REPORTER'S RECORD

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

RICHARD W. JACKSON, LISA C. JACKSON, and KATHLEEN WOODALL, Plaintiffs,	)	IN THE COUNTY COURT
vs.	)	AT LAW NO. 2
JANICE COX and HELEN RAMSEY individually and d/b/a Point Venture Neighbors For STR Reform, an unincorporated association; and POINT VENTURE NEIGHBORS FOR STR REFORM, an unincorporated association, Defendants.	)	TRAVIS COUNTY, TEXAS

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MOTIONS HEARING

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On the 14th of June, 2017, from 9:06 a.m. to 10:30 a.m., the following proceedings came on to be heard in the above entitled and numbered cause before the Honorable ERIC SHEPPERD, judge presiding, County Court at Law No. 2, held in Austin, Travis County, Texas, and reported in machine shorthand by Rabin´ Monroe, RDR, CRR, CRC, Certified Shorthand Reporter for the State of Texas.

APPEARANCES

FOR PLAINTIFFS

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ALSO PRESENT:

JANICE COX, Defendant

HELEN RAMSEY, Defendant

I N D E X

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EXHIBITS

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P R O C E E D I N G S

THE COURT: All right. Lemme call cause number C-1-CV-17-001833, Richard Jackson vs. Janice Cox, *et al*.

Gentlemen, if you'd just announce yourself for the record, please.

MR. SUTTON: Patrick Sutton present for Plaintiffs.

MR. NAVARRE: Michael Navarre for Defendants.

THE COURT: All right. So we have a Defendants' motion, a Plaintiffs' motion, and an a- -- and a motion to dismiss. And I guess we need to go through the motion to dismiss first?

MR. NAVARRE: That's correct, Your Honor.

MR. SUTTON: I agree with that.

THE COURT: 'Kay. All right. So let's talk about that.

MR. NAVARRE: Your Honor, the motion to dismiss that's before the Court is based, of course, on the Texas Citizens Participation Act, otherwise known as the Anti-SLAPP Act. The Court is prob'ly familiar with that act and how it's been construed by both the Third Court of Appeals and the Texas Supreme Court. The purpose of the strategic lawsuits against public

participation is to prevent lawsuits that are filed simply to, as in this case, to shut people up or to stop them from participating in community action.

The case that we've cited, the Cheniere Energy vs. Lofti [sic] case specifically states that it is designed for suits that are against politically and socially active individuals, not with the goal of prevailing on the merits, but, instead, of chilling those individuals' First Amendment activities.

The Court may recall when we were here last we had as an exhibit a letter from Mr. Robinson threatening anybody who stood in the way of short-term rentals, including my clients, who are here today -- this is Janice Cox and Helen Ramsey -- threatening them with a lawsuit. That they would -- he would fight to the death. That he had all kinds of financial resources. "You don't wanna tangle with me. Don't be messin' with me," et cetera. That threat was not only made against my clients, but also against the Board and against other citizens in Point Venture.

This lawsuit, Your Honor, is basically the follow-through of those threats made against my clients.

So the first -- there's a three-step analysis that goes through in the Anti-SLAPP Act. The first question is whether the lawsuit is covered by the

Anti-SLAPP Act; the second step of the analysis is whether they can provide a *prima facie* case of each essential element of each cause of action; and the third step, Your Honor, if we get to that, is whether we have provided by a preponderance of the evidence an affirmative defense to one of those claims.

We win, Your Honor, if they fail under burden number two, or we win if we prevail under burden number three, of course assuming that we meet the first requirement under the Anti-SLAPP Act.

The supreme court in 2005, in the case in re: Lipsky stated that the TCPA protects citizens who petition or speak on matters of public concern from retaliatory lawsuits that seek to intimidate or silence them.

One of the things that we have submitted to the Court is a demand letter made by Plaintiffs' counsel. In that demand letter, Court will see that one of the requirements is that they provided the website for communicating with other people in order to get support f- -- to prevent short-term rentals in Point Venture. It also include [sic] basically a cease-and-desist, where they can't help or solicit or work with other people with respect to stopping short-term rentals.

So basically the demand was to silence them. And in fact, that was -- the injunction was also granted in order to prevent them from filing with . . . the -- the -- the district clerk --

THE COURT: Who is "them"? Just for the record --

MR. NAVARRE: My clients, Your Honor.

THE COURT: Okay.

MR. NAVARRE: My clients. My clients.

So the first step in the analysis is whether this -- these claims fall within the TCPA. We have submitted affidavits, Your Honor, that show that. But frankly, just the Plaintiffs' live petition shows that these claims are covered under the TCPA.

The TCPA includes any claims that are based on, relate to, or are in response to the party's exercise of both the right of free speech and the right of association. Those are the two rights under the First Amendment that are at issue here, Your Honor. There's no doubt that there's a communication that's part of this lawsuit. The communication is my clients creating an amendment to change the deed restrictions and then going out to their fellow neighbors and soliciting signatures for those. Those are communications, Your Honor.

There's also no doubt that there's a freedom of association here, Your Honor, because, again, they were associating among themselves and with other people in the neighborhood.

THE COURT: I guess one of the questions I'd like for you to address is --

MR. NAVARRE: Sure.

THE COURT: -- Justice Pemberton, in writing about these statutes, has expressed some concerns about what is and what is not covered, and -- and appears to suggest -- or at least w- -- is concerned about what is the difference between filing a lawsuit because you believe you have rights under the -- under the law and trying to silence somebody. That line appears to be fairly easily crossed -- too easy to cross, in his words, easily crossed for -- for purposes of the Third Court of Appeals.

So can you address that?

MR. NAVARRE: Yes, Your Honor. So if the Court -- the Court may be referencing I think it was the May opinion by Justice Pemberton. I think that was in a trade-secret cl- -- case.

THE COURT: Yeah.

MR. NAVARRE: And -- and what Justice Pembertom basically said was, "Look. This is the way

the statute's written. My hands are tied. As far as whether even a trade-secret case . . . is covered in the TCPA." And Justice Pemberton came down with a conclusion that as written, it is covered under the TCPA. There's no doubt about it. Plain language. And he s- -- and he basically said to everybody, "If you don't like this, you have to go to the legislature to change the statute."

And I would suggest to the Court that here, what we're talkin' about here, is exactly what even Justice Pemberton would say this statute was designed to prevent.

THE COURT: So help me explain from your perspective what the difference is between if you believe you have a right, and you believe that that right's protected by law, how do I then file it without running afoul of the -- because it almost seems as if --

I agree with you, that that may -- that's probably what he said, and it appears that that's what he's come down to. But the question becomes for the courts, without much guidance, it veers, is how do I allow someone to file a lawsuit for which they believe they have a violated right and not fall -- run afoul of the Anti-SLAPP statute?

MR. NAVARRE: It's the -- it's the second

step of the analysis, Your Honor, that I think saves us from that calamity, if you will. And that is: If they're covered -- which this lawsuit's covered -- by the TCPA, then it's up to the other side to show a *prima facie* case of each essential element of their claim.

THE COURT: So it's the second part that says if you can -- if you can show me how we violated your rights under -- at least a *prima facie* case of such, under step two, then you aren't running afoul of the -- of this, unless I can come up with something else under step three.

MR. NAVARRE: Exactly, Your Honor. Exactly. So the first step is: Are we covered, and if it's a real lawsuit. I mean, if there's a -- you know, a cognigable -- eh. I'm not --

(Mr. Navarre and the Court talking at once.)

THE COURT: Cognizable. Yeah.

MR. NAVARRE: Thank you, Your Honor.

THE COURT: It's hard when you're talkin' fast.

MR. NAVARRE: Well, it's also hard when you have a small amount of brain cells, too.

So the -- that second step, though, Your Honor, is what prevents an abuse of the Anti-SLAPP

Act, is what -- is what I would submit to the Court.

