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	)	

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RARITY BAY PARTNERS' RESPONSE IN OPPOSITION TO RARITY BAY COMMUNITY ASSOCIATION, INC.'S STATEMENT OF UNDISPUTED MATERIAL FACTS and ADDITIONAL STATEMENT OF MATERIAL FACTS

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") ***Statement of Undisputed Material Facts***.

NOTE: Hereinafter, Partners may refer to the community's governing documents (Charter, Bylaws, Declarations, as amended, including but not limited to the Sixth Amendment and Seventh Amendment), the May 18, 2015 Assignment of Right to Purchase Real Property between Partners and LLC, and the Settlement Agreement between Association and the SCP partnership. Copies of these are NOT attached as Exhibits insofar as there are already numerous copies of each already filed of record.

1. In this case, Plaintiff Rarity Bay Partners ("Partners") asserts it "[i]s not a party to this [12-17-15] Settlement Agreement." (Transcript of Proceedings, Nov. 24, 2020,

p. 29, 11. 17-24)(Ex. 1).

RESPONSE: Undisputed that Partners asserts it is not a party to the Settlement Agreement. What is material, however, is that Partners is actually not a party to the Settlement Agreement based on the clear language of that contract itself, and more importantly, that the Court has already found as a matter of law that Partners is not a party to the Settlement Agreement, holding "[b]ased upon the usage and grammar, 'SPC', as a partnership, is one party to [the Settlement Agreement] and Community Association is the other." *Rarity Bay Community Association, Inc. v. Rarity Bay Partners,* Monroe County Case No. 20489 ("Settlement Agreement Case") March 25, 2021, Court Order attached hereto as Exhibit 1 at ¶ 6. See also, Settlement Agreement at the first sentence.

2. Partners further asserts the parties to the Settlement Agreement never reached a mutual agreement on Partner's position as an Exempt Person under the Master Declaration. (Rarity Bay Partners' Objections, Answers and Responses to Plaintiffs First Set of Interrogatories and Requests for Production of Documents to Defendant Rarity Bay Partners, Response No. 2) (Ex. 6).

RESPONSE: Disputed. Partners has never asserted anything remotely of the sort – whether in its discovery responses or elsewhere. The referenced answer in ***Rarity Bay Partners' Objections, Answers and Responses to Plaintiffs First Set of Interrogatories and Requests for Production of Documents to Defendant Rarity Bay Partners*** ("Partners' Discovery Response") merely identifies persons who have knowledge of various subjects. Association misstates and/or mischaracterizes Answer to Interrogatory No. 2, which asking about persons with knowledge of facts. The answer states, in pertinent part:

> Answer to Interrogatory No. 2: . . . Each of these persons presumably has knowledge of the negotiation and execution of the Settlement Agreement and of the identity of the parties to the Settlement Agreement (i.e., the Rarity Bay Community Association, Inc. ("CAI") as one party; and SPC (hereinafter "SPC"), the Tennessee General Partnership formed between Salem Pointe Capital, LLC

> and Salem Pointe Capital Partners as another. Matthew Daniels would have knowledge of any amounts voluntarily paid by Partners towards any voluntary payment that was or could have been made by SPC, that the parties to the Settlement Agreement never reached a mutual agreement as to any infrastructure improvement towards which the voluntary payments would be allotted, what lots or units were owned by SPC, the lots or units owned by Partners, ***and*** Partner's position as an Exempt Person under the Master Declaration.

Partners' Discovery Response Excerpt, attached hereto as Exhibit 2 (emphasis added). Partners' answer only lists several topics of which Mr. Daniels has knowledge, two of which are that Association and SPC never reached a mutual agreement as to any infrastructure improvements toward which SPC's voluntary payments would be allotted AND that Partners is an Exempt Person.

Again, material to the motion is that the Court has already held that Partners is an Exempt Person under the Master Declaration and the Settlement Agreement. The Court has held that:

- "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.* 1. at ¶ 29.
- 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.
- "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.
- "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." *Id.* at ¶ 53.
- "The Settlement 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.

- "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.

The Court also held in the present action:

- "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[1], attached hereto as Exhibit 3 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.

Thus, the Court has already found and determined it to be undisputed, and as a matter of law, that Partners is an Exempt Person.

