IN THE CHANCERY COURT OF MONROE COUNTY
STATE OF TENNESSEE

RARITY BAY PARTNERS, formerly known as SALEM POINTE CAPITAL PARTNERS	)	
Plaintiff	)	
v.	)	
RARITY BAY COMMUNITY ASSOCIATION, INC., SALEM POINTE CAPITAL, LLC and BEP RARITY BAY, LLC	)	**Docket No. 21173**
Defendants	)	

FILED
SEP 26 2022
TIME 4:05
TERESA A. CHUATE
CLERK & MASTER MONROE CTY.

RARITY BAY PARTNERS' RESPONSE IN OPPOSITION TO RARITY BAY COMMUNITY ASSOCIATION, INC.'S MOTION FOR SUMMARY JUDGMENT

Comes Plaintiff Rarity Bay Partners f/k/a Salem Pointe Capital Partners ("Partners"), by and through counsel, and responds to Rarity Bay Community Association, Inc.'s ("Association") ***Motion for Summary Judgment*** ("motion"). In support of its response, Partners also relies on and incorporates by reference its ***Response to Rarity Bay Community Association, Inc.'s Statement of Undisputed Material Facts and Additional Statement of Material Facts***.

I. INTRODUCTION

Association's motion comes far too late in trying to undo substantial progress gained through this Honorable Court's rulings. The Court has already made profound rulings that address most of the arguments in the motion. Instead of accepting the Court's rulings, Association fashions a constrained new theory attempting to circumvent the Court's holdings under the Sixth Amendment, and under the Settlement Agreement, that Partners is an Exempt Person from assessments under the governing documents, in good standing as to assessments, entitled to

vote in elections, eligible to nominate a candidate for election, and may pursue its claims seeking to ensure the integrity of elections.

On November 1, 2022, this case is going to trial in conjunction with the companion case initiated four years ago by Association itself, *Rarity Bay Community Association, Inc. v. Rarity Bay Partners,* Monroe Chancery No. 20489 ("Settlement Agreement Case").[1] In those four years and in the past two years this case has been pending, it has been unequivocally admitted and agreed by Association, Partners, and Salem Pointe Capital, LLC ("LLC") throughout both proceedings that (1) Partners is an Exempt Person under the governing documents; (2) that Association even contracted by virtue of the Settlement agreement to acknowledge and accept that Partners is an Exempt Person; and (3) that Association also contracted that it would never challenge the validity of the Sixth Amendment, including Partners' status as an Exempt Person. These are the undisputed material facts.

The timing of the motion should also be questioned – just two months before trial and while the parties await the Court's ruling in the Settlement Agreement case on ***Defendant Rarity Bay Partners' Motion for Summary Judgment***, which was argued July 12, 2022. If the Court holds that Association failed to meet the condition precedent of obtaining prior approval from 75% of the members, it essentially ends that proceeding. And it does not go unnoticed Association now also asserts for the first time in this proceeding that the Settlement Agreement was a "Cost Sharing Agreement", as if that somehow makes a difference in this case. Indeed, Association only raised the "cost sharing" argument in the Settlement Agreement case just days before that hearing – something the Court even commented on with what appeared to be some surprise or question. Also noteworthy, prior to Association's motion in this case, Partners filed ***Rarity Bay Partners' Motion for Partial Summary Judgment*** on "Count 5 Declaration that 2019 Election

[1]Association has filed essentially the same motion in the Settlement Agreement case. Accordingly, Partners hereby incorporates as if set forth verbatim herein, its Response in Opposition and Response to Statement of Undisputed Material Facts filed in the Settlement Agreement case.

Results are Invalid" of the Complaint and set it for hearing October 4, 2022. Partners' pending motions for summary judgment seek to further advance the progress in each case and narrow trial issues through the parties' admissions and the Court's prior rulings. By contrast, the Association merely seeks to reject all this progress to avoid what might be the inevitable – an unfavorable result for Association – judgments dismissing its claims in the Settlement Agreement case and declaring the 2019 election invalid here.

Ignoring its own admissions, its own contractual commitments, and the Court's significant rulings, the Association attempts to bootstrap an argument that Partners' Exempt Person status is somehow invalid. This brand new argument has never been raised, argued, or briefed – much less pled - in either the Settlement Agreement case or the present action. Moreover, it is precluded by the straightforward, logical, cohesive interpretation of the documents.

