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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES – WEST DISTRICT

MOUNTAINGATE OPEN SPACE MAINTENANCE ASSOCIATION; CREST/PROMONTORY COMMON AREA ASSOCIATION

Plaintiffs,

v.

MONTEVERDI, LLC, a California limited liability company; BERGGRUEN INSTITUTE, a California non-profit organization; and CASTLE & COOKE CALIFORNIA, INC., a California corporation; and DOES 1-10;

Defendants.

Case No.: 19STCV33839

Dept. 28

Assigned to: Hon. Rupert A. Byrdsong

PLAINTIFFS' OPPOSITION TO DEFENDANTS BERGGRUEN INSTITUTE AND MONTEVERDI LLC'S MOTION TO STRIKE PLAINTIFFS' FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES

[Declarations of Stephen Drimmer, Robert Rieth, Allan Abshez and William Brody Filed Concurrently Herewith]

Date: October 13, 2020
Time: 10:00 a.m.
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I. Introduction

This is not a SLAPP lawsuit. The gravamen of Plaintiffs' complaint is a dispute over whether a longstanding 1999 Memorandum of Understanding ("MOU") binds Defendants Monteverdi LLC and Berggruen Institute (collectively "Berggruen") to limit their development to a 29 home "Reduced Density Plan," and whether they have access to a private street. It does not arise from "protected activity," and would exist without it. What gave rise to this lawsuit was Berggruen's repudiation of the MOU when it told MOSMA that it would not comply with it. MOSMA therefore seeks a declaration that, despite this repudiation, the MOU is binding.

Berggruen asserts that the complaint is based on an Environmental Assessment Form ("EAF") that Berggruen filed, after repudiating the MOU. The causes of action relating to the MOU *do not even mention the EAF* and in no way rely on it. Plaintiffs' complaint merely uses the EAF as *evidence* of Berggruen's plans. Case law is very clear that a plaintiff can allege protected activity as evidence of liability even if it is part of a larger breach, and still not fall within the SLAPP statute. This sort of "incidental" or "collateral" protected activity does not support a SLAPP motion when the principal thrust concerns non-protected activity which, here, is a repudiation of the MOU and a dispute over its applicability.

Regardless, under the second prong, Plaintiffs just need to show *minimal merit*, and some evidence to support their claims. Plaintiffs have substantial evidence that Berggruen knew about the MOU prior to closing its acquisition, agreed in the Purchase Agreement to assume and comply with its obligations, accepted its benefits by finalizing the tract map the MOU provided the right for, and then, *right after* that was done, told MOSMA it would no longer comply with the MOU. Berggruen is bound by the MOU because it assumed it, is a successor based on its acceptance of its benefits, and because the MOU operates as an equitable servitude. Berggruen's loosely evidenced claim that it did not have notice of the MOU is directly contradicted by the evidence. For 21 years, MOSMA fully complied with the MOU, even after it was excused from doing so.

The evidence also demonstrates that the clear intent of the MOU was to restrict future development of the property to the 29 home Reduced Density Plan. Nicolas Berggruen is a billionaire seeking to build a massive project, on top of other homes, in clear violation of a

longstanding agreement. Public relations lip-service aside, the project is out of character with the residential community, would create environmental, traffic, aesthetic and other harms, and is strongly opposed in the community. It is exactly what the MOU was designed to prevent.

Berggruen's argument that Plaintiffs' declaratory relief claim regarding access to Stoney Hill Road arises out of protective activity is demonstrative of Berggruen's abuse of the SLAPP statute. In no way does this dispute over road access "arise from protected activity." In any event, Berggruen and Castle & Cooke were never granted an easement, never had access directly from Stoney Hill Road, and do not have any right to use it for Berggruen's proposed project.

II. Factual Background

Mountaingate is a master-planned hillside residential community. It contains 300 single-family homes in a unique, hillside, low density setting. For many years, defendant Castle & Cooke California, Inc. ("C&C") sought to expand Mountaingate to nearby land (the "Property"), initially trying to add over 180 homes and then 117. Rieth Decl., ¶ 4-7. The City did not approve. *Id.* In 1998, C&C filed a lawsuit against the City to force approval of its development, and MOSMA intervened. *Id.* Ultimately, C&C and MOSMA negotiated an agreement to settle the future use of the property once and for all: the MOU. *Id.* Ex. A. The MOU memorialized a "Reduced Density Plan" set forth in a "Tentative Tract Map" that allowed only 29 homes on the Property. *Id.* The intent was to restrict C&C and its successors' future development of the Property. *Id.*, ¶ 8-10.

