

1999

Jean Levanger and Rebecca Levanger v. Joann Vincent, Ken Fisher, Diane Duplanty, Ron Duplanty, Jan Nemcik, Betsy Nelson, Rosie Petronell, Cory Alsberg, Gerald Vincent, Sandy Fisher, Scott Featherstone, Martin Roguschka, Lance Swedish, Laurel Kangas, John Does 1-5, Jane Does 1-5, and Higland Estating Properties Owners Association, INC. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JEAN LEVANGER and REBECCA)
LEVANGER,)
Plaintiffs/Appellants,)

vs.)

JOANN VINCENT, KEN FISHER, DIANE)
DUPLANTY, RON DUPLANTY, JAN)
NEMCIK, BECKY NELSON, ROSIE)
PETRONELL, CORY ALSBERG, GERALD)
VINCENT, SANDY FISHER, SCOTT)
FEATHERSTONE, MARTIN ROGUSCHKA)
LANCE SWEDISH, LAUREL KANGAS,)
JOHN DOES 1-5, JANE DOES 1-5, and)
HIGHLAND ESTATES PROPERTIES)
OWNERS ASSOCIATION, INC.,)

Defendants/Appellees.)

Appellate Court No. 990301-CA
Trial Court No.

Priority No. 15

BRIEF OF APPELLEE

Appeal from the Order Granting Summary Judgment
taken from the Third Judicial District Court
for Summit County, State Of Utah
Judge Ronald E. Nehring.

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FILED

Utah Court of Appeals

SEP 20 1999

Julia D'Alesandro
Clerk of the Court

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Ann. section 78-2a-3(j) (1996).

This appeal was transferred to the Court of Appeals from the Utah Supreme Court.

STATEMENT OF ISSUES

1. Did the actions of the Board of Trustees with respect to the amendment of the CC&R's substantially comply with Utah Statutes and the Homeowners Associations' organizational documents?

2. Did the trial court abuse its discretion when it denied Plaintiffs' Motion to Reconsider on the grounds that the Motion presented no 'newly discovered evidence'?

STANDARDS OF REVIEW

(1) The standard of review on an Appeal from the granting of a motion for summary judgment is that the Appellate Court accords no deference to the trial court's legal conclusions of law which are reviewed for correctness. See Schurtz v. BMW of No. Am., Inc., 814 P.2d 1108 (Utah 1991). The reviewing court may affirm a grant of Summary Judgment on any ground available to the trial court, even if it is one not relied upon below. See Higgins v. Salt Lake County, 855 P.2d 231 (Utah 1993).

(2) A trial court's denial of a motion to reconsider summary judgment is reviewed under Rule 60(b) of the Utah Rules of Civil Procedure for abuse of discretion. See Lund v. Hall, 938 P.2d 285, 287 (Utah 1997); In re Determination of the Rights to Use Water, 368 Utah Adv. Rep. 9, 12 (Utah 1999).

DETERMINATIVE STATUTES

U.C.A. Section 16-6-29. Voting - Quorum

The articles of incorporation or bylaws may provide the number or percentage of members entitled to vote represented in person or by proxy or the number or percentage of votes represented in person or by proxy, which shall constitute a quorum at a meeting of members. In the absence of any such provision, the members present in person or represented by proxy shall constitute a quorum at any meeting of members. The vote of a majority of the votes entitled to be cast by the members present or represented by proxy at a meeting at which a quorum was initially present shall be necessary for the adoption of any matter voted on by the members unless a greater proportion is required by this act, the articles of incorporation or the bylaws.

U.C.A. Section 16-6-30. Voting - Rights of members

The right of the members, or any class or classes of members, to vote may be limited, enlarged or denied to the extent specified in the articles of incorporation or the bylaws. Unless so limited, enlarged or denied, each member, regardless of class, shall be entitled to one vote on each matter submitted to a vote of members.

A member may vote in person or, unless the articles of incorporation or the bylaws otherwise provide, may vote by proxy executed in writing by the member or by his duly authorized attorney in fact. Where trustees or officers are to be elected by members, the governing board by resolution or the bylaws may provide that such elections may be conducted by mail.

U.C.A. Section 16-6-33. Consent to action without meeting

Any action required by this act to be taken at a meeting of the members or trustees of a nonprofit corporation, or any action which may be taken at a meeting of the members or trustees may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all of the members entitled to vote with respect to the subject matter thereof, or all of the trustees, as the case may be.

Such consent shall have the same force and effect as a unanimous vote, and may be stated as such in any articles or document filed with the Division of Corporations and Commercial Code under this act.

STATEMENT OF THE CASE

Nature of the Case

This is an action brought by Jean and Rebecca Levanger, as a derivative action, against Highland Estates Properties Owners Association, Inc., alleging that the manner in which the Associations amended CC&R's were approved was improper and contrary to the Association's organizational documents and Utah law.

Course of Proceedings and Disposition

Plaintiffs filed their Complaint January 21, 1997. (R. 9.) Defendant Highland Estates filed its Answer February 26, 1997. (R. 77.)

Highland Estates filed a Motion for Summary Judgment November 26, 1997. (R. 198.) A hearing on the Motion for Summary Judgment was heard by the Third District Court, the Honorable Ronald E. Nehring presiding, on January 9, 1998, two weeks before the scheduled trial on this matter. (R. 411.) The Court issued an order granting in part Highland Estates' Motion for Summary Judgment on May 28, 1998. (R. 467.)

Plaintiffs filed a Motion to Reconsider the Decision Granting Partial Summary Judgment or to Certify the Order as Final and Appealable on July 16, 1998. (R. 479.) A hearing on Plaintiff's Motion to Reconsider was heard by the Third District Court, the Honorable Pat B. Brian presiding, on October 7, 1998. At the hearing, the Court denied

Plaintiff's Motion to Reconsider and granted Plaintiff's Motion to Certify the Summary Judgment as Final pursuant to Rule 54(b) and (after hearing argument on Plaintiff's Objections to Form of the Order) signed an Order to effect the Court's ruling on March 3, 1999. (R. 1063.)

The Plaintiffs filed a Notice of Appeal on March 31, 1999. (R.1074.) The case subsequently was poured over to the Court of Appeals by Order dated May 18, 1999, and filed May 20, 1999. (The Order has no Bates stamp in the record on appeal but the index to the record indicates that it should be page 1145 of the record on appeal.)

STATEMENT OF FACTS

1. On or about March 14, 1972, Restrictive Covenants ("1972 CC&R's") of Highland Estates Properties Owners Associations, Inc. ("Highland Estates") were recorded in the Summit County Recorder's Office amending earlier conditions and restrictions. (R. 242-245, 202.) The 1972 CC&R's provide that the CC&R's can be amended by a vote of a majority of owners of lots in the subdivision. (R. 245.) The 1972 CC&R's are silent as to how and where such a vote is to be taken. (R. 245.)

2. On or about October 30, 1972, the Articles of Incorporation of Highland Estates were filed with the State of Utah, incorporating Highland Estates as a non-profit corporation. (R. 247-248, 202.) The Articles of Incorporation are silent as to the amending of organizational documents and CC&R's. (R. 247-248.)

3. Subsequent to the filing of its Articles of Incorporation, Highland Estates adopted bylaws. (R. 250-260, 202.)

4. The bylaws do not specifically require that all voting be done at a meeting. (R. 251.) However, the bylaws do provide that if a quorum is not present at a duly held meeting of members, the meeting may be adjourned to a later date. At the reconvened meeting, the members and proxy holders present constitute a quorum for the transaction of business. The bylaws also provide that all inaccuracies and/or irregularities in calls, notices of meetings and in the manner of voting, shall be deemed waived if no objection is made at the meeting. (R. 251.)

5. Annual member meetings were attended by very few members. The lack of attendance made it impossible for the Board of Trustees to transact any business without holding a reconvened meeting. (R. 203.)

6. The Board of Trustees, during 1993 and 1994, determined that the 1972 CC&R's needed to be amended. (R. 304.)

7. In the Spring of 1994, Highland Estate's General Counsel, Scott Welling, was asked by the Board of Trustees to draft an Amendment to Declarations and Restrictive and Protective Covenants ("Amended CC&R's"). A draft was presented to the members in attendance at the Association's 1994 annual meeting held in June, 1994. Attorney Welling was present at the annual meeting and advised the members present with

regard to the legal aspects of the proposed changes. (R. 303-308.) There were not enough members present at the June 1994 meeting to constitute a quorum. (R. 262.)

8. At the conclusion of the discussions, everyone present voted to accept the Amended CC&R's and to allow until July 15, 1994 for comment. (R. 262.)

9. It was suggested, by Mr. Welling, at the June 1994 meeting that the vote on the Amended CC&R's be undertaken by means of a written ballot, to be delivered to all members, along with a copy of the draft Amended CC&R's. (R. 262, 305.)

10. At the suggestion of Mr. Welling, the trustees, and all members present at the 1994 annual meeting, agreed that the most effective and fair way to inform the greatest number of homeowners of the proposed changes to the 1972 CC&R's was by mail-in written ballot. (R. 305, 262.)

11. Efforts to ensure as much input from the owners on the proposed amendment cost the Association several thousand dollars more in attorney's fees and copy costs, let alone the time and effort of individual Board members and Officers that would not have been extended in submitting the Amended CC&R's to members at a reconvened meeting. (R. 305-306.)

12. The Plaintiffs were not present at the June, 1994 meeting. (R. 206.)

13. On August 23, 1994, Attorney Welling, on behalf of Highland Estates, prepared a letter to each member of Highland Estates stating that a copy of the proposed amendment to the 1972 CC&R's was attached to the letter and a ballot to officially register

each member's vote of the proposed amendments to the CC&R's. (R. 306.) The letter indicated that the Amendment had the approval of the Board of Trustees and over forty homeowners in attendance at the annual meeting in June, 1994. Attorney Welling explained the purpose of the Amendment and requested that ballots be returned no later than November 30, 1994. (R. 158, 305-307.)

14. Mr. Welling's letter, along with a ballot and a voting draft of the Amended CC&R's was to be hand delivered to each of the members of Highland Estates. (R. 305.)

15. In August, 1994, Plaintiffs received by hand delivery the letter from Attorney Welling, a voting ballot and a draft of the Amended CC&R's. (R. 205, 233.)

16. The Plaintiffs did not lodge an objection to the Amended CC&R's, nor did they vote on the CC&R's. In fact, Plaintiffs did nothing with respect to the CC&R's until the CC&R's had been ratified by a majority of the members of Highland Estates and had been recorded in the Summit County Recorder's Office. (R. 205, 233-234.)

17. In January, 1995, the Board of Trustees of Highland Estates sent a newsletter to each homeowner stating that the voting period for the Amended CC&R's had been extended and encouraged members who had not voted to do so. (R. 264.)

18. The voting deadline of November 30, 1994, was never intended to be an automatic cut-off date for submission, merely an inducement to motivate homeowners to act as soon as possible. (R. 306.) A majority of member owners voted in favor of the

Amended CC&R's, the vote on the Amended CC&R's was 149 in favor, 26 opposed and 87 who did not respond. (R. 306.)

19. On September 28, 1995, Highland Estates held its annual homeowners meeting at 7:30 p.m. at the Burns Fire Station. The minutes of the annual meeting reflect that an announcement had been made that the Amended CC&R's had been approved by the majority of homeowners, that the ballots would be verified and upon completion, the Amended CC&R's would be recorded with the County. The sign-in sheet indicated that Plaintiffs were not present at the September 28, 1995 meeting. (R. 266-267.)

20. On October 5, 1995, Highland Estates caused to be filed with the Summit County Recorder's Office, the Amended CC&R's. (R. 270-280.)

21. On January 16, 1997, the Plaintiffs filed a Verified Complaint and served the Complaint upon Highland Estates. The Complaint alleged that certain past and present members of the Board of Trustees had breached their fiduciary duty with respect to the manner in which the voting was conducted for the amendment to the 1972 CC&R's. (R. 3-4.)

22. On January 21, 1997, the Plaintiffs caused to be filed in the Third Judicial Court of Summit County a Motion for Temporary Restraining Order asking the Court to enjoin the Highland Estate's Board of Trustees from enforcing the Amended CC&R's, and enjoining the Board of Trustees from convening the meeting of the members of the Highland Estates which was currently scheduled for January 23, 1997. It was not

until September 26, 1997, that Plaintiffs noticed a hearing on their Temporary Restraining Order. (R. 165-166.)

23. On April 25, 1997, the Plaintiffs through their First Request For Production of Documents requested the voting ballots which had been submitted by members on the Amended CC&R's. (R. 1153.)

24. On May 29, 1997, Highland Estates objected to the Request stating that the information sought was not relevant or calculated to lead to discoverable evidence and that the information sought was highly personal and proprietary. (R. 1154.)

25. Following Highland Estate's objection to the Plaintiffs' request for the voting ballots, the Plaintiffs did not seek to compel the production of the voting ballots. The Plaintiffs had over six months before the discovery cut-off date of December 21, 1997 in which to file a motion to compel the production of the voting ballots. The Plaintiffs failed to file a Motion to Compel. (R. 1154.)

26. On September 30, 1997, Plaintiffs' Motion for Temporary Restraining Order was heard by the Honorable Pat D. Brian. Judge Brian, having reviewed the documents filed and having heard oral argument, denied Plaintiffs' Motion for Temporary Restraining Order stating in minute entry that the Plaintiffs had failed to meet their burden as per the rules. At the hearing on September 30, 1997, Judge Brian scheduled a two-day bench trial for January 22 and 23, 1998 with a pre-trial conference set for January 14, 1998. (R. 167.)

27. Before the scheduled trial date, Highland Estates filed a Motion for Summary Judgment which was fully briefed by both the Plaintiffs and Highland Estates. Affidavits were submitted and the matter came on for oral argument at a hearing before the Honorable Ronald E. Nehring on January 9, 1998. The hearing was held two weeks before the scheduled trial of January 22 and 23. (R. 1084-1144.) At the hearing the undisputed evidence before Judge Nehring was that the ballots had been delivered to all members (R. 1132) and that the ballots had been properly counted and a majority of votes received in favor of the amendment. (R. 1133.) From the bench, Judge Nehring granted partial summary judgment to Highland Estates, holding as a matter of law, that the Board of Trustees acted properly in the amendment of the 1972 CC&R's. (R. 1130.)

28. At the hearing, Counsel for Plaintiff requested that the ruling be certified for appeal and Counsel for Defendants so stipulated. (R.1135-1143.)

29. On May 28, 1998, the Honorable Ronald E. Nehring issued an Order granting Partial Summary Judgment for Highland Estates. (R. 467-471.)

30. The Honorable Ronald E. Nehring issued specific findings of fact and conclusions of law holding, as a matter of law, that the actions taken by the Trustees of Highland Estates, that led to the adoption of the Amended CC&R's, were proper and that the mail-in ballot voting procedures substantially complied with the by-laws and the 1972 CC&R's, and that no prejudice to the homeowners of Highland Estates occurred as a result of mail-in balloting. (R. 470.)

31. Subsequent to the Court's Order granting in part and denying in part Highland Estate's Motion for Summary Judgment, the Plaintiffs secured the affidavits of Michael Ferrigno and Christie Bambery on July 8, 1998. (R. 473.)

32. Mr. Ferrigno indicated in his Affidavit that he had been a property owner in the Highland Estates subdivision since January of 1994. (R. 473.)

33. Several months after the issuance of Judge Nehring's Order granting Highland Estate's Motion for Summary Judgment, Plaintiff Rebecca LeVanger, using her newly acquired position on the Board of Directors wrongfully secured the voting ballots, circumventing discovery procedures, and made copies of the ballots. (R. 512.)

34. On July 15, 1998, the Plaintiffs filed a Motion to Reconsider Judge Nehring's Order Granting Summary Judgment, or in the Alternative, to Certify the Order as Final and Appealable Pursuant to Rule 54(b). (R. 479.) Plaintiffs' Motion to Reconsider was premised upon an argument that the ballots had not been counted properly because some of the ballots had not been signed by both joint tenants. (R. 479-500.)

35. On October 7, 1998, after hearing argument on Plaintiff's Motion to Reconsider, Judge Pat. B. Brian denied the Plaintiff's Motion to Reconsider, finding that the new evidence submitted by Plaintiffs was available to the Plaintiffs at the time summary judgment was argued and granted.

36. Because of the earlier stipulation of the parties, Judge Brian agreed to certify Judge Nehring's Partial Summary Judgment Order for Appeal. (R. 1063-1066.)

ARGUMENT

POINT I.

THE TRIAL COURT CORRECTLY FOUND, AS A MATTER OF LAW, THAT THE ACTIONS OF THE BOARD OF TRUSTEES WITH RESPECT TO AMENDING THE RESTRICTIVE COVENANTS WAS PROPER, AND SUBSTANTIALLY COMPLIED WITH STATE STATUTES AND THE ORGANIZATIONAL DOCUMENTS OF THE ASSOCIATION.

A. The Trial Court Applied the Proper Standard of Review of the Actions of the Board of Trustees.

As the trial court in this matter properly stated “few things are more fundamental to Corporations . . . than this process by which those entities amend their charters or their beginning documents.” (R. 1130.) Much discussion has taken place in the appellate courts around the country as to the standard of judicial review which should be given to the actions of a non-profit governing board, including those of homeowners associations. See Levandusky v. One Fifth Avenue Apartment Corp., 553 N.E.2d 1317, 1321 (N.Y. 1990); In re Croton River Club, Inc., 52 F.3d 41, 44 (2nd Cir. 1995). The appellate court in Levandusky recognized that competing concerns exist and that the standard for judicial review of the actions of a homeowners association governing board must be sensitive to a variety of concerns. Levandusky, 553 N.E.2d at 1321. On the one hand, there must be some method of check and balance to prevent members of a governing board from abusive exercise of their power, while on the other hand, courts must not undermine the purposes for which the governing board was formed including the “protection of the interests of the

entire community of residents in an environment managed by the Board for the common benefit.” Id. at 1321.

The Levandusky court concluded that these competing goals were best served by a standard of review that is analogous to the business judgment rule applied by courts to determine challenges to decisions made by corporate directors. Id. at 1321 (citing Auerback v. Bennett, 393 N.E.2d 994 (N.Y. 1979)). The court stated that “a number of courts in this and other states have applied such a standard in reviewing the decisions of co-operative and condominium boards.” Id. at 1321. The Levandusky court went on to explain that the business judgment rule prohibits judicial inquiry into actions of corporate directors “taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of a corporate purpose.” Id. at 1321; see Auerback, 393 N.E.2d at 999.