Association also 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 from 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 ¶ 10. In the Sixth Amendment, Partners is defined as an Exempt Person and as a result each unit that Partners own 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

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

Declarant, a Declarant-Related Entity, a Builder, or any Exempt Person." Sixth Amendment of Master Declaration of Covenants, Conditions, and Restrictions for Rarity Bay and Amendment of Bylaws for Rarity Bay Community Association, Inc. Sixth Amendment ¶1(f).

As part of the recitals, 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).

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 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.

If the Settlement Agreement is not enough proof of the Association's admission of Partners' status as an Exempt Person, the Association has admitted in the course of both this proceeding and the Settlement Agreement Case that under the governing documents Partners is an Exempt Person. While trying to enforce that contract as against Partners, Association likewise argued:

- 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.

- 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.
  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 . . . April 15, 2021 Transcript of Proceedings, excerpt attached hereto as Exhibit 5 at p. 58: 4-10.

LLC has also admitted as much:

- 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. *Id. at* p. 33:18-22.

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

3. If Rarity Bay Partners is not an individual party to the Settlement Agreement of December 17, 2015, it has no standing to enforce the Agreement. (See

Owner-Operator Indep. Drivers Ass'n v. Concord Efs, 59 S.W.3d 63, 68 (Tenn. 2001)).

RESPONSE: Undisputed that Partner is not individually a party to the contract. It is disputed that this purported "fact" is even material to this motion insofar as this proceeding is not about enforcing the Settlement Agreement. Partners is not suing here to enforce the Settlement Agreement in this case. Rather, Partners' claims seeking to protect the integrity of elections arise under the governing documents, not under the Settlement Agreement. And even in the Settlement Agreement case, Partners is a defendant - purportedly sued as a party to the contract. In that case, it relies on the contract language as a defense, not to "enforce" the contract. That defense includes interpreting the contract. The Court has held that Partners would be jointly and severally liable with LLC as a partner of SPC. If it can be held jointly liable a partnership obligation, if any, then Partners it has standing to assert any defense the partnership would have – including relying on the terms of the contract.

4. The Declaration of Covenants, Conditions and Restrictions for Properties of Rarity Bay Subdivision, Phase I, Section 1, 2, and 3 of 1994 (hereinafter "Phase I Declarations"]states that the Declarant covenants, and each lot owner by accepting a deed therefore, is deemed to agree to pay annual and special assessments and agrees to the assessments together with interest, costs, reasonable attorney fees and a continuing lien on the property for the assessments. (Declarations Phase I, Article IV, Section 3)(Ex. 2).

RESPONSE: Disputed. That section merely concerns access to private streets. It is also disputed that any language in the Phase Declaration imposes an obligation for assessments on Partners. Partners is nonetheless an Exempt Person and not obligated to pay such assessments, nor may Association collect assessments from Partners, nor lien Partners lots. See also Response to SUMF 2, above; and Exhibit 1, passim.

5. The purpose of the Assessments was for improvement and maintenance of common areas. (Declarations Phase I, Article IV, Section 2)(Ex. 2).

RESPONSE: Disputed. That section merely concerns access to private streets. It is also disputed that any language in the Phase Declaration imposes an obligation for assessments on Partners. Partners is nonetheless an Exempt Person and not obligated to pay such assessments, nor may Association collect assessments from Partners, nor lien Partners lots. See also Response to SUMF 2, above; and Exhibit 1, *passim.*

6. The original governing documents do not contain the term "Exempt Person". (See governing documents prior to Amendments).

RESPONSE: Undisputed that the term "Exempt Person" is not within the original governing document. Disputed that the absence of this definition in the original governing document is even material. The original governing documents certainly contemplate the Declarant being exempt. What is material is that the governing documents, as amended, in the Sixth Amendment contain the term "Exempt Person" and designate Partners as an Exempt Person. Sixth Amendment at ¶1(d). The Sixth Amendment is clearly part of the governing documents because it amends the Master Declaration and Bylaws, officially making the terms in the Sixth Amendment part of the governing documents within the Rarity Bay Community. The Sixth Amendment is a recorded document in both Monroe and Loudon counties and has continued to be recognized as a governing document in the Rarity Bay Community. Further, under the defined term in the Master Declaration of "Governing Documents" it includes "The Declaration, By-Laws...or any of the above, as each may be amended from time to time." Master Declaration at ¶1.19. For the Court's ease of reference,

the complete original Sixth Amendment, was filed in the record on August 27, 2020, as Exhibit B to the ***Complaint***. For further response, to demonstrate proof that Partners is an Exempt Person under the governing documents, that the Court has ruled Partners is an Exempt Person, and that Association has admitted that exemption and contracted to not challenge Partners Exempt Person status. See Response to SUMF No. 2, above.

