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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
ASSOCIATION, INC., an Arizona nonprofit
corporation, et al.,

15 Defendants.

No. CV2007-005085

**SETTLEMENT CONFERENCE
MEMORANDUM**

(Assigned to Settlement Judge Pro
Tempore Michael J. Ryan)

16 **I. FACTUAL BACKGROUND AND DESCRIPTION OF ISSUES.**

17 Plaintiffs, 93 homeowners in the Apache Wells community, initiated this lawsuit due to the
18 Board of Directors' (the "Director Defendants") breach of their fiduciary duties to the Apache Wells
19 community. The Director Defendants have repeatedly engaged in conduct that is contrary to the
20 governing documents for the community and Arizona law, and that is not in the best interests of the
21 Apache Wells community. The Director Defendants have been governing the Association pursuant to
22 their own personal agendas by seeking to transform this once peaceful community into an upscale
23 resort. While Plaintiffs are in favor of reasonable improvements and upgrading, Plaintiffs believe the
24 interests of the community in its entirety must be considered. Plaintiffs contend the Director
25 Defendants' conduct, as detailed herein, subjects said Defendants, along with the Association, to
26 liability for breach of fiduciary duty.

1 The specific details of the Director Defendants' conduct are set forth in Plaintiff's Motion for
2 Injunction, a copy of which is attached hereto as **Exhibit A**. As set forth in the attached Motion, the
3 Director Defendants' conduct in breach of their fiduciary duties has been extensive. For purposes of
4 brevity, Plaintiffs will focus only on limited issues in this Memorandum.

5 This matter concerns the Defendants' continued efforts to spend homeowner funds without
6 adhering to applicable law or the community's governing documents. Examples of the unauthorized and
7 unreasonable spending include the purchase of a \$700,000 building without homeowner approval, the
8 imposition of a \$950 transfer fee without authority, and the attempt to impose a \$8.5 million dollar
9 special assessment upon the members of Apache Wells for a project that sought to benefit members of a
10 separate entity, the Country Club. Plaintiffs filed this lawsuit for the primary purpose of stopping the
11 Director Defendants from collecting the \$8.5 million dollar assessment. Plaintiffs also seek damages
12 relating to the Director Defendants' breach of fiduciary duty.

13 Plaintiffs filed a motion for partial summary judgment very early in this case. As demonstrated
14 by Plaintiffs in their motion, the Director Defendants did not receive the number of votes required by
15 the community documents to collect the \$8.5 million dollar assessment. The Director Defendants
16 refused to acknowledge this fact, and instead vigorously opposed Plaintiffs' motion and persisted in
17 moving forward with their collection efforts. The Honorable Bethany Hicks granted Plaintiffs' motion,
18 however, which necessarily included granting an injunction prohibiting Defendants from proceeding
19 with their proposed project and the \$8.5 million dollar assessment.

20 Having already prevailed in their injunctive relief claim, Plaintiffs are now pursuing their claims
21 relating to breach of fiduciary duty. One of Plaintiffs' most significant concerns in this regard is the
22 Director Defendants' refusal to provide documentation and information to the homeowners of the
23 Apache Wells community. Plaintiffs made numerous requests for information and documentation prior
24 to retaining counsel, albeit usually on an informal basis at Board meetings. The Director Defendants
25 provided only limited documentation, such as the Nest Technologies report regarding the Country Club
26 facility, in response. The details of the proposed project, including the terms of all contracts, the cost

1 estimates, and the alternatives considered, were kept secret. Accordingly, once Plaintiffs retained
2 counsel, formal document requests were made upon the Association pursuant to A.R.S. § 33-1805.

3 As a homeowners association, the Association is legally obligated to provide records to its
4 members upon request. The only exceptions to this rule concern records relating to personal financial
5 information of members, personal employee files, or records prepared for litigation. None of these
6 exceptions are applicable to the records Plaintiffs have requested, and as such, the Association has not
7 claimed any exception applies. Plaintiffs made numerous written requests pursuant to A.R.S. § 33-
8 1805 for records such as communications amongst Board members involving Association business,
9 contracts, surveys, proposals, estimates, and notes and memoranda. The Association repeatedly
10 ignored Plaintiffs' requests, and when questioned by counsel, the Association promised documents
11 were forthcoming. However, no responsive documents have been provided.

