IN THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE

IN RE:	)	
PETITION OF LAUREL HILLS	)	
CONDOMINIUMS PROPERTY OWNERS	)	**DOCKET NO. 12-00030**
ASSOCIATION FOR A CERTIFICATE	)	
OF PUBLIC CONVENIENCE AND	)	
NECESSITY		

PETITIONER'S SECOND MOTION IN LIMINE

Petitioner files this second Motion in Limine seeking to exclude certain testimony at the February 13, 2013 hearing concerning certain testimony of Mr. John Moore ("Mr. Moore"). Specifically, this Motion seeks to exclude certain direct testimony by Mr. Moore that violates Tenn. R. of Evidence 1002-1003, also known as the "Best Evidence Rule", and which constitutes hearsay.

Mr. Moore has provided hearsay and unsupported evidence in an attempt to put into issue the ownership of the water system owned and operated by Laurel Hills. Specifically, Mr. Moore provided the following testimony:

> Legal Ownership: Initially the water system was constructed, owned and operated by the developer and was at some point turned over or sold to the RMCC which operated, and presumably owned the water system until it was transferred or sold back to the developer in 2000 (Exhibit 1, Line 1 or Attachment #1). Although individuals and legal counsel have petitioned the RMCC's former BOD to review these and other records as allowed by the By-Laws and Tennessee Non Profit Corporation Statutes multiple times (Exhibit 1, Lines 9, 18 and 21), all requests to date have been unanswered or denied.
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> Sale of Water System: It is clear through the master plan and other documents that the original developer's intent was that the water system be constructed for the benefit of the developer to sell lots and therefore remain under the developer's control. With respect

> to the Renegade legal Restrictions, there remains an interpretation of whether the developer even had the right to sell the water system to anyone other than the RMCC and also after selling it to the RMCC, could it then be resold back to the developer.

(Moore Direct Testimony at 9.) The essence of this testimony is meant to question the ownership of the water system, allegedly because a "master plan" would have prevented the transfer of ownership to Laurel Hills. The so called "master plan" supporting this contention is not attached to Mr. Moore's testimony. Documents that would support his contention that the ownership of the system was at some point rested with the Renegade Mountain Community Club ("RMCC") is not attached. Mr. Moore, in fact, provides no guidance as to how he came to know these alleged facts and has provided no foundation, other than his own conjecture, that the ownership of the system is in any way in doubt. Mr. Moore's statement goes so far as to border on the slanderous and clearly does not comport with the Rules of Evidence. This testimony must be excluded because it violates the Best Evidence Rule or because it constitutes impermissible hearsay.

I. Mr. Moore' Statements Violate The Best Evidence Rule

Under the best evidence rule, "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided[.]" Tenn. R. Evid. 1002. The original writing is not required, and other evidence of the writing is admissible, if the original has been lost or destroyed; if the original is not obtainable; if the original is in the possession of the opposing party; or if the writing is not related closely to a controlling issue. Tenn. R. Evid. 1004.

The party seeking to prove the contents of a writing generally is required to introduce the original writing or a duplicate. *Integon Indem. Corp. v. Flanagan*, No. 02A01-9812-CH-00382, 1999 Tenn. App. LEXIS 459, 1999 WL 492656, at *4 (Tenn. Ct. App. July 13, 1999 [9] (citing

see Tenn. R. Evid. 1002, 1003)). The rule is premised on the theory that "only the best or most accurate proof of written or similar evidence should be admitted, to the exclusion of inferior sources of the same proof, absent some extraordinary justification for the introduction of secondary evidence." *Id.* (quoting Neil P. Cohen et al., Tennessee Law of Evidence § 1001.0, at 496 (2d ed. 1990)).

The best evidence rule has evolved somewhat into an "original document" rule, under which "'[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress or the Tennessee Legislature.'" *State v. Sword*, No. 03C01-9203-CR-00074, 1993 Tenn. Crim. App. LEXIS 229, 1993 WL 100192, at *2 (Tenn. Crim. App. Mar. 31, 1993), perm. app. denied (Tenn. [10] Aug. 2, 1993) (quoting Tenn. R. Evid. 1002). Thus, the first inquiry is whether it is the "content of a writing" that the party offering evidence is attempting to prove. *Id.* If it is, then the party seeking to provide evidence must offer an original or duplicate of a document. *Id.*

Accordingly, the only testimony we have that any of these documents exist is the unsupported testimony of Mr. Moore. This is a clear violation of the Best Evidence Rule, which requires a witness to produce an original or, at least a duplicate of a document, if the witness is going to provide testimony as to what the document contains. Tenn. R. Evid. 1002 and 1003.

