



Andrea N. Myers

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March 6, 2020

Via E-Mail and U.S. Mail

Ms. Magnolia Plascencia
Action Property Management
1133 Columbia Street, Suite 106
San Diego, CA 92101
mplascencia@actionlife.com

Re: 666 Upas Street, Suite 1800, Owner Carole Sachs
Cellular Antenna Emissions Concerns
Our File Not. 01725.79856

Dear Ms. Plascencia:

My firm represents Carole Sachs, owner of Suite 1800 in the 666 Upas Street development. I have spoken with several members of Action Property Management (“Action”) and have been informed that you are the correct member of Action to address issues related to the cellular transmission antenna arrays located near Ms. Sachs’ residence. As I indicated in my voicemails, I have been attempting to set up a meeting with Action, HOA Board Members and Ms. Sachs’ legal and financial team to discuss several cellular emissions issues, but have not received the courtesy of a response. If you are not the correct person to whom this correspondence should be directed, please let me know immediately so that I may direct this letter to the correct member of Action.

As you are undoubtedly aware, Action or its agent has posted several notices on Ms. Sachs’ balcony warning of potential exposure danger from frequencies emitted from antennas located on the east wall of Ms. Sachs’ balcony and the adjacent roof. Most recently, a permanent “Notice” was installed on Ms. Sachs’ balcony, warning her to “[s]tay back!” because “[r]adio-frequency energy [m]ay exceed exposure limits.” The admission that Ms. Sachs and her guests are potentially being exposed to a dangerous condition exceeding exposure limits is understandably alarming.

Please allow this letter to serve as a formal request, requiring that Action produce all written documents relating to the decision to warn of emission exposure, including but not limited to all studies or surveys identifying or measuring the subject exposure. In addition, Ms. Sachs hereby requests all documents identifying the instances in which Action and/or the HOA disclosed the existence of the antennas and potential resulting emissions exposure to Ms. Sachs and/or the other owners or residents of the Upas Street property.

Independent of the serious health concerns that you have warned of, Ms. Sachs’ legal and financial team has grave concerns regarding the apparent failure of Action and/or the HOA to adhere to



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recorded restrictive covenants. The resulting economic impact from permitting a dangerous condition that significantly infringes on Ms. Sachs' property rights is significant and must be addressed.

My client remains hopeful, that despite the initial lack of response, Action is prepared to act diligently and swiftly in response to the dangerous condition it has warned of. I would appreciate your prompt reply to my request for a meeting and production of documents, so that we may attempt to resolve this issue informally. If these issues are not resolved, my client may have no choice but to take formal legal action, and hereby reserves all rights in law and equity arising from the cellular emissions issues.

Please provide a reply by close of business on March 15, 2020, and feel free to contact me at (619) 685-3095 or myers@scmv.com to discuss this issue further.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Andrea N. Myers".

Andrea N. Myers, Esq.
Seltzer Caplan McMahon Vitek
A Law Corporation

cc: Ms. Carole Sachs
Ms. Carol Beres
Mr. David Dorne, Esq.
Mr. Ron Ferrari, Bessemer Trust
Ms. Cyndi Boss, Action Property Management



Sarah M. Shekhter
SHEKHTER@SCMV.COM
P (619) 685-3146
F (619) 685-3100

February 18, 2021

Via Electronic Mail and
U.S. First Class Mail

Steven Banks, Esq.
Kriger Law Firm
8220 University Avenue, Suite 100
La Mesa, CA 91942
sbanks@krigerlawfirm.com

Re: 666 Upas Homeowners Association - Owner Carole Sachs, Suite 1801
Request for Records [Civil Code § 5205, 5210, 5210]
Request for Resolution [CC&R's § 15.5; Civil Code §§ 5295-5965, 1359.560]
Our File No. 01725.79856

Dear Mr. Banks:

This notice relates to the dispute involving the enforcement of the Amended and Restated Declaration of Covenants, Conditions and Restrictions of 666 Upas Homeowners Association (“CC&R’s”) commonly referred to as the Del Prado Condominiums located at 666 Upas Street, San Diego, California.

A. Summary of Dispute Regarding Cellular Emissions

As you are aware, Ms. Sachs is the owner of the penthouse unit (the “Residence”) and has exclusive use of the large wrap-around rooftop common area that extends to the parapet walls constructed at the edges of the roof of the Del Prado Condominiums (the “Terrace”). It is our understanding that in or about March 2001, the 666 Upas Homeowners Association (the “Association”) entered into a lease to install certain cellular antennas immediately above and adjacent to the Residence and Terrace. It appears that over the course of a twenty-year period, the Association has entered into additional agreements allowing for the installation and maintenance of cellular antennas in the immediate vicinity of the Residence and Terrace.

In or around February 2017, Ms. Sachs retained an environmental testing firm to conduct a frequency survey of the Residence and Terrace. The frequency readings attributed to the cellular transmission antennas in 2017 were not sufficient to raise alarm. However, it seems that sometime thereafter, the frequency levels of the cellular transmission antenna arrays increased significantly. Indeed, in or about July 2019, the Association and/or its agents posted a paper caution sign, warning of the potential danger. Then, in or around the Fall of 2019, a metal plaque was installed

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on Ms. Sachs' balcony, warning her to "[s]tay back!" because "[r]adio-frequency energy [m]ay exceed exposure limits."

