Steven W. Cheifetz (011824)
Stewart F. Gross (019804)
Melanie C. McKeddie (022942)
CHEIFETZ IANNITELLI MARCOLINI, P.C.
1850 North Central Avenue, 19th Floor
Phoenix, Arizona 85004
(602) 952-6000

Attorneys for Plaintiffs

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

KEN DOSHIER, et al., Plaintiffs, v. APACHE WELLS HOMEOWNERS ASSOCIATION, INC., an Arizona nonprofit corporation, et al., Defendants.	No. CV2007-005805 **PLAINTIFFS' SHORTENED APPLICATION FOR PRELIMINARY INJUNCTION** (Assigned to the Hon. Bethany Hicks)

Plaintiffs, 94 homeowners in the Apache Wells community, hereby request the Court enter a preliminary injunction, pursuant to Rule 65 of the Arizona Rules of Civil Procedure, enjoining Defendant, Apache Wells Homeowners Association, Inc. (the "Association"), from assessing members of the Apache Wells community, including Plaintiffs, the $6,020.00 special assessment invalidly and improperly "approved" by the Association on February 21, 2007, and enjoining the Association from taking any action pursuant to the agreement reached with Defendant Apache Wells Country Club, Inc. (the "Country Club").

MEMORANDUM

I. INTRODUCTION

Plaintiffs reside in a community known as Apache Wells, which consists of approximately 1,412 units and is located in Mesa, Arizona. Affidavit of Judi Teague, incorporated by reference

and attached to prior Application as **Exhibit A**, ¶ 2. As owners of units in the community, Plaintiffs are mandatory members of the Association. The Association was established by, and is bound to adhere to, the community's governing documents, including Covenants, Conditions and Restrictions (CC&Rs) and Bylaws. The Apache Wells community is unique in that within the community, two entities exist and operate. The Country Club, a separate and distinct entity from the Association, consists of 485 members, which own and control a golf course in the community, and own a building that includes a golf pro shop, restaurant, bar and meeting hall. **Exhibit A**, ¶ 3.

Plaintiffs initiated this lawsuit due to significant concerns regarding the management of the Association, which is carried out through the Association's Board of Directors. Plaintiffs believe the Association has repeatedly sought to raise funds in the community without honoring the governing documents or Arizona law, consistent with the Directors' goal in transforming the community into an upscale resort. **Exhibit A**, ¶ 4.

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

The Association has collected over a hundred thousand dollars resulting from the invalid transfer fee. **Exhibit A**, ¶ 5. Still, the Association has consistently raised the general assessment by ten percent (10%) each year. **Exhibit A**, ¶ 6. Moreover, the Association has continued to collect the transfer fee in spite of the Administrative ruling, and in spite of the fact that it has not obtained a stay of that ruling. **Exhibit A**, ¶ 6. The Association claims it needs to collect the

transfer fee because of financial hardship, yet the Association has continued to expend significant sums on seemingly unnecessary items.

II. THE HISTORY OF THE $8.5 MILLION DOLLAR PROJECT

The Apache Wells community is comprised mostly of mobile homes. **Exhibit A**, ¶ 8. Most members of the Association's Board of Directors (the individual Defendants herein) are members of the Country Club. Prior to and during the events at issue in this matter, members of the Association's Board of Directors served on the Country Club's Board of Directors. **Exhibit A**, ¶ 10.

The Country Club, as the current owner of the Country Club facility, bears all responsibility in maintaining the building, paying taxes for the building, and taking care of any other expenses that may arise associated with property ownership. **Exhibit A**, ¶ 11. The Country Club has been negligent in maintaining their facility presumptively due to financial difficulties. The Country Club's failure to maintain its facility led to general consensus in the community that some degree of renovation was needed. **Exhibit A**, ¶ 12. . The Association's Board of Directors, comprised mostly of Country Club members, felt it was unfair for the Country Club "to shoulder the entire cost of providing a new and better facility." As early as 2001, the Association's Board of Directors began negotiating an agreement with the Country Club whereby the Association would take title to the Country Club facility and then build new facilities on that property, which would be available for use by both Association and Country Club members. See February 19, 2001 letter from Country Club and Association, attached to prior Application as **Exhibit D**.

