IN THE CHANCERY COURT FOR MONROE COUNTY, TENNESSEE

MICHAEL FRISBEY and wife, JAMIE FRISBEY,	)	
Plaintiffs,	)	
v.	)	**DOCKET NO. 21,579**
SALEM POINTE CAPITAL, LLC, MICHAEL AYRES, and RARITY BAY COMMUNITY ASSOCIATION, INC.	)	
Defendants.	)	

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SALEM POINTE CAPITAL, LLC'S AND MICHAEL AYRES' MOTION TO ALTER OR AMEND THE ORDER ENTERED ON MARCH 16, 2023

Defendants Salem Pointe Capital, LLC ("LLC") and Michael Ayres ("Ayres"), pursuant to Tenn. R. Civ. P. 59.04, move the Court to alter or amend its order entered on March 16, 2023 (the "Order"). The Court erred in its Order when it concluded that (I) the By-Laws were inconsistent with the Charter; (II) the By-Laws were inconsistent with Tennessee law; and (3) Declarant's notice of the potential removal of Directors was inappropriate. Granting this motion would prevent this Court from committing reversible error.

THE STANDARD FOR MOTIONS TO ALTER OR AMEND

Rule 59.04 motions to alter or amend a judgment test: "(1) whether the factual basis for the decision is properly supported by evidence in the record, (2) whether the [trial] court properly identified and applied the most appropriate legal principles applicable to the decision, and (3) whether the [trial] court's decision was within the range of acceptable alternative dispositions." *Lee Med., Inc. v. Beecher*, 312 S.W.3d

515, 524 (Tenn. 2010). This type of motion provides "the trial court with an opportunity to correct errors before the judgment becomes final." *In re M.L.D.*, 182 S.W.3d 890, 895 (Tenn. Ct. App. 2005). A trial court should grant the motion "when the controlling law changes before the judgment becomes final; when previously unavailable evidence becomes available; or to correct a clear error of law or to prevent injustice." *Id.* Here, the Court should grant this Rule 59.04 motion to correct a clear error of law and/or to prevent injustice.

ARGUMENT

This case centers on two things: Declarant's ability or right to amend the By-Laws and remove directors. The By-Laws allow Declarant to do both. For the reasons explained below, these powers vested in the Declarant are not *inconsistent* with the Charter or state law.

With respect to amending the By-Laws, the Charter directs our attention to the By-Laws themselves, particularly §13.10. And the By-Laws, since 1998, have allowed the Declarant to unilaterally amend them for any reason during the Development Period. (By-Laws §13.10(a)). Thus, the ability to amend the By-Laws is not *inconsistent* with the Charter.

The Court further held that allowing Declarant to amend the By-Laws without the approval of the Board of Directors would violate Tenn. Code Ann. § 48-58-101(a), which requires corporate powers to be exercised by or under the authority of the Board. But the Court failed to consider from where the Declarant obtained the right to amend the By-Laws. That right came directly from the Board itself and is thus not *inconsistent* with state law.

Once those arguments fall by the wayside, we are left with the issue of whether Declarant's notice to Mr. Frisbey of his potential removal from the Board was sufficient. By-Laws §8.5, as amended, governs this issue. Declarant's email communications to Mr. Frisbey on February 24 and 25 make it clear that the notice was sufficient. The record reflects that not only did Mr. Frisbey get the notice, but he was also apprised of the Declarant's intentions for the March 1 meeting, and Mr. Frisbey in fact attended the meeting.

I. The By-Laws are not inconsistent with the Charter.

In its Order, the Court held that "the Charter does not allow a third party to amend or repeal the By-Laws, and under T.C.A. § 48-60-301, that power was not reserved in the Charter for the Declarant." (Order at 4.)

The question is not whether the Charter allows Declarant to amend the By-Laws, which is how the Order framed the issue, but rather whether the procedure for amending said By-Laws is "inconsistent with [the] charter or with the laws of this state..." Tenn. Code Ann. § 48-53-102(3).