II. STANDARD OF REVIEW

Summary judgment is "appropriate in virtually any civil case that can be resolved on the basis of legal issues alone." *COA Holdings, Inc. v. Trost*, 333 S.W.3d 73, 82 (Tenn. 2010). Under Tennessee law, summary judgment is appropriate when the moving party can "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. "The moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense." *Rye v. Women's Care Center of Memphis, MPLLC*, 477 S.W.3d 235, 264 (Tenn. 2015) (italics in original). The non-moving party cannot simply rely upon its pleadings but must set forth specific facts showing that a genuine issue of material fact exists for trial. *Byrd v. Hall*, 847 S.W. 2d 208, 210 (Tenn. 1993). The mere existence of some alleged factual dispute between the parties will not defeat a motion for summary judgment because the rule requires that there be no genuine issue of material fact. *Id.* at 212. A "genuine

issue" exists when a reasonable jury could legitimately resolve a material fact in favor of one side or the other. *Id.* at 215.

III. ARGUMENT.

A. Partners is Undisputedly Exempt under the Governing Documents.

Association backtracks to again argue that Partners should had never been permitted to vote in 2019 but now asserts for the first time that Partners was not actually an Exempt Person under either the governing documents or the Settlement Agreement. The Court has already ruled to the contrary in the Settlement Agreement case – specifically finding that Partners is an Exempt Person and was in good standing to entitle it to vote and nominate a candidate in the 2019 election. Association now experiments with a convoluted "interpretation" of the documents -- despite the Court's findings, its own numerous prior admissions and contractual constraints that Partners is exempt, and a logical and cohesive interpretation of the documents.

Partners' status as an Exempt Person under the governing documents is undisputed. The Court has made clear in rulings in the Settlement Agreement case that Partners is an Exempt Person. In denying Association summary judgment and granting Partners summary judgment motion on the basis of Partners' exempt status, the Court entered its March 25, 2021 Order, attached as Exhibit 1 to ***Rarity Bay Partners' Response in Opposition to Rarity Bay Community Association, Inc.'s Statement of Undisputed Material Facts and Additional Statement of Material Facts*** ("SUMF").[2] The Court held:

- "The Sixth Amendment defines Partners as an 'Exempt Person.'" Exhibit 1 at ¶ 27.
- "Section 7.8 of the Master Declaration, as amended by the Sixth Amendment, provides that Partners' obligation to pay assessments commences 'as to each Unit on the date on which the Unit is conveyed to, or held by, a Person other than the Declarant, a Declarant-Related Entity, a Builder, or any Exempt Person'" *Id.* at ¶ 29.

[2] All Exhibits referenced herein are attached to the SUMF.

- "The Sixth Amendment "make[s] clear that the obligation to pay assessments under the Bylaws 'shall commence as to each Unit on the date specified in section 7.8 of the Master Declaration' such that assessments do not commence on a Unit owned by an Exempt Person such as Partners until the Unit is no longer owned by Partners, an exempt person, the Declarant, a Declarant Related Entity, or a Builder." *Id.* at ¶ 30.

- "In accordance with the Sixth Amendment to the Master Declaration, assessments do not commence under the Master Declaration or the Bylaws on Units owned by Partners until the date on which the Unit is conveyed to, or held by, a Person other than the Declarant, a Declarant-Related Entity, a Builder, or any Exempt Person." *Id.* at ¶ 31.

LLC admits that Partners is exempt:

- MR. HALE: The exempt person in this case is Partners. They're defined in the Master Declaration. I guess it's – well, its defined in the Sixth Amendment – I'm sorry – as the exempt person. April 15, 2021 Transcript of Proceedings, excerpt attached hereto as Exhibit 5 at p. 33:18-22.

- MR. HALE: And the exempt person I think we can stipulate is Partners. *Id.* at 44: 7-8.

