IN THE CHANCERY COURT FOR MONROE COUNTY, TENNESSEE

JOZEF BENAK and wife, OTILIA BENAK,	)	
Plaintiffs,	)	
v.	)	Docket No. 21406
SALEM POINTE CAPITAL, LLC, a Tennessee limited liability company,	)	
Defendant.	)	

FILED

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PLAINTIFFS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

COME the Plaintiffs, by and through counsel, as requested by the Court in the hearing held in this matter on Defendant's Motion to Dismiss on December 2, 2021, and together with the Affidavit of Jozef Benak which is submitted herewith in support of the Response and this Brief, would say as follows:

1. ***Does the Sixth Amendment of Master Declarations of Covenants, Conditions, and Restrictions for Rarity Bay apply to Plaintiffs' property?***

The answer to that question is 'no' as to the issues in this case, i.e., Plaintiffs' liability for social membership dues, asserted by a Notice of Lien recorded by the Defendant on April 23, 2019. According to its express terms, the Sixth Amendment states:

> 7.11 Club Membership and Other Club Matters.
>
> (b) Mandatory Social Membership Dues. Commencing on the date of closing of a Unit by an Owner who shall become a "Social Member" under Subsection (a) above, the Club shall be entitled to charge and collect dues directly from such Owner (the "Social Membership Dues"), as and when they become due under the rules and requirements established by the Club and prorated from the date of closing on the purchase of such Unit.

In other words, it applies to future or new property owners, not existing ones.

That is consistent with the information that Michael Ayres, Owner/General Manager, published in July 2, 2016 that:

> "Amendment 6 has no impact on your situation . . . .All new buyers from May 18, 2015 forward will become Mandatory Social Members." *See* Affidavit of Jozef Benak, Exhibit 3.

Furthermore, Shalee Tipton, Chief Operating Officer, Rarity Bay Country Club, advised Plaintiff on April 4, 2017 that his liability was premised on his Deeds for Lot 1009:

> "Regarding your balance of $3,199.92, I have attached your Deeds for Lot #1009 which has the mandatory language . . . ."

She did not reference the Sixth Amendment. See Affidavit of Jozef Benak, Exhibit 4. Plaintiffs deed for Lot #1009 does not have any language regarding mandatory memberships. It also bears noting that she promises Mr. Benak that a new plan will be distributed soon. The Complaint filed alleges that no new plan has ever been produced.

The actual Notice of Lien states the it is being asserted: *"all as authorized pursuant to the applicable provisions of the Rules and Regulations of the Rarity Bay Golf and Country Club, the Warranty Deed filed of record on July 6, 2006 in the Register's Office for Loudon County, Tennessee and the Declaration of Covenants, Conditions and Restrictions for Rarity Bay."* The Sixth Amendment is not expressly noted. The Sixth Amendment does purport to be an Amendment of the Master Declarations originally recorded on October 1, 1998, that Plaintiffs' lots are subject to. While the enforceability and effectiveness of the Sixth Amendment is an issue in this case, it is not the gravamen of the Complaint. Plaintiffs' suit is not a challenge to the Sixth Amendment *per se*, it is a challenge to the Notice of Lien that clouds Plaintiffs title and purports to subject their property to foreclosure. While determination of the validity and enforceability of the Sixth

Amendment may be a necessary issue, it does not bar the suit. *See **Haiser v. McClung***, 2018 Tenn. App. LEXIS 509, holding that statutes of limitation apply to actions/lawsuits, not issues.

The Sixth Amendment may result in Plaintiffs not receiving a refund of their original deposit or require a buyer of one of their lots to have to pay an initiation fee, that could conceivably affect the sales price in some way, but none of those things have yet to happen, and are thus not ripe for litigation. Plaintiffs have not yet suffered harm or injury in those regards. The Notice of Lien, on the other hand, is an existing cloud on their title.

To be sure, as the Complaint alleges, there are tangential or side issues over the Sixth Amendment that Plaintiffs would request the Court to determine, such as (i) can Defendant unilaterally require property owners to pay dues to a separate legal entity as part of Declarations, Covenants and Restrictions, (ii) does such a covenant actually touch and concern the land, (iii) can a developer unilaterally grant itself lien rights on property retroactively, that it no longer owns, (iv) has the defendants acted in good faith and/or dealt fairly with property owners, among other things..

2. ***Did the Registration of the Sixth Amendment trigger Plaintiffs' statute of limitations?***

The answere to this question is likewise no. The recording and publishing of the Notice of Lien on April 23, 2019 was the trigger. In order to state a claim for slander of title in Tennessee, a plaintiff must demonstrate four elements; (1) that it has an interest in a property; (2) that the defendant published false statements about the title to the property; (3) that the defendant acted maliciously and (4) that false statements approximately cause plaintiff a pecuniary loss. ***Ross v. Orion Financial Group***, 2019 Tenn. App. LEXIS 113. In this case, Plaintiff's submit that the Complaint alleges that the "publication" of the notice of lien against Plaintiffs' property constituted slander of title. The *Ross* case states that slander of title is a common law tort of injurious falsehood,

which relates to interests of parties in property. Under Tenn. Code Ann. §28-3-105, injuries to real property are governed by three-year statute of limitations. Id. at *12. This Complaint was filed within three years of the filing of the Notice of Lien and it is, accordingly, timely.