In August 2014, Berggruen met with MOSMA concerning its acquisition of the Property. Drimmer Decl., ¶ 7-10. The parties discussed the existence and terms of the MOU, including the 29 home limitation. *Id.* Berggruen said it wanted to discuss building a private institute instead of the homes, but that it would work with MOSMA and not build anything other than the homes without MOSMA's approval. *Id.* Soon thereafter, Berggruen closed its acquisition of a portion of the Property via a Purchase Agreement in which Berggruen agreed to "assume and comply with" all obligations relating to the Property (and thus the MOU). Brody Decl., ¶ 2-3, Ex. A. Berggruen also obtained an option to acquire the remainder of the Property from C&C. Abshez Decl., ¶ 6 .

In or around June 2019, Berggruen and C&C obtained City approval for the "Final Map" reflecting the Reduced Density Plan. Lonner Decl., Ex. E. However, just after obtaining this right,

on July 23, 2019, MOSMA met with Berggruen who presented a new plan for its institute (the "Project"), a massive 225,000 square foot facility with a building nearly 100 feet tall placed close to existing homes, and over 45 residences. Drimmer Decl., ¶ 13-15. Berggruen announced it was moving forward with the Project without MOSMA's consent, and that it was not bound by, and would not comply with, the MOU. *Id.* Unable to resolve the issue, MOSMA filed this lawsuit.

III. Legal Standard for Anti-SLAPP Motion

Berggruen, as the moving party, bears the burden of establishing Plaintiffs' claims arise out of protected activity. *Park v. Bd. of Trs. of Cal. State Univ.* (2017) 2 Cal.5th 1057, 1061. Only if this first prong is established must MOSMA demonstrate a "probability of prevailing" under the second prong. To do so, it only needs to make a *prima facie* case, and demonstrate its claims have "minimal merit." *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-94 (emphasis added). Similar to the summary judgment standard, a court should not weigh the evidence, "but accept as true all evidence favorable to the plaintiff and evaluate the defendant's evidence only to determine if it has defeated the evidence submitted by the plaintiff as a matter of law." *City of Alhambra v. D'Ausilio* (2011) 193 Cal.App.4th 1301, 1307.

IV. First Prong: Plaintiffs' Complaint Does Not "Arise Out of Protected Activity"

This is not a SLAPP lawsuit. Plaintiffs' claims are not premised on a communication with the City, but on Berggruen's repudiation of a contract, and a disagreement over the interpretation and applicability of that contract. *See e.g.*, FAC ¶ 57-63, 88, 89. Berggruen falsely asserts that "Plaintiffs filed this action in direct response to the Berggruen Defendants' submission of the EAF" and that "all of Plaintiffs' causes of action reference either the filing of the EAF and/or the development plans reflected therein." With one exception, the causes of action *do not* reference the EAF, and none of them rely on it. Berggruen offers no further analysis to explain how the causes of action concern protected activity. It has not met its burden.

In considering whether conduct arises out of protected activity, courts look to the "principal thrust" and "gravamen" of a cause of action. *Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790, 809. Allegations of protected activity that are incidental or collateral to the primary conduct, or that are pled as *evidence* of liability, do not give rise to a SLAPP lawsuit

where the principal liability arises from non-protected activity. *Id.*; *Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1214–1215.

The "principal thrust" and "predominant nature" of Plaintiffs' complaint is unquestionably not the EAF. *See Wang* at 802. Nowhere in the complaint do Plaintiffs assert that Berggruen is liable for filing the EAF. The *principal thrust* is that Berggruen repudiated the MOU, and claims it does not need to comply with it. *See e.g.*, FAC ¶ 37, 56-58, 60-63, 74-77, 88, 89. The complaint arises out of a dispute regarding the applicability of MOU and what Berggruen claims it can ultimately *build* on the property, not each of the thousands of collateral actions it takes to accomplish that. *Id.* Revealingly, this lawsuit remains at issue even though Berggruen's EAF is no longer valid, as Berggruen is not an "educational institute" as it claimed it was in order to take advantage of certain zoning provisions.

Wang v Wal-Mart, supra is analogous. In *Wang*, the plaintiff (Wang) alleged that Wal-Mart breached an agreement promising Wang street access by applying for a permit to close the street at issue. Wal-Mart filed a SLAPP motion arguing the claims arose from its permit application. The court held that the permit application was collateral to, and evidence of, use of the property in breach of the agreement, but was just a step in that process, and not the principal thrust. It noted, "Wang [] should be able to plead *wrongful* acts by defendants, then attempt to prove them with *evidence* about alleged misconduct that occurred behind the scenes…." *Id.* at 808. Like this case, "[t]he overall thrust of the complaint challenges the manner in which the parties privately dealt with one another, on both contractual and tort theories, and does not principally challenge the collateral activity of pursuing governmental approvals." *Id.* at 809.

