

FILED
SAN MATEO COUNTY

MAY 10 2023

Clerk of the Superior Court

By

DEPUTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

KUMAR CHAUDHARI, et al.,

Plaintiffs,

vs.

KATHERINE LOUDD, et al.,

Defendants.

Master File No. 19CIV00851
(Consolidated with 20CIV00986)

*Assigned for All Purposes to Dept. 2
Hon. Marie S. Weiner*

**FINAL STATEMENT OF DECISION
AFTER COURT TRIAL**

And Related Cross-Claims

Commencing June 17, 2021, a Court Trial was held in Department 2 of this Court before the Honorable Marie S. Weiner. Christopher Kelly and Ranjit Hakim of Mayer Brown LLP appeared on behalf of Plaintiff s Kumar Chaudhari, Ramiro Macias, Delphine Hill, and Shannon Pekary; and Brian Barnhorst of SAC Attorneys LLP appeared on behalf of Defendants Katherine Loudd, Verna Winston, Niambi Lincoln, Fidel Alas, Denise Hawkins and Palo Alto Park Mutual Water Company. Evidence was presented starting June 17, 2021, and concluded September 10, 2021. Pursuant to Stipulation of counsel for the parties, Closing Arguments were presented in writing, and filed according to a stipulated order setting the briefing schedule.

Written Closing Argument briefs were filed November 21, 2022 and November 30, 2022.

The Court issued a Proposed Statement of Decision, and the parties had the opportunity to and did file Objections thereto.

Upon due consideration of the briefs and evidence presented, and the argument of counsel for the parties, and the Objections to the Proposed Statement of Decision,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, as the Final Statement of Decision on the Complaint, as follows:

As to the first statutory claim in 19CIV00851, contesting the May 2018 Election of Directors of the Board of Palo Alto Mutual Water Company, the Court finds in favor of Defendants and against Plaintiffs, as Plaintiffs have failed to prove their claim by a preponderance of the evidence.

As to the second statutory claim in 19CIV00851, seeking removal of all Directors elected at the May 2018 Special Election, the Court finds in favor of Defendants and against Plaintiffs, as Plaintiffs have failed to prove their claim by a preponderance of the evidence; and further the matter is moot due to the subsequent supervening December 2019 Election.

As to the only statutory claim in 20CIV00986, contesting the December 2019 Election, and seeking pursuant to Corporations Code Section 7616, to set aside the election results, the Court finds in favor of Plaintiffs and against Defendants. Plaintiffs have proven by a preponderance of the evidence that the 2019 Election results were invalid, and that application of all valid proxies and ballots yields a result that Norman Picker, Delphine Hill, Ramiro Macias, Kumar Chaudhari and Shannon Pekary won the election as Directors of the Board of Palo Alto Mutual Water Company.

As Defendants prevailed in 19CIV00851, and Plaintiffs prevailed in 20CIV00986, and there was no monetary recovery, the Court finds that under Code of Civil Procedure Section 1032(a)(4), no one is the prevailing party such that no party is entitled to statutory costs.

THE COURT FINDS as follows, as its Final Statement of Decision:

This case involves an election dispute over control of an East Palo Alto Water District named Palo Alto Park Mutual Water Company. Palo Alto Park Mutual Water Company is a not-for-profit mutual benefit corporation. Although Plaintiffs initially filed a complaint pursuant to Corporations Code Section 709 as to the 2018 Election, as to a general corporation, the parties subsequently agreed that the applicable statute – which is substantively identical – is Corporations Code Section 7616.

Section 7616 states as follows

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

* * *

(d) The court, consistent with the provisions of this part and in conformity with the articles and bylaws to the extent feasible, may determine the person entitled to the office of director or may order a new election to be held or appointment to be made, may determine the validity, effectiveness and construction of voting agreements and voting trusts, the

validity of the issuance of memberships and the right of persons to vote and may direct such other relief as may be just and proper.

The Personal Interests and Relationship of the Defendants to the Water District

Defendant Katherine Loudd is a Director on the Board of Defendant Palo Alto Mutual Water Company. Defendant Niambi Lincoln, a Director on the Board of PAMWC, is the daughter of Defendant Loudd.

Loudd also worked for PAMWC as its General Manager; and when Loudd retired, Lincoln was hired as General Manager of PAMWC starting in 2018. Lincoln's previous employment was as a performance impairment advisor for Kaiser Permanente, from which job Lincoln retired after 34 years. Lincoln is paid a salary of \$75,600 per year as General Manager. Loudd continues to be employed by PAMWC as a "consultant", for which she is also paid \$75,600 per year.

Directors of PAMWC are paid a stipend for attending all monthly Board meetings. It was previously \$50 per meeting, but was increased to \$100 in 2019. All PAMWC Directors get free water services. Lincoln testified that she does not draw a director's stipend while she has been working as the General Manager, *but* she gets free water service.

