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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

Case No.

vs. Plaintiff,

MOTION FOR PROTECTIVE ORDER

Defendants

Substance of Protective Order Sought

Plaintiff seeks a protective order prohibiting defense counsel from inquiring, at the depositions of the individual condominium owners, about Plaintiff's counsel's communications with the owners (whether directly from attorney to client, or between the client's representatives). ORCP 36C(4). Plaintiff's counsel has asked defense counsel for assurances that they will not seek such privileged information, but defense counsel have declined to provide such assurances and have taken the position, to

1 varying degrees, that such communications are not protected.

2 Background Facts

3 Plaintiff is an incorporated condominium owners association. There are 18 units in
4 the condominium, with 16 unit owners (one woman owns three units). Plaintiff, for itself
5 and as the statutorily authorized representative of its members, has brought suit against the
6 building's developer, contractor and selling Realtors for construction defects and fraud.

7 Plaintiff, like all condominium owners' associations, was organized as the "means
8 through which the unit owners may take action with regard to the administration,
9 management and operation of the condominium." ORS 100.405(1). In other words, while
10 the Association is suing in its own name as the real party in interest (ORS 100.405 (4)(d)),
11 it is acting both on its own behalf and as the representative of its owners.

12 The Intertwined Relationship Between Plaintiff and its Members

13 The relationship between Plaintiff Association and its member/owners is complex:

- 14 • There is complete identity of membership: All condominium owners are
15 automatically members of the Association;
- 16 • There is identity of harm: The owners each own undivided 1/18 interests in the
17 common areas of the condominium building, and so are harmed individually by the defects
18 in the common areas. At the same time, the Association is legally obligated to repair and
19 maintain the common areas, which is made more expensive by the defects, so as a
20 corporate entity it, too, has suffered direct harm. Closing the circle, the Association has the
21 right and duty to make assessments and, if necessary, record liens back against the
22 individual units for those costs of repair. ORS 100.405(1), (4)(b), (f), (i), (j), (p); ORS
23 100.450. Thus, both the owners and the Association have suffered harm (and have standing
24 to sue), in an intertwined fashion. In such situations, the Association itself is the proper
25 party in interest on both its own and its members' behalf.

2 • Legal advice is necessarily shared with Board members and non-Board members
3 alike: The Association functions more like a family business or a small trust than like a
4 business corporation. The Association's affairs are governed by a Board of Directors, who
5 are Plaintiff's counsel's primary client contacts. However, pursuant to the Association's
6 bylaws, a supermajority of the unit owners were required to vote approval before the
7 Association could hire an attorney to prosecute this lawsuit; to gain such approval, legal
8 advice and evaluations had to be given to the members themselves (not just the Board).
9 Further, pursuant to the "open meetings" rule of ORS 100.420 (1), most Board meetings
10 (including some of those in which legal advice has been given or discussed) have been
11 attended by Association members who are not Board members. In addition, Plaintiff's
12 counsel has had to speak extensively with the Association's individual owners in order to
13 gather information necessary to prepare and conduct the lawsuit. Affidavit of

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15 For these reasons, there is no way to cleanly separate the interests of the
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17 ¹ Recognizing these interrelationships, the Oregon Legislature has authorized the
18 Association to bring suit, in its own name, for those combined claims. ORS 100.405(1)
19 provides: "An association of unit owners shall be organized to serve as a means through
20 which the unit owners may take action with regard to the administration, management and
21 "[i]nstitute, defend or intervene in litigation or administrative proceedings in its own
22 name," on behalf of itself or of two or more of its unit owners. The Association's standing
23 to sue as the real party in interest in both its own and its "representative" capacities, both
24 under the Condominium Act and the common law, was extensively briefed (with extensive
25 support from other jurisdictions as well as Oregon) in Plaintiff's *Opposition* to Defendants
Dunning and Thornton's *Rule 21 Motions* heard by Judge ; that *Opposition* is
incorporated by this reference.

