

2. Plaintiff is BARTON CREEK LAKESIDE P.O.A., INC.
3. Defendants, the third-party plaintiffs, are HUNTERS GROVE COURT JOINT VENTURE, PAT O'NEIL and ROBERT OLVERA.

4. Third-party defendant, PAUL SULLIVAN, an individual, may be served with process at defendant's usual place of abode, 2507 Countryside Circle, Spicewood, TX 78669, Travis County, Texas.
5. Third-party defendant, TOM RASMUSSEN, an individual, may be served with process at defendant's usual place of abode, 27512 Waterfall Hill Pkwy, Spicewood, TX 78669, Travis County, Texas.
6. Third-party defendant, DICK CHILDERS, an individual, may be served with process at defendant's usual place of abode, 27026 Masters Pkwy, Spicewood, TX 78669, Travis County, Texas.
7. Third-party defendant, JOHN CURTIS, an individual, may be served with process at defendant's usual place of abode, 26110 Countryside Dr, Spicewood, TX 78669,
8. Third-party defendant, ROSEMARY DEHAVEN, an individual, may be served with process at defendant's usual place of abode, 1113 Majestic Hills, Spicewood, TX 78669, Travis County, Texas.
9. Third-party defendant, JOHN WASHBURN, an individual, may be served with process at defendant's usual place of abode, 3220 Colgate, Dallas TX 75225.
10. Third-party defendant, JOE CUTRER, an individual, may be served with process at defendant's usual place of abode, 2415 Founders Circle, Spicewood, TX 78669, Travis County, Texas.
11. Third-party defendant, BYRON ZINN, an individual, may be served with process at defendant's usual place of abode, 120 Hidden Springs Ct, Spicewood, TX 78669, Travis County, Texas.
12. Third-party defendant, ROBERT J. DAY, an individual, may be served with process at defendant's usual place of abode, 111 Cloudland Ct., Spicewood, TX 78669, Travis County, Texas.
13. Third-party defendant, GARY CHILDRESS, an individual, may be served with process at defendant's usual place of abode in Travis County, Texas.

14. Third-party defendant, KARL STEWART, an individual, may be served with process at defendant's usual place of abode in Travis County, Texas.

15. Third-party defendant, BOB MCQUAY, an individual, may be served with process at defendant's usual place of abode in Travis County, Texas.

16. Third-party defendant, CHARLES EVANS, an individual, may be served with process at defendant's usual place of abode, 27025 Masters Pkwy., Spicewood, TX 78669, Travis County, Texas.

17. Third-party defendant, JIM RAMSEY, a deceased individual, may be served with process at defendant's address of estate, 2424 Founders Circle, Spicewood, TX 78669, Travis County, Texas.

18. The individuals named as third-party defendants are collectively called the "Directors".

III. Verified Plea

19. Defendants Pat O'Neil and Robert Olvera deny that they are liable in the capacity sued. They deny that they are partners in Hunters Grove Court Joint Venture as alleged in Plaintiff's Original Petition.

20. Defendant denies plaintiff's allegation that all conditions precedent have been performed or have occurred. Specifically, defendants deny that plaintiff has the authority to enforce the Covenants, Conditions, and Restrictions ("CCR's") and to impose fines and assessments with respect to the subject property.

21. Defendant denies that plaintiff has the legal capacity to sue because plaintiff is not a properly formed and authorized Property Owner's Association ("POA").

22. Defendant denies that plaintiff is entitled to recover in the capacity in which plaintiff sues because plaintiff is not authorized to enforce the CCR's nor impose fines and assessments because plaintiff is not a properly formed and authorized POA.

IV. Background Facts

23. In April of 2005, Defendants requested building plan approval from the Architectural Review Committee (ARC) of Barton Creek Lakeside, a residential subdivision in Travis and Burnet Counties, Texas, (the "Subdivision"). At the time, the ARC claimed to be the proper authority to approve such plans as granted by Barton Creek Lakeside Master Property Owners Association, Inc., (The Master Assn.) an alleged Texas non-profit corporation claiming to be authorized to enforce the deed restrictions and building rules as set forth in the Covenants, Conditions, and Restrictions (CCR's) of the subdivision. On May 20, 2005, Defendant's plans for a single-family home to be built at 26605 Hunters Grove Court, Spicewood, Texas 78669 (the "Property") were approved by the ARC and defendants paid \$2,000.00 to the Master Assn. in deposits and fees requested by the ARC.

