

2002

Jean Levanger and Rebecca Levanger v. 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., : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS

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.

Civil No.: 20020090-CA

**BRIEF OF APPELLANT HIGHLAND ESTATES PROPERTIES
OWNERS ASSOCIATION, INC.**

**APPEAL FROM THE THIRD DISTRICT COURT OF SUMMIT COUNTY, THE
HONORABLE JUDGE ROBERT K. HILDER PRESIDING**

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Utah Court of Appeals

NOV 11 2002

Paulotto S.
Clerk of the Court

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STATE OF UTAH

JEAN LEVANGER and REBECCA)	
LEVANGER,)	
Plaintiffs,)	
)	
vs.)	
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JURISDICTION OF THE COURT OF APPEALS

The Supreme Court had original appellate jurisdiction over this matter pursuant to Utah Code Ann. § 78-2-2(3)(j), and transferred it to this Court pursuant to Utah Code Ann. § 78-2-2(4). Jurisdiction in this Court is pursuant to Utah Code Ann. § 78-2a-3(2)(j) by transfer from the Supreme Court. (R. 1632.)

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW

This appeal presents the following issues for this Court:

(a) Whether the trial court erred in denying Highland Estates' motion for directed verdict on the issue of standing under Rule 23.1 at the close of Plaintiffs' case where the LeVangers presented no evidence on this issue to the trial court and where the issues of standing had not been waived or previously decided.

(b) Whether the trial court erred in denying Highland Estates' motion for directed verdict on the issue of substantial benefit at the close of Plaintiffs' case where the LeVangers presented no evidence on this issue to the trial court.

Standard of Review: When a party challenges a trial court's denial of a motion for directed verdict or judgment notwithstanding the verdict on the basis of insufficiency of the evidence, an appellate court will reverse where, viewing the evidence in the light most favorable to the prevailing party, the court concludes that the evidence is insufficient to support the verdict. See Brewer v. Denver & Rio Grande W. R.R., 2001

UT 77; 31 P.3d 557 (Utah 2001); Heslop v. Bank of Utah, 839 P.2d 828, 839 (Utah 1992); see also Scudder v. Kennecott Copper Corp., 886 P.2d 48, 52 (Utah 1994).

PRESERVATION OF THE ISSUES AT THE TRIAL COURT

The issue of Plaintiffs' lack of standing under Rule 23.1 was first raised as a defense in Defendant's Answer. (R. 0074.) The Plaintiffs' lack of standing was presented to the trial court in a Motion for Summary Judgment filed by Highland Estates, which was denied. (R. 208-215.) The standing and substantial benefit issues were brought before the trial court in Highland Estates' Motion for Evidentiary Hearing and again in Defendant's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment filed after the first appeal of this case. (R. 1269-1271, 1311-12, 1384-89, 1430-1433.)

On June 26, 2001, the trial court held a hearing regarding Plaintiffs' Motion for Summary Judgment and Defendant's Motion for Evidentiary Hearing. Defendant informed the trial court that the issues of standing under Rule 23.1 and substantial benefit, among other issues, would need to be addressed at an evidentiary hearing. (R. 1634, p. 3.) The trial court granted Defendant's Motion for Evidentiary Hearing and scheduled a trial. (R. 1445.)

On September 19, 2001, a trial was held where Defendant again presented the issues of standing under Rule 23.1 and substantial benefit. (R. 1634, p. 15.) The trial court requested that the parties submit written closing arguments. (R. 1634, p. 148.)

Defendant again set forth the issues of standing and substantial benefit in its Written Closing Argument. (R. 1511-1526.) At no time did the Plaintiffs present any evidence regarding the issue of standing or substantial benefit.

The trial court entered findings from the evidentiary hearing on December 16, 2001. (R. 1555.) Defendant filed its timely Notice of Appeal on January 7, 2002. (R. 1567-68.)

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Rule 23.1 of the Utah Rules of Civil Procedure is determinative of this appeal.

This Rule provides in full:

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

Utah R. Civ. P. 23.1.

STATEMENT OF THE CASE

A. NATURE OF THE CASE.

This is an action brought by Jean and Rebecca LeVanger, as a purported derivative action under Rule 23.1, against Highland Estates Properties Owners Association, Inc. (“Highland Estates”), and members of its former board of trustees, alleging that the manner in which the Association’s amended CC&R’s were approved was improper and contrary to the Association’s organizational documents and Utah law. (R. 001-009.) In addition, the LeVangers sought attorneys fees for conferring a substantial benefit on Highland Estates.

B. 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.) The Motion was set for hearing before Judge Nehring on January 9, 1998. (R. 411.) The Court issued an order granting in part Highland Estates partial 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 Plaintiffs’ Motion to Reconsider was held before Judge Brian, on October 7, 1998. At the hearing, the Court denied Plaintiffs’ Motion to Reconsider and granted

Plaintiffs' Motion to Certify the Summary Judgment as Final pursuant to Rule 54(b) and thereafter signed an Order to that on March 3, 1999. (R. 1063.)

Plaintiffs filed a Notice of Appeal on March 31, 1999 and appealed only the issue of the propriety of the mail-in ballot process. (R.1074.) The case was subsequently transferred to the Court of Appeals by Order dated May 18, 1999. (R. 1145.) This Court reversed the trial court's entry of summary judgment in favor of Highland Estates and determined that the manner in which the members of Highland Estates had adopted the amended CC&R's did not conform with the pertinent operating documents and Utah Statutes. See Levanger v. Vincent, 2000 UT APP. 103; 3 P.3d 187 (Utah Ct. App. 2000).

After this case was remanded to the trial court, the LeVangers moved for summary judgment on the issue of attorneys fees, claiming they were legally entitled to the same. (R. 1194-96.) Highland Estates moved the trial court to hold an evidentiary hearing on the factual issues relating to whether Plaintiffs were legally entitled to attorneys fees, including the issues of standing and substantial benefit. (R. 1269-71, 1430-33.) Highland Estates opposed Plaintiffs' Motion for Summary Judgment on the basis that: (1) the LeVangers had no standing to bring their claims as they did not fairly and adequately represent the association as required by Rule 23.1 of the Utah Rules of Civil Procedure; (2) that the LeVangers had not conferred a substantial benefit on Highland Estates that would entitle them to collect attorneys fees; and (3) that the claimed

fees were not reasonable.¹ (R. 1311-12, 1384-89.) The trial of these issues was held on September 19, 2001. (R. 1555.) At the close of Plaintiffs' case, Defendant moved the court to enter a directed verdict as Plaintiffs had presented no evidence whatsoever regarding the issues of standing under Rule 23.1 or regarding substantial benefit. (R. 1634, pp. 79-84.) The court took the motion under advisement. (Id.)

Following the evidentiary hearing, the trial court entered a Ruling, dated November 27, 2001, and subsequently signed an Order, dated December 11, 2001 granting the LeVangers \$41,327.15 in attorneys fees and costs. (R. 1554-55.) Defendant timely filed its Notice of Appeal on January 7, 2002. (R. 1567-68.) Highland Estates appeals from this Order given that the LeVangers presented no evidence whatsoever that they had standing under Rule 23.1 or that they had conferred a substantial benefit on the association.

C. STATEMENT OF FACTS.

1. Highland Estates is a homeowners association that consisted of approximately 260 members at the relevant time period. (R. 1089.)

2. On July 6, 1964 the Restrictive Covenants of Highland Estates (hereinafter "1964 CC&R's") were recorded in Summit County. (R. 1316-19.)

3. The 1964 CC&R's were amended on March 14, 1972. (R. 1321-24.)

¹ Highland Estates is not seeking appellate review of its arguments regarding the reasonableness of the attorneys fees as part of this appeal.

4. On October 30, 1972, the Articles of Incorporation of Highland Estates Properties Owners Association, Inc. were filed with the State of Utah, incorporating Highland Estates as a nonprofit corporation. (R. 1325-26.)

5. In the late 1970's, Highland Estates adopted a set of Bylaws (hereinafter "Original Bylaws"). The Original Bylaws gave the Association and the Board of Trustees the authority to make assessments and the ability to establish liens against the homeowners in the association. The Original Bylaws fully set forth the authority, purpose and basis of the Board of Trustees' power to assess and lien. (R. 1327-37.)

6. The Original Bylaws also gave the Association the ability to amend the Bylaws by a majority vote at a regularly convened or specially convened Association meeting. (R. 1327-37.)

7. In 1990 the 1972 CC&R's were again amended to create an architectural committee. (R. 1338-41.)

8. 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.)

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

10. 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 of the legal aspects of the proposed changes. (R. 303-08.) There were not enough members present at the June 1994 meeting to constitute a quorum. (R. 262.)

11. At the conclusion of the discussions, everyone present at the annual meeting voted to accept the Amended CC&R's and to allow until July 15, 1994 for comment by other homeowners. (R. 262.)

12. 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.)

13. 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.)

14. Efforts to ensure as much input from the owners on the proposed amendment cost the Association several thousand dollars 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. 305-06.)

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

16. 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 more than 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, 305-07.)

17. 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.) 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.)

18. 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, 233-34.)

19. 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.)

20. 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.)

21. 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, and that 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. 266-67.)

22. On October 5, 1995, Highland Estates caused to be filed with the Summit County Recorder's Office, the Amended CC&R's. (R. 270-80.) The amendments had the effect of making the following changes: (1) allowing the Board of Trustees to amend the Bylaws without a vote by the Association; (2) allowing the Association's members to vote by mail-in ballot rather than at a convened meeting; and (3) incorporating into the CC&R's the assessment and lien authority already provided for under the Original Bylaws (hereinafter "1995 Amendments"). (R. 1342.)

23. Since the enactment of the 1995 Amendments neither the Board of Trustees nor the Association has taken any action whatsoever under any provision of the 1995 CC&R's. The 1995 Amendments have never been used in any manner by the Association. (R. 1354-59.)

24. All actions taken by the Association since the enactment of the 1995 Amendments have been authorized under either the 1990 CC&R's or the Original Bylaws. (R. 1338, 1327, 1354-59.)

25. The Association has caused liens to be recorded against various property owners which actions were authorized under the Original Bylaws. (R. 1327, 1354-59.)

26. The Board of Trustees has revised the Architectural Guidelines, which authority was provided for under the 1990 CC&R's and Original Bylaws. (R. 1354-59.)

27. Since the enactment of the 1995 Amendments, the Association has made the following amendments to its operating documents:

(A) The CC&R's were amended in 1997 pursuant to the regular meeting process as outlined in the Original Bylaws in order to add a provision regarding common areas and correct a typographical error regarding indemnification. This amendment was not enacted pursuant to any authority provided for in the 1995 Amendments. (R. 1354-59.)

(B) The CC&R's were again amended in 1999 pursuant to the regular meeting process as outlined in the Original Bylaws in order to add a provision regarding residential zones and to give the Board of Trustees the authority to amend the Bylaws without a vote

by the Association. This amendment was not enacted pursuant to any authority provided for in the 1995 Amendments. This amendment in part restored the changes that would have been in place had the LeVangers not brought their lawsuit. (R. 1354-59.)

(C) The Original Bylaws were updated and clarified on or about November 29, 1999 pursuant to the regular meeting process as outlined in the Original Bylaws. This amendment was not enacted pursuant to any authority provided for in the 1995 Amendments. (R. 1354-59.)

(D) The Articles of Incorporation were updated and clarified in November of 1999 pursuant to the regular meeting process as outlined in the Original Bylaws. This amendment was not enacted pursuant to any authority provided for in the 1995 Amendments. (R. 1354-59.)

27. The Plaintiffs, who are 20-year homeowners in the association, had failed to pay the \$37 annual association assessments that had begun accruing since 1991. (R. 207, 285.)

28. Given the Plaintiffs' failure to pay their assessments, the association filed a lawful lien against the LeVangers in an attempt to collect the monies due and owing. (R. 206.)

29. Plaintiffs then filed a purported derivative action pursuant to Rule 23.1 against Highland Estates on January 21, 1997. (R. 9.) Plaintiffs' Complaint sets forth causes of action for "Breach of Fiduciary Duty" and "Breach of Fiduciary Duty – Gross Mismanagement" and seeks rescission of the 1995 Amendments, attorneys fees and punitive damages. (R. 2-3, 5.) Plaintiffs contemporaneously filed a Motion for Temporary Restraining Order. (R. 60-62.)

30. Defendant filed its Answer on February 26, 1997. (R. 77.) Defendant included the following defenses:

SECOND DEFENSE

The Verified Complaint fails to state a cause of action under Rule 23.1 U.R.C.P. upon which relief may be granted, in that plaintiffs have failed identify [sic] any right which defendant Association has failed enforce [sic].

* * *

1. In response to the allegations of paragraph 1, Defendant Association denies that plaintiffs have standing or qualification to bring such action under Rule 23.1 U.R.C.P. and denies that such action is brought in the right and for the benefit of Highland Estates.

(R. 74.)

31. It was not until September 26, 1997, that Plaintiffs noticed a hearing on their Temporary Restraining Order. (R. 165-166.)

32. On September 30, 1997, Plaintiffs' Motion for Temporary Restraining Order was heard by the trial court. Judge Brian denied Plaintiffs' Motion for Temporary Restraining Order stating in a minute entry that the Plaintiffs had failed to meet their

burden under the rules. (R. 167.) In addition, 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.)

33. Before the scheduled trial date, Highland Estates filed a Motion for Summary Judgment which was fully briefed by both parties. The matter came on for oral argument at a hearing before Judge Nehring on January 9, 1998. The hearing was held two weeks before the scheduled trial of January 22 and 23. (R. 1084-1144.)

34. 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 by accepting mail-in ballots to approve the 1995 Amendments. (R. 1130.)

35. However, Judge Nehring declined to grant Defendant summary judgment on the issue of standing under Rule 23.1, finding that:

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.

(R. 1130, 1135, attached as Appendix A.)

36. At the end of the hearing, Counsel for Plaintiff requested that the ruling on the issue of mail-in ballots be certified for interlocutory appeal. (R.1136.)

Throughout the remainder of the hearing, Plaintiffs' counsel continued to emphasize the fact that the ruling on the Motion for Summary Judgment did not dispose of the entire case. (R. 1137-43.) The trial court agreed that his ruling did not dispose of the entire

case and that the matter could properly be certified for interlocutory appeal when the proper papers were presented to the court. (R. 407.)

37. A proposed Order was then submitted to the trial court which memorialized the trial court's ruling regarding the mail-in ballot issue and the trial court's deferral of the standing issue. (R. 467-71, attached as Appendix B.)

38. Plaintiffs objected to the form of the Order on the ground that the Order should include a finding that the Plaintiffs did have standing under Rule 23.1. (R. 434.)

In its responsive memorandum, Highland Estates pointed out to the trial court that:

This Court has not ruled out the possibility that, at the trial of this matter, sufficient evidence will be presented establishing that the LeVangers do not have standing to bring a derivative action. This Court has not ruled as a matter of law that the LeVangers do have standing to bring the derivative action. No cross motion for summary judgment was filed by the plaintiffs in that regarding and no ruling has been made by this Court finding as a matter of law that the LeVangers do have standing to bring a derivative action.

(R. 442-43, attached as Appendix C.)

39. The trial court agreed with Highland Estates, denied Plaintiffs' objections, refused to include a finding that Plaintiffs had standing under Rule 23.1 and entered the proposed Order. (R. 431-36.) The Order provided in pertinent part:

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 related to all other claims in plaintiffs' Complaint is hereby denied.

(R. 471, attached as Exhibit B.)

40. Judge Nehring's Order granted partial summary judgment for Highland Estates and included 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, attache as Exhibit B.)

41. Plaintiffs filed a Motion to Reconsider Order Granting Summary Judgment or, in the Alternative, to Certify the Order as Final and Appealable pursuant to Rule 54(b). (R. 482-798.) Plaintiffs' Motion to Reconsider was based on purportedly newly discovered evidence. (R. 483.) The Motion to Reconsider was denied by the trial court. (R. 1017.)