In or around 2019 and 2020, employees that assisted Ms. Sachs in her home and spent time gardening and sitting on the east side of the Terrace began complaining of headaches and other ailments they attributed to the emissions exposure. Thus, in or around January 2020, Ms. Sachs reengaged the environmental testing firm to update the radio frequency survey of the Residence and Terrace. The 2020 survey of the radio frequency and power density showed significant increases in the amplitude of the frequency signals present on the Terrace. Indeed, when compared to power levels measured in 2017, the 2020 power density increased between 476% to 3,933% in the same testing sites. Most concerning, the east wall of the Terrace, in the area located immediately next to the vegetable garden planter box, contained power density measurements that exceed most international and regulatory threshold limits.

Since receiving the results of the survey, we have repeatedly contacted the Association, requesting information related to the emissions. However, in one year of discussions, we have not received any meaningful response regarding possible mitigation measures to lessen the seriously alarming emissions.

CC&R's § 5.7 entitled "Penthouse Unit," provides that Ms. Sachs is entitled to:

...**the exclusive right to use of the Common Area of the penthouse floor**, subject to the right of ingress and egress by workers and other authorized persons in connection with maintenance or inspection of the Common Area and also subject to the Association's easement rights provided for in the Governing Documents...The Owner of the Penthouse Unit is solely responsible for its terrace, identified as T-1801 in the Condominium Plan, from parapet to parapet.

Section 5.2 entitled "Use of the Common Area," provides that:

The Association may grant to third parties easements in, on and over the Common Area for the purpose of constructing, installing, or maintaining necessary utilities and services, and each Owner, in accepting the deed to his or her Unit, expressly consents to these easements. **However, no easement may be granted if it would interfere with any exclusive easement or with any Owner's use, occupancy, or enjoyment of his or her Unit.**

The alarming increase in the emissions exposure has unreasonably interfered with Ms. Sachs' exclusive use of the Terrace. Her employees that work in her home have complained of serious health ailments caused by the emissions and her inability to use large portions

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of her wraparound Terrace, have interfered with her use, occupancy, or enjoyment of her Residence, not only violating the CC&R's but also causing her residence to materially decrease in value.

B. Request for Resolution [CC&R's § 15.5; Civil Code §§ 5295-5965, 1359.560]

Please allow this letter to serve as a formal notice provided pursuant to CC&R's §15.5, Civil Code §§ 5925 through 5965, and Civil Code § 1359.560. You are hereby requested to agree to submit this dispute to mediation. You must respond to this request within 30 days of your receipt of this request. You may respond by contacting me at shekhter@scmv.com or (619) 685-3146. If you do not respond within the foregoing 30-day period, you will be deemed to have rejected this request pursuant to Civil Code § 5935(a)(3).

A copy of Article 3, of Chapter 10 of the Davis-Stirling Act (Civil Code §§ 5925-5965) is attached hereto as Exhibit A.

As you know, pursuant to Civil Code § 5940, mediation must be completed within 90 days after receipt of your acceptance to mediate. If the Association fails to participate in mediation or the matter is not settled, we intend to commence litigation by filing the draft Complaint, attached hereto as Exhibit B.

C. Request for Records [Civil Code §§ 5205, 5210, 5210]

In addition, please allow this letter to serve as a formal request for the Association's records for the current fiscal year and for each of the two previous fiscal years. Pursuant to Civil Code §§ 5205 and 5210, any member is entitled to view such records upon request. Ms. Sachs also requests all minutes of member and board meetings dating back to January 1, 2007, pursuant to Civil Code § 5210. Please let us know how you intend to make those available.

Given the current Covid-19 pandemic, we would prefer the records be provided electronically or by mail rather than scheduling a meeting to review them in-person. Civil Code § 5210(b)(1) and (2) require you to provide records for the current fiscal year within 10 business days following receipt of this request and records for the previous two fiscal years within 30 calendar days.

My client has been actively seeking a solution to this dispute for over a year. This condition has and will continue to damage the property and personal interests of Ms. Sachs. While there is still limited optimism that some agreement can still be reached, if resolution is not forthcoming, my client will have little choice but to pursue litigation to protect her health, the wellbeing of her guests and her property value.



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I thank you for your continued efforts and would appreciate a prompt reply to my requests.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'Sarah M. Shekhter', with a long horizontal flourish extending to the right.

Sarah M. Shekhter
Seltzer Caplan McMahon Vitek
A Law Corporation

cc: Carole Sachs
Andrea Myers, Esq.
David Dorne, Esq.

EXHIBIT A

[Cal Civ Code § 5925](#)

§ 5925. Definitions

As used in this article:

- (a) “Alternative dispute resolution” means mediation, arbitration, conciliation, or other nonjudicial procedure that involves a neutral party in the decisionmaking process. The form of alternative dispute resolution chosen pursuant to this article may be binding or nonbinding, with the voluntary consent of the parties.
- (b) “Enforcement action” means a civil action or proceeding, other than a cross-complaint, for any of the following purposes:
 - (1) Enforcement of this act.
 - (2) Enforcement of the Nonprofit Mutual Benefit Corporation Law (Part 3 (commencing with [Section 7110](#)) of Division 2 of Title 1 of the Corporations Code).
 - (3) Enforcement of the governing documents.

[Cal Civ Code § 5930](#)

§ 5930. ADR prerequisite to enforcement action

- (a) An association or a member may not file an enforcement action in the superior court unless the parties have endeavored to submit their dispute to alternative dispute resolution pursuant to this article.
- (b) This section applies only to an enforcement action that is solely for declaratory, injunctive, or writ relief, or for that relief in conjunction with a claim for monetary damages not in excess of the jurisdictional limits stated in [Sections 116.220 and 116.221 of the Code of Civil Procedure](#).
- (c) This section does not apply to a small claims action.
- (d) Except as otherwise provided by law, this section does not apply to an assessment dispute.