7. Under the original declarations and Master Declaration, the only entity exempt from assessments is the Declarant for property owned by the Declarant. (See Phase III Declarations, Article VI, Section 1; Master Declaration 7.8 (before amendment))(Ex. 3, Ex. 4).

RESPONSE: Undisputed that under the original governing documents only the Declarant was exempt from paying assessments on land that it owned. Disputed to the extent Association contends that only the Declarant could ever be exempt or that the Declarant can only exempt someone else as to land originally owned by Declarant. The Declarant has a right of exemption to land it owns or additional land it acquires. The "right" is to be exempt and LLC created the same exemption for Partners – to be exempt on land that it owns. . See Response to SUMF 2 and 6, above.

8. The only property exempt from assessments under the Association governing documents is:

> Exempt Property. The following property shall be exempt from payment of General Assessments, Neighborhood Assessments, and Special Assessments:
>
> (a) All Common Area and such portions of the property **owned by the Declarant** and included in the Area of Common Responsibility pursuant to the By-Laws;...

(Master Dec. 7.10)(emphasis added)(Ex. 2)(Ex. 4); (Bylaw 12.1o)(Ex. 3)(Ex. 5).

RESPONSE: Disputed. See Response to SUMF 2 and 6, above. Partners is an Exempt Person under the governing documents such that it does not owe assessments under the governing documents for property it owns. The Court has ruled Partners is an Exempt Person Association has repeatedly admitted that Partners is an Exempt Person under the governing documents, also contracted to that same understanding, and contracted to not challenge Partners' Exempt Person status.

9. There can be only one (1) Declarant at any one time. (Master Dec. 1.12; Fifth Amendment)(Ex. 4; Ex. 7).

RESPONSE: Undisputed in part. Partners agrees that there can only be one named declarant. Partners disputes that LLC now has the proper standing to be the declarant and this is the subject of its Complaint in Monroe Chancery No 19943 insofar as LLC does not own developable property and therefore is unable to meet the definition as the declarant. See Affidavit of Crystal Pate attached hereto as Exhibit 6. Partners further asserts it is not material to this motion that there can only be one Declarant at a time insofar as under the governing documents the Declarant had the right to unilaterally amend the governing documents at the time LLC did so.

10. On or about May 18, 2015, Section 2.10 of the Bylaws was amended to name Salem Pointe Capital, LLC ("LLC") as the Declarant. (Bylaws, Fifth Amendment)(Ex. 7).

RESPONSE: Undisputed in part. While LLC was the named declarant, Partners and LLC had formed a partnership for the co-managing and holding of the declarant rights. Partners and LLC were both share in the handling of the declarant rights. Exhibit 6.

11. LLC remains the named Declarant under the governing documents for the Association. (See Fifth Amendment) (Ex. 7).

to assessments and being delinquent from failure to pay assessments see Response to SUMF No. 2 and 6. Notably, the language emphasized by Association, to wit, "unless otherwise indicated **by the Declarations**" highlights that the Charter itself provides that the declarations can limit that power. The declarations, as amended to include Partners as an Exempt Person, are wholly permissible under the Charter.

15. The Charter gives the Association the right to enforce contracts of any kind to carry out any purpose of the Association. (Charter, Article 7)(Ex. 8).

RESPONSE: Disputed. In order for Association to enforce contracts through litigation it must do so pursuant to §13.5 of the Bylaws which states:

> **13.5. Litigation.** Except as provided below, no judicial or administrative proceeding shall be commenced or prosecuted by the Association unless approved by Members holding seventy-five percent (75%) of the votes in the Association. This Section shall not apply however, to (a) actions brought by the Association to enforce the provision of the Governing Documents (including, without limitation, the foreclosure of liens); (b) the imposition and collection of assessments; (c) proceeding involving challenges to ad valorem taxation; (d) counter-claims brought by the Association in proceedings instituted against, it or (e) actions brought by the Association against any contractor, vendor, or supplier of goods or services arising out of a contract for services or supplies. This Section shall not be amended unless such amendment is approved by the percentage of votes, and pursuant to the same procedures, necessary to institute proceedings as provided above.

