CAUSE NO. C-1-CV-17-001833

RICHARD W. JACKSON, *et al.*	§	IN THE COUNTY COURT
Plaintiffs,	§	
vs.	§	
	§	AT LAW NUMBER TWO OF
JANICE COX and HELEN RAMSEY, *et al.*	§	
Defendants.	§	TRAVIS COUNTY, TEXAS

DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO CLAIMS AND COUNTERCLAIMS CONCERNING SECTION 4 OF ARTICLE I OF THE RESTRICTIVE COVENANTS

Defendants file their Motion For Partial Summary Judgment As To Claims And Counterclaims Concerning Section 4 Of Article I Of The Restrictive Covenants and would respectfully show the Court as follows:

I. INTRODUCTION

This case concerns the nuisance created by transient rentals owned by Plaintiffs and Plaintiffs breaches of the restrictive covenants that apply to their properties. The properties are located in a residential neighborhood of Point Venture Section 3-1, Texas ("Point Venture"). The properties in Point Venture are governed by the 1972 Restrictions that are recorded at Volume 4291 Page 1452, *et seq.* in the Official Records of Travis County ("Restrictive Covenants").

Ms. Cox and Ms. Ramsey live in a residential neighborhood of Point Venture Section 3-1, Texas ("Point Venture"). They moved to Point Venture for the quiet and family oriented lifestyle the community offered. However, as short term rentals have become more common in Point Venture, the quiet has been replaced with constant interference with and disrespect for their rights as property owners. The nuisances caused by the Jackson's transient renters have been documented in prior filings with the Court.

After Ms. Cox and Ms. Ramsey unsuccessfully attempted to resolve the matter amicably by speaking with the Plaintiffs and other Point Venture neighbors directly, they were threatened

and bullied. Pursuant to Section 4 of Article I of the Restrictive Covenants, Ms. Cox and Ms. Ramsey then circulated a proposed change to the restrictive covenants that would have allowed rentals for ninety (90) or more days. Due to the problems caused by the transient rentals, they were almost at the required number of signatures.

The Jacksons rent their property for over $700.00 a night. Realizing that their cash flow was about to be stopped because the neighborhood opposed their transient renting, the Jacksons filed this lawsuit. In fact, some of the transient renters have gone so far as to threaten the Council members, including the Mayor, with legal action if they chose to pursue regulation of transient rentals.

This Motion for Partial Summary Judgment covers Plaintiffs' claims for (1) declaratory judgment that "30 days' notice to all owners of proposed amendments and the prior recommendation of the ACC are required before any amendment may be adopted and recorded" and (2) breach or attempted breach of the Restrictive Covenants. Defendants also move for summary judgment on their declaratory judgment claim that the requirements of notice and prior recommendation of the Architectural Control Authority in Article IX are not copied/pasted into Section 4 of Article I of the Restrictive Covenants.

II. SUMMARY JUDGMENT EVIDENCE

To support this Motion, the Defendants offer the following summary judgment evidence attached to this Motion and incorporate the evidence into the Motion by reference.

Exhibit 1: Restrictive Covenants dated March 15, 1972

Exhibit 2: Affidavit of Michael L. Navarre.

III. ARGUMENT AND AUTHORITIES

A. The Court Should Grant Defendants' Motion Based On The Applicable Summary Judgment Standards.

Defendants' Motion for Partial Summary Judgment is both a traditional and no evidence motion for summary judgment. Pursuant to Texas Rule of Civil Procedure 166a(c), a traditional summary judgment should be granted if the movant can show that "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion." TEX. R. CIV. P. 166(a)(c); *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004). To avoid summary judgment, Plaintiffs must present evidence that raises a genuine issue of material fact. *See State v. $90,235*, 390 S.W.3d 289, 292 (Tex. 2013).

Pursuant to Texas Rule of Civil Procedure 166a(i), a defendant may move for a no evidence summary judgment on the ground that there is no evidence of one or more of the essential elements of the plaintiff's claim. Summary judgment is required if the plaintiff fails to present more than a scintilla of probative summary judgment evidence that raises a genuine issue of material fact on each element challenged. TEX. R. CIV. P. 166(a)(i).

B. The Court Should Grant Defendants' Motion As To The Parties' Declaratory Judgment Claims Based On The Plain Language Of The Restrictive Covenants.

Defendants seek a declaration that the Restrictive Covenants can be changed pursuant to Section 4 of Article I of the Restrictive Covenants. Ex. 1, Restrictive Covenants. On the other hand, Plaintiffs seek to rewrite the Restrictive Covenants to copy and paste conditions located in another Article and provision of the Restrictive Covenants into Section 4 of Article I. Plaintiffs' request that the Court do violence to the contract and rewrite the Restrictive Covenants is contrary to the plain language of the Restrictive Covenants and longstanding Texas law.

