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9 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
10 **IN AND FOR THE COUNTY OF MARICOPA**

11 KEN DOSHIER, et al.,

12 Plaintiffs,

13 v.

14 APACHE WELLS HOMEOWNERS
15 ASSOCIATION, INC., an Arizona nonprofit
16 corporation, et al.,

17 Defendants.

No. CV2007-005085

**PLAINTIFFS' APPLICATION FOR
PRELIMINARY INJUNCTION**

(Assigned to the Hon. Bethany Hicks)

18 Plaintiffs, 94 homeowners in the Apache Wells community, hereby request the Court enter
19 a preliminary injunction, pursuant to Rule 65 of the Arizona Rules of Civil Procedure, enjoining
20 Defendant, Apache Wells Homeowners Association, Inc. (the "Association"), from assessing
21 members of the Apache Wells community, including Plaintiffs, the \$6,020.00 special assessment
22 invalidly and improperly "approved" by the Association on February 21, 2007, and enjoining the
23 Association from taking any action pursuant to the agreement reached with Defendant Apache
24 Wells Country Club, Inc. (the "Country Club"). As set forth below, the special assessment and
25 agreement reached with the Country Club are invalid as a matter of law. The Association did not
26 obtain the required membership approval to impose the special assessment, and any agreement
reached with the Country Club is void due to the Directors' conflicts of interest and the inherent
unfairness resulting therefrom. Further, the Board of Directors engaged in deceptive and illegal

1 election practices to “pass” the special assessment, thereby negating the validity of the vote that
2 occurred.

3 Plaintiffs petition this Court for a preliminary injunction against the Association, to be
4 granted before September 4, 2007, which is the date the Association has indicated it will begin
5 collection of the special assessment. Plaintiffs ask, pursuant to Rule 65(a)(2), that this Court
6 schedule a hearing on Plaintiff’s request for a preliminary injunction as set forth in the Motion for
7 Expedited Evidentiary Hearing, filed contemporaneously herewith. This Application is supported
8 by the Amended Complaint filed by Plaintiffs, the accompanying Affidavits, the within
9 Memorandum, the pending Motion for Partial Summary Judgment, and the entire Court file of
10 record.

11 **MEMORANDUM**

12 **I. INTRODUCTION**

13 Plaintiffs reside in a community known as Apache Wells, which consists of approximately
14 1,412 units and is located in Mesa, Arizona. Affidavit of Judi Teague, incorporated by reference
15 and attached hereto as **Exhibit A**, ¶ 2. As owners of units in the community, Plaintiffs are
16 mandatory members of the Association. The Association was established by, and is bound to
17 adhere to, the community’s governing documents, including Covenants, Conditions and
18 Restrictions (CC&Rs) and Bylaws.

19 The Apache Wells community is unique in that within the community, two entities exist
20 and operate. The Country Club, a separate and distinct entity from the Association, consists of
21 485 members, which own and control a golf course in the community, and own a building that
22 includes a golf pro shop, restaurant, bar and meeting hall. **Exhibit A**, ¶ 3.

23 Plaintiffs initiated this lawsuit due to significant concerns regarding the management of the
24 Association, which is carried out through the Association’s Board of Directors. Plaintiffs believe
25 the Association has repeatedly sought to raise funds in the community without honoring the
26

1 governing documents or Arizona law, consistent with the Directors' goal in transforming the
2 community into an upscale resort. **Exhibit A, ¶ 4.**

3 The Director Defendants began charging a transfer fee to new members in the amount of
4 \$950.00. **Exhibit A, ¶ 5.** The transfer fee increase has been ruled invalid by an Administrative
5 Law Judge, but the issue is currently on appeal before the Honorable Margaret Downie, at Case
6 Number LC2007-000189. As described by Plaintiff Walter Stromme and Administrative Law
7 Judge Kowal in that related case, the Association's transfer fee increase is arbitrary, unreasonable,
8 and contrary to Arizona law. A true and accurate copy of the Administrative Law Judge Decision
9 is incorporated by reference and attached hereto as **Exhibit B.**

10 The Association has collected over a hundred thousand dollars resulting from the invalid
11 transfer fee. **Exhibit A, ¶ 5.** Still, the Association has consistently raised the general assessment
12 by ten percent (10%) each year. **Exhibit A, ¶ 6.** Moreover, the Association has continued to
13 collect the transfer fee in spite of the Administrative ruling, and in spite of the fact that it has not
14 obtained a stay of that ruling. **Exhibit A, ¶ 6.** The Association claims it needs to collect the
15 transfer fee because of financial hardship, yet the Association has continued to expend significant
16 sums on seemingly unnecessary items.

17 **II. THE HISTORY OF THE \$8.5 MILLION DOLLAR PROJECT**

18 The Apache Wells community is comprised mostly of mobile homes. **Exhibit A, ¶ 8.** In
19 recent years, "stick built" homes have become more common, leading to a vast variety of homes
20 in the community that range from low income mobile homes to upscale housing. **Exhibit A, ¶ 8.**

21 Some members of the Association are also members of the Country Club, which provides several
22 benefits, such as access to the golf course.

23 Historically, the Association's Board of Directors has been predominantly comprised of
24 non-Country Club members. **Exhibit A, ¶ 9.** In recent years, however, the Board of Directors
25 changed such that Country Club members became the majority. **Exhibit A, ¶ 9.** The Country
26 Club therefore gained control of the Association's Board of Directors. Along with this control

1 came the effort to cause the Apache Wells community to assume the burden of the Country Club's
2 facilities. **Exhibit A**, ¶ 9.

