No._____

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 similarly situated,	)	Appeal from the Circuit Court of Cook County, Illinois
Plaintiff-Respondent,	)	Circuit Court No. 2016 CH 15920
v.	)	Judge Thomas R. Allen
LIEBERMAN MANAGEMENT SERVICES, INC., an Illinois corporation,	)	
Defendant-Applicant.	)	

APPLICATION FOR LEAVE TO APPEAL
PURSUANT TO SUPREME COURT RULE 308

Defendant-Applicant, Lieberman Management Services, Inc. ("Lieberman"), respectfully submits this Application for Leave to Appeal Pursuant to Supreme Court Rule 308 for this Court to address the questions certified for appeal by the Circuit Court.

STATEMENT OF FACTS

Plaintiff seeks to bring a class action suit against Lieberman, a third-party property management company, under a novel implied-right-of-action theory, for an alleged violation of Section 22.1 of the Condominium Property Act, 765 ILCS 605/1 *et seq.* (the "Condo Act"). (C6-C19.) Section 22.1 requires sellers of condominium units to obtain from their condominium board certain documents and information regarding the condominium and make those documents "available for inspection to the prospective purchaser, upon demand." Section 22.1 requires that the information be furnished within 30 days of the written request, and provides that the board may charge a "reasonable fee

covering the direct out-of-pocket cost." 765 ILCS 605/22.1. Plaintiff bases his theory of liability on the premise that Defendant violated Illinois law by allegedly charging amounts beyond a "reasonable fee covering the direct out-of-pocket cost" in providing a package of disclosure documents listed in Section 22.1 (the "Disclosure Documents") to the prospective seller of the condo. (C12-C13.) The parties and the trial court agreed an interlocutory appeal pursuant to Rule 308 was appropriate in this case, and the trial court certified questions for appeal concerning whether Plaintiff could bring a cause of action under the Condo Act against the Defendant for actions taken by Defendant allegedly as the agent of a condominium association. (C4-C5.) No Illinois court has found such an implied right of action to lie against a property management company.

Plaintiff's Complaint is based upon a provision of the Condo Act relating to the provision of Disclosure Documents that refers only to a condominium "association" or its "Board of Managers" and not to any third parties with which the association or its Board of Managers might have a contractual relationship:

> 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.

765 ILCS 605/22.1. The Condo Act states that the prospective seller must make the Disclosure Documents available for inspection by the prospective buyer if the buyer makes such a demand, and that the condominium association may charge a fee for providing any of these documents. *Id.* Plaintiff, however, has not sued any condominium association or Board of Managers. (*See* C6-C8.) Plaintiff concedes that the language of Section 22.1 makes no reference to a third-party property management business, and does not purport to regulate the business of third-party property management businesses. (C46-

C49.) Despite this, Plaintiff alleges Lieberman can be sued for charging more than their "direct out-of-pocket cost" of providing Disclosure Documents. Plaintiff argues the third-party for-profit property management company is subject to Section 22.1, because it is an agent of the condo associations, and can be individually liable for breaching the duty of the condominium associations under an "active-part" agency theory of legal liability. (*See* C46-C49.)

Specifically, the named Plaintiff alleges that on October 7, 2016, Plaintiff sold a condo unit that was part of the Mission Hills Condominium Association in Northbrook, Illinois. (C9 ¶ 13.) The Defendant is not a condominium association, but rather is a property management company retained by the Mission Hills Condominium Association. (C9 ¶ 14.) On September 27, 2016, the prospective buyer of Plaintiff's unit requested information from Plaintiff regarding the condominium and association pursuant to Section 22.1 of the Condo Act. (C9 ¶ 15.) In turn, Plaintiff's real estate attorney did not make any demand to the Mission Hills Condominium Association or its Board of Managers, but rather directly requested that the Defendant property management company prepare and provide the Disclosure Documents, as well as additional documentation, within five days. (C9 ¶ 17.) Plaintiff's attorney affirmatively submitted an order form from Defendant's web site requesting a Section 22.1 Disclosure and additional documents for a total cost of $220. (C9 ¶ 17, C18.) Plaintiff's attorney also ordered a paid assessment letter, agreed to a rush fee, and buyer's transfer fee for a total of $250. (C9 ¶ 18, C19.)

