DISTRICT COURT, PARK COUNTY, COLORADO 300 Fourth Street Fairplay, Colorado 80440 **Plaintiffs:** ELK FALLS PROPERTY OWNERS ASSOCIATION, a Colorado nonprofit corporation, KATHRYN WELLS, THE PAUL J. VASTOLA AND SUZANNE G. NELSON LIVING TRUST, U/A, ROBERT W. PHELPS, and KEVIN O'CONNELL v. **Defendants:** VERA B. DUNWODY, DRAYTON D. DUNWODY, FARM CREDIT OF SOUTHERN COLORADO, ACA, an agricultural credit association, and THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF PARK, COLORADO **Plaintiffs in Intervention:** PETER J. BRAUN and RENAE J. BRAUN	Case Number: 2010cv65 Div: B
Frederick B. Skillern, #7983 Nathan G. Osborn, #38951 MONTGOMERY LITTLE & SORAN, P.C. 5445 DTC Parkway, Suite 800 Greenwood Village, Colorado 80111 Phone Number: (303) 773-8100 Fax Number: (303) 220-0412 E-mail: fskillern@montgomerylittle.com E-mail: nosborn@montgomerylittle.com	

REPLY TO THE DUNWODY DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR RECONSIDERATION TO VACATE THE INDISPENSABLE PARTIES ORDER AND DENY DEFENDANTS' VERIFIED MOTION TO JOIN INDISPENSABLE PARTIES OR CLARIFICATION OF INDISPENSABLE PARTIES ORDER

Plaintiffs, Elk Falls Property Owners' Association (the "Association"), Kathryn Wells, The Paul J. Vastola and Suzanne G. Nelson Living Trust, U/A, Robert W. Phelps, and Kevin O'Connell (collectively "Plaintiffs"), through their attorneys Montgomery Little & Soran, P.C., replies to Defendants Vera B. Dunwody and Drayton D. Dunwody's (the "Dunwody Defendants") Response to Plaintiffs' Motion for Reconsideration to

Vacate the Indispensable Parties Order and deny Defendants' Verified Motion to Join Indispensable Parties or Clarification of Indispensable Parties Order (the "Response") as follows:

Introduction

There are 141 property owners in the Elk Falls Subdivision who are not joined in this action ("141 Owners"). It is within this Court's discretionary powers to decide whether to join them. Plaintiffs urge the Court not to join the 141 Owners because they are not indispensable parties. Specifically, the Court can make a final ruling that is fair to all homeowners, none of the 141 Owners will be prejudiced by any such ruling, CCIOA grants the Association authority to bring this lawsuit on behalf of all homeowners, any future lawsuits regarding access to the Disputed Roads will be barred, and joining the 141 Owners is complicated, costly, superfluous, prohibitive of settlement efforts, and unduly burdensome.

Response to Factual Allegations and Legal Arguments of the Dunwody Defendants

The legal arguments, exhibits, and affidavits relating to the merits of the case, are irrelevant to the relief requested here. In this motion, the Court must determine whether the 141 Owners are indispensable parties. The Court does not have to rule on dispositive legal issues. That said, Plaintiffs provide brief responses to the Dunwody Defendants' factual allegations and legal arguments below.

1. The Board of Directors for the Association (the "Board") did not unilaterally sue the Dunwody Defendants; the Board was directed to sue by the homeowners. Since purchasing the Dunwody Property in 2008, the Dunwody Defendants have attempted to preclude access to the Disputed Roads. For this reason, an

overwhelming majority of homeowners at the 2009 annual meeting voted for the Board to (a) attempt to negotiate a settlement with the Dunwody Defendants, and (b) litigate if settlement efforts failed. The Board only initiated this lawsuit after attempts at settlement failed, and after the Dunwodys blocked access to the Disputed Roads by way of a pole barrier, large boulders, and a sawhorse.

2. Exhibit A to the Response, while irrelevant here, simply shows that the Board is abiding by its directive. An overwhelming majority of homeowners approved the Association's lawsuit and litigation assessment. This letter proves the Board is carrying on those wishes.