24. Defendants subsequently learned that the Master Assn. had forfeited its Texas charter on February 18, 1998, and was therefore unable to confer any authority to the ARC and could not legally create, organize or name any successors or assigns as set forth in the CCR's. In spite of having no legal authority, the Master Assn. continued to transact business in that name until December 2005. According to meeting minutes of the Master Assn., the directors had knowledge they were not operating legally as early as January of 2004, and they had begun conspiring to create another entity in 2005.

25. In spite of lacking authority to legally transact any business, the Master Assn. directors called a meeting of the property owners of the subdivision and then led them through election of directors, such directors being selected by a nominating committee appointed by the illegally operating Master Assn. directors. On December 5, 2005, the directors of the Master Assn., who were elected in October of 2005 at the Master Assn (property owners) meeting, chartered a new non-profit corporation (the POA), with intentions to enforce the deed restrictions of the subdivision, again in spite of lacking any legal authority to undertake such action. The directors later noted in a newsletter published on the subdivision website that a new POA had been incorporated, but failed to tell the property owners that it was created because the Master Assn. had lost its Texas charter and had no

legal authority, and it additionally failed to mention that the CCR's had not been amended to confer any authority on the new POA. The newsletter failed to mention that compliance with POA assessments and decisions would be strictly voluntary since the POA had no legal authority.

26. On December 10-12, 2005 the Master Assn. elected directors, who were elected in October of 2005 at the Master Assn. member meeting, organized the new POA, again, in spite of lacking any authority to legally do so.

27. In spite of lacking any legal authority, on November 21, 2006, Third-party defendant Curtis and Plaintiff issued a letter to Defendants, threatening to place a lien on Defendant's property, in an attempt to collect an alleged debt, such debt to arise from fines for failure to complete construction of a home within 360 days of commencement of construction.

28. On January 10, 2007 and February 7, 2007, third party defendants Childress and Day executed separate documents allegedly assigning declarant rights to the POA in spite of the fact that the POA had been improperly chartered and organized by the Master Assn., who had no legal authority to create, organize or name a successor POA.

29. On March 9, 2007, Third Party Defendant Cutrer and Plaintiff issued a letter to Defendants asserting that they had in fact begun levying daily fines against Defendants, and once again made the same threat of a lien unless such alleged debts were paid.

30. On February 4, 2008, Plaintiffs' attorney Gary Calabrese, 808 Nueces, Austin, Texas 78701, in collaboration with the Plaintiff and Third-party Defendants, issued a letter to Defendants demanding payment of the alleged fines, such fines being alleged by Calabrese to be "assessments", contrary to "assessments" as defined by the CCR's and the Texas Property Code. The letter also stated that a lien was claimed against Defendant's property, the aforementioned lien having been executed by Third-party Defendant Rasmussen as president of the POA, and recorded by Calabrese in the Travis County Real Estate Records on January 30, 2008 as document number 2008014367.

31. On January 8, 2008, the plaintiff and the Third-party Defendants ratified the decision to perfect lien against the subject property and foreclose on it. On April 10, 2008, Plaintiff's attorney

Calabrese issued to Defendants a letter and Notice of Foreclosure Sale of Defendant's property, such sale being prohibited by the Texas Property Code section 209. Documents were included showing that Calabrese had been named as Substitute Trustee by the Plaintiff in order to facilitate the foreclosure sale which he scheduled for May 6, 2008.

32. On April 16, 2008, Defendants, as owners of other lots in good standing, requested access to the records of the POA pursuant to the Texas Property Code section 209.005 (a) and Article 1396 2.23 (a) & (b) of the revised Texas Civil Statutes requiring an owner's association to make records reasonably available to any owner or owner's representative during regular business hours at the registered office of the POA. Third-party Defendant Cutrer acknowledged the request on the same date. The Plaintiff and Third-party Defendants disregarded the aforementioned statutes and denied reasonable access to the records by the Defendants, responding instead with an email requiring the Defendants to contact attorney Calabrese. Again on August 20, 2008 defendants requested access to the records and were again denied reasonable access during regular business hours at the registered office of the POA. In a letter subsequently received from Plaintiff and Third-party Defendants attorney Calabrese, it was learned that the records were not all kept at the registered office as required by state statute, and that the POA did not in fact have many of the records requested. In spite of prevailing statute requiring reasonable access, Defendants were not allowed access to any records without legal process. The records were not made available at the registered office as required but were brought to a alternate location.

