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See attached Defendants' Settlement Conference Memorandum

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 7 Homeowners Association, Inc., Johnson,
 Stoll, Wood, Pasula, Larson, Bonnell,
 8 Gregory, Risset, St. John, Miller and Finger

9 **SUPERIOR COURT OF THE STATE OF ARIZONA**

10 **COUNTY OF MARICOPA**

11 KEN DOSHIER and DOROTHY DOSHIER,
 12 husband and wife; DOUG W. HENDERSON
 and MARIAM HENDERSON, husband and
 13 wife; JAY HOWLETT and KITTY L.
 HOWLETT, husband and wife; WILLY
 14 FERNANDEZ, an unmarried man;
 HARRIETT JACKSON, an unmarried
 15 woman; KAREN OLSEN, an unmarried
 woman; RICHARD G. JAMES, an unmarried
 16 man; DWANE SEELE, an unmarried man;
 DENNIS O'CONNOR, an unmarried man;
 17 RICK EICHER, an unmarried man; RAY
 FITZGERALD, a married man; LARRY L.
 18 WALSTON, a married man; ROBERT
 TEAGUE and JUDI TEAGUE, husband and
 19 wife; GEORGE W. FUGMAN and ELSIE M.
 FUGMAN, husband and wife; LAVINA M.
 20 JUNG, a married woman; DOLORES M.
 MILLER, an unmarried woman; DENNIS M.
 21 LANG and JOICE A. LANG, husband and
 wife; CHARLES E. KILGORE and LORNA
 22 KILGORE, husband and wife;
 MARGUERITTE CURIN, an unmarried
 23 woman; CHRISTINE KNIGHT, a married
 woman; RONALD KNIGHT, an unmarried
 24 man; RICHARD SWINGLE and CORA
 SWINGLE, husband and wife; GARY
 25 FRANCHER and BARBARA FRANCHER,
 husband and wife; RITA TAYLOR, an
 26 unmarried woman; JESSIE E. BENNETT, an

NO. CV2007-005085

**DEFENDANTS' SETTLEMENT
 CONFERENCE MEMORANDUM**

(Assigned to the Honorable Bethany G.
 Hicks)

(Settlement Conference Judge Michael
 Ryan)

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1 unmarried woman; GENE R. KRZYCKI and
 2 MARJORIE KRZYCKI, husband and wife;
 3 ED WHITE and TERRI WHITE, husband and
 4 wife; DARLENE STEINER, a married
 5 woman; DORA RICH, an unmarried woman;
 6 LEW HANDELAND, an unmarried man;
 7 CLARENCE LAMERS and SHARI
 8 LAMERS, husband and wife; JANICE
 9 CHRISTO, a married woman; OSCAR R.
 10 FLORES, an unmarried man; JENNIAL
 11 MARTIN, an unmarried woman;
 12 GEORGIEANNA LANCIUCKI, an unmarried
 13 woman; JOAN PETERSON, a married
 14 woman; DORA REED, an unmarried woman;
 15 MARYANNE MILLER, an unmarried
 16 woman; DALE ADAM and THERESA
 17 ADAM, husband and wife; JAMES J.
 18 KIRKPATRICK, an unmarried man; EMILE
 19 DUFFY, a married woman; CHARLES LAIR
 20 and LELA LAIR, husband and wife; MARGIE
 21 STOCK, a married woman; JOHN
 22 CORMACK, a married man; LEE WALTER,
 23 a married man; WALTER STROMME, a
 24 married man; DEVERE STEVENSON and
 25 LOIS L. STEVENSON, husband and wife;
 26 BONNIE WILCOX, a married woman; ROY
 NELSON, a married man; SHARON ANTES,
 a married woman; DONALD L. HILL and
 NORMA L. HILL, husband and wife; ROGER
 JOHANSON and DIXIE JOHANSON,
 husband and wife; PAULINE PERMANN, a
 married woman; DAVID STOWE and TONI
 STOWE, husband and wife; LEROY
 LANOUE and DONNA LANOUE, husband
 and wife; PAUL WICHERTS, an unmarried
 man; JAMES DANIELS and LOLA
 DANIELS, husband and wife; CHARLES
 RADCLIFF and VIRGINIA RADCLIFF,
 husband and wife; JAMES DORRANCE, a
 married man; JAMES PEARSON and JANE
 PEARSON, husband and wife; BILL
 VERNON and DORIS VERNON, husband
 and wife; HARVEY BELL, an unmarried man;
 WILLIAMS SCHUMACHER and LUCY
 SCHUMACHER, husband and wife; JAMES
 MASCORELLA and LOISMASCORELLA,
 husband and wife; GERALD LENKA and
 MARCY LENKA, husband and wife.

