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IN THE FIFTH JUDICIAL DISTRICT COURT FOR WASHINGTON COUNTY

STATE OF UTAH

EVELYN OBERG, an individual, Plaintiff, v. DIXIE SPRINGS ARCHITECTURAL CONTROL COMMITTEE, an entity organized under the laws of the state of Utah, Defendant.	**REPLY MEMORANDUM SUPPORTING APPLICATION FOR PRELIMINARY INJUNCTION** Civil No. 230500079 Judge G. Michael Westfall
DIXIE SPRINGS ARCHITECTURAL CONTROL COMMITTEE, a domestic non-profit Utah corporation, Counterclaimant, v. EVELYN OBERG, an individual, Counterclaim Defendant.	

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Defendant/Counterclaimant Dixie Springs Architectural Control Committee (the "ACC"), by and through its counsel of record, hereby submits its Reply Memorandum Supporting its Application for Preliminary Injunction.

INTRO TO MATTERS RAISED IN OPPOSITION

In conjunction with filling her opposition, Plaintiff, for the first time, provides the ACC with an explanation for the process for the petitions on the amendment and documentation related to the petitions. Plaintiff further lambasts the ACC for questioning Plaintiff's evidence – while omitting the fact that Plaintiff has refused to provide that evidence to the ACC or the community. Indeed, it is notable that this litigation was not initiated by the ACC. Instead, the ACC sent a letter to Plaintiff requesting that Plaintiff either withdraw the amendment or provide the documentation that is critical to determining whether the amendment in question is valid. Rather than provide the requested documents and information, Plaintiff instead filed suit. At the same time, Facebook posts in the community of "Amendment 5" supporters began calling for people to flood the ACC's law firm with phone calls to drive up legal expenses. The law firm was indeed flooded with phone calls, many of them abusive. Indeed, the receptionist at the law firm had to be relieved from her phone duties for a time because of the stress associated with handling abusive phone calls. The ACC continued to ask for documentation after suit was filed, but it was not forthcoming. Ultimately, due to significant ongoing harm in the community and Plaintiff's refusal to provide documents, the ACC was forced to bring this motion for preliminary injunction. Now, two months after the ACC requested the documentation that was meant to be of public record, Plaintiff finally provides documentation in order to respond to a motion.

As Plaintiff's group is well aware, the ACC is not an HOA or similar body with the ability to level assessments to fund litigation. Plaintiff's tactical use of litigation is an attempt to force the ACC to give in to the costs of litigation and mask Plaintiff's inability to follow the CC&R procedures required to pass the amendment. The remainder of Plaintiff's motion demonstrates why these tactics were necessary: the evidence provided plainly demonstrates Plaintiff's failure to comply with the requirements of the CC&Rs.

In her opposition, Plaintiff argues that publishing notice in newspapers nearly two years after her petition process had begun is sufficient to meet the requirements of the CC&Rs. Indeed, Plaintiff goes so far as to argue, without specific citation, that federal law precludes her from sending notice to lienholders. Plaintiff ignores the reality that Utah law actually requires the holder of a trust deed to record both the trust deed and the identity and address of a trustee who can "deliver written communications to the lender." Utah Code Ann. § 57-1-21(1)(a)(i)(B). All trustees and successor trustees are likewise required to record a document which states "the name and address of the new trustee." Utah Code Ann. § 57-1-22(2). In other words, Plaintiff's arguments about her inability to provide notice to lienholders fails as a matter of law. The lienholders provide public notice of contact information for the express purpose of receiving notice related to the properties. Plaintiff further fails to adequately address her failure to include the text of the proposed amendment in the notice or provide notice to the lenders prior to a vote being taken.

Similarly, Plaintiff argues that she was not required to record the amendment with the authorizing signatures, contrary to the explicit requirement of the CC&Rs. Plaintiff attempts to shift the burden for making this decision to the county recorder. Plaintiff actually argues that the

county recorder provided her legal advice about what would be sufficient and directed her not to record the signatures. Plaintiff's argument is rife with hearsay and disregards the recording statute and public recorder policies, which prohibit the recorder from providing this type of legal advice and requires the office to record this type of document. Indeed, in the ACC's own inquiries with the recorder's office, they learned that there would be no issue with recording the signature pages along with the amendment. A simple recording of this nature serves several critical purposes. First, it allows interested parties to verify that the amendment meets the requirements for an amendment and avoid a situation where the person who records the amendment can hide the authorizing documents and force a lawsuit upon interested parties. Second, it provides a necessary safeguard against fraud, as homeowners would be able to check and see if their signatures are genuine, which is an important issue in this case. Third, it complies with the express requirements of the CC&Rs.

Finally, Plaintiff argues that she collected the required signatures over a two-year period. Plaintiff's argument is void of the necessary evidence to validate and substantiate those signatures. Indeed, many of the signatures appear to have been collected through an online process that would allow any person with a VPN to simply type in names that comply with the names and addresses on record with the county recorder. The two-year process excluded the ACC and much of the community, did not allow for debate and sharing of information, and did not allow for proper authentication of the votes. All of these issues could have been avoided by a collaborative process that complied with the CC&Rs.

The ACC is not opposed to allowing an amendment if it goes through the proper process and is properly authenticated. That did not happen here. Plaintiff failed to satisfy the CC&R

requirements and is attempting to get past that fact by requiring the ACC to join in expensive litigation just to verify the signatures and process that should have been open to the public. Plaintiff's efforts should not be condoned.