Even Association admits, until now convenient to try otherwise, that Partners is an Exempt Person under the governing documents. In the November 24, 2020 hearing for the Settlement Agreement case, Association's counsel stated:

- MR. STEVENS: So the question and what rose to the dispute was, is that – is that Sixth Amendment that exempted all of them, both SPC and Partners, and declarant related entities and exempt persons, from pay assessments, was that enforceable? And that's why we signed this Settlement Agreement was because there was some challenge to the enforceability of their own exemption. *And so the first sentence provides and clarifies that they are currently exempt under the existing governing documents. No dispute there. That's what the governing documents say.*

November 24, 2020 Transcript of Proceedings, Excerpt attached as Exhibit 4 at p. 18:16 – p.19:1-2 (emphasis added). And counsel admitted the same in this case:

- MS. PEMBERTON: Well, and you know, the Sixth Amendment created them as an exempt person . . . Exhibit 5 at p. 67: 19-20.

Indeed, Association's theories in both cases heretofore have been premised in arguing that Partners was an exempt person under the governing documents and that the parties had also contracted to that by virtue of the Settlement Agreement. It never has been – and still is not legitimately – an issue that Partners is not or could not be exempt.

B. Partners is Undisputedly Exempt under the Settlement Agreement.

In truth, the Settlement Agreement has not been directly at issue in this particular proceeding. Presumably, Association only does so because it cannot escape the undisputed fact that it is a party to the Settlement Agreement, and notwithstanding whether the Sixth Amendment exemption is valid or not, Association is contractually bound by the terms to treat Partners as an Exempt Person and to not even challenge the validity of the Sixth Amendment in the first instance. Thus, Association's last-ditch attempt to halt the progress and avoid an unfavorable declaration that it conducted and was responsible for an invalid election includes asking the Court to simply ignore the Settlement Agreement out of hand. Numerous times, Association -- and incidentally, also LLC - has recognized Partners as an Exempt Person. Association perceived the Settlement Agreement as a means to nonetheless get funds from Partners. After the Court disagreed with Association's interpretation and held that Partners is not a party to that contract, the contract only provides for self-imposed assessments for mutually agreed upon infrastructure improvements, and Partners has no individual obligation to make such payments, Association massaged its new theory into being.

. Association wants to ignore a contract it chose to sue over in the Settlement Case and reverse history. Through ignoring the Court's rulings and a contract that it signed, Association now expects this Court to find that Partners is not in good standing with Association and therefore order a dismissal of this entire case.

In the Settlement Agreement case in granting Partners' motion to enjoin the 2019 election and allow Partners' participation, the Court held:

- "The Settlement Agreement was between SPC and Rarity Bay Community Association, Inc. That Settlement Agreement declared certain rights of the parties concerning the land. They apparently were fussing at that point in time about assessments." May 28, 2019 Order Granting in Part and Denying Part Defendant's Motion for Temporary Injunction[3], attached as Exhibit 3 to SUMF, at p. 5:11-17.

- "Generally, the Settlement Agreement settled this controversy and defined SPC as a partnership between Partners and LLC . . . Both parties are exempt from assessments in the document called Settlement Agreement. . . . the two parties being SPC as one party and the Association agreed that they were exempt from assessments. . ." *Id.* at p. 5:22 – 6:8.

Revisiting the documents two years later to grant Partners' motion for summary judgment on the basis of its exempt status, the Court held:

- "The Settlement Agreement does not authorize the Community Association to strip Partners, an Exempt Person under the Master Declaration, of voting rights in elections for the Community Association Board of Directors." Exhibit 1 at ¶ 53.

- "The Settlement Agreement does not authorize the Community Association to deprive Partners, an Exempt Person, of its right to nominate a candidate for the Community Association Board of Directors election." *Id.* at ¶ 54.

The Court also found that Association contracted to be bound by the Sixth Amendment, agreeing to recognize Partners as an Exempt Person:

- "In the Settlement Agreement, the Community Association "acknowledges that any and all lots in Rarity Bay now owned or hereafter acquired by SPC (and any other qualifying Declarant-Related Entity or Exempt Person) shall be exempt from RBCAI annual assessments." (Settlement Agreement at ¶ 1.)" Id. at ¶ 45.

- "In the Settlement Agreement, the Community Association agreed 'that it will abide by the terms of both the Sixth and Seventh Amendments as written," agreeing to recognize Partners as an Exempt Person. *Id.* at ¶ 55.

In addition to admitting Partners is exempt under both the governing documents and the Settlement Agreement, in this case Association agreed it was contractually bound to that undisputed fact:

- MS. PEMBERTON: One of the things that the Association signed off on and agreed to in that 2015 Settlement Agreement that's been at issue –
  COURT: Yes.