Plaintiffs,

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v.

APACHE WELLS HOMEOWNERS ASSOCIATION, INC., an Arizona non-profit corporation; APACHE WELLS COUNTRY CLUB, INC., an Arizona non profit corporation; BRIAN JOHNSON and Susan JOHNSON, husband and wife; THOMAS H. FINGER, an unmarried man; MARVIN A. STOLL and MARY E. STOLL, husband and wife; GORDON WOOD and LINDA WOOD, husband and wife; TONY PASULA and VAL PASULA, husband and wife; MARVIN A. LARSON and RUTH J. LARSON, husband and wife; JAMES BONNELL and JOCILLE BONNELL, husband and wife; WILLIAM F. GREGORY and JOANNE GREGORY, husband and wife; ROBERT RESSETT and BERNYCE RESSETT, husband and wife; IRV ST. JOHN and PAT ST. JOHN, husband and wife; and L.J. MILLER and JOYCE MILLER, husband and wife,

Defendants.

Defendant hereby submit their Settlement Conference Memorandum.

I. FACTS

Apache Wells is one of the oldest retirement communities in the Phoenix metro area. The community began in the mid 1960's as a mobile home park. Over time, the community has grown to over 1400 homes, that are a mix of mobile homes and traditional custom and semi-custom homes. Apache Wells Country Club has been in existence almost as long as the Apache Wells Homeowners Association. The golf course owned by the Country Club is located in the subdivision, and many of the homes are directly adjacent to the golf course. The Country Club is made up of 485 memberships, which are all individuals that live in Apache Wells. The Country Club memberships are not connected to particular lots, rather, anybody who owns a home in Apache Wells can

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1 be a Country Club member, if one of the 485 memberships is available, and they want to
2 purchase the membership.

3 This lawsuit arises from a proposal for the Association to acquire certain
4 property and to construct a community center for the benefit of all members of the
5 Association. The planning for the community center project began in 2005. The
6 Association retained the services of Dr. Wendy Hultzman, who is a land use professor at
7 Arizona State University. Dr. Hultzman conducted a comprehensive analysis of the
8 community and issued a detailed report. As a result of that study, the Association formed
9 the Long Range Planning Committee to explore the implementation of Dr. Hultzman's
10 recommendations. The Long Range Planning Committee's task was to investigate options
11 for the Association regarding a community center. Currently, the Association does not
12 have a community center.

13 The Long Range Planning Committee held over 55 meetings during the two
14 years this project was being planned. All homeowners were invited to attend so that the
15 Committee could get input from the residents. The Association also held 10 or more
16 "town hall" style meetings that were widely publicized and well attended. A detailed
17 Power Point presentation was made at several of the town hall meetings. The Association
18 held four open joint Board Meetings with the Country Club's Board of Directors, thirteen
19 general homeowners meetings, in addition to over twenty regulatory Board Meetings.
20 The community center project was discussed at every one of those meetings. Every
21 meeting was widely publicized and open to every member.

