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FILED
SUPERIOR COURT
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

AUG 18 2009

By William P. [Signature] Deputy

6 Attorneys for Defendant Mill Pond Partners, L.P.
7

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF SAN BERNARDINO

10
11 ARROWHEAD WOODS
ARCHITECTURAL COMMITTEE, INC. a
12 California corporation,

13 Plaintiff,

14 v.

15 MILL POND PARTNERS, L.P., a Limited
Partnership, and all person unknown claiming
16 any legal or equitable right, title, estate, lien or
interest in the property described in the
17 complaint, named as DOES 1 to 50, inclusive,

18 Defendants.
19

Case No. CIV~~DS~~ 900262

Hon. W. Robert Fawke, Department S 38

NOTICE OF RULING ON DEFENDANT
MILL POND PARTNERS, L.P.'S MOTION
FOR AN ORDER TO REQUIRE AN
UNDERTAKING

Date: August 18, 2009

Time: 8:30 a.m.

Dept.: S 38

Judge: Hon. W. Robert Fawke

Complaint Filed: January 12, 2009

20 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

21 On August 18, 2009, defendant Mill Pond Partners, L.P.'s ("Mill Pond") Motion for an
22 Order to Require an Undertaking came on for hearing in Department S-38 of the Superior Court of
23 California, County of San Bernardino. The court reviewed the moving papers and heard the
24 arguments of counsel. The court ruled as follows:

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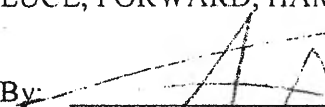
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1 Mill Pond's motion is granted. Plaintiff Arrowhead Woods Architectural Committee, Inc.
2 ("AWAC") shall give Mill Pond Partners, L.P. a \$10,000,000 undertaking. AWAC shall provide
3 the court with proof of compliance with the undertaking order at a hearing on October 2, 2009, at
4 8:30 a.m.

5
6 Dated: August 18, 2009

LUCE, FORWARD, HAMILTON & SCRIPPS, LLP

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8 By: 
9 Steven S. Wall
10 Antony D. Nash
11 John J. McNutt
12 Attorneys for Defendant Mill Pond Partners, L.P.

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FILED
SUPERIOR COURT
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

JUL 21 2009

By R. J. Carr Deputy

6 Attorneys for Defendant Mill Pond Partners, L.P.
7

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 FOR THE COUNTY OF SAN BERNARDINO

10
11 ARROWHEAD WOODS
ARCHITECTURAL COMMITTEE, INC. a
12 California corporation,

13 Plaintiff,

14 v.

15 MILL POND PARTNERS, L.P., a Limited
Partnership, and all person unknown claiming
16 any legal or equitable right, title, estate, lien or
interest in the property described in the
17 complaint, named as DOES 1 to 50, inclusive,

18 Defendants.

Case No. CIV^DSS 900262

Honorable W. Robert Fawke
Department S 38

**DEFENDANT MILL POND PARTNERS,
L.P.'S MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
MOTION FOR AN ORDER TO
REQUIRE AN UNDERTAKING**

Date: August 18, 2009

Time: 8:30 a.m.

Dept.: S 38

Judge: Hon. W. Robert Fawke

Complaint Filed: January 12, 2009

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20
21 Pursuant to Code of Civil Procedure section 405.34, defendant Mill Pond Partners, L.P.
22 ("Defendant" or "Mill Pond") respectfully submits this memorandum of points and authorities in
23 support of its motion ("Motion") for an order to require an undertaking as a condition of Plaintiff
24 maintaining its notice of Pendency of Action ("lis pendens").

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I.

INTRODUCTION

Defendant seeks equitable relief from the Court in the form of an undertaking order because of the extraordinary factual circumstances involved in this civil action (the "Action").

Plaintiff Arrowhead Woods Architectural Committee, Inc. ("Plaintiff" or the "Architectural Committee") filed its complaint on January 12, 2009. In conjunction with the complaint, the Architectural Committee recorded a lis pendens against the property in question on March 18, 2009. Plaintiff recorded an amended lis pendens against the property in April 2009. Copies of the two lis pendens are attached to Mill Pond's Notice of Lodgment of Exhibits ("NOL") as Exhibit 1.

Because of the extraordinary economic harm that a property owner can rapidly incur as a consequence of a recorded lis pendens against the owner's property, the State Legislature enacted a provision in the Code of Civil Procedure providing trial courts explicit statutory authority to order a lis pendens claimant to file an adequate undertaking as a condition of maintaining a Notice Pendency of Action against the record title. (Code Civ. Proc. § 405.34.)

