Judge Vicki I Churchill
Motion set for July 17, 2004

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MARY JEAN CAHAIL
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SUPERIOR COURT OF WASHINGTON FOR SAN JUAN COUNTY

Bradley F Henke and Judith M Henke, Plaintiffs, vs Oly Rose, LLC and Rockresorts International, LLC Defendants	NO 02-2-05188-1 Plaintiffs' Brief re $4 00 Lot Owner's fee and Other Disputes re Settlement Agreement

I. INTRODUCTION

At the hearing on June 7, 2004, the Court ruled that the parties' oral settlement agreement placed on the record January 27, 2004, promised the Rosario plat lot owners the use of the existing outdoor pool facility or a relocated facility forever, within the recreation area as originally claimed The Court rejected defendant Oly Rose's contention that it reserved the right to discontinue maintenance of any pool

Toward the end of the hearing, too late for plaintiff to be allowed to respond or for the Court to make any further ruling, defendants' counsel mentioned one other substantial contention and several minor ones which were deferred for later resolution by the parties This brief addresses those contentions and other disputes which have prevented the parties from agreeing upon a form of judgment

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As is apparent from the events following the June 7 hearing, the Texas defendant, Oly Rose, LLC, has left its local counsel without authority to make any further agreements on its behalf Given the disputes which have arisen subsequent to the parties' agreement on the record January 27th, this is not surprising Nonetheless, given a trial date of August 17th, some final resolution of this suit must come soon

The parties' agreement of January 27th entitles plaintiffs to a positive judgment concluding all of their claims for relief in this suit according to its terms That judgment should set out completely the rights and obligations of the parties and concluding forever their claims and related defenses, with nothing left to be argued or further litigated in the future Plaintiffs have filed herewith a proposed form of such a judgment Defendants have rejected all proposals of plaintiffs and plaintiffs have objected to defendants' proposals, of which plaintiff's counsel attaches the last one, submitted by their counsel June 16th conditioned upon his client's approval

Defendants' suggested form of stipulation for dismissal contains unnecessary "stipulated facts," some of which plaintiffs deny, and then undertakings which do not completely carry out the parties' agreement of January 27th They include statements that defendants will later, following dismissal of this suit, record an easement allowing lot owners to use the agreed park area but include nothing about recording any document which will give notice (to future resort owners or lot owners) of the lot owners' rights to the use of the swimming pool and the conditions pertaining to those rights Both in substance and in form, defendants' suggestion would not provide any final resolution of the claims which parties purported to settle It is a prescription for further litigation, given the history of this suit since January 27th

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II. ARGUMENT IN FAVOR OF PLAINTIFFS' PROPOSED JUDGMENT ENFORCING SETTLEMENT AGREEMENT AND IN OPPOSITION TO DEFENDANTS' PROPOSED "STIPULATION AND ORDER OF DISMISSAL"

A. The maintenance fee of $4.00 per month applies to each lot owner, not to each lot.

At the end of the June 7 hearing, defendants suggested that the lot owners' $4 00 per month fee was intended to be $4 00 per lot per month, rather than $4 00 per lot owner per month, so that plaintiffs, who own three lots, would owe $12 00 per month Defendants' proposed "Stipulation and Order of Dismissal" leaves this issue unresolved and ambiguous, while plaintiffs' proposed "Judgment Enforcing Settlement Agreement" would establish that only one fee is owing by the owner of multiple lots, such as Mr and Mrs Henke

The settlement agreement and the underlying evidence clearly establishes plaintiffs' position

The transcript of the 1/27/04 hearing refers to the fee as the lot owners' existmg contractual obligations, which demonstrates that the parties did not intend to create a new or changed obligation At page 7/line 9 (such a page and line reference abbreviated "7/9" hereafter)

> "and the owners will, pursuant to their contractual obligations, pay the $4 per month maintenance use charge, and again, that's the only charge that would be assessed for their accesses to the family pool "

