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10
11 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
12
13 **IN AND FOR THE COUNTY OF MARICOPA**

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

No. CV2007-005805

**PLAINTIFFS' REPLY IN SUPPORT
OF MOTION FOR PARTIAL
SUMMARY JUDGMENT AND
RESPONSE TO DEFENDANTS'
CROSS-MOTION FOR SUMMARY
JUDGMENT**

Oral Argument Requested

(Assigned to the Hon. Bethany Hicks)

1 husband and wife; RITA TAYLOR, an
2 unmarried woman; CHERYL ROLULLARD,
3 an unmarried woman; JESSIE E. BENNETT,
4 an unmarried woman; GENE R. KRZYCKI and
5 MARJORIE KRZYCKI, husband and wife; ED
6 WHITE AND TERRI WHITE, husband and
7 wife; DARLENE STEINER, a married woman;
8 DORA RICH, an unmarried woman; LEW
9 HANDELAND, an unmarried man;
10 CLARENCE LAMERS and SHARI LAMERS,
11 husband and wife; JANICE CHRISTO, a
12 married woman; OSCAR R. FLORES, an
13 unmarried man; JENNIAL MARTIN, an
14 unmarried woman; GEORGIEANNA
15 LANCUCKI, an unmarried woman; JOAN
16 PETERSON, a married woman; DORA REED,
17 an unmarried woman; MARYANNE MILLER,
18 an unmarried woman; DALE ADAM and
19 THERESE ADAM, husband and wife; JAMES
20 J. KIRKPATRICK, an unmarried man; EMILE
21 DUFFY, a married woman; CHARLES LAIR
22 and LELA LAIR, husband and wife; MARGIE
23 STOCK, a married woman; JOHN
24 CORMACK, a married man; LEE WALTER, a
25 married man; WALTER STROMME, a married
26 man; DEVERE STEVENSON and LOIS L.
STEVENSON, husband and wife; EARL
PEARSON and ISABEL PEARSON, husband
and wife; BONNIE WILCOX, a married
woman; ROY NELSON, a married man;
SHARON ANTES; DONALD L. HILL and
NORMA L. HILL, husband and wife; ROGER
JOHANSON and DIXIE JOHANSON, husband
and wife; PAULINE PERMANN, a married
woman; DAVID STOWE and TONI STOWE,
husband and wife; LEROY LANOUE and
DONNA LANOUE, husband and wife; PAUL
WICHERTS, an unmarried man; JAMES
DANIELS and LOLA DANIELS, husband and
wife; CHARLES RADCLIFF and VIRGINIA
RADCLIFF, husband and wife; JAMES

1 DORRANCE, a married man; JAMES
2 PEARSON and JANE PEARSON, husband and
3 wife; BILL VERNON and DORIS VERNON,
4 husband and wife; HARVEY BELL, an
5 unmarried man; WILLIAMS SCHUMACHER
6 and LUCY SCHUMACHER, husband and
7 wife; JAMES MASCORELLA and LOIS
8 MASCORELLA, husband and wife; GERALD
9 LENKA and MARCY LENKA, husband and
10 wife,

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Plaintiffs,

v.

10 APACHE WELLS HOMEOWNERS
11 ASSOCIATION, INC., an Arizona nonprofit
12 corporation, APACHE WELLS COUNTRY
13 CLUB, INC. an Arizona non-profit corporation;
14 BRIAN JOHNSON and SUSAN JOHNSON,
15 husband and wife; THOMAS H. FINGER, an
16 unmarried man; MARVIN A. STOLL and
17 MARY E. STOLL, husband and wife;
18 GORDON WOOD and LINDA WOOD,
19 husband and wife; TONY PASULA and VAL
20 PASULA, husband and wife; MARVIN A.
21 LARSON and RUTH J. LARSON, husband and
22 wife; JAMES BONNELL and JOCILLE
23 BONNELL, husband and wife; WILLIAM F.
24 GREGORY and JOANNE GREGORY, husband
25 and wife; ROBERT RESSETT and BERNYCE
26 RESSETT, husband and wife; IRV ST. JOHN
and PAT ST. JOHN, husband and wife; and
L.J. MILLER and JOYCE MILLER, husband
and wife,

Defendants.