---

[3] This Order was signed by the Court on May 22, 2019, and filed by the Clerk May 28, 2019.

> MS. PEMBERTON: -- every time we're in here was that we would acknowledge the Sixth Amendment and we would abide by its terms as written . . . Exhibit 5 at p. 58: 4-10.

By the time of this April 15, 2021 hearing, the Court had recently entered its March 25, 2021 Order in the Settlement Agreement case that Partners was exempt under the governing documents and the Settlement Agreement. As the Court pointed out in the hearing, the Association counted on the SPC partnership staying together, but it did not. And dissatisfied with the Court's interpretation of the Settlement Agreement, the Association now tries to challenge its own contract.

Furthermore, Association has already accepted Partners as an Exempt Person under the Master Declaration. In the Settlement Agreement, Association agreed that:

> 1. **Assessment Exemption.** The RBCAI acknowledges that any and all lots in Rarity Bay now owned or hereafter acquired by SPC (and any other qualifying Declarant-Related Entity or Exempt Person) shall be exempt form the RBCAI annual assessments. . .
>
> 10. **RBCAI Acceptance of Sixth and Seventh Amendment.** RBCAI acknowledges that the Bylaws and/or the Master Declaration grant SPC, as the Declarant, certain amendable powers and rights over the ByLaws and Master Declaration during the Development Period, as defined in the Master Declaration. RBCAI agrees that it will abide by the terms of both the Sixth and Seventh Amendments as written and further agrees not take any action to challenge the enforcement and validity of the terms contained in both Sixth and Seventh Amendments and SPC's enforcement thereof now or at any time in the future.

Settlement Agreement at §1 and §10. In section one, Association agrees that Partners, is an Exempt Person, is exempt from assessments. In Section 10, Association accepts the Sixth Amendment. The Sixth Amendment, defines Partners as an Exempt Person, and as a result each unit that Partners owns is exempt from assessments and will not be assessable until "the date on which the Units is conveyed to, or held by, a Person other than the Declarant, a Declarant-Related Entity, a Builder, or any Exempt Person." Sixth Amendment at ¶1(f). In the Seventh Amendment, the term "Builder" was amended to include Partners or its designees. *See* Seventh Amendment. It also bears noting that the Sixth Amendment Agreement alters the order of priority in interpretation: "Notwithstanding Section 13.11 of the Bylaws, in the event of any conflicts between

the terms of the Master Declaration which are referenced in this Amendment and the terms of the Bylaw, the terms of the Master Declaration referenced in this Amendment shall control." Sixth Amendment at 3(a).

Association should be estopped from taking any position contrary to its prior admissions and contractual agreement that Partners is an Exempt Person.

C. LLC had Authority to Make Partners an Exempt Person.

Association is also attempting to backtrack on its acceptance of the Sixth Amendment and state that LLC never had the power to make Partners an Exempt Person. First, as argued above, Partners asserts that Association has already accepted Partners as an Exempt Person and agreed to recognize Partners' status in the Settlement Agreement. Association further contractually acknowledged Declarant's authority to exempt Partners and how the governing documents would be interpreted:

> WHEREAS, on or about May 18, 2015, Salem Point Capital, LLC, ***acting as Declarant*** . . . recorded the Sixth Amendment . . .
>
> WHEREAS, on or about May 18, 2015, Salem Point Capital, LLC, ***acting as Declarant*** . . . recorded the Seventh Amendment . . .

Settlement Agreement at pp. 1-2 (emphasis added). Association further agreed that the contract "contains the entire agreement and understanding of the parties ***with respect to the entire subject matter hereto*** . . ." – those subjects including the Declarant's authority to record the Sixth and Seventh Amendments, that Partners is an Exempt Person under the governing documents and under the Settlement Agreement, and that Association may not challenge the validity of the same – whether procedurally or substantively. *Id.* at ¶ 11. Accordingly, not only is Association prohibited from challenging Partners exempt status but also from challenging LLC's authority to exempt Partners.