CONSOLIDATION

Plaintiff agrees to consolidate the preliminary injunction hearing with a trial. However, Plaintiff attempts to put artificial restraints on the evidence that may be presented at the hearing. It is not entirely clear from her argument, but Plaintiff seems to argue that her documents should simply be accepted into evidence and no other evidence be allowed. To the extent that Plaintiff attempts to put these artificial restraints on the parties and the Court, these attempts should be rejected. Plaintiff must be required to properly admit her evidence into evidence, including by laying foundation, authenticating the documents, establishing their validity, overcoming hearsay issues, and otherwise providing the support necessary to establish the validity of the documents and testimony she wishes to present. Defendant must further be allowed to put on its own testimony and evidence subject to cross-examination. There is no need to avoid the normal legal process for such a hearing. The issues before the Court are straightforward and can be resolved in their entirety at the preliminary hearing.

OBJECTION TO EVIDENCE

In the Opposition Plaintiff refers to evidence, including signature pages, statements from the county recorder and other third parties, and other documentary evidence which rely on hearsay and for which no proper evidentiary foundation is laid. Defendant objects to this evidence below, incorporating the following general evidentiary objections:

Under Utah law "[h]earsay means a statement that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement." Utah R. Evid. 801. "Hearsay is not admissible except as provided by law or by these rules." Utah R. Evid. 802. Plaintiff's facts and arguments are rife with statements and allegations from third parties that are not supported by sworn statements. This includes alleged statements of the county recorder, statements and evidence by those who allegedly authenticated documents, and numerous signature pages. The statements are not only hearsay, including in some places multiple layers of hearsay, but they also lack foundation and are not authenticated.

Under Utah R. Evid. 901, "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Defendant has offered no declaration or other testimony demonstrating that much of the material that allegedly supports her case is what it purports to be. The signatures are not validated nor is the testimony of the custodians or collectors of the evidence present. There is no testimony as to why the Court can have confidence that the "item is what the proponent claims it is." Some of these errors can be corrected through testimony at the hearing, but many of them stem from a failure in the process. The information simply was not collected in a collaborative process that would allow for the necessary safeguards to verify the information. Without a proper evidentiary foundation, this evidence must be excluded.

REPLY TO STATEMENT OF ADDITIONAL FACTS

Plaintiff's statement of facts is in a narrative form with some assertions of fact being compound in a single sentence. This makes it difficult to respond to each assertion of fact and

alleged evidence cited in support. As such, ACC hereby responds to the assertions of fact, but reserves its right to object to the facts asserted and/or evidence at the hearing on the Application. Furthermore, the ACC objects that much of the evidence stated below

"In or around September of 2022, several of the Dixie Springs lot owners…expressed a desire to amend the CC&Rs to abolish the ACC." Opposition at 4. Perhaps this is a typo, but per Plaintiff's own assertions of fact, "In or around August 2020, Amendment 5 to CC&Rs was drafted." *Id*. at 5. Thus, the attempts to abolish the ACC did not begin in September 2022.

"The votes were vetted by two separate individuals against the Washington County recorder's database of property owners downloaded on 10/29/2022." *Id*. at 4. The ACC objects to this assertion of fact on the grounds of foundation and multiple layers hearsay. No information about these alleged "two separate individuals" is provided (i.e., name, qualifications, etc.). The signatures themselves contain multiple layers of hearsay, including the signature itself and the custodian of the documents. For the online documents, there appears to have been no verification that an interested individual with access to public records could not simply use a VPN and sign on behalf of as many households as he/she chose. There is no authentication from the third-party service provider that collected these signatures. For the door-to-door collection, what procedures were put in place to verify that the collectors, who appear to be parties highly motivated to pass the amendment, did not simply sign on behalf of the lot owners? There is no process in place for verifying or authenticating signatures. Furthermore, no information about the vetting process is provided (i.e., how was it confirmed that the Lot Owner signed? If a property was owned by an entity, how was it determined who the Lot Owner authorized to sign was? etc.).

Plaintiff claims that 886 owners voted for Amendment 5 in the affirmative. *Id*. at 4. She asserts that the votes were obtained via door-to-door canvassing, online voting, mail-in voting, and other means. *Id*. at 4-9. The ACC objects to these assertions of fact on the grounds of foundation and hearsay as outlined above. As set forth in more detail herein, the voting process was rife with inadequate procedures to verify the names and identities of individuals voting.

"The vote and signatures are retained separately on an instrument designed as a petition-style ballot." *Id*. The ACC objects to this assertion of fact on the grounds of foundation and hearsay. Again, these signatures have not been adequately verified.

"Prior to the conclusion of owner voting, written notification of the amendment proposal was provided to all first mortgage holders of Dixie Springs properties via public notice through The Intermountain Commercial Record & The Sale Lake Tribune, and The Spectrum (Saint George, UT) published on 10/16/2020, 10/5/2022, 10/12/2022, and 10/19/2022." *Id*. at 4-5, 7. The ACC objects to the assertion that publication provided adequate notice to the holders of first mortgage liens, as is required by the CC&Rs. This is addressed in detail in the argument section below.

"On September 30, 2020, a letter was mailed to all lot owners that did not have a mailing address in Dixie Springs recorded with Washington County." *Id*. at 5. The ACC objects to this assertion of fact as hearsay and vague because it is unclear what it means to "not have a mailing address in Dixie Springs recorded with Washington County."

Plaintiff asserts that, upon recommendation from the Washington County Recorder's office, she signed the Fifth Amendment as agent for the Lot Owners in favor. *Id*. at 11. The ACC objects to this assertion of fact for the reasons detailed herein. The alleged statements of the

county recorder are hearsay and do not comply with either state law or the recorder's office policies.

REPLY TO NEW MATTERS RAISED IN OPPOSITION

In her Opposition, Plaintiff responds to the ACC's arguments and incorporates new evidence. In several points, she asserts that the ACC has no evidence supporting its arguments. She conveniently leaves out that, for two (2) months, she ignored the ACC's request for documents supporting her assertion that the Fifth Amendment is valid. *See* Exhibit 3 to Application.

Plaintiff failed to comply with the brief but plain language regarding how to amend the CC&Rs. For the reasons set forth below, the ACC has met its burden in requesting that its Application be granted.