Additionally, in Burke v. Tennessee Walking Horse Breeders & Exhibitors Assoc., et al., 1997, WL277999 (Tenn. App.), the trial court, in a derivative action such as this, was asked to declare a vote of the members null and void because the votes had not been counted pursuant to the governing documents of the Association. Id. at *7-9. The trial court granted summary judgment for the Association holding that there was a policy against substituting the judgment of a court for the judgment of a corporate board. Id. The appeals court affirmed the trial court’s decision. Id. The court held that this policy was reflected in the business judgment rule. Id. at *5, *9. The appeals court, quoting the trial court stated as follows:

The executive committee therefore faced a situation in which the bylaws could not be applied strictly as written because they could not ascertain what ballots were in the post office on October 15th. The executive committee opted for a course of action reasonably calculated to comply substantially with the bylaws . . . even if the approach was not the most prudent and was not expressly approved by the bylaws, it was not forbidden by the bylaws and in fact, was consistent with the corporation's prior procedure This trial court exercises its discretion not to render a declaratory judgment on the validity of an election to the board of a non-profit corporation where the duly responsible subdivision of the corporation determines how best to conduct an election which is impossible to conduct with absolute precision under the terms of the bylaws

It is particularly inappropriate to entertain a declaratory judgment action when the complaining parties did not raise the issue before the executive committee, the full board or the membership at their meetings

Id. at *14.

It is clear from the record that the trial court in the case at hand applied a standard of review similar to that standard applied in Levandusky and Burke. From the evidence in the record at the time of the oral argument on the Motion for Summary Judgment, the trial court correctly ruled, as a matter of law, that the actions taken by the Trustees that led to the adoption of the Amended CC&R's were proper. In determining that the Board of Trustees' decision to seek approval to amend the Restrictive Covenants by mail-in ballot was proper, the trial court reviewed the objective of the Utah statutes and the organizational documents in decision making procedures to affect changes and amendments to the organic documents and determined that the primary objective was to encourage participation and to invite and solicit the votes of as many members as possible with respect to those issues. (R. 47.)

The court found, as a matter of law, that the bylaws were unambiguous in so far as they set out a procedure for amendment. (R. 47.) The trial court also found, as a matter of law, that the restrictive covenants, as they existed, did not expressly require that amendment to the 1972 CC&R's be adopted in the context of a meeting. (R. 47.) The trial court correctly concluded that the question became: did the alternative voting procedure substantially comply with the terms of the bylaws and CC&R's. The trial court then concluded that the Board of Trustees had substantially complied with those provisions. In so doing, the trial court made a determination based upon the facts in the record at the time that, as a matter of law, the mail-in voting process provided protections and resulted in no prejudice to the members. The trial court stated that in so far as the record at that time was concerned, notice had been provided to everyone who should have received notice. The court also concluded that there was collateral support in that a majority of 'yes' votes came in indicating that the notice had been provided to the members.

Finally, based upon the record before the trial court, the trial court determined that the voting process had integrity. There was no evidence that the votes were not counted properly. Moreover, a majority of homeowners did actually vote for the amendment. The Plaintiffs offered no evidence to the trial court to dispute that all members had not received the mail-in ballot, or that the votes had not been properly counted.¹ Accordingly, the trial

¹ Plaintiffs did not contest these issues of fact until after the summary judgment hearing. Several months following the hearing Plaintiff attempted to use three affidavits to create an issue of fact with respect to the manner in which notice was provided to homeowners and the manner in which the votes were counted. These affidavits became the subject of Plaintiffs'

court was correct in ruling that, as a matter of law, the Board of Trustees had acted properly as it related to the amendment of the 1972 CC&R's.

B. The Mail-in Balloting Process Is Not Prohibited by Utah Law.

Plaintiffs contend that the trial court was incorrect for granting partial summary judgment because Utah law does not allow the amendment of restrictive covenants to be conducted by mail-in ballot and that Utah law only provides for voting through in-person meetings. Plaintiffs are wrong. Just the opposite is true, Utah, unlike many other states, does allow members or shareholders to vote without being present at a meeting.²

The provisions of Utah's Non-Profit Corporations and Co-operative Association Act ("Act"), as cited by Plaintiffs, provide great flexibility in the voting process of the members of a non-profit association. For example, U.C.A. section 16-6-29 (1953 as amended), states simply, that any number of members present in person or represented by proxy shall constitute a quorum at any meeting of members.³ Accordingly, U.C.A. section

Motion to Reconsider. Highland Estates has addressed the Motion to Reconsider in Point II below.

² U.C.A. section 16-6-30 (1953 as Amended). A member may vote in person or, unless the articles of incorporation or the bylaws otherwise provide, may vote by proxy executed in writing by the member or by his duly authorized attorney-in-fact. Where trustees or officers are to be elected by members, the governing board by resolution or the bylaws may provide that such elections may be conducted by mail.

³ U.C.A. section 16-6-29. The articles of incorporation or bylaws may provide the number or percentage of members entitled to vote represented in person or by proxy where the number or percentage of votes represented in person or by proxy, which shall constitute a quorum at a meeting of members. In the absence of any such provision, the members present in person or represented by proxy shall constitute a quorum at any meeting of members. The vote of a majority of the votes entitled to be cast by the members present or represented by proxy at a

16-6-29 would actually allow one member to be a quorum at any meeting. Additionally, U.C.A. section 16-6-30 allows members to vote by proxy. It also allows election votes to be conducted by mail.

Plaintiffs cite U.C.A. section 16-6-33 for the proposition that all action must be taken at a meeting of the members unless all members agree to take action without a meeting. However, a reading of the statute reveals that the only action required to be taken at a meeting is an amendment to the Articles of Incorporation.⁴ Nowhere does the Act require an in-person meeting to take action to amend restrictive covenants or CC&R's. In fact, the only action required by the Act to be taken at a meeting of members is the amendment of the articles of incorporation. The Act in no way contemplates an in-person meeting to take action to amend restrictive covenants or CC&R's. In fact, the Act contemplates great flexibility by the association and trustees. The Act expressly allows one of the most sacred of all voting actions the voting related to the election of trustees, to occur by mail-in balloting. See U.C.A. § 16-6-30 (1953 as amended).

meeting at which a quorum was initially present shall be necessary for the adoption of any matter voted on by the members unless a greater proportion is required by this Act, the articles of incorporation or the bylaws.

⁴ U.C.A. section 16-6-33. Any action required by this Act to be taken at a meeting of the members or trustees of a non-profit corporation, or any action which may be taken at a meeting of the members or trustees may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all the members entitled to vote with respect to the subject matter thereof, or all of the trustees as the case may be . . .

Clearly, the spirit of the Act is to allow the associations themselves to control the inner-workings of the entity. The Act is simply a safety net, requiring minimal procedural guidelines when none have been provided in the organizational documents of the non-profit entity.

C. The Organizational Documents Do Not Prohibit Voting By Mail-In Ballot.

Plaintiffs argue that the organizational documents of Highland Estates, which existed at the time of the proposed amendment of the 1972 CC&R's, prohibited voting by mail-in ballot. The organizational documents which existed at the time of the proposed amendment of the 1972 CC&R's were: (1) Articles of Incorporation; (2) Bylaws of the Corporation; and (3) the 1972 CC&R's.

First, the 1972 CC&R's themselves contain the following language with respect to amendment:

These conditions shall run with the land and shall be binding upon all parties and all persons claiming under them until March 10, 1982, at which time said conditions and covenants shall be automatically extended for successive periods of ten (10) years unless by vote of the owners of a majority of the lots in said subdivision, it is agreed to change said conditions in whole or in part.

(R. 245.) Nothing in the 1972 CC&R's mandates that the vote on amending the 1972 CC&R's be done at an in-person meeting. Clearly, any reasonable means of securing a majority vote is contemplated in the language of the 1972 CC&R's.

Second, while the Bylaws do not specifically address the amendment of CC&R's, the Bylaws do specifically state that only a majority vote is necessary to decide any question, unless a different vote is required by statute or by the other organizational documents.⁵ Additionally, the Bylaws provide that members and holders of proxies of more than fifty percent (50%) of the total votes of the association constitutes a quorum. However, if a quorum is not present at a meeting, the Bylaws allow a reconvened meeting to occur and if properly noticed, whoever appears at the reconvened meeting represents a quorum for the transaction of business.⁶ Moreover, all irregularities in the "manner of voting" are deemed waived if no objection is made at the meeting. (R. 251.)

At the annual meeting of members for 1994, the Amended CC&R's were discussed in great detail. The Amended CC&R's were discussed page by page with input and changes from members present. (R. 262.) All members present at the 1994 annual meeting voted to accept the changes to the 1972 CC&R's and agreed to allow until July 15,

⁵ Section 2.5 - Voting Requirements. When a quorum is present in person or represented by proxy at any meeting, the vote of a majority of the membership present in person or by proxy shall decide any question brought before such meeting . . . (R. 251.)

⁶ Section 2.7 - Quorum. At any meeting of the members, the presence of members holding, or holders of proxies entitled to cast, more than fifty (50%) of the total votes of the association shall constitute a quorum for the transaction of business. In the event a quorum is not present at a meeting, the members present (whether represented in person or by proxy), though less than a quorum may adjourn the meeting to a later date. Notice thereof shall be delivered to the members as provided above at the reconvened meeting, the members and proxy holders present shall constitute a quorum for the transaction of business. (R. 251.)

1994 for any further input from members. Additionally, the minutes of the 1994 annual meeting reflect that all members present voted to allow all members not present to vote on the Amended CC&R's by mail-in ballot. (R. 262.)

No one at the 1994 annual meeting objected to the use of mail-in ballots. (R. 262.) The Plaintiffs admitted in their depositions that they were not present at the 1994 annual meeting of members. They also stated that even after they received the voting ballot and proposed amendment to the 1972 CC&R's, they lodged no objection to the Amended CC&R's nor the manner in which the voting occurred. Finally, Highland Estate's Articles of Incorporation are silent as to the voting practices and procedures of the association.

Clearly, the organizational documents of the association do not prohibit voting by mail-in ballot. The Bylaws of the association clearly and unambiguously contemplate great flexibility in the manner of voting and were designed with the clear purpose of allowing needed changes to occur even if participation was minimal. Additionally, the Bylaws allowed for flexibility in the manner that voting occurred by providing that all irregularities in the manner of voting had to be objected to at the meeting or all objections were deemed to be waived.

There can be no doubt that the trial court was correct in ruling that the board of trustees acted reasonably and properly in their desire to involve more members in the voting process, and actually went beyond what was required by the Bylaws in obtaining a true

majority vote by mail-in ballot. (R. 47-51.) Clearly, the board of trustees substantially complied with Utah law and the organizational documents of the association.

D. The Trial Court Did Not Incorrectly View Mail-In Balloting as the Effective Equivalent of Soliciting Proxies.

The Plaintiffs argue that the trial court was incorrectly “persuaded by the argument that, since proxies are allowed at in-person meetings, mail-in balloting does not injure any fundamental purpose of governance.” (Appellants’ Brief p. 15.) The Plaintiffs have severely misconstrued the trial court’s reasoning. As it pertains to proxies, the trial court simply used the allowance of proxies by the organizational documents to undercut the Plaintiffs’ argument that an actual meeting was necessary to encourage the vigorous exchange of views. (R. 50.)

The Plaintiffs argue that in-person meetings are necessary to provide meaningful input on issues and actions. In support of this argument, the Plaintiffs refer to the affidavit of Christie Bambery. The Plaintiffs’ argument is flawed for a number of reasons. First, the Bambery affidavit cannot be presented as evidence on appeal. The Bambery affidavit was not part of the record at the time the Summary Judgment motion was argued and ruled upon. The Bambery affidavit came several months later as part of Plaintiffs’ Motion for reconsideration.

Second, the Board of Trustees did, at the 1994 annual meeting, dedicate the majority of the meeting to discussing in great detail the proposed amendments to the 1972 CC&R’s. The minutes of the 1994 annual meeting reflect that after a detailed discussion,

every member present at the 1994 annual member meeting voted to accept the changes and to allow mail-in voting to occur. (R. 262.) Again, the Plaintiffs were not present to provide vigorous exchange of views. Accordingly, a meeting was dedicated to an in-depth discussion of the proposed changes to the restrictive covenants and the manner of voting on the amendment to the restrictive covenants.

The Plaintiffs also argue that the trial court was incorrect in giving any weight to the argument that the balloting process was a better alternative than a reconvened meeting. Plaintiffs' argument is premised on their contention that the 1972 CC&R's could not be amended by a reconvened meeting. Plaintiffs are arguing from both sides of the fence. They attempt to use the Bylaws as evidence that an in-person meeting was required to amend the 1972 CC&R's yet, on the other hand, they argue that the Bylaws have no application to amending the 1972 CC&R's.

In support of this argument, the Plaintiffs attempt to apply the notion that the more specific provisions of the 1972 CC&R's controlled over the general provisions of the Bylaws. It is clear, however, from a simple reading of both provisions, that the Bylaws are much more specific than the general language of the 1972 CC&R's. The 1972 CC&R's are silent as to the manner of voting. They simply state that amendment requires a vote of members owning a majority of the lots. They do not state that the vote must take place at a in-person meeting. The trial court was correct in finding, that as a matter of law, the

Bylaws were unambiguous. The Bylaws are clearly more specific than the 1972 CC&R's as to the voting process.

E. No Genuine Issue of Material Fact Was Before the Trial Court as To the Integrity of the Voting Process.

Plaintiffs also argue that the mail-in balloting was unlawful because the voting process was flawed. However, all evidence provided by the Plaintiffs in this regard was acquired months after the Summary Judgment had been granted by the trial court. The state of the Record, at the time of the granting of Summary Judgment is clear. There were no genuine issues of material fact in the record relating to the integrity of voting process. The facts in the record were undisputed, that adequate notice was provided to all members, that all votes were properly counted, and that a majority of members eligible to vote did indeed vote in favor of the amendment. (R. 1133.)

As discussed below, Plaintiffs are precluded from arguing on Appeal that there is an issue of fact as to whether all homeowners eligible to vote actually received the voting packet and whether the votes were properly counted. As discussed below, Plaintiffs had ample opportunity during the discovery process to gather this information and present it to the trial court in a timely manner for the trial court's consideration when ruling upon Defendants' Motion for Summary Judgment. Accordingly, the Plaintiffs cannot now raise the issues on appeal.

POINT II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT PROPERLY REVIEWED PLAINTIFFS' MOTION TO RECONSIDER.

A. The Trial Court Properly Reviewed Plaintiffs' Motion to Reconsider Under Rules 54(b) and 60(b).

Plaintiffs claim that the trial court abused its discretion because it did not consider the probative value of Plaintiffs' Motion to Reconsider. (Appellants' Brief, p. 22.) Plaintiffs assert that Rule 54(b) required Judge Brian to review the pleadings and evidence submitted by Plaintiffs before making his ruling.⁷ (Id.) Such an assertion is not in keeping with the Utah Rules of Civil Procedure or with Utah case law. Rule 54(b) provides in pertinent part that in the absence of a final determination and direction, a judgment upon multiple claims "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Utah R. Civ. P. 54(b). Nothing in this rule *requires* a trial court to revisit a partial summary judgment. Instead, the rule only provides that such an order is "subject to" revision. Before revisiting such an order a trial court must have reason to do so. The reasons for relief from such an order are found in Rule 60(b). See In re Determination of the Rights to Use Water, 368 Utah Adv. Rep. 9, 12 (Utah 1999) (holding that in determining whether a trial court has abused its discretion in denying a motion to reconsider a partial summary judgment, appellate courts look to the standards

⁷ Plaintiffs further allege that "the trial court incorrectly applied a standard of review based on Rule 56 . . ." (Appellants' Brief, p. 23.) However, there is nothing in the record supporting the notion that Judge Brian relied on Rule 56. Instead, the record shows that Judge Brian applied the standards set forth in Rules 54(b) and 60(b). (R. 1047.)

set forth in Rule 60(b); Lund v. Hall, 938 P.2d 285, 287 (Utah 1997); Timm v. Dewsnup, 921 P.2d 1381, 1386 (Utah 1996)). The Rule states in pertinent part:

On motion . . . the court may . . . relieve a party . . . from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) *newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial* . . .; (3) fraud . . . misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied . . .; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), or (3), not more than 3 months after the judgment . . .

Utah R. Civ. P. 60(b) (emphasis added). Without such a reason, it would be pointless for a

court to review a prior order.

Applying this standard Utah courts have found that “new evidence must be submitted and it must; (i) be such as it could not with reasonable diligence have been discovered and produced in opposition to the motion for summary judgment; (ii) not be merely cumulative; and (iii) be such as to render a different result probable.” In re Determination of the Rights to Use Water, 368 Utah Adv. Rep. at 12 (citing State v. Goddard, 871 P.2d 540 (Utah 1994) (refusing to grant a motion for a new trial where new evidence did not meet these standards)); see also Trembly v. Mrs. Fields Cookies, 884 P.2d 1306, 1311 (Utah Ct. App. 1994) (holding that “[a] court can consider several factors in determining the propriety of reconsidering a prior ruling. These may include, but are not limited to, when . . . (3) a party offers new evidence”). As Plaintiffs point out, Motions to

Reconsider should be denied when, “in the case of summary judgment, a subsequent motion fails to present the case in a different light, such as when no new, material evidence is introduced.” Salt Lake City Corp. v. James Constructors, 761 P.2d 42, 43 (Utah Ct. App. 1988); Appellants’ Brief, p. 24.

In this case, Judge Brian properly reviewed Plaintiffs’ Motion to Reconsider under Rules 54(b) and 60(b). After a full hearing on Plaintiffs’ Motion to Reconsider, Judge Brian found that:

The record is undisputed that at the time summary judgment was argued and granted, there was no request by Plaintiffs for a continuance in order to conduct additional discovery; secondly, there was no motion to compel discovery either prior to or at the time of motion for summary judgment; and, three, it is undisputed that evidence relating to what is now offered as newly discovered evidence was, in fact, available to the Plaintiffs at the time summary judgment was argued and granted.

(R. 1047.) Judge Brian, authorized to review Plaintiffs’ Motion to Reconsider under Rule 54(b), applied the standards set forth in Rule 60(b) and found that Plaintiffs’ Motion presented no “newly discovered evidence.” (R. 1047.) As such, Judge Brian’s review of Plaintiffs’ Motion was proper and cannot be considered an abuse of discretion.