The Charter may not specifically allow the Declarant to amend the By-Laws, but it certainly does not prohibit it, and thus, the current framework is not "inconsistent" with the Charter. In fact, the Charter does not explicitly address the procedure for amending the By-Laws at all. Instead, the Charter recognizes that the procedure for amending the By-Laws is governed by the By-Laws themselves. Article 12 of the By-Laws provides:

Article 12. By-Laws. The By-Laws of the Association shall be adopted by the Board and may be altered, amended, or rescinded in the manner provided in the By-Laws. The quorum requirements for meetings of Members, and directors shall be set forth in the By-Laws.

(Charter Art. 12.) Thus, as long as the By-Laws were amended consistent with what the By-Laws prescribe with respect to their own amendment, then it cannot be said that the provision is "inconsistent" with the Charter.

So, what *do* the By-Laws say about amendments? Section 13.10 provides:

> 13.10. Amendment.
>
> (a) By Declarant. Until termination of the Development Period, the Declarant may unilaterally amend these By-Laws for any purpose. Thereafter, the Declarant may unilaterally amend these By-Laws at any time and from time to time if such amendment is necessary (i) to bring any provision into compliance with any applicable governmental statute, rule, regulation, or judicial determination; (ii) to enable any reputable title insurance company to issue title insurance coverage on the Units; (iii) to enable any institutional or governmental lender, purchaser, insurer or guarantor of Mortgage loans, including, for example, the Federal National Mortgage Association or Federal Home Loan Mortgage Corporation, to make, purchase, insure or guarantee Mortgage loans on the Units; or (iv) to satisfy the requirements of any local, state, or federal governmental agency. However, any such amendment shall not adversely affect the title to any Unit unless the Member shall consent thereto in writing.
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> (b) By Members. Except as provided above, these By-Laws may be amended only by the affirmative vote or written consent, or any combination thereof, of Members holding sixty-seven percent (67%) of the votes in the Association, and, during the Development Period, the written consent of the Declarant.

Thus, the By-Laws can be amended by two individuals or groups: (1) the Declarant (during the Development Period) or (2) the Members.[1]

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[1] By-Law § 13.10 has been in effect since 1998, when the By-Laws were adopted by the Board Directors, which was long before Defendants Salem Pointe Capital, LLC and Ayres held any interest in the Rarity Bay Community.

In 2015, when Declarant amended Article 8.5 of the By-Laws (Removal of Directors and Vacancies), such action was not inconsistent with the Charter *because* the Charter says that the By-Laws govern the amendments thereto, and By-Law Article 13.10(a) specifically allowed the Declarant to take such action.[2]

The Court's conclusion that that the Declarant's ability to amend the By-Laws is inconsistent with the Charter is in error based on the provisions of both the Charter and By-Laws cited above.

II. The By-Laws are not inconsistent with state law.

In its Order, the Court also held that "[c]hanging Section 8.5 of the By-Laws by the declarant, to add powers to himself, is inconsistent with T.C.A. § 48-58-101(b) which provides that 'all corporate power shall be exercised by or under the authority of the corporation and shall be managed under the direction of its board.'" (Order at 5.) On this issue, the Court posed what it believed to be the seminal question: "May the Declarant amend the By-Laws without the approval of the Board?" (Id.) The Court answered that question "in the negative." (Id.)

That conclusion is in error because it fails to consider from where the Declarant derived its right to amend the By-Laws. The source of that right directly comes from the Board itself. The Charter provides that the By-Laws "may be altered, amended,

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[2] It is also important to note that LLC was not the first Declarant to exercise the right under By-Laws §13.10(a) to amend the By-Laws. In fact, in the Fifth Amendment of Master Declaration, Sterling P. Owen IV, acting as Receiver and Declarant, amended the By-Laws. (2-7-22 Hearing Ex. D, Fifth Amendment §2.) The Fifth Amendment states in §2: "Pursuant to Receiver's right to do as Declarant under the Master Declaration, the Receiver, in his capacity as Receiver for TLP and Rarity Management, hereby amends the Bylaws as follows..." (Id.)

or rescinded in any manner provided in the By-Laws." (Charter, Art. 12.) As set forth above, the By-Laws then provide that "[u]ntil termination of the Development Period, the Declarant may unilaterally amend these By-Laws for any purpose." (By-Laws, Art. 13.10(a).) The original By-Laws, which contained Article 13.10 giving the Declarant the right to unilaterally amend (a right which flows from Article 12 of the Charter), "were duly adopted at a meeting of the Board of Directors...held on the 28th day of September 1998." (By-Laws Certification, BookM192 Page 519.)

