

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

KO OLINA DEVELOPMENT, LLC,)	CIV. NO. 09-00272 DAE/LEK
a Delaware limited liability)	
company; KO OLINA REALTY,)	
LLC, a Hawaii limited liability)	
company,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
CENTEX HOMES, a Nevada general)	
partnership, JOHN DOES 1-20;)	
JANE DOES 1-20; DOE)	
CORPORATIONS and OTHER)	
ENTITIES 1-20,)	
)	
Defendants.)	
)	
_____)	

ORDER DENYING PLAINTIFFS' MOTION
FOR A PRELIMINARY INJUNCTION

On July 22, 2009, the Court heard Plaintiffs' Motion for a Preliminary Injunction. John A. Sopuch, Esq., Ken Marcus, Esq., and Shyla P.Y. Cockett, Esq., appeared at the hearing on behalf of Plaintiffs; Bert T. Kobayashi, Jr., Esq., appeared at the hearing on behalf of Defendant Centex Homes ("Centex"). After reviewing the motion and the supporting and opposing memoranda, and considering the argument of counsel, the Court DENIES Plaintiffs' Motion.

BACKGROUND

On December 23, 2004, Ko Olina Development, LLC (“KOD”) and its affiliates contracted to sell a parcel of land known as Ko Olina Resort Parcel 53 to Centex. (Mot. Stone Aff. ¶ 2.) The land was sold for the development of a low-rise condominium building and a residential condominium tower with improvements and amenities (the “Beach Villas”). (Id.) The Beach Villas includes six commercial units, denominated as CA-1, CA-2, CA-3, CA-4, CA-B, and CA-C (collectively, the “Commercial Units”). (Id.)

In connection with the sale of the land, KOD and Centex entered into several contracts. First, the parties signed a Right of First Refusal, Purchase Option, Agreement to Lease, dated September 1, 2005 (the “Right of First Refusal”). (Mot. Ex. A.) Under the Right of First Refusal, the parties agreed that “no sale, lease or transfer of a KOD Commercial Apartment may be effected unless and until [KOD] shall have been offered the opportunity to purchase or lease the same” (Id. ¶ 1.) The Right of First Refusal also provided that “any transfer of a controlling interest in the owner of a KOD Commercial Apartment to other than an Affiliate of [Centex] shall be deemed a sale of such KOD Commercial Apartment entitling KOD to purchase the same” (Id. ¶ 1(f).) On the same day, the parties agreed to a Declaration of Covenants and Restrictions, Power to Grant

Easements. (Mot. Ex. D.) The parties then executed a First Amendment to the Agreement, dated December 13, 2007, which extended the Right of First Refusal to Commercial Unit CA-2. (Mot. Ex. B.)

On September 12, 2008, Centex and KOD executed a Second Amendment to the Agreement, which extended the Right of First Refusal to Commercial Units CA-B and CA-C (the “Second Amendment”). (Mot. Ex. C.) The Second Amendment also incorporated a new Section 17. Section 17 reinforced Centex’s covenant not to sell, transfer or otherwise convey its interest in any of the KOD Commercial Units unless first offering the interest to KOD. (Id. ¶ 3.) In addition, Section 17 allowed KOD to purchase the Commercial Units either on December 31, 2012, or 45 days prior to an attempt to offer any or all of the Commercial Units “for sale to a third party (including, without limitation, as part of a bulk sale or a transfer of the controlling partnership interest of [Centex]).” (Id.)

In early April 2009, KOD learned that Centex was contemplating a merger with Pulte Homes, Inc. (“Pulte”), which would cause Centex Corp., the parent corporation of Centex’s general partner, to become a wholly owned subsidiary of Pulte. (Stone Aff. ¶ 4.) On April 24, 2009, counsel for KOD informed Centex that it believed the merger with Pulte constituted a “transfer of

[its] controlling interest,” and therefore triggered their right of first refusal. (Id. ¶ 8.) Several days later, Centex informed KOD that it disagreed with KOD and believed the merger did not trigger the purchase option. (Mot. Ex. G.)

