

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

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

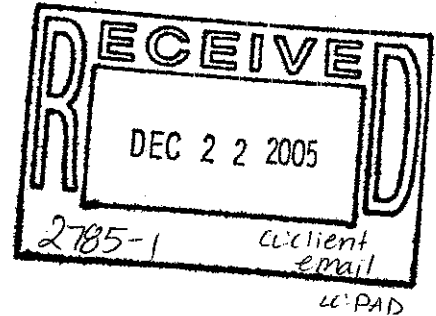
CASE NO. 05-CA-2718

Plaintiffs,

vs.

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

Defendants.



**LENNAR DEFENDANTS' AMENDED MOTION TO DISMISS COMPLAINT, OR IN  
THE ALTERNATIVE FOR MORE DEFINITE STATEMENT,  
AND MOTION TO STRIKE DEMAND FOR JURY TRIAL**

Defendants, LENNAR LAND PARTNERS ("LLP"), LENNAR HOMES, INC. ("Lennar Homes"), LENNAR LAND PARTNERS SUB, INC. ("LLP Sub"), LNR LAND PARTNERS SUB INC. ("LNR Sub"), and E. BING HACKER ("Mr. Hacker"), (collectively, the "Lennar Defendants")<sup>1</sup>, through their undersigned counsel, and pursuant to Fla. R. Civ. P. 1.140, hereby

<sup>1</sup> Plaintiffs purport to sue Neil Greenberg ("Mr. Greenberg") as stated in the opening paragraph of their Complaint. However at no other place in the Complaint do Plaintiffs make any references, allegations or claims as to Mr. Greenberg. As such, Greenberg should be dismissed from this action. To the extent this Court deems Mr. Greenberg a proper party to this action, Mr. Greenberg is included as one of the "Lennar Defendants" and this motion is filed on his behalf as well.

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files its amended motion to dismiss the Complaint filed in this matter, or in the alternative for a more definite statement, and independently move to strike Plaintiffs' demand for jury trial, and as grounds therefore state:

**Allegations as to Parties and Overview of Complaint**

1. The Complaint arises from a duly recorded conveyance of clubhouse facilities ("Club Facilities") dated August 30, 2000 from Defendant, LLP (also, "Grantor"), a Florida general partnership, to Defendant, KINGS RIDGE L.L.C. ("Grantee"), a Florida limited liability company. Plaintiffs contend, among other allegations, that the conveyance was wrongful because certain homeowners of the community who were members of the Club Facilities ("Club Members") were not afforded a first right of refusal to purchase the Club Facilities; a right which Plaintiffs allege they had pursuant to a Declaration of Restrictive Covenants, as amended ("Declaration").

2. The named Plaintiffs comprise (i) KINGS RIDGE COMMUNITY ASSOCIATION, INC. (the "Homeowners Association"), a Florida corporation and homeowners' association for an adult community known as Kings Ridge Community in Clermont, Florida; and (ii) nine individual homeowners alleged to be homeowners in the community and members of the Homeowners Association ("Plaintiff Homeowners").

3. In the One Hundred Forty-Six (146) numbered-paragraph, fourteen (14)-count Complaint, Plaintiffs have sued: the Lennar Defendants, along with co-defendants, KINGS RIDGE L.L.C., MORTGAGE ADVISORS, INC., J. FRANK SURFACE, JR (collectively, "Kings Ridge Defendants"); "JOHN DOE DEFENDANTS" and "UNKNOWN CO-CONSPIRATORS."

4. The Complaint contains a mixture of seven contract and tort counts that the Homeowners Association brings against various defendants, and seven “alternative claims” to those counts that Plaintiff Homeowners bring against various defendants. Other than the particular entity bringing the claim, the alternative claims brought by the Plaintiff Homeowners are identical to the claims brought by the Homeowners Association. Plaintiff Homeowners offer these alternative claims as class action claims “in the event that it is determined” that the Homeowners Association lacks standing to represent all of the interested persons whom Plaintiff Homeowners allege they do represent. See e.g. Complaint, Count 2, ¶50. Accordingly, the Complaint asserts the following claims:

The Homeowners Association brings:	Plaintiff Homeowners bring as <b>alternative Class Action claims</b> on behalf of all Club Members:
<b>Count 1</b> , against unspecified defendants, for rescission of a deed of the Club Facilities;	<b>Count 2</b> , against unspecified defendants, for rescission of a deed of the Club Facilities;
<b>Count 3</b> , against unspecified defendants, for declaratory judgment of the Homeowners Association’s rights to acquire the Club Facilities under the Declaration;	<b>Count 4</b> , against unspecified defendants, for declaratory judgment of the Club Members’ rights to acquire the Club Facilities under the Declaration;
<b>Count 5</b> , against the Grantor and its general partners, for breach of the Declaration;	<b>Count 6</b> , against the Grantor and its general partners, for breach of the Declaration;
<b>Count 7</b> , for breach of fiduciary duty allegedly existing between the Homeowners Association and each of the Lennar Defendants and John Doe Defendants;	<b>Count 8</b> , for breach of fiduciary duty allegedly existing between each of the Plaintiff Homeowners and each of the Lennar Defendants and John Doe Defendants;
<b>Count 9</b> , for tortious interference against the Kings Ridge Defendants and John Doe Defendants;	<b>Count 10</b> , for tortious interference against the Kings Ridge Defendants and John Doe Defendants;

The Homeowners Association brings:	Plaintiff Homeowners bring as <b>alternative Class Action claims</b> on behalf of all Club Members:
<b>Count 11</b> , for tortious interference against Defendants, Lennar Homes, Mr. Hacker and John Doe Defendants, with the Homeowners Association's alleged right to acquire the Club Facilities pursuant to the Declaration;	<b>Count 12</b> , for tortious interference against Defendants, Lennar Homes, Mr. Hacker and John Doe Defendants, with the alleged right to acquire the Club Facilities pursuant to the Declaration;
<b>Count 13</b> , for civil conspiracy against all Defendants for allegedly procuring and facilitating the conveyance between the Grantor and Grantee.	<b>Count 14</b> , for civil conspiracy against all Defendants for allegedly procuring and facilitating the conveyance between the Grantor and Grantee.

5. Plaintiffs have sued LLP, a Florida general partnership and also have sued its partners, LLP Sub and LNR Sub, both Delaware corporations.

6. Plaintiffs also have sued Mr. Hacker, who they allege served as president of the Homeowners Association in 2000 and 2001, as an officer of unnamed neighborhood associations within the development and as an officer of Lennar Homes. Mr. Hacker is specifically named among the defendants in Counts 7 and 8 (alleged breach of fiduciary duty), Counts 12 and 13 (alleged tortious interference), and Counts 13 and 14 (alleged civil conspiracy).

#### General Deficiencies

7. Pursuant to Fla R.Civ.P. 1.130, Plaintiffs' claims based upon rights or obligations stemming from the Declaration must be dismissed, because Plaintiffs deliberately omitted the entire text of the material provision of the Declaration - excerpts of which Plaintiffs attached to the Complaint and incorporated therein by reference. Specifically, Plaintiffs failed to attach the *entire* text of Article II, Section 2 of the Declaration entitled "Amendment," that states the Declarant maintains a reserved right to amend the Declaration in its absolute discretion at any time prior to the Community Completion Date.

8. The Complaint should be dismissed as a matter of law, because the claims are not ripe for adjudication. Plaintiffs' alleged right as "Club Members" to acquire the "Club Facilities," pursuant to Article VI, Section 24 of the Declaration, as amended, did not mature until "following the Community Completion Date," which Plaintiffs allege in ¶24 to have occurred on January 24, 2005. Plaintiffs have failed to allege any "offer for sale" subsequent to the Community Completion Date that triggered an alleged right to purchase the Club Facilities.