Plaintiffs' hereby submit their Reply in Support of Motion for Partial Summary Judgment and Response to the Cross-Motion for Summary Judgment (the "Cross-Motion") filed by Defendants. This Reply and Response is supported by the following *Memorandum of Points and Authorities*, and the entire file of record in this matter.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. Introduction**

3 Defendants' Cross-Motion is wholly conclusory and ignores the issue in this case. As
4 Plaintiffs argued in their Motion, the Bylaws reference majority votes in three provisions. In two
5 of those provisions, the "majority" is qualified to mean a "majority" of those "present and
6 voting." (See Plaintiffs' Statement of Facts ("SOF"), ¶2, Ex. B at art. X, §2(C)(3) and art. XIII,
7 §1(D)). Between those two provisions is the provision at issue, which states:

8 Special Assessments shall be approved by a two-thirds (2/3) vote of the
9 Board at a duly called meeting at which a quorum is present, and by the
10 majority vote of the residential unit owners at a special election called
11 and publicized for that specific purpose.

(See Plaintiffs' SOF, ¶2, Ex. B; Defendants' Controverting Statement of Facts, ¶2).

12 In the subject provision, the words "present and voting" have been omitted. As a matter of
13 law, where drafters of a contract have carefully employed a phrase in one place and excluded it in
14 another, the court must assume different meanings were intended. The issue in this case is
15 whether the Court must assume different meanings were intended where the Association omitted
16 the words "present and voting."

17 The Association devotes five sentences in response to Plaintiffs' argument that meaning
18 must be given to all words in a contract, which entirely misconstrues Plaintiffs' argument that the
19 phrase "present and voting" must mean something different than where the phrase is omitted:

20 Defendants respectfully submit that it is entirely possible, and proper, to
21 say the same thing using different words. Some provisions say "present
22 and voting." The Bylaw for special assessment says "majority vote of
23 residential unit owners at a special election." The provisions mean the
24 same thing. That does not mean either provision is invalid.

25 (Defendants' Cross-Motion, p.7). Defendants' conclusory argument is not only unsupported by
26 any legal authority, but it also clearly ignores the settled law for interpreting contracts. The
provisions, by using the phrase "present and voting" with respect to some majority votes and by
omitting the phrase with respect to the majority vote necessary for a Special Assessment, **cannot**

1 mean the same thing. By excluding “present and voting,” the Association must have intended a
2 different meaning. Because the Bylaw does not mean a majority of those “present and voting,”
3 the provision **must** mean a majority vote of **all** residential unit owners. A majority of all
4 residential unit owners did not vote in favor of the Special Assessment, and therefore, the Special
5 Assessment is invalid. Although Defendants argue otherwise in an effort to confuse the issues,
6 Plaintiffs have never argued that any provision in the Bylaws is invalid.

7 Furthermore, Defendants misstate Plaintiffs’ argument when they claim “Plaintiffs want to
8 re-write the contract, so that their 48% opposing vote can prevent the Special Assessment.”
9 Rather, as Plaintiffs have repeatedly made clear, Plaintiffs wish to give the Bylaws their proper
10 meaning and prevent a fraction of the Apache Wells Community from asserting their desires over
11 the whole of the community and against the wishes of the majority of all residential unit owners.

12 **II. Any words excluded in a provision of a contract must be presumed to have been**
13 **omitted for a purpose**

14 The Bylaws reference majority votes in three instances. In the first instance, the Bylaws
15 expressly specify that a “majority” refer to those “present and voting.” In the third instance, the
16 Bylaws again expressly specify that a “majority” refer to those “present and voting.” Sandwiched
17 between those two paragraphs is the second instance referring to a majority vote. It is the
18 provision regarding votes on Special Assessments, which as the Court is aware, is the provision at
19 issue. The provision does not use the phrase “present and voting.” The omission of the phrase
20 “present and voting” must be given meaning. *See Gfeller v. The Scottsdale Vista North*
21 *Townhomes Association*, 193 Ariz. 52, 54, 969 P.2d 658, 660 (App. 1998) (courts should adopt
22 interpretation that “gives effect to all provisions”, and “give meaning to all [contractual] terms”);
23 *Scholten v. Blackhawk Partners*, 184 Ariz. 326, 329, 909 P.2d 393, 396 (App. 1999) (courts must
24 “give effect to all its provisions and to prevent any of the provisions from being rendered
25 meaningless”).