On June 13, 2009, KOD learned that Centex intended to effectuate an amendment under Article XIII of the Amended Condominium Declaration, which would convert certain limited common elements that were appurtenant and attached to the Commercial Units (“LCE”) into common elements (“CE”). (Stone Aff. ¶¶ 11-12.) Such LCE’s include recreational facilities, designated housekeeping storage areas, the telephone PBX system, parking stalls and related areas, roadways, porte cochere, driveways, access lanes, ramps, and mail alcove areas. (Compl. ¶ 30.) It is KOD’s belief that Centex is attempting to effectuate the amendment in order to placate several owners of residential apartments, by conveying the LCE’s appurtenant to the Commercial Units to the Association of Apartment Owners (the “Association”). (Id. at ¶¶ 35-36.)

As a result of the foregoing, on June 15, 2009, KOD filed suit against Centex for specific performance and damages, asserting claims for breach of contract, anticipatory repudiation, promissory estoppel, breach of the duty of good faith and fair dealing, and requesting injunctive relief. (Doc. # 1.) KOD claims that the Pulte merger constitutes a trigger of their Right of First Refusal and that

Centex's attempt to effectuate an amendment to the Amended Condominium Declaration would impermissibly divest it of a valuable property right to which it has an expectation and interest.

The day after the complaint was filed, KOD alleged that Centex, through its division president who sits on the Board of Directors for the Association, submitted a motion to the Board that a ballot be sent to apartment owners allowing them to vote on the amendment outlined above. (Stone Aff. ¶ 17.) The Association Board, five out of eight of which are Centex employees, voted in favor of submitting the proposed amendment to a vote of the apartment owners. (Id.) As the owner of 120 residential and 6 commercial units, Centex currently controls approximately 50% of the votes needed to effectuate the amendment¹. (Id. at ¶ 20; Mot. at 9.)

On June 23, 2009, KOD filed an ex parte motion for a temporary restraining order and motion for injunctive relief ("TRO Motion"). (Doc. # 6.) The TRO Motion sought to enjoin Centex "from joining in, voting in favor of or unilaterally filing" the aforementioned amendment that is intended to either (1) alter the uses of the Commercial Units or (2) convert the LCE into CE belonging to

¹Article XIII of the Amended Condominium Declaration requires an affirmative vote or written consent of 75% of the common interests in order to effectuate an amendment. (Mot. Ex. H at 31-32.)

the Association. (Id. at 2.) A hearing was set for June 25, 2009. (Doc. # 8.) Centex filed an opposition to the TRO Motion shortly before the hearing. (Doc. # 9.)

At the hearing on the TRO Motion, the Court inquired as to when the vote on the proposed amendment was to take place. Centex indicated the vote would occur in the near future and, at the Court's urging, agreed to stay the vote until resolution of KOD's request for injunctive relief. At the close of argument, the Court denied KOD's TRO Motion and construed the motion as one for a preliminary injunction. (Doc. # 12.) A hearing on the preliminary injunction was scheduled, by agreement of the parties, for July 22, 2009 in Las Vegas, Nevada. (Doc. # 13.) On July 1, 2009, Centex filed a supplemental memorandum in opposition to KOD's motion. (Doc. # 14.) KOD filed a reply on July 8, 2009. (Doc. # 20.)²

STANDARD OF REVIEW

“[I]njunctive relief is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” Winter

²The Court also notes that in the interim between when the Court denied the TRO Motion and the hearing on the preliminary injunction, Centex has filed several motions, including four motions for partial summary judgment. (See Doc. ## 21, 23, 25, & 35.)

v. Natural Resources Defense Council, Inc., 129 S.Ct. 365, 376 (2008). In order to obtain a preliminary injunction, the moving party must demonstrate “that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” Id. at 365 (citing Munaf v. Geren, 128 S.Ct. 2207, 2218-19 (2008); Amoco Prod. Co. v. Gambell, 480 U.S. 531, 542 (1987); Weinberger v. Romero-Barcelo, 456 U.S. 305, 311-12 (1982)); see also Stormans, Inc. v. Selecky, --- F.3d. ---, ---, 2009 WL 1941550, at * 13 (9th Cir. July 8, 2009) (applying heightened standard mandated by Winter).