Bylaws at §13.5. For the Court's ease of reference, the complete original Sixth Amendment, was filed in the record on August 27, 2020, as Exhibit C to the ***Complaint***.

16. Members cannot use the Association for monetary gain or profit. (See Charter, Article 7(c) (Ex. 8).

RESPONSE: Undisputed in part; however, the Charter actually states: "The 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. This is also not material to this motion, because this case does not involve Partners' using the Association for monetary gain or profit. It involves ensuring the integrity of elections.

17. Members cannot exempt themselves from assessments by any means. (See Master Declaration 7.1; Bylaw 12.1) (Ex. 4 and Ex. 5).

RESPONSE: Undisputed that the Master Declaration includes certain language limiting exemptions. Partners disputes any inference or assertion that it is delinquent, owes assessments, or is violating the governing documents. For further response demonstrating Partners position as an Exempt Person, therefore not being subject to assessments and being delinquent from failure to pay assessments, or that LLC did not have authority to exempt Partners, see Response to SUMF No. 2 and 6, above.

18. The Charter for the Association, executed on September 24, 1998 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, Article 8(c), Ex. 4) (Ex. 8).

RESPONSE: Undisputed. What is disputed is the suggestion that being exempt is part of a share in the privileges, rights and assets of the Association, or that Partners' exemption is not somehow an appurtenance to its property.

19. Special rights and obligations of the Declarant set forth in the Governing Documents cannot be transferred or assigned to another, either in whole or in part, if such transfer would either reduce an obligation or enlarge a right beyond that which the Declarant has under the Master Declaration or the By-Laws. (Master Declaration Article 11, Section 11.1)(Ex. 4).

RESPONSE: Undisputed that the Master Declaration limits certain transfers, but it is disputed that in making Partners exempt, LLC was reducing or enlarging any right. It merely gave Partners the same right of exemption LLC had – the right to be right to be exempt from assessments. See Response to SUMF 2 and 6, above.

20. On or about April 23, 2021, the Court found that the Sixth Amendment did not allow the Declarant to extend voting rights to itself on lots the Declarant did not own. (See Transcript, Findings of Fact, April 23, 2021)(Ex. 10).

RESPONSE: Disputed. The Court delineated between Membership in the Association and voting rights as two distinct things. The Court's limited holding was that Membership comes requires being an owner of Unit, and along with that ownership comes the right to vote as to that Unit. Absent ownership of a Unit, a person cannot cast the vote associated with that Unit. The Court was not addressing the Declarant's right generally, but only a condition precedent to being a Member. July 21, 2021 Order at p. 2 with April 23, 2021 Findings of Fact, attached hereto as Exhibit 20.

LLC's counsel pointed out the limitation of the language in the Charter:

- 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.

21. Likewise, the Declarant cannot extend an exemption for assessments on lots the Declarant does not own. (See Charter, Article 8 (Ex. 8); Master Declaration Article 1, Article 7; Article 11)(Ex. 4).

RESPONSE: Disputed. See Response to SUMF 2, 6 and 20, above.

22. Partners owns 377 lots in the Association. (Trans. November 24, 2020, p. 48, 11.18)(Ex. 1).

RESPONSE: Disputed. Partners owns 362 lots in the Association. Exhibit 6.

23. In this lawsuit, Partners claims LLC has never owned any part of Rarity Bay Partners. (Trans. November 24, 2020, p. 36, 11. 15-17)(Ex. 1).

RESPONSE: Undisputed.

24. Partners claims in this lawsuit it was never a parent or subsidiary of LLC. (Trans. November 24, 2020, p. 36, ll 20-23)(Ex. 1).

RESPONSE: Undisputed.

25. Partners claims in this lawsuit the alleged SPC Rarity Bay Partnership owns no lots. (Trans. November 24, 2020, p. 38, ll 13-14)(Ex. 1).

RESPONSE: Undisputed.

26. Partners claims in this lawsuit its obligation to pay under the Settlement Agreement ended when its Rarity Bay Partnership with LLC ended. (Trans. November 24, 2020, p. 39)(Ex. 1).