Defendant Mill Pond Partners, L.P. ("Mill Pond" or "Defendant") has been working on the development of this 30-acre parcel of real property at Lake Arrowhead for thirteen years (the "Project"). (See accompanying Declaration of Joel Burton Goldberg ("Goldberg Decl.") ¶ 2.) Mill Pond purchased the property in 1995, and the County Board of Supervisors initially approved the project in 1998. (Goldberg Decl. ¶ 2.) The Project consists of 60 unimproved residential building lots in close proximity to Lake Arrowhead. See Location Map attached to the NOL as Exhibit 2. (Subject Property outlined in pink.) The 60 lots are graded and have: (1) completed and paved access roads; (2) curbs and gutters; (3) water supply hookups; (4) electricity hookups; (5) natural gas hookups; (6) sewer hookups; (7) cable hookups; and (8) telephone hookups. Seventeen lots have approved White Reports from the California Department of Real Estate. Those 17 lots have been ready for immediate sale to the public for months. (Goldberg Decl. ¶ 3.)

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1 At current market prices, the property is worth between \$15,000,000 and \$20,000,000.
2 (Goldberg Decl. ¶ 12; Declaration of Michael Fogarty (“Fogarty Decl.”) ¶ 11; Declaration of Bill
3 Johnson (“Johnson Decl.”) ¶ 11.) The property is, however, encumbered by several deeds of trust
4 and is in danger of going into foreclosure if Mill Pond and its agents are prevented from actively
5 marketing the lots to the public. (Declaration of Timothy Graham (“Graham Decl.”) ¶¶ 2-5.) The
6 aggregate secured debt against the property exceeds \$6,000,000. (Graham Decl. ¶¶ 3-5.)

7 Each month, Mill Pond must expend thousands of dollars in outlays to maintain the lots
8 and the Project. (Goldberg Decl. ¶ 7.) Mill Pond has no source of income and no ability to obtain
9 income or additional financing unless Mill Pond closes escrows on existing lots. (Goldberg Decl.
10 ¶ 7.) Mill Pond has minimal cash on hand and cannot meet its current obligations without cash
11 flow from lot sales. (Goldberg Decl. ¶ 7.)

12 Plaintiff’s lis pendens is destroying the ability of Defendant to market and sell the 60 lots.
13 The lis pendens has chilled the market for the Mill Pond Project and Defendant has no choice but
14 to seek an immediate order from the court to require Plaintiff to file an undertaking to indemnify
15 Defendant for the extraordinary damages Defendant is currently incurring. Defendant requests
16 that the Court order Plaintiff to file an undertaking for \$10,000,000. The \$10,000,000 is based on
17 a conservative estimate of the total economic harm that Mill Pond will incur if the lis pendens is
18 not expunged. The property is worth between \$15,000,000 and \$20,000,000. The property is
19 encumbered with approximately \$6,500,000 in secured loans. There is between \$8,500,000 to
20 \$13,500,000 in equity in the property. A \$10,000,000 undertaking would be on the lower side of
21 that range.

22 II.

23 ARGUMENT

24 A. California Law Authorizes the Court to Order an Undertaking

25 Code of Civil Procedure section 405.34 authorizes trial courts to order claimants to file
26 undertakings to maintain a Notice of Pendency of Action on record title. (Code Civ. Proc.
27 § 405.34.)

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Section 405.34 specifically provides:

Subject to the provisions of Sections 405.31 and 405.32, at any time after a notice of pendency of action has been recorded, and regardless of whether a motion to expunge has been filed, the court may, upon motion by any person with an interest in the property, **require the claimant to give the moving party an undertaking as a condition of maintaining the notice in the record title**. However, a person who is not a party to the action shall obtain leave to intervene from the court at or before the time the person moves to require an undertaking. The court may permit evidence to be received in the form of oral testimony and may make any orders it deems just to provide for discovery by any affected party. **An undertaking required pursuant to this section shall be of such nature and in such amount as the court may determine to be just**. In its order requiring an undertaking, the court shall set a return date for the claimant to show compliance and if the claimant fails to show compliance on the return date, the court shall order the notice of pendency of action expunged without further notice or hearing.

Recovery on an undertaking required pursuant to this section may be had in an amount not to exceed the undertaking, pursuant to Section 996.440, upon a showing (a) that the claimant did not prevail on the real property claim and (b) that the person seeking recovery suffered damages as a result of the maintenance of the notice. In assessing these damages, the court shall not consider the claimant's intent or the presence or absence of probable cause. (Code Civ. Proc. § 405.34, emphasis added.)

