(415) 977-0444

Representing Respondent, Lisa Nagel, Amy Thorne