But here, Your Honor, as far as the first step -- and Ju- -- as Justice Pemberton has written I think in that May opinion, and also in prior opinions in the Third Court of Appeals, the TCPA defines the exercise of the right of free speech as a communication made in connection with A matter of public concern.

This is undoubtedly a matter of public concern. Public concern is defined to encompass . . . community well-being. That's what this case is about, Your Honor, is community well-being.

We can go on to the exercise the right of association; communication between individuals for a common interest.

Obviously the people who sign the petition have a common interest. Miss Ramsey/Ms. Cox have a common interest in order to prevent their neighborhood from being further abused by the short-term rentals.

So I don't think there's any doubt that we fall under the first prong of the test. So let's go -- let's move to the second step, Your Honor.

In the second step, we examine whether there's been a *prima facie* case of each essential element of the claims made by the Plaintiffs.

And remember, this motion encompasses all

of the claims, Your Honor. So if we look at the various claims, we have a claim for alter ego. I'd submit to the Court that there is no *prima facie* case of alter ego. There's another claim for breach of contract, Your Honor, and for anticipatory or for attempted breach of contract. The breach of contract being the restrictive covenants.

And Your Honor, again, I would submit that there has no been -- there has not been a *prima facie* showing. Because when the Court looks at the response filed in this case, the response filed in this case completely . . . is completely based upon the fatal assumption that Article I, Section 4, includes the requirements of preapproval by the ACC and 30 days' notice. That is the complete basis for both the breach of contract -- attempted-breach-of-contract and declaratory-judgment actions, Your Honor.

And so the question before the Court, as we discussed last time, really comes back to the fundamental issue of the interpretation of the contract. The interpretation of the contract . . . according to Plaintiffs, what they would have the Court do, is take two sentences out of Article IX, copy them, and paste them into Article I, Section 4. That is the fundamental flaw in the logic as far as the *prima facie* case.

And Your Honor, if I may, I've got some demonstratives to show this.

Can the Court see?

THE COURT: Yeah.

MR. NAVARRE: Okay. All right. So in the filings that the Plaintiff has made, the Plaintiff has termed Article I, Section 4, and Article IX as separate and stand-alone or independent methodologies to change the restrictive covenants. Article I, Section 4, is what my clients relied upon. And that's, again, in the -- in the evidence that's been submitted to the Court.

Article I, Section 4, allows for a change of the restrictive covenants every 35 years or every 10 years. So it's -- that timing is crucial. "By a majority of the lots in the subdivision shall have executed a recorded instrument changing the provisions hereof." The instrument is the instrument that they had drafted and then circulated, and they were close to if not had a majority when th- -- when this lawsuit was filed.

That's what Article I, Section 4, requires. It is a methodology to change the restrictive covenants. It sets forth what's required to change that. It can only occur after 35 years or after 10 --

every 10-year period thereafter, majority of the owners signing it.

The other separate and independent alternative methodology is Article IX, Your Honor. Article IX. "Any or all the covenants herein may be annulled, amended, or modified at any time," blah, blah blah. May be. May be. As the Court knows, "may" is an alternative. If I tell my son "You may go to sleep tonight at 7:00 o'clock or 10:00 o'clock," I made a mistake there, 'cause he's goin' to sleep at 10:00 o'clock; right? If I say, "You shall go to sleep at 7:00 o'clock," then he knows he's gotta be in bed by 7:00 o'clock. Here it's "may be" because it's alternative methodologies.

Article IX then goes on to say that, "All such lot owners shall be given 30 days' notice in writing of any proposed amendment before the same is adopted. There shall be no annulment, amendment, or modification of these covenants without the prior recommendation of the Architectural Control Committee." These two sentences -- these two sentences are not found in Article I, Section 4. What the Plaintiff has to do in order to prevail is to somehow or another convince the Court that the Court should do violence to the restrictive covenants, copy these two sentences, and

paste them into Article I, Section 4.

Why do they need -- why do they need that to prevail? Because the drafters didn't do it, Your Honor. The drafters did not do it.

This is again Article I, Section 4. As it exists in the restrictive covenants. This is the Plaintiffs' rewrite of this section. With these two sentences added in the red.

Now. The Court may think, "Well, you know . . . why not do that? Maybe the drafters just made a mistake. Maybe the drafters meant to incorporate those two sentences in Article IX into Article I, Section 4." But -- and we've identified this in our -- in our filings, Your Honor. The drafters knew how to incorporate different sections internally.

In Exhibit 1, which is the restrictive covenants, at Article [sic] 2.a., there's an example of where they say "in which event, such authority shall be vested in and exercised by the Point Venture Architectural Committee as provided in b. below." They know how to incorporate by reference.

Another example. Article II, Section 3. "Approval or disapproval as to architectural-control matters as set forth in the preceding provisions." Incorporate by reference.

Further below. "The general restrictions set forth in IV below shall be applicable to all types of lots." Incorporating by reference. "Subject to the provisions of paragraph 4." Incorporating by reverence [sic]. Reference. And on and on.

And these are just some examples, Your Honor.

So the drafters knew how to incorporate by reference. The drafters knew how, if they wanted to . . . to say at the end of Article I, Section 4, "subject to the restrictions set forth in Article IV." They coulda done that. They didn't do it.

The irony here, Your Honor, the irony, is that the sole case that Plaintiffs originally re- -- relied on, the Zagby [ph/sic] case, out of the Austin Court of Appeals. In that court -- in that case, the Austin Court of Appeals said, "Look. The ha- -- they know how to put duration in. Six months; six years; whatever. A duration requirement. The drafters knew how to do that. Because they put a duration requirement in the restrictive covenants for something else."

And so the court said, "That showed that the drafters knew how to do it, and yet they puddin- -- they did not put a duration requirement in for rentals. Therefore, since they knew how to do it here, and they

didn't know how to do it here, that shows a conscious intent to not incorporate by reference or not put in a duration requirement."

We have the same thing here, Your Honor. The restrictive covenants, the plain language of the restrictive covenants, shows that those two conditions that they would impose into Section -- into Article I -- Section 1, Article IV, are not found. It's just not there, Your Honor. And we go into detail both in our summary-judgment papers and in our reply brief in support of our Anti-SLAPP motion.

As to the rewrite, the ignoring of the plain language, the ignoring of Texas law concerning contract interpretation, to give ordinary meaning to terms such as "may."

So that's what the Anti-SLAPP motion boils down to as far as the DJ action and also the breach-of-contract actions.

One other thing with respect to the breach-of-contract actions, Your Honor. I will submit to the Court that the evidence before the Court is that these . . . this restriction . . . was never adopted. So going back to Article IX, both sides agree this provision here, "All such -- such lot owners shall be given 30 days' notice in writing of any proposed

amendment before same is adopted." The amendment was never adopted, therefore they could not have breached this, because the 30-day period never started.

"There shall be no annulment, amendment, or modification of these covenants without the prior recommendation of the Architectural Control Authority."

Again, there's been no annulment, there's been no amendment, there's been no modification. It didn't occur; therefore, they could not have breached this, because, again, the time period didn't start, Your Honor. The time period didn't start.

Finally, Your Honor, step three. Step three of the analysis is where -- whether we have provided by a preponderance of the evidence some sort of affirmative defense. Here, Your Honor, the affirmative defense is the affirmative defense of prior breach of the contract or unclean hands.

Again, before the Court, in the affidavits and the other documents that we've submitted, is proof that Plaintiffs never sought and never obtained prior written approval from the developer to lease. There's no doubt, Your Honor, that in Article IV, Section 5, in the restrictive covenants, it require -- it says that a vy- -- it is a violation to rent or lease any improvement without the prior written permission of

developer. The evidence before the Court is that there was no prior written permission -- permission of the developer, therefore they're in breach of the restrictive covenants. They have unclean hands. And therefore, Your Honor, that's an affirmative defense to their claims, and they cannot enforce restrictive covenants that they themselves have violated.