What are the "contractual obligations" of the lot owners? All evidence on the subject proves that only one recreation maintenance fee of $4 00 per month was charged to each lot owner, even if he had two or more lots That makes sense, since the families in a given residence on one or more lots used the recreation area and the swimming pool, not the lots themselves, and will continue to use them If an owner of more than one lot sold one of his lots to another family, who erected their own residence, then that new family would also pay $4 00 per month, but the obligation remained on a per owner basis, not per lot

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Most of the early deeds by which Falcon and Geiser conveyed lots did not mention the recreation fee at all, and the contracts, which were also used as earnest money agreements, were often not recorded Examination of the contracts and deeds which were recorded, attached by their trial exhibit numbers to the "Declaration of Counsel in Support of Plaintiffs' Motion to Enforce Settlement Agreement," dated 5/27/2004, makes plain that only a few people bought more than one lot, but, when they did so, only one $4 00 fee was contracted for P Ex 34, Deed, Geiser to Grove 11/15/67 conveys lots 44 and 45 of Rosario Estates and expressly stipulates

> Grantee his heirs and assigns shall pay to grantor his heirs and assigns the sum of $4 00 per month for the maintenance of recreation area "

Mr Geiser by his contract of 9/15/67 (P Ex 37) and deed of 2/8/67 (P Ex 38) conveyed lots 15 and 16 of Rosario Estates No 3 to Northfield Both the contract and the deed contain the same language quoted above from the Grove deed, requiring the grantee to pay one $4 00 per month recreation maintenance fee No contract for the conveyance of more than one lot obligates the grantee to pay more than $4 00 per month

Plaintiffs have one house, on lot 17 of Rosario Estates, which they bought from Gilbert Geiser and his wife by deed in 1968, P Ex 41 They bought lot 52, across a road and up the hill, on which they later built their garage, by deed from Geiser in 1977, P Ex 49 Plaintiffs bought lot 4, downhill and in front of lot 17, from the Roehl Estate in 1985 (P Ex 16), Roehl having bought lot 4 by contract, later fulfilled, from Falcon in 1959, P Ex 13

The contracts used as earnest money agreements on Plaintiffs' purchases from Geiser in 1968 and 1977 have not been found, but Mr Geiser's realtor, Peter Vincent, recalls that Mr Geiser's "ROSARIO" form contract was used as the form of earnest money agreement [Vincent Dep at 65/6 - 14], and Mr Henke confirms that was the case as to his purchases of lots 17 and 52 of Rosario Estates Condition (7)

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of Geiser's "ROSARIO" form contract reads in part "Purchaser shall pay to sellers, so long as purchaser shall have an interest in said property, the sum of $4 00 per month for the maintenance of recreation area, " [Henke, 2d Supp Dec , e g , The Roehl's 1959 contract from Falcon contained more awkward language "Purchaser agrees to pay the sum of $4 00 per month for dues for such use of the dock and recreation area "

From the foregoing contract language alone of these contracts for the purchase of only one lot at a time, it is not clear whether an owner of more than one lot by successive contracts is obliged to pay one, or more than one, fee of $4 per month But the practice of the parties and their oral agreement that only one $4 fee would be payable is clear, as set out in the deposition of Peter Vincent at 44/24 - 45/13, and in Mr Henke's 2d Supp Declaration That has been the consistent and acknowledged practice of Geiser and his successors as to all owners of more than one lot

Christine Vierthaler was defendants' representative present in Court on January 27th Confirming Mr Henke's payment of only one $4 00 recreation fee, Ms Vierthaler attached as Ex IV to her declaration herein her letter of 7/11/1996 to Mr Henke noting his monthly water charges of $20 00 and the previous combined monthly charges "for water and rec" of $24 00

Ms Vierthaler wrote to Mr Charles D'Iorio, who had recently bought a lot, on 2/22/1995, P Ex 62