3 Most members of the Association's Board of Directors (the individual Defendants herein)
4 are members of the Country Club. Prior to and during the events at issue in this matter, members
5 of the Association's Board of Directors served on the Country Club's Board of Directors.
6 **Exhibit A**, ¶ 10. As Country Club members, the individual Defendants have personal and
7 pecuniary interests in any transaction involving the Country Club.

8 At the heart of this dispute is the Directors' claim that they are authorized to impose an
9 \$8.5 million dollar special assessment upon Apache Wells members. The special assessment will
10 fund the replacement of the Country Club pro shop, bar and restaurant.

11 The Country Club, as the current owner of the Country Club facility, bears all
12 responsibility in maintaining the building, paying taxes for the building, and taking care of any
13 other expenses that may arise associated with property ownership. **Exhibit A**, ¶ 11. The Country
14 Club has been negligent in maintaining their facility presumptively due to financial difficulties.
15 The financial difficulties of the Country Club led to the Association providing "gifts" to the
16 Country Club by imposing charges upon Association members. The Defendant Directors decided
17 that \$100.00 of each transfer fee collected by the Association would be "gifted" to the Country
18 Club. **Exhibit A**, ¶ 11. The Country Club approached the Association for funds several times in
19 the past. See Transcript of Administrative Hearing, relevant portions of which are attached hereto
20 as **Exhibit C**, at 95:5-12.

21 The Country Club's failure to maintain its facility led to general consensus in the
22 community that some degree of renovation was needed. **Exhibit A**, ¶ 12. The Director
23 Defendants, consistent with their plan to transform the community, saw this consensus as an
24 opportunity to get a brand new facility that would be far more luxurious than the current facility.
25 The Association's Board of Directors, comprised mostly of Country Club members, felt it was
26 unfair for the Country Club "to shoulder the entire cost of providing a new and better facility."

1 Accordingly, as early as 2001, the Association's Board of Directors began negotiating an
2 agreement with the Country Club whereby the Association would take title to the Country Club
3 facility and then build new facilities on that property, which would be available for use by both
4 Association and Country Club members. See February 19, 2001 letter from Country Club and
5 Association, attached hereto as **Exhibit D**.

6 The proposal advanced in 2001 is essentially identical to the current \$8.5 million project.
7 See Deposition Llewellyn ("Bing") Miller, attached hereto as **Exhibit E**, 17:6-11. At that time,
8 however, the Directors considered having the Country Club and Association "share in the
9 construction or renovations with an aim to provide the maximum benefit to both." **Exhibit D**.
10 Nevertheless, when put to a vote, the homeowners in Apache Wells voted against the proposal.
11 **Exhibit A**, ¶ 13.

12 The Directors never gave up on their plan to build the new, large and luxurious facility that
13 would include a restaurant, bar, golf pro shop and meeting hall. In an effort to obtain
14 homeowners approval on their second try, the Directors decided to describe the proposed changes
15 in a false light to overcome voter objections. In 2006, the Directors again proposed a project
16 whereby the Association would take title to the Country Club facility and build new facilities that
17 could be used by both Country Club and Association members. **Exhibit A**, ¶ 14. The cost to the
18 Association is \$8.5 million, and the only cost to the Country Club is the cost of its land, which
19 has been valued at approximately \$650,000. Accordingly, the Association is contributing
20 approximately fourteen times more than the Country Club to a facility was the sole responsibility
21 of the Country Club. **Exhibit A**, ¶ 14.

22 Although the Directors for the Association had a fiduciary duty to act in the best interest of
23 the Association, they negotiated an agreement that substantially favored the Country Club to the
24 significant detriment of the Association. The agreement with the Country Club results in a facility
25 that was previously a 100% burden of the Country Club becoming a 100% burden of the
26

1 Association, all while the Association pays fourteen times more than the Country Club for the new
2 facility even though the day to day use of the facility does not change. **Exhibit A**, ¶ 15.

3 **III. CAMPAIGNING FOR AN \$8.5 MILLION DOLLAR PROJECT**

4 In an effort to finance the transaction with the Country Club, the Association's Board of
5 Directors sought to impose a special assessment upon Association members in the amount of
6 \$6,020.00 each. The Country Club members, on the other hand, have no assessment
7 responsibility in financing the transaction and instead simply reap the benefits of brand new
8 facilities. See AWCC Calculations, attached hereto as **Exhibit F**. The Board of Directors, as
9 members of the Country Club, therefore save substantial money personally by spreading the costs
10 over the entire Association, as the Country Club has approximately one-third of the members the
11 Association has. More specifically, if the Country Club bore the costs of building the new
12 facilities, the cost would be over \$17,500.00 per member, as opposed to the \$6,020.00 cost if the
13 entire Association pitches in. **Exhibit A**, ¶ 16. This fact was not lost in the campaign to Country
14 Club members. The Country Club's President warned in a letter sent to each member that if they
15 voted "no" in the Association special assessment election, they would have to pay much than
16 \$6,020. A true and accurate copy of the Country Club's February 15, 2007 letter is attached
17 hereto as **Exhibit G**.

