IN THE SUPREME COURT OF MISSOURI

No. SC94693

THE ARBORS AT SUGAR CREEK HOMEOWNERS ASSOCIATION, et al.,

Plaintiffs/Appellants,

v.

JEFFERSON BANK & TRUST COMPANY, INC., et al.,

Defendants/Respondents.

Appeal from the Circuit Court of St. Louis County
Hon. Gloria C. Reno & Hon. James R. Hartenbach (ret.)

APPELLANTS/CROSS-RESPONDENTS' SUBSTITUTE REPLY BRIEF AS APPELLANTS AND RESPONSE BRIEF AS CROSS-RESPONDENTS

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INTRODUCTION

Appellants/Cross-Respondents submit this combined brief as their reply to Defendants/Respondents' response brief and as their response to the points on appeal raised by Cross-Appellant Jefferson Bank in its cross-appeal.

Capitalized terms and abbreviated citations used herein shall have the meanings given to them in Appellants/Cross-Respondents' initial substitute brief unless otherwise defined.

SUPPLEMENTAL STATEMENT OF FACTS

A. Discovery Related to McKelvey's Planned Construction.

The Homeowners requested certain information from McKelvey related to its plans for construction within the Subdivision, but McKelvey initially refused to provide such information. (L.F. 492 ¶ 10, 513 ¶ 4.) The Homeowners then sought discovery from a number of customers McKelvey had under contract to build houses on vacant lots in the Subdivision. (L.F. 453, 507, 515.) In addition to information concerning McKelvey's plans for construction, the Homeowners sought information from McKelvey's customers regarding their communications with McKelvey, which could have been relevant to their decisions to build in the Subdivision and their apparent subsequent decisions to cancel their contracts with McKelvey. (L.F. 453, 507, 515.)

After the Homeowners deposed one of McKelvey's customers (without objection by McKelvey), McKelvey opposed the Homeowners' further attempts to obtain discovery from its customers. (L.F. 425, 427, 429.) Among other grounds advanced for opposing the discovery from its customers, McKelvey asserted that the discovery sought "immaterial and irrelevant information." (L.F. 431.) The trial court granted McKelvey's motion to quash with respect to additional depositions of its customers on the express condition that McKelvey produce to the Homeowners information concerning McKelvey's construction plans for the Subdivision, including "the features of the homes it intends to build on each lot," which McKelvey had previously refused to produce. (L.F. 520.)

Notwithstanding its objection that the information sought from its customers was "immaterial and irrelevant information," McKelvey proceeded at trial to attempt to offer evidence related to these customers, including why the customers allegedly cancelled their contracts with McKelvey. (Perm. Tr. 566-67.) The trial court held McKelvey to its objection and prevented it from offering evidence of these allegedly cancelled contracts and why there were cancelled. (Id.)

B. Original Writ Proceeding Regarding Lis Pendens.

As part of its final judgment, the trial court ordered the Homeowners to "release" the *lis pendens* they had filed with the St. Louis County Office of the Recorder of Deeds in relation to this lawsuit. (L.F. 1413.) The Homeowners sought an original writ of prohibition from the Court of Appeals to prohibit the trial court from ordering the release of the *lis pendens* pending appeal. (See State ex rel. Lemley, et al. v. Hon. Gloria C. Reno, Case No. ED99612.) The Court of Appeals issued a permanent writ in prohibition, allowing the *lis pendens* to remain of record pending appeal. See State ex rel. Lemley v. Reno, 436 S.W.3d 232 (Mo. Ct. App. 2013).

ARGUMENT

REPLY AS APPELLANT

I. THE BANK'S EXECUTIVES SERVING ON THE BOARD OF THE ASC HOA ARE NOT ELIGIBLE TO SERVE AS SUCH BOARD MEMBERS.

Defendants contend that the Bank's executives serving on the board of the ASC HOA are proper board members, despite the residency requirement for elected directors found in the Declaration as originally drafted and recorded. Defendants argue that: (a) the "amendment" of the Declaration to make the Bank's executives eligible to serve as board members did not violate the Bank's duty of good faith and fair dealing owed to the Homeowners; (b) the "amendment" does not constitute a new burden upon the Homeowners and thus did not require unanimous approval; and (c) the Period of Declarant Control had not expired, meaning that the Bank, as purported successor Declarant, could appoint board members. (Defendants' Brief at 37-50.)

Before addressing Defendants' specific arguments, the Homeowners must correct the misleading statements made by Defendants throughout this section in their brief. That is, Defendants state in multiple places that the "amendment" that removed the residency requirements the Bank's executives failed to meet was "approved by more than 67% of the lot owners." (Defendants' Brief at 38; see also id at 37.) But this "amendment" was approved by just one lot owner: Defendant Jefferson Bank. (Ex. Bank H-1, P-44.) The "amendment" was not the product of a democratic process as Defendants would have this Court believe, but rather was done unilaterally by the Bank and the Bank alone.

Defendants also stated that "the Declaration grants lot owners of more than 67% of the lots … the right … to amend the Declaration *as circumstances require*." (Defendants' Brief at 38-39, emphasis added.) Defendants, however, fail to identify the purported circumstances that required stripping the Homeowners of the right to govern their own neighborhood. The only "circumstances" that "required" amendment was the Bank's need to control the board so that it could approve McKelvey's plans and fulfill the Bank's short-term interests, all the while lining its own pockets. (Perm. Tr. 445-46, 513, Bank acknowledges its need to control the board; Ex. P-14 at 12 ¶ 11, Bank's obligation to approve plans.) It is apparent that Defendants believe the Bank had the right to amend the Declaration as its interests require, regardless of the duties it owes to the Homeowners.

A. The Bank Violated Its Duty of Good Faith and Fair Dealing.

Defendants acknowledge that the Bank owed a duty of good faith and fair dealing to the Homeowners under the Declaration, but raise a number of arguments to support their position that this duty was not breached. For the reasons addressed in this subsection, as well as those asserted in the Homeowner's initial substitute brief, Defendants' arguments fail and this Court should find, as the Court of Appeals found, that the Bank breached its duty of good faith and fair dealing by "amending" Declaration to ensure that its executives controlled the board.

Defendants ironically argue that to find that the Bank breached its duty of good faith and fair dealing would "improperly rewrite the parties' bargain." (Defendants' Brief at 43.) Defendants' argument is ironic because it was the Bank, of course, who

actually rewrote the parties' bargain by unilaterally removing the board residency requirement from the Declaration.[1] The Homeowners, by contrast, are merely asking this Court to enforce the Declaration as originally written, recorded and signed off on by the Bank. (See A60; Bank's consent and subordination to the Declaration.) Moreover, enforcing the duty of good faith and fair dealing does not equate to rewriting the parties' bargain because "the covenant of good faith and fair dealing is, by law, present in every contract and need not be added." Hawthorn Bank & Hawthorn Real Estate, LLC v. F.A.L. Investments, LLC, 449 S.W.3d 61, 67 (Mo. Ct. App. 2014) reh'g and/or transfer denied (Oct. 28, 2014), transfer denied (Dec. 23, 2014).

Defendants—for the first time on appeal—further argue that this Court should affirm the trial court because the Homeowners did not specifically plead breach of the duty of good faith and fair dealing. By not raising this ground in the trial court, Defendants have waived it.

Even if this Court were to consider this argument, however, it provides no solace to Defendants because the Homeowners pleaded the relevant facts in support of their

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[1] Defendants' argument is further ironic because elsewhere in their brief, Defendants urge this Court to recognize (i.e., write in) an "implied right" under the Declaration. (Defendants' Brief at 34.) By contrast, the Homeowners are asking this Court not to create additional rights or provisions, but rather to enforce the Declaration as originally written and recorded.

breach of duty of good faith and fair dealing theory in the operative complaint. (L.F. 906-11 ¶¶ 40-49, 55(g)-(i), 56 (g)); see Jennings v. Bd. of Curators of Missouri State Univ., 386 S.W.3d 796, 798 (Mo. Ct. App. 2012) (cited in Defendants' Brief at 40) ("Plaintiff had to plead *more than mere conclusions without supporting facts")* (emphasis in original). Moreover, this legal theory supports the Homeowners' action for declaratory and injunctive relief. See Polk Cnty. Bank v. Spitz, 690 S.W.2d 192, 194 (Mo. App. 1985) (recognizing a petition seeking declaratory relief may be based on a legal theory, regardless of whether a separate count seeking damages is included based on the same legal theory); City of Creve Couer v. Creve Couer Fire Prot. Dist., 355 S.W.2d 857, 859 (Mo. 1962) ("In testing the sufficiency of a petition purporting to state a claim for declaratory relief the question is not whether the petition shows that plaintiff is entitled to the declaratory relief he seeks in accordance with the theory he states, rather, it is whether under the averments of his petition he is entitled to a declaration of rights at all").

