

(between Defendant Larry Tagert and the Townhomes on the Park Homeowners' Association, Inc.) between 2014 and 2018, as well as, in Defendants' violations of: 1) the Townhomes on the Park Homeowners' Association, Inc.'s Declaration of Covenants and By Laws, as well as, 2) the laws of the State of Texas, specifically, the the Uniform Condominium Act and Texas Property Code, as well as, the Texas Deceptive Trade Consumer Protection Act (Business and Commerce Code Chapter 17, §17.46 *et sequitur*),³ and that the Defendants intentionally and knowingly conspired to achieve the above violations against the Plaintiffs' rights fraudulently, as well as, breaching their contracts with Plaintiffs, as well as, in violation of their fiduciary duties, averring in support as follows;

The Defendants are hereby sued "Individually", "Collectively" and in their "Official" Capacities as Agents or former Agents of Townhomes on the Park Homeowners' Association, Inc. Texas Rule of Civil Procedure 78 and 79.⁴ Each Attorney who represents a Defendant should indicate the limitation of their representation concerning the Defendant(s), as an "Individual", or if "Collectively", as well as, the "Official" or Individual Capacities under which the Plaintiffs have brought any specific claim against their client. If Defendant(s) secure relief from one of the above capacities that alone does not dispose of other alternative capacities under which Plaintiffs may have sued the Defendant(s).

1. **Discovery:**

³ "DTPA".

⁴ Hereinafter referenced as "Tex.R.Civ.P. 47".

Plaintiff respectfully state that they intend to conduct discovery under Level 3 and hence do hereby move respectfully for an appropriate Docket Control and Discovery Plan Court Order pursuant to Tex. R. Civ. P. 190.4.

2. **Jurisdiction and Venue:**

Plaintiffs' claims are within the jurisdictional limits of the District Courts for Harris County Texas. Venue is proper in that all the occurrences and/or transactions occurred in Harris County Texas. Plaintiffs seek damages in excess of \$100,000 USD.

3. **Conditions Precedent:**

Plaintiffs have performed all conditions precedent.

4. **Parties:**

a. **Plaintiffs:**

Plaintiffs, Loren Bernhardt, Jennifer Bernhardt and Steve Deilenhein bring this lawsuit as Homeowners and herein otherwise are referred to as the "Plaintiffs". Plaintiffs each own and have owned a unit in the Townhomes on the Park Condominiums, to wit Plaintiffs Loren and Jennifer Bernhardt Unit #8476 and Plaintiff Steve Deilenhein Unit #8285. Plaintiffs all are over the age of twenty-one (21) years, resident domiciliaries of Harris County Texas and citizens of the State of Texas, as well as, the United States of America, as well as, they have personal Knowledge of all the assertions made in this lawsuit.

Service of Process of pleadings, discovery, instruments and other papers upon Plaintiffs is effective by their delivery to their undersigned attorney, Donald T. Cheatham at his law offices at 7500 San Felipe Road, Suite 600, Houston, Texas 77063, 713-335-8945 Telephone, 713-335-8946 Telecopier, and email: cheathamlaw@aol.com, pursuant to Tex.R.Civ.P. 21a.

b. **Defendants:**

Defendant Larry Tagert is a citizen of the United States of America and the State of Texas, as well as, a resident domiciliary of Harris County Texas and above the age of twenty-one years. Service of Process of pleadings, discovery, instruments and other papers upon Defendant Larry Tagert is effective by their delivery to his address, 5928 Allday Drive Houston, Texas 77036.

Defendant Townhomes on the Park Homeowners' Association, Inc. is a Texas corporation.

Service of Process of pleadings, discovery, instruments and other papers upon Defendant Townhomes on the Park Homeowners' Association, Inc. is effective by their delivery to their registered agent Larry Tagert at its registered address, 5928 Allday Drive Houston, Texas 77036.