[Cal Civ Code § 5935](#)

§ 5935. Request for resolution

- (a) Any party to a dispute may initiate the process required by [Section 5930](#) by serving on all other parties to the dispute a Request for Resolution. The Request for Resolution shall include all of the following:
 - (1) A brief description of the dispute between the parties.
 - (2) A request for alternative dispute resolution.
 - (3) A notice that the party receiving the Request for Resolution is required to respond within 30 days of receipt or the request will be deemed rejected.

- (4) If the party on whom the request is served is the member, a copy of this article.
- (b) Service of the Request for Resolution shall be by personal delivery, first-class mail, express mail, facsimile transmission, or other means reasonably calculated to provide the party on whom the request is served actual notice of the request.
- (c) A party on whom a Request for Resolution is served has 30 days following service to accept or reject the request. If a party does not accept the request within that period, the request is deemed rejected by the party.

[Cal Civ Code § 5940](#)

§ 5940. ADR process

- (a) If the party on whom a Request for Resolution is served accepts the request, the parties shall complete the alternative dispute resolution within 90 days after the party initiating the request receives the acceptance, unless this period is extended by written stipulation signed by both parties.
- (b) Chapter 2 (commencing with [Section 1115](#)) of [Division 9 of the Evidence Code](#) applies to any form of alternative dispute resolution initiated by a Request for Resolution under this article, other than arbitration.
- (c) The costs of the alternative dispute resolution shall be borne by the parties.

[Cal Civ Code § 5945](#)

§ 5945. Tolling of statute of limitations

If a Request for Resolution is served before the end of the applicable time limitation for commencing an enforcement action, the time limitation is tolled during the following periods:

- (a) The period provided in [Section 5935](#) for response to a Request for Resolution.
- (b) If the Request for Resolution is accepted, the period provided by [Section 5940](#) for completion of alternative dispute resolution, including any extension of time stipulated to by the parties pursuant to [Section 5940](#).

[Cal Civ Code § 5950](#)

§ 5950. Certification of efforts to resolve dispute

- (a) At the time of commencement of an enforcement action, the party commencing the action shall file with the initial pleading a certificate stating that one or more of the following conditions are satisfied:
- (1) Alternative dispute resolution has been completed in compliance with this article.
 - (2) One of the other parties to the dispute did not accept the terms offered for alternative dispute resolution.
 - (3) Preliminary or temporary injunctive relief is necessary.

(b) Failure to file a certificate pursuant to subdivision (a) is grounds for a demurrer or a motion to strike unless the court finds that dismissal of the action for failure to comply with this article would result in substantial prejudice to one of the parties.

[Cal Civ Code § 5955](#)

§ 5955. Stay of litigation for dispute resolution

(a) After an enforcement action is commenced, on written stipulation of the parties, the matter may be referred to alternative dispute resolution. The referred action is stayed. During the stay, the action is not subject to the rules implementing subdivision (c) of [Section 68603 of the Government Code](#).

(b) The costs of the alternative dispute resolution shall be borne by the parties.

[Cal Civ Code § 5960](#)

§ 5960. Attorney's fees

In an enforcement action in which attorney's fees and costs may be awarded, the court, in determining the amount of the award, may consider whether a party's refusal to participate in alternative dispute resolution before commencement of the action was reasonable.

[Cal Civ Code § 5965](#)

§ 5965. Notice in annual policy statement

(a) An association shall annually provide its members a summary of the provisions of this article that specifically references this article. The summary shall include the following language:

“Failure of a member of the association to comply with the alternative dispute resolution requirements of [Section 5930 of the Civil Code](#) may result in the loss of the member's right to sue the association or another member of the association regarding enforcement of the governing documents or the applicable law.”

(b) The summary shall be included in the annual policy statement prepared pursuant to [Section 5310](#).

EXHIBIT B

1 Andrea N. Myers, Esq. (SBN 259401)
2 Sarah M. Shekhter, Esq. (SBN 278212)
3 SELTZER CAPLAN McMAHON VITEK
4 A Law Corporation
5 750 B Street, Suite 2100
6 San Diego, California 92101-8177
7 Telephone: (619) 685-3003
8 Facsimile: (619) 685-3100
9 E-Mail: myers@scmv.com
10 shekhter@scmv.com

11 Attorneys for Plaintiff, CAROLE SACHS

12 **SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO**

13 **CENTRAL DIVISION**

14 CAROLE SACHS, an individual;

15 Plaintiff,

16 v.

17 666 UPAS HOMEOWNERS ASSOCIATION, a
18 California nonprofit mutual benefit corporation;
19 and DOES 1 through 10, inclusive,

20 Defendants.

Case No.

COMPLAINT FOR:

1. **BREACH OF CONTRACT**
2. **INJUNCTIVE RELIEF**
3. **BREACH OF FIDUCIARY DUTY**
4. **NUISANCE**
5. **DECLARATORY RELIEF**

IMAGED FILE

UNLIMITED CIVIL ACTION

Trial Date: None set

21 Plaintiff CAROLE SACHS alleges as follows:

22 **PARTIES, JURISDICTION, AND VENUE**

23 1. Plaintiff Carole Sachs (“Ms. Sachs” or “Plaintiff”) is an individual whom, at all times
24 herein mentioned, resides in the City of San Diego, County of San Diego, State of California.