Notwithstanding that the right to self-governance by residents was an express benefit conferred by the Declaration, Defendants also argue that the Bank could not have breached its duty of good faith and fair dealing because there was no evidence that Homeowners expected the specific benefits of the Declaration's board residency requirement. (Defendants' Brief at 44-45.) This argument is not only unsupported by Missouri case law, but also ignores the relevant testimony from the Homeowners as to their expectations.

As an initial matter, Defendants' argument is nonsensical because the implied duty of good faith and fair dealing is designed so that one party does not act in an

inappropriately opportunistic manner to take advantage of circumstances not specifically contemplated or provided for in the contract. See Frontenac Bank v. T.R. Hughes, Inc., 404 S.W.3d 272, 280 (Mo. App. 2012) ("Good faith is an obligation imposed by law to prevent opportunistic behavior, that is, the exploitation of changing economic conditions to ensure gains in excess of those reasonably expected at the time of contracting") (quotations and citation omitted). To the extent parties can specifically contemplate certain circumstances that could arise in the future, then they can address them in the contract. The implied duty of good faith and fair dealing is designed, in part, to deal with those circumstances the parties did not anticipate.

The implied covenant of good faith and fair dealing "prohibits contracting parties from acting in such a manner as to evade the spirit of the transaction or… to deny the other party the expected benefit of the contract." City of St. Joseph v. Lake Contrary Sewer Dist., 251 S.W.3d 362, 370 (Mo. App. 2008) (internal citations omitted). The "expected benefit[s] of the contract" are determining by looking to the language of the contract at issue; the subjective expectations of the parties have no place in the analysis.

In City of St. Joseph, for example, the court held that a City's new ordinance, which hindered several suburbs' rights under their existing contracts with the City, was not passed in good faith. City of St. Joseph, 251 S.W.3d at 370. Instead of looking to the suburbs' subjective expectations, the court stated that "the relative benefits and duties of the agreements are patent." Id. Furthermore, the court held that "the primary method of determining that the 2005 ordinance was not passed in good faith is an examination of the structure of the agreements." Id. See also Reliance Bank v. Paramont Properties, LLC,

425 S.W.3d 202, 207 (Mo. App. 2014) (holding no violation of good faith even though the plaintiff subjectively expected a contract to be renewed based on oral representations, since the plain terms of the provision stated otherwise); Amecks, Inc. v. Sw. Bell Tel. Co., 937 S.W.2d 240, 243 (Mo. App. 1996) ("Southwestern Bell's termination of the contract did not deny Amecks' expected benefit because, according to the agreement's terms, Southwestern Bell was not required to" do otherwise).[2]

Courts outside of Missouri have expressly held that the duty of good faith and fair dealing "is to be applied in a manner that will effectuate the reasonable contractual expectations of the parties" and that "it is *only the objectively reasonable expectations* of [the] parties that will be examined in determining whether the obligation of good faith has been met." See Uptown Heights Associates Ltd. P'ship v. Seafirst Corp., 891 P.2d 639, 643 (Ore. 1995) (emphasis added), citing Tolbert v. First National Bank, 823 P.2d 965 (Ore. 1991).

Thus, determining what constitutes an expected benefit under the contract is an objective inquiry, and courts are to consider the benefits promised under the plain terms of the contract. The plain terms of the Declaration here provide that once the Period of Declarant Control ends, directors are to be elected from Subdivision *residents* only. (A39

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[2] In Missouri, contracts should be construed so as to give effect to the parties' intentions, which are determined by looking within the "four corners of the document." Press Mach. Corp. v. Smith R.P.M. Corp., 727 F.2d 781, 784 (8th Cir. 1984) (applying Missouri law).

§ 3.5(b).) The rationale for this provision is easy to see in that it provides those with vested, long-term interests in the Subdivision (i.e., the residents) with the sole authority to serve as board members once the Declarant (developer) relinquishes control. To allow an outsider like the Bank to unilaterally "amend" the Declaration and hijack control of the Subdivision from the Homeowners is most definitely depriving the Homeowners of an express (and reasonably objective) benefit conferred by the Declaration.

Moreover, the Homeowners expected that the Subdivision would be completed with homes that were harmonious to their homes, which can be accomplished only if residents are allowed to serve on the board since it is apparent the Bank has no interest in doing so. (See e.g. Prelim. Tr. 31-35 [G. Lemley]; Prelim. Tr. 87-90 [J. Ori]; and Prelim Tr. 235-236 [B. Choi].)

Defendants further argue that "[t]he Amendment was necessary to preserve a basic function of the Association: insuring representation to all lot owners." (Defendants' Brief at 45.) This argument misses the mark, however, because the Bank, as a lot owner, possessed the ability to vote its lots prior to the amendment, thus insuring it representation. This was no deprivation of the right to vote here. Rather, this issue concerns the Bank's stripping away of the Homeowners' exclusive right to serve on the board as the only residents of the Subdivision.

Defendants also argue that in "amending" the Declaration, the "Bank acted in good faith … [and to] benefit all lot owners." (Defendants' Brief at 46.) This passive aggressive paternalistic argument should be rejected by this Court. The Bank knew the Homeowners' position from outset of litigation and certainly before the Bank "amended"

the Declaration, but nevertheless the Bank acted contrary to the Homeowners' position by "amending" Declaration anyway. (See, e.g., Perm. Tr. 511; Mr. Dulle admitted that "our [the Bank's] interests are different" than those of the Homeowners.) The Bank certainly did not befit all of the lot owners; rather, as it has done throughout this case, the Bank acted to benefit itself at the expense of the Homeowners. (Prelim. Tr. at 382-83; Mr. Dulle confirmed that the Bank was acting in its own interests when it "amended" the Declaration.)

By purporting to "amend" the Declaration, the Bank now purports to control the majority of the board and, with it, the right to dictate all decisions for the Subdivision. Such an "amendment," which deprives the Homeowners of the governance structure set forth in the Declaration, is certainly a breach of duty of good faith and fair dealing. See Rocky Ridge Ranch Property Owners Ass'n v. Areaco Invest. Co. Inc., 993 S.W.2d 553, 556 (Mo. App. 1999) (finding that developer who orchestrated a "poorly concocted voting sham" in order to gain control over the subdivision had violated its duty of good faith and fair dealing). Accordingly, this Court should find, like the Court of Appeals did, that the Bank breached its duty of good faith and fair dealing by "amending" the Declaration to ensure that its otherwise ineligible executives could serve as directors, reverse the trial court, and hold that all of the actions taken by the ASC HOA through the Bank executive board members are null and void.

B. The "Amendment" Required Unanimous Approval Under Missouri Law.

Defendants further argue that the Bank's "amendment" of the Declaration was just that, a mere amendment, rather than the imposition of a new restriction that requires unanimous approval of all affected lot owners. (Defendants' Brief at 46-48.) Contrary to Defendants' assertions, however, the "amendment" is indeed a disguised additional restriction on the Homeowners. According to Defendants, the "amendment" is not a disguised restriction prohibited by Missouri law because the "amendment" acted to eliminate board eligibility requirements. Defendants' argument elevates form over substance. It is no different than if the Bank passed an "amendment" which eliminated the restrictions on what the ASC HOA could pass assessments for. Yes, such an "amendment" would eliminate a restriction, but it would nevertheless constitute a new burden, or restriction, as the lot owners would then be exposed to increased assessments. E.g., Webb v. Mullikin, 142 S.W.3d 822, 827 (Mo. App. 2004) (holding that amended indenture imposing new assessments was invalid for lack of unanimous approval). The "amendment" actually passed by the Bank here is no different. While it eliminates certain restrictions on who can serve as a board member, it imposes a new burden on the lot owners by removing their exclusive right to serve on the board and subject them to the Bank's control.