18 The Association's Board of Directors undertook significant effort to obtain the votes
19 needed to impose the special assessment. The Directors refused to disclose the factual details
20 relating to the transaction with the Country Club to Association members, yet consistently
21 campaigned for the special assessment by claiming it would be in the Association's best interest.
22 **Exhibit A**, ¶ 17. The Directors provided only that information they felt favored their project,
23 engaged in a "media blitz," and concealed all information that could be perceived as having a
24 negative impact on the project's success. **Exhibit A**, ¶ 17. The Directors concealed any facts
25 that demonstrated that the agreement they were proposing resulted in a far better deal for the
26 Country Club than the Association. **Exhibit A**, ¶ 17.

1 Certain members of the Association, including Plaintiffs, made legitimate requests to
2 review documentation relating to the transaction with the Country Club, but the Board of
3 Directors repeatedly refused to provide anything in response. **Exhibit A**, ¶ 18. See also
4 February 25, 2007 letter to Association requesting records, attached hereto as **Exhibit H**;
5 Deposition Bing Miller, attached hereto as **Exhibit E**, at 74-75:12-18 (where Mr. Miller explains
6 homeowners requested documents such as maintenance cost evaluations, which were not provided
7 even though said documents exist). Plaintiffs therefore included a count in their Complaint
8 regarding their demand for documents, which the Association responded to by claiming in its
9 Answer that, "Plaintiffs sought information, and were provided with all information requested."

10 Plaintiffs have since confirmed through depositions, however, that the Association has in
11 fact withheld several records. Defendants Brian Johnson and Bing Miller testified about several
12 documents Plaintiffs have never been provided, including: a detailed estimate from Concord
13 Construction, two surveys of the property at issue, evaluations as to the cost of maintenance, bids,
14 proposals from three architects, various contracts, and letters, notes, memoranda and other
15 communications. See Bing Miller Deposition, **Exhibit E** hereto, 30:1-5, 35-36:22-14, 37:10-14,
16 54:16-17, 74:12-22, 86-87:21-16; Brian Johnson Deposition, attached hereto as **Exhibit I**, 21-
17 22:18-24, 24:8-11, 28:11-20.

18 Plaintiffs' efforts to obtain records from the Association have been significant. Not only
19 did Plaintiffs make requests for records prior to this lawsuit, but also multiple times thereafter
20 through counsel. **Exhibit A**, ¶ 20. As early as April 2007, Plaintiffs' counsel requested all
21 documentation from the Association concerning the proposed project. On April 26, 2007, the
22 Association produced certain documents to Plaintiffs' counsel, claiming all relevant documentation
23 was included. A review of the produced documents demonstrated, however, that virtually no
24 documents actually detailing to the proposed project were disclosed. The Association merely
25 produced numerous community newsletters, meeting minutes, and similar items that Plaintiffs had
26 already obtained.

1 On May 2, 2007, Plaintiffs' counsel formally requested the Association provide certain
2 documents, which appeared to be missing from the production. Plaintiffs' counsel also requested,
3 pursuant to A.R.S. § 10-11601 and § 33-1805, a list of homeowner names and addresses. See
4 May 2, 2007 letter, attached hereto as **Exhibit J**. On May 22, 2007, Plaintiffs' counsel sent
5 another letter to the Association again requesting documentation pursuant to A.R.S. § 33-1805.
6 See May 22, 2007, attached hereto as **Exhibit K**. Having received no response, again on June 5,
7 2007, Plaintiffs' counsel again requested the documentation from the Association pursuant to
8 A.R.S. § 33-1805. Plaintiffs' June 5, 2007 letter also repeated Plaintiffs' request for a list of
9 homeowner names and addresses. See June 5, 2007 letter, attached hereto as **Exhibit L**. Despite
10 Plaintiffs' repeated requests, the Association has refused to provide documentation critical to
11 evaluating the special assessment issue. The Association has failed to produce the requested
12 documentation, even though it is obligated to do so pursuant to at least two applicable statutes.

13 Pursuant to A.R.S. § 33-1805, the Association is required produce documents upon request
14 of any member. As described above, however, the Association has repeatedly failed to respond to
15 Plaintiffs' requests for records. Although the Association has affirmatively represented to the
16 Court that it has provided all documents requested by Plaintiffs, yet its own Directors made it
17 clear at their depositions that numerous documents have in fact been withheld. If the Directors
18 were truly acting in the best interest of the Association and the agreement with the Country Club
19 was fair to all involved, why are the Directors hiding so many documents?

20 Many of the homeowners that were denied access to information and documentation
21 concerning the Association's purported transaction with the Country Club, including the Plaintiffs
22 herein, became suspicious about the true facts relating to the special assessment. They therefore
23 formed a group called "Save Apache Wells," and registered that name with the Arizona
24 Corporation Commission. **Exhibit A**, ¶ 21. The Save Apache Wells group distributed
25 information regarding the special assessment, and urged voters to vote "No" in the upcoming
26 election. **Exhibit A**, ¶ 21. Faced with growing opposition to their plan, the Board of Directors

1 caused purposely confusing signs to be posted in the community that read "Save Apache Wells -
2 Vote Yes." See Bing Miller Deposition, **Exhibit E** hereto, at 107:21-23. The Association's
3 former President, Defendant Brian Johnson, prominently displayed one such sign on the front of
4 his home. A true and accurate copy of a photograph depicting Mr. Johnson's sign is incorporated
5 by reference and attached hereto as **Exhibit M**. At his deposition, despite the photographic
6 evidence, Mr. Johnson adamantly denied ever having such a sign, stating he believed they were
7 misleading. Deposition of Brian Johnson, attached hereto as **Exhibit I**, at 172-173:17-2.

