E-FILED
Transaction ID: 1-18-0059
File Date: 4/17/2018 2:51 PM
Thomas D. Palella
Clerk of the Appellate Court
APPELLATE COURT 1ST DISTRICT

**No. 1-18-0059**

**IN THE APPELLATE COURT OF ILLINOIS**
**FIRST DISTRICT**

| | | |
|---|---|---|
| FRANKLIN P. FRIEDMAN, AS TRUSTEE OF THE FRANKLIN P. FRIEDMAN LIVING TRUST, individually and on behalf of all others similar situated, | ) | On Appeal from the Circuit Court of Cook County, Illinois |
| *Plaintiff-Appellee,* | ) | Case No. 2016 CH 15920 |
| v. | ) | The Honorable Thomas R. Allen, Presiding |
| LIEBERMAN MANAGEMENT SERVICES, INC., | ) | |
| *Defendant-Appellant.* | ) | |

**MOTION OF THE COMMUNITY ASSOCIATIONS INSTITUTE – ILLINOIS CHAPTER FOR LEAVE TO FILE ITS *AMICUS CURIAE* BRIEF, *INSTANTER*, IN SUPPORT OF DEFENDANT-APPELLANT, LIEBERMAN MANAGEMENT SERVICES, INC.**

The Community Associations Institute – Illinois Chapter, by its attorneys, Kovitz Shifrin Nesbit, pursuant to Illinois Supreme Court Rule 345(a), respectfully submits this Motion for Leave to File Its *Amicus Curiae* Brief, *Instanter*, in Support of Defendant-Appellant, Lieberman Management Services, Inc. and, in support thereof, states as follows:

1. The Community Associations Institute ("CAI") was organized in 1973 as a joint venture between the National Association of Home Builders and the Urban Land Institute, as a not-for-profit educational organization.

2. CAI's mission is to serve as a national voice for those involved in community associations, including homeowners, governing boards, services providers, and vendors.

3. CAI's primary purpose is to provide educational and legislative assistance, and to act as a clearing house for ideas and practices, to foster the successful operation and management of all types of residential community associations.

4. To accomplish this goal, CAI offers seminars, workshops, and conferences, and publishes resource materials, concerning management, governance, and operation of community associations.

5. CAI also provides nationally recognized accreditation for community association managers, lawyers, reserve specialists, and insurance professionals.

6. Currently, CAI has more than sixty (60) chapters throughout the United States with 32,000 members nationally, representing more than 315,000 community associations and 62 million residents. Among these chapters is the Community Associations Institute – Illinois Chapter ("CAI – Illinois").

7. The *amicus curiae* here, CAI – Illinois, has over 1300 members including 250 businesses, 350 community association Board members and unit owners, and over 650 community association managers and management companies representing the interests of over 3.5 million homeowners in 18,000 community associations. The Illinois Chapter is one of 60 Community Associations Institute chapters in the nation.

8. The particular mission of CAI – Illinois is to provide education and resources to Illinois residential condominium, cooperative, and homeowners associations, as well as to represent their interests and the interests of Illinois community association members, on issues of legal importance, such as is presented by the case herein on appeal.

9. A substantial portion of Illinois community associations depend for their ability to function and otherwise smooth governance upon property managers and the property management companies that employ them.

10. Were the certified questions presented by this appeal to be resolved by this Court in the affirmative, CAI – Illinois fears that property management companies – for-profit corporate entities – will cease to provide a number of the services upon which associations depend for their governance, including, but not limited to, as to providing the statutorily required Section 22.1 closing documents.

11. CAI – Illinois thus submits its attached proposed Brief to assist this Court in deciding the certified questions raised by the Appellant herein, which such questions present issues of wide-ranging significance to the associations in Illinois.

12. The information CAI – Illinois seeks to impart herein is inclusive of the mandatory authority of this jurisdiction, as well as the legislative purpose and history of the Illinois Condominium Property Act, 765 ILCS 605/1, *et seq.* (the "Act").

13. Second, and to the extent that Section 22.1 of the Act could be construed as ambiguous, CAI – Illinois addresses in its proffered *amicus curiae* Brief whether, as a matter of practice and public policy, the Act – which is intended to and does govern not-for-profit condominium associations – is intended also to cover the *for*-profit corporations that assist the volunteer-run associations with their governance.