26 The canons of statutory construction are analogous in that they also require all words to be

1 given meaning to avoid surplus verbage, and are therefore instructive in this regard:

2 It is an elementary rule of construction that effect must be given, if
3 possible, to every word, clause and sentence of a statute. A statute
4 should be construed so that effect is given to all its provisions, so that no
5 part will be inoperative or superfluous, void or insignificant, and so that
6 one section will not destroy another unless the provision is the result of
7 obvous mistake or error. No clause, sentence or word shall be
8 construed as superfluous, void or insignificant if the construction can be
9 found which will give force to and preserve all the words of the statute.
10 **While every word of a statute must be presumed to have been used**
11 **for a purpose, it is also the case that every word excluded from a**
12 **statute must be presumed to have been excluded for a purpose.** But
13 it has been said that words and clauses which are present in a statute
14 only through inadvertence can be disregarded if they are repugnant to
15 what is found, on the basis of other indicia, to be the legislative intent.
16 There is a presumption that the same words used twice in the same act
17 have the same meaning. Likewise, the courts do not construe different
18 terms within a statute to embody the same meaning. However, it
19 is possible to interpret an imprecise term differently in two separate
20 sections of a statute which have different purposes. Yet when the
21 legislature uses certain language in one part of the statute and different
22 language in another, the court assumes different meanings were
23 intended. **In like manner, where the legislature has carefully**
24 **employed a term in one place and excluded it in another, it should**
25 **not be implied where excluded. The use of different terms within**
26 **related statutes generally implies that different meanings were**
intended.

2A Sutherland Statutory Construction §46:6 (6th ed.).¹ Arizona courts follow the basic principle
that by using a phrase in one provision and excluding it in another, the drafters intended the
provisions to have different meanings. *See Arizona Dep't of Revenue v. Gen. Motors Acceptance*
Corp., 188 Ariz. 441, 445, 937 P.2d 363, 367 (App. 1996) ("Where the legislature has used a
particular term in one place in a statute and has excluded it in another place in the same statute, a
court should not read that term into the provision from which the legislature has chosen to omit
it").

Clearly, if the Association, as drafter of the Bylaws, intended for special assessments to
pass upon a majority of all votes received at a special election rather than a majority of the unit

¹ The rules governing statutory construction are also analogous in that, although Bylaws are
considered contracts, they operate in the same way as statutes by governing operation of
homeowners' associations, which are quasi-governmental entities.

1 owners, they would have used the phrase “present and voting,” as they did in the other two
2 sections. By carefully employing the phrase “present and voting” in two places and excluding it
3 in another, it should not be implied in the subject Bylaw where the phrase was specifically
4 excluded. *See id.*

5 Moreover, as a matter of common sense, if the Association intended the phrase “present
6 and voting” to be implied in the subject Bylaw, they would have specifically included those
7 words. In fact, the Association **did** use those words in those provisions where the Association
8 intended that a majority refer only to those present and voting. The Association, by including the
9 phrase “present and voting” in article X, section 2(C)(3) and article XIII, section 1(D),
10 demonstrated that it knew how to specify when a majority vote of those present at a meeting was
11 intended as opposed to a majority vote of all homeowners. By excluding the phrase “present and
12 voting” in the subject Bylaw, the Association **must** have intended the Bylaw to mean something
13 different than article X, section 2(C)(3) and article XIII, section 1(D). It is not only the legally
14 correct construction based on the foregoing authorities, it is the only logical construction of the
15 Bylaws. If the Association intended the Bylaw to mean a majority of those present and voting,
16 they would have used those words as they did elsewhere. The fact that they did not use the words
17 means they did not intend for a majority of those present and voting to pass a special assessment.

18 Defendants’ claim that “it is entirely possible, and proper, to say the same thing using
19 different words” is contrary to law and reason. The unprincipled flippancy of their argument that
20 provisions including “present and voting” mean exactly the same thing as provisions excluding
21 “present and voting” demonstrates the self-serving nature of the argument and renders the words
22 “present and voting” meaningless. Accordingly, the Court should grant partial summary
23 judgment in Plaintiffs’ favor and find that the Bylaw at issue requires a majority vote of all
24 residential unit owners to validly pass a special assessment.