Moreover, the "amendment" is not "uniformly applied" as Defendants contend. (Defendants' Brief at 47, citing LaBrayere v. LaBrayere, 676 S.W.2d 522 (Mo. App. 1984).) As enacted and enforced, the "amendment" deprives only the Homeowners (as

the Subdivision's only residents) of their important right to govern their own neighborhood. Because the Declaration provided that residents held the exclusive right to serve as directors once the Period of Declarant Control ended, any "amendment" to remove that right necessarily cannot be "uniformly applied."

C. The Period of Declarant Control had Expired, Requiring Election of Directors.

Defendants make a half-hearted attempt to argue that the Period of Declarant Control had not expired under the Declaration and, therefore (so the story goes), the Bank as purported successor Declarant could have appointed board members regardless of whether the "amendment" is effective or not because directors appointed by the Declarant were not subject to the Declaration's residency requirement. (Defendants' Brief at 48-50.) The Declaration provides two methods for selection of board members. During the Period of Declarant Control, the Declarant has the authority to appoint board members, with no applicable eligibility or other requirements. (A39 at §3.5.(b)(1).) After the Period of Declarant Control ends, board members are to be *elected* on an annual basis by lot owners. (A39-40 at §3.5(b)(2).) Elected directors must meet certain requirements to serve as board members: (1) an elected director must be "a resident of the Community [a/k/a the Subdivision]" and (2) an elected director must be a lot owner "other than Declarant." (A39 at §§3.5 & 3.5(a).)

Contrary to Defendants' assertion, the Period of Declarant Control had ended by the time the ASC HOA was created, leaving election as the only method for the Bank executives to be selected as board members. Indeed, the Bank itself *elected* its board

members, twice. (Ex. P-40 at 10-12; Prelim. Tr. 315; Ex. P-42 at 20-24.) Even putting this fact aside, the Bank's executives could not be properly appointed as board members because the Period of Declarant Control ended. The Period of Declarant Control expired upon the occurrence of any one or more of the following:

- First, the Declarant (Evolution Developments) conveyed all but two of the remaining 13 lots (i.e., more than 66.67%) to Hanover in February 2009. (Ex. P-13; Prelim. Tr. 340-42; Perm. Tr. 451.) Thus, as of February 2009, the Developer (Evolution Developments) had conveyed 16 of 18 lots (five to the Homeowners and eleven to Hanover). The Bank's executives were not elected to the board of the ASC HOA until September 2010, well after 60 days of this conveyance. (Ex. P-40 at 11-13.)
- Second, the Bank foreclosed upon the 13 unimproved lots in March 2010, thus causing a transfer of more than 66.67% of the lots. (L.F. 142.) Thus, all lots had been conveyed as of March 2010. Again, the Bank's executives were not elected to the board of the ASC HOA until well after 60 days of this occurrence. (Ex. P-40 at 11-13.)
- Third, the Declarant (Evolution Developments) voluntarily allowed the Original HOA to become administratively dissolved long before any of the issues in this litigation arose, thereby ceding control of that association. (L.F. 376.)

As a result of any of these, the Period of Declarant Control expired. (L.F. § 3.5(b)(1).) Defendants contest only the transfer of lots by Evolution to Hanover (bullet point one

above) in their brief and say nothing about the other ways in which the Period of Declarant Control ended, thereby tacitly admitting to its expiration.

Defendants would have this Court believe that in order for a transfer to count for purposes of terminating the Period of Declarant Control, such transfer had to be more than "an intra-company transfer." (Defendants' Brief at 49.) The Declaration, of course, contains no such language or requirement. In any event, the transfer from Evolution Development to Hanover Homes was more than a mere "intra-company transfer." It was an arm's length transaction between companies supported by consideration. (L.F. 1061.) Moreover, all of the lots were again "transferred" to the Bank via the foreclosure.

Because the Period of Declarant Control had expired, board members could only be elected, not appointed. Indeed, the Bank elected its executives to the board, twice! (Ex. P-40 at 10-12; Prelim. Tr. 315 & 319; Ex. P-42 at 20-24.) Per the Declaration, such *elected* directors were subject to the residency requirement, which the Bank's executives failed to meet.

II. THE ASC HOA IS NOT PROPERLY AUTHORIZED TO GOVERN THE SUBDIVISION OR ACT PURSUANT TO THE DECLARATION.

As an initial matter, Defendants do not contest that the ASC HOA is not the original homeowners association designated by the Declaration. Defendants further do not contest that the ASC HOA did not receive an assignment from the original homeowners association designated by the Declaration. These undisputed facts are crucial because Missouri law is clear that when a successor homeowners' association seeks to govern a subdivision, it must first receive an assignment from the original

association created pursuant to the declaration. "For the new [homeowners'] association to be either a successor or assign there must have been a transfer of the rights and duties from the former [homeowners'] association to the new [homeowners'] association." DeBaliviere Place Ass'n v. Veal, 337 S.W.3d 670, 677 (Mo. banc 2011); see also Valley View Village S. Improvement Ass'n, Inc. v. Brock, 272 S.W.3d 927, 931 (Mo. App. 2009) (holding that, absent an assignment, the purported "successor" homeowners' association had no authority to govern the subdivision).

Defendants make a number of arguments in support of their position that the ASC HOA was properly authorized to govern the Subdivision despite the fact that it never received an assignment from the Original HOA. Defendants' arguments misconstrue both Missouri law and the Declaration and must, accordingly, fail. Moreover, Defendants' references to what was done by the homeowners' association formed by the Homeowners are irrelevant to any matter in this appeal.

Defendants' first line of argument is to paint a picture of "doom and gloom," arguing (incorrectly) that the Original HOA could not act and that the Declaration would be unenforceable without a functioning homeowners' association. (Defendants' Brief at 25, 29, 30.) Defendants' contentions that the Original HOA "ceased to exist and could not act" and that the Original HOA "could not be revived" are just plain wrong. (Defendants' Brief at 29.) While Missouri statutes previously provided that a corporation could only rescind an administrative dissolution within ten years of the date of dissolution, that statute was repealed and the current statute contains no such time limitation. See DeBaliviere Place, 337 S.W.3d at 675-76 (discussing the now-repealed

Mo. Rev. Stat. § 355.507.4); Mo. Rev. Stat. § 355.716 (the current reinstatement statute, which does not contain a time limitation.

Moreover, the Valley View case speaks to this issue and provides that a successor homeowners' association may be formed with the unanimous consent of all affected lot owners, further undermining Defendants' argument. 272 S.W.3d at 931. Alternatively, the Original HOA, even if dissolved, could have made an assignment to the ASC HOA, thereby empowering that entity. See DeBaliviere, 337 S.W.3d at 675 (finding that dissolved homeowners'' association could assign its rights to a new association).

Likewise, Defendants' Chicken Little "the-sky-is-falling" argument about what would happen if there was no governing homeowners' association is unavailing. The majority of property in this country is not subject to governance by homeowners' association and yet averts anarchy. Even if there is not an authorized homeowners' association for the Subdivision, the lot owners would still have recourse pursuant to the Declaration and the ability to manage their affairs. For instance, even without a homeowners association, each lot owner has an individual right to enforce the Declaration. See Wheeler v. Sweezer, 65 S.W.3d 565, 570 (Mo. App. 2002) (holding that an individual subdivision lot owner had standing to bring an action to enforce a restrictive covenant regarding building usage and appearance); Connelly v. Schafer, 837 S.W.2d 344, 346-48 (Mo. App. 1992) (affirming trial court's judgment in favor of one lot owner against another lot owner who violated the subdivision's restrictive covenants by constructing an asphalt roof, instead of a wooden roof, as required by the restrictive covenants).