9. With regard to the "class action" counts against the Lennar Defendants, numbered 2, 4, 6, 8, 12 and 14, the Complaint fails to state as a matter of law sufficient allegations to establish claims upon which relief could be granted, because:

(a) The Homeowners Association lacks standing to represent the Club Members, among whom are the Plaintiff Homeowners, rendering the Homeowners Association's pursuit of class action claims on the Club Members' behalf improper; and

(b) Plaintiff Homeowners fail to allege *when* each of the Plaintiff Homeowners became Club Members in relationship to the events set forth in the General Allegations; and

(c) The Plaintiff Homeowners lack privity and, therefore, standing to pursue rescission of the deeds in question from Grantor to Grantee (Count 2);

10. Moreover, throughout the Complaint, Plaintiffs ambiguously and haphazardly refer to parties, making it impossible for the Lennar Defendants to determine the wrongs or acts Plaintiffs allege particular entities committed. Examples include:

(a) ¶19 - "... *Kings Ridge Recreation Corporation/LENNAR HOMES, INC,* the owner of the Club ..."

(b) ¶27 - “The Sixth Amendment did not relieve any obligations to allow *the Plaintiff* and the Club Members . . .”

(c) ¶27C - “. . . the rights of *the Plaintiff* and the Club Members . . . no notice was provided to *the Plaintiff* or the Club Members . . .”

(d) ¶28 - “*Lennar* kept the transfer . . .”

(e) ¶31 - “. . . that *Lennar* was purposefully violating its obligations . . .”

(f) ¶32 - “Nothing was sent to *the homeowners* . . .”

(g) ¶32 - “. . . *LENNAR* required that *LENNAR* be allowed . . . working for *LENNAR* corporation . . . officials at *LENNAR* . . . rights and privileges of *the homeowners* . . .”

#### **Deficiencies Common to Tort Counts**

11. The statute of limitations, Fla. Stat. §95.11(3), bars Plaintiffs’ Counts 7, 8, 11, 12, 13 and 14 against the Lennar Defendants.

12. Counts 11 and 12 (tortious interference) must be dismissed as to Lennar Homes and Mr. Hacker. In Counts 11 and 12, Plaintiffs specifically allege these defendants tortiously interfered with Plaintiffs’ rights to acquire the Club Facilities. Assuming as true for the purpose of evaluating the sufficiency of the Complaint, that Plaintiff Homeowners had a right of first refusal to purchase the Club Facilities, this right was executory in nature and not contractual. Absent a breach of contract, no claim for tortious interference with a contract can stand as a matter of law.

13. Florida’s economic loss doctrine bars Plaintiffs’ claims against Lennar Homes, LLP, LLP Sub and LNR Sub sounding in tort, because the alleged wrongful conduct of these defendants arises from the same acts Plaintiffs’ allege constitute these defendants’ breach of contractual obligations pursuant to the Declaration. Accordingly, Counts 7, 8, 11, 12, 13 and 14

of Plaintiffs' Complaint must be dismissed as to Lennar Homes, LLP, LLP Sub and LNR Sub, based upon the economic loss doctrine.

14. Counts 7 and 8 (breach of fiduciary duty), 11 and 12 (tortious interference) and 13 and 14 (civil conspiracy) of the Complaint, must be dismissed as to Mr. Hacker. As a matter of law, these counts fail to state a cause of action against him upon which relief may be granted. The Complaint alleges that Mr. Hacker acted solely in his position as an officer of the Homeowners Association. The Complaint fails to allege Mr. Hacker at any time acted outside the scope of his authority or in an individual capacity. Moreover, Plaintiffs have failed to allege Mr. Hacker engaged in any self dealing that would give rise to any liability for breach of fiduciary duty.

15. The Complaint must also be dismissed because the allegations, including Paragraphs 1 through 34 incorporated by reference into each count, are internally inconsistent with the attached exhibits and contradictory to the grounds asserted in support of each count.