25 **III. Ambiguities in a contract are construed against the drafter**

26 Although Plaintiffs submit that the Bylaws are clear and unambiguous, the result remains

1 the same even if the Court determines the subject Bylaw to be ambiguous. “If the meaning [of a
2 contractual term] remains uncertain after primary standards of construction ... a secondary rule of
3 construction provides that ambiguity is to be strictly construed against the drafting party.” *Harris*
4 *v. Harris*, 195 Ariz. 559, 562, ¶15, 991 P.2d 262, 265 (App. 1999). It is axiomatic that the rule
5 of *contra proferentum* requires that ambiguous contractual terms be interpreted against the drafting
6 party. *Timms v. U.S.*, 678 F.2d 831, 834 (9th Cir. 1982). Arizona courts also apply the rule
7 “that a contract will be construed most strictly against its author.” *Leschorn v. Xerikos*, 121 Ariz.
8 77, 81, 588 P.2d 370, 374 (App. 1978) (citing *Harford v. Nat’l Life & Casualty Co.*, 81 Ariz. 43,
9 299 P.2d 635 (1956)); see also *Allison Steel Mfg. Co. v. Superior Court*, 22 Ariz.App. 76, 80,
10 523 P.2d 803, 807 (1974) (ambiguity in contract “strongly construed” against the drafter).

11 The Restatement, which is followed by Arizona courts, provides that where a contract is
12 reasonably susceptible to more than one meaning, “that meaning is generally preferred which
13 operates against the party who supplies the words or from whom a writing otherwise proceeds.”
14 Restatement (Second) of Contracts §206 (1979). The Association drafted the Revised Declaration
15 of Covenants Conditions and Restrictions as well as the operative Bylaws. (See Plaintiffs’ SOF,
16 ¶2, Exhibit B; Defendants’ Controverting Statement of Facts, ¶2). Because the Association
17 drafted the Bylaws, if the Court determines that the Bylaw concerning Special Assessments is
18 reasonably susceptible two meanings, the Court must adopt the meaning asserted by Plaintiffs,
19 which operates against the Association.

20 **IV. Conclusion**

21 For the foregoing reasons and those set forth in Plaintiffs’ Motion, by omitting the phrase
22 “present and voting” in the subject Bylaw, the Association intended that a special assessment
23 require a majority of all residential unit owners. Furthermore, because the Association’s Special
24 Assessment did not garner a majority vote of all residential unit owners, it is therefore invalid as a
25 matter of law. As there are no material facts in dispute relating to the special assessment,
26

1 Plaintiffs respectfully request the Court enter Partial Summary Judgment in their favor, declaring
2 the special assessment invalid and unenforceable.²

3 DATED this 2nd day of July, 2007.

4 ~~CHEIFETZ-IANNITELLI MARCOLINI, P.C.~~

5
6 By _____

7 Steven W. Cheifetz
8 Stewart F. Gross
9 Melanie C. McKeddie
10 Matthew A. Klopp
11 Attorneys for Plaintiff

12 ORIGINAL of the foregoing hand-delivered
13 this 2nd day of July, 2007 to:

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

18 COPY of the foregoing mailed
19 this 2nd day of July, 2007 to:

20 J. Gary Linder, Esq.
21 JONES, SKELTON & HOCHULI, P.L.C.
22 2901 North Central Avenue, Suite 800
23 Phoenix, Arizona 85012
24 Attorneys for Defendants

25 By _____

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² Defendants' Cross-Motion seeks an Order declaring the February 21, 2007 Special Election passing the Special Assessment valid. Assuming Defendants prevail on their Cross-Motion, such an Order would be inappropriate because Plaintiffs have asserted multiple bases for holding the Special Assessment invalid beyond the narrow issue of contract interpretation asserted herein.