Your Honor, that's the argument with respect to the Anti-SLAPP motion. If the Court has any questions, I'm more than happy to answer.

I did not go into, how should I say, elaborate detail on the construction arguments. But if the Court has any questions on that, I'll be more than happy to answer or provide the authorities that we cited in our summary judgment.

THE COURT: No, I think that's fine. Thank you.

MR. NAVARRE: Thank you, Your Honor.

THE COURT: Yes, sir.

MR. SUTTON: Judge, first thing is discussion of the evidence. First of all, I don't know anything about Ben Robinson. He's not a party to this case. Their motion is full of inflammatory statements by someone name Ben Robinson. They include a lot of evidence, written material, with the motion, and all of

it has to be struck, Judge, including the portions of their motion that contain references to this. There apparently is some inflammatory person out there making a lotta statements, but it has nothing to do with this case. And so we've asked in our motion for you to strike all that material. There's no connection with our clients.

Last night they filed a lot of additional evidence: Affidavits; emails. And I quickly filed a long, exhaustive list of objections. Much of is -- is not authenticated. Much of it is hearsay. Much -- much of it relates to assertions that people are urinating on bushes or dancing on roofs. None of it has anything to do with this case, Judge. Our motion sets out for every exhibit all of the objections that we have. It has no bearing on the motion to dismiss.

So let me talk about their motion to dismiss.

First, Judge, I'm going to tell you what's in our lawsuit, and then I'm gonna go -- give you a little background as to why our lawsuit did those things.

Our lawsuit does mention al- -- alter ego, but I'm gonna come back to that, because it's easier to explain after I talk about the claims.

Our lawsuit is a declaratory judgment to declare the meaning of a set of deed restrictions. It is the most common kind of lawsuit one can imagine. We ask for a declaration that 30 days' notice -- that the deed restrictions require 30 days' notice and Architectural Control recommendation before any amendments are adopted. One.

Two, we seek a declaration that the deed restrictions do not presently bar leasing. That -- that issue is not teed up today.

Third, we seek a declaration that the deed restrictions do not bar short-term rentals.

THE COURT: As they're currently constructed.

MR. SUTTON: Correct.

Now, the next claim we have is for bre- -- and this is unusual. I've never set -- seen a set of deed restrictions that do this. The next claim we have is for breach or attempted breach of the restrictive covenants.

And if I may, Judge, approach the bench.

THE COURT: Yes.

MR. SUTTON: I'm gonna just give you a copy of our motion with exhibits.

I'll ask you to turn to Exhibit A. And

I'm gonna show you a clause that is unique, in my experience, and I've read thousands of sets of deed restrictions. This is approximately . . . well, it's numbered page three of the deed restrictions. So it's gonna be a -- a hyphen three hyphen at the bottom of Exhibit A. And what this clause says is, "In the event --"

THE COURT: [Indiscernible]

MR. SUTTON: "-- of any violation --"

THE COURT: Mr. Sutton? Which paragraph?

MR. SUTTON: I'm sorry. W- --

THE COURT: Which paragraph on page three?

MR. SUTTON: Oh, I'm sorry. First paragraph, "Enforcement."

THE COURT: Okay.

MR. SUTTON: Numbered paragraph five.

"In the event of any violation or attempted violation of any of the provisions hereof," and then it goes on to say "a party can seek any form of legal relief, including an injunction."

THE COURT: Okay.

MR. SUTTON: So here's what then played out. Earlier this year, my clients got wind of an attempt to amend the deed restrictions. When they read the deed restrictions, they saw that there's a clause

requiring 30 days' notice and prior recommendation of the Architectural Control Authority. And in their opinion, what that clause meant was that -- precisely what it said. And they knew that they had not been given 30 days' notice before adoption, because it was set to happen a week later; and they also knew that there had been no Architectural Control Authority recommendation.

So they filed a lawsuit, and they sought a temporary -- first a TRO and then a temporary injunction. Actually, I believe we went straight to the temporary injunction in this case. We had a long hearing in this court before Judge Wong. Witnesses got up, and what the Defendants testified was, "We purposefully didn't give at least six people notice of our amendment, because we knew they opposed us."

They also acknowledge that there had been no Architectural Control Authority recommendation.

Judge Wong interpreted the deed restrictions at that point and granted the temporary injunction. And what the injunction granted is important for the purposes of this hearing. It enjoined the Defendants from recording a deed restriction that did not satisfy those two tests. It did not prevent the Defendants from doing anything other than what we

asserted was an attempted violation under the deed restrictions: Of adopting a deed restriction that hadn't fulfilled the requirements of the deed restrictions.

So Plaintiffs mounted a full case at that injunction hearing, and I think it's fair to say we made a *prima facie* case of our claims relevant to the. . . .

THE COURT: As evidenced by the order signed and granting your temporary injunction.

MR. SUTTON: Yes, Judge.

Now, after that hearing, the Defendants themselves asserted a declaratory-judgment claim that is the mirror image of ours, saying that those two requirements of 30 days' notice and a recommendation are not mandatory under certain circumstances. They also asserted breach of restrictive covenant. Judge, their lawsuit is the same as ours. It's a mirror image. If they're trying to say that it shuts down free speech, then they've waived that by filing the same lawsuit in mirror-image form.

So let's talk about -- and I need to go back to our motion to strike. And I'll ask the Court to refer to our Exhibit D. This is an authenticated copy of what I had to submit in response. The authentication is the first page. The second page begins the

substantive evidence.

The first line of that is TRE 408 communication. Judge, this is a letter from me proposing a settlement. Their s- -- Anti-SLAPP motion to dismiss is based on a confidential settlement communication which they characterize as some form of demand or ultimatum.

The first paragraph says, "Here's a compromise framework. Final wording to be determined. Let's get together and try to settle this case."

Now, Judge, I object strenuously to their filing of the same exhibit in unredacted form. I'm only presenting it to the Court for the limited purpose of proving that it is nothing more than a confidential settlement communication.

It includes, as they suggest, what I characterize -- it's like a noncompete agreement -- a noninterference proposal. That's on the second page, paragraph two.

It also has, in paragraph five, an offer to buy their Internet domains and email addresses and things of that nature. But it doesn't matter. It's just an offer. And . . . it asks them to respond.

After we sent the offer, they fire their lawyer and got a new lawyer.

You cannot say that our lawsuit is somehow based on a confidential settlement communication, because it's not. And I believe it probably would be unconstitutional to even say that it is.

So I'll talk now about the burdens. First, they have to show that our lawsuit would chill speech. Our lawsuit has obviously been drafted not to chill free speech. Declaratory judgment, breach of restrictive covenant, and attempted breach of restrictive covenant, and then we pulled out evidence, and were granted a temporary injunction because we proved up the declaratory-judgment claims.

The alter-ego aspect of our lawsuit was necessary because, as the evidence in the case has showed, the Defendants had put up a website with the name of an entity, and what we had to do was prevent anyone from breaching or attempting to breach the restrictive covenants, and we had no way of knowing what the actual membership of the entity was and what its relationship was to the Defendants. But we knew that we needed an injunction to prevent the recordation of a document. And so we claim alter ego to cover our bases on who the proper parties were to the lawsuit and who should be covered by the injunction.

And the injunction continues that by

saying anyone acting in concert with these three Defendants, and including the entity, were prevented from recording anything.

So first part of their lawsuit, first of all, is completely unproven because they have not submitted any evidence that this is a lawsuit intended to chill free speech.

The second part: Have we made a *prima facie* case. Well, in a declaratory-judgment claim, the only issue is did we submit the deed restrictions and have we mounted some sort of argument and asserted facts showing, one, a live controversy. Yes. Two, do the deed restrictions have some sort of demonstrable conflict of the -- or interpretation of the type that we've asserted. Yes. I can go through the analysis, but I'd like to wait until the summary judgment. But at all events, we have the temporary injunction based on a difficult hearing. Finally, this -- yeah. Finally, the third prong, they're saying that the . . . the question of whether . . .

