In the

Court of Appeal

of the

State of California

SECOND APPELLATE DISTRICT
DIVISION EIGHT

OCEAN TOWERS HOUSING CORPORATION,
a California Cooperative Housing Corporation,

Petitioner,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES,

Respondent,

SEIF ASCAR, Individually and as Trustee of the Ascar Family Trust Dated July 5, 2012,
THE WINDSOR PROPERTY TRUST AND THE BREEZE TRUST,
WINDSOR OCEAN INC. and JOHN SPAHI,

Real Parties in Interest.

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY, DEPARTMENT P
HON. ELAINE W. MANDEL · PHONE NO. (310) 255-1877 · NO. 19SMCV00918

PRELIMINARY OPPOSITION TO PETITION FOR WRIT OF MANDATE

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
California Rules of Court, rule 8.488(c)(2)

The following entities or persons have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves:

Defendant and Real Party in Interest Seif Ascar.

DATED: December 10, 2020

BAINBRIDGE LAW APC

MARK ANCHOR ALBERT & ASSOC.

/s/ Mark Anchor Albert
Mark Anchor Albert
Attorneys for Defendants and Real Parties in Interest Windsor Ocean Inc. and John Spahi

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Pursuant to California Rules of Court, rule 8.487, subd. (a)(1), Defendants and Real Parties in Interest Windsor Ocean Inc. and John Spahi ("Spahi") (collectively "Real Parties In Interest") respectfully submit this Preliminary Opposition to the Petition for Writ of Mandate or Other Appropriate Relief (the "Petition") filed by Plaintiff and Petitioner Ocean Towers Housing Corporation ("Petitioner," "OTHC," "HOA," or "Ocean Towers"). The Petition is legally and factually deficient and should be denied summarily.

The Petition seeks to require the Hon. Elaine Mandel, Judge presiding in Department P of the West Division of the Los Angeles Superior Court, to vacate her October 23, 2020 Order staying Case No. 19SMCV00918 on grounds of exclusive concurrent jurisdiction *vis-à-vis* a case involving the same and overlapping subject matter, facts, law, damages, evidence, and key parties and witnesses that was previously pending for several years in Department O of the same courthouse (Case No. SC124263, before the Hon. H. Jay Ford, Judge presiding). Whether or not the stay order is reversed, the Petition seeks to require Judge Mandel to rule on the merits of Petitioner's *ex parte* application in Case No. 19SMCV00918 for the appointment of a receiver over the same 7 luxury residential Units at issue in Case No. SC124263 pending before Judge Ford. The 7 Units are allegedly owned or controlled by Real Party in Interest Spahi – who is the same key defendant sued by Petitioner in both

lawsuits with respect to the same 7 Units.[1]

The Petition is meritless and should be rejected forthwith for the following independently-dispositive reasons:

First, Petitioner fails to sustain its burden of demonstrating – by citation to competent evidence in the Petition for Writ of Mandate record – the absence of any plain, speedy, and adequate remedy at law, or any cognizable irreparable injury or urgency, justifying emergency mandamus relief. Case No. SC124263 has been pending for 5 ½ years, yet Petitioner never sought a receiver over the same 7 Units at issue in that case during that long period of time, even though the stay orders in that case had a carve-out for receivership requests. (*See* Real Parties in Interest's Exhibits ["RE"], Ex. A (April 26, 2017 Order staying Case No. SC124263 "for all purposes" except receivership requests).)

Petitioner also did not seek a receiver over those same Units in Case No. 19SMCV00916 until it filed its *ex parte* receivership application on March 11, 2020, nearly 10 months after it commenced that action (on May 13, 2019), and on the day after the 19SMCV00918 Court issued its Tentative Ruling granting the Real Party in Interest's Motion for Stay. Petitioner fails to explain, or support by record citation, what urgency suddenly arose by March 11, 2020, which purportedly did not exist more than 5 years earlier. Its failure to do so is understandable: no such urgent

[1] The 7 Units at issue in both overlapping cases are: Unit No. 1203B, No. 1509P, No. 1601B, No. 1610P, No. 1709B, No. 1905P, and No. 1908B.

emergency existed, then or now. There has never been any actual, substantial risk of irreparable harm by not imposing a receiver. To this very day, Petitioner remains free to seek the appointment of a receiver in Case No. SC124263, in which the partial stay was lifted on August 21, 2019 (*see infra*, § II.7 and RE, Ex. G, pgs. 104-105), and in which Judge H. Jay Ford retains full jurisdiction over the identical 7 Units at issue in Case No. 19SMCV00918.

In a futile attempt to fabricate a supposed crisis requiring emergency mandamus relief, Petitioner concocts the theory that Spahi might have the dastardly intention to destroy the 7 Units at issue while concurrently absconding with $67,000 per month in lease payments on the Units, which payments the Petitioner apparently wishes to secure for itself without first proving its case at trial before a jury. Petitioner utterly fails to explain how Spahi could continue to collect any rents at all if he destroyed these units.

Petitioner's invented emergency also is nonsensical. Petitioner fails to appreciate the inherent inconsistency of claiming (without foundation) that Real Parties in Interest currently reap $67,000 in monthly lease payments on the 7 Units while simultaneously planning to "raze" them, for some unfathomable self-destructive reason. (*See* Petition at pgs. 10 and 30.)

In any event, the $67,000 per month monetary damages that Petitioner claims for lost rents on the 7 Units and its claim that Real Parties in Interest may damage them simply do not constitute irreparable harm;

they instead are mere money losses compensable at law as ordinary damages on Petitioner's breach of contract claims. Simply put: adequate legal remedies exist here which disqualify mandamus relief. And Petitioner presents no evidence (or even argument) that Real Party in Interest Spahi is insolvent or is otherwise incapable of paying a money judgment after trial, or that Petitioner's money damages somehow are unascertainable.

The Petitioner has also failed to disclose to this Court that there is no risk that the Units will be sold without Petitioner's approval because Petitioner's new Board of Directors has enacted an "Amended Resolution" that prohibits such sales. And both Petitioner's lost-rent claim and its claim that Real Party in Interest may destroy the 7 Units constitute naked *ipse dixit* by Petitioner's counsel without adequate support in competent evidence in the record. (*See infra*, Section IV.A.)

Second, Petitioner has unclean hands regarding the core stay issue that is the subject of this writ proceeding, and mandamus would not promote the interests of justice or equity. Petitioner commenced Case No. 19SMCV00918 in derogation of, and in order to circumvent the previous Stay Orders issued by the Hon. Lisa Hart Cole and the Hon. H. Jay Ford in the first-filed, case (No. SC124263), which case has at all relevant times remained fully in force and effect from June 3, 2015, to the present. Therefore, SC124263 was in full force and effect when Petitioner filed the second, duplicative, piecemeal case (No. 19SMCV00918) as an end run around the stay that continued in the first case, SC124263.

Petitioner improperly filed Case No. 19SMCV00918 just two weeks

after Judge Cole entered her Minute Order on April 30, 2019, which Minute Order denied Petitioner's *ex parte* application to lift the stay in Case No. SC124263. *(See,* RE, Ex. C, which is Plaintiff Ocean Towers' April 26, 2019 *Ex Parte* Application to lift the then existing stay Order in SC124263. *See also*, RE, Ex. D, which is Judge Lisa Cole's April 30, 2019 Minute Order, in which Judge Cole denies Ocean Towers' April 26, 2019 *Ex Parte* Application.)

Petitioner's filing of a new complaint in 19SMCV00918 just two weeks after Petitioner's Ex Parte Application to lift the then existing stay that was in effect in Case No. SC124263 was an inequitable and inappropriate attempt to circumvent the stay Order that existed in the first case by creating improper piecemeal litigation in a second lawsuit after Petitioner could not get its way in the SC124263 case. This improper and unethical end run around the existing stay Order in SC124263 precludes equitable mandamus relief regarding the stay and receiver issues in Case No.19SMCV00918. (*See infra*, Section IV.B.)

