STATE OF MICHIGAN

IN THE OAKLAND COUNTY CIRCUIT COURT

CIVIL DIVISION

WILLIAM DEGHETTO and DEBRA DEGHETTO, ET. AL,

Plaintiffs,

v

Case No. 2014- 141355-CH
Hon. MARTHA D. ANDERSON

BEAUMONT'S SEVEN HARBORS WHITE AND DUCK LAKE ASSOCIATION,

Defendant.

PHILLIP J. NEUMAN (P35499) MARK S. FRANKEL (P41565) COUZENS, LANSKY, FEALK, ELLIS, ROEDER & LAZAR, P.C. Attorneys for Plaintiffs 39395 W. Twelve Mile Road, Suite 200 Farmington Hills, MI 48331 248-489-8600/Fax: (248) 324-2572 pneuman@couzens.com mfrankel@couzens.com	GREGORY M. MEIHN (P38939) HOWARD I. WALLACH (P29921) FOLEY & MANSFIELD, P.L.L.P. Attorneys for Defendant 130 Nine Mile Rd. Ferndale, MI 48220 (248) 721-4200/Fax: (248) 721-4201 gmeihn@foleymansfield.com hwallach@foleymansfield.com

DEFENDANT'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10)

Defendant Beaumont's Seven Harbors White and Duck Lake Association, by their attorneys, Foley & Mansfield, PLLP, file this **Motion for Summary Disposition Pursuant to MCR 2.116(C)(10)**, stating as follows:

1. Plaintiffs filed their Complaint against Beaumont's Seven Harbors White and Duck Lake Association ("Association") on June 16, 2014, alleging the following causes of action: Count I-Declaratory Judgment; Count II-Shareholder Oppression; and Count III-Slander of Title, seeking to have the Court determine, as to the captioned Plaintiffs only, that the

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Association is no longer a mandatory Association requiring Plaintiffs to be members and pay dues. Count III-Slander of Title has been dismissed by Order of the Court.

2. As discussed more fully in the attached Brief, Plaintiffs' complaint must be dismissed pursuant to MCR 2.116(C)(10) because there is no genuine issue of material fact.

WHEREFORE, Defendant Association requests that this Court grant its **Motion for Summary Disposition Pursuant to MCR 2.116(C)(10)**.

Proof of Service

I certify that the foregoing document was served on all parties in this case to each of the attorneys of record at their respective addresses as disclosed on the pleadings in this case on March 11, 2015by:

[ ] U.S. Mail [ ] Fax
[ ] Hand Delivery [ ] UPS Overnight
[ ] Federal Express [ ] Email
[X] Other – file & serve through E-filing

Signature: */s/Rebecca M. Dedene*

Respectfully submitted,
Foley & Mansfield, PLLP

/s/Gregory M. Meihn

HOWARD I. WALLACH (P29921)
GREGORY M. MEIHN (P38939)
Attorneys for Defendant

Dated: March 11, 2015

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JANICE SMITH and LLOYD SMITH,
PATTE DAY and DONALD DAY,
MARGARET RIEPEN and KENNETH RIEPEN,
RICK WOODWORTH, SHIRLEY MATUSZEWSKI,
JEANNIE KOZIOL and WALTER KOZIOL,
JUNE MULLINIX and GREGORY MULLINIX,
KENDRA PAPPAS and VERN PAPPAS,
EDWARD MICHALSKI, EDWARD BALDWIN,
SUSAN C. VERNIER and LON M. VERNIER,
JUDITH JOHNS and JOHN JOHNS,
CELESTINE KESSLER and NEIL KESSLER,
KATHRYN WOLFF and PAUL WOLFF,
CHERYL JONES and ROBERT JONES,
MARCIA CARLINE and THOMAS CARLINE,
and PRICE SPOOR,

Plaintiffs,

v

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BRIEF IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10)

A. INTRODUCTION

1. Procedural Background.

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Plaintiffs' Complaint alleges the following causes of action: Count I-Declaratory Judgment; Count II-Shareholder Oppression; and Count III-Slander of Title, seeking to have the Court determine, **as to the captioned Plaintiffs only**, that participation in the Association is no longer mandatory. [See Complaint Exh. 1]

On January 28, 2015, this Court entered a Stipulated Order dismissing Count III of Plaintiffs' Complaint. The Order required the Association to remove liens placed on five of the Plaintiffs' property, and permits the Association to reassert the liens on the properties subject to the outcome of this case. [See Stip. Order, Exh. 2]

In reviewing Plaintiffs' Motion for Summary Disposition, Plaintiffs appear to have abandoned Count II-the Shareholder Oppression claim, as well they should. There is no basis in law or fact for the claim. Nevertheless, the Association will briefly address that claim and respectfully requests dismissal of the same pursuant to MCR 2.116(C)(10).[1]