5. **Grounds for Action:**

This cause of action against the Defendants is based on, but not limited to the following:

Defendants violated the Townhomes on the Park Homeowners' Association, Inc.'s Declaration of Covenants. Subsequent to the Defendant's Gross Negligence, Willful

Misconduct, as well as, other tortious and contractual Violations, Defendants exposed Plaintiffs and Plaintiffs' families, properties and health to damages and losses;

Defendants violated the Townhomes on the Park Homeowners' Association, Inc.'s By Laws;

Defendants committed Gross Negligence, Willful Misconduct and other tortious and contractual Violations, exposing Plaintiffs and Plaintiffs' families, properties and health to damages and losses;

Defendant Larry Tagert commingled and commingled his personal affairs, money and property with the Townhomes on the Park Homeowners' Association Inc.'s affairs, money and property, as well as, *vice versa*, and thereby deprived the Plaintiffs' of rights and benefits of the Townhomes on the Park Homeowners' Association, Inc.'s ownership privileges and common areas; Subsequent to these Violations, Defendants exposed Plaintiffs, Plaintiffs' families, properties and health to damages and losses;

Defendants engaged in Deceptive Trade Practices and Extortion in violation of the Texas Commerce and Business Code, and thus deprived the Plaintiffs of rights and amenities;

Defendants engaged in fraudulent practices;

Defendants' refused to pay Insurance claims and to resolve damages without conducting a reasonable investigation based upon all available information;

Defendants did not attempt in good faith to effectuate prompt, fair and equitable settlement of claims in which liability has become reasonably clear;

Defendants' initiated and instituted illegal claims proceedings, which compelled the claimants Plaintiffs herein to institute this litigation to recover amounts due them for the Defendants' liability to reconstruct and repair the properties and to get relief subsequent to the Defendants' failures and omissions;

Defendants failed to present any offer to correct the damages done to the Plaintiffs' property from Defendants' failure to perform specific acts;

Defendants expressed and showed favoritism in their settlements of another homeowner's claims that is similar to the Plaintiffs' claims;

Defendants breached its contracts with the Plaintiffs;

Defendants breached its fiduciary duties to the Plaintiffs;

Defendants conspired to violate the Plaintiffs' rights;

6. **STATEMENT OF FACTS:**

At some point in time prior to 2000, Defendant Larry Tagert became the manager of the Townhomes on the Park Homeowners' Association, Inc. and the Townhomes on the Park Condominiums.

Under Defendant Larry Tagert's tenure, Defendants practiced deceptive trade practices.

At all times relevant hereto each Plaintiffs herein is and was a “consumer” as the DTPA defines.

At all times relevant hereto Defendants were and are providers of services as the DTPA defines.

At all times relevant hereto Defendants provided services, which were not marketable, in that they were below par and shoddy, as the DTPA defines and provides.

Following Hurricane Ike in 2008, Defendants submitted claims to insurers and the governments. In 2015, Defendants received money to effectuate and repair damages Hurricane Ike occasioned and Defendants commenced to perform work on the Townhomes on the Park units, which Hurricane Ike damaged.

Defendants commenced work on the Plaintiffs Units, but soon abandoned the work.

Defendants’ management did not send any crew to finish the repairs to Plaintiffs’ from then until the present.

Defendants since have denied every legitimate maintenance request Plaintiffs have made. Plaintiffs and their family were exposed to black mold because of the Defendants' failure and refusal to implement proper maintenance of a leaking roof and a broken hot water pipe in the common area. The broken pipe in this case belonged and belongs to Defendants’ common areas.

Insurance immediately attended to and paid for it.

An investigation report was immediately passed on to the Defendants. Yet the Defendants ignored the report and did not honor Plaintiffs' requests for maintenance.

Plaintiff Loren Bernhardt then called the City of Houston's residential inspector for help. The City of Houston advised the Plaintiff to get a "TREC" licensed Inspector to check out his property for the cause of the damage. Shortly thereafter this Plaintiff's tenant informed this Plaintiff that Plaintiffs' unit's sheet rock was soaked and water logged. Hot water from the ceiling rained in the unit and steam filled the whole unit. This Plaintiff telephoned the Defendants and reported the flooding incident. Defendants promised to attend to the matter, but they did not treat it with the required urgency. Defendants then insinuated that Plaintiff would be responsible to clean up the repercussions of the Defendants' negligence and failure to maintain. Plaintiffs Bernhardt eventually paid for the proper repairs.

