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SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

DOUGLAS KRUSCHEN, an individual

Plaintiff,

vs.

ANNANDALE TOWNHOUSE
ASSOCIATION, INC., a California nonprofit
mutual benefit corporation; VICTOR RENE
MARTINEZ, an individual; ANTHONY
WAGNER, an individual; JAMES
GROSSMAN, an individual; SCOTT PERL,
an individual; JEFFERY ATKINSON, an
individual; and Does 1 through 10, inclusive,

Defendants.

CASE NO. 23VECV05191

(Unlimited Civil)

Assigned for all purposes to Hon. Eric Harmon,
Dept. 107

**TRIAL BRIEF OF PLAINTIFF DOUGLAS
KRUSCHEN**

Pursuant to Department 107 Rules, Trial Policies No. 1, Plaintiff DOUGLAS KRUSCHEN (“Plaintiff”) hereby submits his Trial Brief in connection with the matter set for trial on February 27, 2024, at 9:00 a.m.

I

INTRODUCTION

Plaintiff only wanted his HOA’s election to comply with the law. But despite his good faith effort, Defendant ANNANDALE TOWNHOUSE ASSOCIATION, INC. (“Annandale”) turned its 2023 election into a debacle. Recent, substantial changes in California law affecting community

association elections underscore the importance of this issue as a matter of statewide public policy. Annandale's multiple violations of its governing documents and California law warrant this Court issuing orders that, *inter alia*, a) void the 2023 election, b) reseal the prior board of directors, c) direct Annandale to conduct a new election, d) impose civil penalties, and e) award to Plaintiff his attorney fees as prevailing party.

II

CENTRAL CONTENTIONS

The following itemized contentions are central to Plaintiff's claims at trial.

Item No. 1: *Failure to properly distribute election materials.* Pursuant to Civil Code §4040, the Association was obligated to deliver election related materials to both he and his non-party spouse as record holders of title. However, notices were delivered only to Plaintiff's spouse at one of the designated addresses.

Item No. 2: *Refusal to seek consent of Board nominees.* The Association's Election and Voting Rules at Paragraph 7(c) authorized Plaintiff to nominate board candidates. Recognizing that many potentially qualified candidates never otherwise volunteer, Plaintiff caused the nomination of hundreds of Annandale members. No rule precluded him from doing so. The Election and Voting Rules at Paragraph 7(d) required Annandale to contact the nominees to confirm their consent to running for a director position. The Association refused to do so.

Item No. 3: *Failure to enforce candidate qualifications.* Pursuant to the Association's Election and Voting Rules, Paragraph 7(b)(ii), director candidates are only qualified to serve on the board if they are current in payment of their assessments. However, there is evidence that director Scott Perl was not qualified for election to the board based on assessment delinquency.

Item No. 4: *Failure to facilitate member contact.* Pursuant to Civil Code §5225 and Corporations Code §8330, Annandale was obligated to facilitate Plaintiff contacting all of Annandale's members, which Plaintiff sought for campaign purposes. Annandale failed to do so.

Item No. 5: *Ballots set forth wrong term lengths.* The Association's Bylaws at Article IV, Section 5 require three-year director terms, but ballots distributed to members provided for terms

shorter than three years.

Item No. 6: *Failure to provide access to election rules.* Pursuant to Civil Code §5105(h)(4), Annandale was obligated to provide its members with access to its Election and Voting Rules by (at a minimum) posting them to a website identified on the ballot. Annandale failed to post its Election and Voting Rules to the indicated website.

Item No. 7: *Failure to comply with annual meeting notice obligation.* The Association’s Bylaws at Article III, Section 5, impose on the Secretary a duty to timely mail notice of the annual meeting to each owner of record. The Association failed to do so.

Item No. 8: *Improper proxy handling.* Pursuant to the Association’s Bylaws, proxies must be filed with the Secretary. Pursuant to Civil Code §5130(b), a proxyholder must cast the member’s vote by secret ballot and proxies may not be used in lieu of secret ballots. However, proxies were never filed with the Secretary, and at least one proxyholder submitted proxies—not secret ballots—directly to the inspector.

Item No. 9: *Unauthorized electronic member meeting for ballot count.* Contrary to multiple authorities, Annandale counted ballots for the 2023 election at a meeting which could only be attended via Zoom. (See, e.g., Corp. Code §7510(f); Civil Code §§4926(b), 5120(a); Election and Voting Rules, Paragraph 12(a); Bylaws, Article III, Section 2.)

Item No. 10: *Ballots accepted after close of the polls.* Pursuant to Election and Voting Rules, Paragraph 2(d)(i), when the polls closed, the inspector was precluded from accepting further ballots. However, an additional 50 ballots were accepted and counted.

Item No. 11: *Failure to properly notice election results.* Pursuant to Civil Code §5120(b) and Election and Voting Rules, Paragraph 13(c), Annandale was required to provide notice of the election results, but failed to provide any such notice to Plaintiff.

III

SB323 LEGISLATIVE BACKGROUND DEMONSTRATES THE IMPORTANCE OF ELECTIONS INTEGRITY IN COMMUNITY ASSOCIATIONS

Civil Code §5100, *et seq.*, governs HOA elections and was substantially amended by Senate

Bill 323, which became effective January 1, 2020. The legislative history of the enactment demonstrates a focus on election integrity. “SB 323 will strengthen the democratic governance in California’s over 52,000 homeowner’s associations. . . . SB 323 ensures that those holding positions of power over other residents in HOAs properly establish elections rules and adhere to them.” (Senate Judiciary Committee report, 4/2/2019.)