Defendant moved to dismiss the claim for violation of the Condo Act, arguing 1) that Section 22.1 does not apply to property management companies under the express

terms of the statute; 2) there was no arguable violation of the statute because Plaintiff did not pay more than the condominium association's out-of-pocket costs; and 3) that Section 22.1 does not create a private cause of action, and no cause of action could be implied in favor of a seller against a property management company. (C21-C35.)

In response, Plaintiff conceded that Section 22.1 did not directly create any duty of property management companies such as the Defendant, but argued that Defendant could be held liable for a breach of duty by the condominium association under an "active-part" agency theory. (C43.) Plaintiff relied heavily on *Merrill Tenant Council v. HUD*, 638 F.2d 1086 (7th Cir. 1981) and *Grover v. Commonwealth Plaza Condo. Ass'n*, 76 Ill. App. 3d 500, 507 (1st Dist. 1979), to avoid the general rule of law that an agent cannot be liable for a breach of duty by its principal. (C46-C49.) Plaintiff contends that, under the "active-part" agency theory, an agent can be liable if it takes an active part in the principal's breach of duty. (C46-C49.)

In reply, Defendant provided authority showing the repeated rejection of the "active-part" agency theory by Illinois courts. (C60-C63.) Most notably, Defendant cited this Court's forceful decision in *Bovan v. Am. Family Life Ins. Co.*, 386 Ill. App. 3d 933, 942 (1st Dist. 2008), that considered "active-part" agency at length and expressly rejected it as inconsistent with Illinois law. (C60-C61.)

While the trial court dismissed Plaintiff's other alleged causes of action, it allowed Plaintiff's cause of action for violation of the Condo Act to survive. (C73, R30-R36.) The court expressly relied on the Seventh Circuit's *Merrill* decision and extensively quoted from it in finding that Plaintiff could bring a cause of action under the Condo Act on the theory that Lieberman acted as the condominium association's agent

and played an active part in breaching a duty owed by the condominium association under Section 22.1. (R33-R35.)

Following the court's denial of the motion to dismiss on the count for violation of Section 22.1 of the Condo Act, Defendant filed a motion to certify questions for appeal regarding Plaintiff's ability to bring a cause of action against the Defendant under the Condo Act. (C75-C83.) Plaintiff responded that it agreed that the issue was proper for an immediate interlocutory appeal, and suggested alternate wording for the proposed certified questions. (C152, C155.) The trial court agreed the issue was proper for a Rule 308 appeal. Following negotiations among the parties, and arguments before the judge, Judge Allen certified two questions for appeal. (C4-C5.)

Since this case was filed, several copycat putative class actions alleging violations of the Condo Act due to amounts charged for Disclosure Documents have been filed, including *Murphy v. Foster/Premier Inc.*, 1:17-cv-08114 (N.D. Ill.); *Horist v. Homewise Service Corp., Inc.*, 1:17-cv-08113 (N.D. Ill.); and *Ahrendt v. Condocerts.com, Inc.*, 1:17-cv-08418 (N.D. Ill.).

STATEMENT OF QUESTIONS CERTIFIED

On December 8, 2017, Judge Allen issued an order pursuant to Rule 308 certifying the following questions for interlocutory appeal:

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?

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?

(C4-C5.)

