

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**CHARTER TOWNSHIP OF INDEPENDENCE,
Plaintiff,**

v.

**Case No. 13-136223-CZ
Hon. James M. Alexander**

**DEER LAKE KNOLLS HOMEOWNERS ASSOCIATION,
And DEER LAKE PROPERTY OWNERS' ASSOCIATION,
Defendants,**

And

**DEER LAKE PROPERTY OWNERS' ASSOCIATION, ET AL.,
Counter/Cross-Plaintiffs,**

v.

**DEER LAKE KNOLLS HOMEOWNERS ASSOCIATION,
Cross-Defendant,**

And

**CHARTER TOWNSHIP OF INDEPENDENCE,
Counter-Defendant**

And

**DEER LAKE KNOLLS HOMEOWNERS ASSOCIATION,
Cross-Plaintiff,**

v.

**DEER LAKE PROPERTY OWNERS' ASSOCIATION,
Cross-Defendant.**

_____ /

OPINION AND ORDER RE: (1) DEER LAKE KNOLLS HOMEOWNERS ASSOCIATION'S MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(10); AND (2) DEER LAKE PROPERTY OWNERS' ASSOCIATION'S BRIEF AS TO MEMBERSHIP STATUS

This matter is before the Court on cross motions for summary disposition, namely Deer Lake Knolls Homeowners Association's Motion for Summary Disposition Pursuant to MCR 2.116(C)(10) and Deer Lake Property Owners' Association's Brief as to Membership Status.¹ The Court dispenses with oral argument pursuant to MCR 2.119(E)(3).

This case has had a lengthy and litigious history concerning Deer Lake Knolls' use of its 5.02 acre outlot, which abuts Deer Lake and which its homeowners utilize for access to that lake. By way of background, the Township amended its zoning act in 2007 to regulate access for non-lakefront property owners who have "keyhole" access to Deer Lake by way of an outlot (such as Deer Lake Knolls' 24 non-lakefront property owners)². In 2012, Independence Township responded to complaints and issued a citation against Deer Lake Knolls for failure to obtain a special land use approval for private access property. But, also in 2012, the Township again amended its zoning act to include a provision that, in the event that the 2007 zoning act made a home owners' prior use non-conforming, an aggrieved party may request a validation certificate to validate that non-conforming use.

Deer Lake Knolls subsequently requested a validation certificate. Rather than responding to this request, however, the Township filed its original action for declaratory and equitable relief – seeking certain "preliminary determinations" from this Court that amounted to an advisory opinion on whether Deer Lake Knolls' validation certificate should be granted. The Court declined to provide an advisory opinion and granted Deer Lake Knolls' motion for summary

¹ Deer Lake Knolls Homeowners Association will be referred to as Deer Lake Knolls and Deer Lake Property Owners' Association will be referred to as Deer Lake Property Owners.

² It appears that three of Deer Lake Knolls' property owners have lakefront property.

disposition of the Township's declaratory relief claim in February 2015. At the same time, the Court stayed the remainder of this case pending the Township's decision on Deer Lake Knolls' certificate request.

In January 2016, the Township Building Inspector granted Deer Lake Knolls' Nonconforming Validation Certificate – allowing the mooring or docking of up to four boats associated with the seasonal docking structures on the Knolls' outlot. Deer Lake Knolls then requested review of the Building Inspector's "four boat" decision by the Township Zoning Board of Appeals, which affirmed the same. Deer Lake Knolls then filed an appeal to this Circuit Court of said decision, but the appeal was stayed to allow time for Deer Lake Knolls to seek a Special Land Use Permit in conformance with the Township's Zoning Ordinance. In April 2017, the Township's Planning Commission granted Deer Lake Knolls' Special Land Use Permit – allowing the docking or mooring of up to ten boats on its seasonal docking structures. Deer Lake Property Owners then appealed this administrative decision, and said appeal was consolidated with the current action.

Pursuant to the Court's January 10, 2018 Opinion and Order, the parties were directed to amend or voluntarily dismiss any claims that were inconsistent with the present nature of the dispute. As a result, Plaintiff Charter Township of Independence filed a Second Amended Complaint, Deer Lake Knolls filed a Cross-Claim against Deer Lake Property Owners, and Deer Lake Property Owners filed a Second Amended Counter-Claim and Cross-Claim for Declaratory Relief and Related Relief against Deer Lake Knolls.

