

the Association members who are all Pualani Estates homeowners.” This Court has recognized the tort of “misappropriation” in two very narrow instances. First, in the areas of trade secrets which would require the court to find that the email addresses fit the definition of a “Trade Secret” under HRS-2 (C) (1) and (2). Clearly someone’s email address is not a “Trade Secret”. Second, the Court recognized this tort in *Chapman v Journal Concepts, Inc.* 528 F. Supp. 2d 1081(D. Hawaii 2007), but only in the context of misappropriation of a person’s name and likeness in a publication without authorization from that person. The Court found that “... Plaintiff must show (1) that Defendants used his photograph or name; (2) for the Defendants' commercial advantage; (3) without Plaintiff's consent; and (4) thereby injured Plaintiff.” (ibid. P. 27). Plaintiff’s claim fails on both counts. The essence of their Complaint is that Defendant used the email addresses “Stating therein, her personal negative opinion of the Association Board.”

2.) The Plaintiff implies that there is a tort of misappropriation of email addresses found in the Association Declaration, By-laws, Rules or Design Guidelines (“Association Governing Documents”). There is no such tort, rule or any mention of email addresses, let alone a sanction available in the Association Governing Documents. The Association Declaration Section 24.2(a) states clearly in reference to judicial proceedings available to the Association:

Further, no judicial proceeding shall be commenced or prosecuted by the association except those specifically permitted by this Section. This Section shall not apply, however, to, and the following judicial actions are permitted by the Association: (I) actions brought by the Association to enforce the provisions of this Declaration, the Bylaws, the Association Rules or the Design Guidelines.... (See Exhibit 3 of Defendant’s motion)

3.) The Plaintiff has failed to set forth any provision found in the Association Governing Documents that Defendant has violated such that a judicial action may be prosecuted by the Association, as none exist. The Plaintiff alleges “violation of both Hawaii law and the governing documents of the association” yet fails to provide this Court with any citation to statute or

governing document, instead apparently relying on an owner data sheet (which is not described in any Association Governing Document) as their basis for accusing Defendant of both illegal and wrongful conduct.

4.) The Plaintiff then directs this Court to the Declaration of Michael Kennedy, an employee of Hawaiiana Management Company Ltd. (hereinafter “Hawaiiana”), to support the allegation of illegal conduct. Michael Kennedy neither produced nor delivered the owners list to Defendant therefore his declaration is of no probative value to the issues presented to the Court.

5.) The Plaintiff engages in a long discussion of Association Declaration Section 24 (b) but fails to mention the most relevant sub-paragraph 24.2(b)(4)(a):

Each Owner, the Association and Declarant expressly agree and acknowledge that this Declaration involves and concerns interstate commerce and is governed by the provisions of the Federal Arbitration Act (9 U.S.C. §1, et seq.) now in effect and as the same may from time to time be amended, to the exclusion of any different or inconsistent state or local law, ordinance, regulation, or judicial rule. Accordingly, any and all Disputes shall be arbitrated - which arbitration shall be mandatory and binding - pursuant to the Federal Arbitration Act. To the extent that any state or local law, ordinance, regulation, or judicial rule shall be inconsistent with any provision of the rules of the arbitration service under which the arbitration proceeding shall be conducted, the latter rules shall govern the conduct of the proceeding. (See Exhibit 3 of Defendant’s motion)

6.) Therefore, clearly, the parties are bound to mediate and then arbitrate any and all disputes.

Furthermore, Section 24.2(b)(1) defines the disputes by listing explicitly the types of claims that are subject to arbitration, and states:

... such claim or cause of action whether such dispute is based on contract, tort, or statute, including, without limitation, any dispute over...any other matter arising from or related to the interpretation of any term or provision of this Declaration, or any defense going to the formation or validity of this Declaration, or any provision of this Declaration,... (See Exhibit 3 of Defendant’s motion)

7.) The CC&Rs of the Association clearly anticipated that a party, which is defined therein as any member of the Association, the Association, or the Developer, might bring a tort action against a party, just as the Plaintiff has done here. Plaintiff fails to distinguish how its claim

against the Defendant is somehow exempt from the agreement to negotiate, mediate, and arbitrate all such disputes. The Association cannot elect the forum when they are subject to the prior agreement between the parties contained in the Association's CC&Rs to both mediate and arbitrate disputes.

MEDIATION

8.) The Plaintiff has also clearly failed to set forth why once invoking mediation (see Exhibit 2 of Defendant's motion), they can breach both HRS 421J-13 and the Association CC&Rs by taking judicial action. The Plaintiff has stated that they can take judicial action because Defendant's actions constituted a threat to "... property damage, or health or safety of association members...". The Plaintiff will never be able to show, in good conscience, that receiving an email regarding Association business, that could easily be deleted, rises to the level of "threatened property damage or health and safety of association members" within the meaning of HRS 421J-13(b)(1). Further, it was not only the email issues the Association agreed to mediate, but also Defendant's dispute regarding the election outcome (see Exhibit 2 of Defendant's motion). Thus, while the Association seeks to limit the issues before this Court, they have agreed previously that all issues were subject to mediation.