25 2. Plaintiff alleges on information and belief that Defendant 666 Upas Homeowners
26 Association (the “Association”) is and was at all times mentioned herein, organized as a California
27 nonprofit mutual benefit corporation, qualified to do business in the state of California, with its principal
28 place of business in the City of San Diego, County of San Diego, State of California.

3. Plaintiff does not know the true names and capacities, whether corporate, partnership,
associate, individual or otherwise of Defendants sued herein as Does 1 through 10, inclusive, under the

1 provisions of section 474 of the California Code of Civil Procedure. Plaintiff is informed and believes
2 and thereon alleges that each of the fictitiously named defendants is responsible for, participated or
3 contributed in some manner for the acts, omissions, misrepresentations, and other occurrences alleged
4 herein, and that Plaintiff's damages were proximately caused by such acts, omissions,
5 misrepresentations, and other occurrences. Wherever this complaint alleges that any breach, act, or
6 omission was done or committed by a specifically named defendant, Plaintiff alleges that each and every
7 Doe defendant did and committed the same breach, act, or omission. Plaintiffs will seek leave to amend
8 this complaint to set forth the true names and capacities of the fictitiously named Defendants together
9 with appropriate charging allegations when ascertained. Defendant Association and Does 1 through 10
10 are collectively referred to as "Defendants."

11 4. Plaintiff is further informed and believes and thereon allege that at all times mentioned
12 herein, Defendants, and each of them, were and are agents, joint venturers, partners, principals,
13 employees, subsidiaries, subcontractors, servants, associates, and/or successors in interest of each of the
14 other defendants, and that at all times mentioned herein, were acting within the course and scope of that
15 agency, employment, or other relationship with full knowledge, notice, consent, and ratification of each
16 of the other defendants.

17 5. Venue is proper in San Diego County because the subject property is located in San Diego
18 County and the actions giving rise to the claims at issue occurred in San Diego County. Additionally,
19 all parties to this action reside or are principally located in San Diego County.

20 **FACTUAL BACKGROUND**

21 6. Ms. Sachs is the fee owner of the real property located at 666 Upas Street, Unit 1801, San
22 Diego, California, 92103, in the building commonly known as the Del Prado Condominiums, located in
23 the Bankers Hill neighborhood of San Diego (the "Residence"). The Residence is located within a
24 common interest development governed by the defendant Association.

25 7. The Del Prado Condominiums were built as one of the original high-rise condominium
26 communities outside of Downtown San Diego. Ms. Sachs occupies the penthouse unit, which includes
27 approximately 5,000 square feet of interior space and features unobstructed 360-degree views of San
28 Diego. In addition, Ms. Sachs negotiated and obtained the exclusive use of the large wrap-around

1 rooftop common area that extends to the parapet walls constructed at the edges of the roof of the Del
2 Prado Condominiums (the “Terrace”). The Residence and Terrace comprise the entire top floor of the
3 building (collectively the “Subject Property”).

4 8. Ms. Sachs is informed and believes and therein alleges that in or about March 2001, the
5 Association entered into a lease with Cox PCS Assets, LLC, to lease exterior space for the attachment
6 of certain cellular antennas and base station equipment immediately above and adjacent to Ms. Sachs’
7 Residence and Terrace.

8 9. Ms. Sachs is informed and believes and therein alleges that over the course of a twenty-
9 year period, the Association has entered into additional amendments with various cellular providers to
10 expand and supplement the cellular equipment placed in the immediate vicinity of the Residence and
11 Terrace.

12 10. In or around February 2017, Ms. Sachs retained an environmental testing firm to conduct
13 a radio frequency survey of the Residence and Terrace. The environmental testing firm took
14 measurements from the multiple cellular transmission antenna arrays located on the east wall of the
15 Terrace, as well as the north, south and east sides of the roof of the building, located immediately above
16 the Residence. The frequency readings attributed to the cellular transmission antennas in 2017 did not
17 raise alarm.

18 11. However, thereafter Ms. Sachs is informed and believes and thereon alleges that the
19 frequency levels of the cellular transmission antenna arrays increased significantly. Indeed, Ms. Sachs
20 is informed and believes and thereon alleges that the frequency levels increased to such a level, that the
21 Association and/or its agents were granted elevator access to Ms. Sachs’ Terrace to post signs warning
22 of potential exposure danger from frequencies emitted from antennas located on the east wall and the
23 adjacent roof.

24 12. Ms. Sachs is informed and believes and thereon alleges that in or about July 2019, the
25 Association and/or its agents posted a paper caution sign, warning of the potential danger from the
26 cellular antenna emissions.

27 13. Then, Ms. Sachs is informed and believes and thereon alleges, in or around the fall of
28 2019, a metal plaque was installed on Ms. Sachs’ balcony, warning her to “[s]tay back!” because

1 “[r]adio-frequency energy [m]ay exceed exposure limits.” A true and correct photograph of that metal
2 plaque is attached hereto as Exhibit A.

3 14. Beginning in or around 2019, employees that assisted Ms. Sachs in her home and spent
4 considerable time gardening and sitting on the Terrace began complaining of headaches and other
5 ailments they attributed to the emissions exposure.

6 15. Thus, in or around January 2020, Ms. Sachs reengaged the environmental testing firm to
7 update the radio frequency survey of the Residence and Terrace. The 2020 survey of the radio frequency
8 and power density showed significant increases in the emissions frequency signals. Indeed, when
9 compared to power levels measured in 2017, the 2020 power density levels increased between 476% to
10 3,933% in the same testing sites. Most concerning, on the east wall of the Terrace, in the area located
11 immediately next to the vegetable garden planter box, power density measurements exceeded most
12 international and regulatory threshold limits.