Wilfred Loudd was a Maintenance Supervisor, Treatment Operator and/or Distribution Operator for the Company until 2019, and was paid \$30 per hour. He is the son of Katherine Loudd, and was hired by Loudd when she was serving as General Manager of PAMWC.

The Company's Treatment Operator is Bryan Lincoln, the husband of Defendant Niambi Lincoln (who is a PAMWC Director and General Manager.) Defendant Lincoln

is the one who hired her own husband to work at PAMWC, for which job Mr. Lincoln is paid \$30 per hour.

While she was GM, Katherine Loudd also hired her son Jabari Loudd to work as a Treatment Operator at a wage of \$30 per hour.

Defendant PAMWC has also made loans to the Loudd/Lincoln family, under their control, despite the fact that the Company is a non-profit utility. These were for the personal interests of the Loudd/Lincoln family, and not for the benefits of the PAMWC and its members.

Lincoln testified that she and her family members would all lose their jobs at the PAMWC if the Plaintiffs' Neighbors slate of candidates were elected as Directors; and Plaintiff Shannon Pekary said that they would get rid of present management if elected.

Discontent of Members/Homeowners

Palo Alto Mutual Water Company provides water supply to homes in East Palo Alto. Plaintiff Delphine Hill is a homeowner residing in East Palo Alto since 1982. Plaintiff Ramiro Macias is a homeowner residing in EPA for over 28 years. Plaintiff Shannon Pekary was a resident and homeowner in EPA from 2009 to 2018.

Plaintiffs created Neighbors for Better Water. Other residents/homeowners of the PAMWC also joined Neighbors. They objected to the quality of the water supplied by PAMWC,¹ to its lack of customer service, and to management issues. Also, the water bills were higher by comparison, but the Company refused to disclose its rate sheet, and other demands for records. [The PAMWC does not use water meters.] Neighbors for

¹ Evidence was presented that the California Drinking Water Watch found excessive metals in the PAMWC drinking water from 2001-2018, and there was e-coli found in the water in 2018.

Better Water decided to run a slate of candidates for the PAMWC Board, in order to effectuate change for the better.

On September 23, 2017, the annual shareholders meeting was held. Neighbors members attended, and they attempted to replace the incumbent Board. Proxies were presented. No election was held. Irene Laudeman, a homeowner for 19 years in EPA, and a member of Neighbors, demanded a special shareholders meeting, per the Bylaws, to have the election. The Company refused, so Laudeman filed a lawsuit in March 2018, San Mateo County Superior Court 18CIV01274. The Court ordered that a Special Shareholders Meeting be held no later than May 11, 2018. (Trial Exhibit #16,)

In response to the Court Order, the PAMWC Board and Lincoln decided that they needed to ensure a “safe environment”. Some hate mail had been received by Defendants back in 2016 and 2017. So they decided to now have the meeting outside (instead of inside), have security guards, and get metal detectors.

The 2018 Special Election

Day One

On **May 8, 2018**, a Special Shareholders Meeting was held, per the Court Order, starting at 10:00 a.m., outside in the yard of the PAMWC. Chairman Alas appointed Vice Chair Lewis to serve as Chair of the meeting, because Alas had to go to work. All other members of the Board were present. All attendees were required to sign-in on a sheet with their name and address – which sign-in sheets were drafted by Lincoln. An Agenda was provided (Trial Exhibit #17), and the purpose of the meeting was to count the proxies for an election. There was a court reporter in attendance in the audience at the meeting, hired by Neighbors. The transcript is Trial Exhibit #36.

Slate A was nominees for director, selected by the Company, namely Fidel Alas, Verna Winston, Niambi Lincoln, Jacqueline Lewis, and Katherine Loudd. Slate B was nominees for director, selected by the Neighbors, namely Norman Picker, Delphine Hill, Ramiro Macias, Kumar Chaudhari, and Shannon Pekary.²

The ballot counting process occurred as stated in the Agenda, but was a very tedious process. Lewis read out loud to the attendees the ballot counting process, Trial Exhibit #18. Lewis announced to the attendees that counting of the proxies/ballots would continue until completed.

Hill asked Lewis about approval of the Agenda, and about who would be the Inspector of the election. (Corp. Code §7614.) Corporate Secretary Mitchell was placed in charge of the process of ballot/proxy counting. Lewis stated, “Mrs. Mitchell will certify the count.” Lewis stated that Observers would be placed on both sides of Mitchell, but that Mitchell would be the official Inspector in charge.³

Pekary presented the hundreds of proxies collected by the Neighbors for Better Water. Secretary Mitchell was the only one who counted the proxies presented by Neighbors.

The ballot counting process established by PAMWC took a very long time – more specifically, Lincoln testified that she was the one who created this ballot counting procedure. Lincoln reiterated that counting would continue until completed. The ballot counting process formulated and imposed by Defendants was highly inefficient and

² All the Neighbors nominees for director were originally named Plaintiffs in this lawsuit, but Picker later dismissed his claim as he moved from East Palo Alto and was no longer eligible to serve on the Board.