A. There is a Substantial Likelihood that the ACC will Prevail on the Merits.

To obtain a preliminary injunction, the applicant must show that "there is a substantial likelihood that the applicant will prevail on the merits of the underlying claim, or the case presents serious issues on the merits that should be the subject of further litigation." Utah R. Civ. P. 65A(e)(1). Plaintiff asserts that she complied with the requirements of Article VI Section 2 and thus validly amended the CC&Rs. *See* Opposition at 12-19.

i. Notice was Not Provided to Holders of First Mortgage Liens.

The CC&Rs require notice to holders of first mortgage liens. More specifically, Article VI Section 2 states:

> Prior to any material amendment to this Declaration, *written notice shall*[1] *be sent to all* holders of first mortgage liens, setting forth said amendment and advising them of the date that the Owners will vote on said amendment.

Exhibit 1 to Application (emphasis and footnotes added).

By its plain language, notice *must be sent* to all holders of first mortgage liens. The word "send" is defined by Black's Law Dictionary (11th ed. 2019) as:

> 1. To cause or direct to go or pass; to authorize to go and act.
> 2. *To cause to be moved or conveyed from a present location to another place; esp., to deposit (a writing or notice) in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed*.
> 3. To throw, cast, hurl, or impel by force.

(emphasis added).

Each of these definitions show that "to send" something is to cause it to move from one place to another. *Id*. One definition provides the explicit example of depositing notice in the mail. *Id*. This would certainly satisfy the CC&Rs' requirement that service be "sent". Noticeably absent from the definitions is anything resembling "to publish."

Plaintiff did not send anything to the holders of first mortgage liens. *See* Opposition at 13-15. Rather, after no actual attempt to locate the holders of first mortgage liens, she published a brief paragraph in the newspaper. *Id*. To defend her failure to provide notice as required by the CC&Rs, she asserts several excuses. *Id*.

[1] In Utah, "[t]he meaning of the word *shall* is ordinarily that of command." *Herr v. Salt Lake County,* 525 P.2d 728, 729 (Utah 1974).

a. Plaintiff's excuses fail.

Her first excuse is that she was unable to locate the holders of first mortgage liens so she gave notice via alternative means. Opposition at 15. Anyone can find the holder of a first mortgage lien. It is public record. To find the holder of a first mortgage lien Plaintiff could have reviewed the records of the Washington County Recorder's Office. There she would have found trust deeds, deeds of reconveyance, substitutions or assignments of the trust deeds, etc. for each property. Then she could determine if there was a first mortgage lien, and the loan and contact information for the holder of the lien. By way of example, a Deed of Trust recorded against Plaintiff's property as Document Number 20190016208 states that, "Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower." Oberg's Deed of Trust, **Exhibit 6**. The Lender's address is on the very first page of the Deed of Trust – 1177 West Loop South Suite 200, Houston, Texas 77027. Had she performed this task, she could have sent notice by mail to each of the holders of first mortgage liens and satisfied the CC&R requirement. We are talking about a context where lenders are required by law to have a person designated to receive notice. The name and address of that person is of public record. Providing notice is not the impossible task Plaintiff alleges.

Her next excuse is that the GLBA prohibited her from gathering information from financial institutions. Opposition at 14. In this context, her excuse is nonsensical, irrelevant, and can only be meant as an attempt to confuse the issues. The CC&Rs require that notice *be sent* to the holders of first mortgage liens. *See* Article VI Section 2, Exhibit 1. There is no requirement

that she gather information from the holders of first mortgage liens. As such, the GLBA excuse is irrelevant.

Her next excuse is that Utah law permits service by publication. Opposition at 13-15. She cites to Utah Code § 45-1-101. *Id*. at 14. That section governs the requirements of publishing legal notices. Subsection (1)(d)(i) defines the term "Legal notice" as a communication "required to be made public by a *state statute* or *state agency rule*; or a notice required for *judicial proceedings* or by *judicial decision*." (emphasis added). No state statute, state agency, judicial proceeding, or judicial decision required or permitted notice by publication in the present matter. Plaintiff ignores the reality that Utah law actually requires the holder of a trust deed to record both the trust deed and the identity and address of a trustee who can "deliver written communications to the lender." Utah Code Ann. § 57-1-21(1)(a)(i)(B). All trustees and successor trustees are likewise required to record a document which states "the name and address of the new trustee." Utah Code Ann. § 57-1-22(2). As such, her excuse fails.

Her last excuse is that providing service via publication is sufficient because it is "commonly done in similar context." *Id*. It is unclear what context she is referring to. If she is referring to litigation, to effectuate service by publication the court must order such form of alternative service. When issuing an order for alternative service, the court "will order service…by means reasonably calculated, under all the circumstances, to apprise the named parties of the action." Utah R. Civ. P. 4(d)(5)(B). Here, Plaintiff's service by publication was not reasonably calculated to apprise the holders of first mortgage liens. She allegedly published notice in three (3) Utah-based newspapers. However, holders of first mortgage liens are based across the country and are unlikely to check Utah-based newspapers. Additionally, holders of

first mortgage liens are most likely to expect notice to be served to their registered agent or to the addresses located on their recorded documents. For these reasons, Plaintiff's service by publication was not reasonably calculated to give notice to the holders of first mortgage liens and was therefore insufficient.

For the foregoing reasons, Plaintiff's assertion that she complied with the CC&Rs' requirements for service, fails. She did not *send* notice to the holders of first mortgage liens as required. She did not have a court order permitting service by publication. She failed to take the reasonable effort to locate the holders of first mortgage liens or notify them by reasonably calculated means.

ii. The Notice Did Not Meet the Content Requirements of the CC&Rs.