Plaintiffs seeking preliminary injunctive relief must “demonstrate that irreparable injury is likely in the absence of an injunction[,]” the mere possibility of irreparable harm is insufficient. Winter, 129 S.Ct. at 375 (finding the Ninth Circuit’s standard of a “possibility” of harm too lenient). “To seek injunctive relief, a plaintiff must show that he is under threat of suffering ‘injury in fact’ that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.” Summers v. Earth Island Institute, 129 S.Ct. 1142, 1149 (2009).

If irreparable injury is shown, courts must then “balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” Winter, 129 S.Ct. at 376 (quoting Amoco Prod. Co., 480 U.S. at 542). In assessing whether the plaintiff has met this burden, the district court has a “duty . . . to balance the interests of all parties and weigh the damage to each.” Stormans, --- F.3d. at --- , 2009 WL 1941550, at * 23.

Finally, the court must weigh the public interest, if any, implicated by the injunction. Winter, 129 S.Ct. at 374. When the reach of an injunction is narrow, limited only to the parties, and has no impact on non-parties, the public interest will be “at most a neutral factor in the analysis rather than one that favor[s][granting or] denying the preliminary injunction.” Bernhardt v. Los Angeles County, 339 F.3d 920, 931 (9th Cir. 2003). “If, however, the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequences, the public interest will be relevant to whether the district court grants the preliminary injunction.” Stormans, --- F.3d. at --- , 2009 WL 1941550, at * 24 (citing Sammartano v. First Judicial Dist. Court, 303 F.3d 959, 965 (9th Cir. 2002)). “[When] an injunction is asked which will adversely affect a public interest . . . the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be

burdensome to the plaintiff.” Weinberger v. Romero-Barcelo, 456 U.S. 305, 312-13 (1982). In fact, “courts . . . should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” Winter, 129 S.Ct. at 376-77.

DISCUSSION

I. Necessary Parties and Subject Matter Jurisdiction

As a preliminary matter, Centex argues that KOD has failed to properly allege diversity jurisdiction under 28 U.S.C. § 1332 because: (1) it did not name the Association, which is a necessary party to the litigation; and (2) naming the Association, a Hawaii entity, would destroy complete diversity. As such allegations question the jurisdiction of this Court to hear the instant matter, the Court will address them first.

A. Joinder of Necessary Parties³

Federal Rule of Civil Procedure 19 governs the joinder of parties necessary for the Court to provide complete relief. Determining whether a party is

³The 2007 amendment to Rule 19 changed the language of the rule, eliminating the term “indispensable” and replacing “necessary” with “required.” However, the changes were intended to be stylistic only. Fed. R. Civ. P. 19 advisory committee notes; see also Republic of the Philippines v. Pimentel, --- U.S. ---, 128 S.Ct. 2180, 2184 (2008). Because the traditional terms are terms of art used by courts and commentators and because the parties have used the traditional terms in their briefs, for clarity the Court does the same here.

necessary and indispensable under Rule 19 involves a three-step inquiry. EEOC v. Peabody W. Coal Co., 400 F.3d 774, 779 (9th Cir. 2005) (citations omitted). First, under Rule 19(a), the court determines whether a party is “necessary.” Id. If the court finds that the absent party is a necessary party, the court must then determine whether joinder of the party is feasible. Id. Finally, if joinder is not feasible, the court determines whether the case can proceed without the absent party or whether the absent party is an “indispensable” party such that the court must dismiss the action. Id. “The inquiry is a practical one and fact specific, and is designed to avoid the harsh results of rigid application.” Makah Indian Tribe v. Verity, 910 F.2d 555, 558 (9th Cir. 1990).

Joinder under Rule 19(a)(1)(B) is, however, “contingent . . . upon an initial requirement that the absent party claim a legally-protected interest relating to the subject matter of the action,” and “where a party is aware of an action and chooses not to claim an interest, the district court does not err by holding that joinder [is] ‘unnecessary.’” Altmann v. Republic of Aus., 317 F.3d 954, 971 (9th Cir. 2002) (emphasis in original) (citing Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1043 (9th Cir. 1983)) (“Subparts (i) and (ii) are contingent . . . upon an initial requirement that the absent party claim a legally-protected interest relating to the subject matter of the action.”); see also Fed. Deposit Ins.

