

**ORIGINAL FILED**  
DEC 6 2013  
**LOS ANGELES  
SUPERIOR COURT**

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9 Interest ROBERT LUGLIANI and DOLORES  
10 A. LUGLIANI, as co-trustees of THE  
11 LUGLIANI TRUST; THOMAS J. LIEB,  
12 TRUSTEE, THE VIA PANORAMA TRUST

13 **SUPERIOR COURT OF CALIFORNIA**  
14 **COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

**CONFORMED COPY**  
**ORIGINAL FILED**  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES

15 CITIZENS FOR ENFORCEMENT OF  
16 PARKLAND COVENANTS, an  
17 unincorporated association,

Case No.: BS142768

18 Plaintiff and Petitioner,

**DEFENDANTS AND REAL PARTIES IN**  
**INTEREST, ROBERT LUGLIANI AND**  
**DOLORES A. LUGLIANI, AS CO-TRUSTEES**  
**OF THE LUGLIANI TRUST, THOMAS J.**  
**LIEB, TRUSTEE, THE VIA PANORAMA**  
**TRUST'S NOTICE OF NOTICE OF MOTION**  
**AND MOTION TO STRIKE IMPROPERLY**  
**JOINED PLAINTIFF AND PETITIONER**  
**JOHN HARBISON AND FOURTH CAUSE OF**  
**ACTION IN THE VERIFIED FIRST**  
**AMENDED PETITION FOR PEREMPTORY**  
**WRIT OF MANDATE & COMPLAINT FOR**  
**INJUNCTIVE RELIEF; MEMORANDUM OF**  
**POINTS AND AUTHORITIES IN SUPPORT**  
**THEREOF**

19 vs.

20 CITY OF PALOS VERDES ESTATES, a  
21 municipal corporation; PALOS VERDES  
22 HOMES ASSOCIATION, a California  
23 corporation; PALOS VERDES PENINSULA  
24 UNIFIED SCHOOL DISTRICT, a political  
25 subdivision of the State of California,

26 Defendants and Respondents.

27 ROBERT LUGLIANI and DOLORES A.  
28 LUGLIANI, as co-trustees of THE  
LUGLIANI TRUST; THOMAS J. LIEB,  
TRUSTEE, THE VIA PANORAMA  
TRUST

Hon. Joanne O'Donnell  
Dept. 86

Defendants and Real Parties In Interest.

Petition Filed: May 13, 2013  
Hearing Date: January 3, 2014  
Hearing Time: 1:30 pm

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE THAT on January 3, 2014, at 1:30 p.m. or as soon thereafter as  
3 the matter may be heard in Department 86 at the above-entitled Court, located at 111 North Hill  
4 Street, Los Angeles, California, Defendants and Real Parties In Interest, Robert Lugliani and  
5 Dolores A. Lugliani, as co-trustees of The Lugliani Trust, Thomas J. Lieb, Trustee, The Via  
6 Panorama Trust (collectively "Lugliani") will and do hereby move for an order pursuant to  
7 California Code of Civil Procedure, Sections 435 and 436 to strike the improperly named plaintiff  
8 and petitioner, John Harbison, and to strike the Fourth Cause of Action from the entirety of the  
9 Verified First Amended Petition for Writ of Mandate and Complaint for Injunctive Relief (the  
10 "Amended Petition") filed by Petitioner and Plaintiff, Citizens for Enforcement of Parkland  
11 Covenants (hereinafter "CEPC" or "Petitioners" interchangeably) and purportedly joined by John  
12 Harbison, an individual, as a second plaintiff and petitioner.

13 This Motion to Strike, requesting the court to strike the improperly named petitioner, John  
14 Harbison, from the entirety of the Amended Petition, will be made on the following grounds:

15 (a) it is improper to include Mr. Harbison as a new plaintiff and petitioner in the Amended  
16 Petition because the Code of Civil Procedure Section 472 prohibits the addition of new parties; (b)  
17 CEPC made no motion under Code of Civil Procedure Section 473 to seek leave of this Court to  
18 allow Mr. Harbison to be added as a plaintiff and petitioner; (c) because the Fourth Cause of Action  
19 in the Amended Petition is only brought by Mr. Harbison, the Fourth Cause of Action should also  
20 be stricken in its entirety because it is an improper amendment of the initial complaint.