In Connelly, the plaintiff-owners of one lot sued the defendant-owners of another lot, asserting that the defendants were in violation of the recorded declaration for constructing a roof out of a material that was not authorized by the recorded declaration. On appeal, the defendants argued that the provision was unenforceable because, while the recorded declaration provided for a design review committee to approve any construction in the subdivision, no design review committee had ever been established. Connelly, 837 S.W.2d at 346. The appellate court rejected this argument and enforced the recorded declaration, which prohibited the type of roof the defendants had constructed. Id. The appellate court thus affirmed the trial court's judgment, which required the defendants to replace their non-compliant roof. Id. at 345, 350.

After unpersuasively trying to state why a homeowners' association is needed, Defendants offer two theories to justify ASC HOA's purported authority to govern the Subdivision. First, Defendants argue that, due to the assignment from the original developer to the Bank, the Bank had the authority to create a successor homeowners' association. (Defendants' Brief at 31-34.) To make this argument, Defendants' rely upon § 9.3 of the Declaration, which provides that the original developer (termed the "Declarant") "may transfer, assign or convey any and all Special Declarant Rights contained in § 9.2 to a successor Declarant in a written instrument." (Defendants' Brief at 33, citing A51.) The "Special Declarant Rights contained in § 9.2," however, do not

include the right to form a homeowners' association.[3] (A51 at § 9.2.) Indeed, the Declaration required that the original homeowners' association be formed before the first lot was conveyed (A38 §3.1), which occurred long before the Bank ever received its assignment of Declarant rights. Thus, even assuming the assignment of Declarant rights to the Bank was valid, it did not and could not include the right to form another homeowners' association because that right had already been exercised by the original Declarant and was not included in those Declarant rights that could be assigned in any event. The Declaration did not grant to the Declarant the right to set up numerous homeowners' associations; rather, the Declaration gave the Declarant the right to set up one association, which actually happened.

Second, Defendants argue that the ASC HOA is authorized as the successor homeowners' association pursuant to § 12.1(b) of the Declaration, which provides that "No such amendment shall … eliminate the requirement that there be an Association and Board unless adequate substitution is made." (Defendants' Brief at 34-35; A55.) In fact, Defendants argue an "adequate substitution" is "exactly what occurred here." (Defendants' Brief at 35.) But that is not what happened here because there was no

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[3] The "Special Declarant Rights" in Section 9.2 include, among other things, the Declarant's rights to complete improvements in the Subdivision, to maintain advertising signs in the Subdivision and to keep construction trailers in the Subdivision. (L.F. 48 § 9.2.) They have nothing to do with the homeowners' association.

amendment to "eliminate the requirement that there be an Association and Board" that triggered the "adequate substitution" obligation. The relevant language of § 12.1(b) was obviously intended to ensure that an "adequate substitution" was needed if an amendment was passed that completely eliminated the need for a governing association and board. This scenario never occurred here and thus § 12.1(b) has no relevance.

Defendants also argue, without citation, that "[b]y a two-thirds vote, the lot owners can amend the Declaration to designate a substitute Association." (Defendants' Brief at 35.) But the Declaration provides no such right. If the Declaration contained such an express provision, the parties would not now be arguing this issue before this Court.

Despite Defendants' misleading citations to Missouri law, an assignment from a developer is not the equivalent of an assignment from an original homeowners' association. The Valley View case suggests nothing of the sort, contrary to the assertions of Defendants, who must be mis-reading Valley View. (Defendants' Brief at 31.) The issues related to a successor homeowners' association and successor developer in Valley View were separate. Defendants apparently confuse the appellant and the respondent in the Valley View case, the former claiming it was the successor association and the latter claiming it was the successor developer. The Valley View case simply does not stand for the proposition that an assignment from a developer to a successor developer is the same as an assignment from the original homeowners' association to a successor association. Defendants' additional reliance on the Sherwood Estates case is likewise misplaced. (Defendants' Brief at 33.) That case simply stands for the proposition that a developer,

who had an express right under a recorded declaration to enforce a specific provision of that declaration, could assign its right to enforce that provision to a homeowners' association. Sherwood Estates Homes Association, Inc. v. Schmidt, 592 S.W.2d 244, 248 (Mo. App. 1979). It does not stand for the proposition that an assignment to a successor developer is the same as an assignment to a successor association. In fact, the Sherwood Estates case actually involved an assignment to a homeowners association, a fact that is decidedly absent from the present case.

As a final point, Defendants make various references to what was done by the homeowners' association (i.e., the Plaintiffs' Association) formed by the Homeowners. Defendants' arguments regarding the Plaintiffs' Association, however, are irrelevant because the trial court was not faced with having to decide between the ASC HOA and the Plaintiffs' Association. This simply was not an "either/or" issue and, as explained above, the Subdivision can function even without an authorized homeowners' association. Whatever the Plaintiffs' Association did or did not do is irrelevant.

III. THE BANK'S EXECUTIVES SERVING ON THE BOARD OF THE ASC HOA DID NOT ACT REASONABLY IN APPROVING MCKELVEY'S PLANS.

In response to the Homeowners' contention that this Court should review the decisions of the board of the ASC HOA with a "special intensity" per the Rule of Necessity, Defendants do not argue that the board's actions could withstand such a review, but rather that the Rule of Necessity does not apply. Defendants' failure to even attempt to defend the board's (i.e., the bank executives') actions under this standard speaks volumes.

Moreover, Defendants' attempt to argue against the Rule of Necessity and its heightened standard is unpersuasive. Defendants argue that because subdivision trustees will always be "necessarily interested," the Rule of Necessity should not apply. (Defendants' Brief at 53.) Here, however, the Bank's executives are not typical subdivision trustees as they have a corporate profit motivation that is not present in individual homeowners. Further, Defendants' contention is not well-founded as it is not difficult to imagine any number of instances in which a subdivision trustee would not be necessarily interested (e.g., type of fence material a neighbor located across the subdivision wishes to use; how many times a month to have common ground mowed). Moreover, subdivision trustees or board members, such as the Bank's executives apparently, who are "necessarily interested" only further justify the use of the Rule of Necessity, which only comes into play when an otherwise biased or ineligible administrative board is required to act. See Barker v. Sec'y of State, 752 S.W.2d 437,

441 (Mo. App. 1988); see also Stonecipher v. Poplar Bluff School Dist., 205 S.W.3d 326, 328-29 (Mo. App. 2006).

Defendants make a number of arguments in support of the supposed reasonableness of the decisions of the Bank's executives serving on the board. For instance, Defendants mention that Mr. Dulle and Mr. Ross "visited other neighborhoods … to determine if homes of various styles and materials can be harmonious." (Defendants' Brief at 54.) But these alleged visits were never mentioned in any meeting of the ASC HOA, seriously calling into question Messrs. Dulle and Ross's reliance on these visits. (See Perm. Tr. 417-18, 528.) Moreover, Defendants made no effort to show that what was done in other subdivisions was relevant to what was allowed in this Subdivision pursuant to the Declaration. Indeed, there was no evidence of what sort of architectural requirements, if any, were present for the subdivisions visited by Messrs. Ross and Dulle. (Perm. Tr. 417-18.)

Defendants also point to an appraisal performed by one of the Bank's hired litigation experts, which Defendants contend shows that the McKelvey houses would not diminish the value of the Homeowners' homes. Defendants' reliance on the appraisal of Mr. Neff was anything but reasonable for any and all of the following reasons:

- Mr. Neff is an appraiser. While his opinions could be relevant to damages issues, they are not relevant to whether McKelvey's houses comply with the Declaration. In fact, Mr. Neff's testimony regarding the architectural style of the Homeowners' homes and their uniqueness actually cuts against Defendants' position. (E.g., Prelim. Tr. 297, Mr. Neff testifies that the

Homeowners' homes have "distinctive architectural characteristics" in that they are "contemporary architecture"; see also Prelim. Tr. 300-03.)