³ Corporations Code Section 7614 requires that the “number of inspectors shall be either one or three.”

cumbersome. (Trial Exhibit #18.) Instead of inspecting and processing each one of the proxies completely, and then turning to the next one, Mitchell (per the “ballot counting process”) instead performed *one step* of the process as to each and all of the proxies, and then went back and performed *the second step* of the process as to each and all of the proxies, etc. Thus, there were repetitive passes on the same proxy. Further, the Neighbors proxies were to be processed first, before any of the Company proxies would be reviewed.

After three or four hours, Hill asked Mitchell whether there was a way to speed it up. Lincoln was not present at the time. Hill and Lewis were then allowed to stamp the seal validating each proxy. Lewis stamped and Hill turned the pages. This went on for about 20-30 minutes.

Lincoln then returned to the meeting, and was surprised that Lewis and Hill were assisting Mitchell. Lincoln told them that they were not supposed to do that – and particularly that the proxies should not be sealed yet, as they “had further steps to go through.” Mitchell said that they could go ahead, but Lincoln insisted that Hill stop helping – so she stopped. This was about 4:00 p.m. in the afternoon.

Mitchell and Lewis said that they could stay as long as needed to complete the proxy processing. Lincoln told Mitchell that she had (Mitchell) had something else to do.

Despite the fact that the meeting was being transcribed, Lincoln, Mitchell and a lawyer for the Company had a side discussion, not on the record. After the discussion, Lincoln announced that Mitchell had to leave the meeting at 5:00 p.m. that day. This was a surprise to all the attendees. Hill, as a candidate, was anxious to get the outcome. Mitchell had never mentioned throughout the day that she had to leave at 5:00 p.m.

According to the transcript of the meeting, Lincoln said that Mitchell had to leave at 5:00 p.m. because the office would be closing at 5:00 p.m. (Trial Exhibit #36, pp. 28, 35 42, and 43 of the transcript.)⁴

At trial, Lincoln denied that she told Mitchell to stop; but admitted, "I don't remember all the details." The Court finds that Lincoln told Mitchell to stop.

As of that time, now all of the Neighbors proxies had been counted, and none of the Company-collected proxies had yet been counted (or even presented for counting). There was stated concern about the security of the ballots if the counting was to be interrupted for the day. Emotional and tense conversations ensued. Members of Neighbors were concerned that this was a stalling tactic in order to have time to garner additional proxies by the Company. Accordingly, Neighbors asked for copies of the Company-solicited proxies and a copy of the tabulation sheets used by Mitchell to count the ballots/proxies so far. That request was rejected by Defendants, and the documents were not given.

Making matters worse, Lincoln's brother took one of the binders containing proxies and started walking away with it towards the exit of the property. Hill ran after him, and told him that he could not take the binder and that he should not even have possession of it. He ultimately returned the binder to Lincoln.

Defendants then ordered security guards to escort all attending Neighbors off of the premises. The court reporter also left at that time. President Alas showed up, and the

⁴ Multiple witnesses testified that not everything said was transcribed by the court reporter at the election meeting. The Company kept going on and off the record, or Defendants had conversation on the sidelines, off the record, or multiple people were speaking at the same time so not all could be taken down.

existing Company Board, Mitchell, and the Company's attorney went into the trailer office – the attorney for Neighbors was excluded.

Day Two

On May 9, 2018, the election counting continued at 10:00 a.m. outside in the yard of PAMWC. Lincoln, Mitchell and Lewis were present. Once again, the Chairman was not present. The court reporter did not return.

Lewis started the meeting. Neighbors requested the records and tally sheets, and Lewis agreed to provide copies. Lewis said that they needed two “observers” on each side of Mitchell, to observe the validation of proxies. The attorney for Neighbors, attorney Carlson, then said to Lewis that they needed *three* “inspectors”. Macias was nominated by Carlson and Pekary to serve as one of the Inspectors, with no objection. The directors of the Company selected an unknown male person⁵ as an Inspector, with no objection. Macias moved from sitting in the audience to sitting at the counting table. There was a binder of proxies and tabulation tables brought to the counting table, now including the Company proxies.

Trial Exhibit #39 are the Neighbors-collected proxies for the 2018 Election; and Trial Exhibit #40 are the Company-collected proxies for the 2018 Election. The tabulation sheets (26 pages) is Trial Exhibit #21. Proxies are done by street name in EPA.

Almost immediately, the unknown male announced that he had to leave and that he did not want to participate in the counting of the proxies. Attorney Carlson insisted

⁵ Pekary and Lincoln speculated that it might have been Lee Hawkins.

that there must be *three* inspectors. Carlson suggested Pekary, and there was no objection.

Only Company proxies were counted and processed on Day Two; the Neighbors proxies from Day One were not subjected to further review.

