IN THE CIRCUIT COURT FOR THE FIFTH JUDICIAL CIRCUIT
IN AND FOR LAKE COUNTY, FLORIDA

KINGS RIDGE COMMUNITY ASSOCIATION, INC., SEYMOUR HOLZMAN, MAYNARD L. TIRRELL, ROY B. GORDON, WILLIAM CAMPBELL, ROBERT A. FOWLER, DONALD L. POLK, HOWARD W. RANDALL, DONALD W SANTEE and MARQUETTE L. FLOYD,

CASE NO. 05-CA-2718

Plaintiffs,

vs.

LENNAR LAND PARTNERS, LENNAR HOMES, INC., LENNAR LAND PARTNERS SUB, INC., LNR LAND PARTNERS SUB INC., KINGS RIDGE L.L.C., E. BING HACKER, MORTGAGE ADVISORS, INC., J. FRANK SURFACE, JR., JOHN DOE DEFENDANTS and UNKNOWN CO-CONSPIRATORS,

Defendants.
_____/

DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS OF ENTITLEMENT TO RECOVER FACILITIES FEES

The Defendants, LENNAR HOMES, INC. ("Lennar Homes"), and E. BING HACKER ("Mr. Hacker") (collectively the "Lennar Defendants"), KINGS RIDGE L.L.C., MORTGAGE ADVISORS, INC. and J. FRANK SURFACE, JR. ("Mr. Surface") (the "Kings Ridge Defendants") (collectively the "Defendants"), through their undersigned counsel, move for Partial Summary Judgment on the Plaintiffs'[1] claim of entitlement to the Club Facilities Fees

[1] The right to acquire was granted expressly to the Club Members and Defendants have simultaneously filed a Motion for Partial Summary Judgment as to the Association's standing to bring its claims in this action. However, for purposes of this motion, it is irrelevant to whom the right was granted, as the triggering event never occurred.

pursuant to the right to acquire or as damages. The Defendants are entitled as a matter of law to summary judgment in their favor, as discovery is complete and no genuine issue of material fact exists as to this issue.

MEMORANDUM OF LAW

I. INTRODUCTION

This action, commenced by nine named representatives on behalf of a certified class of Kings Ridge Community Club Members ("Class Members") and the Kings Ridge Community Association, Inc. (the "Association") (collectively, "the Plaintiffs"), alleges that LLP conveyed the Kings Ridge Clubhouse ("Club Facilities") in violation of a "right to acquire" provision contained in the Declaration and that the other defendants participated in and/or facilitated the wrongful conveyance. Plaintiffs' Complaint[2] alleges contract and tort claims for damages including the value of the Club Facilities and the recovery of other fees and costs. The Plaintiffs' demand for "the lost profits represented by the Club membership fees that are paid by all Club Members and which constitutes profits from the ownership of the Club," is the subject of this motion.

The unambiguous terms of the Declaration and Club Covenants provide that the Club Facilities and the Facilities Fees are independently transferable assets, and that any right to acquire provision that may have existed pertained only to the Club Facilities. Plaintiffs' inclusion of the Facilities Fees in the alleged damages and request for relief flies in the face of the clear and unambiguous controlling documents.

[2] Plaintiffs' Amended Complaint shall be referred to herein as the "Complaint" or "Compl."

II. STATEMENT OF UNDISPUTED FACTS

A. The Kings Ridge Community

In the mid 1990's, Lennar Homes began developing Kings Ridge, a retirement community located in Clermont, Florida. (Compl. ¶ 16)[3] In connection with the development, Lennar Homes, King Ridge Recreation Corporation, Kings Ridge Golf Corporation, and the Association entered into the Declaration.[4] (Id. at ¶ 18) The Declaration was duly recorded in the Lake County public records on February 16, 1996 at OR Book 1417, Page 225 et seq. (Id. ¶ 17)