42. On October 7, 1998, after a hearing argument on Plaintiff's Motion to Reconsider, Judge Brian denied the Plaintiff's Motion to Reconsider. Judge Brian agreed

to certify Judge Nehring's Partial Summary Judgment Order for Appeal. (R. 1063-66, attached as Exhibit D.)

43. The Plaintiffs filed a Notice of Appeal on March 31, 1999. (R.1074.) The case was transferred to the Court of Appeals by Order dated May 18, 1999. (R. 1145.)

44. On April 13, 2000, this Court issued a decision reported as Levanger v. Vincent, 3 P.3d 187 (Utah Ct App. 2000). (R. 1173-82, attached as Exhibit E.) This Court reversed the trial court's order of partial summary judgment and determined that the Association did not comply with the statutory and by-law requirements when it accepted mail-in ballots regarding the 1995 Amendments. (R. 1182.)

45. On September 15, 2001, Plaintiffs filed a Motion for Summary Judgment with the trial court seeking: (1) that the 1995 Amended CC&R's be rescinded; (2) that any subsequent actions based upon the 1995 Amended CC&R's be declared void; and (3) that the LeVangers be awarded attorneys fees and costs. (R. 1194-95.)

46. Following a 56(f) continuance, Defendant moved the trial court to hold an evidentiary hearing on the factual issues relating to whether Plaintiffs were legally entitled to attorneys fees, including standing under Rule 23.1. (R. 1269-71, 1430-33.) In addition, Defendant opposed the Motion for Summary Judgment arguing: (1) the LeVangers had no standing to bring their claims as they did not fairly and adequately represent the association as required by Rule 23.1 of the Utah Rules of Civil Procedure;

(2) that the LeVangers had not conferred a substantial benefit on Highland Estates that would entitle them to collect attorneys fees; and (3) that the claimed fees were not reasonable.² (R. 1311-12, 1384-89.)

47. Oral argument on Plaintiffs' Motion for Summary Judgment and Defendant's Motion for Evidentiary Hearing was held on June 26, 2001. (R. 1634³, p. 2.) At that hearing, defense counsel explained that the issue of standing under Rule 23.1 and the issue of substantial benefit had not been decided as follows:

Mr. Belnap: So I don't know if there's anything left to try on the lawsuit itself, based on that previous discussion at the time of summary judgment, but we certainly do have a concern which we've raised in our papers about benefit, success in the litigation. Also, do the LeVangers fairly represent –

The Court: Oh, yea, the derivative. Yea.

Mr. Belnap: – the derivative issue, Judge, and then simply on the fees themselves, we don't think that there's – that they meet Utah law's evidentiary requirement for the showing.

The Court: You've raised a lot of issues, all around the same essential issue of the fees, and they seem to be very fact-intensive.

(R. 1634, pp. 3-4.)

² Highland Estates is not renewing its arguments regarding the reasonableness of the attorneys fees as part of this appeal.

³ While a transcript of the June 26, 2001 and September 19, 2001 hearings was requested by the Defendant pursuant to this appeal and was prepared, the transcript was not included in the paginated record prepared for this matter. As such the parties have entered into a stipulation to correct this oversight and to number the first page of the transcript as 1634 and will correct the oversight with the trial court and appellate court clerks as called for under Rule 11.

48. The court then granted Defendant's Motion for Evidentiary Hearing and scheduled a trial for September 19, 2001. (R. 1555.)

49. The trial was held on September 19, 2001 before Judge Hilder. (R. 1634, p. 15.) The trial court began the trial by inquiring whether Plaintiffs needed to conduct any additional discovery before proceeding with the trial, to which Plaintiffs' counsel responded that no additional discovery was required. (R. 1634, p. 15.) In addition, the trial court stated that if Plaintiffs needed to add any additional evidence or argument they could do so via additional briefing after the trial. (R. 1634, p. 33.)

50. The trial court then inquired of Plaintiffs' counsel as to whether any additional issues were left in the case beyond whether the Plaintiffs were legally entitled to attorneys fees. (R. 1634, pp. 16-19.) Plaintiffs' counsel responded that they were prepared to present evidence and legal argument on the issues set forth in the summary judgment briefing which were the only issues left in the case. (R. 1634, p. 19, 21.)

51. During opening statements, defense counsel began by discussing the issue of standing under Rule 23.1 as follows:

Mr. Belnap: Because the cases have looked at a couple of issues. And one of them – and they have revolved around whether there's an economic antagonism, and they revolve around whether these people fairly represent all of the home owners.

Now, as stated right in their complaint, what led to the filing of this lawsuit is that the LeVangers did not pay their assessments for a number of years. Their property was lienied. That upset them. They wrote letters indicating that they were very upset about that

and basically claimed they didn't think the Association had the right to assess or to lien, and then this lawsuit started up.

* * *

And, very briefly, Rule 23 requires that, the derivative action may not be maintained if it appears the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated and enforcing the rights of the corporation.

On page 11 of [the Memorandum in Support of Motion for Summary Judgment], we have cited what is absolute Black letter law from all around the jurisdictions on Rule 23. And that law is that the persons seeking recovery must not have interests that are antagonistic to those of the other shareholders or members. And then the cases, you can yield out eight points from them. And the two that I want a moment on, Judge, is the cases say if there is economic antagonism, they're not representative of the class.

In this case, as set forth in the plaintiffs' complaint, that's actually the driving force of what started this lawsuit was economic antagonism over assessments and liening of their property.

(R. 1634, pp. 23, 29-30.)

52. Plaintiffs began their case by proffering the testimony of Plaintiffs' attorney Jay Sheen regarding the amount of work that had been performed on the case and the reasonableness and necessity of the attorneys fees and costs. (R. 1634, pp. 33-40.)

53. Plaintiffs then proceeded to proffer the testimony of attorney Hardin Whitney regarding the reasonableness and necessity of the attorneys fees and costs. (R. 1634, pp. 42-45.)

54. Plaintiffs then proffered and took testimony from defense counsel Paul Belnap regarding the amount of attorneys fees incurred on the defense side of the case. (R. 1634, pp. 46-49, 74-79.)

55. Plaintiffs then rested their case as follows:

Mr. Robinson: Okay. That's all I have.

The Court. Thank you. Do you have anything else to offer in terms of witnesses or proffer at this time?

Mr. Robinson: No.

(R. 1634, p. 79.)⁴

56. With Plaintiffs resting their case, Defendant then moved for a directed verdict on the basis that Plaintiffs had presented no evidence whatsoever regarding either standing under Rule 23.1 or substantial benefit despite the fact that these issues had been raised in the briefing and at the hearing. (R. 1634, pp. 79-84, attached as Appendix F.)

57. The trial court took the motion under advisement. (R. 1634, p. 99.)

58. Defendant then proffered the testimony of the Lance Swedish – the former president of Highland Estates and a current board member – as to the following facts:

- a. The LeVangers' lawsuit has very little, if any, support among the members of the Association. (R. 1634, pp. 103-05.)
- b. The LeVangers' lawsuit has conferred no benefit on the Association. In

⁴ While both Plaintiffs attended the hearing, neither Plaintiff offered any live or proffered testimony. (R. 1634, 15-150.)

fact, the LeVangers' lawsuit has inflicted a substantial and severe detriment to the operations and purposes of the Association and to the interests of the individual homeowners within the Association. (R. 1634, pp. 103-05.)

c. That the LeVangers' lawsuit has caused the Association to forestall taking actions with respect to improvements and planning. (R. 1634, pp. 103-05.)

d. The LeVangers' lawsuit has created a sense of frustration amongst the Board of Trustees as well as a concern that the LeVangers will bring additional unnecessary lawsuits that will cost the Association additional funds. (R. 1634, pp. 103-05.)

e. The Association has been reluctant to use the dues it has collected for fear that such funds would be needed to defend against the LeVangers' lawsuit. (R. 1634, pp. 103-05.)

f. The LeVangers' lawsuit has had the effect of discouraging participation on the Board of Trustees and within the Association as a whole. (R. 1634, pp. 103-05.)

g. Even after the commencement of this lawsuit, Rebecca LeVanger has continued to protest, object and threaten the Board of Trustees and members of the Association with legal action. This lawsuit has greatly interfered with the actions of the Board of Trustees and the desires of the Association as a whole. (R. 1634, pp. 103-05.)

h. That Highland Estates did not take any action based upon the 1995 CC&R's and that the rescinding of those documents would not impact the association in any way. (R. 1634, pp. 101-03.)

59. Defendant then called attorney James R. Blakesley to testify regarding the issues of reasonableness of the attorneys fees and whether Highland Estates had received a substantial benefit as a result of the LeVangers' lawsuit. (R. 1634, p. 106.)

60. Mr. Blakesley testified that Highland Estates had taken very limited actions since the 1995 CC&R's were adopted and that those actions were based entirely on authority in prior operating documents. (R. 1634, p. 112.) In addition, as an expert witness, Mr. Blakesley testified that in his opinion there was no substantial benefit to Highland Estates from the LeVangers' lawsuit for four reasons:

a. First, Mr. Blakesley stated that because the Utah State Legislature amended the Non-Profit Act in May of 2000 – one month after this Court's prior decision – to allow mail-in balloting, the voting rights of the members of Highland Estates had not been altered in any way by the LeVangers' lawsuit. (R. 1634, pp. 113-17.)

b. Second, Mr. Blakesley testified that there was no common fund created by the LeVangers' lawsuit and therefore there was no possibility of unjust enrichment on the part of the association that would justify an award of attorneys fees from the common fund. (R. 1634, pp. 113-17.)

c. Third, Mr. Blakesley testified that Highland Estates realized a net deficit rather than a substantial benefit given that Highland Estates' operating fund would be entirely depleted by the payment of the LeVangers' attorney fees. (R. 1634, pp. 113-17.)

d. Fourth, Mr. Blakesley testified that the LeVangers' lawsuit had no day-to-day effect on the operation of Highland Estates. (R. 1634, pp. 113-17.)

61. At the close of the trial, the trial court instructed the parties to submit written closing arguments. (R. 1634, p. 148.)

62. The standing issue was addressed by both parties in their written closing arguments. (R. 1511-1547.)

63. On November 27, 2001, the trial court entered a Ruling which effectively denied Defendant's motion for directed verdict and granted Plaintiffs' Motion for Summary Judgment on attorneys fees and costs. (R. 1551-53, attached as Appendix G.)

64. As to the issue of standing, the trial court held:

[W]hether plaintiffs' had standing to bring this derivative action (as proper representatives of the class under Rule 23.1, Utah Rules of Civil Procedure), was effectively, if not expressly, decided by Judge Nehring, when he opined that there were insufficient facts to determine, on summary judgment, that plaintiffs "are inappropriate parties to bring this action." Judge Nehring did not then defer the matter for an evidentiary hearing. Instead, he decided the matter, albeit adversely to plaintiffs, on the merits.

The next time the standing issue could have been addressed was on appeal. The record, however, reflects, that neither party briefed the issue for the Court of Appeals. This court cannot say whether the appellate court considered the issue *sua sponte*, but the court can read from the decision that no ruling was entered regarding standing. What did happen was that the Court of Appeals reached the merits, which they could not have done had they considered that plaintiffs are inappropriate parties. Thus, acceptance of plaintiffs' standing to bring the action is implicit in the court's decision.

While the court believes the foregoing reasoning is dispositive of the standing issue, defendants' failure to raise the issue at the Court of Appeals, or to file an appropriate motion on remand, both support a conclusion that defendants did, in fact, waive the standing issue.

(R. 1551, attached as Appendix G.)

65. On December 16, 2001, the Court entered an Order granting the LeVangers \$41,327.15 in attorneys fees and costs. (R. 1554-55.) In its entirety, the Order provided as follows:

1. Plaintiffs have standing to pursue this matter and to seek their attorneys fees and costs from defendant Highland Estates Properties Owners Association, Inc., as derivative plaintiffs under Rule 23.1 of the Utah Rules of Civil Procedure.
2. Plaintiffs have conferred a substantial benefit on members of the Highland Estates Properties Owners Association who are similarly situated.
3. Plaintiffs are awarded attorneys' fees of \$39,174.00 and costs of \$2,153.15, for a total award of \$41,327.15, to be paid by The Highland Estates Properties Owners Association, Inc.

(R. 1555-56, attached as Appendix H.)

D. SUMMARY OF THE ARGUMENT.

Rule 23.1 requires a plaintiff in a derivative action to show that they fairly and adequately represent the interests of the defendant organization. See Utah R. Civ. P. 23.1 Plaintiffs' presented their case as a derivative action brought under Rule 23.1. (R. 1-9.) Highland Estates set forth as an affirmative defense Plaintiffs' failure to meet their burden of showing fair and adequate representation of the association. (R. 73-77.)

Despite the fact that this defense was raised at the very beginning of the case, and despite the fact that the issue of standing was raised a number of times throughout the case, the Plaintiffs failed to present the trial court with any evidence indicating that they fairly or adequately represented the interests of the members of Highland Estates. (R. 1634, pp. 15-150.) In fact, all of the evidence presented at the trial of this matter indicated that the LeVangers' lawsuit had provided no benefits to Highland Estates. (R. 1634, pp. 101-03.) Instead, the LeVangers' lawsuit has had a chilling effect on the operations and purpose of the association. (R. 1634, pp. 101-03.)

Because Plaintiffs failed to present any evidence on the issue of standing under Rule 23.1 and because this issue was properly preserved at the trial court level, the trial court incorrectly denied Defendants' motion for a directed verdict on the issue of standing. As such, this Court should reverse the trial court's ruling and determine that Plaintiffs did not make a showing that they fairly and adequately represented Highland Estates as required by Rule 23.1.

Similarly, Plaintiffs failed to demonstrate that they conferred any real or actual benefit on the association. In fact, all of the evidence presented to the trial court indicates the exact opposite, that Highland Estates has been severely harmed by Plaintiffs' use of litigation to carry out a personal vendetta against certain members of the association. Accordingly, the trial court incorrectly denied Highland Estates' Motion for Directed Verdict on the issue of substantial benefit.

E. MARSHALING OF THE EVIDENCE SUPPORTING THE TRIAL COURT'S FINDINGS.

As set forth fully above, at no time in the course of this case did Plaintiffs present any evidence whatsoever that indicated that they fairly and adequately represented the interests of Highland Estates under Rule 23.1. Similarly, Plaintiffs presented no evidence that they had conferred a substantial benefit on Highland Estates. This fact remained true despite numerous opportunities to present such evidence. In fact, a trial was scheduled by the trial court for September 19, 2001 to specifically address the issues regarding whether Plaintiffs were legally entitled to attorneys fees, including the issues of standing and substantial benefit. Plaintiffs presented absolutely no evidence regarding either issues at the trial. (R. 1634, pp. 15-150.)

ARGUMENT

I. PLAINTIFFS FAILED TO MEET THEIR BURDEN OF SHOWING THAT THEY FAIRLY AND ADEQUATELY REPRESENTED THE MEMBERS OF HIGHLAND ESTATES.

Rule 23.1 of the Utah Rules of Civil Procedure requires that a plaintiff to a derivative action must show that they fairly and adequately represent the members of a corporation. (See Utah R. Civ. P. 23.1.) Because Plaintiffs presented no evidence that they fairly and adequately represented the interests of the members of Highland Estates, and because all evidence presented at the trial of this matter indicated that the LeVangers did not represent the interests of Highland Estates, the trial court incorrectly found that Plaintiffs had standing under Rule 23.1.

Rule 23.1 governs the procedural requirements for derivative actions by shareholders on behalf of corporations. In general, Rule 23.1 allows one or more shareholders, perceiving that the corporation has received an injury that the management of the corporation has failed to address, sues on behalf of the corporation. It is a suit by the corporation, asserted by the shareholders on its behalf against those liable to it. See, e.g., Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984). Any recovery in a derivative action inures to the corporation, not the individual shareholders, who bring suit. See Ross v. Bernhard, 396 U.S. 531, 538 (1970).