STATEMENT OF REASONS WHY A SUBSTANTIAL BASIS EXISTS FOR A DIFFERENCE OF OPINION ON THE QUESTIONS AND WHY AN IMMEDIATE APPEAL MAY MATERIALLY ADVANCE THE TERMINATION OF THE LITIGATION

The Court should allow the appeal and decide the questions certified by the trial court because this case presents an issue of first impression, involving conflicting legal authority, which determines whether Plaintiff has any cause of action against Defendant. Foremost, the parties and the trial court agree the certified questions are appropriate for interlocutory appeal and seek the decision of this Court on these novel legal issues that are threshold questions as to whether Plaintiff's case can move forward. In light of the possibility that Plaintiff will be found to have no such cause of action, the parties should not be forced to incur the significant expense of litigating a putative class action. Further, this is a putative class action that is the first of its kind in Illinois. Since Plaintiff brought this case, numerous other class actions alleging the same theory have been filed in state and federal courts in Illinois. This Court should accept this appeal to provide guidance as to the viability of the novel legal theories asserted by Plaintiff in this case and copied by numerous other plaintiffs in Illinois.

A. Basis for Difference of Opinion on Certified Questions.

This case presents a matter of first impression for Illinois courts: whether Section 22.1 allows a private cause of action by a condominium seller against a third-party property management company hired by the seller's condominium board based on the

management company's making available or providing certain documents regarding the seller's condominium.

1. The Statutory Language Contradicts the Trial Court's Decision.

Section 22.1(a) of the Condo Act requires a condominium unit seller to "obtain from the Board" and "make available for inspection to the prospective purchaser, upon demand" certain documents prescribed therein. The required disclosure can be satisfied multiple ways: by making the documents available for inspection or sending the documents electronically, or having the Board or a third-party management firm prepare and deliver a hard copy of the documents. If the seller requests that the association provide the prescribed documentation, Section 22.1(b) requires the principal officer of the association to furnish such documents within 30 days of a written request. Section 22.1(c) provides that the association can charge a "reasonable fee covering the direct out-of-pocket cost of providing such information and copying."

Plaintiff has not alleged that he ever attempted to obtain the information prescribed by Section 22.1(a) from the Board, or that the Board ever failed to honor a request for such information. Instead, he alleges only that he obtained that information directly from the Defendant by voluntarily paying Defendant for those documents (including a rush fee). Nonetheless, Plaintiff alleges that Defendant is bound by Section 22.1(c) of the Condo Act, and violated that subsection by allegedly charging fees in excess of the "direct out-of-pocket cost of providing such information and copying."

The cardinal rule of statutory construction is to "ascertain and give effect to the true intent and meaning of the legislature." *Kunkel v. Walton*, 179 Ill. 2d 519, 533 (1997). The language of the statute itself is the best indication of the legislature's intent, and if

the statutory language is clear, its plain language shall apply. *Id.* A court cannot "read into a statute words which are not within the plain meaning of the legislature as determined from the statute itself." *Petalino v. Williams*, 2016 IL App (1st) 151861, ¶ 24 ("Such word is not in the statute and we cannot place it there"). By its own terms, Section 22.1 does not apply to property management companies. The trial court's ruling essentially read those words into the statute, which violates the rules of statutory construction and frustrates the purpose of the statute.

The Condo Act regulates the duties of "boards of managers, as well as condominium associations and unit owners." *Royal Glen Condo. Ass'n*, 2014 IL App (2d) 131311, ¶ 22. Indeed, although Section 18.5 of the Condo Act expressly allows condominium associations and boards to hire property managers, Section 22.1 does not reference or attempt to regulate such businesses. Nowhere in the Act does it impute the duties of condo associations or boards of managers to outside companies, and such a construction would be contrary to the intent of the Act. *See, e.g., id.* at ¶ 24 (holding that portion of condo act regarding the insurance requirements of a condo association could not create a private right of action against an insurance producer). By its terms, Section 22.1 references "the association or its Board of Managers." It does not reference a property management company. Similarly, it does not reference other third-party vendors that a condo association or Board of Managers may engage to compile the information listed in the statute such as copy services or attorneys.