Accordingly, the salient claim before this Court is Count I-Declaratory Judgment. In short, Plaintiffs argue in Count I of their Complaint[2] that because the 1956 and 1959 Deed Restrictions, which compelled Plaintiffs' membership in the Association, expired on January 1, 1986, the Association is no longer a mandatory Association, but rather voluntary. Plaintiffs are asking this Court to make that declaration so they may discontinue their participation in the Association and not have to pay dues any longer . [See Complaint, Exh. 1]

Plaintiffs' claim, however, is without factual or legal support. As discussed more fully below, because 1) the actual deeds of Plaintiffs Koziol, Mullinix, Vernier, Wolff, Pappas, and Day compel membership in the Association; 2) the obligation to become members of the Association and pay dues is set forth in the initial Articles of Incorporation and Constitution

[1]As the Court will learn later in this Brief, many of the Plaintiffs in this matter were actual Board members or Trustee members who governed the Association for years. If there was shareholder oppression, they did it to themselves for which there is no remedy. Count II was an improperly brought claim by Plaintiffs.

[2] This is the sole basis of Plaintiffs' Motion for Summary Disposition.

applicable to all Plaintiffs; 3) the covenants establishing the obligation to become members of the Association and pay dues set forth in the 1956 and 1959 Deed Restrictions never expired, only the restrictions, 4) alternatively, the obligation to become members of the Association and pay dues set forth in the 1956 and 1959 Deed Restrictions were renewed prior to expiration and apply to all owners; 5) it is uncontroverted that the intent of the original owners of the land, Harry and Florence Beaumont, was to distribute the land pursuant to a common scheme and plan where all property owners are members of the Association and participate in maintaining the many private roads, parks, beaches, bridges, out lots and related and connected items, the doctrine of Reciprocal Negative Easement applies compelling membership in the Association; and 6) Plaintiffs claim is barred by the equitable doctrine of laches, Plaintiffs' complaint must be dismissed pursuant to MCR 2.116(C)(10).

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B. <u>BACKGROUND FACTS</u>.

1. A Short History Of The Association-Creation of A Perpetual Community.

The Association is a community made up of approximately 800 homeowners who reside in six platted subdivisions. Homes in the Association are marketed as being part of a lakeshore community, through which homeowners have access to beaches on two lakes, two boat launches, boat docking facilities, maintenance of private roads, numerous common areas and out-lots, and family-friendly events that are maintained and hosted by the Association. Importantly, the Association pays for all of these amenities through dues that are provided by homeowners.

Some of the land comprising the plats was originally deeded by President James K. Polk in 1848 to Francis Beaumont. Francis' son, John Beaumont, acquired an additional 120 acres, and all the land was conveyed to John's son, Harry S. Beaumont. Beginning in 1929, Harry Beaumont, and his wife, Florence Beaumont (the "Beaumonts") eventually sold, gifted, or otherwise conveyed the entirety of the land which now comprises the Association. [History,

Exh. 3]. Common to all of the transactions entered into by the Beaumonts is the uncontroverted clear intent to create a perpetual community of co-owners governed by an Association who pay association dues for the purpose of maintaining the private roads, bridges,[3] beaches, parks, out lots, and gifted land. Indeed, by way of example only, the Articles of Incorporation dated October 27, 1947, provides clear evidence of the intent of Beaumonts in creating the Association and a perpetual community:

> To **perpetuate a community** of beautiful homes and good neighbors. (emphasis added) [Articles, Exh. 4]

The Articles further provide for the creation of the Association and the payment of dues.

The Constitution which was adopted shortly thereafter provides as follows:

> To **perpetuate a community** of beautiful homes, proper and acceptable neighbors and living conditions, and filling a place in our lives for peace and rest, we dedicate ourselves to the following. (emphasis added) [Constitution, 1947, Exh. 5]

The Constitution further provides for the creation of the Association and the payment of dues.

This common scheme of a creating and maintaining a perpetual community of owners **governed by an Association and the payment of dues** was approved and ratified by the Association and its co-owners through the Amended Articles of Incorporation filed on April 22, 1959 (Exh. 6), Amended Articles of Incorporation filed in 2007 (Exh. 7), Amended Constitution dated 1978, which was approved by a majority of the co-owners as required (Exh. 8), and Amended Constitution in 1990 which was approved by a majority of the co-owners as required. (Exh. 9).[4]

[3] One bridge is a vehicle bridge that allows owners living on the island to cross the island to the mainland.

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2. Beaumonts' Gift of Property.

As part of the overall scheme of creating a perpetual community of owners governed by an Association and maintained through the payment of dues, the Beaumonts gifted to the Association, for the use and enjoyment of all co-owners, the following properties:

1. Co-owner Boat launch on Duck Lake;
2. Co-owner Boat launch on White Lake;
3. Two beach on White Lake;
4. Beach on Duck Lake;
5. Two Parks/playgrounds;
6. 14 Out-lots that permit access to Duck Lake and White Lake to the co-owners;
7. Walking paths;
8. Walking bridge over part of White Lake; and
9. Vehicle bridge to access residential Island.