8 Plaintiffs submitted a written complaint to the Association regarding the misleading and
9 inappropriate signs. See February 9, 2007 letter, attached hereto as **Exhibit N**. In response, the
10 Association's current President, Defendant Marvin Stoll, wrote to Plaintiffs and although he
11 admitted the signs were "subterfuge" and "confusing," refused to remove the signs claiming the
12 Association had no authority to do so. See February 11, 2007 letter, attached hereto as **Exhibit**
13 **O**. At the deposition of Bing Miller, however, Plaintiffs confirmed that the Board of Directors
14 had expressly approved of the signs they claimed they had no authority to regulate. **Exhibit E**,
15 107:21-23. Moreover, the CC&Rs for Apache Wells are absolutely clear that no signs are
16 allowed in the community unless approved by the Board.

17 The Association also consciously chose to control all media in the community, presenting
18 only the views of the Director Defendants to community members. The Director Defendants, as
19 described above, campaigned heavily for their proposed project, while concealing the fact that the
20 agreement significantly favored the Country Club over the Association. Without allowing
21 opponents the opportunity to respond, the Director Defendants, through Association media, called
22 opponents liars, destructive forces in the community, and numerous other insults and accusations.
23 **Exhibit A**, ¶ 24. One of the Directors, Brian Johnson, testified that he believes it was
24 permissible for the Association to conduct an election whereby only favorable opinions and
25 information about the project are presented in the community media, negative information and
26 opinions about the project are specifically excluded from the media, and any known opposition is

1 sharply criticized in community media without providing an opportunity for response. See
2 Deposition of Brian Johnson, **Exhibit I** hereto, 61-63:2-1, 78:6-21.

3 **IV. THE ELECTION**

4 Despite the lack of information provided to community members, and the confusion
5 regarding the special assessment, the Board of Directors proceeded to hold a vote regarding the
6 special assessment on February 21, 2007. The Directors created new rules and procedures for
7 this vote, significantly shortening deadlines such as the absentee ballot return date, shortening the
8 time for which voters have to cast their vote in person by six hours, and intimidating voters by
9 taking away their privacy and “hovering” over them while they cast their votes. See Affidavit of
10 Dolores Miller, attached hereto as **Exhibit P**, ¶ 9. Further, pursuant to Section 4.A and 4.B of
11 the CC&Rs, and Article X(D) of the Bylaws, a special assessment must be approved by a majority
12 of all unit owners.¹

13 Plaintiffs hereby incorporate by reference the arguments made in their Motion for Partial
14 Summary Judgment, and Reply. As described therein, even if the Association actually received
15 644 votes in favor of the special assessment, the Association did not receive the requisite majority
16 of the Apache Wells homeowners’ approval required to pass the special assessment.

17 In addition to the majority vote issue, Plaintiffs have discovered numerous irregularities
18 with the voting procedure that cast significant doubt on the number of votes the Association claims
19 to have obtained. **Exhibit P**, ¶ 14; see also Affidavit of Catherine Rauscher, attached hereto as
20 **Exhibit Q**, ¶ 5. A review of the ballots demonstrates however that several duplicate ballot
21 numbers exist, some ballots were not numbered at all, and some owners cast more than one vote,
22 among other things. **Exhibit P**, ¶ 4. In addition, the Association did not provide sufficient time
23 for absentee voters to submit their ballots. **Exhibit P**, ¶ 11. There are many ballots that cannot
24 be validated due to the irregularities described above. **Exhibit P**, ¶¶ 14, 15; **Exhibit Q**, ¶¶ 4, 5.

25 _____
26 ¹ This issue is the subject of Plaintiffs’ Motion for Partial Summary Judgment, which is currently pending before
the Court.

1 For nearly twenty years prior to the special assessment election, Plaintiff Dolores (“Dee”)
2 Miller served as Chair of the Apache Wells election committee, and in such capacity, Ms. Miller
3 oversaw all prior elections in the community. **Exhibit P**, ¶ 3. The Defendant Directors decided
4 unilaterally to significantly change the voting procedure for the special assessment, despite Dee’s
5 objections. **Exhibit P**, ¶ 9.

6 The Association sent absentee ballots to homeowners, many of whom reside in the
7 community on only a part-time basis, on February 3, 2007. The Association required that all
8 absentee ballots be received in the Apache Wells office by February 16, 2007, at 2:00 pm.
9 **Exhibit P**, ¶ 11. On more than one occasion, homeowners did not even receive the ballot in the
10 mail until it was too late to return it to the Association in time for the Association’s deadline. For
11 instance, one homeowner in the Apache Wells community received the ballot at her winter home
12 in Canada on February 12, 2007. **Exhibit P**, ¶ 11. Numerous other homeowners were shocked
13 when they turned in their absentee ballots in person, as they found the Association’s office
14 manager was not using a ballot box, but instead was simply putting all ballots in a drawer.
15 **Exhibit P**, ¶ 11.

16 Pursuant to A.R.S. § 33-1812, the Association was required to deliver absentee ballots to
17 homeowners at least seven days prior to the deadline for their receipt. Pursuant to A.R.S. § 10-
18 140, an absentee ballot is “delivered” when it is actually received by the person it is directed to.
19 Numerous absentee ballots were sent to Canada, although the time it takes to receive mail from
20 Canada is over one week.

21 The Association claims 644 votes were cast in favor of the special assessment, but only 604
22 ballots with a “yes” vote exist; there are 35 ballots with the same ballot number as at least 1 other
23 ballot; there are 23 ballots with no ballot number; there are 11 ballots with ballot numbers that do
24 not match any number on the Association’s roster; there is at least one instance where a non-
25 member signed the Association’s roster to vote for a member. **Exhibit P**, ¶ 14; **Exhibit Q**, ¶¶ 3,
26 4, 5.

