NO. 18-2150

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KEITH HORIST, JOSHUA EYMAN, AND LORI EYMAN,

PLAINTIFF-APPELLANTS

v.

SUDLER AND COMPANY D/B/A SUDLER PROPERTY MANAGEMENT, HOMEWISE SERVICECORP., INC., AND NEXTLEVEL ASSOCIATION SOLUTIONS, INC.

DEFENDANT-APPELLEES

Appeal from the United States District Court
For the Northern District of Illinois, Eastern Division
Case No. 1:17-cv-08113
The Honorable Robert W. Gettleman

COMMUNITY ASSOCIATIONS INSTITUTE – ILLINOIS CHAPTER'S MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLEES AND AFFIRMANCE

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Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, the Community Associations Institute – Illinois Chapter ("CAI") respectfully seeks leave to file the attached brief as *amicus curiae* in support of Appellees Sudlar and Company, HomeWise Servicecorp. Inc. and NextLevel Association Solutions, Inc.

CAI is an international organization dedicated to providing information, education, resources, and advocacy for community association leaders, members, and professionals with the intent of promoting successful communities through effective, responsible governance and management. CAI's more than 40,000 members include homeowners, board members, association managers, community management firms, and other professionals who provide services to community associations and is the largest organization of its kind. The Illinois Chapter of CAI endeavors to fulfill the same purpose of the national organization on behalf of its members and the estimated 3.79 million Illinois residents who live in a community association.

Given this background and CAI's intimate knowledge of the inner workings of community associations, CAI is in a unique position to explain the way that the market works in providing disclosure documents and has a public policy statement that specifically addresses the issue on appeal, which involves the fees associated with providing disclosure documents in connection with the sale of a unit. Therefore, CAI is distinctly qualified and well positioned to represent the views of the community association leaders respecting the issues before the Court.

Additionally, CAI will provide important assistance to the Court by presenting a broader view of how the outcome of this case will affect the entire community association industry – including not just property management companies and document collection professionals like Appellees, but individual unit owners themselves. The district court properly found that a condominium seller does not have a private right of action under 765 ILCS 605/22.1(C), nor any

other viable cause action, against property management companies and document services companies for charge fees associated with providing the documents set forth in Section 22.1. This finding is consistent with Section 22.1's intent of providing full disclosures and information to purchasers because it provides a reliable and efficient method of providing this information. Should the Court find that a condominium seller has a private right of action under Section 22.1 against property management companies and document services companies for charging a fee beyond copying costs, such a decision would upend the efficient manner that associations, property management companies, and document services companies use to efficiently, reliably, and economically provide disclosure documents.

For all these reasons, the amicus brief accompanying this motion is desirable and provides the Court with matters relevant to the disposition of this case. Accordingly, the Community Associations Institute – Illinois Chapter respectfully requests that the Court grant leave to file the attached *amicus* brief for the Court's consideration. Before filing this motion, counsel for CAI requested consent of the parties to obviate the need for this motion. Although Appellees consented, Appellant did not.

Dated: January 29, 2019

Respectfully submitted,

/s/ J. Philip Calabrese

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CERTIFICATE OF SERVICE

I hereby certify that, on January 29, 2019, I electronically filed the foregoing with the Clerk of Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: January 29, 2019

/s/ J. Philip Calabrese

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BRIEF OF THE COMMUNITY ASSOCIATIONS INSTITUTE – ILLINOIS CHAPTER AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-2150

Short Caption: Horist v. Sudler & Co.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

The Community Associations Institute – Illinois Chapter, Amicus Curiae

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Keough & Moody

Porter Wright Morris & Arthur, LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None.

Attorney's Signature: s/ J. Philip Calabrese Date: January 29, 2019

Attorney's Printed Name: J. Philip Calabrese

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes _____ No X

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INTEREST OF CAI AS AMICUS CURIAE[1]

In 1973, the Urban Land Institute and the National Association of Home Builders formed the Community Associations Institute ("CAI"). CAI is a national organization, which also consists of state chapters, including one in Illinois, and three (3) international chapters. The purpose of CAI is to provide guidance for both the creation and operation of community associations, including condominiums, cooperatives, and homeowners associations. CAI focuses its work on education and advocacy. CAI regularly sponsors educational and training opportunities for its members. It is composed of nearly 40,000 members, who are community associations members, community association managers, volunteer board members, attorneys, accountants, community bankers, insurers, and other service providers for community associations.

