

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 FOR THE COUNTY OF LOS ANGELES

3 DEPARTMENT 72

HON. RUTH A. KWAN, JUDGE

4  
5 RESIDENTS FOR OPEN BOARD )  
ELECTIONS, ET AL., )

6 Plaintiffs, )

7 vs. )

8 PALOS VERDES HOMES ASSOCIATION, )

9 Defendant. )  
10 \_\_\_\_\_ )

11  
12 REPORTER'S TRANSCRIPT OF PROCEEDINGS

13 Thursday, November 30, 2017

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Motion Hearing

1

1 CASE NUMBER: BS 169638  
2 CASE NAME: RESIDENTS V. PALOS VERDES  
3 LOS ANGELES, CALIFORNIA THURSDAY, NOVEMBER 30, 2017  
4 DEPARTMENT 72 RUTH A. KWAN, JUDGE  
5 REPORTER: DAVID A. SALYER, CSR 4410  
6 TIME: 9:00 A.M.

7 -o0o-

8 THE COURT: Schott versus Palos Verdes Home  
9 Association.

10 MR. LEWIS: Good morning, your Honor. Jeff Lewis on  
11 behalf of petitioner.

12 MR. DVEIRIN: Good morning, your Honor. Lewis Brisbois  
13 Bisgaard & Smith, Brant Dveirin and Sara Atsbaha on behalf of  
14 respondent Palos Verdes Homes Association.

15 THE COURT: Have a seat. You'll be a little while.

16 I want to address the first issue, which is your claim  
17 that Schott does not have standing.

18 So let's look at Corporations Code Section 7515.

19 So the code section reads that:

20 "If for any reason it is impractical or  
21 unduly difficult for any corporation to  
22 call or conduct a meeting of its members,  
23 delegates or directors or otherwise obtain  
24 their consent in the manner prescribed by  
25 this article or bylaws or this part, then  
26 the Superior Court of the proper county  
27 upon petition of a director, officer,  
28 delegate or member may order that such a

1 meeting be called," and it goes on.

2 So upon the petition of a director, officer, delegates  
3 or member. Who is the member?

4 Mr. Brant Dveirin?

5 MR. DVEIRIN: Are you asking me?

6 THE COURT: Yes.

7 MR. DVEIRIN: I believe it's undisputed that Mr. Schott  
8 is a member.

9 THE COURT: Okay. And so case law has interpreted that  
10 the real party in interest is the homeowners' association,  
11 okay, the Palos Verdes Association, Homes Association in this  
12 case.

13 So do you agree or disagree that he, in his own name,  
14 could bring this lawsuit, but not on his personal behalf but  
15 on behalf of the home associations, PV Home Associations?

16 MR. DVEIRIN: I disagree with that.

17 THE COURT: So then under the law how could a member  
18 bring a lawsuit?

19 Are you saying a member may never bring lawsuit, then?

20 MR. DVEIRIN: No.

21 THE COURT: So tell me how. Under this section you  
22 tell me how.

23 MR. DVEIRIN: Okay. Okay.

24 THE COURT: Since you agree that he is a member.

25 MR. DVEIRIN: I will say it this way. I will say it  
26 this way.

27 I believe that at the very least they have to comply  
28 with this Court's prior order, which is that the name of this

1 lawsuit, the petitioner in this lawsuit has to be the Homes  
2 Association and signed, verified by the petitioner.

3 And how do I know that? How do I know that?

4 I know that because I just submitted to you in a  
5 request for judicial notice a copy of the petition that was  
6 filed in the Fourth LaCosta case as an example.

7 I also have the example of a petition. That is  
8 Exhibit 1.

9 THE COURT: Is that what you gave me this morning?

10 MR. DVEIRIN: Yes. If you look at the petition that is  
11 in there, you'll see that the proper way to file this petition  
12 as the petitioner is the homeowners' association.

13 And if you look at the verification at the back page of  
14 this petition, it's by the board president.

15 So I do think in compliance with this statute you could  
16 sue in the name of the association, and it has to be signed by  
17 the member.

18 Now, if you look --

19 THE COURT: Okay. So this is quite different than your  
20 argument in opposition to the petition. So I'm -- so what I'm  
21 saying is that if you believe --

22 MR. DVEIRIN: But I'm not done.

23 THE COURT: Okay. Just a moment.

24 MR. DVEIRIN: Yes.

25 THE COURT: I mean, this is one way.

26 So what you're saying is that the title has to say the  
27 name of the association. So it would be Palos Verdes Home  
28 Association, Petitioners, versus Palos Verdes Homes

1 Association. That's what you're saying?

2 And then at the back Mr., is it Schott?

3 MR. LEWIS: Schott.

4 THE COURT: Has to sign a verification similar to the  
5 one that you've attached, dated and signed by him with the  
6 following title, member of the Palos Verdes Home Association.

7 MR. DVEIRIN: I think that --

8 THE COURT: If that form is submitted, you think it's  
9 fine, right?

10 MR. DVEIRIN: I don't think it's fine. I think it's  
11 correct according to the Court's order.

12 The Court's order was very specific that a member of  
13 the Homes Association could have signed the petition and  
14 brought it on behalf of the Homes Association.

15 And you were very clear in your argument that the real  
16 party in interest cited in the Greenback case has to be the  
17 Homes Association.

18 Now, if we look at Exhibit 1, Exhibit 1 to the petition  
19 filed by -- the opening brief filed by counsel, he attaches a  
20 draft position that he sent to the homeowners' association.  
21 And it's written that way.

22 His Exhibit 1 says, here, join in this. We want to  
23 file a petition in the matter of the Palos Verdes Homes  
24 Association.

25 He knew how to do this correctly. He knew what your  
26 order said, and he purposefully didn't follow it. And we have  
27 to ask ourselves why. And that's really interesting.

28 THE COURT: Is it because the home association did not

1 want itself to be sued, right?

2 MR. DVEIRIN: No. It's because of the fact that he  
3 knows that the bylaws of the Homes Association, which are  
4 before you both as Exhibit C to the Sid Croft declaration and  
5 Exhibit 12 -- and because it's not very clear, I brought a  
6 very clean copy for you to take a look at.