Plaintiffs rely on Timm for the proposition that Rule 54(b) requires that the trial court must examine a Motion to Reconsider on its substantive merits. Timm v. Dewsnup, 851 P.2d 1178 (Utah 1993). Timm involved a Motion to Reconsider which was denied when the trial court found that such a motion did not exist under the Utah Rules. Id. at 1184. In reversing that finding, the Utah Supreme Court held that “pursuant to the

provisions of rule 54(b), because the summary judgment was ‘subject to revision,’ a motion to reconsider is a reasonable means of requesting such a revision and is therefore permitted.” Id. at 1185. However, nothing from the decision shows that the trial court in the instant case abused its discretion in denying Plaintiffs’ Motion. The instant case involves a trial court which, while recognizing that a Motion to Reconsider exists under the Utah Rules, denied to grant the motion because Plaintiffs had waived their opportunity to discover the ballots, and because the ballots did not qualify as ‘newly discovered evidence.’ (R. 1047.) Such findings are commonly upheld by Utah courts. See Salt Lake City Corp. v. James Constructors, 761 P.2d 42, 43-44 (Utah Ct. App. 1988) (affirming denial of motion to reconsider when motion did not fulfill the requirements of the ‘newly discovered evidence’ Rule).⁸

The instant case is similar to In Re Determination of the Rights to Use Water, 368 Utah Adv. Rep. at 9. There the Utah Supreme Court heard a case where the trial court had denied plaintiffs’ Motion to Reconsider an Order granting Partial Summary Judgment. Id. at 12. Though the Plaintiffs had supported their Motion with an affidavit, the trial court ruled that since the affidavit presented no new evidence the Motion could not be considered.

⁸ Appellants’ citation of Kennedy v. New Era Indus., Inc., 600 P.2d 534, 536 (Utah 1979) is likewise misplaced. There the court explained that Rule 54(b) expressly states that “a trial judge should have the opportunity for reconsideration in such cases since it facilitates the just and speedy resolution of disputes in the trial court.” Id. at 536-37. While Rule 54(b) provides a trial judge with the “opportunity for reconsideration,” nothing in the Rule provides that a trial judge *must* consider a Motion to Reconsider when Plaintiffs present no reason, such as new evidence, to do so.

Id. In affirming the trial courts' decision, the Utah Supreme Court stated that "[a] trial court's denial of a motion to reconsider summary judgment is reviewed under Rule 60(b) of the Utah Rules of Civil Procedure for abuse of discretion." Id. (internal quotations omitted). The court found that since the affidavit did not constitute "newly discovered evidence" the trial court "did not abuse its discretion . . . in refusing to reconsider the [plaintiffs'] summary judgment." Id.

Though factually different, the instant case presents an identical situation. Here Plaintiffs asked the trial court to reconsider a partial summary judgment based on evidence which could have been properly sought prior to the summary judgment ruling. (R. 1047.) As such, Plaintiffs' evidence does not qualify under the 'newly discovered evidence' standard required by the Utah Rules of Civil Procedure and the Utah Supreme Court. Because Plaintiffs presented the trial court with no 'newly discovered evidence' the trial court did not abuse its discretion when it ruled that it could not consider Plaintiffs' Motion. (R. 1047.); see In re Determination of the Rights to Use Water, 368 Utah Adv. Rep. at 12; J.V. Hatch Const. Inc. v. Kampros, 971 P.2d 8, 11 (Utah Ct. App. 1998); see also Rothwell Cotton Co. v. Rosenthal & Co., 827 F.2d 246, 251 (7th Cir. 1987) (holding that for trial court to relieve party from an order on the basis of newly discovered evidence, the evidence must satisfy the Rule 60(b) requirements).

B. Plaintiffs Do Not Qualify Under the ‘Newly Discovered Evidence’ Standard.

Because the voting ballots do not qualify as ‘newly discovered evidence’ under the Utah Rules of Civil Procedure, and because Plaintiffs failed to properly attempt to discover the voting ballots, the trial court did not abuse its discretion when it denied Plaintiffs’ Motion to Reconsider. The voting ballots do not qualify under this standard for three reasons. First, the ballots do not qualify as ‘newly discovered evidence.’ The voting ballots were the subject of a discovery dispute during which Plaintiffs failed to exercise any diligence in discovering the ballots. Plaintiffs requested the ballots through their first request for production of documents. (R. 1153.) Highland Estates objected to Plaintiffs’ request on the basis that the ballots would reveal highly personal information about those who voted to amend the CC&R’s. (R. 1154.) Plaintiffs failed to seek to compel the production of the ballots and failed to request a continuance in order that they may discover the ballots. (R. 1045, 1047, 1154.) Following Judge Nehring’s Order granting partial summary, Plaintiffs obtained copies of the ballots only through Mrs. LeVanger’s new position on the homeowners association Board of Trustees. (R. 512.) Thus, Plaintiffs failed to exercise reasonable diligence to discover and produce evidence which was available to them. Plaintiffs failed to file a motion compelling production of the ballots. Plaintiffs further failed to request a continuance granting them more time to discover the ballots. Such failures can not rise to the level of diligent discovery. Thus, the ballots do not qualify as ‘newly discovered evidence.’ See Keene Corp. v. Int’l Fidelity Insurance Co., 561 F.Supp.

656, 665 (N.D. Ga. 1982) (holding that the moving party must establish that through due diligence the newly discovered evidence could not have been discovered while the summary judgment motion was pending). As the Keene court has stated:

Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence. Such motions cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during pendency of the summary judgment motion. The non-movant has an affirmative duty to come forward to meet a properly supported motion for summary judgment.

Keene, 561 F.Supp. at 666.

Likewise, Plaintiffs failed to provide the trial court with any justification as to why the affidavits submitted with Plaintiffs' Motion to Reconsider were not filed while Highland Estates' Motion for Summary Judgment was pending. The Utah Rules of Civil Procedure preclude Plaintiffs from arguing that the affidavit could not have been produced at the time the Motion for Summary Judgment was pending. Rule 56(f) provides that:

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Utah R. Civ. P. 56(f). Thus, had Plaintiffs been concerned about the availability of the affidavits for the court to consider in regard to Highland Estates' Motion for Summary Judgment, it could have taken the necessary precautions provided by the Rules.

In addition, Rule 56(c) requires that motions, memoranda and affidavits pertaining to a motion for summary judgment “shall be filed and served in accordance with CJA 4-501.” Utah R. Civ. P. 56(c). Rule 4-501(1)(B) requires that “the responding party shall file and serve upon all parties within ten days after service of a motion, a memorandum in opposition to the motion, and all supporting documentation.” Since Plaintiffs did not file the affidavits with their Memorandum in Opposition to Highland Estates’ Motion for Summary Judgment, the affidavits cannot now be considered. Accordingly, Plaintiffs did not exercise ‘due diligence’ in bringing to light the evidence which was discoverable during the time the Court considered and granted Highland Estates’ Motion for Summary Judgment.

Second, the fact that Plaintiffs failed to fulfill the Rule 60(b) ‘due diligence’ requirement in regard to the ballots constitutes a waiver which procedurally precludes Plaintiffs’ Motion to Reconsider. The trial court stated that:

The Court finds that procedurally the Plaintiffs had an opportunity to either conduct additional discovery, compel discovery that was outstanding and unresponded to or to seek a continuance for those purposes. Their failure to do so constitutes a waiver, and procedurally the Court finds that there is simply no basis for the setting aside of the summary judgment granted by Judge Nehring in behalf of the Defendants.

(R. 1047.)

Plaintiffs had over six months in which to attempt to discover the voting ballots.

(R. 1154.) They did not present the ballots to the court until long after the summary

judgment hearing. (R. 512.) Failure by Plaintiffs to diligently pursue the ballots through the proper discovery process constitutes a waiver. See Hi-Country Estates Homeowners Ass'n v. Bagley & Co., 863 P.2d 1, 7 (Utah Ct. App. 1993) (reversed on other grounds) (holding that party's inaction can result in procedural waiver of evidentiary hearing). When Plaintiffs fail to properly conduct diligent discovery they should not be allowed to circumvent the discovery procedures and present such evidence after summary judgment. Such conduct violates the principles of discovery and judicial economy.

Third, Plaintiffs do not qualify under the Rule 60(b) 'newly discovered evidence' standard because they circumvented discovery procedures in order to obtain copies of the voting ballots. When Plaintiffs originally attempted to discover the voting ballots, Defendants objected to their discovery. (R. 1153-54.) Defendants had assured the homeowners association members that their votes would be held confidential and were concerned that disclosure of the personal information contained on the ballots could be used to embarrass or persecute those who had voted for changes in the CC&R's. (R. 1046.) Plaintiffs then failed to address Defendants' objections and failed to file a motion to compel. (R. 1047.) Subsequently Mrs. LeVanger was elected to the Highland Estates Board of Trustees, the very board against whom she had filed suit. (R. 800, 1042.) Mrs. LeVanger then used this newly obtained position to secure copies of the voting records, despite Defendants' objections. (R. 1042.) Such behavior constitutes a blatant conflict of interest in that Mrs. LeVanger knowingly used her new position to obtain records which Defendants

had specifically objected to her having. Mrs. LeVanger's conflict of interest is especially apparent considering that she was now a member of the very board against whom she had filed suit. (R. 1047.) Mrs. LeVanger's circumvention of the discovery procedures constitutes unfair surprise and a breach of the principles and procedures underlying the discovery process. As such, Plaintiffs should not be permitted to present evidence obtained in such a way, in an untimely manner, when such evidence could have been obtained through proper procedures before summary judgment.

C. Plaintiffs Waived Their Right to Object to Judge Brian's Decision to Hear Oral Argument Without First Reviewing the Additional Evidence Submitted by Plaintiffs.

Plaintiffs argue that the trial court (the Honorable Judge Pat B. Brian) abused its discretion by not reviewing the pleadings or evidence submitted by Plaintiff before making its ruling denying Plaintiff's Motion to Reconsider. However, the record establishes that the Plaintiffs have waived any right to object to the court ruling on its Motion without first reviewing the evidence submitted by Plaintiff in support of their Motion to Reconsider.

Plaintiff's counsel, after learning that the court had not reviewed any of the pleadings submitted in relation to the Motion to Reconsider, agreed to proceed with oral argument, without objection. (R. 1041-1042.) Moreover, Plaintiff's counsel agreed, at the conclusion of the oral argument to submit the Motion for Reconsideration for decision at that time. Specifically, the transcript of the hearing on Plaintiff's Motion to Reconsider states as follows:

The court: Anything further anybody else would like to say before the court rules? Do you submit? (R. 1047.)

Mr. Sheen: Yes, your Honor. (R. 1047.)

By agreeing to submit the motion to reconsider to the court for decision immediately after oral argument, Plaintiff has waived his right to “now allege that the trial court abused his discretion by not reviewing the pleadings submitted.” Plaintiffs, surely, cannot be allowed to agree to submit the Motion to Reconsider to the court for decision, thereby attempting to lead the trial court into error. Accordingly, Plaintiff should be precluded from arguing that the trial court abused its discretion by not reviewing the pleadings prior to ruling on Plaintiff’s Motion to Reconsider.

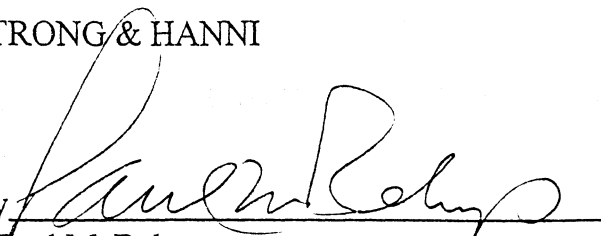
CONCLUSION

For the reasons discussed above this Court should hold that the trial court correctly found that the actions of the Highland Estates Board of Trustees, with respect to amending the CC&R’s, substantially complied with Utah law and with the Association’s organizational documents. This Court should further hold that the trial court did not abuse its discretion when it denied Plaintiffs’ Motion to Reconsider.

DATED this 20 day of September, 1999.

STRONG & HANNI

By

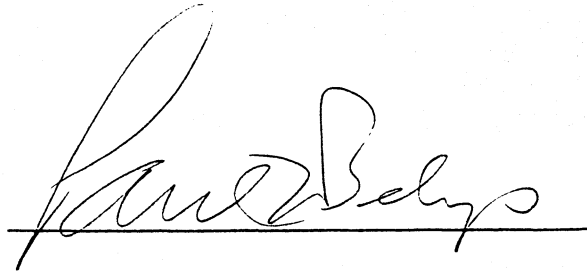

Paul M. Belnap

H. Burt Ringwood

CERTIFICATE OF SERVICE

I hereby certify that on this 20 day of September, 1999, a true and correct copy of the foregoing BRIEF OF APPELLEE was mailed, first class postage prepaid, to:

E. Jay Sheen
ROBINSON & SHEEN
1366 East Murray-Holladay Road
Salt Lake City, Utah 84117

A handwritten signature in cursive script, appearing to read "Paul B. Bly", is written over a horizontal line.

ADDENDUM

FILED

MAY 10 1999

Third District Court

JUDICIAL COURT
Deputy Clerk, Summit County

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR SUMMIT COUNTY, STATE OF UTAH

JEAN LEVANGER AND REBECCA
LEVANGER,

Plaintiffs,

vs.

JOANN VINCENT, ET AL

Defendants.

Case No. 970300011

Transcript of:

MOTION FOR SUMMARY

JUDGMENT

BEFORE THE HONORABLE RONALD E. NEHRING

SCOTT M. MATHESON COURTHOUSE
450 SOUTH STATE STREET
SALT LAKE CITY, UTAH 84114-1860

ORIGINAL

REPORTER'S TRANSCRIPT OF PROCEEDINGS

JANUARY 9, 1998

REPORTED BY: ED MIDGLEY, RPR, RMR
238-7533

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6
7 A P P E A R A N C E S
8

9 For the Plaintiff:

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21 Telephone 532-7080
22 * * *

1
2
3 (Whereupon, the following proceedings
4 continued in open court:)
5

6 THE COURT: Good morning, ladies and
7 gentlemen. We're here this morning on the Levanger v.
8 Vincent et al matter, 970300011. Counsel, please
9 state appearances for the record.

10 MR. RINGWOOD: Burt Ringwood and Paul Belnap
11 for the defendant Highland Estates Property Owners
12 Association.

13 MR. SHEEN: Jay Sheen for the Levangers, your
14 Honor.

15 THE COURT: Good morning. It's good to have
16 you up here. I've reviewed your papers, and who's
17 going to argue this?

18 MR. RINGWOOD: I am, your Honor.

19 THE COURT: You're up.

20 MR. RINGWOOD: Your Honor, just as a
21 preliminary matter, you may or may not know that
22 this -- that the motion that we filed on behalf of the
23 Home Owners Association was scheduled earlier in
24 December for oral argument before Judge Brian, and,
25 the day of the hearing, Judge Brian continued the

1 hearing because of personal reasons. And this was the
2 earliest time that we could get another hearing date.

3 And I explain that because, as you know, we
4 have a trial scheduled in this case January 22nd
5 before your Honor, and I didn't want you to feel like
6 we were throwing this thing at you at the last minute.

7 THE COURT: No. I'm used to it.

8 MR. RINGWOOD: Okay. Your Honor, Jean and
9 Becky Levanger brought this action naming as
10 defendants in their complaint current and past members
11 of the Highland Estates Property Owners Association,
12 which is a Utah non-profit corporation, and also
13 naming the corporation itself as a party.

14 The complaint alleges two causes of action,
15 both I believe directed at the individual board
16 members. The first is breach of fiduciary duty, and
17 in their duties as board members; and second also a
18 breach of fiduciary duty by alleging gross
19 mismanagement.

20 The case centers around the approval and
21 recording of some amended restrictive covenants, and
22 that is the nucleus, or the reason, primary reason,
23 why we're here today.

24 As you know, the Levangers are bringing this
25 action derivatively for and on behalf of the

1 corporation; in other words, the action belongs to the
2 corporation, not to the Levangers. And any recovery
3 belongs to the corporation and not the Levangers.

4 I'm here today representing the corporation
5 who, along with the Levangers, are the only parties
6 before this court.

7 Your Honor, as you note from our pleadings,
8 we're bringing our motion because we believe that this
9 action does not meet the procedural requirements of
10 Rule 23.1. We've stated in our documents that we do
11 not believe -- and the facts are undisputed -- that
12 the Levangers fairly and adequately represent the
13 interests of the members of the Home Owners
14 Association.

15 We have set forth in our brief several
16 factors that courts look at to determine the adequacy
17 of representation, and I want to focus on two of those
18 today. They are Numbers 7 and 8:

19 The plaintiff's vindictiveness towards the
20 defendants and degree of support the
21 plaintiff received from the other members
22 that he or she purports to represent.
23 Now, this is not a typical derivative -- derivative
24 action situation. This is not about a majority
25 shareholder who is accused of self-dealing with the

1 corporation. In this situation, all of the members
2 have one vote. All lot owners have one vote. They're
3 all similarly situated. There are 260 members,
4 approximately, in this case.

5 With respect to the issue of vindication, I
6 would just like to review a few facts with your Honor
7 that are undisputed in this case. First of all, the
8 Home Owners Association was established in 1964 by
9 just a few members at the time, and has since
10 increased to approximately 260 members. It has an
11 elected board of trustees made up of nine members of
12 the association.

13 A new board is elected every year, and
14 within the past two months a new board has been
15 elected, and the election occurs at the annual
16 meetings of the Home Owners Association.

17 Now, Jean and Becky Levanger have been
18 members of the association for approximately twenty
19 years now, and for many years the association did
20 require annual assessments because they were required
21 to take care of the roads; primarily snow removal.

22 And in the 1980's, I believe, the snow
23 removal was taken over by the county, and the
24 association did continue the requirement of an annual
25 assessment.

1 And at that time, they did have some
2 reserves to cover some of the operating expenses of
3 the association.

4 In approximately 1991-92, that timeframe,
5 the association ran out of their reserves, and the
6 duly-elected board of trustees at the time, pursuant
7 to the bylaws, determined that it was necessary again
8 to have an annual assessment to meet the operating
9 expenses of the association, and determined that
10 amount would be \$37 per year.

11 And the Levangers opposed the annual
12 assessments and testified in their deposition that
13 when these annual assessments were made, they
14 determined at that time, back in 1991-92, that
15 timeframe, that they would not attend any more
16 meetings of the association, and refused to make any
17 payment of the annual assessment.

18 There's no challenge of the procedural
19 method in which those assessments were made at the
20 time; they simply decided to take the ball and go
21 home, and that's what they did.

22 For the next several years, the Levangers
23 attended no meetings of the association, and continued
24 to refuse to make any annual assessments.

25 Shortly after the board determined that

1 assessments were necessary, they began then working on
2 amending the restrictive covenants. The covenants
3 they were working under dated back to 1992. They felt
4 they were outdated and they needed to be modernized.

5 So the board, with the assistance of counsel
6 Scott Welling, who practices in Park City, Utah, they
7 amended the covenants with the help of Mr. Welling.