“The California Appellate courts have ruled repeatedly that associations parallel in almost every way the powers, duties, and responsibilities of local government. The original legislation to create integrity in association elections built on these opinions by stating that ‘it is the intent of the Legislature to ensure that democratic principles and practices are in place with respect to the governance of common interest developments.’ Nowhere in association governance are democratic principles more vital than during elections [...] Unfortunately, since their enactment, the California laws governing association elections have been ignored or violated or undermined [...]. SB323 aims to address these abuses.”

(*Id.*) “. . . SB323 makes it harder for associations to manipulate HOA elections and goes a long way toward restoring confidence in this essential democratic process.” (Assembly Committee on Judiciary report, 7/9/2019; Senate Rules Committee report, 9/9/2019.) Plaintiff’s action seeks to vindicate the state’s interest in ensuring the reliability and trustworthiness of HOA director elections.

IV

BASES FOR RELIEF

The following synopsis supplements Plaintiff’s Verified Complaint, which more fully addresses his claims and supporting authority.

A. Plaintiff’s Claims for Relief

i. Corporations Code §7616 Authorizes This Court To Order a New Election

Corporations Code section 7616 provides as follows:

(a) Upon the filing of an action therefor by any director or member or by any person who had the right to vote in the election at issue, the superior court of the proper county shall determine the validity of any election or appointment of any director of any corporation.

...

(d) The court, consistent with the provisions of this part and in

conformity with the articles and bylaws to the extent feasible, may determine the person entitled to the office of director or **may order a new election to be held** or appointment to be made, may determine the validity, effectiveness and construction of voting agreements and voting trusts, the validity of the issuance of memberships and the right of persons to vote **and may direct such other relief as may be just and proper.**

The Corporations Code provides broad authority for this Court to remedy the defects which affected Annandale's 2023 director election.

ii. Civil Code §5145 Authorizes This Court To Void the Election

Civil Code section 5145(a) provides as follows:

"A member of an association may bring a civil action for declaratory or equitable relief for a violation of this article by the association, including, but not limited to, injunctive relief, restitution, or a combination thereof, within one year of the date that the inspector or inspectors of elections notifies the board and membership of the election results or the cause of action accrues, whichever is later. If a member establishes, by a preponderance of the evidence, that the election procedures of this article, or the adoption of and adherence to rules provided by Article 5 (commencing with Section 4340) of Chapter 3, were not followed, **a court shall void any results of the election unless the association establishes, by a preponderance of the evidence, that the association's noncompliance with this article or the election operating rules did not affect the results of the election.** The findings of the court shall be stated in writing as part of the record."

Under the Civil Code, Plaintiff's burden is to demonstrate that Annandale failed to comply with its Election and Voting Rules or with the applicable Civil Code provisions. When he does so, the burden shifts to Annandale to prove that the violations did not affect the results of the election. In the words of the Senate Judiciary Committee, this "makes policy and logical sense. The claim that an HOA's violation of the election laws did not affect the outcome sounds very much like an affirmative defense, and defendants usually bear the burden of proving an affirmative defense." (Senate Judiciary Committee report, 4/2/2019.)

Pursuant to Civil Code §5145(b), Plaintiff also seeks imposition of civil penalties of \$500 per violation.

B. Annandale's Affirmative Defenses

Annandale's affirmative defenses all fail for lack of factual or legal support. Boilerplate defenses such as waiver, consent, and failure to mitigate damages, do not arise from admissible

evidence. Those focused on Plaintiff's failure to save Annandale from itself, likewise, fall flat in that they do not constitute affirmative defenses. Annandale at all times relevant was represented by counsel, and assisted by professional management and an inspector of elections. Plaintiff in good faith advised Annandale of its procedural missteps. Moreover, substantial irregularities occurred in the final stages of the electoral process. As for Annandale's Twelfth Affirmative Defense that procedural defects did not affect the election's outcome, it cannot establish that each procedural failure, whether discrete or cumulative, did not affect the outcome.

IV

CONCLUSION

For the foregoing reasons and in anticipation of the evidence to be presented at the trial of this matter, Plaintiff is entitled to the relief sought by way of his Verified Complaint.

Dated: February 25, 2024

MYERS, WIDDERS, GIBSON,
JONES & FEINGOLD, L.L.P.

By: 
James E. Perero
Attorneys for Plaintiff Douglas Kruschen

STATE OF CALIFORNIA)
) SS
COUNTY OF VENTURA)

On February 25, 2024, I served the foregoing document described as TRIAL BRIEF OF PLAINTIFF DOUGLAS KRUSCHEN on the interested parties in this action as follows:

Attorneys for Defendants, ANNANDALE
TOWNHOUSE ASSOCIATION, INC.;
VICTOR RENE MARTINEZ; ANTHONY
WAGNER; JAMES GROSSMAN;
SCOTT PER; and JEFFERY ATKINSON

☐ **(BY PERSONAL SERVICE)** I enclosed a true copy of such documents in a sealed envelope and delivered such envelope by hand to the offices of the addressee.

☒ **(BY ELECTRONIC TRANSMISSION)** I transmitted a PDF version of this document by electronic mail to the party (s) identified on the above service list using the e-mail address (es) indicated.

/s/ James E. Perera

James E. Perero