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IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT
IN AND FOR COLLIER COUNTY, FLORIDA

KIMBERLY ANN SCHNELL MITCHELL,
and DONNIE GENE MITCHELL, and
DOLPHIN POINT, LLC, a Florida limited
liability company,

Plaintiffs,

v. CASE NO.: 2019-CA-3254

THE CLUB AT LA PENINSULA, INC., a
Florida Corporation

Defendant.
_______________________________/

MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff, DOLPHIN POINT, LLC, a Florida limited liability company ("Dolphin"), pursuant to Fla.R.Civ.P. 1.510, moves for entry of a partial summary judgment as to Count I of the Amended Complaint ("Complaint") and Count I of the Second Amended Counterclaim ("Counterclaim") and states that there is no genuine issue as to a material fact and that the movant is entitled judgment as a matter of law.

INTRODUCTION AND OVERVIEW OF THE DISPUTE

1. Plaintiffs KIMBERLY ANN SCHNELL MITCHELL and DONNIE GENE MITCHELL ("the Mitchells") own the single family residence at 85 Pelican Street West, Isle of Capri, in Collier County, Florida. Adjacent to 85 Pelican Street West is a 2.15 acre parcel ("the Subject Parcel") which is the subject of the dispute. The Subject Parcel is unimproved, with the exception of four tennis courts located thereon, and is owned by Dolphin, a limited liability company owned by the Mitchells.

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2. The Subject Parcel is located within the development known as La Peninsula. On August 19, 1986, the original developer of La Peninsula recorded the Declaration of Covenants, Conditions and Restrictions of La Peninsula at Official Records Book 1213, Page 770 of the Public Records of Collier County, Florida ("the Declaration"). Defendant, the Club at La Peninsula, Inc. ("The Club") is defined as the "Master Association" in the Declaration. In the Declaration, the original developer and Declarant stated that it intended to develop La Peninsula with approximately 213 condominium units to be located in various condominiums together with certain recreational facilities and other improvements. The La Peninsula development currently includes seven condominiums, a clubhouse and pool area and other common areas. Four of the condominiums have twenty-five (25) residential units, one has nineteen (19) residential units, one has twenty (20) residential units and one has thirty-seven 37 residential units. The current number of condominiums units in La Peninsula is one hundred seventy six (176).

3. Dolphin owns and holds the Declarant rights under the Declaration which have been assigned several times with Dolphin being the last assignee. In .2013, Dolphin's predecessor in title entered into a settlement agreement with the Club and the Club agreed to recognize the rights of the owner of the Subject Parcel as the Declarant under the Declaration, subject to a partial assignment of architectural control rights to the Club as to areas other than the Subject Parcel.

4. On September 18, 2015, the Club recorded an Amended and Restated Declaration of Covenants, Conditions and Restrictions of La Peninsula at Official Records Book 5195, Page 3784 of the Public Records of Collier County, Florida ("Claimed A & R Amendment"). The Claimed A & R Amendment purports to remove or delete provisions in the Declaration which granted certain rights and privileges to the Declarant. Count I of the Complaint is an action for

declaratory relief under Chapter 86, Florida Statutes and seeks a ruling that the Claimed A & R Amendment is invalid and void or, in the alternative, that is invalid to the limited extent that it purports to eliminate, restrict or reduce vested Declarant rights as to the Subject Parcel. Count I of the Counterclaim is an action for declaratory judgment under Chapter 86, Florida Statutes and seeks a ruling that the Claimed A & R Amendment is proper and valid, along with other requested findings.

FACTS

5. In 2007, Dolphin's predecessor in title, Aircraft Investment, LLC ("Aircraft"), acquired title to the Subject Parcel by Warranty Deed from a former Developer of La Peninsula, Twin Dolphins Equity Partners, LTD. The Warranty Deed from Twin Dolphins to Aircraft is attached to the Amended Complaint ("Complaint") as Exhibit "A". Also in 2007, Twin Dolphins executed a Bill of Sale and Assignment to Aircraft which included the assignment and transfer of all rights held by Twin Dolphins as developer and as Declarant under the Declaration, a copy is attached to the Complaint as Exhibit "B".