The notice to be provided to the holders of first mortgage liens is to set "forth said amendment and advise [the holders of first mortgage liens] of the date that the Owners will vote on said amendment." Article VI Section 2, Exhibit 1. Plaintiff proposes mangling the plain and unambiguous language of this provision and molding it to fit her own needs. She ignores the plain language of this provision on three (3) different topics: (1) that there be *a date* that the Owners vote; (2) that the notice state when the Owners *will vote*; or and (3) provide the text of the amendment. Opposition at 15-16.

"Restrictive covenants that run with the land and encumber subdivision lots form a contract between subdivision property owners as a whole and individual lot owners; therefore, interpretation of the covenants is governed by the same rules of construction as those used to interpret contracts." *Swenson v. Erickson*, 2000 UT 16, ¶ 11, 998 P.2d 807, 810–11. "Generally unambiguous restrictive covenants should be enforced as written." *Id*. (internal citations

omitted); *see also Rappoport v. Martin*, 2018 UT App. 163, ¶ 9, 432 P.3d 772, 775 (CC&Rs are interpreted by the same rules of construction as those used to interpret contracts and terms are enforced as written). Based on the foregoing, the CC&Rs are interpreted much like a contract and if the terms are unambiguous, they must be enforced.

a. The CC&Rs require the vote to occur on a specified date.

Article VI Section 2 requires the holders of first mortgage liens to be apprised of "*the date that the Owners will vote*." Exhibit 1 (emphasis added). *Id*. One reason that a singular date of voting is important is that it provides notice to holders of first mortgage liens of a date certain by which they must act. Thus, the CC&Rs indicate that a vote should take place on a specified date.

The ACC acknowledges that certain challenges may arise when attempting to hold a vote on a specified date. The challenges include permitting all Lot Owners the opportunity to vote, to be apprised of the amendment being voted on, and verifying that the Lot Owners are the persons actually voting. Thus, while a specified date of a vote is appropriate, the ACC acknowledges that it could be reasonable to hold a vote over a specific several day or even a week-long period.[2] However, the ACC submits that it would be absurd to interpret the CC&R provision as permitting a years-long vote.

[2] The ACC submits that such a vote would be more than sufficient to provide Lot Owners the opportunity to vote on the proposed amendment, whether they reside in the area or not. By way of example, absentee ballots can be mailed to Lot Owners prior to the voting period and counted as long as they are postmarked by the final voting date. An alternative example is an online voting system with Lot Owner-specific passwords or log in information.

Plaintiff asserts that a specified voting date would (somehow) prohibit an online voting system or absentee ballots.[3] Opposition at 15. She also claims that Lot Owners are unlikely to gather to vote on an amendment. *Id*. Despite these assertions, the public at-large (including Lot Owners) vote in local, state, and national elections. Clearly, it can be done. Furthermore, Lot Owners are arguably more likely to participate in a vote that so intimately and directly addresses their property rights and obligations.

The reason Plaintiff disputes the concept of voting within a reasonably defined period is because she collected "votes" for over two (2) years. Opposition at 4-11. She wants this Court to interpret the phrase "the date that the Owners will vote" to be expanded to multiples of years. Such an extrapolation is not only against the plain meaning of the CC&Rs, but also ignores the various methods by which a vote could be conducted in a reasonable amount of time.

b. The CC&Rs require that the notice state when the Owners *will vote* and be provided to lienholders before the vote.

Article VI Section 2 requires the holders of first mortgage liens to be apprised of "the date that the Owners *will vote*." Exhibit 1 (emphasis added). Note that this contains the future tense for "vote." *Id*. Much like above, a reason that providing notice of the date that the vote *will occur* is because it provides notice to lien holders of a date certain by which they must act or risk their respective Lot Owner from voting against the lien holder's interests. Thus, notice to the holders of first mortgage liens must advise them of when the Owners will be voting – not when the vote will conclude.

[3] It is unclear why Plaintiff believes that online voting could not be handled in a singular day or even a brief time period. Additionally, it is unclear why requiring absentee ballots to be mailed by the date/period of a vote would be "draconian."

Plaintiff started gathering votes in October 2020. Opposition at 4-11. Plaintiff's "notice" was published two (2) years later on October 5th, 12th, and 19th , 2022. *Id*. at 7-8. The "notice" provided stated when the vote would close – twelve (12) days after the last day of publication. *Id*. This "notice" is insufficient because it did not notify the lien holders of when the Owners *will vote*.

Furthermore, this "notice" is insufficient because it did not provide sufficient time for the lien holders to act if they so desired. As a comparison, a party responding to a Complaint has twenty-one (21) days to file an Answer. Based on the foregoing, the notice provided was insufficient.

iii. The "Vote" Conducted Does Not Comply.

a. The "vote" did not take place in a reasonably defined period, as required by the CC&Rs.

As set forth above, the CC&Rs require a vote to occur on a certain date or within a defined period. *See* Article VI Section 2 of Exhibit 1 to the Application. Despite this, Plaintiff tries to convince this Court to ignore the plain language of the CC&Rs and find that, in this circumstance, a multi-year vote was appropriate. Opposition at 16. She argues that an extended voting period was necessary to "enable a more efficient and streamlined voting process," make the vote accessible to all voters, and attract the attention of the subdivision. *Id*. If efficiency was Plaintiff's primary concern, a two-year long vote is certainly not efficient.

The ACC acknowledges that accessibility is a valid concern. However, as set forth above, this challenge can be easily overcome in a myriad of ways – an online vote with safeguards and verification in place, in-person voting over the course of a couple days or a week, and/or voting via absentee ballots mailed by the voter on or before the close of the vote. *Supra* at fn. 3.; *see*

also Declaration of Nancy Crowley March 21, 2023, **Exhibit 7**. Plaintiff asserts that "all lot owners were given an equal opportunity to participate in the decision-making process." Opposition at 17. This is not true. *See* Exhibit 5 to Application; *see also* Declaration of Kim Boyer, **Exhibit 8**. Furthermore, many of the names on Plaintiff's spreadsheet of Lot Owners contain the notation "ACC Supporter – DO NOT CONTACT." Thus, Plaintiff's argument that a multi-year vote was necessary for reasons of accessibility fails.