The Townhomes on the Park Homeowners' Association, Inc. misappropriated maintenance finances from Plaintiffs and other homeowner members, and used them for Defendant Larry Tagert's personal interests. Defendants Have abandoned the common elements' maintenance.

Now, after securing sufficient units mostly through embezzlement of the maintenance assessments and other illegal artifices and machinations, as well as, the use of purported

proxies, Defendant Larry Tagert under the guise of authority from Townhomes on the Park Homeowners' Association, Inc. has and is now over-taxing the remaining Owners to correct the maintenance omissions and failures that made he and his wife more or less the majority owner.

Defendants have also used and will continue to use special assessments to perpetrate fraud.

Plaintiffs are entitled to Rescission, to the return of the consideration paid to the Townhomes on the Park Homeowners' Association, Inc. together with such further special damage or expense as may have been reasonably incurred and which will be proven after discovery at trial.

Plaintiffs are entitled to an equitable accounting from Defendant of all receipts and disbursements made in the past four years.

Plaintiffs are also entitled to an award of attorneys' fees and costs under the DTPA and the Condominium Act. Plaintiffs are also entitled to an award of pre and post judgment interest.

Plaintiffs have suffered severe emotional distress as a direct and proximate result of Defendants tortious omissions and commissions under the DTPA.

Plaintiffs are entitled to nominal, actual, compensatory and exemplary damages, as Texas law might allow, especially under the DTPA.

7. **Some AUTHORITIES:**

Texas Courts have long recognized that where one person trusts and relies upon another, the relationship between the two may be a fiduciary.⁵

The Defendants' False Misleading Acts are Actionable Under the DTPA.

The goals of the Townhomes on the Park Homeowners' Association, Inc. are personal pecuniary gain particularly for Defendants Larry Tagert, whose wife works in the office as a "bookkeeper" and as head of security for the Townhomes on the Park condominiums.

The Defendants' have expressed interest to solely own the entire units in the project and to convert it into a rental tenement which directly conflicts with the purpose for the establishment of Townhomes on the Park Homeowners' Association, Inc. The creation of Townhomes on the Park Homeowners' Association, Inc. is to promote individual home ownership by separate people or by individual families.

WHEREFORE AND FOR ALL OF THE ABOVE REASONS, The defendants' acts were "unconscionable" under the Texas Business & Commerce Code, DTPA § 1745, and Plaintiffs are entitled to relief also under §§ 17.45(5), 17.46(b)(1-4), 17.46(24), and 17.50(a).

⁵ ***Fitzgerald v. Hull***, 150 Tex. 39, 237 S.W. 2d. 256, 261 (1951).

Count One: Commingling and Unjust Enrichment:

Defendant Larry Tagert has grossly overpaid himself for management at the expense of and to the Townhomes on the Lake Homeowners' Association, Inc. and the individuals who own condominium units.

Defendants also violated the law when they commingled personal business affairs, money and property with the Townhomes on the Park Homeowners' Association, Inc.'s affairs, money and property.

Liability exists for the Defendants when they cause financial harm to the Townhomes on the Park Homeowners' Association, Inc. or the individual Homeowner; act solely on their own behalf and to the detriment of the Townhomes on the Park Homeowners' Association, Inc. and / or the Homeowner; or commit a crime or wrongful act.

The violations of the Association's Declaration of Covenant for personal pecuniary gain subjects Defendant Larry Tagert to personal liability. The Defendant Larry Tagert is personally liable for financial harm caused to the Plaintiffs when he Breached his Duty of Care to the Townhomes on the Park Homeowners' Association, Inc. and the Plaintiffs; and Breached his Duty of Loyalty to the Townhomes on the Park Homeowners' Association, Inc. and the Plaintiffs; Misappropriated corporate assets for personal use or use by another business;

commingled personal and business assets; or Fail to disclose potential or actual conflicts of interest

Count Two: Gross Negligence:

These Defendants are and were grossly negligent because they committed acts and omissions with conscious indifference to the rights, safety, and welfare of the Plaintiffs and the Plaintiffs' families.