See Map and Deeds, attached as Exh. 10. In furtherance of the creation of a perpetual community of owners governed by the Association and maintained through the payment of dues, the Beaumonts specifically restricted the gifts to the continuation of the Association. Indeed, the Article VI, Section 1 of the 1947 Constitution provides as follows:

> All property deeded to the Association **shall revert** to the previous owner, if at any time or for any reason the Association shall cease to function or fails to maintain the property or fails to carryout the orders of this Constitution…" [Exh. 5].

See also Amended Constitution dated 1978 (Exh. 8) and Amended Constitution in 1990 (Exh. 9).

3. The Plaintiffs And Their Deeds.

As stated earlier, there are six platted subdivisions in the Association:

- Supervisor's Plat No. 1
- Supervisor's Plat No. 5
- Supervisor's Plat No. 6
- Supervisor's Plat No. 7
- Supervisor's Plat of Seven Harbors
- Seven Harbors Reserve

The Plaintiffs in this case are members of the Association and own property in the following Plats:

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- Mr. and Mrs. Koziol (Lot 10 of Sup Plat No. 6)
- Mr. and Mrs. Mullinix (Lot 69 and part of Lot 70, Seven Harbors Reserve)
- Mr. and Mrs. Vernier (Lot 10, 11 & 12 of Sup Plat No 1)
- Mr. and Mrs. Wolff (Lot 3 of Sup Plat No. 6)
- Mr. and Mrs. Pappas (Lots 203 and 204, except for easterly 20 feet of each, and all of Lots 205 and 206 of Sup Plat of Seven Harbors)
- Mr. and Mrs. Day (Lot 98 of Seven Harbors Reserve)
- Ms. Matuszewski (Lot 1 and North ½ of Lot 2 of Seven Harbors Reserve)
- Mr. Michalski (Lots 96 of Seven Harbors Reserve)
- Mr. and Mrs. Riepen (Lot 83 and 84, Seven Harbors Reserve)
- Mr. and Mrs. Smith (Lot 209-210 of Supervisor's Plat of Seven Harbors)
- Mr. Spoor (South 45 feet of Lot 8 and all of Lot 9 of Supervisors Plat No. 5)
- Mr. Baldwin (Lot 61 & 62 of Seven Harbors Reserve)
- Mr. and Mrs. Carline (Lot 4 of Supervisors Plat No. 6)
- Mr. and Ms. DeGhetto[5] (Lot 97 of Seven Harbors Reserve)
- Mr. and Mrs. Johns (Lot 103 of Seven Harbors Reserve)
- Mr. and Mrs. Jones (Lot 9 of Supervisors Plat No. 6)
- Ms. Woods (Lot 4, Supervisor's Plat No. 7)
- Mr. Nelson (Lot 5, Supervisor's Plat No. 7)
- Mr. Woodworth (Lot 104 of Seven Harbors Reserve)
- Mr. and Mrs. Hill (Lot 101 of Seven Harbors Reserve)
- Mr. and Mrs. Kessler (Lots 8 and 9 of Supervisor's Plat No. 1)

Despite the efforts of the Beaumonts to create a common scheme and a perpetual community governed by an association of co-owners as evidenced by the Articles of Incorporation, as amended (Exs. 6,-7), the Constitution, as amended (Ex. 8-9), and the By-Laws, the creation and inclusion of covenants and restrictions in the deeds and filing of the deeds relating to the properties in the Association dating back to 1947 forward was not consistent. Indeed, as to all of the Plaintiffs except Mr. and Mrs. Koziol, Mr. and Mrs. Mullinix, Mr. and Mrs. Vernier, Mr. and Mrs. Wolff, Mr. and Mrs. Pappas, and Mr. and Mrs. Day, the original conveyance deeds from the Beaumonts do not directly reference membership in the Association. As discussed below, the failure to include such a provision in a deed does not mean those Plaintiffs are exempt from mandatory membership in the Association. The 1956 and 1959 Deed Restrictions referenced later in this brief conclusively require the Plaintiffs mandatory membership in the Association.

[5] These co-owners is no longer an owner in the Association as they have sold their property.

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However, as to **Mr. and Mrs. Koziol**, **Mr. and Mrs. Mullinix**, **Mr. and Mrs. Vernier**, **Mr. and Mrs. Wolff**, **Mr. and Mrs. Pappas**, and **Mr. and Mrs. Day**, their recorded deeds specifically provide, without any limitation or sunset period, mandatory membership in the Association as follows:

> The Purchaser hereby agrees that they, as property owners in Seven Harbors, are now members of the Beaumont's Seven Harbors Whit and Duck Lake Association and are hereby governed by its restrictions and by-laws.