The purpose of Section 22.1 is to protect prospective purchasers of condo units against sellers of those units. *D'Attomo v. Baumbeck*, 2015 IL App (2d) 140865, ¶ 34. Specifically, Section 22.1 is intended to "to prevent prospective purchasers from buying a

unit without being fully informed and satisfied with the financial stability of the condominium as well as the management, rules and regulations which affect the unit being purchased." *D'Attomo*, 2015 IL App (2d) 140865 at ¶ 34 (*quoting Nikolopulos v. Balourdos*, 245 Ill. App. 3d 71, 77 (1st Dist. 1993)). It is clear that the purpose of Section 22.1 is not to regulate third-party vendors that as part of their business prepare and compile the documents listed in Section 22.1.

Given the clear statutory language, the trial court's ruling that Lieberman could be liable under the statute should not stand.

2. Recent Illinois Decisions Reject the "Active Part" Agency Theory and Cases Relied on By the Plaintiff and the Trial Court.

In order to reach the conclusion that the property management company could potentially be found liable under the Condo Act, the trial court applied the "active part" agency liability theory found in *Merrill*, 638 F.2d 1086. However, this Court expressly rejected the "active part" agency liability theory in *Bovan*, 386 Ill. App. 3d at 942-944. Other Illinois decisions and a recent Seventh Circuit decision roundly criticize the "active-part" agency theory as bad law and inconsistent with Illinois agency law. This Court should allow this appeal to address this dispute in the case law.

Plaintiff's "active part" agency argument fails as a matter of law. *Bovan* considered this theory at length, and expressly rejected the theory of liability relied on by the Plaintiff and the trial court in allowing this suit to survive a motion to dismiss. *Bovan* affirmed that an agent cannot be held liable for violation of a duty owed by the principal to the plaintiff. "It is a general principle of agency law that '[a]n agent's breach of a duty owed to the principal is not an independent basis for the agent's tort liability to a third party. An agent is subject to tort liability to a third party harmed by the agent's conduct

only when the agent's conduct breaches a duty that the agent owes to the third party.'" *Id.* (quoting Restatement (Third) of Agency § 7.02, at 138 (2006)).

Bovan involved whether an agent of a wrongdoer could be held liable in a statutory cause of action under the Wrongful Death Act. *Bovan* expressly rejected such an argument. *Bovan* went on to discuss the repeated rejection of the case upon which Plaintiff relies, *Grover v. Commonwealth Plaza Condo. Ass'n*, 76 Ill. App. 3d 500, 507 (1st Dist. 1979). *Bovan* noted that *Grover* "has been repudiated by subsequent decisions" which held that "the *Grover* court's expansion of liability is unsupported." *Bovan* , 386 Ill. App. 3d at 943 (citing *Gateway Erectors v. Lutheran General Hospital*, 102 Ill. App. 3d 300, 303 (1st Dist. 1981), and *Joe & Dan International Corp. v. United States Fidelity & Guaranty Co.*, 178 Ill. App. 3d 741 (1st Dist. 1988)). The *Bovan* court concluded: "Because we agree that the decision in *Grover* is an anomaly, we decline to expand the *Grover* decision's broad and sharply criticized view of agent liability in contract to cover the instant tort case." *Bovan*, 386 Ill. App. 3d at 944.

Plaintiff alleges no independent duty of Defendant to him outside of the requirements of the Condo Act, which by its own terms only applies to the condominium association or Board of Managers. The general rule is that an agent of a principal owes no duty to a principal's customer unless there is an agency relationship between the agent and the customer. *Bovan*, 386 Ill. App. 3d at 940. Here, it is clear there is no agency or contractual relationship that requires Lieberman to refrain from making a profit on its professional services. Since the subject provision of the Condo Act, by its express terms, does not apply to Defendant, Plaintiff attempts to bootstrap Defendant to the

condominium association under an agency theory. As shown by *Bovan*, however, such a legal theory fails as a matter of law.

