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February 16, 2012

California Court of Appeal
Second Appellate District, Division Six
Court Place
200 East Santa Clara Street
Ventura, CA 93001

Re: *Michael M. Klein, et al. v. Eswar Nyamathi, et al.*
Case No. B228157 / Filed: January 25, 2012
Superior Court Case No. 56-2008-00313459-CU-OR-SIM

Dear Honorable Justices of the Court of Appeal:

The law firm of Swedelson & Gottlieb respectfully request that you consider certifying the *Michael M. Klein, et al. v. Eswar Nyamathi, et al.* opinion ("Opinion") for publication.

Since 1987, our firm has limited its practice to the representation of hundreds of California Community Associations.

As many Californians reside in California community associations and because this Opinion could benefit and assist in the governance at these community associations, we believe that the Opinion of *Michael M. Klein, et al. v. Eswar Nyamathi, et al.*, qualifies for publication under the grounds set forth in California Rules of Court, Rule §§8.1105(c)(2), 8.1105(c)(3), 8.1105(c)(6), and 8.1105(c)(8) as discussed below. As stated below, there are no other reported decisions that address the "common issue" exception relating to the application of attorneys' fees where there are both a breach of CC&Rs claim and a tort claim based on the same facts.

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THE DECISION

Landowners Michael M. Klein and Donna Lynn Klein (Plaintiffs and Respondents) sued their adjoining landowners Eswar Nyamathi and Adeline Nyamanthi (Defendants and Appellants) alleging that they failed to abate an improper driveway grading and V-swale, failed to maintain proper erosion control, and failed to prevent excessive storm

water from flowing onto Plaintiffs' property, causing damage to Plaintiffs' property. The subject properties are part of the Bell Canyon Planned development and subject to the Bell Canyon Homeowners Association ("Association") CC&Rs. Plaintiffs initially sued Defendants only on tort theories (nuisance, negligence, trespass, and injunctive relief). However, at the close of evidence, Plaintiffs sought and were granted leave to amend to add two causes of action for breach of the CC&Rs and a Plan Submittal Acknowledgement Agreement ("PSA"), a document required by the Association as part of it's architectural review process. The jury awarded Plaintiffs $400,000 in damages, and the trial court warded $552,655 in attorney's fees and $63,595.83 in costs.

The Appellants contended that neither the CC&Rs nor the PSA constituted a valid contractual basis for the fee award. (Opinion at page 11). The Court of Appeal held that the CC&Rs were a contract between the members of the Association. (Opinion at page 13). Appellants also claimed that the fee award was excessive because it included work performed on the tort causes of action as well as the breach of contract causes of action. The Court of Appeal went on to state that generally, fees need to be apportioned between those claims for which fees are recoverable (contractual) and those claims for which fees are not recoverable (tort). However, fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which fees are not allowed. (Opinion at pages 11 and 15). In upholding the fee award, the Court of Appeal concluded: "The trial court did not abuse its discretion when it determined that each of respondent's legal theories was based on the same conduct, same facts, and same evidence as the other." (Opinion at page 15).

GROUND FOR CERTIFICATION

The grounds advanced for certification are as follows:

1. *California Rules of Court* § 8.1005(c)(2) – The case applies an existing rule of law to a set of facts significantly different from those stated in published opinions;

2. *California Rules of Court* §8.1105(c)(6) – The case involves a legal issue of continuing public interest; and

3. *California Rules of Court* § 8.1105(c)(8) – The case reaffirms a principle of law not applied in a recently reported decision.

ARGUMENT FOR CERTIFICATION

1. Section 8.1105(c)(2) – The case applies an existing rule of law to a set of facts significantly different from those stated in published opinions.

The Court of Appeal's opinion reiterates the existing rules of law that the prevailing party in an action to enforce CC&Rs is only entitled to those fees that are incurred on the enforcement claim (*Salawy v. Ocean Towers Housing Towers Corp.* (2004) 121 Cal.App.4th 664, 667) and that fees generally must be apportioned between those claims for which fees are recoverable and those claims for which fees are not recoverable (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129-130). However, the opinion goes on to reiterate the existing rule of law that under the "common issue" exception, fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allows. (Ibid.) The opinion then finds that from inception Respondents claimed that Appellants were negligent, trespassed, and maintained a nuisance because they failed to maintain their property in a manner that would avoid flooding their neighbors and that such nuisance violated the CC&Rs based on the same facts, proven with the same trial testimony and documentary evidence. (Opinion at page 15). The Opinion then holds that allocation was not required and as the prevailing party, Respondents were entitled to recover all expenses incurred in litigating such common issues. (Opinion at page 16).