Third, Judge Mandel's October 23, 2020 Order staying Case No. 19SMCV00918 on grounds of exclusive concurrent jurisdiction was proper as a matter of fact and law. The same policies favoring judicial efficiency and comity animate the doctrine of exclusive concurrent jurisdiction (sometimes called "priority of jurisdiction"), whether the two duplicative cases are pending before different departments of the same court, or before different superior courts. The risk of duplicative proceedings resulting in inconsistent rulings on the same and/or overlapping facts and evidence,

involving the same and/or overlapping parties and witnesses, and involving the same and/or overlapping damages is considerable. Case No. 19SMCV00918 involved (1) the same 7 Units, (2) the same key defendant (Real Party in Interest, Spahi) who supposedly owns or controls those same Units, and (3) the same core damages comprised of millions of dollars in attorneys' fees incurred as a result of litigation with the lender/lienholders that involved the same Units.

Judge Ford's decision not to transfer Case No. 19SMCV00918 for coordinated or consolidated adjudication with Case No. SC124263 was based on judicial efficiency grounds, and not for any lack of case relatedness.

Judge Mandel's ruling that Petitioner's *ex parte* receivership application was mooted by her stay order was also proper. Given Judge Mandel's entirely-correct determination that Judge Ford's case, Case No. SC124263, had priority of jurisdiction over the subject matter of the underlying litigation, regarding not only the same 7 Units at issue but all other related claims between Real Party in Interest and Petitioner, it is perfectly consistent and in conformity with judicial efficiency and comity to leave Petitioner's receivership request on the table unless and until the stay is lifted after consummation of Case No. SC124263 (*See infra*, Section IV.C.)

Put another way, all matters related to a need for a Receiver can be effectively addressed in the ongoing SC124263 case where the same 7 Units are at issue. Indeed, a table specifically listing those same 7 Units

appear at PE, Vol. III, Ex. 31, pg. 1233, ¶ 7, lines 12-20 of the operative Sixth Amended Complaint in SC124263. Thus, once the 19SMCV00918 case was stayed by Judge Mandel based on the doctrine and on the principles of exclusive concurrent jurisdiction, there was no need for the 19SMCV00918 Court to continue that case by the appointment of a Receiver, particularly when Receiver-type relief—if it should be warranted—would also be available to the Petitioner in the Senior and ongoing SC124263 case, which involves the same 7 Units.

Fourth, Real Parties in Interest did not waive, nor were they estopped from presenting, their successful exclusive concurrent jurisdiction challenge. Real Parties in Interest repeatedly and explicitly asserted their right to a stay on the basis of exclusive concurrent jurisdiction, including explicitly stating exclusive concurrent jurisdiction as the Third Affirmative Defense in Spahi's Answer to the First Amended Complaint in Case No. 19SMCV00918, filed on December 3, 2019, and as the Third Affirmative Defense in Windsor Ocean Inc.'s Amended Answer to the First Amended Complaint in Case No. 19SMCV00918, filed on March 2, 2020. Both Answers were filed before Petitioner made its *ex parte* application for a receiver on March 11, 2020, and before the 19SMCV00918 Court ruled on Spahi's Motion for Stay based on the doctrine and the principles of exclusive concurrent jurisdiction. (*See*, RE, Ex. I, pg. 138 which is the Third Affirmative Defense for Exclusive Concurrent Jurisdiction, which is part of John Spahi's December 3, 2019 Answer; *See also*, Petitioner's Appendix of Exhibits ("PE"), Vol. II, Ex. 18, pg. 780, which is the Third

Affirmative Defense for Exclusive Concurrent Jurisdiction, which is part of Windsor Ocean Inc.'s March 2, 2020, Amended Answer.) (*See infra*, Section IV.D.)

Fifth, Petitioner erroneously claims that because Real Party in Interest Spahi did not include a thorough attempt to stay the case in its demurrer by relating the allegations from the Fifth Amended Complaint in SC124263 with the allegations from the First Amended Complaint in 19SMCV00918 that Spahi waived his rights to pursue, or is estopped from pursuing, a stay based on exclusive concurrent jurisdiction in the future. What Petitioner failed to disclose to this Court is that Petitioner did not even file its Fifth Amended Complaint in SC124263 until October 16, 2019, whereas Spahi's Demurrer was already filed on October 7, 2019—nine days prior to when the key Fifth Amended Complaint was filed by Petitioner. (*See,* RE, Ex. H, which is a conformed copy of the Fifth Amended Complaint, showing that it was filed on October 16, 2019.) (*See*, PE, Vol. I, Ex. 7, which is a copy of Spahi's Demurrer that was signed, filed and served on October 7, 2019—nine days prior to the existence of the filed Fifth Amended Complaint in SC124263.)

Spahi's Motion for Stay based on the doctrine and on the principles of exclusive concurrent jurisdiction was based almost exclusively on the similarity of the allegations that were made in the Fifth Amended Complaint in SC124263 and the allegations that were made in the First Amended Complaint in 19SMCV00918. These were clearly new facts and circumstances at the time the Fifth Amended Complaint was filed on

October 16, 2019, which warranted Spahi's filing of his Motion for Stay based on the doctrine and on the principles of exclusive concurrent jurisdiction. (*See* more detailed discussion *infra*, Section IV. D.)

Sixth, no countervailing policies exist which outweigh the strong public policies favoring judicial economy and comity, and the avoidance of duplicative proceedings involving the same subject matter, with the attendant risks of inconsistent rulings and adjudications on the same or substantively similar facts, evidence, and law, involving the same and/or overlapping parties, witnesses, damages, and property. (*See infra*, Section IV.E.)

For each and all of these reasons, singly and together, as elaborated upon above and below, the Petition should be summarily denied.

II. ADDITIONAL MATERIAL FACTS NOT INCLUDED IN THE PETITION

Pursuant to California Rules of Court, rule 8.487, subd. (a)(2), Real Parties in Interest submit the following material facts that were not included in the Petition, and which are supported by the exhibits filed concurrently with this Preliminary Opposition.

1. On April 26, 2017, Judge Lisa Hart Cole issued an order staying Case No. SC123263 for "all purposes" (except for receivership proceedings). RE, Ex. A.)

2. On October 18, 2017, Judge Cole issued a subsequent 90-day stay order in Case No. SC124263 focusing with particularity on the same 7 Units at issue in Case No. 19SMCV00918. (RE, Ex. B.)

3. On April 26, 2019, Petitioner filed in Case No. SC124263 an *ex parte* application requesting that Judge Cole dissolve her stay orders and lift the stay in Case No. SC124263. (RE, Ex. C.)

4. On April 30, 2019, Judge Cole issued a Minute Order denying Petitioner's *Ex Parte* Application to dissolve her stay orders and lift the stay in Case No. SC124263. (RE, Ex. D.)

5. On May 13, 2019, Petitioner filed its original complaint commencing Case No. 19SMCV00918 regarding the same 7 Units at issue, the same key defendant (John Spahi), and the same damages for attorneys' fees incurred by litigation involving the same Units (RE, Ex. E is a conformed copy of the May 13, 2019 original complaint in 19SMCV00918), which complaint was quickly followed up on May 29, 2019, by the First Amended Complaint in 19SMCV00918, which is PE, Vol. I, Ex. 1.

6. August 16, 2019, Real Parties in Interest filed in Case No. SC124263 a Notice of errata re Notice of Related Case, to correct an error in Real Parties in Interest's Notice of Related Case previously filed on August 5, 2019. (RE, Ex. F.)