On May 2, 2018, the Court affirmed the April 27, 2017 Planning Commission's decision on Deer Lake Knolls' special land use request and subsequently dismissed the Appellants' appeal, namely *Deer Lake Property Owners Association, et al. v Independence Charter*

Township, et al., Case No. 2017-159031-AV. Deer Lake Property Owners then filed a Claim of Appeal of this Court’s May 2, 2018 Opinion and Order. On October 10, 2019 the Court of Appeals issued its unpublished opinion, affirming the Planning Commission’s issuance of the Special Land Use Permit as well as this Court’s decision. *Deer Lake Prop. Owners Ass’n, v Indep. Charter Twp.*, unpublished opinion per curiam of the Court of Appeals, issued October 10, 2019 (Docket No. 343965). On January 14, 2020, Plaintiff Charter Township of Independence – having negotiated a Settlement Agreement and Mutual Release with all parties - was dismissed from this lawsuit. Further, all claims raised by or against the Township were dismissed on April 10, 2020.³

Thereafter, the parties filed cross motions for summary disposition against Deer Lake Property Owners’ Second Amended Counter-Claim and Cross-Claim for Declaratory Relief and Related Relief and Deer Lake Knolls’ Cross-Claim, respectively. The Court considered the parties’ motions and in its May 26, 2020 Opinion and Order, the Court dismissed Deer Lake Property Owners’ Second Amended Counter-Claim and Cross-Claim. The Court also denied Deer Lake Property Owners’ summary disposition motion due to an existing question of fact concerning Deer Lake Knolls’ status as a member of the Deer Lake Property Owners’ Association. The Court reasoned that “[i]f the Knolls can establish that it is a member of the Property Owners, then it can maintain its oppression claim. However, the Court must determine the Knolls’ membership status before it can determine if there was oppression.”

Following the Court’s ruling, the parties filed their current summary disposition motions, which are the subject of this Opinion and Order. Whereas Deer Lake Knolls has filed a Motion

³ The Court entered a Consent Order of Dismissal on June 17, 2020 that again dismissed the Township from this matter and dismissed the Second Amended Complaint.

for Summary Disposition Pursuant to MCR 2.116(C)(10), Deer Lake Property Owners has filed a Brief as to Membership Status, seeking summary disposition pursuant to MCR 2.116 (C)(10).

“A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties...in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.” *Maiden v Rozwood*, 461 Mich 109, 109; 597 NW2d 817 (1999); *Quinto v Cross & Peters Co.*, 451 Mich 358, 362; 547 NW2d 314 (1996).

The remaining, substantive issue in this case concerns Deer Lake Knolls’ member oppression claim as alleged in its February 9, 2018 Cross-Claim. The claims raised by Deer Lake Knolls in its Cross-Claim comprise of: (1) Declaratory Judgment; and (2) Violation of MCL 450.2489 – Member Oppression. The parties appear to agree that Deer Lake Knolls’ Declaratory Judgment claim, regarding its riparian ownership with legal access to Deer Lake, is now moot considering the Court of Appeals’ affirmance of the Planning Commission’s issuance of the Special Land Use Permit. As such, the parties focus their arguments on Deer Lake Knoll’s membership status in the Association as well as its member oppression claim.

While Deer Lake Knolls argues that its membership status should not have been terminated by the Association, Deer Lake Property Owners asserts that the Knolls’ membership status was terminated due to delinquent dues and failure to comply with state and/or township laws.

Deer Lake Knolls’ Arguments: Motion for Summary Disposition and Reply Brief

In its Motion for Summary Disposition, Deer Lake Knolls maintains that there is no genuine issue of material fact that it was a member of Deer Lake Property Owners at all relevant times for purposes of its member oppression claim.

Deer Lake Knolls contends that it has historically paid its membership dues at the annual Association meetings. While Deer Lake Knolls attended the annual meeting in 2017, it maintains that it was asked to leave the meeting by Deer Lake Property Owners when it sought to publicly address the pending lawsuit. As such, Deer Lake Knolls argues that it did not have an opportunity to pay its dues since it was expelled from the meeting. Deer Lake Knolls attaches the Affidavit of Ken Sharkey as Exhibit A in support of its position. In his Affidavit, Ken Sharkey, the Secretary and Treasurer for the Knolls from 2013 through 2018, attests to the following:

15. During the annual meeting, it was the normal course of conduct by DLPOA to collect payment of its dues from the members for the next fiscal year.