See Exhs. 11, 12, 13, 14, 15, and 16. In other words, **the outcome or decision by this Court with regard to the renewal of the 1956 and 1959 Restrictions will have no impact on the mandatory nature of the Association as it relates to co-owners Koziol, Mullinix, Vernier, Wolff, Pappas, and Day**.

In a well-meaning effort by the Beaumonts and the co-owners in the Association to correct the inconsistent way deeds were created, and to overcome a 1949 Oakland County Circuit Court decision determining that 12 co-owners' deeds did not require membership in the Association or the obligation to pay dues[6] the Beaumonts, in concert with the co-owners on Supervisors Plat 5, Supervisors Plat 6, and Seven Harbors Reserve created and filed what is called the 1956 Deed Restrictions on December 12, 1956 [See Exh. 18]. The 1956 Deed Restrictions were recorded.

Similarly, the Beaumonts, in concert with the co-owners on Supervisors Plat 1 and Supervisors Plat of Seven Harbors created and filed what is called the 1959 Deed Restrictions on December 18, 1959 [See Exh. 19]. The 1959 Deed Restrictions were recorded on all owners' properties in Supervisors Plat 1 and Supervisors Plat of Seven Harbors.

[6] See decision, Exh. 17. **This decision is important in demonstrating the overall plan and scheme of Beaumonts to create a perpetual community governed by an Association of members who pay dues. Indeed, Beaumonts fought the suit to establish that it was his common plan. When the Court disagreed, Beaumonts created the 1956 and 1959 Deed Restrictions to correct the decision by the Court. [Exs. 18 and 19**]

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There are no similar filings relating to Supervisors Plat 7. Those members in Plat 7 are member of the Association as set forth in the Articles of Incorporation, as amended (Exs. 6-7), Constitution, as amended (Exs. 8-9), and Bylaws (Ex. 22) requiring membership in the Association.

i. 1956 and 1959 Restrictions-Expiration.

Both the 1956 and 1959 Restrictions contain identical language regarding membership in the Association, which reads as follows:

> Every purchaser shall become, by virtue of the purchase of any of these lots, a member of the Beaumont's Seven Harbors White and Duck Lake Association, hereafter and heretofore referred to herein as the Association, and every prospective purchaser shall be approved by the Association for membership and agree to abide by its rules and restrictions before any present or future sale shall be consummated. All tenants must be acceptable to the Association and shall be notified of and bound by these restrictions. [Exs. 18 and 19].

Both the 1956 and 1959 Restrictions also contain the following language:

> Terms and Severability
>
> If these restrictions are not **extended by valid action** under the law of this state and the provisions herein, they shall expire on January 1, 1986.
>
> Should any of these restrictions be subsequently declared invalid the remainder shall be given as full force and effect as if such invalid restrictions had never been a part thereof. [Exs. 18 and 19].

Importantly, neither the 1956 nor the 1959 Restrictions require the renewal to be by **a recorded document.** Rather, renewal or extension can occur by "***valid action under the law of this state***."

ii. 1956 and 1959 Restrictions-Renewed By Valid Action.

It is uncontested that both the 1956 and 1959 Restrictions were extended by "*valid action*" taken by the Association. Indeed, "*valid action*" was taken when the Association filed a Certificate of Amendment to the Articles of Incorporation; Certificate of Renewal of Corporate Existence; and ratified an amended Constitution governing the affairs of the Association, well

before 1986. Specifically, in September of 1977, the Association filed a Certificate of Amendment to the Articles of Incorporation with the State of Michigan. The Certificate of Amendment expressly states :

> Maintenance fees
> Maintenance fees shall be collected from each property owner in each subdivision, to be used for maintaining all subdivision roads, parkways, beaches and such property owned by the Association for use of all property owners who are paid up members in the Association, and for incidental expenses incurred in carrying on the work. **All property owners (except the Association) shall pay these fees on or before June 1st of each year**.
> ***
> **This Association is comprised of property owners of Seven Harbors**, is incorporated under the laws of the State of Michigan as a non-profit corporation, and has accepted deeds for land, beaches and roadways, as provided in the original deeds to the property of which it is comprised.

See Exh. 20.

Additionally, the Association also filed a "Certificate of Renewal of Corporate Existence" with the State of Michigan on or about November 29, 1977. [Exh. 21]. The express purpose of the Certificate was to extend the Corporate Term for 30 years from the date of filing (until 2007). This constitutes " *valid action*" taken under state law, prior to the expiration of the restrictions in 1986, to continue the existence of the Association and its corporate purpose – i.e., to govern the affairs of the condominium project and maintain the property in it- and to impose the obligations of membership and payment of dues on all affected co-owners.