1 Steven W. Cheifetz (011824)
2 Stewart F. Gross (019804)
3 Melanie C. McKeddie (022942)
4 Matthew A. Klopp (023313)
5 **CHEIFETZ IANNITELLI MARCOLINI, P.C.**
6 1850 North Central Avenue, 19th Floor
7 Phoenix, Arizona 85004
8 (602) 952-6000

9 Attorneys for Plaintiffs

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

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

No. CV2007-005805

**PLAINTIFFS' CONTROVERTING
STATEMENT OF FACTS**

(Assigned to the Hon. Bethany Hicks)

1 husband and wife; RITA TAYLOR, an
2 unmarried woman; CHERYL ROLULLARD,
3 an unmarried woman; JESSIE E. BENNETT,
4 an unmarried woman; GENE R. KRZYCKI and
5 MARJORIE KRZYCKI, husband and wife; ED
6 WHITE AND TERRI WHITE, husband and
7 wife; DARLENE STEINER, a married woman;
8 DORA RICH, an unmarried woman; LEW
9 HANDELAND, an unmarried man;
10 CLARENCE LAMERS and SHARI LAMERS,
11 husband and wife; JANICE CHRISTO, a
12 married woman; OSCAR R. FLORES, an
13 unmarried man; JENNIAL MARTIN, an
14 unmarried woman; GEORGIEANNA
15 LANCUCKI, an unmarried woman; JOAN
16 PETERSON, a married woman; DORA REED,
17 an unmarried woman; MARYANNE MILLER,
18 an unmarried woman; DALE ADAM and
19 THERESE ADAM, husband and wife; JAMES
20 J. KIRKPATRICK, an unmarried man; EMILE
21 DUFFY, a married woman; CHARLES LAIR
22 and LELA LAIR, husband and wife; MARGIE
23 STOCK, a married woman; JOHN
24 CORMACK, a married man; LEE WALTER, a
25 married man; WALTER STROMME, a married
26 man; DEVERE STEVENSON and LOIS L.
STEVENSON, husband and wife; EARL
PEARSON and ISABEL PEARSON, husband
and wife; BONNIE WILCOX, a married
woman; ROY NELSON, a married man;
SHARON ANTES; DONALD L. HILL and
NORMA L. HILL, husband and wife; ROGER
JOHANSON and DIXIE JOHANSON, husband
and wife; PAULINE PERMANN, a married
woman; DAVID STOWE and TONI STOWE,
husband and wife; LEROY LANOUE and
DONNA LANOUE, husband and wife; PAUL
WICHERTS, an unmarried man; JAMES
DANIELS and LOLA DANIELS, husband and
wife; CHARLES RADCLIFF and VIRGINIA
RADCLIFF, husband and wife; JAMES

1 DORRANCE, a married man; JAMES
2 PEARSON and JANE PEARSON, husband and
3 wife; BILL VERNON and DORIS VERNON,
4 husband and wife; HARVEY BELL, an
5 unmarried man; WILLIAMS SCHUMACHER
6 and LUCY SCHUMACHER, husband and
7 wife; JAMES MASCORELLA and LOIS
8 MASCORELLA, husband and wife; GERALD
9 LENKA and MARCY LENKA, husband and
10 wife,

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Plaintiffs,

v.

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

Defendants.

Plaintiffs' hereby submit this Controverting Statement of Facts in response to the Separate
Statement of Facts in support of Defendants' Cross Motion for Summary Judgment.

1 **CONTROVERTING STATEMENT OF FACTS**

2 1. Plaintiffs admit that Dolores Miller was in charge of counting votes at the special
3 election in question. However, in redirect Ms. Miller testified that she misunderstood the original
4 question, attached to Defendants' Separate Statement of Facts (Deposition of Dolores Miller
5 ("Depo. Miller"), dated June 11, 2007, excerpts attached hereto as **Exhibit 1**, T97:19-24),
6 regarding the counting of the votes and clarified:

- 7 a. That there were "some discrepancies on the register sheet" at the special
8 election (Depo. Miller, T98:14-15);
- 9 b. That "there were more signatures on the register than what we had counted"
10 (Depo. Miller, T97:19-T98:21);
- 11 c. That she counted 194 ballots at the special election that did not vote at all
12 for the special assessment, although after subtracting the votes for and
13 against from the total number of residential units, there should only have
14 been 174 non-votes - a discrepancy of 20 ballots (T100:9-T100:2);
- 15 d. That she "[did] know of one party who voted who are not owners" of any
16 unit in the Apache Wells Community (Depo. Miller, T101:14-16);
- 17 e. That she was rushed in counting the ballots, which impacted the accuracy of
18 the count (Depo. Miller, T104:22-105:21).