In order to move along the process, each Company proxy was processed completely before the next one. Pekary validated the proxy, Mitchell stamped the proxy, and Macias put the date and other information on the tally sheet. The three Inspectors only jointly invalidated one (or so) proxy, which looked doctored and the date versus the signature had different colored ink. Mitchell told the others than “we put those dates in “. Pekary questioned how Mitchell or others could have dated someone’s proxy. Mitchell did not respond. Thereafter, Pekary noticed that multiple Company proxies had dates that had been added, but decided not to dispute them, as the statute provides that proxies are presumptively valid. (See Corp. Code §7517, §7613(a).)

In the afternoon of Day Two, the attorney for Neighbors presented a declaration by Fidela Guerra (Trial Exhibit #14) stating that she had withdrawn her candidacy and had not given consent to be on the proxy/ballot. [Defendants admitted at trial that Guerra told Loudd on September 23, 2017, the date of the prior Annual Meeting, that she did not want to be on the ballot.] (Trial Exhibit #38, No. 8.) Company by-laws required the consent of the candidate in order for the proxy/ballot to be valid. (Trial Exhibit #2, Article 20.) Mitchell acted surprised, upset, and disappointed. Mitchell showed the Guerra declaration to Lincoln. Lincoln said that Guerra gave consent.⁶ Pekary asked for

⁶ Lincoln testified at trial that *she* was the one who drafted the form of proxy issued and solicited by the Company for its slate of candidates. Lincoln was also the one who solicited proxies before the September 2017 Meeting and between the September 2017 and May 2018 meeting. She collected hundreds of Company proxies.

proof of consent. Lincoln and/or Mitchell went into the trailer office to find Guerra's consent paperwork, but could not find any. Lincoln was upset, and said to Mitchell, "We lost."

Macias and Pekary made the decision, based upon Article 20 of the Bylaws, that all proxies dated after September 23, 2017 were invalid, and that any proxy containing Guerra's name as a candidate was also invalid (*unless* it was dated before Guerra's withdrawal). Mitchell objected to that decision. Notably, Guerra's name is only on the Company-created proxies and is not on the Neighbor-created proxies. More specifically, the Neighbors' proxies were true proxies that simply delegated voting to the Neighbors, and was not like a ballot with the names of candidates listed.

So the three "inspectors" agreed to create two tallies. None of the proxies had been formally validated as yet, so they just kept going writing down the dates of the proxies on the tabulation sheets. The tally showed A if voted in favor of the Company slate of candidates, B if voted in favor of the Neighbors slate, and "--" or "0" if invalidated. The tally might also say "object" or "*" if it was a Company proxy dated after September 23, 2017. Mitchell was also using an adding machine with a paper tape printout.

213 Company proxies for 519.7348 membership interests were signed after September 23, 2017. (Trial Exhibit #38, No. 7.)

By 9:00 p.m. it was dark and cold outside. Macias and Pekary, and Lewis and Mitchell were at the counting table. Lincoln was in the trailer office, before announcing the results.

According to the tally by Macias and Pekary, the proxy vote was A had 114.893 and B had 832.739 – relying upon their decision to reject the "Guerra" proxies. They

waited to make any announcement because Mitchell was not finished with her tally. Lincoln leaned over to see the paper tally, and then Lincoln called for a recess/temporary stop of the process. Laudeman came up to the counting table and looked at the adding machine tape – which showed that Slate B had a higher number of proxies. Upon Laudeman’s viewing, the papers were covered up, and a Company representative told Laudeman to step back from the table. Lincoln said, “I need to go do something”, and walked into the trailer office. She was followed by the existing Directors and other Company representatives into the trailer office with her. Loudd took the tally sheets, rolled them up and put them in her sleeve, and then walked into the trailer office. Lincoln and Mitchell picked up all of the proxy papers and took them into the trailer office and locked the door. There they stayed for three hours, while the attendees were literally left out in the cold. The objections by attendees were quite vocal.

In the meantime, Macias and Pekary sat at the counting table and wanted to do a calculation based upon Mitchell’s tally. Pekary also still had his tabulation sheets. The Board of Directors refused to show Mitchell’s tabulation to the other two inspectors. Mitchell refused to copy her results and provide it to the others. Ultimately, the attorney for Neighbors was authorized to take a photo with a cell phone of Mitchell’s adding machine tapes, which Carlson did while Chaudhari held the tapes. (Trial Exhibit #20.)

Looking at the tabulations, Mitchell’s totals showed that the Company had *lost*. Pekary separately did the math as a double-check, and had a different total, showing that the Company slate had won (if the post-September 23, 2017 proxies were counted).

Lincoln came out of the trailer office around Midnight. Mitchell refused to announce the results. Lewis refused to announce the results. Pekary tried to orally announce the results, but Lincoln was very upset and was shouting to block out the ability

of attendees to hear what he was saying. Lincoln kept repeating, “What’s going on here?” Neighbors were still not allowed to make copies of the tallies or calculations, but they showed 645.5214 for Slate A, and 704.0618 for Slate B.