LLC was in fact within its powers to make Partners an Exempt Person. Section 13.2(a) of the Master Declaration states: "Until the end of the Development Period, the Declarant may

unilaterally amend this Declaration for any purpose." This language predates the Assignment of Right and the Sixth Amendment. So, at the time the Sixth Amendment was recorded, LLC – sharing declarant rights in a partnership with Partners – had the authority to record the amendment. The Sixth Amendment then limited LLC's ability to remove Partners' exemption, stating, "neither the Declarant nor any other party shall be permitted to amend this Declaration as it pertains to rights of an Exempt person under this Section 7.8 without the joinder of each Exempt Person whose rights would be affected by such an amendment." LLC also contractually bound itself through the Assignment of Right to agree it could no longer amend whatsoever without Partners' consent for ten years. Assignment of Right at 8(d).

Association mistakenly argues that adding Partners as an Exempt Person enlarges a right beyond which the Declarant has under the Master Declaration. This interpretation is wrong. Association relies primarily on Article 8(c) of the Charter which states "[t]he share of a Member in the privileges, rights and assets of the Association cannot be assigned, hypothecated, or transferred in any manner, except as a appurtenance to real property subject to the Declarations." Association is again taking this language out of context. This provision is specifically discussing how a member can transfer their status of being a member in the first instance to another. Section 8(c) of the Charter is designed to limit someone giving their membership to another without selling the land to the person as well. This section has no bearing on whether LLC has the ability to make Partners an Exempt Person. The spirit of this section is to just maintain the connection between ownership of property and being a voting member of Association.

Furthermore, Association is arguing that LLC is violating 11.1 by expanding its powers. 11.1 of the Master Declaration states "[a]ny or all of the special rights and obligation of the Declarant set forth in the Governing Documents may be transferred or assigned in whole or in part to the Association or to other Persons, provided that the transfer shall not reduce an obligation nor enlarge a right beyond that which the Declarant has under this Declaration or the By-Laws." Master Declaration at 11.1. Clearly through 11.1, Declarant can assign or share rights it has within

the Master Declaration. All LLC has done is made Partners exempt from assessments, a right the LLC has, if it owned developable property. Even though LLC does not own developable property, it is still an entity that would be free from assessments if it did. All LLC did in the Sixth Amendment is assign Partners that same privilege. It does not expand a privilege to grant something that LLC did not have. Accordingly, there is no violation of 11.1 of the Master Declaration.

The sole issue in the July 21, 2021 Order that Association relies on was that voting rights were tied to membership, and membership was in turn tied to ownership. Thus, Declarant could not vote on lots it did not own. The issue in that motion was inapposite to the present motion. Specifically, the language in Article VIII(b) of the Charter "provides that membership in the Association is established by recording a deed or other instrument establishing ownership of real property and expressly prohibits the assignment or transfer of rights in the Association except as appurtenant to real property in the declarations." Exhibit 7 at Transcript of Findings of Fact p. 7:3-10. Likewise, the membership classification has only to do with voting rights and nothing to do with assessment exemptions. Indeed, LLC argued that language in the Charter only had to do with reflecting changes in membership by recording ownership:

- MR. HALE: We've heard a lot about Article VIII – VIII(b). VIII(b) in the charter: 'Changes in membership in the Association shall be established by recording . . .' What this has to do with, Your Honor, is when somebody moved and they sell their house or their lot in the development, you got to figure out, well, who owns it? Well, you look at the records to see who owns the lot, and that's who's the member. If you sell a lot, you're no longer a member. That's the essence of that paragraph. And to turn that paragraph into something more that that is, we say, not at all what was intended by the provision. It's plain on its face to deal with changes when there are sales of property. ." Exhibit 5 at p. 36:10-24.

That is correct. And membership requires ownership. That was the extent of the issue. Indeed, if anything, Partners' exempt status is entirely consistent with the governing documents. An exempt status can only accompany land ownership. Partners owns the land for which it is exempt from paying assessments. In reaching that conclusion, the Court reasoned, in part, that it rendered the document "cohesive" and "does not separate or cause an incongruent interpretation." Exhibit 7 at Transcript of Findings of Fact p. 9:22-25.

Association is attempting to rely on this Court's July 21, 2021, Order and argue that Article 8(c) of the Charter prevents LLC from making a party exempt from assessments if the property was not an appurtenant to real property. Article 8(c) states:

> The share of a Member in the privileges, rights and assets of the Association cannot be assigned, hypothecated or transferred in any manner, except as an appurtenance to real property subject to the Declarations.