Rule 23.1 of the Utah Rules of Civil Procedure provides:

Any derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complainant shall be verified and shall allege (1) that the plaintiff or shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter dissolved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority, and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated and enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

Utah R. Civ. P. 23.1 (emphasis added).

Under this Rule, the derivative action plaintiffs should have no right, title or interest in the claim itself. See Richardson v. Arizona Fuels Corp., 614 P.2d 636, 638 (Utah 1980). To protect against this, Rule 23.1 requires an affirmative showing on the part of the derivative plaintiffs. As courts have stated, “[t]he rationale of Rule 23.1 is two-fold. On the one hand, it would allow a plaintiff to proceed with discovery and trial if the plaintiff complies with this rule and can articulate a reasonable basis to be entrusted with a claim that belongs to the corporation. On the other hand, the rule does not permit a

stockholder to cause the corporation to expend money and resources in discovery and trial in the stockholder's quixotic pursuit of a purported corporate claim based solely on conclusions, opinions or speculation.” Brehm v. Eisner, 746 A.2d 244, 254-55 (Del. 2000). Where a derivative action plaintiff fails to meet their burden under Rule 23.1, they may not maintain their claims. See id.; Utah R. Civ. P. 23.1.

Rule 23.1 was designed to protect against certain kinds of abuse stemming from derivative actions. First, Rule 23.1 seeks to prevent the unrestrained use of derivative actions by shareholders or members which would undermine the basic principle of corporate governance, which is that the decisions of the corporation should be made by its management. See Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 530 (1984). Derivative actions have been characterized as a remedy of last resort because these actions impinge on the inherent role of corporate management to conduct the affairs of the corporation, including the power to bring suit. See Renfor v. FTIC, 773 F.2d 657, 658 (5th Cir. 1985). One way that Rule 23.1 protects the corporation from abuse of derivative actions is by requiring that the plaintiff fairly and adequately represent the interests of other members similarly situated in enforcing the right of the corporation or association. For plaintiff to be a fair and adequate representative, the plaintiff must have the capacity to vigorously and conscientiously prosecute a derivative suit and must not have interests that are antagonistic to those of the other shareholders or members. See Shamrock Assocs. v. Horizon Corp., 632 F. Supp. 566, 570-571 (SDNY 1986). Fair and

adequate representation is especially important in a non-profit association where all shareholders are similarly situated. Moreover, fair and adequate representation is crucial because the rights and interests of absent persons may be conclusively determined. See Mayer v. Development Corp. of America, 396 F.Supp. 917 (D. C. Del. 1975).

Courts have held that the following factors determine the adequacy of the representative plaintiff:

1. Economic antagonism between the representative and the class;
2. The remedy sought by the plaintiff in a derivative action;
3. Indications that the named plaintiff was not the driving force behind the litigation;
4. Plaintiff's unfamiliarity with the litigation;
5. Other litigation pending between the plaintiff and the defendant;
6. The relative magnitude of the plaintiff's personal interests in matters beyond the scope of the derivative action, as compared to his or her interest in the derivative action;
7. The plaintiff's vindictiveness towards the defendants; and
8. The degree of support the plaintiff received from the other members that he or she purports to represent.

New Crawford Valley, Ltd. v. Benedict, 847 P.2d 642 (Colo. App. 1993); Fratris v. Comed, Inc., 619 F.2d 588, 593-594 (6th Cir. 1980); GA Enters., Inc. v. Leisure Living Communities, Inc., 517 F.2d 24, 26 (1st Cir. 1975); Vanderbilt v. Geo-Energy, Ltd., 725 F.2d 204, 207 (3rd Cir. 1983); Larsen v. Dumke, 900 F.2d 1363, 1368 (9th Cir. 1990).

A. Plaintiffs Presented No Evidence Whatsoever That They Fairly and Adequately Represented the Interests of Highland Estates.

Despite the express requirements of Rule 23.1 and the defenses set forth in Highland Estates' Answer, Plaintiffs never met their burden by showing that they fairly and adequately represent the interests of Highland Estates. In fact, all of the evidence presented to the trial court indicated that Plaintiffs did not properly represent the interests of the association and that their lawsuit had a destructive effect on its efforts and purposes.

It was well understood by the parties and the trial court that the issue of standing would be addressed at the September 19, 2001 trial. This issue had been raised with the trial court in Defendant's Answer. (R. 73-77.) The issue was again raised in Defendant's Motion for Summary Judgment filed on November 26, 1997. (R. 201-302.) After remand, the standing issue was again brought before the trial court in Defendant's Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment. (R. 1284-1389.) In addition, the standing issue was the subject of Defendant's Motion for Evidentiary Hearing. (R. 1269-71, 1284-1389, 1430-33.)

At the June 26, 2001 hearing that was scheduled to address Plaintiffs' Motion for Summary Judgment and Defendant's Motion for Evidentiary Hearing, counsel for Highland Estates specifically stated that a trial would be needed to address several issues, including the issue of standing under Rule 23.1. (R. 1369-71, 1284-1389, 1430-33.) Defendant pointed out to the trial court that Plaintiffs had yet to produce any affirmative

showing under Rule 23.1 that would demonstrate that the Plaintiffs fairly and adequately represented the interests of Highland Estates. (Id.) Accordingly, the trial court granted Defendant's Motion for Evidentiary Hearing and scheduled a trial for September 19, 2001. (R. 1634, p. 15.)

At the beginning of the trial, Plaintiffs informed the court that there was no additional discovery that they wished to conduct and that there were no additional issues in the case beyond those to be addressed at the trial, including Rule 23.1 standing. (R. 1634, pp. 16-19.) Plaintiffs then waived their opening statement. (R. 1634, p. 21.)

During Defendant's opening statement, defense counsel informed the trial court that there was a complete lack of evidence regarding standing from the Plaintiffs. (R. 1634, pp. 21-24, 29-31.) Defendant also explained that, in addition to Plaintiffs not meeting their burden under Rule 23.1, it would put on evidence that affirmatively showed that the Plaintiffs did not fairly and adequately represent the interests of Highland Estates, that the LeVangers' lawsuit had served as a substantial detriment to the operations and purposes of the association, and that the LeVangers did not have the support of the members of Highland Estates. (R. 1634, pp. 29-31.)

At the close of opening statements, Plaintiffs then proceeded to present evidence to the trial court via proffered and live testimony. (R. 1634, pp. 33-34.) Plaintiffs did not put on any evidence whatsoever regarding the issue of standing under

Rule 23.1 or substantial benefit. (R. 1634, pp. 15-150.) In fact, Plaintiffs completely refused to address Rule 23.1 in any way. (Id.)

At the close of Plaintiffs' case, Defendant then moved for a directed verdict on the basis that Plaintiffs had presented no evidence whatsoever regarding standing under Rule 23.1, despite the fact that these issues had been raised in the briefing and at the opening of the trial. (R. 1634, pp. 79-84.) After a discussion on the record, the trial court took the motion under advisement. (R. 1634, p. 99.)

Defendant then proffered the testimony of the Lance Swedish – the former president of Highland Estates and a current board member. Mr. Swedish testified that the LeVangers' lawsuit has very little, if any, support among the members of the Association. (R. 1634, pp. 103-05.) Mr. Swedish also testified that the LeVangers' lawsuit had conferred no benefit on the Association. In fact, Mr. Swedish testified that the LeVangers' lawsuit had inflicted a substantial and severe detriment to the operations and purposes of Highland Estates and to the interests of the individual homeowners within the Association. (R. 1634, pp. 103-05.) According to Mr. Swedish, these detriments included the fact that the LeVangers' lawsuit had caused the Association to forestall taking actions with respect to improvements and planning for fear of having to use the Association's funds to defend against the LeVanger's current and future threatened lawsuits. (R. 1634, pp. 103-05.) In addition, Mr. Swedish testified that the LeVangers' lawsuit has created a sense of frustration amongst the Board of Trustees as well as a concern that the LeVangers would bring additional unnecessary lawsuits that would cost the Association additional funds.

(R. 1634, pp. 103-05.) As a result, the Association had been reluctant to use the dues it has collected for fear that such funds would be needed to defend against the LeVangers' lawsuit. (R. 1634, pp. 103-05.)

Mr. Swedish also testified that the LeVangers' lawsuit had the effect of discouraging participation on the Board of Trustees and within the Association as a whole. (R. 1634, pp. 103-05.) In fact, even after the commencement of this lawsuit Plaintiffs continued to protest, object, bully and threaten the Board of Trustees and various members of the Association with legal action, not only against the association but also against the individuals themselves. (R. 1634, pp. 103-05.) As such, Mr. Swedish testified that the LeVanger's lawsuit had greatly interfered with the actions of the Board of Trustees and the desires of the Association as a whole. (R. 1634, pp. 103-05.)

Finally, Mr. Swedish testified that after the LeVangers had expressed concerns about the 1995 CC&R's, Highland Estates determined that it would not take any actions based on the amendments. Instead, the association continued to operate based only upon the authority of the preexisting operating documents that were still in effect. As such, Mr. Swedish testified that the rescinding of those documents would not impact the association in any way. (R. 1634, pp. 101-03.) Mr. Swedish's testimony remained undisputed.

Defendant then called attorney James R. Blakesley as an expert witness to testify regarding the impact the LeVangers' lawsuit had had on Highland Estates. (R. 1634, p. 106.) Mr. Blakesley testified that Highland Estates had taken very limited actions

since the 1995 CC&R's were adopted and that those actions were based entirely on authority in prior operating documents. (R. 1634, p. 112.) In addition, as an expert witness, Mr. Blakesley testified that in his opinion there was no substantial benefit to Highland Estates from the LeVangers' lawsuit. (R. 1634, p. 112.) Mr. Blakesley stated that because the Utah State Legislature amended the Non-Profit Act in May of 2000 – one month after this Court's prior decision – to allow mail-in balloting, the voting rights of the members of Highland Estates had not been altered in any way by the LeVanger's lawsuit. (R. 1634, pp. 113-17.) Mr. Blakesley also testified that there was no common fund created by the LeVangers' lawsuit and therefore there was no possibility of unjust enrichment on the part of the association that would justify an award of attorneys fees from the common fund. (R. 1634, pp. 113-17.)

In addition, Mr. Blakesley testified that Highland Estates realized a net deficit rather than a substantial benefit given that Highland Estates' operating fund would be entirely depleted by the payment of the LeVangers' attorney fees. (R. 1634, pp. 113-17.) Mr. Blakesley also testified that the LeVangers' lawsuit had no day-to-day effect on the operation of Highland Estates. (R. 1634, pp. 113-17.) Mr. Blakesley's testimony regarding standing remained undisputed.

At the close of the evidentiary hearing, the trial court instructed the parties to submit written closing arguments. (R. 1643, p. 148.) In its Written Closing Argument, Highland Estates argued once again that Plaintiffs had failed to present the trial court with

any evidence whatsoever during the trial that they fairly and adequately represented the interests of Highland Estates. (R. 1511-26.) Instead, Highland Estates pointed out that the only evidence that had been presented at the trial affirmatively showed that the Plaintiffs did not fairly and adequately represent the interests of Highland Estates, that the LeVangers' lawsuit had served as a substantial detriment to the operations and purposes of the association, and that the LeVangers did not have the support of the members of Highland Estates. (R. 1511-26.)

Plaintiffs also submitted a written closing argument where, for the first time, they addressed the issue of standing under Rule 23.1. (R. 1527-47.) While Plaintiffs acknowledged that they had not presented any evidence to show that they fairly and adequately represented the interests of Highland Estates as required by Rule 23.1, they argued instead that the issue of standing had previously been decided by Judge Brian, or in the alternative, that Highland Estates had somehow waived the issue of standing.⁵ (R. 1533.)

While the two legal issues raised by Plaintiffs are addressed below, it remains undisputed in this case that Plaintiffs have made no showing regarding standing under

⁵ Plaintiffs also argued that it was Highland Estates' burden to show that the Plaintiffs did not properly represent the association under Rule 23.1. (R. 1533.) However, the trial court apparently rejected this argument as it was not set forth in the court's Ruling. Clearly this argument ignores the well-accepted case law indicating that derivative action plaintiffs must make an affirmative showing under Rule 23.1. See, e.g., Brehm v. Eisner, 746 A.2d 244, 254-55 (Del. 2000).

Rule 23.1 in this case. Given the requirements and protections of Rule 23.1, Plaintiffs' failure to make any affirmative showing that they fairly and adequately represent the interests of Highland Estates and that they did not have a personal right, title or interest in the claim itself shows that they are not proper derivative action plaintiffs in this case. Because there is no evidence whatsoever supporting the trial court's ruling that Plaintiffs have standing under Rule 23.1, and because the only evidence presented at trial indicated that the LeVangers do not have standing under Rule 23.1, this Court should reverse the trial court's December 11, 2001 Order.

II. THE TRIAL COURT INCORRECTLY FOUND THAT THE ISSUE OF STANDING HAD BEEN DECIDED AND WAIVED.

After the trial of this matter, the court found that the issue of standing had been "effectively, if not expressly, decided by Judge Nehring, when he opined that there were insufficient facts to determine on summary judgment, that plaintiffs 'are inappropriate parties to bring this action.'" (R. 1551-53, attached as Appendix G.) The trial court also found that the issue of standing was waived when Highland Estates did not raise the issue of standing at the interlocutory appeal of this matter before this Court. (R. 155-53.) Given that Rule 23.1 places the burden on the Plaintiffs to show that they fairly and adequately represented Highland Estates, and given that Plaintiffs presented no evidence whatsoever on the issue of standing, the trial court was clearly in error on both grounds.

A. Judge Nehring Did Not Determine the Issue of Standing.

On November 26, 1997, Highland Estates filed a Motion for Summary Judgment seeking dismissal of Plaintiffs' claims on two grounds. First, Highland Estates argued that Plaintiffs had failed to make a showing that they fairly and adequately represented the interests of Highland Estates as Required by Rule 23.1. (R. 201-302.) Second, Highland Estates argued that a portion of Plaintiffs' claims should be dismissed as Highland Estates had substantially complied with the operating documents and Utah law when it allowed mail-in voting to amend the 1995 CC&R's. (*Id.*) Plaintiff opposed the motion on the basis that it was Defendant's burden to show that Plaintiffs did not fairly and adequately represent the association and that Highland Estates had not followed the operating documents or Utah law in accepting mail-in ballots from its members. (R. 1101.) The motion was set for oral argument and was heard by Judge Nehring on January 9, 1998. (R. 1084.)

After the hearing, Judge Nehring granted Defendant's Motion for Summary Judgment finding that Highland Estates had substantially complied with the operating documents and Utah law when it allowed mail-in voting to amend the 1995 CC&R's. On the issue of standing, the trial court denied the motion and stated as follows:

The Court: Okay. All right. I'm prepared to rule. First, with respect to the standing of the Levangers on the derivative action, my determination is that based on the reports that I have seen, there are insufficient facts and insufficient grounds to, as a matter

of law, determine that the Levangers are inappropriate parties to bring an action.

(R. 1130.)

Later, after discussing the mail-in voting practice, the trial court stated:

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

(R. 1135.)

Plaintiffs' counsel then indicated that he would likely ask the trial court to certify the case for interlocutory appeal on the issue of the propriety of the mail-in ballot process given that the court's ruling determined a major portion of Plaintiffs' case.

Plaintiffs' counsel indicated:

Mr. Sheen: I think I'm leaning toward requesting that this be certified so that we get –

The Court: Yes.

Mr. Sheen: – so we can take that up [on appeal]. It does emasculate the case. I don't think it gets rid of it altogether.

(R. 1136.) Throughout the remainder of the hearing, Plaintiffs' counsel continued to emphasize the fact that the ruling on the Motion for Summary Judgment did not dispose of the entire case. (R. 1137-43.) The trial court agreed that his ruling did not dispose of the entire case and that the matter could properly be certified for interlocutory appeal when the proper papers were presented to the court. (R. 407.)