Plaintiffs' complaint charges Berggruen with repudiating the MOU by refusing to comply with it, as evidenced by (among other things) the plans in the EAF – just like Wang exposed Wal-Mart's breach by pointing to a permit filing with the City. The EAF is merely incidental to Berggruen's repudiation and plans to build its non-conforming Project. It provided explanatory evidence of the scope of the Project but does not form the principal basis for MOSMA's claims concerning whether the MOU applies. Such "collateral or incidental allusions to protected activity will not trigger application of the anti-SLAPP statute." *Hylton v. Frank E. Rogozienski, Inc.* (2009)

177 Cal.App.4th 1264, 1272; *Moriarty v. Laramar Mgmt. Corp.* (2014) 224 Cal.App.4th 125 (lawsuit "arose from" wrongful termination of a lease, not the unlawful detainer lawsuit the landlord used to effectuate the termination). If filing a CEQA form or pursuing permits gives rise to a SLAPP suit, as Berggruen insists, then such motions would be inevitable in all land use disputes as parties regularly file forms prior to developing property.

Berggruen's argument that Plaintiffs (allegedly) filed this action "in response to" the EAF is also flawed, and has been repeatedly rejected. The fact that a plaintiff files a lawsuit "in response to" protected activity has no bearing on whether it "arises from" protected activity even if the lawsuit was "triggered" or motivated by protected activity. *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 77; *City of Alhambra*, 193 Cal.App.4th at 1307. MOSMA's claims arose prior to the filing of the EAF by July 23, 2019 when Berggruen told MOSMA it planned to build the Project in violation of the MOU, over MOSMA's objection. Drimmer Decl., ¶ 14; Abshez Decl., ¶ 3. At that point, Berggruen had repudiated the contract, and MOSMA had a claim to pursue.

A. The Specific Causes of Action Do Not Arise From Protected Activity.

First Cause of Action For Declaratory Relief. The First Cause of Action simply seeks declaratory relief: (1) "that the MOU is binding on Monteverdi, and thus Berggruen, as a successor or assignee of [C&C]" and (2) "that the MOU obligates Monteverdi, Berggruen and/or [C&C] to, among other things, limit development of the Adjacent Land to the Reduced Density Plan in accordance with the MOU." It does not in any way arise out of, or *even reference* the EAF.[1] In *City of Alhambra*, the Court found that even though a judicial declaration on the applicability of a contract would bar protected speech activity, "the [] declaratory relief claim involve[d] an actual dispute between the parties regarding the validity of a contract provision and the parties' rights and obligations under that contract provision. The declaratory relief claim arises from a contract dispute; it does not arise from actions taken by appellant in furtherance of his constitutional

[1] The fact that a cause of action generally incorporates allegations by reference cannot be used to show it "arises out of" protected activity. *Kajima Engin. Const. v. City of L.A.* (2002) 95 Cal.App.4th 921, 930. Berggruen's argument that MOSMA relies on development plans in the EAF is false and nonsensical. The scope of the project was communicated before the EAF was filed. Drimmer Decl., ¶ 13-15; Abshez Decl., ¶ 3. The EAF is *evidence* explaining Berggruen's plans, but is not the repudiation or misuse of the land that is the primary breach of the MOU.

rights." *City of Alhambra*, 193 Cal.App.4th at 1309; *City of Cotati*, 29 Cal.4th at 77 (declaratory relief claim not a SLAPP suit). Likewise, this cause of action arises out of a dispute regarding "the parties' rights and obligations under" a contract, separate and apart from any protected activity. *Id.*

Second Cause of Action for Declaratory Relief Re: Equitable Servitude. MOSMA's Second Cause of Action also does not reference, rely on, or refer to the EAF. It merely requests a declaration to settle a dispute over the applicability and scope of the MOU as an equitable servitude. Whether MOSMA is entitled to a declaration that the MOU is an equitable servitude has absolutely nothing to do with the filing of an EAF, and is not based on the EAF.

Third Cause of Action For Breach of the MOU. Here, MOSMA seeks relief for a breach, or "anticipatory breach," of the MOU. *It does not reference or mention the EAF whatsoever*. As discussed above, MOSMA's claims relating to the MOU do not rely on the EAF.

Fifth Cause of Action For Intentional Interference. This cause of action seeks relief based on Berggruen's intent to cause C&C to breach the MOU by using C&C's adjacent property to assist in the development of the Project, and by allowing the Berggruen Project at all. It does not reference, refer or relate to the EAF. The allegations are not based on protected activity.