7. On August 21, 2019, Judge Ford lifted the stay in Case No. SC124263. (RE, Ex. G, which is an entered copy of the August 21, 2019 Minute Order.)

8. On October 16, 2019, Petitioner filed its Fifth Amended Complaint (the "5AC") in Case No. SC124263. Petitioner's 5AC added new allegations and claims regarding the same 7 Units at issue, the same

key defendant (John Spahi), and the same damages for attorneys' fees incurred by Petitioner in litigation involving the Units that are alleged in Case No. 19SMCV00918. (RE, Ex. H, which is a conformed copy of the 5AC.)

9. On December 3, 2019, Real Party in Interest Spahi filed his original Answer to Petitioner's First Amended Complaint in Case No. 19SMCV00918. The Third Affirmative Defense in John Spahi's Answer is based on the doctrine and the principles of exclusive concurrent jurisdiction. (RE, Ex. I, which is a conformed copy of John Spahi's December 3, 2019 Answer.)

10. On March 5, 2020, Real Parties in Interest filed their Reply papers in support of their motion to stay Case No. 19SMCV00918 on the grounds and on the principles of exclusive concurrent jurisdiction. (RE, Ex. J, which is a copy of the March 5, 2020 Reply papers.)

11. On May 18, 2020, Petitioner filed and served in Case No. SC124263 its Request for Order determining whether to relate 19SMCV00918 with Case No. SC124263. (RE, Ex. K, which is a copy of Petitioner's May 18, 2020 Request for Order to determine whether to relate the two cases.)

12. On May 26, 2020, Real Party in Interest Spahi filed and served in Case No. SC124263 his Opposition to Petitioner's Request for Order to relate Case No. 19SMCV00918 with Case No. SC124263. (RE, Ex. L, which is John Spahi's May 26, 2020 Opposition to relating the two cases, which was filed more than one year after the second case was filed.)

13. On May 28, 2020, the Hon. H. Jay Ford, Judge presiding in Case No. SC124263, issued a Minute Order for the parties to show cause why Cases 19SMCV00918 and 19SMCV00918 should not be related. (RE, Ex. M.)

III. STANDARD OF REVIEW

Petitioner argues that its Petition is governed by a pure *de novo* standard of review. (Petition, § II ("Standard of Review"), at pgs. 37-38.) Petitioner's argument is incorrect.

In an original mandamus proceeding such as this one, it is well established that this Court reviews the trial court's ruling for an abuse of discretion. "Mandate lies to control judicial discretion when that discretion has been abused." (*Diaz-Barba v. Superior Court* (2015) 236 Cal.App.4th 1470, 1483, denying Petition, and quoting largely from our Supreme Court in *State Farm etc. Ins. Co v. Superior Court* (1956) 47 Cal.2d 428, 432 and in *Robbins v. Superior Court* (1985) 38 Cal.3d 199, 205: "[A]lthough mandamus does not generally lie to control the exercise of judicial discretion, the writ will issue 'where, under the facts, that discretion can be exercised in only one way." (*Id*. at 205; emphasis added.) Where, as here, there is no palpable abuse of discretion resulting in irreparable harm, the reviewing court should dismiss the writ petition.

In this mandamus proceeding, the "order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be

affirmatively shown." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, original italics.)

IV. ARGUMENT

A. PETITIONER FAILS TO ESTABLISH EITHER AN ABSENCE OF ADEQUATE REMEDIES AT LAW OR THE EXISTENCE OF IRREPARABLE HARM OR URGENCY JUSTIFYING EMERGENCY MANDAMUS RELIEF

Mandamus may be appropriate "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station" (Code Civ. Proc., § 1085) in cases "where there is not a plain, speedy, and adequate remedy, in the ordinary course of law." (Code Civ. Proc., § 1086.) Under Code Civ. Proc., § 1086, "it has long been established as a general rule that the writ will not be issued if another such remedy was available to the petitioner." (*Phelan v. Superior Court* (1950) 35 Cal.2d 363, 366.) Irreparable harm also must be shown before a writ will issue. (*See, e.g., Los Angeles Gay & Lesbian Center v. Superior Court* (2011) 194 Cal.App.4th 288, 299–300 ["Conditions prerequisite to the issuance of a writ are a showing there is no adequate remedy at law … and the petitioner will suffer an irreparable injury if the writ is not granted" (citing cases) (emphasis added).]

A general allegation that petitioner faces irreparable harm and lacks an adequate legal remedy, "without reference to any facts," is not sufficient to sustain the petitioner's "burden of showing that the remedy of appeal would be inadequate." (*See Phelan v. Superior Court*, *supra*, at 370;

accord County of Alameda v. Superior Court (1987) 196 Cal.App.3d 619, 623 [conclusory statements by petitioner, made without reference to facts in the record, is "insufficient to sustain petitioner's burden of showing that the remedy of appeal would be inadequate" (citing *Phelan*)].) "The burden, of course, is on the petitioner to show that he did not have such a remedy." (*Phelan*, *supra*, at 370. *Accord, Los Angeles Police Protective League v. City of Los Angeles* (2014) 232 Cal.App.4th 136, 140: "In a petition for writ of mandate brought pursuant to Code of Civil Procedure section 1085, ... the petitioner bears the burden of pleading and proving the facts on which the claim for relief is based. (Emphasis added.)

In a half-hearted attempt to sustain its burden, Petitioner *alleges* that absent immediate, emergency mandamus, Real Parties in Interest allegedly "will continue to abscond with the [Petitioner's] collateral and there is a serious risk that he will raze the Units." (Petition at pg. 30 and fn. 18.) In particular, Petitioner claims it is losing $67,000 per month in rental income that Real Parties in Interest allegedly generate from the 7 Units, and Spahi *allegedly* trashed a Unit many years ago – not at issue in this litigation – to allegedly retaliate against a lender/lienholder that had foreclosed on that Unit. (*Ibid.*)

Petitioner's irreparable-harm and inadequate-legal-remedy arguments fail, both legally and factually.

Petitioner's arguments fail as a legal matter because its *alleged* $67,000-per-month rent-loss claim does not constitute irreparable harm. Instead, it is a standard, legal money-damage claim compensable by

ordinary remedies at law. (*Friedman v. Friedman* (1993) 20 Cal.App.4th 876, 890 ["monetary loss does not constitute irreparable harm" unless the amounts are unrecoverable].) Petitioner has made no showing (or even argument) that Real Parties in Interest are insolvent and could not satisfy a money judgment unless emergency writ intervention comes to the rescue.

Further, in the context of real property, an essential feature marking an injury as irreparable is that the injury is an act that is a serious change of or is destructive to a special or unique property that has some peculiar quality or use *such that its pecuniary value as estimated by a jury will not fairly recompense the owner for its loss*. (*See Grey v. Webb* (1979) 97 Cal.App.3d 232, 238; *Helms Bakeries v. State Bd. Of Equalization* (1942) 53 Cal.App.2d 417, 426.) Here, Petitioner merely claims an unliquidated contractual security interest in them. (*Agosto v. Board of Trustees of Grossmont-Cuyamaca Community College Dist.* (2010) 189 Cal.App.4th 330, 336 ["If the petitioner has an adequate remedy in the form of an ordinary cause of action for breach of contract and has no right to reinstatement to his or her position, a writ of mandate must be denied."].) Petitioner has also not shown (nor could it show) that the 7 Units at issue are somehow unique or have special, intrinsic value that is not compensable in ordinary damages. Petitioner, Ocean Towers Housing Corporation has never resided in any of the subject Units so it has no unique physical affinity to any of these Units. Petitioner has also not shown (nor could it show) that the interim, loss-of-rents *allegation* is not fully compensable by ordinary money damages, *i.e*., that the legal remedy of damages would not

afford adequate relief, or that the legal remedy of damages would be impracticable because it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief. "It is a general rule that the extraordinary remedy of mandate is not available when other remedies at law are adequate." (*Tevis v. San Francisco* (1954) 43 Cal.2d 190, 198; *see also* Code Civ. Proc., § 1086.) On this basis alone, the requested writ should be summarily denied.