17. During the [April 24, 2017] meeting, we made a request of DLPOA Board member, Eugene English, that we be provided an opportunity to present our perspective to the DLPOA's membership of the unreasonable and baseless nature of DLPOA's actions in this case....

18. In response, we were informed that DLPOA would not deviate from its agenda and we were asked to leave the meeting, which we did.

19. DLKHA members were ejected from the 2017 DLPOA meeting prior to the board member selection portion of the meeting, thereby depriving it of its rights to participate in that process.

20. No mention was made of DLKHA's dues payment when we were asked to leave DLPOA's 2017 annual meeting, and I was not otherwise provided an opportunity to pay the dues since we were expelled from the meeting.

21. After consulting with my Board of Directors, DLKHA submitted its 2017/2018 membership year dues on May 2, 2017, a mere six business-days after we were asked to leave the annual meeting.

22. DLPOA returned DLKHA's dues payment, despite having no basis in the DLPOA By-laws to do so.

25. Indeed, DLPOA has accepted late payments from other members in the past without cancelling those memberships.

Deer Lake Knolls attaches as Exhibit F, the letter from the Deer Lake Property Owners' Association, dated May 30, 2017, in which the Association returned the \$250.00 membership dues check, dated May 2, 2017. Deer Lake Knolls asserts that Deer Lake Property Owners cannot wrongfully reject its membership dues so that it can now argue that Deer Lake Knolls is precluded from continuing as a member of the Association and pursuing a member oppression claim.

Deer Lake Knolls argues further that the current Bylaws only provide the penalty of ineligibility to vote in response to late or missed dues payments by a member. As such, Deer Lake Property Owners had no authority to terminate Deer Lake Knolls' membership based upon missing the dues payment deadline. Deer Lake Knolls anticipates an argument by Deer Lake Property Owners that it was not in good standing in 2017. Under Article 3(2) of the Bylaws, the term "good standing" is defined as "a member who is current with their dues, and is [sic] full compliance to Township and/or state laws for lake use." See Exhibit D of Deer Lake Property Owners' Brief. However, Deer Lake Knolls maintains that the "good standing" provision refers to whether organizational members were in good standing in 2014 when the Bylaws were amended to their current form. If they were in good standing, they would not lose their membership under the grandfather clause. Stated otherwise, this language was used to preserve the membership status of then-current organizational members in good standing.

Where the good standing requirement references compliance with state and local ordinances, Deer Lake Knolls argues that it has been conclusively established that it was in compliance with both state and local ordinances. Deer Lake Knolls also points out that Deer Lakes Property Owners had never alleged violations of the zoning ordinance to strip Deer Lake

Knolls of its membership status and what is more, the law of the case is Deer Lake Knolls' complete vindication in that respect.

Regarding Deer Lake Property Owners' allegation that the Knolls voluntarily relinquished its membership in the Association, Deer Lake Knolls asserts that there is no evidence to support this claim. While Deer Lake Property Owners rely upon a statement made by Mr. Sharkey during the April 27, 2017 Township meeting to support their claim, Deer Lake Knolls maintains that his statement is a far cry from an unambiguous statement that it planned to relinquish its membership. In Paragraphs 27-28 of his Affidavit, Keith Sharkey attests that he "never made any statement during an April 27, 2017 meeting at the Township with the intention to indicate that DLKHA relinquished its membership in DLPOA. To the contrary, I made statements confirming that DLKHA had been an original charter member of DLPOA and paid its dues every year since then." What is more, Deer Lake Knolls argues that statements made by Keith Sharkey at a public hearing, which were taken out of context, are not binding on the organization.

With respect to member oppression, Deer Lake Knolls argues that Deer Lake Property Owners' actions of terminating its membership is at the core of willfully unfair and oppressive conduct. What is more, Deer Lake Property Owners allegedly obstructed Deer Lake Knolls' ability to vote and it failed to provide Deer Lake Knolls with meeting notices. As evidence, Deer Lake Knolls again defers to the Affidavit of Kevin Sharkey, who attests that Deer Lake Knolls was not provided proper notice of the 2014 meeting concerning the vote to amend the Bylaws of the Deer Lake Property Owners' Association. See Paragraphs 7-9 of the Affidavit. As noted previously, Kevin Sharkey also attests that Deer Lake Knolls was ejected from the 2017 annual meeting prior to the board member selection portion of the meeting. See Paragraph 19 of the Affidavit. Deer Lake Knolls defers to MCL 450.2304(3) which provides that each member of a

membership-based non-profit organization has the right to vote unless that right is specifically abridged in the Bylaws. Here, Deer Lake Knolls contends that the Bylaws do not restrict organizational members from voting.