Sixth Cause of Action For Unjust Enrichment. Here, MOSMA asserts that Berggruen and C&C were unjustly enriched by accepting the benefits of the MOU without providing the return consideration. This has nothing to do with protected activity or the EAF whatsoever.

Seventh Cause of Action For Declaratory Relief re: Stoney Hill Road. Plaintiffs' Seventh Cause of Action seeks a declaration that Berggruen does not have rights to use Stoney Hill Road, a private street owned by Mountaingate's homeowners. Although Plaintiffs mention as evidence that Berggruen asserted in the EAF that it has access to the road, the communication with the City is not the issue. The issue is whether Berggruen in fact has access to the private street. Even if the EAF triggered the complaint, or the complaint was filed in response to it, that does not mean the claim arises from that conduct. *City of Cotati*, 29 Cal.4th at 77; *City of Alhambra*, 193 Cal.App.4th at 1307. Thus, as the court held in *Alhambra* in evaluating a declaratory relief claim "[w]hile [the] protected speech activities may have alerted the [plaintiff] that an actual controversy existed….the speech itself does not constitute the controversy." *Id.* at 1308.

It is obvious that the dispute over road access is the thrust of this claim, and exists separate and apart from any protected, communicative activity or the EAF. Berggruen communicated its position even before the EAF was filed, and even now continues to assert it has access. Abshez Decl., ¶ 3. Berggruen's communications to the City are *evidence* of the dispute requiring a judicial declaration and are incidental to it, but are not the dispute itself and have no bearing on it. "If the core injury-producing conduct upon which the plaintiff's claim is premised does not rest on protected speech or petitioning activity, collateral or incidental allusions to protected activity will not trigger application of the anti-SLAPP statute." *Hylton,* 177 Cal.App.4th at 1272.

V. Second Prong: Plaintiffs Can Demonstrate A Probability of Prevailing

A. MOSMA's First And Third Causes of Action Regarding The MOU.

1. The MOU Binds Berggruen.

MOSMA's First and Third Causes of Action concern Berggruen's repudiation of the MOU by claiming it is not bound to the Reduced Density Plan.[2] MOSMA does not assert that the MOU "runs with the land," but that Berggruen assumed and agreed to comply with the obligations in the MOU and is a successor in interest (and separately because the MOU is an equitable servitude).

First, in Section 8(b) of the Purchase Agreement entitled, "Purchaser's Assumptions of Obligations," Berggruen agreed that, as of the closing, it "shall assume and comply with….all obligations for or relating to the ownership and use of the Property." Brody Decl., Ex. A, ¶ 8(b). Such obligations include the MOU, which expressly states that it is binding on C&C's successors and assigns, and that it governs "the future development" of the Property. Rieth Decl., Ex. A, ¶ 8. Section 8(b) of the Purchase Agreement states that it is subject to Section 6(g). This section merely contains a warranty by C&C that it would terminate contracts relating to the property unless Berggruen "otherwise consented or approved," or assumed the contract. C&C *did not* terminate the MOU. Drimmer Decl., ¶ 5. C&C also did not breach the warranty because Berggruen had knowledge of the MOU prior to closing, and thus waived any claims about it. *Id.*,

[2] A declaratory relief claim is available to resolve a controversy regarding the scope and applicability of a contract. Cal. Code Civ. Proc. § 1060. Such a claim "may be brought to establish rights once a conflict has arisen, or…as a prophylactic measure before a breach occurs." *Mycogen Corp. v. Monsanto Co*. (2002) 28 Cal. 4th 888, 898.

¶ 7-10 (Berggruen had knowledge of MOU); Brody Decl., Ex. A, ¶ 6 (knowledge by Berggruen of a breach of a warranty waives it), 12, 5(b). At most, Berggruen can sue C&C for breach of this warranty, but that does not negate the assumption.

Second, Berggruen is bound by the MOU because acceptance of the benefits of a contract by a successor binds that successor to its obligations. *Citizens Suburban Co. v. Rosemont Dev. Co.*, (1966) 244 Cal.App.2d 666, 675-77l; Civil Code § 1589. Likewise, Civil Code section 3521 provides the Court the ability to apply the equitable principal that "[h]e who takes the benefit must bear the burden." *Edmonds v. Cty. of L.A.* (1953) 40 Cal.2d 642, 653. In *Citizens Suburban*, the court held a clause in a contract binding successors and assigns, like the one in the MOU, eliminates any need for an express assumption of burdens (which Berggruen did here anyway). *Citizens Suburban Co.*, 244 Cal.App.2d at 675-76.