Charter at ¶ 8(c). In the first instance, maybe it oversimplifies the obvious to say that being exempt is not part of "[t]he share of a Member in the privileges, rights and asses of the Association." Moving on, Association uses this paragraph to argue that the declarant's power to exempt assessments is tied to real property ownership and that making an assessment exemption is a conveyance. According to the Association, anytime the declarant changes or amends the governing documents, it counts as an assignment or conveyance of the declarant rights and that it affects the privileges or rights of the Association. Association makes an illogical leap that creates a major windfall for the integrity of the Master Declaration. Association's argument is that anytime the declarant changes the governing documents that has an affect on the title to the property of the homeowner, it must be done appurtenant to real property. Essentially, the Association is arguing that anytime the declarant tries to change or amend anything under these governing documents, it functions as a conveyance. This interpretation of the Charter completely contradicts the whole purpose of the governing documents.

In its July 21, 2021, Order, in finding that LLC does not have voting rights for property it does not own, the Court also found that the interpretation of the documents "makes the document cohesive, makes the bylaws cohesive. It does not – it does not separate the voting rights. It does not separate or cause an incongruent interpretation." Exhibit 7 at Tr. 9:21-25. And the Court rightly concluded and applied the rules of construction under which courts are to construe writings to avoid a conflict, if possible. *Coble Systems, Inc. v. Gifford Co.,* 627 S.W.2d 359,363 (Tenn. Ct. App. 1981) (cited by *Brown v. Balaton Power, Inc.* 2003 WL 230996788 at *5 (Tenn. Ct. App. Dec. 31, 2003)). However, Association's interpretation of the governing documents results in an

incongruent interpretation. This interpretation makes the declarant rights powerless and completely eviscerates the whole purpose and plan for the Rarity Bay declarant rights. This interpretation would not make the documents cohesive and would result in chaos for the development of the community by stripping away the power of the declarant rights. The cohesive way for the documents to be read is just what they say – that Partners is an Exempt Person.

LLC assigned certain of it rights to Partners through the Assignment to Purchase Real Property ("Assignment"). The right LLC assigned was to be exempt from paying assessments. For any property LLC owned it would be exempt. And if LLC purchased more property within subdivision, it would be exempt as to that property as well. LLC assigned that same right to Partners. Thus, Partners was and is exempt as to all property it owns within the community. The Court has found in this case: "On 5/18/15 LLC and Partners signed an agreement. Partners purchased the right to buy lots in these subdivisions and all entitlements, privileges, and other appurtenance connected with the enjoyment of property." Exhibit 7 at Transcript of Findings of Fact p. 8:11-15. And in the Settlement Agreement case, the Court found:

> In the Assignment of Right, LLC agreed that Partners would not be subject to any dues, fees or assessments for a period of ten (10) years after the closing date. Paragraph 8© of the Assignment of Rights states:
>
> > (c) LOT FEES. Buyer shall not at any time be subject to any dues, fees, assessments or other payments normally applicable to the Property or any other property within Rarity Bay that is acquired by Buyer within ten (10) years of the closing Date . . .
>
> In furtherance of LLC's and Partners's agreement in the Assignment of Right, LLC recorded the Sixth Amendment to the Master Declaration and the Bylaws for Rarity Bay ("Sixth Amendment").

Exhibit 1 at ¶¶ 23 and 24.

D. Partners has Standing to Bring a Derivative Action.

Association incorrectly asserts that Partners may not bring a derivative action. Partners is perfectly positioned under Tenn. Code Ann. § 48-53-104(b) to bring a derivative action. As an owner of 362 lots of the approximately 1400 Units, it owns far more than the statutory five percent

(5%) minimum. Partners repeatedly asked Association for transparency in the election process, and indeed, to actually hold an election. Association refused. Partners was compelled to file suit with a verified complaint because its requests were denied.