The Board, thus, granted the Declarant the very right to do what it did: unilaterally amend the By-Laws during the Development Period. Turning back to the question posed by the Court in its Order: "May the Declarant amend the By-Laws without the approval of the Board?" When the history and plain text of these governing documents is given their proper weight, it is clear that the Declarant already had the Board approval the Court has concluded is necessary. Indeed, when the Board granted, without reservation, the Declarant the power to unilaterally amend the By-Laws in 1998, it gave its approval for any amendment by the Declarant during the Development Period.

Moreover, this grant of a right from the Board to the Declarant is not "inconsistent" with Tenn. Code Ann. § 48-58-101(b), which provides:

> Except as provided in chapters 51-68 of this title or subsection (c), all corporate powers shall be exercised by or under the authority of, and the affairs of the corporation managed under the direction of, its board.

Id. This statute does *not* require that the corporate powers of a non-profit corporation be exercised exclusively and directly by the Board itself. Instead, it recognizes that

those "corporate powers" can be exercised "under the authority of...[the] board." *Id.* That is *exactly* what has occurred here. The Declarant obtained its right to unilaterally amend the By-Laws during the Development Period under the authority of the Board pursuant to the original By-Laws that were adopted by the Board on September 28, 1998 in accordance with the power granted by the Charter in Article 12.

If the Declarant purported to have the authority to amend the By-Laws from some source other than the Board, then perhaps Tenn. Code Ann. § 48-58-101(b) does more to support the Court's decision. But, here, the Declarant's power to amend the By-Laws flows directly "under the authority of" the Board itself, which is consistent with Tenn. Code Ann. § 48-58-101(b).

The Court cites to Tenn. Code Ann. § 48-60-201 *et seq.* for the proposition that "any amendments to the By-Laws are to be amended by the Board of Directors or the members." But these statutes, particularly Tenn. Code Ann. § 48-60-201 and 202, are permissive rather than mandatory in that they state that the directors and members "may" amend the by-laws. They do not say that *only* the board or members may amend the by-laws. Moreover, there is no provision in the Tennessee Code that says someone or some entity other than the board or members is disallowed from unilaterally amending the by-laws of a non-profit corporation.

The Court's reliance on Tenn. Code Ann. § 48-60-301 is also misplaced. The Court held: "In this case, the Charter does not allow a third party to amend or repeal the By-Laws and, under T.C.A. § 48-60-301, that power was not reserved in the Charter for the declarant." (Order at 4.) That statute provides:

> The charter may require an amendment to the charter or bylaws to be approved in writing by a specified person or persons other than the board or members. Such a charter provision may only be amended with the approval of such person or persons in the form of a document.

Id. This statute deals with the ability of a third party to *approve* the actions of the board or members in amending the charter or by-laws, not with the ability of a third person to take the action directly, which is how the Court's Order applied, albeit incorrectly, § 48-60-301. In other words, § 48-60-301 has no application here because with the facts of this matter do not involve a situation where the board or members took any act that was then to be approved by a third party. Instead, Declarant was vested by the Board, through the By-Laws, with the power to directly and unilaterally amend the By-Laws during the Development Period. Declarant's ability to take such action is not contrary to § 48-60-301.

The Court erred when it concluded that Declarant's right to amend the By-Laws was inconsistent with Tenn. Code Ann. § 48-58-101(b) or any other provision of state law, to the extent the Order so held.