> "Thank you for writing to inquire about the Rosario Recreation fees
>
> "When the property was originally subdivided, even before Rosario became a resort, a condition of sale was the payment of a $4 00 monthly recreation fee as a recreation area upkeep contribution, due from each owner - except if one owner had two or more parcels, he only had to pay one fee "

Consistent with this, in her declaration on file herein dated 6/12/2003, Ms Vierthaler states at 2/7 "Recreation fees were charged out at the rate of $4 00 per month per owner " Ms Vierthaler attached as Ex VII to her declaration her letter of

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1/3/1990 to another recent purchaser of a lot in Rosario Estates, John Anderson, which recited

> "We have been advised of your recent property purchase in the Rosario Estates Welcome to the Rosario community We would also like to let you know of your property owners' privileges and fees
>
> "Recreation fees are $4.00 per month and are included with your quarterly water billing or billed once a year if water has not been hooked up Should you purchase another Rosario lot, additional recreation fees are waived "

Ms Vierthaler's letter to Alan Schulman of 10/31/1994, P Ex 61, contains identical language

Plaintiffs submit that, in view of the consistent and unequivocal practice of defendant Oly Rose's predecessor, Mr Geiser, the admissions of Christine Vierthaler, which are directly binding upon defendant Oly Rose, and the evidence given in the declaration of Mr Henke filed herewith and the deposition of Mr Geiser's realtor, Peter Vincent, there is no doubt that one recreation area maintenance fee of $4 00 per month was payable by each lot owner

B. The agreed maintenance fee is limited to $4.00 per month.

Defendants suggest that the maintenance fee, upon payment of which the lot owners' rights will be conditioned, should be "$4 00 per month, or such other amount as should have been contractually agreed upon" [Paragraphs 9 B & D, Def s' proposed "Stipulation and Order of Dismissal "] This suggested language is contrary to the parties' agreement of January 27th, the purpose of which was to settle all such disputes, which was that there would be one and only one amount $4 00 per month

> "It will be a right that is granted in perpetuity, it will run for the benefit of all of the lot owners, it will be Oly Rose's compliance with any contractual obligations that Mr Curtin and Mr Geiser or predecessors [there were none] have entered into with regard to providing that area, and the owners will, pursuant to their contractual obligations, pay the $4 per month maintenance use charge, and again, that's the only charge that would be assessed for their accesses to the family pool that exists, or the pool that replaces the family pool, assuming that the master plan goes forward " Page 3/lines 4 - 14

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The parties' agreement that $4 00 per month would be "the only charge that would be assessed" was consistent with all of the evidence in the record regarding the amount of such a fee for the lots platted and sold by Falcon and Geiser to which this settlement agreement pertains Mr Geiser in his letter to Harpham concerning the recreation fee, P Ex 60, stated

> "Although the $4 00 recreation fee was established before my 1960 arrival, in the original subdivision, and when the Mansion was a private home with no pools and no tennis courts to offer, we have continued that same fee to our property owners "

Defendants have not provided any examples of contracts or deeds for the payment of non-standard recreation fees by Falcon or Geiser specifically for maintenance or use of the recreation area, and plaintiffs have found none [1] In any event, if a broader provision allowing proof of some other contractually specified amount be adopted, it should clearly specify that $4 00 per month is the default amount upon which use of the pool and the fixed recreation area shall be conditioned, absent production of the original or county record copy of the written contract calling for payment of a different amount The settlement agreement was intended to end such disputes, not spawn new ones

C. A lot owner's right to use the fixed park area and the pool should extend to use by his lineal descendants and his and their guests occupying his lot with permission and without financial compensation.

