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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE

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Attorneys for Defendant
TRI PALM UNIFIED OWNERS ASSOCIATION

Lucero Zuniga

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF RIVERSIDE, PALM SPRINGS COURT**

ALEX CHEVELDAVE, an individual; and
RICHARD N. DAVIS, an individual;

Plaintiffs,

v.

TRI PALM UNIFIED OWNERS
ASSOCIATION; KORT & SCOTT
FINANCIAL GROUP, LLC;
SHENANDOAH VENTURES, L.P., a
California Limited Partnership;
and DOES 1 - 20;

Defendants.

CASE NO. PSC 1600368

Assigned for all purposes to:
Honorable James T. Latting
Department PS 1

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT/RESPONDENT TRI PALM
UNIFIED OWNERS ASSOCIATION'S
MOTION FOR AN ORDER TO REQUIRE
PLAINTIFFS/APPELLANTS TO POST AN
UNDERTAKING ON APPEAL
[CCP § 917.9]**

Date: September 21, 2016
Time: 8:30 a.m.
Dept.: PS 1

Complaint Filed: January 26, 2016
Trial Date: None Set

Defendant/Respondent TRI PALM UNIFIED OWNERS ASSOCIATION
("Association") respectfully submits the following Memorandum of Points and Authorities in
support of its Motion for an Order to Require Plaintiffs/Appellants ALEX CHEVELDAVE
and RICHARD DAVIS (collectively "Appellants") to post an undertaking to stay enforcement
of the Judgment in this case pending their appeal pursuant to Code of Civil Procedure § 917.9.

I.

STATEMENT OF THE FACTS

On January 26, 2016, Appellants filed a Complaint against the Association and others contending a settlement agreement executed by and between the Association and Defendant Kort & Scott Financial Group, LLC (“K&S”), that was approved on June 12, 2014, by the Honorable Mark D. Houle, United States Bankruptcy Court, Central District of California, Riverside Division, after a noticed hearing, was void as a matter of law.

The Association filed a Special Motion to Strike Appellants’ Complaint, pursuant to Code of Civil Procedure § 425.16 (“anti-SLAPP Motion”), which was granted by the Court on April 28, 2016.

On May 26, 2016, the Association’s Motion for an Award of its Attorneys’ Fees and Costs in favor of the Association and against Appellants, pursuant to Code of Civil Procedure section 425.16 was heard and granted. The Association was awarded attorneys’ fees in the amount of \$33,720.00 and costs in the amount of \$1,505.77 for a total award of \$35,225.77. Plaintiffs were ordered to pay the attorneys’ fees and costs no later than June 27, 2016, which they have failed to do.

Appellants filed a Motion for Reconsideration of the granting of the Association’s anti-SLAPP Motion, which was heard and denied on July 11, 2016. In conjunction with Appellants’ Motion for Reconsideration, the Association sought an award of additional attorneys’ fees, which was granted in the amount of \$6,750.00, thereby increasing the attorney’s fees awarded in this case to \$40,470.00. Adding the costs previously awarded in the amount of \$1,505.77, the total award of attorneys’ fees and costs now stands at \$41,975.77.

On or about July 15, 2016, Plaintiffs/Appellants filed their Notice of Appeal.

On August 19, 2016, a Judgment of Dismissal was entered in favor of the Association and against Appellants in this case. The Judgment contains an award of attorneys’ fees in favor of the Association in the amount of \$40,470.00 and costs in the amount of \$1,505.77 for a total award of \$41,975.77. The Judgment further provides that Appellants are jointly and severally liable for the entire amount of the attorneys’ fees and costs awarded to the

1 Association. Appellants have not paid the attorneys' fees and costs they were ordered to pay
2 by June 26, 2016, nor have Appellants posted an undertaking to stay enforcement of the Order
3 issued by the Court on May 26, 2016, or the Judgment subsequently entered against them.

4 At the time the Association filed its initial Motion for an Award of Attorneys' Fees and
5 Costs, the Association also filed a companion Motion for an Order Requiring Plaintiff Alex
6 Cheveldave to File an Undertaking pursuant to Code of Civil Procedure ("CCP") section 1030.
7 The Association's Motion to require an undertaking be posted was heard on May 26, 2016,
8 and denied on the ground the Association's anti-SLAPP motion had already been granted, and
9 as a result, the Association was dismissed from the case. The Court therefore concluded that
10 "Code of Civil Procedure section 1030 no longer has any application with respect to HOA as a
11 former defendant in this case." [See, Court's tentative ruling, issued on May 25, 2016, and
12 confirmed on May 26, 2016].