12 Plaintiffs included in their Complaint a cause of action relating to withheld records. The
13 Association, in its Answer, claimed all records had been provided to Plaintiffs. However, at the
14 deposition of both Defendant Brian Johnson and Defendant Bing Miller, Plaintiffs' confirmed what they
15 knew all along – numerous other documents exist but have not been provided by the Association. With
16 full knowledge of this fact, the Association continued to ignore Plaintiffs' repeated demands for
17 documentation, even those demands that specifically enumerated what was testified about at the
18 Director Defendants' depositions. Accordingly, Plaintiffs proceeded with a formal Request for
19 Production of Documents and Rule 30(b)(6) Notice of Deposition on October 11, 2007. Plaintiffs can
20 only hope that the Association will finally honor its obligations to disclose records to its members.

21 The Director Defendants' conduct in refusing to disclose records is just one example of their
22 many breaches of fiduciary duty. As described above and in detail in the attached Motion, the Director
23 Defendants' conduct in attempting to obtain homeowner approval for their proposed project was
24 undertaken in bad faith, and not in the best interests of the Association. The Director Defendants
25 concealed documents, presented only skewed and misleading information regarding their proposed
26 project, utilized Association media to demean and insult anyone opposed to their project, refused to

1 present any information that could negatively impact their proposed project, and conducted an improper
2 and illegal election.

3 The election for the Directors' proposed project the Director Defendants held in February 2007
4 resulted after a misleading and intimidating campaign by the Director Defendants. The Director
5 Defendants dramatically changed the voting procedures that had been in place for over twenty years,
6 resulting in voter confusion and intimidation. Elections in the Apache Wells community had always
7 been conducted with secret ballots, but for this election, the Director Defendants required homeowners
8 to identify themselves with numbers on their ballots. Homeowners were outraged, and some refused to
9 vote at all. Homeowners felt there would certainly be repercussions from the Director Defendants who
10 would now be able to determine how each member voted. Further, Plaintiffs have since undertaken a
11 review of the ballots the Director Defendants claimed they received at the February 2007 election.
12 Plaintiffs discovered numerous irregularities, including duplicate ballot numbers, some ballots not
13 numbered at all, and some owners casting more than one vote, among other things.

14 Moreover, homeowners voting in the election were confused about what exactly was going on.
15 As a result of the apparent refusal of the Director Defendants to provide details to homeowners, or any
16 information that would reflect negatively upon their proposed project, Plaintiffs formed a group known
17 as "Save Apache Wells," or "SAW", which they utilized to advocate for voting against the Director
18 Defendants' proposed project. Plaintiffs registered the "Save Apache Wells" name with the Arizona
19 Corporation Commission. Plaintiffs created a website and held meetings to convey information
20 regarding the proposed project to homeowners. Homeowner interest in the SAW group was
21 significant, as many people simply did not understand what the proposed project was about, and did not
22 feel adequately informed. Near the time for the election, however the Director Defendants, in what can
23 only be an effort to confuse voters (many of whom are elderly and suffer from ill health), posted signs
24 throughout the community that read "Save Apache Wells - Vote Yes." Presumptively, the Director
25 Defendants were attempting to gain support for their project by using the SAW name when they knew
26 all along SAW was against the project.

1 Plaintiffs immediately complained to the Association about the improper and confusing signs.
2 Pursuant to the CC&Rs, the Board of Directors must approve the use of signs in the Apache Wells
3 community. The Association responded by claiming such signs were “subterfuge,” yet the Directors
4 claimed they could not do anything to have the signs removed. Plaintiffs later discovered that the
5 Director Defendants had actually approved of the signs. Moreover, some of the Director Defendants,
6 such as Defendant Brian Johnson, proudly displayed such signs on their homes.

7 Overall, the Director Defendants’ proposed project and the manner in which they sought to
8 impose it upon the community represents the ongoing plan of the Director Defendants to tax and spend
9 without regard for applicable law or the governing documents for Apache Wells. In a related but
10 separate matter, an Administrative Law Judge has already ruled that the Association acted arbitrarily in
11 imposing a \$950 transfer fee upon new members to the Apache Wells community. The Association had
12 no authority to impose such a fee, and did so in an effort to support expenditures that Plaintiffs contend
13 are unnecessary and not in the best interests of the Association. The Association appealed the
14 Administrative Law Judge’s ruling, and currently, the parties are awaiting a decision on that appeal.