The ACC acknowledges that attracting the attention of the Lot Owners is a valid concern. However, this challenge can be easily overcome by simply taking efforts to advise Lot Owners of the issues being voted on and advertising of how the vote is being conducted. This advertisement could take place via in-person meetings, zoom community meetings, door-to-door canvassing, signage, and mailing information (notices, reminders, letters encouraging/explaining a vote, etc.). The documentation provided to voters should allow participation of all parties, not just information narrowly tailored from the position of the petitioners. Informing voters and encouraging voter turnout do not require multiple years. As such, Plaintiff's argument that a multi-year vote was necessary for reasons of attracting attention fails.

b. Plaintiff's voting process is replete with issues.

Plaintiff asserts that a vote of the Lot Owners occurred, that it was fair, that it was not marred by fraud or misrepresentations. *See generally* Opposition. The alleged "voting process" occurred over door-to-door canvassing, mail-in ballots, and a petition website. *Id*. Finally, the votes were allegedly "vetted by two separate individuals against the Washington County recorder's database of property owners." *Id*. at 4.

i. Misinformation and scare tactics.

Plaintiff and her group in support of the Fifth Amendment cultivated and told unsubstantiated lies, spread rumors, and purposefully misinformed the Lot Owners about the provisions of the CC&Rs and the ACC's authority, function, and actions. *See* Declaration of Kim Boyer, **Exhibit 8**; *see also* Declaration of Rex Woods, **Exhibit 9**. In response to these falsehoods, the ACC on its own and via counsel, issued letters and newsletters to inform the Lot Owners of these tactics. *See* Newsletters, **Exhibit 10**. These tactics caused confusion over the terms of the CC&Rs and harmed the reputation of the ACC and its ability to conduct its function. *See* Exhibit 5 to Application; *see also* **Exhibits 8, 9, 10**. Sadly, those in favor of the Fifth Amendment would not only perpetuate lies about the ACC, but they would also do so about Lot Owners not in favor of the Fifth Amendment. *See* **Exhibits 8, 9, 10**. These rogue tactics resulted in a sham of a vote tainted with deceit and intimidation.

ii. Verification issues.

Plaintiff asserts that the online petition was protected from against stuffing the ballot box by "locking out IP addresses." Opposition at 9. However, this is not a sufficient measure to protect the vote because a single person could use and access multiple IP addresses in a short period of time. *See* Declaration of Nancy Crowley March 21, 2023, **Exhibit 7** (Signed the petition twice in a matter of minutes using names, addresses, and lot numbers found from the recorder's records).

Additionally, an interested party could use a virtual private network (commonly known as a VPN) that "hides the user's IP address from the websites visited" and thus circumvent the website's protections and vote on behalf of nearly anyone. § 3:13. Virtual private networks

(VPNs), Electronic Discovery and Records and Information Management Guide § 3:13; *see also Technology-Property, Prob. & Prop.*, September/October 2018, at 62 ("The VPN connection will hide your IP address so that the only IP others can see is the VPN server IP. When you use a VPN, data cannot be seen as it is transmitted between you and the VPN server."); Anthony G. Volini, *A Deep Dive into Technical Encryption Concepts to Better Understand Cybersecurity & Data Privacy Legal & Policy Issues*, 28 J. Intell. Prop. L. 291, 332 (2021) ("A computer user may wish to hide his IP address via VPN for legitimate defensive purposes or to hide criminal activity."). Thus, while the petition website may have some measure of security, these could be circumvented by nearly any motivated user. As such, despite Plaintiff's assertions that the petition website has adequate defenses, it would be quite difficult to verify whether the actual Lot Owner voted.

Additionally, Plaintiff asserts that the votes were "vetted by two separate individuals." Opposition at 2. It is not clear who these individuals are, whether they were truly unbiased, or how they "vetted" the votes. She only asserts that these individuals compared the votes to the Washington County Recorder's Office records for property ownership. *Id*. However, these verification efforts are barebones and do not serve to verify that each respective Lot Owner signed in favor of the Fifth Amendment.

As set forth above, a motivated person could have voted on behalf of numerous Lot Owners if they used different IP addresses. There does not appear to have been any verification of online signatures. Additionally, the door-to-door canvassing did not appear to require any form of identification to be presented. *See* Declaration of Kim Boyer, **Exhibit 8**; *see also*

Declaration of Rex Woods, **Exhibit 9**. Considering these many failures to protect the integrity of the vote, the Application should be granted.

iv. The Fifth Amendment is Not Signed as Required by the CC&Rs.

Article VI Section 2 of the CC&Rs states that "this Declaration may be amended…by an instrument signed by not less than sixty percent (60%) of the Lot Owners, which amendment shall be effective upon recordation." Exhibit 1 to Application. Unambiguous restrictive covenants are to be enforced as written. *Swenson*, 2000 UT 16, ¶ 11. Here, the covenant clearly requires that *an instrument be signed by not less than sixty percent (60%) of the Lot Owners*.

The likely reason for this requirement is to provide transparency to the amendment process. If an amendment is recorded with the signatures of those in favor, then interested parties (the ACC, Lot Owners, holders of first mortgage liens, prospective buyers, etc.) can verify that those who voted were Lot Owners at the time of the vote. It provides an opportunity for Lot Owners to verify that their votes were properly tabulated and provides a critical check against fraudulent votes. It is much less likely that a party interested in getting rid of the ACC will manufacture votes or include false names in an online record if the Lot Owners will have the opportunity to review to see if false signatures were included. Had the Fifth Amendment been recorded per the requirements of the CC&Rs, the ACC would have had some of the documents that were kept hidden until Plaintiff finally disclosed them.