Pursuant to the Declaration, all residents of Kings Ridge are members of the Association. (Decl. Art. I. § 17; Hacker Depo. p. 137[5]) The Declaration provides for the construction of Club Facilities consisting of a multi-function social facility and related amenities. (Decl. Art. VI. § 3) Membership to the Club Facilities is elected on a voluntary basis at the time of the initial purchase of a homesite. (Decl. Art. VI. § 2) Thereafter, club membership is irrevocable and the rights and obligations of membership run with the land. *(Id)* There are 2088 homesites, of which 2041 are subject to club memberships. (Seymour Holzman Aff. ¶ 7[6]; John Hart Aff. ¶ 5[7])

B. Relevant Definitions

Pursuant to the original Declaration, "Club Owner" was defined as "Kings Ridge Recreation Corporation, its successors and assigns. The Club Owner is an affiliate of Declarant." (Decl. Art. I §14) On October 31, 1997, Lennar Homes conveyed the real property to be developed as Kings Ridge, including the Club Facilities, to LLP.[8] On October 31, 1997

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[3] Appendix ("Appx.") Ex. 1. In the interest of conserving resources, all documents referred to herein as contained in the Appendix were previously filed with this Court and are contained as referenced in the Appendix to Defendants' Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment served November 21, 2007.

[4] Appx. Ex. 2. The Declaration is cited herein as "Decl."

[5] Appx. Ex. 3.

[6] Appx. Ex 4.

[7] Appx. Ex 5.

[8] Appx. Ex 8.

Lennar Homes also executed the Fourth Amendment to the Declaration[9] to delete in its entirety and replaced the definition of "Club Owner" as follows:

> "Club Owner" shall mean the owner of the real property comprising the Club. At this time, Lennar Land Partners, a Florida general partnership ("LLP") is Club Owner. *Club Owner may change from time to time (e.g., LLP may sell the Club).*

(emphasis added). Further, by virtue of an assignment dated October 31, 1997, Lennar Homes assigned all of its rights as Declarant to LLP.[10]

C. **Right to Acquire Provision**

The express terms of the right to acquire provision contained in the Declaration provided that the Club Members had a right to acquire the Club Facilities pursuant to section 617.31, Florida Statutes as follows:

> Section 24. Right to Acquire. Although the Club arrangement is not a lease of recreation facilities, the Club Owner grants to the Club Members the rights to acquire *the Club Facilities* pursuant to the provisions of F.S. 617.31, Florida Statutes as it exists as of the date hereof.

(emphasis added) (Decl. Art. VI § 24) The Declaration defines Club Member as: "Each Owner who elects, in its contract to purchase a Homesite, to be a member of The Club and bound by the provisions hereof relating thereto." (Decl. Art. I § 11)

Most significantly, the Declaration by its express terms defines "Club Facilities" as:

> **The *real property* and *facilities* provided to the Club Members pursuant to the provisions of this Community Declaration, also known as 'The Club.'**

(Decl. Art. I § 9) (emphasis added).

Pursuant to the unilateral right to amend set forth in the Declaration at Article II Section 2, on August 30, 2000[11], LLP amended section 24 of the Declaration to amend the definition of

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[9] Appx. Ex. 9. The Fourth Amendment was recorded on March 19, 1998

[10] Appx. Ex. 10.

[11] In the Complaint, Plaintiffs alleged that the Sixth Amendment was executed on August 31, 2000. (Compl. ¶ 30) The Sixth Amendment, however, plainly indicates August 30, 2000 as the execution date.

Club Member and the right to acquire by executing the Sixth Amendment to the Declaration.[12]

The relevant portions of the Sixth Amendment provide:

> 4. The definition of "Club Member" set forth in Article I section 11 is amended as follows:
>
> Each owner who elects, in its contract to purchase a Homesite or in any other document, to be a member of The Club and bound by the provision hereof relating thereto and all succeeding Owners of such Homesite.
>
> 7. Section 24 of Article VI is amended to read as follows, with amended language in italics:
>
> Right to Acquire. Although the Club arrangement is not a lease of recreation facilities, the Club Owner grants to the Club Members the rights to acquire, *following the Community Completion Date*, the Club Facilities pursuant to the provisions of F.S. 617.31, Florida Statutes as it exists as of the date of initial recording of the Declaration.