7 THE COURT: Oh, good.

8 MR. DVEIRIN: May I approach?

9 THE COURT: Yes.

10 MR. DVEIRIN: If you look at the bylaws on page 4, you  
11 will see there are Articles 3 and 4 of the bylaws. We address  
12 this in our brief.

13 Their petition fails to allege any basis for Schott to  
14 be authorized by the board.

15 And what this says here is that --

16 THE COURT: Wait a second.

17 MR. DVEIRIN: Hang on. Can I -- I'm sorry.

18 THE COURT: No. By the plain reading of 70 -- I can't.

19 MR. LEWIS: 7515.

20 THE COURT: I want to go back because of your shifting  
21 to authorizing by the board.

22 MR. DVEIRIN: No. What I'm saying is --

23 THE COURT: What I'm reading is that a member could  
24 bring the lawsuit irrespective of the board's authorization.

25 MR. DVEIRIN: I agree with you that's what it says.

26 THE COURT: Thank you. Thank you.

27 MR. DVEIRIN: But I also believe based on the authority  
28 I cited in my brief that that statute doesn't override the

1 authority that the bylaws grant unless he can point to a case  
2 law that says otherwise.

3 THE COURT: I think it's your burden to produce the  
4 case law.

5 MR. DVEIRIN: No, I'm saying -- I cited a case that  
6 uses the exact same. The case I cited, the Sealand case,  
7 quotes the exact same bylaw you have before you in that  
8 corporation's bylaws.

9 And what this says in Article 3 and in 4(c), is that in  
10 order to take any action by the board, you need three  
11 directors.

12 THE COURT: Right. But the thing is that's only if the  
13 action is only if the board is taking the action. It's a  
14 member of the association who is bringing the petition.

15 MR. DVEIRIN: Right. But the board is empowered to  
16 authorize a member to file a petition.

17 THE COURT: But the thing is, is there anything in  
18 7515(a) that says that in order for a member to file a  
19 petition it has to be authorized by the board?

20 MR. DVEIRIN: No. But -- but -- the "but" is I don't  
21 think -- you have to read into this the term "manner  
22 prescribed by its articles or bylaws," which is in 7515.

23 And the bylaws don't go away.

24 This is important, your Honor.

25 THE COURT: Just a second. Just a second. Just a  
26 moment.

27 MR. DVEIRIN: Okay.

28 THE COURT: No, no, no.



1           It says:

2           "If for any reason it is impractical or  
3           unduly difficult for any corporation to  
4           call or conduct a meeting of its members,  
5           delegates or directors will otherwise  
6           obtain the consent in the manner prescribed  
7           by its articles or by law."

8           That is talking about when the action could be brought,  
9           okay? Not that a member who chose to bring this action in the  
10          name of the real party in interest has to now show somehow  
11          they have sought the board's pre-approval to sue the  
12          association. No. I don't read it that way.

13          Because the whole purpose of this lawsuit is that  
14          they're saying that there has not been any election in years.

15          MR. DVEIRIN: No.

16          THE COURT: Because of the lack of quorum. We need to  
17          change quorum. And when you have a lack of quorum, basically  
18          you have no election, no real election as the bylaw  
19          contemplates there would be.

20          So, therefore, I as a member would like to ask the  
21          Court to make certain changes.

22          Now, I do not read it, counsel, as meaning that that  
23          number now before bringing a lawsuit in the name of the real  
24          party in interest would then have to seek the approval of the  
25          PV Homes Association.

26          MR. DVEIRIN: No, it doesn't --

27          THE COURT: It's almost analogized a little bit with  
28          derivative action. It's almost like a futile act, okay?

1 MR. DVEIRIN: It's not futile, because the way this is  
2 set up, what's really difficult for the association to get its  
3 hands around -- and this gets to the other case as well --  
4 there's a way to deal with the sale of the parkland that you  
5 don't like and there is a way to deal with the board that you  
6 don't like. It's called getting on the board. It's called  
7 running for an election.

8 THE COURT: Exactly. That's why they say I've been  
9 trying to run, but it appears that the bylaw itself is an  
10 impediment. Because we have -- excuse me. But that goes to  
11 the merit, okay? That goes to the merit.

12 I'm talking about stand, okay? And we'll go to the  
13 merit later. Don't skirt that around.

14 MR. DVEIRIN: I won't skirt that around.

15 What I'm saying is I don't believe -- I believe this is  
16 the legal issue that will be decided here or elsewhere -- that  
17 notwithstanding the fact that this statute says that a member  
18 can sign a petition, number one, he has to do it in the right  
19 way.

20 I'm the real party in interest. My client is the real  
21 party in interest. You just sign the petition. You are not  
22 the petitioner.

23 That's mistake number one. He should be sent packing.

24 The question is did he get leave to amend. He didn't  
25 follow the Court's order. He didn't follow the Greenback  
26 case. He didn't follow the bylaws. For whatever reason you  
27 want to choose, he has not done it in the way you required it.

28 That should send him packing for another petition.

1 THE COURT: Well, first of all, you said that I  
2 dismissed his prior petition. I never dismissed. I gave him  
3 leave to amend. I just want you to know that.

4 In your argument there are a lot of --

5 MR. DVEIRIN: I misspoke. You gave him leave to amend.  
6 He needs to do it correctly.

7 What I'm explaining to you is the reason that he  
8 submits a petition that reads like the one in the request for  
9 judicial notice as in Exhibit 1 is he knows how to do it  
10 correctly.

11 He didn't do it correctly and he didn't plead that  
12 Schott had the authority to be the petitioner. If he's going  
13 to do it the way that he's doing it, he needs to plead that at  
14 least Schott had the authority --

15 THE COURT: I actually don't like the way he headed it,  
16 I have to tell you.

17 MR. DVEIRIN: And if you --

18 THE COURT: It should have been almost like a trust  
19 being sued or a trust bringing a lawsuit.

20 MR. LEWIS: In Re matter of?

21 THE COURT: No. It can be L. Ried Schott, member of  
22 da, da, da, on behalf of the real party in interest.

23 MR. DVEIRIN: We --

24 THE COURT: Excuse me. Don't interrupt me, counsel. I  
25 do not interrupt you.

26 MR. DVEIRIN: Sorry.

27 THE COURT: But I have to say that although the heading  
28 itself may be questionable, but you don't just look at a

1 heading.

