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ABBREVIATIONS

Technical Record: (R. at _____)

Supplemental Technical Record: (Supp. R. at ____)

Trial Transcript: (T. at _____)

Volume of Trial Exhibits: (Vol.____, Ex. _____)

Cumberland Gardens Community Club: "CGCC"

Renegade Mountain Community Club / HOA: "RMCC" or "HOA"

Cumberland Gardens Limited Partnership: "CGLP"

Cumberland Gardens Acquisition Group: "CGAC"

Renegade Resort, LLC: "RRLLC"

Larry McMeans: "LKM Group"

Haiser v. Haines, No. E2013-02350-COA-CV; 2014 WL 7010723 (Tenn. Ct. App. Dec. 12, 2014): "*Haiser I*"

Haiser v. McClung, E2017-00741-COA-R3-CV; 2018 WL 415877 (Tenn. Ct. App. Aug. 29, 2018): "*Haiser II*

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STATEMENT OF JURISDICTION

This Court has jurisdiction to hear an appeal from the final judgment of the 13th District Chancery Court of Cumberland County, Tennessee, pursuant to Tennessee Code Annotated § 16-4-108 and Rule 3 of the Tennessee Rules of Appellate Procedure.

STATEMENT OF THE CASE

This cause now makes its third appearance before the Court. It follows two previous appeals in *Haiser v. Haines*, No. E2013-02350-COA-CV; 2014 WL 7010723 (Tenn. Ct. App. Dec. 12, 2014) (herein "***Haiser I***") and *Haiser v. McClung*, E2017-00741-COA-R3-CV; 2018 WL 415877 (Tenn. Ct. App. Aug. 29, 2018) (herein "***Haiser II***").

This action was originally commenced on December 22, 2011, with filing of a derivative proceeding seeking declaratory relief and damages on behalf of Renegade Mountain Community Club, Inc.(herein "RMCC"), an HOA for Renegade Resorts, which is a community located in Cumberland County, Tennessee. R. at 3. The Plaintiffs were Gary Haiser and Joel Matchak, as purported members of the Board of Directors for RMCC, and John Moore and Gerald Nugent, as members of RMCC and property owners within the Resort. *Id.* The Defendants were Moy Toy, LLC, Michael McClung, Michael Haines, Phillip Guettler and Joseph Wucher. The individual Defendants were past Directors and Officers of RMCC, while Moy Toy was sued as the developer of the Resort. *Id.*

The Complaint alleged that Gary Haiser and Joel Matchak had been elected at a special meeting on September 2, 2011, to serve as current members of RMCC's Board, replacing the individual Defendants. R. at 7. It was contended, among other things, that the Defendant board

members had been negligent in performance of their duties. R. at 5-8. The Complaint demanded a declaration affirming the status of Plaintiffs as Directors and Officers of RMCC, that there be an accounting, and that there be an award of damages, costs, and attorney's fees. R. at 10.

Defendants moved to dismiss, contending, among other things, that the Complaint failed to state a cause of action where Plaintiffs lacked standing and where there was no compliance with requirements for bringing a derivative cause of action. R. at 13, 33, 35 and 37. Plaintiffs responded with a First Amended Complaint, which differed from the original Complaint by attaching several sets of by-laws for RMCC. R. at 49, 52.

Defendants answered the First Amended Complaint, asserting affirmatively *inter alia* that Plaintiffs failed to join as necessary and indispensable parties the other lot owners within the Resort (R. at 181, 189) and that the claim was barred by statutes of limitation. R. at 180, 188.

Plaintiffs then moved to file a Second Amended Complaint. R. at 619. This draft Complaint, unlike the first, added allegations that Moy Toy does not hold developer's rights, and had not received such rights from its predecessor in title. R. at 630.

Defendants objected to the proposed Second Amended Amendment, asserting that any such amendments were futile and unsustainable (R. at 748), upon grounds including contention that the draft complaint failed to join all necessary and indispensable parties, namely all property owners on the mountain. R. at 754-756.

The Motion to Amend Plaintiff's Complaint came before the Trial Court in a hearing on June 28, 2013, at which time Plaintiffs asked for leave to withdraw the proposed amendments,

without prejudice. R. at 828. The Trial Court agreed, and entered an Order dated July 23, 2013, allowing the withdrawal. R. at 828-829.

The Trial Court denied Plaintiffs' motion for class action certification and gave Plaintiffs 90 days to join indispensable parties. *Haiser I* at *2.

On the same day that Order was signed by the Court, July 22, 2013, Plaintiffs again served their original Motion to Amend, attaching a new draft of their proposed Second Amended Complaint. R. at 809. This one, unlike the previous draft, included a claim for class action relief, seeking to establish a class in which all property owners might be members. R. at 814-815.

Defendants again objected on grounds of futility (R. at 832-849), asserting that the attempt to overthrow the resort's Amended Declarations of Covenant, Conditions and Restrictions, and By-laws was barred by statutes of limitation. R. at 835, 847. It was also asserted that the proposed Second Amended Complaint did not properly allege compliance with requirements for class action relief under Rule 12, Tennessee Rules of Civil Procedure. R. at 835, 838.

A hearing upon Plaintiffs' latest Motion to Amend took place on August 29, 2013, whereupon the Motion to Amend was granted. R. at 1040. The Court ordered that a hearing take place on September 29, 2013, upon issues relating to class certification. R. at 1041.

When that hearing took place, Plaintiffs failed to satisfy the Trial Court that they even met the *prima facie* requirements for class action relief, and the request for class certification was denied. R. at 1138. Such Order directed that a new, Amended Complaint be filed 90 days thereafter. R. at 1138. *Haiser I* at *2.

***Haiser I* (Plaintiffs' First Appeal)**

Plaintiffs elected to appeal denial of their class action claim (R. at 1145) and this Court entered its opinion in the matter on December 12, 2014. *Haiser v. Haines*, No. E2013-02350-COA-R3-CV; 2014 WL 7010723 at *2(Tenn. Ct. App. December 12, 2014)(herein "*Haiser I*"). The Court saw that the Renegade Community is sharply divided on Plaintiffs' action: "There are at least two camps, possibly more, to say nothing of the indifferent community members." *Haiser I* at *2. This Court concluded that neither typicality nor adequacy of representation could be demonstrated as a prerequisite for class action entitlement:

> The chief problem, as we see it, is the overwhelming antagonism amongst the proposed class. Given the limited proof presented to the Trial Court of at least two competing groups in the community and with little proof of the size and composition of these groups, we are skeptical that the requirements of typicality and adequacy of representation can be met under the limited evidence in the record before us. The Plaintiffs, after all, are taking positions directly contrary to some unknown number of the proposed class members. We understand Plaintiffs' frustration at the prospect of suing and serving potentially hundreds of people. ... This is a case about a community divided, not a group of similarly situated people pursuing the same grievance.

Haiser I at *5.

This Court thus affirmed the Trial Court, *Id.* at *6, and the Mandate was filed in the Trial Court on February 26, 2015. R. at 1272.

Without joining all owners as required by the Trial Court's and Appellate Court's ruling, Plaintiffs filed another motion in the Trial Court to amend their Complaint. R. at 1304.

Defendants again objected to failure to join necessary and indispensable parties, specifically prior entities in Moy Toy's chain of title. R. at 1319, *et seq.* The amendment was allowed to proceed, providing that "Plaintiffs shall have to add the known developer entities in

the chain of title as additional necessary parties." R. at 1384. The Third Amended Complaint disregarded this Court's admonition that it give due regard for necessity "of suing and serving potentially hundreds of people," so that joinder requirements be satisfied. *Haiser I* at *5.

Plaintiffs proceeded to file a modified Third Amended Complaint for Declaratory Relief, Injunctive Relief and Damages. R. at 1389. Such Complaint listed some of the previous "known developer entities" preceding Moy Toy's receipt of title to the property, but it did not include either DG German Bank, the parent company of Cumberland Gardens Acquisition Corp., or LKM Group, LLC. R. at 3722.

Defendants responded with an Answer to the Third Amended Complaint generally denying the allegations of the Complaint (R. at1422), which Answer also raised a series of affirmative defenses. These included claims that Plaintiffs' action is barred by a statute of limitations (R. at 1433, 1435), and that Plaintiffs lacked standing. R. at 1435.

Trial No. 1

Trial No. 1 extended over a course of weeks. R. at 2020-2021. A formal Order setting out the Trial Court's detailed findings was filed on July 1, 2016. R. at 2020. Such findings included the following:

- Neither the developer's board nor the owner's board was properly constituted. R. at 2020-2021.
- The "special meeting" by the owner's group on September 2, 2011, was not a validly called meeting. R. at 2020-2021.
- Alternatively, Moy Toy should have been allowed to cast 30 votes, not 3. R. at 2022.
- The statute of limitations had run on Plaintiffs' effort to invalidate the 2005 Amendments to the Declarations and By-laws. R. at 2023.
- The developer was to retain legal title to any common areas. R. at 2027.

The Trial Court further ordered that a new, special meeting of the RMCC be convened for purposes of voting on board membership and that a special master supervise the entire process of calling the meeting and overseeing elections. R. at 2024-2025.

The Special Master duly submitted Interim (R. at 2333) and Final Reports (R. at 2376). He reported that Michael McClung, Phillip Guettler and Darren Guettler were elected as the new Directors for RMCC. R. at 2335. He also found that Plaintiffs, most particularly John Moore, had commingled Club dues payments with their personal obligations, and thus owed RMCC a total of $143,513.55. R. at 2360. The Trial Court endorsed these reports through its Order Approving Special Masters Reports, which Order was filed on January 23, 2017. R. at 2447.

A Final judgment was entered on March 10, 2017. R. at 2557. Notably, the Judgment ordered that Plaintiffs pay $143,513.55 to RMCC, as recommended by the Special Master, for the monies wrongfully taken from RMCC's accounts.

Plaintiffs filed a Notice of Appeal on April 7, 2017. R. at 2561.

***Haiser II* (Plaintiffs' 2nd Appeal)**

This Court handed down its opinion on August 29, 2018. *Haiser v. McClung*, No. E2017-00741-COA-R3-CV; 2018 WL 4150877 ("*Haiser II*"). There, the Court reversed the Chancellor's rulings and remanded for further proceedings after tasking the Trial Court with retrying certain of the issues.

On October 15, 2019, Moy Toy filed with the Trial Court a Motion to Determine Identity and Status of the Party Plaintiffs, Their Basis of Standing, and Claims Remaining for Retrial Supp. R. at 5. There, standing of the Plaintiffs was questioned, where it was pointed out that

several of the Plaintiffs were no longer property owners on the Mountain and therefore no longer eligible for membership in the Renegade Mountain Community Club, which itself was no longer even in existence and where at least one of the Plaintiffs had moved out of state. Supp. R. at 6. Further, Defendant Moy Toy suggested that "... it would clearly promote judicial economy by requiring Plaintiffs to provide the Court, as well as Moy Toy, with a definitive identification of which claims they believe are subject to retrial." Supp. R. at 7.

On November 12, 2019, Plaintiffs filed another Motion to Amend, seeking leave to file a Fourth Amended Complaint. R. at 2707. Defendants objected. R. at 2755. Among other things, Defendants pointed to a new cause of action embodied in ¶ 9 of the draft Complaint, based upon the Restatement of Property, Servitudes, Sec. 619, as recently treated in *Innerimages, Inc. v. Newman*, 579 S.W. 3d 29 (Tenn. Ct. App. 2019).

On December 31, 2019, Defendants asked that the Court consider joinder of all property owners within the Resort, on grounds they are necessary and indispensable parties as asserted:

> Validity of the 2005 Amendments is not a claim or issue for retrial. If, however, this Court determines otherwise, joinder of all affected property owners in this lawsuit is mandatory as they and others are clearly necessary and indispensable parties. None of the Plaintiff Owners have legal authority or standing to represent all affected property and unit owners of Renegade Mountain. More importantly, the Renegade Mountain Community Club, as the HOA, is a connected party to the 2005 Amendments. The restrictive covenants set out in the 2005 Amendments are property interests that run with the land and arise from a series of overlapping contractual transactions. See Appeals Court Opinion at pg. 19, citing *Hughes v. New Life Dev. Corp.*, 387 S.W.3d 453, 457 (Tenn. 2012). Restrictive Covenants are viewed as contracts and examined as such. If, on retrial, there is any issue as to the validity of the 2005 Amendments, the Renegade Mountain Community Club as the legally established HOA entity and a mandatory party to the contract (see fn. 2, R. at 2775-2776), must clearly be joined as an indispensable party, and Moy Toy would so move the Court. R. 2775

These Motions were ruled upon by means of the Court's Order Regarding Post Remand Issues, on January 13, 2020, and filed on January 15, 2020. R. at 2793. Plaintiff's Motion to Amend was denied, upon grounds that "The Court of Appeals in this case, remanded the case to this Court with explicit instructions as to the issues to be tried. A trial court does not have the authority to expand the directive or the purpose of a specific remand from the Appellate Court." R. at 2794. Moy Toy's motion to add the other property owners as necessary and indispensable parties was likewise denied, because:

> ... the Court further finds that the Homeowners Association for Renegade Resort may act on behalf of its members. The Court finds that the Homeowners Association for Renegade Resort is an appropriate entity to act as a representative of the entire group on whose rights it is asserting. All of the homeowners in this case have a common interest and the Association has substantial identification with the real property owners in this development to challenge the developer rights of Moy Toy and who is going to control the Association. *op.cit.*

R. at 2793.

On the same day it issued that Order, the Court released another order entitled Order Declaring the Issues for Appeal, *sic* "Trial," (R. at 2788), which included a brief recitation of the factual context of the appellate court's preceding remand, and declaration that particular matters would be considered in light of such remand.

In response to such Order, Defendants served a Motion to Reconsider or Clarify Order Declaring the Issues for Trial. R. at 2797, *et seq*. Among the many concerns raised in this Motion over the Court's Order, Defendants argued that the Order misallocated the burden of proof. Defendants pointed out in this Motion that in their Third Amended Complaint, Plaintiffs contended that Defendant Moy Toy has no "developer's rights." This means, Defendants

asserted, that it is Plaintiffs, not Defendants, who bear the burden of demonstrating that Defendants do not have developer's rights. R. at 2801-2802. Thus, if there was any question about whether the 2005 Amendments failed to convey developer's rights, the burden of proving such rested with Plaintiffs.

Defendants pointed out that they themselves had only ever referenced the 2005 Amendments as evidence of their entitlement to such rights, as recognized by the Appellate Court:

> The pleadings indicate that the Owner Board did not in its third amended complaint bring an action challenging the validity of the 2005 Amendments, which might have been potentially barred by a statute of limitations.

Haiser II at *12

But as the challengers of those rights, Plaintiffs were obliged to prove their case in that regard. R. at 2798-2802. Further, Defendants said in their Motion that the Court was "without means to adjudicate, by retrial or otherwise, the validity of the 2005 amendments, where it does not have in personam jurisdiction over all parties to the agreements making up the Amendments in question, which parties are necessary and indispensable." R. at 2802. Defendants likewise pointed out that nothing in the Appellate Court ruling prevented consideration of Defendants' defense that application of the statute of limitations bars any attack against the 2005 Amendments or Moy Toy's developer status. R. at 2802.

In further response, Moy Toy pointed out that, contrary to what the Court concluded in its Order, the Renegade Mountain Community Club (RMCC) is not situated as a "suitable representative" for the other property owners on the mountain. R. at 2826. To begin with, RMCC

doesn't even exist, having been administratively dissolved. R. at 2826. Moreover, Moy Toy reminded the Trial Court of the Appellate Court's earlier observation that there is in fact no commonality of interest between the Plaintiffs, the RMCC, and the other members and property owners within the mountain community. R. at 282; *Haiser I.* Moy Toy noted that "the Court of Appeal's rulings above clearly show there are many divergent and competing interests on Renegade Mountain. Movants submit that evidence is plentiful wherein RMCC members openly oppose the Party Plaintiffs' claims." R. at 2828. Moy Toy also argued in its Motion that:

> ... this Court expresses the fact that an indispensable party issue was 'never raised by Moy Toy on appeal and is, therefore, not a proper issue to be raised on remand. However, the issue of indispensable parties was not an issue before the Court of Appeals on appeal or otherwise asserted as appealable error in the trial court below. The issue of indispensable parties arises in this retrial by virtue of the mistaken inclusion of a claim that the First 2005 Amendments are somehow invalid...
>
> There is simply no one in this case representing the interests of these property owners or the legal effect it would have on their lot or unit on Renegade Mountain should this Court render an adverse judgment or ruling as to the 'validity' or application of the First 2005 Amendments. Moreover, joinder of indispensable parties is never waivable under Tennessee law. See *Johnnie Roberts v. Carl Douglas England,* 2001 WL 575560 (Tenn. Ct. App. May 30, 2001).

R. at 2828-2829.

See also Moy Toy's First Supplement to Motion, filed on April 13, 2020 (R. at 2880); and Moy Toy's Second Supplement to Motion, filed on April 23, 2020 (R. at 2943) attaching 12 affidavits from property owners expressing opposition to Plaintiffs and need for joinder of owners.

Both Motions of Defendants referenced above (R. at 2880 and R. at 2943) were denied by two separate orders. R. at 2959, 2963. The Trial Court's later Order ended thusly: "Finally, the Moy Toy Defendants continue to take the position that every owner must be made a defendant. Nowhere in the Court of Appeals' opinion is there any suggestion that this needs to be done on remand." R. at 2964.

To the contrary, "The Trial Court denied Plaintiffs' motion for class action certification and gave Plaintiffs 90 days to join indispensable parties." *Haiser I* at *2.

On June 26, 2020, a group of 21 individuals who owned lots in the Renegade Resorts and are members of the Renegade Mountain Community Club (RMCC), collectively filed a Motion to Intervene. R. at 2969. The Motion was accompanied by a Complaint in Intervention and an affidavit from each Movant (see exhibits attached to Motion). *Id.* Leave to intervene was requested on several alternative grounds, including assertion that Movants were necessary and indispensable parties. R. at 2971. The Motion to Intervene stated that Movants/Owners had or claimed an interest which would be impacted by the case: "... Movants claim an interest relating to the subject matter of this action, which is so situated that, in their absence, resolution of such subject matter would directly impact Movants interests and property rights, impede or impair Movants' ability to protect their interests, or leave present parties subject to substantial risk of incurring multiple or otherwise inconsistent obligations by reason of the interests asserted by Movants." R. at 2971-2972.

Each Affiant averred that he or she was one of 76 Condominium owners at the Cumberland Point complex, located on Renegade Mountain, and that such Affiant was a member

of RMCC by virtue of their property ownership. R. at 2904. The Affiants expressed awareness that the litigation involved claims by Plaintiffs that the First 2005 Amendments were invalid, and that any such invalidity would affect 530 lots or units on the Mountain which are subject to those particular Amendments. R. at 2905. The Affiants further referred to a prior ruling of the Court to effect that the Plaintiffs' Board for RMCC was a suitable group to represent all the property owners, but that Affiants contested such finding, asserting that Affiants were opposed to one or more positions taken by RMCC (R. at 2906), and that Plaintiffs do not in fact represent the best interests of the lot owners. Conviction was expressed that the presence of "... a developer on Renegade Mountain is essential to maintaining the integrity of the deed restrictions of the First 200 Amendments... (and determining) how the future development of the hundreds of acres of vacant land on Renegade Mountain owned by the Developer will occur." R. at 2906.