The Association also ratified an amended Constitution in 1978 (a prior constitution was ratified in 1947, shortly after the Articles of Incorporation were filed). The 1978 Constitution expressly provides that:

> Every property owner in Supervisor's Plat of Seven Harbors, Supervisor's Plat No. 1, 5, 6, and 7 and Supervisor's Plat of Seven Harbors Reserve of Highland Township, Oakland County, Michigan and such owners of property adjacent thereto as may be admitted by vote of the Board of Directors of this Association **are automatically a member of Beaumont's Seven Harbors White and Duck Lake Association and are bound by its restrictions, laws and regulations**. (bold emphasis added).

The 1978 Constitution also contains the following language:

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> Article 3, Section 1, Restrictions
> Restrictions remain as they are recorded with the plat, except that part which is dealt with in Article 4, Section 2 of this Constitution. It is the duty of the Association to see that all restrictions are upheld, and there is a committee appointed by the Association to enforce these restrictions. Each property owner hereby agrees that he or she shall abide by the rules and regulations as set by this Association.

See Exhibit 8. Article 4, Section 2 of the 1978 Constitution likewise states that: "The maintenance fee for each undeveloped lot and all lots with buildings thereon will be set at the General Membership Meeting each year, or at any special meeting called for such purpose."

Additionally, the Association promulgated By-Laws on March 14, 1994, to effectuate the purposes set out in the Articles of Incorporation, Constitution, and the deeds of co-owners for the creation of a mechanism for voting on issues, holding meetings, electing officers, and collecting association dues. [See Exh. 22].[7]

5. The Attorneys Weigh In And The Association Acts In Good Faith.

In early 2010, certain Plaintiffs in this case began questioning whether the Association was mandatory or voluntary as a result of the belief that the 1956 and 1959 Deed Restrictions had expired. Not understanding that the 1956 and 1959 Deed Restrictions did not apply to Plat 7 and not having the benefit, as we do now, of reviewing the deeds regarding the Plaintiffs' in this claim, the Association did the prudent thing and employed attorney Matt Novello, Esq. at the firm Bagley & Langan, PLLC to provide an opinion to the Board. After extensive review of the documents, Mr. Novello, Esq. determined that the 1956 and 1959 Deed Restrictions did not expire for reasons similar to the arguments made here. [Exh. 23].

Things returned to normal until approximately 2012 when then Board President Lori Woods, a Plaintiff in this case, pushed the Board for a second opinion and hired Bruce R. Seglund at the firm Groth, Elowsky Kelley Pawlak & Seglund, PLC. Not surprisingly, Mr.

[7] At least one prior version of the Bylaws existed; however, based upon information currently available, such Bylaws applied only to the Seven Harbors Community Center, which was subsequently sold.

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Seglund, without reviewing the deeds, Article of Incorporation, as amended, and Constitution, as amended, provided the opinion Plaintiff Woods desired, opining that the 1956 and 1959 Deed Restrictions did expire and, therefore, in his opinion the Association was now voluntary. [See May 16, 2012 Meeting Minutes, Exh. 24]. Despite the Association Board not having authorized any action to be taken on Mr. Seglund's legal opinion,[8] Plaintiff Woods and Plaintiff Day, on their own, sent an August 2012 Association News Letter out to all co-owners stating that the Association was not mandatory, but voluntary, "limited to homeowners that wish to remain…" [News Letter, Exh. 26].

In April 2013, the Association sought the advice of Barry D. Malone, Esq. from the firm Adkison, Need & Allen, PLLC regarding whether the Association was mandatory and whether the Association could place liens on delinquent properties. Mr. Malone, Esq. issued his opinion finding that the membership in the Association was mandatory and the Association could charge and collect association dues. [Malone Opinion, Exh. 27].

In response to Plaintiff's counsel's letter in February, 2014, Gregory Need, Esq. from the firm Adkison, Need & Allen, sent a letter to Plaintiffs' counsel on March 20, 2014 stating his opinion that the Association is mandatory aside from the 1956 and 1959 Deed Restrictions. [Need Letter, Exh. 28]. This was the fourth legal opinion on this issue with three lawyers finding that the Association was mandatory and one lawyer finding the Association was not.

C. ARGUMENTS

1. Standard of Review-MCR 2.116(C)(10).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint and it may be filed at any time.[9] The moving party must first " specifically identify the issues as to

[8] See meeting minutes for May 16, 2012 [Exh. 24] and Dep. of Lori Woods, pg. 34-36, [Exh. 25].

[9] *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379, 392; 651 NW2d 756, n16 (2002), *lv den* 468 Mich 852; 658 NW2d 491 (2003), *cert den* 540 US 1004; 124 S Ct 538; 157

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which [it] believes there is no genuine issue as to any material fact,"[10] and has the initial burden of supporting its position with affidavits, depositions, admissions, or other admissible documentary evidence.[11] Once this initial burden has been met, the burden shifts to the nonmoving party to establish the existence of a genuine issue of material fact for trial.[12] If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted.[13]

2. Plaintiffs Koziol, Mullinix, Vernier, Wolff, Pappas, Day Are Mandatory Members Of The Association And Therefore The Association's Motion For Summary Disposition Must Be Granted As To Them.