1. As Plaintiffs admit, the two alternative methods to change the Restrictive Covenants are "standalone" and "separate."

To resolve this Motion, the Court need look no further than Plaintiffs' judicial admissions that the two alternative methods to change the Restrictive Covenants are "separate" and "standalone." *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 568 (Tex. 2001) ("A judicial admission that is clear and unequivocal has conclusive effect and bars the admitting party from later disputing the admitted fact.") (citation omitted).

First, Plaintiffs correctly admit that the provision in Section 4 of Article I (which does *not* require architectural control committee approval and 30-days' notice) is a "separate" provision:

> 5. A separate **"Duration"** provision at Section I, ¶ 4 allows a mere majority of owners to amend the deed restrictions upon the 35th anniversary of their adoption and every 10 years thereafter:

Plaintiffs' MPSJ at 3. Second, Plaintiffs also correctly admit that the Article IX provision (which does require architectural control committee approval and 30-days' notice) is a "standalone" provision:

> 4. A standalone **"Amendments"** provision at Section IX governs amendments as follows:

Id.; see also Plaintiffs' Fourth Amended Petition at 3. The fact that, as even Plaintiffs admit, these provisions are "separate" and "standalone" shows that sentences from one provision should not be copied/pasted into the other provision.

Importantly, the Court should also take notice of Plaintiffs' description of the "separate" methodology set forth in Section 4 of Article I. Plaintiffs accurately describe the methodology that Defendants followed as allowing for a change to the Restrictive Covenants by "a mere majority of owners [] amend[ing] the deed restrictions upon the 35th anniversary of their adoption

and every 10 years thereafter." Plaintiffs' MPSJ at 3. Missing, properly, from Plaintiffs' description are the two conditions that Plaintiffs now would have this Court improperly copy from the "standalone" provision into this "separate" provision.

2. Plaintiffs' requested interpretation is contrary to the plain language of the Restrictive Covenants.

Plaintiffs' requested interpretation is contrary to the plain language of the Restrictive Covenants. The rules of construction for a contract such as the Restrictive Covenants are well settled under Texas law. "In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument." *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983) (citation omitted). The parties' intent must be derived from the agreement itself, and the agreement must be enforced as written. *Wells Fargo Bank, Minn., N.A. v. N. Cent. Plaza I, L.L.P.*, 194 S.W.3d 723, 726 (Tex. App.—Dallas 2006, pet. denied). Pursuant to Texas statute, a "restrictive covenant shall be liberally construed to give effect to its purposes and intent." Tex. Prop. Code Ann. § 202.003(a).

In the present case, the parties expressly chose to allow for "changing the provisions" of the Restrictive Covenants if "the then owners of a majority of lots in the Subdivision shall have executed and recorded an instrument changing the provisions hereof, in whole or in part." Ex. 1, Restrictive Covenants at Art. I.4. Pursuant to the plain language of the Restrictive Covenants, there can be no doubt that this is a permitted method of changing the terms of the Restrictive Covenants.

In its entirety, the provision states:

> The provisions hereof, including the Reservations, Restrictions and Covenants herein set forth, shall run with the land and shall be binding upon the Developer, its successors and assigns, and all persons or parties claiming under it or them for a period of thirty-five (35) years from the date hereof, at which time all of such provisions shall be automatically extended for successive periods of ten (10) years each, unless prior to the expiration of any such period of thirty-five (35) years or

> ten (10) years, the then owners of a majority of lots in the Subdivision shall have executed and recorded an instrument changing the provisions hereof, in whole or in part, the provisions of said instrument to become operative at the expiration of the particular period in which such instrument is executed and recorded, whether such particular period to be the aforesaid thirty-five (35) year period or any successive ten (10) year period thereafter.

Ex. 1, Restrictive Covenants at Art. I.4. Contrary to Plaintiffs' claim, there is nothing in this provision that requires that the owners be given 30-days advance notice in writing of the proposed change. Nor is there anything in this provision that requires that the Architectural Control Committee recommend the proposed change. It's just not there.

Plaintiffs' claim is also contrary to Texas law. *Wilchester W. Concerned Homeowners LDEF, Inc. v. Wilchester W. Fund, Inc.*, 177 S.W.3d 552, 563 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). In *Winchester*, the court determined that amendments to restrictive covenants were valid. *Id.* In *Winchester*, the amendment provision at issue was as follows:

> **8.01 Term:** These restrictions and covenants shall run with the land and shall be binding upon all parties and all persons claiming under them…unless at any time an instrument, executed by the then Owners of a *majority* of the Lots within the Property, has been filed for record *agreeing to change these restrictions* in whole or in part.

Id. at 563. The court applied the rules of construction and held that "paragraph 8.01 unambiguously provides the homeowners in Wilchester West with the right and means to amend the restrictions by written consent of a simple majority of the homeowners in Wilchester West filed of record." *Id.* at 563.