1 As the Association claims only a 50-vote lead in its “pass” of the special assessment, the
2 above issues suggest the results of the special assessment election are invalid. The numerous
3 irregularities invalidate the legitimacy of the Association’s claimed results, such that the election
4 should be redone.

5 Perhaps most troubling to the homeowners is the fact that the Directors for the first time in
6 Apache Wells history would not allow votes to be cast by secret ballot, thereby taking away any
7 privacy the homeowner had traditionally enjoyed. When questioned about this issue at deposition,
8 Director Defendant Johnson explained that voters in Apache Wells have no right to privacy in
9 their vote. See Brian Johnson Deposition, **Exhibit I** hereto, 83-84:23-19. However, the only
10 reported case the undersigned counsel located that has addressed this issue holds otherwise. In
11 Chantiles v. Lake Forest II Master Homeowners Association, 37 Cal.App.4th 914, 45 Cal.Rptr.2d
12 1 (App. 1995), the California Court of Appeals held that voters in a homeowners association
13 election have a right to privacy in their vote that is subject to legal protection. The Court
14 explained that a homeowners association differs dramatically from a typical corporation, in that a
15 homeowners association is “a quasi-government entity paralleling in almost every case the
16 powers, duties, and responsibilities of a municipal government.” Id. at 922, 45 Cal.Rptr.2d at 5.
17 With these considerations in mind, the Court found that although statutory law did not expressly
18 afford confidentiality in voting,

19 Homeowner association elections may raise emotions as high or
20 higher than those involved in political elections. Under these
21 circumstances, a degree of privacy afforded to the electors in such
22 elections is desirable. Neighbors may cease to speak to each other if
23 it became publicly known that certain votes were cast. Voters may
24 be intimidated to vote in a certain way should their ballot be subject
25 to public scrutiny. Under these circumstances, the expectation of
26 privacy . . . gains credibility.

Id. at 924-25, 45 Cal.Rptr.2d at 6-7. In this case, the Association’s refusal to allow voters
privacy in their voting caused the problems the Chantiles Court feared.

1 Regardless of whether voters had a privacy right in casting their ballot, the way in which
2 the Association carried out the election was inherently unfair. As the facts set forth above
3 demonstrate, the Director Defendants confused voters, providing misleading information,
4 disseminated biased and skewed media, intimidated voters, and caused numerous problems
5 through their change of the voting procedures. Such actions are inconsistent with the
6 Association's duties to its members, which specifically include treating members fairly. See
7 RESTATEMENT (THIRD) PROPERTY; SERVITUDES, §§ 6.13, 6.14.

8 The Director Defendants owe fiduciary duties to Plaintiffs, which require "high standards
9 of honesty and fair dealing." Id. at § 6.14, cmt. b. These fiduciary duties entail acting with the
10 utmost good faith, with the utmost care, and with the utmost fairness to members in mind. See,
11 e.g., Ahwatukee Custom Estates Management Association, Inc. v. Turner, 196 Ariz. 631, P.3d
12 1276 (App. 2000); Nahrstedt v. Lakeside Village Condominium Association, Inc., 8 Cal.4th 361,
13 878 P.2d 1275, 33 Cal.Rptr.2d 63 (1994); Ironwood Owners Association IX v. Solomon, 178
14 Cal.App.3d 766, 224 Cal.Rptr.18 (App. 1986); Riss v. Angel, 131 Wash.2d 612, 934 P.2d 669
15 (1997); Kenyon v. Polo Park Homeowners Association, Inc., 907 So.2d 1226 (App. 2005). The
16 Directors' conduct in carrying out the special assessment election in an unfair, skewed, and
17 dishonest manner in no way suffices. The Directors' election practices constitute a breach of the
18 Directors' fiduciary duties.

19 Faced with challenges regarding these issues, the Director Defendants have consistently
20 explained that traditional corporate law applies, such that their actions are of little or no legal
21 consequence. See, e.g., Brian Johnson Deposition, Exhibit I hereto, 83-84:25-19. However, the
22 law recognizes overwhelming differences between a homeowners association and an ordinary
23 business corporation. The Restatement describes three major differences, noting that these
24 differences create the need for greater judicial review. First, "the stakes of the association
25 members are generally much higher than those of shareholders in business corporations." Id.
26 The investment for a shareholder is financial only, while the investment for a member of a
homeowners association is that member's home, which is "often the largest single asset the

1 member owns, and which has personal and social significance far beyond the monetary value of
2 the asset.” Id. Second, a homeowners association has much more power over the individual
3 member than an ordinary business corporation. Id. Third, an individual’s home cannot be sold
4 as easily as shares of stock. Id.

5 **V. THE UNFAIR AGREEMENT WITH THE COUNTRY CLUB**

6 Plaintiffs have contested the validity of any agreement reached with the Country Club due
7 to the inherent unfairness to Association members. It is unfair for the Association members to
8 absorb all costs associated with facilities that will predominantly benefit Country Club members,
9 including the Board of Directors. **Exhibit A**, ¶ 26. The Board of Directors did not disclose this
10 conflict of interest to Association members, nor did they disclose their conflict resulting from the
11 pecuniary interest they have in this transaction. **Exhibit A**, ¶ 26.