6. In 2017, the Mitchells acquired title to the Subject Parcel from Aircraft via the Special Warranty Deed, a copy of which is attached as Exhibit "C" to the Complaint. On December 18, 2017, Aircraft executed an Assignment and Assumption of Development Rights, Permits, Contracts, Declarant Rights and Other Intangible Rights in favor of the Mitchells which assigned and transferred all of Aircraft's rights as Declarant and developer under the Declaration. The Assignment was recorded at Official Records Book 5543, Page 3395 the Public Records of Collier County, Florida and a copy is attached as Exhibit "D" to the Complaint.

7. On December 3, 2019, the Mitchells deeded the Subject Parcel to Dolphin via the Warranty Deed recorded at Official Records Book 5708, Page 3362 the Public Records of

Collier County, Florida, a copy of which is attached as Exhibit "E" to the Complaint. On August 14, 2020, the Mitchells executed an Assignment and Assumption of Development Rights in favor of Dolphin which assigned and transferred all of the Developer and Declarant rights under the Declaration. The Assignment was recorded at Official Records Book 5804, Page 3045 the Public Records of Collier County, Florida and a copy is attached as Exhibit "F" to the Complaint.

8. One of the rights reserved to the Declarant in the Declaration is a limited right to amend the Declaration. In particular, Section 11.3 of the Declaration provides:

> "Notwithstanding anything herein to the contrary, the Declarant may amend this Declaration for any purpose without the consent of the Members so long as it owns any property or units in La Peninsula and provided such amendment doesn't materially and adversely effect the plan of development for La Peninsula."

9. On February 12, 2013, Aircraft exercised its right to amend the Declaration and recorded a Declarant Amendment to Declaration of Covenants, Conditions and Restrictions which was recorded at Official Records Book 4886, Page 1681 the Public Records of Collier County, Florida, a copy of which is attached as Exhibit "G" to the Complaint ("the Declarant Amendment"). In the Declarant Amendment, Aircraft added a new Section 11.12 which states:

> "11.12 <u>Amendments to Declaration</u>. Notwithstanding anything to the contrary herein contained, no amendment to this Declaration shall be effective which shall impair or prejudice the rights or priorities of Declarant, under the Declaration, the organizational documents of the Association and/or any rules and regulations promulgated thereunder, without the specific written approval of Declarant so long as Declarant owns any property or units subject to the Declaration. In addition and notwithstanding anything to the contrary contained herein, no amendment to this Declaration shall be effective which shall eliminate or modify the provisions to this Section 11.12 and any such amendment

> shall be deemed to impair and prejudice the rights of Declarant."

10. On May 15, 1998, the Club entered into an agreement with a prior developer, S. Charles Bennett, III, as Trustee, setting forth various rights and obligations as between the Club and the developer/Declarant under the Declaration. A copy of this agreement is Exhibit B to the Counterclaim. On or about May 10, 2012, the Club filed suit in the Circuit Court of Collier County, Florida under Case Number 2012-CA-1775 ("the 2012 Lawsuit") against Aircraft alleging various violations of the agreement and outstanding obligations of Aircraft as successor developer and Declarant under the Declaration[1]. In particular, the Club alleged that (i) Aircraft assumed all of the prior developer's obligations and interests relative to La Peninsula, (ii) Aircraft as assignee of the prior developer stands in the shoes of Bennett and was bound by the May 15, 1998 agreement, (iii) Aircraft was responsible for certain needed seawall repairs, landscaping and road resurfacing and (iv) that the Subject Parcel was a common element which Aircraft was obligated to convey to the Club.

11. Aircraft filed a Counterclaim in the 2012 Lawsuit in which it alleged that (i) all of the rights as "developer" and "Declarant" under the Declaration had been assigned to Aircraft, (ii) the Club had wrongfully interfered with Aircrafts prior attempts to transfer the Subject Parcel, (iii) the Club had no rightful claim to the Subject Parcel, and (iv) the Club had acted in complete disregard of Aircrafts vested declarant rights under the Declaration. The Counterclaim brought claims for slander of title, declaratory judgment and unjust enrichment.

12. The 2012 lawsuit was settled at mediation on March 14, 2013. A copy of the Mediated Settlement Agreement is attached as Exhibit "H" to the Complaint ("the Settlement Agreement"). Pursuant to the Settlement Agreement, the Club agreed to recognize the rights of

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[1] By Order entered on June 8, 2020, this Court agreed to take judicial notice of the 2012 Lawsuit.