Berggruen clearly accepted the benefits of the MOU. By entering into the MOU, MOSMA agreed that it would support and not challenge the Reduced Density Plan. That promise provided, and continues to provide, critical support and avoidance of litigation. Berggruen acknowledges that, in 2006, C&C obtained otherwise unavailable approval for the Tentative Map and that Berggruen purchased the property with those rights intact.[3] Motion p. 7-8; Lonner Decl., Ex. B. Berggruen also admits that, in June 2019, it obtained City approval of the "Final Map," which solidified Berggruen's right to develop and sell lots, and prevented those rights from expiring. *See* Motion p. 9:7-12. Because of the MOU, MOSMA did not object. *See* Drimmer Decl., ¶ 12. Based on MOSMA's agreement in the MOU, Berggruen obtained valuable entitlements, which were heavily litigated and about to expire. This is an enormous benefit and value. If the Project does not get built, Berggruen can sell the Property with the rights in the Final Map intact, or build homes and sell them individually without submitting to the arduous process that took C&C decades. If Berggruen truly saw zero value in it, it would not have sought approval of the Final

[3] Berggruen asserts, without evidence, that this value was already reflected in the purchase price. Regardless of what it paid, Berggruen accepted the benefits of the agreement by being transferred the rights to the Property allowed by the MOU and finalizing it in June 2019. Berggruen redacted the purchase price in the Purchase Agreement, and has not submitted any evidence as to the market value.

Map. Also, Berggruen has asserted that easements allegedly granted under the Final Map give it hugely beneficial rights to access the Project via Stoney Hill Road. Motion p. 1926:23-20:2.

2. The MOU Restricts Future Development By Berggruen.

The purpose and intent of the MOU was to limit development of the Property to the 29 homes in the Reduced Density Plan. Rieth Decl., ¶ 8-10. It states upfront that it is the agreement of the parties "relating to *future* development of the property…" and required filing of the Reduced Density Plan. *Id.*, Ex. A. The only reasonable reading of this language is that the MOU was intended to limit the use of the Property to the Reduced Density Plan. There would be no point in requiring C&C to file the 29 home plan if it could then ignore it, withdraw it, or simply pursue an entirely different project. In fact, for 16 years until Berggruen intervened, C&C pursued the Reduced Density Plan, just as called for by the MOU. Drimmer Decl., ¶ 6.

The MOU also limits when Berggruen can build a different development. Rieth Decl., Ex. A, ¶ 6, 7. Berggruen falsely asserts Section 6 of the MOU permits it to pursue a different development at any point, which MOSMA can then oppose. Section 6 directly contradicts this argument. It states that "in the event" MOSMA breaches the MOU, only *then* can Berggruen proceed with any development it chooses. Section 6 continues that *if* Berggruen exercises that "remedy" in response to MOSMA's breach, *then* MOSMA can oppose the new development. Because this section specifically lists the circumstances when Berggruen can proceed with a different development (which is referenced only as a "remedy"), the contract must be read to confine Berggruen's option to do so to the specifically enumerated circumstances. A different reading would render the terms "in the event" and "remedy" (if not the entire section) meaningless surplusage, a result that must be avoided. *In re Marriage of Nassimi* (2016) 3 Cal.App.5th 667, 688 (contracts must be read as a whole, to give effect to all terms and to avoid surplusage).

Berggruen also falsely claims that Section 7 supports its interpretation because it allows it to terminate the MOU. Berggruen again gets it backwards. This section limits Berggruen's right to terminate to two situations: (i) if approvals for the Reduced Density Plan are not obtained, or (ii) if, after the approvals are obtained, the Reduced Density Plan becomes infeasible. If the MOU did not limit development to the Reduced Density Plan, there would be no purpose in restricting the

termination right to the two situations when it could not be developed. The fact that termination is only allowed if the Reduced Density Plan could not proceed indicates the MOU was intended to limit Berggruen to that plan. Moreover, the continuation of the termination right *after* approvals are obtained suggests the parties intended an ongoing obligation with respect to development of the Property after the plan was filed. This negates Berggruen's argument that its only obligation was to file the plan, after which its obligations ceased.

To the extent there is an ambiguity, at the time the MOU was executed, both parties intended that the MOU was binding on C&C and its successors and assigns to limit development of the Property to the Reduced Density Plan, and no other projects. Rieth Decl., ¶ 8-10. A contemporaneous memorandum from the time of the MOU summarized the agreement as follows: "C&C agrees that there will be no further development of the Mountaingate property." *Id.*, Ex. B.