12 As members of the Country Club, the individual Directors personally benefit from new
13 facilities such as a golf pro shop and restaurant, and financially benefit if more people share in the
14 cost of those new facilities. Accordingly, the Directors have a conflict of interest in the
15 transaction with the Country Club, thereby negating any presumption of good faith and shifting
16 the burden on Defendants to establish the agreement is fair to the Association.

17 The Arizona legislature has codified the requirement that homeowner association Directors
18 disclose any conflicts of interest in A.R.S. § 33-1811. The statute requires a Director to “declare
19 the conflict in an open meeting of the board before the board discusses or takes action on that
20 issue and that member may then vote on that issue.” § 33-1811 also enumerates the consequences
21 of failing to declare a conflict of interest. It expressly states, “[a]ny contract entered into in
22 violation of this section is *void and unenforceable*.” (Emphasis added). As the Directors of the
23 Association did not declare their conflicts in an open meeting, any agreement reached with the
24 Country Club is void and unenforceable. See Bing Miller Deposition, **Exhibit E** hereto, at 108:7-
12; Brian Johnson Deposition, **Exhibit I** hereto, at 110:12-19.

25 Beyond the plain language of A.R.S. § 33-1811, which by itself renders any agreement
26 with the Country Club void and unenforceable because the Directors did not declare their conflict

1 in an open meeting, common law conflict of interest analysis also requires any agreement be
2 declared void and unenforceable. Laws relating to director conflicts of interest arise from “the
3 prohibition against self-dealing that is inherent in a director’s fiduciary relationship” with the
4 corporation and its members, in this case the homeowners. Resolution Trust Corporation v.
5 Dean, 854 F.Supp. 626. 644 (D. Ariz. 1994). See also Tucson Federal Savings & Loan Ass’n v.
6 Aetna Investment Corp., 74 Ariz. 163, 172, 245 P.2d 423, 429 (1952) (holding that when
7 evaluating contracts resulting from director conflict of interest, courts will “scrutinize these
8 contracts very closely and will set them aside upon the slightest showing of unfairness to either
9 corporation.”) The United States Supreme Court explained the serious nature of director conflict
10 of interest in the early case of Geddes v. Anaconda Copper Mining Co., 254 U.S. 590, 41 S.Ct.
11 209 (1921). The Geddes Court held that director conflict of interest is “regarded as jealousy by
12 the law . . . and where the fairness of such transactions is challenged the burden is upon those
13 who would maintain them to show their entire fairness.” Id. at 599, 41 S.Ct. at 212. To be
14 certain, a showing of personal interest in the transaction at issue is all that is required to
15 demonstrate a conflict of interest exists. Resolution Trust Corporation, 854 F.Supp. at 644.
16 Once the conflict of interest is shown, “the business judgment rule does not apply, and the burden
17 shifts to the defendant to show that the transaction is fair and serves the best interests of the
18 corporation.” Id.

19 Although no Arizona case has discussed the conflict of interest issue as it pertains to
20 homeowners associations specifically, Courts of other jurisdictions have recognized the greater
21 need for judicial scrutiny in the homeowners’ association context. For instance, in Raven’s Cove
22 Townhomes, Inc. v. Knuppe Development Company, Inc., 114 Cal.App.3d 783, 800, 171
23 Cal.Rptr. 334, 343 (Cal. App. 1981), the Court noted the need for “closer judicial scrutiny” in
24 the context of homeowner association conflict of interest. The Court noted that the traditional
25 fiduciary duties directors of corporations owe to members “take on a greater magnitude in view of
26 the mandatory association membership required of the homeowners.” Id. at 801, 171 Cal.Rptr. at

1 344. Because the directors in that case acted with a conflict of interest, they were personally
2 liable for breach of fiduciary duty.

3 **VI. PLAINTIFFS ARE ENTITLED TO AN INJUNCTION**

4 A party seeking a preliminary injunction must establish (1) a likelihood of success on the
5 merits; (2) the possibility of irreparable injury not remediable by damages; (3) a balance of
6 hardships in that party's favor; and (4) public policy favoring the requested relief. Shoen v.
7 Shoen, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App.1990). This burden can be established by
8 showing: (1) a combination of probable success on the merits and a possibility of irreparable
9 injury, or (2) the existence of serious questions going to the merits and that the balance of
10 hardships tips sharply in its favor. Goto.com, Inc. v. Walt Disney Co., 202 F.3d 1199, 1204-05
11 (9th Cir.2000), citing Sardi's Rest. Corp. v. Sardie, 755 F.2d 719, 723 (9th Cir.1985).

12 Regardless of which evaluation the Court undertakes, Plaintiffs are entitled to an
13 injunction. As described in detail above, Plaintiffs' probable success on the merits is great.
14 Moreover, Plaintiffs will be irreparably harmed by the Association's imposition of the \$6,020.00
15 special assessment. Many members of the Apache Wells community, including some Plaintiffs,
16 are financially unable to make the payment required by the Association. If the special assessment
17 is not paid, the Association will institute collection actions against Plaintiffs. The Association has
18 threatened to report any non-payment to credit agencies in an effort to purposefully damage the
19 credit ratings of anyone that elects not to pay

20 A damage award could not suffice in this situation since Plaintiffs, as homeowners in the
21 Association, will be forced, in essence, to pay their own damages to themselves. That is, if the
22 Association is assessed damages through a money judgment, it will undoubtedly need to raise
23 funds to pay the judgment. The only way the Association can raise funds is by assessing its
24 members. As such, if damages are awarded, Plaintiffs will ultimately end up paying for the
25 damages inflicted upon them by the Association.

