IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

JOHN ENRIETTO Plaintiff, vs. **CAPTAIN'S COMMAND AT BLUEBEARD'S BEACH CLUB OWNERS ASSOCIATION, INC.** Defendant.	)	CASE NO. ST-14-CV-302 ACTION TO ENFORCE SHAREHOLDER'S RIGHT OF INSPECTION

MEMORANDUM OPINION

THIS MATTER is before the Court on Plaintiff John Enrietto's Motion for Summary Judgment[1] and Defendant Captain's Command at Bluebeard's Beach Club Owners Association, Inc. Cross-Motion for Summary Judgment.[2] For the reasons set forth herein the Court will deny Plaintiff Enrietto's Motion For Summary Judgment and grant Defendant Captain's Command's Cross Motion for Summary Judgment.

I. Background

This is an action by a shareholder/member of an incorporated timeshare condominium association seeking to compel the association to provide him with the names and addresses of the other timeshare owners in electronic form.

[1] Filed on August 18, 2014. Previously, by Order dated August 4, 2014, Plaintiff's Motion for Preliminary Injunction was denied.

[2] Filed on September 9, 2014 and included Defendant's Opposition to Plaintiff's Motion For Summary Judgment.

Plaintiff John Enrietto ("Enrietto") owns a time share interest at Captain's Command at Bluebeard's Beach Club, a resort condominium development on St. Thomas, Virgin Islands. All time share owners are members and shareholders of Captain's Command at Bluebeard's Beach Club Owners Association, Inc. ("the Association"), which has a total of 3,848 time share units. The Association is incorporated pursuant to Chapter 1 of Title 13 of the Virgin Islands Code and is responsible for the operation, management, and maintenance of the resort. Wyndham was the developer of the condominium resort and continues to own several hundred units. Wyndham St. Thomas is the Association's management firm.

Enrietto claims that historically fewer than 700 non-developer owners vote in the elections, which permits Wyndham to use its votes to influence elections and control the Board. On the other hand, the Association claims there were 2,840 privately owned units and 1,008 developer owned units in the 2013 elections, and disputes the allegation that Wyndham influences elections and controls the Board.[3]

The parties at bar were previously engaged in litigation over a similar issue in a case captioned as *John Enrietto v. Captain's Command at Bluebeard's Beach Club Owner's Association, Inc.*, Case No. ST-12-CV-499, (hereinafter "*Enrietto I*") in which Plaintiff Enrietto sought an injunction compelling the Association to provide him with the names, addresses, email addresses, and telephone numbers of the other time

[3] The accuracy of these disputed allegations is not material to the Court's analysis. They are included merely to provide a better picture of Plaintiff's argument and Defendant's response.

share owners. In a Memorandum Opinion and Order entered on October 1, 2012, the Court (the Honorable James Carroll presiding) granted Enrietto's Motion For Preliminary Injunction in part and denied it in part. The Court found that Enrietto is entitled to inspect the owners' list of Owners at a reasonable time, pursuant to § 73(2) of Title 13 of the Virgin Islands Code, and directed the Association "to allow access to a list of the owners' names and addresses." The Court determined, however, that Enrietto is not entitled to the owners' email addresses and telephone numbers as the public interest is best served by keeping the owners' email addresses and telephone numbers private. In addition, because the Association made an unconditional offer to Enrietto, during trial, to distribute his campaign materials to all owners, at his expense, in the same manner that the Board had already distributed the Notice of Annual meeting, the Court directed Captain's Command to do so.[4]

Plaintiff John Enrietto filed the case at bar on June 12, 2014.[5] In this case Enrietto seeks an injunction to compel the Association to provide him with the mailing list of owners (names and addresses) in usable electronic format that would

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[4] Mem. Op. 3

[5] At the time of filing, Enrietto expressed his intention to run in the October 2014 Election for the Board of Directors of Captain's Command. However the deadline to submit notice of his candidacy for the 2014 Election lapsed without Enrietto's registration. However, the issues remain ripe for 2015 and future elections.

facilitate mass mailing of his campaign literature and proxy solicitations without the necessity of manually typing the addresses of over 2,000 owners.[6]

The Association characterizes this litigation as "a dispute over the balance between one individual's demand for the unconditional distribution of information, and the Association's obligation to protect thousands of owners from the risks associated with the dissemination of their personal information."