3. MOSMA Did Not Breach And Was Excused From Performance.

Berggruen argues that MOSMA breached the MOU by sending two letters. Berggruen first argues that on August 12, 2019, MOSMA sent a letter to the City pointing out that Berggruen was not entitled to access Stoney Hill Road for the Project. Lonner Decl., Ex. G. First, the letter does not breach the MOU because the MOU says nothing about road access. Second, the letter merely states that two other homeowners associations—but not MOSMA—would not provide access to the "proposed Berggruen Project" via Stoney Hill Road. The letter does not refuse access to the *29 homes* contemplated by the Reduced Density Plan. Finally, the letter affirms MOSMA's compliance with the MOU. It states that MOSMA is willing to give street access if the Reduced Density Plan proceeds and the homes are annexed pursuant to the terms of the MOU.

Berggruen also argues that MOSMA breached the MOU by challenging the approval of the grading permits under the Final Map in December 2019. MOSMA was not challenging, but seeking *compliance* with the Tentative Map, which requires approval of a post-closure plan for the landfill prior to issuing grading permits. Lonner Decl., Ex. F. The City's issuance of grading permits without prior approval of the post-closure plan has created a serious public safety issue because the landfill, which is adjacent to Mountaingate in a very high risk fire area, generates toxic and highly flammable methane gas. Insisting on compliance with the Tentative Map conditions is

expressly reserved to MOSMA in Section 4 of the MOU, which gave MOSMA the right to "object and challenge" C&C's implementation of the Reduced Density Plan as long as such objection focused on, among other things, "safety related to methane management" and "grading." Rieth Decl., Ex. A, ¶ 4. MOSMA's letter was entirely consistent with its retained rights under Section 4. Indeed, Section 3 upon which Berggruen relies does not even govern post-closure plans. Regardless, even if there was a breach, given that MOSMA only sought compliance with one condition of over 113, it was not material and would not justify Berggruen's breach.

Moreover, even if MOSMA did breach the MOU (which it did not), it was excused from performance because, as of July 23 2019, prior to each of these letters, Berggruen had already repudiated the MOU. Drimmer Decl., ¶ 13-14; Abshez Decl., ¶ 3. After Berggruen's repudiation and anticipatory breach, MOSMA no longer needed to comply with the MOU; it could breach the agreement and still sue to enforce it. *Ferguson v. City of Cathedral City* (2011) 197 Cal.App.4th 1161, 1169; Cal. Civ. Code § 1440.

4. Remaining Elements Of The Third Cause Of Action.

MOSMA can also prove the remaining elements of its third cause of action. MOSMA has performed all of its obligations under the MOU and has repeatedly told Berggruen it will honor it. Drimmer Decl., ¶ 5. As discussed above, MOSMA is also excused from doing so. Berggruen breached the MOU by repudiating it in July 2019 at meetings with MOSMA and thereafter. Drimmer Decl., ¶ 13-14; Abshez Decl., ¶ 3. Repudiation occurs when one party "….makes a positive statement to the other party indicating that he will not or cannot substantially perform his contractual duties." *Gold Mining & Water Co. v. Swinerton* (1943) 23 Cal.2d 19, 29; Cal. Civ. Code § 1440. After repudiation, or anticipatory breach, MOSMA can immediately sue, without performing. *Romano v. Rockwell Internat., Inc*. (1996) 14 Cal.4th 479, 489.

Berggruen argues that MOSMA cannot prevail because it has not been damaged. First, as discussed above, MOSMA does not need to show damages for its declaratory relief claims. Second, MOSMA is entitled to specific performance of the contract, regardless of any actual damages. *Real Estate Analytics, LLC v. Vallas* (2008) 160 Cal.App.4th 463, 476-77. Section 6 of the MOU expressly allows specific performance. The MOU was intended to limit development to

avoid safety, aesthetic and environmental harms, things that cannot be remedied by money. *See* Rieth Decl., Ex. A. Third, MOSMA has already been damaged by the negative effect on property values and the significant time and costs of dealing with Berggruen's efforts to pursue the Project, and will experience additional aesthetic, safety, traffic and environmental harms if the Project continues. Drimmer Decl., ¶ 15-16. Finally, even if MOSMA could not show it suffered actual *monetary* damages, it is still entitled to nominal damages which are enough to prevail. Cal. Civ. Code § 3360; *Avina v. Spurlock* (1972) 28 Cal.App.3d 1086, 1088.

To the extent MOSMA does not show Berggruen's conduct breached the MOU directly, Berggruen had an implied duty of good faith and fair dealing not to injure MOSMA's right to receive the benefits of the MOU. *Andrews v. Mobile Aire Estates* (2005) 125 Cal.App.4th 578, 589. The intent of the MOU was to limit future development of the Property. Rieth Decl., ¶ 8-10. By ignoring the Reduced Density Plan, Berggruen denied MOSMA the benefits of its bargain.