Evidence of gross negligence can be inferred from evidence of carelessness.⁶

Count Three: Breach of Contract.

By the agreement in the Covenant and maintenance oversight agreement, Defendants promised to perform maintenance and to maintain the project as a first class property and Defendant Larry Tagert did not.

Between 2014 and 2018, Defendants failed to maintain the common area and the common elements and thus became exposed to liability from damages caused by the defective common element. Upon Plaintiffs' request for relief, the Defendants committed Gross Negligence, Willful Misconduct and Violation of the Townhomes on the Park Homeowners'

⁶ See, e.g., **General Chem. Corp.**, 852 S.W.2d 916 at 921 (TEX. 1993). The Defendants' mental state can be proven by direct or circumstantial evidence. See, e.g., **Transportation Insurance Co. v. Moriel**, 879 S.W. 2d 10, 22-23 (TEX. 1994)..

Association, Inc.'s restrictive covenant, when it opposed implementation of the Plaintiffs' insurance claims or request for maintenance relief.

Subsequently, Defendants exposed Plaintiffs and Plaintiffs' families, properties, finances and health to damages and losses, for which the defendants are liable.

In support, Plaintiffs hereby adopt the following and incorporate the same by reference, as if set forth fully herein: (1) Its argument on the issue of Defendants' Breach of the Association's By -Laws, (2) Its argument on the issue of the defendants' violation of the Homeowners' Declaration of Covenant, and (3) the statement of facts.

The defendants' breach of contract is synonymous to the substance of the defendants' restrictive covenant violations, which includes, but are not limited to, (a) misappropriation of funds by selectively using the Townhomes on the Park Homeowners' Association, Inc.'s maintenance fees for personal benefits; (b) the procurement of inferior Insurance under what the Declaration of Covenant called for; (c) the deliberate negligence and failure to maintain the Plaintiffs' properties when legally liable; (d) the deliberate failure to maintain the condominium's common element, common area and to perform necessary repairs; (e) the deliberate failures and omissions of needed common area repairs to appurtenant apartments that did not belong to defendants; (f) the bad faith delay in the settlement of the Association's liabilities to other homeowners; (g) the practice of poor maintenance management to enhance personal pecuniary gain; (h) the failure of the defendants to adhere to the Declaration of

Covenant and the By-Laws (i) the breach of Insurance contract; (j) the breach of duty of good faith and fair dealing; (k) over compensation for supposed management, and (l) fraud.

Count Four: Breach of Fiduciary duty.

These Courts have long recognized that where one person trusts and relies upon another, the relationship between the two may be a fiduciary.⁷

Plaintiffs assert that by the covenants, the relationship between Defendants and themselves is that of a fiduciary.

The defendants omitted the needs and matters of the Plaintiff's maintenance as a strategy to fulfill the Defendants' pecuniary gains. Thereby, Plaintiffs assert that Defendants breached their fiduciary duties to Plaintiffs by putting their personal interests before the Plaintiffs' needs and interests. The Defendants have a fiduciary duty to the Plaintiffs. A fiduciary is a special relationship of trust.⁸ The Townhomes on the Park Homeowners' Association, Inc.'s "By Laws" created a relationship of trust with and between its Board members, homeowners and managers.

Count Five: Fraud

Defendants Committed Fraud.

⁷ *Fitzgerald v. Hull*, 150 Tex. 39, 237 S.W. 2d. 256, 261; (1951).

⁸ See *Kline v. O'Quinn*, 874 S.W.2d 776 (Tex.App. Dist. 14-Houston 1994, writ denied).