CAI is a resource for providing information, in several different formats, on current issues related to community association living. These formats include conducting seminars, online learning, and webinars, as well as hosting trade shows, forums, and expos. CAI Press is a publishing division of CAI which is dedicated to publishing books related to association governance, management, and operations. CAI also publishes a bimonthly magazine called *Common Ground*. In addition, it publishes a Community Manager Newsletter and other e-newsletters.

Each year CAI advocates on behalf of community associations and their residents before legislatures, regulatory bodies, and courts. This advocacy is completed at both the state and

[1] This brief has not been authored, in part or in whole, by any attorney for a party to this matter. In addition, no party to this matter and no attorney for any party to this matter have made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

federal level. CAI has a Federal Legislative Action Committee, as well as Legal Action Committees within the state chapters.

The Illinois Chapter of CAI endeavors to fulfill the same purpose of the national organization. It too regularly offers educational opportunities for its members, in the form of seminars, webinars, and expos. The Illinois Chapter of CAI has a Legislative Action Committee and actively advocates on behalf of its members. Legislation and advocacy is important to the Illinois Chapter of CAI since an estimated 3.79 million Illinois residents live in a community association. Community Associations Institute & Foundation for Community Association Research, *National and State Statistical Review for 2017 Community Association Data*, https://foundation.aionline.org/wp-content/uploads/2018/06/2017StatsReview.pdf.

ARGUMENT

It is common practice for sellers of condominium units within Illinois to meet their obligations under Section 22.1 of the Illinois Condominium Property Act ("Condo Act"), 765 ILCS 605/22.1, by requesting their Association to provide the information directly to a prospective purchaser. As it is a common practice for Illinois condominium associations to be professionally managed, these disclosures are completed on behalf of the associations through their management companies, who typically is the custodian of the condominium association's books and records. The accuracy of this information is critical, and the gathering of it is time consuming.

By taking on this duty for the seller, the condominium association and its managing agent assume liability. Further, ensuring an Illinois condominium association properly complies with the requirements of Section 22.1 provides a great benefit to the seller, as it not only ensures compliance with Illinois law, but also it leads to the sale of his/her condominium unit. The completion of Section 22.1 disclosures by a community association manager helps to keep transaction costs lower and is less time consuming since it is completed by personnel well versed on the contents of a condominium association's books and records. It also ensures the accuracy of the information disclosed since the information is supported by the contents of the books and records of the association. As stated in greater detail below, the Plaintiffs/Appellants' attempt to limit management companies and third-party vendors from distributing the required disclosure documents and providing a legitimate service to the seller of a condominium unit at no cost has no basis in Illinois law and is contrary to the efficient, reliable, and economical provision of disclosure documents, which CAI has strived to promote through its policies.

Accordingly, the *Amicus Curiae* urges the Court to affirm the dismissal by the District Court so as to deny a right of action to unit owners under Section 22.1 of the Condo Act, recognize this method of document delivery is transparent and fair under the Fraud Act, and dismiss all other claims.

I. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S DISMISSAL OF PLAINTIFFS/APPELLANTS' COMPLAINT.

In this appeal, this Court shall consider: (1) whether Section 22.1 of the Condo Act gives rise to a private right of action against management companies and third-party companies; (2) whether distribution from a third-party company violates the Illinois Consumer Fraud Act, 815 ILCS 505/1 *et seq*. ("Fraud Act"); and (3) if the present system constitutes a breach of fiduciary duty, unjust enrichment or conspiracy. As stated in greater detail below, the opposition and attempt to limit management companies and third-party vendors from distributing the required disclosure documents has no basis in Illinois law and is contrary to the efficient, reliable, and economical provision of disclosure documents, which CAI has strived to promote through its policies.

A. Plaintiffs/Appellants' Reading of Section 22.1 is Contrary to the Policy underlying the Purpose of the Statute.

Plaintiffs/Appellants attempt to take a statute that is designed to ensure that a purchaser has adequate information so as to be fully informed and satisfied with matters affecting the condominium unit and ask this Court to read it as a regulation of the price management companies and document processors may charge. Not only is allowing a cause of action against such entities contrary to the express statutory language, but it cuts against the policy underlying the statute because it will negate a reliable, efficient avenue of receiving these documents from professional management companies and document processors.