21 This Motion to Strike is further based upon this Notice of Motion and Motion, the  
22 Memorandum of Points and Authorities attached to this Motion, and all pleadings and papers on  
23 file in this matter and all arguments that the court entertains at the time of hearing of this Motion.

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1 **I. INTRODUCTION**

2 On October 25, 2013, the Court heard demurrers from all Respondents and Real Parties In  
3 Interest challenging all causes of action in the original Verified Petition for Writ of Mandate and  
4 Complaint for Injunctive Relief (the “Petition”) filed by Petitioner and Plaintiff, Citizens for  
5 Enforcement of Parkland Covenants (hereinafter “CEPC” or “Petitioners” interchangeably). At the  
6 October 25, 2013 hearing on the demurrers, CEPC did not seek leave of court to add a new plaintiff  
7 and petitioner and no such leave was granted. On October 28, 2013, the Court issued a minute  
8 order sustaining demurrers to the Third Cause of Action (Writ of Mandate) and granting CEPC  
9 leave to amend its Petition.<sup>1</sup>

10 Thereafter, CEPC filed a Verified First Amended Petition for Writ of Mandate and  
11 Complaint for Injunctive Relief (the “Amended Petition”) restating its previous defective claims  
12 and improperly adding John Harbison suing as an individual plaintiff and petitioner, and adding a  
13 new Fourth Cause of Action in nuisance per se brought only by Mr. Harbison.

14 The Amended Petition exceeds the scope of the Court’s leave to amend and the permissible  
15 scope of California Code of Civil Procedure (“CCP”) Section 472.

16 It is improper to include Mr. Harbison as a plaintiff and petitioner in the Amended Petition  
17 without leave of court, because the CCP Section 472 prohibits the addition of new parties. Only the  
18 original “party of course” may amend a pleading pursuant to CCP Section 472. Also, CEPC made  
19 no motion under CCP Section 473 to seek leave of this Court to add Mr. Harbison as a plaintiff and  
20 petitioner. Moreover, because the new Fourth Cause of Action in the Amended Petition is only  
21 brought by Mr. Harbison, individually, that cause of action is also improper and should be stricken.

22 Therefore, the Amended Petition includes improper matter inserted in the Amended Petition  
23 (CCP § 436, subd. (a)) and the Amended Petition is not drawn or filed in conformity with the laws  
24 of this state. (CCP § 436, subd. (b).)

25  
26 \_\_\_\_\_  
27 <sup>1</sup> At the October 25, 2013 hearing, the court stated that it would not rule on demurrers to causes of  
28 action other than the Writ of Mandate cause of action because the case is being heard in the Writs  
and Receivers Department of the Los Angeles Superior Court.

1 **II. ANALYSIS**

2 **A. CEPC May Not Join a New Plaintiff and Petitioner to an Amended**  
3 **Petition under Code of Civil Procedure Section 472**

4 CCP Section 436 reads as follows:

5 “The court may, upon a motion made pursuant to Section 435, or at any time in its  
6 discretion, and upon terms it deems proper:

7 (a) Strike out any irrelevant, false, or improper matter inserted in any pleading.

8 (b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws  
of this state, a court rule, or an order of the court.” (CCP § 436.)

9 Lugliani contends that the addition of Mr. Harbison as a new plaintiff and petitioner in the  
10 Amended Petition is not in conformity with the laws of this state and that this Court should strike  
11 Mr. Harbison entirely from the Amended Petition. Each of the particular allegations and claims that  
12 Lugliani considers to be improper and that should be stricken from the Amended Petition are set  
13 forth below in Section III of this Motion to Strike.<sup>2</sup>

14 CCP Section 472 states that “[a]ny pleading may be amended once *by the party of course*,  
15 and without costs, at any time before the answer or demurrer is filed, or after demurrer and before  
16 the trial of the issue of law thereon, by filing the same as amended and serving a copy on the  
17 adverse party, and the time in which the adverse party must respond thereto shall be computed from  
18 the date of notice of the amendment.” (CCP § 472 {*emphasis supplied*}.)