A video was taken of the incident. (Trial Exhibits #37 and #46.) The video reflects that Lincoln keeps talking over others to purposely disrupt the presentation of the results. Pekary says: “We are finishing the Court ordered election and putting on record the results of the election.” Lincoln comes up and stands behind Pekary to intentionally be disruptive. Lincoln is not saying anything of substance, just talking for the sake of talking loudly. Lincoln even grabs away the microphone, and says things like: “Want to go home! Tired! 14 Plus hours!” Pekary then used a different microphone.

Immediately after the announcement at midnight, the Company turned off all the lights and turned off the electricity (so that the microphones would no longer work). Lewis announced that the meeting was adjourned.

According to the Macias/Pekary tally, the Neighbors slate had the most proxies and the most votes. According to the Mitchell tally, the Neighbors slate had the most proxies.

Day Three

Lincoln testified that she was instructed by Chair Alas to have three Inspectors appointed for Day Three; and that he was appointing *Lincoln* to serve as Chair for the election – replacing Lewis as Chair. No one could explain how Alas had the power to appoint Lincoln as the Chair.

On May 10, 2018, further meeting was held, starting at 10:00 a.m. Lincoln announced that the three Inspectors would be Mitchell, Winston, and Hawkins – of which Winston and Hawkins were on the ballot as Company nominees for Director.

Mitchell found the whole thing too stressful, and decided to quit her involvement in handling the counting of the proxies and ballots. Lincoln then suggested Macias, but he declined on the basis that he had already been an Inspector on Day Two and completed the job of tallying. Plaintiff Chaudhari served as a Observer, but claims that he was not one of the Inspectors. Lincoln testified that Chaudhari was an Inspector. Mitchell testified that she also was an Observer, but not an Inspector, on Day Three. The evidence is that there was confusion as to whether and whom was a third “inspector”.

Lincoln announced that the Company was invalidating all of the Neighbors proxies dated after the March 28, 2018 hearing where the judge granting the motion to require the special meeting. Lincoln also announced that all Neighbors proxies dated after the September 23, 2017 annual meeting were invalid, on the grounds that the May 2018 special meeting was simply a “continuance” of the September 2017 annual meeting. Further Lincoln asserted that only proxies that had been presented to the Court as evidence on the motion in the lawsuit would be considered.⁷ Neighbors disagreed.

Only proxies submitted by Neighbors were invalidated by the Company on these grounds, but not as to the Company proxies. Indeed Chaudhari specifically objected that if all proxied dated after September 20, 2017 were being invalidated, then that should

⁷ Corporations Code Section 7517(c) only provides for invalidation of ballots or proxies “if the secretary or other officer or agent authorized to tabulate votes, acting in good faith, has reasonable basis for doubt concerning the validity of the signature or the signatory’s authority to sign for the member.” That was not the basis for PAMWC’s rejection of these Neighbors proxies.

apply to both Neighbors' proxies *and* Company proxies – but that was not what was done.

Evidence was also represented that Defendants, when invalidating Neighbors' proxies, were then counting those votes *in favor of the Company slate*, even though those members (including Plaintiff Chaudhari!) had never given any proxy to the Company. (Trial Exhibit #26, lines 117, 124, and 126 as examples.) In other cases, votes were counted in favor of the Company slate even if no proxy at all was submitted. (Trial Exhibit #26, page 6, lines 150, 152, 154, 156, and 162 as examples.)

It was announced that the Company slate was the winner, which a count of 835.87 for company and 307.58 for Neighbors. The Company certified that Slate A won the election as Directors.

The 2019 Annual Election

The Annual Members Meeting was held indoors at the Company office on December 21, 2019 – the *Saturday* before Christmas; a date selected by the Board of Directors, i.e., Defendants. (Agenda, Trial Exhibit #5.) An election of the directors was scheduled to be held, as the Company had filed amended Articles (Trial Exhibit #3) and amended Bylaws (Trial Exhibit #4), which now established a staggered election of Board members.

Pekary presented Neighbors proxies. (Trial Exhibit #41.) Company proxies were submitted as well. (Trial Exhibit #15.) Unbelievably, given the history of election disputes, the Company still was using and relying upon the same old proxies from the prior years (including the so-called Guerra Proxies)! Apparently this is because the

Company proxies, drafted by certain Defendants, wrote into the proxy that it was valid for three years from the date of the signature.

Three Inspectors certified the vote on February 10, 2020.⁸ (Trial Exhibit #38, Request No. 16.) The results were posted as 593 shares voted for the Company slate, and 577 shares voted for the Neighbors slate.

In actuality, the Neighbors slate had more votes. The Company decided in February 2020 – weeks after the 2019 Election – that it was disqualifying the votes of four members who had unpaid balances on their bills/assessments.⁹ (Trial Exhibit #38, Request Nos. 16 and 25.) By this disqualification decision, Defendants disqualified 16.4648 interests, i.e., subtracted Neighbors votes sufficiently to give the victory to the Company slate. (Trial Exhibits #11 and #12.)