Association's contention that Partners may not simultaneously pursue its own interests along with a derivative action misstates the law. *United States Council AASR SJ v. McWilliams* stands for the proposition that a conflict of interest "may" preclude a derivative action, but the Court must examine the facts – particularly on summary judgment – for evidence that there is a conflict such as would disqualify the litigant. 586 S.W.3d 373 (Tenn. Ct. App. 2019) The intermediate appellate court cited *Hall v. Tennessee Dressed Beef Co.,* 957 S.W.2d 536 (Tenn. 1997). In *Hall,* the Tennessee Supreme Court ruled in that "[s]hareholders may bring derivative and individual actions simultaneously. While there is always a theoretical conflict of interest, the great weight of authority rejects a *per se* rule prohibiting such representation. Because there is no evidence in the record to support a finding that [Hall] is incapable of fairly representing the interests of the corporation in the derivative action while maintain his individual suit, the existence of both is no reason to deny him standing." *Id.* at 540. The factual record in *United States Council* was that members of the homeowners' association took more than $100,000 from the association's account, then resigned their memberships, created a competing entity and marketed the same to the residents. There is literally no proof before this Court that Partners has a conflict in pursuing a derivative action to ensure the transparency and integrity of elections. A glaring omission from Associations' statement of material facts is an purported proof of any conflict whatsoever.

Through this action, Partners seeks to ensure the integrity of elections in the community – a posture that benefits every single owner. The Court had already held that Partners "has an interest in ensuring that the Association is run in compliance with the governing documents." July 21, 2021 Order, excerpt attached as Exhibit 7 at p. 2. And in denying Association's recent motion to dismiss the 2019 election issues as moot, the Court also held that its ruling on "the validity of

that election will affect future elections" and "involves a matter of public interest." July 18, 2022 Order Denying Rarity Bay Community Association, Inc. Motion to Dismiss at ¶¶ 2 and 4.

E. No Monetary Gain or Profit from Association.

In a last ditch effort to avoid the Settlement Agreement, Association argues that Partners exemption somehow constitutes using the Association for monetary gain or profit. Association again takes the language completely out of context. For full context, the clause Association cites states: "[t]he Association does not contemplate pecuniary gain or profit, direct or indirect, to its Members and shall make no distributions of income to its Members, directors, or officers." Charter at §7(c). The language just prevents a member from receiving any pecuniary gain from the Association. The clause has no bearing on Partners being exempt from assessments. Instead, the clause's purpose is to prevent board members from receiving payments or other forms of distribution of income to members. It is to ensure that the Association is spending money on its improvement and is not a shell organization for its members. The clause is not designed to prevent Partners from being an Exempt Person. One has nothing to do with the other.

F. Association is Time Barred from Challenging the Sixth Amendment.

Article 13.2 (c) prevents Association or any other member from challenging the effectiveness of the Sixth Amendment this late in the game. Article 13.2(c) states:

> (c) Validity and Effective Date. Any amendment to the Declaration shall become effective upon recordation in the Public Records, unless a later effective date is specified in the amendment. Any procedural challenge to an amendment must be made within six (6) months of its recordation or such amendment shall be presumed to have been validly adopted. In no event shall a change of conditions or circumstances operate to amend any provisions of this Declaration. No amendment may remove, revoke, or modify any right or privilege of the Declarant without the written consent of the Declarant or the assignee of such right or privilege.

The Sixth Amendment has been a validly adopted amendment to the Master Declaration by LLC, which had unilateral authority to do so at the time. Under the guise of characterizing the as a matter of interpretation, Association is actually raising a challenge to the procedure insofar as it

argues that LLC did not have unilateral authority to amend. To explain, consider Section 13.2 and its subpart:

> Section 13.2 Amendment.
>
> (a) By Declarant. Until the end of the Development Period, the Declaration may unilaterally amend this Declaration for any purpose. . . .
> (b) By Owners. Except as specifically provided above and elsewhere in this Declaration, this Declaration may be amended only by the affirmative vote or written consent, or any combination thereof, of Owners holding sixty-seven (67%) of the votes allocated Units . . .

This section in essence lays out the procedural pre-conditions for amendment, to wit, none for the Declarant during the Development Period and a 67% vote of Unit owners. Contending that LLC could not unilaterally amend is raising a procedural challenge. Seven years later, Association is time-barred.

G. Association's Argument Raises a Defense or Counterclaim Not Otherwise Pled.

The motion is a way for Association amend its answer, or alternatively, somehow state a counterclaim for relief. Leave of Court to do this was never requested. Nowhere in Association's original Answer, its August 2, 2022 Amended Answer, or any of its previous filings has Association ever asserted that Partners is not an "Exempt Person" under the governing documents, under the Settlement Agreement, or by virtue of the LLC lacking authority to exempt Partners.