The proposed Complaint in Intervention alleged that the property of the Intervenors was subject to the Amended and Restated Declaration of Amended Covenants and Restrictions for Renegade Mountain ("the First 2005 Amendments"), as recorded in the Office of the Cumberland County Registrar of Deeds. R. 2976. The Complaint alleged that the Intervenors were members of RMCC. R. at 2976. Paragraph 4 of such Complaint alleged that "... the Third Amended Complaint of the Defendants in Intervention seeks a forced transfer and recovery of certain unspecified and undescribed lands, allegedly on behalf of the RMCC, and to convert the same to 'common elements' for a common purpose, which claim directly impacts intervenors individually and as members of the RMCC, and as such, gives Intervenors an interest in this proceeding pursuant to Tenn. Code Ann. § 20-1-115." R. at 2974. The Complaint in Intervention

denied that Plaintiffs constitute a valid Board for RMCC, who do not represent the interests of Intervenors. R. at 2977. It was alleged that the Intervenors' properties, all 530 lots or more, are subject to the 2005 Amendments, which are valid and binding, and that the property owners "have an inalienable right to be heard in any action that would directly impact their property rights," which denial of their ability to protect themselves would be a taking of property rights without due process. R. at 2977- 2979.

The Motion for Intervention was heard by the Trial Court on July 29, 2020. The Motion was denied. R. at 3027. The Court undertook a detailed review in light of Tenn. Code Ann. § 29-1-115 and Tenn. R. Civ. P. 24.01. R. at 3028. The Court agreed that Movants possessed "... a financial interest in the common area which may result in an increase in their HOA fees. Thus the requirements of Rule 24.02 has been satisfied and this Court has the discretion to permit intervention." R. at 3031-3032. The Court stated that such discretion would be exercised by denying the requested intervention as to all Movants except for those few who had purchased their properties after September 1, 2019. R. at 3031. The property owners were otherwise deemed to have thus waived their right to join. Moreover, for a second reason, the Court found that the interests of the intervenors were "in lockstep with the positions of Moy Toy," and that if "either party to the underlying suit can adequately represent the Intervenors interest, then the intervention serves no purpose. That being the case, the Intervenors are not necessary and indispensable parties to this proceeding." R. at 3031.

Trial No. 2

In preparation for trial, Defendants filed on September 25, 2020, a series of motions in

limine. Such motions included Defendants' Motion In Limine - Standing of Plaintiffs (pointing out that several Plaintiffs had moved and therefore had no remaining connection with Renegade Mountain and the RMCC, so should be dismissed from the action for lack of standing). R. at 3558. There was also Defendants' Motion in Limine - Failure to Join Necessary Parties and/or Lack of Service. R. at 3592. This Motion reminded the Trial Court that, as a condition for allowing Plaintiffs to file their Third Amended Complaint, "Plaintiffs were ordered to join as party defendants all developers and other parties on the chain of title in order to bring claims (that) their deeds of record failed to include or convey developers." R. at 3592. In fact, almost none of the parties in question were served or joined to the action. R. at 3595. The Motion asked either that Plaintiffs' case be dismissed for failure to follow the direction of the Court, or that Plaintiffs be precluded from attacking Moy Toy's developer's rights through its chain of title. *Id.* Neither motion was granted.

Upon completion of Trial, the Court issued on March 31, 2020, a thirty-six (36) page Memorandum and Order, detailing its conclusions of law and fact. R. at 3718, *et seq*. Among its holdings were these:

> **(1)** that Moy Toy has no developer rights, such rights not having been conveyed in a previous foreclosure on the last developer identified by the Court, Cumberland Gardens Limited Partnership, thus breaking the chain of title leading to Moy Toy. R. at 3736. Alternatively, any such developer's rights were conveyed to an entity other than Moy Toy, LKM Group, LLC. *Id.*;
> **(2)** the 2005 Amendments to the resort's Restated and Amended Declaration of Covenants and Restrictions, and its bylaws, were all invalid, having been improperly adopted (see R-3738), wherein Moy Toy was deemed to have failed in carrying its burden of proof regarding their validity (R. at 3739);
> **(3)** the specially-called RMCC meeting of September 2, 2011, was legitimate and the Court endorsed actions taken there, reinstating the board as composed of the Plaintiffs (R. at 3743);

(4) an easement of enjoyment for the benefit of Plaintiffs was imposed on common areas and properties otherwise belonging to Moy Toy. R. at 3744. In furtherance of that the Trial Court invoked reliance on *Innerimages, Inc. v. Newman*, 579 S.W.3d 29 (Tenn. 2019), the decision which Plaintiffs earlier were unsuccessful in raising by means of their proposed Fourth Amended Complaint (R. at 3744-3746); and

(5) Unplatted roads, on Moy Toy's property, currently in use by residents were to be maintained and controlled by RMCC (R. at 3747), though Moy Toy was free to redevelop such trails thereafter as it wished. R. at 3747-3750.

Defendants filed a Motion to Alter or Amend Judgment on April 29, 2021. R. at 3755. The Motion was ruled upon in the Court's Final Order Re Motion to Alter or Amend, as filed on June 28, 2021. R. at 3784. The Court agreed to remove the Golf Course from application of its ruling, denied that the Court's description of the common areas was unenforceably vague, and rejected argument based on joinder of necessary parties, and the statute of limitations, on grounds that such arguments had already been heard and overruled. R. at 3762-3763.

This appeal followed by formal Notice of Appeal.

STATEMENT OF FACTS

In two previous appearances before this Court, detailed factual summaries on the case were set out. *See Haiser v. Haines*, Case No. E2013-02350-COA-R3-CV; 2014 WL 7010723 (Tenn. Ct. App. December 12, 2014), pp. 1-2; and *Haiser v. McClung*, Case No. E2017-00741-COA-R3-CV; 2018 WL 4150877 (Tenn. Ct. App. April 17, 2018), pp. 1-9. The Court is permitted to take judicial notice of these factual recitations in the instant matter. *See Hughes v. New Life Development Corp.*, 387 S.W.3d 453 (Tenn. 2012). Defendants thus respectfully refer to, adopt and incorporate herein such factual summaries for immediate purposes, requesting the Court to take notice of such stated facts as it might find proper.

Creation of Renegade Development

The facts of this matter begin with the original recording of a declaration of covenants and restrictions, filed on July 26, 1972 (T. at 264), through means of which American Recreation Services, Inc. was designated as the developer for Renegade Resort. T. at 266. Such designation was intended to run with the land, the term "developer" being defined to include "American Recreation Services, Inc., its subsidiaries, and its successors and assigns." Vol. 60, Ex. 3, Art. I, Sec. 1(s); Vol. 60, Ex. 4. Eventually, American Recreation encountered financial difficulties and quit-claimed roughly 9000 acres, on Renegade Mountain in Cumberland County, (T. at 511) through a receiver to Renegade Development Co. (T. at 298-299; 512), a German group which launched development of Renegade Mountain. Development included two timeshare projects, rebuild of an existent golf course, and construction of a new entrance to the mountain, while changing the name of the mountain complex from Renegade Resort to Cumberland Gardens Limited Partnership. T. at 512.

On October 19, 1987, there was executed a First Amendment to Declarations of Covenants and Restrictions (Vol. 60, Ex. 4) which changed the name of the developer to Cumberland Gardens Limited Partnership ("CGLP") and the name of its HOA to the Cumberland Gardens Community Club ("CGCC") (Vol. 60, Ex. 4). There were other changes made by the First Amendment. The definition of "common property" was amended, limiting such properties to those specifically described on the plat. T at 1880-1881; Ex. 4. In fact, with the exception of a few platted roads, the plat did not depict nor create any common areas. T. at 1878-1881; 1718-1719; Vol. 60, Ex. 4, *et. seq.*

To the contrary, the Record is void of any evidence of "common properties" having been designated. Both the 2005 Amendments (Vol. 60, Ex. 5) and the 1987 Amendments (Vol. 60, Ex. 4) proscribe that the developer may, but shall not be required, to make a transfer of any common properties which may be designated at the developer's discretion, assuming any were ever designated to exist. T. at 1878 – 1881; Vol. 60, Exhs. 4 & 5. The evidence before the Court demonstrates that searches of title and review of plats, maps, and other filings have determined that there are no designated "common properties" on Renegade Mountain. T. at 1880 (Joe Huie's Testimony).

Additionally, when the issue of "common properties" was raised at Trial, Plaintiffs stipulated that "There are no common properties identified on plats or recorded instruments . . . with the possible exception of roads." T. at 13. Further, the two and only plats moved into evidence were Exhibits 22 and 23, neither of which show any parcels or areas designated to be "common properties," and these Exhibits show where any "platted roads" terminate. Vol. 68 at Exhs. 22 and 23.

Cumberland Gardens Limited Partnership was financing its activities through a German bank, DG Bank, with a $19.5m loan. T. at 543. Such commercial loans are normally evidenced by a series of documents including a loan agreement, promissory note, an assignment of rights and a security instrument. T. at 546. And it is customary that, as a condition for obtaining the loan, the borrower will convey all interests in the secured property to the lender, contingent upon repayment of the loan. Vol. 78-Hill, pp. 49-50.

. With the loss of its primary investor, Cumberland Gardens Limited Partnership could no longer carry on (T. at 518) and was thus foreclosed on by its lender, through DG Bank's alter ego and wholly owned subsidiary, Cumberland Gardens Acquisition Corp.(CGAC), a special purpose entity created by the Bank for the sole purpose of taking title to the property (T. at 513), and was thus subject to the Bank's control. T. at 557. The Bank, being in the banking business, was interested in keeping the property maintained until it could find a buyer to recoup its loan, while being correspondingly less interested in conducting any "development" activity (T. at 519-521), while selling the project intact. T. at 535.

DG Bank understood that it had "inherited" the cluster of developer's rights previously held by Cumberland Gardens Limited Partnership. That is, CGAC states that it held annual meetings of the Cumberland Gardens Community Club. T. at 564, 565. CGAC appointed the Club's Board of Directors (T. at 572), exercising voting privileges of 10 to 1, a right given to the "developer" by the Declarations of Covenants and Restrictions. T. at 564-565. CGAC did not pay membership dues to the Club, off-setting such dues with the cost of maintenance (T. at 564), such prerogatives being consistent with what is allowed of the "developer" under the 1972 Declarations of Covenants and Restrictions, as well as the 1987 Amendments. T. at 574; Vol. 60, Ex. 4.

DG Bank/CGAC finally sold the property on January 6, 2000 (T. at 524), to Renegade Resorts, LLC. T. at 523. There was realization that such sale and purchase included entitlement to developer's rights. As CGACs attorney acknowledged at trial, "I don't think there was any question that we assumed that they had the right to amend the covenant and declarations. There's

a process in the declaration of how you could do that." T. at 552. Hence, to protect its collateral interest, CGAC insisted on retaining veto rights over whatever amendments might be proposed by the buyer regarding the Declaration of Covenants and Restrictions. T. at 551-552; Vol. 80, Ex. MT-H. Moreover, the transaction included a substitution of CGAC's member directors on the Club's Board of Directors for directors chosen by the buyer. Vol.80, Ex. MT-C; Vol. 78-Hill, p. 37.

Further, to assure such transfer of developer's rights, the bill of sale from seller to buyer included broad, expansive language, conveying "**all right, title, interest in and to: (i) the name 'Cumberland Gardens' and trade names, trademarks and derivatives and combinations thereof, used in connection with the operation of the real property; (ii) any and all guarantees, warranties, licenses, permits, certificates, rights and privileges, if any, and whether or not in the possession of seller related to the real property and operation of the real property**." T. at 555-556; Vol. 78-Hill, pp. 39, 43; Vol. 80, Ex. MT-8. The buyer's attorney was satisfied that this sufficed to convey the developer's rights previously held by CGLP (T. at 555), and the bank's attorney doesn't disagree with such understanding. T. at 556. Such broad language was intended by the parties to effect a complete transfer of ALL rights and privileges of the seller, including the capacity to act as "Developer." *Id.*; Vol. 78-Hill, pp. 88-89. Similar language appeared for that reason in the more formal Deed of Trust/Security Agreement and Fixture filing. T. at 556-557; compare with Vol. 78-Hill, pp. 22-27. RRLLC was acquiring the property for the specific purpose of developing it, where it already included an operating golf course and club house, 8000 unplatted lots, a water system and public access road, and RRLLC

purchase money mortgage loan to that end. Vol.78-Hill, pp. 28-29. Fundamentally, the purpose of possessing such developer's rights, as explained by RRLLC's counsel at Trial, was that it provided the ability "to control the association and what the association does. So that . . . the third party purchasers don't take an action that impairs your ability to sell—sell out-- build out and sell out the property." Vol. 78-Hill, p. 42.

It is difficult to overstate the essential character of these "developer's rights" to any buyer of the property and the individual lot owners. Only the developer may record amendments to the Declarations. T. at 1851. Only the developer may add properties to the development (T. at 1891), thereby extending to these lots the protections afforded by the Declarations of Covenants and Restrictions. T. at 1891. No new common areas may be designated-- that's done by the developer. T. at 1859, 1881. Lot owners will not qualify for Club membership without addition of their properties to the project. T. at 1891. Moreover, where there is no "developer" there will be no "... definition of what the community would be and could become" (T. at 2039), and no ready source of capital to pay for the cost of infrastructure, such as repaving and new road construction (T. at 2071-2073), thus depressing the market value of properties within the community (T. at 2072), leading to deterioration and blight. T. at 2045.

Lot buyers are relying upon the stability and predictability afforded by protective covenants and restrictions put in place by the developer. T. at 1858. One witness described their importance thusly:

> They protect the value of a person's investment in the lot and the home that they either bought or intend to build on that lot. It provides them with a means of preventing other owners from doing things which would be adverse to their interest

> in their property such as, you know, putting a junk yard on the lot next door or letting it grow up and accumulate trash and so forth.

T. at 1856-1857.

On October 20, 2000, RRLLC and the CGCC arranged amendment of the declarations and Club bylaws, through adoption of an Amended and Restated Declaration of Amended Covenants and Restrictions for Renegade Mountain. T. at 267; Vol. 60, Ex. 5, pp. 1, 54. Known henceforth as "First 2005 Amendments" since the Amendment was not actually recorded until 2005. The validity of this Amendment's adoption is not at issue in this proceeding and is unchallenged by Plaintiffs. T. at 1896; see also Third Amended Complaint at ¶ 25, which makes no reference to impeachment of this recorded instrument. *Haiser II* at *12. The Amendment renamed the Club as the Renegade Mountain Community Club (RMCC). Vol. 60, Ex.5, p. 10. The developer was identified as the Renegade Resort, LLC, a Nevada Limited Liability Company, "one of the declarants of the Declaration, or (ii) its successor to the assigns of the rights and interests of Renegade as developer under the Declarations." Vol. 60, Ex. 5, p. 13. Other changes were made, but overall, the document is broadly in line with the previously existing Declarations -- for example, Renegade, like its predecessor Developer, was given 10 votes on the Club's Board, for every Lot it owned of record on the community property. Vol. 60, Ex. 5, p. 23. Consistent with earlier agreement with DG Bank/CGAC, RRLLC asked for and received permission from DG Bank/CGAC to make these changes. Vol. 78-Hill, pp. 76-78.

At one point following its purchase of the property for $6.5m (T. at 1938), RRLLC issued an option contract to sell a portion of the property to LKM Group, LLC, but the contract went

into default and was later set aside and invalidated by Judgment and Agreed Order entered on January 14, 2010. T. at 1362 (Appendix A).

On Sept. 28, 2010, RRLLC elected to convey all interest in the property, through warranty deed, to the Defendant, Moy Toy, LLC (T. at 309; Vol. 66-Wucher, Ex. 3, p. 1), so that Moy Toy became its successor in interest. T. at 1861. Such Deed was accompanied by a Bill of Sale to Moy Toy transferring all personal rights held by RRLLC in the property, including, expressly, "Developer Rights." Vol. 66-Wucher, Ex. 4.

Not long thereafter, a special meeting of the Club was purportedly called by Plaintiffs, without the by-laws requirement that it be called by 10% of all the members. Vol. 76, Ex. H, pp. 8-9. The President, Michael McClung, required by the by-laws to preside over such meeting, was pushed aside, in violation of the by-laws, by Plaintiff Moore who substituted himself. Vol. 76, Ex. H, p. 5. A group of attendees then proceeded to purportedly vote out Moy Toy's Board and replace it with Plaintiffs, while ignoring Defendant's votes, which included 325 proxy votes from another property owner, TIG (Vol. 76, Ex. H, p. 60), and proceeded to supposedly amend the by-laws. Vol. 76, Ex. H, pp. 63-103.

Moy Toy was then sued in this cause by Plaintiffs on December 22, 2011(R. at 5), blamed in Plaintiffs' suit for things happening as much as a decade ago. T. at 6, 8.

LAW AND ARGUMENT

I. WHETHER THE TRIAL COURT LACKED SUBJECT MATTER JURISDICTION TO ENTER JUDGMENT WHEN NECESSARY AND INDISPENSABLE PARTIES WERE NOT JOINED IN PLAINTIFFS' ACTION

The Trial Court erred, by failing to order joinder of all necessary and indispensable parties to this cause, consisting of lot owners within the Renegade Resort. The Trial Court abused its discretion by overlooking argument, applied improper legal standards, and erroneously assessed evidence.

A. Generally: Joinder of Necessary and Indispensable Parties

Plaintiffs/Appellees herein sought declaratory relief from the Trial Court. Such claim for Declaratory relief is embodied, in part, (Third Amended Complaint at ¶ 25):

> 25. Further, Moy Toy, LLC is after further legal review not the 'developer' … Moy Toy, LLC purports to have superior developer rights that would give it voting rights of 10 votes in the Community Club per lot owned, exemption from Community Club dues, etc. … **A declaration is sought that Moy Toy, LLC, its successors and assigns, have no developer rights within Renegade Resort and are simply land owners.**

R. at 1400 at ¶ 25.

That is, Plaintiffs brought an action seeking declaratory relief. *See* Tenn. Code Ann. § 28-3-101 ("'Action' in this title includes motions, garnishments, petitions, and other legal proceedings in judicial tribunals for the redress of civil injuries."). Based upon such action, Plaintiffs sought relief through declaration, including in part the following findings: (1) that the current board of the Renegade Mountain Community Club be declared invalid and that another, self-appointed by Plaintiffs, be substituted in its place; (2) that Moy Toy be divested of its status

as "developer" for Renegade Resort; (3) together with certain lands and roads, whether identified by plat or not. R. at 1403-1404.

Declaratory actions carry with them certain requirements. One requirement is set out at Tenn. Code Ann. § 29-14-107(a), which provides that "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings." *Little v. City of Chattanooga*, No. E2018-00870-COA-R3-CV, 2019 WL 1308264, *8 (Tenn. Ct. App., March 21, 2019). Also, Tennessee Rules of Civil Procedure 19.01 is incorporated herein. Tenn. R. Civ. P. 19.01.