The evidence is that Lincoln prepared gave to the Inspectors a list of members who submitted Neighbors proxies who were “delinquent” on past bills, but did not include any delinquent members who submitted Company proxies.

⁸ There was apparently irregularity in the appointment of the Inspectors. As stated previously, the statute requires an odd number of Inspectors – only one or three. Lincoln testified that four Inspectors were selected, namely Mitchell, Eduardo Als, Patricia Lopez and Cynthia Escoto. Mitchell testified that she thought there were three Inspectors and one “alternate.” Neither the Articles, By-laws or statute provide for selection of an “alternate” inspector, nor it made clear to this Court, as the trier of fact, as to who was the “alternate” of the four. It appears from Trial Exhibit #109 that ultimately Escoto, Als and Mitchell were considered to be the Inspectors.

⁹ Two of the four members that Defendants disqualified owed a 1986 special assessment of \$50 that was never paid.

It is undisputed that no prior notice was given that those specific delinquent members would have their votes disqualified, or that their voting rights would be suspended at the 2019 Election.¹⁰

In their Objections, Defendant assert that the Inspectors made the decision at the 2019 meeting to disqualify the vote/proxy of the four members for being in default on paying an assessment. The counting took multiple days, and the certification of the vote took weeks. Whether or not the “decision” was made by the Inspections at the time, the Court finds that this disqualification “decision” of the Inspectors was not announced at the first day of the election meeting to the attending members, and was not announced prior to any counting.

The Guerra Proxies are Valid

A key dispute between the parties is the validity of the proxies prepared, solicited and submitted by the Company, which proxies indicated Guerra as a potential appointee if there was a future vacancy on the Board of Directors. The Court finds that the so-called Guerra Proxies are valid for purposes of the 2018 Special Election.

¹⁰ The Amended Articles were approved by Defendants at a meeting in August 2019. Although Notice of that meeting was given to members, the actual Amended Articles to be voted upon were *not* provided to members, were not make available to attending members at the Meeting, and were never sent to the members after adoption.

Lincoln testified that she posted the Amended Articles at the PAMWC office in a case behind glass.

In those Amended Articles, Defendants enacted the Sixth Article, which states in pertinent part: “no member shall be permitted to vote at any meeting while in default in the payment of any rates, charges or assessments levied for any purpose by this corporation”. Testimony was presented that Lincoln told a Company attorney specifically to add language in the Amended Articles to say that members would be unable to vote if they were in default. It was not discussed to have a process for disenfranchisement in the Amended Articles or Amended Bylaws.

Section 7613 of the Corporations Code pertains to proxies, and dates of their viability. Section 7517 pertains to verification of signatures on proxies. Nothing in the statutes would invalidate a proxy based upon its *contents*, other than Section 7514 which does not apply here.

As for the date of the proxy, Section 7613(b) provides in pertinent part: “No proxy shall be valid after the expiration of 11 months from the date thereof unless otherwise provided in the proxy, except that the maximum term of any proxy shall be three years from the date of execution.”

The matter to be voted upon was the election of Directors of the Board. There is no statute or the Articles of Incorporation or the Bylaws of the Company authorizing or providing for a substitute slate or pre-determined identification of persons who could be selected to serve as a director if a vacancy occurs in the future. Guerra was never a candidate for director, and was not subject to election as a director on the Board at the 2018 Election. The reference to Guerra as a potential future substitute director has no legal effect or significance. Thus the presence or absence of her name on the Company proxy was irrelevant and immaterial.

The Court finds that the Guerra Proxies are valid for the 2018 Election.

If the Guerra Proxies are counted, then based upon the calculations on Day Two there is evidence that the Company slate had the most proxies/votes, as reflected and testified to by certain Plaintiffs who recalculated Mitchell’s math. Accordingly, Plaintiffs have not proven their claims regarding the 2018 Special Election by a preponderance of the evidence.

The Exclusion of Proxies by Delinquent Members is Not Authorized

In order to achieve victory in the 2019 Election, the Defendants manipulated the outcome by selectively excluding a few proxies from the voting calculations. These excluded proxies were submitted by members who were delinquent in paying their bills/assessments to PAMWC. Defendants only targeted proxies by Neighbors, and not by Company.

In regard to disenfranchisement of members, Section 7341 pertains to termination or suspension of members (including member rights). Section 7341 states in pertinent part:

(a) No member may be expelled or suspended, and no membership or memberships may be terminated or suspended, except according to procedures satisfying the requirements of this section. An expulsion, termination or suspension not in accord with this section shall be void and without effect.

(b) Any expulsion, suspension, or termination must be done in good faith and in a fair and reasonable manner. Any procedure which conforms to the requirements of subdivision (c) is fair and reasonable, but a court may also find other procedures to be fair and reasonable when the full circumstances of the suspension, termination, or expulsion are considered.