2 His first paragraph says, "Petitioner Schott, L. Ried  
3 Schott on behalf of the behalf of the respondent and real  
4 party in interest, Palos Verdes Home Association, hereby  
5 alleges as follows."

6 So I think that to say he has to do the heading  
7 correctly is form over substance.

8 MR. DVEIRIN: I --

9 THE COURT: Wait. Just a moment. Let me look at the  
10 verification.

11 I mean, it is nicer if Mr. Lewis signed it as attorney  
12 for petitioner Schott, on behalf of the Palos Verdes Home --  
13 the real party in interest?

14 Because your client isn't Schott. He's just bringing  
15 it -- he is as a member on behalf of the real party in  
16 interest.

17 Would it be nice if he signed his verification as  
18 member bringing this lawsuit on behalf of the real party in  
19 interest?

20 MR. LEWIS: I'm sorry, your Honor, I thought it was  
21 rhetorical.

22 Yeah, I clearly could have been more precise.

23 I will say Brant and I have been litigating against  
24 each other since 2012. It just seemed counter intuitive to  
25 sign my name on behalf of the PV Homes Association when  
26 they're my adversary. It just felt --

27 THE COURT: You deliberately did it this way. Is that  
28 what you're saying?

1 MR. LEWIS: Your Honor, I thought that the language --

2 THE COURT: Okay. Is that what you're saying? Be  
3 honest.

4 MR. LEWIS: I made a mistake. I should have done that.

5 But, your Honor, I relied on the language in the first  
6 page. I thought that was sufficient when I said, "Petitioner  
7 Schott hereby alleges on behalf of the real party in  
8 interest."

9 And in the caption PV Homes Association is identified  
10 as the real party in interest. So I thought that was  
11 sufficient.

12 If I had to do it all over again, I would have added  
13 those words to my signature block. I see the Court's  
14 reasoning.

15 THE COURT: The association are not necessarily the  
16 directors and the board members.

17 The association encompasses all members. So I don't  
18 know why just because you have been in litigation with the  
19 association itself should preclude you from doing it so that  
20 it wouldn't be subject to challenges.

21 You're the one that tells me time is of the essence.

22 And I specifically told you how I needed it done.

23 Sit down.

24 So without ruling on the standing issue at this point,  
25 because to me it's really form over substance, because I'll  
26 probably allow them to amend if I think the amendment -- that  
27 they didn't do it correctly.

28 But I do believe that if they do it correctly, they

1 have standing. I disagree with you.

2 So let's go to the merits.

3 MR. DVEIRIN: Okay. Do you want me to address that?

4 THE COURT: Why don't we take a five-minute break.

5 Okay?

6 MR. DVEIRIN: Thank you.

7 (Recess.)

8 THE COURT: All right. We are back in session.

9 So let's move on to the merits of the petition, okay?

10 I have a question. Just a moment.

11 Article 5, section 1.

12 MR. DVEIRIN: Of the bylaws?

13 THE COURT: Yes.

14 How do you interpret this?

15 "At such annual meeting of the members,  
16 directors for the ensuing year shall be  
17 elected by secret ballot to serve as herein  
18 provided and until their successors are  
19 elected. If, however, for want of a quorum  
20 or other cause a member's meeting shall not  
21 be held on the date above named or should  
22 the members fail to complete the elections  
23 or such other business as may be presented  
24 for their consideration, those present may  
25 adjourn from day-to-day until the same  
26 shall be accomplished."

27 So the last sentence, "those present may adjourn from  
28 day-to-day until the same shall be accomplished."

1 MR. DVEIRIN: What section are you reading from? What  
2 article, what section?

3 THE COURT: Article 5, Meetings.

4 MR. DVEIRIN: Let me get there.

5 Do you want to hear from me?

6 THE COURT: I want to hear from both of you, but since  
7 you didn't address that too much in your opposition, I'd like  
8 to hear from you.

9 MR. DVEIRIN: Yes.

10 Well, if you look at the Sid Croft declaration,  
11 paragraph 11, page 4, of his declaration --

12 THE COURT: Okay. I don't care about the declaration.

13 MR. DVEIRIN: Yes.

14 THE COURT: I want to know how you legally believe it  
15 should be interpreted.

16 I don't want to know what your clients' interpretation  
17 is, okay?

18 Thank you.

19 MR. DVEIRIN: Yes. I believe the operative word is  
20 "may" in the last sentence, in that it's up to the discretion  
21 of the board of directors.

22 They could adjourn it and they can do it the way that  
23 they do it.

24 There are other provisions that provide for that.  
25 There are outlines --

26 THE COURT: Okay. Slow down. Okay?

27 So they could adjourn it from day-to-day. And what  
28 does that mean, adjourning it from day-to-day?

1 MR. DVEIRIN: I'm not sure what it means, but I think  
2 it means that they can adjourn it from day-to-day, meaning  
3 that they could continue to carry on their business and if  
4 they choose to have -- to carry on their business with the  
5 existing board until they can accomplish the things that are  
6 in that paragraph at their discretion.

7 THE COURT: Including the election.

8 So they could, for instance, extend the election  
9 period.

10 They could do other things, right?

11 MR. DVEIRIN: I believe the operative term "may"  
12 puts --

13 THE COURT: No. I understand that an operative term.  
14 I understand that.

15 So they could, if they wish. Am I correct to say let's  
16 extend the election to see if we can get more people  
17 participate?

18 Let's send out letters to say, hey, we don't have  
19 enough quorum from you guys. We need to elect a new board.  
20 You know, it's that time of the year. We only got 1,700 votes  
21 and we need at least 2,700 so that we can elect a new board.  
22 Please come on, guys. It's been five years since we have had  
23 a new board.