It is essential that **all** such individuals, persons or entities be joined. *Tenn. Farmers Mut. v. DeBruce*, 586 S.W.3d 901, 906 (Tenn. 2019)("To achieve the goal of finality and certainty in a declaratory judgment action, all necessary parties must be joined"). Failure to join leaves the interested person not bound by the adjudication. *See* Tenn. Code Ann. § 29-14-107(a); cited by *Isaacs v. Fitzpatrick*, No. M2018-01863-COA-R3-CV, 2019 WL 3729857, *10 (Tenn. Ct. App., May 8, 2019)("Because Mr. and Mrs. Isaacs were not parties to the declaratory judgment action . . ., the agreed declaratory judgment order is not binding on Mr. and Mrs. Isaacs and does not prejudice their rights.") Failure to join necessary parties defeats the entire purpose of the Declaratory Judgments Act. *Little v. City of Chattanooga* at *8 (2019)(affirming trial court dismissal of claim which failed to join adjoining property owners as necessary parties). "The purpose of the Declaratory Judgment Act, however, is to settle uncertainties and avoid 'the specter of recurring litigation'... . The express purpose of the Declaratory Judgment Act can

therefore only be accomplished if all abutting land owners are made parties to this action." *Id.* at *10.

While there is some authority that the trial court is given discretion to identify who the necessary parties are, *Reed v. Town of Louisville*, No. E2006-01637-COA-R3CV, 2007 WL 816521, *2 (Tenn. Ct. App. March 19, 2007), such discretion is constrained by the requirement, as noted above, that the trial court must join all such parties, while non-joinder of necessary parties is fatal on the question of justiciability, which, in a suit for a declaratory judgment, is a necessary "condition of judicial relief." *Huntsville Utility Dist. Of Scott County v. Gen. Trust Co.*, 839 S.W.2d 397, 400 (Tenn. Ct. App. 1992). "A trial court abuses its discretion when it causes an injustice by applying an incorrect legal standard, reaching an illogical decision, or by resolving the case 'on a clearly erroneous assessment of the evidence.'" *Tenn. Farmers Mut. Ins. Co. v. DeBruce*, 586 S.W.3d 901, 905 (Tenn. 2019). Failure to join necessary parties is jurisdictional; the judgment will be vacated and the cause remanded for a new trial. *Dialysis Clinic v. Medley*, No. M2018-00399-COA-R3-CV, 2019 WL 2173194, *1(Tenn. App. Ct. May 20, 2019); *Tenn. Farmers Mut. Ins. Co. v. DeBruce*, 586 S.W.3d 901, 906 (Tenn. 2019); *Citizens Real Est. & Loan v. Mountain States Dev. Corp.*, 633 S.W.2d. 763, 764 (Tenn. Ct. App., June 4, 1982); *Largen v. City of Harriman*, No. E2017-01501-COA-R3-CV, 2018 WL 3458280, *10 (Tenn. Ct. App., July 17, 2018); see also *The Tennessean v. Metropolitan Gov't. Of Nashville*, 485 S.W.3d 857, 603 (Tenn. 2016).

Failure to join necessary parties is not excused on grounds that other parties in the case already have the same interest. *Largen v. City of Harriman*, No. E2017-01501-COA-R3-CV,

2018 WL 3458280, *10 (Tenn. Ct. App., 2018). Nor is joinder to be refused on grounds that the affected party might have nothing to say. *Largen, Id.* at *9 ("The Declaratory Judgments Act requires the joinder of all parties who 'have or claim any interest which would be affected by the declaration,' which is a qualification independent from whether a party has material evidence to contribute.") Further, it is not grounds for rejecting joinder on the basis that a favorable outcome for one side or another is somehow a foregone conclusion. *Largen, Id.* at*9.

B. Order Dated August 6, 2020, Denying Intervention

On June 26, 2020, a group of 21 individuals who owned lots in the Renegade Resort and are members of the Renegade Mountain Community Club (RMCC), collectively filed a Motion to Intervene. R. at 2969. The motion was accompanied by a Complaint in Intervention and an affidavit from each Movant. R. at 2974. Intervention was sought on several alternative grounds. Movants asserted Tenn. Code Ann. § 20-1-115. "In actions for the recovery of property, any person not a party to the action, on showing interest in the subject matter of the suit, may be allowed to appear as defendant in the action", so as to intervene of right, also citing Tenn. R. Civ. Proc. 24.01. R. at 2971. The motion additionally asserted that they were necessary and indispensable parties under Tenn. R. Civ. P. Rule 19.01 and Tenn. Code. Ann. § 29-14-107. R at 2971 states: "... Movants claim an interest relating to the subject matter of this action, which is so situated that, in their absence, resolution of such subject matter would directly impact Movants' interests and property rights, impede or impair Movants' ability to protect their interests, or leave present parties subject to substantial risk of incurring multiple or otherwise inconsistent obligations by reason of the interests asserted by Movants." R at 2971 - 2972.

This Motion to Intervene was accompanied by an affidavit from each of the affected landowners. Each affiant averred that he or she was one of 76 Condominium owners at the Cumberland Point complex, located on Renegade Mountain, and that he or she was a member of RMCC by virtue of their respective property ownership. R. at 2904. The Affiants noted awareness that the litigation involved claims by Plaintiffs that would affect 530 lots or units on the Mountain which are subject to those particular Amendments. R. at 2905. The Affiants further referred to a prior ruling of the Trial Court to the effect that the Plaintiffs' Board for RMCC was a suitable group to represent all the property owners, but that Affiants contested such finding, asserting that Affiants were opposed to one or more positions taken by RMCC (R. at 2906), and that Plaintiffs do not represent the best interests of all lot owners. R. at 2905. Conviction was expressed that the presence of "... a developer on Renegade Mountain is essential to maintaining the integrity of the deed restrictions of the First 2005 Amendments ... (in determining) how the future development of the hundreds of acres of vacant land on Renegade Mountain owned by the Developer will occur." R. at 2906.

A proposed Complaint in Intervention accompanied the Motion to Intervene. R. at 2975. The Complaint alleged that the property of the Intervenors was subject to the Amended and Restated Declaration of Amended Covenants and Restrictions for Renegade Mountain ("the First 2005 Amendments"), as recorded with the Register of Deeds. R. at 2976; Vol 60, Ex. 4. Intervenors were members of RMCC. R. at 2976. Paragraph 4 of such Complaint alleged that "... the Third Amended Complaint of the Defendants in Intervention seeks a forced transfer and recovery of certain unspecified and undescribed lands, allegedly on behalf of the RMCC, and to

convert the same to 'common elements' for a common purpose, which claim directly impacts Intervenors individually and as members of the RMCC, and as such, gives Intervenors an interest in this proceeding pursuant to Tenn. Code Ann. § 20-1-115." R. at 2974. The Complaint in Intervention denied that Plaintiffs HAISER constituted a valid Board for RMCC, who do not represent the interests of Intervenors. R. at 2977. It was alleged that the Intervenors' properties, all 530 lots or more, are subject to the 2005 Amendments, which are valid and binding, and that the property owners "have an inalienable right to be heard in any action that would directly impact their property rights," while denial of their ability to protect themselves would be a taking of property rights without due process. R. at 2978.

The proposed Complaint in Intervention expressed support for Moy Toy's role as Developer. R. at 2978.

The Court agreed that Movants possessed "... a financial interest in the common area which may result in an increase in their HOA fees; thus, the requirements of Rule 24.02 have been satisfied and this Court has the discretion to permit intervention." R. at 3031-3032. The requested intervention was denied as to all movants except for those few who had purchased their properties after September 1, 2019. R. at 3031. Why the Court might have come to such conclusion is unclear, for it was not until January, 2020, that the Court finally entered an Order spelling out the issues to be heard on remand, R. at 2788, just five months before the Motion for Intervention was served. R. at 3013.

The Court found that the interests of the Intervenors were "in lockstep with the positions of Moy Toy," and that if " either party to the underlying suit can adequately represent the

Intervenors' interest, then the intervention serves no purpose." R. at 3031.

Significantly, Intervenors are necessary parties to this action based upon their respective property interests and Plaintiffs' requests for declaratory relief. Tenn. Code. Ann. 29-14-107; Tenn. R. Civ. P. 19.01.

The Trial Court abused its discretion in failing to grant and/or mandate intervention for all movants and all property owners within the ambit of the HOA (i.e., RMCC) by virtue of land owner status as necessary and indispensable parties. The Trial Court's failure to allow intervention and/or require joinder of all parties having an interest was contrary to the law. *See Adler v. Double Eagle Properties Holdings*, LLC, No. W2010-01412-COA-R3-CV, 2011 WL 862948 (Tenn. Ct. App., March 14, 2011); *Citizens Real Estate & Loan v. Mountain States Devel. Corp.*, 633 S.W.2d 763; *Dialysis Clinic v. Medley*, No. M2018-00399-COA-R3-CV, 2019 WL 2173194 (Tenn. App. Ct. May 20, 2019); *Huntsville Utility Dist. Of Scott County v. Gen. Trust Co.*; *Isaacs v. Fitzpatrick*, No. M2018-01863-COA-R3-CV, 2019 WL 3729857 (Tenn. Ct. App., May 8, 2019); *Largen v. City of Harriman*, No. E2019-01501-COA-R3-CV, 2018 WL 3458280 (Tenn. Ct. App., July 17, 2018); *Little v. City of Chattanooga*, No. E2018-00870-COA-R3-CV, 2019 WL 1308264 (Tenn. Ct. App., Feb. 20, 2019); *Reed v. Town of Louisville*, (2007); *Scandlyn v. McDill Columbus Corp.*, 895 S.W.2d 342 (Tenn. Ct. App. 1995); *Stuart v. City of White Pine*, 1988 WL 86585 (Tenn. Ct. App., Aug. 19, 1988); *Tenn. Farmers Mut. v. DeBruce*, 586 S.W.3d 857 (Tenn. 2019).

In this instant action, Movants in Intervention are not bound by the Trial Court's decision instanter, having been denied an opportunity to intervene. Under the Trial Court's ruling, each of

the 21 Movants would be free to file their own proposed Complaint in Intervention, or something equivalent, each pursuing its own, separate lawsuit, seeking to re-litigate all of the issues raised in this proceeding (the other property owners not covered in the Motion are discussed hereafter). Such is not a result contemplated by Tennessee's Declaratory Judgments Act.

The likelihood of further litigation is seen from effects of the present ruling. If sustained on appeal, it means there has been no legally recognizable "developer" in the past thirty years. That has consequences for the development and the inhabitants of Renegade Mountain. Only a "developer" may record amendments to the Declarations, so the Declarations become frozen in time. T. at 1851, 1867, 1868. Only a "developer" may add properties to the development. 1987 Amendments to Declaration of Covenants and Restrictions, Vol. 60, Ex. 4 at ¶ 12. T. at 1891.

Hence, lots purportedly added since then now loose the benefit of the protective covenants provided by the Declaration of record. T. at 1891. No common areas may be designated. Common areas may be designated only by the "developer." T. at 1859, 1881. Owners of property supposedly added after 1991 do not qualify for Club membership, T. at 1891, nor are these owners subject to a duty to pay subdivision assessments. T. at 1892. Thus one must wonder whether any initiative of the HOA within the last several decades may withstand scrutiny where carried out with voting supported by properties added after the date when there was no developer. As the Chancellor points out (see Memorandum and Order, at p. 28), R. at 3745, "judicial decisions in civil cases are given retrospective effect," citing *Luna v. Clayton*, 655 S.W.2d 893, 899 (Tenn. 1983); *Hill v. City of German Town*, 31 S.W.3d 234, 239 (Tenn. 2000). In view of such impacts, it is reasonable to suppose that the Trial Court's ruling will create

litigation for years to come from property owners (who were denied intervention and/or not otherwise joined) seeking to effect a better result for themselves.

Such a result would be consistent with Tennessee's Declaratory Judgments Act; property owners within the ambit of the HOA were indispensable, necessary parties. *Citizens Real Estate & Loan Co., Inc. v. Mountain States Dev. Corp.*, 633 S.W.2d 763, 766 (Tenn. Ct. App. 1981).

In the instant action, a careful reading of the Trial Court's Order of August 6, 2020, reveals that the Trial Court considered the question of intervention solely on the basis of Rules 24.01 and 24.02. R. at 3028, *et seq*. However, it is equally clear that the Trial Court devoted no attention whatever to Rule 19.01, as raised in the Motion for Intervention, and such is reversible error. *Dialysis Clinic, Inc. v. Medley*, No. M201800399COAR3CV, 2019 WL 2173194, at *4 (Tenn. Ct. App. May 20, 2019).

In error, the Trial Court reasoned, "If either party to the underlying suit can adequately represent the Intervenors' interest, then the intervention serves no purpose." R. at 3031. To the contrary, the fact that existing parties to the suit may arguably be able to "adequately represent the Intervenors' interest," is not grounds for denying intervention by a necessary and indispensable party. *Largen v. City of Harriman*, No. E2019-01501-COA-R3-CV, 2018 WL 3458280 (Tenn. Ct. App., July 17, 2018). The opposite is true. Holding an interest relating to the subject of the action is grounds for compelling joinder and/or allowing intervention. Tenn. R. Civ. P. 19.01; *Dialysis* (Tenn. 2019); *Largen, Id.*

Moreover, the Trial Court's decision to limit the right of intervention solely to those

intervenors who purchased their property after September 1, 2019, is improper. The date and criteria was an arbitrary distinction, which is not supported by application of either Rule 19.01 or Tenn. Code. Ann. 29-14-107, and is not a permissible standard for weighing entitlement of an interested party to joinder as being necessary and indispensable. This contrary ruling by the Trial Court is additional grounds for finding that there was abuse of discretion. *Tenn. Farmers Mut. v. DeBruce*, 586 S.W.3d 901 (Tenn. 2019).

Even if Rule 19.01 failed in its application, which applies generally to all types of cases, the matter here, involving the Declaratory Judgments Act, remained under control of Tenn. Code Ann § 29-14-107, which statute is even stricter than Rule 19.01.

> . . . the Declaratory Judgments Act makes it incumbent that every person having an affected interest be given notice and an opportunity to be heard before declaratory relief may be granted. The Declaratory Judgments Act imposes stricter requirements than those imposed generally by Tennessee Rules of Civil Procedure 19.01 and 19.02, it is clearly required in a suit for declaratory relief pursuant to Tennessee Code Annotated, § 29-14-107(a) which provides that 'When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to those proceedings.

Huntsville Utility Dist. Of Scott County v. Gen. Trust Co., 839 S.W. 2d 397, 403 (Tenn. Ct. App. 1992).

The Trial Court's Memorandum and Order Re Intervention (R. at 3027), denies intervention on grounds that those Intervenors "are in lockstep with the positions of Moy Toy. If either party to the underlying suit can adequately represent the Intervenors' interest, then the intervention serves no purpose. That being the case, the Intervenors are not necessary and indispensable parties to this proceeding." R. at 3031. As noted above, this finding weighs in favor of joinder, not against it; such non-joinder sets the stage for the invidious results that the

Declaratory Judgments Act is intended to avoid. The Trial Court thus abuses its discretion in assigning this as a reason for refusing joinder. *Largen v. City of Harriman*, No. E2019-01501-COA-R3-CV, 2018 WL 3458280 (Tenn. Ct. App., July 17, 2018).

"The non-joinder of necessary parties is fatal on the question of justiciability, which, in a suit for a declaratory judgment, is a necessary condition of judicial relief." *Wright v. Nashville Gas & Heating Co.*, 194 S.W.2d 459, 461 (Tenn. 1946); *Largen, v. City of Harriman*, No. E2017-01501-COA-R3-CV, 2018 WL 3458280, *8 (Tenn. Ct. App., July 17, 2018).

"Proper parties include all those who must be bound by the decree in order to make it effective and to avoid the recurrence of additional litigation on the same subject." *Byrn v. Metro. Bd. of Pub. Educ.*, No. 01-A-019003-CV-00124, 1991 WL 7806, at *5 (Tenn. Ct. App. Jan. 30, 1991); *Little v. City of Chattanooga*, No. E201800870COAR3CV, 2019 WL 1308264, at *8 (Tenn. Ct. App. Mar. 21, 2019).

The trial court is charged with responsibility for determining the interests of the affected third parties and identifying whether they present risk of re-litigation. The instant Trial Court's decision addressed none of that, and its decision denying joinder was contrary to the law. *Reed v. Town of Louisville*, No. E2006-01637-COA-R3CV, 2007 WL 816521 (Tenn. Ct. App. Mar. 19, 2007).

Factual echoes of the case at bar are found in *Scandlyn v. McDill Columbus Corp.*, 895 S.W.2d 342 (Tenn. Ct. App. 1994). The essential holding of which is that a modification or challenge to development covenants requires joinder of all owners within the development.

In summation, it is submitted that the Trial Court abused its discretion by failing to require joinder and denying the intervention of necessary and indispensable parties. The Trial Court applied an incorrect legal standard and resolved the matter on a clearly erroneous assessment of the evidence. The Court failed to apply the correct law relating to consideration of party status, applying Rules 24.01 and 24.02, instead of 19.01 and T..C.A. § 29-14-107.

C. Orders Dated or Filed Jan. 13, 2020, April 23, 2020 and June 25, 2021 Denying Joinder

The foregoing argument relating to joinder of the Intervenors is adopted and reincorporated here as it applies more generally to all such interested property owners whose properties were bound up in the restrictive covenants in dispute, together with the entity known as Renegade Mountain Community Club (RMCC), in a development involving approximately 1300 lots, and all predecessors in Moy Toy's chain of title. R. at 372.

Moy Toy sought to have **all** property owners on the mountain, along with RMCC, who were subject to the restrictive covenants at issue, be declared necessary and indispensable parties. The Trial Court denied Appellants' joinder Motions.

There was submitted "Moy Toy and Party Defendants' Supplemental Position Statement" on December 31, 2019. R. at 2770. This Supplemental Statement embodied argument in the form of a motion asking that the Court not proceed to retrial unless all necessary and indispensable parties be joined, including the RMCC and all owners whose land was embraced within the legal description of the 2005 Amendments, the restrictive covenants which were being defended by Moy Toy as Developer, and the validity of which hinged on Plaintiffs' success in challenging Defendants' developer rights.

The motion was denied. R. at 2793. Appellants/Moy Toy asked that the ruling be reconsidered (R. at 2824), but the request was denied. R. at 2963. The Court found in relevant part as follows:

> The Moy Toy Defendants also contend that the Plaintiffs may not go forward in this lawsuit because they were not able to convince the Trial Court or the Court of Appeals to certify them in a class action (see *Haiser v. Haynes*, 2013 WL 7010723 (Tenn. Ct. App. 2014). However, that prior appeal dealt with whether an individual could be a class representative, not whether the RMCC could represent its members in the lawsuit. Since the issue is who is going to control the RMCC, whether or not all of the members out of the hundreds of owners in the Renegade Mountain community agree is not relevant. Those types of issues are controlled by elections, not by the Court.
>
> Finally, the Moy Toy Defendants continue to take the position that every owner must be made a defendant. Nowhere in the Court of Appeals' Opinion is there any suggestion that this needs to be done on remand.