RESPONSE: Disputed to the extent this purports to state that Partners was a party to the Settlement Agreement. Partners maintains that it was not a party to the Settlement Agreement, but that instead, the Association and the SPC Partnership were instead parties. The Court has held the same. See SUMF 2 and 6, above. Also disputed to the extent this purports to state that the Settlement Agreement obligated the SPC partnership to pay assessments under the governing documents. The Court has held that Settlement Agreement provides only for self-imposed voluntary payments for mutually agreed upon infrastructure improvements, which neither the Master Declaration nor the Bylaws impose. *See* Exhibit 1 at ¶ 33-36 and 48. It undisputed, however, that Partners never had an obligation to pay directly to the Association, as the Court has held. *See* Ex 1 at ¶ 47, either before or after termination of the partnership with LLC.

27. Partners claims in this lawsuit its lots are separately owned from its relationship with LLC. (Trans. November 24, 2020, p. 40, 11. 5-8)(Ex. 1).

    RESPONSE: Undisputed.

28. Partners is simply a Class A lot(s) owner/member of the Association. (See Bylaw, Section 4.1)(Ex. 5).

    RESPONSE: Disputed. Partners is a Class A member in terms of its voting rights, but is also an Exempt Person under the governing documents for purposes of paying assessments under the governing documents. Voting rights are wholly separate from exempt status on assessments. See also Response to SUMF 2 and 6.

29. The Settlement Agreement qualifies as a cost sharing agreement under the governing documents for the Association. (See Master Declaration, Article I,

Section 1.10)(Ex. 4).

RESPONSE: Disputed. A cost sharing agreement, as defined in the Master Declaration is specifically limited to a contract or agreement "between the Association and any owner or operator of property . . . for the allocation of expense that benefit both the Association and the owner or operator of such property." By its own terms, the Settlement Agreement is a contract agreement "by and between Salem Pointe Capital, LLC and Salem Pointe Capital Partners, a Tennessee General Partnership (collectively 'SPC') and Rarity Bay Community Association, Inc. ("RBCAI")." The Court has held not only that Partners is not a party to the contract, but that it provides only for voluntary, self-imposed payments for undefined mutually agreed upon infrastructure improvements.

30. An owner's right to vote may be suspended under the Governing Documents for violating the Governing Documents. (Phase III Declaration, Article IV, Bylaw Section 1(a)(Ex. 3).

RESPONSE: Undisputed in part. Partners dispute any inference or assertion that it is delinquent, owes assessments, or is violating the governing documents. For further response demonstrating Partners position as an Exempt Person, therefore not being subject to assessments and being delinquent from failure to pay assessments see Response to SUMF No. 2 and 6. Furthermore, the Court has held that "the community Association did not have the right to place liens or foreclose on the lots of Partners, and the Community Association further did not have the right to prohibit Partners from participating in the elections for the Community Association Board of Directors." Exhibit 1 at ¶19.

31. A member with delinquent assessments loses its voting rights. (See Bylaw 8.24)(Ex. 5).

RESPONSE: Undisputed in part. Partners dispute any inference or assertion that it is delinquent, owes assessments, or is violating the governing documents. For further response demonstrating Partners position as an Exempt Person, therefore not being subject to assessments and being delinquent from failure to pay assessments see Response to SUMF No. 2 and 6. Furthermore, the Court has held that "the community Association did not have the right to place liens or foreclose on the lots of Partners, and the Community Association further did not have the right to prohibit Partners from participating in the elections for the Community Association Board of Directors." Exhibit 1 at ¶19.

32. No member or resident shall be eligible to serve as a director if any assessment for such member's unit is delinquent. (Bylaw Section 8.10)(Ex. 5).

RESPONSE: Undisputed in part. Partners dispute any inference or assertion that it is delinquent, owes assessments, or is violating the governing documents. For further response demonstrating Partners position as an Exempt Person, therefore not being subject to assessments and being delinquent from failure to pay assessments see Response to SUMF No. 2 and 6. Furthermore, the Court has held that "the community Association did not have the right to place liens or foreclose on the lots of Partners, and the Community Association further did not have the right to prohibit Partners from participating in the elections for the Community Association Board of Directors." Exhibit 1 at ¶19, and see also at ¶¶ 33, 34, 35, 36, 37, 39, 47, 48, 49, 50, 51.