A proposed Order was then submitted to the trial court which memorialized the trial court's ruling regarding the mail-in ballot issue. (R. 467-71, attached as Appendix B.) Plaintiffs objected to the form of the Order on the ground that the Order should include a finding that the Plaintiffs did have standing under Rule 23.1. (R. 434.) In its responsive memorandum, Highland Estates pointed out to the trial court that:

This Court has not ruled out the possibility that, at the trial of this matter, sufficient evidence will be presented establishing that the LeVangers do not have standing to bring a derivative action. This Court has not ruled as a matter of law that the LeVangers do have standing to bring the derivative action. No cross motion for summary judgment was filed by the plaintiffs in that regard and no ruling has been made by this Court finding as a matter of law that the LeVangers do have standing to bring a derivative action.

(R. 442-43, attached as Appendix C.) The trial court agreed with Highland Estates, denied Plaintiffs' objections, refused to include a finding that Plaintiffs had standing under Rule 23.1 and entered the proposed Order. (R. 431-36.) The Order provided in pertinent part:

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 related to all other claims in plaintiffs' Complaint is hereby denied.

(R. 471, attached as Appendix B.)

Plaintiffs then filed a Motion to Reconsider Order Granting Summary Judgment or, in the Alternative, to Certify the Order as Final and Appealable pursuant to Rule 54(b). (R. 482-798.) Plaintiffs' Motion to Reconsider was based on purportedly newly discovered evidence. (R. 483.) The Motion to Reconsider was denied by the trial court. (R. 1017.)

These facts show that Judge Nehring did not decide that Plaintiffs did in fact have standing under Rule 23.1. Judge Nehring did rule from the bench that there were "insufficient facts and insufficient grounds to, as a matter of law, determine that the LeVangers are inappropriate parties to bring an action." (R. 1130, 1135.) However, this is something entirely different than a finding of fact that Plaintiffs fairly and adequately represented the interests of Highland Estates and that the Plaintiffs had complied with the requirements of Rule 23.1. This is affirmed by the fact that Plaintiffs specifically requested that the trial court include a finding that the Plaintiffs had standing under Rule 23.1 when they filed their objections to the Order. (R. 434.) The trial court refused to do so and instead simply found that there had been insufficient facts to show as a matter of law that Plaintiffs did not have standing. (R. 431-36; 467-71, attached as Appendix B.)

Given that Rule 23.1 places a burden on Plaintiffs to affirmatively show that they fairly and adequately represent the interest of Highland Estates, it cannot be said that Judge Nehring's determination that he could not rule as a matter of law that Plaintiffs'

were not proper representative of the association under Rule 23.1 resolved the issue of standing in this case. Such a finding cannot relieve Plaintiffs from their burden of making a showing under Rule 23.1. This is especially true where Plaintiffs have never provided the court with evidence showing that they are proper representatives of the association even when a trial was specifically held to address this issue – and where all of the evidence presented indicated that Plaintiffs were not proper representatives.

Accordingly, the trial court was incorrect when it determined in its December 11, 2001 Order that Plaintiffs had standing under Rule 23.1 and this Court should reverse that Order.

B. Because The Interlocutory Appeal of This Case Dealt With Only a Single Narrow Issue, The Issue of Standing Was Not Before This Court In LeVanger I.

As set forth above, it was accepted by the parties and the trial court that the Order of summary judgment did not fully dispose of the case. Plaintiffs indicated to the trial court in oral argument and in briefing that they intended to appeal the issue of the mail-in ballots. At the hearing on the Motion to Reconsider, counsel for the parties stipulated that the matter could be certified for interlocutory appeal pursuant to Rule 54(b) and the trial court so ruled. (R. 1017.) Accordingly, the court entered an Order and Rule 54(b) Certification which provided in pertinent part:

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

(R. 1065-66, attached as Appendix D.) This matter then proceeded to the first appeal before this Court pursuant to a Notice of Appeal filed by Plaintiffs on March 31, 1999.

(R. 1074-75.)

Rule 54(b) allows for certification of a portion of the case for purposes of appeal where other issues of the case remain undecided. The Rule provides in pertinent part:

(b) Judgment upon multiple claims and/or involving multiple parties.

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, and/or when multiple parties are involved, **the court may direct the entry of a final judgment as to one or more but fewer than all of the claims** or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment.

Utah R. Civ. P. 54(b).

As set forth above, the trial court certified the single issue of whether the mail-in ballot process complied with Utah law. (R. 1065-66, attached as Appendix D.) The trial court did not certify any other issues in the case as no other issues had been decided. (R. 1065-66, attached as Appendix D.) As such, Plaintiffs presented only a single issue to this Court in their appeal. As this Court summarized:

The trial court concluded as a matter of law “that the mail-in ballot voting procedure substantially complied with the Bylaws and [CC&Rs] in place and that no prejudice to the homeowners of Highland Estates occurred as a result of mail-in balloting.” Plaintiffs argue the amended CC&Rs are ineffectual because mail-in balloting is prohibited by the Utah Nonprofit Corporations statute and the Association’s by-laws.

LeVanger, 2000 UT APP 103 ¶ 10, attached as Appendix E.

Given that only the mail-in ballot issue had been certified for appeal, neither party addressed the issue of standing in their briefs before this Court and this Court did not mention standing in its decision. Instead, the issue of standing was reserved for future

determination of the trial court pursuant to the burdens prescribed by Rule 23.1 as it had not been certified for appeal.

Because the issue of standing was not presented to this Court for decision, and because the issue was reserved for future factual determination by the trial court, Highland Estates could not have waived the standing issue by not raising it on appeal. Because the issue was not presented to the Court in any manner, the standing issue was not determined by this Court either expressly or implicitly. Accordingly, the trial court's determination in its November 29, 2001 Ruling that the standing issue was waived because it was not presented to this Court on appeal is incorrect and the trial court's denial of Defendant's Motion for Directed verdict should be reversed by this Court.

C. Defendant Properly Raised the Issue of Standing on Remand to the Trial Court.

In its November 27, 2001 Ruling, the trial court alternatively found that Highland Estates should have raised the standing issue in a motion to the trial court after remand of the case from this Court. (R. 1552, attached as Appendix G.) However, the trial court overlooked the fact that the issue was presented to the trial court in a motion and several pleadings.

Following remand, Plaintiffs filed a Motion for Summary Judgment. (R. 1194.) Highland Estates filed for a Rule 56(f) continuance in order to seek additional discovery regarding Plaintiffs' claimed attorneys fees. (R. 1230.) Plaintiffs did not

oppose the 56(f) Motion. Highland Estates then filed a Motion for Evidentiary Hearing seeking a trial on the factual issues regarding whether Plaintiffs were legally entitled to attorneys fees, including standing under Rule 23.1. (R. 1269-71, 1430-33.) Highland Estates opposed Plaintiffs' Motion for Summary Judgment on several grounds including the standing issue. (R. 1284-1389.) The case then proceeded towards a trial on the evidentiary issues as set forth in detail above. Accordingly, it is clear that Highland Estates did in fact file a motion before the trial court on the issue of standing.

Finally, Rule 23.1 requires Plaintiffs to make a showing in order to bring a derivative action. Even though Highland Estates did show that Plaintiffs are not proper representatives in this case, Rule 23.1 does not require a derivative action defendant to affirmatively show that the plaintiffs lack standing where the plaintiffs have failed to make any evidentiary showing whatsoever that they are proper representatives of the association. As such, the trial court incorrectly found that the Highland Estates waived the standing issue.

III. PLAINTIFFS FAILED TO MEET THEIR BURDEN OF SHOWING THAT THEY CONFERRED A SUBSTANTIAL BENEFIT ON HIGHLAND ESTATES.

The second threshold burden Plaintiffs are required to meet is to show, under the facts of this case, that they have successfully conferred a substantial benefit on Highland Estates. Just as Plaintiffs failed to demonstrate standing before the trial court,

Plaintiffs failed to meet their burden of showing that they had conferred a substantial benefit on Highland Estates.

Plaintiffs' only evidence regarding this issue is this Court's opinion, where it was determined that the mail-in ballot procedure used to adopt the 1995 Amendments was not in strict compliance with the Utah Non-Profit Corporations Act. Before the trial court, Plaintiffs claimed this decision "vindicates" the voting rights of the members of Highland Estates and that they were therefore legally entitled to over \$40,000 in attorney fees. However, Plaintiffs presented no factual evidence to the trial court by which it could properly determine whether the Court of Appeal's decision substantially benefits the members of Highland Estates.

In reality, Plaintiffs have done nothing that affects the actual voting of the association's members in any manner whatsoever. As set forth fully above, according to the trial testimony of Lance Swedish and the live testimony of James Blakesley, with the exception of the enactment of the 1995 Amendments, the mail-in ballot voting provision was never used by the association, either before or after the LeVangers began their lawsuit. As such, the resulting effect of the LeVanger's lawsuit was to accrue excessive amounts in attorney fees without conferring a substantial benefit on the members of Highland Estates. This fact clearly reveals the true motivation behind the LeVangers' litigation against individual members of Highland Estates. The undisputed testimony of Lance Swedish and James Blakesley, the harmful effects of Plaintiffs' lawsuit extends

much further than simply incurring unnecessary attorney fees and has done anything but benefit the members of Highland Estates.

Furthermore, the fleeting nature of Plaintiffs' alleged benefit was established by the undisputed testimony of expert witness James Blakesley who testified on September 19, 2001, that under recently enacted section 16-6a-707, the Plaintiffs' lawsuit could, at best, have effected Highland Estates for only a few short months. See U.C.A. § 16-6a-707. As such, it is hard to imagine how Plaintiffs' lawsuit, which has done far more harm than good, could entitle Plaintiffs to an award of over \$40,000 in attorney fees.

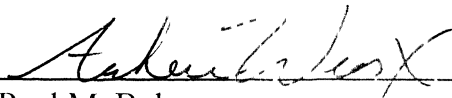
As admitted by Plaintiffs at the September 19, 2001 hearing, the determination of substantial benefit is a highly fact intensive question that requires the trial court to weigh the equities. See Stewart v. Utah Public Service Comm'n., 885 P.2d 759, 783 (Utah 1994); Barker v. Utah Public Service Com'n., 970 P.2d 702, 708 (Utah 1998). Despite Plaintiffs' counsel's agreement with the trial court that a court should weigh the detriments and benefits to the association, Plaintiffs presented absolutely no factual evidence that could allow the trial court to determine the real and actual effect of this lawsuit on Highland Estates. Accordingly, because Plaintiffs have failed to meet their factual burden of showing that they have successfully conferred a substantial benefit – as opposed to substantial harms – on Highland Estates, the trial court incorrectly denied Highland Estates' Motion for Directed Verdict.

CONCLUSION

For the reasons set forth above, this Court should hold that the trial court incorrectly denied Highland Estates' motion for directed verdict when it found that Plaintiffs had standing under Rule 23.1 and had conferred a substantial benefit where Plaintiffs failed to present any evidence on these issues to the trial court.

DATED this 22 day of November, 2002.

STRONG & HANNI

By 
Paul M. Belnap
Andrew D. Wright
Attorneys for Defendant Highland Estates
Homeowners Association

CERTIFICATE OF SERVICE

I hereby certify that on this 22 day of November, 2002, a true and correct copy of the foregoing **BRIEF OF APPELLANT** was served by the method indicated below to the following:

E. Jay Sheen	<input checked="" type="checkbox"/>	U.S. Mail, Postage Prepaid
ROBINSON & SHEEN	<input type="checkbox"/>	Hand Delivered
1366 E. Murray-Holladay Road	<input type="checkbox"/>	Overnight Mail
Salt Lake City, Utah 84117	<input type="checkbox"/>	Facsimile



4409.997

APPENDICES

APPENDIX A

No. ~~FILED~~

8984 MAY 10 1999

IN THE THIRD JUDICIAL DISTRICT COURT
Third District Court
Deputy Clerk, Summit County

IN AND FOR SUMMIT COUNTY, STATE OF UTAH

JEAN LEVANGER AND REBECCA)
LEVANGER,)
)
Plaintiffs,) Case No. 970300011
)
vs.) Transcript of:
)
JOANN VINCENT, ET AL) MOTION FOR SUMMARY
) JUDGMENT
Defendants.)

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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A P P E A R A N C E S

For the Plaintiff:

E.JAY SHEEN, Attorney-at-Law
77 West 200 South, Suite 420
Salt Lake City, UT 84101
Telephone 273-0855

For the Defendant:

Messrs. PAUL M. BELNAP
and H. BURT RINGWOOD, Attorneys-at-Law
Strong & Hanni
Sixth Floor, Boston Building
9 Exchange Place
Salt Lake City, UT 84111
Telephone 532-7080

* * *

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

APPENDIX B

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 unambigious 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

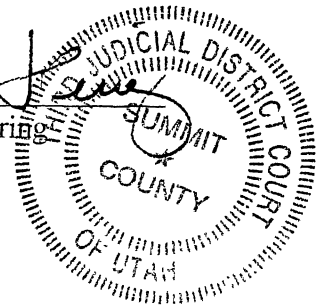
Amendment to Declaration of Restrictive and Protective Covenants was voted on and approved are hereby dismissed with prejudice.

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


Julia C. Sheen

APPENDIX C

No. _____

FILED

MAR 18 1998

By Third District Court 
Deputy Clerk, Summit County

Paul M. Belnap, #0279
H. Burt Ringwood, #5787
STRONG & HANNI
Attorneys for Defendant
Highland Estates Properties Owners Assoc.
Sixth Floor Boston Building
#9 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 532-7080

IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

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.

**RESPONSE TO PLAINTIFFS'
OBJECTION TO FORM OF ORDER**

Civil No. 970300011

Judge William B. Bohling

Defendant, Highland Estates Properties Owners Association, Inc, by and through counsel
of record, respectfully submits this response to plaintiffs' Objection to Form of Order

RESPONSE TO OBJECTIONS TO FINDINGS

Plaintiffs have objected to paragraphs 4 through 8 of defendant's proposed Order's Findings primarily on the basis that the findings are not supported by facts in the record and plaintiffs contend that some of the Findings are irrelevant. Defendant's proposed Order's Findings are indeed supported by the record and this Court's ruling in open court as follows:

Paragraph 4 is a direct quote from this Court's ruling in open court in which the Court stated as follows:

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

(See Exhibit A attached)

Paragraph 5 of the proposed Order's Findings is also a direct quote from this Court's ruling in open court as follows:

The CC & R's, as they existed in 1996, do not expressly require that changed amendment to be adopted in the context of a meeting.

(See Exhibit A attached)

Paragraphs 6 and 7 of the proposed Order's Findings are supported in the record by attorney Welling's Affidavit and deposition testimony of JoAnn Vincent. Plaintiffs have provided absolutely no evidence by way of Affidavit or deposition to refute the record. This Court, relying upon the record before it, stated as follows:

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

(See Exhibit A attached).

Paragraphs 8 and 9 are also supported by the deposition testimony of JoAnn Vincent.

This Court, noting the evidence in the record, and plaintiffs' lack of evidence to dispute the evidence stated as follows.

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

RESPONSE TO OBJECTIONS TO CONCLUSIONS

Plaintiffs also object to each of the Conclusions set forth in the proposed Order. Plaintiffs suggest that this Court found as a matter of law that plaintiffs did have standing to bring the derivative action. However, this Court did not make such a ruling. This Court stated as follows.

First, with respect to the standing of the LeVangers on the derivative action, my determine is that based on the reports that I have seen, there are insufficient facts, and insufficient grounds, to, as a matter of law, determine that the LeVangers are inappropriate parties to bring the action.

This Court has not ruled out the possibility that, at the trial of this matter, sufficient evidence will be presented establishing that LeVangers do not have standing to bring a derivative action. This Court has not ruled as a matter of law that the LeVangers do have standing to bring the

derivative action. No cross motion for summary judgment was filed by the plaintiffs in that regard and no ruling has been made by this Court finding as a matter of law that the LeVangers do have standing to bring a derivative action.