13 In light of the appeal filed by Plaintiffs/Appellants, the Association now requests that
14 Plaintiffs be required to post an undertaking to stay enforcement of the Judgment entered
15 against them.

16 Appellant Alex Cheveldave is a nonresident, Canadian citizen who resides in Canada.
17 Appellant Cheveldave listed his Tri Palm Estates property for sale shortly after the
18 Association's anti-SLAPP Motion was granted.

19 The property in which Appellant Richard Davis resides was owned, until January 31,
20 2014, solely by Davis' wife as her sole and separate property. Davis was put on title to the
21 property on January 31, 2014, shortly before he initiated his first lawsuit against the
22 Association in Small Claims Court. On May 10, 2016, while the Association's Motion for
23 Attorneys' Fees was pending, Davis conveyed his interest in his Tri Palm Estates property
24 back to his wife, who now owns the property once again as her sole and separate property.

25 The recent listing of the Cheveldave property for sale and the recent transfer of title by
26 Davis back to his wife reflect a clear indication that Appellants are attempting to liquidate their
27 real property holdings to thwart the Association's ability to collect the Judgment entered
28 against Appellants after their appeal is decided.

1 The Association respectfully requests that its Motion be granted to protect the interests
2 of the Association as the prevailing party in this action.

3 **II.**

4 **THE COURT HAS JURISDICTION TO HEAR THIS MOTION**

5 The Court has jurisdiction to hear the Association's motion pursuant to Code of Civil
6 Procedure ("CCP") section 916(a).

7 **Except as provided in Sections 917.1 to 917.9, inclusive, and**
8 **in Section 116.810, the perfecting of an appeal stays proceedings**
9 **in the trial court upon the judgment or order appealed from or**
10 **upon the matters embraced therein or affected thereby, including**
11 **enforcement of the judgment or order, but the trial court may**
12 **proceed upon any other matter embraced in the action and not**
13 **affected by the judgment or order. (Emphasis added.)**

11 **III.**

12 **THE COURT HAS DISCRETION TO REQUIRE APPELLANTS TO POST AN**
13 **UNDERTAKING PENDING APPEAL**

14 CCP section 917.9 (a) provides:

15 (a) The perfecting of an appeal shall not stay enforcement of the
16 judgment or order in cases not provided for in Sections 917.1 to
17 917.8, inclusive, if the trial court, in its discretion, requires an
18 undertaking and the undertaking is not given, in any of the
19 following cases:

18 (1) Appellant was found to possess money or other property
19 belonging to respondent.

20 (2) Appellant is required to perform an act for respondent's
21 benefit pursuant to judgment or order under appeal.

21 (3) **The judgment against appellant is solely for costs**
22 **awarded to the respondent by the trial court pursuant to**
23 **Chapter 6 (commencing with Section 1021) of Title 14."**
(Emphasis added.)

24 As to the amount of the undertaking, CCP section 917.9 (b) states: "the undertaking
25 shall be in a sum fixed by the court and shall be in an amount sufficient to cover all damages
26 which the respondent may sustain by reason of the stay in the enforcement of the judgment or
27 order."
28

1 Section 917.9 (c) additionally provides:

2 The undertaking shall be in the sum fixed by the court. The
3 undertaking shall be conditioned upon the performance of the
4 judgment or order appealed from or payment of the sums
5 required by the judgment or order appealed from, if the
6 judgment or order is affirmed or the appeal is withdrawn or
7 dismissed, and it shall provide that if the judgment or order
8 appealed from or any part of it is affirmed, or the appeal is
9 withdrawn or dismissed, the appellant will pay all damages
10 which the respondent may sustain by reason of the stay in the
11 enforcement of the judgment.

12 Section 917.9 (d) defines “damages” as either of the following:

- 13 (1) Reasonable compensation for the loss of use of the money or
14 property.
15 (2) Payment of the amounts specified in paragraph (3) of
16 subdivision (a).