26 When serious questions exist about the merits of a claim and the balance of hardships
favors the party requesting an injunction, the injunction should issue. Goto.com, Inc. v. Walt

1 Disney Co., 202 F.3d 1199, 1204-05 (9th Cir.2000), citing Sardi's Rest. Corp. v. Sardie, 755
2 F.2d 719, 723 (9th Cir.1985). In this case, the above-identified issues demonstrate that at a
3 minimum, serious questions exist about the merits of Plaintiffs' claims. Accordingly, the Court
4 should then consider the balance of hardships, which weighs heavily in Plaintiffs' favor.

5 The governing documents, along with Arizona law, were designed to protect and benefit all
6 members of the Association. The Defendants' failure to abide by these instruments, as well as
7 applicable law, has become a matter threatening the entire Association, its members and the
8 welfare of all persons in the Apache Wells community. If Defendants are permitted to proceed
9 with collection and construction, the risk of economic waste is significant. Even if Plaintiffs
10 ultimately prevail in this matter, the funds expended upon construction may be a total loss, which
11 will ultimately come out of Plaintiffs' pockets. The only way Plaintiffs can avoid harm is by
12 maintaining the status quo, as any subsequent decision in Plaintiffs' favor after the Association has
13 collected the special assessment and began construction shall result in damages to the Association
14 and its members, including Plaintiffs. On the other hand, maintaining the status quo causes the
15 Defendants no immediate hardships. Collection of the special assessment has not yet begun, nor
16 has construction of the new facilities. Defendants lose nothing by the issuance of an injunction.
17 Defendants will not lose the use of the current facility, but instead will simply not have a new,
18 more luxurious facility.

19 While Plaintiffs recognize the requirement that a bond must be posted, Plaintiffs submit
20 that in this matter, a bond of only \$5,000.00 is appropriate in this case. There is no immediate
21 need for the Association to collect the special assessment, or engage in construction of facilities
22 pursuant to the transaction with the Country Club. The Association has been functioning without
23 the special assessment and new facilities for several years without difficulty. If the Court were to
24 ultimately rule against Plaintiffs, the Association would still get the full benefit of the special
25 assessment and Country Club transaction. Although no bond is required at all for a preliminary
26 injunction to be enforceable (see Matter of Wilcox Revocable Trust, 192 Ariz. 337, 341, 965 P.2d
71, 75 (App. 1998), Plaintiffs stand ready to post a "reasonable" bond amount as set forth in Rule

1 65 of the Arizona Rules of Civil Procedure, which Plaintiffs contend does not exceed \$5,000.00
2 in light of the circumstances of this case.

3 **VII. CONCLUSION**


4 Rather than act in the best interest of the Association and its members as required by their
5 fiduciary duties, Defendants negotiated an agreement with the Country Club that results in the
6 burden of providing facilities for both entities' use shifting from one extreme to the other. The
7 agreement requires the Association contribute fourteen times more than the Country Club for a
8 facility that will be used in the *exact same manner* as the current facility is used today. Such a
9 result is in direct contradiction of the duties to act with the utmost good faith, with the utmost
10 care, with the utmost honesty, and in the best interests of the Association, which duties
11 Defendants owed to Plaintiffs and all members of the Association. Plaintiffs are not opposed to
12 sharing facilities, but instead believe the shift from one extreme to the other is inequitable and
13 unfair. Why is it that Defendants are opposed to an equitable sharing of facilities?

14 For reach of the foregoing reasons, Plaintiffs respectfully request a preliminary injunction
15 issue, enjoining Defendants from imposing the special assessment and/or taking any action
16 relating to the transaction with the Country Club.

17 DATED this 9th day of August, 2007.

18 **CHEIFETZ IANNITELLI MARCOLINI, P.C.**

19
20 By


21 Steven W. Cheifetz
22 Melanie C. McKeddie
23 Attorneys for Plaintiffs

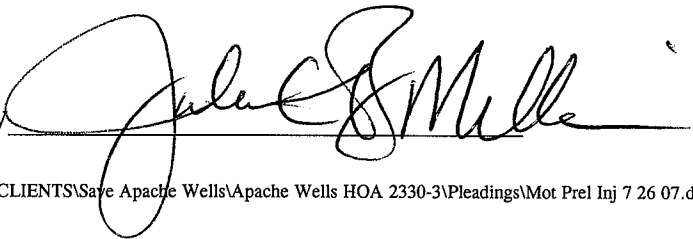
24 ORIGINAL of the foregoing hand-delivered
25 this 9th day of August, 2007 to:

26 The Honorable Bethany Hicks
MARICOPA COUNTY SUPERIOR COURT
101 West Jefferson, ECB-811
Phoenix, Arizona 85003

1 COPY of the foregoing mailed
2 this 9 day of August, 2007 to:

3 J. Gary Linder, Esq.
4 JONES, SKELTON & HOCHULI, P.L.C.
5 2901 North Central Avenue, Suite 800
6 Phoenix, Arizona 85012
7 Attorneys for Defendants

8 By



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9 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
10 **IN AND FOR THE COUNTY OF MARICOPA**

11 **KEN DOSHIER, et al.,**

12 Plaintiffs,

13 v.