THE COURT: They filed an affirmative --

MR. SUTTON: A defense.

They've dragged in an irrelevant claim for which they have absolutely no evidence, and which is not the subject of any penning -- pending motion today.

One of the disputes in this case is whether . . . owners must obtain the consent of the developer, or presumably someone succeeding the d- -- the developer, in order to lease their property. At the hearing a week or two ago, you ordered that their summary judgment on that claim be continued. But in any event, they have not submitted any evidence with their motion that we did not obtain consent from anyone. To the extent that they've made assertions in various affidavits, the affidavits themselves are not competent summary-judgment evidence.

The question I guess would be: Did Jackson or Woodall obtain anyone's consent prior to leasing. We just don't have any evidence as to that. We will in two months, when we have summary-judgment hearings.

Judge, we've asked for an award of fees for their bringing of this motion. It is obviously not meritorious. It is based on a confidential settlement agreement. If you look at the progression of their filings, they filed it just before they substituted new counsel. The only evidence they attached was our confidential settlement agreement. That was the evidence, Judge, for claiming Anti-SLAPP motion to dismiss. It's improper. It sh- -- that evidence should

be struck. All the inflammatory evidence they filed last night should likewise be struck.

Thank you.

THE COURT: Yes, sir.

MR. NAVARRE: First off, Your Honor, the evidence we filed yesterday is the same evidence we filed in our summary-judgment response seven days ago. It includes affidavits that substantiate the affirmative defense, et cetera.

Let me start with -- with the demand letter. Rule 408. Your Honor is very familiar with Rule 408, which states, "Evidence of the following is not admissible either to prove or disprove the validity or amount of a disputed claim."

I would submit to the Court that we did not submit the demand letter as evidence to prove or disprove liability. That's not the purpose, Your Honor. The purpose of the demand letter is to show the Court the true nature of this case, the cease-and-desist language in the demand letter, that c- -- Counsel did not identify. And also the takedown of the website. The communication. The free speech. That's the purpose of the Rule four-oh- -- of the -- of the demand letter.

I've seen Rule 408 used all the time, Your Honor. The reason you don't ha- -- the reason you do

not allow the admission of a demand letter to prove or disprove liability is in front of the jury. That's why. But the rule specifically states, in Subparagraph B -- 408, Subparagraph B, the court may m- -- admit this evidence for another purpose, such as, and goes through a long list.

So the only limit on 408, Your Honor, is to prove or disprove liability, which we're not using it for. And . . . there's no jury here, either, Your Honor. So. I don't think that's a problem.

Lemme move to Ben Robinson. I was shocked to hear Counsel state that he does not know who Ben Robinson is. Shocked, Your Honor. Because as Counsel stated, the original counsel in this case was replaced. Mr. Rob Johnson of Gardere Wynn was contacted to begin representing --

MR. SUTTON: I'm gonna object to all the material that is not in evidence, Judge.

MR. NAVARRE: I'll take k- -- then Your Honor, lemme ask Counsel to take the stand, then, and we'll put on evidence.

THE COURT: Why are we doing that?

MR. NAVARRE: Because, Your Honor --

THE COURT: The summary-judgment hearing or you mean the s- -- motion-to-dismiss hearing?

MR. NAVARRE: Yeah, and -- which we can do, Your Honor.

Here -- here's why, Your Honor. Lemme give you background, and then the Court can make its decision.

Mr. Rob Johnson was going to represent my clients -- this is before they contacted me -- but he was told by opposing counsel that he could not represent them against Ben Robinson --

MR. SUTTON: I object to this. I object to this. I object to it being on the record. These are confidential communications between counsel. None of this should be in this courtroom today.

MR. NAVARRE: How could it be confidential between. . . . I don't understand that, Your Honor.

THE COURT: Well, I -- I think he's saying that the counsel were in settlement negotiations, I would assume --

MR. NAVARRE: No, Your Honor.

THE COURT: -- or something of that nature, but --

MR. NAVARRE: No.

THE COURT: I don't -- I don't -- I don't -- I -- I don't -- I mean, I don't have enough of the facts to know whether or not it is or isn't. All I

know is you've claimed confidential communications.

You wanna tell me why they're confidential?

MR. SUTTON: Okay. Let me think back to the tenor. There was a conversation about whether another law firm would be conflicted out of a representation. And. . . .

THE COURT: Why would that be conf- --

MR. SUTTON: I -- I --

THE COURT: -- -idential?

MR. SUTTON: Okay. Judge, I'll withdraw the objection.

THE COURT: Yeah.

MR. SUTTON: Thank you.

MR. NAVARRE: I'm gonna lower down.

In that conversation, Your Honor, opposing counsel told Mr. Johnson that his law firm could not represent Miss Cox and Miss Ramsey against the Plaintiffs because Ben Robinson was a spokesperson for the Plaintiff group, and Blen -- Ben Robinson was part of the engagement letter that he had.

So for counsel to say he's never heard of this Ben Robinson person is shocking to me. Ben Robinson is one of the leaders of this group. He's not a party to the lawsuit, but he's behind the lawsuit,

Your Honor.

May I approach?

THE COURT: Sure.

(A discussion was held off the record.)

(Defendant's Exhibit 1 marked for identification.)

MR. NAVARRE: What I've handed the Court, Your Honor, is the meeting minutes from the Point Venture Property Owner Association, Inc., meeting of March 11, 2017. I would direct the Court's attention to subparagraph Roman numeral five. "Members' input and inquiries." Ben Robinson spoke about the short-term-rental issue and the restraining order he recently obtained against a group seeking to amend the deed restrictions in one section so as to preclude, I believe it's supposed to be, property rentals. This led to a general discussion among the board and members on the subject.

MR. SUTTON: Is this being offered into evidence?

MR. NAVARRE: Yes, Your Honor.

THE COURT: Yes.

MR. SUTTON: I object on the basis of hearsay and lack of authentication.

THE COURT: Objection sustained. I'm -- I

don't know where the document's from. It hasn't been proved up as -- I mean, we don't have anybody here to prove it up as a record of the minutes of the -- unless you're [indiscernible] one of your people do that.

MR. NAVARRE: Maybe in the af- -- maybe in the affidavits, Your Honor.

THE COURT: Okay.

MR. NAVARRE: That's all right. It's a -- the -- the point, Your Honor, is the statement that he doesn't know who Ben Robinson is: Ben Robinson's behind this.

THE COURT: Right.

MR. NAVARRE: The threats made were made by somebody representing --

THE COURT: Representing himself to have been a part of the group.

MR. NAVARRE: Yes, Your Honor.

THE COURT: Okay.

MR. NAVARRE: And that's why the conflict was raised, Your Honor.

THE COURT: Okay.

MR. NAVARRE: Not in confidential communication.

Lemme move on to the temporary injunction.

Temporary injunction, this Court's well

aware, is to maintain the status quo. Judge Wong did not come down with an interpretation of the restrictive covenants. There's nothing in the temprays- -- temporary injunction that states "The restrictive covenants being this, this, or this." Judge Wong did not have the advantage of all the arguments that we provided to the Court today regarding the interpretation of the restrictive covenants. It just didn't happen, Your Honor.

In fact, Your Honor, in the temporary-injunction hearing, as you know, it's a shortened hearing. There was evidence put on both ways, and frankly, it's -- the evidence is consistent with what the Court's heard today.

Lemme move on to the standard for the Anti-SLAPP Act. Counsel said that we need to prove that this is to chill free speech. Chill free speech. That's not the standard, Your Honor. That's not the standard that Justice Pemberton set forth. It's not the standard that the Texas Supreme Court set forth in E. Re -- in ee- -- re: Lipsky. It's not the standard in the statute.