1 Association from the interests of the unit owners.

2 **Issue Presented**

3 This motion seeks a simple order: protection for Plaintiff's counsel's
4 communications with the principals/individual shareholders of a small, closely-held
5 condominium association. Plaintiff's counsel does not doubt at all that the attorney-client
6 privilege attaches to these communications, given the law (summarized below) and the
7 broad policies behind the privilege. However, defense counsel apparently disagree.

8 Therefore, this motion presents a narrow legal issue: whether counsel's
9 communications with the unit owners/members of a small condominium association, and
10 the members' subsequent re-publications of those communications, are protected by the
11 attorney-client privilege in the following circumstances:

12 1. The Association is acting partly in a representative capacity on behalf of its
13 members/unit owners pursuant to ORS 100.405(4)(d) (suits in Association's own name on
14 behalf of two or more unit owners) and ORS 100.405(1)(Association is "means through
15 which the unit owners may take action with regard to the administration, management and
16 operation of the condominium") and to the common law of representative suits (*Wright v*
17 *United Brotherhood of Carpenters & Joiners of America*, 432 U.S. 333 (1977);

18 2. The Association is small, more like a family business than a large corporation;
19 five (5) of its 16 members currently sit on its Board of Directors, and others have served as
20 directors or officers in the past;

21 3. The Association's Declaration (drafted by the defendant developer!) required a
22 supermajority vote of the Association members (not just its Board of Directors) to enable
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1 this litigation to be brought, which required counsel to give advice to all those voting;²

2 4. As required by statute, some Board meetings at which legal advice has been
3 discussed have necessarily been open to Association members; and

4 5. Counsel has been required to hold detailed discussions with Association members
5 (not just Board members) to gather information and develop the Association's claims.

6 **The Relevant Communications Are Protected by the Attorney-Client Privilege**

7 The starting point for analysis is ORS 40.225(2) (ORE 503(2)(d)), which allows a
8 client to refuse to disclose, and to prevent others from disclosing, any confidential
9 communications occurring between the client's attorney and the client's "representative."
10 (It also protects discussions between "representatives". v. , 325
11 Or 492, 504-5 (1997).) In this case, the client is the Association, an entity (*see OHSU*, 325
12 Or at 500). The question is whether the Association's members/unit owners are
13 "representatives" of that entity, communications with (or among) whom may be held
14 privileged.

15 In several letters, defense counsel has asserted that communications
16 with anyone outside the Association's "control group" (which he defines as the Board of
17 Directors) cannot be privileged. However, the "control group" test is no longer good law.
18 In 1981, the United States Supreme Court "rejected the 'control group' test and broadened
19 the scope of the attorney-client privilege in federal proceedings." *OHSU*, 325 Or at 507,
20 citing *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584
21 (1981). The *OHSU* court continued: "In response to that case [*Upjohn*] and to the
22 developing trend toward recognizing a broader lawyer-client privilege in the corporate

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24 ² Counsel was retained by the Association for corporate matters prior to his retention for
25 purposes of this lawsuit. Therefore, an attorney-client relationship was in place at the time
counsel gave advice concerning this litigation to the larger membership.

1 setting, the 1987 Oregon Legislature adopted a much broader definition of 'representative
2 of the client' than had existed before." *OHSU*, 325 Or at 507-508.

3 The policy behind this broadening of the privilege was clear. _____, chair of
4 the Senate Judiciary Committee, testified:

5 [A]s a practical matter, there are many other individuals outside of this control
6 group *** that need to communicate on behalf of the client with the attorney for the
7 purpose of receiving legal advice. And this bill then changes the attorney-client
8 privilege by expanding it to include individuals who are representing the client and
9 who are seeking the advice or giving the information [or] making the
10 communication for the purpose of receiving legal advice. And whether that person is
11 an employee or an officer or someone else that's described in here, *** who
12 communicates with the attorney for the purpose of seeking legal advice, those
13 communications will be protected.

14 *Id.* at 508 (all emphases and deletions in original); *see also* discussion of laudable public
15 policies advanced through the privilege at *OHSU*, 325 Or. at 500, n. 6.