Plaintiffs' proposed judgment tracks the above language while defendants' proposed "Stipulation and Order of Dismissal," at paragraph 9 F, would limit exercise of an owner's rights to the lot owner and members of his immediate family and guests when accompanied by an owner or family member

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[1] A Falcon contract to sell lot 19 of Rosario Estates of 11/23/1959, D Ex 94, provides, "Purchaser hereby agrees to pay the sum of $8 00 per month for water and recreation privileges " Some earlier contracts mentioned $4 00 per month for water alone, *e g* P Ex 7 for the sale of lot 53 dated 7/31/1958, while others mentioned $6 00 for water per month, *e g* P Ex 13 for the sale of lot 4 dated 5/8/59

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Nothing was said on the subject of who could exercise a lot owner's rights to use the recreation area and the pool, for which he pays his $4 00 per month fee, in the settlement agreement stated on the record by the parties' counsel January 27, 2004 That subject is not mentioned in any of Falcon's or Geiser's contracts or deeds found by either party, which indicates that the lot owner should be able to assign his right to use the park and pool to anyone occupying his lot with his permission It is not a subject which normally would have to be spelled out, however, and the Court may and should do so in its judgment enforcing the settlement in the event of a dispute The normal use of a pool for the use of owners within a private plat, as the population of the original lot buyers ages, is by their children and grand children, not restricted to the immediate family The same is true as to the homes constructed on the lots themselves This normal pattern has been followed in the case of Rosario Estates, as set out in the attached second supplemental declaration of Bradley F Henke He was 35 years old when he bought his house and lot from Geiser at Rosario His children and later his grand children have used the family pool, never subject to any challenge until defendants recently excluded Mr Henke from any use of the pool, precipitating this lawsuit He is now 70 years old, and in not too many years it may be expected that great-grandchildren of his may use the pool, while occupying Mr Henke's house with the owner's permission but not accompanied by him or anyone in his immediate family, even if Mr Henke or his Estate continues to retain title The facility has never been overused, Mr Henke states he has never observed more than about 15 persons using it, half children in the pool and half parents lounging on the deck around it watching them

To limit the use of the pool and fixed recreation area to the lot owners or their immediate families or guests accompanied by an owner or owner's immediate family member, after most of the purchasers of lots from Falcon or Geiser are past 70 years of age, would render the right nearly useless -- until the original lot owner sold or

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gave title to his children Why should it matter whether, when Mr Henke's children and grandchildren (or their children and his great-grandchildren) occupy his house and lot at Rosario, while he and his wife remain in Seattle, whether he has conveyed title to next generation or not? By defendants' proposed language, the 12 year old grandchildren or great-grandchildren could not use the pool unless one of Mr Henke's adult children was present, even though Mr Henke's children at 12 years of age could have used the pool unaccompanied by either parent That makes no sense The potential burden on the pool of use by successive generations of an owner's descendants occupying his lot is the same, regardless of whether the original lot owner has retained title or conveyed it to one of a later generation

D. The resort owner's right to use of the recreation area and pool may be exercised by resort owner's employees and commercial guests, including vendees of fractional shares in the projected condominiums which may be sold by the resort owner, and the vendees' families and personal guests.

At the hearing on June 7, defendants objected to plaintiffs' proposed form of order to enforce the parties' 1/27/2004 settlement on the ground that it sought to limit unduly how the resort owner could use the outdoor pool in common with the lot owners, noting that the servient estate owner should be able to use his property freely so long as his use does not burden the exercise of the easement by its holders In referring to the pool in the settlement agreement, including the lot owners' obligations to pay $4 per month toward its maintenance as a condition of their use of it, the reference was necessarily to a private facility for the recreational use of the Rosario Community, as the pool has always been used in the past The purpose of plaintiffs' proposed language is to maintain this status of the pool The resort owners' commercial guests and the vendees of the currently proposed fractional shares of the condominiums, as well as their families (including lineal descendants) and personal guests staying with them, should be able to use the pool