24 Is that -- they could do that if they want, right?

25 My reading of this paragraph --

26 MR. DVEIRIN: I could not be more clear that a  
27 homeowner association's discretion lies with the board and  
28 they can pretty much do what they want as long as it complies



1 with the bylaws.

2 I don't find what you're saying to be a reasonable way  
3 to handle it, but that would be up to the board. The board  
4 has a right to act not reasonably.

5 THE COURT: But what I'm saying is the board has a  
6 right to not act reasonably. That's what you're saying?

7 MR. DVEIRIN: That's right.

8 THE COURT: So are you conceding that they have not  
9 been acting reasonably?

10 MR. DVEIRIN: No.

11 THE COURT: So you don't like the way I propose.

12 I'm not asking whether you like it or not. I just want  
13 to know that what I'm saying is something that could be done  
14 under this paragraph; am I correct?

15 MR. DVEIRIN: I have been consistently arguing both in  
16 the prior case and in this case that the business judgment  
17 rule applies to the corporate actions of the board in that it  
18 goes so far that in the interest of the Homes Association the  
19 board of directors can even in some instances violate their  
20 rules in order to preserve the existence of the homeowners  
21 associations and do the business of the Homes Association.

22 The discretion of the board is paramount in any  
23 governing homeowners' association, this one included.

24 THE COURT: That's not my question.

25 MR. DVEIRIN: I'm answering your question. I'm saying,  
26 yes, they could do that.

27 THE COURT: They could do what I'm suggesting. Okay.  
28 That's all I want to know.

1 I'm not saying that -- that's all I want to know,  
2 counsel.

3 MR. DVEIRIN: You don't understand who you're dealing  
4 with when you're dealing with Mr. Lewis.

5 Because in the other case he picks out rules and says,  
6 oh, you violated this.

7 And in the whole other case I'm saying no. The board  
8 of directors has the business judgment to even at times engage  
9 in what you consider to be a violation because they are the  
10 ultimate arbiter of what these rules mean and how they are to  
11 be interpreted and it's not your place.

12 What it is your client's place to do is to participate  
13 and try to get elected. I don't doubt that.

14 You haven't done a very good job of that, and most of  
15 the association doesn't agree with your client, but on the  
16 other hand your job is not to run to the Court --

17 THE COURT: But don't you think the association members  
18 should have a say in saying we don't agree with your client,  
19 and at least boot them out of there and say don't even try?

20 MR. DVEIRIN: No. What I'm saying is that --

21 THE COURT: And maybe have some votes counted.

22 MR. DVEIRIN: -- jumping in and asking Judge Meiers or  
23 Judge Kwan to step in place of the board of directors and make  
24 that decision for the board. What you should do --

25 THE COURT: I have no intention of stepping in place of  
26 any board of directors. I'm just deciding whether the quorum  
27 should be lowered, okay? That's all that has been asked of  
28 me.

1           He put a lot of other stuff in his brief that I'm not  
2 going to touch.

3           That's actually not something that I think I could do.

4           MR. DVEIRIN: But I think you hit on the operative  
5 point --

6           MR. LEWIS: Does the Court want us to be heard on that?

7           THE COURT: No. Sit down, counsel.

8           MR. DVEIRIN: No. I think you're hitting on the  
9 operative pointed of lowering the quorum. I think that's what  
10 this is about.

11           When we submitted the joint statement regarding the  
12 settlement, we have agreed -- we are in the power of the board  
13 to make a lot of changes that don't violate the board -- the  
14 rules of the bylaws because we need a two-thirds vote for  
15 that.

16           So, for example, in this upcoming election which is in  
17 January, they wanted more mailings. We're sending out three  
18 mailings.

19           We are actually sending out and have sent out a mailing  
20 that says your ballot is coming. Look for it.

21           We sent out the ballot. I have examples of that.

22           Here's your ballot.

23           And we have another mailing going out in a few days  
24 that's going to say don't forget to vote. Those are three  
25 mailings.

26           THE COURT: How about do what I do. If you don't have  
27 enough quorum, extend it and say, you know what? We need a  
28 really election here. You know, that is actually not a bad

1 thing.

2 MR. DVEIRIN: Look, I don't disagree with you.

3 THE COURT: I see some of your board members here. So  
4 I hope they're listening to me.

5 MR. DVEIRIN: Yeah, they are.

6 THE COURT: Because you know why? I'll tell you why.

7 The reason is because it's not whether it is true that  
8 these old guards are trying to safeguard their own position  
9 and exclude these new people from coming in and shaking things  
10 up.

11 Whether their allegation is true or not is irrelevant.  
12 It's the appearance.

13 And if you don't have -- if you're unable to have an  
14 election year after year after year because it's going to give  
15 the appearance that what they're doing is to safeguard their  
16 own position and not giving other people an opportunity and a  
17 voice to be heard.

18 You know, this is irrespective of the allegations. I'm  
19 only interested in knowing and understanding whether the board  
20 has done everything that they could to bring -- to get people  
21 to participate in the election or have they not.

22 That's the reason why -- but, you know what? At some  
23 point it becomes irrelevant because if year after year you  
24 don't have enough members participating, there's something  
25 wrong with the system. Because the system is not meant for  
26 existing board members to keep appointing new board members  
27 they like that are going to toe the line and think the way  
28 they think. Okay?

1 I'm just going to tell you that.

2 MR. DVEIRIN: I get it and I hear you.

3 THE COURT: Okay. And they should be hearing me.

4 MR. DVEIRIN: And they hear you.

5 But let me address it this way. And this is what I  
6 wanted to make a point.

7 The legislative history that enacted this 715 that's  
8 quoted in the Greenback case says:

9 "Due to poor record keeping, inactivity for  
10 a period of time or other reasons, some  
11 nonprofit corporations are unable to obtain  
12 a quorum of members or directors,  
13 accurately identify their members or  
14 directors or comply with various provisions  
15 of their articles or bylaws. The proposed  
16 law allows a corporation upon obtaining  
17 court approval to extricate itself from the  
18 situation and restore regularity in its  
19 organizational structure and operations."