13 16. Beginning in or around February and March 2020, counsel for Ms. Sachs repeatedly
14 contacted the Association and the management company for the Del Prado Condominiums, requesting
15 information related to the posted health warnings and emissions studies related to the cellular antennas.

16 17. In response, Ms. Sachs is informed and believes and thereon alleges that the Association
17 and/or its agents disavowed knowledge of the dangerous conditions, and removed the emissions warning
18 plaque, dismissing its placement as “inadvertent.”

19 18. While counsel for the Association agreed to work in good faith to “investigate” the
20 significantly inflated emissions frequency levels, in twelve months, the Association has failed to provide
21 a reasonable and good faith response, including but not limited to failing to decrease the emissions levels.

22 **A. Governing Documents**

23 19. The 2011 Amended and Restated Declaration of Covenants, Conditions and Restrictions
24 of 666 Upas Homeowners Association (“CC&Rs”) govern the use of the Terrace and set forth the
25 Association’s obligations that protect Ms. Sachs’ rights.

26 20. CC&Rs section 5.7 entitled “Penthouse Unit,” provides that Ms. Sachs is entitled to:

27 **...the exclusive right to use of the Common Area of the penthouse**
28 **floor [Terrace],** subject to the right of ingress and egress by workers and
other authorized persons in connection with maintenance or inspection of

1 the Common Area and also subject to the Association’s easement rights
2 provided for in the Governing Documents...The Owner of the Penthouse
3 Unit is solely responsible for its terrace, identified as T-1801 in the
4 Condominium Plan, from parapet to parapet.

5 The CC&Rs are attached hereto as Exhibit B and incorporated herein by reference. In consideration for
6 this, Ms. Sachs, among other things, pays homeowners association fees and assessments equal to three
7 units.

8 21. The governing documents make clear that the Association is prohibited from maintaining
9 any easements for utilities or services that interfere with an exclusive easement or use of a residence.
10 Specifically, CC&Rs, section 5.2 entitled “Use of the Common Area,” provides that:

11 The Association may grant to third parties easements in, on and over the
12 Common Area for the purpose of constructing, installing, or maintaining
13 necessary utilities and services, and each Owner, in accepting the deed to
14 his or her Unit, expressly consents to these easements. **However, no
15 easement may be granted if it would interfere with any exclusive
16 easement or with any Owner’s use, occupancy, or enjoyment of his or
17 her Unit.**

18 22. Ms. Sachs has a contractual right to ensure that the Association follows its obligations,
19 pursuant to the right of enforcement provided in CC&Rs, section 13.1, that sets forth:

20 Each Owner has a right of action against the Association or any other
21 Owner for failure to comply with the provisions of the Governing
22 Documents...

23 23. Moreover, the governing documents set forth that such violations by the Association,
24 shall be treated as a nuisance, pursuant to CC&Rs, section 13.2 which states:

25 The result of every act or omission, whereby any provision, condition
26 restriction, covenant, easement or reservation contained in the Governing
27 Documents is violated in whole or in part, is hereby declared to be and
28 constitutes a nuisance, and every remedy allowed by law or equity against
a nuisance, either public or private, is applicable against every such result
and may be exercised by any owner...

29 24. CC&Rs, section 15.6 further provides that an owner may initiate litigation against the
30 Association and that the prevailing party shall be entitled to an award of reasonable attorneys’ fees and
31 court costs.

32 25. The alarming increase in the emissions exposure since 2017 has unreasonably interfered
33 with Ms. Sachs’ property rights. Her caregivers have complained of serious health ailments caused by
34 alarmingly high emissions and she has been prevented from using large portions of her Terrace. The

1 Associations' allowance of the increased power density and failure to bring emissions back down to
2 2017 levels has interfered with Ms. Sachs' enjoyment of the Subject Property and has caused the Subject
3 Property to materially decrease in value.

4 **FIRST CAUSE OF ACTION**

5 **(Breach of Contract against the Association and Does 1 through 10)**

6 26. Plaintiff repeats and incorporates by reference all of the allegations set forth above as
7 though fully set forth herein.

8 27. The CC&Rs govern the rights, responsibilities and obligations owed by and the
9 Association and other members of the development, including Ms. Sachs, and constitute an enforceable
10 written contract between Ms. Sachs and the Association.

11 28. Ms. Sachs did all or substantially all of the significant things required by the CC&Rs
12 except those obligations she was excused from performing or that the Association prevented Ms. Sachs
13 from performing.

14 29. The Association agreed to uphold and consistently administer its CC&Rs so as to protect
15 Ms. Sachs' exclusive Terrace easement and her use, occupancy, and enjoyment of the Subject Property.
16 All conditions required by the CC&Rs for the Association's performance occurred, except those that
17 were waived or excused.

18 30. The Association breached the CC&Rs by failing to perform its obligations, including but
19 not limited to permitting an increase in the emissions exposure to levels that exceed most international
20 and regulatory threshold limits and refusing to take necessary steps to decrease the emissions to 2017
21 levels.

22 31. As a direct and proximate result of the Association's breach of the CC&Rs, Ms. Sachs
23 has been damaged in an amount, in excess of the jurisdictional limit, to be proven at trial.