(c) A procedure is fair and reasonable when:

(1) The provisions of the procedure have been set forth in the articles or bylaws, or copies of such provisions are sent annually to all the members as required by the articles or bylaws;

(2) It provides the giving of 15 days' prior notice of the expulsion, suspension or termination and the reasons therefor; and

(3) It provides an opportunity for the member to be heard, orally or in writing, not less than five days before the effective date of the expulsion, suspension or termination by a person or body authorized to decide that the proposed expulsion, termination or suspension not take place.

In regard to the exclusion of certain proxies by delinquent members, none of the procedures and protections of Section 7341(c) were done by Defendants. No such procedures are contained in the Amended Articles or Amended Bylaws of the Company. The only reference to such is contained in Amended Bylaw Section 12, entitled "Forfeiture and Recovery of Memberships" which does not meet the requirements of Section 7341. Thus, the suspension of their member voting rights was not fair and not reasonable.

Evidence was presented that these were not the only members with "delinquent" bills/assessment, but only these particular members who had voted for the Neighbors slate were disenfranchised at the 2019 Election. Others who also were known to be delinquent in their bills had their proxies counted – in favor of the Company slate.

The Court finds that the exclusion of these proxies by Defendants at the 2019 Election was in bad faith, and for the purpose, and with the effect, of wrongfully excluding these members from the vote, so as to effect the outcome of the vote. (Corp. Code §7341(e).)

Accordingly, the invalidation of the proxies by the allegedly delinquent members, per Trial Exhibits #11 and #12, constituting 16 votes (i.e., membership interest of 16+) is

REVERSED. The validity of those votes yields the 2019 Election results as being the election of the Neighbors Slate B, i.e., election of Plaintiffs as Directors.

Affirmative Defense of Laches

Timeline of Filing the Lawsuits

Defendants assert the affirmative defense of laches on the basis that Plaintiffs did not bring this lawsuit soon enough. Plaintiffs filed the initial lawsuit regarding the 2018 Election within nine months, in conformity with the statute, Corporations Code Section 7527. Plaintiffs filed the second lawsuit regarding the 2019 Election within 17 days of the conclusion of that election, which is very quick.

Jacqueline Lewis died in May 2019, a few months after the filing of the first lawsuit regarding the 2018 Election. Lewis had no involvement with the 2019 Election, and thus she would not have been a witness in the second lawsuit. It was not possible for Plaintiffs to have brought the first lawsuit to trial prior to Lewis death, as the action was in the pleading stage – indeed, Defendants slowed the process by bringing a demurrer rather than filing an answer. There was no impediment to Defendants taking the deposition of Lewis to preserve her testimony if they were aware that she was going to die. It seems that no one knew – and thus the “blame” cannot be placed upon Plaintiffs.

The Court finds that Defendants have not proven their affirmative defense of laches on this basis by a preponderance of the evidence. Further, the affirmative defense is MOOT as to the 2018 Election as the Court has found in favor of Defendants on that point; and laches is clearly not proven as to the 2019 Election on this point as the lawsuit was filed within 17 days.

Timeline of the Court Proceedings

Defendants argues that Plaintiffs unreasonably delayed in bringing this matter to trial, and that it is subject to the affirmative defense of laches. Laches typically pertains to how quickly a lawsuit is filed. Defendants rely upon case law stating that laches may also apply to diligence in the prosecution of a lawsuit. Julian Volunteer Fire Co. Assn. v. Julian Cuyamaca Fire Protection District (2021) 62 Cal.App.5th 583, 601-602.¹¹

[Although it seems to this Court that the failure to diligently prosecute a case, and the ability of a Court to dismiss a case or grant a motion for judgment on the pleading on this ground, is governed by statutes such as Code of Civil Procedure Sections 583.110 *et seq.*)]

Corporations Code Section 7616(c) provides for expedited hearing on a complaint contesting the validity of an election. There is no record of Plaintiffs taking any steps to have the Presiding Judge set the matter for hearing in five days under the Corporations Code. Accordingly this civil action was handled as a general civil proceeding by the Court.

This lawsuit was filed as a Complaint on February 11, 2019 regarding a special shareholders meeting election held in May 2018. (19CIV00851.) In response,

Defendants filed a demurrer on April 10, 2019, set for hearing on May 17, 2019.

Defendants stated grounds for the demurrer was that Corporations Code Section 709 did

¹¹ In Julian, the petition asserting violation of the Brown Act was filed in April 2018 and set for hearing on the merits to be held November 2, 2018. Thereafter the plaintiff *cancelled* the hearing and did not take action to have the matter adjudicated until after a special election was held on the substantive underlying issue (for dissolution of the plaintiff, and selection of a different fire department to serve the city). There was no cancellation of any trial or hearing on the merits by Plaintiffs here – rather it was Defendants that requested the original continuance, and the Pandemic that lead to further rescheduling.

not apply. Because Defendants failed to comply with the mandatory meet and confer requirements of C.C.P. Section 430.41, hearing on the demurrer was continued by the Court to June 13, 2019. The demurrer was overruled, and Defendants filed an Answer on June 28, 2019.