Plaintiffs object to paragraphs 2 and 3 of the proposed Order's Conclusion on the basis that the Conclusions are overly broad. The Conclusions are not overly broad, and clearly the Conclusions of this Court as set forth by the Court at the hearing on this matter. Specifically, this Court stated as follows:

Turning to the merits of the claim, it is my determination, that, as a matter of law, the actions taken by the trustees that lead to the adoption of the amended CC & R's was proper. . . . That analysis requires investigation whether the substitute performance - - in this case voting - - was prejudicial to the people whose interest were supposed to be protected by the unambiguous Bylaws. It is my conclusion that, as a matter of law, those protections were present and no prejudice occurred.

RESPONSE TO OBJECTIONS TO ORDER

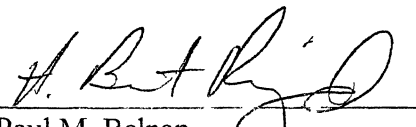
The order of this Court was clearly set forth in the Court's ruling in open court. Plaintiffs, again, argue that this Court ruled as a matter of law that plaintiffs were entitled to bring the action derivatively. Defendant maintains that this Court simply denied defendant's Motion for Summary Judgment based upon the LeVangers standing to bring this lawsuit derivatively. This Court did not find as a matter of law that the LeVangers were entitled to bring the action. The Court simply stated that there were insufficient facts in evidence, at this time, to rule as a matter of law, that the LeVangers were not entitled to bring the action derivatively.

CONCLUSION

This Court should execute the proposed Order as presented by defendant.

DATED this the 17th day of March, 1998.

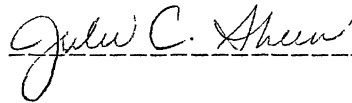
STRONG & HANNI

By 
Paul M. Belnap
H. Burt Ringwood

MAILING CERTIFICATE

I hereby certify that on this 17th day of March, 1998, I did mail, first class mail, postage prepaid the above Response to Plaintiffs' Objection to Proposed Form of Order to the following:

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



0445

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
 IN AND FOR ~~SALT LAKE~~ ^{Summit} COUNTY, STATE OF UTAH

JEAN LEVANGER and
 REBECCA LEVANGER,

Plaintiffs,

vs.

JOANN VINCENT et al,

Defendants.

Reporter's Partial Transcript
 of Hearing on Motion for
 Summary Judgment:
 Court's Ruling

Case No. 970300011
 Hon. Ronald E. Nehring

BE IT REMEMBERED that on the 9th day of January, 1998, the above-entitled matter continued in hearing in the Courtroom of the Summit County Courthouse, Coalville, Utah, before the Honorable Ronald E. Nehring, Judge in the Third Judicial District, State of Utah.

APPEARANCES

E. Jay Sheen, Attorney-at-Law, 77 West 200 South, Suite 420, Salt Lake City, UT 84101 Telephone 238-1840 appearing on behalf of the plaintiffs Levanger.

Messrs. Paul M. Belnap, Attorney-at-Law, and H. Burt Ringwood, Attorney-at-Law, Strong & Hanni, Sixth Floor Boston Building, No. 9 Exchange Place, Salt Lake City, UT 84111 Telephone 532-7080 appearing on behalf of the defendant Highland Estates Properties Owners Association.

COPY

1 (Whereupon, the following proceedings.
2 continued in open court:)

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

13 Turning to the merits of the claim,
14 it's my determination that, as a matter of
15 law, the actions taken by the trustees that
16 led to the adoption of the amended CC&R's
17 was proper.

18 And I'm going to tell you why. It is
19 true that there is nothing -- few things --
20 more fundamental to corporations, entities
21 in general, than this process by which those
22 entities amend their charters or their
23 beginning documents so to speak. In this
24 case, and I think in all cases, the primary
25 objective of the decision-making procedures

1 to effect changes and amendments to the
2 organic documents was to encourage
3 participation by system members, and to
4 invite and solicit the votes, so to speak,
5 of those members with respect to the issues.

6 The bylaws are unanimous insofar as
7 they set out a procedure for amendment.
8 Those procedures contemplate amendments to
9 be adopted at an annual meeting, and -- in
10 the absence of a quorum-- at a reconvened
11 meeting, at which no quorum would be
12 necessary.

13 That procedure is, in my view, directly
14 at odds with the fundamental objective of
15 seeking a maximization of participation in
16 the decision-making concern in important
17 matters like amending the bylaws, amending
18 the CC&R's.

19 Next: The CC&R's, as they existed in
20 '96, do not expressly require that changed
21 amendment to be adopted in the context of a
22 meeting.

23 The question then is: Did the alternate
24 voting proceeding comply with the terms of
25 the bylaws and CC&R's?

1 To answer this question, one has to
2 address this: Does this determination of
3 that question--in other words, did it
4 comply?-- is the proper analytical method
5 one which would yield a result that one has
6 to strictly comply with those provisions?
7 Or is substantial compliance enough to
8 comply with those provisions?

9 And resolving that, I look to the way
10 that the law looks at whether provisions of
11 a statute should be strictly complied with,
12 or whether the provision of a statute may be
13 substantially complied with and thereby meet
14 the requirements of the statute.

15 Because it seems to me that
16 substantive -- the substantial versus strict
17 compliance analysis situation with respect
18 to statutes fits, at least roughly, this
19 kind of contract setting.

20 That analysis requires investigation of
21 whether the substitute performance-- in this
22 case voting-- was prejudicial to the people
23 whose interests were supposed to be
24 protected by the unambiguous bylaws.

25 And it's my conclusion that, as a

1 matter of law, those protections were
2 present and no prejudice occurred. I base
3 that on the following factors.

4 First, insofar as the record is
5 concerned, that I have before me, the
6 Welling letter and the draft CC&R's went to
7 everybody who should have got them. That's
8 what the reports that I have tell me.

9 Well, is there any collateral support
10 for this? I believe there is. The majority
11 of yes votes came in. Somebody must have
12 known about it. They got the votes.

13 There has been no genuine issue of fact
14 presented which I can find that legitimately
15 challenges the alternate process.

16 In other words, did the voting process
17 have integrity? It's my conclusion that the
18 record supports the conclusion that it did
19 have integrity; in other words, nobody
20 suggested that votes weren't counted. Nobody
21 suggested that a majority didn't actually
22 vote for it.

23 The sanctity of meetings is not the
24 be-all and end-all of a legitimate
25 decision-making process concerning corporate

1 governance or amendments to organic
2 corporate documents.

3 Under Utah's corporation law for
4 example, there is express authorization to
5 make decisions outside the context of a
6 meeting; albeit there is a requirement that
7 notice be provided.

8 And I would suggest that here, that
9 there is certainly, impliedly, notice that
10 there was going to be a decision, an
11 important decision made outside the context
12 of the meeting.

13 Furthermore, whereas here meetings
14 could be conducted by attendance through
15 proxy, the argument that meetings are
16 necessary to encourage the vigorous exchange
17 of views, is severely undercut.

18 If I were to point out, however, the
19 most salient reason that, in my view, the
20 voting process was an appropriate
21 substitute, it's this: That based on the
22 state of the record, the reconvened meeting
23 process was detrimental to the fundamental
24 objective of encouraging and maximizing
25 participation in the decision-making.

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

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

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

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

6 And to reiterate, I'm at this time
7 denying the motion, for lack of a better
8 term, to disqualify the Levangers as
9 derivative action claimants, or plaintiffs,
10 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 even that
14 is a little bit unclear to me. Because if
15 I've determined that the CC&R amendments are
16 appropriate, that may have implications for
17 the gross mismanagement issues, and you'll
18 have to sort those out; since I assume at
19 some point we're going to have to make a
20 decision about what's going to be tried and
21 what's not going to be tried.

22 So I'm going to stop talking and let
23 you weigh in to that somewhat.

24 MR. BELNAP: Your Honor, I don't
25 believe there's anything left to try, in

1 view of the court's ruling.

2 THE COURT: You no, I would expect you
3 to say that. But maybe the best thing to
4 do, is to let the dust settle. Mr. Sheen
5 you seem anxious to say something.

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

10 THE COURT: Yes.

11 MR. SHEEN: -- so we can take that up.
12 That does emasculate the case. I don't think
13 it gets rid of it all together.

14 THE COURT: Mr. Sheen actually raises a
15 pretty legitimate point. We spend a couple
16 of days trying this, some little piece or
17 some big piece that I decide is what's left,
18 and all of that's contingent on me being
19 right on what I just did. We may end up
20 being back doing the whole business again.
21 You no, I think there is some merit in what
22 Mr. Sheen says. Practically, where does
23 that take us? Your client may want to weigh
24 in.

25 MR. SHEEN: He's standing up there

1 behind me.

2 THE COURT: Besides strangling me, of
3 course.

4

5 CLIENT: I would just --.

6 MR. SHEEN: No, no.

7 THE COURT: Well, I understand. Let me
8 just say this in your benefit. I make no
9 claim to infallibility. That's why there are
10 appellate courts. I've done what I did;
11 somebody's going to be happy, somebody's
12 going to be unhappy. That's why I get paid
13 the big bucks by the taxpayers.

14 Fortunately, you have competent
15 counsel who's indicated he's probably going
16 to let the appellate court take a look at
17 what I did and we all may be back in this
18 courtroom with me being very chastened and
19 humiliated by a court of appeals that says I
20 made a mistake. But I can live with that I
21 guess.

22 Let's take practically what we're going
23 to do here. Do you want to keep the trial
24 date on in this at the present time? It
25 would give you some time to think about

1 whether you want to take it up and file your
2 papers? If you file your papers, you
3 strike the trial date, and see what happens?

4 MR. SHEFN: That's certainly agreeable
5 to me. I would make that decision within
6 the next day or two, say Tuesday.

7 MR. BELNAP: Your Honor maybe you don't
8 want to get into this because we're into
9 the dust-settling stage here, which I
10 understand.

11 But if you look at the complaint and
12 the prayer for relief, subparagraphs A
13 through D, which are all the prayers that
14 are made, A asks injunctive relief with
15 respect to the CC&R's. You of dealt with
16 that.

17 B asks for attorneys fees because of
18 the derivative action, and that's dealt with
19 by the ruling on A.

20 C asks for removal of the defendants as
21 officers and trustees and for the election
22 of new trustees because of the alleged
23 conduct in A. And that's been dealt with.

24 And D, says as to all causes of action
25 for rescission of all prior ultra vires and

1 unauthorized acts or in issuance of
2 membership certificates and for damages for
3 rectifying prior unauthorized acts.

4 We'll stipulate right now,
5 your Honor, that these people have been
6 offered a membership certificate and we'll
7 stipulate that an order can enter. We'll
8 give them one.

9 THE COURT: Okay here's what I see as
10 maybe the driving issue. If this is going
11 up, I don't want it coming back on the
12 grounds that all of the issues weren't
13 resolved in summary judgment.

14 MR. SHEEN: That's certainly the first
15 issue I would raise, your Honor, because I
16 read different parts of the complaint and
17 would indicate that there are outstanding
18 issues.

19 THE COURT: And we're going to have to
20 wrestle with this because it's going to be a
21 critical question on appeal.

22 And if it goes up on appeal from a
23 motion for a partial summary judgment, we're
24 going to have to go through all the
25 certification business and address the

1 prerequisites to certification.

2 I've got to think you've got to do
3 that anyway; I fully appreciate where you're
4 coming from.

5 MR. BELNAP: I would just say your
6 Honor, as a suggestion, if counsel believes
7 that there are issues that have not been
8 disposed of by this court's ruling, we're to
9 show up for trial, and within what is framed
10 in this complaint, if he claims there's
11 issues that haven't been disposed off, then
12 we ought to dispose of them. We're two weeks
13 away from trial. Then the whole thing's
14 going up.

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

18 If we do that, if we do that, why
19 shouldn't we try and take an expansive view
20 of the available issues left to be tried,
21 rather than a narrow view?

22 At least if we do that-- and I'm still
23 going to let you tell me this whole thing's
24 a bad idea--there are going to be findings
25 and conclusions on the whole rest of the

1 business and that might be beneficial
2 ultimately, I think. I don't know.

3 MR. SHEEN: I'm only thinking about
4 economies, your Honor, and I have admitted
5 that your decision has rendered difficult
6 the guts of this case. I do not agree with
7 Mr. Belnap that now the entire case is gone.

8 But it doesn't seem to make sense
9 unless we're going to do as the court
10 suggests which I guess I'm open to
11 considering. In other words, I guess we'll
12 be making a record on appeal in the event
13 that the appellate court disagrees with the
14 court's decision on the motion for summary
15 judgment.

16 It seems kind of an uneconomical weigh
17 of handling the situation when the central
18 issue I believe will probably need to be
19 decided by and appellate court.

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

23 MR. BELNAP: I can't think of any,
24 other than we're ready, Judge, and, you
25 know, we now-- as Mr. Ringwood has

1 indicated, there's a newly-elected board in
2 place. These people need to get on with
3 their lives. Judge Brian directed at the
4 time that he denied injunctive relief, he
5 said, "you folks need to get on, and you
6 need to, you know, function and get along."

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

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

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

25 MR. BELNAP Judge, is it your feeling

1 that what we're talking about here--when you
2 asked me how are we prejudiced, and I
3 indicated I couldn't think of any, other
4 than what I indicated-- that it is a cleaner
5 record to go up on partial summary
6 judgment and get that resolved? Which
7 handles what Mr. Sheen calls the guts of the
8 the case anyway, and maybe that's correct.

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

16 THE COURT: I certainly would-- I guess
17 I would be sympathetic to making the rulings
18 appropriate to get it up on partial summary
19 judgment because it certainly makes sense to
20 do it that way.

21 MR. SHEEN: Could I draft the form of--
22 basically of order and have it approved as
23 to form in that vein?

24 THE COURT: Yes.

25 MR. BELNAP: We would like the

1 opportunity, if it's acceptable, to draft
2 findings and conclusions supporting your
3 partial summary judgment. If counsel wants
4 to do a 54 B certification, we would like to
5 look at that.

6 THE COURT: I think that's a good idea,
7 because I would like to have the Court of
8 Appeals have a clear shot at me, and you
9 know, if I made a mistake I want them to
10 know-- I want to know exactly what it is."
11 An so I concur with that. Lets go that
12 way.

13 MR. SHEEN: Okay.

14 THE COURT: Gentlemen, lets-- before
15 you adjourn, let me thank you. Both the
16 papers were very well prepared, the case was
17 well argued. Good job all the way around,
18 and this won't be the end of it.

19 MR. SHEEN: Thank you, your Honor.

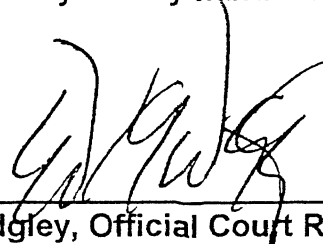
20 MR. BELNAP: Thank you, your Honor.

21 (Whereupon, the instant proceedings.
22 Came to a close.)
23
24
25

REPORTER'S CERTIFICATE

I, Ed Midgley, Official Court Reporter in the Third Judicial District, State of Utah, do hereby certify that the above and foregoing proceedings were, by me, stenographically reported at the times and places herein set forth; that said report was, by me, subsequently reduced to printed form, consisting of the enumerated pages hereinabove appearing; and that said report so transcribed constitutes a true and correct transcription of testimony given, evidence adduced and/or proceedings had as in the foregoing proceedings hereinbefore represented; portion only of entire proceedings being herein transcribed pursuant to requested transcript content.

To which certification I hereby set my hand this 14th day of January, 1998, at Salt Lake City.

A handwritten signature in black ink, appearing to read 'Ed Midgley', is written over a horizontal line.