24 **SECOND CAUSE OF ACTION**

25 **(Injunctive Relief against the Association and Does 1 through 10)**

26 32. Plaintiff repeats and incorporates by reference all of the allegations set forth above as
27 though fully set forth herein.

28 33. The Association has breached the CC&Rs by permitting an increase in the emissions

1 exposure to levels that exceed most international and regulatory threshold limits and refusing to take
2 necessary steps to decrease the emissions to 2017 levels. The Association's actions have interfered with
3 Ms. Sachs' exclusive Terrace easement and her use, occupancy, and enjoyment of the Subject Property.

4 34. The Association should be enjoined and restrained from interfering with Ms. Sachs'
5 exclusive Terrace easement and her use, occupancy, and enjoyment of the Subject Property and ordered
6 to limit the exposure emanating from the cellular antennas to the 2017 levels. Unless restrained and
7 enjoined by this Court, the continued violation of the provisions of the CC&Rs by Defendants will
8 frustrate Ms. Sachs' use of her exclusive Terrace easement and her use, occupancy, and enjoyment of
9 the Subject Property.

10 **THIRD CAUSE OF ACTION**

11 **(Breach of Fiduciary Duty against the Association and Does 1 through 10)**

12 35. Plaintiff repeats and incorporates by reference all of the allegations set forth above as
13 though fully set forth herein.

14 36. The Association owes fiduciary duties of care, loyalty and good faith to the Association's
15 members, including Ms. Sachs, which it has breached by, among other things, violating the CC&Rs and
16 failing to provide remediation of emissions levels, despite knowing of the violation of Ms. Sachs'
17 property rights and the significant health risk to Ms. Sachs and potentially other Association members.

18 37. Ms. Sachs has been damaged by the Association's breach of its fiduciary duties in an
19 amount to be determined at the time of trial, according to proof.

20 **FOURTH CAUSE OF ACTION**

21 **(Nuisance [Civ. Code § 3479, Code Civ. Proc. §731, CC&Rs § 13.2]
22 against the Association and Does 1 through 10)**

23 38. Plaintiff repeats and incorporates by reference all of the allegations set forth above as
24 though fully set forth herein.

25 39. Ms. Sachs is informed and believes and thereon alleges that the Association, by and
26 through its wrongful conduct and failure to act, has created, maintained and/or concealed a private
27 nuisance within the meaning of Civil Code § 3479, Code of Civil Procedure § 731 and CC&Rs section
28 13.2.

1 Defendants, and each of them, on the other, in that Plaintiff contends and Plaintiff is informed and
2 believes, and thereon alleges, and Defendants deny that:

- 3 a. Plaintiff owns and is entitled to an exclusive easement over the Terrace;
- 4 b. The elevated emissions exposure measured between 2020 and the present has
5 unreasonably interfered with Ms. Sachs' exclusive easement over the Terrace;
- 6 c. The elevated emissions exposure measured between 2020 and the present has
7 unreasonably interfered with Ms. Sachs' use, occupancy, and/or enjoyment of
8 the Subject Property;
- 9 d. That Defendants' allowance of an increase in the emissions exposure to levels
10 that exceed most international and regulatory threshold limits violates the
11 CC&Rs;
- 12 e. That Defendants' failure to take necessary steps to decrease the emissions to
13 2017 levels violates the CC&Rs.

14 50. In addition, Ms. Sachs is entitled to equitable relief and a Court order to force the
15 Association to comply with applicable law by abating the nuisances and properly maintaining the
16 common areas, including but not limited to the cellular antenna easements, that have been negatively
17 affecting the Subject Property.

18 51. Plaintiff requests a judicial determination of the rights, privileges, and obligations of
19 Plaintiff and Defendants with respect to the emissions exposure and all implied and ancillary rights and
20 privileges of access and otherwise, as alleged above.

21 52. A judicial declaration is necessary and appropriate at this time in order that Plaintiff and
22 Defendants may ascertain their respective rights and obligations with respect to the emissions exposure,
23 as described above.

24 **PRAYER FOR RELIEF**

25 Therefore, Plaintiff prays for judgment against Defendants, as follows:

26 1. For temporary, preliminary and permanent injunctions restraining and enjoining
27 Defendants from permitting elevated emissions exposure levels and ordering Defendants to limit or abate
28 cellular emissions to 2017 levels;

1 2. For a determination and judgment declaring the rights, duties, and obligations of the
2 parties, including but not limited to: (a) Plaintiff’s ownership and use of an exclusive easement over the
3 Terrace; (b) emissions exposure levels; and (c) the Association’s obligations to mitigate or abate elevated
4 emissions exposure levels.

5 3. For prejudgment interest at the legal rate;

6 4. All costs of suit including attorneys’ fees; and

7 5. For such other and further relief as the Court deems just and proper under the
8 circumstances.