Petitioner's irreparable-harm and inadequate-legal-remedy arguments also fail as a factual matter, since they are not supported by competent evidence in the record.

A general allegation that petitioner has no plain, speedy or (and) adequate remedy, "without reference to any facts," is not sufficient to sustain the petitioner's "burden of showing that the remedy of appeal would be inadequate." (*See Phelan v. Superior Court*, *supra*, at pg. 370.) There was no showing by the conclusory, boilerplate verification by one of Petitioner's lawyers (Petition at pg. 33), or in underlying materials submitted in support of Petitioner's receivership request, establishing that any particular fact or circumstance in the case rendered inadequate the remedy by appeal.

In *Phelan v. Superior Court*, *supra*, it was said at page 370 that the remedy by appeal "should be considered adequate unless petitioner can show some special reason why it is rendered inadequate by the particular circumstances of his case." (*See also*, *Los Angeles Police Protective League v. City of Los Angeles* (2014) 232 Cal.App.4th 136, 140 [petitioner

bears the burden of demonstrating inadequacy of legal remedies].)

Here, the original case filed by Petitioner, No. SC124263, is ongoing, where *the same 7 Units are at issue*, thereby providing the Petitioner with adequate opportunities to protect whatever assets the Petitioner might be able to convince the SC124263 Court are actually in danger. This should not be a matter for emergency intervention by the Court of Appeal on an extraordinary Petition for Writ of Mandate.

Far from supporting the absence of an adequate legal remedy or the existence of any irreparable harm, the alleged evidence—consisting primarily of baseless *allegations* without adequate support in the appellate record presented by Petitioner—is entirely inapposite. In particular, Petitioner asserts that, absent immediate, emergency writ relief, there is a substantial risk that Real Parties in Interest – in a self-defeating effort to kill the proverbial "goose that lays the golden eggs" – will destroy the 7 Units that *allegedly* generate $67,000 per month for them. In support of this fanciful claim, Petitioner cites to the Declaration of Petitioner's attorney, Jeff Wittenberg, at ¶ 9(a), PE, Vol. II, Ex. 19, at pg. 801.

But the Wittenberg Declaration is not competent evidence of any such risk of property destruction; it is hearsay without any foundation for the existence of his personal knowledge in this regard. This Declaration instead references another declaration in a separate lawsuit, the Declaration of Dale Person, in Case No. BC507616. (PE, Vol. III, Ex. 24, pgs. 1042-1043.) That Declaration does not mention Real Party in Interest Spahi at all, and it never blames him personally, directly or indirectly, for destroying

the Units at issue in that case. Furthermore, the Units at issue in that case – *i.e.*, Unit Nos. 1809P, 1705P, and 904P – are not among the 7 Units at issue here in Case No. 19SMCV00918. Petitioner fails to show by citation to admissible evidence in the record any risk of property damage by Real Parties in Interest.

Petitioner also fails to establish its $67,000-per-month damage claim with adequate record citations. Instead, it points again to the Wittenberg Declaration, at PE, Vol. II, Ex. 19, at pg. 800, lines 4-17, which references prior lease agreements for the 7 Units. Most of these leases are more than two years old with the most current lease being more than 1-1/2 years old. But Petitioner has presented zero evidence showing that these 7 Units are presently in fact generating this or any income today; or that any of those leases even remain in effect today.

Petitioner fails to show by citation to admissible evidence in the record that its supposed lost-rents claim is valid (which in all events would not constitute irreparable harm, as discussed above).

Finally, there is no risk that the Units will be sold or otherwise transferred or disposed without Petitioner's approval because Petitioner's new Board of Directors has enacted an Amended Resolution that prohibits such sales. (*See* OTHC's Amended Resolution, PE, Vol. III, Ex. 25, at pgs. 1110, 1117, 1118, 1124.)

B. PETITIONER HAS UNCLEAN HANDS REGARDING THE STAY ISSUE, PRECLUDING WRIT RELIEF

Mandamus should not issue to Petitioner because its hands are unclean with respect to Petitioner's request for emergency dissolution of the stay order issued by Judge Mandel in 19SMCV00918. "It has … been held that the writ [of mandate] should not issue in aid of one who does not come into court with clean hands [citation], or 'Where … the conduct of the party applying for the writ has been such as to render it inequitable to grant him relief …' [citation]." (*Kaiser Foundation Hospitals v. Superior Court* (2005) 128 Cal.App.4th 85, 111 [citing *San Diego County Dept. of Pub. Welfare v. Superior Court* (1972) 7 Cal.3d 1, 9 [petitioner's unclean hands bar mandamus relief].) The unclean hands doctrine is a critical adjunct to mandamus relief. It is a "vehicle for affirmatively enforcing the requirements of conscience and good faith" (*Mattco Forge, Inc. v. Arthur Young & Co*. (1997) 52 Cal.App.4th 820, 846; citation and internal quotation marks omitted), and reflects established "public policy [and] sound morals." (Citations omitted.)

In *Pond v. Insurance Co. of North America* (1984) 151 Cal.App.3d 280, 291, our Second District Court of Appeal explained that unclean hands does not require a showing of fraud or illegal conduct, but rather *"[a]ny unconscientious conduct"* is sufficient to invoke the doctrine: "The equitable principles underlying the clean hands doctrine do not require a finding that Pond was guilty of perjury, concealment or other illegal conduct, "[f]or it is not only fraud or illegality which will prevent a suitor

from obtaining equitable relief. *Any unconscientious conduct* upon his part which is connected with the controversy will repel him from the forum whose very foundation is good conscience." *Id*. at 291(emphasis in the original).

Shortly after the Special Litigation Committee ("SLC") was appointed, on April 27, 2017, Judge Cole issued an order staying the litigation in Case No. SC124263. (*See* RE, Ex. A, at pg. 8 [April 26, 2017 Minute Order: "The Court imposes a stay for all purposes but for plaintiff's filing, and any opposition to, plaintiff's motion for order appointing receiver and for a preliminary injunction" (emphasis added)]. On October 18, 2017, Judge Cole granted a further stay of that action for a period of 90 days "to allow the SLC to continue its investigation and prepare its report concerning the derivative claims." (*See,* RE, Ex. B at pg. 11.) Judge Cole's October 18, 2017 Stay Order directed the OTHC (and its attorneys) as follows:

> 4 (a)(ii) [No party shall] abandon, settle, or release any of OTHC's indemnity claims associated with the allegations in the derivative complaint without first obtaining approval from the SLC, followed by approval from the Court.
>
> 4 (b) HOA'S Board, including the Director and Officer Defendants shall not approve any sale, transfer or encumbrance of the following units which are the subject of the U.S. Bank actions (i.e. units 1908B, 1610P, 1203B, 1905P, 161 OB, 1709B, 1509P) without prior court approval.
>
> * * *
>
> 4 (f) The shares relating to the seven pending U.S. Bank actions (i.e. units 1908B, 1610P, 1203B, 1905P, 1610B,

1709B, 1509P) are prohibited from voting for or against any HOA action or election that is submitted to the shareholders for vote during the period of the stay.

4 (g) HOA'S Board, including the Director and Officer Defendants and their affiliates-broadly defined-are prohibited from purchasing any leasehold interest and/or shares associated with any unit recovered by OTHC through an unlawful detainer action, abandonment, or otherwise, without prior court approval. (RE, Ex. B at pgs. 11-12.)