Ed Midgley, Official Court Reporter
Utah CSR No. 22-104249-7801

APPENDIX D

Paul M Belnap, #0279
H Burt Ringwood, #5787
STRONG & HANNI
Attorneys for Defendant
Highland Estates Properties Owners Assoc
Sixth Floor Boston Building
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No. ~~FILED~~
DEC 29 1998
Third District Court
By ~~Deputy Clerk, Summit County~~

~~FILED~~
MAR - 3 1999
Third District Court
Deputy Clerk, Summit County

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

1663

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

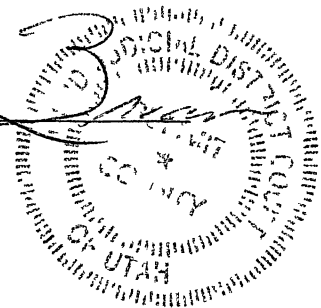
as per Judge Brian -
3/3/99 J.O.

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


DATED this 3rd day of 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 24 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 "Maguelina Raymond", written over a horizontal line.

APPENDIX E

APR 13 2000

IN THE UTAH COURT OF APPEALS

-----○○○-----

2000 UT App 103

APR 14 2000

By Third District Court
Deputy Clerk, Summit County *jo*
Compellants
Salt Lake City

Attorneys: E. Jay Sheen, Salt Lake City, for Appellants
Paul M. Belnap and H. Burt Ringwood, Salt Lake City,
for Appellees

1173

¶3 In 1993, the Trustees of the Association determined that the 1972 CC&Rs required updating and revision. The Trustees had their counsel draft a new set of revised CC&Rs, which were presented to the members attending the Association's June 1994 annual meeting.

¶4 Although all of the approximately forty homeowners in attendance at the meeting voted in favor of the new CC&Rs, the Trustees could not obtain the required vote of the owners of a majority of the subdivision lots at the meeting. The Trustees decided that a mail-in ballot would be the best way to notify the homeowners in the subdivision and maximize participation in the election.

¶5 In August 1994, the Association's attorney prepared a letter addressed to each member of the Association that contained a copy of the proposed amended CC&Rs and a ballot. The letter stated, "the voting period expires November 30, 1994; ballots must be returned by that date." However, the Trustees had not received all of the ballots by that date and therefore extended the voting period. The Association's January 1995 newsletter informed the homeowners that the voting period had been extended, and encouraged everybody to mail in a ballot.

¶6 The Association held its next annual meeting on September 25, 1995, when it was announced that the amended CC&Rs had been approved by mail-in ballot, that the ballots would be verified, and that the CC&Rs would be recorded with the county. The final vote was 149 in favor of the CC&Rs, 26 opposed, and 87 abstaining (about 57% of the 262 lot owners voted in favor of the amended CC&Rs). Plaintiffs did not complain about nor comment on either the mail-in balloting procedure or the CC&Rs until the CC&Rs had been recorded by the Trustees.

¶7 Plaintiffs filed their complaint on January 21, 1997. The Trustees filed a motion for summary judgment on November 26, 1997.¹ The trial court granted partial summary judgment to the Trustees on May 28, 1998.

¶8 Following entry of summary judgment for the Trustees, Plaintiffs obtained the ballots cast by the homeowners and also procured affidavits from other Highland Estates homeowners stating that they did not receive notice of the balloting. Plaintiffs presented this information to the trial court in a Rule 60(b) motion to reconsider summary judgment. See Utah R. Civ. P. 60(b). On March 3, 1999, the trial court denied

1. Plaintiffs did not file a cross motion for summary judgment.

Plaintiffs' motion to reconsider and certified the court's May 28, 1998 order as a final order and judgment.

¶9 Plaintiffs now appeal both the summary judgment and the denial of their motion to reconsider.²

ANALYSIS

¶10 The trial court concluded as a matter of law "that the mail-in ballot voting procedure substantially complied with the Bylaws and [CC&Rs] in place and that no prejudice to the homeowners of Highland Estates occurred as a result of mail-in balloting." Plaintiffs argue the amended CC&Rs are ineffectual because mail-in balloting is prohibited by the Utah Nonprofit Corporations statute and the Association's by-laws.

Standard of Review

¶11 "'The interpretation of a statute is a question of law, which we review for correctness.'" Provo City v. Cannon, 1999 UT App 344, ¶5, 383 Utah Adv. Rep. 7 (citations omitted). In addition to the statute under which a corporation is formed, a corporation's articles of incorporation and by-laws constitute a contract between the corporation and its members. See Workman v. Brighton Properties., Inc., 1999 UT 30, ¶10, 976 P.2d 1209 (citing Turner v. Hi-Country Homeowners Ass'n, 910 P.2d 1223, 1225 (Utah 1996)). Interpretation of contracts is likewise a question of law we review for correctness. See Nova Cas. Co. v. Able Constr., Inc., 1999 UT 69, ¶6, 983 P.2d 575.³

2. Because we reverse the grant of summary judgment, we need not reach the issue of whether the motion to reconsider was properly denied.

3. The Trustees argue that we should review their decision to use mail-in balloting under the business judgment rule. However, we find no support in Utah case law for the proposition that a corporation's adherence to required procedure, as opposed to its substantive decisions, is entitled to such deferential review. Rather, our case law indicates that the propriety of the Trustees' acts presents a question of law and that we should employ the usual rules of statutory and contract interpretation. See Reedeker v. Salisbury, 952 P.2d 577, 583 (Utah Ct. App. 1998).

Required Voting Procedure

¶12 Plaintiffs argue the Trustees could only modify the CC&Rs through a duly called meeting of the members of the Association. We agree.

¶13 The 1972 CC&Rs, which the Trustees purported to amend through the mail-in balloting process now at issue, provide for amendment by vote of owners holding a majority of the lots in the subdivision, but do not specify a voting procedure.⁴ However, by incorporating into a homeowners association, the homeowners bound themselves to the requirements of Utah's Nonprofit Corporations statute. See, e.g., Village of Brown Deer v. City of Milwaukee, 114 N.W.2d 493, 497 (Wisc. 1962) (requiring corporation to follow statutory procedures for action in absence of directors' meeting and noting: "Those who would enjoy the benefits that attend the corporate form of operation are obliged to conduct their affairs in accordance with the laws which authorize them.").

¶14 Generally, the shareholders of a corporation "have no power to act as or for the corporation except at a corporate meeting called and conducted according to law except in those jurisdictions that specifically provide for corporate action by shareholders without a meeting." W. Fletcher, 5 Cyclopedia of the Law of Private Corporations, § 1996 (1996). Utah adopted this general rule in its Nonprofit Corporation Act (Act). Utah Code Ann. §§ 16-1-1 to -124(5) (1999). The Act calls for action by members of the corporation at either annual or special meetings of members, see id. § 16-6-27, at which members may vote in person or by proxy. See id. § 16-6-30 (permitting voting by proxy if not prohibited by articles of incorporation or by-laws of corporation). Action by the members in the absence of a meeting requires unanimous written consent by the members. See id. § 16-6-33. That is,

Any action required by this act to be taken
at a meeting of the members . . . of a

4. The 1972 CC&Rs provide:

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.

nonprofit corporation, or any action which may be taken at a meeting of the members . . . 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.⁵

¶15 It is undisputed that the Trustees received only 175 total ballots and only 149 ballots in favor of the revised CC&Rs. The Trustees therefore lacked unanimous written consent to amend the 1972 CC&Rs in the absence of a shareholders meeting. The Trustees therefore did not strictly comply with the Act's requirement of unanimous written consent.

¶16 Nor did the Trustees comply with the voting procedures specified by the Association's by-laws. The Association's by-laws contemplate action taken only at a duly constituted meeting. For example, Section 2.5 of the by-laws, titled "Voting Requirements," provides: "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. . . . All votes may be cast by the members either in person or by proxy." (Emphasis added.) It is clear that the trustees did not comply with the voting procedures required by the Act and by their own by-laws. See Reedeker v. Salisbury, 952 P.2d 577, 582 (Utah Ct. App. 1998) ("[B]ecause the Association is a corporation, it may not act in any way not authorized in its . . . articles of incorporation or bylaws." (citations omitted)); National Dev. Co. Inc. v. Trusteeship of Woodland Lakes, 643 F. Supp. 561, 563 (E.D. Mo. 1986) (holding only votes taken in compliance with corporate constitution and by-laws binding).

¶17 The Trustees argue, and the trial court concluded, that they substantially complied with the statutory and by-law voting requirements. However, we have stated:

When determining whether substantial statutory compliance as opposed to strict statutory compliance should be permitted, we must . . . ascertain whether full protection under the statute would still be enjoyed by the party the statute seeks to protect. If

5. Defendants somehow construe this section to require unanimous written consent only if the action to be taken is amendment of the articles of incorporation. We do not understand how defendants arrive at that conclusion.

"substantial . . . compliance satisfies the policy of the statute[,]" then strict compliance is not in order.

Badger v. Madsen, 896 P.2d 20, 23 (Utah Ct. App. 1995) (citations omitted). Badger involved a nonprofit corporation's compliance with Utah Code Ann. § 16-6-61 (1991). See id. at 21-22. Section 16-6-61 requires that a nonprofit corporation intending to encumber substantially all of its assets provide notice that a vote on that issue will be taken at the meeting. See id. at 22-23. Because the notice provision was intended to protect the shareholders' rights, we required strict compliance. See id. at 23.

¶18 We conclude the present case raises the same concerns. The Act's requirement that Association members act only at a duly called meeting protects the rights of the members and is therefore for their benefit. See id. The Association included a similar protection in its by-laws, which, like the Act, contemplate actions taken only at a duly constituted meeting of Association members. That by-law, like the Act, protects the Association's members by requiring that member actions be taken at member meetings where free discussion and dissent can be heard. Absent a meeting, the homeowners' consent must be unanimous.

¶19 We conclude that, because the voting procedures protect the members' interests, they are mandatory rather than directory and therefore strict compliance is required. Because the mail-in balloting procedure did not comply strictly with either the Act or the Association's by-laws, we conclude it was ineffectual.

Waiver

¶20 The Trustees argue that, even if mail-in balloting did not comply with required procedures, we should uphold summary judgment for defendants because Plaintiffs waived their objections to the mail-in balloting procedure. The Trustees argue that Plaintiffs waived their objections to procedural irregularities because, although Plaintiffs had full knowledge of the mail-in balloting procedure, Plaintiffs made no objection to the procedure until after the amended CC&Rs were recorded.

¶21 The Trustees base their argument on Section 2.8 of the by-laws, which provides:

All inaccuracies and/or irregularities in calls, notices of meeting and in the manner of voting, form of proxies, credentials and method of ascertaining those present, shall

be deemed waived if no objection is made at the meeting.

(Emphasis added.) This by-law plainly applies to waiver of procedural irregularities at a duly convened meeting. This provision thus does not apply where no meeting is convened and the lack of a meeting forms the basis of Plaintiffs' complaint.

¶22 Furthermore, the Trustees cite no authority for their proposition that a member of a corporation waives an objection to the manner of voting where the voting was not conducted at a duly called meeting. Our independent research has found no case in which a plaintiff was held to have waived a claim where proxies were not presented at a meeting,⁶ nor where fewer than the required written consents were obtained for action without a meeting.⁷ We therefore conclude that Plaintiffs did not waive their objections.

CONCLUSION

¶23 The statutory and by-law provisions requiring that action by members of a nonprofit corporation be taken only at a duly convened meeting protect the interests of the members of the association; strict compliance with these provisions is therefore required. Because the mail-in balloting procedure did not comply strictly with the Utah Nonprofit Corporations Act or the Association's by-laws, the procedure was ineffectual and summary judgment for the Trustees was error. Furthermore, Plaintiffs did

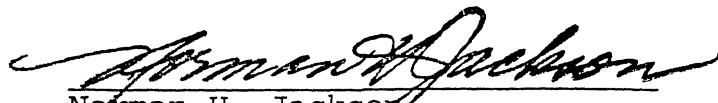
6. This court has said that "when shareholders attend and participate in a meeting, either in person or by proxy, they cannot later claim that any action taken at the meeting was invalid because of improper notice." Badger, 896 P.2d at 24. However, we have found no case where mail-in ballots were counted in the absence of a meeting called for the purpose of an election. A finding of waiver in this case would therefore be without precedent.

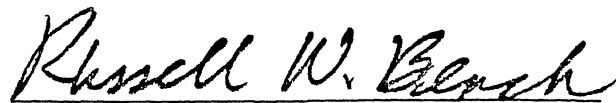
7. On the contrary, courts set aside the actions of a corporation where the required written consents were not obtained. See, e.g., Barsam v. Pure Tech Int'l, Inc., 864 F. Supp. 1440, 1452-53 (S.D.N.Y. 1994) (setting aside amendment to corporation by-laws where written consents were obtained from only 57 percent of shareholders but by-law required 100 percent and statute required 67 percent).

not waive their objections to the mail-in voting procedure. We therefore reverse the trial court's grant of summary judgment.


Judith M. Billings, Judge

¶24 WE CONCUR:


Norman H. Jackson,
Associate Presiding Judge


Russell W. Bench, Judge

No. _____

FILED

APR 14 2000

Third District Court

By _____
Deputy Clerk, Summit County

CERTIFICATE OF MAILING

I hereby certify that on the 13th day of April, 2000, a true and correct copy of the attached OPINION was deposited in the United States mail to:

E. JAY SHEEN
ROBINSON & SHEEN LLC
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SALT LAKE CITY UT 84117-5052

PAUL M. BELNAP
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and a true and correct copy of the attached OPINION was deposited in the United States mail to the judge listed below:

HONORABLE PAT B. BRIAN
THIRD DISTRICT, COALVILLE DEPT
60 N MAIN
PO BOX 128
COALVILLE UT 84017


Judicial Secretary

TRIAL COURT: THIRD DISTRICT, COALVILLE DEPT, 970600011
APPEALS CASE NO.: 990301-CA

APPENDIX F

IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY
STATE OF UTAH

JEAN LEVANGER and REBECCA
LEVANGER,

Plaintiffs,

vs.

JOANN VINCENT, KEN FISHER,
DIANE DUPLANTY, RON DUPLANTY,
JAN NEMCIK, BECKY NELSON, ROSIE
PETRONELLA, 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.

Civil No. 97-0600011

TRANSCRIPT OF HEARINGS

June 26, 2001
September 19, 2001

BEFORE THE HONORABLE ROBERT K. HILDER
District Court Judge

Jeri Kearbey
Certified Court Transcriber

1270 Gaylene Circle
Sandy, Utah 84094
(801) 566-4540

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APPEARANCES:

For the Plaintiffs: E. Jay Sheen
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For the Defendants: Paul Belnap
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1 PARK CITY, UTAH; WEDNESDAY, SEPTEMBER 19, 2001, 1:30 P.M.

2 -ooo0ooo-

3 THE COURT: What we need today? Mr. Robinson?

4 MR. ROBINSON: Let's see, Your Honor. I
5 appreciate the opportunity to address the Court. I think
6 all -- as I understand it, we're just here to establish the
7 reasonableness of the fees --

8 THE COURT: Uh-huh.

9 MR. ROBINSON: -- charged to the plaintiffs.

10 THE COURT: Yeah.

11 MR. ROBINSON: And we would -- and I'd be happy to
12 do that by proffer.

13 THE COURT: Well, I think we'd be better off that
14 way but, of course, if Mr. Belnap wants to challenge that,
15 as he's entitled to cross-examine, as you would be the
16 witness he had. Did you get the Court's ruling on that
17 expedited motion?

18 MR. ROBINSON: We did, Your Honor, and we've
19 received that summary billing.

20 THE COURT: Good. Was that any help for your
21 purposes? I mean, that's as far as I was prepared to go
22 without more. But I think -- do you need more or are you --

23
24 MR. ROBINSON: I think -- well, again, depending
25 on what happens here, whether we proffer or whether we have

1 insurance work?