Plaintiffs stated in their Case Management Conference Statement, filed May 28, 2019, that the matter was entitled to statutory preference under Section 709 (which applies to general corporations). Defendant failed to file any CMC Statement and took no steps to have a hearing set on an expedited basis. Because the case was not “at issue”, because the demurrer was pending, the CMC set for June 2019 was continued by the Court to August 2019 in the course of the Court’s typical procedures.

Plaintiffs stated in their Case Management Conference Statement, filed August 8, 2019, that the matter was entitled to statutory preference under Section 709. Defendant failed to file any CMC Statement and took no steps to have a hearing set on an expedited basis.

At the initial Case Management Conference held August 23, 2019, the case was set for Mandatory Settlement Conference on November 19, 2019, and for Court Trial to commence on December 2, 2019, with an estimate of three court days. There is no indication in the Court’s records that any party requested or demanded a hearing be set for sooner date. It is unknown whether the Court was fully aware of the statutory time limitation of five days.

Thereafter, counsel for *Defendants* notified counsel for Plaintiffs that he was now scheduled for an appellate hearing on the date set for trial. Counsel for *Defendants* asked for the professional courtesy of continuing the MSC and the Trial dates, which was agreed, as set forth in the Stipulation and Order filed November 15, 2019. The Court

granted the continuance, and the case was then set for MSC on January 15, 2020 and Court Trial on February 24, 2020.

On February 18, 2020, Plaintiffs filed another case against Defendants regarding the elections held at the 2019 annual shareholders meeting. (20CIV00986.) The election was initially held on December 21, 2019 but did not conclude until February 1, 2020. Thus the complaint was filed within 17 days of that election.

In February 2020, Plaintiffs brought an ex parte application for order shortening time to hear a motion to consolidate the two actions. At the hearing, counsel for the parties *stipulated* to consolidation. By Order entered February 24, 2020, the Court granted the motion to consolidate, vacated the existing trial date, and set the consolidated actions for Court Trial commencing March 30, 2020. As we are all aware, the Covid Pandemic hit in March 2020. No one appeared on March 30th.

Due to the shutdown of all courts, pursuant to Orders of the Governor and the Chief Justice, the trial could not go forward in March 2020. Notice was sent resetting the Court Trial for July 6, 2020. On July 6, 2020, counsel for the parties appeared before the Presiding Judge, and the matter was rescheduled for September 18, 2020 for Case Management Conference (not for trial) – as general civil trials were not going forward due to the Pandemic restrictions. Due to *Defendants'* failure to file the required CMC Statement within 15 days of the hearing, the September 2020 CMC was continued by the Court.

Ultimately, due to the Pandemic, the Presiding Judge suspended all civil trials in general civil actions through the end of December 2020.

The Court noticed a Trial Setting Conference for December 3, 2020, that was then continued and noticed by the Court for February 2, 2021. Due to the complete revision of

civil proceedings in the San Mateo County Superior Court, from a Master Calendar system to a Direct Calendar system, this lawsuit was single assigned to Department 2 for all purposes effective January 1, 2021.

At the CMC held on February 2, 2021 in Department 2, the case was set for MSC in March 2021, and the case was set for Court Trial commencing June 17, 2021, with an estimate of three court days.

Court trial was held on June 17, 18 and 21, 2021, but did not conclude. Further court trial was held on June 28, 2021, July 8, and July 9, and still did not conclude. Plaintiffs rested on June 28th, and the Defendants proceeded with their presentation of evidence that day. The final day of evidence by Defendants at court trial was September 10, 2021. The original estimate was three court days, which was scheduled accordingly. Counsel for the parties took seven court days instead, i.e., more than double the estimate. As the Department had other matters already calendared, the additional court days were schedule as available for the Department, the attorneys, and the witnesses.

The Court finds that Plaintiffs did not unreasonably delay in bringing this action to trial; and Defendants have failed to prove the affirmative defense of laches on that basis.


Alternatively, the Court finds that as to the claims based upon the 2018 Election, the affirmative defense of laches is MOOT, as the Court has found in favor of Defendants on those claims. As to the claims based upon the 2019 Election, the Plaintiffs filed a lawsuit within 17 days thereof on February 18, 2020, and the matter was set for trial to commence March 30, 2020, i.e., within 40 days. The trial was only delayed due to events

not within the control of the parties or the Court, namely the Covid Pandemic, and this cannot be blamed upon the Plaintiffs as “laches”.

Unclean Hands

Defendants also assert an affirmative defense of unclean hands, apparently based upon conduct by Pekary and Picker. First, Picker is no longer a party to this action, so the affirmative defense in that regard is Moot. Second, there is no evidence or argument as to any conduct by named Plaintiffs, other than Pekary, that is a basis for unclean hands, so this affirmative defense would not defeat the joint cause of action to set aside these elections. Third, the Court finds that Defendants did not prove any affirmative defense of unclean hands by a preponderance of the evidence.

DATED: May 10, 2023



HON. MARIE S. WEINER
SUPERIOR COURT JUDGE