As clearly explained by *Bovan*, Plaintiff's reliance on the federal case of *Merrill Tenant Council v. HUD*, 638 F.2d 1086 (7th Cir. 1981) fails for the same reasons as his reliance on *Grover*. Nonetheless, the Seventh Circuit recently clarified that any reading of *Merrill* that concludes "active-part" agency is viable under Illinois law is wrong. *Thomas D. Philipsborn Irrevocable Ins. Tr. v. Avon Capital, LLC*, 699 Fed. Appx. 550, 552 (7th Cir. 2017). In *Avon Capital*, the Seventh Circuit found that the case expressly relied on by the trial court in this case, *Merrill*, did not hold "active part" agency liability was available, but instead merely quoted a statement from a treatise that inaccurately portrayed Illinois law. *Id.*

Therefore, there is much authority showing that the legal theory relied on by the Plaintiff and the trial court simply does not exist under Illinois law. Without this theory, this Plaintiff (and the other plaintiffs in the several other putative class actions that have been filed) cannot bring a cognizable cause of action.

3. <u>There is No Precedent for Implying a Cause of Action Under the Condo Act against a Property Management Company.</u>

The Condo Act does not specifically create a cause of action for an alleged violation of Section 22.1, and there is no case that holds that a condo seller can recover against a condo association or Board of Managers of a condo association, much less a third-party vendor of a condo association. In this case, implying a private right of action against a property management company by a seller of a condo would be improper under Illinois law.

Section 22.1 is silent with respect to any remedy for a violation of the statute. *See*

765 ILCS 605/22.1; *D'Attomo*, 2015 IL App (2d) 140865 at ¶ 35. In order for a private right of action to be implied from a silent statute, a court must analyze in the specific suit whether: "(1) the plaintiff is within the class of persons the statute is designed to protect; (2) implying a cause of action is consistent with the underlying purpose of the statute; (3) the plaintiff's injury is one the statute is designed to prevent; and (4) implying a cause of action is necessary to effectuate the purpose of the statute." *D'Attomo*, 2015 IL App (2d) 140865 at ¶ 37; *see also Nikolopulos*, 245 Ill. App. 3d at 77.

The appellate courts have found an implied private right of action **against a seller of a condo** for termination of a contract **by the buyer of the condo** if the seller fails to provide a proper section 22.1 disclosure. *See D'Attomo*, 2015 IL App (2d) 140865 at ¶ 37; *Nikolopulos*, 245 Ill. App. 3d at 77. In those cases, the cause of action was implied under Section 22.1 because disclosure requirements were designed to protect buyers of condos from not receiving information regarding the property at issue. *D'Attomo*, 2015 IL App (2d) 140865 at ¶ 38. In *D'Attomo*, the private right of action under the Act was implied "under the factual scenario present in this case." *Id.* ¶ 39. The statute does not contemplate an action by a seller against a management company of the condominium association for damages. Applying the four-part test confirms no private right of action should be implied.

First, the statute is not designed to protect sellers of condos; rather, it is meant to protect buyers of condos. *See D'Attomo*, 2015 IL App (2d) 140865 at ¶ 34. To the extent the language at the end of the statute arguably can be construed to protect a seller, it only protects the seller from the condo association or Board of Managers, not a third-party property management company. More likely, the language is meant to protect the

association or Board of Managers from having to provide the Disclosure Documents without compensation.

Second, implying a cause of action would not be consistent with the purpose of the statute. Allowing suits against third-party vendors for their professional services in compiling the required information would lead to less reliable Section 22.1 disclosures. Professionals would refuse to provide these services because it would be illegal for such companies to charge for their services. This would lead to untrained condo associations and Boards of Managers compiling these disclosures, which would be much less reliable and increase the chance that a buyer of a condo would not be properly informed of the relevant disclosures. Indeed, implying a cause of action would frustrate the Condo Act's express grant allowing associations to engage professional property management firms in 765 ILCS 160/18(a)(5).