8 And the amended covenants were actually part
9 of the meeting of Mr. Welling and the board of
10 trustees at the time, and members of the association
11 who attended the 1994 annual association meeting.

12 Now, some confusion existed as to what
13 procedure was required to get these amended covenants
14 approved and recorded.

15 Mr. Welling advised the board of trustees
16 that they did need a majority of members to pass the
17 amended covenants. And knowing that it was an
18 impossibility for the association to get out a
19 majority at the home owners meeting, Mr. Welling
20 informed them that they could hold -- pursuant to the
21 bylaws -- a reconvened meeting, and with proper notice
22 of the reconvened meeting, a majority of members --
23 whoever showed up at the reconvened meeting represents
24 the majority of the members. That's the fallback to
25 get anything done in the association.

1 The board was concerned about their method
2 of having a reconvened meeting with respect to the
3 covenants, because they wanted everybody in the
4 association -- even though it wasn't technically
5 necessary -- they wanted everybody to have an
6 opportunity to vote on the amended CC&R's.

7 They expressed the concern with the idea of
8 a reconvened meeting. Mr. Welling then proposed that
9 they conduct a vote by mail. So it was decided by the
10 board and was introduced to the members at the 1994 --
11 in attendance at the 1994 annual meeting, that they
12 would vote on the CC&R's by mail, in ballot; and it
13 was agreed at that meeting that they would do that.

14 So, subsequent to the 1994 annual meeting,
15 each home owner received, by hand delivery, a letter
16 from Attorney Welling explaining the circumstances and
17 a voting draft of the amended covenants, and a voting
18 ballot, with instructions from Mr. Welling as to how
19 to vote, and to mail in those votes.

20 THE COURT: I didn't see a copy of those
21 papers as exhibits to your pleadings.

22 MR. RINGWOOD: Of the actual --

23 THE COURT: Of the Welling letter and of the
24 draft CC&R's that went out pursuant to the '94
25 meeting.

1 MR. RINGWOOD: Yeah, I don't see it, either,
2 your Honor. We do have copies of that to get to your
3 Honor. The letter itself -- maybe Mr. Sheen has a
4 copy -- but the letter itself explained what the
5 CC&R's were, discussed the amendments to the CC&R's,
6 then explained voting procedures to the members. And
7 then there was a voting copy of the CC&R's attached to
8 the letter, along with the ballot.

9 The Levangers admitted in their depositions
10 that they received, by hand delivery, a copy of the
11 Welling letter, the voting draft of the amended
12 covenants, and the ballot.

13 As stated in their deposition, they chose to
14 do nothing with it. They didn't vote for it, they
15 didn't vote against it; they just simply ignored the
16 ballot and did not discuss their concerns with any
17 board members at the time, and just simply ignored it.

18 After several months, a majority of members
19 had approved the amended covenants by mail-in vote.
20 At the annual meeting in 1995 -- which, again, the
21 Levangers did not attend -- the board announced that a
22 majority vote had been received and that the amended
23 covenant would be recorded, and they were forwarded to
24 the Recorder in October of 1995.

25 Shortly after they were recorded, it was

1 brought to the attention of the board that they had
2 inadvertently recorded a draft copy and left out a
3 provision that they felt was important, so then they
4 subsequently filed an amendment.

5 THE COURT: There has been much to do over
6 this omitted clause in the CC&R's. What was that
7 about?

8 MR. RINGWOOD: It was simply just an
9 oversight.

10 THE COURT: What was the substance of the
11 provision?

12 MR. RINGWOOD: Well, the provision itself
13 that was omitted was the provision which provided --
14 it was basically stated that if you use the horse
15 trail, that you do so at your own risk, and that the
16 association won't be liable for harm that might occur
17 on those trails.

18 So, the board obviously thought it was
19 important; that's why they thought it -- that's why
20 they put it in. And they made sure it got recorded so
21 it was part of the CC&R's.

22 So, after the recording of the CC&R's in
23 1995, the Levangers still had no involvement, voiced
24 no concern, and simply refused to participate in the
25 association. It wasn't until January of '96, at which

1 time the Levangers received a demand notice from the
2 association that they were five years in arrears --
3 four years in arrears on the payment of their \$37
4 annual fee for the two lots that they owned, and
5 demanded payment from the Levangers.

6 The Levangers continued to refuse to make
7 payment, and in June of 1996, the association filed a
8 lien on their property; and, at which time, the
9 Levangers hired an attorney and brought this action.

10 Your Honor, with that background in place,
11 it's our contention that Rule 23.1, which is the rule
12 that allows a derivative action to be brought, is
13 designed to protect against exactly what's happened
14 here.

15 And part of the safety net that is in that
16 provision requires that if there's any appearance that
17 plaintiffs in the action do not fairly and adequately
18 represent the interests of other members who are
19 similarly situated, that the action cannot be
20 maintained.

21 And it's our opinion -- and I think the
22 facts support it -- that the Levangers do not fairly
23 and adequately represent the interests of the other
24 members in the association.

25 Now, the need for fair and adequate

1 representation, in my opinion, your Honor, is
2 absolutely critical in a case like this involving a
3 non-profit corporation.

4 There are no monetary damages alleged here,
5 and we have two disgruntled home owners, basically,
6 who are asking this court to substitute their judgment
7 for the judgment of the duly appointed board of
8 directors and a majority of the members who have voted
9 to approve the CC&R's.

10 Additionally, your Honor, derivative actions
11 are designed to benefit the corporation. There's no
12 benefit to the corporation in this case. There are
13 two parties before the court in this action.

14 And, thirdly, the rights of all the members
15 are being determined and advocated by these two
16 members. So, it's a very important part of Rule 23.1.

17 Clearly, the facts of this case indicate
18 that this case is nothing more than an attempt by the
19 Levangers to get even for placing a lien on their
20 property.

21 They had ample opportunity during the time
22 that the CC&R's were being developed, the amended
23 covenants were being developed, to voice concern, to
24 put input into those amended covenants, and they chose
25 not to. They chose not to participate.

1 It wasn't until after a demand was made on
2 them for their association dues that they voiced any
3 concern.

4 Your Honor, they are claiming that the
5 CC&R's -- amended CC&R's, are being enforced
6 unlawfully, that they're being enforced
7 indiscriminately. There's no evidence that the
8 amended CC&R's have even been enforced yet.

9 The Levangers are mistaken. They mistakenly
10 believe that the CC&R's were used to place a lien upon
11 their property. The bylaws that have existed since
12 the 1980's provide that a lien can be placed upon
13 property for members -- against members' property if
14 they don't pay their dues, and that's what the board
15 did. It simply relied upon the bylaws and placed the
16 lien upon the property.

17 Now, after the lien was placed upon the
18 property, the Levangers immediately hired an attorney.
19 The board has explained, in Mr. Welling's affidavit,
20 when they found out it was going to cost them \$75 to
21 place the liens, \$75 apiece to place liens upon all
22 the property, Mr. Welling said, "well, I'll show you
23 how to do one."

24 He did one. They chose the Levangers, who
25 refused to pay their dues from the very inception.

1 And at that point in time, with the hiring of the
2 attorney, the imminent lawsuit, the board did not
3 place any more liens on anybody else's property.

4 And not to make a lot to do about that, your
5 Honor, but the fact of the matter is that the
6 Levangers have refused pay their dues, and the
7 association has a right to lien their property.

8 And, the second is, your Honor, the
9 Levangers, in order to maintain this derivative
10 action, have to have some support by the other members
11 of the association. And they are the only named
12 plaintiffs in this action.

13 They have absolutely no support. Even the
14 affidavit they have submitted from two other members
15 does not state that they're supportive of this
16 litigation. They sympathize with the Levangers, but
17 they're not supportive of this litigation.

18 Your Honor, I cited in my brief a case I
19 believe out of Tennessee, the Tennessee Walking Horse
20 case, which I believe is a great example of why it's
21 important that the non-profit corporation -- that the
22 court not require that the judgment of two disgruntled
23 members be imposed upon and substituted for the
24 judgment of a duly appointed board of directors who
25 are lay people, your Honor; they're not compensated

1 for what they do.

2 They do the best job that they can. They
3 sought legal advise through every step of the way.
4 And technically we admit, your Honor, that the bylaws
5 do not provide for vote by mail-in ballot.

6 But they also don't specifically prohibit
7 that approach either, your Honor. This was a judgment
8 call, and we believe the best-judgment rule protects
9 the members of the board, and that the judgment of the
10 Levangers or even the judgment of this court should
11 not substitute the judgment of the duly-elected board,
12 as well as the judgment of the majority of members who
13 voted in favor of the amended CC&R's.

14 And so we believe that this case should be
15 dismissed, because the Levangers don't fairly and
16 adequately represent the interests of the other
17 members; and that the members of the board of trustees
18 used reasonable judgment in the approach that they
19 took in getting the amended CC&R's.

20 And, quite frankly, your Honor, the best
21 resolution of this case is exactly what's happening
22 now. Two months ago, a new board was elected. There
23 are only three members on that board out of nine who
24 are named defendants in this case.

25 And in fact Becky Levanger herself is now a

1 member of the board. That is how changes should be
2 made, by getting involved, by having the voice heard.

3 And that's what this case simply is; it's
4 just failure to act on their part. And now they're
5 coming back after the fact, accusing the board of
6 gross mismanagement, when there's absolutely no
7 evidence of any gross mismanagement.

8 There's no allegations that they're
9 self-dealing. There's no allegations of mismanagement
10 of funds; simply the approval and recording of the
11 amended CC&R's.

12 THE COURT: What can you tell me about the
13 state of the record with respect to the distribution
14 of the Welling letter and draft CC&R's to the members?

15 MR. RINGWOOD: The state which the record --
16 in Joanne Vincent's deposition, who was president of
17 the board at the time, she testified that all of
18 the -- that the Welling letter and the voting draft,
19 and the ballot, were hand-delivered by board members
20 to all of the members of the association.

21 THE COURT: The Levangers say they didn't get
22 one.

23 MR. RINGWOOD: They testified in their
24 deposition that they received, by hand delivery, the
25 letter by Welling, the voting draft, and the -- and

1 the ballot. That's undisputed, your Honor.

2 THE COURT: If memory serves, I thought I
3 read somewhere in these papers that they didn't.

4 MR. RINGWOOD: No, I can find the testimony
5 for you. I think we attached it as an exhibit. But
6 Mr. Sheen will, I'm sure, certainly admit that that is
7 not a factor in dispute. They did receive; they just
8 simply chose not to act on it.

9 THE COURT: Thank you, Mr. Ringwood. Mr.
10 Sheen?

11 MR. SHEEN: Thank you, your Honor. It's
12 defendants' burden of proof to show that present
13 plaintiffs are inadequately representing in the
14 derivative action. I want to read briefly an excerpt
15 from the case, which I have a copy of for the court
16 and opposing counsel.

17 As you are no doubt aware, your Honor, the
18 majority of derivative actions in common law come from
19 Delaware, where the majority of these cases are tried.
20 This is a case out of the Chancery Court of Delaware;
21 Emerald Partners v. Berlin. It's very short.

22 A defendant has the burden of proof in a
23 motion to disqualify a derivative plaintiff
24 and he must show that a serious conflict
25 exists, by virtue of one factor or a

1 combination of factors, and that the
2 plaintiff cannot be expected to act in the
3 interests of the others because doing so
4 would harm his other interests...
5 In effect, the defendant must show a
6 substantial likelihood that the derivative
7 action is not being maintained for the
8 benefit of the shareholders.

9 Now, what we hear from the defendants is that there are
10 two sources of antagonism vis-a-vis these plaintiffs
11 and the defendants. The first source is these
12 plaintiffs' failure to pay their assessments over the
13 years.

14 As Mr. Swedish testified in his deposition,
15 40 or 50 other members of the association remain today
16 in the state that the Levangers were in two years ago.

17 Other members have paid their assessments
18 under protest. We filed the affidavits of Shelby
19 Ramsdale who has paid her assessment under protest
20 similar to the Levangers.

21 The Levangers are now current in their
22 payment of the assessment. They paid the lien amount,
23 and had the lien removed. And they have
24 hand-delivered to the president of the association now
25 their current dues. And so they are current, paid

1 under protest.

2 In fact they represent the members very
3 adequately in terms of assessments, because all
4 members assessed, all members are charged a fee, and
5 all members certainly would like to have those fees
6 adopted legally, assessed legally, and imposed -- any
7 penalties imposed legally and nondiscriminatorily.

8 We have a case here of the tail wagging the
9 dog, your Honor. What we have is the defendant saying
10 my clients are vindictive, and vindictiveness is shown
11 by how they reacted to the filing of the lien.

12 Well, how they reacted to filing of the lien
13 was to request, by way of letter, what the amounts
14 related to, seeking the assistance of legal counsel,
15 and paying the lien.

16 That's how they reacted. There was no other
17 vindictive or antagonistic behavior on behalf of my
18 client. In fact, if you look at the state of the
19 record that we have for this motion, Exhibits L and M
20 of Defendants' memoranda are two letters from the
21 Levangers.

22 I ask that the court will review those if
23 there's any question in your mind about my clients'
24 antagonism. Those are professionally-written letters.
25 The sentences begin with, "please provide this

1 information." The demands are made, but the demands
2 are not -- you know, there's not overblown language.
3 It's not like they're out to get anybody here.

4 And it really is a case of the tail wagging
5 the dog. They imposed the lien, my clients reacted in
6 the fashion they reacted in, which is absolutely
7 reasonable for them to react in that fashion.

8 Now, they're saying that's evidence of
9 vindictiveness. The filing of the lawsuit is really
10 the only evidence they have of vindictiveness.

11 And, as the state of the record indicates,
12 my clients attempted for months to obtain relief
13 otherwise prior to the filing of the lawsuit.

14 It's interesting to note that on the bridle
15 path liability omission issue, that was specifically
16 highlighted in a letter from counsel for the
17 plaintiffs prior to the filing of the lawsuit.

18 This error has been made, and it was not
19 corrected until a week before the deposition of Ms.
20 Vincent. So apparently it required not only the
21 filing of the lawsuit, but noticing up of the
22 deposition of Ms. Vincent before the correction was
23 made.

24 And even at that time, the only way we
25 discovered that the correction had been made to the

1 CC&R's was during the deposition of Ms. Vincent, where
2 she first indicated it.

3 So, no communication with Levangers or with
4 anyone else in the association that indeed a mistake
5 had been made. The mistake was highlighted by
6 Levangers; the mistake was corrected; but only after
7 the Levangers were forced to file the lawsuit.

8 They claim again that's basically a
9 non-issue. In fact, the affidavit of Mr. Welling is
10 that the liability issue was one thing that everybody
11 agreed on; the one thing that should be included in
12 the CC&R's.

13 Why did it require the filing of this
14 lawsuit to get that change made? It's not
15 vindictiveness of my clients. It's the entrenchment
16 of the board of trustees of this association who
17 believe they're above the statute, the charter
18 documents, and that they can pick and choose which
19 rules they're going to apply at any given point in
20 time.

21 The second thing, as indicated in
22 Mr. Blackburn's affidavit, contrary to antagonism
23 coming from the plaintiffs, it's the board of trustees
24 who treat the members with disdain. Mr. Blackburn's
25 affidavit was:

1 I probably won't go back after the way I
2 was treated at the October, 1997 meeting.
3 I asked questions that were put off and
4 never answered and told to quit complaining
5 again when I asked a simple question.

6 Second paragraph:

7 The association was told at one meeting the
8 board will make all the decisions
9 regardless of what the members want.

10 That's Blackburn's affidavit. So, there's no evidence
11 of vindictiveness here. My clients have attempted to
12 do everything short of filing the lawsuit. Even after
13 the filing of the lawsuit, attempts have been made to
14 try and open up the lines of communication.

15 Certainly, Ms. Levanger's present position
16 on the board of trustees suggests that there's some
17 support for the Levangers within the home owners
18 association, as I indicated in my brief. But they do
19 highlight the point that we represent very few if any
20 members of the association. And I read again from
21 Emerald Partners, because it's instructive in this
22 case. Another very short segment:

23 A stockholder derivative claim may be
24 maintained although it does not have the
25 support of a majority of the corporation's

1 shareholders or even the support of all the
2 minority shareholders...

3 The true measure of adequacy of
4 representation, therefore, is not how many
5 shareholders the derivative plaintiff
6 represents, but rather, how well he
7 advances the interests of the other
8 similarly situated shareholders.

9 Well, these clients are committed to pursuing the
10 action which is the first and foremost evidence of the
11 adequacy of representation. They have, if I may say
12 so, employed competent counsel, and counsel is pursuing
13 the matter vigorously, and they intend to pursue it to
14 its conclusion.

15 THE COURT: Who are other similarly situated
16 members?

17 MR. SHEEN: Well, you have -- I take that on
18 two different levels, your Honor. One, every member
19 wants to see that the home owners association operates
20 lawfully, legally. They're entitled to that.

21 They have a contract with the association.
22 Both the CC&R's, the bylaws, and articles of
23 incorporation are contracts among these individuals.
24 They want to see those contracts are enforced
25 appropriately and legally and the statutes of the

1 state of Utah are enforced. So that on that level,
2 it's every member.

3 The members who are particularly upset,
4 however, are represented for example by Mr. Blackburn
5 and Ms. Shelby; the affidavits that were filed in
6 connection with this, with our opposition to the
7 motion.

8 They have been willing to come forward and
9 state their opposition to the current state of
10 affairs.

11 Even though Mr. Blackburn indicates when you
12 do state your opposition, you are then treated as
13 though you are the enemy. And opposing views are not
14 accepted in this association.

15 And Blackburn's affidavit makes that clear.
16 So our contention is that there are a vast number of
17 members of the association who --

18 THE COURT: Defined by -- give me a
19 definition, of the secondary, the subsidiary group of
20 similarly situated members. What shared
21 characteristics do they have?

22 MR. SHEEN: Those members who disagree with
23 the method by which the association adopted the
24 CC&R's.

25 THE COURT: That's group No. 1. What you're

1 telling me is that Group No. 1 is comprised of all of
2 the members, because all of the members have a stake
3 in having lawfully adopted articles, CC&R's and
4 bylaws.

5 Okay. Now, there's a subsidiary group that
6 you say exists. That includes Mr. Blackburn and your
7 other affiants. What I'm looking for is: What are
8 the characteristics that they share with the
9 Levangers? Other than not liking the board, which is
10 what you have told me so far.

11 MR. SHEEN: When you say, "not liking the
12 board," your Honor, it's -- you know, I hesitate to
13 put it in those terms, because it is not a question --
14 it's a question of not allowing open discussion of
15 these issues.