20 This is something that the corporation uses when it's  
21 not functioning.

22 And if you look at the Greenback case --

23 THE COURT: I don't think, counsel -- okay. I'm not  
24 done. You're putting -- you're moving a little ahead of where  
25 I'm going, okay?

26 You can still make that argument later, but I'm  
27 actually still on this track of this Article 5, okay?

28 MR. DVEIRIN: Sorry. My apology.

1 THE COURT: Is there anything in the bylaw that says  
2 that if there's no election that somehow the existing board is  
3 reelected?

4 MR. LEWIS: I don't see any express language --

5 THE COURT: I just want to know. I'm asking him, not  
6 you.

7 MR. DVEIRIN: It says in Article 4, Section 2.

8 THE COURT: Just a moment.

9 MR. DVEIRIN: Article 4, Section 2 on page 4 of the  
10 document I handed you.

11 THE COURT: Section 2? Oh, here. I see it.

12 MR. DVEIRIN: If no quorum is present.

13 THE COURT: Give me a chance to read that article,  
14 okay?

15 So am I correct to read this to mean there are five  
16 board of directors?

17 MR. DVEIRIN: Yes.

18 THE COURT: And then one only sits for one year, two  
19 sit for two years and two sits for three years, right?

20 MR. DVEIRIN: Right. It's staggered, yes.

21 THE COURT: All right. So when there is a vacancy --  
22 you don't need to stand. Just --

23 MR. DVEIRIN: Okay. Sorry.

24 THE COURT: No, no, it's okay. I'm giving you  
25 permission to sit since this as long hearing.

26 MR. DVEIRIN: Yes, your Honor.

27 THE COURT: So when there's a vacancy in the board,  
28 okay, then the remainder of the board may appoint such a

1 person until the next annual meeting for the regular election  
2 of the board or a special meeting, if they choose to call one,  
3 and then that election would be for the unexpired portion of  
4 the term of that board member if it's a special meeting.

5 That is Section 2 that you've quoted me.

6 MR. DVEIRIN: Uh-huh. Yes.

7 THE COURT: So my question is this. When there is a  
8 meeting, an annual meeting where board members are to be  
9 elected, and there's no quorum, is there anywhere in this  
10 article that says the existing board member is automatically  
11 elected?

12 Because if there's no quorum for election, nobody gets  
13 elected.

14 MR. DVEIRIN: No. The vacancies --

15 THE COURT: Wait. The --

16 MR. DVEIRIN: My understanding is the vacancies are  
17 filled by the remaining directors.

18 In other words, it's their discretion to fill the  
19 vacancies and they add people in. Sometimes people leave, but  
20 that Article 4, Section 2 says, "Vacancies in the board of  
21 directors shall be filled by the remaining directors," by a  
22 majority vote of the directors.

23 THE COURT: So then what happens here is that they vote  
24 to keep themselves in.

25 MR. DVEIRIN: Sometimes, yes. Most of the times, yes.  
26 Not all the times.

27 THE COURT: But most of the time. Ninety-nine percent  
28 of the time.

1 MR. DVEIRIN: I don't know if it's 99 percent. Even  
2 since I have been representing them there have been a couple  
3 members come and go on the board.

4 THE COURT: Well, that was probably vacancies because  
5 of in the middle of a term.

6 MR. DVEIRIN: The one I'm thinking of was a vacancy in  
7 the middle of a term.

8 THE COURT: Okay. I am talking about vacancies.  
9 Because each year during the election year how many people  
10 usually get elected?

11 MR. DVEIRIN: Five.

12 THE COURT: This coming election, how many vacancies do  
13 we have?

14 MR. DVEIRIN: Okay. I have it here.

15 THE COURT: I told you it was going to be a long  
16 hearing.

17 MR. LEWIS: No problem, your Honor. I appreciate the  
18 Court reading the papers.

19 THE COURT: I expect this to be appealed by one side or  
20 the other no matter what my decision may be.

21 MR. DVEIRIN: The --

22 THE COURT: Excuse me -- so I think the record should  
23 be very clear, so that there is a very clear record, because  
24 some of the information that I am seeking is really not part  
25 of the record in your brief.

26 MR. DVEIRIN: Yes. And I would like to address that at  
27 some point. But a copy of the current ballot that's already  
28 out shows nine people running for the board. Five are



1 incumbent board candidates and four are candidates nominated  
2 by petition.

3 You are allowed to vote for five candidates only. So  
4 it's a five-member board and there are four people that are  
5 running that are nominated by petition and five incumbent  
6 directors that are running.

7 And so there's nine on the board.

8 THE COURT: All right. So the election for next year  
9 is not staggered. So every one is in the election. Is that  
10 what you're saying?

11 MR. DVEIRIN: So my understanding is that if you get a  
12 quorum and the votes then are counted --

13 THE COURT: Can you just go back for a second?

14 MR. DVEIRIN: Yes.

15 THE COURT: So for next year, at least, all five board  
16 of directors terms are up?

17 MR. DVEIRIN: Yes.

18 THE COURT: So if they are not elected, do they get to  
19 vote themselves back in?

20 MR. DVEIRIN: If there are vacancies on the board of  
21 directors, they are filled by the remaining directors.

22 So if they don't have a quorum, if there's not a  
23 quorum -- if they have a quorum --

24 THE COURT: Okay. When does the term expire? The  
25 expiration of the term is when?

26 MR. DVEIRIN: At the end of an entire year, unless  
27 there was a quorum and they're elected for a staggered term.  
28 Then their terms could be three years, two years, one year.

1           THE COURT: So theoretically the term expires the end  
2 of the year. So when there's no quorum for election the  
3 following year, these expired term board of directors, even  
4 though they were not reelected, they can vote themselves.  
5 They can vote themselves back in? That's what you're saying?

6           MR. DVEIRIN: I'm saying they have to vote themselves  
7 back in because there is no quorum. That unless they do the  
8 day-to-day thing it's at their discretion.