22 In addition to the above referenced meetings, the Board of Directors decided
23 to conduct a series of 54 smaller meetings in member's homes. Those meetings are
24 commonly referred to as "coffee parties". Again, the purpose of those meetings was to
25 inform the members of the Association of the plan to build a community center, and to
26 seek input from the members. Over 800 people attended these coffee meetings. Input

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1 from the members was paramount, as the Board wanted to make certain that the proposed
2 project had the support of the community. If the project was not supported by the
3 community, a vote on the issue would have been a waste of time.

4 In addition to the dozens of open meetings held, the Association also
5 provided mailings to all members regarding the project. Furthermore, information
6 regarding the project was routinely provided in the newsletter of the Association.

7 In order to acquire the property and build the community center, the
8 Association needed to raise money for the project by way of a special assessment. The
9 vote for the special assessment was widely publicized and the voter turnout was 88% of
10 the eligible voters. The vote was held on February 21, 2007. The person in charge of the
11 counting of the ballots was Plaintiff Delores Miller. Ms. Miller has testified that the
12 outcome of the election was 644 yes votes and 594 no votes.

13 The applicable bylaw regarding special assessment votes states that:

14 **(1) Special Assessments shall be approved by a two-**
15 **thirds (2/3) vote of the Board at a duly called meeting at**
16 **which a quorum is present, and by the majority vote of the**
17 **residential unit owners at a special election called and**
18 **publicized for that specific purpose.**

19 The Board of Directors of the Association reads that provision to require a
20 majority of the votes cast at the special election, which is what happened. At the present
21 time, the Court in this matter has ruled that the provision requires the majority of all
22 eligible voters. Accordingly, the special assessment is not being collected at this time.

23 With respect to Plaintiffs' claim of a conflict of interest for the Board
24 Members that also are members of the Country Club, the reality is that the status of
25 certain Board Members as members of the Country Club was well known. The fact that
26 certain Board Members were also Country Club members was never concealed, and was
fully disclosed.

II. PLAINTIFFS' CLAIMS

1
2 Plaintiffs' Amended Complaint contains three Counts. Defendants' position
3 on these claims are as follows:

Declaratory Relief/Injunction

4
5 Defendants have conducted the affairs of the Association in accordance with
6 the applicable CC&R's, Bylaws, and State Law at all time relevant to this lawsuit. At the
7 present time, the claim for a permanent injunction appears to be moot, as Judge Hicks has
8 issued a minute entry ordering the injunction. In the event Judge Hick's ruling is reversed
9 by way of a Motion for Reconsideration or Appeal, Defendants will supplement this
10 portion of their disclosure statement.

Request for Documents

11
12 Over 1,000 documents have been produce so far. Plaintiffs have recently
13 served Defendant with a Request for Production. Defendants will continue to produce all
14 non-privileged documents that are required to be produced under the Rules of Civil
15 Procedure.

Breach of Fiduciary Obligation

16
17 Arizona has long accepted the "business judgment rule" with respect to
18 claims against members of Boards of Directors. Furthermore, in order to establish a claim
19 of breach of fiduciary obligation against the individual Defendants in this matter, the
20 standard is *gross negligence*. See *United Dairymen of Arizona v. Schugg*, 212 Ariz. 133,
21 128 P.3d 756 (2006).

22 Plaintiffs' claim that a recent Arizona Court of Appeals case, *Tierra*
23 *Ranchos Homeowners Association v. Kitchukov*, stands for the proposition that the
24 business judgment rule does not apply to Boards of Directors of homeowner associations.
25 Plaintiffs claim that the standard is not gross negligence, rather, the standard is
26

1 reasonable. Plaintiffs claim that in order to prevail on their claim for breach of
2 fiduciary obligation, they have the burden of proving that the acts of the Board were
3 unreasonable. Defendants have reviewed the *Tierra Ranchos* case and do not agree with
4 Plaintiffs' assessment of the case. Regardless, Defendants did act reasonably at all times
5 relevant to this lawsuit.