Aircraft as the owner of the Subject Parcel and the rights of Aircraft as the Declarant under the Declaration, subject to a partial assignment of architectural control rights to the Club as to all areas other than the Subject Parcel. The Club also agreed in the Settlement Agreement to approve construction of up to thirty-seven (37) condominium units on the Subject Parcel and to take whatever steps necessary to cancel and remove from the public records a Memorandum of Agreement the Club had recorded by which it put the May 15, 1998 agreement with S. Charles Bennett in the public record.

13. Contrary to provisions in the Declaration and the Settlement Agreement, the Club recorded the Claimed A & R Amendment on September 18, 2015. The Claimed A & R Amendment purports to remove or delete provisions which grant rights and privileges to Dolphin as Successor Declarant, including the following: (i) deleting Section 2.2 which previously stated that Declarant was not required to following any predetermined sequence or order of improvement and development, and may add to, subtract from, or make changes in the site plan regardless of the fact that such actions may alter the relative voting strength of the various types of membership in the association, (ii) deleting Section 6.3 which reserved the right to the Declarant for a perpetual easement, and (iii) amending Section 11.3 to remove the ability for a Declarant to make amendments for any purpose without the consent of the members so long as it owns any property or units in La Peninsula and providing such amendment "doesn't materially and adversely effect the plan of development for La Peninsula". Neither Aircraft, the Mitchells or Dolphin ever consented to or provided written approval for the Claimed A & R Amendment.

14. In the Counterclaim, the Club alleges that transfer of control of the Club from the developer to the unit owners occurred no later than April, 2010. This allegation is not disputed for purposes of this Partial Summary Judgment Motion only.

LEGAL STANDARD

15. Effective May 1, 2021, Florida follows a new standard for summary judgment under Fla. R. Civ. P. Rule 1.510. In substance, the changes to the rule are intended to "adopt the federal summary judgment standard." *Wilsonart, LLC v. Lopez,* 308 So. 3d 961, 964 (Fla. 2020). In adopting the new rules, the Florida Supreme Court has explained that among its goals was "simply to improve the fairness and efficiency of Florida's civil justice system, to relieve parties from the expense and burdens of meritless litigation, and to save the work of juries for cases where there are real factual disputes that need resolution" *In Re Amendments to Florida Rules of Civil Procedure 1.510,* 309 So. 3d 1092, 1094 (Fla. 2020). "[A] party opposing summary judgment `must do more than simply show some metaphysical doubt as to the material facts."' *Id.* at 193. Further, "summary judgment should be entered `against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."' *Id.* The primary purpose of the current version of Rule 1.510 is to "isolate and dispose of factually unsupported claims" and "should be interpreted in a way that allows it to accomplish this purpose." *Id.* at 194. As stated by the Supreme Court of the United States in *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1983), "The moving party is entitled to a judgment as a matter of law" when the nonmoving party "has failed to make a sufficient showing on an essential element" of his case with respect to which he has the burden of proof. *Id.*

16. The test for the court to determine the existence of a genuine factual dispute is whether "the evidence is such that a reasonable jury could return a verdict for the

nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). That there are "some alleged factual disputes between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Id.* at 247-48. Federal courts have stated that summary judgment should be granted where the evidence is such that it would require a directed verdict for the nonmoving party. *Id.* at 251. In essence, the crucial question for the court is whether there is a genuine issue of fact concerning any essential element of the claim on which judgment is sought. *Id.* at 247-248. The party opposing summary judgment may not rely upon pleadings or mere denials of the allegations contained in a motion for summary judgment, but rather must adduce some evidence showing that material facts are in issue. *Id.* at 256; *Celotex Corp.,* 477 U.S. 317, 324 (1986) ("Rule 56(c) therefore requires a non-moving party to go beyond the pleadings and by [its] own affidavits or by the `depositions, answers to interrogatories, and admissions on file' designate `specific facts showing that there is a genuine issue for trial.")

ARGUMENT

17. The issue presented by this motion, which is the subject of Count I of the Complaint and Count I of the Counterclaim, is whether the Claimed A & R Amendment is valid. Dolphin submits that the Claimed A & R Amendment is invalid because (i) it was not enacted pursuant to the requirements in the Declaration, (ii) it violates the Declarant Amendment and (iii) the Club is barred by the Settlement Agreement and by the doctrine of estopped from amending the Declaration in any way which impairs or prejudices the declarant rights vested in Dolphin so long as Dolphin owns property in La Peninsula.