II. Facts

Both parties assert that there are no disputes of material fact and this matter is ripe for summary judgment. The Court agrees.

The Association has a five-person Board of Directors. Directors are elected at an annual meeting held in October of each year. The owner of each unit is entitled to vote in the annual election.[7] Each year the Board prepares materials relating to the annual meeting, and then forwards those materials to Wyndham St. Thomas for distribution to the unit owners. Def.'s Opp. to Emergency Mot. for Prelim. Inj. (Aff. of Robert Bobowksi ¶ 6-7). The annual meeting materials mailed to owners are also posted online on the Association's website and includes biographies of the candidates

[6] Enrietto is not seeking the telephone numbers or email addresses of the owners.

[7] Each unit is eligible to cast one vote, but owners who are not in good standing for non-payment of dues are not permitted to vote.

for the Board.[8] Def.'s Counter Statement of Material Facts, Ex. 1 (Supp. Aff. of Robert Bobowski, ¶ 6-7, and Ex. 1-A thereto).

Enrietto planned to run for a position on the Board in the 2014 election. Aff. of John Enrietto ¶ 7. To that end, he wrote to the Board requesting a mailing list in electronic format in order to allow him to mail his campaign materials directly to the other owners. Pl.'s Statement of Material Facts ¶ 21; Aff. of Robert Bobowski ¶14. The Board responded that pursuant to its privacy policy, it would provide the (hard copy) Membership List to Enrietto only if he first signed a document entitled "Affidavit of Legitimate Use," but it would not provide the list in electronic form.

The Affidavit requires Enrietto to provide, *inter alia*, the following: 1) the purpose for which the list is being requested, 2) a representation that the use of the Membership List shall be limited to matters directly related to the Association and/or the identified purpose, and that its use will be compliant with the governing documents of the Association and all applicable laws, and 3) a representation that the Owner will not use the Membership List for any commercial purpose or monetary gain, nor distribute, sell or otherwise transfer the Membership List, or use the names

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[8] The biographies may also be mailed to owners. Compare Aff. of Robert Bobowski ¶ 2 ("The 2014 Annual Meeting materials will be mailed to the owners in September, 2014. The package generally includes: the Meeting Notice, brief biographies of all candidates for the five (5) Board seats, the proxy statement, the ballot/proxy, the proposed budget, and the Association Letter") with Supp. Aff. of Robert Bobowski ¶ 3 ("The mailed information includes: the Meeting Notice, Board Letter and proposed budget. The online materials include the Meeting Notice, Agenda, Board Letter, Proxy Statement, Proposed Budget, Candidate bios, Revocable Proxy . . . ."). Whether the Association will include the candidates' biographies in the material that is mailed to the owners, or post the biographies on its website, or both, is not a material fact in this dispute.

to solicit business, or disclose any information in the Membership List to any third party. Finally, the Affidavit includes a clause requiring the requesting owner to indemnify and hold harmless the Association for any actions arising from the distribution of the owners list (without regard to whether or not the owner used the list in conformance with the terms of the Affidavit).[9]

III. Summary Judgment Standard

Summary judgment is appropriate if the moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).[10] A "genuine" dispute exists if, based on the evidence in the summary judgment record, a reasonable jury could find in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If the moving party satisfies that standard, "the burden shifts to the non-moving party to present 'affirmative evidence' from which a jury might reasonably return a verdict in his favor." *Chapman v. Cornwall*, 58 V.I. 431, 436 (V.I. 2013) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-25 (1986); *Liberty Lobby*, 477 U.S. at 248). At the summary judgment stage, this Court examines the evidence in the light most

[9] Copy of form Affidavit is attached to Def.'s Counter Statement of Material Facts as a part of Ex. D.