Judge Cole's October 18, 2017 Stay Order shows unequivocally that both that Order and the other previous and subsequent Stay Orders issued in SC124263 were directed precisely and intentionally to the very same 7 Units at issue in Case No. 19SMCV00918, including any control over the 7 subject Units, including any sale, transfer, encumbrance, or leasing of these 7 subject Units. The stay continued in place in Case No. SC124263 after the Court appointed a receiver for the OTHC on July 9, 2018.

Petitioner did not wish to delay its efforts to litigate over the control of the 7 Units at issue. Consequently, on or about April 26, 2019, Petitioner filed an *ex parte* application requesting Judge Cole to lift the stay in Case No. SC124263 regarding the 7 Units. (RE, Ex. C, at pg. 14.) But by her Minute Order dated April 30, 2019, Judge Cole denied Petitioner's request and kept the stay in place. (RE, Ex. D, at pg. 86-87.)

Yet, despite the trial court's rejection of Petitioner's request to lift the stay in Case No. SC124263, Petitioner filed on May 13, 2019 (only two weeks later), its complaint commencing the 19SMCV00918 action, in order to achieve an improper "end run" around the Hon. Lisa Cole's Stay Order

that she Order not be lifted. Petitioner did this even though Petitioner's duplicative new, piecemeal lawsuit involved the same key defendant (Real Party in Interest), the same 7 Units, and the same core damage claim for attorneys' fees arising from litigation regarding those same 7 Units. All the while, the Stay Order issued by Judge Cole and Judge Ford in Case No. SC124263 remained in force and effect until August 21, 2019. (RE, Ex. G at pg. 105, which is a Minute Order wherein Judge Ford lifts the stay on August 21, 2019.)

Petitioner attempts to deflect blame for its unethical, and "unconscientious" circumvention of the Stay Order, which was imposed and in effect in Case No. SC124263, by claiming, in a footnote 9 at page 20 of its Petition, that "Judge Cole had directed the Receiver to pursue the HOA's indemnity claims via a separate action." Petitioner's blame-deflection effort is more than disingenuous. It is based, yet again, solely and entirely on the *ipse dixit* of Petitioner's own counsel without any record citation or support, in violation of Cal. Rules of Court, rule 8.486(b), and in violation of a cardinal rule of appellate practice:

> "For the purpose of appellate review, any parts of the superior court trial that are not included in your designated record do not exist, will not be examined or considered by the appellate court, and cannot be used by either side to support their case."

(*See* https://www.courts.ca.gov/12424.htm?rdeLocaleAttr=en.)

In *Sherwood v. Superior Court* (1979) 24 Cal.3d 183, 186, our High Court held as follows: "A defendant seeking review of a ruling of the trial court by means of a petition for extraordinary writ must provide the

appellate court with a record sufficient to permit such review." *See also*: "Any statement in a brief concerning matters in the appellate record—whether factual or procedural and no matter where in the brief the reference to the record occurs—must be supported by a citation to the record." (Eisenberg *et al*., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2015) ¶ 9:36, pg. 9-12.) "It is not the task of the reviewing court to search the record for evidence that supports the party's statement; it is for the party to cite the court to those references." (*Regents of University of California v. Sheily* (2004) 122 Cal.App.4th 824, 826, fn. 1.)

Thus, allegations that are made by counsel, which are not supported by citation to an adequate appellate record, such as Petitioner's "factual" allegations that are made in fn. 9 at pg. 20 of Petitioner's Petition here, have no force and have zero effect in supporting emergency mandamus relief. (*Ibid.*)

For the foregoing reasons, a writ of mandate should not issue because, among the numerous other reasons stated herein, Petitioner has unclean hands and its alleged excuse for circumventing Judge Cole's continuation of the Stay Order in Case No. SC124263, by filing a new piecemeal suit in 19SMCV00918, is unsupported in this Petition within Petitioner's Writ of Mandate record.

C. THE SUPERIOR COURT'S STAY ORDER AND RECEIVERSHIP MOOTNESS RULINGS WERE CORRECT

Petitioner claims that Judge Mandel's October 23, 2020 Order staying Case No. 10SMCV00918 and denying Petitioner's *ex parte*

application for appointment of a receiver as moot was substantively erroneous. As a preliminary matter, as discussed above, even if, *arguendo*, Judge Mandel had made an error—which she did not—the abuse of discretion standard, which is applicable here for a Petition for Writ of Mandate, would require a demonstration with admissible evidence that needed to have been presented with Petitioner's moving papers, such that "the writ will issue 'where, under the facts, that discretion can be exercised in only one way." *Robbins v. Superior Court* (1985) 38 Cal.3d 199, 205. (emphasis added).

Petitioner claims that, "in light of the nature of the contract-based claims alleged in this case and the different tort-based claims alleged in the Senior Case (against a different set of defendants), there is no risk of inconsistent adjudications with regard to the contractual obligations at issue in this action." (Petition at pg. 36, and pg. 50.) That claim is baseless.

As presented in Spahi's Motion for Stay (PE, Vol. II, Ex. 15) and in Spahi's related Reply papers (RE, Ex. J) in 19SMCV00918, the First Amended Complaint (the "1AC") in 19SMCV00918 (PE, Ex. 1) substantially overlapped with the new claims and allegations that Petitioner asserted in its Fifth Amended Complaint (the "5AC") in Case No. SC124263 (RE, Ex. H). This was elaborated on in detail in the Motion for Stay (PE, Vol. II, Ex. 15), and in the related Reply papers (RE, Ex. J). By way of example, Petitioner's 5AC in Case No. SC124263 include numerous allegations which are necessarily related, and indeed practically identical, to the same or substantively similar allegations asserted in Petitioners 1AC in

19SMCV00918, including the following illustrative examples (which are not all inclusive):

- Spahi's alleged involvement in the seven U.S. Bank Actions. Compare 1AC ¶¶ 25, 33 (chart of U.S. Bank Actions) (PE, Ex. 1 at pgs. 15, 17) with 5AC ¶ 7 (same) (RE, Ex. H at pg. 111);
- An entirely new cause of action against Spahi for violation of Penal Code § 496, alleging that Spahi "received property from the HOA that was either stolen by him or obtained in a manner constituting theft." (RE, Ex. H at pg. 131 [5AC¶ 85].) These new allegations are nearly identical to the claim in the 1AC in this action of "Stolen Units"— a concept repeated 30 times in 10 pages of the 1AC. (PE, Vol. 1, Ex. 1.)
- Allegations that Spahi's alleged alter ego, the Ascar Family Trust, owns or owned units at Ocean Towers, including Units involved in the U.S. Bank Actions. Compare 1AC ¶ 3 (PE, Ex. 1 at pg. 10) (alleging that the "Ascar Family Trust" was "used as an alter ego of Spahi") with 5AC ¶ 48 (alleging that the "Ascar Family Trust" is "an alter ego of John Spahi') (RE, Ex. H at pg. 119)
- Allegations that Spahi, through his alter egos, caused the HOA to incur legal fees for his benefit. Compare 1AC ¶¶ 26-27 (alleging that Spahi caused the HOA to "incur[] and pa[y] many millions in legal fees and expenses" for his "own benefit") (PE, Ex. 1 at pg. 15) with 5AC ¶ 59(d) (alleging that Spahi caused the HOA to "incur[] approximately $3 million in unpaid legal fees relating to actions that

had been instituted by the HOA to personally benefit Spahi, or had been instituted against the HOA because of Spahi's efforts to benefit himself") (RE, Ex. H at pgs. 124-125);

- Claims for damages based on the HOA's alleged payment of legal fees for Spahi's benefit. Compare 1AC ¶¶ 47-48 (seeking damages for "the legal fees incurred in each bank lawsuit") (PE, Ex. 1 at pg. 20) with 5AC ¶¶ 85, 87 (seeking damages for property "received from the HOA that was either stolen by him or obtained by him in a manner constituting theft . . . including costs of suit and reasonable attorneys' fees.") (RE, Ex. H at pg. 131).