The question i- -- before the Court in the first step is whether this lawsuit relates to, concerns, or is in response to the right of free speech or the

right of free association. Even Counsel's remarks about the background of the lawsuit, the statements in Plaintiffs' Fourth Amended Petition, show that my clients were exercising the right of free speech, the right of freedom of association, by drafting the change; by communicating amongst themselves; by communicating with their neighbors; by soliciting the petitions.

And there's certainly no doubt, even under Judge -- Justice Pemberton's potential view of the statute, that these are communications with a common interest and for the public concern. 'Cause it deals with the community.

So that moves us to step two, Your Honor. In step two, what Counsel says is our claims are a mirror image of their claims and therefore we have waived. Well, number one, he doesn't cite any authority for that proposition. Number two, from a factual standpoint, he's incorrect. We're not trying to stop any free speech. We're not complaining about any action that they took; any communications that they had in order to amend the restrictive covenants. That's not what we're doing, Your Honor. So it's not a mirror image. It's not a waiver.

The *prima facie* case that they have to set forth is completely built upon the false assumption that

those two conditions in Article IX can be copied and pasted into Article I -- I mean -- sorry -- Article IV, Section 1. That's the *prima facie* case they have to show. We've got -- we already talked about the breach of contract and the attempted breach of contract relying on that.

Let's talk about what Counsel says is the *prima facie* case for declaratory judgment. They said that you have to have a contract and a justiciable controversy. I would submit to the Court you need to have something more. Okay?

Imagine if the Court entered into a contract with Counsel for the -- for the sale of that picture over there, Your Honor [indicating], and you were gonna sell that picture to Counsel for $5,000. Entered into a contract. That's the only term in there. And then Counsel came back four or five months later and said, "By the way, you -- you also sold me the courtroom. You sold me the bench. You sold me everything," and then filed a dec. action on that. I would submit to the Court that that's -- he would not have a *prima facie* case, because there's no way you can get from a sale of that picture to the sale of the courtroom. It's not in the terms.

There has to be some sort of colorable

interpretation. There has to be some sort of legal argument that they can make. Here, Your Honor, there is no such thing with respect to the interpretation of the restrictive covenants.

Counsel, in their actual pleadings in their . . . lawsuit, Your Honor, has stated that it is separate and independent or separate and stand-alone alternative methodologies. During the argument, Counsel stated that there was a conflict, and then he kind of reversed direction a little bit.

There's no conflict, Your Honor. There's no conflict. These two provisions sit . . . s- -- one place in the restrictive covenants and another place. They rest freely as alternative methodologies.

In Plaintiffs' motion for partial summary judgment, at page three, Counsel states, "A separate duration provision at Section 1, Article IV --" I think he meant this [indicating] -- "allows a mere majority of owners to amend the deed restrictions upon the 35th anniversary of their adoption and every 10 years thereafter." That's what this is. Counsel in the motion for partial summary judgment accurately described this. That's all that has to occur.

Then Counsel described Article IX, "A stand-alone amendments provision at Section 9 governs

amendments as follows."

They're alternative methodologies. There's no basis. There's no colorable argument for copying and pasting these two sentences from Article IX into Article I, Section 4. No legal authority. Nothing cited. No -- no argument whatsoever, Your Honor, under any contract-interpretation provision under Texas law. It just doesn't exist.

The Court has any questions, I'd be more than happy to take them, otherwise --

Oh, need to mention one thing. The affirmative defense, Your Honor. That affirmative defense has been in the paper since the beginning. Since our original answer and . . . counterclaim, prior to the filing of this Anti-SLAPP motion.

The evidence is in the affidavits, that there's no -- there was no written permission prior to the rental. There's no controverting evidence, Your Honor. There's no controverting evidence on that topic. So not only do we prove by a preponderance of the evidence, but that's all the evidence there is. So it's not even like, you know, the old scale like this [indicating]. It's got it [indicating]; don't have it [indicating].

THE COURT: All right. Thank you.

MR. NAVARRE: Thank you, Your Honor.

THE COURT: Anything further?

MR. SUTTON: I'll rest on that, Judge.

THE COURT: All right. Thank you.

Do we have other motions we need to argue today?

MR. SUTTON: Yes, Judge. So we have cross-motions for summary judgments on merits issues.

THE COURT: All right. Well, let's hear those, as well, and then I'll take it all under advisement and figure it out.

MR. SUTTON: Okay. Judge, I'll begin. We filed the first motion for partial summary judgment.

May I approach?

THE COURT: Yes.

MR. SUTTON: Judge, this a smaller version of what has been put on these boards. Our motion for summary judgment is partial. It asks for summary judgment as a matter of law on the meaning of the deed restrictions.

They're -- the other side has conceded that jer- -- there is a justiciable controversy on these deed restrictions; therefore, the only evidence that the Court needs to look at today is the deed restrictions. Accordingly, our motion -- our response and reply to

their motion for summary judgment asks to strike virtually everything they have submitted, apart from the deed restrictions.

And I will return to that issue. First I'd like to focus on the deed restrictions.

First, this issue of separate and stand-alone being a judicial admission. Judge, I was giving a factual description of the layout on the page of the deed restrictions. It is not an admission. And it certainly is not clear. To the extent that this was any form of judicial admission, we formally retracted it in our reply. By law, that is sufficient to remove it as a judicial admission.

So let's talk about the clauses themselves.

And we cite authorities for that in our brief.

The l- -- the physical layout of the clauses you're looking at, in particular the first two, Judge, is that near the beginning of the deed restrictions, there is this duration clause. It is a subpart of another section. Another article. Near the end there is what I've characterized as a stand-alone article, called "Amendments."

The duration clause at the beginning

basically says at the 35-year mark, and every 10 years thereafter, there is a relaxed vote requirement. The vote requirement to amend is a mere majority instead of a super majority.

A short aside here. The Defendants are saying that their amendment literally does not fall under the later clause we'll talking about -- talk about because this first section talks about changes. And they say, "Well, we -- we were proposing a changing instrument."

Judge, when you look at their actual amendment, it is entitled "Amendment to the Deed Restrictions." So we can dispense with that argument, because they've waived it.

Okay. So first clause. Relaxed voting requirement at stated intervals.

Now let's talk about the later clause, the amendments clause. And this has to be broken down into its constituent parts. First, "Any or all of the covenants can be annulled, amended, or modified at any time at the recommendation of the Architectural Control Authority." That's one. At any time. Not just at intervals. And . . . by two-thirds of the lot owners. So separate from what we saw earlier in the contract, that only at stated intervals do you have this relaxed

requirement, it doesn't matter when you seek to amend if you get Architectural Control approval.

And then there's a requirement that says, the next sentence, "All such lot owners shall be given 30 days' notice in writing of any proposed amendment before same is adopted." Now, because it says "such lot owners" and it seems to refer back, there's some question as to whether this sentence, this second sentence, only relates to this two-thirds vote procedure. But then it says "any proposed amendment." So I submit to the Court that there's an ambiguity there, and I'll come back to that problem.

There's no ambiguity, however, regarding that third sentence. Here we have a repetition, what would seem to be redundant, of a requirement to get prior recommendation of the Architectural Control Authority. Well, there's no reason to be redundant. This is a new and different sentence. "There shall be no annulment or amendment of these covenants without the prior recommendation of the Architectural Control Authority." The drafter has repeated this statement and has made it applicable to all deed-restriction amendments.

And since it's been established in this case and is not disputed, that there was no

Architectural Control Authority approval, we have said that both because of the undisputed facts and because there's no justiciable controversy that we're fighting about this, that every amendment of any kind requires at least that: Architectural Control of -- Control Authority approval.

So that is the first part of our declaratory-judgment case.

And let me explain two things that -- well, lemme add two things to that analysis. First of all, Judge, if there's any ambiguity in a set of deed restrictions, they are -- the Third Court has said in Zgabay in 2015, in a *per curiam* opinion. . . . I'm sorry. Memorandum opinion. That ambiguity is construed to favor the free and open use of property.