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

The Directors never gave up on their plan to build the new, large and luxurious facility that would include a restaurant, bar, golf pro shop and meeting hall. In an effort to obtain homeowners approval on their second try, the Directors decided to describe the proposed changes in a false light to overcome voter objections. . This time, however, the cost to the Association is $8.5 million, and the only cost to the Country Club is the cost of its land, which has been valued at approximately $650,000. Accordingly, the Association is contributing approximately **fourteen times more** than the Country Club to a facility was the sole responsibility of the Country Club. **Exhibit A**, ¶ 14.

Although the Directors for the Association had a fiduciary duty to act in the best interest of the Association, they negotiated an agreement that substantially favored the Country Club to the significant detriment of the Association. The agreement with the Country Club results in a facility that was previously a 100% burden of the Country Club becoming a 100% burden of the Association, all while the Association pays fourteen times more than the Country Club for the new facility even though the day to day use of the facility does not change. **Exhibit A**, ¶ 15.

III. CAMPAIGNING FOR AN $8.5 MILLION DOLLAR PROJECT

In an effort to finance the transaction with the Country Club, the Association's Board of Directors sought to impose a special assessment upon Association members in the amount of $6,020.00 each. The Country Club members, on the other hand, have no assessment responsibility in financing the transaction and instead simply reap the benefits of brand new facilities. See AWCC Calculations, attached to prior Application as **Exhibit F**. If the Country Club bore the costs of building the new facilities, the cost would be over $17,500.00 per member, as opposed to the $6,020.00 cost if the entire Association pitches in. **Exhibit A**, ¶ 16. This fact was not lost in the campaign to Country Club members. The Country Club's President warned in a letter sent to each member that if they voted "no" in the Association special assessment election, they would have to pay much than $6,020. A true and accurate copy of the Country Club's February 15, 2007 letter is attached to prior Application as **Exhibit G**.

The Association's Board of Directors undertook significant effort to obtain the votes needed to impose the special assessment. The Directors provided only that information they felt favored their project, engaged in a "media blitz," and concealed all information that could be perceived as having a negative impact on the project's success. **Exhibit A**, ¶ 17. .

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

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

Pursuant to A.R.S. § 33-1805, the Association is required produce documents upon request of any member. Although the Association has affirmatively represented to the Court that is has

provided all documents requested by Plaintiffs, its own Directors made it clear at their depositions that numerous documents have in fact been withheld. If the Directors were truly acting in the best interest of the Association and the agreement with the Country Club was fair to all involved, why are the Directors hiding so many documents?

Many of the homeowners that were denied access to information and documentation concerning the Association's purported transaction with the Country Club, including the Plaintiffs herein, became suspicious about the true facts relating to the special assessment. They therefore formed a group called "Save Apache Wells," and registered that name with the Arizona Corporation Commission. **Exhibit A**, ¶ 21. The Save Apache Wells group distributed information regarding the special assessment, and urged voters to vote "No" in the upcoming election. **Exhibit A**, ¶ 21. Faced with growing opposition to their plan, the Board of Directors caused purposely confusing signs to be posted in the community that read "Save Apache Wells – Vote Yes." See Bing Miller Deposition, **Exhibit E**, at 107:21-23. The Association's former President, Defendant Brian Johnson, prominently displayed one such sign on the front of his home. A true and accurate copy of a photograph depicting Mr. Johnson's sign is incorporated by reference and attached to prior Application as **Exhibit M**. At his deposition, despite the photographic evidence, Mr. Johnson adamantly denied ever having such a sign, stating he believed they were misleading. Deposition of Brian Johnson, attached to prior Application as **Exhibit I**, at 172-173:17-2.

Plaintiffs submitted a written complaint to the Association regarding the misleading and inappropriate signs. See February 9, 2007 letter, attached to prior Application as **Exhibit N**. In response, the Association's current President, Defendant Marvin Stoll, wrote to Plaintiffs and although he admitted the signs were "subterfuge" and "confusing," refused to remove the signs claiming the Association had no authority to do so. See February 11, 2007 letter, attached to prior Application as **Exhibit O**. At the deposition of Bing Miller, however, Plaintiffs confirmed that the Board of Directors had expressly approved of the signs they claimed they had no authority

to regulate. **Exhibit E**, 107:21-23. Moreover, the CC&Rs for Apache Wells are absolutely clear that no signs are allowed in the community unless approved by the Board.