9.) Even if the Court finds that mediation is not required under the CC&Rs, it should find that HRS 421J-13 applies to all issues raised by both parties.

JOINDER OF NECESSARY PARTIES

10.) The Plaintiff has claimed in paragraph 9 of its complaint, **"The private and confidential email addresses of all Association members are provided to the Association on a confidential basis by Association members and kept, stored and maintained on a List in confidence by Hawaiiana for the use of the Association Board of Directors solely for the purpose of communicating official Association communications with Association members. Some,**

but not all, of the Association Board also have access to the confidential and private email addresses of Association members.”

11.) Either the list was provided directly by Hawaiiiana to Defendant or was “negligently” provided by Hawaiiiana to a member of the Association Board of Directors. If the email list came from a Board member, the Board has in effect brought suit against itself, a ludicrous position to take. In paragraph 12 of Plaintiff’s complaint it states, “From sources unknown Wunschel illegally and wrongfully obtained a copy of the Association’s List of private and confidential email addresses of all of the members of the Association.” The allegation is that Defendant received the email list from a “source”, not that she broke into Hawaiiiana’s offices or hacked Hawaiiiana’s computer system. Without evidence of such, there is no intentional tort. In any case, all roads lead through Hawaiiiana. Hawaiiiana is an indispensable party within the meaning of HRCP 19 and must be joined by the Plaintiff. The purpose of joinder is to protect a defendant against a multiplicity of lawsuits. Here, in order to provide intent, Plaintiff must show that Defendant converted the property from either Hawaiiiana or a member of the Board of Directors, which according to the complaint are the only two “sources” of the email list. Since the Plaintiff cannot prove intent if the Plaintiff provided the email list to Defendant, the only remaining possibility that it was taken “illegally” from Hawaiiiana, and, if true, Defendant would be subject to another suit from Hawaiiiana for conversion if they are not joined here as either a plaintiff or defendant.

12.) It is the responsibility of the Plaintiff to join all necessary parties and, as the Plaintiff has stated that the email list is “kept, stored and maintained” by Hawaiiiana, it is their duty to join Hawaiiiana as a Defendant. Therefore, Hawaiiiana must be joined as a joint tortfeasor under HRS 663.11 which states, “Joint tortfeasors defined. For the purpose of this part the term ‘joint tortfeasors’ means two or more persons jointly or severally liable in tort for the same injury for

the same party or property, whether or not judgment has been recovered against all or some of them.” By Plaintiff’s own allegations, if true, then Hawaiiiana fits the definition of a joint tortfeasor and must be joined because in their absence the court cannot accord complete relief among the parties.

Contrary, to Plaintiff’s contention that Defendant could make a separate complaint against Hawaiiiana, there is no cause of action or claim that Defendant can make against Hawaiiiana as Hawaiiiana is not an agent or employee of defendant. However, Hawaiiiana is the agent of and is employed by the Association to assist the Association with their duty to manage the Association.

PRAYER FOR RELIEF

Defendant prays for relief from the Court as follows:

- A. To compel Plaintiff to mediate their disputes with Defendant, and if the dispute is not resolved through mediation, then the dispute is to be submitted to arbitration;
- B. To require Plaintiff to join Hawaiiiana Management Company Ltd. as a defendant. Plaintiff to serve joined defendant with the complaint as ordered by Court; and
- C. For such other relief as the Court may order.

Date: September 20, 2021


Dee Ann Wunschel, Movant in pro per

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In Pro Per

IN THE CIRCUIT COURT OF THE THIRD DISTRICT
STATE OF HAWAII

PUALANI ESTATES AT KONA)
COMMUNITY ASSOCIATION, a Hawaii)
non-profit corporation,)

Plaintiff,)

v.)

DEE ANN WUNSCHEL, an individual;)
JOHN DOES 1-10, DOE)
GOVERNMENTAL AGENCIES 1-10 and)
DOE ENTITIES 1-10)
and Does 1 to 10,)

Defendants.)

Case No. 3CCV-21-0000188

CERTIFICATE OF SERVICE

Assigned to:
Action Filed: June 25, 2021
Trial Date: TBD

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2021, A copy of this **REPLY TO PLAINTIFF’S OPPOSITION TO DEFENDANT’S MOTION TO COMPEL ARBITRATION (HRS§ 658A-7) AND MOTION FOR JOINDER OF PERSONS NEEDED FOR ADJUDICATION (HCRP RULE 19)** was served to the last known address of the Opposing Party’s attorney by United States Postal Service First Class Mail, Postage Prepaid to the address below. I also electronically filed the foregoing with the Third Circuit Clerk of Court using the JEFS system, which will send notification of such filing to the following:

Francis Jung
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Dee Ann Wunsch Date: 9/20/21
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