Important for this case, the court rejected the claim of a lack of notice because, as here, there was no notice requirement in the provision:

> WWCH argues that the amendments are invalid for lack of notice. **However, there is no specific notice requirement contained in the restrictions. Rather, the restrictions expressly permit an amendment by filing an instrument executed by the majority of homeowners.** When homeowners represented by WWCH purchased homes in Wilchester West, they were on notice that the restrictions could be changed through majority vote and that there were no specific notice

> requirements in order for the restrictions to be amended. Because the restrictions do not contain any specific notice requirement of a proposed amendment to the restrictions, WWCH's notice argument fails.

Id. at 563 (citations omitted) (emphasis added). As in *Winchester*, there is no requirement that all of the lot owners be provided notice of the requested change. Here, because the conditions that Plaintiffs seek to impose are not found in the plain language of Section 4 of Article 1, the Court should grant Defendants' Motion.[1]

3. Plaintiffs' requested interpretation is contrary to the plain language of "may" for the permissive method to "annul, amend, or modify" the Restrictive Covenants in Article IX.

Even Plaintiffs agree that the conditions that Plaintiffs seek to impose are not found in the plain language of Section 4 of Article 1. Because of this undisputed fact, Plaintiffs are forced to copy conditions from Article IX and paste them into Section 4 of Article 1 to achieve their desired result. However, by its very plain terms, Article IX is a permissive method to "annul, amend, or modify" the Restrictive Covenants. It is not an exclusive method. The plain and express language is a **permissive "may"**: "[a]ny or all of the covenants herein **may** be annulled, amended or modified" by the method set forth in Article IX. Ex. 1, Restrictive Covenants at Art. IX (emphasis added). Accordingly, it is not the exclusive method.

The full text of Article IX is set forth below:

> Any or all of the covenants herein may be annulled, amended or modified at any time at the recommendation of the Architectural Control Authority, or its successors, and ratified by a vote of two-thirds of the lot owners in the Subdivision. All such lot owners shall be given thirty (30) days notice in writing of any proposed amendment before same is adopted. There shall be no annulment, amendment or

[1] Realizing that the plain language of the Restrictive Covenants defeats their argument, Plaintiffs have argued that the Restrictive Covenants are ambiguous and the ambiguity should be "resolved in favor of property rights." However, the Restrictive Covenants are not ambiguous and, as Plaintiffs judicially admit, provide for two alternative methods that are "separate" and "stand alone." Furthermore, if the Restrictive Covenants were ambiguous with respect to these provisions to change the terms of the Restrictive Covenants, the ambiguity would be resolved in favor of Defendants because it is Plaintiffs, not Defendants, that are trying to impose additional requirements on a property owner's ability to change the terms of the Restrictive Covenants.

> modification of these covenants without the prior recommendation of the Architectural Control Authority.

Ex. 1, Restrictive Covenants at Art. IX. Courts construe terms used in the agreement with their plain, ordinary, and generally accepted meanings unless the contract itself shows the terms are used in a technical or different sense. *Valence Op. Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005); *see also Epps v. Fowler*, 351 S.W.3d 862, 866 (Tex. 2011) ("When a contract leaves a term undefined, we presume that the parties intended its plain, generally accepted meaning."). Here, the parties chose to use the term "may" and the Court should give that term its plain, ordinary, and generally accepted meaning.

Article IX provides one alternative method to amend the Restrictive Covenants. The Article IX method comes with certain conditions for the amendment to be effective: (1) two-thirds vote of the lot owners; (2) recommendation by the ACC; and (3) thirty-days written notice of the proposed amendment. *Id.*

On the other hand, Section 4 of Article I provides another alternative method to change the Restrictive Covenants. The Section 4 of Article I method comes with certain conditions for the amendment to be effective: (1) the owners of a majority of lots must execute and record an instrument changing the provisions and (2) it "become[s] operative at the expiration of the particular period in which such instrument is executed and recorded, whether such particular period to be the aforesaid thirty-five (35) year period or any successive ten (10) year period thereafter." *Id.* at Art I.4. Each provision provides an alternative, permissive method to change or modify the Restrictive Covenants and each provision comes with its own independent conditions.

4. The Court should reject Plaintiffs' attempt to copy and paste terms from one section of the Restrictive Covenants into another section of the Restrictive Covenants as contrary to longstanding Texas law.

Pursuant to Texas law, courts must read contracts in their entirety, giving effect to each provision. *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 159 (Tex. 2003). Courts must not interpret a contract in a way that would render other provisions of the contract meaningless. *Id.* Contrary to this longstanding rule, Plaintiffs' interpretation would render Section 4 of Article I meaningless. *See Coker*, 650 S.W.2d at 394.