The Director Defendants, as described above, campaigned heavily for their proposed project, while concealing the fact that the agreement significantly favored the Country Club over the Association. Without allowing opponents the opportunity to respond, the Director Defendants, through Association media, called opponents liars, destructive forces in the community, and numerous other insults and accusations. **Exhibit A**, ¶ 24. One of the Directors, Brian Johnson, testified that he believes it was permissible for the Association to conduct an election whereby only favorable opinions and information about the project are presented in the community media, negative information and opinions about the project are specifically excluded from the media, and any known opposition is sharply criticized in community media without providing an opportunity for response. See Deposition of Brian Johnson, **Exhibit I**, 61-63:2-1, 78:6-21.

IV. THE ELECTION

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

[1] This issue is the subject of Plaintiffs' Motion for Partial Summary Judgment, which is currently pending before the Court.

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

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

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

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

manager was not using a ballot box, but instead was simply putting all ballots in a drawer. **Exhibit P**, ¶ 11.

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

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

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

considerations in mind, the Court found that although statutory law did not expressly afford confidentiality in voting,

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

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

The Director Defendants owe fiduciary duties to Plaintiffs, which require "high standards of honesty and fair dealing." Id. at § 6.14, cmt. b. These fiduciary duties entail acting with the utmost good faith, with the utmost care, and with the utmost fairness to members in mind. See, e.g., Ahwatukee Custom Estates Management Association, Inc. v. Turner, 196 Ariz. 631, P.3d 1276 (App. 2000); Nahrstedt v. Lakeside Village Condominium Association, Inc., 8 Cal.4th 361, 878 P.2d 1275, 33 Cal.Rptr.2d 63 (1994); Ironwood Owners Association IX v. Solomon, 178 Cal.App.3d 766, 224 Cal.Rptr.18 (App. 1986); Riss v. Angel, 131 Wash.2d 612, 934 P.2d 669 (1997); Kenyon v. Polo Park Homeowners Association, Inc., 907 So.2d 1226 (App. 2005). The Directors' conduct in carrying out the special assessment election in an unfair, skewed, and

dishonest manner in no way suffices. The Directors' election practices constitute a breach of the Directors' fiduciary duties.

Faced with challenges regarding these issues, the Director Defendants have consistently explained that traditional corporate law applies, such that their actions are of little or no legal consequence. See, e.g., Brian Johnson Deposition, **Exhibit I**, 83-84:25-19. However, the law recognizes overwhelming differences between a homeowners association and an ordinary business corporation. The Restatement describes three major differences, noting that these differences create the need for greater judicial review. First, "the stakes of the association members are generally much higher than those of shareholders in business corporations." Id. 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 member owns, and which has personal and social significance far beyond the monetary value of the asset." Id. Second, a homeowners association has much more power over the individual member than an ordinary business corporation. Id. Third, an individual's home cannot be sold as easily as shares of stock. Id.

V. THE UNFAIR AGREEMENT WITH THE COUNTRY CLUB

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

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

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

Beyond the plain language of A.R.S. § 33-1811, which by itself renders any agreement with the Country Club void and unenforceable because the Directors did not declare their conflict in an open meeting, common law conflict of interest analysis also requires any agreement be declared void and unenforceable. Laws relating to director conflicts of interest arise from "the prohibition against self-dealing that is inherent in a director's fiduciary relationship" with the corporation and its members, in this case the homeowners. Resolution Trust Corporation v. Dean, 854 F.Supp. 626. 644 (D. Ariz. 1994). See also Tucson Federal Savings & Loan Ass'n v. Aetna Investment Corp., 74 Ariz. 163, 172, 245 P.2d 423, 429 (1952) (holding that when evaluating contracts resulting from director conflict of interest, courts will "scrutinize these contracts very closely and will set them aside upon the slightest showing of unfairness to either corporation.") The United States Supreme Court explained the serious nature of director conflict of interest in the early case of Geddes v. Anaconda Copper Mining Co., 254 U.S. 590, 41 S.Ct. 209 (1921). The Geddes Court held that director conflict of interest is "regarded as jealousy by the law . . . and where the fairness of such transactions is challenged the burden is upon those who would maintain them to show their entire fairness." Id. at 599, 41 S.Ct. at 212. To be certain, a showing of personal interest in the transaction at issue is all that is required to demonstrate a conflict of interest exists. Resolution Trust Corporation, 854 F.Supp. at 644. Once the conflict of interest is shown, "the business judgment rule does not apply, and the burden