15 Plaintiffs contend that the evidence presented thus far, which has already resulted in a
16 significant ruling in Plaintiffs’ favor, demonstrates that Defendants are liable for breach of fiduciary
17 duty.

18 **II. EVIDENCE TO BE PRESENTED.**

19 Plaintiffs intend to rely upon all documentary evidence disclosed by the parties to date.
20 Plaintiffs also intend to rely upon deposition testimony, and the trial testimony of Plaintiffs,
21 Defendants, and potentially numerous third parties. The third parties include, but are not limited to,
22 non-party homeowners and representatives of various companies hired by Defendants in relation to the
23 proposed project, such as Nest Technologies and Concord Construction. Further, as Plaintiffs know
24 additional relevant documentation exists as described above, Plaintiffs intend to rely upon that
25 documentation in the event Defendants actually disclose it.

26 **III. SUMMARY OF SETTLEMENT NEGOTIATIONS**

1 The parties have not yet participated in any settlement negotiations. Plaintiffs have
2 repeatedly requested meetings with Defendants to discuss potential settlement options, however
3 Defendants have refused to participate. It was not until Judge Hicks ordered the parties to
4 participate in this settlement conference, presumptively in response to the request of Plaintiffs'
5 counsel after ruling in Plaintiffs' favor on their motion for partial summary judgment, that
6 Defendants agreed to participate in settlement negotiations.

7 **IV. ANTICIPATED RESULT AT TRIAL**

8 Plaintiffs contend that in the event this matter proceeds to trial, they will prevail in all respects.
9 Plaintiffs have already prevailed in their primary objective in this case, in that Plaintiffs have obtained
10 an injunction prohibiting Defendants from proceeding with their proposed project and prohibiting
11 Defendants from collecting the \$8.5 million dollar assessment. As such, Plaintiffs have already
12 established Defendants are liable for breach of fiduciary duty. Further, the evidence Plaintiffs will
13 present at trial will establish beyond any doubt that the Director Defendants engaged in bad faith
14 conduct that was not in the best interests of the Association, as described above. Plaintiffs will
15 therefore prevail on their breach of fiduciary duty claims.

16 As this matter arises out of contract (the CC&Rs), Plaintiffs expect an award of their
17 reasonable attorneys' fees and costs incurred herein. Plaintiffs are already the prevailing party in this
18 matter.

19 **V. CONCLUSION**


20 Plaintiffs have sought from the beginning of this unfortunate dispute to reach an amicable
21 resolution with Defendants. Until ordered by the Court to do so, however, Defendants refused to
22 participate in any settlement discussions. Plaintiffs seek only to restore peace in the Apache Wells
23 community, and to ensure the homeowners association is managed in a fair and equitable manner in
24 the future. Because Plaintiffs have already prevailed regarding the proposed project and \$8.5 million
25 dollar assessment, Plaintiffs would now like to resolve their remaining claims for breach of fiduciary
26

1 duty and attorneys' fees. This will necessarily include agreements as to how the Director Defendants
2 will perform their director duties in the future.

3 Plaintiffs believe the parties can reach a fair resolution, provided Defendants are willing to
4 participate in the settlement process in good faith.

5 DATED this 17th day of October, 2007.

6 CHEIFETZ IANNITELLI MARCOLINI, P.C.

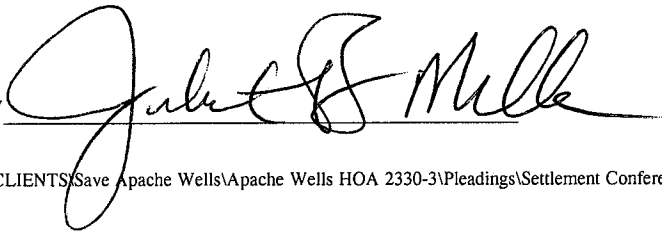
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8 By 
9 Steven W. Cheifetz
10 Melanie C. McKeddie
11 Attorneys for Plaintiffs

11 ORIGINAL of the foregoing hand-delivered
12 this 17 day of October, 2007 to:

13 Michael J. Ryan, Esq., Judge Pro Tempore
14 BROENING OBERG WOODS & WILSON, PC
15 1122 East Jefferson Street
16 Phoenix, Arizona 85034

17 COPY of the foregoing mailed
18 this 17th day of October, 2007 to:

19 J. Gary Linder, Esq.
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21 2901 North Central Avenue, Suite 800
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24
25 By 

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