16 For example, one of the issues at trial,
17 your Honor, is going to be, here you have CC&R's that
18 are adopted over a more than 12-month -- say 14-month
19 balloting process, in which only the proponents of the
20 CC&R's have all of the weight and authority and power
21 and speaking ability because you're not holding a
22 meeting. You're changing rules midstream. You
23 remember the CC&R's, there's a cutoff period for
24 balloting which is arbitrarily extended by the board
25 of trustees.

1 You have the written communications which
2 are prepared by the proponents and then sent out.
3 They highlight the issues proponents want to make
4 clear. Then you have solicitation of those votes,
5 whereas you have no opportunity in a meeting setting
6 to render opposing views.

7 And, if you do render opposing views -- and
8 Mr. Blackburn indicates, and as the Levangers have
9 found, it's not that you are -- that you then hate the
10 board of trustees. It's that they hate you because
11 you're raising issues they just don't want to deal
12 with, or that are not within the agenda they want to
13 pursue.

14 So these parties -- maybe the clearest way
15 to represent that portion is, you know, throughout
16 this case now we've had it highlighted over and over
17 again, that there's simply an insufficient number of
18 members of the association who are interested enough
19 to attend meetings.

20 Well, that's not the take that the Levangers
21 and Blackburns and the Ramsdales and others have on
22 this situation.

23 They found their voices to be ineffective,
24 or they desired to maintain the status quo. And by
25 not attending the meeting, they know that no action

1 can be taken. Actions cannot be taken. They will not
2 have a quorum there and they have actively voted by
3 not attending. And that's the position that we're
4 taking in the matter.

5 And if that's the sub-category you're
6 looking for, I'm frankly trying to come up with a
7 sub-category other than people who are willing to
8 voice openly their opinion of the operation of the
9 association.

10 THE COURT: Well, then how would your
11 sub-category deal with the reconvened meeting? They
12 would show up en masse to the reconvened meeting? I
13 don't buy it. I mean, is that what you're telling me?

14 MR. SHEEN: The notion of a reconvened
15 meeting cannot emasculate the more specific provisions
16 of the bylaws, statutes and the CC&R's.

17 THE COURT: It seems to me it's unambiguous.
18 The bylaws say, if you don't get a quorum at the
19 annual meeting, and if you notice the reconvened
20 meeting, if you have one person there, that person
21 sets the pot. That's absolutely clear as I read that.

22 MR. SHEEN: Yes, on matters which are not
23 otherwise specifically dealt with, the bylaws, the
24 CC&R's are contracts and they're interpreted according
25 to contract provisions.

1 If you have a specific contract provision,
2 it controls over the general, and there are specific
3 provisions that describe how CC&R's are adopted.

4 And it says a majority of the home owners
5 must approve the amendments to the CC&R's and bylaws,
6 and in similar fashion with a majority of the members
7 at a meeting. It says, in fact, those are the only
8 way you can amend the bylaws.

9 They attempted, through amending the CC&R's,
10 to not only amend the CC&R's by a process that was not
11 allowed, but to amend the bylaws by saying that the
12 bylaws could then be adopted by the board of trustees
13 through the CC&R's.

14 And that's why this group, the sub-category,
15 is probably best characterized as those people who are
16 saying, "we can't win because you get to pick and
17 choose your rules as you go."

18 Well, the contract interpretation says that
19 the specific controls over the general, so when you
20 have a general provision, but then you have a
21 paragraph that deals with a very specific issue, that
22 specific issue controls.

23 And our contention is that the reconvened
24 meeting -- which, by the way, never occurred until
25 just prior to the lawsuit being filed -- there's no

1 evidence of any reconvened meeting at any time in
2 history. So the board of trustees had never adopted
3 that policy. That's the situation.

4 THE COURT: Okay. Thank you.

5 MR. SHEEN: Thank you, your Honor.

6 THE COURT: Tell me the defendants'
7 perspective on this contention that there are specific
8 provisions in the CC&R's, and I guess the bylaws,
9 bearing on the question of amendments, and that those
10 specific provisions trump the reconvened meeting
11 procedural scheme.

12 MR. RINGWOOD: I don't agree with that, your
13 Honor, because in looking at the 1972 CC&R's, it says
14 that --

15 THE COURT: Where are you looking?

16 MR. RINGWOOD: I'm looking on the last page,
17 the signature page, Page 4. It's Exhibit A to our
18 memoranda, your Honor.

19 THE COURT: All right. Page 4, Exhibit A.

20 MR. RINGWOOD: Right after -- the first
21 paragraph, after where it says "lot split," there's a
22 paragraph which is unlettered there. It says:

23 These conditions shall run with the land
24 and shall be binding upon all parties and
25 all persons claiming under them until March

1 10, 1982, at which time said conditions
2 shall be automatically extended.

3 THE COURT: Yes.

4 MR. RINGWOOD: Notice, your Honor, it does
5 not say that it needs to be a majority at a meeting.
6 It just simply says, "unless by vote of majority of
7 the owners in the subdivision," and I don't see that
8 that's any more specific, your Honor, than the bylaws.

9 The thing about the bylaws is they are more
10 specific than covenants, and if you want to take this
11 as being the specific way, then there'd be no
12 violation in the amending of the voting procedure,
13 because it's not restricting how that vote should take
14 place.

15 Again, your Honor, it comes back to I
16 believe this was a business judgment call, made by the
17 members of the board, with the advice of counsel.
18 And --

19 THE COURT: What about Mr. Sheen's argument
20 that lack of attendance at the meeting was an
21 affirmative manifestation of the non-attending home
22 owners' desires to maintain the status quo and to
23 block all action at the meetings?

24 MR. RINGWOOD: The only evidence in the
25 record, your Honor, is the testimony of Joanne Vigil

1 in her deposition, who stated from Day One they had
2 absolutely no involvement.

3 It's a continual problem: They just can't
4 get the members to come to the meetings. It doesn't
5 have anything to do with any protest. There's
6 absolutely no evidence in the record that this was
7 because of any protest.

8 It's simply absence, your Honor. And it's a
9 frustrating thing for the board members. Joanne said
10 in her deposition, because they couldn't get -- as
11 hard as they tried, they tried refreshments, they
12 tried everything to get people involved; and this goes
13 back twenty years. It's not a recent phenomenon. It
14 didn't start with the \$37 a year annual assessment.

15 It's taken place from Day One. It's just a
16 matter of getting people interested enough to come
17 out.

18 You know, this sounds a lot like a family
19 fight, your Honor. And where is this going to stop?
20 Ever time there's a disagreement in a way of a
21 procedure being run, we're going to be back in here.
22 Are you going to have to monitor this family feud into
23 the future? That's not what Rule 23.1 is all about.

24 THE COURT: Yeah, but isn't it possible to
25 have one member lead an entirely appropriate crusade

1 to right the wrongs of management of a non-profit
2 corporation? Or isn't that within the realm of
3 contemplation?

4 MR. RINGWOOD: It may be in the realm of
5 contemplation, your Honor, but I don't believe that
6 Rule 23.1 to a derivative action's necessarily the way
7 that should be done.

8 THE COURT: Well, let me come at this from a
9 different direction. It would be unusual, would it
10 not, for a majority block of shareholders and members
11 in a corporation, to initiate derivative -- a
12 shareholders derivative action?

13 MR. RINGWOOD: Yes, it would be.

14 THE COURT: And so almost by definition,
15 shareholder derivative actions are initiated by a
16 minority of shareholders. Then the question is:
17 Well, how is the law to determine whether that
18 minority is raising a legitimate issue and thereby
19 gaining standing under the Rule 23.1?

20 That's -- as near as I can tell, that's what
21 led them to jurisprudence that you cite in your
22 papers; seven, eight factors that gives them guidance.

23 As I did my own personal ranking of those
24 factors, it struck me that vindictiveness was the most
25 elusive or one of the more elusive of those, because

1 it calls upon a judge to apply the name-calling meter
2 in kind of determining whether there's enough
3 name-calling going on here to go into the red zone.

4 And I've got to tell you, I'm uncomfortable
5 with making a ruling on standing on a derivative
6 action where the primary thrust is the vindictiveness
7 contention. I mean that's kind of where I'm hung up
8 on that.

9 MR. BELNAP: Judge, can I have just a moment?

10 THE COURT: Sure.

11 (Whereupon, a discussion was had off the
12 record between counsel; after which, the
13 following proceedings continued in open
14 court:)

15 MR. RINGWOOD: Your Honor, in dealing with
16 that, these -- one of the contentions that we're
17 making, the undisputed facts are that the Levangers
18 had ample opportunity to voice concern about what was
19 taking place, and they chose not to.

20 And in fact the covenants were recorded, and
21 several months went by, and it was discussed in all of
22 the meetings that the Levangers refused to attend.

23 It wasn't until a demand was made, and this
24 is a case in which -- you know, I agree that
25 plaintiffs' vindictiveness is one of the more elusive

1 ones. But this is one case where it's appropriate,
2 because of the facts and circumstances of this case.

3 And again, your Honor, we're also
4 maintaining that there's no support for this lawsuit
5 amongst the other members of the association.

6 For years, you couldn't even bring a
7 derivative action in a non-profit corporation, and
8 it's for this very reason.

9 And now the courts have softened that rule
10 and allowed derivative actions, because there are
11 circumstances, your Honor, where a board member
12 himself is dealing with the corporation. And it's an
13 economic hardship to the corporation.

14 But again, I believe that the Tennessee
15 Walking Horse case is right on point with this case,
16 and simply asking this court through a derivative
17 action to substitute its judgment for the reasonable
18 judgment of the board members.

19 There's no evidence before the court that
20 they did anything inappropriate in the way that CC&R's
21 were voted upon. There's nothing pointed to that it
22 prohibited the manner in which they chose to do it.
23 They chose to do it that way out of caution because
24 they wanted everybody to have an opportunity.

25 I believe that, pursuant to the bylaws, they

1 could have held a reconvened meeting and passed those
2 CC&R's.

3 THE COURT: All right.

4 MR. RINGWOOD: And that Rule 23.1, as we
5 cited it, derivative actions are not favored in the
6 law. They should be used as a last resort, and this
7 is the primary reason why.

8 It's because we're standing here with a lot
9 to do about nothing, and the manner in which this case
10 should be fixed and handled, if there's a problem, is
11 exactly the way it's being done now; with a new board,
12 of which Becky Levanger is a member.

13 And if there are some problems with the
14 amended CC&R's, then it's their prerogative to amend
15 them again.

16 And that's the proper way to resolve these
17 types of disputes, not here before your Honor in a
18 case in which virtually a corporation has sued itself
19 with absolutely no benefit to be derived from it.

20 THE COURT: Thank you. I have a few
21 questions for Mr. Sheen.

22 MR. BELNAP: Your Honor, also, if you were
23 still interested, Judge, in those deposition
24 citations, it doesn't appear it's in dispute, but we
25 have them.

1 THE COURT: That's with respect to the
2 acquisition of the Welling letter and --

3 MR. BELNAP: And other materials.

4 MR. SHEEN: Right. I also have a copy of
5 this Emerald Partners case I quoted from, if you would
6 like to have it.

7 THE COURT: If you could pass that up, let's
8 take a look at it.

9 MR. SHEEN: I'm sorry, your Honor; just one
10 second.

11 THE COURT: Okay.

12 MR. SHEEN: My client makes an important
13 point, your Honor. There's still a contention about
14 who received notice of the proposed changes to the
15 CC&R's. And it relates to --

16 THE COURT: It's hard to put that on the
17 record at this point.

18 MR. SHEEN: Well, it relates to the fact that
19 the association does not maintain a list of members
20 per se, but only ad hoc, as needed.

21 And it flows back to the notion that, in the
22 beginning, it was anticipated that every member would
23 have a membership certificate, which the argument has
24 been made that that provision has been taken out.

25 But the importance of that is there are many

1 non-resident members of the association.

2 THE COURT: How does the association know who
3 to send notice of the meetings to?

4 MR. SHEEN: I believe on an ad hoc basis;
5 they take it as best they can from the real property.

6 THE COURT: But that issue has never been
7 raised in the papers. There's nothing in the record
8 that suggests that's a problem. So --

9 MR. SHEEN: Well, in connection with their
10 motion for summary judgment, you're right, but in
11 connection with the trial on the merits, that's
12 absolutely an issue. I mean it's at issue in the
13 complaint. We made it clear, that lack of a --

14 THE COURT: Well, part of this motion goes to
15 the merits. As I -- this motion is a two-part motion,
16 as I understand it. One is challenge to the standing
17 of the plaintiffs to bring a derivative action. The
18 second part is as to the merits of the case itself.

19 MR. SHEEN: Well, but they haven't asked that
20 the entire case be dismissed on the merits. They have
21 raised several of the -- what they consider to be
22 substantive claims, but they've said nothing about the
23 member lists. All I'm doing is responding to their
24 motion for summary judgment.

25 THE COURT: Well, I understand, but it seems

1 to me the member list issue may have some bearing on
2 the merits of one of these claims, and -- well, I
3 guess if it does, it does. If it doesn't, it doesn't.
4 Let me turn to the question that's on my mind.

5 MR. SHEEN: Okay.

6 THE COURT: Which is: You have indicated to
7 me that the event of a meeting is kind of the sine qua
8 non of proper action to be taken for and on behalf of
9 the home owners association.

10 And if I'm correct, and that's what you have
11 been trying to communicate to me, I would like to have
12 you tell me why, in your mind, the meeting is so
13 important that I should strictly apply the meeting
14 requirements of the bylaws.

15 MR. SHEEN: Well, because there are several
16 concepts here, your Honor. One is the concept of
17 voting and the requirement of voting, and another goes
18 to the manner of voting. And the bylaws, Section
19 2.5., the only manner of voting allowed under this
20 contract with the home owners is all votes may be cast
21 by members, either in person or by proxy. There's no
22 indication in any of the --

23 THE COURT: Okay, but that begs the question.
24 Please understand my question. My question is, okay,
25 I'll spot you that that's what that says. I think

1 it's unambiguous. That's what it says.

2 But, why is the meeting so important that I
3 should strictly construe that section as opposed to
4 permitting substantial compliance with it through an
5 alternate decision-making process; to-wit, voting
6 outside the context of the meeting?

7 MR. SHEEN: I'll tell you what the record
8 indicates so far, your Honor. The record indicates at
9 members' meetings, poorly attended though they be, at
10 which the members voiced opposition to matters, those
11 matters were tabled, were not acted on, and the board
12 of trustees heard and acted on dissenting members'
13 viewpoints in the meetings. And the deposition
14 testimony of Mary -- Kathy Mears was, and Roger
15 Stevens was, that there were multiple attempts over a
16 period of years to adopt amended CC&R's. And at every
17 meeting of the members, there was not a consensus on
18 how best to do that.

19 And so our contention is that, had a meeting
20 been held, there would have been that opposition to
21 the association, and it's that give and take that is
22 required.

23 That's the reason the statutes are written
24 the way they are. That's the reason methods of voting
25 have been adopted.

1 THE COURT: How do you factor in proxies into
2 this? I mean, all this would I think be -- would have
3 a lot more persuasiveness to me if the law didn't
4 provide for proxies. As you probably know, under the
5 common law, proxies weren't permitted.

6 And of course since proxies have been
7 recognized, it's quite possible to have a meeting at
8 which there are very few attendees; but there's
9 nevertheless a quorum. But those people who submit
10 proxies, they're not there to give their views.

11 MR. SHEEN: No, but they have an agent there.
12 That's a representative democracy.

13 THE COURT: But it's delegated. They have
14 delegated their right to hear competing views to their
15 agents. So, as a practical matter, they're not there.
16 They don't get any benefit of the give and take of a
17 meeting because they have given it away.

18 They have given it to their agent who holds
19 the proxy, who attends the meeting, who voices the
20 proxy.

21 MR. SHEEN: I'm afraid I don't understand
22 what the court is struggling with here. Because when
23 you give someone a proxy, you have determined that
24 that person can represent your interests at the
25 meeting. That is still a personal, physical presence

1 at the meeting, because that person has had to
2 consciously decide that this person is going to
3 represent him.

4 THE COURT: Well here's --

5 MR. SHEEN: Whether he's an assenter or
6 proponent.

7 THE COURT: It may be a small matter. Let me
8 try to articulate it more clearly. The case cited in
9 your papers suggests that meetings are a good idea
10 because there's discussion at the meetings.

11 There's an idealistic view that many of us
12 hold that one can benefit from an exchange of views
13 that usually happens in a meeting. Those of us who
14 have attended many meetings over our lifetime, we
15 disagree with that. (Laughter)

16 But there's an impression, in the abstract,
17 that there's something to be gained somehow with the
18 give and take.

19 What -- and sometimes that give and take
20 modifies the hardened view that individuals may have
21 when they walk in the door at the meeting.

22 In other words, the power of persuasion
23 sometimes has an effect on those sought to be
24 persuaded.

25 The concept of proxy distorts that salutary

1 benefit of a meeting to the extent that those who
2 entrust -- by proxy -- their power to vote to another,
3 don't benefit from the persuasive interchange from the
4 dialogue, so to speak, that may go on in a meeting.

5 They delegate everything to the person who
6 holds the proxy, including the possibility that they
7 might themselves be persuaded in a manner contrary to
8 the way that the person who holds the proxy is voting.
9 Is that any clearer?

10 MR. SHEEN: Yes, that's clearer. And if I
11 could argue with the court for one brief instance,
12 then agree with the court.

13 THE COURT: Please do so.

14 MR. SHEEN: The proxy process is -- let me
15 agree with the court.

16 THE COURT: Please. It happens so seldom.
17 (Laughter)

18 MR. SHEEN: The point I was going to make is,
19 in most meetings I have attended -- and you've
20 attended a few over the years -- where there's a large
21 gathering, there tends to be dominant personalities,
22 and those dominant personalities tend to control the
23 outcome of the meeting one way or the other.

24 And in that sense I would hope that proxies
25 are given on the basis of the person's involvement and

1 they're saying, "I'm not one of those people. If I
2 attend, the people -- I will not be a dominant
3 personality; I know a friend who is," or, "this is the
4 position I would want to take, so I would entrust that
5 into the hands of my representative."

6 But let me agree with the court, that
7 proxies are a distortion of that meeting environment;
8 but only a slight distortion, in my view, your Honor.

9 What is much more a distortion of the
10 meeting concept is the concept of balloting. I'm
11 talking about balloting over a long period of time.

12 And I'm talking about balloting over a
13 period of time, during which changes in membership may
14 occur, and balloting still goes on; and during which
15 the board of trustees, without further notice, now --
16 without further notice other than an after-the-fact,
17 basically a newsletter that gets delivered; whether it
18 actually is received by the home owners or not -- that
19 says, "by the way, the balloting, for which we said
20 the drop-dead date of X is on, has now been extended,
21 because we didn't get the result we wanted."