The requirements in the Declaration were not satisfied:

18. Section 11.2 in the Declaration sets forth the procedural requirements for the members to amend the Declaration. Among the requirements, 11.2 provides that the President and Secretary must execute the amendment. The Claimed A & R Amendment is signed by the President but not by the Secretary. Section 11.2 also requires that the amendment (i) set forth the effective date of the amendment, (ii) the date notice of the meeting was given, (iii) the total number of votes, (iv) the total number of votes required to constitute a quorum, (v) the number of votes necessary to adopt the amendment and (vi) the number of votes cast against the amendment. The Claimed A & R Amendment fails to comply with these 6 additional requirements.

19. Section 11.2 of the Declaration requires 2/3rd of the members vote in favor to pass an amendment. At a special membership meeting on August 18, 2015, the Club acknowledged that 118 affirmative votes out of the 176 members was required to approve the Claimed A & R Amendment. The Club counted the votes as 119 in favor and 24 opposed. However, the Club mis-counted. First, the owner of unit 203 voted "No" on her ballot but the Club mistakenly counted her vote as a "Yes". Second, the Club counted "Yes" votes from at least 2 units owned by a Trust where the vote was cast by a person who was not the Trustee and another "Yes" vote from a limited liability company where the person who cast the vote was not a manager of the company. Third, the Club counted "Yes" votes from at least 4 units which were jointly owned by 2 or more unmarried persons for which the Club did not have a Voting Certificate. These votes should not have been counted because section 3.3 B. in the Declaration provides:

> "When any property entitling the owner to membership in the Master Association is owned of record in the name of two (2) or more persons or entities . . . then the

> vote for such membership shall be cast by the person designated in a Voting Certificate signed by all of the owners (or the proper corporate officer) of said property, filed with the secretary of the Master Association. In the absence of such a writing, such vote shall not be counted except that a Voting Certificate shall not be required.when a condominium unit is owned by a husband and wife only."

20. The courts refer to the Declaration of Condominium as the condominium's "constitution". Woodside Village v. Jahren, 806 So. 2d 452 (Fla. 2002) The Declaration possesses the attributes of a covenant running with the land, operates as a contract among the owners and the association and must be given effect according to the clear and unambiguous language therein. First Equitable v. Grandview Palace, 329 So. 3d 167 (Fla. 3d DCA 2021). Pursuant to F.S. 718.110 (1) (c), material errors or omissions in the amendment process invalidate an otherwise properly promulgated amendment. Since the clear and unambiguous requirements in the Declaration were not followed and material errors occurred, the Claimed A & R Amendment is invalid.

The Claimed A &R Amendment is invalid due to the terms in the Declarant Amendment

21. When the Declaration was recorded on August 19, 1986, the original developer included section 11.3 which gave the Declarant the right to amend the Declaration, for any purpose and without the consent of the members, so long as the Declarant owned any property in La Peninsula. The power was limited by the provision that such amendment could not "materially and adversely effect the plan of development for La Peninsula."

22. On February 14, 2013, Aircraft as successor developer exercised the power that had been reserved to the Declarant in section 11.3 by recording the Declarant Amendment. At the time, Aircraft owned property in La Peninsula because it owned the Subject Parcel. Accordingly, the only requirement and condition precedent to exercise the power to amend was satisfied. By the addition of section 11.12 to the Declaration, Aircraft codified the rule that no

future amendment to the Declaration could be enacted which would "impair or prejudice the rights or priorities of Declarant" . . . "without the specific written approval of Declarant so long as Declarant owns any property or units subject to the Declaration". In direct violation of 11.12, approximately 2 years later the Club recorded the Claimed A & R Amendment which purports to eliminate several material Declarant rights. As such the Claimed A & R Amendment should be held to be completely, or at least in part, invalid.

The Club is barred by the settlement agreement and by the doctrine of estoppel

23. In the Counterclaim, the Club takes the position that turnover occurred no later than April 2010. As a result, according to the Counterclaim, Aircraft did not have the right to record the Declarant Amendment which occurred approximately 3 years after turnover. Count I in the Counterclaim alleges that because turnover had occurred the Declarant "had no rights to control the Club" and makes the unsupported leap from this premise to the conclusion that the Declarant Amendment is invalid. It should first be noted that Dolphin has not asserted a claim to "control the Club". Rather, the Complaint seeks only to preserve the Declarant's rights under the Declaration as to the Subject Parcel which has not yet been developed.