Because the By-Laws, as amended, are not inconsistent with the Charter or state law, the Court is required to interpret them according to general contract principles. *Maples Homeowners Ass'n v. T&R Nashville Ltd. P'Ship*, 993 S.W.2d 36, 38-39 (Tenn. Ct. App. 1998). The Tennessee Supreme Court in *Hughes v. New Life Development Corp.*, 387 S.W.3d 453 (Tenn. 2012), explained *why* courts should refrain from invalidating private residential development covenants, even when they are subject to amendment:

> Contract law in Tennessee plainly reflects the public policy allowing competent parties to strike their own bargains. Courts do not concern themselves with the wisdom or folly of a contract...and they cannot countenance disregarding contractual provisions simply because a party later finds the contract to be unwise or unsatisfactory.
> These contract principles, applied in the context of a private residential development with covenants that are expressly subject to amendment without substantive limitation, yield the conclusion that a homeowner should not be heard to complain when, as anticipated by the recorded declaration of covenants, the homeowners' association amends the declaration. When a purchaser buys into such a community, the purchaser buys not only subject to the express covenants in the declaration, but also subject to the amendment provisions of the declaration. And, of course, a potential homeowner concerned about community association governance has the option to purchase a home not subject to association governance. As one commentator has noted, people who live in private developments "are not just opting for private ordering in the form of covenants, but also are opting for a privatized form of collective decision making that can undo, replace, modify, or augment the private ordering already achieved."
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> For this reason, we decline to subject the amendments to the Declaration in this case, adopted by the requisite 75% super-majority, to the "reasonableness" test as announced by the Court of Appeals. We acknowledge that a homeowner's Lockean exchange of personal rights for the advantages afforded by private residential communities does not operate to wholly preclude judicial review of the majority's decision. However, because of the respect Tennessee law affords private contracting parties, we are reticent to inject the courts too deeply into the affairs of a majoritarian association that parties freely choose to enter.

Id. at 475-476 (internal citations omitted) (emphasis added). Absent some inconsistency with the charter or state law (which is not present here, as explained above), *Hughes* holds that courts should not interfere with the rights of private parties to enter into contracts, like the By-Laws in this case. In other words, Mr.

Frisbey "should not be heard to complain" about the Declarant amending the By-Laws when this was a pre-existing right afforded to the Declarant during the Development Period since the inception of the Association, and provided for in both the Charter and the By-Laws.

III. Notice of Removal was Sufficient.

Because the Declarant's ability to amend the By-Laws is not inconsistent with the Charter or state law (as set forth above), then By-Laws §8.5, as amended, stands to govern Declarant's ability to remove Directors. The Court erred when it determined that By-Laws §7.3 and §7.4 and Tenn. Code Ann. § 48-51-202 governed Declarant's removal of Directors.[3] By-Laws § 8.5 is the only provision that governs, and the only provision that should be considered by this Court in determining whether "notice" was sufficient. This is so because unlike actions proposed for consideration by the Members or Directors, the By-Laws do not purport to govern or regulate "notice" or meetings at which the Declarant proposes an action.

The Court held that "the By-Laws require that any such removal [of Directors] occur at a special called meeting. See By-Laws Section 7.3 and 8.5." (Order at 6.) But §8.5 does not mention a "special called meeting" or "special meeting." Instead, it states:

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[3] Although the Court did not cite By-Laws §7.4 or Tenn. Code Ann. § 48-51-202 in its March 16 Order, it stated that it was "adopt[ing] its previous findings on [the notice] issue as stated in the Order from the July 21, 2022 hearing." (Order at 6.) The July 29, 2022 Order cited both §7.4 and Tenn. Code Ann. § 48-51-202. (7-29-22 Order at 4.)

> Removal of Directors and Vacancies. Any director may be removed, with or without cause, by Members holding a Majority of the total votes in the Association, or by the Declarant. Any director whose removal is sought shall be given notice prior to any meeting called for that purpose. Upon removal of a director, a successor shall be elected by the Members to fill the vacancy for the remainder of the term of such director, which successor must also be approved by the Declarant.