22 That's the process we're dealing with here,
23 your Honor. And if I can take it down to the facts of
24 this case, here's the situation we have.

25 We have meetings over the past year

1 and-a-half, including the 1997 meeting referred to in
2 the affidavit and during the depositions, the various
3 meetings discussed, where opposition to various
4 matters was raised by the home owners.

5 The actions were not taken, matters were
6 tabled. You have that throughout the history of the
7 home owners association.

8 Now juxtapose that conduct with the conduct
9 of the board of trustees when they say, "instead of
10 doing a reconvene meeting "-- which, by the way,
11 there's no evidence that that discussion ever occurred
12 during the early days of the adoption of 1994, or the
13 '94 process of balloting -- but in any event -- now I
14 lost my train of thought. I go off on those side
15 angles. Where was I?

16 THE COURT: Well, what you were telling me
17 was that the record doesn't suggest that they even
18 tried to reconvene a meeting and that there were
19 inherent defects with the voting process.

20 And you pointed out to me that, according to
21 you, the problems with the voting process included
22 inadequate management over the members who were
23 eligible to vote; to-wit, some might have died and
24 moved, transferred their interest, become non-members,
25 new members show up, different things.

1 That the time for voting was extended,
2 apparently without any legitimate basis to do so. And
3 I guess if the voting process was illegitimate in the
4 first place, the extension would be that it would be
5 now. And that the proponents of the voting process
6 are the advocates in changes, and they controlled the
7 press so to speak. Those seem to be the major points.

8 MR. SHEEN: The last point I wanted to wrap
9 this up with was that, in -- there will be a strong
10 inference from the evidence that we have so far that
11 actions of the board of trustees were to intentionally
12 avoid that meeting because they hadn't been able to
13 accomplish it previously in the context of those
14 meetings.

15 Too much open opposition. So there's almost
16 an element of intent here that we think we're entitled
17 to put on, and have the court's --

18 THE COURT: Where's the record on that that's
19 before me now?

20 MR. SHEEN: Well, you see I think we've
21 expanded it -- well, I thought the absolute primary
22 thrust of their memoranda was the inadequate
23 representation of the claim. And so now if there
24 needs to be augmentation of the record on that point,
25 and if the court will allow me, I'm happy to do that,

1 as well as the lack of members list. There's evidence
2 in depositions about each of those points.

3 THE COURT: Okay. All right. I'm prepared
4 to rule. First, with respect to the standing of the
5 Levangers on the derivative action, my determination
6 is that based on the reports that I have seen, there
7 are insufficient facts and insufficient grounds to, as
8 a matter of law, determine that the Levangers are
9 inappropriate parties to bring an action.

10 Turning to the merits of the claim, it's my
11 determination that, as a matter of law, the actions
12 taken by the trustees that led to the adoption of the
13 amended CC&R's were proper.

14 And I'm going to tell you why. It is true
15 that there is nothing -- few things -- more
16 fundamental to corporations, entities in general, than
17 this process by which those entities amend their
18 charters or their beginning documents so to speak.

19 In this case, and I think in all cases, the
20 primary objective of the decision-making procedures to
21 effect changes and amendments to the organic documents
22 was to encourage participation by system members, and
23 to invite and solicit the votes, so to speak, of those
24 members with respect to the issues.

25 The bylaws are unanimous insofar as they set

1 out a procedure for amendment. Those procedures
2 contemplate amendments to be adopted at an annual
3 meeting, and -- in the absence of a quorum -- at a
4 reconvened meeting, at which no quorum would be
5 necessary.

6 That procedure is, in my view, directly at
7 odds with the fundamental objective of seeking a
8 maximization of participation in the decision-making
9 concern in important matters like amending the bylaws,
10 amending the CC&R's.

11 Next: The CC&R's, as they existed in '96,
12 do not expressly require that changed amendment to be
13 adopted in the context of a meeting.

14 The question then is: Did the alternate
15 voting proceeding comply with the terms of the bylaws
16 and CC&R's?

17 To answer this question, one has to address
18 this: Does the determination of that question -- in
19 other words, did it comply? -- is the proper
20 analytical method one which would yield a result that
21 one has to strictly comply with those provisions?

22 Or is substantial compliance enough to
23 comply with those provisions?

24 And resolving that, I look to the way that
25 the law looks at whether the provisions of a statute

1 should be strictly complied with, or whether the
2 provision of a statute may be substantially complied
3 with and thereby meet the requirements of the statute.

4 Because it seemed to me that substantive --
5 the substantial versus strict compliance analysis
6 situation with respect to statutes fits, at least
7 roughly, this kind of contract setting.

8 That analysis requires investigation of
9 whether the substitute performance -- in this case
10 voting -- was prejudicial to the people whose
11 interests were supposed to be protected by the
12 unambiguous bylaws.

13 And it's my conclusion that, as a matter of
14 law, those protections were present and no prejudice
15 occurred. I base that on the following factors.

16 First, insofar as the record is concerned,
17 that I have before me, the Welling letter and the
18 draft CC&R's went to everybody who should have got
19 them. That's what the reports that I have tell me.

20 Well, is there any collateral support for
21 this? I believe there is. The majority of yes votes
22 came in. Somebody must have known about it. They got
23 the votes.

24 There has been no genuine issue of fact
25 presented which I can find that legitimately

1 challenges the alternate process.

2 In other words, did the voting process have
3 integrity? It's my conclusion that the record
4 supports the conclusion that it did have integrity; in
5 other words, nobody suggested that votes weren't
6 counted. Nobody suggested that a majority didn't
7 actually vote for it.

8 The sanctity of meetings is not the be-all
9 and end-all of a legitimate decision-making process
10 concerning corporate governance or amendments to
11 organic corporate documents.

12 Under Utah's corporation law for example,
13 there is express authorization to make decisions
14 outside the context of a meeting; albeit there is a
15 requirement that notice be provided.

16 And I would suggest that here, that there is
17 certainly, impliedly, notice that there was going to
18 be a decision, an important decision made outside the
19 context of the meeting.

20 Furthermore, whereas here meetings could be
21 conducted by attendance through proxy, the argument
22 that meetings are necessary to encourage the vigorous
23 exchange of views is severely undercut.

24 If I were to point out, however, the most
25 salient reason that, in my view, the voting process

1 was an appropriate substitute, it's this: That based
2 on the state of the record, the reconvened meeting
3 process was detrimental to the fundamental objective
4 of encouraging and maximizing participation in the
5 decision-making.

6 The voting process as adopted by the
7 trustees was clearly directed towards that laudable
8 objective. I want to just remark briefly on the
9 contention that failing to participate in meetings was
10 an affirmative act designed to affirmatively block
11 actions of the trustees.

12 It's my belief that that contention is a
13 weak one, because of the availability of proxies.
14 First, individuals who are members of an organization
15 should -- I guess as a moral issue -- exercise their
16 support or opposition to issues by showing up
17 affirmatively doing something about it.

18 That judgmental, general judgmental point of
19 view is, I believe, brought down to a -- brought to
20 practical fruition through the proxy process. If you
21 don't want to go to a meeting, if you're intimidated
22 by who's going to be there, if you're gone and can't
23 be there because you're going to be in the Bahamas,
24 you find somebody you trust and you give them the
25 proxy, and you have that person show up and vote for

1 or in opposition to the issue based on the proxy.

2 So, all of that is a long way of saying
3 this: That it's my conclusion that, to the extent
4 that the plaintiffs' case bears on the propriety of
5 the amendment process, I'm finding, as a matter of
6 law, that it does.

7 And to reiterate: I'm at this time denying
8 the motion, for lack of a better term, to disqualify
9 the Levangers as derivative action claimants, or
10 plaintiffs, which in my view leaves us with the
11 remaining claims of the plaintiffs.

12 I guess that would be the gross
13 mismanagement business; although I'm -- even that is a
14 little bit unclear to me, because if I've determined
15 the CC&R amendments are appropriate, that may have
16 implications for the gross mismanagement issues, and
17 you have to sort those out; since at some point we're
18 going to have to decide what's going to be tried and
19 what's not going to be tried.

20 So, I'm going to stop talking and let you
21 weigh in to that somewhat.

22 MR. BELNAP: Your Honor, I don't believe
23 there's anything left to try, in view of the court's
24 ruling.

25 THE COURT: Well, you know, I would expect

1 you to say that. But maybe the best thing to do is to
2 let the dust settle. Mr. Sheen, you seem anxious to
3 say something.

4 MR. SHEEN: I think I want to let the dust
5 settle. I think I'm leaning toward requesting that
6 this be certified so that we get --

7 THE COURT: Yes.

8 MR. SHEEN: -- so we can take that up. It
9 does emasculate the case. I don't think it gets rid
10 of it altogether.

11 THE COURT: Mr. Sheen actually raises a
12 pretty legitimate point. We spend a couple of days
13 trying this -- some little piece or some big piece
14 that I decide is what's left -- and all of that's
15 contingent on me being right on what I just did. We
16 may end up being back doing the whole business again.
17 You know, I think there's some merit to what Mr. Sheen
18 says.

19 Practically, where does that take us? Your
20 client may want to weigh in.

21 MR. SHEEN: Is he standing up there behind
22 me?

23 THE COURT: Besides strangling me, of course.

24 MR. LEVANGER: I would just --

25 MR. SHEEN: No, no.

1 THE COURT: Well, I understand. Let me just
2 say this for your benefit. I make no claim to
3 infallibility. That's why there are appellate courts.
4 I've done what I did; somebody's going to be happy,
5 somebody's going to be unhappy. That's why I get paid
6 the big bucks by the taxpayers.

7 Fortunately, you have competent counsel
8 who's indicated he's probably going to let the
9 appellate court take a look at what I did and we all
10 may be back in this courtroom with me being very
11 chastened and humiliated by a court of appeals that
12 says I made a mistake. But I can live with that, I
13 guess.

14 Let's take practically what we're going to
15 do here. Do you want to keep the trial date on in
16 this at the present time? It would give you some time
17 to think about whether you want to take it up and file
18 your papers. If you file your papers, you strike the
19 trial date and see what happens.

20 MR. SHEEN: That's certainly agreeable to me.
21 I would make that decision within the next day or two;
22 say Tuesday.

23 MR. BELNAP: Your Honor, maybe you don't want
24 to get into this because we're into the dust-settling
25 stage here, which I understand. But if you look at

1 the complaint and the prayer for relief, Subparagraphs
2 A through D, which are all the prayers that are made,
3 A asks injunctive relief with respect to the CC&R's.
4 You have dealt with that.

5 B asks for attorneys fees because of the
6 derivative action, and that's dealt with by the ruling
7 on A.

8 C asks for removal of the defendants as
9 officers and trustees and for the election of new
10 trustees because of the alleged conduct in A. And
11 that's been dealt with.

12 And D says, "as to all causes of action for
13 rescission of all prior ultra vires and unauthorized
14 acts, or in issuance of membership certificates and
15 for damages for rectifying prior unauthorized acts."

16 We'll stipulate right now, your Honor, that
17 these people have been offered a membership
18 certificate and we'll stipulate that an order can
19 enter. We'll give them one.

20 THE COURT: Okay. Here's what I see as maybe
21 the driving issue. If this is going up, I don't want
22 it coming back on the grounds that all of the issues
23 weren't resolved in summary judgment.

24 MR. SHEEN: That's certainly the first issue
25 I would raise, your Honor, because I read different

1 parts of the complaint and would indicate that there
2 are outstanding issues.

3 THE COURT: And we're going to have to
4 wrestle with this because it's going to be a critical
5 question on appeal.

6 And if it goes up on appeal from a motion
7 for a partial summary judgment, we're going to have to
8 go through all the certification business and address
9 the prerequisites to certification.

10 I've got to think you've got to do that
11 anyway; just to cover yourself. And, Mr. Belnap, I
12 fully appreciate where you're coming from.

13 MR. BELNAP: I would just say, your Honor, as
14 a suggestion, if counsel believes that there are
15 issues that have not been disposed off by this court's
16 ruling, we're two weeks away from trial.

17 I think we ought to show up for trial, and
18 within what is framed in this complaint, if he claims
19 there's issues that haven't been disposed of, then we
20 ought to dispose of them. We're two weeks away from
21 trial. Then the whole thing's going up.

22 THE COURT: Okay. Just a second. Let me --
23 I'm going to let you have your say on this, but I want
24 to follow up on this.

25 If we do that, if we do that, why shouldn't

1 we try and take an expansive view of the available
2 issues left to be tried, rather than a narrow view?

3 At least if we do that -- and I'm still
4 going to let you tell me this whole thing's a bad
5 idea -- there are going to be findings and conclusions
6 on the whole rest of the business, and that might be
7 beneficial ultimately, I think. I don't know.

8 MR. SHEEN: I'm only thinking about
9 economies, your Honor, and I have admitted that your
10 decision has rendered difficult the guts of this case.
11 I do not agree with Mr. Belnap that now the entire
12 case is gone.

13 But it doesn't seem to make sense unless
14 we're going to do as the court suggests, which I guess
15 I'm open to considering.

16 In other words, I guess we'll be making a
17 record on appeal in the event that the appellate court
18 disagrees with the court's decision on the motion for
19 summary judgment.

20 It seems kind of an uneconomical way of
21 handling the situation when the central issue I
22 believe will probably need to be decided by an
23 appellate court.

24 THE COURT: How are you prejudiced if there
25 are remaining issues and we don't try it on the 22nd?

1 MR. BELNAP: I can't think of any, other than
2 we're ready, Judge; and, you know, we now -- as Mr.
3 Ringwood has indicated, there's a newly-elected board
4 in place.

5 These people need to get on with their
6 lives. Judge Brian directed at the time that he
7 denied injunctive relief, he said, "you folks need to
8 get on, and you need to, you know, function and get
9 along."

10 And so, that would be the only basis. We
11 realize you cannot sit on the bench and tell people,
12 "go get along," and they always will do it. That
13 doesn't happen. But bringing the matter to a
14 conclusion will assist us in doing that.

15 THE COURT: Well, but we still come back to
16 I think kind of a fundamental procedural question, and
17 that is: Is the appeal going to be an appeal from a
18 grant of a motion for partial summary judgment, or is
19 the appeal from a grant of summary judgment that
20 resolves all of the issues in the case?

21 I guess it's Mr. Sheen that's probably going
22 to have to take the first crack at it. I'm trying to
23 think how we're going to do this. Or you can argue
24 the issues, I guess.

25 MR. BELNAP: Judge, is it your feeling that

1 what we're talking about here -- when you asked me how
2 are we prejudiced, and I indicated I couldn't think of
3 any, other than what I indicated, that it is a cleaner
4 record to go up on partial summary judgment and get
5 that resolved?

6 Which handles what Mr. Sheen calls the guts
7 of the case anyway, and maybe that's correct.

8 It's just when you get this close, and then
9 in our view this ruling disposes of the case, and
10 there's a difference of opinion on that, I don't know
11 that we're going to be able to convince each other's
12 counsel of that. So maybe we ought to go up on the
13 partial summary judgment.

14 THE COURT: I certainly would -- I guess I
15 would be sympathetic to making the rulings appropriate
16 to getting it up on partial summary judgment, because
17 it certainly makes sense to do it that way.

18 MR. SHEEN: Could I draft the form of --
19 basically of order and have it approved as to form in
20 that vein?

21 THE COURT: Yes.

22 MR. BELNAP: We would like the opportunity,
23 if it's acceptable, to draft findings and conclusions
24 supporting your partial summary judgment. If counsel
25 wants to do a 54 B certification, we would like to

1 look at that.

2 THE COURT: I think that's a good idea,
3 because I would like to have the Court of Appeals have
4 a clear shot at me; and, you know, if I made a
5 mistake, I want them to know -- I want to know exactly
6 what it is. And so I concur with that. Let's go that
7 way.

8 MR. SHEEN: Okay.

9 THE COURT: Gentlemen, let's -- before you
10 adjourn, let me thank you both. The papers were very
11 well prepared. The case was well argued. Good job
12 all the way around, and this won't be the end of it.

13 MR. SHEEN: Thank you, your Honor.

14 MR. BELNAP: Thank you, your Honor.

15

16 (Whereupon, the instant proceedings came to
17 a close:)

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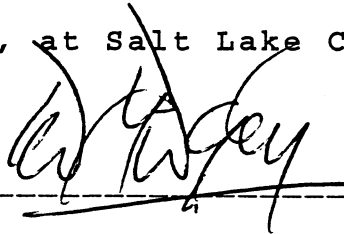
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3
4 REPORTER'S CERTIFICATE
5


6 I, Ed Midgley, Official Court Reporter in
7 and for the State of Utah, do hereby certify that the
8 above and foregoing proceedings were, by me,
9 stenographically reported at the times and places
10 herein set forth; that said report was, by me,
11 subsequently reduced to printed form, consisting of
12 the enumerated pages hereinbefore appearing; and that
13 said report so transcribed constitutes a true and
14 correct transcription of testimony given, evidence
15 adduced and/or proceedings had as at the times and
16 places hereinabove referenced.

17 To which certification I hereby set my hand
18 this 5th day of May, 1999, at Salt Lake City.

19
20 

21 Ed Midgley, Off.Ct.Reporter.

22 22-104249-7801
23
24
25

By Third District Court
Deputy Clerk, Summit County 

1998 at the hour of 10:00 a.m. E. Jay Sheen appeared on behalf of the plaintiffs. Paul M. Belnap and H. Burt Ringwood appeared on behalf of the defendant, Highland Estates Properties Owners Association (hereinafter referred to as "Highland Estates"). The oral argument having taken place 9 days prior to the trial of this matter. The Court having considered the defendant's Memorandum in Support of its Motion for Summary Judgment, the plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment and Defendant's Reply to Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment and considering the evidence presented at oral argument, and good cause appearing, having made its ruling from the bench, and desiring to set forth the Court's reasoning, the Court makes the following findings and conclusions and orders as follows:

FINDINGS

1. The Court finds that on or about March 14, 1972, Restrictive Covenants of Highland Estates were recorded in the Summit County recorder's office amending the earlier Conditions and Restrictions.
2. The Court finds that on or about October 30, 1972, the Articles of Incorporation of Highland Estates, were filed with the state of Utah, incorporating Highland Estates as a non-profit corporation.
3. The Court finds that subsequent to the filing of its Articles of Incorporation, Highland Estates adopted Bylaws.

4. The Court finds that the Bylaws are unamibigious insofar as they set out a procedure for amendment to Restrictive Covenants. Those procedures contemplate amendments to be adopted at an annual meeting, and in the absence of a quorum at the annual meeting at a reconvened meeting, at which no quorum would be necessary.