Third, the statute is not designed to protect a seller from paying the exact amount a professional vendor charges to compile these disclosures; rather, the statute is structured to ensure that the prospective purchaser is able to inspect documents and the association is able to collect a reasonable fee if the prospective seller requests the documents from the association.

Fourth, implying a cause of action is not necessary to effectuate the purpose of the statute. Implying a cause of action against the property management company actually frustrates the statute by discouraging professional vendors from providing services to reliably compile disclosures and by encouraging the condo association to be an intermediary where it would have the opportunity to charge more than the standard fee of the property management company.

This analysis is supported by *Royal Glen Condominium Association*, 2014 IL App (2d) 13131. There, the appellate court refused to imply a cause of action from a portion of Condo Act addressing the insurance requirements of a condo association, as the statute was not meant to regulate insurance producers even though it referenced insurance issues in the statute *Id.* at ¶ 22. Like the insurance producer in that case, a property management company is not a proper defendant against which to imply a private right of action under Section 22.1.

As an issue of first impression, the trial court ruled that a private cause of action can be implied in this case. As shown above, Illinois law supports the opposite conclusion. Therefore, this Court should allow the appeal to determine the issue.

B. Why Appeal Will Materially Advance the Termination of the Litigation.

The parties agree allowing an appeal will materially advance the termination of the litigation, as a finding in Defendant's favor likely will end the suit altogether, and a finding in the Plaintiff's favor will at least give the parties sufficient certainty to determine how the case should move forward.

Plaintiff purports to bring a class action suit on behalf of "all persons who sold or attempted to sell a condominium unit in a condominium association managed by the Defendant . . . ." (C10 ¶ 24.) Given the expansiveness of Plaintiff's proposed class definition and the fact that the Defendant currently provides services to more than 200 community associations, discovery and litigation of this matter is likely to be extremely complex, costly, time-consuming, and expensive for all parties if the Plaintiff is able to advance to the class action portion of the litigation. Based on Defendant's knowledge and extensive research, this appears to be the very first case of its kind where anyone has sued

based on section 22.1(c) of the Condo Act, much less sued a third-party property management company. It is clear that there are no appellate cases addressing such an action. There are multiple questions of first impression the Court had to reach in order to allow survival of Count I of Plaintiff's Complaint.

Allowing a Rule 308 appeal is especially appropriate when the denial of a motion to dismiss involves a threshold legal issue of first impression. *See, e.g., Santiago v. Kusper*, 133 Ill. 2d 318, 322, 549 N.E.2d 1251, 1253 (1990) (addressing question certified by trial court on threshold issue on denial of motion to dismiss); *Williams v. Athletico, Ltd.*, 2017 IL App (1st) 161902 (Rule 308 appeal on denial of motion to dismiss in case requiring novel interpretation of Illinois statute). Furthermore, in a class action case where a decision of the appellate court on a disputed question of law may avoid complex class litigation, certification pursuant to Rule 308 is prudent. *See Cwik v. Giannoulias*, 237 Ill. 2d 409, 411 (2010) (consideration of a Rule 308 appeal on a denial of a motion to dismiss in a putative class action).

Rule 308 was designed to allow review of exactly the type of decision the trial court had to make in this case. It is likely that this Court will address this issue in this case eventually (and if not in this case, in others). If an interlocutory appeal is allowed, it is possible that this Court's decision could obviate the need for years of complex class action discovery and litigation. Thus, a ruling by this Court on these issues is sure to materially advance the termination of the litigation.

CONCLUSION

There is no doubt the trial court's ruling that a condo seller can sue a property management company under an implied right of action for an alleged violation of Section

22.1(c) of the Condo Act involves "a question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Therefore, Defendant respectfully requests this Court accept the appeal and decide the Certified Questions pursuant to Rule 308.

Respectfully Submitted,

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