33. On May 20, 2008, attorney Calabrese filed this lawsuit against the Defendants in the 250th Judicial District Court on behalf of an improperly formed POA with no legal standing to bring suit which constitutes frivolous pleadings intended to damage the Defendants. In addition, attorney Calabrese named Pat O'Neil and Robert Olvera personally as Defendants in spite of the fact that there are no written or recorded documents available to establish that they in fact have any individual ownership or management interest in the subject property. In documentation obtained from the Plaintiff, it has been learned that there have been numerous instances of homes that took longer than

one year to complete, yet the POA, authority aside, has never previously taken legal action against those owners, choosing to instead selectively attempt to enforce those restrictions upon the defendants, in spite of the fact that no waiver of right to estoppel was ever executed by the defendants.

V. Standing - Motion to Dismiss for Lack of Jurisdiction

34. Defendants ask the court to dismiss plaintiff's suit for lack of jurisdiction.

35. Defendants attach affidavits to this motion as Exhibit A to establish facts not apparent from the record and incorporates them by reference.

36. The purpose of a plea to the jurisdiction is to dismiss a cause of action without regard to whether the claim has merit. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000).

37. The court must decide whether plaintiff has affirmatively demonstrated this court's jurisdiction to hear this suit, based on the facts alleged by plaintiff and, when necessary to resolve jurisdictional facts, on evidence submitted by the parties. *See State v. Holland*, 221 S.W.3d 639, 643 (Tex. 2007); *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-27 (Tex. 2004); *Bland Indep. Sch. Dist.*, 34 S.W.3d at 555; *see, e.g., State v. Sledge*, 36 S.W.3d 152, 155 (Tex. App.—Houston [1st Dist.] 2000, pet. denied) (trial court conducted hearing and received oral testimony, affidavits, exhibits, and stipulations).

38. This court does not have jurisdiction over this lawsuit because plaintiff has no standing to bring this suit. *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 710-11 (Tex. 2001). Because standing is a component of subject-matter jurisdiction, a plaintiff's lack of standing deprives this court of jurisdiction over the claims asserted in plaintiff's petition.

39. The Master Assn. had no legal right to transact business in the State of Texas after it forfeited its Texas charter on February 18, 1998. The Master Assn. was therefore unable to confer any authority to the ARC or legally name or organize any successors or assigns (the POA) as set forth in the CCR's. In spite of losing its charter, the Master Assn. continued to transact business in that

name until December 2005. Defendants assert that since the Master Assn. had no legal right to transact business in the State of Texas, they could not legally organize and assign the POA as successor, and therefore the POA has no legally assigned authority to enforce the CCR's or to impose fines and assessments with respect to the subject property.

40. Because it is clear from Plaintiff's pleadings and the evidence submitted with this motion that the court does not have jurisdiction to hear Plaintiff's cause of action, the court should dismiss Plaintiff's suit.

VI. Causes of Action

CRPC §12.002 - Fraudulent Lien

41. Pursuant to Civil Practice & Remedies Code, § 12.002, Defendants would show that Plaintiff and Third-party defendants had no legal authority to enforce the CCR's or to impose assessments with respect to the subject property, any property owners' association's claim to a "vendor's lien and superior title" as claimed in the CCRs and recorded in the deed records, would be unauthorized and fraudulent, in addition to filing a fraudulent lien against real property. Because the Plaintiff had and has no legal authority to enforce the CCR's or to impose fines and assessments with respect to the subject property, any property owners' association's assessment lien claimed by previously recorded documents or filed by Plaintiff against the subject property or others similarly situated would be unauthorized and fraudulent. Defendants further assert that Plaintiff and Third-party Defendants, at the time that Plaintiff and Third-party Defendants caused any assessments to be mailed, or filed any liens, knew or should have known that the filed claim of a "vendor's lien and superior title" in volume 10755, page 240 of the Travis County Deed Records, in addition to filing a lien against defendants, was fraudulent due to their lack of legal authority, therefore, Defendants ask the Court to award Defendants the costs of bringing this action pursuant to Civil Practice & Remedies Code, § 12.006.