9

10 Dated: February __, 2021

SELTZER CAPLAN McMAHON VITEK
A Law Corporation

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By: _____
Andrea N. Myers, Esq.
Sarah M. Shekhter, Esq.
Attorneys for Plaintiff CAROLE SACHS

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Ricardo Arias
ARIAS@SCMV.COM
P (619) 685-3172
F (619) 702-6853

October 5, 2022

Steven Banks, Esq.
Kriger Law Firm
8220 University Avenue, Suite 100
La Mesa, CA 91942
sbanks@krigerlawfirm.com

VIA EMAIL AND CERTIFIED MAIL

Re: 666 Upas Homeowners Association - Owner Carole Sachs, Suite 1801
Breach of Fiduciary Duties by the HOA
Request for Immediate Notice of Sprint Upgrade Project
Request for Resolution under CC&R's § 15.5 and Civil Code §§ 5295-5965,
1359.560
Our File No. 01725.79856

Dear Mr. Banks:

As you are aware, our firm represents Ms. Carole Sachs, her family trust, and power of attorney ("Ms. Sachs"), owner of the penthouse unit in the 666 Upas Street residence (the "Residence"). Ms. Sachs has exclusive use of the large wrap-around rooftop Terrace that extends to the parapet walls constructed at the edges of the roof of the Del Prado Condominiums. Ms. Sachs' exclusive use of the Terrace, for which a variance was negotiated and recorded, is threatened by the Del Prado HOA's actions (the "HOA") and the apparent commencement of cellphone antenna projects, without notice or response to repeated requests for information, seems to leave my client with little choice, but to proceed with emergency legal action to protect her rights.

For the last month we have diligently sought information regarding two projects involving cellphone antennas--the Sprint project "upgrade" and a Verizon project for which a conditional use permit application was submitted. The excessive (and expected increase in) radiation from these projects unreasonably interferes with Ms. Sachs' exclusive use of the Terrace. Her employees, who work in her home, have complained of serious health ailments caused by the emissions and her inability to use large portions of her wraparound Terrace, have interfered with her use, occupancy, and enjoyment of her residence, not only violating the CC&R's but also causing her residence to materially decrease in value.

Despite repeated requests, we have yet to receive any meaningful information regarding the scope and status of these projects, let alone basic information regarding the anticipated timing of these projects. Our requests for information have been met with a level of incivility and lack of transparency that is simply not conducive to resolution. The HOA has refused to provide any



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documentation, has instructed us to contact the carriers directly (who will not speak to us, as we are not in privity with any contracts with them) and has disavowed all knowledge of what antennas are being installed or repaired on the Residence. This response is unacceptable and suggests a failure of the HOA to even meet its baseline standard of care.

Moreover, today we were informed that a large bundle of metal equipment was left on my client's east deck, **without notice or consent**, and that a large crane has appeared at the ground floor of the Property, that appears to be poised to start lifting supplies/equipment to the roof of the building and/or my client's deck. This intentional intrusion onto my client's Terrace, without notice or consent and continued interference with her exclusive right of use constitutes a trespass and violation of the CC&R's.

This letter serves as notice that if the requested information is not provided and these projects proceed over Ms. Sachs' objection, we have been instructed to take all legal action necessary, including but not limited to seeking emergency injunctive relief, to enjoin action that threatens the safety of the 666 Upas residents, and infringes on Ms. Sachs' property rights.

Notably, Mr. Ronald D. Getchey, Secretary of the Board of the Del Prado HOA has disavowed knowledge of the scope or timing of both the Sprint and Verizon projects, claiming, "the Board doesn't track such things," and apparently has no intention of providing any requested information in breach of its fiduciary duties to Ms. Sachs and the rest of its members. (*See Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App.3d. 642, 650-651.)

The Sprint project, which we can only assume will materially increase emissions, creates a nuisance in or around Ms. Sachs' Terrace. CC&R's § 5.7 entitled "Penthouse Unit," provides that Ms. Sachs is entitled to:

...**the exclusive right to use of the Common Area of the penthouse floor**, subject to the right of ingress and egress by workers and other authorized persons in connection with maintenance or inspection of the Common Area and also subject to the Association's easement rights provided for in the Governing Documents...The Owner of the Penthouse Unit is solely responsible for its terrace, identified as T-1801 in the Condominium Plan, from parapet to parapet.

Section 5.2 entitled "Use of the Common Area," provides that:

The Association may grant to third parties easements in, on and over the Common Area for the purpose of constructing, installing, or maintaining necessary utilities and services, and each Owner, in accepting the deed to his or her Unit, expressly consents to these easements. **However, no easement may be granted if it would**



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interfere with any exclusive easement or with any Owner's use, occupancy, or enjoyment of his or her Unit.

Ms. Sachs' ultimate concern remains improving tenant safety at the Property and protecting her exclusive property rights.

We renew our request to the Board to provide us with the exact start date of the Sprint upgrade project and all relevant documentation regarding all anticipated cell antenna modifications, and cease any modifications that are violative of Ms. Sachs' recorded rights.

Request for Resolution under CC&R's § 15.5 and Civil Code §§ 5295-5965, 1359.560

Please allow this letter to serve as a formal notice provided pursuant to CC&R's §15.5, Civil Code §§ 5925 through 5965, and Civil Code § 1359.560. You are hereby requested to agree to submit this dispute to mediation. You must respond to this request within thirty (30) days of your receipt of this request.

You may respond by contacting me at arias@scmv.com or (619) 685-3172. If you do not respond within the foregoing 30-day period, you will be deemed to have rejected this request pursuant to Civil Code § 5935(a)(3). As you know, pursuant to Civil Code § 5940, mediation must be completed within 90 days after receipt of your acceptance to mediate.

As we have repeatedly expressed, we would prefer to avoid litigation and were hopeful that we may explore potential business resolutions that improve tenant safety and restore Ms. Sachs' exclusive property rights, including but not limited to potentially compensating the HOA for any monies lost due to the revenue generated by the wireless carrier contract(s). However, Ms. Sachs has instructed us to take all legal action necessary, including but not limited to seeking emergency injunctive relief, to enjoin action that threatens the safety of the 666 Upas residents, and infringes on Ms. Sachs' property rights.

Feel free to contact me at (619) 685-3172 or by e-mail at arias@scmv.com to discuss this issue further.

