CAUSE NO. C47833

DAN DIPPREY, CURTIS PRIDDY, et al.,	§	IN THE DISTRICT COURT
	§	
Plaintiffs, and	§	
	§	
THE CLIFFS PROPERTY OWNERS' ASSOCIATION, INC.,	§	
	§	
	§	PALO PINTO COUNTY, TEXAS
Plaintiff in Intervention,	§	
	§	
v.	§	
	§	
DOUBLE DIAMOND, INC., et al.	§	
	§	
Defendants.	§	29th JUDICIAL DISTRICT

PLAINTIFF INTERVENOR'S APPLICATION FOR A TEMPORARY INJUNCTION

TO THE HONORABLE COURT:

The Cliffs Property Owners' Association, Inc. (The Cliffs POA), Plaintiff Intervenor, hereby seeks entry by the Court of a Temporary Injunction against Defendants, and more particularly Double Diamond Management Corp. (DDM), Double Diamond, Inc. (DDI) and R. Mike Ward (Ward), directing these Defendants (collectively Double Diamond) to take and/or refrain from taking the actions set forth herein below, showing:

A. BACKGROUND

1. Pursuant to the most recent election in the Annual Meeting of the Members of The Cliffs POA, a new Board of Directors was elected. It is necessary for The Cliffs POA to file this application to stop the Double Diamond Defendants' unlawful interference with the ability of The Cliffs POA to conduct its business.

2. The new Board has been taking steps towards transferring management of The Cliffs POA away from Double Diamond and vesting it in the POA under the direction of the non-

conflicted Board.

3. In conjunction therewith, the Board has resolved to have the Members' fees and any assessments placed in a new POA account, not under the direction and control of Double Diamond through the conduit of DDM.

4. Second, there is a list of Members of The Cliffs POA and their contact information, which has been maintained by Double Diamond, but which is POA property.

5. In order to transfer the source of communications pertaining to The Cliffs POA to the Board, as opposed to Double Diamond (including particularly Ward), and especially as it relates to dues (¶ 6 *infra*), the Board has through its counsel requested that Double Diamond immediately provide this list, which belongs to The Cliffs POA and not Double Diamond, to the Board.

6. This matter is of *extreme emergency* because Double Diamond is *now* sending out assessment notices and, in fact, has been *collecting* assessments from unsuspecting Members when it no longer has authorization to do so. Furthermore, Defendant Ward has been sending *misleading communications* in this regard. *See* Ex. A. Contrary to Ward's contention, the current Board stands ready to pay legitimate, third party invoices to ensure those that provide services and products to the POA are paid, and the only reason assessment notices could not be sent out by the current Board is Double Diamond's refusal to turn over the Members' assessment billing list. These dues statements need to instead be sent out by the Board or its designee only, and the assessments (or other funds sought pertaining to The Cliffs POA) placed in a POA account controlled by the POA Board, as opposed to DDM, Ward, and DDI.

B. RELIEF SOUGHT

7. The Cliffs POA asks that the Court order Double Diamond to *transfer* the Members

list (and any other books and records that belong to The Cliffs POA) to the Board *within three days* from the date of the Court's Order.

8. Second, Double Diamond should be ordered to *cease and desist* from sending out any assessment statements, or any other requests for monies from POA Members, to the POA Members, *immediately*.

9. Third, since the money in The Cliffs POA account(s), such as particularly in Green Bank, is POA money, as Double Diamond corporate representatives have admitted in their depositions, it should not be under the exclusive control of DDM or any other Double Diamond entity, but rather under the exclusive control of The Cliffs POA (under the direction of the Board). Defendants should therefore be enjoined to *immediately transfer* all POA funds, including at Green Bank, into a new account, as to whom the persons with authorized access will be POA Board Members or persons designated by the Board, not Double Diamond employees. This is also *urgent* because DDM has transferred around $2.1 MM out of the Green Bank account while the "proxy battle" was underway, according to DDM's Detail Trial Balance. *See* Ex. B (deposition excerpt). Double Diamond's CFO and corporate rep. Rick de la Fuente testified he could not explain what these transfers were for. *Id*. Furthermore, he also testified that once this money gets into the hands of DDI, it becomes DDI money to do with as it pleases. *See* Ex. C (deposition excerpt). Alternatively, DDM should be enjoined from disbursing any funds from Cliffs POA bank accounts except on written approval of the current Board of Directors and DDM is ordered to execute whatever documents Green Bank requires to place the current Board of Directors of The Cliffs in sole and exclusive control of all Cliffs POA bank accounts at Green Bank.