14. Finally, CAI – Illinois wishes to reinforce that, whatever constraints the Act imposes on the charges the Association itself may bill, here, the Plaintiff opted to bypass the Association and proceeded directly to obtain the required closing documents, on an expedited basis, through a website portal maintained for this purpose by the property management company.

WHEREFORE, CAI – Illinois respectfully requests that this Court grant it leave to file the accompanying *Amicus Curiae* Brief, *Instanter,* and that – as requested therein – this Court resolve the certified questions presented in the negative.

Respectfully submitted,

COMMUNITY ASSOCIATIONS
INSTITUTE – ILLINOIS CHAPTER

By: /s/ Diane J. Silverberg
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**No. 1-18-0059**

In the

# Appellate Court of Illinois

## First Judicial District

FRANKLIN P. FRIEDMAN, AS TRUSTEE OF THE FRANKLIN P. FRIEDMAN LIVING TRUST, individually and on behalf of all others similarly situated,

*Plaintiff-Appellee,*

v.

LIEBERMAN MANAGEMENT SERVICES, INC.,

*Defendant-Appellee.*

Appeal from the Circuit Court of Cook County, Illinois,
County Department, Chancery, No. 2016 CH 15920.
The Honorable **Thomas R. Allen**, Judge Presiding.

**_AMICUS CURIAE_ BRIEF OF COMMUNITY ASSOCIATIONS INSTITUTE – ILLINOIS CHAPTER – IN SUPPORT OF DEFENDANT-APPELLANT LIEBERMAN MANAGEMENT SERVICES, INC.**

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## POINTS AND AUTHORITIES

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## INTEREST OF THE AMICUS CURIAE

The Community Associations Institute is an international organization that is dedicated to building professionalism, effective leadership, and responsible citizenship in community associations. The *amicus curiae* here is the Association's Illinois Chapter, has over 1300 members, including 250 businesses, 350 community association Board members and unit owners, and over 650 community association managers and management companies representing the interests of over 3.5 million homeowners in 18,000 community associations. The Illinois Chapter is one of 60 Community Associations Institute chapters in the nation. The mission of the Community Associations Institute – Illinois Chapter ("CAI – Illinois") is to provide education and resources to Illinois residential condominium, cooperative, and homeowners associations and their members.

CAI – Illinois has a specific interest in this matter because many of the Illinois community associations are able to function and, indeed, thrive, only because they employ and depend upon professional property management. This interlocutory appeal comes before this Court via certified questions arising from Section 22.1 of the Illinois Condominium Property Act (the "Act"), 765 ILCS 6-5/22.1, which provides, in pertinent part, that – in conjunction with providing nine categories of documentation required for closings on condominium units – "[a] reasonable fee covering the direct out-of-pocket cost of providing such information and copying may be charged by the association or its Board of Managers to the unit seller for providing such information." The esteemed trial court judge, the Honorable Thomas R. Allen, found that the constraint on the fee that may be charged limited not only the association, but by extension, for-profit property management companies such as Lieberman Management Services, Inc. ("Lieberman").

Were this Court to determine that, not only are "the provisions of this Act [ ] applicable to all condominiums in this State" (Act, 765 ILCS 605/2.1), but that they are also applicable to *for-profit* corporations such as property management companies, it would undermine the intent behind Section 22.1's "truth in selling" provision, to say nothing of upending the condominium industry that depends on the services that property management companies provide to facilitate the smooth governance of condominium associations.

For these reasons, CAI – Illinois joins with Lieberman in urging that this Court answer the two certified questions in the negative.

## NATURE OF THE CASE

The sole defendant in the case below is *not* a condominium association or its board of managers, but rather, a property management company which the Plaintiff had approached directly to provide the required Section 22.1 disclosure packet on a condominium unit – on an expedited basis. After paying the fee voluntarily, the Plaintiff, a trustee of a living trust, sued Lieberman on a putative class-action basis, asserting claims that he alleges arose, in part, under Section 22.1 of the Act.

The Honorable Thomas R. Allen, the esteemed trial court below, dismissed two counts of the putative class-action Complaint: Count II (for violation of the Illinois Consumer Fraud and Deceptive Practices Act); and Count III (asserted in the alternative to Counts I and II, for restitution/unjust enrichment). He let stand, however, Count I of the Complaint. That Count – which purports to state a claim under Section 22.1 of the Act – contends that Lieberman's total charge of $470 to provide nine categories of closing documents on an expedited basis for a closing on a condominium unit violates the Act.