This Court should also be aware that in a previous case involving Rarity Bay under the prior regime, styled ***Diehl v. Rarity Bay Community Assoc.***, 2013 U.S. Dist. LEXIS 82472. The U.S. District Court for the Eastern District of Tennessee, in a slander of title action, rejected the Subdivision's argument that since the Master Declarations had been down for more than six (6) years, Plaintiff was time barred. The Court stated:

> 1. **Slander of Title Claim (Count I)**
>
> Plaintiffs allege that on October 19, 2010, defendant Carolyn D. Beatty, acting on behalf of the Association, sent plaintiffs a notice of intention to record a lien against the Property as a result of their failure to pay the 2011 General Assessment and the fines assessed for failure to remove the for-sale sign, and then, on or about August 26, 2011, executed a Notice of Lien against the Property for $21,141.20, which was recorded in the Register's Office for Monroe County, Tennessee [Doc. 18-1 ¶¶ 86, 87]. Plaintiffs further allege that defendant James Glasgow caused the Notice of Lien to be electronic communication in or around September 2011 to one or more members of the Association [*Id.* ¶ 89]. According to plaintiffs, this Notice of Lien was false because it stated that the Master Declaration gave the Association authority to impose a lien against the Property and defendants acted with malice in publishing it because they knew the Master Declaration did not apply with respect to the Property [*Id.* ¶¶ 90-93, 97]. As a result, plaintiffs state the title to the Property has been slandered and the marketability of the Property has been impaired in that the fair market value has been diminished [*Id.* ¶¶ 95-96].
>
> Defendants argue that the slander of title claim is futile because it is time barred. More particularly, they assert that the Master Declaration applies to the Property because it was approved and filed with the register of deeds approximately fourteen years ago and plaintiffs did not challenge its application within the six-year statute of limitations period established by **Grand Valley Lakes Property Owners Association, Inc. v. Burrow, 376 S.W.3d 66**

> **(Tenn. Ct. App. 2011).** Plaintiffs state that the slander of title claim was brought in response to defendants' wrongful and malicious publication of an improper lien that was recorded against the Property on August 26, 2011, not to challenge the validity of the Master Declaration.
>
> **Application of the Master Declaration to the Property is an issue in this case and it seems that the Court may be called upon to determine whether the Master Declaration applies to the Property in determining the merits of plaintiffs' claim, but defendants point to no case law that suggests the slander of title claim, which is based upon actions that took place within one year of filing the complaint, is barred because plaintiffs did not challenge the application of the Master Declaration to their Property within the six-years after its adoption. The Court therefore declines to find that the slander of title claim is futile because it is time barred.** ***Diehl v. Rarity Bay Community Assoc., supra. [Emphasis added.]***

As additional authority, Plaintiffs would submit that the Tennessee Supreme Court, in an action to remove a cloud on title, noted with approval that "the following authorities hold that the statute of limitations has no application to an action to remove cloud from title where the owner is in possession or is in some where the owner is not out of possession (long list of cases omitted). ***Stearns Coal & Lumber Co. v. Patton***, 1915 Tenn. LEXIS 177, at * 10. Furthermore, the Court stated that the cause of action is not the *creation* of a cloud, but its *existence* by quoting approvingly from a Nebraska case:

> "while a cause of action clearly accrues to the owner of real property in possession thereof, whenever a cloud upon his title is created or an adverse title asserted, we do think it necessarily follows such cause of action accrues then once and for all so as to start the statute of limitations from that date. The cloud upon a title must always continue to operate as such during the period of this existence and as its effect upon the title is continuing, the cause of action resting on the right of the owner to have it removed would seem to be continuing also, and to be available at all times while the cloud remains. *Miner v. Beekman, 50 N.Y. 337.* The cause of action is not the creation of the cloud, but its existence, its affect upon the title of the owner, and his right to

> have it removed. *Schoener v. Lissauer, 107 N.Y. 111, 117, 13 N. E. 741.* Hence there would seem good ground for holding that the lapse of time after the creation of a cloud upon title will not bar an action by an owner to have it removed".

In other words, the statute of limitations does not run so long as the lien exists. The *Stearns Coal* case remains good law even today, despite being decided over 100 years ago, being recently cited in ***Coleman v. Wells Fargo Banks, N.A.,*** 2018 F. Supp. LEXIS 597, by the U.S. District Court for the Middle District of Tennessee in a case ultimately deciding to apply the 10-year statute of limitations to that quiet title action (because the property owner agreed it did). The nature of this matter is certainly akin to a quiet title action. Plaintiffs are seeking a determination as to the parties respective rights, title and interests, that Defendants have asserted by its filing of a Notice of Lien. In any event, Plaintiffs' claims are timely whichever time period is determined to apply.