6 The former and current members of the Board of Directors did not breach
7 any duties owed to the Apache Wells Homeowners Association. The affairs of the
8 Association have been conducted by way of open Board meetings. The minutes for each
9 of those meetings were provided to all members of the Association.

10 The allegations of failing to disclose a conflict of interest have no legal or
11 factual basis. Certain members of the Association's Board of the Directors are also
12 members of the Country Club. Those Board members' status as Country Club members
13 was not hidden and was well known. The golf course and country club are located
14 completely within the Apache Wells Association.

15 III. DAMAGES

16 Damages are a complicated issue in this matter because most, if not all, of
17 this claims being made by Plaintiffs sound in equity. At this point, Plaintiffs have
18 prevailed on a portion of their claims as they relate to the interpretation of the Bylaw
19 provision regarding the number of votes required for a special assessment to pass.
20 Plaintiffs are expected to demand payment of their attorneys' fees expended with respect
21 to that issue. Plaintiffs have not filed a fee application with respect to that issue,
22 therefore, the billings have not be disclosed.

23 The remaining breach of fiduciary obligation claims, which have been the
24 subject of the majority of the discovery conducted to date also will also likely result in an
25 attorneys' fee award for the prevailing party.

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1 **IV. SETTLEMENT DISCUSSIONS**

2 There have not been any settlement discussions since this lawsuit was filed.
3 Plaintiffs did request that that Association refrain from collecting the special assessment
4 and moving forward with the building project. The Association agreed to delay the
5 collection of the special assessment for a time, and then decided to move forward. Judge
6 Hicks' ruling on Plaintiffs' Motion for Summary Judgment invalidated the vote on the
7 special assessment, therefore, it has not been collected. Since the special assessment is
8 required for the building project, the proposed Community Center Project has not moved
9 forward.

10 The building project involved an Agreement in Principal with the Country
11 Club. The Country Club currently owns the building and land at the location of the
12 proposed Community Center. The Agreement in Principal involved the sale of the land
13 and building to the Association. In light of the special assessment being invalidated, the
14 Association will not be able to comply with the Agreement in Principal. The Country
15 Club's position on this issue has not been decided. On information and belief, the
16 Country Club is likely to move forward with a project of some type that will not involve
17 the Association. If that happens, the Association will be unable to construct a Community
18 Center at the current location. There are no feasible alternative locations for a
19 Community Center.

20 **V. LIKELY VERDICT**

21 Judge Hicks has already ruled that the special election did not obtain enough
22 votes for the special assessment to pass. The Association is in the process of deciding if
23 an appeal will be filed, as Judge Hicks has issued an injunction, which can be appealed as
24 a matter of right. Judge Hicks' ruling has not been reduced to a signed order, therefore,
25 the 30 day time period to file an appeal has not started to run.
26


1 With respect to the remaining claims, Defendants' position is that the likely
2 verdict will be in favor of the Defendants, as Plaintiffs will not meet their burden of proof
3 regarding the breach of fiduciary obligation claims.

4 **VI. CONCLUSION**

5 Defendants are prepared to participate in this settlement conference in good
6 faith. Defendants are willing to evaluate a reasonable proposal from Plaintiffs that is in
7 the best interest of the community.

8 DATED this 17th day of October, 2007.

9 JONES, SKELTON & HOCHULI, P.L.C.

10
11 By 
12 Michael A. Ludwig
13 J. Gary Linder
14 2901 North Central Avenue, Suite 800
15 Phoenix, Arizona 85012
16 Attorneys for Defendants Apache Wells
17 Homeowners Association, Inc., Johnson,
18 Stoll, Wood, Pasula, Larson, Bonnell,
19 Gregory, Resset, St. John, Miller and
20 Finger

21 Original/Copy of the foregoing faxed/mailed
22 this 17th day of October, 2007 to:

23 Michael J. Ryan
24 BROENING OBERG WOODS & WILSON
25 P.O. Box 20527
26 Phoenix, Arizona 85036
Settlement Conference Judge

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