(7-21-22 Hearing Trans. Ex. 1, Sixth Amendment (which contains the amended 8.5).) And while §7.3 governs "Special Meetings", that provision only applies to "special meetings" of the Members of the Association called by the president or by 25% of the Members. §8.5, on the other hand, gives the Declarant the right to call a meeting to remove a Director, which is the situation we have here. Thus, §8.5, not §7.3, governs.[4]

§7.4 does not apply, either. § 7.4 only applies to a "meeting of the members" who are entitled to vote at said meeting; it does not apply to a meeting called by the Declarant pursuant to § 8.5. Indeed, §7.4 provides:

> 7.4. Notice of Meetings. Written notice stating the place, day, and time of any meeting of the Members shall be delivered to each Class "A" and Class "B" Member entitled to vote at such meeting, not less than thirty (30) nor more than sixty (60) Days before the date of such meeting, by or at the direction of the president or the secretary or the officers or persons calling the meeting.
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> In the case of a special meeting or when otherwise required by statute or these By-Laws, the purpose or purposes for which the meeting is called shall be stated in the notice. No business shall be transacted at a special meeting except as stated in the notice.

A plain reading of §7.4 indicates that the notice is contemplated for "any meeting of the Members" and said notice shall be delivered to "Class 'A' and Class 'B' Member[s] entitled to vote at such meeting..." §7.4 has no application here because the Declarant's ability to remove Directors, pursuant to §8.5, does not have to occur at a

[4] Were the action being proposed a removal of a Director by the Members, an action also allowed by §8.5, then looking to §7.3 or §7.4 of the By-Laws for the proper way to call a meeting would be appropriate.

"meeting of the Members" and said removal does not have to be voted on by the Members.

In the case of a potential removal of a Director by the Declarant, §8.5 only requires that "[a]ny director whose removal is sought shall be given notice prior to any meeting called for that purpose." That occurred here. Said notice was provided to Mr. Frisbey by the Declarant on February 24, 2022. (7-21-22 Hearing Ex. 6).[5]

The reading of §§ 7.3, 7.4, and 8.5 of the By-Laws advanced by LLC and Ayres is in accord with the common law of Tennessee that provides for corporate by-laws to be given their plain meaning when being interpreted and applied. For example, in *Grand Valley Lakes Prop. Owners Ass'n, Inc. v. Burrow*, the Tennessee Court of Appeals explained that, in interpreting by-laws, courts are to:

> interpret them in compliance with the well-established rules governing interpretation of other written contracts, where the primary goal is to ascertain the intention of the parties as expressed by the language of the document itself. *See Hicks v. Cox*, 978 S.W.2d 544, 547 (Tenn. Ct. App. 1998). The words of a contract must be given their usual and ordinary meaning. *Hicks*, 978 S.W.2d at 547 (citing *Aldridge v. Morgan*, 912 S.W.2d 151, 153 (Tenn. Ct. App. 1995); *Rainey v. Stansell*, 836 S.W.2d 117, 119 (Tenn. Ct. App. 1992))

376 S.W.3d 66, 78 (Tenn. Ct. App. 2011).

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[5] To the extent the Court considered this "notice" as coming from Mr. Ayres rather than the Declarant, Salem Pointe Capital, LLC, such a conclusion is in error and not supported by the facts. Indeed, the email clearly stated, "please consider this correspondence **from SPC** as official 'notice' of the special called meeting for the pending removal of one and/or more Members from the CAI Board of Directors on March 1, 2022 at 11am in the Community Activity Center." (7-21-22 Hearing Trans. Ex. 6 (emphasis added)).

With respect to Tenn. Code Ann. § 48-51-202, that "Notice" statute does not apply to removal of Directors by the Declarant pursuant to By-Laws § 8.5, and even if it did, it is a "red herring" in this case as Mr. Frisbey admits receiving the February 24, 2022 email and he was present at the March 1, 2022 meeting where he was removed as a Director by the Declarant.

"Notice" in Tenn. Code Ann. § 48-51-202 refers to "[n]otice under chapters 51-68 of this title..." Tenn. Code Ann. § 48-51-202(a). But chapters 51-68 of Title 48 of the Tennessee Code do not specifically speak to a Declarant's ability to call a meeting to remove Directors, which is allowed by By-Laws §8.5, so § 48-51-202 does not apply here.