Examples include:

- Plaintiffs allege in paragraph 27 that the Sixth Amendment “if valid and enforceable” modified the timing of the right to acquire and extended it to the Community Completion Date, but (in paragraph 27B), “the action taken in adopting the Sixth Amendment violated the rights of the Plaintiff and the Club Members . . .”, yet Article II, Section 2 of the Declaration, excerpts of which Plaintiffs attached to the complaint as Exhibit D, expressly provides that “The Declarant shall have the right, at any time until the Community Completion Date, to amend . . .”<sup>2</sup>
- In Article VI, Section 1, the Club Facilities “will remain the property of the Club Owner” subject to the Article VI, Section 24 “Right to Acquire,” but Article VI, Section 25(h) states that the provisions of the Declaration “do not grant ownership rights in the Club Facilities in favor of the Club Association or Club Members;

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<sup>2</sup> Had Plaintiffs attached the entire relevant sentence of that provision as required by Fla.R.Civ P. 1.130 it reads as follows “ . . . this Community Declaration as it, in its sole discretion, deems appropriate.”

yet, Plaintiffs cast in multiple counts the alleged “rights to acquire” as vested contractual rights or vested property rights;

- Article VI, Section 25(g) provides that each Club Member, by electing to be a Club Member and accepting title to a Homesite, and the Homeowners Association ratify, confirm and agree that the Declarant, the Homeowners Association or the Club Owner have fully discharged all duties to each Club Member concerning the Club including, but not limited to and without acknowledging or imposing same, any fiduciary duties imposed by law, yet Counts 7 and 8 seek relief for breach of fiduciary duties;
- Plaintiffs allege in paragraph 27 B that the Sixth Amendment to the Declaration is unenforceable, because “Section 24 of the original Declaration includes a grant of a right which cannot legally be extinguished by any amendment to the **already completed grant of the property right.**” Yet, Article VI, Section 25(h) provides that each Club Member, by electing to be a Club Member and accepting title to a Homesite, and the Homeowners Association ratify, confirm and agree that the provisions of the Declaration “do not grant ownership rights in the Club Facilities in favor of the Club Association or Club Members but, rather, grants a non-exclusive license and membership to use the Club Facilities subject to full compliance with all obligations imposed on each of them relating thereto.” Counts 3 and 4 seek to compel “specific performance to transfer the Club Facilities” to Plaintiffs; Counts 5 and 6 seek relief for alleged failure to transfer the Club Facilities to Plaintiffs and Counts 11 and 12 seek relief for alleged “procurement of the breach of the rights to acquire.” These allegations are hopelessly contradictory.

#### Additional Deficiencies in Particular Counts

16. **Counts 1 and 2 (Rescission of Special Warranty Deeds) must be dismissed:**

(a) because the statute of limitations, Fla. Stat. §95.11(3)(l), bars these counts; and

(b) for failure to state a cause of action because Plaintiffs have failed to allege:

(i) any legally sufficient grounds for rescission, such as fraud, mutual

mistake, false representations, impossibility of performance or other sufficient grounds;

(ii) sufficient allegations to show they have standing to seek rescission of the

Special Warranty Deeds; and



(iii) that Plaintiffs are willing to restore the parties to the position they occupied prior to the August 31, 2000 conveyance and that such restoration is possible.

17. **Counts 3 and 4 (Declaratory Judgment)** against unspecified Defendants, must be dismissed because:

(a) Plaintiffs are not entitled to pursue a specific performance claim cloaked as a declaratory action, and to the extent they seek to pursue a specific performance claim, such a claim is barred by the statute of limitations, Fla. Stat. 95.11.

(b) Plaintiffs failed to allege there is a bona fide, actual and present practical need for the declaration sought;

(c) Plaintiffs fail to allege the declaration sought deals with a present controversy as to a state of facts;

(d) Plaintiffs fail to allege there is some person or persons who have, or reasonably may have, an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; and

(e) Plaintiffs fail to allege the antagonistic and adverse interests (if any) are all before the court by proper process.

18. **Counts 5 and 6 (Breach of Declaration)** against the Grantor and its general partners must be dismissed for failure to state a cause of action because:

(a) Plaintiffs fail to allege a duty on the part of the Grantor's general partners to Plaintiffs to do the acts they allege in ¶26 of the Complaint that Grantor did not do.

(b) Plaintiffs fail to allege the general partners of the Grantor were parties to the Declaration;

(c) As a matter of law Plaintiffs fail to allege facts that are ripe for an action for breach, because there is no “offer” following the date of the Community Completion Date that Plaintiffs allege has triggered a right of first refusal; and

(d) Plaintiffs fail to allege a legal basis for a duty on the part of the Grantor and its general partners to “transfer the Club Facilities” to Plaintiffs (Complaint ¶¶67, 73).

