DARREN M. LARSEN
1200 Paseo Camarillo, Suite 160
Camarillo, California 93010
(805) 484-4741 (ph)
(805) 389-1651 (fax)
California Bar No. 102778

Counsel for ~~Home Owners~~-Amici Curiae

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA

SIMI VALLEY LE PARC HOMEOWNERS ASSOCIATION, Plaintiff/Respondent, vs. ZM CORPORATION, dba QUIKRESPONSE DISASTER CONTROL AND CONSTRUCTION, Defendant/Petitioner.	CASE NO. CIV 159037 BRIEF OF OWNERS OF HOMES IN LE PARC SIMI VALLEY, AS AMICI CURIAE, IN OPPOSITION TO ZM CORPORATION'S MOTION TO AMEND JUDGMENT TO INCLUDE "LE PARC COMMUNITY ASSOCIATION" AS JUDGMENT DEBTOR, MOTION FOR ORDER TO LEVY A SPECIAL ASSESSMENT, and APPLICATION FOR INJUNCTION; and IN SUPPORT OF APPLICATION BY SIMI VALLEY LE PARC HOMEOWNERS ASSOCIATION FOR INJUNCTION AS AGAINST RECEIVER DATE: May 7, 1999 TIME: 8:30 A.M. DEPT: 32

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

The following Owners of LeParc Simi Valley homes (hereinafter "OWNERS"), as *amici curiae* and parties in interest, by and through their undersigned counsel, do hereby state their support of the application for injunction filed by Simi Valley Le Parc Homeowners Association

and object to the motion filed by ZM Corporation, dba Quikresponse Disaster Control and Construction (hereinafter "ZM") to amend its judgment against Simi Valley Le Parc Homeowners Association to include "Le Parc Community Association," ZM's motion for an order to levy a special assessment and ZM's application for injunction:

(Names Deleted)

In support of their Objection, they respectfully represent:

The OWNERS are the true parties in interest with respect to the attempts by ZM to collect its judgment against Simi Valley Le Parc Homeowners Association. Although the judgment was entered against the Simi Valley Le Parc Homeowners Association, a corporation, ZM is seeking to collect the judgment from the individuals who own condominiums in the Le Parc Simi Valley development. The OWNERS oppose the attempts by ZM to impose personal liability on them for the subject debt, to have the Court disregard the Le Parc Community Association, and to take control of their funds which they have paid to the Le Parc Community Association solely for the benefit of the Le Parc development. Accordingly, the OWNERS fully support the application of the Simi Valley Le Parc Homeowners Association for an injunction permanently prohibiting ZM from interfering with the legitimate and essential operations of the Le Parc Community Association. The OWNERS' position is:

1. Imposition of A Special Assessment Is Improper.
2. The Le Parc Community Association Is A Valid Entity Which Is Not An Alter Ego of the Simi Valley Le Parc Homeowners Association and Which Should Not Be Added As A Judgment Debtor.
3. Based Upon The Equities in This Matter The Le Parc Community Association Must Be Allowed To Function As The Management Entity For the Le Parc Development Without Interference From ZM.

1. Imposition of A Special Assessment Is Improper

The actions of ZM are based upon the notion that the individual home owners may be held personally liable for the debt represented by ZM's judgment, even though the judgment is against the Le Parc Simi Valley Homeowners Association and not against any individual home owner. This notion is unsupported by law. California Corporations Code section 7350(a) expressly provides that a member of a nonprofit mutual benefit corporation is not personally liable for the debts, liabilities or obligations of the corporation. The Debtor is a nonprofit mutual benefit corporation; the OWNERS are members thereof. It follows that the proposed imposition of

liability on the OWNERS is contrary to statute.

ZM seeks to have the individual OWNERS be made personally liable to pay the ZM judgment via a special assessment imposed by this Court. Special assessments, under Civil Code section 1366(b), are limited to situations where the assessment is necessary to pay for an expense which directly relates to the express purposes of the association. Under the terms of the "Covenants,, Conditions and Restrictions" (commonly known as "CC&Rs") for the Simi Valley Le Parc development,

> The assessments levied by the Association shall be used exclusively to promote the recreation, health, safety, and welfare of the members of the Association, the improvement, replacement, repair, operation and maintenance of the Common Area and the performance of the duties of the Association as set forth in this Declaration."