The Fifth Amendment is signed by only one Lot Owner – Plaintiff. Exhibit 2 to Application. Despite this, Plaintiff falsely asserts that "the amendment was signed by more than 60% of the lot owners." Opposition at 18. Her disdain for the plain language of the CC&Rs is

apparent when she refers to such signatures as "superfluous." *Id*. at 19. For the foregoing reasons, the Fifth Amendment does not satisfy the covenant and is therefore invalid.

a. The "recommendation" that the Fifth Amendment be recorded without the signatures.

Plaintiff asserts that she did not record the Fifth Amendment with "350 pages of signatures" because the Washington County Recorder's Office instructed her not to. Opposition at 19. Plaintiff "met with the Washington County Recorder's Office on the morning of November 1, 2022." Declaration of Ms. Oberg at ¶ 32, Exhibit A to Opposition. While there, "Upon recommendation from the County Recorder's Office and in accordance with the requirements laid outlined in the CC&Rs, I signed as an agent for lot owners." *Id*. at ¶ 33. There are couple issues with Plaintiff's alleged experience.

First, the Fifth Amendment appears to have already had Ms. Oberg's signature line prepared stating that the signor would be representing 63% of the Lot Owners. *See* Exhibit 2 to Application; *see also* October 7, 2020 Draft of Fifth Amendment, **Exhibit 11** (Showing that the Fifth Amendment was to be signed by a sole person on behalf of the Lot Owners). This indicates that Plaintiff always intended to record the Fifth Amendment without the signatures of the Lot Owners attached, as is required by the CC&Rs. This also casts doubt over her assertion that the Washington County Recorder's Office recommended that she sign as agent on behalf of 886 Lot Owners.

Second, the Washington County Recorder's Office website states that, "The Recorder is required to record all documents submitted by the public which are qualified to be recorded." Recording Requirements per Washington County Recorder's Office, **Exhibit 12**; *see also* Utah Code § 17-21-20(1) ("[A] county recorder shall record each paper, notice, and instrument

required by law to be recorded in the office of the county recorder unless otherwise provided."). The county recorders offices are repositories for recording records; they do not prepare legal documents, interpret legal documents, or give legal advice. *See* FAQs from various Utah Counties, **Exhibit 13** (Each County Recorder's webpage states "What We Don't Do" including: prepare legal documents, interpret legal documents, give legal advice). As such, it is highly unlikely that the Recorder's Office gave the "express instruction" that Ms. Oberg not record the 350+ pages of signatures. Opposition at 19. Furthermore, it is highly unlikely that the Recorder's Office advised her to sign as the agent for the 63% of Lot Owners.

Due to time constraints in getting this Reply on file, the Washington County Recorder's Office was unable to conduct an investigation into these assertions and submit an affidavit or declaration with their findings prior to the ACC's filing of this Reply. However, for the foregoing reasons, it is doubtful that Plaintiff's assertion that she was instructed to submit the Fifth Amendment without the Lot Owners' signatures and to sign on their behalf as their agent.

B. The ACC Will Suffer Irreparable Harm Unless the Injunction Issues.

To obtain a preliminary injunction, the applicant must show that they "will suffer irreparable harm unless the order and injunction issues." Utah R. Civ. P. 65A(e)(2). Plaintiff argues that the ACC will not suffer irreparable harm. *See* Opposition at 20-21. Plaintiff also argues that the ACC's focus on harm to the Lot Owners is misplaced. *Id*.

i. The ACC's Will Suffer Irreparable Harm.

Plaintiff asserts that the ACC has not and will not suffer irreparable harm, despite its authority and function being removed entirely. Opposition at 20-21.

The ACC and its Lot Owners are entitled to "rely on the covenants according to their terms." *See Crimmins v. Simonds*, 636 P.2d 478, 481 (Utah 1981). The ACC is tasked with enforcing the CC&Rs. Opposition at 21. One such task is ensuring that amendments to the CC&Rs follow the process set forth therein. *Id*. at 20 (The ACC is "to ensure that its authority is not revoked incorrectly."). The Fifth Amendment purports to eliminate all of the ACC's authority and function. *See* Exhibit 5 to Application. Clearly, the Fifth Amendment irreparably harms the ACC.

One of the ACC's tasks is ensuring that amendments to the CC&Rs follow the process set forth therein. Opposition at 20 (The ACC is "to ensure that its authority is not revoked incorrectly."). While the validity of the Fifth Amendment is in question, the ACC faces immense challenges and confusion. As it tries to enforce the CC&Rs during the pendency of this action, the ACC must explain and argue with Lot Owners, contractors, realtors, and the public at-large about the authority and function of the ACC and why the Fifth Amendment is invalid. Thus, the ACC faces time-consuming and difficult obstacles each time is tries to enforce the CC&Rs while the Fifth Amendment's validity is in question.

Plaintiff asserts that the ACC can just cease enforcing the CC&Rs for a period of time and just restart enforcement if the Fifth Amendment is invalid. *Id*. The ACC cannot just cease enforcement for a period of time because it would risk abandoning the ability to enforce the covenants at a later date and thus compromise its ability to perform its sole function. *See Vanderwood v. Woodward*, 2019 UT App 140, ¶ 16, 449 P.3d 983, 988; *see also Fink v. Miller*, 869 P.2d 649, 652 (Utah Ct. App. 1995). Of course, Plaintiff suggests ceasing enforcement because she wants the ACC to lose its authority to enforce any covenants.

Based on the foregoing, the ACC faces irreparable harm unless the injunction issues. The ACC has requested an order and preliminary injunction declaring that the Fifth Amendment is invalid, failed to amend the CC&Rs, and should be revoked. The ACC has also requested that, at the very least, a preliminary injunction issue halting the effect of the Fifth Amendment until its validity can be determined at trial.

ii. The Lot Owners and Others Have Been Harmed by the Fifth Amendment.