Nor do any of the exceptions in Tenn. R. Evid. 1004 apply. The so called "master plan", in order to be valid, would have to be filed with the Register of Deeds office, becoming a matter of public record and must be provided under the Best Evidence Rule. "Copies of public records are the best evidence if certified or otherwise authenticated under the rule." If it existed then, it could be identified through a simple deed search. Mr. Moore has not provided it, and has

provided no evidence that he even reviewed those public records or performed a title search on the property.

Accordingly, any evidence concerning the ownership of the system must be excluded under Tenn. R. Evid. 1002 and 1003. *Riggs v. Royal Beauty Supply*, 879 S.W.2d 848 (Tenn. Ct. App. 1994) (upholding exclusion of evidence under Best Evidence Rule where witness attempted to testify about the contents of a letter but the witness could not provide the letter); *Pacheco v. Homecomings Fin., LLC*, Case No. 08-3002, 2010 U.S. Dist. LEXIS 64400, (N.D. Cal. June 29, 2010) (excluding evidence of real estate appraisal because written appraisal was not provided).

II. Mr. Moore' Statements Are Impermissible Hearsay

Hearsay is a statement, other than one made by the declarant, while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Tenn. R. Evid. 801(c). As a general rule, hearsay is not admissible at trial except as provided by the rules or otherwise by law. Tenn. R. Evid. 802. "The determination of whether a statement is hearsay and whether it is admissible through an exception to the hearsay rule is left to the sound discretion of the trial court." State v. Stout, 46 S.W.3d 689, 697 (Tenn. 2001).

Here, Mr. Moore has offered several statements in his direct testimony that constitute hearsay, and specifically the following comments:

> **Statement 1:** Initially the water system was constructed, owned and operated by the developer and was at some point turned over or sold to the RMCC which operated, and presumably owned the water system until it was transferred or sold back to the developer in 2000 (Exhibit 1, Line 1 or Attachment #1).
>
> **Statement 2**: It is clear through the master plan ***and other documents*** that the original developer's ***intent*** was that the water system be constructed for the benefit of the developer to sell lots and therefore remain under the developer's control.

> **Statement 3**: With respect to the ***Renegade legal Restrictions***, there remains an interpretation of whether the developer even had the right to sell the water system to anyone other than the RMCC and also after selling it to the RMCC, could it then be resold back to the developer.

(Moore Direct Testimony at 9 (emphasis added).) Each of these statements are offered for the proof of the matter asserted. Mr. Moore has no basis, apart from statements made out of court, that would provide a foundation for the admission of these statements.

Statement 1 alleges, without foundation, that RMCC once owned the water system. Mr. Moore cannot know this fact based on his own personal knowledge and he claims that documents purported in possession of the RMCC support this contention, but Mr. Moore admits he has not reviewed those documents. This admission is poignant because it establishes that Mr. Moore does not have personal knowledge of the subject he has testified to, after all, he has not reviewed the documents he claims support his contention. In any event, Mr. Moore has admitted that he does not know that the RMCC owned the community club based on his own personal knowledge, and therefore, must have learned of this fact based on statements told to him by others or based on documents he has reviewed. Either way, the statements clearly constitute hearsay and must be excluded. *Godbee v. Dimik*, 213 S.W.3d 685 (Tenn. Ct. App. 2006) (holding that a doctor's letter, which was used to bolster the defendant physician's position that he was not negligent in assessing the patient's MRI scan, was improperly admitted into evidence because it was clearly hearsay as it contained a statement made by the doctor other than while testifying at trial in which he stated that he would have interpreted the MRI scan the same as the defendant physician); *State Ex Rel. Murphy v. Franks*, -- S.W.3d --, 2010 Tenn. App. LEXIS 307 (Tenn. Ct. App. Apr. 30, 2010) (holding that statements that the suspension on a parent's driver's license had been released and that the parent was simply unlicensed and needed to only retake

the driving test were inadmissible hearsay because there was no indication whatsoever as to where an investigator-bailiff obtained the information.)

Statement 2 suffers from similar deficiencies. This statement specifically references the "master plan and other documents" that support Mr. Moore contention that the "original developer's intent" was that the system remain under the original developer. Mr. Moore provides no foundation for his knowledge of this statement other than referencing documents he did not provide. This statement ust be excluded. *Godbee*, 213 S.W.3d 685; *Franks*, 2010 Tenn. App. LEXIS 307.

Finally, Statement 3 is similarly flawed. Mr. Moore makes reference to the "Renegade legal Restrictions" but he provides no foundation for what those restrictions are or any document that purports to provide those restrictions. His testimony is clearly hearsay and must be excluded. *Godbee*, 213 S.W.3d 685; *Franks*, 2010 Tenn. App. LEXIS 307.

For the reasons outlined above, Mr. Moore's testimony must be excluded based upon Tennessee Rules of Evidence 1002, 10003 and Rules 801(c) and 802.

DATED: February 5, 2013

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing was served upon the following via United States Mail:

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This the 5th day of February, 2013

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