- Mr. Neff did not issue his report until April 2011, well after the Bank's executives initially approved McKelvey's plans in November 2010. (Compare Ex. Bank-K, with Ex. P-42.)
- Mr. Neff was engaged by the Bank, not by the ASC HOA. (Prelim. Tr. 289.) The Bank's counsel selected Mr. Neff and gave him direction. (Ex. P-47 at 33-34.) In fact, the ASC HOA did not even approve of Mr. Neff until after he had rendered his report. (Ex. P-47 at 32; see also Ex. Bank-K.)
- The Bank disclosed Mr. Neff as its litigation expert. (L.F. 1244-47; see also L.F. 1248; request of the Bank's litigation counsel for access to the Homeowners' homes for Mr. Neff "on behalf of Defendant Jefferson Bank so Mr. Neff can do his work.")
- The Bank attempted to assess the Homeowners for the costs of Mr. Neff and the Bank's other litigation expert via an assessment from the ASC HOA, even though such an assessment is invalid under the Declaration. The Declaration provides: "In the event any professional services are required by the Association in connection with a request by an Owner, the fees incurred for such services shall be recoverable from the Owner making the request." (A41 at §4.9.) The Homeowners, obviously, did not request

the services of Mr. Neff or the Bank's other litigation expert in connection with the requests for approval by the Bank and McKelvey.

In addition to these serious concerns about Mr. Neff's partiality, the bases of his opinions are, at best, incomplete. Mr. Neff never spoke with a single Homeowner prior to issuing his written report.[4] (Prelim. Tr. 293.) Likewise, Mr. Neff proceeded to render his value opinions in his written report without ever having stepped foot into any of the Homeowners' homes, despite acknowledging that such inspections would have made his report more reliable. (Prelim. Tr. 291-92.) Notably, Mr. Neff did later inspect the Homeowners' homes, but never supplemented his opinions. (Perm. Tr. 423.) Mr. Neff's less reliable opinions must have suited the Bank's needs better than his more thorough analysis after having visited the Homeowners' homes.

Defendants also seek to deflect the deficiencies of the analysis of the Bank's executives by pointing to alleged shortcomings of Mr. Lemley, a Homeowner and the minority board member of the ASC HOA. Among other things, Defendants assert that Mr. Lemley offered no "independent" experts at the board meetings to support his opposition to McKelvey's plans. What Mr. Lemley did or did not do, as an initial matter, is irrelevant to whether the Bank's executives acted reasonably. Moreover, Mr. Lemley

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[4] Had Mr. Neff bothered to contact the Homeowners, he could have discovered that the amounts spent by the Homeowners to construct their homes were much greater than the value of McKelvey's houses. (Perm. Tr 85, 247; Prelim. Tr. 90; Ex. P-1.)

very clearly set forth the Homeowners' contentions at the beginning of each meeting. (E.g., Ex. P-45 at 4-6.) Additionally, this litigation was pending throughout Mr. Lemley's tenure as a board member of the ASC HOA so Defendants were fully aware of the Homeowners' positions. Defendants should not now be heard that they were somehow caught off-guard by the Homeowners' opposition to McKelvey's plans. Anything additional that Mr. Lemley might have done would have been futile. Indeed, Mr. Lemley could not even have a motion heard in these meetings, which were primarily dominated by the Bank's counsel, Mr. Mersman. (Ex. P-47 at 59.)

IV. NEITHER THE LOT 13 HOUSE NOR MCKELVEY'S OTHER PLANS FOR THE SUBDIVISION COMPLIED WITH THE DECLARATION'S ARCHITECTURAL REQUIREMENTS.

Defendants contend that the Lot 13 House and the other houses McKelvey intended to build in the Subdivision complied with the Declaration's architectural requirements. Among other things, Defendants contend that the Declaration contains none of the express requirements or prohibitions on which the Homeowners rely. (Defendants' Brief at 60.) Defendants further seek to discredit the damning testimony of the Homeowners' architectural expert, Mr. Bolazina, by misleadingly stating that he did not prepare the chart relied upon by the Homeowners. (Defendants' Brief at 62-63.)

At both trial and in their brief, Defendants went to great lengths to point out that the Declaration did not contain specific language of the requirements (e.g., "stucco," "contemporary style") and prohibitions (e.g., "red brick") the Homeowners allege must be present. (Perm. Tr. 290-94.) Instead, Defendants argue, the Declaration only requires

that certain architectural aspects be considered. (Defendants' Brief at 57.) The case of Bennett v. Huwar, 748 S.W.2d 777 (Mo. App. 1988), speaks directly to this issue and does not support Defendants' position.

In Bennett, the defendant sought to build an "earth contact home" that would face away from the street, which made it unlike any other existing home in the subdivision. Id. at 779. The recorded restrictions required that, in approving or denying a request for a new house, the homeowners' association consider "the harmony thereof with the surroundings." Id. at 778. The homeowners' association denied approval to the defendant, finding that defendant's proposed home faced away from the street and was not harmonious with the other structures in the subdivision. The defendant complained that such justifications were improper because the recorded declaration did not expressly require harmony or that homes face the street. The appellate court rejected this argument, stating that such "considerations are, however, implicit in the restrictions because the [board] is instructed to consider, in reviewing plans for approval, the harmony of the proposed construction with the surroundings …." Bennett, 748 S.W.2d at 780.

Accordingly, consideration of whether McKelvey's houses are harmonious with the Homeowners' homes necessarily requires consideration of the specific features of the Homeowners' homes. The Homeowners went to great lengths to establish the stark differences between their homes and McKelvey's houses. (See Homeowners' Initial Brief at 55-62; see also A71-A76.) Defendants have not refuted this evidence and offered no experts of their own at trial. Rather, the Homeowners were forced to read into

evidence the deposition transcripts of the Bank's experts to show their unreliability. (Prelim. Trans. 249, 289.)

Defendants further attempt to discredit the Homeowners' architectural expert, Mr. Bolazina, by asserting that Mr. Bolazina did not personally draft his chart of the numerous disparities between the Homeowners' homes and McKelvey's houses. (Defendants' Brief at 62-63.) This chart was admitted as an exhibit at trial and used by the Homeowners in their initial brief. (Ex. P-11; Homeowners' Initial Brief at 57-59.) Mr. Bolazina made very clear that while he did not personally draft this chart, it consisted entirely of his own ideas, which he generated himself. (Prelim. Tr. at 134-35, 160-61.) This is a red herring raised by Defendants for no purpose other than to confuse the real issues in this appeal.

Defendants further seek to discredit Mr. Bolazina by stating his chart is not accurate. Among other things, Defendants assert that the chart incorrectly states that the Lot 13 House was to have vinyl siding, instead of hardie board siding. When the chart was first prepared, however, the materials produced by McKelvey to date showed only vinyl siding. (Prelim. Tr. 125-26, 156.) In any event, there is no dispute that siding for the Lot 13 House, whether vinyl or some other material, is "lap" siding, which is present in none of the existing homes. (Prelim. Tr. 125-26.)

In the end, the starkly contrasting styles of the houses speak for themselves. One need look no further than pictures of the houses to see the stark contrasts. (See pictures in Appendix at A71-A76; compare P-5 through P-9 (the Homeowners' homes) with Ex.

P-22 (the Lot 13 House); see also P-21 (aerial shots of Subdivision with partially completed Lot 13 House); Prelim. Tr. 118-34, 261-64, 274-75, 414-17.)

Defendants refer to the Lot 13 House as the "Komlos" house and urge this Court to find in their favor so that they are not forced to tear that house down. The Court should disregard this emotionally-based argument because the whole issue of having to tear down the Lot 13 House is of Defendants' making. McKelvey did not begin construction on the Lot 13 House until August 2011, well over a year *after* this lawsuit had been filed.[5] (L.F. 521.) It voluntarily chose to take the risk of having to tear down the Lot 13 House. It should not now be heard that requiring its destruction would be inequitable. Moreover, the Komloses are aware of this litigation and have agreed to abide by any injunctive relief entered herein. (Ex. P-50.) They too have taken the risk that the Lot 13 House could be torn down.