R. at 2964.

A third request for joinder of the necessary parties (i.e., lot owners within the development on the mountain) was made by means of Defendants' Motion to Alter or Amend. R. at 3755, 3759. It was denied by the Trial Court. R. at 3784.

There is no question that the property owners are "necessary and indispensable" parties. The Trial Court concedes as much in the case of the 21 property owners who moved to intervene. "Although intervenors have no property interest in the common area, they do have a financial interest in the common area which may result in an increase in their HOA fees." R. at 3031-3032. Judicial resolution of Moy Toy's entitlement to developer's rights will finally determine who controls the Renegade Mountain Community Club, which, in turn, governs use of the lots owned by the community members. R. at 3031. So those member lot owners have an interest in

what happens with the RMCC. Moreover, the covenant restrictions placed in the chain of title for each lot, by the putative developers of record, control the value of the properties. The role of these covenants was explained by witness Joseph H. Huie, an expert in the field of real estate and loan transactions, thusly:

> They protect the value of a person's investment in the lot and the home that they either bought or intend to build on that lot. It provides them with a means of preventing other owners from doing things which would be adverse to their interest in their property such as, you know, putting a junk yard on the lot next door or letting it grow up and accumulate trash and so forth.

T. at 1856.

Hence, the legal viability of those covenants is a matter of vital interest to the lot owners, including most particularly the 2005 Covenants put in place by Moy Toy's immediate predecessor, Renegade Resort (T. at 267), the validity of which was being disputed by Plaintiffs thru their challenge to Moy Toy's legal ability to act as a Developer. R. at 1867.

D. No "Common Property" Exists

Moreover, there is a problem in this case, glossed over by the Trial Court, but discussed elsewhere herein: many of the roads of the Renegade Mountain Resort development are not platted, and there is no description whatsoever, whether metes and bounds or otherwise, specifying their locations or boundaries. T. at 1859, 1880. The Trial Court recognized the problem in its trial order. R. at 3718. Further, there are no common areas in Renegade Resort shown on plats. R. at 3747; T. at 13. No common properties nor areas exist.

The Court noted that "Plaintiffs have identified eight unplatted roads of concern... ." *Id.* What might be done regarding those trails in the event there were future interest by some party in

extending them? Well, the Court had a solution. It was the same for each of the unplatted roads it addressed: "Should Moy Toy or a subsequent fee simple owner of this portion of road desire to develop this area, the owner may, at its own expense, alter the course of this roadway in any such manner as necessary." R. at 3749-3750. Nothing in the Order here discloses any awareness of how that process might impact the other roughly 1300 lot owners, in the event Moy Toy or "other subsequent fee simple owner of this portion of road," apparently in their unfettered discretion, choose to exercise such discretion by extending the road onto the property of other lot owners. All potentially effected lot owners must be joined so that they may be able to protect their interests regarding those unplatted common areas. This makes them necessary and indispensable.

The Trial Court's reasons for denying joinder of necessary and indispensable parties are incorrect legal standards, and wrongly applied. It is improper to deny prospective parties the right to defend their interests as necessary and indispensable parties on grounds that "this is not a proper issue to be raised on remand." Tenn. R. Civ. P. 19.01(2). This is a matter that goes to the Court's subject matter jurisdiction. *Largen v. City of Harriman*, No. E2019-01501-COA-R3-CV, 2018 WL 3458280 (Tenn. Ct. App., July 17, 2018). In such a case, considerations of "timeliness" are not applicable. *Roberts v. England*, No. M19999-02688-COA-R3-CV, 2001 WL 575560 at *2 (Tenn. Ct. App. May 30, 2001); *Citizens Real Estate & Loan Co., Inc. v. Mountain States Dev. Corp.*, 633 S.W.2d 763, 764-66 (Tenn. Ct. App. 1981); *Lee v. Brown*, No. 89-230-11, 1989 WL 147497 at *1 (Tenn. Ct. App. Dec 8, 1989); *Stuart v. City of White Pine*, 1988 WL 86585 (Tenn. Ct. App., Aug. 19, 1988); And *see also Sanders v. Lincoln County*, No. 01A01-

9902-CH-00111 *5 (Tenn. Ct. App. Sept. 3, 1999)("the parties may raise the issue of subject-matter jurisdiction 'at any time in any court.'") citing *In Re Southern Lumber Mfg. Co.*, 210 S.W. at 640; *Scales v. Winston*, 760 S.W.2d 952, 953 (Tenn. Ct. App. 1988); see also Tenn. R. Civ. P. 12.08 (requiring court to dismiss action "wherever it appears by suggestion of parties or otherwise that the court lacks subject matter jurisdiction").

As previously pointed out by this Court when it confirmed denial of class certification: "The chief problem, as we see it, is the overwhelming antagonism amongst the proposed class. . . at least two competing groups in the community, and with little proof of the size and composition of these groups, we are skeptical that the requirements of typicality and adequacy of representation can be met. ...." *Haiser I* at *5.

E. Conclusion

The Trial Court erred in denying and failing to require joinder to all necessary and indispensable parties. In so doing, the Trial Court abused its discretion by applying improper standards. Tenn. Code Ann. § 29-14-107 and Rule 19.01.

II. WHETHER THE TRIAL COURT ERRED IN FINDING THAT MOY TOY HAS NO DEVELOPER'S RIGHTS WHEN THE COURT MISSTATED, MISCHARACTERIZED AND FAILED TO GIVE PROPER EFFECT TO THE TESTIMONY OF THE WITNESSES ON WHOSE TESTIMONY THE FINDING WAS BASED, AND WHERE PLAINTIFFS FAILED TO CARRY THEIR BURDEN OF PROOF

This point on appeal originally arises through Plaintiffs' Third Amended Complaint. There, Plaintiffs brought an action seeking a declaration from the Court that Defendant Moy Toy did not have the right to act as the "developer" of the Renegade Mountain Resort Community. R. at 1400 at ¶ 25.

This claim of Plaintiffs is an "action" for declaratory relief. Tenn. Code Ann. § 28-3-109. As the parties seeking affirmative, declaratory relief on this petition, Plaintiffs bear the burden of proof:

> It must be stated as a general rule that the burden of proof is upon the plaintiff to show that the conditions exist to justify the court in exercising its discretionary powers to grant declaratory relief pursuant to the declaratory judgment statute.

Blake v. Plus Mark, Inc., 952 S.W.2d 413, 417 (Tenn. 1999).

In response, Defendants Answered with a general denial. R. at 1431. Such denial by Defendants does not relieve Plaintiffs of their burden.

> The burden of proof is on the party having the affirmative of the issue, and the burden of proof never shifts. *op.cit.* The plaintiff had the burden of proving the elements of her theory of recovery and the facts which she alleged in her complaint. *op.cit.* The burden of proof rests on him who affirms, not on him who denies. *op.cit.*

Winford v. Hiwassee Apt. Complex and Turfmaster, Inc., 812 S.W.2d 293, 295 (Tenn. Ct. App. 1991).

Defendants expanded upon their denial elsewhere with an explanation regarding a defect in Plaintiffs' allegations, by pointing to the "First 2005 Amendment" as evidence that they did in fact possess such "developer's rights." *Haiser II* at *12 ("In response, the Moy Toy Board relied upon the First 2005 Amendments as evidence of Moy Toy's alleged developer's rights. . ..").

Originally the Trial Court did not actually reach the issue of whether Moy Toy has developer's rights, finding that Plaintiffs were barred by the statute of limitations from raising it. *Haiser II* at *10.

A. Limitations Defense Sustained in *Haiser II*

It is submitted that the statute of limitations defense of Moy Toy was sustained in

Haiser II. Because the six-year limitations period ran before this action was commenced in 2011, the Trial Court's earlier ruling was sustained in *Haiser II.* The issue of developer's rights has been decided in Moy Toy's favor. *Haiser II.* The only reservation concerned developer rights and use by Moy Toy of the Covenants as evidence of developer's rights.

B. Moy Toy Holds Developer's Rights

On remand, the Trial Court reconsidered the question of developer's rights regarding Plaintiffs' declaratory claim that there are no such rights. *Haiser II* at *14. When the matter returned to the Trial Court, this time the Chancellor found that developer's rights were not transferred to Moy Toy by an earlier predecessor in title, Cumberland Gardens Limited Partnership (CGLP), when the land was transferred through foreclosure to Cumberland Gardens Acquisition Corp. (CGAC), a vehicle set up by the mortgage lender, DG Bank, to facilitate the transfer, and then resold by CGAC to a new buyer roughly nine years later, Renegade Resort, LLC. R. at 3735 (Memorandum and Order, dated March 31, 2021, at p. 18).

The Trial Court did not apply the statute of limitations and stripped Moy Toy of developer rights. R. at 3735, at p. 18. This finding, all based on testimony from one Mr. Joseph Looney, covers two transactions, both involving Cumberland Gardens Acquisition Corp. and DG Bank. In the one instance, their foreclosure on CGLP, all relevant records were destroyed by Plaintiffs' witness, Mr. Looney (T. at 545-546), the evidentiary consequences of which must be borne by Plaintiffs since Plaintiffs bore the burden of proof. In the other instance, the subsequent resale to Renegade Resort, LLC, substantial support of intent regarding a rights transfer, is found from relevant, ancillary records, including bills of sale and the contract for purchase and sale,

together with actual conduct, to establish that the contracting parties intended to convey developer rights. Here the Chancellor misstates, mischaracterizes, and misapplies the factual record.

There is a discernible factual parallel in *Hughes v. New Life Development Corp.*, 387 S.W. 3d 453 (Tenn. 2012) to the instant proceeding. As with the matter at hand, *Hughes* was an appeal involving "the validity and effect of amendments to restrictive covenants for a residential development and amendments to the charter and bylaws for the homeowners' association serving the development." *Hughes, Id.* at 456-457.

As do the instant Plaintiffs, the plaintiffs in *Hughes* alleged that the subsequent buyer of the development was not the "developer" and therefore did not have the power to appoint board members of the HOA, or to even call the meeting where the contested amendments were adopted. The trial court found *inter alia* that the improvements relied upon by the homeowners were not reflected in the recorded plats and, consequently, no implied covenants were applicable to unplatted property. The Court of Appeals rejected challenge to the Developer's amendments, but it remanded on whether implied covenants could be found based upon "blurry words" on the plat at the time developer purchased the property.

The Supreme Court scrutinized the sales transaction through which developer's rights were alleged. *Hughes, Id.* In seeking to divine the intent of the contracting parties about conveyance of such rights, it attached great importance to the Purchase and Sale Agreement, as well as the "Work Product Documents" which accompanied such agreement. *Hughes, Id.* at 465-466.

Hughes placed correspondingly less weight on the deed itself. *Hughes v. New Life Development Corp.*, 387 S.W. 3d 466-467 (Tenn. 2012):

> The deed identifies the real property at issue and conveys it "with the appurtenances, estate, title and interest thereto." Not surprisingly, the deed does not reference the Work Product. At its core, a deed is simply "a written instrument by which land is conveyed." Black's Law Dictionary 475 (9th ed. 2009).

The *Hughes* Court did note that, *Id.* at 467:

> ...the deed does contain some limited language consistent with the transfer of rights and interests as the Developer evidenced by the Purchase and Sale Agreement. In particular, the deed references the Declaration, stating that New Life takes title to the real property subject to the Declaration. The Declaration, in turn, clearly (1) speaks to the development of the real property owned at the time by Raoul Land Development, (2) refers to the impending creation of the Charter, the Bylaws, the Association, and the Board, and (3) identifies the 'Developer' . . . 'and its successors and assigns.' Thus, what little there is in the deed pertaining to the rights and interests as the Developer suggests that [developer/buyer] would indeed succeed [as new developer].

Compare all of this with the testimony of Plaintiff's witness, Mr. Looney, which underpins the Chancellor's findings. Mr. Looney prepared the foreclosure deeds for the bank and its subsidiary, Cumberland Gardens Acquisition Corp (CGAC), by means of which CGAC acquired title in foreclosure from Cumberland Gardens Limited Partnership, June 4, 1991 (T. at 514) and then subsequently conveyed such title to Renegade Resort, LLC. (T. at 512-525), on January 6, 2000 (T. at 524). Mr. Looney testified that CGAC was a single-purpose entity created by the bank for the sole purpose of taking title to the property (T. at 513), and was thus subject to the bank's control. T. at 557. The bank itself had absolutely no interest in developing the

property; its only interest was in keeping the property maintained until it could find a buyer to recoup its loan (T. at 519-521), selling the existing development intact. T. at 535.

The transactional "work product documents" and working papers describing any "developers rights" corresponding to those described above by *Hughes, Id.* for a conventional sale and purchase of property would have been the original loan agreement, promissory note, an assignment of rights, and a security instrument. T. at 546. Plaintiffs' witness, Mr. Looney, couldn't remember, at trial, the details or content of such documents (T. at 526, 527, 544, 547), hardly remarkable given that the original transfer to CGAC took place thirty years beforehand. But unfortunately he shredded all such materials, maybe 15-20 boxes worth of material, roughly sometime around 2013 (T. at 545-546), not long after this legal proceeding first commenced. Plaintiffs were unable to establish from direct evidence that CGLP and CGAC/bank did not intend to transfer developer's rights in the event CGLP's loan from the bank went into default. However, based upon customary commercial practices, it may reasonably be understood that the bank would have insisted, as a condition of loan approval, upon transfer of all rights, including developers rights, contingent on default of the loan. Vol. 78 - Hill at pp. 49-50.

The work product documents which are the primary means of establishing developer rights here, *Hughes, Id.* at 466, having been shredded, were simply not available to Mr. Looney and he did not consider them. T. at 519. He did, however, concede that the Loan Agreement should indeed contain evidence of an intent to transfer these rights, where any such reference would typically be found (T. at 547), but he is not familiar with what the loan terms provided. T. at 542, 557, 559. Any such failure of evidence should be charged against Plaintiffs, not

Defendants, where Plaintiffs bear the burden of proof on this point. *Chattanooga-Dayton Bus Line v. Lynch*, 6 Tenn. App. 470, 480-481 (Tenn. Ct. App. 1928).

The Chancellor gives improper effect to the witnesses' testimony. It is not correct for the Chancellor to assert that "... there is no evidence in any of the ancillary documents such as the contract for sale that mentions the transfer of developer rights in the property." R. at 3735. It is certainly not true of the first transaction. It would be more accurate to say that such documents no longer existed, they had been shredded by Plaintiffs' witness, that the witness either didn't know or could not recall what they said, and that they are the primary means by which Plaintiffs might have otherwise sought to establish that the parties somehow did not intend to pass on the developer's rights that Mr. Looney himself agreed were held securely by the predecessor mortgagee in title. T. at 538. Nor is it true of the second transaction, from CGAC to RRLLC, where there are ancillary documents supporting conveyance of developer's rights. Vol. 78, Exhs. MT-B and MT-C, as discussed immediately below.

In this regard, the Chancellor does not accurately describe dealings between Mr. Looney and counsel for the buyer, RRLLC, in the Order's findings on the subject: "when Attorney Edward Hill representing Renegade Resort, LLC negotiated the purchase of the property, neither he nor Mr. Looney ever discussed developer's rights." R. at 3735. In fact, Mr. Looney **does not remember** any such discussions, one way or the other. T. at 526, 527, 547. As to that, he is content to defer to the recollections of Mr. Hill, who recalled a great deal about the subject. T. at 556, 557, 579-580.

For his part, Mr. Hill stated that, during the many discussions with Mr. Looney resulting in his client's purchase of the Renegade Mountain Resort property (Vol. 78- Hill, pp. 21, 33), the contract for purchase and sale was shaped with language specifically designed to assure that Renegade Resort, LLC would be able to carry out its intentions to further develop the property. Vol. 78, Hill, pp. 27-29; 33-39; see also Contract, Vol. 79, Ex. MT-A. The terms of such contract do not include the specific phrase "developer's rights," which is used only when there are special concerns about ambiguity, unnecessary in this instance where the buyer understood the inclusive language relating to its rights, including developer's rights, which was otherwise clear and unambiguous. Vol. 78- Hill, pp. 23-26. Such Contract was accompanied by a Bill of Sale, which was itself designed to reflect intentions regarding conveyance of those rights. Vol.78-Hill, pp. 39-45, Exhs. MT-B and MT-C. It was Renegade Resort's understanding that such rights were CGAC's to convey Vol.78-Hill, p. 89. That is reflected in the expansive language set out in the Deed of Trust given by CGAC through Mr. Looney, at pp. 1 and 2, ¶ C. Vol. 80, Ex. MT-D; *Cellco Partnership v. Shelley County*, 172 S.W.2d 574, 587 (Tenn. Ct. App. 2005)("Under Tennessee law a deed conveys all of a grantors estate or interest in property, unless it clearly expresses an intent to limit the estate or interest conveyed").

The evidence of Mr. Looney, replete with I-don't-knows (T. at 519, 542, 544, 557), I-don't-remembers (T. at 547, 526, 527), and repeated deferrals to counsel for RRLLC (T. at 548 556, 557, 579-580), all alleged without support of ancillary documentation (T. at 517, 519), neither sustains the Chancellor's findings nor carries Plaintiffs' burden of proof. *Riggs v. Royal Beauty Supply, Inc.*, 879 S.W.2d 848, 850 (Tenn. Ct. App. 1994)("We are of the opinion that,

under these circumstances the proffered evidence had no probative value whatsoever and added nothing to the plaintiff's case.") Put simply, Plaintiffs failed to prove that the parties to the transactions did not intend to convey developer's rights.

In other words, Plaintiffs failed to prove through Mr. Looney that CGAC and the bank did not convey developer's rights. Plaintiffs' witness, Mr. Looney, had no knowledge about the loan transaction between CGLLC and CGAC or its terms. T. at 542, 558. Mr. Looney doesn't know if the loan agreement was ever a part of his record T. at 545. Mr. Looney doesn't know whether any such agreement provided for a contingent transfer of developer rights by the borrower, CGLP, though concedes the possibility that it might have. T. at 547. Mr. Looney does not know anything about the default or foreclosure itself, having been narrowly tasked with drafting the deeds of conveyance. T. at 517-519. Mr. Looney doesn't know, one way or the other, of any discussions with the buyer's attorney about conveyance of developer's rights, or doesn't remember. T. at 526, 527-528, 547, 548, 552-553. Mr. Looney accepts the testimony of the buyer's attorney about what they talked about in terms of contract language in the Agreement for Sale and Purchase concerning what it said and meant about developer's rights. T. at 555- 557, 579.

During the nine years that CGAC held the property, its conduct was governed in a manner consistent with understanding that it had acquired developer's rights from the former developer/owner, CGLP: CGAC held annual meetings of the HOA (T. at 564-565), appointed the board of directors (T. at 572), exercised voting privileges of 10 to 1, as provided by the Declarations of Covenants and Restrictions (T. at 564-565), and didn't pay membership dues,

off-setting them with the cost of maintenance (T. at 564), such prerogatives being consistent with what is allowed of the "developer" under the 1972 Declarations of Covenants and Restrictions, as well as the 1982 Amendments. This pattern of conduct carried into the final closing with RRLLC, when CGAC handed it's buyer a resolution setting out the resignations of its HOA board members, so that they might be immediately replaced with a board selected by the buyer. Vol. 78, Hill, pp. 37, 46-47.