Slander of Title

42. Defendants further assert that the placing of the prohibited lien constitutes slander of Defendant's title to the property, with such slander still ongoing. Defendants further assert that the posting of Defendant's property for foreclosure constitutes further slander of Defendant's title to the property.

Fraud in a Real Estate Transaction

43. The foregoing actions of Plaintiff and Third-party defendants constitutes fraud in a real estate transaction in violation of Section 27.01 of the Texas Business and Commerce Code. Such fraud was the proximate cause of Defendants damages as alleged above, for which Defendants sue.

Common Law Fraud

44. The foregoing actions of Plaintiff and Third-party Defendants constitute common law fraud. Plaintiff and Third-party Defendants knowingly and recklessly made false representations of material fact claiming to be authorized to enforce the deed restrictions and building rules as set forth in the Covenants, Conditions, and Restrictions (CCR's) of the subdivision with the intent of inducing Defendants into acknowledging Plaintiff's authority as the subdivision's property owner's association. Each of these representations concerned material facts for the reason that Defendants would not have paid any money to the Plaintiff had they known the representations were false. Defendants relied on the representations to their substantial injury and damage. Defendants damages include, without limitation, slander of title, money collected as building deposits, annual dues, assessments, and extreme mental and emotional anguish which Defendants have undergone since learning of Plaintiff and Third-party Defendants' fraud.

Deceptive Trade Practices

45. Plaintiff and Third-party Defendants are guilty of false, misleading and deceptive acts and practices prohibited by the Texas Deceptive Trade Practices Act ("DTPA"), Tex. Bus. & Com. Code Ann. 17.46. Such representations were relied upon by Defendants to their detriment. Specifically, Plaintiff and Third-party Defendants, are guilty of the following false, misleading and deceptive trade practices:

- a. taking advantage of Defendants' lack of knowledge, ability, experience, or capacity to a grossly unfair degree;
- b. misrepresenting its services to Defendants;
- c. representing that services have sponsorship, approval, or benefits which they do not have;
- d. representing that Plaintiff and Third Party Defendants have an approval, status, affiliation, or connection which they does not;
- e. made false or misleading statements of fact concerning the reasons for, existence of, or amount of deposits, fees, fines and assessments.
- f. represented that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law;
- g. knowingly making false or misleading statements of facts concerning the need to complete construction timely;
- h. misrepresented the authority of the Plaintiff and Third-Party Defendants to enforce the deed restrictions and building rules as set forth in the Covenants, Conditions, and Restrictions (CCR's) of the subdivision;
- i. caused confusion or misunderstanding as to the source, sponsorship, approval, or certification of services; and
- j. engaging in harassing, retaliatory and dilatory practices.

46. Such conduct subjects Plaintiff and Third-party Defendants, jointly and severally, to liability under the Texas Deceptive Trade Practices Act, Tex. Bus. & Com. Code Section 17.41 et. sequentia. These false, misleading and deceptive trade practices have been producing causes of Defendants' actual damages. These false, misleading and deceptive trade practices have caused Defendants Pat O'Neil and Robert Olvera extreme mental anguish.

Conspiracy

47. Defendants allege on documented information and belief that Plaintiff and Third-party Defendants, the Directors, conspired to defraud Defendants and others similarly situated by making misrepresentations as herein set out. The conspiracy was formed with the full knowledge and intent of Plaintiff and each Director to defraud and deprive Defendants of their rights and interests and each of Plaintiff's and the Directors unlawful and overt acts were the proximate result of Defendants' damages. The portion of the civil conspiracy and concert of action that applies to Defendants are but part and parcel of a long ongoing conspiracy between Plaintiff and the Directors to defraud and take advantage of Defendants and others similarly situated. Shouldn't Calabrese be mentioned in this article too for conspiring with them to post the foreclosure notice?