Fraud is committed when: (a) a material misrepresentation was made; (b) that it was false; (c) that when the person made it, he knew it was false or made it recklessly without any knowledge of its truth and as a positive assertion; (d) that he made it with the intention that it should be acted upon by the party; (e) that the party acted in reliance upon it and (f) that the party thereby suffered injury.

Defendants owed Plaintiffs certain legal duties.

Through various acts of commission and omission, Defendants breached those legal duties.

Through various acts of commission and omission, Defendants defrauded Plaintiffs to their financial detriment.

Defendants actively and passively, as well as, defrauded Plaintiffs in that they knowingly made material misrepresentations of fact or omitted to inform Plaintiffs of important information regarding repair and maintenance to the individual Plaintiff units knowing and aware that such misrepresentations to be false at the time they were made or omissions to be material at the time Defendants omitted them upon which each Plaintiff relied to his or her financial detriment which directly and proximately caused Plaintiff financial losses and damages.

Count Six: Negligent Misrepresentations

Defendants repeatedly materially misrepresented to Plaintiffs, as aforesaid.

Count Seven: Conspiracy and Extortion

At all times relevant hereto Defendants Larry Tagert and Townhomes on the Lake Homeowners' Association, Inc. entered into and engaged in an active civil conspiracy to defraud Plaintiffs for Defendant Larry Tagert's own personal gain and unjust enrichment.

At all times relevant hereto Defendants entered into and engaged in an active civil conspiracy to defraud Plaintiffs as aforesaid.

Conspiracy is an agreement between two or more people to commit an act prohibited by law or to commit a lawful act by means prohibited by law. Conspiracy is grounds for a lawsuit. The essence of the crime or tort of conspiracy is the agreement. Agreement in a conspiracy can be inferred from the action of the conspirators. There is unanimous precedent that, in a conspiracy, it is not necessary to show that the parties met and actually agreed to undertake the performance of an unlawful act nor is it necessary that they had previously arranged a detailed plan for execution or that the parties entered into a formal or expressed agreement, but rather an agreement can be shown by a tacit understanding between co-conspirators to accomplish an unlawful act or a lawful act through an unlawful means, which may be inferred from the development and collocation of the circumstances.

The evidence supports, and that Plaintiffs adduce at trial will conclusively prove the elements of the Defendants' conspiracy.

Precedent⁹, states that the defendant's subjective mental state can be proven by direct or circumstantial evidence.

INJUNCTIVE RELIEF

Plaintiffs are entitled to a temporary restraining Order, a Preliminary Injunction and a Permanent Injunction for the following reasons:

Defendants have initiated a foreclosure proceeding against the Bernhardt Plaintiffs for unpaid maintenance fees, which maintenance fees these Courts or the assigned District Court should suspend and enjoin *in toto* until conclusion of this case and/or the Defendants' provision of an accurate accounting through the issuance of a preliminary injunction, which should also enjoin any further foreclosure action against any unit owner, which TRO these Courts or the assigned District Court after Notice and Hearing should expand to a preliminary injunction, which these Courts or the assignee District Court if appropriate should expand to a permanent injunction.

Otherwise, Plaintiffs shall suffer irreparable injury.

This equitable relief is within the Public policy of the State of Texas.

⁹ *Transportation Insurance Co. v. Moriel*, 879 S.W. 2d 10, 22-23 (TEX. 1994).

There is a strong likelihood that Plaintiffs shall prevail on the merits of this case.

WHEREFORE THE PREMISES CONSIDERED, Plaintiffs respectfully submit their Original Petition and pray for the following relief:

A. That Citations issue and that upon service or process on Defendants, that this Court require the Defendants to appear and answer;

B. That the trial Court after jury trial, render a judgment for the damages proven upon the verdict rendered at trial; and,

C. That this Court grants all such other relief to which the Plaintiffs are entitled in equity or at law, or as the nature of this cause requires, which these Courts deem meet, just and proper.

Plaintiffs demand a trial by jury.

Plaintiffs pray for general relief.

Respectfully Submitted,

By: /s/ Donald T. Cheatham

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