2 A. Yes.

3 Q. Okay. I guess I'd want to ask Mr. Wright if he
4 ever bills over \$110. Do you know?

5 A. I don't think so.

6 Q. But do you know?

7 A. I do.

8 Q. Okay. So you're not just thinking; you know he's
9 never billed for higher than \$110 an hour.

10 A. Not that I know of.

11 Q. Okay.

12 MR. ROBINSON: Okay. That's all I have.

13 THE COURT: Thank you.

14 Do you have anything else to offer in terms of
15 witnesses or proffer at this time?

16 MR. ROBINSON: No.

17 THE COURT: Okay. Mr. Belnap?

18 MR. BELNAP: Your Honor, with the plaintiff
19 resting, I have some motions that I'd like to bring at this
20 time.

21 THE COURT: Go ahead.

22 MR. BELNAP: Your Honor, at this time, the defense
23 would like to move for a directed verdict on the issue
24 that's before you on attorneys fees in this trial, and the
25 basis for that motion would be as follows, Your Honor.

1 It is our position that it is clear, under Utah
2 law, that there has to be a threshold showing of legal
3 entitlement to attorneys fees. It is simply not sufficient
4 to say that the fees were reasonable or necessary. That's
5 one of the components, if you pass the threshold question of
6 legal entitlement. But there has been a void, a failure, a
7 complete lack of evidence on legal entitlement. There's
8 been nothing put before the Court in the plaintiffs' case on
9 legal entitlement.

10 I would say to the Court that Rule 23.1 of the
11 Utah Rules of Civil Procedure, on derivative actions,
12 indicates, and I quote in part. Quote: "The derivative
13 action may not be maintained if it appears the plaintiff
14 does not fairly and adequately represent the interests of
15 the shareholders or members similarly situated in enforcing
16 the right of the corporation or association."

17 THE COURT: Now, that's your standing argument,
18 correct, on the --

19 MR. BELNAP: That is, but --

20 THE COURT: And I'm just a little -- I've been
21 wondering about that ever since you mentioned it earlier in
22 the context of what the Court of Appeals ruled on. Is it a
23 different standing requirement or threshold requirement for
24 what they determined in terms of the vote to amend, or are
25 you saying it was just never raised and it's not too late to

1 raise it now? I'm a little confused since we had that
2 ruling from the Court of Appeals. But it's a dead issue --

3 MR. BELNAP: Well, you'll remember, Your Honor,
4 and that's why I started where I did this afternoon with
5 confirming on the record that there are no issues left to be
6 decided from the plaintiffs' perspective. Because what went
7 up to the Court of Appeals was a 54(b) certification on the
8 summary judgment on the question of: Was the mail-in ballot
9 procedure substantially complying with the provisions of the
10 corporate -- the Non-profit Corporation Act? That was the
11 issue that went up to the Court of Appeals.

12 We filed a motion before Judge Nehring on the
13 standing issue at the same time as we filed the motion on
14 the -- on the other claims. We filed it also on standing.
15 And Judge Nehring said the following in his order. This is
16 his order of May 28th, 1998.

17 "Based upon the record before the Court, there are
18
19 insufficient facts and insufficient grounds to, as a matter
20 of law, to determine that the plaintiffs are inappropriate
21 parties to bring this action." End of quote. He simply
22 indicated that that was a question that would have to be
23 sorted out factually.

24 Now, that question becomes at issue in this case,
25 in our opinion, because it's a threshold requirement. That

1 they -- they are claiming to be in the position of
2 representing all of the home owners as a whole under that
3 derivative action status, and they have to make a showing
4 that they are, and they have not, Judge.

5 Now, with respect to the caselaw dealing with this
6 legal entitlement issue, I would again reference the Court
7 to the Stewart case. This was a case from our Supreme Court
8 in 1994, and they indicated this is the first time we have
9 ever departed from the American rule in terms of -- of
10 saying that you can get fees in this kind of a situation.
11 And so they said, certainly, there is a legal entitlement
12 requirement to be shown. And they said that very plainly
13 when they said the general rule in Utah and the traditional
14 American rule, subject to exceptions, is that attorneys fees
15 cannot be recovered by a prevailing party unless a statute
16 or contract authorizes such.

17 So there has to be a showing. There's not a
18 statute, there's not a contract. They then have to show we
19 fall into one of the legal exceptions. And in my -- and in
20 our view, Judge, this is not a pure question of law. This
21 is a factual inquiry when you start talking about
22 substantial benefit. It's clearly a factual inquiry if you
23 look at the cases, all of the cases. Whether they're in
24 Utah or not. When you look at the common fund cases, it is
25 a factual inquiry. In dealing with this court exercising

1 its inheritable -- excuse me, it's inherent equitable power
2 and those examples the court gave in Stewart of where
3 they've allowed it, vexatious, bad-faith litigation, class
4 actions because of common fund, private attorney general
5 actions, and then they said, "We're going to allow it here."

6 But I think it's important, if you look at this
7 case, how closely our courts look at it straying from the
8 American rule when there's not been a showing, when they
9 said in footnote 19: "In holding that the private attorney
10 general doctrine applies here" -- and that's what they
11 decided, that those people that had brought the action
12 against USWest stood in the shoes of a private attorney
13 general -- "We note the exceptional nature of this case. We
14 further note that any future award of attorneys fees under
15 this doctrine will take an equally extraordinary case."

16 So they don't just say you plop into that -- that
17 groove just automatically, Judge.

18 The following case that followed Stewart was this
19 Barker case, when the court reviewed the amount of the fees
20 that were awarded because of that. And the court in Barker
21 specifically said that the determination that they used in
22 this common fund case -- which we don't have here -- was to
23 avoid the unjust enrichment of those who benefit from the
24 fund that is created by those who don't bear the costs.

25 To me, that's, once again, if they want to -- if

1 they want to urge the Court that this is a substantial
2 benefit case, which is what their legal arguments have been
3 to the Court, there has to be a factual showing of where is
4 that substantial benefit after you've crossed the first
5 threshold I mentioned of standing, Your Honor, and that's
6 our motion.

7 MR. ROBINSON: Your Honor, I'm going to defer to
8 Mr. Sheen on these issues.

9 THE COURT: That's fine.

10 MR. SHEEN: Your Honor, I must admit I remain
11 confused on the standing argument. They raise the issue of
12 standing prior to trial in their motion for summary
13 judgment. One of their motions was: Move for summary
14 judgment this case should be dismissed on the basis of the
15 lack of standing. And the court, with the evidence in the
16 summary judgment, taking all of the evidence at hand, said,
17 "Motion denied."

18 THE COURT: Are we referring to the same ruling,
19 Judge Nehring's --

20 MR. SHEEN: We are. Judge Nehring's ruling.

21 MR. ROBINSON: Can I present you a copy of that?

22 THE COURT: Please, uh-huh.

23 MR. SHEEN: I was referring, Judge, to this -- to
24 the conclusions there.

25 THE COURT: Okay.

1 MR. SHEEN: Obviously, the essence of that hearing
2 was the standing of the plaintiffs in this action, and that
3 was the vast majority of the evidence that was elicited.
4 It's in the record in this matter. It's in the case.

5 We appealed our portion of the summary judgment
6 motion, where the motion for -- was granted in that there
7 wasn't a sufficient basis for us to proceed, not on the
8 issue of standing, which was denied. They did not appeal
9 that motion -- the denial of that motion on appeal. And the
10 Court of Appeals accepted that appeal on the basis that this
11 was a derivative action. We're sitting here today as a
12 derivative action.

13 THE COURT: Well, that being my nagging question.
14 Does the Court of Appeals impliedly find there is standing
15 to address this other issue?

16 MR. SHEEN: Well, the Court doesn't have to find
17 that. No one disputed that there was standing at that point
18 in time. The standing now comes up at this late date again,
19 and the standing --

20 THE COURT: Well, depends on if the appeal was for
21 everything or whether it was in fact some kind of partial.
22 Mr. Belnap says it was a 54(b) certification.

23 MR. SHEEN: It was a 54(b) certification.

24 THE COURT: So what was remaining in terms -- what
25 do people think still hadn't been resolved?

1 MR. SHEEN: Well, we were unsure as to whether
2 there would be legitimate substantive material issues on
3 issues like the failure to -- to prepare and keep a
4 shareholders list, the failure to issue membership
5 certificates. Those all became, essentially, minor and moot
6 items. Those were the items that were left out. And, in
7 fact, the record again is very clear that the parties, on
8 the record in front of the court -- this is now Judge
9 Brian -- indicated to him, both of us again, that,
10 basically, this would take care of the case and it was the
11 reason that it needed to be on appeal, is that this would
12 basically take care of the case. It wasn't felt there were
13 any other issues.

14 Now, today, at the beginning of this hearing we
15 stipulated, along with counsel for the defendants, that
16 there were no other issues; we were here to talk about the
17 form of the order, and today specifically, the
18 reasonableness of the attorneys fees. Now he's saying
19 there's an issue of standing that has never been decided.
20 He stipulated at the beginning of this hearing that there
21 wasn't any other issues to be decided in this case, that it
22 was over and that we could move on to these other issues.

23 THE COURT: I guess that depends on how you can --
24 how you interpret the stipulation. If you interpret it: Do
25 you contend there has to be any more findings by the Court

1 before this is completely resolved, and you say there are
2 not. Mr. Belnap then says, "Well, we have never had a
3 factual examination on standing which was, in a sense,
4 reserved by Judge Nehring." I don't know if that's true.
5 This is quite novel.

6 MR. SHEEN: Well, it wasn't reserved by Judge
7 Nehring. He denied their motion to get rid of the case on
8 the basis of standing.

9 THE COURT: Yeah. He basically granted the
10 motion, but only on one ground.

11 MR. SHEEN: Yeah. And, granted, the order may be
12 inartfully worded; that is, when it says there is -- you
13 know, "I find there is not a -- a sufficient evidence to
14 invalidate these parties as -- as derivative plaintiffs,
15 proper derivative plaintiffs." That's exactly what he's
16 finding, that they are derivative plaintiffs. We all
17 perceived it on that basis from that point forward. There
18 was never any attempt for any of the motions to reconsider
19 on the appeal or here today, until this procedural motion
20 for directed verdict comes up. That there's a question of
21 the standing of these plaintiffs. That was fully argued and
22 litigated in that motion for summary judgment. The facts
23 are in the record. And the facts are there and they're a
24 proper party.

25 The fact that Judge Nehring said, "I can't find

1 that they're improper parties" --

2 THE COURT: But he didn't find they were proper
3 either. He really did leave a bit of a limbo there, but I
4 don't know if it makes a difference at this point.

5 MR. SHEEN: I don't think it does make a
6 difference at this point. And, frankly, I think his wording
7 in the negative simply affirms the positive, they are proper
8 parties. They tried everything they could in the motion for
9 summary judgment to get it dismissed on that basis. The
10 court said, "You haven't elicited enough evidence." And,
11 remember, based on their same description of the status of
12 the case at that point, all discovery had been done and we
13 were ready to go to trial. There was nothing further they
14 were going to be able to offer to convince the judge that --
15 that these people did have standing. All the arguments he's
16 raised here today about economic controversy between the
17 parties, that there is antagonism, economic antagonism, was
18 all raised in that hearing before Judge Nehring. There's
19 nothing new to offer on that point. That's the standing
20 order.

21 As for the substantial benefit, Your Honor, I
22 think the argument being raised there is there were no facts
23 elicited in this hearing about what the substantial benefit
24 was. Well, the record is replete and it's on the record.
25 And the Court of Appeals decision is public knowledge, and

1 the Court can take judicial notice of that. And the fact is
2 that we've relied on that all along and continue to rely on
3 that. The fact is we won at the Court of Appeals level and
4 we won validating a substantial members' right --

5 THE COURT: Well, just a minute. You could win
6 legally but not confer a benefit; isn't that true?

7 MR. SHEEN: Yes, you could. And we're arguing
8 that that was a substantial benefit. The right to allow
9 members to cast an informed vote is a substantial benefit.

10 Now, to put that in somebody's mouth, if we need
11 to, we can certainly put that in somebody's mouth, that is
12 that the Court of Appeals -- the decision of the Court of
13 Appeals validated a member's fundamental right to vote is in
14 the statutory scheme. But that's in the appeal opinion. In
15 fact, we quote that in our refined memorandum. The language
16 is very clear. This is vindication of a member's right to
17 open, active participation in the association that they're a
18 member of, that they have an ownership interest in. That's
19 right in the Court of Appeals opinion. I don't know who
20 could say it better than that. I can refer you to that
21 language, if you need, Your Honor.

22 THE COURT: What I do need you to do, and I
23 apologize for this, is to refer me -- or identify for me
24 your specific argument for legal entitlement to fees.

25 MR. SHEEN: Okay.

1 THE COURT: And I'm sure it's in here, but I'm not
2 fresh on it right now.

3 MR. SHEEN: Let's see. And, unfortunately, it may
4 not be in my reply, Your Honor. It may be -- I may have
5 been looking in the -- no, it's in my reply at page 5. I
6 don't know if you have that right here in front of you.

7 THE COURT: No. Now that I'll find it quickly,
8 just tell me about it.

9 MR. SHEEN: Page 5, let me read it to you and then
10 I can hand it to you, if you'd like to read it yourself.

11 THE COURT: Uh-huh.

12 MR. SHEEN: The Utah Court of Appeals in its
13 written -- in its written opinion says: "The Act's
14 requirement that association members, at only a duly called
15 meeting, protects the rights of the members and is,
16 therefore --

17 MR. BELNAP: Jay, can you let me catch up to you?

18 MR. SHEEN: I'm sorry.

19 MR. BELNAP: Where are you?

20 MR. SHEEN: Page 5 of my reply. Page 5 right
21 there.

22 MR. BELNAP: Okay.

23 MR. SHEEN: Got it?

24 MR. BELNAP: Thank you.

25 MR. SHEEN: So you've got that first -- first

1 line -- or that first sentence in mind.

2 THE COURT: Uh-huh.

3 MR. SHEEN: "...is, therefore, for their benefit.
4 The Association included a similar protection in its by-laws
5 which, like the Act, contemplate actions taken only at a
6 duly constituted meeting of Association members. That by-
7 law, like the Act, protects the Association members by
8 requiring that member action be taken at member meetings,
9 where a free discussion of dissent can be heard."

10 And in fact, I cite a number of cases, and there
11 are a number of other cases -- these were cases that seemed
12 to apply directly in this case -- in the reply memorandum in
13 which I indicate that, exactly as in the Court of Appeals
14 opinion, for example in the WalMart case, the *Amalgamated*
15 *Clothing v. WalMart*, what happens there is people claimed
16 that the proxy process is flawed. Well, WalMart says, 90
17 percent of it -- we know what 90 percent of the votes are
18 going to be, so it doesn't have any practical effect on the
19 result.

20 And the court holds that it is a substantial
21 benefit just to allow the shareholders to render their
22 informed vote, whether the outcome is dictated by how the
23 shareholders already know they're going to vote or not.

24 And so the Court of Appeals, in as clear a
25 language as we need, indicates that vindication of this

1 fundamental right of membership participation is a
2 substantial benefit. They indicate that's a protection that
3 the statute allows, that this has been --

4 THE COURT: And does the caselaw always give a
5 right to fees if a substantial benefit is conferred or
6 received, or is that just one requirement? In a derivative.

7 MR. SHEEN: Well, the reason, I think, that this
8 was brought as a motion for a directed verdict is because it
9 is probably a preliminary requirement. In other words, in
10 common fund cases, you have a common fund from which to pay
11 the fees.

12 THE COURT: Uh-huh.

13 MR. SHEEN: But in substantial benefit cases, you
14 then come to argue there wasn't a fund created from which
15 you can pay the fees, but if there was a substantial benefit
16 conferred, there should still be fees paid.

17 And, by the way, in the Baker -- or Barker case
18 referred to by both sides -- several points in our briefs
19 and here again being argued, the court obviously understood
20 that common fund cases were recognized in Utah, so a
21 departure from the so-called American rule noted that it had
22 been done before. And then it refers to this Cabrera case.
23 This is found on page 708 of -- of the opinion, 970 P2d 708.
24 Let's see, they talk about affirming the notion that, "in
25 common fund cases, to avoid the unjust enrichment of those

1 who benefit from the fund that is created by litigation and
2 who, otherwise, would bear none of the litigation costs."
3 That's the whole process, and it's similar to class action.
4 I mean, derivative actions are very similar to class actions
5 in many respects, and that's the reason that the American
6 rule has been abrogated in both class action cases and
7 derivative action.