Deer Lake Property Owners Arguments: Brief as to Membership Status and Reply Brief

In its Brief, the Deer Lake Property Owners' Association argues that Deer Lake Knolls was not a member of the Association when it filed the Cross-Claim and therefore, it cannot maintain a claim for member oppression as stated.

While Deer Lake Property Owners concede that Deer Lake Knolls was a member of the Association prior to 2017, they maintain that Deer Lake Knolls was not a member of the Association as of 2017 because it was not in good standing due to delinquent dues and a violation of the Township ordinances. According to Deer Lakes Property Owners, it is undisputed that Deer Lake Knolls failed to timely pay their 2017 membership dues. As such, Deer Lake Knolls cannot bring a member oppression claim against the Association.

Deer Lake Property Owners attach the Affidavit of Eugene English, the Association president, as Exhibit C to its Brief. Mr. English attests that “[i]n 2017, Knolls did not pay their membership dues by April 24, 2017.” See Paragraph 5 of the Affidavit. In Paragraph 7 of his Affidavit, Mr. English states that “[s]ubsequent to April 27, 2017, the Knolls attempted to send a check to DLPOA for membership dues. However, they were no longer a member in good standing because of the delinquent dues and having constructed a non-permitted structure.” While there may not be a provision in the Bylaws to expel a member, Deer Lake Property Owners argue that there is also no provision that allows the reinstatement of membership for organizational members. Deer Lake Property Owners contend further that Deer Lake Knolls has

not presented a single example to support its claim that the Association has accepted late membership dues payments in the past. As such, this assertion should be disregarded.

Deer Lake Property Owners also rely on Keith Sharkey's statement during the 2017 Township Planning Commission meeting when he indicated that he had paid dues until this year. This statement should be considered additional evidence that Deer Lake Knolls allowed its membership to lapse. As such, Deer Lake Property Owners maintain that Deer Lake Knolls voluntarily terminated its membership.

With regard to Deer Lake Knolls' purported violation of the Township laws, Deer Lake Property Owners argue that as of 2017, Deer Lake Knolls was not in compliance with Township laws on account of their illegal marina. Even though the Township repealed the marina ordinance in 2018, Deer Lake Knolls was in violation of the Township laws at the time it filed its Cross-Claim.

Cognizant of Mr. Sharkey's claims that the Knolls did not receive notice of the 2014 meeting when the Bylaws were amended, Deer Lake Property Owners contend that even if that were true, organizational members lacked the ability to vote. Furthermore, the 2014 Bylaws amendment passed unanimously and so a vote by Deer Lakes Knolls would not have affected the outcome. Mr. English attests in his Affidavit that the amended Bylaws were approved on April 16, 2014 by a vote of twenty-seven to zero by the DLPOA membership.

In relation to the issue of voting rights, Deer Lake Property Owners allege that no organizational member of the Association has ever voted on an issue before the membership since 2010. Deer Lake Property Owners presents the Affidavit of Fred Daris as Exhibit A in support of this argument. Fred Daris, the director of the Association, attests that since 2010, "there has been no contested election for the DLPOA Board of Directors....Anyone who volunteered was allowed

to serve without membership objection...At the 2017 DLPOA annual meeting, there was no formal vote or any election for the Board of Directors because, as in past years, the agenda item was simply to solicit participation in serving on the Board. Even if there were issues for the membership to be voted on at the 2017 annual meeting, Knolls would have been ineligible to do so because they had not paid their dues as required...[S]ince 2013, the only vote of the members of DLPOA was a vote to pay for patrols of Deer Lake by the Oakland County Sheriff's Department Marine Division." See Paragraphs 10-13 and 17 of Exhibit A.

Deer Lake Property Owners also dispute Deer Lake Knolls' assertion that it was expelled from the 2017 annual meeting. In Fred Daris' Affidavit, Mr. Daris attests that "[w]hile it is true that the Knolls representatives were asked to leave the 2017 annual meeting, that was done because the only remaining item of business was discussion of the litigation, as to which the Knolls was an adverse party. The discussion took place after the meeting formally concluded, among those members who were interested in the discussion." See Paragraph 14 of Exhibit A.