Should the Court find that a condominium seller has a private right of action under Section 22.1 against property management companies and document services companies for charging a fee beyond copying costs, such a decision would upend the efficient manner that associations, property management companies, and document services companies all use to efficiently, reliably, and economically provide disclosure documents. Allowing condominium associations to engage professional property management companies and document services companies to perform a legitimate service for a seller that requires it to gather this information promotes Section 22.1's policy of full disclosure to buyers by having the information provided by entities that understand the disclosure requirements. This interest would be impaired should such professionals be prohibited from charging a fee and sellers and/or association members are left to comply on their own. Further, reversal would require associations to incur additional expenses because they would need to either hire employees to compile and provide disclosure documents or pay management companies more because such companies can no longer charge the seller the reasonable costs associated with compiling this information. As a result, associations and their members will pay for the costs of the sellers, unfairly subsidizing transactions of sellers without receiving any benefit. It would also result in delays in closings that would have a detrimental effect on sellers.

Plaintiffs/Appellants' position also cuts against CAI's policy with respect to "Disclosures Before Sales in Community Associations," which – like Section 22.1 for associations and their Boards – permits management companies and document preparers to charge reasonable fees associated with this task:

> Frequently an association's management company serves to fulfill the requests for document production related to the sale of a property. Such requests may come several months in advance or with short notice. Preparers incur labor and material costs for such production and must attest to the accuracy of the information. As

> such, preparers should be allowed to charge a reasonable fee for the liability risk incurred by affirming the correctness of the information as well as the preparation and production of disclosure documents/resale certificates. Although most disclosures are of a routine nature, there may be transactions or circumstances that justify additional charges. Such fees, at the discretion of the association or its agent, may be required in advance of production to ensure costs incurred to the association are properly allocated to the parties to the transaction and in a timely manner. If the resale package is demanded without reasonable notice, an expedited charge may be warranted.

As CAI's policy reflects, allowing professional management companies or document services companies to charge a condominium seller reasonable costs in assembling and providing documents ensures that sellers receive reliable and timely information. Further, this policy safeguards against associations expending resources on fulfilling document requests that would ultimately be subsidized by unit owners, instead of the individual benefiting from the sale. Last, charging a reasonable fee covers the potential liability to a management company or document service company if such information is alleged to be inaccurate by a purchaser of a condominium unit. *See Mikulecky v Bart*, 825 N.E.2d 266 (Ill. App. Ct. 2004) (where a condominium unit owner purchaser brought an action against a vendor of the condominium association for the alleged misrepresentation of expenses within a 22.1 disclosure).

B. The plain language of Section 22.1 of the Condo Act does not provide a private right of action by a selling condominium unit owner against his/her former association's managing agent or other third-party company.

This policy of promoting full disclosure of information to a buyer is reflected in the express language of Section 22.1 and, notably, does not prohibit property management companies or document services companies from charging a reasonable fee, nor does it create a private right of action against such entities. Section 22.1 of the Condo Act requires a selling *unit owner* of a condominium unit to make available upon demand by a prospective purchaser, certain documents related to the Association. 765 ILCS 605/22.1(a). These documents include:

1. the declaration, bylaws, and rules and regulations of the association;
2. a statement of any liens and a statement of account for the unit that is the subject of the sale;
3. a statement of any anticipated capital expenditures by the association within the current or succeeding two fiscal years;
4. a statement of the status and amount of any reserves for the association, identifying if any such funds are earmarked for a specific project;
5. a copy of the statement of the financial condition of the association for the last fiscal year;
6. a statement of the status of any pending suits or judgments which the association is a party;
7. a statement setting forth what insurance coverage is provided for all unit owners by the association;
8. a statement that any improvements or alterations made to the unit have been done in good faith and in compliance with the association's condominium instruments; and
9. the identity and mailing address of the principal officer of the association or agent of the association, that is designated to receive notices.

765 ILCS 605/22.1(a)(1)-(9).

The Condo Act contemplates that a selling condominium unit owner will request the information he/she is required to provide to a prospective purchaser from the association so that a purchaser can review the association's financial information and other relevant materials before closing the real estate transaction. The statute aims to ensure that a prospective purchaser is fully informed and satisfied with matters affecting the condominium unit. Thus, while concerned with full disclosure and transparency in condominium purchases, what Section 22.1 of the Condo Act does not do is impose any duty on an association's managing agent or other third-party company that is employed to provide this information to a seller, the prospective buyer or agent. In fact, the plain language of Section 22.1 of the Condo Act also makes it clear that Section 22.1 does *not* give rise to an express private right of action by a former owner against an association's managing agent and other third-party companies that assist the association in providing a selling unit owner with the requested information under Section 22.1 of the Condo Act.