[10] Rule 56 of the Federal Rules of Civil Procedure is applicable to proceedings in the Superior Court through Rule 7 of the Superior Court Rules.

favorable to the non-moving party. *Simpson v. Golden Resorts, LLLP*, 56 V.I. 597, 605 (V.I. 2012).

IV. Cross-Motions for Summary Judgment

Enrietto seeks a permanent injunction requiring the Association to provide him with an electronic copy of the owners list. The Association also moves for summary judgment, arguing that Enrietto is not entitled any relief and instead the Association is entitled to summary judgment. Therefore, the cross-summary judgment motions can be evaluated simultaneously.

To determine whether Enrietto is entitled to a permanent injunction, the Court considers whether

> (1) the moving party has shown actual success on the merits of the underlying legal claim;
> (2) the moving party will be irreparably injured by the denial of injunctive relief;
> (3) whether a permanent injunction will result in greater harm to the defendant; and
> (4) the injunction would be in the public interest.

Coffelt v. Fawkes, 765 F.3d 197, 201 (3d Cir. 2014) (citing *Shields v. Zuccarini*, 254 F.3d 476, 482 (3d Cir.2001)); *see also A & D Fire Prot., Inc. v. United States*, 72 Fed. Cl. 126, 132 (2006).[11]

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[11] In his Motion for Summary Judgment, Enrietto incorporates the arguments set forth in his Motion for Preliminary Injunction. Accordingly, the Court considers the arguments advanced by the parties relating to Enrietto's Motion for Preliminary Injunction in addition to their summary judgment arguments. However, the standard for evaluating a permanent injunction differs from the preliminary injunction test. To succeed on a motion for preliminary injunction, a litigant need only show "a reasonable chance, or probability, of winning," *Yusef v. Hamed*, 59 V.I. 841, 849 (V.I. 2013), whereas

Enrietto pursues his claims on two theories: 1) a statutory right as set forth in the Virgin Islands Code, and 2) a right arising out of the decision rendered by Honorable James Carroll in *Enrietto 1.* We will analyze each claim separately.

A. Statutory Claim Analysis.

Enrietto seeks a permanent injunction requiring the Association to provide the owners list in an electronic, "economically-usable form" and requiring the Association to allow him access to its website, where he wishes to post his campaign letter. In support of his argument, he cites § 73(2) of Title 13 of the Virgin Islands Code, which provides for a shareholder's right of inspection. He also asserts that the Association is burdening his right to inspection by requiring that he sign its Affidavit of Legitimate Use, which contains an indemnification clause.

The Association agrees that all owners have a right to inspect the list of owners' names and addresses and financial records at the Association's Office on St. Thomas. It has offered to provide Enrietto with a hard-copy of the list, but only if he signs the Association's Affidavit of Legitimate Use. It argues, however, that Enrietto has no statutory right to an electronic, manipulable copy of the owners list.

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to succeed on a motion for permanent injunction, the moving party must actually succeed on the merits.

1. Right to Electronic Copy of the Owners List

Enrietto's right to inspect the records is indisputable. *See Estate of Bishop v. Antilles Enters.*, 252 F.2d 498, 500 (3d Cir. 1958) ("statutory provisions securing to stockholders the right to inspect books and records are to be regarded as supplemental to the common law right to such inspection and not as a restriction upon it"). However, it is not an absolute, unrestricted right.

The Court notes there are no provisions in the Virgin Islands Condominium Act (28 V.I.C. §§910-927), or elsewhere in the Virgin Islands Code, that specifically deal with time share communities. However, the Condominium Act does apply. Sections 917-919 provide that the administration of the property be governed by bylaws but the Code does not expressly allow or prohibit the adoption of provisions governing access to owner identity or information.