Plaintiffs ask the Court to do violence to the Restrictive Covenants by copying and pasting the conditions in Article IX into Section 4 of Article I. The Court should decline Plaintiffs' invitation to violate longstanding Texas law. Throughout the Restrictive Covenants, there are many examples of one section of the Restrictive Covenant referencing or being subject to another section. Below are a few such examples:

> 2.a. The authority to grant or withhold architectural control approval as referred to above is vested in the Developer; except, however, that such authority of the Developer shall cease and terminate upon the election of the Point Venture Architectural Control Committee, in which event such authority shall be vested in and exercised by the Point Venture Architectural Control·Committee (**as provided in b. below),** hereinafter referred to; except as to plans and specifications and plats theretofore submitted to the Developer which shall continue to exercise such authority over all such plans, specifications, and plats. Ex. 1, Restrictive Covenants at II.2.a (emphasis added).
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> 3. Approval or disapproval as to architectural control matters **as set forth in the preceding provisions** shall be in writing. *Id.* at II.3 (emphasis added).
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> **The "General Restrictions" set forth in IV. below** shall be applicable to all types of lots in the Subdivision hereinabove enumerated and designated. *Id.* at IV.1 (emphasis added).
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> * * *

> **Subject to the provisions of Paragraph 4.,** no building shall be located nearer than seven and one-half (7 ½) feet to an interior side lot line. *Id.* at IV.3.a (emphasis added).
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> Upon any such required approval having been obtained, such composite building site shall thereupon be regarded as a "lot" for all purposes hereunder, however, that for purposes or voting for the Committee **(as provided under Paragraph II. 2.b. above)**, an owner shall be entitled to one (l) vote for each whole lot within such owner's building site. *Id.* at IV.4.a (emphasis added).
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> 1. **In addition to the General Restrictions set forth in IV. above**, the following restrictions shall apply. *Id.* at V.1 (emphasis added).

However, contrary to Plaintiffs' claim, there is no such reference in Section 4 of Article I. Section 4 of Article I does not expressly or implicitly reference or otherwise incorporate the conditions in Article IX. It's just not there. The drafters knew how to reference or incorporate provisions from one section into another section. Here, they chose not to do so.

To now allow Plaintiffs to rewrite the Restrictive Covenants in a manner that is contrary to the plain language of the agreement and the intent of the parties would be a violation of longstanding Texas law. Therefore, the Court should grant Defendants' Motion.

C. The Court Should Grant Defendants' Motion As To Plaintiffs' Claims For Breach Of Contract And Anticipatory Breach Of Contract.

The elements of an action for breach of contract are: (1) There is a valid, enforceable contract, (2) plaintiff is the property party to sue for breach, (3) plaintiff performed, tendered performance of, or was excused from performing its contractual obligations, (4) the defendant breached the contract and (5) the defendant's breach caused the plaintiff's injury. *City of The Colony v. North Texas. Mun. Water Dist.,* 272 S.W.3d 699 (Tex. App. —Fort Worth, 2008 pet. dism'd). The elements of an anticipatory breach of contract claim are: (1) a party to a contract has absolutely repudiated the obligation; (2) without just excuse; and (3) the other party is damaged as

a result. *Hauglum v. Durst*, 769 S.W.2d 646, 651 (Tex. App.—Corpus Christi 1989, no writ). Here, Plaintiffs' claims fail as a matter of law for three reasons.

First, Plaintiffs' claims are based on the alleged breach of the conditions in Article IX when Defendants attempted to change the Restrictive Covenants pursuant to Section 4 of Article I. Plaintiffs' breach of contract and anticipatory breach of contract claims rest completely on Plaintiffs' incorrect attempt to rewrite the Restrictive Covenants. As set forth above, Plaintiffs' attempt is contrary to the plain language of the Restrictive Covenants and longstanding Texas law. Therefore, Plaintiffs' claims fail as a matter of law.

Second, the events in Article IX have not occurred. The amendment was not adopted pursuant to Article IX so there could be no violation of the thirty-day notice provision. Similarly, there has been "no annulment, amendment or modification of these covenants" pursuant to Article IX so there could be no violation of receiving a prior recommendation of the ACC. Therefore, Plaintiffs' claims fail and the Court should grant Defendants' Motion for Summary Judgment.

Third, there is no evidence of the third, fourth, and fifth essential elements of Plaintiffs' claim of breach of contract and the first, second, and, third essential elements of Plaintiffs' claim of anticipatory breach of contract. Therefore, the Court should grant Defendants' Motion for Partial Summary Judgment.

IV. CONCLUSION

For these reasons, Defendants respectfully request that the Court enter an order granting Defendants' Motions for Partial Summary Judgment, and for such other relief as they may be entitled.

Respectfully submitted,

/s/ Michael L. Navarre

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was electronically served on counsel of record by electronic transmission on this 12th day of October, 2017:

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