19 DATED this 2nd day of July, 2007.

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

21
22 By _____

23 Steven W. Cheifetz
24 Stewart F. Gross
25 Melanie C. McKeddie
26 Matthew A. Klopp
Attorneys for Plaintiff

27 ORIGINAL of the foregoing hand-delivered
28 this 2nd day of July, 2007 to:

1 The Honorable Bethany Hicks
2 MARICOPA COUNTY SUPERIOR COURT
3 101 West Jefferson, ECB-811
4 Phoenix, Arizona 85003

5 COPY of the foregoing mailed
6 this 2nd day of July, 2007 to:

7 J. Gary Linder, Esq.
8 JONES, SKELTON & HOCHULI, P.L.C.
9 2901 North Central Avenue, Suite 800
10 Phoenix, Arizona 85012
11 Attorneys for Defendants

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Exhibit 1

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

KEN DOSHIER and DOROTHY DOSHIER,)
husband and wife; et al.,)
)
Plaintiffs,)
)
vs.) No. CV2007-005085
)
APACHE WELLS HOMEOWNERS ASSOCIATION,)
INC., an Arizona non-profit)
corporation; APACHE WELLS COUNTRY)
CLUB, INC., an Arizona non-profit)
corporation; et al.,)
)
Defendants.)
-----)

DEPOSITION OF DOLORES MARILYN MILLER

Phoenix, Arizona
June 11, 2007
1:38 p.m.

REPORTED BY:
PAMELA J. MAYER, RMR-CRR
Certified Reporter
Certificate No. 50207

PREPARED FOR:
MELANIE C. MCKEDDIE, ESQ.

(Copy)



3030 North Central Avenue
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Phoenix, Arizona 85012

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www.griffinreporters.com

1 DEPOSITION OF DOLORES MARILYN MILLER was
2 taken on June 11, 2007, commencing at 1:38 p.m., at the
3 law offices of Jones Skelton & Hochuli, 2901 North
4 Central Avenue, 7th Floor, Phoenix, Arizona, before
5 PAMELA J. MAYER, a Certified Reporter in the State of
6 Arizona.

7

8 COUNSEL APPEARING:

9 For Plaintiffs:

10 CHEIFETZ IANNITELLI MARCOLINI, P.C.
11 Ms. Melanie C. McKeddie
12 1850 North Central Avenue
13 19th Floor
14 Phoenix, AZ 85004

15 For Defendants:

16 JONES, SKELTON & HOCHULI, P.L.C.
17 Mr. James Gary Linder
18 2901 North Central Avenue
19 Suite 800
20 Phoenix, AZ 85012

21

22 ALSO PRESENT:

23 Mr. Brian Johnson
24 Ms. Susan Johnson
25 Ms. Lois Stevenson
Mr. Walter Stromme

26

27

28

29

1 already there -- when you cast your vote no for this
2 project, one of the things you were able to take into
3 consideration was this agreement in principle, and you
4 didn't like it. Correct?

5 A. Correct.

6 Q. And you voted no.

7 A. Yes.

8 MR. LINDER: All right. You know what?
9 I'm done.

10 MS. MCKEDDIE: A couple questions. Very,
11 very few.

12

13 EXAMINATION

14 BY MS. MCKEDDIE:

15 Q. Dee, you were talking about the ballot
16 inspection that we all went to in, I think, April of this
17 year. Right?

18 A. Yes.

19 Q. And Gary had asked you if you knew about
20 anything out of the ordinary that was discovered at that
21 inspection. Is that correct?

22 MR. LINDER: Form.

23 THE WITNESS: That's correct, although I
24 believe I misunderstood his question.

25 ///

1 BY MS. MCKEDDIE:

2 Q. Is there anything you'd like to add about the
3 results of the inspection?

4 A. Yes. I believe that there were some other
5 things.

6 THE WITNESS: I -- when you asked me that
7 question, I thought you were talking strictly about what
8 came out of that box and if -- out of the storage box.
9 Right?

10 MR. LINDER: Yeah.

11 MS. MCKEDDIE: I'm the one asking --

12 MR. LINDER: I was asking about everything
13 we saw out there that day, yeah.

14 THE WITNESS: Yes, I do believe that there
15 were some discrepancies on the register sheet.

16 BY MS. MCKEDDIE:

17 Q. Can you elaborate on that a little bit?

18 A. In the count of the votes.

19 Q. What specifically?

20 A. I believe there were more signatures on the
21 register than what we had counted.

22 Q. Well, let's go through the numbers.

23 Do you have a pretty good recollection of the
24 vote totals that were released by the board, if I'm
25 wording that correctly?