If the legislature intended for Section 22.1 to grant an express private right of action to a former owner against an association's managing agent or other third party-company, the legislature could have used such language within Section 22.1. After all, when the legislature's intent is to expressly give rise to a private right of action, it has included such language within the Condo Act. In Section 19 of the Condo Act, the legislature included language that allows a member to pursue an enforcement action to compel an Illinois condominium association to permit the member of the association to examine certain records of the association. 765 ILCS 605/19. Hence, the failure to include such similar language within Section 22.1 of the Condo Act, evidenced by the plain language of Section 19 of the Condo Act, leads to the only reasonable conclusion which is such a private right of action by a former owner against the association's managing agent or other third party does not exist.

C. Section 22.1 only created an implied private right of action for a prospective purchaser against a seller of a condominium unit owner.

While Section 22.1 does not create a right of action on behalf of any party, 765 ILCS 605/22.1, the statue has been expanded by Illinois courts to create an implied private right of action – but only under narrow factual circumstances not applicable here. *D'Attomo v. Baumbeck*, 36 N.E.3d 892 (Ill. App. Ct. 2015); *Nikolopulos v. Balourdos*, 614 N.E.2d 412 (Ill. App. Ct.1993). Consistent with promoting transparency in condominium sales, the only private right of action created by Section 22.1 is one by a prospective purchaser of a condominium unit against a seller of a condominium unit if it is alleged that the seller concealed documents requested under Section 22.1 until after closing. That was the situation in *Nikolopulos*, where the Court held that Section 22.1 of the Condo Act implies a private right by the prospective purchaser against a seller of a condominium unit to terminate the sales contract if the financial information in Section 22.1 discloses previously undisclosed material expenses. *Id.* at 77. In

reaching this conclusion, the *Nikolopulos* Court considered whether: (1) the plaintiff is a member of the class for whose benefit the statute was enacted; (2) plaintiff's injury is of the type the statute was designed to prevent; (3) the private right of action is consistent with the purpose of the statute; and (4) the private right of action is necessary to provide an adequate remedy. *Nikolopulos*, 614 N.E.2d at 77, *citing Bd. of Educ v. A, C &S, Inc.*, 546 N.E.2d 580, 599 (Ill. 1989). Similarly, the *D'Attomo* Court followed the *Nikolopulos'* Court and the court's rationale to conclude that a buyer of a condominium unit can pursue an action against the seller, pursuant to Section 22.1 of the Condo Act, after the closing occurs if documents were concealed. 36 N.E.3d at 907 (implying a private right of action where a buyer alleges the seller concealed documents requested under Section 22.1 until after closing).

In both *Nikolopulos* and *D'Attomo*, the Courts concluded that Section 22.1 of the Condo Act is intended to protect prospective purchasers. *D'Attomo* 36 N.E.3d at 905; *Nikolopulos*, 614 N.E.2d at 416. This conclusion is supported by the plain language of Section 22.1. After all, the plain language of Section 22.1 makes clear that a prospective purchaser may demand specific information from a seller, before resale of the unit, and such information provides a better understanding as to what the person is about to purchase. *See* 765 ILCS 605/22.1. The rulings in *Nikolopulos* and *D'Attomo,* and the ruling by the District Court in this case, were the result of a proper reading of Section 22.1. A contrary ruling would have ignored the intent of the legislature.

Here, Plaintiffs/Appellants are not prospective or actual *purchasers* of condominium units. Instead, they are *sellers*--former members of a condominium unit. They are not the persons that Section 22.1 is intended to protect. Hence, the District Court properly dismissed their complaint. Furthermore, the District Court properly dismissed the complaint because

Plaintiffs/Appellants seek a remedy from the association's managing agent and a third-party company used to provide information Plaintiffs/Appellants requested. That is, after performing a legitimate service on their behalf, Plaintiffs/Appellants seek to prevent the association's managing agent and a third party company from being compensated. Neither the plain language of Section 22.1 nor the purpose of the statute suggests that there are prohibitions or limitations on what a managing agent or third-party company can charge to provide a selling owner with information pursuant to Section 22.1 of the Condo Act.