shifts to the defendant to show that the transaction is fair and serves the best interests of the corporation." Id.

Although no Arizona case has discussed the conflict of interest issue as it pertains to homeowners associations specifically, Courts of other jurisdictions have recognized the greater need for judicial scrutiny in the homeowners' association context. For instance, in Raven's Cove Townhomes, Inc. v. Knuppe Development Company, Inc., 114 Cal.App.3d 783, 800, 171 Cal.Rptr. 334, 343 (Cal. App. 1981), the Court noted the need for "closer judicial scrutiny" in the context of homeowner association conflict of interest. The Court noted that the traditional fiduciary duties directors of corporations owe to members "take on a greater magnitude in view of the mandatory association membership required of the homeowners." Id. at 801, 171 Cal.Rptr. at 344. Because the directors in that case acted with a conflict of interest, they were personally liable for breach of fiduciary duty.

VI. PLAINTIFFS ARE ENTITLED TO AN INJUNCTION

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

Regardless of which evaluation the Court undertakes, Plaintiffs are entitled to an injunction. As described in detail above, Plaintiffs' probable success on the merits is great. Moreover, Plaintiffs will be irreparably harmed by the Association's imposition of the $6,020.00 special assessment. Many members of the Apache Wells community, including some Plaintiffs, are financially unable to make the payment required by the Association. If the special assessment is not paid, the Association will institute collection actions against Plaintiffs. The Association has

threatened to report any non-payment to credit agencies in an effort to purposefully damage the credit ratings of anyone that elects not to pay

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

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

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

Defendants will not lose the use of the current facility, but instead will simply not have a new, more luxurious facility.

While Plaintiffs recognize the requirement that a bond must be posted, Plaintiffs submit that in this matter, a bond of only $5,000.00 is appropriate in this case. There is no immediate need for the Association to collect the special assessment, or engage in construction of facilities pursuant to the transaction with the Country Club. The Association has been functioning without the special assessment and new facilities for several years without difficulty. If the Court were to ultimately rule against Plaintiffs, the Association would still get the full benefit of the special assessment and Country Club transaction. Although no bond is required at all for a preliminary 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 65 of the Arizona Rules of Civil Procedure, which Plaintiffs contend does not exceed $5,000.00 in light of the circumstances of this case.

VII. CONCLUSION

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

DATED this 10th day of August, 2007.

CHEIFETZ IANNITELLI MARCOLINI, P.C.

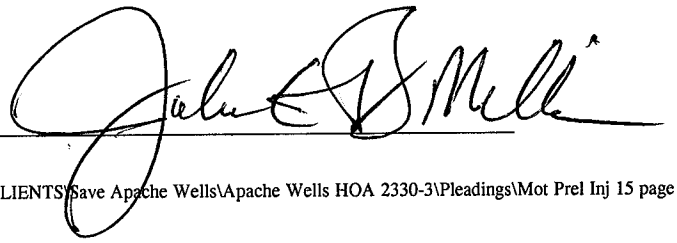
By Melanie McKeddie
Steven W. Cheifetz
Melanie C. McKeddie
Attorneys for Plaintiffs

ORIGINAL of the foregoing hand-delivered this 10th day of August, 2007 to:

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

COPY of the foregoing mailed and faxed this 16th day of August, 2007 to:

J. Gary Linder, Esq.
JONES, SKELTON & HOCHULI, P.L.C.
2901 North Central Avenue, Suite 800
Phoenix, Arizona 85012
Fax: (602) 263-1784
Attorneys for Defendants

By 

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