VII. Injunctive Relief

CPRC § 65.011- Injunctive Relief

48. Defendants would show that Plaintiff (the POA) was improperly organized by an illegally operating entity and has no legal authority to act as the property owner's association for the subject property. Defendants would further show that they and others similarly situated will suffer irreparable harm if Plaintiff is allowed to continue acting as the property owner's association, for which there is no adequate remedy at law. Therefore, Defendants seek an injunction prohibiting the Plaintiff from continuing to act in the capacity of a property owner's association and requiring the Plaintiff to cease and desist all further unauthorized actions.

CPRC § 65.011(3) - Equitable Injunctive Relief

49. Pursuant to Civil Practice & Remedies Code, §65.011(3), Defendants seek an injunction preventing Plaintiff from spending money illegally obtained by Plaintiff and Third-Party Defendants fraudulently holding themselves out as an authorized property owner's association.

CPRC §65.011(4) - Injunctive Relief, Claim vs. Real Property

50. Defendants further seek an injunction with regards to Plaintiff's threats to foreclose the property pursuant to Civil Practice & Remedies Code, §65.011(4). Plaintiff is prohibited from attempting foreclosure under Texas Property Code §209.009 which states that a property owner's association may not foreclose a property owner's association's assessment lien if the alleged debt securing the lien consists solely of fines assessed by the association; or attorney's fees incurred by the

association solely associated with fines assessed by the association. The placing of the prohibited lien and the posting of Defendant's property for foreclosure each constitutes slander of Defendant's title to the property, with such slander still ongoing. Defendants therefore seek an injunction prohibiting Plaintiff from issuing further threats or attempting to foreclose the property and requiring Plaintiff to remove the lien.

Frivolous Pleadings

51. Defendants assert that Plaintiff's pleadings are groundless, with no basis in law or fact, and brought in bad faith. Plaintiff has no authority to bring suit as POA for the subdivision. If it could be argued that Plaintiff did have authority as POA for the subdivision, the pleadings would still be frivolous because such pleadings constitute malicious and selective enforcement of the CCR's. Plaintiff's pleadings against defendants O'Neil and Olvera are groundless because the suit involves real estate and there is no written or recorded documentation of O'Neil and Olvera being personally liable as owners of the subject property or personally involved as partners of the Defendant, Hunters Grove Court Joint Venture.

VIII. Declaratory Relief

52. The Bylaws of the Plaintiff should be declared void as against public policy. Specifically and without limitation, said bylaws were drafted, ratified and approved by directors elected by a non-existent entity with no authority to transact business in the State of Texas.

IX. Motion for Sanctions

53. Defendants say the Plaintiffs' pleadings are groundless, with no basis in law or fact, and brought in bad faith. Plaintiff's pleadings against defendants O'Neil and Olvera are groundless because the suit involves real estate and there is no written or recorded documentation of O'Neil and Olvera being personally liable as owners of the subject property or personally involved as partners of the Defendant, Hunters Grove Court Joint Venture. Pursuant to Rule 13, Texas Rules of Civil Procedure, Defendants ask that this Court impose Rule 215-2b sanctions.

X. Exemplary Damages

54. Defendants are entitled to recover exemplary damages under §27.01(c) and (d) of the Texas Business and Commerce Code because this is a suit for fraud in a real estate transaction.

XI. Attorney Fees

55. Defendants are entitled to recover reasonable and necessary attorney's fees, expert witness fees, costs for copies of depositions, and costs of court under §27.01(e) of the Texas Business and Commerce Code. Defendant is also entitled to recover costs of bringing this action pursuant to Civil Practice & Remedies Code, § 12.006 including all court costs, attorney's fees, and related expenses of bringing the action, including investigative expenses.

XII. Request for Disclosure

56. Under Texas Rule of Civil Procedure 194, Defendants request that Plaintiff and Third-party Defendants disclose, within 30 days of the service of this request, the information or material described in Rule 194.2.

XIII. Prayer

57. For these reasons, defendants ask the court to dismiss this suit or render judgment that plaintiff take nothing, assess costs against Plaintiff, and award all other relief to which Defendants are entitled.

Respectfully Submitted,

Law Office of William B. Gammon
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William B. Gammon
SBN: 07611280
Attorney for Defendants

Certificate of Service

By my signature above, I, William B. Gammon, certify that a true and correct copy of the above and foregoing document has been served on counsel for Plaintiff on December 1, 2008 in accordance with Rule 21a, Texas Rules of Civil Procedure