(Article 6, Section 6.3)

Absent a showing by ZM that any portion of the judgment award actually represents a benefit of the type set forth in the CC&Rs which was conferred upon the OWNERS and for which ZM has not already been compensated, a special assessment to satisfy ZM's judgment for tort damages and breach of contract would be unwarranted. Moreover, it would not be permitted by statute. There is no support for the proposition that the language of Civil Code subsection 1366(b)(1) that an emergency ("special") assessment may be imposed to deal with "an extraordinary expense required by an order of a court" contemplates an expense other than for any of the exclusive purposes designated in the CC&Rs.

By seeking a special assessment against the individual OWNERS, payment of which must come from their personal assets, ZM is, in effect, treating the individuals as if they had each personally guaranteed payment of the construction contract entered into between ZM and the Simi Valley Le Parc Homeowners Association in 1994. In fact, no individual agreed to be a guarantor or surety. Few individuals even knew the contract was being entered into. They were not consulted in any way regarding the contract. They certainly did not agree that if a dispute arose under the contract because of the conduct of other individuals that they would personally pay a large sum of money in exchange for which they received no benefit whatsoever.

ZM seeks to impose joint and several liability on the individuals owning properties at Le Parc as if they were general partners of a partnership with which it had contracted. Simply put, the Simi Valley Le Parc Homeowners Association is a mutual benefit nonprofit corporation, not a general partnership. The OWNERS, by purchasing properties at Le Parc, agreed to become members of a homeowners association, for whom liability limitations are provided by State law, not general partners who openly accept full liability for actions of their partnership.

California law protects those who live in common interest developments from personal liability. The California Civil Code provides that a homeowner association is required to carry a significant amount of liability insurance, which is necessarily paid for by the owners. The homeowners association is required to disclose to its members on an annual basis information about the insurance coverage. Moreover, so long as such insurance is in place, owners are protected from civil liability:

> It is the intent of the Legislature to offer civil liability protection to owners of separate interests in a common interest development that have common areas owned in tenancy-in-common if the association carries a certain level of prescribed insurance that covers a cause of action in tort.

Civil Code section 1365.9(a).

Similarly, the Civil Code provides protection to owners in the event a mechanic's lien is recorded against the common property. Sections 3121(b) and 1369 provide that an owner's exposure to liability is limited not only by the value of the labor, services, equipment and materials actually furnished by the lienor, but also by his/her proportional share of the claim which is attributable to his/her unit.

It would be inconsistent with this legislative plan to allow an individual owner to face unlimited liability for the sort of damages which gave rise to ZM's judgment. This is especially so, given the nature of the arbitrator's award, which is not based upon *quantum meruit* or any specific findings of uncompensated benefit conferred upon the owners. Furthermore, ZM's proposal creates the potential for individual liability for some owners (those with the deepest pockets) to exceed his/her 1/264 proportionate share. This result would be contrary to the

statutory scheme developed by the California Legislature in the Davis-Stirling Act and as amended in 1994 when Section 1365.9 was added.

At the outset of its Preliminary Opposition To Ex Parte Application [of the Simi Valley Le Parc Homeowners Association for Injunction], ZM cites the following sentence from the case of the *Marie Antoinette Condominium Owners Association* case, *supra*, as support for the proposition that the law requires a special assessment in a case such as this: "The condominium owners are, after all, the ones who are assessed to pay for improvements, insurance premiums, liability judgments not covered by insurance, and the like." 19 Cal.App.4th at 833. ZM placed visual emphasis on the words "assessed," "pay" and "liability judgments." However, it should be noted, first of all, that the *Marie Antoinette* case did not concern the propriety of assessment of owners to satisfy a judgment of any kind. Rather, the issue in the case was whether, by use of an exculpatory clause in the CC&Rs, an association could shift the risk of loss from water damage to an individual unit from the association to the owner herself. The Court found that the owners could increase or decrease the relative amount of risk assumed by the association by making changes to their CC&Rs. Secondly, the inclusion of the phrase "liability judgments not covered by insurance" in the dictum cannot reasonably be read as a statement of "the law." The Court's opinion was rendered in 1993, prior to the 1994 enactment of Civil Code Section 1365.9 which effectively limited the civil liability of owners for tort damages in excess of the association's insurance coverage.