24. In the 2012 Lawsuit, the Club sued Aircraft and alleged in its Complaint that by way of transfers from a prior developer, Aircraft had assumed all developer "obligations and interests relative to La Peninsula", that Aircraft "stands in the shoes" of the prior developer and that Aircraft was obligated as the developer to repair or replace seawall, add landscaping and resurface roads. In short, in the 2012 Lawsuit the Club took the position that Aircraft was the developer and Declarant and as such had various outstanding obligations. Now, in this case, the Club takes the position when turnover occurred in 2010 all rights vested in the Declarant vanished. The doctrine of judicial estoppel precludes the Club from taking one position in the

2012 Lawsuit and then taking an inconsistent position in this case. In Smith v. Avatar Properties, 714 So. 2d 1103, (Fla. 5th DCA 1998), the doctrine was explained:

> "Judicial estoppel is an equitable doctrine that is used to prevent litigants from taking totally inconsistent positions in separate judicial, including quasi-judicial, proceedings. The doctrine is 'designed to prevent parties from making a mockery of justice by inconsistent pleadings'. American Nat. Bank v. Federal Dep., 710 F. 2d 1528, 1536 (11th Cir. 1983). Stated differently, the doctrine is intended to prevent a litigant from 'playing fast and loose with the courts.' Russell v. Rolfs, 893 F. 2d 1033, 1037 (9th Cir. 1990), cert. denied, 501 U.S. 1260".

25. It should also be noted that the Club's position that turnover eviscerated the Declarant of all Declarant rights is not supported by Florida law. The "turnover" of control of condominium associations is governed by F.S. 718.301. Sub-section (1) in 718.301 specifies when the transfer of control from the developer to the unit owners must occur, to wit: when "unit owners other than the developer are entitled to elect at least a majority of the members of the board of administration". Sub-section (2) has provisions dealing with the election of a new board after turnover and sub-section (4) has provisions requiring the developer to deliver various documents and records and to relinquish control of the association. Nothing in F.S. 718.301, or in Florida case law, provides that after turnover the developer forfeits all right reserved to the Declarant in the Declaration of Condominium. In fact, sub-section (3) in F.S. 718.301 envisions that the developer may still own units after turnover and prohibits the association from assessing the developer as a unit owner for capital improvements or taking any action "that would be detrimental to the sales of units by the developer". There are no condominium units on the Subject Parcel at this time, but, in the Settlement Agreement the Club agreed to approve construction of up to 37 units on the Subject Parcel. With regard to the Subject Parcel and its' future development, the rights reserved to the developer and Declarant remain in effect and have

been assigned to Dolphin. The Club's position that as of turnover all rights reserved to the Declarant are forfeited is incorrect.

26. A similar post turnover attack on Declarant rights occurred in Residential Communities of America v. Escondido Community Association, 603 So. 2d 122 (Fla. 5th DCA 1992). Beginning in 1979, Residential Communities of America ("RCA") developed the Escondido condominium. By 1984 RCA had built and sold 203 units and turned over control of the condominium association to Escondido Community Association ("ECA"). Similar to Dolphin which owns one undeveloped parcel, RCA owned two undeveloped parcels in the last phase of the development after turnover. The Board of Directors of ECA amended the Declaration to prohibit the sale of lease of units unless an occupant of the unit is 55 years of age or older. The Declaration included a provision that amendments "shall not affect in any manner whatsoever the rights of the developer unless the developer joins in said amendment." RCA had not joined in the amendment and the court held the amendment was invalid as to the undeveloped parcels, even though turnover had occurred.

27. Moreover, the Club's position is barred by the Settlement Agreement and by equitable estoppel. In the Settlement Agreement, the Club agreed to "recognize the rights of the owner of the Development Parcel as Declarant, subject to a partial assignment of architectural control rights to the Club at La Peninsula as to all areas other than the Development Parcel." At the time of the Settlement Agreement, turnover had occurred 3 years prior and the Declarant Amendment had been recorded for 1 month. If the Club is going to honor the Settlement Agreement, it must recognize that the Declarant Amendment is valid and that the Claimed A & R Amendment is invalid, at least to the extent that the Claimed A & R Amendment impairs or prejudices the Declarant rights which have been assigned to Dolphin. The relief sought by the

Club in the Counterclaim would put the Club in breach of the Settlement Agreement and by filing the Counterclaim the Club is already violating the Settlement Agreement. Settlement agreements are binding contracts which are "highly favored in the law". Dorson v. Dorson, 393 So. 2d 632 (Fla. 4th DCA 1981).