3. The Disclaimers filed by the Dunwody Defendants (Exhibits B - G) prove nothing more than a small minority of the 141 Owners signed a disclaimer stating that they do not actively support this litigation. We do not know their reasons. Plaintiffs are unaware of any homeowner who does not want access to the Disputed Roads.

4. Exhibit H is irrelevant. It is also unclear the context, the meaning, or the accuracy of any comment contained therein. Without proper authentication or foundation, the statement is also inadmissible hearsay.

5. The affidavit of Wallace Williams, II and attached warranty deed are irrelevant for the relief requested in this motion. Nonetheless, Plaintiffs dispute its accuracy. Most importantly, there is no connection between the Sportsmen's Club and the Disputed Roads. The Dunwody Defendants have also not provided Plaintiffs, any Party, or the Court with any evidence supporting this contention. It is an unsubstantiated claim. It is also important to note that the attached deed excepts the Block 1 plat, and the Block 1 plat clearly depicts the Disputed Roads as "50-Foot Right(s) of Way."

6. The affidavit of Vera Dunwody is irrelevant to this motion. Ms. Dunwody also cannot attest to the claims she makes; she has not been qualified as an expert, the grantor/grantee information should be authenticated by a county official, and Ms. Dunwody was never a member or representative of the Sportsmen's Club.

7. A substantial majority of the 141 Owners want the Association to represent their interests here. Many of the 141 Owners who support the Association, and who do not want to be named as individual plaintiffs, do so because they want the Association to represent their interests.

8. The Response contains numerous legal arguments irrelevant to this motion. To wit: the Disputed Roads are not public roads, the homeowners have no easements of record over and across the Disputed Roads, and the homeowners cannot establish prescriptive rights, or an easement by necessity or estoppel to the Disputed Roads. These are trial arguments. The relevant inquiry here is whether the 141 Owners are indispensable parties. Nonetheless, Plaintiffs deny these claims.

9. The Dunwody Defendants argue that Plaintiffs are required to file a Lis Pendens. This is inaccurate and irrelevant to this motion. C.R.C.P. 105(f)(1) states: "A notice of lis pendens **may** be recorded." Failure to file a lis pendens is not a defect to this lawsuit. It also has no bearing on whether the 141 Owners are indispensable parties.

10. The Dunwody Defendants argue that Plaintiffs have not provided them with a property description of the Disputed Roads and that this is a defect to their lawsuit. This is untrue. Plaintiffs have provided the Dunwody Defendants with numerous descriptions of where the Disputed Roads situate by way of deeds, title commitments, pleadings, and other documents. The 141 Owners and the Dunwody Defendants are well

aware of where the Disputed Roads lie. The Dunwody Defendants' argument is also premature because Plaintiffs anticipate obtaining a survey before trial, and will disclose the results to them.

11. The Dunwody Defendants' arguments relating to the Association's possession of its members title history, and the verification of Paul Vastola on the interrogatories is also irrelevant to this motion. That said, at this point Plaintiffs are not required to possess the title history of every current and past member of the Association. There was also nothing wrong with Mr. Vastola attesting to information he has personal knowledge of.

ARGUMENT

1. The Court's prior indispensable parties Order contradicts the intent of CCIOA. The logic used by courts in construction defect cases should be applied here. Colorado courts have continually held that under CCIOA homeowner associations have standing to pursue construction defect claims on behalf of individual owners. *See Yacht Club II Homeowners Ass'n v. A.C. Excavating*, 94 P.3d 1177, 1180 (Colo. App. 2003) (finding that the purpose of CCIOA is to clarify that an association can sue on behalf of homeowners, that CCIOA ends the issue of homeowner standing, that CCIOA eliminates the need of class action lawsuits, and that CCIOA simplifies and makes prompt action more practical); *See also Heritage Village Owners Association, Inc. v. Golden Heritage Investors, Ltd.*, 89 P.3d 513 (Colo. App. 2004) (concluding that under CCIOA it is clear that an Association has standing to assert claims of individual unit owners for construction defect issues in the individual units). CCIOA was created so that homeowner associations could protect the interests of their individual homeowners.

Because the Association is a common interest community (e.g. it assesses dues for maintenance of common areas), the Court should let the Association protect the interests of its homeowners here.