Mr. Looney drafted the final bill of sale which marked conveyance of the property from CGAC and the bank to RRLLC. T. at 556. Such bill of sale, negotiated over a period of time between Looney and Edward Hill, counsel for RRLLC, contained language conveying "**all right, title, interest in and to: (i) the name 'Cumberland Gardens' and trade names, trademarks and derivatives and combinations thereof, used in connection with the operation of the real property; (ii) any and all guarantees, warranties, licenses, permits, certificates, rights and privileges, if any, and whether or not in the possession of seller related to the real property and operation of the real property.**" T. at 555-556 (*emphasis added*). The buyer's attorney was satisfied that this sufficed to convey the developer's rights previously held by CGLP (T. at 555), and Mr. Looney does not quarrel with the buyer's view of that language. T. at 556. Such broad language was intended to affect a complete transfer of **ALL** rights and privileges of the seller, including the capacity to act as "Developer." Vol.78- Hill, at 39, 43; see also Vol. 80, Ex. MT-B; *Cellco Partnership v. Shelley County*, 172 S.W.2d 574 (Tenn. Ct. App. 2005).

That same language appeared in the more formal Deed of Trust/Security Agreement and Fixture Filing. T. at 556-557. This, too, was at the instance of buyer's counsel so as to assure

conveyance of developer's rights, with whose construction of the document Mr. Looney offers no objection. T. at 557; see also substitution of CGAC board members in CGCC for board members of RRLLC; Vol. 80- Ex. MT-C.

Moreover, Mr. Looney acknowledged that CGAC and the bank were well aware of the Declarations of Covenant and Restrictions, and understood that under the aforedescribed terms of sale their buyer, RRLLC, would be exercising a developer's role: "I don't think there was any question that we assumed that they had the right to amend the covenant and declarations. There's a process in the declaratory of how you could do that." T. at 552. Hence, when the bank heard that RRLLC might be amending the Covenants, there was insistence, for the purpose of protecting their collateral interest (T. at 551-552), that CGAC and the bank have the ability to approve any such amendment, a demand conveyed both by e-mail (T. at 551-552) and through letter by Mr. Looney to RRLLC. Vol. 80, Ex. MT-H.

The Trial Court gives effect to an apparent lack of interest by the bank in actively filling the role of developer. R. at 3722. This is hardly remarkable since the bank was in the banking business, not the development business. But while the bank and its alter ego, CGAC, were not interested in exercising the prerogatives of such role, they nevertheless assumed the formal office of "developer" as successor to the predecessor in title. In the "Definitions" Section of the 1987 Amendments to Declaration of Covenants and Restrictions, it states: "'Developer' shall mean American Recreation Services, Inc., its subsidiaries, **and its successors and assigns,** specifically, including Cumberland Gardens Limited Partnership, a Tennessee limited

partnership, and when used collectively shall include Recreation Unlimited, Inc." (*Emphasis added*) .Vol. 60, Ex. 4 at p. 2.

It is well to consider the practical consequences of the Trial Court's determination that the "chain" in developer entitlement broke thirty years ago. Such would mean there has been no legally recognizable "developer" in the past thirty years. That has consequences for the development and the inhabitants of Renegade Mountain. Only a "developer" may record amendments to the Declarations, so the Declarations become frozen in time. T. at 1851, 1867, 1868. Only a "developer" may add properties to the development. T. at 1891 (1987 Amendments to Declaration of Covenants and Restrictions at ¶ 12). Hence, lots purportedly added since then now lose the benefit of the protective covenants provided by the Declarations of record. T. at 1891. No new common areas may be designated. That is done by the "developer." T. at 1859, 1881. Owners of property supposedly added after 1991 do not qualify for Club membership (T. at 891) nor are subject to any duty to pay dues (T. at 1892), and thus one must wonder whether any initiative of the HOA within the last several decades may withstand scrutiny where carried out with voting support from properties added after the date when the Court finds there was in fact no developer. As the Chancellor points out, (R. at 3745, Memorandum and Order at p. 28), "judicial decisions in civil cases are given retrospective effect," citing *Luna v. Clayton*, 655 S.W.2d 893, 899 (Tenn. 1983); *Hill v. City of German Town*, 31 S.W.3d 234, 239 (Tenn. 2000).

Further, the opinion of Plaintiffs' expert, Jack Atkins, is largely derived from a limited review, based on the "chain of title," the recorded instruments of title (T. at 262-3, 262-3; 314-315). Instruments of title have little to say on the subject. *Hughes v. New Life Development*

Corp., 387 S.W. 3d 453 (Tenn. 2012). ("The deed identifies the real property at issue and conveys it 'with the appurtenances, estate, title and interest thereto.' Not surprisingly, the deed does not reference the Work Product. At its core, a deed is simply 'a written instrument by which land is conveyed.'") T. at 466-467. But personal rights, such as those at issue here, as *Hughes at* 453 points out, are controlled by a wealth of unrecorded ancillary and work product documents which are incident to the sale and purchase of land. Or, as here, the original loan documents, contingent assignments by the mortgagee, promissory notes, security instruments and so forth. T. at 546. That critical body of material went unexamined by Mr. Atkins (T. at 314-315), since it had all been shredded by Plaintiffs' witness, Mr. Looney. Hence, to the extent that the Trial Court relies on the opinions of Mr. Atkins then, to that extent the Trial Court fails to follow the Supreme Court's teachings in *Hughes, Id.* Furthermore, Mr. Atkins overlooked, and is contradicted by, the effect of *Cellco Partnership v. Shelley County*, supra, and its construction of substantially identical contract language as set out in the Deed of Trust, by means of which CGAC conveyed title to RRLLC . Vol. 80 - Ex. MT-D.

Then there is the Chancellor's alternative finding. Assuming that the chain of developer's rights did not in fact break upon the foreclosure initiated by CGAC, the Chancellor stated alternatively that: "It appears Renegade Resort, LLC, informally and by contract transferred developer rights to the LKM Group as of September 15, 2005, to operate and develop Renegade Mountain. However, those same developer rights were never transferred back to Renegade Resort, LLC and therefore Renegade Resort, LLC had no developer rights to transfer to Moy Toy." T. at 3736.

This is the explanation of LKM's involvement given by Moy Toy's counsel at Trial:

> So in 2005 or somewhere around there-- and Mr. Guettler can talk about it, if it's even relevant-- Mr. Wucher and his group decided to do an option contract to Mr. Larry McMeans and his group, LKM, or something like that, and there was an option but there was never any title transfer. It was solely an option. Well, that transaction went into default and there was litigation, and Renegade Resort, Mr. Wucher and his partners had to wrestle control back of Renegade Resort from LK (sic) whatever. It seems like every developer has its problems on Renegade Mountain.

T. at 136; Vol. 64-Wucher at 46-48; Appendix A. *See* Judgment entered on January 14, 2010, dissolving the transaction and LKM's contractual interest in the property. **Appendix A.**

A copy of such Judgment is attached hereto and included within the appendix to this Brief. Such judgment having been entered by the Chancery Court. *Counts v. Bryan*, 182 S.W.3d 288, 291 (Tenn. Ct. App. Nov. 28, 2005)("A court will take judicial notice whether requested or not") citing *State v. Lawson*, 291 S.W.3d 864, 869 (TN 2009)("even where a trial court fails to take judicial notice, the appellate court may do so upon review").

The Chancellor erred in alternatively finding that ""those same developer rights were never transferred back to Renegade Resort, LLC and therefore Renegade Resort, LLC had no developer rights to transfer to Moy Toy." R. at 3736. Any such transfer was never consummated. It failed and was judicially expunged. The transfer relied upon by the Chancellor in his alternative finding never took place.

In sum, Defendants respectfully submit that the Chancellor erred in declaring that the "chain of title" was broken by the acquisition in foreclosure by Cumberland Gardens Acquisition Corp. and its banking parent, DG Bank, and then by the Bank's subsequent resale to Renegade Resort, LLC. The Chancellor misstated and mischaracterized the witnesses' testimony in this

regard and failed to acknowledge testimony from the witness which countered the Trial Court's conclusions. In so doing, the Chancellor abused his discretion. *Tenn. Farmers Mut. v. DeBruce*, 586 S.W.3d 905 (Tenn. 2019)("The Court abuses it's discretion when it causes an injustice by applying an incorrect legal standard, reaching an illogical decision, or by resolving the case 'on a clearly erroneous assessment of the evidence.'") As the proponents of this issue, Plaintiffs failed to carry their burden of proof when their own witness, Mr. Looney, destroyed all relevant documentary evidence during the ongoing legal proceeding, which evidence would have addressed intent of the contracting parties, CGLP and the DG Bank, regarding conveyance of all rights in the property, including developer's rights, as a contingent condition of securing loan approval. Moreover, the undisputed ancillary documentation regarding the sale between CGAC and RRLCC, coupled with their conduct, shows that they intended to transfer developer rights. The finding of the Trial Court should therefore be reversed.

III. WHETHER THE TRIAL COURT ERRED IN FINDING THAT MOY TOY DID NOT HAVE DEVELOPER RIGHTS BY FAILING TO CONSIDER DEFENDANT MOY TOY'S DEFENSE THAT PLAINTIFFS HAVE NO STANDING TO CHALLENGE SUCH ENTITLEMENT TO RIGHTS

Plaintiffs' Third Amended Complaint injected, at ¶ 25 (R. at 1389 -1400) a new petition for declaratory relief, requesting the Trial Court to declare that Defendant Moy Toy has no developer rights. R. at 1389-1400. In answer to the Plaintiffs' Third Amended Complaint (R. at 1422), Moy Toy raised standing as a defense. R. at 1435.

Pre-year 2018, the Trial Court addressed the issue of "developer's rights, originally finding that Plaintiff's action in this regard was time-barred by the six-year statute of limitations. R. at 2026 (Order dated 6/29/16 at ¶ 21).

Haiser v. McClung, No. E2017-00741-COA-R3-CV, 2018 WL 4150877 (Tenn. Ct. App.

Aug 29, 2018), remanded the motion for rehearing. *Id.* at *14. Moy Toy thus resurrected its standing concerns on remand. Supp. R. at 5. In such Motion, Moy Toy asserted:

> 8. Plaintiffs' standing at the previous trial for purposes of challenging the Declaration of Restrictions and Covenants as a contract was not at issue since Plaintiffs, as RMCC members, representatives, or property owners were arguably parties or at least third party beneficiaries to the declaration. **However, the retrial of Plaintiffs' remaining claims will involve a challenge to Moy Toy's deed and chain of title, which requires a different standing analysis.**"(*Emphasis added*).

Supp. R. at 7.

A hearing on December 19, 2019, took place to determine which would be the issues for retrial, pursuant to the directives of *Haiser II.* But there being no agreement among the parties on what those directives actually were (R. at 2789), the Court drafted an Order setting out its own conclusions. This Order Declaring the Issues for Appeal stated that the Court would hear evidence concerning the chain of title of Moy Toy's developers' rights in Renegade Mountain. R. at 2789. However, nothing in this Order addressed or acknowledged Defendants' defense of standing, although standing was raised multiple times. R. at 2789-2790.

Defendants responded with Moy Toy's Motion to Reconsider and Amend Order Regarding Post-Remand Issues, on March 13, 2020. R. at 2795. Another, similar Motion was filed on the same day requesting this Court Amend, Reconsider or Clarify Order Declaring the Issues for Trial. R. at 2825. Each was denied (R. at 2959), without any express ruling on Plaintiffs' standing.

Moy Toy made final effort to secure a ruling on standing via Motion in Limine - Standing of Plaintiffs. R. at 3556. But the Court did not act upon it in the Memorandum and Order. R. at 3717, *et seq.*

It was improper to hear Plaintiffs' petition for declaratory action, bearing on Moy Toy's entitlement to developer's rights, without also hearing Moy Toy's affirmative defense that Plaintiffs lacked standing to bring any such petition in their derivative capacities. *Gatlin v. Tenn. Farmers Mut. Ins. Co.*, 741 S.W.2d 324, 326 (Tenn. 1987). A plaintiff must have standing before there is ability to seek declaratory relief on behalf of the corporation or association in question. *City of Memphis v. Hargett,* No. M2012-02141-COA-R3-CV; 2012 WL 5265006 (Tenn. App. Ct. Oct. 25, 2012), at *5, citing *Am. Civil Liberties Union v. Darnell*, 195 S.W.3d 612, 619-620 (Tenn. 2006).

Plaintiffs have no standing. *Hughes v. New Life Development Corp.*, 387 S.W.3d 453, 470 (Tenn. 2012)("Tennessee law restricts the parties who may challenge corporate action on the ground that the corporation lacks or lacked power to so act. Those parties who may bring such challenges generally include the Attorney General and Reporter, a director of the corporation, or a member of the corporation in a derivative proceeding."). In this instance, the HOA ("RMCC") didn't even exist; it was administratively dissolved late in 2019. R. at 2832. Plaintiffs were therefore not "members" of the corporation, or "directors," whether they elected to call themselves that or not.

Moreover, relief through derivative action is particularly inappropriate where, as here, there is substantial conflict within the club membership over whether Plaintiffs are the proper board, and whether Moy Toy should be divested of its developer's rights. *Haiser I at* *5. *See also* Tenn. R. Civ. P. 23.06 ("The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interest of the shareholders or members

similarly situated in enforcing the rights of the corporation or association"); *United Supreme Council AASR v. McWilliams,* 586 S.W.3d 373, 382-385 (Tenn. 2019); *Hall v. Tennessee Dressed Beef Co.*, 957 S.W.2d 536 (Tenn. 1997).

Furthermore, Plaintiffs were attacking the contractual arrangements between third parties in their effort to establish that such contract did not come with the contingent developer's rights. Pursuant to the substantial evidence discussed before, CGAC/DG Bank certainly understood that they had acquired such rights, as did their subsequent buyer, RRLLC. As strangers or third parties to this contract, Plaintiffs herein have no standing to effectively intervene in this contract arrangement long after the fact, where there is no evidence they were intended third party beneficiaries of it. *Wallis v. Brainerd Baptist Church, 509 S.W.3d 886, 899* (Tenn. 2016).

IV. WHETHER THE TRIAL COURT ERRED BY FAILING TO FIND THAT PLAINTIFFS' ACTIONS WERE BARRED BY THE STATUTE OF LIMITATIONS

Defendants request dismissal of Plaintiffs' declaratory action claim that Defendants are without any developer's rights, on grounds that such claim of Plaintiffs is barred by the limitations provision set out at Tenn. Code Ann. § 28-3-109(3)(a) ("Actions on contracts not otherwise expressly provided for"; 6 years). It is difficult to imagine a subject, involving limitations, which possesses a stronger claim to judicial sympathy than this. Where the issue here is one of entitlement to "developer's rights," the critical evidentiary documents, as described by the Supreme Court in *Hughes v. New Life Development*, 387 SW 3d 453, 465-466 (Tenn. 2012), are principally contracts, bills of sale, and ancillary working documents. Such materials, unlike deeds, are normally not recorded so don't appear in the formal "chain of title." They get lost or shredded and memories fade, effects of which are magnified where, as here, effort is being made

to reach back many decades to ascertain present day rights. T. at 1902. Vigilant judicial awareness of the essential purposes served by such limitations statutes is necessary if valuable commercial expectations are to be adequately protected. *Quality Auto Parts Co., Inc. v. Bluff City Buice Co., Inc.*, 876 S.W.2d 818 (Tenn. 1994)(stating at p. 820, that **"the policy reasons for the development of statutes of limitations (are) to ensure fairness to the defendant by preventing undue delay in bringing suits on claims and by preserving evidence so that facts are not obscured by the lapse of time or the defective memory or death of a witness.")**

Limitations first enters this case on the heels of a new Third Amended Complaint by Plaintiffs, whose motion to amend was granted by order of the Court dated June 4, 2015. R. at 1384. *Haiser II* at *5. For the first time, Plaintiffs there challenged Defendants' developer rights, and "requested that the Trial Court order Moy Toy to convey title to all 'Common Property' in Renegade Mountain to RMCC, and requested that the Court declare RMCC the controlling entity for the private roads of Renegade Mountain." *Haiser II* at *5; Plaintiffs' Third Amended Complaint at ¶ 25; R. at 1400.

In response, Defendants' Answer raised the statute of limitations as a bar to recovery. R. at 1435. The Trial Court agreed with the defense, entering a directed verdict on Plaintiffs' claim, on behalf of Defendants, upon grounds that Plaintiffs' action was untimely and barred by the six year limitations period for contracts as provided by Tenn. Code Ann. § 28-3-109(a)(3)("actions on contracts not otherwise provided for"). *Haiser II* at *11; *see also Hughes v. New Life Dev. Corp.*, 387 S.W.3d 453, 475(Tenn. 2012)("The restrictive covenants in the Declaration in this case are property interests that run with the land, but they arise from a series of overlapping

contractual transactions... Accordingly, they should be viewed as contracts and examined as such.") At the original trial of this action, the effect of the trial court's ruling was to bar any effort to invalidate, or set aside any prior contracts, restrictive covenants, agreements or understandings regarding Moy Toy's receipt of developer's rights. *Haiser II* at *6.

Plaintiffs appealed to the Appellate Court in *Haiser II.* This, among others, was their issue: "Whether the trial court erred by applying a six-year statute of limitations to bar the Owner Board's challenge to Moy Toy's purported developer's rights." *Haiser II* at *9. The Answer under the heading of "Affirmative Defenses," reads as follows:

> 11. Pursuant to the governing Declaration of Covenants, Conditions and Restrictions, recorded in the Cumberland County Register of Deeds office at Book 1212, Page 1224, which Declaration is not being challenged, the developer rights belonged to Renegade Resort, LLC at the time the Declaration was drafted and would pass to any successor in title through an instrument specifically conveying such developer rights. Renegade Resort, LLC is defined as developer and referred to as developer throughout the Declaration.
>
> In accordance with the Declaration and applicable Tennessee property and contract law, such developer rights are personal property and were properly conveyed to Moy Toy via contract in the form of bills of sale. In accordance with the Declaration and the Bills of Sale whereby Renegade Resort, LLC and J.L. Wucher Company, LLC properly conveyed their developer rights to Moy Toy, LLC, Moy Toy is the current developer, and such transfers in accordance with the Declaration cannot be challenged without challenging the Declaration itself.

R. at 1436.

The document described in this Paragraph 11 as being recorded at Book 1212, page 1224, put in evidence at Trial (Vol. 60, Ex. 5) is otherwise known as the "First 2005 Amendments," a restrictive covenant describing the role and status of Moy Toy's immediate predecessor, Renegade Resorts, LLC, as a "developer." T. at 267. By citing the 2005 Amendments, one of the

most recent indicia of Moy Toy's own status as "developer," Moy Toy was identifying and pointing out an important defect in Plaintiffs' claim that Moy Toy allegedly has no developer rights. As *Haiser II* at *12, "In response, the Moy Toy Board relied upon the First 2005 Amendments as **evidence** of Moy Toy's alleged developer's rights." (e.s.). Paragraph 11 was included within the Defendants' Answer. *Brooks v Davis*, No. 01-A-01-9509-CV00-02, 1996 WL 99794 (Tenn. Ct. App. 1996), J. Koch concurring at*7, ("The difference between a general denial which is not required to be specifically pled and an affirmative defense is that a general denial negates an element of the plaintiff's prima facie case, while **an affirmative defense excuses the defendant's conduct even if the plaintiff is able to establish a prima facie case.**")(e.s.) Reliance upon the 2005 Amendments as evidence was an explanatory addition to the general denial of Plaintiffs' claim, such denial being set out earlier in Defendants' Answer at p. 10, ¶ 25. R. at 1431.