There are no other reported decisions we are aware of which involve the issue of apportionment of attorney's fees in a case involving a violation of CC&Rs and tort claims. In *Ritter & Ritter, Inv. Pension & Profit Plan v. The Churchill Condominium Association* (2008) 166 Cal.App.4th 103, the issue of recovery prevailing party attorney's fees pursuant to CC&Rs was referenced, but the case did not address apportionment

between breach of CC&Rs claims and tort claims. In *Goldt Chee v. Amanda Property Management* (2006) 143 Cal.App.4th 1360, 1381, the apportionment issue raised concerned apportionment of fees as between the two defendants, not the different claims. Further, the Goldt case did not address the "common issue" exception.

Unlike the *Ritter* and *Goldt* cases, the *Kelin* opinion addresses the "common issue" exception to apportionment of attorneys fees where there are breach of CC&Rs and tort claims involving common facts. We believe the Appellate Court's opinion regarding the application of the "common issue" exception to be correct and of precedential value in cases involving breach of CC&Rs.

2. Section 8.1105(c)(6) – The case involves a legal issue of continuing public interest.

Since more and more Californians are living within community associations, the number of lawsuits involving breaches of CC&Rs will undoubtedly increase. Such lawsuits often involve both contract and tort claims based on common facts. The *Klein* Opinion provides valuable guidance to the boards of directors who govern these community associations, as well as the individual homeowners living within them, regarding the recovery of attorney's fees in these types of lawsuits. Such guidance will better enable these boards and homeowners to assess the potential risk of an attorney fee award in lawsuits involving claims of breach of CC&Rs and tort claims.

3. Section 8.1105(c)(8) – The case reaffirms a principle of law not applied in a recently reported decision:

The only recent cases involving apportionment of attorney's fees n a breach of CC&Rs lawsuit are *Ritter* and *Goldt*. However, again, neither case directly addresses the "common issue" exception where there are both a breach of CC&R claim and a tort claim based on the same facts. We, therefore, believe that it would be beneficial to have the Klein decision published as it reaffirms the "common issue" exception to apportionment of attorney's fees as applied to disputes involving breach of CC&Rs.

CONCLUSION

Publication of this decision would provide valuable guidance for both homeowners associations and individual owners residing in common interest developments regarding their rights and responsibilities to pay costs and attorney's fees to the prevailing party in an action to enforce the governing documents of a homeowners association. The issues set forth in this opinion are important not just to the parties in this action, but to the millions of California citizens residing in California community associations. We respectfully request, on behalf of all community associations in the State of California, that the Court consider publishing the Opinion.

Respectfully submitted,

Sincerely,

SWEDELSON & GOTTLIEB

DAVID C. SWEDELSON, ESQ.
(CALIFORNIA STATE BAR NO. 84490)
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles. I am over the age of eighteen years and am not a party to the within entitled action. My business address is 11900 West Olympic Boulevard, Suite 700, Los Angeles, California 90064.

On the date executed below, I served a copy of letter dated February 16, 2012, regarding **REQUEST FOR CERTIFICATION OF OPINION FOR PUBLICATION** on the interested parties in this action addressed as follows:

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■ **(Via Mail)** I am readily familiar with the firm's procedures for collecting and processing correspondence for mailing and that pursuant to such procedure, such envelope would be deposited in the U.S. Postal Service on this same day with postage thereon fully prepaid at Los Angeles, California. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing listed in the affidavit.

❑ **(Via Facsimile)** By transmitting from my business address a true copy thereof sending facsimile machine (310) 207-2115 addressed to each individual at its facsimile telephone number set forth above.

❑ **(Via Overnight Service)** I am readily familiar with the firm's practice of collecting and processing correspondence for delivery by overnight delivery service. In accordance with that practice the documents would be delivered to an authorized courier or driver authorized by the express courier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it is to be served, at the office address as last given by that person on any document filed in the cause and served on the party making service; otherwise at the party's place of residence.

■ **(State)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on February 16, 2012, at Los Angeles, California.

ESTHER KIM