Corp. v. County of Orange, 262 F.3d 1014, 1023 (9th Cir. 2001) (“[The defendant] cannot claim that the [absent parties] have a legally-protected interest in the action unless the [absent parties] themselves claim that they have such an interest.”); United States v. Bowen, 172 F.3d 682, 689 (9th Cir. 1999) (“[I]t is inappropriate for one defendant to attempt to champion the absent party’s interests . . .”); Fanning v. Group Health Coop., 2008 WL 2148753, at *2 (W.D. Wash. May 21, 2008) (finding that because Rule 19(a)(1)(B) “allows a forced joinder of an outside party only upon the impetus of that outside party,” the absent party who had not claimed an interest or sought to join the suit could not be a required party under the rule).

In this case, the Association has not come forward and claimed a direct interest in this action despite some indication that the Board has been made aware of the litigation. (See Oppo. Ex M.) As such, Centex’s argument that the Association is a necessary party is considerably undermined. The Court is particularly hesitant to undertake a thorough analysis under Rule 19 when, as here, the issue is being considered outside of the usual vehicle for such contentions: a motion to dismiss under Federal Rule of Civil Procedure 12(b)(7). Because the briefing in the instant motion does not adequately address the Rule 19 issue, the Court declines to decide at this time whether the Association is a necessary party.

The Court does note, however, that all of the contracts presented thus far have been executed between Centex and KOD only. The Association, therefore, is not a signatory to any of the contracts nor a primary party to the instant lawsuit. There is a question, however, as to whether the Association constitutes a third party beneficiary to these contracts and whether it -- or the individual owners that comprise the Association -- possess a resulting interest in this case that requires their presence as necessary parties. Nevertheless, for the reasons outlined above, the Court declines to decide whether the Association is a necessary party.

B. Naming Doe Defendants

Centex argues that KOD has failed to name the Association because it knows that doing so would destroy diversity jurisdiction. Instead, Centex contends that KOD has impermissibly named “Doe Defendants” in an attempt to circumvent the requirements of 28 U.S.C. § 1332.

Although Ninth Circuit law concerning the effect of “Doe defendants” on diversity jurisdiction appears conflicted, this Court has held that including Doe Defendants does not automatically destroy diversity jurisdiction. See Fat T, Inc. v. Aloha Tower Assocs. Piers 7, 8, & 9, 172 F.R.D. 411, 414 (D. Haw. 1996); Macheras v. Center Art Galleries, 776 F.Supp. 1436, 1439 (D. Haw. 1991). In

those cases, the Court determined that requiring dismissal simply due to the inclusion of Doe Defendants would undermine the purpose of the statute. Id. Instead, “a more sensible approach would be to allow Doe Defendants while deferring the jurisdictional question until actual parties are substituted.” Fat T, 172 F.R.D. at 414. Once the actual parties are substituted, a more accurate analysis of diversity may be possible.

Here, the Court finds that the presence of Doe Defendants does not automatically destroy diversity jurisdiction. Although it appears undisputed that the Association, through its individual members, would be possess citizenship in Hawaii and its presence would therefore destroy diversity (see Windward City Center of Hawaii v. Transamerica Occidental Life Ins. Co., 613 F. Supp. 1216, 1217 (D. Haw. 1985); Oppo. at 7), the Court has declined at this juncture to decide whether the Association is a necessary party. Because the Association remains unnamed, the Court will not make any presumptions as to the motivations behind KOD’s decision and will not dismiss the case at this point based on subject matter jurisdiction.

II. Likelihood of Success on the Merits

A review of KOD's motion indicates that it believes Centex has committed or is imminently going to commit two breaches: (1) failing to honor the Right of First Refusal when Centex began the Pulte merger; and (2) divesting KOD of its full expected property rights by proposing the Amendment converting LCE's to CE's.