Moreover, this appeal and this litigation involve more than the Lot 13 House. The Homeowners' declaratory judgment count encompasses construction within the Subdivision as a whole. (L.F. 909-11.) Even putting aside the Lot 13 House issues, the

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[5] Based on email from Jon Haupt to Jim Brennan, McKelvey's president, McKelvey considered beginning construction in the Subdivision in order to force the Homeowners to seek an injunction. (L.F. 744.) In other words, McKelvey's decision to build was less about meeting the needs of its customers and more about advancing McKelvey's litigation strategy.

Homeowners are requesting relief regarding construction standards going forward. (Id.) If allowed to proceed, Defendants will make the Subdivision unrecognizable as it would then consist of 13 traditional styles homes, with the Homeowners' 5 unique, contemporary style homes sticking out like a sore thumb. This is not why the Homeowners collectively invested millions of dollars in the Subdivision.

V. THE BANK WAS NOT ENTITLED TO REIMBURSEMENT OF ITS ALLEGED EXPENSES.

Defendants contend that the trial court properly ordered the Homeowners to reimburse the Bank for certain expenses the Bank allegedly paid. Despite Defendants' arguments, the trial court erred in a number of ways in granting the Bank such relief.

Defendants wholly ignore the clear Missouri law cited by the Homeowners that a trial court cannot award relief which is not prayed for in any pleadings. See Norman v. Wright, 100 S.W.3d 783, 786 (Mo. Banc 2003) ("The relief awarded in a judgment is limited to that sought by the pleadings"); In re Marriage of M.A. & M.S., 149 S.W.3d 562, 570 (Mo. App. 2004) ("A judgment is void to the extent it grants relief beyond what is requested in the pleadings"). Defendants' silence speaks volumes.

Instead of addressing this clear case law, Defendants rely on Hamill v. Hamill, 972 S.W.2d 632 (Mo. App. 1998), for the proposition that equity courts may award relief even if such relief is not requested in any pleadings. (Defendants' Brief at 70-71.) The Hamill case, however, bears no relation to this case. The Hamill case involved a dispute between the minority and majority stockholders of a corporation. Hamill v. Hamill, 972 S.W.2d 632 (Mo. App. 1998). The corporation at issue operated from a certain piece of

property, which property the plaintiff-minority stockholder wanted the court to convey to him. The Court ordered the conveyance, but required the plaintiff to first execute a lease of the property in favor of the corporation as a condition precedent, even though the defendant-majority stockholders had not specifically pled the requirement of a lease as an affirmative defense. Despite this lack of pleading, the issue of a lease came up at trial. Id. at 634.

The Hamill case is thus distinguishable on numerous grounds. First, the relief at issue in the Hamill case was truly equitable relief, namely the execution of a lease for real property. By contrast, here the relief at issue is legal in nature, namely money damages. Second, the relief at issue in Hamill was brought up at trial. By contrast, here the relief was not brought up at trial. Indeed, the Bank never requested any such relief until *after* trial was over. The Hamill case thus provides no solace for Defendants.

Defendants further argue that the Homeowners could have, but did not, request any discovery or a hearing related to the Bank's motion for reimbursement of certain expenses. (Defendants' Brief at 71.) The Homeowners, however, expressly stated in their response that "they have not had an opportunity to legally and factually evaluate the relief the Bank now seeks." (L.F. 1372 ¶ 4.) Despite this, the Bank proceeded with its motion and the trial court granted it. The Bank should not now be heard to say that the Homeowners somehow waived their right to contest the motion. The Homeowners did, in fact, expressly complain about their inability to factually or legally challenge the Bank's motion.

Defendants do not even attempt to argue that the Bank's unilateral attempt to stick the Homeowners' with these costs complied with the Declaration's assessment requirements, further undermining Defendants' position on this point. The Declaration requires that certain procedures be followed for Subdivision costs, yet that was not done here. Rather, the Bank (not the "independent" ASC HOA)[6] filed a motion unsupported by any competent (i.e., non-hearsay evidence), which the trial court improperly granted.

VI. THE TRIAL COURT SHOULD NOT HAVE ENTERED JUDGMENT AGAINST THE HOMEOWNERS ON THEIR DAMAGES CLAIMS.

Defendants contend that because they did not violate the Declaration, the Homeowners' damage claims were properly denied. (Defendants' Brief at 71-72.) As stated in their initial brief, the Homeowners acknowledge that unless Defendants violated the Declaration, their damages claims fail (as they are all based upon such violations). But the converse is true also. If Defendants did breach the Declaration, then the Homeowners' damages claims would have traction. Thus, should this Court reverse the

[6] The fact that the Bank is seeking recovery of costs on behalf of the ASC HOA shows what a farce the Bank's position is regarding the "independent" acts and consideration of the ASC HOA and its directors. The Bank's position on this reimbursement issue only reinforces that the ASC HOA and the bank executives serving on its board act only for the benefit of the Bank, not the Subdivision or the Homeowners.

trial court's Permanent Injunction Order, then it should also remand for further consideration of the Homeowners' damages claims.

RESPONSE AS CROSS-RESPONDENT

I. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS ON COUNT II OF THE BANK'S COUNTERCLAIM (SLANDER OF TITLE) BECAUSE THERE WERE NO GENUINE ISSUES OF MATERIAL FACT CONCERNING ONE OR MORE ELEMENTS OF THE BANK'S CLAIM IN THAT: (A) PLAINTIFFS WERE ABSOLUTELY PRIVILEGED TO FILE THE *LIS PENDENS* UNDER MISSOURI LAW; (B) THERE WAS NO EVIDENCE THAT THE *LIS PENDENS* WAS MALICIOUSLY PUBLISHED; AND (C) THE BANK ADMITTED IT HAD NOT BEEN DAMAGED BY THE *LIS PENDENS* AND SHOULD BE ESTOPPED FROM USING AN AFFIDAVIT FROM MCKELVEY'S PRESIDENT TO "PROVE" ITS DAMAGES.

The Bank claims that the trial court erred in granting summary judgment in favor the Homeowners and against the Bank on the Bank's slander of title counterclaim. The Bank's slander of title counterclaim seeks damages for the Homeowner's allegedly improper recording of the *lis pendens*. The trial court correctly granted summary judgment against the Bank because the Homeowners established that the Bank could not meet its burden of proof on one or more essential elements of its claims.

Pursuant to Missouri law, where the defending party will not bear the burden of proof at trial on the issues presented for summary judgment, that party "may establish a

right to judgment by showing (1) facts that negate *any one* of the claimant's elements, (2) that the non-movant, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow the trier of fact to find the existence of *any one* of the claimant's elements, or (3) that there is no genuine dispute as to the existence of *each* of the facts necessary to support the movant's properly-pleaded affirmative defense. Regardless of which of these three means is employed by the 'defending party,' each establishes a right to judgment as a matter of law." ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 381 (Mo. 1993) (emphasis in original). The proper standard of review when considering appeals from summary judgment is *de novo*. Id. at 376.

A. The Homeowners Were Absolutely Privileged To File The *Lis Pendens*.

The Bank maintains that the *lis pendens* filed by the Homeowners in relation to this lawsuit was not authorized by Missouri's lis pendens statute, Mo. Rev. Stat. § 527.260. This issue has already been addressed three times by the parties: before the trial court, before the Court of Appeals in a writ proceeding (State ex rel. Lemley v. Reno, 436 S.W.3d 232 (Mo. Ct. App. 2013)), and before the Court of Appeals again on appeal. The Bank has lost each time this issue has been addressed and should lose again before this Court. The Court of Appeals succinctly stated:

> Contrary to [the Bank's] claim, Section 527.260 imposes no requirement that the underlying action must call into question the right to ownership of the real property in question. Section 527.260 provides plaintiff the

> unqualified right to record a lis pendens '[i]n any civil action, based on any equitable right, claim or lien, affecting or designed to affect real estate.' Section 527.260. [The Homeowners'] action concerns the enforcement of certain covenants and restrictions that affect the owners' interest in the land. See State ex rel. Shiek v. McElhinney, 176 S.W. 292 (Mo. App. St.L. 1915) (a suit to enforce compliance with restrictive covenants may affect title to real estate). Accordingly, [the Homeowners] properly exercised their rights under Section 527.260 when they initially recorded the lis pendens at issue.