Now, less than two months before trial in this case, Association is wanting to do away with the Settlement Agreement and completely amend its position to vitiate Partner's voting rights – efforts which have failed on all other bases. This completely changes the landscape – arguably even calling into question LLC's ability to ever have imposed mandatory social initiation fees or take any other action through the Sixth Amendment that relates to real property. This motion clearly seeks to amend in violation of Tenn. R. Civ. P. 15.01 and 15.04, and should be denied.

IV. Conclusion

This motion is rooted in Association's dissatisfaction with this Honorable Court's interpretation of the Settlement Agreement that Partners is not individually a party to that contract, and that the contract provides only for voluntary payments for mutually agreed upon infrastructure improvements - something that neither the Master Declaration nor the Bylaws include. The Association knows Partners is an Exempt Person, exempt from paying assessments under the governing documents, and exempt under the Settlement Agreement. Association had banked on the Settlement Agreement executed by SPC, which is now winding up. Association had also banked on its own incorrect interpretation of the Settlement Agreement as individually binding Partners. Instead of abiding by the governing documents, the contractual terms of the Settlement Agreement, and this Court's rulings, Association is attempting to undo all progress in both the Settlement Agreement Case and this case. Association is just trying to avoid and delay what has become inevitable in this case, a finding that the 2019 election was invalid. As the Court has held in both this proceeding and the Settlement Agreement Case, Partners is in good standing and has the right to participate and vote in the Board of Directors elections and to pursue this action.

Respectfully submitted this 26th day of September, 2022.

ELMORE, STONE & CAFFEY, PLLC

By: _____
Wynne du M. Caffey-Knight (BPR #014876)
Trent R. Kinkaid (BPR #038546)
5616 Kingston Pike, Suite 301
Knoxville, Tennessee 37919
Tel: (865) 766-0056
Email: wcaffey@esc-law.com
tkinkaid@esc-law.com
Attorneys for Rarity Bay Partners f/k/a Salem Pointe Capital Partners

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by as follows:

HAND DELIVERY:

Kevin C. Stevens, Esq.
KENNERLY MONTGOMERY & FINLEY, P.C.
550 Main Street, Suite 400
Knoxville, Tennessee 37902
Stevens Email: kstevens@kmfpc.com
Fax: (865) 524-1773
Counsel for Defendant Rarity Bay Community Association, Inc.

Dana Pemberton, Esq.
Ellis A. Sharp, Esq.
STOKES, WILLIAMS, SHARP
P.O. Box 2644
Knoxville, TN 37901
Pemberton Email: dana@stokeswilliams.com
Sharp Email: sandy@stokeswilliams.com
Fax: (865) 544-1849
Counsel for Defendant Rarity Bay Community Association, Inc.

Thomas M. Hale, Esq.
KRAMER RAYSON, LLP
800 S Gay St # 2500
Knoxville, TN 37929
Hale Email: tomhale@kramer-rayson.com
Fax: (865) 522-5723
Counsel for Defendant Salem Pointe Capital, LLC,

Adam G. Russell, Esq.
FISHER RUSSELL, PLLC
10265 Kingston Pike, Suite C
Knoxville, TN 37922
Russell Email: arussell@fisher-russell.com
Fax: (865) 322-9998
Counsel for Defendants Salem Pointe Capital, LLC

EMAIL WITH FACSIMILE CONFIRMATION:

S. Joshua Kahane
Aubrey B. Greer
GLANKLER BROWN, PLLC
6000 Poplar Ave., Suite 400
Memphis, TN 38119
Kahane Email: jkahane@glankler.com
Aubrey Email: agreer@glankler.com
Fax: (901) 525-2389
Counsel for Defendant BEP Rarity Bay, LLC

Shane G. Ramsey
John T. Baxter
NELSON MULLINS RILEY AND SCARBOROUGH LLP
One Nashville Place
150 Fourth Avenue North, Suite 1100
Nashville, TN 37219
Ramsey Email: shane.ramsey@nelsonmullins.com
Baxter Email: john.baxter@nelsonmullins.com
Fax: (615) 664-5399
Counsel for Defendant BEP Rarity Bay, LLC

This 26th day of Sept, 2022.