It is as to the trial court's ruling solely on this Count I that the certified questions arise, thus implicating the jurisdiction of this Court and seeking its answers to the certified questions.

## ISSUES PRESENTED

Before this Court are two questions certified by the trial court, namely:

1) Whether 765 ILCS 605/22.1 of the Illinois Condominium Property Act (the "Act") allows a cause of action to be brought by a condominium unit seller against a property management company, acting as an agent for the Condominium Board of Managers and/or the "Unit Owners" Association, with respect to the fees charged by the property management company to the condominium unit seller for the documents described in Section 22.1(a) of the Act? and

2) Whether a private cause of action can be implied on behalf of a condominium unit seller and against a property management company, under Section 22.1 of the Act (765 ILCS 605/22.1), where the property management company is acting as agent for the Condominium Board of Managers and/or the "Unit Owners" Association, with respect to the fees charged by the property management company to the condominium unit seller for the documents described in Section 22.1(a) of the Act?

CAI – Illinois most respectfully urges that this Court answer these two certified questions in the negative for the reasons explained below as well as in the Appellant's Brief filed contemporaneously herewith.

## ARGUMENT

At the root of both certified questions before this Court is the issue of whether Section 22.1 of the Condominium Property Act impliedly permits a cause of action against property management companies, despite the lack of any such express directive contained within the language of the Act. Indeed, the plain language of Section 22.1, the legislative history behind this Section, and fundamental rules of statutory construction all militate against finding the existence of any such cause of action, as does review of the Condominium Property Act as a whole. Moreover, a case from the sister state of California,

interpreting the applicability of that State's similarly worded statute to allow property management companies to charge a fee for providing closing documents, provides worthwhile guidance.

Even were this Court to determine that the operative provision of the Act is ambiguous, CAI – Illinois urges that the Court conclude that the Act does not imply a cause of action against property management companies under Section 22.1 of the Act; to conclude otherwise would fly in the face of the accepted analysis for making such a determination and would call into question the rights of property management companies to earn a profit.

## I. NO CAUSE OF ACTION PROPERLY LIES AS AGAINST PROPERTY MANAGEMENT COMPANIES UNDER SECTION 22.1 OF THE ACT

### A. Neither the Plain Language of Section 22.1 nor its Legislative History Supports Limitations on What a Property Manager May Charge for Supplying Mandated Disclosures

The best indication of legislative intent is the statutory language itself, which must be given its plain and ordinary meaning. *Metro. Life Ins. Co. v. Hamer,* 2013 IL 114234, P18. Section 22.1 provides, in its entirety, that:

> **Section 22.1.** (a) In the event of any resale of a condominium unit by a unit owner other than the developer *such owner shall obtain from the Board of Managers* and shall make available for inspection to the prospective purchaser, upon demand, the following:
>
> (1) A copy of the Declaration, by-laws, other condominium instruments and any rules and regulations.
>
> (2) A statement of any liens, including a statement of the account of the unit setting forth the amounts of unpaid assessments and other charges due and owing as authorized and limited by the provisions of Section 9 of this Act or the condominium instruments.
>
> (3) A statement of any capital expenditures anticipated by the unit owner's association within the current or succeeding two fiscal years.

(4) A statement of the status and amount of any reserve for replacement fund and any portion of such fund earmarked for any specified project by the Board of Managers.

(5) A copy of the statement of financial condition of the unit owner's association for the last fiscal year for which such statement is available.

(6) A statement of the status of any pending suits or judgments in which the unit owner's association is a party.

(7) A statement setting forth what insurance coverage is provided for all unit owners by the unit owner's association.

(8) A statement that any improvements or alterations made to the unit, or the limited common elements assigned thereto, by the prior unit owner are in good faith believed to be in compliance with the condominium instruments.

(9) The identity and mailing address of the principal officer of the unit owner's association or of the other officer or agent as is specifically designated to receive notices.

(b) The principal officer of the unit owner's association or such other officer as is specifically designated shall furnish the above information when requested to do so in writing and within 30 days of the request.

(c) Within 15 days of the recording of a mortgage or trust deed against a unit ownership given by the owner of that unit to secure a debt, the owner shall inform the Board of Managers of the unit owner's association of the identity of the lender together with a mailing address at which the lender can receive notices from the association. If a unit owner fails or refuses to inform the Board as required under subsection (c) then that unit owner shall be liable to the association for all costs, expenses and reasonable attorneys fees and such other damages, if any, incurred by the association as a result of such failure or refusal.