Lemley, 436 S.W.3d at 235.

As the Court of Appeals correctly found, a litigant has an absolute right and privilege to file a *lis pendens* provided that: (i) the lawsuit affects real property; and (ii) the *lis pendens* reasonably relates to the lawsuit. The first requirement—that the lawsuit affects real property—is found in Missouri's *lis pendens* statute. Mo. Rev. Stat. § 527.260, entitled "Notice of lis pendens in equity action—recording," provides, in pertinent part:

> In any civil action, based on any equitable right, claim or lien, affecting or designed to affect real estate, the plaintiff shall file for record, with the recorder of deeds of the county in which any such real estate is situated, a written notice of the pendency of the suit, stating the names of the parties, the style of the action and the term of the court to which such suit is brought, and a description of the real estate liable to be affected thereby;

and the pendency of such suit shall be constructive notice to purchasers or encumbrances, only from the time of filing such notice.

The Bank asserts that the *lis pendens* was not authorized because this lawsuit does not contest the Bank's *ownership* of property within the Subdivision. This reading of Missouri law is not supported by the plain language of the *lis pendens* statute. Conspicuously absent from this statutory language is any requirement that the lawsuit must involve a dispute of title or ownership of property. Rather, the statute clearly sets forth that the lawsuit must instead "affect[] or [be] designed to affect real estate" for a lis pendens to be authorized. Id.

In addition to a lawsuit affecting real property, a lis pendens must be reasonably related to the lawsuit in order for the lis pendens to be authorized. See Birdsong v. Bydalek, 953 S.W.2d 103, 114 (Mo. App. 1997) ("There was a reasonable relationship between the first three counts of Plaintiff's petition and the notices of lis pendens; hence, Plaintiffs were absolutely privileged to file those notices"); Pipefitters Health & Welfare Trust v. Waldo R., Inc., 760 S.W.2d 196, 200 (Mo. App. 1988) ("The notice of lis pendens bore a reasonable relation to the action filed. Therefore, it was absolutely privileged and respondents are immune from liability for slander of title"); Sharpton v. Lofton, 721 S.W.2d 770, 777 (Mo. App. 1986) ("Rather, defendants assert that the filing of such notice [of lis pendens] constitutes slander of title. Such an assertion is contrary to Missouri law, which holds that an absolute privilege attaches to the filing of the lis pendens as long as the notice has a reasonable relation to the action filed"); cf. First Nat'l Bank of St. Louis v. Ricon, Inc., 311 S.W.3d 857, 865 (Mo. App. 2010) ("The Notices

had no reasonable relation to the action filed; thus, absolute privilege did not attach to their recordation").

The relationship between the underlying lawsuit and the *lis pendens* is not—and cannot be—challenged by the Bank. The Homeowners sought a judicial declaration and injunction regarding what sort of construction was allowed in the Subdivision pursuant to the recorded Declaration and the *lis pendens* merely provides notice of this. (Compare L.F. 20 with L.F. 989.)

Not that this Court need look outside of Missouri, but case law from other jurisdictions supports the Homeowners' position. See Hammersley v. District Court In and For the County of Routt, 610 P.2d 94, 96 (Colo. banc 1980) (finding that *lis pendens* filed in relation to enforcement of recorded covenants was proper and stating, "[a]lthough the litigation [did] not seek to change ownership in any way, it does involve a determination of certain rights incident to ownership and in that sense affects title to real property"); Tucson Estates, Inc. v. Superior Court In and For The County of Pima, 729 P.2d 954, 959 (Ariz. Ct. App. 1986) ("the purpose behind the doctrine of lis pendens is best served by construing the statute to permit the filing of a notice of lis pendens in any action involving an adjudication of rights incident to title to real property").

Because this lawsuit affects real property and because *lis pendens* is reasonably related to this lawsuit, the Homeowners properly filed the *lis pendens*. As established by this Court in 1969 and applied ever since, "absolute privilege 'attaches to the recordation of a notice of lis pendens."' Houska v. Frederick, 447 S.W.3d 514, 518-19 (Mo. 1969) (adopting the Supreme Court of California's holding in Albertson v. Raboff, 295 P.2d

405, 409 (Cal. 1956)); see also Pipefitters Health & Welfare Trust, 760 S.W.2d at 200; Birdsong, 953 S.W.2d at 113 ("[R]ecordation of lis pendens is absolutely privileged even if made with actual malice").

This Court also adopted the California Supreme Court's rationale for granting this absolute privilege for filing of lis pendens notices: "'It would be anomalous to hold that a litigant is privileged to make a publication necessary to bring an action but that he can be sued for defamation if he lets any one know that he has brought it…particularly when he is expressly authorized by statute to let all the world know that he has brought it." Houska, 447 S.W.3d at 519.

Moreover, the lis pendens statute issues an unequivocal directive—it places the responsibility on plaintiffs in an equity action relating to real estate, as here, to record a lis pendens notice. See Mo. Rev. Stat. § 527.260 (commanding that a plaintiff "shall" file a lis pendens if the lawsuit asserts an equitable claim that affects real property). The clear public purpose behind the filing of a lis pendens is to provide "a record notice to potential purchasers of a pending suit which may affect title to property and its purpose is to preserve rights pending the outcome of litigation." First Nat'l Bank of St. Louis, 311 S.W.3d at 864 (citing Houska v. Frederick, 447 S.W.2d 514, 419 (Mo. 1969)). Thus, the Homeowners had a clear right and absolute privilege—arguably an obligation, even—under Missouri law to file the *lis pendens* in the first place.[7]

[7] The rationale underlying the *lis pendens* statute is easy to see by imagining what would

Because the *lis pendens* was authorized by the statute and absolutely privileged, this Court should affirm the trial court's summary judgment in favor of the Homeowners.

B. There Was No Evidence That The *Lis Pendens* Was Maliciously Filed.

The Bank's argument regarding the Homeowners' alleged malicious intent in publishing the *lis pendens* is just mere boot-strapping to its first argument about whether the *lis pendens* was authorized. That is, the Bank alleges that because the *lis pendens* was not authorized, it must have been maliciously published. (Defendants' Brief at 78-79.) Even if the *lis pendens* was not authorized (which it, of course, was), that alone would not mean that the Homeowners acted maliciously. As evidenced by (i) the trial court's grant of summary judgment to the Homeowners, (ii) the Court of Appeals' decision in the writ proceeding, and (iii) the Court of Appeals' decision below, the Homeowners obviously had at the very least a good faith belief that the *lis pendens* was authorized. (See also L.F. 1100; Affidavit by Homeowner Ms. Lemley stating that the *lis pendens* was not filed with malicious intent.)

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have happened if the *lis pendens* had not been filed the Homeowners. In that case, a third party could have purchased a lot within the Subdivision and then become involved in this litigation about the construction standards for the Subdivision. The *lis pendens*, however, put such third parties on notice so that they would know what they were getting into by purchasing a lot.

The Bank further contends that malicious intent is evidenced by the fact that the *lis pendens* extends to the common ground. (Defendants' Brief at 79.) This desperate grasp for straws shows just how far the Bank is willing to go in order to save its slander of title claim. First, the common ground was at issue in this lawsuit as many of the Bank's alterations of the landscape plan affected trees either located or to be planted on the common ground. Second, even assuming *arguendo* that the common ground should not have been included, the Bank cannot show any harm from its inclusion. As the Bank points out in its brief (at page 79), no homes were to be built on the common ground so the Bank has lost out on nothing. Moreover the Bank cites absolutely no support that it has suffered damages by the inclusion of the common ground in the *lis pendens*. Because the Bank has proffered no support that the lis pendens was filed with malice, this Court should affirm the trial court's grant of summary judgment.