In their reply brief⁴ and at the hearing on the instant motion, counsel for KOD indicated that it is not necessary to determine at this juncture whether the Pulte Merger triggers the Right of First Refusal. Counsel explained that KOD believes the conversion of the LCE's to CE's would divest them of their property rights of which they have an expectation either (1) on December 31, 2012 or (2) 45 days prior to an attempt to offer any of the Commercial Units for sale. In either case, KOD contended, the conversion would strip them of their rights in the LCE's. As such, counsel asserted that no further inquiry into the Pulte Merger is necessary at this early stage of preliminary injunction.

The Court agrees, because of the nature of KOD's claim to property rights in the LCE's, that it need not reach the issue of whether the Pulte Merger triggers the Right of First Refusal. As such, in assessing the likelihood of success

⁴ "The Court need not determine whether the Pulte Merger accelerates KOD's rights under the Second Amendment at this time." (Reply at 9.)

on the merits, the Court will only consider whether KOD is likely to succeed on its claim regarding the extent to which the proposed Amendment affects its expectation in the LCE's.

KOD appears to have changed its argument with respect to the basis for its contention that the proposed Amendment divests them of certain property rights to LCE's. In the original motion, KOD claims that it is likely to succeed on the merits regarding Section 3B of the Restrictive Covenant entered between the parties, which prohibits Centex from modifying the uses that may be made of the property "without prior written approval of KOD." (Mot. at 13.) In its reply memorandum, however, KOD asserts that it was the parties' intention (although not expressly defined in the Second Amendment) that the Commercial Units include the LCE's under Section I(D) of the Amended Condominium Declaration. (Reply at 7.) The initial argument, in essence, is based on contractual limits to actions the parties may undertake while the latter contends that KOD had contracted for a particular property interest that is now being threatened by the proposed Amendment. These are very different arguments.⁵

⁵The Court would not normally countenance arguments made in reply briefs that were not propounded in the original motion. See LR 7.4 ("[a]ny arguments raised for the first time in the reply shall be disregarded.") However, because the instant motion does not require a final adjudication on the merits but rather an

(continued...)

Section 3B of the Restrictive Covenant states that neither the declaration nor the by-laws may be modified in any manner that materially alters the uses that may be made of the Property without the prior written approval of KOD. (Mot. Ex. D. at 6 (emphasis added).) The proposed Amendment, however, does not affect the uses of the LCE's; rather, its intention is to convert the LCE's into CE's. The conversion affects who may use the LCE's, or who owns the rights to them, but not what the uses of those LCE's will be. In other words, the conversion proposed by the Amendment would not change the use or purpose of a mail alcove into a parking stall. Instead, the conversion would simply affect who would have the exclusive use of those elements: the Association rather than Centex.

The Court is likewise unpersuaded by KOD's contentions that it has a fixed property interest in the Commercial Units under Section I(D) of the Amended Condominium Declaration. Although Section I(D) describes the certain LCE's for several of the residential apartments and Commercial Units, another section of the same agreement expressly reserves Centex's right to recharacterize the LCE's as CE's at any time until the end of 2025. (Compare Mot. Ex. H at 13-14 with 44.)

⁵(...continued)
initial assessment of the likelihood of eventual success on the merits, the Court will address each argument.

The Amended Condominium Declaration, therefore, expressly contemplates modifications or alterations to some interests. Indeed, KOD admitted as such as an undisputed fact in its opening motion. (Mot. at 3.)

Moreover, KOD has failed to present language in any of the contracts that requires Centex to convey the Commercial Units exactly as they existed at the time of signing. In its reply memorandum, KOD argues that it “was clearly understood” that the Commercial Units would include the LCE’s originally designated under Section I(B). The Court, however, relies on the language of the contracts themselves, which evidence a clear contemplation by the parties that certain LCE’s may be recharacterized.

Accordingly, this Court finds that at this juncture KOD has failed to show a likelihood of success on the merits of its claim.

III. Irreparable Harm

KOD claims that it will suffer irreparable injury if the proposed Amendment is allowed to proceed to vote. In the first instance, KOD contends that the parties have already stipulated to the fact that a breach of the Right of First Refusal would cause harm for which monetary damages would be insufficient. (See Mot. Ex. A at 4; Ex. D at 6.) In Section 4 the Right of First Refusal, the

parties agreed that an aggrieved party may seek injunctive relief for a breach of the contract and would not have to demonstrate the inadequacy of damages. (Id.)