The two duplicative lawsuits indisputably involve: (a) the same key defendant (Spahi), (b) the same alleged *alter egos*, (c) the same general subject matter regarding their ownership and control of the same 7 luxury Units, (d) the same bank lienholders, trust deeds, and related title, loan, and settlement agreement documents, (e) the same alleged damages (for attorneys' fees incurred in litigation relating to the ownership, transfer, and liens on the Units), and (f) the same common core of witnesses, facts, and evidence. The contention that this considerable overlap of facts, evidence, damages, parties, documents, property, and witnesses does not create a substantial risk of inconsistent rulings of fact and law is meritless.

Petitioner further claims that the doctrine of exclusive concurrent jurisdiction applies only to overlapping lawsuits in different courts, not duplicative cases filed in different departments of the same court. (Petition at pgs. 40-41.) Petitioner suggests that our Second District Court of Appeal

decision in *Glade v. Glade* (1995) 38 Cal.App.4th 1441, 1449 ("*Glade*"), was wrongly decided insofar as it holds that the exclusive concurrent jurisdiction doctrine mandates a stay of a second-filed action in a different Department of the same Superior Court. (*Ibid.*) Petitioner cites Witkin, California Procedure (5th Ed.), Chapter III. Jurisdiction, § 430 ("Distinction: Actions in Same Court"), as support for its argument that the exclusive concurrent jurisdiction doctrine has no application to duplicative lawsuits pending in different departments of the same superior court. (Petition at pgs. 38-40.)

Petitioner claims, alternatively, that *Glade* is materially distinguishable from the facts of this case. (Petition at pgs. 40-42.) Petitioner's effort to diminish *Glade's* holding and reasoning and its related effort to distinguish that case from this one are unavailing.

In the first place, whether the principle or "doctrine" is labeled "exclusive concurrent jurisdiction" or "priority of jurisdiction," its application and underlying rationale, and the public and judicial policies it advances, are the same. To be sure, the exclusive concurrent jurisdiction doctrine applies when there are duplicative cases involving the same essential subject matter pending before two different superior courts. But the identical animating principle behind the doctrine applies with equal force when two duplicative cases involving the same essential subject matter are pending before <u>different departments</u> of the <u>same superior court</u>.

The venerable scholar, Bernard Witkin, recognized this very point, which makes eminent sense. As explained in 2 Witkin, California

Procedure, Courts, section 229, pages 313 to 315, the doctrine of "priority of jurisdiction" is properly invoked when there has been some assumption of jurisdiction by the first court, and this exercise of authority should be judicial in nature rather than merely clerical:

> [W]hen a case has been assigned to one department and the judge of that department is proceeding to hear it . . . [that] judge must of course be allowed to exercise exclusive jurisdiction over that case until its determination, free from unwarranted interference by the judge of another department. The problem is analogous to that arising where two distinct courts have concurrent jurisdiction over a class of cases, and the first court to assume jurisdiction over a particular case has a prior exclusive jurisdiction. But the conflict between departments is not quite the same as a conflict between courts. Where distinct courts are involved, the conflict is sometimes held to affect subject matter jurisdiction. [Citation.] Where the conflict is merely between judges of different departments of the same court, it would seem that subject matter jurisdiction is not affected and that the objection is one of excess of jurisdiction on the part of the interfering judge.

(*Id*. at pg. 313.)

Whether it is called "exclusive concurrent jurisdiction" or "priority of jurisdiction," the principle is the same: where, as here, a second lawsuit is filed in a different superior court or in a different department of the same superior court that involved substantially the same subject matter, judicial economy and comity, and the need to avoid unseemly inconsistent rulings by different courts involving the same parties, facts, law, damages, and witnesses, together require that the later filed action be stayed ("abated" or dismissed) in deference to the first-filed action.

In a vain effort to obfuscate this common sense principle of comity, which is grounded in a policy that favors judicial economy and the avoidance of unseemly conflicts between superior courts and their constituent departments in this State, Petitioner argues that *Glade v. Glade* involves only family law cases concerning jurisdiction over the communal marital estate and assets, or where the trial judge in the first-filed action asserts exclusive jurisdiction by order in relation to a later-filed action infringing on his or her jurisdiction. (Petition at pgs. 40-41.) Petitioner's effort fails; established precedents hold otherwise, and for sound policy reasons.

It is true that the priority of jurisdiction doctrine has been applied to invalidate superior court orders that may conflict or interfere with the family court's priority of jurisdiction to characterize and divide a community estate. (*See, e.g., In re Marriage of Schenck* (1991) 228 Cal.App.3d 1474, 1482-1484 [civil law and motion department had no authority to order sale of family home to pay husband's support arrearages when family court had retained jurisdiction to divide community interests in the home].) However, the priority of jurisdiction/exclusive concurrent jurisdiction principle, or rule, applies generally both to superior courts and to their departments, and these principles are <u>not</u> limited to family law cases or family law departments, or limited narrowly to cases involving specific jurisdiction over marital property, as Petitioner seems to suggest (at pg. 41), incorrectly.

That *Glade* involved duplicative cases turning on a marital property

dispute previously pending before a "family court" is a distinction without a difference. Our High Court clearly made this point: "By contrast, 'family court' refers to the activities of one or more superior court judicial officers who handle litigation arising under the Family Code. It is not a separate court with special jurisdiction, but is instead the superior court performing one of its general duties." (*In re Chantal S.* (1996) 13 Cal.4th 196, 201) (emphasis added). *See also*, Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2017) ¶ 3:3.10, p. 3-3 (same).)

Our state Constitution establishes one superior court comprised "of one or more judges" in each county. (Cal. Const., art. VI, § 4.) Because a superior court is but one tribunal, its judges "hold but one and the same court" and the jurisdiction they exercise in any cause is that of the court and not the individual judge or department. (*Williams v. Superior Court* (1939) 14 Cal.2d 656, 662.) Under the doctrine of "priority of jurisdiction," the first judge or department to assume and exercise jurisdiction in a cause or matter acquires exclusive jurisdiction in the matter until it is disposed of. (*Williams v. Superior Court*, *supra*, at p. 662; *Glade*, *supra,* 38 Cal.App.4th at pgs. 1449-1450.)

The doctrine of priority of jurisdiction avoids "conflicting adjudications of the same subject-matter" by different Departments of the same Superior Court, as in this case (*see Williams v. Superior Court*, *supra*, 14 Cal.2d at p. 662) and also conflicts between different Superior Courts of different California Counties, as happens sometimes in other cases. (*See, e.g., Ford v. Superior Court* (1986) 188 Cal.App.3d 737, 742; *see also*

People ex rel. Garamendi v. American Autoplan, Inc. (1993) 20 Cal.App.4th 760, 769-776 [if invoked by appropriate pleading, the rule of "exclusive concurrent jurisdiction" requires stay of second action filed in different county pending disposition of first action]). As explained in *Williams*:

> [W]here a proceeding has been duly assigned for hearing and determination to one department of the superior court . . . and the proceeding so assigned has not been finally disposed of . . . it is beyond the jurisdictional authority of another department of the same court to interfere with the exercise of the power of the department to which the proceeding has been so assigned. [Citation.] . . . If such were not the law, conflicting adjudications of the same subject-matter by different departments of the one court would bring about an anomalous situation and doubtless lead to much confusion.

(*Williams v. Superior Court*, *supra*, 14 Cal.2d at p. 662.)