Plaintiff opposes the ACC's arguments that harm to Lot Owners, prospective purchasers of property, and others should be considered in the analysis of granting the Application. *See generally* Opposition. However, this court should consider the harm these third parties suffer when determining whether granting the Application is in the public's interest.

"The court must also consider the effect of the injunction on nonparties." *Graham v. Med. Mut. of Ohio*, 130 F.3d 293, 295 (7th Cir. 1997); *see also Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 587 (Del. Ch. 1998) ("It is also appropriate to consider the impact an injunction will have on the public and innocent third parties."); *Shattuck v. S. Travelers' Ass'n*, 298 S.W. 461, 462 (Tex. Civ. App. 1927) ("It is well–observed rule that the court shall take into consideration the relative inconvenience or injury which may be sustained by third persons by the granting or refusing of an application for injunction.").

Lot Owners in the ACC purchased their property subject to and in reliance on the CC&Rs. *See Crimmins*, 636 P.2d at 481. The Fifth Amendment purports to rescind all authority and function of the ACC and drastically alters the rights and obligations of the Lot Owners. As set forth in the Declaration of Nancy Crowley, mass confusion and dispute has set in amongst Lot Owners about their rights and obligations under the CC&Rs, the validity of the Fifth

Amendment, and the function and authority of the ACC. Exhibit 5 to Application; *see also* Declaration of Kimberly Boyer, **Exhibit 8**; Declaration of Rex Woods, **Exhibit 9**; Newsletters, **Exhibit 10**. This chaos was intentionally fomented by Plaintiff and her group. *Id*.

As set forth herein, this Court must also consider the effect of the proposed injunction on third parties. Here, the Lot Owners' ability to rely on the CC&Rs has been muddied. The issuance of the ACC's requested relief will rectify the harm caused by the Fifth Amendment, even if temporarily.

C. The Threatened Injury Outweighs the Damage the Proposed Injunction May Cause.

To obtain a preliminary injunction, the applicant must show that the threatened injury to the applicant outweighs the potential damage to the enjoined party. Utah R. Civ. P. 65A(e)(3). Plaintiff argues that the ACC is not at risk of injury. *See* Opposition at 21-22. Plaintiff misunderstands (or purposefully confuses) the requirement – the threatened injury to the ACC outweighs the potential damage to Plaintiff. Utah R. Civ. P. 65A(e)(3).

i. Potential Damage to Plaintiff.

The ACC's argument that Plaintiff will not suffer damage if the Application is granted is unopposed. *See* Application at 11-12; *see also* Opposition. If the Application is granted, the potential damage to Plaintiff is that she will have to abide by the terms of the CC&Rs and its valid amendments – as she has been required to do since before November 1, 2022. Thus, this factor weighs heavily in favor of the ACC.

ii. Threatened Injury to the ACC.

The ACC stands to suffer significant injury. The ACC's function is to "insure that all exteriors of homes and landscaping within the property harmonize with existing surroundings

and structures." Article II Section 1 of Exhibit 1 to Application. Here, the ACC's very purpose and authority are in question – the Fifth Amendment purports to rescind the ACC's authority and function, but the Fifth Amendment's validity is in question. *See* Exhibit 5 to Application. This has led to mass confusion amongst the ACC and Lot Owners, including Plaintiff. *Id*.

On consecutive pages, she states that "the ACC can function entirely property by simply waiting on the outcome. The ACC only exists to enforce specific provisions in the CC&Rs….[the Lot Owners] will operate with the understanding that there is currently not an ACC in the neighborhood but that there is a pending lawsuit that may affect that." Opposition at 21-22. Which is it? How can the ACC simply wait around when its only function is to enforce the CC&Rs? If the ACC does not exist but it might function in the future, how should people proceed with buying, selling, or remodeling their property? Plaintiff herself is not sure. Based on the foregoing, the threatened injury to the ACC far outweighs the potential damage to Plaintiff.

a. Extra violations and fines are not just a part of business.

Plaintiff argues that this is just part of the nature of operations like the ACC. *See* Opposition at 21. While violation notices and imposing fines are a part of the ACC's operations, it is not their main function, and it is not just "the nature of operations" to face violations from large swathes of the Lot Owners in a short period of time.

Furthermore, it is not par for the course for an entity such as the ACC to be forced to explain its continuing authority, dispute the validity of the Fifth Amendment, and engage in endless back-and-forth with every Lot Owner, realtor, contractor, or other interested party. With its authority and purpose in question, the ACC has had extreme difficulty in performing its function. These challenges and injury are a direct result of Plaintiffs' actions.

b. Plaintiff's argument that no security is necessary indicates that the ACC has not suffered damage is incorrect.

Plaintiff argues that the ACC's request for no security is evidence that it will not suffer damage. *See* Opposition at 21-22. Plaintiff does not understand (or purposefully confuses) the quoted language. The ACC requests no security because no party will incur costs, fees, or damages if a *wrongful order or injunction* is entered. *See* Application at 17 (emphasis added); *see also* Utah R. Civ. P. 65A(c)(1) (Stating that the requirement for a security can be overcome if "it appears that none of the parties will incur or suffer costs, attorney fees or damage as the result of any wrongful order or injunction."). As set forth herein, the issuance of a preliminary injunction will not be wrongful, Plaintiff has forgone any argument that she will be harmed by the issuance of such a preliminary injunction, and (as set forth below) the issuance of the preliminary injunction is in the public's interest.