I think that's important to bear in mind here, because we're talking about people's property rights, and in this case the amendment seeks to limit property rights. So our position is to the extent that you find any ambiguity, you have to look at both my clients' rights under this clause and also the property right being threatened.

Second. What is the function of this amendment clause? The function is to afford procedural due process to the owners, so that they know about

amendments. And we had evidence in the prior hearing, and that's attached at our motion --

THE COURT: Let's assume for the moment that's correct, then what would be the function of I -- Article I, Section 4?

MR. SUTTON: The function is a- -- the relaxed vote requirement. It's easier at those intervals to get your vote together. Because instead of 67 percent, it's 51 percent. That's its function.

THE COURT: So the drafters assumed there's a fight; it's been roiling in the neighborhood for some period of time; you don't need . . . permission or a 67 percent majority to do it; you can just do it at ten if there's a majority of the people who want to do it.

MR. SUTTON: So . . . not sure I understand the question.

I think the point is you have to give everyone procedural due process --

THE COURT: But you don't in Section 1 [sic] --

MR. SUTTON: But you don't need a 67-percent vote; you need a 51-percent vote.

THE COURT: So you're saying that's the only difference, is the amount of people you need for a

vote.

MR. SUTTON: Yes.

THE COURT: Okay.

MR. SUTTON: The second part, our summary judgment, Judge, is the short-term-rental issue. There's no distinction between these facts and the facts in Zgabay. I've attached to your summary-judgment package a copy of the Zgabay. . . . And you pull it, Your Honor. Excuse me. I've attached the Zgabay. . . .

Judge, may I approach? I forgot to give you our summary judgment.

THE COURT: I thought you did.

MR. SUTTON: That's the Anti-SLAPP --

THE COURT: Anti-SLAPP? Okay.

MR. SUTTON: Thank you.

A copy of the Zgabay opinion from 2015. It's on all fours with this case. It's controlling authority, Judge. Leasing is allowed expressly. It is subject to exactly one restriction: It says that you have to have developer consent. That's the only restriction. There is a discussion of the use of temporary structures. But otherwise, these are wide open.

The best one can say is that the drafters never addressed the issue of duration as regards leasing

or occupancy, and the Zgabay opinion absolutely controls. This is an easy case on the short-term-rental issue.

I don't wanna belabor the analysis. I've argued this case in this court half a dozen times at least. I think the Zgabay opinion is so clear that there's no reason to spend time discussing it. Apart from looking at the case.

Second, we have a new opinion as of last Thursday from the Second Court of Appeals in Fort Worth that elaborates on Zgabay under another identical set of restrictions and aligns itself expressly with Zgabay. It's not controlling, because it's in Fort Worth, but it is a much fuller analysis of the kinds of ambiguities that are present when all you have is "residential use" wording.

The Defendants are arguing a case from San Antonio that I lost a few months ago called Tarr that is now in front of the Texas Supreme Court. They also argue a case out of Beaumont from 1999. Those cases are not controlling on this court. They have different analysis -- analyses and they actually have completely different results on what the short-term duration that they impose is. Those -- those cases are -- are not convincing, they're not controlling, and

the Court should not be looking at those cases.

That is our summary judgment. I'll reserve my comments on their summary judgment for my rebuttal.

THE COURT: All right. Yes, sir.

MR. NAVARRE: Thank you, Your Honor.

I'm actually gonna start, Your Honor, with where Counsel started, and that's with the judicial admission. And this is covered in our argument at A, sub 1. That, as Plaintiffs admit, there's two alternative method [sic]; separate and stand-alone.

For -- to be a judicial admission, according to the Texas Supreme Court, in the Holy Cross Church case, 44 S.W.3d 562, quote, "A judicial admission that is clear and unequivocal has conclusive effect and bars admitting party from later disputing the admitted fact."

Counsel described . . . his description in the pleadings before this Court of these two descrip- -- of these two sections as being separate and stand-alone or independent as, quote, "a factual description of the provisions." Factual description of the provisions. Therefore, Your Honor, it's a judicial admission.

And Your Honor, frankly, I commend Counsel for factually describing these accurate [sic]. They're

separate. There's no linkage between the two. They don't refer to each other; they're in completely different articles; they deal with different situations.

What the Court then heard was elaborate gymnastics by Counsel in order to try to harmonize conflicting provisions. But Your Honor, you don't have to harmonize conflicting provisions that in fact do not conflict. There is no conflict. There's two ways to do something, Your Honor: There's the way in Article I, Section 4; there's the way in Article IX.

The Court does not have to go through those elaborate gymnastics that I would suggest to the Court are contrary to Texas law. All the Court has to do is look at the plain language of the restrictive covenants: What's there; what's not there. What's not there is the two conditions that the Plaintiffs would have us copy and paste from Article IX into Article I, Section 4.

What's not there is some sort of internal referent, Your Honor, which the drafters obviously knew how to do.

What's not there, Your Honor, is any sort of a statement that these two provisions have to be melded together. They don't have to be. They live side by side as two alternatives.

In fact, Counsel stated that Article I, Section 4, is relaxed methodology. It is relaxed, Your Honor. Only a majority. And you don't have these two conditions. It's relaxed.

Let's talk about procedural due process. Counsel would have this court input/change the deed restrictions to provide pers- -- their definition of procedural due process. But, Your Honor, every person who purchased property in Point Venture had access to these restrictive covenants. That's the procedural due process. The procedural due process from my clients is knowing that if they want to change the restrictive covenants, they can go by this methodology [indicating] or this methodology [indicating].

We cited to the Court the Winchester [sic] case, where the exact same argument was made. Well, what about procedural due process? You know, kinda like you'd have for the -- for hearings and committee meetings and everything like that at the session, which thankfully . . . hopefully none of us were -- were involved in this past session -- all of that procedural due process. You know what, Your Honor? If it's not in the contract, it's not there.

The Court will see that there is no Texas case that I'm aware of, and certainly no Texas case that

Counsel has cited, where a court has modified/done violence to restrictive covenants in order to add procedural due process that was not present in the black and white of the contract. And that's what the Winchester case stands for, Your Honor. That's what it stands for.

Lemme talk about the -- I think Counsel pronounced it. . . .

MR. SUTTON: My client's name was Zgabay.

MR. NAVARRE: Zgabay. Which is Z-G-A-B-A-Y. So I pronounced it -- I have been pronouncing it "Zig-uh- -- Zi-ga-bee." So . . . I will rely on Counsel's pronunciation; however, I assure the Court I will subsequently completely mess it up.

Counsel states, "We don't have to be here. This whole issue's been decided. We can go home. We have a controlling case. Why are we wasting our time." Of course then Counsel says, "By the way, there's these other appellate courts that came to the different conclusion, but we should ignore those." Says . . . "Zgabay is exactly on point. It's the exact same issue. Exact same facts."

It's not, Your Honor. It's not at all. In our motion for summary ju- -- in our response to their motion for summary judgment, we identified at

least three differences. In the Z case, Your Honor, the court found it important that the restrictive covenants allowed for leasing and, quote, permitted signs advertising a property for sale or rent. That's in the Z case.

I would submit to the Court the Court can look through these articles [indicating], Court can look through the entire restrictive covenants, you're not gonna find a provision that allows for signs advertising a property for sale or rent. Just doesn't exist.

Why is that significant? It's significant, Your Honor, because the Court in the Z case hit on that as saying, "Well, if you have a sign allowing you to rent or lease, then that must mean that you're allowed to rent or lease." Which makes sense.

And by the way, Your Honor, the -- the recent case that -- that Counsel attached I think to the filing yesterday, the day before, had that same provision, Your Honor. But there's no such provision in our case. So that's a difference.

In this case, the restrictive covenants prohibit any leasing or renting without prior written approval from the developer, Your Honor. Is that provision found in the Z case in the restrictive covenants? It's not. It's not.