9           THE COURT: Okay. I'm go through this exercise for the  
10 benefit of the record and also for the existing board members  
11 who are here to hear from an outsider's point of view how that  
12 may seem and how that may look. Okay?

13           So that when you conduct your next election, you will  
14 make sure that it's done accordingly so that maybe you would  
15 want to -- even if you don't have a quorum -- do what I  
16 suggest, to extend the election period and urge all homeowners  
17 to put in -- to participate up to the point where you can get  
18 a quorum.

19           MR. DVEIRIN: We have a vigorous campaign ongoing for  
20 this current election that's coming up in January, both on  
21 behalf of the board and on behalf of people that are  
22 challenging the board.

23           There are articles. There are banners. There are  
24 mailing lists going out.

25           We're getting reminders from the petition candidates to  
26 vote and we're sending out three mailings that relate to this  
27 election.

28           There's an argument advanced in their brief that there

1 were quorums reached in 2007 to 2009 and they say it's because  
2 of mailings and phone calls. Where we're making mailings and  
3 we're putting up banners and we have a Dropbox in the Homes  
4 Association and we're sending out three mailings.

5 THE COURT: And also the threat of this petition helps.

6 MR. DVEIRIN: I think it did help.

7 THE COURT: Thank you.

8 MR. DVEIRIN: I would say this, though. My argument to  
9 them all along has been that I need a two-thirds vote to  
10 change the bylaws. I don't need a two-thirds vote to put in  
11 three mailings, to add a Dropbox, to do all kinds of things  
12 that are not --

13 THE COURT: But you're the one who tells me if they  
14 want to even violate their own bylaw, they could.

15 MR. DVEIRIN: No. I'm saying that they could violate  
16 it in -- they might be able to violate the bylaw in the other  
17 case in a small way to preserve more usable property and to  
18 dispose of a hillside property to a particular owner in order  
19 to settle litigation to which you're bound by the settlement  
20 agreement if you're a member of the association.

21 That I agree with.

22 I don't agree that you can wholesale change the bylaws  
23 without on the association coming to court as an association  
24 did in the Greenback case and as an association did in the --

25 THE COURT: I'm not here to deal with the prior  
26 litigation.

27 The motives of the people that are trying to seek to be  
28 elected is irrelevant to me.

1 MR. DVEIRIN: Yes.

2 THE COURT: It's the process that I am interested in.

3 MR. DVEIRIN: I'm interested in the process, too.

4 My only argument is that process is not beyond the  
5 reach. It hasn't been beyond the reach of anybody else over  
6 the hundred years that really --

7 THE COURT: I have to admit that kind of finding in  
8 order to change the quorum?

9 MR. DVEIRIN: No, no. I'm saying I disagree with their  
10 evidence. I don't think it's authenticated. But on the other  
11 hand, they do make the argument that for the last hundred  
12 years we have 50 percent quorums.

13 For the last -- 1981 to 2017, 37 years, there were  
14 18 quorums.

15 My point is that when you look at 7515, and that it  
16 says that something is unduly difficult, if you look at the  
17 case law on this, it's pretty clear that an association runs  
18 in to Greenback and says they have changed the whole  
19 non-profit law, and therefore we need to bring our rules up to  
20 speed.

21 It's a small petition, three or four pages, just like  
22 the one I sent you. Not a lot of exhibits. It's not designed  
23 for the back and forth factual argument we're having here.

24 That law was designed for an association to come in and  
25 say, hey, I can't function. I can't have my meeting. I can't  
26 get anything done. I have to catch up with a new law. Those  
27 are what LaCosta and those are about. We are functioning --

28 THE COURT: You know what? Are we going back to the

1 standing issue again?

2 MR. DVEIRIN: No, no. We're going to merits.

3 What I was trying to say to you is that when you look  
4 at the legislative history and you look at the rulings in  
5 Greenback and the Fourth LaCosta case, that the reason that  
6 the association is the real party in interest is that that law  
7 is designed as it says in the actual statute. If it's  
8 impractical or unduly difficult to conduct the business of the  
9 association in the manner prescribed by its articles and  
10 bylaws, you can go in.

11 And if you look at the cases -- and the reason why  
12 they're brought in the name of the association is because the  
13 cases give you a clue.

14 In Greenback they were saying, hey, the non-profit law  
15 was just amended. Our stuff is not compliant with the new  
16 law. We need to amend all the bylaws. So we bring in a  
17 petition in the name of the association. It's three or four  
18 pages long.

19 I pulled the appellate brief. The appellate briefs are  
20 seven pages long each in a three-page reply.

21 The amount of paper that you have filed in this case is  
22 because there is a disagreement over what it means to comply  
23 to the bylaws.

24 That's not what this petition under 7515 is for. It's  
25 for when you have a catastrophic failure of a corporation to  
26 exist, to hold itself --

27 THE COURT: What about catastrophic failure of the  
28 board to recognize that if you don't have a quorum year after

1 year for election, maybe it's time to examine how they conduct  
2 the election or lower the quorum.

3 And if they don't want to do it, maybe the law says a  
4 member could bring that action. And this is what they're  
5 doing, isn't it?

6 MR. DVEIRIN: I think the correct interpretation of  
7 this statute in line with the legislative history and the case  
8 law is that if this corporation couldn't have an annual  
9 meeting -- we always have an annual meeting -- if we didn't  
10 have a system to run the art jury, which is all the board of  
11 directors does nowadays is run the art jury. The city is in  
12 charge of maintaining the parklands, not us. We gave that up  
13 when we couldn't pay the property taxes. That's in the  
14 history.

15 If we weren't functioning at all and we were completely  
16 falling apart -- this is the difficulty I've had with this law  
17 ever since the beginning -- I actually think there's an  
18 argument that if you can't hold a meeting and there is no  
19 board of directors showing up, maybe a member can come in  
20 without being authorized by the board and bring that petition.

21 This is not a catastrophic situation. You know how I  
22 know? It's because they filed a petition with 15 exhibits,  
23 and I opposed with 15 exhibits. That's not what this  
24 shortened ex parte petition process is for.