*A reasonable fee covering the direct out-of-pocket cost of providing such information and copying may be charged by the association or its Board of Managers to the unit seller for providing such information.*

(Emphases added).

Section 22.1, then, expressly contemplates that the seller will obtain the mandatory disclosure from the association, and that the association's charge therefor is limited to its direct, out-of-pocket cost for providing such information. *Id.*

In *In re Goesel*, 2017 IL 122046, the Supreme Court had occasion to reiterate the well-established rules of statutory construction:

> The issue before us is one of statutory construction, and the principles guiding our review are familiar. The primary goal of statutory construction, to which all other rules are subordinate, is to ascertain and give effect to the intention of the legislature. *Jackson v. Bd. of Election Comm'rs, 2012 IL 111928, 363 Ill. Dec. 557, 975 N.E.2d 583, ¶ 48*. The best indication of legislative intent is the statutory language, which must be given its plain and ordinary meaning. *Metro. Life Ins. Co. v. Hamer, 2013 IL 114234, 990 N.E.2d 1144, 371 Ill. Dec. 766, ¶ 18*. It is improper for a court to depart from the plain statutory language by reading into the statute exceptions, limitations, or conditions that conflict with the clearly expressed legislative intent. *Id.* ***Words and phrases should not be viewed in isolation but should be considered in light of other relevant provisions of the statute.*** [Emphasis added].

*Id.*, P13. *Accord, Ferris, Thompson & Zweig, Ltd. v. Esposito*, 2015 IL 117443, P17.

On the face of Section 22.1, there is no reference whatsoever to property management companies or property managers and the fees they may charge. Indeed, the mechanism for obtaining the disclosures contemplated by the "truth in selling" statute mandates that a condominium unit seller "shall obtain *from the Board of Managers* and shall make available for inspection to the prospective purchaser, upon demand" the categories of information mandated by Section 22.1. (Emphasis added).

Any suggestion that this plain language forbids a property management company from whom the seller sought the mandatory disclosures (on an expedited basis no less) – and gives rise to a cause of action against it – is belied by review of the Condominium Property Act as a whole. For example, in Section 9.2 of the Act, addressed to additional remedies, the Act provides that:

> (c) Other than attorney's fees, no fees pertaining to the collection of a unit owner's financial obligation to the Association, *including fees charged by a manager or managing agent*, shall be added to and deemed a part of an owner's respective share of the common expenses unless: (i) *the managing agent fees relate to the costs to collect common expenses for the Association; (ii) the fees are set forth in a contract between the managing agent and the Association; and (iii) the authority to add the management fees to an owner's respective share of the common expenses is specifically stated in the declaration or bylaws of the Association.* (Emphases added).

*See, too,* Section 18.5(c)(8) of the Act – addressed to master associations – which similarly so provides. In other words, where the legislature intended to restrict the amount of fees that could be charged by an entity other than the association or its Board of Managers, it would and could have said so, just as it so carefully delineated in Sections 9.2 and 18.5(c)(8) of the Act. As it did not so restrict the language of Section 22.1 of the Act, it must be understood that such a limitation was not intended.

Particularly since the Act elsewhere includes a specific prohibition on charging property management fees unless certain very specific conditions are met, the maxim *unious est exclusion alterius* – that a statute's list of things to which it refers creates an inference that all omissions should be understood as exclusions – should apply to bar any presumption of a limitation of the fees that a property management company may charge under Section 22.1 of the Act. *See Metzger v. DaRosa*, 209 Ill. 2d 30, 44 (2004); and *Kalkman v. Nedved*, 2013 IL App (3d) 120800, P22 ("[w]hen certain things are enumerated in a statute, that enumeration implies the exclusion of all other things *even if there are no negative words of prohibition*") (emphasis added).