Even if the defense is improperly labeled as a request for affirmative relief, it is treated for what it is in fact, a denial. Tenn. R. Civ. P. 8.03 ("When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, if justice so requires, shall treat the pleadings as if there had been a proper designation. However, when a specific denial is labeled as an affirmative defense, a court will treat the defense as a denial and the proper remedy is not to strike the defense but to treat it as a special denial.") *See also In Re Rawson Food Service, Inc. v. Rawson Food Service*, 846 F2d. 1343,1349 (11 Cir. 1988) ("A Defense which points out a defect in the plaintiff's prima facie case is not an affirmative defense"), citing *Ford Motor Co. v. Transport Indemnity Co.*, 795 F2d 538, 546 (6th Cir 1986).

In this instance, Plaintiffs' action for declaratory relief is not timely. Defendants note that limitations statutes are aimed at **actions**, not **lawsuits**. Tenn. Code Ann. § 28-1-109(a). Where, as here, a "lawsuit" contains multiple causes of action, *see* Tenn. R. Civ. P. 54 (multiple claims of relief), each separate action is analyzed independently in terms of applying the statutes of limitation. *Bryant v. McCord*, No.01A01-9801-CV-00046; 1999 WL 10085 (Tenn. Ct. App. Jan. 12, 1999); *Rich v. Warlick*, No.M12013-01150-COA-R3-CV, 2014 WL 1512821; *McGhee v. Shelby County Gov't*, No. W2012-00185-COA-R3-CV; 2012 WL 2087188.

After *Haiser II* returned the case to the Trial Court to retry certain issues, Defendants served a Motion in Limine to Preclude Testimony Challenging Deeds Based on Statute of Limitations. R. at 3586. It renewed argument that Plaintiffs' effort to seek construction of Moy Toy's developer rights, through declaratory action, was barred under the six-year limitations period governing contract rights, pursuant to Tenn. Code Ann. § 28-3-109(a)(3). The motion was denied by the Trial Court's Final Order re: Motion to Alter or Amend. R. at 3784; T. at 49-52.

It is respectfully asserted that such denial by the Trial Court was in error. *See Hughes v. New Life Development Corp.*, 387 S.W. 3d 453 (Tenn. 2012) at p. 475 (construing rights of developer; "The restrictive covenants in the Declaration in this case are property interests that run with the land, but they arise from a series of overlapping contractual transactions. op.cit. Accordingly, they should be viewed as contracts and examined as such.") In this instance, rights of Moy Toy as the developer were publicly recorded through the 2005 Amendments. T. at 267. That was "notice to all the world," including Plaintiffs, Tenn. Code Ann. § 66-26-102, triggering the running of the statute of limitations. See *Burch v. McKoon, Billings & Gold, PC*, No. M2004-

00083-COA-R3-CV; 2005 WL 2104611 (Tenn. App. Ct. August 31, 2005); *Carroll v. Braden,* No. W2001-01901-COA-R3-CV; 2002 WL 31306697 (Tenn. App. Ct. October 15, 2002); *Denton-Preletz v. Denton*, No. E2010-01756-COA-R3-CV; 2011 WL 5375141 (Tenn. App. Ct. April 11, 2012).

It has been far more than six years from the time Plaintiffs had notice of such document to the time they amended their Third Party Complaint first raising their declaratory action challenging developer's rights on June 4, 2015, *see Haiser II* at *5, or even the time when their lawsuit first commenced on December 22, 2011. R. at 3. The judgment of the Trial Court should therefore be reversed upon finding that the six-year limitations period bars a challenge to Moy Toy's developer rights. Tenn. Code. Ann. § 28-1-109(a).

V. WHETHER THE TRIAL COURT ERRED BY IMPOSING EQUITABLE RESTRICTIVE RECIPROCAL SERVITUDES ON DEFENDANTS' PROPERTY WHERE THE COURT'S ORDER WAS INCONSISTENT AND WHERE PURPORTED EASEMENTS WERE NOT DESCRIBED BY COVENANT OR OTHER MEANS, AND WERE NOT PART OF A PLAN OF DEVELOPMENT

Among the Trial Court's conclusions of law and fact was this determination:

> . . . the Court finds that the entrance area, guard shack, platted roads, certain unplatted roads, sports park, pool and tennis courts were all intended, promised, promoted, used, operated and maintained in the past as common property for the benefit of the developer and the RMCC members. Control of this unplatted land, which was intended and used as common properties in this community by the developer is not absolute, and the property remaining in the hands of a developer may be held in equity to be subject to these rights of enjoyment, *Innerimages* at 29 (Tenn. 2019); *Land Developers, Inc. v. Maxwell*, 537 S.W. 2d 904, 912 (Tenn. 1976); *Stracener v. Bailey*, 737 S.W. 3d 536 (Tenn. Ct. App. 1987). While the common areas in Renegade Resort are not shown on plats, they are referenced in all versions of the restrictions, and lots were sold in reliance on these recorded equities. An easement of enjoyment is identified in every set of restrictions and in the 1987 bylaws for members of the RMCC who are in good standing. Here, Moy

> Toy effectively negated the RMCC's members' easement of enjoyment by failing to maintain these common areas, thereby making them impossible to enjoy.

R. at 3718 (*emphasis added*).

Such determination placing "easements of enjoyment" upon the property of the Defendants must be reversed, for several reasons: it is internally inconsistent; the easements it imposes are not described by covenant or other means; and were not part of a common plan of development.

A. Internal Inconsistency

To begin with, the Court's determination is inconsistent. On the one hand, Moy Toy is treated as a "developer". As stated by the Court, "the property remaining in the hands of a developer may be held in equity. . .." R. at 3747. Moy Toy is criticized for "failing to maintain these common areas," *Id.*, a duty expected of the developer. Such findings appear to be material to the Court's determination. But, on the other hand, the Court finds that Moy Toy is not, never was, the developer. R. at 3736. The Court cannot have it both ways. Either Moy Toy was the developer or it was not. This is an unsustainable self-contradiction. *Spight v. Spight,* No. W2018-00666-COA-R3-CV; 2019 WL 1313487 at *1 (Tenn. Ct. App. March 21, 2019)("Because there are no findings to resolve the inconsistency, we vacate the trial court's award . . .").

B. Easements of Enjoyment, Generally

The Trial Court improperly invaded Moy Toy's fundamental right as a property owner to own, use and enjoy its property. The Trial Court implied and imposed "easements of enjoyment" on Moy Toy's property completely inconsistent with the covenants. These implied easements are known as negative reciprocal restrictive covenants, which limit the use of land. *Phillips v. Hatfield*, 624 S.W. 3d 464, 472 (Tenn. 2021). Negative reciprocal easements are not favored.

Land Developers, Inc. v. Maxwell, 537 S.W. 2d 904, 913 (Tenn. 1976). They undercut the Statute of Frauds and create uncertainty in land titles. *Philips* at 478 (Tenn. 1998). "The law and public policy of this state favor the alienability of real property, its unrestricted use by its owner and certainty in the rights of the parties with interests therein." *McArthur v. East Tenn. Natural Gas Co.*, 813 S.W. 2d 417, 419 (Tenn. 1991). "We think it quite apparent that the doctrine ought to be used and applied with extreme caution, for it involves difficulty and lodges discretionary power in a court of equity, in a degree, to deprive a man of his property by imposing a servitude through implication." *McCurdy v. Standard Realty Corp.*, 295 Ky. 587, 175 S.W. 2d 28, 30 (Tenn. Ct. App. 1943). Restrictive covenants are to be strictly construed and will not be extended by implication and any ambiguity in the restriction will be resolved against it. *Arthur v. Lake Tansi Village, Inc.*, 590 S.W. 2d 923, 927 (Tenn. 1979).

"Tennessee courts recognize implied restrictive covenants in three circumstances: 1) implication by necessity, 2) implication by conveying property with restrictions under a general plan or scheme of development, 3) implication by reference to a plat." *Lutzak v. Phoenix American Development Partners, L.P.*, No. M2015-02117-COA-R3-CV; 2017 WL 4685300 at *6 (Tenn. Ct. App., Oct. 18, 2017). Here, no effort is made in this proceeding to address implied easements by necessity. But easements by covenant and a common plan of development are addressed below.

C. Implied Easements by Plat

There is no description of the easements in question anywhere in the records of this cause. Of the two plats for Renegade Mountains Resort put into evidence respectively as Exhibits 22 and 23 (Vol. 68, Exhs. 22 and 23), neither provides **any** location for common areas

for which the Trial Court proposes to establish easements on Moy Toy's land, except for a few platted roads. T. at 1878-1881. The parties stipulated to this. T. at 13. There are no boundaries for any of the purported common areas on any exhibit nor instrument of record. The Trial Court refers to a 'sports park, pool, tennis court, play area, or some other descriptive terms' used by Plaintiffs. T. at 1718-1719. However the real property where the pool and tennis courts are located is owned by Moy Toy, its tract in that location being comprised of approximately 60-80 acres, and was purchased by Moy Toy from Renegade Resort, LLC. T. at 1718-1719. No easement rights nor putative common properties were ever platted, designated, nor conveyed upon Moy Toy's parcel. T at 1718-1719. "Tennessee law requires that instruments conveying an interest in property include a descriptive of the property." *ABN AMRO Mortgage Group, Inc. v. Southern Security Federal Credit Union*, 372 S.W. 3d 121, 127 (Tenn. Ct. App. 2012), citing Tenn. Code Ann. § 66-5-103.

The Trial Court refers vaguely to "references" "in these recorded equities". R. at 3747. Exactly what those are or what they say is not made clear. But the test of sufficiency for any easement's description is "whether a surveyor with the deed before him and with or without the aid of extrinsic evidence can locate the land and establish the boundaries." *Wallace v. McPherson,* 23 Beeler 333, 340, 214 S.W.2d 50, 53 (Tenn. 1947). Mere reference, without reasonably precise locational information will not suffice. *Lovett v Cole*, 584 S.W. 3d 840 (Tenn. Ct. App. 2019)(descriptive vagueness rendered alleged easement unenforceably ambiguous).

D. Error to Admit Exhibit 41 – No Plan Nor Plat

The undefined and unplatted nature of Plaintiffs' easement claim is highlighted by the

fact that the Plaintiffs submitted a partially hand-drawn document (Vol. 71, Ex. 41) for the purpose of suggesting dedication of land upon which Plaintiffs claimed easements. Objection was made to admission of Exhibit 41. T. at 898-910. Admission of Exhibit 41 was in error. Tenn. R. Evid. 901, 801, 701.

The Trial Court limited the admission of Exhibit 41 for "some idea of what we're talking about" but ruled that "None of the writing on there is being considered . . .." T. at 910. Plaintiffs indicated that particular lines on Exhibit 41 were not of consequence. T. at 901 – 902. No boundaries were to be suggested by Exhibit 41. T. at 898 – 910. "It is true that there are no platted common areas in Renegade Resort . . .." R. at 3784 (Final Order Re Motion to Alter or Amend).

Regardless, it was error to admit Exhibit 41, but even if admissible Exhibit 41 does not provide the specificity necessary to delineate an easement boundary. Further, the land where the alleged "Sports Park" is located is not part of the Renegade Mountain Development and is located in the middle of Moy Toy's private 60-80 acre parcel. There is no definable property of record upon which any easement was granted. There is no "Sports Park" defined, and it therefore could not be subjected to a purported easement. *See* Tenn. Code Ann. § 66-5-103; *Shied v. Stamps*, 34 Tenn. 172 (Tenn. 1854). Plaintiffs admitted that Exhibit 41 was submitted "not for metes and bounds or anything like that." T. at 899, Lines 7-8.

E. Easement by Common Plan of Development

The Supreme Court describes creation of a restrictive covenant or easement by common plan or development in these terms:

> . . . reciprocal covenant whereby the grantor covenants to insert like covenants in all deeds out of the common development and that other ways may consist of the grantor's selling the lots upon representation to the individual purchasers that like covenants will be inserted in the grantor's deeds to others, for the common benefit, or the grantors pursuing a course of conduct indicating a neighborhood scheme, leading the several purchasers to assume its adoption and the adherence to it by such conduct.

Arthur v. Lake Tansi Village, Inc., 590 S.W. 2d 923, 923 (Tenn. 1979):

Here, for decades, there was no common "plan" of development. Consider the findings of the Chancellor on this in the Memorandum and Order, dated March 31, 2021 (R. at 3747):

> **(1)** The property was sold to a group of Germans in 1988, when the original developers went bankrupt, and the development scheme or project was essentially abandoned (the German bank "was not interested in developing the property and over the nine years that CGAC owned the property, there was no development at all"). R. at 3722 - 3723;
> **(2)** Lot owners were no longer being billed for assessments. R. at 3724;
> **(3)** The original project was divided up among a series of subsequent buyers. R. at 3726 - 3727;
> **(4)** The most recent amendments to the restrictive covenants in 2000, known as the First 2005 Amendments," are now invalidated. R. at 1734, et seq;
> **(5)** In 2010 Moy Toy purchased the property from its immediate predecessor, Renegade Mountain Resort, and Moy Toy itself "has never marketed, has never advertised any lots for sale, and has conducted no development since its purchase in 2010. It has never prepared a development plan or any proposed plats." R. at 3729;
> **(6)** "not a single lot has been developed," since 2010. R. at 3729; and
> **(7)** "it has been over forty years since the first unit or lot was sold." R. at 3746.

Plaintiffs' own expert denied there was any discernible plan of development:

> Is it their plan to complete development of the plan that was instituted in 1972? I can't understand why a developer would want to continue with a plan that has failed year after year; developer after developer. That just doesn't make sense to me. So I guess my question is what development are they continuing? On what land are they going to build these roads? Are those roads going to the existing platted lots? Are these roads going to existing undeveloped portions of the property? I don't know. Until I can get answers to those questions, I can't tell you if this is a plan or not. T. at 370-371.

The "common property" or easements were never platted nor described with defined locate. T. at 13 (Stipulation).

If there was ever a "plan of development" at all, it never got beyond the very earliest stages of formation, it was an inchoate expectation or, in the words of Plaintiffs' expert, a "failed plan," with no development activity at all, for at least the past 18 years. T. at 323. As to why that occurred, another Plaintiffs' witness, Joseph Looney, said "Well, I think what happened, the prime investor was a man named Sievert who was in the concrete business in Hamburg. He died and the family did not want to continue and the money dried up. Now, in a nutshell, I think that's what happened." T. at 518. Such an unrealized aspiration as this does not support imposition of an easement on a remote grantee situated as was Moy Toy. *Hughes v. New Life Development Corp.*, 387 S.W. 3d 453 (Tenn. 2012); *Arthur v. Lake Tansi Village, Inc.*, 590 S.W.2d 923 (Tenn. 1979); It is the sort of "Topsy" plan described in *Arthur v. Lake Tansi Village, Inc.*, at 928 (Tenn. 1979):

> If restrictive covenants enforceable by the plaintiffs prohibiting the abandoning of the air strip and the relocation of the marina, the sand beach and a portion of the golf course arising from a general plan the development do exist, these arose at the time the plaintiffs or their predecessors in title or their predecessors purchased found, 'that the defendant, for the past several years has put into effect an overall development plan, which includes the alternation or relocation of certain golf holes, a sand beach, and a boat marina together with the abandonment of a grass landing strip for small aircraft.' The Court of Appeals found specifically that there was no general plan of development in the early stages when plaintiffs or their predecessors purchased. The statement of the Court of Appeals in part is, '... in the early stages the development was like Topsy and no real plan emerged until after the merger was accomplished and a real estate consultant employed.

Arthur v. Lake Tansi Village, Inc., at 928 (Tenn. 1979).

Of particular significance is what the developers' covenants and restrictions had to say. The "First 2005 Amendments" were invalidated by the Trial Court, R. at 3734–3741. This left the declarations and covenants in place which were executed in 1987. R. at 3734. "No one has questioned the validity of Cumberland Gardens Limited Partnership as being the developer of the property in the 1980s. In fact, it was Cumberland Gardens Limited Partnership which recorded an amendment to the original covenants and restrictions for Renegade Resort with bylaws in 1987." R. at 3734. Such 1987 Amendment read in part as follows:

> Notwithstanding any other provision of the declaration covenants and restrictions to the contrary, the developer may in its sole and exclusive discretion choose . . . to build new or additional facilities, without designating those facilities as common properties.

T. at 1786, 1859, 1879.

This language is dispositive, where it effectively retains sole authority to unilaterally alter or amend the development, at least to the extent such plan involves the common properties. It means that there is no basis to apply the "Common Plan" doctrine in the creation of any implied easement on Moy Toy's property; "***the doctrine has no application when, as here, the 'developer has expressly retained the right to deviate from the plan.***" *Lutzak v. Phoenix American Development Partners, L.C.*; No. R3-2015-02117-COA-CV; 2017 WL 4685300 at *7 (Tenn. Ct. App. Oct. 18, 2017).

"Based on all these circumstances, we can only conclude that the amended Declaration (reserving the right to change the plan) does not serve as the basis for implied restrictive covenants, based on a general plan or scheme applicable to [developer's] property outside the platted lots." *Hughes*, 387 S.W.3d at 481.

Indeed, the very definition of "common property," as set out in the 1987 covenants and restrictions, in language duplicating what is found in the First 2005 Amendment, limits such properties to those **specifically described** on the plat. T. at 1880-1881. The parties stipulated that there were no platted "common properties" T. at 13.

There is **no** designation of any "common property" in the plats for the Renegade Mountain Resort (parties' stipulation; T. at 13), and therefore no such common properties are in fact provided for as part of the plan and development at issue. Vol. 60, Ex. 4, *et seq*. These cited provisions of the Covenants and Restrictions are of record in Cumberland County (Vol. 60, Ex. 4) and thus lie within the chain of title for each property owner, putting them on constructive notice. *Innerimages, Inc. v. Newman*, 579 S.W. 3d 29, 41 (Tenn. 2019). No easement lies where, as here, there are no "common property" restrictions which "touch and concern the land" and no showing that the original parties intended that any common property restrictions would "run with the land and bind remote grantees," such as Moy Toy, except to the extent made formally of record. *Gambrell v. Nivens*, 275 S.W.3d 429 (Tenn. Ct. App. 2008).

Finally, it is important to note what happened when the Trial Court below invalidated the "First 2005 Amendment." Such Amendment set out a planned objective to include adjoining properties within the development, these properties included Moy Toy's 800 acres. T. at 366-367. When the Amendment was stricken, Moy Toy's property was left outside the development, which was then left with no plan to incorporate such property. There is no basis for impressing an easement upon Moy Toy's unplatted lots which lie outside the development.