25 What this process is for is when you have a complete  
26 failure to abide by your bylaws and your corporation is  
27 falling apart, the corporation can run in, or somebody on its  
28 behalf, and repair the situation.

1           We don't need to be repaired. We have an annual  
2 meeting. We've had quorums 50 percent of the time.

3           Talking to my clients, it's the issue.

4           In other words, there were some years ago where we said  
5 we're going to do an assessment.

6           THE COURT: You know what? I'm going to stop you and  
7 interrupt you for just a moment.

8           MR. DVEIRIN: Okay.

9           THE COURT: If that's the case, then, boy, whoever  
10 wants to be a part of the association, whoever wants to own a  
11 condo, whoever wants to be part of a co-op if you can have a  
12 board that could run itself, violate some terms of law, the  
13 bylaws that the lawyer tells you that you could, and then  
14 forbid somehow it's big enough so that you don't generate  
15 enough interest for people to vote except for the few people  
16 that cares, and you somehow always stack your own board with  
17 your friends and reelect yourself year after year --

18          MR. DVEIRIN: I --

19          THE COURT: Excuse me.

20          MR. DVEIRIN: I live in the Westwood Holmby Homeowners  
21 Association, which is similar to this.

22          THE COURT: That's exactly what you're trying to tell  
23 me. I think -- I'm going to tell you something. By making  
24 this argument, this isn't advancing their case. It's making  
25 them look a little bit better.

26          MR. DVEIRIN: My point is that we know -- you know by  
27 reading the two cases and by looking at the legislative  
28 history that the type of stuff that this thing was designed to

1 deal with is a complete failure of a corporation to operate.  
2 That's not what we have here.

3 We have a group of people who are arguing that we  
4 should have a quorum more often.

5 And I'm saying we have a quorum 50 percent of the time  
6 even based on their own evidence.

7 THE COURT: That's not true.

8 Fifty percent of the time from the inception of this  
9 association to now. But my understanding is that when this  
10 association was formed, they were still selling lots for  
11 people to build.

12 So it was the developer that owned it and so the  
13 developer could wholesale vote on behalf of all those lots.  
14 So you have a quorum.

15 But now I'm talking about once it was fully developed,  
16 can you say there was 50 percent?

17 MR. DVEIRIN: Yes, because they say in their papers --

18 THE COURT: You know what? Let's get all the records.  
19 Let's get all the records.

20 I would like to see them.

21 MR. DVEIRIN: Yeah. Because they say between 1981 and  
22 2017, which is 37 years -- this is theirs -- and I believe  
23 paragraph 18.

24 THE COURT: So now you don't want to dispute their  
25 evidence?

26 MR. DVEIRIN: No, I'm not. I'm disputing their  
27 evidence.

28 But I'm saying by their own admission over the last 37



1 years they've gotten 18 quorums.

2 THE COURT: I'm going to tell you where I'm going.

3 If the board doesn't make a quorum this time, I'm going  
4 to lower it. I'm not going to lower it to 25 percent. That's  
5 way too low.

6 I'm not going to tell you what I'm thinking.

7 Excuse me.

8 In the interim I'm going to ask you to amend your  
9 petition to do what I tell you you need to do and I'm going to  
10 hold this hearing after you amend it next year.

11 Hopefully by then the election has taken place and  
12 we'll see if the board can be more conscientious in bringing a  
13 quorum here.

14 I think that the board has mighty power here. And if  
15 they want to encourage people to go vote, I think they will.

16 If they need to extend the election period to get  
17 enough members to vote, I think they can do that as well.

18 MR. DVEIRIN: I think they can do a lot of things.

19 I just wanted to bring up one example.

20 THE COURT: You've been their lawyer. So I don't know.  
21 You haven't been kicking them to do what they need to do?

22 MR. DVEIRIN: No.

23 No, in fact --

24 THE COURT: Or they don't want to listen to you. You  
25 don't need to disclose that.

26 MR. DVEIRIN: They actually listen to me.

27 THE COURT: I'm being facetious.

28 MR. DVEIRIN: And I would say that I don't need to kick

1       them.

2               But I was going to say that I listen to them. And what  
3       they say to me is that in a period much time when they were  
4       going to do an assessment and they sent out a notice to the  
5       homeowners and said we have to do an assessment unless  
6       everybody pays, like, 50 bucks, they get a response of  
7       95 percent.

8               What I'm saying to you is and what they're saying to me  
9       is that when there are issues that the people care about, they  
10      reach a quorum.

11              It's not that these people aren't trying hard. It's  
12      that they don't have an issue that the membership cares about.

13              Now, it may be that if they beat the bushes, they can  
14      get a quorum. I'm not -- I don't know enough about that  
15      because they are in charge of the association.

16              I've told them it's in their interest to have a quorum.

17              THE COURT: Because most people don't want to rock the  
18      boat.

19              MR. DVEIRIN: No, I get it.

20              But what I'm saying is there are times when we get a  
21      quorum and it's because of something that membership cares  
22      about.

23              THE COURT: Because it hits their pocketbook. I  
24      understand.

25              But what I'm also saying is that, you know what, let  
26      there be an election. Let there be a quorum. Let there be a  
27      vote.

28              MR. LEWIS: Your Honor, may I join in this request for

1 judicial notice and ask the Court to take judicial notice of  
2 this document that Brant offered this morning?

3 THE COURT: Of which one?

4 MR. DVEIRIN: You can join in it.

5 MR. LEWIS: It's from this Greenback case. And the  
6 Greenback case --

7 MR. DVEIRIN: No. It's from the Fourth LaCosta case.  
8 Excuse me. I'm sorry.

9 MR. LEWIS: Where they held the election open for  
10 30 days to get more votes.

11 I think it would be helpful for the Court to see this  
12 document.

13 MR. DVEIRIN: That's fine. And I know that they did  
14 that.

15 That's because in that case they had a 75 percent  
16 quorum and they were trying to show that no matter what they  
17 did --

18 THE COURT: Counsel, I don't care what they want to do.  
19 I already told you what my indication was.

20 MR. DVEIRIN: No, I get it.

21 THE COURT: Excuse me. I'm going to conclude the  
22 hearing.

23 I have a trial this afternoon coming back.

24 So I am going to tell you that my only role here, if  
25 I'm doing anything at all, is to determine whether I want to  
26 lower the quorum, and if so to what amount, to what point.