Even if Deer Lake Knolls was a member at the time it filed its Cross-Claim, Deer Lake Property Owners argue that nothing has taken place to constitute member oppression. Moreover, Deer Lake Knolls has not provided any specificity as to the alleged, false representations made by the Association. Rather, Deer Lake Knolls simply references the October 4, 2013 meeting notice and the April 24, 2017 meeting notice, however, neither document reveals a materially false representation. Deer Lake Property Owners stand by their position that Deer Lake Knolls had no voting rights, but if it had, the only votes that took place from the filing of this action in 2013 were voting on the 2014 Bylaws amendment and the sheriff's patrol on Deer Lake.

Finally, Deer Lake Property Owners contend that the member oppression claim is barred by the Statute of Limitations under MCL 450.4515.⁴

Findings of Fact and Conclusions of Law

Membership in Deer Lake Property Owners' Association

As stated previously, the remaining issues in this lawsuit concern: (a) whether Deer Lake Knolls was a member of the Deer Lake Property Owners' Association at the time of filing its Cross-Claim to have standing to pursue its member oppression claim; and if so, (2) whether Deer Lake Knolls has been oppressed as a member of Deer Lake Property Owners' Association.

There is no dispute that Deer Lake Knolls did not submit their 2017/2018 membership dues until May 2, 2017. Additionally, there is no dispute that Deer Lake Property Owners returned the membership dues check to Deer Lake Knolls by letter, dated May 30, 2017. The initial question then becomes, how does a member of the Deer Lake Property Owners' Association lose its membership status under the Association Bylaws.

“When validly promulgated, an entity's bylaws or similar governing instrument will constitute a binding contractual agreement between the entity and its members.” *Conlin v Upton*, 313 Mich App 243, 255; 881 NW2d 511 (2015). Michigan law is well-established that “[a] contract must be interpreted according to its plain and ordinary meaning.” *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008), citing *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). “Under ordinary contract principles, if contractual

⁴ “[T]he running of the statute of limitations is an affirmative defense. Under MCR 2.111(F)(3), [a]ffirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118...Thus, a statute of limitations defense must be raised in the responsive pleading, unless [it] previously [was] raised in a motion for summary disposition before the filing of a responsive pleading. The failure to raise an affirmative defense as required by the court rule constitutes a waiver of that affirmative defense. *Dell v Citizens Ins. Co. of Am.*, 312 Mich App 734, 752–53; 880 NW2d 280 (2015). Here, Deer Lake Property Owners did not raise the affirmative defense of the running of the Statute of Limitations in its first responsive pleading, or March 12, 2018 Answer, to Deer Lake Knolls' Cross-Claim. As such, Deer Lake Property Owners has waived this affirmative defense.

language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate.” *Holmes v Holmes, supra* at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

“Contracts must be construed as a whole, giving effect to all provisions. Courts must avoid interpretations that would render any part of a contract surplusage or nugatory and must also, if possible, seek an interpretation that harmonizes potentially conflicting terms.” *Village of Edmore v Crystal Automation Systems Inc.*, 322 Mich App 244, 263; 911 NW2d 241 (2017). (Citations omitted).

Upon review of the Deer Lake Property Owners’ Association Bylaws, the Court takes note of the following provisions that are relevant to this dispute:

Article III. Membership. Section 1:

The following shall be eligible for membership:

The home owner of each riparian residence on Deer Lake and of each lot or lots on which a single residence with lake improved designation by the Township of Independence, maybe [sic] constituted.

Any group or organization that is a current member of this association and is in “good standing” may continue to be a member. One person from this group or organization must be designated as its representative.

Article III. Membership. Section 2:

The term “member” is defined as: For owners of riparian residences (see 1a), a single person or member of a family unit. Each riparian residence shall be entitled to one vote.

The term “good standing” is defined as: a member who is current with their dues, and is [sic] full compliance to Township and/or state laws for lake use.

Article III. Membership. Section 4:

The annual dues are payable to the treasurer before or at the annual meeting of each year. Dues shall become delinquent if not paid by the annual meeting. A delinquent member shall be ineligible to vote at any meeting of the association.

Article VI. Meetings of the Membership. Section 2:

Each riparian member shall be entitled to cast one vote upon each and every question properly before any meeting of the association. A majority vote of the members attending a special or Annual Meeting of the association shall be required to approve an order of business. Any special meeting shall include notification in writing with an agenda.