33. Partners has not paid assessments since 2017. (Affidavit of Joe Barletta, Ex. 9).

RESPONSE: Undisputed in part. Partners instead asserts that it has never paid any assessments under the governing documents, and is not obligated to as it is exempt. In 2017, Partners made a voluntary payment on behalf of the SPC Partnership under the Settlement Agreement, but disputes this was an assessment under the governing documents. As the Court has held, that contract only refers to self-imposed voluntary payments for mutually agreed upon infrastructure improvements and that neither the Master Declaration nor the Bylaw impose an obligation for such assessments. Partners disputes any inference or assertion that it is delinquent, owe assessments, or is violating the governing documents, as the Court has already held that Partners is exempt and in good standing so as to participate in elections. For further response demonstrating Partners as an Exempt Person, therefore not being subject to assessments and being delinquent from failure to pay assessments see Response to SUMF No. 2 and 6. Furthermore, the Court has held that "the community Association did not have the right to place liens or foreclose on the lots of Partners, and the Community Association further did not have the right to prohibit Partners from participating in the elections for the Community Association Board of Directors." Exhibit 1 at ¶19, and see also at ¶¶ 33, 34, 35, 36, 37, 39, 47, 48, 49, 50, 51.

ADDITIONAL STATEMENT OF MATERIAL FACTS

Having responded to Association's Statement of Undisputed Material Facts, Partners submits the following additional statement of material facts that further demonstrate that Association is not entitled to summary judgment pursuant to Rule 56.03, beginning with the next consecutive number for the Court's convenience:

34. The Court has held that "the community Association did not have the right to place liens or foreclose on the lots of Partners, and the Community Association further did not have the right to prohibit Partners from participating in the elections for the Community Association Board of Directors." Exhibit 1 at ¶19.35.

35. The Sixth Amendment adds the defined term "Exempt Person" to the Master Declaration of Covenants, Conditions, and Restrictions for Rarity Bay ("Master Declaration") as follows:

> Amendment of Master Declaration. Pursuant to the Declarant's right to do so under the Master Declaration, the Declarant hereby amends the Master Declaration as follows:
>
> * * *
>
> (d) The following defined terms shall be added as new Sections 1.40, 1.41 and 1.42:
>
> * * *
>
> 1.42 "Exempt Person": Salem Pointe Capital Partners, a Tennessee general
> partnership, any Person or entity which is a parent, subsidiary or affiliate of Salem Pointe Capital Partners, and/or in which Salem Pointe Capital Partners or any parent, subsidiary or affiliate of Salem Pointe Capital Partners or any officer, director, shareholder, partner, member, manager, or trustee of any of the foregoing, or any combination thereof, owns, directly or indirectly, not less than fifty percent (50%) of such entity.
>
> Sixth Amendment at Paragraph 1(d).

36. The Sixth Amendment defines Partners as an "Exempt Person." *Id.* Paragraph 1(d).

37. The Sixth Amendment deletes Section 7.8 of the Master Declaration and replaces it with a new Section 7.8 entitled "Date of Commencement of Assessments." *Id.* at 1(f).

38. 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.*

39. The Sixth Amendment replaced Section 12.8 of the Bylaws for the Rarity Bay Community Association ("Bylaws") to make 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" so 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 Paragraph 2(c).

40. 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 1(d), 1(f), and 2(c).

41. Section 7.8 of the Sixth Amendment provides that the obligation to pay assessments commences "as to each Unit on the date on which the Unity is conveyed to, or held by, a Person other than the Declaration, a Declarant-Related Entity, a Builder, or any Exempt Person." Id. at 7.8.

42. Section 7.8 of the Master Declaration as amended by the Sixth Amendment also provides, that notwithstanding any other provision, "neither the Declarant nor any

other party shall be permitted to amend this Declaration as it pertain to rights of an Exempt Person under this Section 7.8 without joinder of each Exempt Person whose rights would be affected by such an amendment." *Id.* at 1(f).

43. The Settlement Agreement recites that it is being entered between "a Tennessee General Partnership" comprised of LLC and Partners "(collectively 'SPC')" and Association. Settlement Agreement at p. 1.