D. <u>Section 617.31</u>

Section 617.31, Florida Statutes provides in relevant part:

> 617.31 Recreational leaseholds; right to acquire; escalation clauses.--
>
> (1) Any lease of recreational or other commonly used facilities serving a community, which lease is entered into by the association or its members before control of the homeowners' association is turned over to the members other than the developer, must provide as follows:
>
> (a) That the facilities *may not be offered for sale unless the homeowners' association has the option to purchase the facilities*, provided the homeowners' association meets the price and terms and conditions of the facility owner by executing a contract with the facility owner within 90 days, unless agreed to otherwise, from the date of mailing of the notice by the facility owner to the homeowners' association. If the facility owner *offers the facilities for sale*, he or she shall notify the homeowners' association in writing stating the price and the terms and conditions of sale.
>
> (b) If a contract between the facility owner and the association is not executed within such 90-day period, unless extended by mutual agreement, then, unless the facility owner thereafter elects to offer the facilities at a price lower than the price specified in his or her notice to the homeowners' association, he or she has no

[12] Appx. Ex. 11.

further obligations under this subsection, and his or her only obligation shall be as set forth in subsection (2).

* * *

(2) If a facility owner *receives a bona fide offer to purchase the facilities that he or she intends to consider or make a counteroffer to*, his or her only obligations shall be to notify the homeowners' association that he or she has received an offer, to disclose the price and material terms and conditions upon which he or she would consider selling the facilities, and to consider any offer made by the homeowners' association. The facility owner shall be *under no obligation to sell to the homeowners' association or to interrupt or delay other negotiations, and he or she shall be free at any time to execute a contract for the sale of the facilities to a party or parties other than the homeowners' association.*

(emphasis added)

E. <u>The Conveyance of the Clubhouse & Assignment of Club Owner Rights</u>

In early 2000, Mr. Surface approached Mr. Malcolm about whether Mortgage Advisors, Inc. could provide financing for other Lennar projects. (*Id.* at 25-27) As the negotiations progressed, Mr. Surface, Mr. Wright, and Mr. Lester created Purchase Term Sheets that summarized "where the parties were" in negotiations. (Surface Depo. 144-46, 178) The June 23, 2000 Purchase Term Sheet set forth the material terms and conditions of the conveyance including identification of the two separate assets of the Club Facilities and Contract Rights for a total purchase price. (June 23, 2000 Purchase Term Sheet)[13] Thereafter, Mr. Surface, Mr. Wright, and Mr. Lester created a July 17, 2000 Purchase Term Sheet that set forth an updated version of the offer to LLP including terms and conditions of the deal. (Surface Depo. 178; July 17, 2000 Purchase Term Sheet[14]) On August 31, 2000, Kings Ridge L.L.C. purchased from LLP both the Club Facilities and the right to collect the Facilities Fees (Compl. ¶ 28)[15],[16]

[13] Appx. Ex. 14
[14] Appx. Ex. 15.
[15] The Warranty Deed was recorded on October 9, 2000. (Compl. ¶ 28, 30)
[16] Appx. Ex. 16.

F. Summary of Plaintiffs' Claims

The Complaint alleges a wrongful conveyance of the "*Club Property*"[17] that breached the right to acquire provided by the Declaration and section 617.31, Florida Statutes which resulted in damages including "the lost profits represented by the Club membership fees that are paid by all Club Members and which constitutes profits from the ownership of the Club, the excessive management fees paid during the time the Club Property should have been owned by the Association, and such other expenses of operation that would have been saved had the Club Property been owned by the Association instead of being transferred to Kings Ridge." (see, e.g., Compl. ¶ 90 and 96)

III. STANDARD OF REVIEW

Florida Rule of Civil Procedure 1.510(c) provides that summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Where the facts are such that, if established, there could be no recovery, or where the undisputed facts as such would preclude recovery, then the question becomes one of law for the determination of the Court and a proper matter for disposition by summary judgment. Yost v. Miami Transit Co., 66 So. 2d 214, 215 (Fla. 1953). The existence of nonmaterial issues of fact will not preclude the entry of summary judgment. Cristol v. City of Miami Beach, 246 So. 2d 595, 596-97 (Fla. 3d DCA 1971). When only one conclusion can be drawn from the admitted facts, then the question of liability becomes one of law. Lofton v. McGregor, 14 So. 2d 574, 575 (Fla. 1943).