In the matter at hand, the individual homeowners found out years after the incident that a few individual board members and an outside firm hired by the Board conducted themselves in a manner which resulted in an arbitration award in favor of ZM Corporation. The individuals had no knowledge this conduct was ongoing. They had no involvement in the activities concerning the contract. These individuals had no control over the actions of these persons. They also had no reason to expect they could each be asked to pay a large sum of money for something they got no benefit from and had no part in.

To the extent the owners actually received benefit from ZM, for which ZM was not

compensated, they have had no objection to paying for such benefit in principle. The Le Parc OWNERS have not been seeking unjust enrichment. However, they do object to paying a debt which they feel is not their debt. They do object to paying for the actions of others.

If these OWNERS were shareholders of a for-profit corporation, as shareholders they would not, and could not be expected to pay the debt of the corporation. A judgment against a corporation is collectible against the assets of the corporation only. This mutual benefit non-profit corporation is not different in this respect. Members of a mutual benefit, nonprofit corporation, by statute, are not liable for corporate debts.

> A member of a corporation is not, as such, personally liable for the debts, liabilities, or obligations of the corporation.

Corporations Code Section 7350(a). This protection applies to members of a homeowners association.

> A nonprofit corporation, like a business corporation, has all the powers of a natural person in carrying out its activities. (Corp. Code sec. 7140.) These powers specifically include the power to enter into contracts. (Corp. Code sec. 7140, subd. (i).) A contract in the name of the corporation 'binds the corporation, and the corporation acquires rights thereunder whether the contract is wholly or in part executory.' (Corp. Code sec. 7141, subd.(b).) Correspondingly, a member of a nonprofit corporation 'is not, as such, personally liable for the debts, liabilities, or obligations of the corporation.' (Corp. Code sec. 7350, subd. (a).)

Gantman v. United Pacific Insurance Company, (1991) 232 Cal.App.3d 1560, 1567.

In an analogous situation a Court refused to compel a nonprofit corporation to increase assessments to satisfy a series of judgments against the corporation. In *In re General Teamsters, Warehousemen and Helpers Union Local 890*, 225 B.R. 719 (Bankr.N.D.Cal. 1998), a labor union, a nonprofit corporation, confirmed a Chapter 11 plan over the objections of the judgment creditors. The plan provided for payment of only 31% of the judgment debts and did not require an increase in monthly assessments to fully satisfy the debts. Like the homeowners association, the Debtor's income consisted of monthly dues (and initiation fees) received from Debtor's members. The Debtor operated on a "break even" basis. Like homeowner associations, the labor union's development, purpose and function, to benefit its members, is governed by statute.

It is statutorily entitled to collect dues from its members in certain minimum amounts, but increases in such amounts require approval of members by majority vote. The purpose of the statute was to limit the authority of the union officers and vest control over increases in dues rates in the members themselves, not management. The Debtor did not provide in its reorganization plan for an increase in dues because it had reason to believe its members would not approve an increase. As in the case of homeowners associations, the applicable statute provides that money judgments against unions are enforceable only against the union and its assets, not against members and their assets.

> Any money judgment against a labor organization in a district court of the united States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

29 U.S.C. 185(b).

> When Congress passed [the statute] it declared its view that only the union was to be made to respond for union wrongs, and that the union members were not to be subject to levy. ... [The statute] exempts agents and members from personal liability for judgments against the union (apparently even when the union is without assets to pay the judgment).

Id., at 730, citing *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 247-248 (1962). The Court found as a "valid point" the Debtor's contention that

> ...leaving members with no realistic option other than to raise their dues for the sake of paying creditor's judgment against Debtor could be considered to violate the spirit of the statute, which prohibits Debtor from shifting its own liability under the judgment to its members

In confirming the plan, the Court found that

> ...Debtor's decision not to seek a dues increase with which to fund the Plan appears to have been a rational one that was not based on bad faith.

Id., at 731. Just as in the case of the labor union, the increase in assessments by a homeowners association to satisfy a debt of the association would violate the spirit of the governing statute and the association's failure to increase the assessments does not constitute bad faith