2. Contrary to the Dunwody Defendants' argument, *Dunne v. Shenandoah Homeowners Association, Inc.*, 12 P.3d 340 (Colo. App. 2000); *Davis v. Maddox*, 169 Colo. 433, 457 P.2d 394 (1969), *Merth v. Hobart*, 129 Colo. 546, 551, 272 P.2d 273 (1954), and *Hopkins v. Board of County Commissioners*, 193 Colo. 230, 564 P.2d 415 (1977) do not mandate that the Court join the 141 Owners. The Dunwody Defendants incorrectly argue that a party is indispensable if it has an interest in the action. Having a substantial interest does not make a party indispensable. *See Thorne v. Board of County Commissioners of County of Fremont*, 638 P.2d 69, 73 (Colo. 1981). The correct inquiry is whether a final judgment can be entered without injuriously and inequitably affecting the rights of the absent parties; and whether a there is a danger of multiple lawsuits. *Davis v. Maddox*, 169 Colo. 433, 438, 457 P.2d 394, 396-397 (1969). None of these concerns are present.

3. The 141 Owners will not by prejudiced by any final determination. All homeowners benefit if Plaintiffs prevail as their property values will increase and they will have access to the Disputed Roads. The 141 Owners are also not prejudiced if Plaintiffs lose. To wit: a substantial majority of homeowners support the Association, and understand that the Association is representing their interests. Those homeowners do not support the Association do so because they do not want to pay for the litigation, and/or they do not consistently use the Disputed Roads. A ruling adverse to Plaintiffs will not affect those unsupportive homeowners. The Association has also instituted

procedural safeguards to ensure that none of the 141 Owners are prejudiced. The Board only commenced this lawsuit after a majority of the homeowners directed as such. The Association has also provided all homeowners notice of this litigation and frequent case updates.

4. There are many options for those 141 Owners who want to participate in this case. Foremost, they are free to intervene. They can also run for the Board, vote the Board out, voice their concerns at a homeowner association meeting, or draft a referendum to end this litigation.

5. There is no fear of multiple lawsuits regarding access to the Disputed Roads. CCIOA gives authority to the Association to litigate on behalf of all the homeowners; therefore, the 141 Owners' interests are being represented here. Claim preclusion will bar future litigation. *See Camus v. State Farm Mutual Automobile Insurance Co.*, 151 P.3d 678, 680 (holding that to preclude a second claim, there must be (1) finality of the first judgment, (2) identity of subject matter, (3) identity of claims for relief, and (4) identity or privity between parties to the actions). Here, claim preclusion would bar subsequent lawsuits because a judgment would be final, and under CCIOA all the homeowners' interests relating to the Disputed Roads are being represented. The Dunwody Defendants have also provided no evidence that they would be subject to future lawsuits.

6. Case law supports the notion that the Association can represent the interests of all the homeowners because the homeowners have standing to sue the Dunwody Defendants for access, participation by each homeowner is unnecessary, the Association brought this claim for efficiency and costs reasons, there are no

countervailing benefits to joining the 141 Owners, the 141 Owners are free to intervene, and forcing Plaintiffs to join the 141 Owners is a burdensome requirement that impedes justice.

a. *Conestoga Pines Homeowners' Asso.. v. Black*, 689 P.2d 1176 (Colo. App. 1984) (permitting an association to represent interests of all homeowners because (1) the individual owners were authorized to enforce covenant restrictions, and (2) the participation of any particular landowner was not necessary).

b. *Architectural Committee of Mt. Olympus Cove Subdivision No. 3 v. Kabatznick*, 949 P.2d 776, 779 (Utah Ct. App. 1997) (discussing the advantages of association standing: "[a]ssociational standing has the advantage of permitting the prosecution of legitimate claims by an entity with the capacity to spread the costs of litigation among its members and to assume the burdens incident of it, rather than requiring a single litigant to carry the entire load. To deny an association standing under such circumstances just might deter the assertion of valid claims without serving any countervailing public purpose").

c. *Harboring Villas Homeowners Ass'n v. Superior Court*, 63 Cal. App. 4th 426 (Cal. App. 4th Dist. 1998) (discussing a similar statute to C.R.C.P. 19, the Court found that "indispensable" means "parties without whom the action could not fairly proceed." The Court held that the lenders were not "indispensable" and were free to intervene if they so choose).

d. *Bank of California, Nat'l Asso. v. Superior Court of San Francisco*, 16 Cal. 2d 516, 521 (Cal. 1940) (the California Supreme Court cautioned against finding a party indispensable because it can easily convert a discretionary power or a rule of fairness in procedure into an arbitrary and burdensome requirement which may thwart rather than accomplish justice).