[17] While Plaintiffs' Complaint does not define the term "Club Property", even it refers to a legal description and real estate as the Club Property. (Compl. 19, 20) ¶

Interpretation of an unambiguous written contract is appropriate on a motion for summary judgment. "Where the determination of the issues of a lawsuit depends upon the construction of a written instrument and the legal effect to be drawn therefrom, the question at issue is essentially one of law only and determinable by entry of summary judgment." Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000); Hammond v. DSY Developers, LLC, 951 So. 2d 985, 988 (Fla. 3d DCA 2007).

IV. ARGUMENT

The Express Terms of the Right to Acquire did Not Grant to Plaintiffs the Right to Purchase the Club Facilities Fees

Assuming for the limited purposes of this motion that the Court determines the Plaintiffs enjoyed an enforceable right to acquire the Club Facilities, the unambiguous terms of the Declaration and Club Covenants provide that the Club Facilities and the Facilities Fees are independently transferable assets, and that the right to acquire provision pertained to the Club Facilities only—not to the Facilities Fees. Accordingly, no basis in law or fact exists to support the Plaintiffs' claim to the Facilities Fees.

1. Right to Acquire Provision and Related Statute

The right to acquire provision in the Declaration provided that the Club Members had a right to acquire the "Club Facilities" pursuant to section 617.31, Florida Statutes:

> Section 24. Right to Acquire. Although the Club arrangement is not a lease of recreation facilities, the Club Owner grants to the Club Members the rights to acquire the *Club Facilities* pursuant to the provisions of F.S. 617.31, Florida Statutes as it exists as of the date hereof.

(Decl. Art. VI. § 24) (emphasis added). The Declaration defines "Club Facilities" as:

> The *real property* and *facilities* provided to the Club Members pursuant to the provisions of this Community Declaration, also known as 'The Club.'

(Decl. Art. I § 9) (emphasis added). Section 617.31, which right to acquire provision references, provides that the right to acquire is for *recreational facilities*. The statute is notably silent concerning fees regularly associated with recreational facilities.

2. Facilities Fees Provision and Related Statute

The Declaration requires Club Members to pay "Club Charges,"[18] which includes Club Operating Costs[19] and a Facilities Fee. The Declaration defines "Club Facilities Fee" as:

> The fee to be paid to the Club Owner by each Club Member pursuant to Article VI, Section 6 hereof. The Facilities Fee is an amenity fee as defined in F.S. 617.301(1).

(Decl. Art. I § 10)

Section 617.301(1), Florida Statutes (1997) defines "amenity fee" as:

> [A] sum or sums of money payable to the association, to the developer or *other owner of* common areas, or to *recreational facilities* and other properties serving the parcels by the owners of one or more parcels as authorized in the governing documents, which if not paid by the owner of a parcel, can result in a lien against the parcel.

(emphasis added).

3. Section 21 of the Club Covenants[20]

The Declaration incorporates by reference the Club Covenants and provides that the Association and the Club Members "shall be bound by and comply with the Club Covenants." (Decl. Art. VI § 22) Section 21 of the Club Covenants provides that the Club Facilities and Facilities Fees are independently transferable assets:

> 21. Conveyance. Should Club Owner, in its sole discretion, at any time and without being obligated to do so, desire to convey the Club Facilities to the Community Association, it may do so by Special Warranty Deed, *reserving unto*

[18] The Declaration defines "Club Charges" as "[t]he charges related to The Club to be paid by the Club Members pursuant to the provisions of this Community Declaration, including the Club Facilities Fee and Club Operating Costs." (Decl. Art. I, § 7)

[19] The Declaration defines "Club Operating Costs" in relevant part as "[a]ll costs of . . . owning . . . operating, managing, maintaining and insuring The Club." (Decl. Art. 1 § 12)

[20] Appx. Ex. 19

itself, without set off or deduction, the continuing right to receive the total of all Club Facilities Fees . . . .