Best regards,

Ricardo Arias
Seltzer Caplan McMahon Vitek
A Law Corporation



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October 10, 2022

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SENT VIA EMAIL

Ms. Delilah Bruzee
MD7, LLC, obo Sprint
10590 W. Ocean Air Drive, Suite 300
San Diego, CA 92130
dbruzee@md7.com

Re: **CEASE AND DESIST – Carole Sachs, 666 Upas Street, Suite 1801**

Dear Mr. Banks and Ms. Bruzee:

As you know, our firm represents Ms. Carole Sachs, her family trust, and power of attorney (“Ms. Sachs”), owner of the penthouse unit in the 666 Upas Street residence (the “Residence”). Ms. Sachs has exclusive use of the rooftop terrace that extends to the parapet walls constructed at the edges of the roof of the building. Ms. Sachs’ exclusive use of the terrace was negotiated and recorded in CC&R § 5.7 entitled “Penthouse Unit,” which provides that Ms. Sachs is entitled to:

...the exclusive right to use of the Common Area of the penthouse floor, subject to the right of ingress and egress by workers and other authorized persons in connection with maintenance or inspection of the Common Area and also subject to the Association’s easement rights provided for in the Governing Documents...

Notably, the Association’s rights to maintain an easement over the penthouse floor terrace is limited in CC&R § 5.2, which provides that:

... no easement may be granted if it would interfere with any exclusive easement or with any Owner’s use, occupancy, or enjoyment of his or her Unit.

For the last month,¹ we have diligently sought information regarding two specific projects involving cellphone antennas--the Sprint project “upgrade” and a Verizon project for which a

¹ We have repeatedly sought information regarding the cellular towers constructed above, and adjacent to, Ms. Sach’s terrace. It is our position that the excessive (and expected increase in) radiation from these projects

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conditional use permit application was submitted—that threaten my client’s use and enjoyment of her terrace and residence. We did not receive any material information regarding the scope or timing of the alleged projects until approximal 5:00 p.m. on October 7, 2022, **a day after construction of the Sprint project had already begun**. Specifically, Mr. Banks informed us of the following:

“[T]he Sprint project is replacing existing equipment ‘like-for-like.’ The dimensions and weight of the new equipment are substantially the same as the equipment it is replacing. The equipment footprint will not change materially. Sprint is using licensed contractors to replace existing equipment with new equipment. The City and the FAA have approved the project. The work is being performed as permitted by existing easements. It will not interfere with any exclusive easement or with Ms. Sachs’ use, occupancy, or enjoyment of her unit. ... Sprint’s contractor has informed me that the estimated completion date for the like-for-like work is the week of November 7th -11th. As for Verizon, I understand it is in the process of obtaining necessary approvals for work regarding its existing equipment at the project. Verizon is not presently performing any work at the project.”²

Notwithstanding the promises to the contrary, the Sprint project has and threatens to continue to interfere with my clients’ exclusive easement and use, occupancy and enjoyment of her unit. As you can see in the photographs attached as **Exhibit A**, large portions of the East terrace are being used as a staging area to store large pallets of wood and scaffolding equipment, rendering that portion of the terrace unusable. Moreover, representatives of Sprint have been moving Ms. Sachs’ personal property without her consent and have been placing metal and wood equipment on top of her planters. We are in possession of video recordings demonstrating the excessive construction noise, beginning as early as 8AM, that can be heard within Ms. Sachs’ penthouse unit (adjacent to her bedroom). This excessive construction noise renders the terrace completely unusable and

unreasonably interferes with Ms. Sachs’ exclusive use of her terrace in direct violation of the above-cited provisions. This position is not hypothetical but rather based on professional environmental testing, which demonstrates that between 2017 and 2020 emissions increased between 476% and 3,933%. This increase in emissions threatens Ms. Sach’s health and well-being and substantially diminishes the value of the Residence. Accordingly, over the last few years, we have made several Requests for Resolution pursuant to CC&R § 15.5 and Civil Code §§ 5295-5965, 1359.560, as well as Requests for Records pursuant to Civil Code §§ 5205 and 5210. These requests have been ignored.

² Notably, Mr. Banks did not provide any support for most of the information provided. Instead, Mr. Banks attached one document, which he then mischaracterized. While the Notice of Right to Appeal Environmental Determination, dated November 10, 2021, does state that Sprint will “replace old equipment with new without expanding the use of the WCF[,]” it also states that the project will “modify[] the existing facility[.]” The extent of these modifications are still unknown.



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interferes with Ms. Sachs' use, occupancy, or enjoyment of her residential unit. Critically, it threatens Ms. Sachs' medical care and comfort.

These actions, which have been undertaken without the consent or approval of Ms. Sachs, constitute a nuisance, continuing trespass and violation of the Associations' governing documents.

My client demands that all equipment be removed and construction noise terminated by 12:00 p.m. tomorrow, October 11, 2022, otherwise, Ms. Sachs will have little choice but to take the necessary emergency legal action. My associate Allyson Werner and I intend to be at Ms. Sachs' Residence no later than 1:30 p.m. tomorrow to ensure that work has ceased and all equipment has been removed from Ms. Sachs' terrace.

Please contact me or my associate Allyson Werner at 619.685.3003 with any questions or concerns.

Very truly yours,

A handwritten signature in blue ink that reads "Andrea N. Myers". The signature is fluid and cursive.

Andrea N. Myers
Seltzer Caplan McMahon Vitek
A Law Corporation