28. The Settlement Agreement also brings into the analysis the doctrine of estoppel. The Club represented in the Settlement Agreement that it would recognize the rights of the owner of the Subject Parcel as Declarant under the Declaration. Now it does not want to do so. The Club should be estopped to renege on its promise and representation in the Settlement Agreement.

29. One court has commented that "the occasions for fashioning a remedy under the label of estoppel in order to prevent injustice are too numerous to count." Lambert v. Nationwide Mutual, 456 So. 2d 517 (Fla. 1st DCA 1985). Under the doctrine of estoppel a person is not permitted to unfairly assert, assume or maintain inconsistent positions. Florida law recognizes that a "form of estoppel occurs where a person attempts to repudiate the obligations and validity of a transaction after accepting the benefits resulting from it." Head v. Lane, 495 So.2d 821 (Fla. 4th DCA 1986). This rule was recognized in Doyle v. Tutan, 110 So.2d 42 (Fla. 3rd DCA 1959) where the Court quoted with approval from 19 Am. Jur., *Estoppel*, section 64, stating:

> "Estoppel is frequently based upon the acceptance and retention by one having knowledge or notice of the facts of benefits from a transaction, contract, instrument, regulation, or statute which he might have rejected or contested. This doctrine is obviously a branch of the rule against assuming inconsistent positions...such estoppel operates to prevent the party thus benefited from questioning the validity and effectiveness of the matter or transaction insofar as it imposes a liability or restriction upon him, or, in other

> words, it precludes one who accepts the benefits from repudiating the accompanying or resulting obligation…"

30. In Doe v. Univision Television Group, 717 So. 2d 63 (Fla 3d DCA 1998) the court noted that "the doctrine of promissory estoppel comes into play where the requisites of contract are not met, yet the promise should be enforced to avoid injustice". Promissory estoppel is frequently described as requiring the following three elements: (1) a representation as to a material fact that is contrary to a later-asserted position; (2) a reasonable reliance on that representation; and (3) a change in position detrimental to the party claiming estoppel caused by the representation and reliance thereon. FCCI Ins. v. Cayce's Excavation, 901 So. 2d 248, (Fla. 2nd DCA 2005). These are also identified as the elements of equitable estoppel. In Coral Way Properties v. Roses, 565 So. 2d 372, (Fla. 3d DCA 1990) the court described promissory estoppel as a form of equitable estopping stating:

> "Promissory estoppel is a qualified form of equitable estoppel, Crown Life Ins. Co. v. McBride, 517 So.2d 660 (Fla.1987), based on "[a] promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance.... [The promise] is binding if injustice can be avoided only by enforcement of the promise." *Restatement (Second) of Contracts,* § 90 at 242 (1987)."

The position taken by the Club in this case qualifies for invocation of each of the various varieties of the doctrine of estoppel. The 2012 Lawsuit was settled, in part, on the basis of the promise and representation by the Club that it would recognize the rights of the owner of the Subject Parcel as Declarant under the Declaration. Instead, the Club now takes the position that the Declarant Amendment was "improper" because turnover had occurred (Counterclaim Paragraph 7) and the Claimed A & R Amendment is valid, even to the extent it impairs and prejudices the Declarants' rights as developer of the Subject Parcel.

WHEREFORE, Plaintiff, DOLPHIN POINT, LLC, moves for entry of a partial summary judgment as to Count I of the Amended Complaint and Count I of the Second Amended Counterclaim declaring under Chapter 86, Florida Statutes that the Claimed A & R Amendment is invalid and void ab initio, or in the alternative, that it is invalid to the extent it purports to have eliminated, restricted or reduced vested developer or successor Declarant rights or privileges associated with the Subject Parcel.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing document on November 14, 2022 with the Clerk of Court using the Florida Courts E-filing Portal which will send electronic copies to: **Wayde P. Seidensticker, Jr., Esquire**, Seidensticker & San Filippo, LLC, 791 10th Street South, Suite 202, Naples, Florida 34102 at wps@sandslawoffices.com; wserve@sandslawoffices.com; psf@sandslawoffices.com, *Co-counsel for Plaintiffs* and **Jeffrey D. Fridkin, Esquire**, **and Michael T. Traficante, Esquire**, Grant Fridkin Pearson, P.A., 5551 Ridgewood Drive, Suite 501, Naples, Florida 34108 at jfridkin@gfpac.com; mtraficante@gfpac.com; tfriedman@gfpac.com; nkusy@gfpac.com, *Counsel for Defendant*.

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