B. California Appellate Courts Support Section 405.34

Numerous California appellate courts have noted their approval of using section 405.34 to cause an undertaking to be given where equity so requires. (See, e.g., *Kirkeby v. Superior Court (Fascenelli)* (2004) 33 Cal.4th 642, 647 fn.2 (trial court must expunge a lis pendens if the claimant fails to obey a court order to file an undertaking pursuant to Code of Civil Procedure section 405.34); *Campbell v. Superior Court (La Barrie)* (2005) 132 Cal.App.4th 904, 916 (favorably citing section 405.34); *Hunting World, Inc. v. Superior Court (Bogar)* (1994) 22 Cal.App.4th 67, 71 (pursuant to section 405.34, "The court may also protect the property owner by requiring an undertaking as a condition of maintaining the notice in the record title."))

When analyzing Mill Pond's request for an undertaking, this Court has discretion in determining the damages that the property owner has suffered, and is continuing to suffer, as a result of the recorded lis pendens. Earlier this year, the Second District Court of Appeal addressed this issue in *Manhattan Loft, LLC v. Mercury Liquors, Inc.* (2009) 173 Cal.App.4th 1040. In

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1 *Manhattan Loft*, the court of appeal reviewed the evidentiary and legal adequacy of a declaration
2 from the property owner's agent about the damages the owner had suffered, and was suffering, as
3 a consequence of a lis pendens against the property.

4 The agent declared that the owner "could not sell any of the residential condominium units,
5 until the lis pendens are removed." (*Manhattan Loft* at 1057.) The agent also declared that the
6 lis pendens was preventing the owner from marketing the condominiums and preventing the
7 owner from opening escrows. (*Id.*) The agent declared that the lis pendens had caused the owner
8 millions of dollars in damages because the market for loft-style condominiums had fallen
9 dramatically since the claimant had recorded the lis pendens. (*Id.*) Finally, the agent declared that
10 even if the market had not fallen, the owner would "still have suffered damage as a result of the
11 delay in receiving the sales proceeds." (*Id.* at 1057-58.)

12 After citing to these sections of the agent's declaration, the court of appeal stated, "This
13 testimony provides adequate evidence of damage." (*Manhattan Loft* at 1058.)

14 **C. The Evidence of Mill Pond's Economic Damages is Undisputed and Compelling**

15 The following facts demonstrate that the lis pendens is causing Mill Pond millions of
16 dollars in damages:

- 17 1. Seventeen lots are ready for sale (Fogarty Decl. ¶ 5);
- 18 2. The listing agents cannot sell any lots so long as the lis pendens is in place (Fogarty
19 Decl. ¶¶ 8-10; Johnson Decl. ¶¶ 8-10);
- 20 3. The project is encumbered with millions of dollars of debt and is in imminent
21 danger of going into foreclosure (Graham Decl. ¶¶ 3-5);
- 22 4. Prospective buyers cannot obtain title insurance because of the lis pendens
23 (Graham Decl. ¶ 10);
- 24 5. Prospective lenders cannot obtain title insurance because of the lis pendens
25 (Graham Decl. ¶ 10);
- 26 6. Mill Pond is incurring over two thousand dollars a day in accrued interest on the
27 loans against the property, but cannot sell any lots (Graham Decl. ¶¶ 3-5;
28 Goldberg Decl. ¶ 7);

- 1 7. Mill Pond cannot close escrow on two lots with existing contracts because of the
2 Architectural Committee' lis pendens (Fogarty Decl. ¶ 9; Graham Decl. ¶¶ 7-11;
3 Declaration of Katherine Coker ¶¶ 2-3; Declaration of Joe Coker ¶¶ 2-3); and
4 8. Mill Pond's marketing efforts have ended because of lack of cash and because of
5 the existence of the lis pendens against the property (Fogarty Decl. ¶¶ 8-10;
6 Johnson Decl. ¶¶ 8-10.).

7 Based on the evidentiary standard articulated in *Manhattan Loft*, the declarations of
8 Goldberg, Fogarty, Johnson, Graham, and the Cokers – when evaluated in the aggregate – provide
9 legally sufficient, indeed compelling, evidence of the substantial past, ongoing, and future
10 damages the Architectural Committee's lis pendens is causing to Mill Pond.

11 **D. Equity Requires an Undertaking**

12 The official legislative comment to Code of Civil Procedure section 405.34 states that
13 “Decisions regarding an undertaking requirement are to be governed by normally applicable
14 equitable principles.” (Code Civ. Proc. § 405.34, official legislative comment, attached as
15 Exhibit 3 to the NOL.)

16 Equity requires the Court to order Plaintiff to file an undertaking. As established in
17 Section II(C), supra, there is overwhelming evidence that the Plaintiff's lis pendens is causing
18 immediate and substantial harm to Mill Pond.