17 Ordinarily a judgment for costs and attorney’s fees is automatically stayed pending
18 appeal. *Chapala Mgmt. Corp. v. Stanton* (2010) 186 Cal.App.4th 1532. However, the Court
19 nevertheless has discretion to require an undertaking to stay enforcement of a judgment for
20 costs pending appeal pursuant to CCP section 917.9(a)(3). See, e.g., *Ziello v. Superior Court*
21 (1999) 75 Cal. App. 4th 651, 655 fn.2; and Eisenberg, Horvitz & Wiener, CAL. PRAC.
22 GUIDE: CIVIL APPEALS AND WRITS (The Rutter Group 2013) sections 7:164 – 7:167.

23 In 1993, the California Legislature specifically re-wrote part of CCP section 917.9 to
24 give trial courts discretion in cases in which a judgment is *solely* for costs. See, CCP section
25 917.9 Historical and Statutory Notes; and 9 B.E. Witkin, California Procedure, Appeal,
26 sections 272-73 (5th Ed. 2008).

27 In this case, the Judgment entered is solely for attorneys’ fees and costs awarded to the
28 Association pursuant to CCP section 425.16(c).

To date, Appellants have not posted an undertaking for the attorneys’ fees and costs
awarded to the Association. CCP section 917.9 (a)(3) authorizes the Court to require the
posting of an undertaking to protect the interests of the Association, as the prevailing party,
while the appeal is pending and to secure the payment of the monetary judgment after the
appeal has been decided.

1 IV.

2 **THE COURT SHOULD REQUIRE AN UNDERTAKING PENDING APPEAL**

3 Section 917.9 “authorize[s] the trial court to impose an undertaking to protect the
4 respondent from any loss of benefits during an appeal.” *Estate of Murphy* (1971) 16 Cal. App.
5 3d 564, 568. An undertaking is appropriate here to protect the Judgment entered in favor of
6 the Association from becoming uncollectible after the appeal, particularly since it is clear
7 Appellants have already disposed of assets or are attempting to dispose of assets to avoid
8 payment of the Judgment after their appeal is decided.

9 In determining this motion, this Court may take into account the fact that Plaintiffs are
10 unlikely to prevail on their appeal. See, California Judges Benchbook: Civil Proceedings –
11 After Trial § 6:191 (2008): “Some judges almost always require an undertaking in these
12 instances [under Section 917.9]. Others require an undertaking if the grounds for the appeal
13 seem weak and it appears that an appeal has been filed only to delay enforcement.”

14 Appellants are not prejudiced and cannot establish prejudice by an order requiring them
15 to post an undertaking. “[T]here is no constitutional right to an appeal and the appellate
16 procedure is subject to statutory control and the concomitant legislative determinations of
17 appropriate conditions or restrictions. Requiring a party who desires to contest the results of a
18 trial to post a sufficient undertaking to cover all money which he might owe to the other
19 should he not succeed on appeal does not offend due process.” *Grant v. Superior Court*
20 (1990) 225 Cal.App.3d 929,939.

21 The 4th District Court of Appeals, historically, has been taking two or more years to
22 decide cases before it on appeal. Given that the Judgment is accruing statutory interest at the
23 rate of 10% per annum [CCP § 685.010(a)] and the fact that Appellant Davis has already
24 transferred his interest in his Tri Palm Estates property and Appellant Cheveldave is
25 attempting to sell off his interest in his Tri Palm Estates property, presumably in an effort to
26 protect their assets from the Judgment entered in this case and given the great risk of harm to
27 the Association by such actions, the Association requests the Court fix the amount of the
28 undertaking at \$62,964.00 which is 150% of the amount of the monetary Judgment against

1 Plaintiffs/Appellants. Appellants should bear the risk and be required to provide security for
2 the Association's ultimate recovery in this case.

3 In certain circumstances, the perfecting of an appeal does not
4 stay enforcement of the judgment or order in the trial court
5 unless an undertaking is given by the appealing party. *Like an*
automatic stay, the purpose of an undertaking is to protect the
judgment while the appeal is pending. (Citations omitted.)

6 *City of Lodi v. Randtron* (2004) 118 Cal.App.4th 337, 362-363.
7 (Emphasis added).

8 The Association respectfully requests the Court fix the amount of the undertaking at
9 \$62,964.00 and order Appellants to post an appeal bond within thirty (30) days.

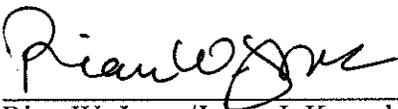
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11 Dated: August 14, 2016

EPSTEN GRINNELL & HOWELL, APC

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By: 

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Rian W. Jones/Joyce J. Kapsal
Attorneys for Defendant Tri Palm Unified
Owners Association

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