Section 73(2) of Title 13 of the Virgin Islands Code, general corporation law, provides that "[e]very corporation formed under [Chapter 1 of Title 13 of the Virgin Islands Code][12] shall maintain . . . a stock ledger," and the ledger "shall be kept in the principal office of the corporation in the United States Virgin Islands and which shall be open daily to any stockholder for inspection at reasonable times."[13]

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[12] The Association was incorporated under Chapter 1 of Title 13; therefore, § 73(2) applies to it. See Ex. B. to Def.'s Opp. To Emergency Mot. for Prelim. Inj. (the Association's Articles of Incorporation).

[13] Enrietto also relies upon V.I. tit. Ann. 28 VIC 919, the Virgin Islands Condominium Act, but his reliance is misplaced since that section addresses access to receipts and expenditures, not access to a list of owners.

Section 189, also of Title 13, contains a similar provision. It reads:

> The original or duplicate stock ledger containing the names and addresses of the stockholders, the number of shares held by them, respectively and the dates when they respectively became owners, shall, at all times, during the usual hours for business, be open to the examination of every stockholder at its principal office or place of business in the United States Virgin Islands . . .

A plain-language reading of § 73(2) does not support a shareholder's right to demand an electronic copy of the owners' list. Sections 73(2) and 189 both explicitly state that the stock ledger shall be available at the corporation's principal place of business in the Virgin Islands. The Association has not barred Enrietto from inspecting the books and records or the owners list, nor otherwise limited that right. The Association has simply declined Enrietto's request for the owners list in electronic form, and it has the right to decline that request since the statute does not impose that duty on the Association. Similarly Enrietto has no right to post his campaign material on the Association's website, and he has offered no authority for that claim.

Enrietto argues that it would be wasteful for him to travel from his home in Indiana to St. Thomas to inspect the owners' list in the Association's office and to "spend a week hand-writing the names and addresses of each of the 2,752 private owners, and turn around and mail to them whatever campaign literature he pleases." He therefore argues that the list of Owners should be transmitted to him in an electronic form. Enrietto asserts that this would result in no greater an invasion of privacy than if he acquired the names and addresses from his personal visit to the Association's office. Enrietto also points out that the names and addresses are on file at the Office of the Recorder of Deeds and are therefore neither private nor confidential. Finally he points out that he was provided with an owners list in 2012; therefore, the proverbial cat is out of the bag and the Association's privacy concerns are moot. Enrietto's argument seems logical. However, there is little to support such a liberal interpretation of the Association's duties, even if Enrietto received an owners list in 2012.

Air travel is certainly less convenient and more costly than simply receiving an electronic copy, but convenience to a requesting stockholder does not factor into the analysis of whether the Association has complied with § 73(2) or with § 189. Those statutes only require the Association to make the owners' list available for inspection at its principal place of business at reasonable times, and this it has done.

In addition, the court in *Enrietto 1* found that § 73(2) "is explicit in the information a corporation is required to provide for inspection," and it could see "no reason why the legislature would not have amended the statute to include email addresses and telephone information if it had so desired." The Court in *Enrietto 1* therefore declined "to rewrite the statute." This Court now also declines to re-write the statute to require the Association to provide Enrietto with names and addresses in electronic format.

2. **Affidavit of Legitimate Use**

Enrietto argues that the Affidavit of Legitimate Use (hereinafter "the Affidavit") burdens his statutory right to inspect the owners' list.

The Affidavit is a result of two policies the Board adopted in 2013: a "Privacy Policy" and a "Document Sharing and Duplication Policy."

The Privacy Policy states:

> Each owner is entitled, upon advance written request, to have access to a current membership list, which shall consist of the name and mailing address for each owner. Disclosure of the Captain's Command at Bluebeard's Beach Club Owners Association Inc. owners list maintained by the resort management company containing additional personal contact information such as email addresses and telephone numbers shall be limited to the resort management company, its affiliates, the Board of Directors and companies contracted to perform business on behalf of the Association (such as, but not limited to collections, notifications, reservation services).