F. Absence of Estoppel

Nowhere in his Order and Memorandum does the Chancellor state that "estoppel" is being invoked as a basis for establishing an implied easement on Moy Toy's property. Nor is estoppel pled by Plaintiffs as a basis for relief in their Third Party Complaint. R. at 1389. There is only the mere comment that states, "Here, Moy Toy effectively negated the RMCC's members easement of enjoyment by failing to maintain these common areas, thereby making them impossible to enjoy." R. at 3747 (Order and Memorandum at p. 30). So while there is no agreement or understanding that estoppel is in fact an issue to be addressed in this proceeding, it is nevertheless briefly examined for the purpose of affirming that it has no place in this proceeding.

Under the right set of facts, a defendant may be estopped from denying the application of an implied easement. *Arthur v. Lake Tansi Village, Inc.*, 590 S.W.2d 929, as when there is evidence that "... the improvements or continued maintenance were done in reliance upon any acts or statements of defendant." *Arthur*, *Id.* at 930. But estoppel is meted out for the sin of commission, not of omission. From all accounts, Moy Toy was not doing anything to induce anyone to do a thing. The Chancellor so found that "Moy Toy has never marketed, has never advertised any lots for sale, and has conducted no development since its purchase in 2010." R. at 3729.

The Chancellor does find that "Numerous members and residents testified that they or other members used the common properties in question; were promised the common properties in question to purchase their property; relied on those promises; and paid dues which in the past

were used to improve and maintain these common properties." R. at 3746. There is no record evidence supporting such a sweeping generalization, nothing either there in that finding or in the record itself relates such promises or use to these Defendants. It is reasonable to infer in any case that such use was strictly on a permissive basis.

The Chancellor is seen to rely heavily on *Innerimages, Inc. v. Newman*, 579 S.W.3d 29 (Tenn. Ct. App. 2019), discussing that decision for three pages of his Order in finding support for the imposition of a lien on common properties, on behalf of the HOA. R. at 3744-3747. That decision presupposes the involvement of a "developer." But here the Chancellor decrees that no developer has existed for the past several decades, rendering the case irrelevant.

G. Summary

The Chancellor erred in placing an equitable servitude on the property of Defendant Moy Toy. Initially, the findings supporting this highly disfavored measure were self-contradictory. Moreover, there is nothing in the record of this nascent development describing where the location or bounds of any common areas might lay, creating additional problems about how any easement might be sited. Further, the fact that there is no defined boundaries of these common areas affirms that the development had not yet reached the stage where it might fairly sustain expectations of its residents, or to create legally sustainable entitlements. Moreover, the Declarations of Covenant gave the developers sole, exclusive discretion regarding common areas, leaving no room for residents to independently to claim any, without consent of the developer, thereby eliminating the basis for equity to itself invoke such control. Additionally, some of the property of Moy Toy lies outside the development, abutting its boundaries and, after elimination of the First 2005 Amendments, there was no existing plan which might ground effort

to encroach on Moy Toy's lands in the name of any common development. Moy Toy did not itself induce, promote or create any expectations in that regard so as to warrant any finding of an easement of any sort. Moreover, the Trial Court improperly invoked *Innerimages Inc. v. Newman,* where such invocation contradicted its finding that Moy Toy is supposedly not a developer, and where *Innerimages* represents an argument that was not within the pleadings and was raised *sua sponte* without opportunity for Defendants to anticipate its use, thus resulting in substantial prejudice.

VI. WHETHER THE CHANCELLOR ERRED IN UPHOLDING THE SEPTEMBER 2, 2011, SPECIAL ELECTION WHERE THERE WAS APPLICATION OF AN IMPROPER STANDARD, WHERE THE DECISION WAS ILLOGICAL, AND WHERE IMPROPER EFFECT WAS GIVEN TO EVIDENCE

The Chancellor determined that the "Owners Board" (i.e., Plaintiffs) for RMCC ("HOA") was validly elected in a special meeting which took place on September 2, 2011. R. at 3740-3744. Such determination by the Trial Court in 2021 is in error, for a number of reasons.

First, the Trial Court's treatment of the election is inconsistent with the Trial Court's finding that there has been no valid developer for the resort since developer rights were not transferred Cumberland Gardens Limited Partnership to Cumberland Gardens Acquisition Co." R. at 3735. That sale took place on June 4, 1991. T. at 514. This means there has been no legally recognizable developer of the resort for the past 30 years.

Under the Trial Court's finding, no further properties may be added to the development after 1991, for only the developer may add new properties. Vol. 60, Ex. 4, (First Amendment to Declaration of Covenants and Restrictions at ¶ 12, Article II, Section 4 – "Additions Limited to

Developer"); *see also* T. at 1891. It follows that lot owners whose properties were not within the development as of 1991 did not qualify for club membership or have a duty to pay dues (T. at 1891-1892), since there was no developer to add them to the project, and were thus unable to vote.

Therefore, the Chancellor erred by basing his analysis of the voting conducted in September, 2011, on the 2010 membership role since only those owners whose paid-up memberships predating the 1991 sale would have been eligible to vote in light of the instant ruling. R. at 3741. No effort is made by the Trial Court to reconcile its ruling on developer status with the conflicting impact on the HOA, RMCC. *Spight v. Spight (Tenn. Ct. App. March 21, 2019) at* *1("Because there are no findings to resolve the inconsistency, we vacate the trial court's award of retroactive child support.")

Second, the current by-laws for RMCC were invalidated by the Trial Court, upon grounds that the by-laws "... were not approved by a vote of the RMCC membership which was required by the 1987 amendments." R. at 3738. Those were the by-laws upon which the "Owner Board was operating under during the course of its Special meeting of Sept. 2, 2011, and which it sought to amend at such meeting, and under which the members of the Owner Board were elected. Vol. 76, Ex. 58, p. 99. The Trial Court having invalidated the basis upon which the Board might act, the status quo now reverts to the state in which this Court originally found it, when the Chancellor first determined that neither the "Developer's Board" nor the "Owner's Board" was validly constituted. *Haiser II* at *1.

CONCLUSION

In sum, the Defendants, Appellants herein, respectfully pray for entry of judgment dismissing Plaintiffs suit on grounds that it is not justiciable where it fails to confer subject matter jurisdiction upon the Court inasmuch as it does not join all entities which are necessary and indispensable parties, including each property owner on Renegade Mountain, the members of the Renegade Mountain Community Club, Moy Toy's past predecessors in title to developers rights, as well as the Renegade Mountain Community Club.

Alternatively, Appellants request of the Court that it reverse the lower court's rulings where, first, the trial court erred in finding that Moy Toy has no developer rights, where the Court failed to consider Moy Toy's defenses based on standing and the statute of limitations, where the Trial Court abused its discretion by imposing an equitable lien on Defendant's property, and where the Trial Court improperly credited Plaintiffs' self-appointment through purported election, as Directors of the Renegade Mountain Community Club.

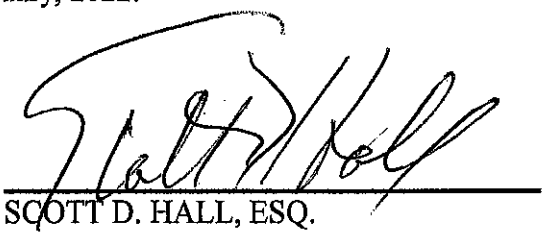
RESPECTFULLY submitted this the 10th day of February, 2022.

SCOTT D. HALL, ESQ.
BPR#14874
Attorney for Appellants
374 Forks of the River Parkway
Sevierville, Tennessee 37862
(865) 428-9900
scott@scottdhallesq.com

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Appellants complies with the page limitation specified by Rule 27 of the Tennessee Rules of Appellate Procedure. The undersigned counsel confirms that the Argument contains a page count of 50 pursuant to the word processing system used to prepare the Brief.

Respectfully submitted this 10th day of February, 2022.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing **BRIEF OF APPELLANTS** has been served upon the following counsel for the parties in interest herein by delivering the same to the offices of said counsel via electronic mail or by mailing same to the offices of said counsel by United States Mail with sufficient postage thereon to carry the same to its destination, in accordance with Rule 20 of the Tennessee Rules of Appellate Procedure.

Melanie E. Davis, Esq.
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Boston & Poore
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Crossville, TN 38555

Michael Haines
6 Silver Drive
Burlington, CT 06013

This 10th day of February, 2022.

SCOTT D. HALL, ESQ. BPR#14874
374 Forks of the River Parkway
Sevierville, Tennessee 37862
Attorney for Appellants Moy Toy
scott@scottdhallesq.com

APPENDIX A

IN THE CHANCERY COURT FOR CUMBERLAND COUNTY, TENNESSEE

RENEGADE RESORT, LLC a Tennessee limited liability company; RENEGADE MOUNTAIN GOLF CLUB, LLC, A Tennessee limited liability company,	
Plaintiffs,	Cumberland County Docket No.: 09-CH-229
v.	
LARRY K. MCMEANS, a citizen and resident of the state of Kansas; LKM GROUP, LLC, a Tennessee limited liability Company; TIG HOLDINGS, LLC, a Kansas limited liability company, and doing business in the state of Tennessee; PHIL G. MCCOY, a citizen and resident of the state of Kansas; and MARSHALL L. HIX, substitute trustee,	Knox County Docket No. 171280-3
Defendants.	

FILED 3:20 AM PM
Date 1-15 2010 at
Entered 1-15-10
SUE TOLLETT, CLERK & MASTER
Cumberland County, Crossville, TN
BY

JUDGMENT AND AGREED ORDER

This matter having come on for trial before the Honorable Mike Moyers, Chancellor sitting by Interchange, for trial on the 11th, 12th, and 13th day of January, 2010, and upon the testimony of the parties in open Court, the introduction of exhibits, the statements and arguments of counsel, and the Court in possession of the entered record of this cause, from all of which certain findings of fact and conclusions of law were reached, and it is therefore ORDERED, ADJUDGED and DECREED as follows:

1. The contract ("Standard Offer, Agreement and Escrow") and all exhibits thereto as amended from time to time, between Renegade Resorts, LLC/Renegade Mountain Golf Club, LLC, as sellers, and LKM Group, LLC, as purchaser, is declared

terminated and of no further effect, and the Defendants LKM Group, LLC and Larry K. McMeans shall by January 15, 2015 relinquish possession of, and all claims to, the real property identified in Exhibit A, to said contract, (except as previously conveyed of record) and identified in Exhibit A to the Deed of Trust and fixture filing recorded at Book 1103, Page 923-934 in the Register's Office for Cumberland County, Tennessee, executed by Renegade Mountain Golf Club, LLC, identified herein.

2. No damages shall be awarded between Renegade Resorts, LLC/Renegade Mountain Golf Club, LLC and LKM Group, LLC/Larry K. McMeans upon the original Complaint and First Amended Complaint of Renegade Resorts, LLC/Renegade Mountain Golf Club, LLC vs. LKM Group, LLC, or upon the Counter-Claim and Amended Counter-Claim of LKM Group, LLC and Larry K. McMeans, and none of these parties shall recover damages or other relief from the other except as set forth herein. Except as otherwise provided in paragraph 3 immediately below, all such claims and counter-claims of the parties named in this paragraph 2 and those claims against Marshall L. Hix, Substitute Trustee, are dismissed with prejudice, and their right to appeal or rehearing is waived.

3. The claim of equitable lien or title by LKM Group, LLC and/or Larry K. McMeans, or their successors and assigns, if any, is dismissed, with prejudice, upon agreement of the parties and the Notice of Lien Lis Pendens recorded May 29, 2009 at document no. 09007187 in Register's Office for Cumberland County, Tennessee is terminated, and LKM Group, LLC and Larry K. McMeans shall immediately upon the entry of the Order cause such Notice of Lien Lis Pendens, and any other claim, cloud, or encumbrance upon the title to the real estate of Renegade Resorts, LLC and

Renegade Mountain Golf Club, LLC caused or created by LKM Group, LLC and/or Larry K. McMeans to be terminated of record. A certified copy of this Order may also be registered for this purpose of effectuating the termination of any clouds, claims, or encumbrances of LKM Group, LLC or Larry K. McMeans.

4. The authorization of TIG Holdings, LLC to LKM Group, LLC, Renegade Management Company, or Larry K. McMeans, and their agents and assigns, if any, for the maintenance or entry upon the real property of Renegade Mountain Golf Club, LLC is terminated and of no further effect upon the entry of this Order.

5. Pursuant to the agreement of Renegade Mountain Golf Club, LLC and TIG Holdings, LLC, the Counter-Claim of TIG Holdings, LLC to enforce the Zions Bank Promissory Note and Deed of Trust recorded at Book 1103, Pages 912-934 shall be allowed, and the original and First Amended Claim of Renegade Resorts, LLC and Renegade Mountain Golf Club, LLC against TIG Holdings, LLC and Phil G. McCoy shall be dismissed with prejudice. The enforcement of the Zions First National Bank Promissory Note and Deed of Trust against Renegade Mountain Golf Club, LLC, and its guarantors, shall be subject to the separate agreement of TIG Holdings, LLC and Renegade Mountain Golf Club, LLC dated January 14, 2010, to the extent the agreement between the parties modifies the Loan Agreement originally entered into between Zions and Renegade Golf Club. Except as to those modifications, the terms and conditions of the Loan Agreement shall continue to apply. Except for this Court's retention of jurisdiction set forth in paragraph 6, this Order is a final judgment pursuant to Tennessee Rule of Civil Procedure 54.02, there being no just reason for delay in the entry hereof as a final judgment, which entry is hereby directed.

6. Upon having the express agreement of Renegade Mountain Golf Club, LLC and TIG Holdings, LLC the Court hereby Orders said parties to perform their obligations with respect to the settlement between these parties, as said agreement was announced and described on January 13, 2010, and as more specifically set forth in their separate agreement. The Court retains jurisdiction over these parties and Joseph L. Wucher only for the purpose of enforcement of said agreement.

7. The Clerk and Master is directed to pay from the funds on deposit in the registry of the Court in this matter, immediately as follows:

a) the sum of $300,000.00 to TIG Holdings, LLC, in care of Patrick K. McMonigle, Esq., 4420 Madison Avenue, Kansas City, Missouri, 64111.

b) the remaining balance to Renegade Mountain Golf, LLC, in care of Joseph L. Wucher, 18 Barcelona Circle, Redwood City, California, 94065.

8. The Temporary Injunction previously issued in this matter is dismissed, and the Bond cash deposit paid by Plaintiff(s) is discharged and released.

9. Each party shall bear its own attorneys fees, expenses of litigation, discretionary costs, and expenses.

10. The costs of this cause are taxed to LKM Group, LLC, to be paid upon entry of this Order.

ENTERED this 14th day of January, 2010.

CHANCELLOR

APPROVED FOR ENTRY:

WISE & REEVES, P.C.

By: _____
William A. Reeves, SBN 5343
Attorney for Plaintiffs
625 S. Gay Street, Suite 160
Knoxville, TN 37902

By: _____
Marshall L. Hix, Esq.
315 Deadrick Street, Suite 1230
Nashville, TN 37238

By: _____
Patrick K. McMonigle, Esq.
4420 Madison Avenue
Kansas City, MO 64111-3407

By: _____
Joseph L. Wucher, Individually

57 50

FILED

IN THE CHANCERY COURT FOR KNOX COUNTY, TENNESSEE

2007 DEC 28 PM 12:10

RICHARD G. HOGAN

RENEGADE RESORT, LLC
a Tennessee limited liability company,

and

RENEGADE MOUNTAIN GOLF CLUB, LLC,
a Tennessee limited liability company,

Plaintiffs,

v.

Docket No. 171280-3

#09-CH-229

LARRY K. MCMEANS, a citizen and resident of the state of Kansas,

and

LKM GROUP, LLC,
a Tennessee limited liability company,

and

TIG HOLDINGS, LLC,
a Kansas limited liability company, and doing business in the state of Tennessee

and

PHIL G. MCCOY,
a citizen and resident of the state of Kansas,

and

MARSHALL L. HIX, substitute trustee,

Defendants.

FILED
Date 3-20 2009 1:30 AM PM
Entered:
SUE TOLLETT, CLERK & MASTER
Cumberland County, Crossville, TN
BY: G

COMPLAINT

Come the Plaintiffs, Renegade Resorts, LLC and Renegade Mountain Golf Club, LLC, and for their Complaint would show this honorable court the following:

I. PARTIES

1. The Plaintiffs are limited liability companies organized and operated under the laws of the state of Tennessee.

2. The Defendant Larry K. McMeans is a citizen of the state of Kansas, but resides on a part-time basis in Cumberland County, Tennessee. The Defendant Larry K. McMeans may be served with process at 4501 West 126th Street, Leawood, Kansas 66209.

3. LKM Group, LLC is a Tennessee limited liability company, organized and operating under the laws of the state of Tennessee, and may be served with process through its registered agent Marshall L. Hix, Esq., at 315 Deadrick Street, Suite 1230, Nashville, Tennessee, 37238.

4. TIG Holdings, LLC is a Kansas limited liability company, organized and operating under the laws of the state of Kansas, but doing business in the state of Tennessee, and may be served with process through its registered agent Phil G. McCoy at 1001 7th Street Trafficway, Kansas City, Kansas, 66105.

5. Phil G. McCoy is a citizen and resident of the state of Kansas, but is engaged in certain business transactions within the state of Tennessee, and may be served with process at 1001 7th Street Trafficway, Kansas City, Kansas, 66105.

6. Marshall L. Hix is a citizen and resident of the State of Tennessee and may be severed with process at 1315 Deadrick Street, Suite 1230, Nashville, Tennessee, 37238.

II. JURISDICTION

7. The Plaintiffs own certain real property located in Cumberland County, Tennessee, generally known as Renegade Resort, which includes substantial undeveloped real property and a golf course. The Plaintiffs entered into a written contract with the Defendants LKM Group, LLC and Larry K. McMeans, in September 2004, for the sale of such real property to LKM Group, LLC and/or Larry K. McMeans. The parties' written contract was executed by LKM Group, LLC in Knox County, Tennessee, and required the parties to perform by making payments and delivering deeds to an escrow agent located in Knox County, Tennessee.

8. The Defendant TIG Holdings, LLC was formed in August, 2007, by the Defendant Phillip McCoy, in the state of Kansas, for the purpose of purchasing a promissory note upon which the Plaintiff, Renegade Mountain Golf Club, LLC, was a debtor. The Defendant Phillip McCoy is a member of LKM Group, LLC, and a member of TIG Holdings, LLC, and has engaged in activities within the state of Tennessee, including the recordation of documents for the purpose of affecting the sale of the real property of the Plaintiffs. The Defendants have all engaged in certain collusive activity within the state of Tennessee for the purpose of avoiding or minimizing the effect of the breach of the parties' written real estate contract by LKM Group, LLC and Larry K. McMeans.

9. The Defendant Marshall L. Hix, Esq., as Substitute Trustee, has issued a Foreclosure Sale Notice dated December 19, 2007, and a "corrected" Foreclosure Sale Notice dated December 20, 2000, for the real property owned by Plaintiff Renegade Moutain Golf Course, LLC.