Prior to the amendment of the Deer Lake Property Owners' Association Bylaws in 2014, the Bylaws provided that "[a]ny adult person who owns riparian property on Deer Lake and any group or organization which owns riparian property with legal access to Deer Lake is eligible for membership in the association." See Section 1, Article III of the prior Bylaws; Exhibit H of Deer Lake Knolls' Motion. In 2014, the Bylaws were amended to restrict membership, however, certain organizations were able to continue their membership under a "grandfather clause," namely Section 1 of Article III. Section 1 provides that "[a]ny group or organization that is a current member of this association and is in 'good standing' may continue to be a member." Pursuant to these provisions, Deer Lake Knolls had membership status in the Deer Lake Property Owners' Association.

While the parties acknowledge that Deer Lake Knolls was delinquent or late in paying its 2017/2018 membership dues, the Court observes from the plain language of the Bylaws that the current penalty for the delinquent payment of membership dues under Section 4 of Article III is the ineligibility to vote. Notably, Fred Daris attests in his Affidavit that "[e]ven if there were issues for the membership to be voted on at the 2017 annual meeting, Knolls would have been ineligible to do so because they had not paid their dues as required..."

Notwithstanding Mr. Daris' statement, Deer Lake Property Owners argue that Deer Lake Knolls had no voting rights⁵ and so the applicable penalty for delinquent dues must be the loss of its membership status under the "good standing" provision. Section 2 of Article III provides that "[t]he term 'good standing' is defined as: a member who is current with their dues, and is in full compliance to Township and/or state laws for lake use." Since Deer Lake Knolls was delinquent in the payment of its 2017/2018 dues, Deer Lake Property Owners assert that the Knolls was not in good standing and consequently lost its membership status.

Upon review of the history of the Association's Bylaws, it is interesting to note that Section 5 of the prior Bylaws provided that "[d]ues shall become delinquent if not paid by June 1 of each calendar year. A delinquent member shall be ineligible to attend any meetings of the association and shall be removed from the membership list if the delinquent dues are not paid by July 1 each year." See Exhibit H of Deer Lake Knolls' Motion. Once the Association Bylaws were amended in 2014, however, Section 5 of the prior Bylaws was removed and essentially replaced by Section 4, which provides: "[t]he annual dues are payable to the treasurer before or at the annual meeting of each year. Dues shall become delinquent if not paid by the annual meeting. A delinquent member shall be ineligible to vote at any meeting of the association." See Section 4 of the Bylaws; Exhibit D of Deer Lake Knolls' Motion.

By the removal of Section 5 of the prior Bylaws, it is clear that the penalty for the delinquent payment of membership dues is the loss of voting rights under Section 4 and not the loss of membership status. Since the harsh penalty of membership ineligibility was removed for delinquent dues, it also follows that the reference to "good standing" in Section 1 referred to

⁵ Deer Lake Property Owners rely on Section 2 of Article III, which provides that "[e]ach riparian residence shall be entitled to one vote." However, Section 2 of Article VI in the Bylaws provides that "[e]ach riparian member is entitled to cast one vote upon each and every question properly before any meeting of the association." Since the Deer Lake Knolls Homeowners Association encompasses land with 535 feet of shoreline frontage on Deer Lake, they are riparian owners of the property and would arguably fall under the classification of a riparian member.

organizational members choosing to continue their membership status at the time the amended Bylaws were enacted. The Court agrees with Plaintiff that Section 1 of the Bylaws was written to preserve the membership status of then-current organizational members in good standing. If the organization was in good standing as of the 2014 amendment, then it could choose to continue as a member of the Association, which Deer Lake Knolls did. Based upon the Court's reading of the Bylaws, Deer Lake Property Owners did not have the authority to terminate Deer Lake Knolls' membership based upon delinquent dues.

Deer Lake Property Owners also submit the April 27, 2017 Planning Commission Meeting Minutes in an attempt to show that Keith Sharkey voluntarily terminated Deer Lake Knolls' membership when he said that the Knolls had been paying dues until this year. However, the minutes of a meeting provide merely a summary of what was discussed and furthermore, Mr. Sharkey's summarized statement at a public meeting does not correlate to a formal termination of Deer Lake Knolls' membership. In addition, Keith Sharkey states in his Affidavit that he was never provided an opportunity to pay membership dues at the annual meeting due to his removal. Mr. Sharkey also attests in his Affidavit that he never made any statement during the April 27, 2017 Township meeting to indicate that Deer Lake Knolls relinquished its membership. Moreover, Deer Lake Knolls clearly attempted to pay its dues following the annual meeting, however, Deer Lake Property Owners returned the dues payment almost one month later.