8 But what they came to discover early on -- and
9 it's highlighted by the Mills case in 1970, the U.S. Supreme
10 Court says it doesn't necessarily have to be money we're
11 talking about. It could be a fundamental right to some
12 corporate involvement, for example. Or a fundamental right
13 to assume that the organization you're a member of is going
14 to comply with state statute, as is the case here.

15 But the court in Barker goes on to note that
16 Cabrera was a fee-shifting case where the opposition, as
17 opposed to the beneficiaries of the fund, paid the attorneys
18 fees. I mean, that's what we're talking about here, a fee-
19 shifting case. We're talking about a case in which
20 substantial benefit's conferred, that fee needs to be paid
21 out of the -- out of the -- or by the parties to whom the
22 benefit was conferred upon. And that, in this case, is the
23 entity the home owners association.

24 And so that is a preliminary inquiry. There's no
25 question that that's a preliminary inquiry, but we've dealt

1 with it in cases. And their own memorandum, at page 11,
2 says this -- this is their own memorandum:

3 "While Barker involved a common fund situation,
4 defendant -- I mean -- I'm sorry, that's my language. Their
5 language is:

6 "Courts that have adopted the substantial benefit
7 doctrine, we have, no longer insist that the benefit
8 conferred on the class be pecuniary."

9 That's their memorandum. And so they've --
10 they've acknowledged --

11 THE COURT: When the benefit is not money,
12 pecuniary, as you say, and in fact the benefitted -- the
13 allegedly benefitted parties are now going to have to, in a
14 sense, cough up the money from that same entity to pay the
15 fees, can the court ever, or should the court weigh the
16 benefit against the detriment? I mean, this is going to
17 increase the cost of this home owners' participation
18 significantly. So do I get to weigh? To find out whether
19 there's really a benefit, a net benefit, I guess you'd say.

20 MR. SHEEN: Yes. I'd have to say you do. You do
21 get to weigh that. And in the mix, I think you've got to
22 take the language from the Court of Appeals very seriously.
23 All the way through this litigation we tried, at every turn,
24 to forestall this -- this expensive solution to the problem.
25 Demand was made before I got involved, written demand was

1 made before I got involved. Written requests for
2 discussions were made. Demand was made after I got involved
3 on the Association. The Association simply stonewalled from
4 the very beginning. There were no attempts at settlement.
5 The arbitration that was attempted, or the mediation that
6 was required by the Court of Appeals was completely
7 unsuccessful and no fruit of any kind -- the day-long event
8 was simply just discarded by the parties. And we've never
9 been able to obtain any other result than by this process of
10 continued litigation.

11 Well, at the end of the day, the rights of all of
12 the members of the Association have been vindicated, and we
13 also know for a fact that, as a result of the Court of
14 Appeals opinion, the CC&Rs have been struck down.

15 THE COURT: Uh-huh.

16 MR. SHEEN: The offending CC&Rs. Now, that is a
17 blight on every home owner's home and property in that
18 association. Those restrictions have been removed. The
19 ability, for example, of the trustees to act with more --
20 with less control by the members has been rescinded and
21 we're back to the 1972 CC&Rs.

22 And so there are two substantial benefits
23 conferred on all of the members of the association, and it
24 is inappropriate to require these parties, the plaintiffs,
25 to shoulder the burden of that litigation cost when they

1 have conferred this benefit. Therefore, we ask that the
2 motion be denied.

3 THE COURT: Thank you.
4 Rebuttal?

5 MR. BELNAP: May I briefly speak to --

6 THE COURT: Certainly.

7 MR. BELNAP: Your Honor, the Court of Appeals --
8 well, let me start back here, first of all. I have my copy
9 of the pleading, Judge, but I would reference the Court to
10 an order that Judge Brian signed March 3, 1999.

11 THE COURT: March '99?

12 MR. BELNAP: And I can show you my copy if it
13 would be faster.

14 THE COURT: Yeah. Maybe it would. I have the
15 file from '98 through the present, but I'm not turning right
16 to that. So come on up. Yeah, I'm missing it so far.

17 MR. BELNAP: This was a hearing that was had
18 before Judge Brian on a motion to reconsider, and also we
19 had tendered at the same time a Rule 54(b) certification.

20 THE COURT: Uh-huh.

21 MR. BELNAP: And Judge Brian went through his
22 analysis on why the reconsideration was not proper. And
23 then the following was said:

24 "Based upon the arguments of counsel, the
25 agreement of counsel and this Court's review of the matter,

1 it's determined by this Court, and this Court so finds, that
2 there's no just reason for delay and the order of The
3 Honorable Ronald E. Nehring is hereby certified, pursuant to
4 Rule 54(b), for entry as a final order and judgment.

5 "It's the opinion of this Court, and counsel have
6 also represented to this Court that it was the opinion of
7 Judge Nehring, that it would be prudent to certify this
8 order pursuant to Rule 54(b), since the ruling on a summary
9 judgment substantially resolves the determinative issues in
10 the above action. And if plaintiff chooses to appeal from
11 the same, it would be a substantial savings of judicial
12 resources to have that appeal proceed now rather than
13 proceeding through a trial and a subsequent appeal."

14 Now, Judge, we have never waived the standing
15 issue.

16 THE COURT: It wasn't addressed at all on appeal?

17 MR. BELNAP: It was not. And the Court of Appeals
18 only dealt with the issue of whether the mail-in ballot
19 procedure was proper or not. And, yes, we'll agree, that
20 was the guts of the case, just as the order indicated. And
21 depending on how that ended up resolved, the guts of the
22 case is -- is gone or is still in there, we agree. But we
23 have never waived the other issues, and that's why I asked
24 the plaintiffs at the start of this, "Are you proceeding on
25 any other claims?" Now, that doesn't preclude us from the

1 threshold requirements we deem they have in showing legal
2 entitlement. They had that burden; it is not ours.

3 That's the first issue I wanted to address. The
4 second issue is the Court of Appeals decision did not
5 determine substantial benefit. They simply indicated that
6 protecting the rights of members is for their benefit.
7 There was never a statement, never an issue before the court
8 about substantial benefit. That did not go up on appeal and
9 was not before them.

10 The case of WalMart was cited to the Court. Your
11 Honor, I realize you -- you haven't had an opportunity as we
12 have to read all these cases that we've briefed, but there
13 is a significant difference in both the policy
14 considerations that the cases take and the caselaw between
15 for-profit and not-for-profit corporations, such as home
16 owners associations. And WalMart was a for-profit case.
17 And you know what the caselaw deals with when you're talking
18 about minority shareholders in for-profit corporations.
19 They are given certain rights, and that's not an issue in
20 a -- in a not-for-profit corporation.

21 Mr. Sheen then cited the Court to the Cabrera case
22 that's referenced in the Barker case. And he called it a
23 fee-shifting case. It was. If you look at the fee-shifting
24 cases, they are cases where a county employee or a state
25 employee has been sued and he has tendered his fees to the

1 government and they've refused to pay them. That is called
2 fee shifting by our court. It has nothing to do with this
3 issue, Your Honor, and that's what Cabrera was.

4 I go back to the issue of equitable power that
5 this Court has. And I started there early this afternoon.
6 In the case that I quoted from, Your Honor, the reason that
7 our Supreme Court has indicated that there are some
8 exceptions to the American rule is that there are inherent
9 equitable powers. And if you're going to do equity, you
10 have to weigh the benefits versus the detriment. And it's
11 their burden of going forward, it's their burden of proof.
12 Both of those burdens have not been met and there's a void
13 and, therefore, the motion should be granted.

14 THE COURT: I think it's obvious, one, that I need
15 to read the cases; two, that a lot of issues so far have
16 been raised today that perhaps weren't fully anticipated.
17 But regardless, this is not something I can decide from the
18 bench. I need to take your motion under advisement, and I'm
19 doing so. That probably still means you need to protect
20 your record or create your record in terms of
21 reasonableness.

22 MR. BELNAP: Okay.

23 THE COURT: Okay. Go ahead and call your witness
24 or make your proffer, however you wish. And when I say
25 reasonableness, of course I include necessity, but you

APPENDIX G

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SUMMIT COUNTY, STATE OF UTAH

JEAN LEVANGER and REBECCA
LEVANGER,

Plaintiffs,

RULING

vs.

JOANN VINCENT, *et al.*,

Civil No. 970300011

Defendants.

Judge Robert K. Hilder

This matter is before the court for final determination of the attorney's fees issue, and also consideration of the parties' respective proposed Orders re: Motion for Summary Judgment. Plaintiffs' proposed Order was signed August 17, 2001, but the court accepts defendants' position that the Utah Court of Appeals decision does not require abrogation of all decisions and actions taken by the Association, but only those taken in reliance on the improperly amended CC&Rs. Accordingly, the court this day modifies the signed Order to make the distinction identified by defendants explicit. A copy of the modified Order is provided to counsel along with this Ruling.

At the court's direction, counsel submitted written closing arguments regarding the attorney's fees issue (including the threshold standing issue), following the evidentiary hearing on September 19, 2001. Now, having considered the evidence and the arguments, and being fully advised, the court rules as follows:

First, as to standing, the court determines that whether plaintiffs' had standing to bring this derivative action (as proper representatives of the class under Rule 23.1, Utah Rules of Civil Procedure), was effectively, if not expressly, decided by Judge Nehring, when he opined that there were insufficient facts to determine, on summary judgment, that plaintiffs "are inappropriate parties to bring this action." Judge Nehring did not then defer the matter for an evidentiary hearing. Instead, he decided the matter, albeit adversely to plaintiffs, on the merits.

The next time the standing issue could have been addressed was on appeal. The record, however, reflects, that neither party briefed the issue for the Court of Appeals. This court cannot say whether the appellate court considered the issue *sua sponte*, but the court can read from the decision that no ruling was entered regarding standing. What did happen was that the Court of Appeals reached the merits, which they could not have done had they considered that plaintiffs

are inappropriate parties. Thus, acceptance of plaintiffs' standing to bring the action is implicit in the court's decision.

While the court believes the foregoing reasoning is dispositive of the standing issue, defendants' failure to raise the issue at the Court of Appeals, or to file an appropriate motion on remand, both support a conclusion that defendants did, in fact, waive the standing issue.

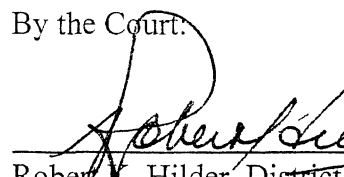
The remaining issue is the fee award itself. The court agrees that plaintiffs must satisfy the substantial benefit test to receive fees, but once it is shown that the Association was required to change its practices, and that certain rights of the Association members, as asserted by plaintiffs, were vindicated, the court cannot say that a substantial benefit was not conferred. The extent of the benefit is potentially far-reaching, and for the court to engage in excessive assessment of the quality of the benefit would likely discourage similarly situated plaintiffs from taking aggressive action for fear of the financial burden if a court found that some, but not enough, benefit was conferred in a particular case. Accordingly, the court finds that the substantial benefit requirement is met in this case.

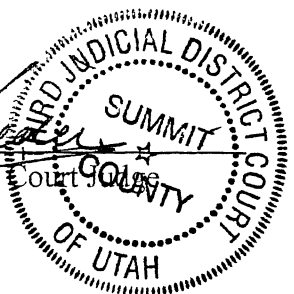
The final issue is reasonableness of the fee itself. It is substantial, and payment of the requested some will tax the homeowners significantly. Out of concern for those who will bear the cost, the court could be tempted to second guess the total and pare specific entries, but that is not the standard by which fee awards are measured. Also, a line by line critique ignores the reality is that the case must be viewed as a whole. This matter was bitterly contested. Nothing was conceded on either side. Mr. Blakesly may be correct that both sides "over-lawyered" the case, but that is an easy criticism, and the most persuasive evidence that plaintiffs did what was necessary is the fees of defendants, which are very similar to plaintiffs. The court finds that the rates charged are reasonable in all instances, but that there is nothing in the difficulty of this case or in the result that justifies the premium, or lodestar multiplier, requested by plaintiffs' counsel.

In summary, the case was an expensive undertaking for both sides and the lessons learned, if any, were purchased at a substantial price, but the court cannot find that plaintiffs' fees are neither necessary nor reasonable. Accordingly, plaintiffs are awarded their attorney's fees of \$39,174.00, and costs of \$2,153.15, for a total award of \$41,327.15. Counsel for plaintiffs shall prepare an appropriate Order that is consistent with this Ruling.

DATED this 27th day of November, 2001.

By the Court.


Robert K. Hilder, District Court Judge



CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 970600011 by the method and on the date specified.

METHOD NAME

Fax PAUL M. BELNAP 801-596-1508
Fax JAY E SHEEN 801-273-0875

Dated this 29th day of November, 2001.

Debbie K. Faust
Deputy Court Clerk

APPENDIX H

E. Jay Sheen (No. 3749), of
ROBINSON & SHEEN, L.L.C.
1366 East Murray-Holladay Road
Salt Lake City, Utah 84117
Telephone (801) 273-0855

16:33
DS

Attorneys for Jean LeVanger and Rebecca LeVanger

IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

JEAN LEVANGER and REBECCA	:	
LEVANGER,	:	ORDER: ATTORNEYS
	:	FEES AND COSTS
Plaintiffs,	:	
v.	:	
	:	
JOANN VINCENT, KEN FISHER, DIANE	:	
DUPLANTY, RON DUPLANTY, JAN	:	
NEMCIK, BECKY NELSON, ROSIE	:	
PETRONELLA, 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.	:	Civil No. 97-0300011
	:	
Defendants.	:	Judge Robert K. Hilder
	:	

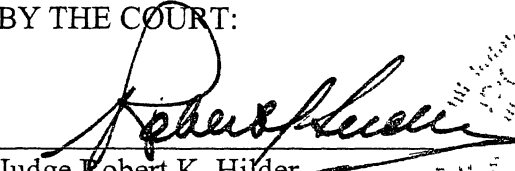
An evidentiary hearing on plaintiffs' motion to award attorneys' fees, as part of their motion for summary judgment, was held September 19, 2001. Based on the evidence presented and arguments of counsel,

IT IS HEREBY ORDERED:

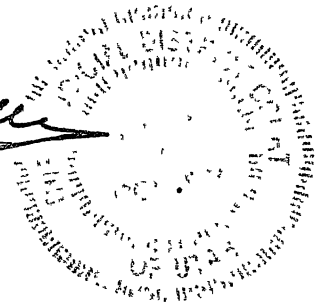
1. Plaintiffs have standing to pursue this matter and to seek their attorneys fees and costs from defendant Highland Estates Properties Owners Association, Inc., as derivative plaintiffs under Rule 23.1 of the Utah Rules of Civil Procedure.
2. Plaintiffs have conferred a substantial benefit on members of the Highland Estates Properties Owners Association who are similarly situated.
3. Plaintiffs are awarded attorneys' fees of \$39,174.00 and costs of \$2,153.15, for a total award of \$41,327.15, to be paid by The Highland Estates Properties Owners Association, Inc.

Dated: 10th December, 2001.

BY THE COURT:



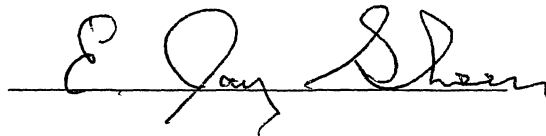
Judge Robert K. Hilder
Third District Court Judge



CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2001, a copy of this Order was faxed and hand
delivered to:

Paul M. Belnap
Andrew D. Wright
STRONG & HANNI
Sixth Floor Boston Building
#9 Exchange Place
Salt Lake City, UT 84111

A handwritten signature in black ink, appearing to read "E. Jay Sherr", is written over a horizontal line.