Glade is not some outlier case that should be limited by this Court or the Supreme Court to its peculiar facts, as Petitioner mistakenly urges. (Petition, at pgs. 40-41.) The priority-of-jurisdiction rule articulated and implemented in *Glade* is one of general application, grounded on hornbook principles of judicial economy and comity. The rule has been reaffirmed time and again outside the family law context because it is designed to avoid the risk of simultaneous proceedings or conflicting decisions between judges handling cases involving the same subject matter, whether in different Departments of the same Superior Court, or between two different Superior Courts. (*See, e.g., Ford v. Superior Court*, *supra*, 188 Cal.App.3d at pp. 741–742; *see also Wozniak v. Lucutz* (2002) 102 Cal.App.4th 1031,

1040–1041 ["[A]nother court, though it might originally have taken jurisdiction, is wholly without power to interfere, and may be restrained by prohibition. [Citation.] The rule is generally invoked where a proceeding is still pending; when it is completed and judgment has become final, jurisdiction has been exhausted and the rule has no application.").

For the foregoing reasons, and as shown by the record, Judge Mandel's October 23, 2020 Stay Order (PE, Vol. III, Ex 32, Pg. 1272.) was properly invoked, and was based on, this sensible rule, and should not be disturbed by this Court.

D. REAL PARTIES IN INTEREST HAVE NOT WAIVED, AND ARE NOT ESTOPPED FROM ASSERTING, THEIR AFFIRMATIVE DEFENSE OF EXCLUSIVE CONCURRENT JURISDICTION.

Petitioner asserts that Real Parties in Interest have waived, or are estopped from asserting, that "the "Respondent lacks jurisdiction over the HOA's claims in this case." (Petition, § III.A.4, at pgs. 47-49.) Petitioner's assertion misstates the record and is unmeritorious as a matter of law.

Petitioner argues that Real Parties in Interest sought substantive rulings on the merits before making their stay request on grounds of exclusive concurrent jurisdiction. (*Ibid.*). They argue that, having done so, Real Parties in interest waived their right to seek such a stay, and are otherwise estopped from asserting it, citing *Sea World v. Superior Court* (1973) 34 Cal.App.3d 494. (Petition at pgs. 47-48.) Petitioner's argument misstates the record and misapplies applicable law.

In Real Party in Interest Spahi's Answer to Petitioner's First

Amended Complaint, which was filed in Case No. 19SMCV00918 on December 3, 2019, Real Party in Interest Spahi set forth his Third Affirmative Defense, which is entitled "Exclusive Concurrent Jurisdiction." (RE, Ex. I, pg. 138.) Petitioner conveniently failed to include Spahi's Answer in its Appendices. This affirmative defense states that "Case Number 19SMCV00918 must be stayed because another court has exclusive concurrent over the subject matter that is involved in this case, Case Number SC124263." (RE, Ex. I, at pg. 138.)

Moreover, in the very Demurrer that Real Parties in Interest filed as to the original Complaint in Case No. 19SMCV00918 – which Petitioner disingenuously claims effectuated a waiver of exclusive concurrent jurisdiction defense – Real Parties in Interest specifically demurred on that very same ground, seeking a stay of the proceedings on that very basis. (PE, Ex. 7, at pg. 110 and pg. 124.)

Petitioner erroneously claims that because Real Party in Interest Spahi did not include in its Demurrer a thorough attempt to stay the case by relating the allegations from the Fifth Amended Complaint in SC124263 with the allegations from the First Amended Complaint in 19SMCV00918 that Spahi waived his rights to pursue, or is estopped from pursuing, a stay based on exclusive concurrent jurisdiction in the future. What Petitioner disingenuously fails to disclose to this Court is that the Petitioner did not even file its Fifth Amended Complaint in Case No. SC124263 until October 16, 2019, whereas Spahi's Demurrer was already filed on October 7, 2019—nine days prior to when the key Fifth Amended Complaint was filed

by Petitioner. *(See,* RE, Ex. H for a conformed copy of Fifth Amended Complaint, showing that it was filed on October 16, 2019.) (*See*, PE, Vol. I, Ex. 7, which is a copy of Spahi's Demurrer that was filed and served on October 7, 2019—nine days prior to the filing of Petitioner's Fifth Amended Complaint in Case No. SC124263.)

Therefore, the new facts and circumstances that presented themselves in the 5AC, which were the heart of, and form the foundation for, Spahi's Motion for Stay based on the doctrine and on the principles of exclusive concurrent jurisdiction, did not even exist until nine days after John Spahi's Demurrer was filed in 19SMCV00918.

John Spahi's Motion for Stay based on the doctrine of exclusive concurrent jurisdiction was proper and was not an impermissible reconsideration motion, since the 5AC in SC124263 was filed AFTER the Demurrer was ruled upon, and the 5AC raised new facts and circumstances in that case based on the same 7 Units at issue in Case No. 19SMCV00918. (*See* PE, Ex. 15 at pgs. 490-492 [Motion for Stay]; RE, Ex. J, pg. 162-164 [Reply Re Motion for Stay].)

Unlike this case, *Sea World*, *supra*, did not immediately address the threshold issue of exclusive jurisdiction. Instead, Sea World moved for summary judgment in the superior court. Thus "the jurisdiction of the superior court was invoked specifically by Sea World to make the threshold determination based upon what was originally claimed to be a showing of undisputed facts." (*Sea World*, *supra*, 34 Cal.App.3d at p. 502.) Sea World's later attempt to question the superior court's jurisdiction

contradicted its earlier motion for summary judgment: "Sea World's motion was not to stay proceedings in the superior court because of the claimed prior right of WCAB, but was for summary judgment, calling for a determination of the issue which Sea World now says the superior court might not determine because WCAB had the prior right to do so." (*Id*. at p. 503.) The Court of Appeal held that as a result, "Sea World has waived, or is estopped to urge, objection to the jurisdiction which it has invited the superior court to exercise, which the superior court has exercised, which exercise has been followed by a suspension of proceedings before WCAB amounting to a waiver by that tribunal of its priority of right." (*Id*. at p. 503.).

Here, however, the evidence does not support a finding of waiver or estoppel, and Petitioner fails to point to any facts in the record to support such a finding. The record demonstrates the opposite. Unlike the employer in *Sea World*, *supra*, Real Party in Interest Spahi from the very outset of Case No. 19SMCV00918 unequivocally asserted his position regarding jurisdiction, the duplicative nature of the proceeding, and the need for a stay on grounds of exclusive concurrent jurisdiction. (*See* Spahi's Answer in Case No. 19SMCV00918, filed on December 3, 2019 [RE, Ex. I, Third Affirmative Defense of Exclusive Concurrent Jurisdiction].) Real Party in Interest Windsor Ocean Inc. also asserted its position regarding jurisdiction, the duplicative nature of the proceedings, and the need for a stay on grounds of exclusive concurrent jurisdiction in its Third Affirmative Defense in its Amended Answer that it filed on March 2, 2020. And Real

Parties in Interest raised that defense again in their Demurrer, and again in their Motion to Stay in response to the new claims about the 7 Units at issue in Petitioner's 5AC. Thus, neither waiver nor estoppel compels this Court to depart from the priority of jurisdiction rule applied to inter-Departmental case conflicts as applied in *Glade*, *supra.*

Real Parties in Interest carefully adhered to the procedure for asserting a stay on grounds of priority of jurisdiction approved in *People ex rel. Garamendi v. American Autoplan, Inc.* (1993) 20 Cal.App.4th 760, 770 ("*Garamendi*".) As explained in *Garamendi*, the priority of jurisdiction rule is a "judicial rule of priority or preference and is not jurisdictional in the traditional sense of the word," in that it does not divest a court, which "otherwise has jurisdiction of an action, of jurisdiction." (*Garamendi*, *supra*, 20 Cal.App.4th at pp. 764-765, 769.) Hence, a failure to comply with the rule renders subsequent proceedings voidable, not void. (*Id*. at p. 772.) The rule is "similar to an affirmative defense and the remedy for its applicability is a stay of the second action. Prior to an appropriate pleading requesting such a stay, the trial court in the second action properly exercises its jurisdiction." (*Id*. at p. 769.)