D. Granting the ACC's Application is Not Adverse to the Public's Interest.

To obtain a preliminary injunction, the applicant must show that the order or injunction to be issued is "*not adverse to the public interest*." Utah R. Civ. P. 65A(e)(4) (emphasis added). Again, Plaintiff misunderstands (or purposefully confuses) the requirement. She argues that granting or denying the Application has "no impact" on the public. *See* Opposition at 22. At no point does she argue that granting the Application is adverse to the public interest. *Id*. As such, the Application should be granted.

i. This Court Should Consider the Positive Effect that the Injunction Will Have on the Lot Owners and the Public at-large.

Plaintiff largely ignores the ACC's assertions that the Fifth Amendment has caused mass confusion and wreaked harm on Lot Owners and the public. *See generally* Opposition. Ignoring the positive impact that the injunction will have is inappropriate.

As set forth above, courts "must also consider the effect of the injunction on nonparties." *Graham*, 130 F.3d at 295. Granting the ACC's requested relief is in the best interest of the Lot Owners and the public because it would clarify their rights and obligations under the CC&Rs.

E. The ACC's Request for Attorney's Fees Should be Granted.

i. Utah Code § 78B-5-825(1).

The ACC requested attorney's fees under Utah Code § 78B-5-825(1). *See* Application at 17-18. This request was based on Plaintiff's prolonged failure (and excuses) to provide evidence supporting her claim that the CC&R amendment process had been followed.

On January 13, 2023, the ACC requested documentation showing that the CC&R amendment process had been followed. *See* Exhibit 3 to Application. Rather than provide the documents, Plaintiff filed suit and stated that she could not provide them because the "computer wouldn't turn on." Her actions and excuses appeared to be a clear indication that no such documents existed. Nearly two (2) months after the documents were first requested, her alleged evidence was finally produced on March 9th (her initial disclosure deadline). Plaintiff's action of withholding the requested documents, which the ACC requested for purposes of investigating the validity of the Fifth Amendment and which, at least in part, should have been public record (i.e., the signatures to the Amendment), and instead initiating suit speak to her bringing this action in bad faith.

a. Additionally, Lot Owners in favor of the Fifth Amendment have purposefully attempted to make this litigation more costly to the ACC, a clear demonstration of bad faith.

Those in favor of the Fifth Amendment have made their intentions known. A post from "Donaldson Errick" states "I say flood the lawyers office with calls about this and cost them more $." *See* Facebook Post, **Exhibit 14**. While it does not appear that Plaintiff made this post, she is serving as a conduit by which disgruntled Lot Owners are trying to intimidate and bully the ACC into submission. Such acts are clearly done in bad faith.

ii. CC&R Article V Section 6.

Plaintiff asserts that the ACC cannot recover its fees and costs because it failed to provide a violation notice, the opportunity for a hearing, and a second violation notice. *See* Opposition at 23. Article V Section 6(i) states that "Owners will be liable to pay any and all costs and fees, including a *reasonable attorney's fee incurred in connection with any enforcement* or collection *action* related to the Owner's violation of the CC&Rs." *See* Exhibit 4 to Application (emphasis added). As set forth above, unambiguous restrictive covenants should be enforced as written. Here, the covenant states that Owners are liable for a reasonable attorney's fee incurred in *any enforcement action*. The covenant does not restrict the award to occasions when certain steps have been taken. *Id*. Thus, Article V Section 6(i) should be broadly applied to any action related to the enforcement of the CC&Rs.

Additionally, Article V Section 6(i) contains no requirement that the preceding subsections be satisfied before Lot Owners are liable to pay for the ACC's fees and costs in an enforcement action. *Id*. It would be absurd to require the ACC to satisfy Section 6(a)-(h) each

time it seeks attorney's fees and costs *especially when it is sued before it is able to satisfy those subsections*! Yet, this is exactly what Plaintiff argues.

In January 2023, the ACC requested documents demonstrating whether the CC&R amendment process had been followed. *See* Exhibit 3 to Application. Plaintiff responded by immediately filing suit and withholding the requested documents for nearly two (2) months. Her actions inhibited the ACC's: (1) ability to review whether the amendment process was followed, (2) determine the exact violations committed, (3) issue a violation notice, and (4) follow the other procedures set forth in Article V Section 6. *See* Exhibit 4 to Application. In sum, Plaintiff circumvented the entire Section 6 process by suing the ACC when it was investigating the issues. Plaintiff's impetuous action should not inhibit the ACC's recovery of attorney's fees and costs.

Finally, to the extent necessary, the January letter may be interpreted as written violation notice and therefore satisfies Article V Section 6(a). It notified Plaintiff of expected violations and issues with the Fifth Amendment. She then ignored Section 6(b) (which permits an Owner to request a hearing with the ACC) and filed suit – again circumventing the entire process set forth in Section 6 – which should not serve as a bar to the ACC's ability to recover its fees and costs. For the foregoing reasons, the ACC's request for attorney's fees and costs should be granted, assuming it prevails.

CONCLUSION

For the reasons set forth herein and in the Application, the ACC's request for an injunction and order that the Fifth Amendment failed to satisfy the requirements to amend the CC&Rs and should be declared invalid, of no effect, and should be revoked, rescinded, or otherwise eliminated should be granted.

Additionally, the hearing on the Application should be consolidated with a trial on the merits. The issues caused by the Fifth Amendment have caused confusion and damage to the ACC, the Lot Owners and the public. To limit the damage caused by the Fifth Amendment, the court should swiftly enter a final judgment and order on this matter.

DATED: March 22, 2023.

SNOW JENSEN & REECE, P.C.

By: /s/ *J. Tyler King*
Jeffrey R. Miles
J. Tyler King
Attorneys for Counterclaimant

CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2023, I caused a true and correct copy of the foregoing **REPLY MEMORANDUM SUPPORTING APPLICATION FOR PRELIMINARY INJUNCTION** to be served upon the following by the method indicated:

Zackary P. Takos	☒	Electronic Filing
Steven R. Hart	☐	Email
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/s/ *Francesca Alas*
Paralegal