19. **Counts 7 and 8 (Breach of Fiduciary Duty)** against the Lennar Defendants must be dismissed for failure to state a cause of action because:

(a) Plaintiffs fail to allege, with respect to each of the Lennar Defendants, a legally recognized and sufficient basis for or source from which the “fiduciary or confidential relation” between Plaintiffs and each of the Lennar Defendants arose;

(b) Plaintiffs fail to allege privity with each of the Lennar Defendants and how influence by each Lennar Defendant was acquired and abused to the detriment of Plaintiffs;

(c) Plaintiffs fail to allege any tortious acts independent of contractual obligations to avoid the application of the economic loss doctrine to bar the breach of fiduciary claims;

(d) Plaintiffs fail to allege the “fiduciary or confidential relation” with each of the Lennar Defendants existed *at the time* of the events about which Plaintiffs complain;

(e) Plaintiffs fail to allege that, while a fiduciary, each of the Lennar Defendants violated his or its fiduciary obligations to Plaintiffs;

(f) Plaintiffs fail to allege that each of the Lennar Defendants violated a fiduciary duty by willful misconduct, bad faith or gross negligence;

(g) Plaintiffs fail to allege each of them suffered damages as a proximate result of that violation of the fiduciary obligation.

20      **Counts 11 and 12 (Tortious Interference) against the Lennar Homes and**

**Mr. Hacker** must be dismissed for failure to state a cause of action because:

(a)      Plaintiffs fail to allege a contract between the Grantor and them.

(b)      Plaintiffs' alleged "rights to acquire as set forth in the Declaration"

(Complaint ¶119) were merely unvested expectancies, arising under the amended Declaration *following the Community Completion Date* and dependent upon an offer by the Club Owner to sell or prospective buyer to purchase the Club Facilities.

21.      **Counts 13 and 14 (Civil Conspiracy) against the Lennar Defendants** must be dismissed for failure to state a cause of action because:

(a)      Plaintiffs' general allegations of conspiracy fail to allege with sufficient specificity acts giving rise to a tort independent of the alleged breach of the Declaration, as amended.

(b)      Plaintiffs fail to allege an underlying independent tort and specific affirmative actions in furtherance of that tort to support a claim for civil conspiracy.

(c)      Plaintiffs fail to allege a malicious motive on the part of the Lennar Defendants and coercion by them through numbers or economic influence.

(d)      As a matter of law, exercise of the Declarant's reserved right of amendment, by adopting the Sixth Amendment to the Declaration, could not be considered either wrongful or in furtherance of a civil conspiracy, where each of the Plaintiff Homeowners took ownership of their property subject to the reserved contractual right of amendment.

WHEREFORE, the Lennar Defendants respectfully request this Court dismiss Plaintiffs' Complaint as to the Lennar Defendants, or in the alternative, require Plaintiffs to provide a more

definite statement as to each of the above counts, and grant such other relief as is deemed just and equitable.

**MOTION TO STRIKE JURY DEMAND**

The Lennar Defendants, through their undersigned counsel, hereby independently move this Court to Strike Plaintiffs' demand for jury trial. Pursuant to Paragraph 22 of the Club Covenants of the Declaration, the material portions of which were not attached to Plaintiffs' Complaint, the parties to the Declaration agreed to waive trial by jury on all matters or disputes arising out of the Declaration, the Club Facilities, the Covenants, or the Club Members or Homeowners Association's use or occupancy of the Club Facilities.

WHEREFORE, the Lennar Defendants respectfully request this Court strike Plaintiffs' demand for trial by jury in this action.

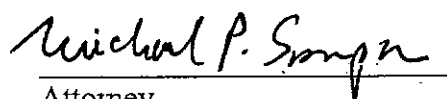


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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via facsimile and U.S. Mail this 21<sup>st</sup> day of December, 2005 to:

Robert W. Anthony, Esquire  
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