As discussed previously, the recorded deeds for Mr. and Mrs. Koziol, Mr. and Mrs. Mullinix, Mr. and Mrs. Vernier, Mr. and Mrs. Wolff, Mr. and Mrs. Pappas, and Mr. and Mrs. Day, expressly require, without any limitation or sunset period, mandatory membership in the Association and payment of dues. Indeed, the deeds specifically provide:

> The Purchaser hereby agrees that they, as property owners in Seven Harbors, are now members of the Beaumont's Seven Harbors White and Duck Lake Association and are hereby governed by its restrictions and by-laws.

See Exhs. 11, 12, 13, 14, 15, and 16. In other words, Plaintiffs Koziol, Mullinix, Vernier, Wolff, Pappas, and Day are members of the Association and governed by Articles of Incorporation, Constitution, and By-Laws by virtue of the recorded deeds on their properties. **The outcome or decision by this Court with regard to the renewal of the 1956 and 1959 Restrictions has no impact on the mandatory nature of the Association as it relates to Plaintiffs Koziol, Mullinix, Vernier, Wolff, Pappas, and Day**. Plaintiffs' counsel knew or should have known of this outcome as it relates to these Plaintiffs.

L Ed2d 409 (2003) and MCR 2.116 (D)(3). See also, *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

[10] MCR 2.116(G)(4).

[11] MCR 2.116(G)(3)(b); MCR 2.116(G)(6); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); *Neubacher v Glove Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

[12] *Id.*

[13] *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

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3. The 1956 and 1959 Restrictions Were Extended by "Valid Action" And Therefore The Association's Motion For Summary Disposition Must Be Granted As To All Plaintiffs.

As stated earlier at pp 8-10, the 1956 and 1959 Restrictions expressly required membership in the Association.[14] The 1956 and 1959 Deed Restrictions, not the covenants,[15] also indicate they expire on January 1, 1986 unless extended by valid action under Michigan law, which occurred here on several occasions.[16] Examples include the March 7, 1959 Certificate of Amendment to the Articles of Incorporation with the State of Michigan (Ex. 6); the September 21, 1977 Certificate of Amendment to the Articles of Incorporation with the State of Michigan (Ex. 20), the filing of a Certificate of Renewal of Corporate Existence with the State of Michigan on or about November 29, 1977 (Ex. 21), and the Association's members ratification, by approval of the majority of members, of an amended Constitution in 1978 (a prior constitution was ratified in 1947, shortly after the Articles of Incorporation were filed). [Ex. 8]

In summary, the actions take by the Association Board was "*valid action*" under state law to renew the 1956 and 1959 Restrictions. It is important to note that neither 1956 Deed Restrictions nor the 1959 Deed Restrictions require that such renewal action be recorded. Rather, the action necessary is "*valid action*" under state law which the Association accomplished more than once. Further, Michigan law does not require that renewal of deed restrictions be by a recorded document. See generally *Sampson v Kaufman*, 345 Mich 48 (1956)(while the Court found that renewal occurred after expiration of the deed restrictions was not enforceable. the Court implicitly recognized the restrictions could be renewed by 2/3 of the homeowners); *Katz v Riverwood Subdivision Homeowners*, 2010 WL 2680175 (Court held that

[14] See p. 8.

[15] The requirement to be in the Association as set out in the 1956 and 1959 Deed Restrictions was a covenant that was independent of the restrictions and did not expire in 1986.

[16] *Id*. at 9-10.

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restrictions renewed by 2/3 of the homeowners after expiration of the restrictions was valid as to those homeowners approving the restrictions and their successors).

Michigan law values residential deed restrictions and the ability to enter into private agreements, covenants and restrictions as the Beaumonts established in the beginning and was carried through by the Association and co-owners up and through today. *In Re Egbert R. Smith Trust*, 480 Mich 19 (2008); *Rory v Continental Ins. Co*., 473 Mich (2005). .

4. Plaintiffs' Complaint Must Be Dismissed Pursuant To the Doctrine Reciprocal Negative Easement.

The fundamental flaw in the argument advanced by Plaintiffs is, as evidenced by the numerous documents filed with the Register of Deeds, that the intent of the Beaumonts (from the inception of the development of the property), to have a common scheme and plan, one where all property owners would be members of the Association. The plan was to create a perpetual community governed by an Association. Indeed, this is evidence by the fight put up by the Beaumonts in the 1948 suit (Exs. 17-18), the deeds issued (Exs. 11-16), the Articles of Incorporation, as amended, (Exs. 6-7), the Constitution, as amended, which was approved twice by a majority of the co-owners (Exs. 8-9), the 1956 and 1959 Deed Restrictions (Exs. 18-19), the actions of the Association of managing the Association, providing services to the co-owners such as road maintenance, plowing, bridge repair, and maintaining and process access to two lakes, beaches and docking privileges on the two lakes for over sixty-four (64) years.