D. It would be improper to construe Section 22.1 of the Condo Act to limit a for-profit corporation, not bound by Section 22.1 of the Condo Act, to limit its charges.

Section 22.1 of the Condo Act is devoid of any reference to a managing agent or third-party company. Plaintiffs/Appellants attempt to rely on Section 22.1(c) to prevent an association's managing agent or a third-party company from charging more than out of pocket expenses when providing a seller with the required information. But this argument requires a court to read words within Section 22.1, which quite simply are not there.

Section 22.1(c) only contains language that limits what the association or its board of directors can charge. 765 ILCS 605/22.1(c). That is, there is no language related to a managing agent or a third-party company assisting an association. Again, this Court can only rely on the plain language of Section 22.1, which here includes words limiting what the association's board of directors or association can recover. A board of directors and an association do not mean the same as managing agent or community association manager. This is evidenced by the language used by the legislature throughout the Condo Act.

Section 2(o) of the Condo Act defines "association" to include the association of all the unit owners acting pursuant to the association's bylaws through its elected board. 765 ILCS

605/2(o). The Condo Act later defines "community association manager", in part, as one who administers for ***compensation*** the coordination of financial, administrative, maintenance, or other duties called for in a management contract. 765 ILCS 605/18.7(b). This definition of "community association manager" does not include the Board of Directors for an Association or in any way suggest "Board of Directors" and "community association manager" are synonymous with one another. 765 ILCS 605/18.7.

Section 18.4 of the Condo Act relates to the Powers and Duties of a Board of Managers. 765 ILCS 605/18.4. Section 18.7 of the Condo Act relates to the Standards of a Community Association Manager. 765 ILCS 605/18.7. Likewise, in other sections of the Condo Act, the legislature imposed duties on a managing agent that are not imposed upon the Board or it distinguished the managing agent from the Board. Specifically, Section 12 of the Condo Act requires that all management companies handling funds of an association be covered by a comprehensive fidelity bond. 765 ILCS 605/12(a)(3)(B). Section 9.2 of the Condo Act provides that the attorney's fees incurred by the Association arising out of a default by a unit owner to be part of the owner's respective share of common expenses. 765 ILCS 605/9.2(b). However, it also provides that the fees incurred to have a managing agent involved in the collection of common expenses due by the Owner, can only be considered part of the owner's respective share of the common expenses, if the managing agreement between the association and the managing agent allows for it and the association's community instruments so provide. 765 ILCS 605/9.2(c). Distinguishing between the Board and a managing agent within the Condo Act is logical since the two are very different. One consists of volunteer members and one is a for profit corporation or other type of entity.

By imposing separate, distinct duties on a managing agent in other provisions of the Condo Act, the General Assembly intended to impose a duty on managing agents in limited areas. The decision to mention certain parties within Section 22.1 and exclude managing agents and third-party vendors was intentional. Section 22.1 excludes any duty or burden upon managing agents, and by extension the third-party companies with which they contract.

When contemplating the interpretation of a statute, it is critical to presume that the Illinois General Assembly did not intend to create absurd or inconvenient results. *Royal Glen Condo. Ass'n v. S.T. Nesworld & Assocs.*, 18 N.E.3d 137, 141 (Ill. App. Ct. 2014). Interpreting Section 22.1 of the Condo Act to provide a private right of action for unit owners would ultimately create absurd and inconvenient results, causing an unprecedented shift in the operation of community associations and the industry as a whole. After all, condominium associations within the state of Illinois are commonly managed by a managing agent, which are for-profit corporations.