27 As far as every other remedy that you're asking for,  
28 no. You're asking me to change the bylaws? No.

1           Are you asking me to do X, Y and Z with the bylaw? The  
2 answer is no.

3           The section does not allow me to do that. I'm very  
4 plain and clear, okay?

5           MR. LEWIS: May I be heard very briefly?

6           THE COURT: No. I want you -- right now I want you to  
7 amend your petition.

8           MR. LEWIS: Understood.

9           THE COURT: How long do you need?

10          MR. LEWIS: I need one week, your Honor.

11          THE COURT: Okay. I just wanted to have this  
12 discussion for everybody's benefit. That's the reason why I  
13 don't want you to be heard further today. Okay?

14          MR. DVEIRIN: It's helpful, thank you. Seriously.

15          THE COURT: Just so it would be helpful for the right  
16 ears and the right audience, I just want to give you a sense  
17 of where I'm going.

18          MR. DVEIRIN: Thank you, your Honor.

19          THE COURT: But I want you to amend the petition to  
20 conform to my prior ruling, counsel.

21          Is that clear?

22          MR. LEWIS: Understood, your Honor.

23          THE COURT: So the today is 30th.

24          I'll give you until December the 8th. All right?

25          MR. LEWIS: Thank you, your Honor.

26          THE COURT: And let's have a hearing on the amended  
27 petition.

28          MR. DVEIRIN: The election is on the 9th, the 9th of

1 January.

2 THE COURT: I'm going to be gone from the 17th through  
3 the 27th.

4 Would the parties agree that the briefs that have been  
5 filed so far may be applicable to the amended petition so that  
6 we don't need new briefing?

7 MR. LEWIS: I think it might be helpful.

8 Yes, your Honor. I think it might be helpful to have a  
9 one-page declaration from counsel on the results of the  
10 election.

11 THE COURT: Oh, yes. Except that I will allow you to  
12 each have three pages to tell me what happened in the  
13 election, whether you have a quorum, and if you didn't how the  
14 board has dealt with it. Okay?

15 And let's have -- would you both stipulate that the  
16 brief that's been filed thus far will apply to the amended  
17 petition?

18 MR. LEWIS: I do.

19 MR. DVEIRIN: Yes. Yes.

20 THE COURT: Okay. Is that a yes?

21 MR. LEWIS: Yes, absolutely, your Honor.

22 THE COURT: Okay. So let me give you a date to come  
23 back.

24 And to the extent that either of you plan to order a  
25 transcript, make sure I get a copy.

26 MR. DVEIRIN: Yes, your Honor.

27 I have a very responsible court reporter. Used to be  
28 with the federal court.

1 THE COURT: You mean the people that report in state  
2 court are not responsible?

3 MR. DVEIRIN: No. I'm saying he particularly has had  
4 many years of experience.

5 THE COURT: We have some excellent ones in the state  
6 and some not so great ones, and the same with the Federal  
7 Court.

8 It's easier to report in the Federal Court. You know  
9 why?

10 People behave a little better.

11 Attorneys don't tend to talk over each other, and they  
12 don't tend to talk over the judges.

13 And when the judge tells them to be quiet, they do.

14 So therefore it's a lot easier to be a court reporter  
15 in the federal court. Would you agree?

16 MR. DVEIRIN: I don't know if I have enough experience.

17 I like certain aspects of the Federal Court. I don't  
18 know if it's because of the court reporters.

19 For the reasons you said.

20 THE COURT: We'll ask our esteemed reporter.

21 Was I correct?

22 THE REPORTER: Yes.

23 THE COURT: You don't have to agree with me. I won't  
24 take offense.

25 THE REPORTER: No, everybody is miked. It's more  
26 formal.

27 THE COURT: Just look for the date.

28 THE CLERK: Do you want to do late January or February,

1 your Honor?

2 THE COURT: I cannot do it late January. I will just  
3 be coming back.

4 Sometime in mid-February on a date that I'm kind of  
5 free.

6 THE CLERK: Okay. February 8th. That's a Thursday.

7 MR. DVEIRIN: That works.

8 THE CLERK: Or we can do February 15th.

9 THE COURT: How about the 15th?

10 MR. LEWIS: Eighth or 15th works for me.

11 THE COURT: 2/15.

12 MR. LEWIS: Either the 8th or the 15th works for me,  
13 your Honor.

14 MR. DVEIRIN: Me too.

15 THE COURT: February the 15th.

16 You may file additional brief to the Court to apprise  
17 the Court of what happened with the January election.

18 MR. DVEIRIN: Uh-huh.

19 THE COURT: Are you going to have Judge Latin monitor  
20 again?

21 JUDGE LATIN: That's correct.

22 MR. DVEIRIN: Judge Latin will be monitoring the  
23 election.

24 THE COURT: Okay.

25 MR. DVEIRIN: And he certifies the results.

26 THE COURT: Well, there hasn't been any result because  
27 he certified the last --

28 MR. DVEIRIN: No. He certifies the count so we know

1       whether or not we make the quorum by his count.

2               THE COURT:   Okay.   The 15th of February, then, at  
3       nine --

4               MR. DVEIRIN:   Nine, 9:30?

5               THE COURT:   It had better be 9:30 because I'm probably  
6       going to take you last.

7               MR. DVEIRIN:   We feel honored.

8               THE COURT:   You feel honored I'm giving you so much  
9       time?

10              MR. DVEIRIN:   No.   That you take us last.

11              THE COURT:   Thank you.

12              MR. DVEIRIN:   Thank you, your Honor.

13              (End of proceedings.)

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HON. RUTH A. KWAN, JUDGE

Defendant.

)  
)  
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)  
) SUPERIOR COURT  
) CASE NO. BS 169638

DATED: December 3, 2017.

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