The Document Sharing and Duplication Policy provides:

> Members of the Association (Owners) are permitted to have access to financial records and access to a list of owners' names and addresses.
>
> Access to such information is to be at the Association [sic] physical address at the resort property. The Board understands that the majority of the Owners reside outside of St. Thomas, thus copies of requested records shall be provided. In accordance with the Management Agreement signed January 1, 2010, any expense associated with the copying of records by request of an Owner, shall be at the cost of such Owner.
>
> It is agreed by the Board that privacy and accuracy are of paramount importance. Accordingly, records shall be distributed in hard-copy format to ensure the validity of the information. The Board also agrees

> that any request for records be accompanied by an Affidavit of Legitimate Use to protect the Association as a whole and the expectation of privacy of the individual owners as provided in the Privacy Policy adopted by the Board February 13, 2013.

These policies explicitly recognize each unit owner's right to inspect the owners list, and, consistent with § 73(2) and § 189, state that an owner may access the list at the resort property in St. Thomas. The Document Sharing and Duplication Policy acknowledges that a majority of owners reside outside of St. Thomas, and states that "copies of requested records shall be provided." The policy further specifies two conditions to providing copies of the owners list: that the records will be distributed in hard-copy format, and that the owner requesting records execute the Affidavit of Legitimate Use.

An owner inspecting the owners' list in the Association's office is not required to sign the affidavit. The Association only requires an owner to sign the affidavit when an owner requests copies of the owners list. The Board's adoption of a policy whereby it offers to distribute the owners list to an owner upon request is a voluntary expansion of an owner's right to inspect. No such accommodation is required under applicable law. In other words, the affidavit does not affect Enrietto's statutory right to inspect because that right does not include the right to demand that a corporation provide an owners list in electronic format or hard copy. Enrietto's right is simply, as the statute says, to inspect the owners list "in the principal office of the corporation in the United States Virgin Islands . . . at reasonable times." 13 V.I.C. § 73(2).

The Affidavit's indemnification clause reads:

> I agree to indemnify and hold the Association, their managing agent, and each of their respective parents, affiliates, subsidiaries, officers, directors, employees and agents harmless from any claims, damages, liabilities, or causes of action arising from or relating to [the requesting owner's] use of the Membership List. My indemnification shall include, without limitation, the cost of all attorney fees and court costs incurred in connection with any of the foregoing.

The Affidavit requires an owner to indemnify and hold the Association harmless ... from any claims, damages, liabilities or causes of action arising from or relating to (the mere) use of the Membership List, even if the owner did not use the list for any unlawful or improper purpose. Although the indemnity and hold harmless clause is overbroad, the Affidavit does not violate Enrietto's right to inspect the owners list.[14]

This Court now reaffirms Enrietto's right to inspect. However, as explained above, the Affidavit of Legitimate Use does not affect his right of inspection. The right to inspection in the Virgin Islands is the right to inspect a corporation's stock ledger in the corporation's principal office or place of business in the Virgin Islands at a reasonable times.

[14] The Court agrees with Enrietto that the language in the Affidavit has the potential to cause him (and every other owner who signs the affidavit) financial harm, particularly from others against whom he might campaign. The Court is hard pressed to imagine that any unit owner who understands its meaning would execute the Affidavit in its current form and finds the indemnity clause is oppressive. However, the Court finds no basis upon which it may order the Association to revise the Affidavit. Nevertheless, the Court encourages the Board to revise its Affidavit of Legitimate Use.