And Your Honor, we actually attached the restrictive covenants from the appellate briefing, the appendix, in the Z case, to our motion -- to our response to the motion for summary judgment. So it's in evidence, Your Honor. So the Court can compare.

In the Z case, the court also found it important that a temporary, quote, structure may never be used as a residence, except for up to six months while the permanent house is under construction, end quotes. And that's at the Z case at 2015 Westlaw 5097116, at pages five to six.

Is that restriction found in this case? No, it's not. There's no such restriction. And that -- or no such allowance, I should say, Your Honor.

And the Court may remember back to the argument on the Anti-SLAPP motion. That's what the court looked at and said, "Wait a second. The drafters of the restrictive covenants in the Z case knew how to put a duration limitation on, because they said it can be up to six months while the permanent house is under construction."

We don't have that in our case, Your Honor. We don't have that at all.

Finally, in this case, the restrictive covenants include a prohibition that no lot in the

subdivision shall be used for any commercial, business, or professional purpose. That's at Article IV, Section 5. No such provision exists in the Z case, Your Honor. It's just not there.

And in fact, in this case, Your Honor, we have submitted to the Court the tax records for the businesses that they're running, which is the short-term rentals. Additionally, we've submitted the -- the websites they use to advertise their business.

Simply put, the restrictive covenants in this case are materially different than the restrictive covenants in the Z case, and those differences include the exact language that the Z case relied upon in coming to its holding, which Counsel knows, 'cause Counsel was in the Z case.

Second, Your Honor. In the Z case, the Plaintiffs sought a declaration that renting the house to an individual or single family for residential use is considered a single-family, residential purpose that is allowed under the restrictive covenants. As the Court heard, that is not the declaration that's being sought here. Nor is that the factual s- -- situation in this case, Your Honor. There is no evidence that anybody renting these short-term rentals is renting it for single-family, residential use.

I would submit to the Court that when you have 20 college kids over for a party weekend for one or two days, that none of those college kids . . . are using that -- that residence -- are using that home as their residence. I bet none of 'em change their driver's license to that address. I get n- -- I bet none of 'em change their mailing address. It's just not used for a residence.

Third, Your Honor. In the Zi- -- in the Z case, as Counsel stated, the Court found that the restrictive covenants were ambiguous. Were ambiguous. We don't have that, Your Honor. There's no ambiguity. It's just the plain language. It's just the black and white. There's no ambiguity, Your Honor. So that's the third material difference.

We have material differences in the restrictive covenants, we have material difference in the facts and in the declarations sought, and we have material difference in whether it's ambiguous or not, Your Honor.

Lemme touch on that ambiguity, 'cause this is an interesting argument I heard. If it's ambiguous, Counsel says, then it should be interpreted for the free and open use of the property. I agree. I agree. So let's look at this. This restrictive covenant in

Article I, Section 4, allows for a change to the restrictive covenants every 35 years, or 10 years thereafter, by a majority vote. Without these two conditions [indicating]. If we assume it's ambiguous, which we deny, and these two [indicating] maybe should be put over here [indicating], does this make it more of a free use for the property rights, or does this impress more obligations on the property rights?

The answer, Your Honor, is that if you take additional conditions, additional restrictions, from Article IX and impress them in Article I, Section 4, a property owner's ability, their right to change the restrictive covenants, has now been limited.

So if we accept Counsel's argument that we should copy/paste two additional conditions or restrictions on a property owner's right to change . . . we're not allowing more free use of the property; we're in fact restricting a property owner's rights to change it. We're restricting the property owner's rights.

So even under Counsel's authority and argument, if it's ambiguous -- which, again, it's not, Your Honor. I mean, it's plain as day. If it's ambiguous, then the Court should interpret the restrictive covenants the way we suggest, and keep those additional conditions or restrictions out of Article I,

Section 4.

And lemme go back to some of the arguments that we made in our summary-judgment response, Your Honor.

We've already talked about the plain language of the restrictive covenants. The important thing, Your Honor, is there's nothing in Article I, Section 4, either expressly or implicitly, copies those two conditions over from Article IX into Article I, Section 4. It's just not there.

Plaintiffs' claim is also contrary to Texas law. In the Wilchester case, which is 177 S.W.3d 5512, Houston Court of Appeals, petition denied. That's the case I discussed before, although I called it "Winchester" before. It's Wilchester, Your Honor. The Court applied the rules of construction and held that the amendment provision did not include these procedural due-process rules that they wanted to impress on it.

The Court said, quote, 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, end quote. That's at page 563, Your Honor, in the Wilchester case. That's exactly what we have here. You get a majority, you file it. There's

no additional requirements.

Plaintiffs requested interpretations also contrary to the plain language of the word "may." "May," as we discussed before, is alternative language. And we cited to the case -- the Valenz [sp] case, Texas Supreme Court 2005, 164 S.W.2d Third. Quote, "When a contract leaves a term undefined, we presume that the parties intended its plain, generally accepted meaning." "May" is an alternative word: Do it this way or do it that way.

Also, Your Honor, pursuant to Texas law, courts must read the contracts in their entirety, giving effect to each provision. Here, Your Honor, if we allow them to copy/paste, we're no longer giving effect to Article I, Section 4. We're nullifying it by copying and pasting conditions that are not present but are present in another stand-alone, independent provision.

As we discussed before, in the Z case, the court specifically stated, "Look. The drafters knew how to put duration requirements on. They didn't put a duration requirement in."

Here, Your Honor, as we saw, the drafters knew how . . . to incorporate by reference provisions from one paragraph or sentences from one paragraph into another. They simply did not do that, Your Honor.

Finally, Your Honor, with respect to the short-term renters. There are three provisions that the Court should take note of. Number one: In Article V, Se- -- Section -- Article IV, Section 5, "No renting or leasing is prohibited. . . ." "All renting or leasing is prohibited without the prior written consent of the developer." A provision not found in the cases cited by Counsel.

In Article IV, Section 1, "Lots," quote, "shall be used only for single-family, residential purposes, and improvements can only be used for," quote, "single-family, private, residential purposes." The evidence before the Court is that's not the case with the short-term rentals.

Third, Your Honor. Article IV, Section 5. "No lot in the subdivision shall be used for any commercial business or professional purpose." That would include, Your Honor, renting your house out for charge for your business that you're actually paying taxes on, as submitted in the summary-judgment evidence.

Texas courts, contrary to what Counsel said, have held that similar language in restrictive covenants restricted short-term rentals. We cited a couple cases. The Benard case and the Munson case, for example, Your Honor.

And the question is one -- is a question of intent. And in the Munson case, I believe it is, the court, after analyzing the provisions, then said, "You know what? If we just look at the Texas property code and the Texas tax code, that also shows . . . the difference between a permanent rent -- a permanent use and transient housing, otherwise known as short-term rentals."

Your Honor, at the end of the day, the Court is faced with two interpretations: The Court can either look at the plain language in Article I, Section 4 . . . read it as it exists, read it consistent with long-standing Texas law; or the Court can do violence to the restrictive covenants and copy and paste two sentences out of Article IX into Article I, Section 4.

There is no authority cited by Counsel for that proposition. There is no situation where a court has done that in these types of restrictive covenants. These are, as they say, separate and stand-alone, alternative methodologies. They're not in conflict. They're alternatives. Therefore the Court should deny Plaintiffs' motion for partial summary judgment.

If the Court has any questions, I'm more than happy to respond.

THE COURT: Okay. Thanks.

Yes, sir.

MR. SUTTON: Judge, I'll be brief.

So let's talk first about the issue of amendments. The Wilchester case that they've cited lacked any kind of notice wording whatsoever. Obviously we have such wording in this case. The question is whether the court will harmonize the entire set of deed restrictions and give effect to the middle sentence of this clause.

But I can make it easier for you. An owner purchases a piece of property and they see a clause that says "Amendments." They see floating around the neighborhood a document that says "Amendment." And when they look at the deed restrictions, what it says is, "There shall be no amendment without the prior recommendation of the Architectural Control Authority. That is the people that you voted into office in your subdivision to look out for your interests."