While this issue has not been specifically addressed by an Illinois Court, the California Court of Appeals contemplated a similar issue of fees charged by management companies and third-party vendors against the state's condominium statute, which is parallel in structure and design to the Illinois statute. These cases, *Fowler v. M&C Association Management Services*, 163 Cal. Rptr. 3d 717 (Cal. Ct. App. 2013), and *Brown v. Professional Community. Management., Inc.*, 25 Cal. Rptr. 3d 617 (Cal. Ct. App. 2005), hold that businesses excluded from coverage of a statute are not subject to the same restrictions as parties specifically included within the plain language of the legislation. In *Brown,* the Court recognized that associations are authorized to engage management companies in the administration of the association; hence, the legislature contemplated that the involvement of for profit corporations in the running of the

association. 25 Cal. Rptr 3d at 621. The *Brown* Court concluded that the applicable act imposed *separate* duties on a managing agent than an association, and the applicable act did *not* require a managing agent to be a nonprofit entity; hence, the managing agent could be a for-profit corporation. *Id.* Following the *Brown* Court, the Court in *Berryman v. Merit Property Management, Inc.*, went on to conclude that the California statute did not seek to "constrain" what a managing agent could charge for rendering such services, since such fees would be dictated by competitive forces, not the statute. *Berryman v. Merit Property Management*, 62 Cal. Rptr 3d 177 (Cal. Ct. App. 2007).

Section 22.1 of the Condo Act does not contain language that prevents a management company or third-party distributor from charging a fee which allows it to recover reasonable costs, its overhead costs, which includes those related to protect the agent from the liability assumed by providing such information, as requested by a seller, so that the seller fulfills *his/her* obligation under Section 22.1, and potential profit. There is nothing within Section 22.1 of the Condo Act which implies that a for-profit company must limit its charge for rendering a legitimate service. If the Court interprets Section 22.1 to remove the potential of profit for management companies and third-party distributors, there would no longer be an economic incentive for these companies to provide these services to associations. Board members of condominium associations are volunteers who have a life outside of their association and most often with no knowledge on how to manage a condominium association. If community association management companies are limited or prevented from acting as a for-profit entity, they are less likely to manage condominium associations. To create a market that precludes professional management companies for associations will not only have an adverse effect on the

management of an association, but will also have an adverse effect on the marketability of the units within condominium associations.

E. A Managing Agent or Third-Party Distributor's Imposition of Fees Fails to Constitute a Violation of the Illinois Consumer Fraud Act.

The Illinois Consumer Fraud Act prohibits unfair or deceptive acts or practices which are intended to induce an individual during the conduct of trade or commerce. 815 ILCS 505/1 *et seq*. The purpose of the Consumer Fraud Act is to protect consumers against deception, fraud, false pretense, false promise, misrepresentation, and/or concealment. 815 ILCS505/2; *Avery v. State Farm Mutual Auto. Ins.*, 835 N.E.2d 801, 850-53 (Ill. 2005). To prevail on a consumer fraud claim, a plaintiff must prove: (1) an unfair or deceptive act or practice by the defendant; (2) the defendant intends that the plaintiff rely upon this deception; (3) the deception occurred in the course of conduct of trade or commerce; (4) actual damages to the plaintiff; and (5) the deception was the proximate cause of these damages. *Avery*, 835 N.E.2d at 850.

Initially, to assert a violation of the Consumer Fraud Act, the plaintiff must demonstrate that the defendant engaged in a deceptive act or practice; the Fraud Act allows a plaintiff to allege "unfair" practices as an alternative to "deception." *Wigod v. Wells Fargo Bank, N.A.*,673 F.3d 547, 575 (7th Cir 2012); *Saunders v. Mich. Ave. Nat'l Bank*, 662 N.E.2d 602, 607 (Ill. 1996). Deceptive acts are subjected to a heightened pleading standard, requiring particularly. *Demitro v. General Motors Acceptance Corp.*, 902 N.E.2d 1163, 1169 (Ill. 2009).

In order for an act or practice to be considered "unfair", courts apply the Sperry Test, which weighs three factors: (1) whether the act offends public policy; (2) if the act is immoral, unethical, oppressive or unscrupulous; and (3) if the act causes a substantial injury to customers. *FTC v. Sperry &* Hutchinson, 405 US 233, 244 (1972); *Robinson v. Toyota Motor Credit Corp.*, 775 N.E.2d 951, 960-61 (Ill. 2002). All three of these factors do not need to be present to

support a finding of unfairness; a practice may be unfair if it strongly meets one factor or meets all three of the criteria to a lesser extent. *Robinson* 775 N.E. 2d at 961; *Ramirez v. Smart Corp.*, 863 N.E.2d 800, 811-12 (Ill. App. Ct. 2006).