44. The Settlement Agreement references the Sixth Amendment and does not otherwise define "Exempt Person." *Id.*

45. The Settlement Agreement references the Sixth Amendment and does not otherwise define "Declarant Related Entity." *Id.*

46. In the Settlement Agreement Association agreed "that it will abide by the terms of both the Sixth and Seventh Amendments as written and further agrees that it will not take any action to challenge the enforcement and validity of the terms contained in both the Sixth and Seventh Amendments and SPC's enforcement thereof no or at any time in the future." *Id.* at ¶10.

47. In the Settlement Agreement 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 Association annual assessments." Id. at ¶1.

48. In the Settlement Agreement, SPC, the Tennessee General Partnership consisting of Partners and LLC, and the Association, agreed:

> **SPC** agrees that it will **<u>self-impose</u>** a **<u>limited</u>** RBCAI annual assessment exemption for SPC (and any other qualifying Declarant-Related Entity or Exempt Person), being that RBCAI annual assessments **<u>will be paid by SPC (and any other qualifying Declarant-Related Entity)</u>** on all Rarity **<u>Bay lots held by SPC (and any other Declarant-Related Entity)</u>** *in*

> *excess of 250 Rarity Bay lots in inventory on the last day of the calendar year.* Any and all payment of annual assessment by SPC, if any, are to go to a mutually agreed upon infrastructure improvements.

Id. at ¶1. (bold and underlining added.)

49. Partners, individually, never agreed to pay any self-imposed assessment. *See* Exhibit 1 at ¶ 47.

50. The partnership between LLC and Partners, SPC, agreed to self-impose a limited assessment for mutually agreed upon infrastructure improvements, but the Settlement Agreement does not require that those amounts be paid directly to Association. (See Exhibit 1 at ¶ 9 and 48. see Transcript of Ruling on April 24, 2019, excerpt attached as Exhibit 3 at p. 6, lines 16-22.

51. Any self-imposed assessments by the SPC partnership under the Settlement Agreement are for mutually agreed upon infrastructure improvements only and are not owed directly to the Association. See Settlement Agreement at ¶1.

52. The Settlement Agreement contains no provision that provides for Association to collect assessments directly from Partners, individually. *See* Exhibit 1 at ¶ 51 and Settlement Agreement, *passim.*

53. The Settlement Agreement contains no provision requiring Partners individually to self-impose assessments for mutually agreed upon infrastructure improvement for periods after the SPC partnership is dissolved. *See* Exhibit 1, *passim* and Exhibit 2 *passim.*

54. Partners, individually, never owed any amounts to the Association for any self-imposed assessment pursuant to the Settlement Agreement. *See* Exhibit 1, *passim* and Exhibit 2 *passim.*

55. Partners was not a Declarant-Related entity after the partnership's termination in July, 2017. Sixth Amendment (Exhibit 4 at ¶1(d 1.41) (definition of "Declarant-Related entity").

56. No self-imposed assessment is even potentially triggered based on Partners' ownership of lots for periods after the SPC was terminated. *Id.*

57. As of the years ending 2017 through 2021 there were no Rarity Bay lots held by SPC partnership (and any other Declarant-Related entity) in excess of 250 Rarity Bay lots in inventory on the last day of the calendar year. Pate Affidavit Exhibit 6.

58. The Settlement Agreement does not authorize the Association to place liens on Partners' lots. *See* Exhibit 1 at ¶ 52.

59. The Settlement Agreement does not authorize the Association to strip Partners, an Exempt Person under the Master Declaration, of voting rights in elections for the Association Board of Directors. *See* Exhibit 1 at ¶ 54.

60. The Settlement Agreement does not authorize the Association to deprive Partners, an Exempt Person, of its right to nominate a candidate for the Association Board of Directors. *See* Exhibit 1 at ¶ 54.

61. As an "Exempt Person" under the Sixth Amendment, Partners owes no assessments under the Master Declaration or Bylaws for lots it owns in the Rarity Bay Subdivision. Exhibit 4 at ¶¶ 1(d), 1(f), and 2(c). 66.

62. Association is barred from challenging the Sixth Amendment pursuant to §13.2(c) of the Master Declaration Master Declaration at 13.2(c).

63. LLC had the authority to make Partners an Exempt Person under the governing documents. See Response to SUMF 2, 6, 17, 18, 19, 20, and 28, above.

Respectfully submitted this 16th day of September, 2022.

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