(Club Covenants, § 21) (emphasis added) Consequently, the documents on which the Plaintiffs base their causes of action unambiguously permit the Club Owner to sell or retain the Club Facilities Fee.

4. The Conveyance of the Clubhouse & Assignment of Club Owner Rights

Leading up to the conveyance of the Club Facilities, Kings Ridge L.L.C. created purchase term sheets that summarized "where the parties were" in negotiations. (Surface Depo. 144, 146, 178) Both the June 23, 2000 Purchase Term Sheet and the July 17, 2000 Purchase Term Sheet distinguished the asset of the Club Facilities from the asset of contract rights, which expressly included the Facilities Fees:

> The Property: . . . . . (a) All the existing and future real property and facilities (the "Club Facilities") provided to the resident members pursuant to the provisions of the community association documents ("Community Declaration")
>
> (b) Contract rights ("Contracts" or "Contract Rights") that entitle the owner of the Club Facilities to receive a fee ("Facility Fee") from each resident in order for the resident to have access to the Club Facility.

Similarly, the Acquisition and Operation Agreement, dated August 30, 2000, set forth separately the "Real Property" asset from the "Personal Property" assets that consisted of the contract rights. (Acquisition and Operating Agreement § 3.1)[21] There exists no other provision in the Declaration, Club Covenants, term sheets, or Acquisition and Operation Agreement that indicate that the Club Facilities and Facilities Fee were intended by the parties or otherwise deemed to be interconnected.

[21] Appx. Ex. 20.

On August 31, 2000, LLP conveyed the Clubhouse to Kings Ridge L.L.C. (Compl. ¶ 28) On the same day, Kings Ridge Recreation Corporation and LLP assigned all of their right, title, and interest as Club Owner in the Club Facilities including the right to collect the Club Facilities Fees. The parties to the conveyances treated them separately, as they constituted separate interests in property.

Kings Ridge L.L.C. paid $2,500,000.00 for the Clubhouse and $6,340,000.00 for the contract rights, which included the right to receive the Facilities Fees. (Surface Depo. Vol. I, p. 60; Lake County Property Appraiser Sale Price[22]) Thus, the total purchase price paid, minus closing costs, was $8,840,000.00. (Closing Statement[23]; Acquisition and Operating Agreement §§ 3.1-3.2)

Despite the unambiguous language of the Declaration, Club Covenants, relevant statutes, and the segregated transfer of the Club Facilities as separate from the Club Facilities Fees, the Plaintiffs nonetheless seek to recover the Club Facilities Fees as damages (or suggest they enjoyed a legal right to acquire the Club Facilities Fees).

Florida courts routinely grant partial summary judgment against claims for damages that lack a basis in law or fact. See, e.g., Bothmann v. Harrington, 458 So. 2d 1163, 1170 (Fla. 3d DCA 1984) (affirming the grant of partial summary judgment against compensatory damages that did not flow from the claim alleged); Arencibia v. Lennon, 532 So. 2d 1328 (Fla. 3d DCA 1988) (affirming the grant of partial summary judgment against punitive damages that were unavailable under the claims alleged); Gibbs v. Reliance Ins. Co., 399 So. 2d 1108, 1109 (Fla. 5th DCA 1981) (affirming the grant of partial summary judgment against punitive and compensatory damages that were unavailable under the claims alleged); Henderson v. Insur. Co.

[22] Appx. Ex. 21.
[23] Appx. Ex. 22.

of N. Am., 347 So. 2d 690, 691-92 (Fla. 4th DCA 1977) (affirming the grant of partial summary judgment against damages for loss of net accumulations that were statutorily unavailable). In the instant matter, the Court can and should rid the case of the unsupportable claim for entitlement to fees that were expressly not granted or otherwise contemplated by the right to acquire.