So I submit to you that that is clear, and it's not a question of cutting and pasting. It's merely a matter of giving effect to every sentence of the deed restrictions.

Onto the short-term-rental issue. I want to correct a couple of statements by Counsel. Counsel

said the deed restrictions here do not have this "temporary structure" wording. That's not true. At page seven of the deed restrictions, paragraph six -- I'll give a dramatic reading -- "No structure of a temporary character, ellipsis," I'm giving the ellipsis, "shall be used at any time as a residence." The drafters thought about residence and temporary structures, and they said, "You can't do that."

Now, it was slightly different in Zgabay, where they said, "You can use a temporary structure as a residence for six months." But that's a distinction without a difference.

The point is the drafters thought about temporary uses of things, and in this case, they didn't restrict leasing that way.

I'll also correct Counsel when he says that there's no reference to business use. Page six of the deed restrictions, paragraph five. "No lot in a subdivision shall be used for any commercial, business, or professional purpose." Counsel denies that that exists.

The renting -- and this is on your -- Judge, this is on the one -- one-page handout I gave you. The bottom of the page.

The renting or leasing without consent of

the developer is prohibited. We'll state that another way. Rent or leasing is allowed, but you have to get developer consent. That's why this case is like Zgabay. In that case, the deed restrictions did not otherwise mention leasing, except they allowed for lease signs. And so the court said, "Well, we know that the deed restrictions do allow leasing, but notably, they don't regulate anything apart from signs."

Well, Judge, we know that the deed restrictions allow leasing, but they don't do anything but require developer preapproval. It's the same case.

Finally I wanna touch on some of the inflammatory material that has been raised in their evidence that we've asked to strike and was raised in their presentation. No tenant or landlord should be a nuisance, should have too many people staying at a house, should have people urinating on shrubs, anything like that. Those are all problems. And those are all breaches of restrictive covenant. But that's not today's case. The case before you today at summary judgment is for you to declare the meaning of a set of deed restrictions. Do the deed restrictions prohibit leasing according to duration. We've argued that they do not.

The Defendants have lots of avenues to

attack all these other problems. The Texas Property Code has an overoccupancy statute that doesn't allow more than three adults per bedroom in a rented premises. They have made no claim like that. They have not brought a nuisance claim. They have not brought any other kind of breach claim that relates to the behavior they seek to regulate. And it doesn't matter how long someone is staying at a property. Duration is the issue for this summary judgment. All those other issues, they need to bring a lawsuit, and at that point we can have a brawl over the facts of what has happened at these properties. But that's not before you, and you have to strike that evidence.

That's all I have. Thank you, Judge.

THE COURT: Yes, sir.

MR. NAVARRE: Briefly, Your Honor.

The Z case restrictive covenant was "no temporary, but you can live there for six months until you build your permanent." What I said was we don't have that in this case. And Counsel just proved that. There's no temporary residence allowed at all in this case. At all. So unlike the Z case, where the drafters knew how to put a duration of six months or some other time in the case, that didn't occur here. It's none at all. So that is a difference, Your Honor. And it's

material because that's one of the provisions that the Z case relied upon.

Second, I'm -- I'm -- I must have been misunderstood, because in fact, the provision that no lot in the subdivision shall be used for any commercial, business, or professional purpose is one of the three provisions that I stated to the Court as a reason to deny their declaratory judgment with respect to short-term rental. "There is no -- be -- no lot in the subdivision shall be used for any commercial, business, or professional purpose." Totally agree. That's what we're arguing. That's one of the three provisions, Your Honor, that should shut down these short-term rentals. One of the three. Along with no renting's allowed without the prior written consent of the developer, and the lot shall be used only for single-family, residential purposes.

So I'm not denying that these homes can't be used for commercial, business, or professional purpose. In f- -- in fact, that's what we're arguing, Your Honor. They can't be used for that. And that's one of the many reasons why their declaratory judgment . . . their motion for partial summary judgment should be denied.

And again, if the Court has any questions,

more than happy to respond.

THE COURT: Good.

MR. SUTTON: Nothing further, Judge.

THE COURT: Nothing further?

What do we have left? Yours? But it's -- I think it would be the mirror of that.

MR. NAVARRE: Yeah, that's what I was gonna say, Your Honor. We've taken up an hour and a half of the Court's time. I know we -- we announced I think -- Mr. Sutton announced for an hour over there; I said more like prob'ly an hour and a half. To which Judge Wong said, "Looks like Judge Shepperd," just FYI, Your Honor. So I don't feel a need to go through everything again.

THE COURT: Yeah, I think I've got it. I need to take it under advisement; obviously do some reading. You folks cited a number of cases that I need to take a look at, and I will do so, and we'll let you know as soon as we've got something.

We have next up no trial dates; right?

MR. NAVARRE: We do have a trial date, Your Honor.

THE COURT: When is it set for?

MR. SUTTON: I believe we set that in October --

THE COURT: Oh, okay.

MR. SUTTON: -- once the jury demand came down.

THE COURT: Yeah. We're not -- it won't be that long.

MR. NAVARRE: You've got more than 24 hours, Your Honor.

THE COURT: Yeah. That's --

MR. NAVARRE: Your Honor --

THE COURT: -- that's all I need.

MR. NAVARRE: -- I also have affidavits in support of the attorneys' fees that I'd like to submit to the Court.

THE COURT: Sure.

MR. NAVARRE: Okay.

THE COURT: I don't have a problem with that.

MR. SUTTON: Judge, I don't think any of that was filed as part of the summary judgments. I'm going to object because --

MR. NAVARRE: It's not --

I'm sorry. Go ahead.

MR. SUTTON: We can argue about attorneys' fees later. But they didn't submit any such evidence with their filings. I would say it's a surprise and we

should resolve this later.

THE COURT: Well, I mean, I'll allow you to respond to them, and that -- that'll be fine. But, I mean, I assume that declaratory-judgment -- -judgment motions usually come with attorneys' fees, and defense of them does, as well.

MR. NAVARRE: Yeah, just to clarify, Your Honor, I'm not moving in my summary judgment for attorneys' fees.

THE COURT: Right.

MR. NAVARRE: This has to do with the Anti-SLAPP --

(Mr. Navarre and the Court talking at once.)

MR. NAVARRE: -- and I'm allowed to submit evidence at a hearing --

(Several people talking at once.)

MR. SUTTON: Yes, I -- and I have not submitted evidence as to that at this time.

THE COURT: Right.

MR. SUTTON: If I may approach, I have proposed orders.

THE COURT: If you'll give those to Priscela. They tend to get lost when you give them to me.

We're off the record.

(Brief pause.)

THE COURT: Back on the record.

MR. NAVARRE: We have an affidavit from Mr. Sterling, Your Honor, which apparently . . . I decided to leave at the office. So I'll email it to the Court.

THE COURT: Submit it later.

(The Court and Mr. Navarre talking at once.)

MR. NAVARRE: And I'll submit orders also to the Court, if that's --

THE COURT: All right. That sounds fine. Thank you, gentlemen.

(Hearing concluded at 10:30 a.m.)

THE STATE OF TEXAS *
*
THE COUNTY OF TRAVIS *

I, RABIN´ MONROE, RDR, CRR, CRC, Court Reporter for Travis County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record in the above styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, admitted by the respective parties.

I further certify that the total cost for the preparation of this Reporter's Record is $252.00 and was paid/will be paid by Defendants.

I further certify that I am neither counsel for, related to, nor employed by any of the parties in the action in which this proceeding was taken, and further, that I am not financially or otherwise interested in the outcome of this action.

WITNESS MY OFFICIAL HAND this 26th day of June, 2017.

/s/ Rabin´ Monroe
RABIN´ MONROE, RDR, CRR, CRC
Texas CSR #9049
Expiration: December 31, 2018