19 Mill Pond has been working for thirteen years to develop this project. As of the spring of
20 2009, 17 of the 60 lots were ready for immediate sale. The recorded lis pendens destroyed any
21 chance that Mill Pond would be able to sell those 17 lots in the spring or summer of this year. As
22 a consequence, Mill Pond is on the verge of losing the lots to a foreclosure sale or filing for
23 bankruptcy. There is simply no private, non-judicial tool or mechanism for Mill Pond to employ
24 to avoid the legal and market consequences of the recorded lis pendens. The only option for
25 Mill Pond is to obtain an undertaking order from the Court that will indemnify Mill Pond for the
26 economic devastation the lis pendens is imposing on the Project.

27 If Plaintiff cannot post a substantial undertaking in the amount that this Court believes to
28 be just, section 405.34 provides that the Court shall order the Notice of Pendency of action

1 expunged without further notice or hearing. At that point, at least, Mill Pond should be able to
2 salvage its marketing efforts for the fall season; despite the damages it has already sustained after
3 losing the spring and summer marketing seasons.

4 Against the very real, very severe, and very immediate harm the lis pendens is causing Mill
5 Pond, an undertaking in an amount the Court determines to be just will cause Plaintiff little, if any,
6 harm. The disputed trees have already been removed. Residences have yet to be built on Mill
7 Pond's lots. A detailed set of protective CC&Rs are of record for the Project. (Goldberg Decl.
8 ¶ 5.) The infrastructure for the lots has already been completed. (Goldberg Decl. ¶ 3.)

9 **E. The Court Should Order Plaintiff to File an Undertaking for \$10,000,000**

10 The Architectural Committee's lis pendens against the Project is preventing the sale of
11 every lot at the Project. (Goldberg Decl. ¶¶ 6, 10, 13.) These lot sales are crucial to Mill Pond
12 because they represent the only source of income for payment of the large amounts due on Mill
13 Pond's construction loans. (*Id.*) If Mill Pond cannot close numerous escrows in the next few
14 months, Mill Pond will be forced into bankruptcy or will lose the lots through foreclosure.
15 (Goldberg Decl. ¶ 13.) The impact of the Architectural Committee's lis pendens has been – and is
16 – financially devastating. (Goldberg Decl. ¶ 13.)

17 The 60 lots (eleven of which are now owned by one of Mill Pond's secured creditors) are
18 worth between \$15,000,000 and \$20,000,000. The property is burdened with approximately
19 \$6,500,000 in secured debt. Mill Pond's estimated equity in the property is approximately
20 \$10,000,000. Under these circumstances, a \$10,000,000 undertaking is just.

21 The Court should not be tempted to proverbially "split the baby". With escrows that
22 cannot be closed, sales efforts that are shut down, and the prime marketing season already lost, a
23 \$10,000,000 loss to Mill Pond is very realistic.

24 The Court should order Plaintiff to file its undertaking within five days of the August 18th
25 hearing. Code of Civil Procedure section 996.960 provides that the Court must order a party
26 subject to a bond to post a sufficient bond within five days of a hearing determining the
27 sufficiency or insufficiency of a bond. (Code Civ. Proc. § 996.960.) If five days is sufficient to
28 post a replacement bond, five days should be sufficient to post the bond in the first instance.

1 **F. Plaintiff's Admission**

2 At the ex parte hearing in this Action on July 17, 2009, Plaintiff's counsel, Mr. John
3 Wurm, made the following admission to this Court.

4 "And I certainly – you know, my client has no interest to see the defendant or the
5 defendant's lenders go out of business or suffer a loss."

6 Reporter's Transcript of July 17, 2009, page 5, lines 10-13. (A true and correct copy of the
7 Reporter's Transcript is attached to the NOL as Exhibit 4.)

8 Given that the Architectural Committee does not want to see Mill Pond suffer a loss, and
9 the overwhelming evidence is that this very loss has occurred and is ongoing as a result of the lis
10 pendens, equity demands that the Plaintiff give Mill Pond a just undertaking in the amount of
11 \$10,000,000.

12 **III.**

13 **CONCLUSION**

14 Mill Pond has provided six declarations and numerous documents attesting to the millions
15 of dollars in damages Mill Pond is incurring as a result of the lis pendens recorded by Arrowhead
16 Woods Architectural Committee, Inc. This Court has the statutory authority to order Plaintiff to
17 file an undertaking. Without such an undertaking, Mill Pond will go into bankruptcy or lose all of
18 the lots at a foreclosure sale. Mill Pond respectfully requests that the Court grant the Motion and
19 order Plaintiff to file a \$10,000,000 undertaking within five days of the hearing on the Motion.
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21 Dated: July 20, 2009

LUCE, FORWARD, HAMILTON & SCRIPPS, LLP

22 By: Steven S. Wall

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