19 The phrase “the party of course” in CCP Section 472 allows only the original petitioner or  
20 plaintiff to amend the complaint without leave of Court. CEPC is the named petitioner in the  
21 original Petition and is the only proper plaintiff or petitioner in the Amended Petition. “[T]he right  
22 to amend ‘of course’ does not permit the bringing in of new parties. It is Section 473 which deals  
23 with adding the names of new parties and requires the express permission of the court.” (*Taliaferro*  
24 *v. Davis* (1963) 220 Cal.App.2d 793, 795.) CCP Section 472 thus prohibits CEPC from joining Mr.  
25 Harbison as a new plaintiff and petitioner to the Amended Petition because Mr. Harbison as an  
26

27 \_\_\_\_\_  
28 <sup>2</sup> All of the matters that should be stricken, identified with specificity in Section III below, are  
hereafter referred to as the “Improper Matter.”

1 individual was not “the party of course” in the original Petition.

2 Although most of the case law developed around CCP Section 472 arises in the context of  
3 defendants added to complaints, there are several cases in which the courts have stricken  
4 improperly added petitioners. One such case that is substantially similar to CEPC’s Amended  
5 Petition is *Shapell Industries, Inc. v. Superior Court* (2005) 132 Cal.App.4th 1101. In *Shapell*, the  
6 petitioner (“Borecki”) in a class action conceded that the applicable statute of limitations barred his  
7 individual cause of action. Borecki then attempted to amend his complaint and add a new plaintiff,  
8 Mr. Stark (“Stark”). Apparently, Mr. Stark would not have been barred by the statute of limitations  
9 from pursuing the same cause of action that Borecki desired to pursue. With respect to the issue of  
10 adding a new plaintiff, the *Shapell* court articulated the holding from *Taliaferro v. Davis* and  
11 determined that Borecki was required by CCP Section 473 to specifically request leave of court to  
12 add Stark as another plaintiff.<sup>3</sup> The *Shapell* court cited to additional authority prohibiting the  
13 addition of plaintiffs to amended complaints, including *Phoenix of Hartford Ins. Companies v.*  
14 *Colony Kitchens* (1976) 57 Cal.App.3d 140, 147 [naming a new party in a complaint without  
15 obtaining prior leave of court is a nullity] and *Himmel v. City Council* (1959) 169 Cal.App.2d 97,  
16 101 [adding plaintiff to amended complaint requires permission of court under CCP Section 473; no  
17 motion to strike must be granted if new parties are added to a pleading without permission of court].

18 Thus, CEPC violates the limitations of CCP Section 472 by attempting to add Mr. Harbison  
19 as a new plaintiff and petitioner in the Amended Petition because Mr. Harbison is not the “party of  
20 course.” Accordingly, the improperly, newly joined petitioner, John Harbison, should be stricken  
21 as a plaintiff and petitioner throughout the Amended Petition, without leave to amend. (CCP §436,  
22 subd. (a).)

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27 <sup>3</sup> After holding that the new plaintiff should be stricken from the complaint, the *Shappel* court  
28 nonetheless allowed the class action to proceed without a named plaintiff, due to the ‘unusual  
procedural scenario’ in that case. (*Shapell Industries, Inc. v. Superior Court* , supra at 1108.)

1           **CEPC Failed to Make a Motion under Code of Civil Procedure**  
2           **Section 473 to Allow CEPC to Join Mr. Harbison as an Additional Plaintiff and**  
3           **Petitioner**

4           CCP Section 473, subdivision (a), subdivision (1) requires in pertinent part that a court  
5           “...in its discretion, after notice to the adverse party, allow, upon any terms as may be just, an  
6           amendment to any pleading or proceeding in other particulars.” (CCP §473, subd. (a)(1).) As  
7           established in Section II.A above, CEPC may not rely on CCP Section 472 to add Mr. Harbison as a  
8           plaintiff and petitioner to the Amended Petition. Thus, if CEPC desires to add Mr. Harbison as a  
9           new plaintiff and petitioner in this action, CEPC is required to seek leave of this Court to do so.  
10          (*Leader v. Health Indus. of Am.* (2001) 89 Cal.App.4th 603, 613; *Taliaferro v. Davis* (1963) 220  
11          Cal.App.2d 793.)