Furthermore, it is important for the Court to note that the Beaumonts also gifted several parcels of land expressly to "The Beaumont's Seven Harbors White and Duck Lakes Association." These gifts include out lots, parks, and boat launches to be used by all co-owners for the common good.

These gifts which clearly reference and contemplate the land being used by the Association, coupled with the language of the deeds from the Beaumonts, establish that the Beaumonts envisioned the Seven Harbors neighborhood developed pursuant to a common

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scheme, one by which all homeowners are members of the Association, and by which the Association maintains the roads, beaches, parks, and common elements. Importantly, Plaintiffs bought their homes in a community that they knew full well was governed by an Association, and paid dues for years without complaint. Plaintiffs' mortgage documents reflect the existence of the Association, membership and dues.

Michigan courts recognize the doctrine of reciprocal negative easements, which applies in situations where a grantor intends to establish a common scheme of development, but the restrictions imposed on the lots are not uniform, or have been omitted from some of the original or subsequent deeds to the lots.[17]

Under the concept of a reciprocal negative easement, Michigan courts have enforced restrictions against certain lots in a subdivision developed pursuant to a common scheme**, even though the restrictions were not expressly recorded against such lots**.

Specifically, in *Civic Association of Hammond Lake Estates v Hammond Lake Estates No. 3, et al*[18]., a property owners association brought an action for injunctive relief against certain lot owners who were using speedboats on a lake owned by the association. Hammond Lake Estates included eight subdivisions that were platted in the 1950s, and were numbered HLE 1 through HLE 7. All of the subdivisions **except** HLE No. 3 included a deed restriction that lot owners may not use motorboats on the lake. In spite of this, certain homeowners began to use speedboats on the lake. After the association filed suit to enjoin them, the homeowners argued *inter alia* that the motorboat restriction did not apply to residents in HLE No. 3 because the deeds for that subdivision did not expressly contain that restriction.

The court disagreed with the homeowners, reasoning that "the rationale of the doctrine of reciprocal negative easements 'is based upon the fairness inherent in placing uniform

[17] *See, e.g.*, 62 Am. Jur. Proof of Facts 3d 1, *Grantor's Intent to Create Reciprocal Negative Easement by Common Development Scheme of Subdivision*.

[18] 271 Mich App 130; 721 NW2d 801 (2006),

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restrictions upon the use of all lots similarly situated, notwithstanding that less than all of the deeds contain an express restriction.'"[19]

Under Michigan law, the elements of a reciprocal negative easement are: (1) a common grantor; (2) a general plan, and (3) restrictive covenants running with the land in accordance with the plan and within the plan area in deeds granted by the common grantor.[20]

The logic of *Hammond* and the other cases cited above should apply to the instant case. Specifically, to the extent Plaintiffs argue that the deed restrictions expired in 1986 (which the Association disputes), the overall organization and framework for the subdivisions clearly evidence that the original grantors, the Beaumonts, **intended for the entire Seven Harbors estate to be created pursuant to a common plan**.

Furthermore, the Seven Harbors estate satisfies all three prongs of the reciprocal negative easement test. All subdivisions were conveyed by a common grantor, the Beaumonts (or the administrator of the Beaumonts' estate). They were all conveyed pursuant to a general plan whereby all homeowners would be members of the Association and pay dues, which in turn would be used to maintain the private roads, beaches, parks, and other common elements of the Association – many of which were expressly gifted to the Association by the Beaumonts. Finally, there are restrictive covenants in place which either run with the land and did not expire (or, if slated to expire in 1986, were extended by valid action) mandating that all homeowners be members of the Association.

[19] *Id*. at 136. *See also Sanborn v McLean*, 233 Mich 227, 232; 206 NW 496, 498 (1925) (holding that where 51 of the 91 deeds on a particular street contained restrictions prohibiting all but residential use of the land, owner of a lot with a deed containing no restrictions was subject to a reciprocal negative easement based on a general plan of residential use); *Parcells v Burton*, 20 Mich App 457; 174 NW2d 151 (1969) (holding that where restrictive covenants appeared in deeds to four lots of a five-lot parcel, restrictions would be applied as to all five lots based on intent of grantor); *Dean v Hanson*, No. 241317, 2003 WL 22717941, at *2 (Mich. Ct. App. Nov. 18, 2003) (attached hereto as Exhibit 29) (holding that all the parcels were governed by a reciprocal negative easement contained in a single building and use restrictions document filed by the grantor, even though the individual deeds contained no such restrictions).

[20] *Cook v Bandeen*, 356 Mich 328, 337; 96 NW2d 734 (1959).