C. PROPRIETY OF THE RELIEF REQUESTED

10. ARTICLE ELEVEN, Section 7, of The Cliffs POA Bylaws (Ex. F), provides:

> The officer or agent having charge of the Association's book shall make, at least ten (10) days before each meeting of Members, a complete list of the Members entitled to vote at such meeting or any adjournment thereof, with the address of each, which list, for a period of ten (10) days prior to such meeting, shall be kept on file at the principle office of the Association or such other location which has been designated by the Board of Directors and shall be subject to inspections by any Member at any time during the usual business hours. Such list shall also be produced and kept open at the time and place of the meeting and shall be subject to the inspection of any Member during the whole time of the meeting.

11. Therefore, it is evident that Double Diamond, as heretofore "having charge of the Association's book" (or books), has this list,[1] and the list is "subject to inspections by any Member at any time." Even *without* the change in Board membership, Double Diamond is obliged to make this list available "at any time," and this has been requested.[2]

12. Also, all *other* records of The Cliffs POA (which certainly belong to the POA), have likewise been requested to be turned over to General Counsel for the POA. See Ex. E. No reason presents itself why this transfer should not also be made within three days from the Order.[3]

13. With respect to Double Diamond *sending out assessment notices*, **payable to a Double Diamond controlled account**, as stated it is obvious and undisputed that the dues money is POA money. POA money should be subject to control by its owner, The Cliffs POA, not a third party, such as Double Diamond. Therefore, there is no basis for Double Diamond to be permitted to *continue collecting* these assessments, or *retaining* assessment money already collected.

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[1] To whatever extent Double Diamond might argue otherwise, the accounting firm hired by Double Diamond as to the proxy evaluation stated that it used such a list. See Ex. D.

[2] See January 7, 2019 Letter from The Cliffs POA General Counsel Chad E. Robinson to R. Jeffrey Schmidt, Senior Vice President/General Counsel of Double Diamond, page 2. See Ex. E.

[3] The deadline given in the letter, Monday, January 14, 2019 (which gave a week), has not yet expired. Based on past experience, however, Intervenor does not expect compliance, so this Application is being advanced presently due to the urgency of the matter. Obviously if Double Diamond *does* comply, the Application will be moot as to this point.

14. The Cliffs POA expects that Double Diamond may contend that it has the right to collect and maintain the money pursuant to *contract*, a service agreement. While The Cliffs POA denies that contention, *assuming arguendo* that the service agreement were enforceable, DDM is breaching it by refusing to honor the directives of the Board of Directors of The Cliffs POA. For example, Paragraph 1 of the services agreement provides, in pertinent part, that "DDMC will furnish its best skill and judgment and will cooperate in furthering the interests of the POA." By interfering with collections of maintenance fees and refusing control of The Cliffs POA bank accounts, DDM is breaching this agreement, which must be stopped. In any event, the history in that regard is that there was a *prior* Service Agreement. *See* Ex. G. However, its term expired December 31, 2016. See Ex. H. The POA Board did not extend it; instead, Mike Ward *purportedly* **unilaterally** extended it on his own (representing both sides of the fence). Subsequently, apparently realizing the inefficacy of such a charade, in March, 2018, *one week before the vote to remove the prior Double Diamond controlled directors*, Ward purportedly had the Board enter a *new* Management Agreement contract to last until December 31, 2028. See Ex I. However, this effort was *void* and of no effect, and therefore *incompetent* to bind The Cliffs POA (a) to continue to send its money to Double Diamond, and (b) to have Double Diamond manage it, as now discussed.

15. *First*, under Texas Property Code § 209.0052(b), the POA can only enter a contract with a Board member (Ward) or a company with which the Board member has a financial interest (DDM) if *all* of the following conditions are met:

> (1) the board member, relative, or company bids on the proposed contract and the association has received at least two other bids for the contract from persons not associated with the board member, relative, or company, if reasonably available in the community;
>
> (2) the board member:

(A) is not given access to the other bids;

(B) does not participate in any board discussion regarding the contract; and

(C) does not vote on the award of the contract;

(3) the material facts regarding the relationship or interest with respect to the proposed contract are disclosed to or known by the association board and the board, in good faith and with ordinary care, authorizes the contract by an affirmative vote of the majority of the board members who do not have an interest governed by this subsection; and

(4) the association board certifies that the other requirements of this subsection have been satisfied by a resolution approved by an affirmative vote of the majority of the board members who do not have an interest governed by this subsection.