16 The privilege now extends to communications between an attorney and any
17 "representative" of the client, defined broadly as "a principal, an employee, an officer or a
18 director of the client." ORS 40.225(1)(d)(ORE 503(1)(d)). Those terms should be
19 interpreted broadly to advance the policy goals behind the privilege, including protecting
20 counsel's ability to information-gather and educate all of his client's representatives. In this
21 case, each Association member is either a director (5 of 16), an officer (who need not also
22 be directors), or a principal of the Association.³

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24 ³ According to the Condominium Act, the Association is an agent of each of the unit
25 owners, who are the principals of the Association separate and apart from being its
shareholders. The Association is a "means through which the unit owners may take action"

1 Further, the privilege extends to discussion among the client's "representatives", or
2 between the "client" and the client's "representatives" (e.g., from the Board to the
3 membership). Again, the *OHSU* decision is helpful: "For an entity ... to make use of legal
4 advice, the entity must inform at least some individuals of the content of that advice in
5 order to enlist their assistance and aid in carrying out the advice" (325 Or at 502). The
6 Court continued:

7 "[T]he legal advice must originate with the lawyer, but the lawyer need not be the
8 one who relays that advice directly. Under OEC 503(2)(d), a client has a privilege
9 to refuse to disclose a confidential communication between the representatives of the
10 client or between the client and a representative of a client, if the communication
11 was made for the purpose of facilitating the rendition of professional legal services
12 to the client. *** Logically, then, the privilege is not limited to communications
13 made directly from the lawyer to the client.

14 325 Or at 504-505. Therefore, the order should exclude any attempt to learn what
15 discussions have occurred within the Association relating to legal advice.

16 **There Is a Bona Fide Need for the Relief Sought**

17 There is reason to fear improper questions will be asked. Crystal Construction's
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19 and may institute litigation "on behalf of" its owners. ORS 100.405(1), (4)(d). This
20 situation tracks the broadest definition of "principal": "The term 'principal' describes one
21 who has permitted or directed another ... to act for his benefit and subject to his direction
22 and control." West, *Black's Law Dictionary* (5 ed. 1979). As a matter of corporate and
23 associational law, the relationship between the Association and its owners is more complex
24 than simple master/servant, but for purposes of the attorney-client privilege -- with the
25 public policy benefits that stand behind it -- the unit owners are broadly the Association's
"principals" and therefore its "representatives", and their communications with the
Association's lawyer are privileged.

1 counsel has noticed the depositions of eight (8) unit owners for May 27, 1998. Crystal's
2 counsel mentioned the attorney-client privilege issue in her letter initiating the scheduling of
3 those depositions. Prior to that letter, Plaintiff's counsel had discussions with other defense
4 counsel, who asserted that the privilege did not attach to attorney/unit owner
5 communications. See Affidavit of . Therefore, upon receiving notice of the
6 homeowner depositions, Plaintiff's counsel became concerned that such deponents might be
7 asked about attorney-client communications. Accordingly, Plaintiff's counsel asked for
8 reassurances from defense counsel. In response, defense counsel have declined to provide
9 such assurances. Exhibits A-C; Affidavit of

10 Fighting over this issue during the depositions would be counterproductive,
11 annoying, embarrassing, and oppressive, and would cause the depositions to take longer
12 than necessary, unduly burdening the witnesses; and a hasty telephone call to a judge
13 during the deposition is not likely to lead to a well-briefed, reasoned analysis. Accordingly,
14 Plaintiff moves for a protective order confirming that the communications between
15 Plaintiff's counsel and the members of his client are protected by the attorney-client
16 privilege, and prohibiting any questions at the Association members' depositions which
17 seek information protected by such privilege. ORCP 36C(4)(order "that certain matters not
18 be inquired into").

19 Based on the foregoing, Plaintiff respectfully requests the Court issue a protective
20 order in the form appended hereto.

21 RESPECTFULLY SUBMITTED this 26 day of May, 1998.

22 _____, OSB #
23 Of Trial Attorneys for Plaintiffs
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