In addition, KOD argues that the proposed Amendment will divest it of valuable property rights for which monetary damages would be difficult to ascertain. While it is true that property rights enjoy unique protection under Hawaii law, as discussed in Section III, infra, it is unclear at this juncture whether KOD in fact possesses a fixed property interest in the LCE's or easements thereto. Without such an interest, KOD cannot claim that it is being divested of its property rights. The LCE's in question here certainly possess value and the Court understands that KOD does not want to lose the chance to obtain those LCE's if and when it purchases the property. However, it was KOD who agreed to execute the contracts, many of which expressly contemplate recharacterization or modification of property interests and easements, and the Court declines to create a property interest where one has not yet been proved.

IV. Balance of Equities

KOD argues that the injunction sought by this motion would merely maintain the status quo until the Court could properly determine the rights of the parties. As such, KOD contends that Centex will not be harmed by imposition of the injunction whereas KOD stands to lose valuable property interests (or, at least,

the opportunity to purchase such interests). Centex, on the other hand, does not address this prong of the preliminary injunction standard.

The Court agrees with KOD that maintaining the status quo by prohibiting Centex from pursuing conversion of the LCE's to CE's is favored. The limitation on Centex would be minimal whereas the damage to KOD, if its interpretation eventually prevails, could be substantial. As KOD notes, if Centex eventually prevails, it may then reissue the proposed amendment or pursue its unilateral powers under Article XXIII of the Amended Condominium Declaration. The injunction, therefore, would merely cause to delay the conversion.⁶ As such, the Court finds that the balance of the equities does, in fact, favor issuance of the injunction to maintain the status quo.

⁶The Court also notes that while there are several methods by which Centex may convert the LCE's to CE's (i.e., by amendment or unilaterally), the agreements do not contain any express language authorizing the reconversion from CE's back to LCE's. In that sense, KOD argues that allowing the Amendment to proceed may cause irreversible consequences.

While it is true there is no language expressly permitting reconversion, there is likewise no language expressly forbidding such action. As such, the Court is not persuaded that conversion would strike a irretrievable blow. Nevertheless, if KOD prevails, it will have the opportunity at that point to seek monetary damages which may compensate it for any loss of ownership or use over LCE's.

V. Public Interest

KOD argues that the final prong of the preliminary injunction analysis, involving a determination of whether the injunction would be in the public interest, supports its motion. KOD contends that public policy supports both freedom of contract and efficient judicial proceedings.

The Court believes that the requested injunction only minimally invokes a public interest. Because the injunction would only bind Centex, it is more akin to the narrow injunctions which constitute “at most a neutral factor.” Bernhardt, 339 F.3d at 931. While the freedom of contract is a well-rooted public interest, both parties could appeal to this notion to support their claims. KOD claims Centex should be held responsible for its breach while Centex claims KOD should abide by the terms of the contracts to which it agreed, however unfortunate they may presently seem. Moreover, the efficiency of judicial proceedings is only valuable to the public insofar as truth is not sacrificed for its sake. As such, the Court finds the public interest prong does not weigh strongly in favor of either party.

VI. Conclusion

The Court has found that KOD has failed to demonstrate either a likelihood of success on the merits or the likelihood of irreparable injury. While

the Court believes maintaining the status quo would not be unreasonably burdensome on Centex, the Court finds, as a whole, that an injunction is not warranted in this case. As the Supreme Court has recently recognized, “injunctive relief is an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” Winter, 129 S.Ct. at 376. Here, KOD has simply failed to demonstrate that its interests require the extraordinary remedy. Accordingly, the Court DENIES KOD’s motion for a preliminary injunction.

CONCLUSION

For the reasons stated above, the Court DENIES KOD’s motion for a preliminary injunction.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, August 13, 2009.





David Alan Ezra
United States District Judge

Ko Olina Development, LLC v. Centex Homes, et al., Civ. No. 09-00272; ORDER DENYING PLAINTIFFS’ MOTION FOR A PRELIMINARY INJUNCTION