12          CEPC has not made a CCP Section 473 motion to amend the original Petition. Therefore,  
13          the inclusion of Mr. Harbison as a new plaintiff and petitioner in the Amended Petition is not in  
14          compliance with the law. Pursuant to CCP Section 436, subdivision (b), this Court should strike  
15          Mr. Harbison as a petitioner from the entirety of the Amended Petition for failure to comply with  
16          law. (*Leader v. Health Indus. of Am.* (2001) 89 Cal.App.4th 603, 613; *Mann v. Quality Old Time*  
17          *Service, Inc.* (2004) 120 Cal.App.4th 90, 106; *Loser v. E. R. Bacon Co.* (1962) 201 Cal.App.2d 387,  
18          390.)

19          Accordingly, the improperly, newly joined plaintiff and petitioner, John Harbison, should be  
20          stricken throughout the Amended Petition, without leave to amend. (CCP §436, subd. (a).) As a  
21          necessary corollary to striking Mr. Harbison as a plaintiff and petitioner, this Court should also  
22          strike all of the Improper Matter from the Amended Petition, without leave to amend. (CCP §436,  
23          subd. (b).)

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1 **IV. CONCLUSION**

2 For all the aforementioned reasons, the Court should grant this Motion to Strike John  
3 Harbison as a plaintiff and petitioner from the Amended Petition and strike the fourth cause of  
4 action brought only by Mr. Harbison, without leave to amend.  
5  
6

7 DATED: December 6, 2013

Respectfully submitted,  
ARMBRUSTER-GOLDSMITH & DELVAC LLP

9 By: 

10 R.J. COMER

11 Attorney for Real Parties in Interest, ROBERT  
12 LUGLIANI and DOLORES A. LUGLIANI, as co-  
13 trustees of THE LUGLIANI TRUST; THOMAS J. LIEB,  
14 TRUSTEE, THE VIA PANORAMA TRUST  
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**PROOF OF SERVICE**

I am a resident in the State of California. I am over the age of 18 and not a party to the within action. My business address is 11611 San Vicente Blvd., Suite 900, Los Angeles, California 90049. On December 6, 2013, I served the within Documents:

**(1) DEFENDANTS AND REAL PARTIES IN INTEREST, ROBERT LUGLIANI AND DOLORES A. LUGLIANI, AS CO-TRUSTEES OF THE LUGLIANI TRUST, THOMAS J. LIEB, TRUSTEE, THE VIA PANORAMA TRUST'S NOTICE OF NOTICE OF MOTION AND MOTION TO STRIKE IMPROPERLY JOINED PLAINTIFF AND PETITIONER JOHN HARBISON AND FOURTH CAUSE OF ACTION IN THE VERIFIED FIRST AMENDED PETITION FOR PEREMPTORY WRIT OF MANDATE & COMPLAINT FOR INJUNCTIVE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

- By transmitting the document(s) listed above via email to the person(s) named on the attached Service List at the respective email addresses next to their names, on this date before 5:00 p.m. and receiving confirmed transmission reports indicating that the document(s) were successfully transmitted.
- By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as set forth on the attached Service List, to each of the persons named on the attached Service List.
- By causing overnight delivery by Federal Express of the document(s) listed above, addressed as set forth on the attached Service List, to each of the person(s) named on the attached Service List.
- By causing personal delivery by messenger service of the document(s) listed above, addressed as set forth on the attached Service List, to each of the person(s) named on the attached Service List.
- By personally delivering the document(s) listed above to each of the person(s) named on the attached Service List, at their respective addresses set forth on the attached Service List.

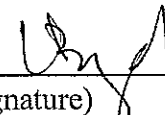
**SEE ATTACHED SERVICE LIST**

I am readily familiar with this firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

- (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
- (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on December 6, 2013 at Los Angeles, California.

\_\_\_\_\_  
Bogdana Koiso  
(Type or print name)

  
\_\_\_\_\_  
(Signature)

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**DOCUMENT(S) SENT**

1. Defendants and Real Parties in Interest, Robert Lugliani and Dolores A. Lugliani, as Co-Trustees of the Lugliani Trust, Thomas J. Lieb, Trustee, the Via Panorama Trust's Notice of Notice Of Motion and Motion to Strike Improperly Joined Plaintiff and Petitioner John Harbison and Fourth Cause of Action in the Verified First Amended Petition for Peremptory Writ of Mandate & Complaint for Injunctive Relief; Memorandum of Points and Authorities in Support Thereof
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