14 **APACHE WELLS HOMEOWNERS**
15 **ASSOCIATION, INC.,** an Arizona nonprofit
16 corporation, et al.,

17 Defendants.

No. CV2007-005085

**PLAINTIFFS' MOTION FOR
EXPEDITED EVIDENTIARY
HEARING ON PLAINTIFFS'
APPLICATION FOR AN INJUNCTION**

18 Plaintiffs hereby move for an expedited hearing to issue a Preliminary Injunction against
19 Defendants, as described in the Application for Injunction, filed contemporaneously herewith. As
20 set forth in Plaintiffs' Application, the Association intends to begin collection of the \$6,020.00 per
21 member special assessment at issue in this litigation on September 4, 2007. As Plaintiffs' request
22 for an injunction concerns the special assessment, a determination as to its validity is required
23 before September 4, 2007.

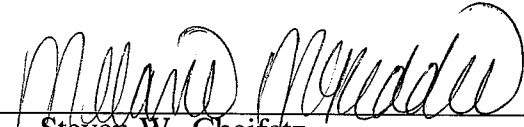
24 In the event a hearing and decision as to Plaintiffs' Application for a Preliminary Injunction
25 does not occur prior to September 4, 2007, upon information and belief, the Association will
26 collect the special assessment and begin construction activities in the community. As set forth in
Plaintiffs' Application, if construction activities commence, Plaintiffs will lose any ability to
meaningfully challenge the Association's actions. As homeowners in the Association, in the event

1 Plaintiffs prevail but construction has commenced, Plaintiffs will suffer any damages owed by the
2 Association. The Association obtains its funding, including funding to pay for damages, from its
3 members.

4 For each the foregoing reasons, and those set forth in Plaintiffs' Application for
5 Preliminary Injunction, it is respectfully submitted that Plaintiffs' Motion for an Expedited
6 Hearing be granted.

7 DATED this 9th day of August, 2007.

8 CHEIFETZ IANNITELLI MARCOLINI, P.C.

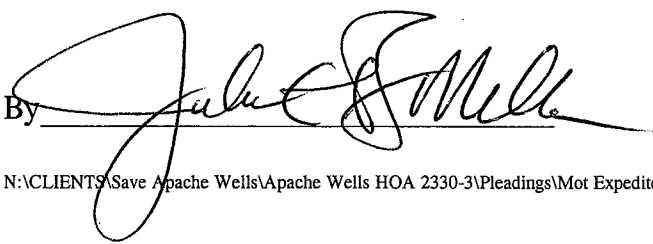
9
10 By 
11 Steven W. Cheifetz
12 Melanie C. McKeddie
13 Attorneys for Plaintiffs

14 ORIGINAL of the foregoing hand-delivered
15 this 9th day of August, 2007 to:

16 The Honorable Bethany Hicks
17 MARICOPA COUNTY SUPERIOR COURT
18 101 West Jefferson, ECB-811
19 Phoenix, Arizona 85003

20 COPY of the foregoing mailed
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24 2901 North Central Avenue, Suite 800
25 Phoenix, Arizona 85012
26 Attorneys for Defendants

By 

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11 **KEN DOSHIER, et al.,**

12 Plaintiffs,

13 v.

14 **APACHE WELLS HOMEOWNERS**
15 **ASSOCIATION, INC., an Arizona nonprofit**
16 **corporation, et al.,**

17 Defendants.

No. CV2007-005085

ORDER

18 **THIS MATTER**, having come before the Court on Plaintiffs' Motion for Expedited
19 Evidentiary Hearing on Plaintiffs' Application for an Injunction, and good cause appearing,

20 **IT IS HEREBY ORDERED** scheduling an evidentiary hearing on Plaintiffs' Application
21 for an Injunction on the _____ day of _____, 2007 at _____ a.m./p.m.

22 DATED this _____ day of August, 2007.

23 _____
24 The Honorable Bethany Hicks
25 Judge of the Superior Court

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9 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
10 **IN AND FOR THE COUNTY OF MARICOPA**

11 KEN DOSHIER, et al.,

12 Plaintiffs,

13 v.

14 APACHE WELLS HOMEOWNERS
15 ASSOCIATION, INC., an Arizona nonprofit
16 corporation, et al.,

17 Defendants.

No. CV2007-005085

**PLAINTIFFS' MOTION TO EXCEED
PAGE LIMITATION**


18 Plaintiffs, pursuant to Maricopa County Superior Court Local Rule 3.2(f), request leave of
19 the Court to exceed the limitation of 15 pages for their Application for Preliminary Injunction by
20 four pages. Plaintiffs seek the additional pages so that they may fully brief the Court on the
21 complex factual issues relevant to their requested relief, as well as the legal issues in dispute.

22 Plaintiffs respectfully request that the Court allow them to file their Application in excess
23 of 15 pages, and that the Court fully consider same.

24 DATED this 9th day of August, 2007.

CHEIFETZ IANNITELLI MARCOLINI, P.C.

By



Steven W. Cheifetz
Melanie C. McKeddie
Attorneys for Plaintiffs

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12 Plaintiffs,

13 v.

14 APACHE WELLS HOMEOWNERS
15 ASSOCIATION, INC., an Arizona nonprofit
16 corporation, et al.,

17 Defendants.

No. CV2007-005085

ORDER

18 **THIS MATTER**, having come before the Court on Plaintiffs' Motion to Exceed Page
19 Limitation, and good cause appearing,

20 **IT IS HEREBY ORDERED** Plaintiffs may exceed the page limitation for their
21 Application for Injunction by four pages, and the Court will consider the Application for
22 Injunction submitted by Plaintiffs in its entirety.

23 DATED this _____ day of August, 2007.

24 _____
25 The Honorable Bethany Hicks
26 Judge of the Superior Court