While Deer Lake Property Owners also argue that Deer Lake Knolls was noncompliant with the Township or state laws in 2017, the Court observes from the case file that the Township issued a Non-Conforming Validation Certificate to Deer Lake Knolls to allow the docking or mooring of four boats on the outlot on January 19, 2016.⁶ On April 27, 2017, the Township

⁶ The Court takes judicial notice of the case file, particularly, Exhibit E in Deer Lake Property Owners' Association's Motion to Lift Stay and for Preliminary Injunction.

Planning Commission approved the special land use request of Deer Lake Knolls to permit the docking and mooring of as many as ten boats in the outlet.⁷ Remarkably, Deer Lake Property Owners sent back Deer Lake Knolls' membership dues payment on May 30, 2017, following the Township Planning Commission's approval of Deer Lake Knolls' special land use request.

To now argue that Deer Lake Knolls was noncompliant with the Township or state laws in 2017 is disingenuous based upon the determinations by the Township and Planning Commission. Additionally, and in light of the seven years of litigation in this matter, the Court has the benefit of considering the Court of Appeals' affirmation of the Independence Township Planning Commission's decision to grant the Special Land Use Permit to Deer Lake Knolls to allow the docking or mooring of up to ten boats on its 5.02 acre lakefront lot. Accordingly, Deer Lake Property Owners cannot now argue that Deer Lake Knolls was noncompliant with the Township or state laws as of 2017.

Based upon the parties' arguments and in consideration of the associated exhibits, the Court finds that there is no genuine issue of material fact that Deer Lake Knolls qualified as a member of the Deer Lake Property Owners' Association at all relevant times for purposes of its member oppression claim.

Violation of MCL 450.2489 – Member Oppression

Regarding Deer Lake Knolls' oppression claim, the Court finds that Deer Lake Knolls has standing – as a member of the Deer Lake Property Owners' Association – to pursue this claim pursuant to MCL 450.2489(1) of the Michigan Nonprofit Corporation Act.

MCL 450.2489(1) provides that “[a] director of a corporation that is organized on a directorship basis, a shareholder of a corporation that is organized on a stock basis, or a member

⁷ The Court takes judicial notice of the Complaint, filed in Case No. 2017-159031-AV, which was consolidated with the present lawsuit.

of a corporation that is organized on a membership basis may bring an action in the circuit court of the county in which the principal place of business or registered office of the corporation is located to establish that the acts of the directors, shareholders, members, or others in control of the corporation are illegal, fraudulent, or willfully unfair and oppressive to the corporation or to the director, member, or shareholder.” Under MCL 450.2489(2), “‘willfully unfair and oppressive conduct’ with respect to a member or shareholder means a continuing course of conduct or a significant action or series of actions that substantially interferes with the rights or interests of the member or shareholder as a member or shareholder. The term does not include conduct or actions that are permitted by an agreement, the articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure.”

Here, Deer Lake Knolls makes the following allegations with respect to Deer Lake Property Owners’ willfully unfair and oppressive conduct. First, Deer Lake Knolls asserts that Deer Lake Property Owners substantially interfered with its rights as a member by improperly cancelling Deer Lake Knolls’ membership. According to Deer Lake Knolls, Deer Lake Property Owners refused to accept its late dues payment and subsequently cancelled its membership when it had accepted late dues payments from other members in the past. The Affidavit of Keith Sharkey supports these assertions. Deer Lake Knolls also attaches the May 30, 2017 letter from the Association as Exhibit F to its motion to support the allegation that it refused to accept Deer Lake Knolls’ membership dues. In opposition, Eugene English acknowledges in his Affidavit that Deer Lake Knolls attempted to send a check to the Association for membership dues, however, he asserts that the check was returned since Deer Lake Knolls did not qualify for membership.

Second, Deer Lake Knolls points to the October 4, 2013 letter from Deer Lake Property Owners to its membership wherein it outlines its legal efforts to interfere with Deer Lake Knolls’

use of the lake and it requests monetary assistance from its members to defray the associated legal costs. See Exhibit B of Deer Lake Knolls' Motion.