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4. **The Doctrine of Laches Bars Plaintiffs Claims**

Furthermore, Plaintiffs should be barred from disputing the mandatory nature of the Association under the equitable doctrine of laches. Specifically, many of the Plaintiffs have been homeowners in the Association for over 20 years. For example, Plaintiffs Celestine and Neil Kessler have been homeowners since 1994. Plaintiff Donald Day has been a homeowner since 1995. Plaintiff Vern Pappas has been a homeowner since 1992.

It is undisputed that all of the Plaintiffs have, at one time or another, paid annual homeowner dues to the Association. Many of the Plaintiffs also live on the private roads maintained by the Association, and they have benefitted from the amenities maintained and events hosted by the Association. For example, Plaintiff Donald Day even signed a "Notice of Private Road" which was recorded with the Register of Deeds, expressly acknowledging that he lives on a private road (i.e., one that is maintained by the Association). *See* Exh. 30.

Perhaps most importantly, all of the Plaintiffs purchased their homes with the knowledge that they were buying into a community that was governed by an Association, and to which they had to pay dues. The Association has relied on the payments made by homeowners, including the Plaintiffs, to continue its operations and maintain the subdivisions' common elements.

Due to the Plaintiffs' delay in filing suit, and the Association's reliance – in some cases, for nearly two decades – that Plaintiffs are homeowners who would continue paying dues to the Association, Plaintiffs' claims should be barred under the equitable doctrine of laches.

"The doctrine of laches is concerned with unreasonable delay that results in circumstances that would render inequitable any grant of relief to the dilatory plaintiff."[21] The doctrine of laches may be applied if a passage of time due to delay by the plaintiff and a change

[21] *Twp of Yankee Springs v Fox*, 264 Mich App 604, 611-12; 692 NW2d 728, 733-34 (2004) (internal citations omitted).

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in condition results in such prejudice to the defendant that it would make it inequitable to enforce the claim against the defendant.[22]

5. Plaintiffs' Shareholder Oppression Claim Must Be Dismissed.

The Michigan Shareholder Oppression Statute, MCL 450.2825, provides in pertinent part that:

> The circuit court for the county in which the registered office of the corporation is located may adjudge the dissolution of, and liquidate the assets and affairs of, a corporation, in an action filed by a shareholder, member, or director when it is established that the acts of the directors or those in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to such shareholder or member or contrary to the purposes of the corporation.

Plaintiffs do not allege any specific activities that are "illegal or fraudulent", and instead claim only that the Association's Board of Directors "has consistently and systematically been controlled by homeowners in the Plats with the larger number of common areas." *See* Complaint, ¶49, Exh. 1.

This argument is nonsensical for two simple reasons. First, under the Association's Bylaws, all officers and trustees of the Board of Directors are elected by the general membership of the association (i.e., the homeowners). *See* Article III, Section 1 and Section 2 to Bylaws, attached as Exh. 22. Each member of the Association is entitled to one vote (husband and wife tenants owning a unit together are entitled to one vote). *See* Article VII, Section 3, Exh. 22. Accordingly, all of the homeowners are charged with electing members to the Association's Board of Directors. If, as Plaintiffs allege, the Board is comprised primarily of individuals who reside in the plats with a larger number of common areas, it is only because those Board members have been elected to the position by a majority of homeowners (through

[22] *Id*.

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no fault of their own). Plaintiffs do not allege that the actual Board took any actions that exceeded their enumerated powers, thereby trampling upon the rights of shareholders.[23]

Second, and perhaps more importantly, many of the Plaintiffs have actually served on the Board of Directors. For example, Plaintiff Pat Day was a trustee on the Board from October of 2011 – September 2012. (*See* Day Responses to Defendant's First Set of Interrogatories, 18-19, attached hereto as Exh. 32). Plaintiff Jeannie Koziol was Treasurer of the Association Board of Directors from October 2005 until September 2010. (See Koziol dep at 14, Exh. 33).

D. **CONCLUSION**

In light of the foregoing, the Association respectfully prays this Court grant its Motion for Summary Disposition pursuant to MCR 2.116(C)(10) and dismiss Count I and Count II of Plaintiffs' complaint. The Association requests that it be awarded its costs and attorneys fees incurred in this matter.

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Proof of Service

I certify that the foregoing document was served on all parties in this case to each of the attorneys of record at their respective addresses as disclosed on the pleadings in this case on March 11, 2015by:

[ ] U.S. Mail [ ] Fax
[ ] Hand Delivery [ ] UPS Overnight
[ ] Federal Express [ ] Email
[X] Other – file & serve through E-filing

Signature: */s/Rebecca M. Dedene*

Respectfully submitted,
Foley & Mansfield, PLLP

/s/Gregory M. Meihn

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Attorneys for Defendant

Dated: March 11, 2015

[23] *See, e.g., Andreozzi v Stony Point Peninsula Ass'n*, 2009 WL 1567359, Dkt. 281113 (Mich App June 4, 2009) attached hereto ax Exh. 31 (finding no cause of action for shareholder oppression where association board did not take any action outside the scope of their powers).