Were this Court to deem it necessary, the legislative history behind Section 22.1 supports the conclusion that the intent of Section 22.1 does not include claims against property management companies. Section 22.1 came into being in 1972 as House Bill 3779. It was viewed as a "truth in selling of condominium units" provision. House of Representatives, Seventy-Seventh General Assembly, One Hundred Thirty-Fourth Legislative Day, May 15, 2972, 2:00 p.m. (available at: http://www.ilga.gov/house/transcripts/htrans77/HT051572.pdf, pp. 149-150, as of April 15, 2018). The focus of the House Bill was to protect buyers of condominiums against undisclosed pitfalls and expenses. *Id.*

This Court has had several occasions to consider and comment upon the legislative history of Section 22.1, beginning with *Giacomazzi v. Urban Search Corp.*, 86 Ill. App. 3d 429, 435 (1st Dist. 1990). There, this Court observed that:

> [t]his section [22.1] was added (Laws of 1963, at 1120, added by Pub. Act 77-2297, § 1, eff. Oct. 1, 1972) to the previously existing act which gave statutory recognition to the form of property ownership known as the "condominium." (See Ill. Rev. Stat. 1963, ch. 30, par. 301 et seq.) On May 9, 1972, Representative David Regner introduced in the Illinois House a bill to add section 22, describing it as a "truth in selling" provision. (House Debates, May 15, 1972, third reading.) When the bill was debated in the Senate, the sponsor there, Senator Graham, explained that *the bill was directed toward providing information for the elderly, and presumably those on fixed incomes, so that they would be financially aware at the outset of purchase negotiations.* (Senate Debates, June 21, 1972). [Emphasis added].

*Accord, Mikulecky v. Bart*, 355 Ill. App. 3d 1006, 1011 (1st Dist. 2001).

In other words, the impetus behind the legislation that gave rise to Section 22.1 was to ensure that condominium buyers were fully apprised of all relevant information before making their purchase. If property managers can ensure that such information is provided on a timely – indeed, expedited – basis such that a purchaser is ensured of having all mandated disclosures prior to closing, then the participation of property management is to be encouraged, not discouraged, by allowing these for-profit entities to affix an appropriate charge to the disclosures they provide.

### B. Faced with a Directly Analogous Case, the Sister State of California Ruled as CAI – Illinois Urges Herein

The First District Court of Appeals in California has considered a virtually identical issue to that posed herein by the certified questions and arrived at the same conclusion as CAI – Illinois here urges. Without in-state authority on which to rely as to Section 22.1, the California case of *Fowler v. MC Assn. Management Services, Inc.*, 220 Cal. App. 4th 1152 (1st Dist. 2013), constitutes persuasive authority worthy of this Court's consideration. *Sim-Hearns v. Office of Medical Examiner, County of Cook*, 359 Ill. App. 3d 439, 444 (1st Dist. 2005).

Before the California Court of Appeals in *Fowler v. MC Assn. Management Services, Inc.*, *supra,* was the analogous question of whether that State's Davis-Stirling Common Interest Development Act's prohibition against associations, community service organizations and similar entities from imposing or collecting any assessment, penalty, or fee in connection with documentation required for a transfer of title or any other interest in an amount "*not to exceed the association's actual costs to change its records* " forbade a property management company from imposing its actual, for-profit charge against the buyer of a common-interest property. 220 Cal. App. 4th at 719 (emphasis added). The *Fowler* Court observed that "an association's 'costs' for purposes of the [California] statute include 'the fees and profit the vendor charges for its services'" and that, while "the statutory language prevents *associations* from charging inflated fees for documents and for transfer of title and using those fees for other purposes; *it does not constrain the amount a managing agent may charge for these services*." *Id.* at 720 (emphases added). The *Fowler* Court went on to observe that "the implication . . . that a for-profit business must have statutory or contractual authorization for providing a service to a third party and charging a fee for that service, is fundamentally flawed", finding that the burden was on the plaintiffs to demonstrate "why a statute or a contract *prohibits* [the managing agent] from doing so" (finding that the analogous statute did not so prohibit the agent). *Id.*

CAI – Illinois urges that this Court conclude similarly, finding that Section 22.1's admonition regarding the fees that may be charged for providing the mandatory disclosures must be nothing more than the *Association's* "actual costs". Indeed, if anything, the instant case presents an even more compelling argument against finding a cause of action against the property manager; in *Fowler*, the cause of action was brought by a member of the class the statute was designed to protect, namely, a plaintiff buyer. Here, the Plaintiff in the case below was not within the protected class of buyers, but rather, was a *seller*. Such distinction

figures prominently in considering whether a private cause of action against property managers should be implied, too. (*See* Section II, hereinbelow).