3. ***Do certain events, actions and representations of the Defendants equitably estop them from asserting the running of the statute of limitations?***

In its Motion to Dismiss, Defendant argues that Plaintiffs' cause of action accrued on the date the Sixth Amendment was recorded, May 18, 2015. Plaintiffs have alleged that the Board undertook the cause of contesting the actions of the Defendant on behalf of property owners such as themselves. As evidence, the Minutes of the Rarity Bay Community Association, Inc.s' regular board meeting on November 24, 2015, have been submitted, wherein the Board voted to strike the amendments to the By-laws set forth in the Sixth Amendment. This dispute over the Sixth Amendment was not resolved until the Settlement Agreement between the Board and Defendants dated December 17, 2015.

Defendant also represented to a "prior Club Member" on July 2, 2016 that "Amendment 6 has no bearing on your situation"; only new buyers from May 18, 2015 forward would become mandatory social members. See Affidavit of J. Benak, Exhibit 3. Furthermore, Defendant advised Plaintiff on April 4, 2017, during his continued communications with its representatives, that it was his "deeds" that contained the mandatory language (their deed does not), and that a new updated Club Membership Plan would be distributed in the coming weeks. See Affidavit of J. Benak, Exhibit 4.

Tennessee courts have held that when a Defendant assures another that he is not at risk, it can toll the running of the statute of limitations. ***Riccardi v. Carl Little Constr. Co.***, 2021 Tenn. App. LEXIS 297. *Riccardi* involved a case of between a homeowner and builder, who had repeatedly assured the homeowner that the cracks he was experiencing were the result of natural settlement and would eventually cease. The court quoted the Tennessee Supreme Court as follows: *"The doctrine of equitable estoppel tolls the running of the statute of limitations when the defendant has misled the Plaintiff in failing to file suit"*. ***Id.*** at *21. *According to Redwing, the statute of limitations is tolled for the period during which defendant misled plaintiff. At the point when the plaintiff knows or should know that the defendant has misled him or her, the original statute of limitations begins to run anew, and the plaintiff mist file his or her claim within the statutory limitations period.* ***Id.*** at *23, *24.

As indicated in Defendant's Motion to Dismiss, the statute of limitations on covenants and restrictions is governed by TCA 28-3-109 (a)(3), which is six (6) years. Six years from the Settlement Agreements is December 17, 2021, six years for the Ayres email is July 2, 2022, and six years from the S. Tipton email is April 2, 2023; this Complaint was filed on August 27, 2021, prior to any of those dates.

4. ***The cases provided by defense counsel are distinguishable.***

Defense counsel has provided the Court with *Clark v. City of Franklin*, and *Royalton Woods Homeowner Ass'n v. Soholat* as authority. These cases are completely inapposite.

The *Clark* case concerns a municipality recording liens pursuant to a Tennessee statute, not by an HOA or Developer pursuant to covenants and restrictions. In *Royalton Woods*, the deed to the owner specifically incorporated the CCR's that the owners said contended did not apply to their property. The Sixth Amendment in this case was recorded long after Plaintiffs' acquired their title and attempts to require affirmative personal obligations, not a restrictive covenant that touches and concerns the land.

5. ***Conclusion.***

In conclusion, Plaintiffs would assert that their complaint is timely, as it was unquestionable filed within 3 years of Defendant registering the Notice of Lien on their property; that the lien still exists, and continues to cloud their title to this day. The Complaint was also filed within 10 years of the recording of the Sixth Amendment, which is timely if this case is viewed as a Quiet title action. Even if it is a 6 year limitations period, as set forth in Plaintiffs original Response to the Motion to Dismiss, that period was tolled by the Board's vote to strike the Amendment on November 24, 2015, which was ultimately resolved by the Settlement Agreement of December 17, 2015. The Court could also determine that the statements by Defendant's General Manager on July 2, 2016 that the Sixth Amendment had no bearing on existing property owners' situations, only new buyers after May 18, 2015. Likewise, the representation in 2017that Plaintiffs' obligations for social membership dues emanated from their deeds, not the Sixth Amendment, and assuring them that an a new plan was forthecoming, should be found to have had a tolling effect.

Respectfully, submitted.

This the 12 day of December, 2021.

JOZEF BENAK and wife,
OTILIA BENAK,

By: _____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy hereof has been served upon all parties in interest or their counsel by delivering a copy hereof to Lewis S. Howard, Jr., Esq., 4820 Old Kingston Pike, Knoxville, Tennessee 37919, by electronic communication, hand or by United States Mail, properly addressed and with sufficient postage thereupon to carry the same to its destination, this 12th day of December, 2021.

Winchester, Sellers, Foster & Steele, P.C.

By: _____