5. The Court finds that the Restrictive Covenants of Highland Estates, as they existed in 1996, do not expressly provide that amendment be adopted in the context of a meeting.

6. The Court finds that on or about August 23, 1994, attorney Scott Welling, on behalf of Highland Estates, prepared a letter to each member of Highland Estates, stating that a copy of the proposed Amendment to Declaration of Restrictive and Protective Covenants was attached to the letter and a ballot to officially register each members vote of the proposed amendments to the Restrictive Covenants.

7. The Court finds that Mr. Welling's letter, along with a ballot and a voting draft of the Amendment to Declaration of Restrictions and Protective Covenants was delivered to the members of Highland Estates.

8. The Court finds that the Amendment to the Declaration of Restrictive and Protective Covenants of Highland Estates was approved by a majority of homeowners through mail-in ballots.

9. The Court finds that the record supports the conclusion that the voting process had integrity, that all votes were counted properly, and that a majority of homeowners did actually vote in favor of the Amended Restrictive Covenants.

CONCLUSIONS

1. Based upon the record before the Court, there are insufficient facts and insufficient grounds to, as a matter of law, determine that the plaintiffs are inappropriate parties to bring this action.

2. As a matter of law, the actions taken by the trustees of Highland Estates that led to the adoption of the Amended Restrictive Covenants was proper.

3. The Court concludes as a matter of law that the mail-in ballot voting procedure substantially complied with the Bylaws and Restrictive Covenants in place and that no prejudice to the homeowners of Highland Estates occurred as a result of mail-in balloting.

Based upon the aforesaid, the Court now makes the following ORDER, JUDGMENT AND DECREE:

1. The defendant's Motion for Summary Judgment is hereby granted in part and denied in part as follows:

A. All of plaintiffs' claims set forth in plaintiffs' Complaint relating to the conduct of the members of the Board of Trustees of Highland Estates in the manner in which the

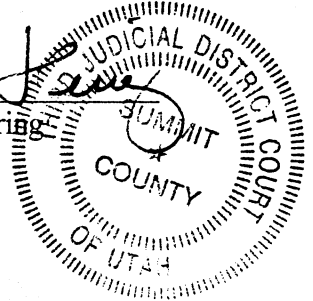
Amendment to Declaration of Restrictive and Protective Covenants was voted on and approved are hereby dismissed with prejudice.

B. Defendant's Motion for Summary Judgment as it relates to all other claims in plaintiffs' Complaint is hereby denied.

DATED this the 28 day of May, 1998.

BY THE COURT:

Donald E. Nehring
Honorable Ronald E. Nehring
District Court Judge



Approved as to Form:

E. Jay Sheen
Attorney for Plaintiffs

MAILING CERTIFICATE

I hereby certify that on this 2nd day of March, 1998, I did mail, first class mail, postage prepaid the above Order to the following:

E. Jay Sheen
Robinson & Sheen
77 West 200 South, Suite 420
Salt Lake City, Utah 84101

Julie C. Sheen

Page 1

1 IN THE THIRD JUDICIAL DISTRICT COURT
2 IN AND FOR SALT LAKE COUNTY, STATE OF UTAH
3
4 JEAN LEVANGER,)
5)
6 Plaintiff,)
7 VS.) CASE NO. 970600011
8 JOAN VINCENT, ET AL.,)
9 Defendants.)
10
11 REPORTER'S TRANSCRIPT OF PROCEEDINGS
12 (CARLTON WAY, RPR)
13 BEFORE THE HONORABLE PAT B. BRIAN
14
15 PARK CITY, UTAH
16
17 OCTOBER 7, 1998
18
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20
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ORIGINAL

Page 2

1 A P P E A R A N C E S
2
3 FOR THE PLAINTIFF:
4 JAY E. SHEEN
5 Attorney at Law
6
7 FOR THE DEFENDANT:
8 PAUL M. BELNAP
9 SCOTT C. WELLING
10 H. BURT RINGWOOD
11 Attorneys at Law
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Page 3

1 (PROCEEDINGS)
2 THE COURT: Levanger versus Vincent, et al,
3 97-011. Third District Court
4 Counsel, state an appearance. By
5 MR. SHEEN: Jay Sheen for the Plaintiffs,
6 Jean Levanger.
7 MR. BELNAP: Paul Belnap and Burt Ringwood
8 for Highland Estates, Your Honor.
9 THE COURT: Counsel, the Court in preparation
10 for today's hearing requested that the file be brought
11 from Coalville to this Court. (Indicating) This is the
12 third volume of at least three volumes in this case,
13 and this volume does not contain the pleadings. The
14 Court is telling you that because I have not read the
15 pleadings in connection with today's hearing. There
16 are none to read. And when I arrived at court this
17 morning and realized that, we made a request for the
18 file to be delivered to us from Coalville. But we just
19 simply have a logistics problem and that did not occur.
20 I propose that you proceed with argument, you take some
21 time in educating the Court. Then if you want to have
22 the Court take the matter under advisement and read the
23 pleadings, I'll do that. And if the Court feels that
24 it's sufficiently educated and enlightened on the
25 issues regarding today's hearing, then the Court will

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1 rule from the bench. We'll play it as we can.
2 MR. SHEEN: Okay.
3 THE COURT: Let's proceed.
4 MR. SHEEN: Your Honor, I provided courtesy
5 copies to the Court on Monday.
6 THE COURT: Where did you bring them?
7 MR. SHEEN: They were hand-delivered to your
8 Third District Court office.
9 THE COURT: That's the problem. I haven't
10 been in that court to do business for some time, and
11 there's always some kind of a problem in the paperwork
12 catching up with the Judge when we rotate into Summit
13 County.
14 MR. SHEEN: All right.
15 THE COURT: It simply is not going to be
16 where either party will be prejudiced. Let's proceed
17 with the hearing, and then we'll decide at the
18 conclusion of the argument how you want to proceed in
19 light of the pleadings.
20 MR. SHEEN: Okay, thank you, Your Honor.
21 Jay Sheen for the the Levangers, Your Honor.
22 This is our motion. It's a motion to reconsider the
23 granting of the summary judgment motion which was
24 entered by Judge Ron Nehring.
25 Your Honor --

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1 THE COURT: Let me ask right off: Why don't
2 we ask Judge Nehring to hear that if it's a motion to
3 reconsider on the ruling that he made?

4 MR. SHEEN: I'm happy to do that, Your Honor,
5 whatever the Court would desire. What I understood was
6 that the Summit County rotation was very strict and
7 that you weren't allowed to request the judge who had
8 left the bench on the matter. In other words, cases
9 didn't follow judges.

10 THE COURT: To the contrary. Whenever it is
11 logical that a judge maintain the continuity of the
12 case after rotating off of the calendar, we do that.
13 If this were a matter of first impression inspite of
14 the fact that many other hearings and many other orders
15 had occurred in this case, the fact that you're asking
16 me now to second-guess my predecessor puts this Court
17 in a very awkward situation.

18 MR. BELNAP: Your Honor, we are willing to do
19 whatever you would direct, obviously, but I don't think
20 the motion is asking this Court to second-guess the
21 substance of the ruling. It's really a procedural
22 issue that they are talking about as I understand the
23 arguments, Your Honor.

24 THE COURT: All right. Let's proceed and see
25 where it takes us.

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1 MR. SHEEN: Well, Your Honor, if the motion
2 is granted, the summary judgment would be reheard, so
3 there is that factor to consider. But I'm, along with
4 Mr. Belnap, happy to do whatever the Court requests.

5 THE COURT: Is it true that at some time
6 prior to today's date Judge Ron Nehring heard a motion
7 in this matter, made a ruling and now you are asking
8 this Court to reconsider the ruling that Judge Nehring
9 made?

10 MR. SHEEN: Yes.

11 THE COURT: All right. Let's proceed.

12 MR. SHEEN: Thank you.

13 Your Honor, we find ourselves here -- the
14 Plaintiffs have filed a complaint against the
15 homeowners association alleging that they had
16 improperly approved and filed and recorded and had
17 CC&R's for the association. There were other claims
18 made in the complaint. It is a multiple claim
19 complaint. But on that particular issue, Judge Nehring
20 granted a summary judgment motion.

21 THE COURT: For whom?

22 MR. SHEEN: For the Defendant, Highland
23 Estates Homeowners Association on the basis that, with
24 the evidence in front of the Court, the homeowners
25 association had acted properly in its methods in

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1 conducting the balloting for amending the CC&R's and
2 their subsequent approval and recording.

3 Your Honor, at that time we did not have
4 certain material evidence which has since come to
5 light, and that's the reason for our motion to
6 reconsider here today.

7 We sought the ballots that were created
8 during the process of voting on the amended CC&R's
9 through discovery. We were denied those. That was
10 objected to. Since then Miss Levanger, in connection
11 with her becoming a Member of the Board of Trustees of
12 the Association sought extrajudicially and obtained
13 from the President of the Association copies of the
14 ballots. The ballots now indicate in their exhibit
15 that we filed along with this motion and memorandum,
16 Your Honor, and they are contained -- they are also
17 described in Miss Levanger's affidavit which she has
18 filed in connection with this matter.

19 The ballots indicate that the votes were
20 miscounted pursuant to the specific provisions of the
21 Bylaws of the Association. Joint tenant owners of
22 property have the number of votes divided by the number
23 of joint tenant owners. So for a man and wife, for
24 example, the husband would have half a vote and the
25 wife would have half a vote. On 46 of the ballots

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1 cast, the written ballots cast, there was a single
2 joint tenant voting, and yet they were all counted as
3 whole votes in direct violation of Section 2.5 of the
4 Bylaws of the Association.

5 Furthermore, we obtained an affidavit, again,
6 after the filing of the -- I mean, after the entry of
7 the order granting the motion for summary judgment. We
8 filed an affidavit from Mr. Michael Ferino [phonetic],
9 who is the current President of the Association and a
10 member of the Board of Trustees of the Association, in
11 which he specifically denies having received notice of
12 any voting, of any balloting for the amending of CC&R's
13 when that was conducted. And that goes directly to the
14 heart of the propriety, of the method, by which the
15 Association obtained these votes.

16 Judge Nehring -- a substantial portion of
17 Judge Nehring's ruling was based on an affidavit from
18 Mr. Welling that each homeowner had received personal
19 hand-delivery of the notice. And the reason for that,
20 Your Honor -- I need to step back to educate the Court
21 just a little. As you read the pleadings, you'll
22 understand this. But let me explain it for purpose of
23 my oral argument. There is no method under Utah law by
24 which written ballots are allowed. In fact, Utah law
25 requires that either a meeting be held or that

1 unanimous consent be obtained for corporate action. In
2 this case the Association, on its own, determined that
3 it would seek written ballots, the excuse being that
4 they could not get enough homeowner interest to approve
5 amending CC&R's, and so they did it by way of written
6 ballots. The written ballot had a deadline for voting
7 in it, in the notice accompanying the ballot. That
8 deadline was passed, and there was insufficient votes
9 cast before the deadline. And so the date was then
10 arbitrarily extended until the Board of Trustees felt
11 that there were sufficient votes.

12 Given that ad hoc process the Association had
13 basically created on the fly, Judge Nehring indicated
14 that with Mr. Welling's affidavit, that every homeowner
15 had received notice, and with the ballot indication
16 that -- the indication from the Homeowners Association,
17 the ballots had been accumulated and counted and
18 exceeded the majority necessary, that that was an
19 allowable corporate action by the association.

20 Well, now we have evidence of two very
21 important things: Michael Ferino's Affidavit indicates
22 that he did not receive notice directly calling into
23 contention the Affidavit of Mr. Welling. Now, at the
24 time of the previous hearing, Your Honor, we didn't
25 have any information about Mr. Ferino's knowledge.

1 Mr. Ferino became President of the Association and a
2 Member of the Board and then became interested in its
3 affairs and educated himself as to the extent of the
4 present action before the Court. And it was only after
5 he had educated himself as to various issues that he
6 met with the Levangers and indicated that the -- that
7 he had never received this notice. Once that came to
8 light, he graciously agreed to file an affidavit on
9 that on that score.

10 So we have filed additional affidavits which
11 were not -- which represent testimony that was not
12 available at the time of the motion for summary
13 judgment. We have filed the Affidavit of Miss Levanger
14 in which she indicates the ballots that are attached
15 have been reviewed and the indication from the records
16 of the Association are that the 46 homeowners
17 improperly voted.

18 There's an additional issue, Your Honor,
19 which represents a number of shares, as well, votes of
20 persons who were not members of the Association at the
21 time notice was given, but became members through
22 purchase of property thereafter and were still allowed
23 to vote on the proposition. And their votes were cast,
24 and you'll find all that in the memorandum. That
25 represents a significant number of shares, as well. On

1 either one or both of those bases, that is the faulty
2 counting of the joint tenant votes and the failure to
3 keep a record of the shareholders entitled to notice
4 and to vote in the process, the balloting process was
5 fatally flawed as was the notice process.

6 Now, the Association elected to create these
7 ad hoc rules. It's absolutely critical that they be
8 required to follow them to the letter. Judge Nehring's
9 analysis went something like this, Your Honor: He said
10 if everyone received notice and everyone had an
11 opportunity to consider the issue and the -- and the
12 votes then cast were in a sense proxy votes, we can
13 consider them perhaps in some argument to be proxy
14 voted rather than this balloting process, then he says,
15 the integrity of the process remeans. Well, we have
16 evidence now that the process did not have integrity
17 from the very beginning. Now, they chose to follow
18 these ad hoc rules. They have to comply strictly with
19 the notice requirement, that is every member must
20 receive notice. We have evidence that they did not.

21 Frankly, Your Honor, when we argued this
22 motion before Judge Nehring, I indicated to the Court
23 and we actually indicated in written papers that
24 Mr. Welling's Affidavit fails on its face. There is no
25 evidence in Mr. Welling's Affidavit as to how he would

1 have personal knowledge that every single homeowner
2 received hand-delivery of these documents that he
3 claims. Mr. Welling was the attorney for the
4 Association. He gives no indication in his affidavit
5 that he went door to door or that he even knows who
6 didn't go door to door for the hand-delivery. So his
7 affidavit failed on its face. It failed at the last
8 hearing, but certainly now in the face of Mr. Ferino's
9 affidavit. You have to understand, Your Honor, we are
10 not talking about people who are now outside of the
11 process, disgruntled members as the Defendants would
12 have us believe and argued strenuously with Judge
13 Nehring. These people are the President of the
14 Association, a Member of the Board of Trustees.
15 Miss Levanger is also the Secretary of the Association.
16 So these people have been elected by their peers, other
17 members in the Association, other homeowners to look
18 out for their interests. And they now understand the
19 legitimacy of the complaint that the Levangers have
20 made.

21 We were denied the information through the
22 discovery process. We continue to be denied
23 information today, Your Honor. There's a continual
24 pattern in the association to not educate the
25 homeowners when reasonable requests are made for

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1 information. And there is a continuing pattern of the
2 Association acting in an ad hoc manner.

3 Your Honor, recently the Association -- to
4 give you two examples: Recently the association had
5 determined and wrote a letter to the homeowners, that
6 is the Board of Trustees, indicating that they would
7 not operate under the newly amended Bylaws until the
8 controversy was settled. Well, in the interim from the
9 date of that announcement they have then attempted in a
10 meeting -- certain members of the Board of Trustees
11 indicated to the rest of the Board that they were
12 operating under the new Bylaws and that they were now
13 going to remove Mr. Ferino apparently for his
14 willingness to sign the affidavit and turn over the
15 information. And it was only after apparent discussion
16 among Counsel that that action was rescinded and not
17 taken. But they intended to fully do that. So, again,
18 they simply operate in an ad hoc fashion.

19 Let me deal briefly with -- reply to their
20 arguments that they make in their Memorandum in
21 Opposition, and I'll be done, Your Honor. If you have
22 any questions, feel free.

23 They raise two points in their opposing
24 memorandum: The first point is that we have to
25 establish that the information was not available to us.

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1 And if we can't establish that, then the motion to
2 reconsider fails because the evidence was there and
3 available and we simply didn't get it. Well, that
4 argument puts them in an interesting bind, Your Honor,
5 because they objected formally to the production of
6 those ballots. Now, they say we could have filed a
7 motion to compel. They are assuming that that motion
8 to compel would -- they would have then have not
9 resisted the motion to compel or it would have been
10 granted in which case their objection is not
11 well-founded. Now, they can't have it both ways. They
12 can't say, "We deny you the information, but had you
13 sought it we would have given it to you because our
14 denial was not well-founded. And by the way today
15 you're too late in seeking this reconsideration because
16 the evidence was there and available to you."

17 The second point is the affidavits, Your
18 Honor. We had no information from Mr. Ferino until he
19 became involved in the management of the homeowners
20 association regarding any of these matters. And I
21 guess their argument is that we should have gone out
22 and canvassed the entire neighborhood and found out
23 what everybody knew about every single thing that could
24 come into play. Well, Mr. Ferino became President
25 after the fact, after these matters were taken care of

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1 and educated himself after the fact, and his evidence
2 is compelling. This is all material -- very material
3 evidence.

4 The second argument they make, Your Honor, is
5 that the balloting process was not flawed. They
6 completely ignore in their argument Section 2.5 of the
7 Bylaws, which is very, very specific and details the
8 number of votes to grant each joint tenant in a joint
9 tenancy. And they refer, instead, to the generic state
10 law regarding ownership and joint tenancy and voting by
11 owners in a joint tenancy. Well, that's superseded by
12 the very specific provisions of the Bylaws.

13 Now, they turn their previous argument on its
14 head, Your Honor. Previously they argued because there
15 was nothing -- I am sorry. They argued that the
16 statutes that we outlined previously, that is you can
17 only conduct business by meeting, a duly called
18 meeting, notice, with a quorum present or by unanimous
19 written consent. In their prior arguments before Judge
20 Nehring, they argued that those provisions should not
21 control and that the Association should be allowed to
22 do whatever it wants. Now they are arguing that the
23 very specific provisions of the Bylaws should not
24 control and rather the statutes should control in this
25 instance. Your Honor, they can't have it both ways.

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1 And I believe I've stated our case, and I
2 think after you review the information that we have
3 provided, including unfortunately the rather lengthy
4 exhibits, our motion will be granted. Thank you.

5 THE COURT: Thank you, Counsel.

6 MR. BELNAP: May it please the Court and
7 Counsel, Your Honor I ask leave of the Court to be able
8 to split our argument, if it's deemed necessary by the
9 Court, between procedural issues that I would like to
10 address and then Mr. Ringwood -- if Your Honor wants to
11 hear on the merits of our objection to this motion to
12 reconsider -- has some case authority to address on
13 that issue. Knowing what the Court knows at this
14 juncture of the hearing, let me make two observations,
15 and then Counsel are all invited to proceed as you deem
16 appropriate. The purpose, in the Court's opinion, to
17 have a judge review his or her own ruling is to avoid
18 inconsistent decisions. And it also has an element of
19 judicial economy that all of us are interested in
20 fostering.