CAI – Illinois therefore respectfully requests that the first of the certified questions be answered in the negative because the plain language of the statute reveals no intention to forbid a for-profit management company from charging a fee over and above its actual costs; the Act elsewhere carefully limits property management fees; the legislative intent behind this Section of the Act is to get important disclosures into the hands of prospective purchasers prior to closing; and a Court in California, when faced with a directly analogous issue, concluded as CAI – Illinois urges herein.

## II. AS PLAINTIFF IS NOT WITHIN THE CATEGORY OF PERSONS THAT SECTION 22.1 WAS DESIGNED TO PROTECT, NO PRIVATE CAUSE OF ACTION PROPERLY SHOULD BE IMPLIED

### A. The Four Mandatory Consideration for Determining the Existence of an Implied Private Remedy All Favor Defendant

In *Nikolopulos v. Balourdos,* 245 Ill. App. 3d 71, 77 (1st Dist. 1993), this Court identified the four factors that a court "must consider" when determining whether a statute creates an implied private remedy, as follows:

> (1) whether the plaintiff is within the class of persons the statute is designed to protect; (2) whether implying the cause of action is consistent with the underlying purpose of the act; (3) whether the plaintiff's injury is one the statute was designed to prevent; and (4) whether implying a cause of action is necessary to effectuate the purpose of the act. (Board of Education v. A, C & S, Inc. (1989), 131 Ill. 2d 428, 470, 546 N.E.2d 580, 599, 137 Ill. Dec. 635.)

*Accord, D'Attomo v. Baumbeck,* 2015 IL App (2d) 140865, P39. Indeed, the Court in *Nikolopulos* went on to observe that "section 22.1 of the Act was clearly designed to protect prospective *purchasers* of condominium units." 245 Ill. App. 3d at 77 (emphasis added). None of the other mandatory considerations favor the Plaintiff seller herein, either.

In particular, "implying the cause of action" is likely to reduce the interest of property management companies in continuing to provide 22.1 disclosures, much less, on an expedited basis. After all, there is risk involved in making the representations; if they can only recoup the cost of copying, there would be no business reason to assume the risk of liability. With the reduced involvement of property management companies, in turn, it is likely that associations will be unable to meet the deadline for providing the disclosure documents.

With respect to the consideration of whether the plaintiff's injury is one the statute was designed to prevent, the answer is no. As the legislative history underscores, the purpose of the Act is to protect potential *buyers* of condominium units. By making disclosure documents harder to obtain, implying a cause of action herein would *undercut* the legislative intent behind this Section of the Act.

Finally, and as with the prior consideration, implying a cause of action where none exists would make obtaining the mandatory disclosures that much harder.

### B. Under a Parallel Analysis, the Second District Rejected the Existence of an Implied Cause of Action

In the Second District case of *Royal Glen Condominium Association v. S.T. Neswold & Assocs.,* 2014 IL App (2d) 131311, the Court evaluated the question of whether Section 12 of the Act – addressed to associations' obtaining certain types of insurance – imposed any duties on the part of insurance producers not to place, sell or deliver noncompliant policies within the State. The Court concluded, among other things, that it would be "unjust" to subject insurance producers to the various requirements of the Act. *Id.*, P24. In reaching this conclusion, the Court observed, as here, that there was no "explicit statement" requiring an insurance producer's compliance with the Act. Indeed, the Court went on to state that "the Condo Act regulates only condominiums". *Id.* It further observed that the insurance

industry is already heavily regulated by a separate statute. *Id.* The same is true for property management companies and property managers, by and through the Community Association Manager Licensing And Disciplinary Act, 225 ILCS 427/1, *et seq.*

Based on the foregoing, it is respectfully submitted that the second of the certified questions – as to whether a private cause of action against property managers and property management companies should be implied under Section 22.1 – should be answered in the negative, too.

## III. THE PUBLIC POLICY BEHIND THE "TRUTH IN SELLING" PROVISION OF THE ACT WOULD BE IMPAIRED, NOT PROMOTED, IF THE CERTIFIED QUESTIONS ARE ANSWERED IN THE AFFIRMATIVE

Allowing the cause of action Plaintiff asserted for purported violation of Section 22.1 of the Act would not promote the public policy behind this part of the Act, but rather, would impair it. The legislative intent of Section 22.1 is to ensure that buyers obtain the required disclosures prior to closing. Allowing property management companies to provide this service (particularly when required on an expedited basis) thus promotes the established legislative intent behind the Act. This is particularly true where, as in Illinois, associations are governed by volunteer unit owners who may well hold full-time jobs in addition to their board-member responsibilities. Permitting property management companies to provide the mandated disclosure documents, and requiring the sellers to pay commercial rates therefor, advances the purposes of the Act: to place 22.1 disclosure packages into buyers' hands on a timely basis.