5. The Club Facilities Constituted One Right in the Bundle of Property Rights that were Conveyable by the Club Owner

The Plaintiffs have no claim to the Facilities Fees when the contractual right to acquire expressly and solely limits the right of first refusal to the Club Facilities. "Property is a bundle of rights analogous to a bundle of sticks." City of Orlando v. MSD-Mattie, L.L.C., 895 So. 2d 1127, 1130 (Fla. 5th DCA 2005). The scope of a right conveyed from the bundle is confined to that right, and no more. For example, in MSD-Mattie, L.L.C., the grantee of a transmission line easement sought to use the easement for a purpose because it was not *expressly excluded* by the terms of the easement. Id. at 1129. The Fifth District held that the scope of the easement "is defined by what is granted, not by what is excluded, and all rights not granted are retained by the grantor." Id. at 1130. Where the grantor "contracted to convey some, but not all, of the sticks in the bundle . . . [a]ll of the other sticks were retained by the [grantor] for [its] use or sale." Id. As such, the grantee was not entitled to anything more than what was expressly provided by the instrument. Id. at 1131.

As explained in MSD-Mattie, L.L.C., the Club Owner in this case was entitled to transfer the Club Facilities while retaining for itself the rest of the bundle, which includes the Facilities Fees. This is precisely what the Club Covenants evinced. The Club Owner "reserve[ed] *unto itself, without set off or deduction, the continuing right to receive the total of all Club Facilities Fees* . . . ."(Club Covenants, § 21) (emphasis added). As such, any conveyance of the Club Facilities cannot be understood to include the Club Facilities Fees. The Club Owner had the

discretion to retain for itself the right to receive the Club Facilities Fees, and could not be compelled to relinquish its right to the fees in connection with the voluntary sale of the Club Facilities.

6. The Clear and Unambiguous Language of the Declaration Provides that the Right to Acquire Pertained Exclusively to the Club Facilities

"[W]here a contract is clear and unambiguous in its terms, a court may not give those terms any meaning beyond the plain meaning of the terms contained therein." Dows v. Nike, Inc., 846 So. 2d 595, 601 (Fla. 4th DCA 2003) (citing Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126 (Fla. 2000)). "Courts have no authority to make new or different contracts for the parties and may only compel performance of a contract in the *precise* terms agreed upon by them." Edlund v. Seagull Townhomes Condo. Ass'n, Inc., 928 So. 2d 405, 407 (Fla. 3d DCA 2006) (emphasis added)

The Declaration defines the Club Facilities as "the *real property* and *facilities* provided to the Club Members." The Facilities Fees are not included in the definition, either expressly or by implication. The right to acquire provision, read together with the applicable statute, explicitly grants a right to acquire the "Club Facilities." Again, the Declaration makes absolutely no mention of Facilities Fees. Instead, the Declaration defines the Facilities Fee separately as "a fee to be paid to the Club Owner by each Club Member." As made clear by section 21 of the Club Covenants, the Club Facilities Fees are a stream of income that the Club Owner may retain, despite the transfer of the Club Facilities.

Because the governing documents define the Club Facilities and the Club Facilities Fees as separate and different assets, the purchase term sheets leading up to the closing and the Acquisition Agreement itself consistently differentiated the asset of "real property and facilities" from the asset of "contract rights . . . that entitle the owner of the Club Facility to receive a fee

('Facility Fee')." (July 17, 2000 Term Sheet) And, it is precisely for this reason that the total purchase price was apportioned between the $2.5 million for the Club Facilities and the $6.34 million for the contract rights that expressly included the Facilities Fees. Consequently, because the right to acquire provision clearly and unambiguously applied to the Club Facilities and did not include the right to acquire the Facilities Fees, the Plaintiffs are not entitled to recover the Facilities Fees as damages in this case.

7. The Express Language of the Right to Acquire Controls Even Under Circumstances that May Cause the Right to be Circumvented

A contractual right to purchase is construed in strict adherence to the clear and unambiguous language of the provision. As the Florida Supreme Court has explained, this is true even when the right itself might be circumvented by various circumstances.