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But defendants should not be able to open up the pool as part of, for example, an amusement park open to members of the public who are not occupying any land within the Rosario plats or Rosario Resort To turn the pool into part of a general amusement park or some other similar facility would be to alter its fundamental character and deprive the lot owners of the right they were promised and for which they have paid and will continue to pay their maintenance fees the right to use the private pool within the recreation area dedicated for the use of lot owners by the plat of Rosario Estates and thereafter opened to the use of the owners of lots in the surrounding plats created by Mr Geiser as well as by the guests of Mr Geiser's resort

E. Specific Objections to Defendants' proposed "Stipulation and Order of Dismissal"

Below are specific objections to the various numbered parts of Defendants' most recent proposed form of stipulation, and omissions from it, the version dated June 15th, attached to the Supplemental Declaration of Counsel filed herewith

¶ 1-8 Plaintiffs disagree that any stipulated facts are necessary except the fact of the parties' agreement of January 27th

¶ 3, s 3 "recreation area is not defined "

¶ 4 Plaintiffs sought to obtain a judicial declaration of their rights, not to define their rights, which plaintiffs contend are defined and proven by the plat of Rosario Estates and real estate contracts used by Falcon and Geiser for conveying lots

¶ 7 Plaintiffs deny this

¶ 9 Plaintiffs would not agree to dismissal of the action until the forms of easement and any other implementing documents were agreed and placed of record, so as to bind successive resort owners Plaintiffs' proposed form of judgment would be recorded in the county land records, so as to bind successive owners, but defendants' proposed stipulation for dismissal would not be

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¶ B 1 The agreement or judgment regarding use of the pool area must be either recorded as an easement or recorded as a judgment some record of the lot owners' rights to use of a pool will have to be of record

2 The monthly fee of $4 per month must be specified to be regardless of the number of lots and regardless of the number of contracts Henke's earnest money contracts with Geiser and assumption of Roehl's contract for lot 4 do not aggregate to either $12 or $8 per month Plaintiffs are agreeable to language re other amounts contractually agreed upon provided the contract is evidenced in a document either currently of record or in the possession of the lot owner or Oly Rose

¶ C The relocated pool must be as large or larger than the existing pool

¶ D, s 1 This sentence repeats ¶ B, and plaintiffs' objections 1 and 2 pertaining to ¶ B, above, apply

s 3 Plaintiffs object to the provision for statutory interest for the reasons argued in our brief filed before the last hearing interest on $4 00/month would be a de minimis amount, rendering the amount due difficult of precise calculation and impeding the lot owners' exercise of their rights

¶ F, s 1 and 2 The exercise of each lot owner's rights must extend to lineal descendants of the lot owner and their guests occupying the owner's dwelling on his lot or lots It may not be limited to the immediate family of lot owners, as it must be exercised by, for example, Mr Henke's daughter and grandchildren staying in his dwelling, even if he is not staying there Most of the lot owners, by now, are grandparents, with their lots and pool rights now exercised similarly by children and grandchildren

s 2 Plaintiffs agree that renters may not use the pool, but disagree with the limitation of occupants to owners for the reasons stated above

3 The pool must be limited to a private pool for the use of a defined group of persons, as it has been, so the persons who may exercise the resort owner's rights

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must also be defined, e g paying guests and vendees of condominiums or other dwelling units or time-shares therein, and their lineal descendants and their guests occupying the unit with the owner's permission The resort owner may not open the pool to use by persons without any connection with the resort land or the Rosario Community on a day-fee or other fee basis

¶ I 1 The agreed amounts must be paid with statutory interest $15,000 with interest at 12% per year from January 27, 2004, and $2,770 07 with interest at 12% per year from February 27, 2004

2 Again, the lot owners' rights regarding use of a pool, as well as in the area defined in Ex B, must be of record, so later resort owners have constructive notice

III. Summary

For the forgoing reasons, plaintiffs request the Court enter their proposed "Judgment Enforcing Settlement Agreement" filed herewith

Respectfully submitted this 6 day of July, 2004

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by _____
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