C. The Bank Could Not Establish It Had Been Damaged by the *Lis Pendens*.

The Bank contends that there is an issue of material fact with respect to the damages it allegedly suffered as a result of the alleged slander of title by the Homeowners. To manufacture this issue of fact, the Bank relies solely upon an affidavit from McKelvey's president, Mr. Brennan. (Defendants' Brief at 79-80.) This Court should reject the Bank's attempt to create a material fact by relying upon evidence from McKelvey. The Homeowners sought discovery from McKelvey's customers related to

their decision to build in the Subdivision, but McKelvey stonewalled the Homeowners by making baseless objections.[8] (See Supplemental Statement of Facts, supra, ¶ A.) The Bank now seeks to use this information from McKelvey, which was denied to the Homeowners, to survive summary judgment. This Court should not sanction such gamesmanship between the Defendants.

Moreover, the Bank, through its president Mr. Dulle, admitted in a sworn affidavit that he was aware of nothing that adversely affects the Bank's title to property in the Subdivision. (L.F. 1103.) This affidavit was executed more than a year *after* this lawsuit and the *lis pendens* were filed. (Compare id., with L.F. 20.) Mr. Dulle swore:

> [The Bank's] possession [of Lot 13 in the Subdivision] has been peaceable and undisturbed and title to said property has never been disputed or questioned to my knowledge, **nor do I [Dulle] know of any facts** by reason of which the title to, or possession of, said property might be disturbed or questioned, or **by reason of which any claim to any of said**

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[8] The relevance of information that would have been obtained is easy to see. For instance, at least one of McKelvey's customers decided not to build in the Subdivision for reasons wholly unrelated to this litigation or the Homeowners' actions. (L.F. 1097.) Instead, that customer chose not to build in the Subdivision due to obtaining a new job. The Homeowners were denied the opportunity to discover the rationale of the decisions of McKelvey's other customers.

property be asserted adversely to said Individual(s) [the Bank].

(Id., emphasis added.) This affidavit was given in conjunction with the Bank's request for the issuance of title insurance on Lot 13 so that the Bank and McKelvey could begin construction on that property. Mr. Dulle's admission utterly belies the Bank's claim that the *lis pendens* clouded the Bank's title and alone justifies a grant of summary judgment on the slander of title claim in favor of the Homeowners.

Finally, the Bank curiously argues that the because the Declaration was already a matter of public record, there was no need for the *lis pendens* to be filed. (Defendants' Brief at 77.) While the Homeowners dispute the logic of this argument (about the need for the *lis pendens*), this argument actually defeats the Bank's damages claim because merely clarifying what is already a matter of public record (as the *lis pendens* apparently did per the Bank's argument) could have not caused damages. If the Declaration was enough to put third parties on notice of the construction standards in the Subdivision and the Homeowners' claims in this lawsuit (according to the Bank's argument), then the *lis pendens* caused no further damage to the Bank.

II. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS ON COUNT III OF THE BANK'S COUNTERCLAIM (ABUSE OF PROCESS) BECAUSE THERE WERE NO GENUINE ISSUES OF MATERIAL FACT CONCERNING ONE OR MORE ELEMENTS OF THE BANK'S CLAIM IN THAT PLAINTIFFS DID NOT IMPROPERLY FILE THIS LAWSUIT OR SEEK TO USE THIS LAWSUIT FOR AN IMPROPER PURPOSE.

The Bank's second counterclaim for damages is a claim for abuse of process. This Court has stated that '"[a] pleading alleging abuse of process must set forth ultimate facts establishing the following elements: (1) the present defendant made an illegal, improper, perverted use of process, a use neither warranted nor authorized by the process; (2) the defendant had an improper purpose in exercising such illegal, perverted or improper use of process; and (3) damage resulted."' Ritterbusch v. Holt, 789 S.W.2d 491, 493 (Mo. 1990). Put another way, the test is "whether the process was used to accomplish some unlawful end or to compel the plaintiff to do some collateral thing that he could not be compelled to do legally." Duvall v. Lawrence, 86 S.W.3d 74, 85 (Mo. Ct. App. 2002). There is no abuse of process if one brings a lawsuit in order to pursue the cause of action pleaded in the petition. Id.; see also Misischia v. St. John's Mercy Med. Ctr., 30 S.W.3d 848, 862 (Mo. Ct. App. 2000) ("Abuse of process is not appropriate where the action is confined to its regular function . . . [i]t is where the claim is brought

not to recover on the cause of action stated, but to accomplish a purpose for which the process was not designed that there is an abuse of process").

The Bank claims that the Homeowners' filing of this lawsuit constituted an abuse of process because the Homeowners initially sought to compel arbitration of this lawsuit pursuant to the Declaration. (Defendants' Brief at 82.) The Bank's position is untenable because, immediately after filing this lawsuit, the Homeowners attempted to stay this lawsuit and submit this matter to mediation and arbitration as per the Declaration. (L.F. 1104, 1106, 1108.) **The Bank refused ADR**. (L.F. 1104, 1106, 1108.) The Bank claimed that the parties' controversy did not fall within the Declaration's ADR provision because no plans had yet (at that time) been submitted to a homeowners association or design review committee. (L.F. 1113.) Yet, when plans were finally submitted to the ASC HOA, the Bank still not did not seek to enforce the ADR provisions of the Declaration. The Bank's positions are completely contradictory and self-serving. While, on the one hand, it asserts that the Homeowners should not have filed this lawsuit because of the Declaration's ADR provision, the Bank, on the other hand, itself refused to submit this case to ADR and indeed is the sole reason why the matter was not submitted to ADR.

Moreover, the Homeowners followed the only applicable reported case law in filing this lawsuit and then seeking to enforce the ADR provisions of the Declaration. Because this lawsuit affects real property in the Subdivision, the Homeowners had to file this suit in order to file the *lis pendens*. As addressed above, the *lis pendens* was filed properly. The only case on point counsel has been able to locate is a California case,

Manhattan Loft, LLC v. Mercury Liquors, Inc., 173 Cal. App. 4th 1040 (2009). In Manhattan Loft, the plaintiff brought a slander of title claim against the defendant for the defendant's filing of two *lis pendens* filed in relation to two arbitration proceedings. Though the Court found that the *lis pendens* related to and affected real estate, the Court further found that California's *lis pendens* statute did not authorize the filing of a *lis pendens* in connection with an arbitration proceeding. The Court noted, however, that parties to an arbitration proceeding are not without recourse as it would have been proper for the party to file a lawsuit, record a *lis pendens*, stay the lawsuit and then seek to submit the matter to arbitration. Id. at 1054. That is precisely what the Homeowners did here, but the Bank refused to stay this lawsuit or to submit this matter to mediation or arbitration. It is disingenuous at best for the Bank to now complain that this matter was not submitted to mediation or arbitration when it was the one who opposed the Homeowners' attempts to submit this case to ADR. Accordingly, the Homeowners have committed no abuse of process and should be awarded summary judgment.

Finally, the Bank's attempt to manufacture an issue of fact with respect to damages should be rejected because the Bank again relies solely upon the affidavit of McKelvey's president. For the reasons given above (supra § I.C), the Court should reject the Bank's attempt to establish damages.

CONCLUSION

For the reasons stated, the Homeowners request that this Court:

A. Reverse the ruling of the trial court with respect to the validity of the Bank's executives serving as board members of the ASC HOA;

B. Reverse the partial summary judgment regarding the authority of the ASC HOA to govern the Subdivision;

C. Reverse the trial court's denial of injunctive relief to the Homeowners and grant of declaratory judgment to the Bank;

D. Reverse the trial court's judgment against the Homeowners requiring them to reimburse the Bank for certain alleged maintenance costs;

E. Reverse the trial court's judgment against the Homeowners on their damages claims against Defendants; and

F. Affirm the trial court's judgment in favor of the Homeowners on the Bank's counterclaims.

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CERTIFICATE OF COMPLIANCE

The undersigned herby certifies, pursuant to Missouri Supreme Court Rule 84.06(c), that this brief complies with Rule 55.03 and the length limitations contained in Rule 84.06(b) in that there are 12,496 words in the brief (except the cover, signature block, certificate of service, and certificate of compliance) according to the word count of the Microsoft Word word-processing system used to prepare the brief.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 24th day of April, 2015, the foregoing brief was filed electronically with the Clerk of the Court and served by operation of the Court's electronic filing system upon the following:

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