Third, Deer Lake Knolls contends that Deer Lake Property Owners substantially interfered with its ability to vote and/or to voice its opinions as a member by failing to provide proper meeting notices for the 2014 annual meeting when the Bylaws were amended. In his Affidavit, Keith Sharkey attests that Deer Lake Knolls was not provided proper notice of the 2014 meeting and as a result, it was not afforded an opportunity to exercise its rights as a member. In response, Deer Lake Property Owners argue that Deer Lake Knolls was not a voting member, and even if it was, the only votes that took place were the 2014 amendment to the Bylaws and the contract with the Oakland County Sheriff's Department for lake patrols. Deer Lake Property Knolls also asserts that Deer Lake Knolls' vote would not have impacted the decision by relying on the Affidavit of Eugene English, who attests that the 2014 Bylaws amendment passed by a vote of twenty-seven to zero.

Fourth, Deer Lake Knolls maintains that it was expelled from the 2017 annual meeting by Deer Lake Property Owners prior to the board member selection process. Keith Sharkey states in his Affidavit that Deer Lake Knolls was ejected from the 2017 Association meeting prior to the selection of the board members. In contrast, Fred Daris attests in his Affidavit that the Knolls representatives were asked to leave the 2017 annual meeting because the only remaining item of business was the discussion of litigation.

While there is no dispute as to the general actions taken by Deer Lake Property Owners in relation to Deer Lake Knolls, the Court finds that a trier of fact must determine whether Deer Lake Property Owners engaged in a continuous course of action against Deer Lake Knolls that

was willfully unfair and oppressive and undertaken with the *intent* to substantially interfere with its interest as a member.

In the case of *Franks v Franks*, 330 Mich App 69; 944 NW2d 388 (2019), owners of nonvoting shares in a manufacturing corporation brought an action against the corporation, its managers, and the owners of voting shares for shareholder oppression. While this appellate case concerned acts that were willfully unfair and oppressive under MCL 450.1489(1) of the Business Corporation Act, the language of the applicable statute herein, namely MCL 450.2489(2) of the Michigan Nonprofit Corporation Act, is identical. When reviewing the trial court's decision concerning the respective parties' motions for summary disposition, the *Franks* Court of Appeals held "that with regard to acts that are willfully unfair and oppressive, the complaining shareholder must prove that the directors or persons in control of the corporation engaged in a continuing course of conduct or took a significant action or series of actions that substantially interfered with the interests of the shareholder as a shareholder and that they did so with the intent to substantially interfere with the interests of the shareholder as a shareholder. MCL 450.1489(1); MCL 450.1489(3). Thus, a defendant can avoid liability by showing that he or she did not have the requisite *intent* when he or she took the acts that interfered with the shareholder's interests." *Id.* (Emphasis added).

"The granting of a motion for summary disposition is especially suspect where motive and intent are at issue or where a witness or deponent's credibility is crucial. Accordingly, where the truth of a material factual assertion of a moving party depends upon a deponent's credibility, there exists a genuine issue for the trier of fact and a motion for summary disposition should not be granted." *White v Taylor Distrib. Co.*, 275 Mich App 615, 625; 739 NW2d 132 (2007). (Citations

omitted). As such, the Court cannot grant summary disposition to either party with regard to Deer Lake Knolls' member oppression claim.

Accordingly, and for the foregoing reasons, the Court finds that there are no material facts in dispute in relation to Deer Lake Knolls' status as a rightful member of the Deer Lake Property Owners' Association at all relevant times for purposes of its member oppression claim. Consequently, Deer Lake Knolls' Motion for Summary Disposition Pursuant to MCR 2.116(C)(10) is GRANTED and Deer Lake Property Owners' Brief as to Membership Status/Motion is DENIED regarding the issues concerning Deer Lake Knolls' membership status and its member oppression claim as a viable claim.

The Court further finds that there is a question of fact as to whether Deer Lake Property Owners engaged in a continuous course of action against Deer Lake Knolls that was willfully unfair and oppressive and undertaken with the *intent* to substantially interfere with its interest as a member in the Association. Therefore, neither party is entitled to summary judgment in relation to Deer Lake Knolls' member oppression claim since this is an issue to be determined by the trier of fact. Thus, both Deer Lake Knolls' Motion for Summary Disposition Pursuant to MCR 2.116(C)(10) and Deer Lake Property Owners' Brief as to Membership Status/Motion are DENIED in that regard.

The parties shall appear for a pretrial on Tuesday, September 8, 2020 at 10:00 a.m. to discuss and schedule further litigation in relation to Count Two of Deer Lake Knolls' Cross-Claim.

IT IS SO ORDERED.

August 19, 2020
Date

/s/ James M. Alexander
Hon. James M. Alexander
Circuit Court Judge