The previous discussion of the Condo Act demonstrates that the production of documents through a management company or a third-party distributor does not violate public policy, *because there is no violation of the Condo Act*. To the contrary, allowing a managing agent or a third-party distributor to provide the documentation supports the underlying policy of the statute—to provide a prospective purchaser with detailed and accurate information. Nor is there a violation of public policy because the statute does not create or imply a right of action for Plaintiffs/Appellants to state a claim. Moreover, the use of a third-party vendor is not immoral, unethical, oppressive, or unscrupulous.

The use of a third-party to obtain the disclosure documents fails to constitute oppressive behavior. Conduct is oppressive when it "imposes a lack of meaningful choice or an unreasonable burden on the consumer." *Garrett v. Rentgrow*, No. 04-8309, 2005 U.S. Dist. LEXIS 13210, at *9 (N.D. Ill. July 1, 2005); see also *Anthony v. Country Life Mfg., LLC*, 70 F. App'x 379, 382 (7th Cir. 2003); *Saunders,* 662 N.E.2d at 608. It follows that a behavior is not oppressive where a consumer has alternative options to obtain the product or service. *Batson v. Live Nation Entm't, Inc.*, No. 11 C 1226, 2013 U.S. Dist LEXIS 34424, at *15 (N.D. Ill. Mar. 13, 2013). Unit owner-sellers *chose* to utilize the services of a managing agent or a third party-vendor instead of obtaining the documents in a number of other ways, rendering any allegation of oppressive conduct without merit. Managing agents and document distribution companies do not have a monopoly over the possession of the required disclosure documents. Unit owner-sellers can contact associations themselves by requesting the documents from the Board of

Directors in accordance with the resale provision of the Condo Act. 765 ILCS 605/22.1(b). Additionally, a unit owner can utilize other provisions of the Condo Act to obtain the required information. A selling unit owner can also engage his/her own attorney to assist in making the requires 22.1 disclosures.

In a similar case contemplating document preparation fees for loan transactions, the Illinois Supreme Court noted that a party's remorse over paying a high fee to a company does not negate the fact that the party could have pursued other courses of conduct, such as simply paying their own attorneys. *King v. First Capital Fin. Servs. Corp.*, 828 N.E.2d 1155, 1143 (Ill. 2005). In light of the various options available to unit owners, the assertion that sellers are oppressed and "strong-armed" by a document-monopoly is patently false. *Id.* (stating oppression cannot be determined when there are no facts demonstrating that plaintiffs were compelled to pay that particular company or forgo the transaction entirely).

Plaintiff/Appellants' argument fails to address the convenience for selling unit owners when they use the legitimate service of a managing agent or third-party vendor to provide the requested information to the prospective purchaser. In fact, managing agents or third-party document preparation companies offer a countervailing benefit, justifying the price they charge. Instead of requesting documentation from the Board of Managers and waiting thirty (30) days while a potential sale is at stake or expending one's own time requesting or compiling the documents, management companies or document distribution companies allow a seller the speed and convenience of receiving the required disclosure documents promptly and efficiently through electronic transmission. Plaintiffs/Appellants also ignore the fact that by providing the documents requested under Section 22.1 to a prospective purchaser, the managing agent or third-party vendor assume liability for the representations made and the service provided ensured that

they complied with their requirements under Section 22.1 of the Condo Act. Quite simply, Plaintiffs/Appellants requested a service that requires them to compensate by the managing agent or third-party vendor.

The present system of using management companies or third-party vendors to provide disclosure documents is a transparent and fair method of distribution and does not violate the Fraud Act. Accordingly, *Amicus Curiae* urge the Court to affirm District court's opinion.

CONCLUSION

Ultimately, the decision of condominium associations to employ managing agents, who in turn administer the association and contract with document distribution companies, functions separately from Section 22.1 of the Condo Act, and does not give rise to an implied right of action; nor does this system violate the Consumer Fraud Act, as the conduct is not deceptive or unfair. Any other allegations of a breach of fiduciary duty, conspiracy or unjust enrichment are predicated on the theory that this system violates the Condo Act or the Fraud Act. Without a cause of action under these acts, no other claims exist.

For all these reasons, CAI-Illinois Chapter respectfully requests that the Court affirm the judgment of the District Court. A contrary holding would adversely affect the interests of CAI members in Illinois and lead to increased costs and other unintended consequences.

Dated: January 29, 2019

Respectfully submitted,

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I hereby certify that, on January 29, 2019, I electronically filed the foregoing with the Clerk of Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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