B. Second Cause of Action For Declaratory Relief Re: Equitable Servitude.

Under the doctrine of equitable servitudes, "[e]ven though a covenant does not run with the land, it may be enforceable in equity against a transferee of the covenantor who takes with knowledge of its terms under circumstances which would make it inequitable to permit him to avoid the restriction." *Marra v. Aetna Constr. Co*. (1940) 15 Cal.2d 375, 378. Thus if a landowner agrees to limit use of his or her land in order to benefit neighbors, those pre-agreed limitations are enforceable against subsequent owners as equitable servitudes. *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 379.

Berggruen argues that there is no equitable servitude because it did not have notice of the MOU. This simply not true. Drimmer Decl. ¶ 7-10. Stephen Drimmer, the president of MOSMA, met with Nicolas Berggruen and other Berggruen representatives in August 2014 prior to the closing of the acquisition. *Id.* Mr. Drimmer told him that C&C had an agreement with MOSMA to limit use of the Property to the 29 homes in the Reduced Density Plan which was binding on Berggruen. *Id.* The purchase was not final until September after the "Feasibility Period," during which time Berggruen could terminate the deal for any reason. Brody Decl., Ex. A, ¶5(b).

The 2014 meeting with MOSMA and history of the tract also put Berggruen on inquiry and

constructive notice of the MOU. *Mullin v. Bank of Am.* (1988) 199 Cal.App.3d 448. Constructive notice can create an equitable servitude. *MacDonald Props., Inc. v. Bel-Air Country Club* (1977) 72 Cal.App.3d 693, 700. Berggruen's only evidence that it did not have notice is Ms. Nakagawa's declaration that just "to her knowledge," Berggruen was not aware. Nakagawa Decl., ¶ 4. Her sparse and unfounded statement is directly contradicted by Mr. Drimmer's declaration, which must be taken as true for purposes of a SLAPP motion. She also was not at the August 2014 meeting, and does not say she was even involved at the time. Drimmer Decl., ¶ 10.

In addition, C&C is still the owner of a portion of the Property that is covered by the Reduced Density Plan, and that Berggruen plans to use for its Project. Abshez Decl., ¶ 6-9 . Berggruen has an option to acquire this land. *Id.*; Motion p. 8. With respect to the optioned land, there is no question Berggruen has actual notice of the MOU before it has acquired it.

Berggruen also argues that it did not have notice because the MOU does not prevent successors from developing the property, and there are no inequities because there is no agreement to enforce. The scope of the MOU is addressed above, and the inequities are clear. MOSMA negotiated and relied on the 29 home plan. Its residents have expected this to be in place and moved to, bought property in, and made a home in the community based in part on it. Drimmer Decl., ¶ 5, 15. The proposed project would create negative aesthetic impacts, overtake open space the community uses, create fire and security risks, noise issues (helipad), block views and result in massive construction and traffic. *Id.* Berggruen knew of the restrictions, knew MOSMA and its members would enforce it, knew it bound successors, yet acquired the property anyway accepting all obligations under it. An equitable servitude is entirely appropriate.

C. Fifth and Sixth Causes of Action.

Berggruen hardly mentions MOSMA's Fifth and Sixth Causes of Action. The fifth is for intentional interference, the elements of which include: (1) a valid contract with a third party; (2) defendant's knowledge of it; (3) defendant's intentional acts designed to induce a breach or disruption of it; (4) breach or disruption; and (5) resulting damage. *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1129. Most of these elements have been discussed above. In sum, Berggruen is refusing to adhere to the Reduced Density Plan and plans to use

C&C's land for its Project, thereby putting C&C in breach of the MOU and covenant of good faith and fair dealing, and disrupting C&C's ability to comply.

For the Sixth Cause of Action for unjust enrichment, MOSMA must show a receipt of a benefit by Berggruen and unjust retention of it at MOSMA's expense. *Lectrodryer v. Seoulbank* (2000) 77 Cal.App.4th 723, 726. MOSMA supported and did not object to the Reduced Density Plan, and relied on it for 20 years. Drimmer Decl., ¶ 5, 6, 15. As discussed above, Berggruen and C&C knowingly accepted the benefits of the MOU but refuse to provide the return performance.

D. Seventh Cause of Action For Declaratory Relief Regarding Stoney Hill Road.

Plaintiffs' Seventh Cause of Action seeks a declaration resolving whether Berggruen is entitled to use Stoney Hill Road, which it concedes is private property owned by Plaintiffs' members. Lonner Decl., Ex. K; Drimmer Decl., ¶ 17. Plaintiffs seek to vindicate their right to exclude others as codified in Civil Code Section 654.