7. There is no benefit in joining the 141 Owners because joinder would not provide the Court with additional information. The 141 Owners all have similar arguments: if not public roads, then all homeowners have a right to access the Disputed Roads by way of an express or implied easement. Many of the 141 Owners may also be called as witnesses at trial to prove these claims. It is unnecessary to join them as parties.

8. The Dunwody Defendants allege that no conflict of interest would be present if the 141 Owners are joined, because those individuals will not want to participate in this litigation. If this is true, then what purpose does the Dunwody Defendants' motion serve? The Dunwody Defendants are not prejudiced if the Court does not join the 141 Owners, nor do they articulate to the Court why they would be. Seemingly, the Dunwody Defendants want to increase the burdens and costs of this litigation on the Association.

9. It is unduly burdensome to require that the Association join the 141 Owners. This case can fairly proceed without joining the 141 Owners. Joining the 141 Owners would make this case unmanageable for the parties and the Court. It would also complicate potential settlement.

10. A ruling that the 141 Owners are indispensable parties leads to practical results unintended by CCIOA. Here, the homeowners were faced with an emergency. The Dunwody Defendants blocked the roads they needed to safely access their residences. Faced with this predicament, the Board initiated a lawsuit after majority approval on behalf of all homeowners. At that time, joining over a hundred plaintiffs or initiating a class-action lawsuit was unreasonable, and would not have provided efficient relief. CCIOA was passed to allow for prompt action. *See Yacht Club II Homeowners Ass'n v. A.C. Excavating*, 94 P.3d 1177, 1180 (Colo. App. 2003).

11. The Dunwody Defendants joinder motion should be denied as untimely. C.R.C.P. 16 is governs the case management order. C.R.C.P. 16(b)(8) grants a party 120 days after the case is at issue to join additional parties. Here, the 120th day was August

24, 2010. The Dunwody Defendants' motion was filed on September 8, 2010. The Dunwody Defendants' have provided no reason for this delay.

12. The Court should not interfere with the interests of the Association and the homeowners. There are advantages and disadvantages to living in a common interest community. One consequence is that upon majority approval, you must comply. It is democracy on a micro scale. Each homeowner moved into the Elk Falls Subdivision with full knowledge of the Association, the Board, its assessments, and its covenants. The Association should not be forced to join the 141 Owners because a handful of homeowners do not appreciate the litigation assessment or do not frequently use the Disputed Roads.

Motion for Clarification

If the Court reaffirms the Defendants' Verified Motion to Join Indispensable Parties, Plaintiffs respectfully request the Court clarify the issues as requested in Plaintiffs' Motion for Reconsideration to Vacate the Indispensable Parties Order and Deny Defendants' Verified Motion to join Indispensable Parties or Clarification of Indispensable Parties Order. These issues must be resolved before Plaintiffs can effectively proceed.

Conclusion

Plaintiffs respectfully request that the Court rule against the relief requested in Defendants' Verified Motion to Join Indispensable Parties because the Court can make a final ruling that is just, none of the 141 Owners will be prejudiced by such a ruling, CCIOA grants the Association authority to bring this lawsuit on behalf of all homeowners, any future lawsuits will be barred, and joining the 141 Owners is

complicated, costly, superfluous, prohibitive of settlement efforts, and unduly burdensome.

Dated: November 5, 2010.

Respectfully submitted,

MONTGOMERY LITTLE & SORAN, P.C.

By *s/ Nathan G. Osborn*
Frederick B. Skillern, #7983
Nathan G. Osborn, #38951

CERTIFICATE OF SERVICE

I hereby certify that on November 5, 2010, a true and correct copy of the foregoing was duly served to the following via LexisNexis:

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