- *Garamendi* instructs practitioners as follows: Exclusive concurrent jurisdiction therefore should be raised "by demurrer where the issue appears on the face of the complaint and by answer where factual issues must be resolved." (*Id*. at p. 771.) If raised by answer, the party asserting the rule may raise it by way of a motion to dismiss or

to abate or a motion for summary judgment. (*Ibid*.) And that is precisely what Real Parties in Interest did here.

Only in cases – unlike this one – where the defense is not timely raised will it properly be subject to waiver and estoppel. (*Sea World*, *supra*, at 500-502.) Accordingly, as a matter of fact and law, neither waiver nor estoppel undermines Judge Mandel's October 23, 2020 Stay Order, which this Court should leave undisturbed.

E. ALLEGED "COUNTERVAILING POLICIES" DO NOT UNDERMINE THE APPROPRIATENESS OF THE RESPONDENT'S OCTOBER 23, 2020 STAY ORDER

Citing *County of San Diego v. State of Calif*. (1997) 15 Cal.4th 68, 88-89, Petitioner claims that "countervailing policies" required Judge Mandel to deny a stay of Case No. 19SMCV00918, in deference to Case No. SC124263. (*See* Petition § III.B. at pgs. 49-51.) In making this claim, Petitioner neglects to explain how any such "countervailing policies" somehow outweighed the strong policy favoring judicial economy and the need to avoid unseemly conflicts and inconsistent rulings by two different Departments of the same court in cases covering the same subject matter, the same key parties, and same overlapping damages relating to the same 7 Units at issue.

Petitioner claims (at pg. 50) that "Judge Ford had refused to accept this case or find that it is related to the Senior Case." That is both inaccurate and a red herring. It is inaccurate because Judge Ford declined to order a "related to" transfer of Case No. 19SMCV00918. Judge Ford declined to relate the cases not because the two cases do not overlap substantially, but rather because the relating of the 19SMCV00918 case to

the SC124263 case at this late juncture contravened the judicial efficiency policy under the "related case" procedures under Cal. Rules of Court, Rule 3.300. (*See* PE, Ex. 28, pg. 1190.)

Contrary to Petitioner's statement (Petition, pg. 50), Real Parties in Interest did not "successfully oppose the transfer of this case to Judge Ford on the grounds that it is not related to the Senior Case." Real Parties in Interest's opposition to related-case transfer was based entirely on judicial economy grounds, while conceding that the two cases were substantially related since the both involved the same 7 Units, the same key defendant (John Spahi), and the same alleged attorney-fee damages. (RE, Ex. L.)

It is true that "Spahi sought and obtained favorable rulings on the merits from Judge Mandel in connection with his demurrer and motion to strike." (Petition, pg. 50.) But he concurrently sought to stay the case based on his previously-filed Third Affirmative Defense based on the doctrine of exclusive concurrent jurisdiction. (*See* Demurrer, PE, Ex. 7 at pgs. 110, 124; *see also*, Answer, RE, Ex. I, at pg. 138.)

Petitioner's statement that "A decision on the HOA's Receiver Application is not a decision on the merits and, therefore, there is no possibility that it will be inconsistent with any ruling or order on the merits that may be entered in the Senior Case," is a red herring, and it is also untrue. It is untrue because Judge Ford, in SC124263, might deny the same receivership request if presented with it. It is a red herring also, because if Judge Mandel granted Petitioner's receivership request and appointed a receiver, the receiver might make decisions regarding the 7 Units that would be the subject of the receivership estate in Case No. 19SMCV00918

that could conflict with decisions made by Judge Ford or by a jury about those same 7 Units in Case No. SC124263.

Petitioner's statement that "The Nominal Purchasers are in serious default on their indemnity obligations; and the HOA is entitled to the appointment of a receiver under these circumstances" (Petition at pg. 51) is wholly conclusory, speculative, and without foundation in the record before this Court.

Petitioner states that "Defaults have been entered against three of the four Nominal Purchasers; and the fourth Nominal Purchaser, Windsor, did not seek a stay; only Spahi sought a stay" (Petition at pg. 51). This statement is also materially misleading. In fact, the record shows, and Real Parties in Interest vociferously argued, that the Nominal Purchasers were never properly served in the action. (*See* Opposition to Petitioner's Ex Parte Application for appointment of a Receiver, PE, Ex. 25, at pgs. 1119-1122.)

Finally, Petitioner claims that "If the stay remains in place and the HOA is denied a further hearing on the Receiver Application, Spahi will continue to appropriate the HOA's collateral, thus exacerbating the substantial, irreparable injury that the HOA has already suffered." This claim is not supported by the record before this Court, and it is contrary to law, because money damages do not constitute irreparable harm here, where there is a defendant who Petitioner has not even claimed is insolvent, and where the damages are fully ascertainable. (*See supra*, § IV.A.)

V. CONCLUSION

For the foregoing reasons, Real Parties in Interest, Windsor Ocean Inc. and John Spahi respectfully request that the Court summarily deny the Petition.

DATED: December 10, 2020

BAINBRIDGE LAW APC
MARK ANCHOR ALBERT & ASSOC.

/s/ Mark Anchor Albert
Mark Anchor Albert
Attorneys for Defendants and Real Parties in Interest Windsor Ocean Inc. and John Spahi

VERIFICATION

I, Mark Anchor Albert, declare as follows:

1. I am an attorney licensed to practice in all of the courts of the State of California. I am the principal of Mark Anchor Albert and Associates, co-counsel of record for Defendants and Real Parties In Interest Windsor Ocean Inc. and John Spahi. I have been authorized to make this Verification on their behalf.

2. I have prepared and read the foregoing Preliminary Opposition to Petition for Writ of Mandate or Other Appropriate Relief filed by Plaintiff and Petitioner Ocean Towers Housing Corporation (the "Preliminary Opposition"), and I am familiar with its contents.

3. I am informed and believe under penalty of perjury that the matters set forth in the Preliminary Opposition are true and correct.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and Honolulu, Hawaii on December 10, 2020.

/s/ Mark Anchor Albert
Mark Anchor Albert

CERTIFICATE OF WORD COUNT

Pursuant to rule 8.204, subdivision (c), of the California Rules of Court, the undersigned co-counsel for Defendants and Real Parties in Interest, Windsor Ocean Inc. and John Spahi, hereby certifies that the foregoing Preliminary Opposition to Petition for Writ of Mandate is in 13-point Times New Roman type font and approximately 10,691 words, which is less than the 14,000 words permitted by the rule, according to the Microsoft word count generated by the computer program used to prepare the brief.

DATED: December 10, 2020

BAINBRIDGE LAW APC

MARK ANCHOR ALBERT & ASSOC.

/s/ Mark Anchor Albert
Mark Anchor Albert
Attorneys for Defendants and Real Parties in Interest Windsor Ocean Inc. and John Spahi

State of California)
County of Los Angeles)
)

Proof of Service by:
✔ US Postal Service
Federal Express

I, Kirstin Largent , declare that I am not a party to the action, am over 18 years of age and my business address is: 626 Wilshire Blvd., Suite 820, Los Angeles, California 90017; ca@counselpress.com

On 12/10/2020 declarant served the within: Preliminary Opposition to Petition for Writ of Mandate; Exhibits in Support of Preliminary Opposition **upon:**

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Santa Monica, California 90401
Trial Court Judge

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Signature: Kirstin Largent