III. Facts

10. The Plaintiff, Renegade Resort, LLC, owns substantial real property in Cumberland County, Tennessee consisting of approximately two thousand five hundred (2,500) acres of developed and undeveloped real property, generally known as Renegade Resort. The Plaintiff Renegade Mountain Golf Club, LLC, owns real property contiguous to the real property of Renegade Resorts, LLC, which is generally described as an eighteen (18) hole golf course, although such golf course is not operational at this time.

11. The Defendant LKM Group, LLC was formed by the Defendant Larry K. McMeans for the purpose of entering into the contract to purchase the real property owned by the Plaintiffs. The Defendant Phillip McCoy is a member of LKM Group, LLC, and has made substantial investments or loans to it. The real estate contract was executed on September 9 and September 10, 2004, and required the Defendants to make cash payments totaling One Million Six Hundred Thousand Dollars ($1,600,000.00) to Plaintiffs, and assume existing mortgage indebtedness from two lending institutions, totaling approximately Three Million Dollars ($3,000,000.00). The Defendants were also required, pursuant to the parties' real estate contract, to assume and pay other indebtedness, including:

a. Plaintiffs' trade payables, in an amount not to exceed Nine Hundred Thousand Dollars ($900,000.00);

b. Two loans payable to Union Planters Bank in the amounts of Three Hundred Fifty Thousand Dollars ($350,000.00) and Three Hundred Thirty Thousand Dollars ($330,000.00) respectively;

c. The Alleghany Enterprises loan in an amount not to exceed Three Hundred Thirty Thousand Dollars ($330,000.00); and

d. A condominium and truck loan payable to Union Planters Bank in the amount of Ninety Thousand Dollars ($90,000.00).

e. The Defendants also agreed to purchase a minimum of twenty-three (23) residential subdivision lots at specific prices from specific individual owners.

12. The parties' real estate contract allowed the Defendants to assume daily operation of the properties, and to undertake renovation of the golf course property. The Defendants were contractually required to make all monthly mortgage installment payments, including all payments to Zions National Bank, Business Express Bank (formally Amresco), and Union Planters Bank, pending the assumption of all listed debts by the Defendants and the release from such debts of Plaintiffs and Plaintiffs individual members.

13. The cash payments were required by the real estate contract to be paid to the Plaintiffs on the following schedule.

a. Five Hundred Thousand Dollars ($500,000.00) down payment.

b. Five Hundred Thousand Dollars ($500,000.00) payable on December 1, 2004.

c. Six Hundred Thousand Dollars ($600,000.00) payable on April 1, 2005.

14. The total purchase consideration to be paid by Defendants for the Plaintiffs' real property was approximately Six Million Six Hundred Thousand Dollars

($6,600,000.00). The total which Defendants agreed to pay for the purchase of lots from third parties was approximately Two Million Two Hundred Five Thousand Dollars ($2,205,000.00).

15. The Defendants were unwilling or unable to comply with the terms of the parties' real estate contract. The time for performance was extended by written agreement of the parties on two occasions, with the last extension agreement expiring in November, 2006. The Defendants made the monthly mortgage payments to Zions National Bank and Business Express Bank until August, 2006. The Defendants were unable or unwilling to make the second and third cash payments due to Plaintiffs, or to cause the Plaintiffs to be released from the indebtedness to Zions National Bank and Business Express Bank. Time was of the essence of the parties' real estate contract, and the Defendant Larry K. McMeans has admitted in November, 2007 that, "getting the funds to pay. . .the full purchase price . . .has just not worked". . .

16. The Defendants did pay the indebtedness to Alleghany Enterprise Partners in full by paying the amount of Two Hundred Twenty Five Thousand Dollars $225,000.00. The Plaintiffs, or individual members of the Plaintiff LLC's, have been required to pay the Union Planters debt in the respective amounts of Three Hundred Fifty Thousand Dollars ($350,000.00) and Three Hundred Thousand Dollars ($300,000.00) as a result of the failure or refusal of the Defendants to make such contractually required payments.

17. In attempting to renovate the golf course property the Defendants entered into a contract with a golf course renovation company. As a result of the Defendants' failure to make full and timely payment to such contractor, the Defendants

allowed a Notice of Lien to be placed upon the real property of the Plaintiff Renegade Mountain Golf Club, LLC, on November 8, 2006. The payment issue between Defendants and the golf course contractor was apparently ultimately resolved, and the Lien was released on October 15, 2007, but Plaintiffs incurred expenses as a result.

18. Following the default of LKM Group, LLC and Larry K. McMeans of the parties' real estate contract, the Defendants caused three (3) Notices of Mechanics and Materialmens' Liens to be recorded against the Plaintiffs' real property on March 6, 2007. The Plaintiffs immediately demanded the Defendants release and terminate such Liens because they were clearly illegal, but the Defendants did not cause such Liens to be released until November 27, 2007. The Defendants had no purpose for the recording of such Liens other than to cause Plaintiffs to have unmarketable title to their real property, and the Plaintiffs incurred expenses as a result.

19. As part of the Defendants' efforts to interfere with the marketability of the Plaintiffs' property, the Defendant, Phillip McCoy, formed the Defendant TIG Holdings, LLC, in August, 2007, as a Kansas limited liability company, for the sole purpose of purchasing the Plaintiff's mortgage indebtedness payable to Zions National Bank. The Zions National Bank loan to Plaintiff was in default as a direct result of the failure of the Defendants to make the monthly mortgage payments, which caused Zions National Bank to issue a Notice of Foreclosure. Instead of paying the Zions National Bank indebtedness in full, or assuming the indebtedness as required by the parties' real estate contract, the Defendants purchased the Zions National Bank note after causing it to be subordinated to the illegal Mechanics and Materialmens' Lien which the Defendants recorded in March, 2007. By coordinating these activities, the

Defendants, and each of them, intentionally, or negligently, engaged in a course of action to avoid the consequence of their breach of the parties' real estate contract, and to prevent the Plaintiffs from being able to sell their real estate. The Defendants also immediately began threatening to foreclose on the assigned Zions National Bank note and Deed of Trust.

20. The Defendants are refusing to vacate the Plaintiffs' real property, and continued to threaten Plaintiffs with foreclosure of the assigned Zions National Bank Deed of Trust, which Defendants purchased on August 20, 2007. The Defendant Larry K. McMeans continues to reside near the Plaintiffs' real property and to falsely represent himself to the public as a being a representative of the Plaintiffs.

21. On December 19, 2007, the Defendants caused their attorney, Marshall L. Hix, Esq., as Substitute Trustee, to issue a Foreclosure Sale Notice based on the Zions National Bank Deed of Trust, which was assigned to the Defendants on August 20, 2007 (Exhibit 1).

22. The original Foreclosure Sale Notice, issued by Marshall L. Hix, Esq. as substitute trustee on December 19, 2007, misrepresents that Zions National Bank, as owner and holder of the indebtedness, has demanded that the real property be advertised and sold. In a subsequent letter dated December 20, 2007, Mr. Hix attempts to replace page one of the Foreclosure Sale Notice, and recites that the Defendant TIG Holdings, LLC was assigned the Zions National Bank Deed of Trust and that the Defendants have purchased such indebtedness. The Plaintiffs allege that the Defendants have not acquired the Zion's indebtedness and note in good faith, and that the Defendants are fully aware of Plaintiffs' contract rights to require the

Defendants to pay such indebtedness in full, and that the Defendants are not holders in due course.

23. The Plaintiffs' obligation to pay the Zions National Bank indebtedness has been extinguished by the actions of the Defendants, and the Zions National Bank note and deed of trust should be reformed and cancelled, to reflect that such indebtedness is satisfied in full, pursuant to the equitable doctrines of reformation, subrogation or constructive trust.

24. Alternatively, the proceeds of any sale conducted by the substitute trustee should be paid into the registry of this court to be held pending the final hearing in this matter, and the delivery of a substitute trustee's deed to the Defendants, or any of Defendants' alter ego entities, should be enjoined pending the final hearing of this matter.

25. The previous efforts of the Defendants to create clouds on the title to Plaintiff's real property appear to have subordinated the priority of the Zions National Bank indebtedness to the indebtedness of Business Loans Express Bank, as a result of the Defendants' recordation of a document entitled Deed of Trust Subordination Agreement on September 24, 2007 (Exhibit 2). The stated purpose of that document was to subordinate the Zions National Bank Deed of Trust to the Defendants' previously recorded illegal Notice of Mechanics and Materialman's Liens (recorded March 6, 2007). The Defendants' Lien Notices were recorded subsequent to the Business Loans Express Deed of Trust, and the Defendants' Deed of Trust Subordination Agreement (Exhibit 2) appears to have caused the Business Loans

Express Deed of Trust to obtain a first priority position above the Defendants' rights (if any) under the assigned Zions National Bank Deed of Trust.

24. Plaintiffs affirmatively aver that Business Loan Express is a necessary party if it is defendants present contention that the Zions (Defendants') Deed of Trust has priority to the Business Loan Express Deed of Trust, and if the Zions (Defendants') indebtedness is not determined by the this Court to have been fully satisfied by the Defendants purchase of such indebtedness from Zions National Bank.

PREMISES CONSIDERED, PLAINTIFFS PRAY AS FOLLOWS:

1. That a default be declared and decreed by LKM Group, LLC and Larry K. McMeans of the contract to purchase real estate from the Plaintiffs, and Plaintiffs be awarded judgment for all unpaid contract amounts, not to exceed Seven Million Four Hundred Twenty Thousand Dollars ($7,420,000.00), exclusive of interest and expenses.

2. That it be declared and decreed that LKM Group, LLC and Larry McMeans have engaged in a civil conspiracy with Phil G. McCoy and TIG Holdings, LLC for the purpose of avoiding the obligations of LKM Group and Larry McMeans, and to preserve the financial investment of McCoy in LKM Group, LLC, by the Defendants' purchase of the Deed of Trust from Zions National Bank, and the initiation of a foreclosure sale against the property of Renegade Mountain Golf Course, LLC.

3. That it be declared and decreed that Plaintiffs' obligations have been fully satisfied and extinguished as to the former Zions National Bank indebtedness and Deed of Trust.

4. As alternative relief to paragraph three (3), that it be declared and decreed that the former Zions National Bank indebtedness and Deed of Trust have been subordinated to the indebtedness and the Deed of Trust of Business Loan Express Bank, as a result of the Defendants' Deed of Trust Subordination Agreement dated August 20, 2007 (Exhibit 2).

5. That a temporary injunction be issued against the Defendants, enjoining any sale at foreclosure of the real estate of Renegade Mountain Golf Course, LLC, pending the final hearing in this matter.

6. As alternative relief to paragraph 5, that a mandatory temporary injunction be issued requiring the Defendants to pay all proceeds from any sale at foreclosure of the real estate of Renegade Mountain Golf Course, LLC into the registry of this Court, pending the final hearing in this matter.

7. That the Defendants LKM Group, LLC and Larry McMeans be required to instanter remove themselves and their personal property from the real property of the Plaintiffs, pursuant to T.C.A. § 39-14-405.

8. That judgment be awarded to Plaintiffs and against the Defendants LKM Group, LLC, TIG Holdings, LLC, Phil G. McCoy, individually and Larry K. McMeans, individually, for all damages determined and decreed in this matter, including prejudgment interest (T.C.A. § 47-14-123), as a result of breach of contract, trespass, libel of title to real property, civil conspiracy to avoid contractual obligations and civil conspiracy to defraud, damage to or conversion of personal or real property of Plaintiffs, and general damages.

9. That judgment be awarded to Plaintiffs and against the Defendants LKM Group, LLC, TIG Holdings, LLC, Phillip McCoy, individually and Larry K. McMeans, for attorneys' fees and litigation expenses incurred in this matter, pursuant to the parties' contract, and pursuant to the Defendants' libel of title of Plaintiffs' property.

10. That judgment be awarded to Plaintiffs and against each of the Defendants LKM Group, LLC, TIG Holdings, LLC, Phillip McCoy, individually and Larry K. McMeans, for exemplary damages for the Defendants' intentional and/or egregious actions and/or omissions.

11. That the Defendants be required to to appear and show cause, if any they may have, why the temporary injunctions prayed for herein should not be ordered, with such hearing to be held expeditiously.

12. That the Plaintiff have such other, further and general relief which they may show themselves entitled upon the hearing of this cause.

THIS IS THE FIRST APPLICATION FOR EXTRAORDINARY RELIEF IN THIS CAUSE.

RENEGADE RESORT, LLC

By: Joseph L. Wucher by WKA
JOSEPH L. WUCHER, Managing Member

RENEGADE MOUNTAIN GOLF CLUB, LLC

By: Joseph L. Wucher by WKA
JOSEPH L. WUCHER, Managing Member

WISE & REEVES, P.C.

By: William A Reeves

William A. Reeves, SBN 5343
Attorney for Plaintiffs
625 S. Gay Street, Suite 160
Knoxville, TN 37902
(865) 544-1199

BOND

We acknowledge ourselves as surety for all court costs and taxes in this case in accordance with T. C. A. 20-12-120.

PRINCIPAL:

RENEGADE RESORT, LLC
RENEGADE MOUNTAIN GOLF CLUB, LLC

By: Joseph L Wucher by WAR

William A. Reeves, SBN 5343
Two Centre Square, Suite 160
625 S. Gay Street
Knoxville, TN 37902
(865) 544-1199

SURETY: WISE & REEVES, P. C.

By: William A Reeves

William A. Reeves, SBN 5343
Two Centre Square, Suite 160
625 S. Gay Street
Knoxville, TN 37902
(865) 544-1199

BK/PG: 1275/1638-1639
07393844

2 PGS : AL - ASSIGNMENT	
REGINA BATCH: 6733	
09/24/2007 - 11:51:32 AM	
VALUE	0.00
MORTGAGE TAX	0.00
VALUE	0.00
MORTGAGE TAX	0.00
TRANSFER TAX	0.00
RECORDING FEE	10.00
DP FEE	2.00
REGISTER'S FEE	0.00
TOTAL AMOUNT	12.00

STATE OF TENNESSEE, CUMBERLAND COUNTY
JUDY GRAHAM SWALLOWS
REGISTER OF DEEDS

This Instrument Prepared By:
Miller & Martin PLLC
This Instrument Prepared By:
Miller & Martin PLLC
W. Neal McBrayer
1200 One Nashville Place
150 Fourth Avenue North
Nashville, TN 37219

ASSIGNMENT OF DEED OF TRUST AND FIXTURE FILING AND ASSIGNMENT OF ASSIGNMENT OF LEASE
(Without Recourse)

FOR VALUE RECEIVED, the undersigned, **ZIONS FIRST NATIONAL BANK**, ("Assignor"), whose address is One South Main, Suite 700, Salt Lake City, Utah 84111; does hereby grant, bargain, sell, transfer, convey and assign to TIG Holdings, LLC, a Kansas limited liability company ("Assignee"), without recourse, all Assignor's right, title and interest in and to the following:

- Deed of Trust and Fixture Filing dated April 19, 2002, from Renegade Mountain Golf Club, LLC to Harry D. Sabine, P.C., Trustee, of record in Book 1103, pages 912-934, Register's Office, Cumberland County, Tennessee, securing $1,650,000.00 to Assignor.
- Assignment of Lease dated April 19, 2002, from Renegade Mountain Golf Club, LLC to Assignor of record at Book 1103, pages 935-952, Register's Office, Cumberland County, Tennessee.

Together with any and all notes and obligations therein described, the debt secured thereby and all sums of money due and to become due thereon, with the interest provided for therein.

IN WITNESS WHEREOF, Assignor has executed this Assignment of Deed of Trust and Fixture Filing and Assignment of Assignment of Lease this 20th day of August, 2007.

ZIONS FIRST NATIONAL BANK

By: _____
Title: VP

Boston

EXHIBIT
tabbies
1

BK/PG: 1275/1640-1641
07393845

2 PGS : AL - SUBORDINATION AGR.
REGINA BATCH: 6733
09/24/2007 - 11:51:32 AM
VALUE 0.00
09/24/2007 - 11:51:32 AM
VALUE 0.00
MORTGAGE TAX 0.00
TRANSFER TAX 0.00
RECORDING FEE 10.00
DP FEE 2.00
REGISTER'S FEE 0.00
TOTAL AMOUNT 12.00
STATE OF TENNESSEE, CUMBERLAND COUNTY
JUDY GRAHAM SWALLOWS
REGISTER OF DEEDS

This Instrument Prepared By:
Miller & Martin PLLC
W. Neal McBrayer
1200 One Nashville Place
150 Fourth Avenue North
Nashville, TN 37219

DEED OF TRUST SUBORDINATION AGREEMENT

(Deed of Trust and Fixture Filing Recorded in Book 1103, Pages 912-934, Register's Office, Cumberland County, Tennessee)

FOR AND IN CONSIDERATION OF the sum of Ten Dollars ($10.00) cash in hand paid and of other good and valuable consideration, the receipt and legal sufficiency of all of which are hereby acknowledged, and pursuant to the terms of that certain Agreement Regarding Sale of Loan dated August 13, 2007, **ZIONS FIRST NATIONAL BANK**, ("Creditor"), declaring that it is the true and lawful owner and holder of that certain Promissory Note dated April 19, 2002, executed by **RENEGADE MOUNTAIN GOLF CLUB, LLC** ("Borrower") in the original principal amount of One Million Six Hundred Fifty Thousand and No/100 Dollars ($1,650,000.00) ("Creditor's Note"), which Creditor's Note is secured by, among other things, that certain Deed of Trust and Fixture Filing dated April 19, 2002 executed by Borrower in favor of Creditor, recorded in Book 1103, Pages 912-934, Register's Office, Cumberland County, Tennessee ("Creditor's Deed of Trust"), does hereby subordinate and make inferior the lien and priority of the Creditor's Deed of Trust to the lien and priority of that certain Notice of Mechanics' and Materialmen's Lien acknowledged March 2, 2007, filed by **LKM GROUP, LLC**, ("Senior Creditor") recorded in Book 1257, Pages 1084-1096, Register's Office, Cumberland County, Tennessee, as same may hereafter be amended or modified.

This Subordination Agreement shall be binding upon the successors and assigns of Creditor and shall enure to the benefit of the successors and assigns of Senior Creditor.

IN WITNESS WHEREOF, Creditor has caused this instrument to be executed as of the 10 day of August, 2007.

CREDITOR:

ZIONS FIRST NATIONAL BANK

By: _____

Title: V.P.

EXHIBIT 2

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STATE OF UTAH)
)
COUNTY OF SALT LAKE)

Before me, a Notary Public of the State and County aforesaid, personally appeared Ken Leigh, with whom I am personally acquainted (or proved to me on the basis of satisfactory evidence) and who, upon oath, acknowledged himself to be Vice President of Zions First National Bank, the within named bargainor, and that he, as such officer, executed the foregoing instrument for the purposes therein contained, by signing the name of the bank by himself as such officer.

WITNESS my hand and seal, this 20 day of August, 2007.

Elaine O'Connell
NOTARY PUBLIC

My Commission Expires:
Aug 1.09

NOTARY PUBLIC
ELAINE O'CONNELL
10 East South Temple #600
Salt Lake City, UT 84133
My Commission Expires
August 1, 2009
STATE OF UTAH