Despite the Plaintiffs' assertion that no Florida law exists that is addresses this issue, the matter was considered in Robbinson v. Cent. Props., Inc., 468 So. 2d 986 (Fla. 1985). There, a real estate development company obtained a right of first refusal to purchase the water and sewer system on a landowner's property. Id. at 986-87. Subsequently, the landowner created a corporation to operate and own the water and sewer system. Id. at 987. At issue was whether all of the capital stock of the corporation could be transferred without triggering the right of first refusal. Id. The First District held it could not, because the right of first refusal "could be circumvented quite easily" if ownership in the corporation (which in turn owned the water and sewer system) could be transferred. Id. The Florida Supreme Court, however, reversed, concluding that where the unambiguous language of the right of first refusal did not extend to the sale of the capital stock, the right was not triggered. Id. at 988. Because language inclusive of a transfer of corporate stock could have been included if the parties had intended it, the Court would not add it.

> [T]he contract provision only refers to the purchase of the water and sewer system. It does not refer in any way to the purchase of corporate stock, and, absent any contrary intent in the contract, the unambiguous language of the contract controls. Therefore, . . . [the] right of first refusal does not extend to the sale of [landowner's] capital stock.
>
> . . . .
>
> *[T]he parties were free at the time of entering into the contract to extend the right of first purchase to stock sales and transfers which they did not do.*

Robbinson, 468 So. 2d at 988. (emphasis added).

Likewise, in Cruising World, Inc. v. Westermeyer, 351 So. 2d 371 (Fla. 2d DCA 1977), the Second District held that a lessee's right of first refusal to purchase real property owned by the lessor marina was not triggered by the sale of all of the lessor marina's corporate stock to a third party. Id. at 372. The option "went directly to the land itself" and therefore "did not extend to the corporation's stock." Id. at 373; see also Pantry Pride Enters. v. The Stop & Shop Cos., Inc., 806 F.2d 1227, 1229 (4th Cir. 1986) (holding that right of first refusal reached only the leasehold interest and not the equipment associated with the leasehold); Fox Grocery Co. v. Univ. Foods, Inc., 382 S.E.2d 43, 46 (W.Va. 1989) (holding that right of first refusal did not include leasehold interest because the term "lease" was not mentioned in the grant of "assets, inventory, furniture, and fixtures, stock or other property proposed to be sold pledged, or transferred").

Like the real estate company in Robbinson and the lessee in Westermeyer, the Plaintiffs are not entitled to recover more than what the express terms of the right to acquire explicitly affords them. The right to acquire provision is specific and unambiguous. If the parties to the Declaration had intended to include the Club Facilities Fees into the right to acquire, they were free to do so at that time or in a subsequent amendment. Robbinson, 468 So. 2d at 988. The parties did not do so because they did not intend it.

IV. CONCLUSION

No genuine issue of material fact exists as to the express and unambiguous terms of the right to acquire. The right to acquire granted to the Club Members a right to acquire the Club Facilities, a specifically defined term. The right to acquire the Facilities Fees, on the other hand, was purposefully excluded from the right to acquire and also the definition of Club Facilities. Therefore, the Facilities Fees were not subject to the Plaintiffs' right to acquire, no matter how they attempt to manipulate the language and/or the circumstances. Summary judgment on the issue is, accordingly warranted as no genuine issue of material fact exists

WHEREFORE, the Defendants respectfully request that the Court enter Partial Summary Judgment in their favor and against the Plaintiffs on the issue of the Plaintiffs' entitlement to acquire the Facilities Fees and/or recover the Facilities Fees as damages.

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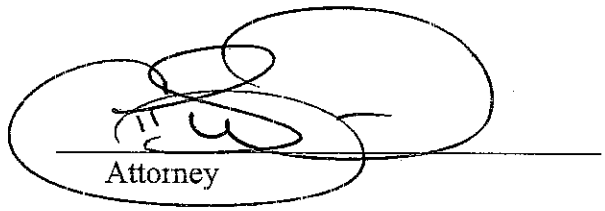
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished this 10th day of June, 2008, by HAND DELIVERY to Robert Anthony and Phil D'Aniello, Fassett, Anthony & Taylor, P.A., 1325 West Colonial Drive, Orlando, FL 32804, and by U.S. Mail to: Phillip S. Smith, McLin & Burnsed, P.A., P.O. Box 491357, Leesburg, Florida 34749-1357 and Don H. Lester, Lester & Mitchell, P.A., 1035 LaSalle Street, Jacksonville, FL 32207.



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