1 only vote for -- they're on two lots, but they can only
2 vote on one.

3 Q. Okay. I think I understand. But 1412 at the
4 time of the election. Is that correct?

5 MR. LINDER: Walt thinks 1407.

6 MS. MCKEDDIE: What's that?

7 MR. LINDER: I think Walt told me 1407.

8 MS. MCKEDDIE: I think he said 1412.

9 MR. LINDER: Okay. 1412. It doesn't
10 matter.

11 MR. JOHNSON: I think it's actually 1411.

12 MS. MCKEDDIE: It's around 1412.

13 THE WITNESS: Well, we're close.

14 BY MS. MCKEDDIE:

15 Q. Okay. So if you did the math, I think that your
16 recollection, and if I'm mistaken here, don't get me
17 wrong, but we had 644 votes in favor, 594 against, which
18 left 174 that did not vote. Is that correct?

19 A. Correct.

20 Q. How many votes -- this is a very strange way to
21 ask this. How many did we count at the special -- at the
22 review that did not vote at all?

23 A. 194.

24 Q. So was there a discrepancy?

25 A. There was a discrepancy.

1 Q. By how many?

2 A. 20.

3 Q. Just so we're clear.

4 So, although you are not the ones that requested
5 the review of the ballots, do you now remember why some
6 of your fellow plaintiffs may have requested a review?

7 A. Yes, I do.

8 Q. Okay. And, let's see. Could there be any other
9 discrepancies?

10 MR. LINDER: Form.

11 THE WITNESS: There could be.

12 BY MS. MCKEDDIE:

13 Q. Do you know the extent of everything?

14 A. I can tell you -- I can tell you -- and maybe
15 it's in the records but not on the register sheet. I do
16 know of one party who voted who are not owners.

17 Q. Okay. So is it fair to say --

18 A. If they own the property, it's not on the list
19 of registered owners. I can give you their name, if you
20 want it.

21 Q. That's okay.

22 MR. LINDER: I'd like it.

23 THE WITNESS: Betsy and Jim Freeman. I
24 believe that home is owned by Wilkins.

25 MR. LINDER: The last name is Wilkins?

1 who.

2 A. Huh?

3 Q. Who won't work for you anymore?

4 A. I can tell you, Joe and Mary Kramer.

5 Q. Is it C or a K?

6 A. K.

7 Jerry and Jean Surratt, S-u-r-r-a-t-t.

8 Darlene Steiner.

9 Q. How do you spell that?

10 A. S-t-e-i-n-e-r.

11 And possibly Lee Schroer. I'm not sure -- some
12 of my -- you know, I know that he's faithful to me on
13 counting and that sort of thing, but he was quite
14 disturbed about -- very disturbed -- you might talk to
15 him, because he wanted to go on record.

16 MS. MCKEDDIE: Can I have one more
17 question? I'll try and be quick. I know we've been here
18 all day, and I'm sorry.

19

20

FURTHER EXAMINATION

21 BY MS. MCKEDDIE:

22 Q. Anything else about -- when you conducted the
23 count, when you oversaw the election for the special
24 assessment, do you think you were rushed in any way?

25 A. Oh, definitely.

1 Q. How so?

2 A. Because I was supposed to get the ballots at
3 3 o'clock on Friday afternoon, on the 16th. I didn't get
4 them until 8:15 on the morning of the voting, on the
5 21st, although I had been there -- I went down at
6 6 o'clock in the morning, and could not get the ballots.

7 Q. How much time did you have to do what you needed
8 to do that day?

9 A. I didn't -- we had to put numbers on the back of
10 the ballots that -- four-digit numbers on every ballot,
11 which, we got out about 600 before the line -- before
12 they opened the door.

13 Q. So things were going quick.

14 A. Too fast. And Marv Stoll, our president, said,
15 "Dee, I've got a heads up on that. I wouldn't do that to
16 you again."

17 Q. Did they do that again?

18 A. No, it was a little bit better the second time.

19 Q. Okay. And do you think that impacted the way
20 the count went?

21 A. Of course.

22 MS. MCKEDDIE: Okay. That's all I have.

23 (Next page, please.)

24

25