In consideration of the above analysis, Enrietto does not succeed on the merits of his statutory claim.[15]

B. Claim Based on 2012 Memorandum Opinion and Order

Enrietto asserts that the Association's refusal to turn over the owners list and the new policy requiring him to sign the Affidavit of Legitimate Use violate the permanent injunction in *Enrietto 1.*

Enrietto has mischaracterized the Order in *Enrietto 1.* That Order was not a permanent injunction. It merely acknowledged the Association had already offered a better deal to Enrietto than the court was willing to order as a matter of law. Any rights Enrietto gained in *Enrietto 1* were narrowly defined by the terms of the offer and in that sense, gratuitous. The Order in *Enrietto 1* certainly was not perpetual. The court in *Enrietto 1* found that Enrietto has a right to inspect the owners' list at a reasonable times, but that he does not have a right to the owners' email addresses and telephone numbers. It explained that § 73(2) "is explicit in the information a corporation is required to provide for inspection," and could see "no reason why the legislature would not have amended the statute to include email addresses and telephone information if it had so desired." The court concluded that the Association's

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[15] Enrietto also argued that the Association's refusal to provide an owners list in electronic form is a violation of his common law rights. However, he did not brief that issue nor cite to any common law sources to advance his argument. Therefore, the Court did not analyze that argument. In addition, it is doubtful that common law would impose a duty upon the Association that did not arrive until the 21st century.

unconditional offer to distribute Enrietto's campaign mailing to all owners in the same manner it distributed the Notice of Annual Meeting, at Enrietto's expense, "protects the privacy of the owners, addresses the concerns of both parties, and serves the public interest." In arriving at that conclusion, the Court noted that "this Opinion is not precedential to the extent that it orders relief pursuant to [the Association's] unconditional offer to Enrietto." The Court declined "to address whether it would have the power to order similar relief . . . absent [the Association's] express unconditional offer."[16] Therefore, the Association's Affidavit requirement does not violate *Enrietto 1* as that decision rendered no perpetual right to the owners list to Enrietto.

C. Remaining Injunctive Relief Factors

Because Enrietto has not succeeded on the merits of his claims, the Court need not address the three remaining permanent injunction factors because "[a] plaintiff that has not actually succeeded on the merits of its claim cannot prevail on its motion for injunctive relief. *See Argencord Mach. & Equip., Inc. v. United States*, 68 Fed. Cl. 167, 176 (Fed. Cl. 2005) (evaluating a motion for permanent injunction); *Dakota Indus., Inc. v. Dayton Hudson Corp.*, 2001 U.S. Dist. LEXIS 24029, at P34 (D.S.D. Sept. 13, 2001) (evaluating a motion for permanent injunction and concluding this

[16] Mem. Op. 6, n. 14.

court does not need to review the [remaining injunctive] factors because the movant had not shown actual success on the merits).

V. Conclusion

Enrietto's right to inspect the records is indisputable. Sections 73(2) and 189 both explicitly state that the stock ledger shall be available at the corporation's principal place of business in the Virgin Islands. However, neither statute imposes a duty upon the Association to provide the owners' list to Enrietto in electronic form, or "economically-usable form," or to transmit or distribute copies in any manner. An owner inspecting the owners' list in the Association's office is not required to sign the affidavit. The Association only requires an owner to sign the affidavit when an owner requests copies of the owners list. The Board's adoption of a policy whereby it offers to distribute the owners list to an owner upon request is a voluntary expansion of an owner's right to inspect.

In addition, *Enrietto 1* did not grant Enrietto any perpetual rights to a hard-copy of the owners list.

Neither Enrietto's statutory rights nor the rights granted in *Enrietto 1* grant Enrietto the right to the owners list in an electronic form or hard-copy. The Association is not prohibited from requesting an Affidavit in exchange for a hard-copy of the owners list.

Accordingly, Enrietto does not succeed on the merits. Therefore, Enrietto's motion for permanent injunction and summary judgment will be denied, and the Association's motion for summary judgment will be granted.

A Judgment consistent herewith is being issued simultaneously.

DATED: July 17, 2015

Kathleen Mackay
Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Acting Clerk of the Court

BY: Paula Clayton
for **DONNA D. DONOVAN**
Court Clerk Supervisor 7/17/15