However, far from *all* of these conditions being met, as to either the "unilateral" extension or the Board's "new contract," *none* were. So the putative contract is void, and cannot serve as a basis for POA money to continue to go to or be controlled by DDM or any Double Diamond entity.[4]

16. *Second*, the new contract is void for another reason as well, because it was approved by a "*void*" or improperly constituted *Board* due to *improperly extended terms* of the replacement members. Previously Dan Dipprey and Mike Elyea were elected to and were serving on the Board. In December, 2017, Ward purportedly held a Board meeting to remove them from the Board. Ward then purportedly appointed two replacement Board members who were beholden to Double Diamond, and appointed them for **three-year terms**, even though the Bylaws only allow for **two-year terms**, see Ex. F (Bylaws ARTICLE SEVEN, Section 1, and Dipprey and Elyea had already served *part* of those terms. Whereas under Texas Property Code § 209.00593(a), "A board member may be appointed by the board to fill a vacancy on the board. A board member appointed

[4] Undoubtedly Double Diamond will argue that subsection (**a**) applies: "This section does not apply to a contract entered into by an association during the development period." However, no such development period is in effect, or was in effect at the time of the "extension(s)." See Ex. J brief. Therefore, the contract(s) are void and of no effect.

to fill a vacant position shall serve **for the remainder of the unexpired term of the position**" (emphasis added). Here, Ward (or the "rogue" Board under his direction) appointed the new "replacement" Board members for a ***longer*** period. Under subsection (c), "The appointment of a board member in violation of this section is **void**" (emphasis added). So the "Board" that approved the new Management Agreement contract was void and the contract therefore void as well.[5]

17. *Third*, and finally, the contract is void is because the Board was a void Board due to *lack of notice* of the Board meeting to replace Dipprey and Elyea. Under Texas Property Code § 209.0051(h), "The board may not, unless done in an open meeting for which prior notice was given to owners under Subsection (e), consider or vote on: … (13) **the filling of a vacancy on the board**" (emphasis added). The notice required under (e) is:

> (e) Members shall be given notice of the date, hour, place, and general subject of a regular or special board meeting, including a general description of any matter to be brought up for deliberation in executive session. The notice shall be:
>
> (1) mailed to each property owner not later than the 10th day or earlier than the 60th day before the date of the meeting; or
>
> (2) provided at least 72 hours before the start of the meeting by:
>
> (A) posting the notice in a conspicuous manner reasonably designed to provide notice to property owners' association members:
>
> (i) in a place located on the association's common property or, with the property owner's consent, on other conspicuously located privately owned property within the subdivision; or
>
> (ii) on any Internet website maintained by the association or other Internet media; and
>
> (B) sending the notice by e-mail to each owner who has registered an e-mail address with the association.

[5] Once again, Double Diamond will likely make an argument based on the development period, relying on Texas Property Code § 209.00593(**d**): "This section does not apply to the appointment of a board member during a development period." However, once again there was no development period in effect at the time of this appointment.

No such notice was given by the Board before the meeting in which Ward and his compatriots claim to have voted to replace Dipprey and Elyea on the Board.[6]

18. For these three *independent* reasons, then, there was no proper Board approval of the "new" Management Agreement, so Double Diamond cannot support its continued collection and retention of the POA money on the basis of contract.

D. ENTITLEMENT TO THE RELIEF REQUESTED VIA TEMPORARY INJUNCTION.

19. "While, as a rule, equity jurisdiction is rarely exercised by way of mandatory injunction upon interlocutory application, yet it is well settled that such an order may issue before final hearing in extreme cases where the right is clearly established and serious injury results from the invasion of the applicant's rights. In cases of willful and unlawful invasion of a plaintiff's right, the injury being a continuing one, a preliminary mandatory injunction will issue, it appearing to the court that full and adequate relief at law is not afforded." *Dallas v. McElroy*, 254 S.W. 599, 601 (Tex. App.—Dallas 1923, writ dism'd w.o.j.).

20. This holding in *McElroy* is directly applicable in this case. The continued obtaining and spending of POA money by Double Diamond during the pendency of this suit constitutes a "willful and unlawful invasion of [The Cliffs POA's] right [and] the injury [is] a continuing one." Therefore, the Court should grant the injunctive relief requested in ¶¶ 7-9 *supra*. Plaintiffs have shown a probable right of recovery, probable harm, and the inadequacy of any legal remedy. The potential for (and actuality of) considerable confusion on the part of The Cliffs POA Members respecting to whom dues money should be sent is further evidence of the necessity of *immediate* injunctive relief as prayed for hereinabove.

[6] This ground of invalidity is not dependent on the question of non-existence of the development period.

21. The Cliffs POA stands ready to post a reasonable bond. However, Intervenor suggests that a minimal bond should be ordered since it is apparent that the POA is entitled to the information sought and to collect and control its own funds.

22. A trial date has already been scheduled in the case.

WHEREFORE, the Cliffs POA, as Plaintiff in Intervention, prays for issuance of a Temporary Injunction for the relief sought in ¶¶ 7-9 *supra*, and for such further or other relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 14th day of January, 2019, the undersigned electronically filed the foregoing document using the eFile.TXCourts.gov electronic filing system which will send notification of such filing to all counsel of record, including specifically to:

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