Berggruen's claim to an "abutter's" easement fails because the Property never abutted Stoney Hill Road. Stoney Hill Road became a private street in 2009. Lonner Decl., Ex K. Prior to that, it was a public street separated from Berggruen's property by a strip of land known as a "future street," that was not part of the public street and was separately vacated from the public street. Lonner Decl., Exs. J, K, L (at 260), E (containing map showing where the future street terminates, as described in the other exhibits). Berggruen's Property abutted this "future street," not Stoney Hill Road. *Id.* Berggruen relies on *Bacich v. Bd. of Control* (1943) 23 Cal.2d 343, 349-50, which notes that abutter's easements only attach to public streets. Thus, the fact that Berggruen's land may now abut the private street does not give it an easement. In addition, abutter's rights only include the customary uses, which here would be for access to undeveloped land and *residential* uses, not commercial uses such as the Project and its conferences. *People v. Russell* (1957) 48 Cal.2d 189, 195. An abutter's right can also be waived or abandoned. Cal. SHC § 8352(b). For 10 years, neither Berggruen or C&C challenged or objected to the private nature of the road or sought to maintain access, and therefore have waived any right. Drimmer Decl., ¶ 18.

Berggruen's remaining argument is that it is entitled to an easement by virtue of a covenant granted when Stoney Hill Road was vacated in 2009. Lonner Decl., Ex M. However, that

covenant was simply an agreement with the City that "private ingress and egress easement over the private street area *will* be granted to all properties currently using the public street portion of Stoney Hill Road being vacated…" (emphasis added). *Id.* It does not specifically grant Berggruen (or C&C) anything. They did not have an easement, and Berggruen has not shown one was actually granted to it. Drimmer Decl., ¶ 18. The covenant pertained only to the homeowners who depended upon access to the nearest public street via Stoney Hill Road. It did not benefit Berggruen (or C&C) because they did not rely on Stoney Hill Road for public street access. *Id.*

Moreover, the covenant did not, and was not intended to, apply to C&C (or Berggruen). Berggruen submitted no evidence that C&C was then using or dependent Stoney Hill Road. It was not, and other roads give Defendants access to the Property, including Sepulveda Boulevard and Canyonback Road. *Id.* In its June 30, 2008 decision, the City's Deputy Advisory Agency identified the address of every lot fronting the street and that the private street would serve. Lonner Decl., Ex. L. *Berggruen's* property is not included in the address list, and for good reason: because of the future street, it never had frontage on or took legal access from Stoney Hill Road. Finally, on December 17, 2009, the City confirmed that all of the conditions of the Private Street Map had been complied with even though C&C was never granted an easement. *Id.*, Ex. M.

Berggruen argues that the Tentative Map was approved with the "understanding" that access would be provided over Stoney Hill Road. This, of course, is not the same as actually granting access and does not create an easement. Any access would be for the 29 homes, not the Project. Berggruen also claims an Engineer's Report expressly referenced 2050 Stoney Hill Road, and referred to it as an "adjacent use." The report does not reference that address but merely identifies properties adjacent to the "vacated" area. Berggruen's property was mentioned because it abutted the *future street*, which also happened to be a "vacated area." Lonner Decl., Ex. L.

MOSMA stands willing to honor its agreement in the MOU to negotiate with Berggruen in good faith towards annexation of the 29 homes to the relevant associations, and thus allow street access. Drimmer Decl., ¶ 19. Berggruen cannot, however, obtain the benefits of the MOU (access to Stoney Hill Road) without accepting annexation to the appropriate homeowners' association and the obligations incumbent on their members.

VI. Conclusion

For the foregoing reasons, Berggruen's motion should be denied.

Dated: September 29, 2020

LOEB & LOEB LLP
WILLIAM M. BRODY
ARTHUR FELS

By: */s/ William M. Brody*
William M. Brody
Attorneys for Plaintiffs

PROOF OF SERVICE

I, OLIVIA JOHNSON, the undersigned, declare that:

I am employed in the County of Los Angeles, State of California, over the age of 18, and not a party to this case. My business address is 10100 Santa Monica Blvd., Suite 2200, Los Angeles, CA 90067.

On September 29, 2020, I caused to be served a true copy of the **PLAINTIFFS' OPPOSITION TO DEFENDANTS BERGGRUEN INSTITUTE AND MONTEVERDI LLC'S MOTION TO STRIKE PLAINTIFFS' FIRST AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES** on the parties in this cause as follows:

☑ (**VIA ELECTRONIC TRANSMISSION**) through electronic transmission by an approved Electronic Filing Service Provider, as part of the Los Angeles Superior Court efiling system, to the email addresses set forth below or on the attached service list.

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

Executed on September 29, 2020, at Los Angeles, California.

OLIVIA JOHNSON