21 There are a number of questions that I have
22 noted by way of notes as I've listened to Counsel's
23 argument. I'm asking rhetorically whether or not there
24 was a motion made by Plaintiffs' Counsel to continue
25 the summary judgment hearing because discovery was not

1 complete.

2 MR. BELNAP: There was not, Your Honor.

3 THE COURT: I am also asking rhetorically
4 whether or not there was a motion to compel on the
5 discovery that was outstanding?

6 MR. BELNAP: There was not, Your Honor.

7 THE COURT: I'm also asking whether or not
8 any of the evidence that has now been brought to this
9 Court's attention was available with reasonable
10 diligence to present to the Court at the time the
11 summary judgment motion was heard?

12 MR. BELNAP: It was available, Your Honor, or
13 could have been asked and brought up and it was not.
14 And I could lay a very brief groundwork on that, Judge.

15 THE COURT: Do you understand where the Court
16 is coming from?

17 MR. BELNAP: I do. That's why I say this is
18 a procedural issue in our opinion and doesn't get to
19 the merits, doesn't need to go there to have this Court
20 revisiting what Judge Nehring's analysis was.

21 THE COURT: Well, if, in fact, I have a
22 degree of comfort in your position at the conclusion of
23 the argument, that's -- that may well be the way the
24 Court is going to rule. But if there's any question
25 about that, it appears to the Court that Judge Nehring

1 who made the original ruling on summary judgment,
2 should be the one who reviews the propriety of his
3 ruling.

4 MR. BELNAP: Okay.

5 THE COURT: Not this Court.

6 MR. BELNAP: All right. I understand.

7 THE COURT: You may proceed.

8 MR. BELNAP: Your Honor, this case, just by
9 way of brief background, arises out of a situation
10 where there's a subdivision here in the Summit County
11 Area called Highland Estates. And as part of that
12 subdivision, each person who has a home there is part
13 of the homeowners association. And the whole
14 controversy in this case arose out of the fact that the
15 Plaintiffs in this case did not like a decision that
16 was made by the homeowners' association to make an
17 assessment to the homeowners to create a fund by which
18 they could have a rainy day fund so to speak and also a
19 fund to do certain improvements. And that seems to
20 have been at the core of the starting of this dispute.

21 The Levangers have participated over the
22 years in meetings. When they didn't get their way,
23 they decided the best way to participate was not to
24 participate in meetings. Then a change of decision was
25 made, and Becky Levanger, one of the Plaintiffs in this

1 case, decided, "Okay, I am going to get involved." She
2 ran for office in the homeowners association and was
3 elected, and thus got herself in a position where she
4 could be involved in the governance of this group of
5 laypeople that are trying to run their homes and their
6 homeowners association.

7 This case was then filed by the Levangers
8 claiming under Rule 23 that this was a derivative
9 action on the behalf of all of the homeowners against
10 the homeowners association. So they, in essence, were
11 suing themselves.

12 We came before this Court September 30th,
13 last year, 1997, before Your Honor in Coalville. What
14 brought us before the Court at that time was a motion
15 for a restraining order and an injunction. And we had
16 a hearing before, Your Honor. And at that hearing Your
17 Honor denied the Plaintiffs' motions for a restraining
18 order and an injunction which was asking to enjoin the
19 Association and the governance of the Association and
20 to have things done the way the Levangers wanted it
21 done.

22 Your Honor, at that hearing in denying that
23 motion said a couple of things: Number one, these
24 people need to get on with their lives, meaning the
25 homeowners. They need to get on with life and try to

1 run their affairs in a way that's productive. That you
2 weren't trying to tell them how to do. That you were
3 simply encouraging that from the bench.

4 As part of that process, Your Honor set a
5 trial date in this case for January 19th and 20th of
6 this year. Before that hearing, in September, written
7 discovery was propounded, among other things, asking
8 for these ballots. Now, what brings these ballots into
9 play, Judge, and what was significant in Judge
10 Nehring's mind about it, without getting into the
11 merits, is that Judge Nehring decided what's important
12 in his mind is what is going to foster the most ability
13 for people to step forward and express their views.
14 What had happened in the past is people didn't show up
15 for meetings. And the governing papers had a provision
16 if they didn't have enough of a quorum, they could then
17 do a reconvened meeting, and those that showed up at
18 the reconvened meeting could then transact business.
19 Well, at reconvened meetings there was very few people
20 there, and so you had a situation where there wasn't a
21 voice, a good cross-section voice of the association.
22 So a decision was made to amend the documents and allow
23 for decisions to be made by a balancing process. And
24 Judge Nehring went through an analysis as part of his
25 ruling that that balloting process fostered

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1 participation and fostered exactly what the law and the
2 rules of substantial compliance should be fostering,
3 and that is participation.

4 It is that balloting process that was at
5 issue, in part, at the time of the motion. That was on
6 the table from day one. Written discovery was served
7 April 19, '97, by the Plaintiff asking for, among other
8 things, each of the ballots. We objected to that
9 discovery because it would subject the people who
10 turned in ballots to harassment. The Levangers --

11 Your Honor?

12 THE COURT: If there is going to be any
13 demonstration in this courtroom, I will order anyone
14 who participates in that removed from the courtroom.

15 A VOICE: I am sorry.

16 THE COURT: We are in a formal dignified
17 proceeding. The Court will not tolerate for one moment
18 any unbecoming behavior.

19 MR. SHEEN: Your Honor, I apologize for that
20 reaction.

21 THE COURT: The apology is accepted. No
22 harm, no foul. Let's proceed.

23 MR. BELNAP: Thank you. It was felt by the
24 homeowners association, our client, as authorized by
25 the representatives, our client, the spokesman that we

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1 deal with, that that would potentially subject those
2 people who put in confidential ballots to individual
3 harassment and so it was objected to. A conversation
4 took place after that between Counsel, and Mr. Sheen
5 indicated, "Well, I may have to file a motion to
6 compel." We said, "Fine, whatever you think you need
7 to do." No motion was filed. We came before this
8 Court in September, nothing was said, nothing was
9 brought forward. This Court set a trial date. We came
10 before Judge Nehring January 9th on our motion for
11 summary judgment. Nothing was said. No Rule 56
12 affidavit was filed, no motion to compel, no claim
13 whatsoever that all of the materials they needed or
14 wished to have were not before the Court.

15 The motion was argued on January 9th, and was
16 granted. Mr. Sheen was to prepare a 54B Certification.
17 We were to prepare the order with the findings. We did
18 so. It was submitted to Judge Nehring and signed.
19 After that order was entered, Miss Levanger, because of
20 her position on the Board and Mr. Ferino, who had been
21 elected through a normal voting process and balloting,
22 decided that they were going to turn over these private
23 ballots to Counsel for the Plaintiff. And so these
24 were received after the hearing, which was a hearing, I
25 might remind the Court, two weeks before we were to go

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1 to trial. We were ready for trial. These were
2 received after the order was tendered, after it was
3 signed. Now, we don't think they are relevant, and
4 Mr. Ringwood can speak to that. We don't think it
5 changes anything. Mr. Ringwood could speak to that.
6 But, procedurally, there was nothing, and still remains
7 nothing, why that hearing shouldn't have gone forward,
8 was not objected to by Counsel for the Plaintiff on any
9 basis and that ruling should stand.

10 What resulted from that hearing -- and I have
11 a transcript that should be part of the Court's
12 original file -- was a suggestion by Counsel for the
13 Plaintiff that this matter be certified since, to use
14 his words, the guts of his case had been ruled upon.
15 We felt that Judge Nehring's ruling had resolved all
16 issues, but there was a difference of opinion that he
17 didn't want to try and sort out that day. And what was
18 agreed and suggested by Plaintiffs' Counsel was that he
19 get a 54B Certification, that we go up on this issue
20 that had been ruled on, we let the appellate court
21 decide if Judge Nehring was right, because if he's
22 right, the case is over. If he's wrong, then we are
23 back here on some evidentiary issues, perhaps. Or I
24 should say some legal issues directing him with respect
25 to the amendment process, et cetera. I'll wrap up in

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1 one minute, Your Honor.

2 That being the case, Judge, we believe that
3 procedurally this motion is not proper. Mr. Ringwood
4 can indicate to you why -- if Your Honor wants to deal
5 with it -- why the vote of a joint tenant in a joint
6 tenancy is sufficient to count for the joint tenant
7 owners of the property. And that's the heart of what
8 they are concerned about.

9 With respect to the two affidavits that were
10 tendered after the hearing, after the order was signed,
11 there are some people saying, "I don't remember getting
12 this." But that -- where are all the other people?
13 And all Judge Nehring said is that the process fosters
14 participation. That's what he said.

15 THE COURT: Tell the Court the status of the
16 54 Certification.

17 MR. BELNAP: The Plaintiff has moved in the
18 alternative today for 54B Certification in accordance
19 with what they suggested be done at the hearing in
20 January. So they've moved to reconsider or in the
21 alternative for 54B Certification. We don't object to
22 the 54B Certification. We anticipated it would be
23 made. Judge Nehring felt it was a very appropriate
24 case to do that. We think that is the direction this
25 case ought to take as agreed upon in the record.

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1 THE COURT: Anything you'd like to say?

2 MR. RINGWOOD: I'm happy to address the joint

3 tendency issue if Your Honor would like?

4 THE COURT: In the Court's opinion, the

5 hearing is focused on procedural and not subjective

6 issues.

7 Anything further anybody else would like to

8 say before the Court rules? Do you submit?

9 MR. SHEEN: Yes, Your Honor.

10 THE COURT: Regarding the Plaintiff's motion

11 to reconsider the granting of summary judgment in

12 behalf of Highland Estates Properties, the Owners

13 Association, Inc, the Court finds and rules as follows:

14 The record is undisputed that at the time

15 summary judgment was argued and granted, there was no

16 request by Plaintiffs for a continuance in order to

17 conduct additional discovery; secondly, there was no

18 motion to compel discovery either prior to or at the

19 time of the motion for summary judgment; and, three, it

20 is undisputed that evidence relating to what is now

21 offered as newly discovered evidence was, in fact,

22 available to the Plaintiffs at the time summary

23 judgment was argued and granted.

24 The Court finds that procedurally the

25 Plaintiffs had an opportunity to either conduct

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1 additional discovery, compel discovery that was

2 outstanding and unresponded to or to seek a continuance

3 for those purposes. Their failure to do so constitutes

4 a waiver, and procedurally the Court finds that there

5 is simply no basis for the setting aside of the summary

6 judgment granted by Judge Nehring in behalf of the

7 Defendants.

8 The Court, unless there is some objection by

9 either side, will make no finding and no ruling on the

10 54 Certification question. If Judge Nehring acquiesced

11 in that process, then perhaps the thing for the parties

12 to do is to take the matter to the appellate court on

13 the substantive issues.

14 The Plaintiff's motion to reconsider is

15 denied. The Court has set forth the reasons. Counsel

16 for Defendant will prepare very specific findings

17 consistent with the ruling of the Court; prepare an

18 accompanying order that is consistent with the

19 findings; submit those documents to opposing counsel

20 for approval as to form; return them to this Court for

21 signature before 5:00 p.m, October the 21st.

22 MR. BELNAP: Your Honor, could we have just a

23 couple of more days? Mr. Ringwood and I are both going

24 to be out of town that entire week.

25 THE COURT: On pleasure or business?

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1 MR. BELNAP: Like the 23rd?

2 THE COURT: Are you on pleasure or business?

3 MR. BELNAP: Business.

4 THE COURT: October 28th, 5:00 p.m.

5 MR. BELNAP: Your Honor, also with respect to

6 the 54B Certification, I think that Counsel can

7 stipulate to that, and we could make that part of --

8 THE COURT: Part of the order?

9 You so stipulate?

10 MR. SHEEN: Yes, I do, Your Honor. I'd like

11 to take care of it rather than going back to Judge

12 Nehring to get him to sign the order.

13 THE COURT: In the desire of this Court to

14 minimize the expense and the inconvenience to the

15 litigants, it appears that that's the way to go;

16 include that in your order and then you may proceed

17 with any appellate remedies you desire on the

18 substantive issues of that motion. That way none of

19 the interests of the parties are compromised and you

20 may proceed on that basis.

21 MR. SHEEN: Thank you, Your Honor.

22 MR. BELNAP: Thank you, Judge.

23 THE COURT: We are in recess.

24 (Hearing adjourned.)

25

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1 REPORTER'S CERTIFICATE

2 STATE OF UTAH)

3 : SS.

3 County of Salt Lake)

4 I, Carlton S. Way, do certify that I am a

5 Certified Shorthand Reporter and Official Court

6 Reporter in and for the State of Utah; that as such

7 reporter, I reported the occasion of the proceedings of

8 the above-entitled matter at the aforesaid time and

9 place. That the proceeding was reported by me in

10 stenotype using computer-aided transcription real-time

11 technology consisting of pages 1 through 28, inclusive.

12 That the same constitutes a true and correct

13 transcription of the said proceedings.

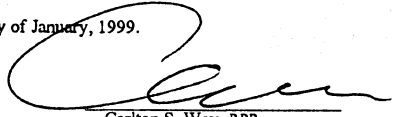
14 That I am not of kin or otherwise associated

15 with any of the parties herein or their counsel, and

16 that I am not interested in the events thereof.

17 WITNESS my hand at Salt Lake, Utah, this 26th

18 day of January, 1999.

19 

20 Carlton S. Way, RPR

21 Utah License No. 86-108284-7801

22

23

24

25

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No.
FILED
DEC 29 1998
Third District Court
By
Deputy Clerk, Summit County

FILED
MAR - 3 1999
Third District Court

IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

*Date Change Ordered by
Judge Pat B. Brian*

STATE OF UTAH

JEAN LEVANGER and REBECCA)
LEVANGER,)
Plaintiffs,)
vs.)
JOANN VINCENT, KEN FISHER, DIANE)
DUPLANTY, RON DUPLANTY, JAN)
NEMCIK, BECKY NELSON, ROSIE)
PETRONELL, CORY ALSBERG, GERALD)
VINCENT, SANDY FISHER, SCOTT)
FEATHERSTONE, MARTIN ROGUSCHKA)
LANCE SWEDISH, LAUREL KANGAS,)
JOHN DOES 1-5, JANE DOES 1-5, and)
HIGHLAND ESTATES PROPERTIES)
OWNERS ASSOCIATION, INC.,)
Defendants.)

**ORDER AND RULE 54(b)
CERTIFICATION**

Civil No. 970300011

Judge Pat Brian

The above-entitled matter came on for hearing on the 7th day of October, 1998 on plaintiff's Motion to Reconsider, with counsel of record for plaintiff appearing and counsel of record for defendant appearing.

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The matter was argued to the Court and the Court being fully advised by counsel concerning the issues involved, the Court made its ruling denying the plaintiff's motion. The Court deems it appropriate to set forth the basis of this ruling as follows:

1. At the time the summary judgment hearing was argued and presented to Judge Nehring, the above-entitled matter was scheduled to proceed to trial in less than two weeks thereafter.

2. At the time of the summary judgment hearing, plaintiff did not request leave for additional discovery or indicate that the matter was not ripe for decision at that juncture in the case.

3. This Court finds that the documents which plaintiff attempts to now rely upon for their Motion to Reconsider, procedurally are not appropriate to be submitted at this juncture of the case. If plaintiff felt that the documents were potentially significant or important, plaintiff was aware of the potential existence of the same, and of defendant's objection to production of the documents for reasons stated in discovery responses. Plaintiff made no motion to compel the production of the documents tendered to the court with the Motion to Reconsider and it is undisputed that the evidence plaintiff now attempts to tender to the court with the Motion to Reconsider was in fact available to be requested, to seek an order compelling the same, or to seek leave from the court to have additional time to review the matter before the case was presented to Judge Nehring for summary judgment argument just prior to the scheduled trial of the case. Therefore, this court finds that procedurally the plaintiff had fair opportunity to conduct and complete such discovery as plaintiffs felt necessary and appropriate or to compel production of

such documents as plaintiffs felt appropriate. Plaintiffs' failure to do so constitutes a waiver of the basis on which plaintiffs now seek reconsideration and procedurally there is no basis to set aside the order of the Honorable Ronald E. Nehring granting the defendant summary judgment.

Following the ruling of the Court on Plaintiffs' Motion to Reconsider, counsel addressed to the Court the issues surrounding the status of the case and plaintiffs' desire to have the ruling of Judge Nehring reviewed by an appellate court. Based upon the arguments of counsel, the agreement of counsel and this court's review of this matter, it is determined by this Court and this Court so finds that there is not just reason for delay and the order of the Honorable Ronald E. Nehring is hereby certified pursuant to Rule 54(b) for entry as a final Order and judgment. It is the opinion of this Court, and counsel also have represented to this Court that it was the opinion of Judge Nehring that it would be prudent to certify this order pursuant to Rule 54(b) since the ruling on the summary judgment substantially resolves the determinative issues in the above-entitled action and if plaintiff chooses to appeal from the same, it would be a substantial savings of judicial resources to have that appeal proceed now rather than proceeding through a trial and then a subsequent appeal.

WHEREFORE, based upon the reasons set forth above, it is

HEREBY ORDERED, ADJUDGED AND DECREED that:

1. That Plaintiffs' Motion to Reconsider is hereby denied.
2. The Court certifies the Order of the Honorable Ronald E. Nehring dated May 28,

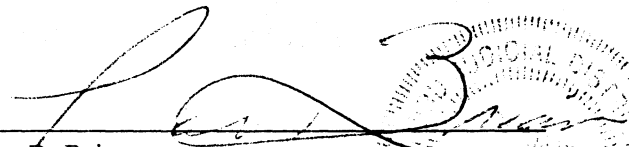
1998 as a final Order and Judgment pursuant to Rule 54(b), this Court determining that there is


as per Judge Brian.
3/3/99 g.o.

no just reason for delay and that a judgment should enter pursuant to said order.


DATED this 3rd ^{g.o.} day of ~~December~~ ^{March}, 1998.

BY THE COURT:

By 
Pat B. Brian
Third District Court Judge



Approved as to Form:



E. Jay Sheen
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 21 day of December, 1998, a true and correct copy of the foregoing Order and Rule 54(b) Certification was mailed, first class postage prepaid, to:

E. Jay Sheen
ROBINSON & SHEEN
77 West 200 South, Suite 420
Salt Lake City, Utah 84101

A handwritten signature in cursive script, reading "Jacqueline Raymond", written over a horizontal line.