But even if this statute did apply, it permits notice to be delivered "by electronic transmission if consented to by the recipient..." Tenn. Code Ann. § 48-51-202(f). It is important to note that Tennessee has adopted the Uniform Electronic Transactions Act (TUETA), which provides, in pertinent part, that:

> (a) A record...may not be denied legal effect or enforceability solely because it is in electronic form.
>
> * * * *
>
> (c) If a law requires a record to be in writing, an electronic record satisfies the law.

Tenn. Code Ann. § 47-10-107.[6] Here, Declarant's February 24 email would satisfy the definition of "record" under the TUETA, which is: information that is inscribed on a

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[6] The TUETA "applies only to transactions between parties each of which has agreed to conduct transactions by electronic means." Tenn. Code Ann. § 47-10-105(b). But, "[w]hether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct." *Id.* Here, due to the substantial email traffic between

tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." Tenn. Code Ann. 47-10-102(13). *See also Waddle v. Elrod*, 367 S.W.3d 217 (Tenn. 2012) (applying TUETA to e-mail exchange between attorneys confirming that settlement agreement had been reached and holding that e-mail was a "writing" signed by party to be charged, in compliance with statute of frauds).

Even assuming that notice pursuant to the Tennessee Code was required, and that Declarant's February 24 did not satisfy that requirement, what is the practical effect? Is not the purpose of notice provisions to alert individuals as to what may take place at a meeting at a set time and place? If so, Mr. Frisbey cannot claim that any alleged deficiencies in the notice negatively impacted him in any way. He testified as follows:

> Q: Did you receive an email on February 24th from Michael Ayres and the LLC:
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> A: Yes, I did.

(7-21-22 Trans. at 64-65; Exhibit 6.) And Mr. Frisbey further testified that he was in attendance for the March 1, 2022 meeting. (Id at 67.)

Finally, we address an issue raised in the July 29, 2022 Order that was incorporated into the March 16, 2023 Order. In its July 29 Order, the Court held: "the Declarant did not...deliver said notice to the specific member who was being considered for removal, the removal was inappropriate." (7-29-22 Order at 4.) The February 24 email to Mr. Frisbey and other from Declarant advised: "...please

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the parties, evidencing their course of conduct and preference for electronic communications, it cannot be said that the parties have not agreed to conduct business through electronic means.

consider this correspondence from SPC as official 'notice' of the special called meeting for the pending removal of one and/or more Members from the CAI Board of Directors on March 1, 2022 at 11am in the Community Activity Center." (7-21-22 Hearing Trans. Ex. 10). Mr. Frisbey testified that after receiving this email, he understood it to mean that the Declarant had plans to "remove everybody" from the Board, including himself. (7-21-22 Trans. at 65.) Moreover, Mr. Frisbey was advised, through a February 25, 2022 email from the Declarant, of the plan for the March 1 meeting: "All board members will be consulted on March 1 at 11am as to their desire to continue serving on the board, and how honest the answers are to the questions will be a determining factor. If past performance is indicative of future results, then I do not have high hopes specifically for Mr. Frisbey and Ms. Pate." (7-21-22 Hearing Trans at 89, Ex. 10.) In light of these email communications from Declarant, and Mr. Frisbey's own testimony, it cannot be said that Mr. Frisbey was not put on notice prior to the meeting of his potential removal from the Board of Directors.

CONCLUSION

The Declarant's right to amend the By-Laws is not inconsistent with the Charter or state law. The Declarant complied with By-Laws §8.5 in providing notice to Mr. Frisbey of his potential removal from the Board of Directors. LLC and Ayres respectfully request the Court to enter an order altering or amending its March 16 Order to correct the errors set forth above.

Respectfully submitted this 13th day of April, 2023.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document has been served upon all counsel of interest in this cause by emailing a true and exact copy to all counsel and parties of interest shown at the addresses below and by placing a copy in the United States mail, postage prepaid.

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This 13th day of April, 2023.

Thomas M. Hale