Since March 2010, CAI – Illinois has publically advocated for the right of the preparer of mandatory pre-sale documentation to be able to charge a reasonable fee therefor. *See, e.g.*, https://www.caionline.org/Advocacy/PublicPolicies/Pages/Disclosure-Before-Sales-in-Community-Associations.aspx (available as of April 16, 2018). As CAI – Illinois has

explained in conjunction therewith, requests for the 22.1 disclosures may come months in advance, or with short notice, as here. Moreover:

> [p]reparers 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.
>
> *Id.*

In the event that reasonable fees may not be charged, it may logically be assumed that associations within Illinois will be required to incur additional expenses by hiring employees to compile and provide the 22.1 disclosure documents, or by paying additional management fees to the management companies, as opposed to the companies' simply charging the seller, as is done now. In turn, this would result in higher across-the-board expenses to all association owners, who would then be forced to shoulder the costs of closings – effectively subsidizing costs that properly should be borne solely by unit sellers, whom will not even be members of the association after the sale. Such an outcome was logically unforeseen by the legislature in enacting Section 22.1, and would have the most unfortunate effect of increasing costs to all condominium association members, rather than allocating such costs solely to the parties who are the reason for the costs' being generated. Such considerations, too, favor answering the two certified questions in the negative.

## CONCLUSION

Based on the foregoing, CAI – Illinois respectfully submits that the certified questions presented to this Court properly be answered in the negative. Accordingly, the ruling by the Honorable Thomas R. Allen, denying that portion of the Defendant-Appellant's Motion to Dismiss directed to Count I (for purported violation of Section 22.1 of the Act), should be reversed, and the case dismissed, with prejudice, in its entirety.

Respectfully submitted,

COMMUNITY ASSOCIATIONS
INSTITUTE – ILLINOIS CHAPTER

By: /s/ *Diane J. Silverberg*
One of their attorneys

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## Certificate of Compliance

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, this Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 14 pages.

/s/ *Diane J. Silverberg*

**NOTICE OF FILING and PROOF OF SERVICE**

In the Appellate Court of Illinois
First Judicial District

| | | |
|---|---|---|
| FRANKLIN P. FRIEDMAN, as Trustee of the Franklin P. Friedman Living Trust, individually and on behalf of all others similarly situated, | ) | |
| *Plaintiff-Appellee,* | ) | |
| v. | ) | No. 1-18-0059 |
| LIEBERMAN MANAGEMENT SERVICES, INC., | ) | |
| *Defendant-Appellant.* | ) | |

The undersigned, being first duly sworn, deposes and states that on April 17, 2018, there was electronically filed and served upon the Clerk of the above court the Motion of the Community Associations Institute – Illinois Chapter for Leave to File Its *Amicus Curiae* Brief, *Instanter,* In Support of Defendant-Appellant Liberman Management Services, Inc., and that on the same day, a pdf of same was e-mailed to the following counsel of record:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

*/s/ Diane J. Silverberg*
Diane J. Silverberg

**No. 1-18-0059**

**IN THE APPELLATE COURT OF ILLINOIS**
**FIRST DISTRICT**

| | | |
|---|---|---|
| FRANKLIN P. FRIEDMAN, AS TRUSTEE OF THE FRANKLIN P. FRIEDMAN LIVING TRUST, individually and on behalf of all others similar situated, | ) | On Appeal from the Circuit Court of Cook County, Illinois |
| *Plaintiff-Appellee,* | ) | Case No. 2016 CH 15920 |
| v. | ) | The Honorable Thomas R. Allen, Presiding |
| LIEBERMAN MANAGEMENT SERVICES, INC., | ) | |
| *Defendant-Appellant.* | ) | |

**ORDER**

This matter's coming on to be heard on the Motion of the Community Associations Institute – Illinois Chapter For Leave To File Its *Amicus Curiae* Brief, *Instanter*, In Support of Defendant-Appellant, Lieberman Management Services, Inc. (the "Motion"),

IT IS HEREBY ORDERED that the Motion is _____GRANTED / _____ DENIED.

**SO ORDERED.**

_____

_____

_____

Submitted by:

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