In The

# Supreme Court of Virginia

**RECORD NO. 160606**

## KENNETH M. SHEPHERD, *et al.*,

***Appellants*,**

**v.**

## RACHELLE CONDE, *et al.*,

***Appellees.***

## REPLY BRIEF OF APPELLANTS

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**Mariam W. Tadros (VSB No. 75502)**
**Jasmine G. Chalashtori (VSB No. 90615)**
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# REPLY BRIEF

## INTRODUCTION[1]

In their Opposition Brief, the Condes fail to persuasively refute any of the legal arguments raised by the Shepherd Parties regarding the numerous errors committed by the trial court.

First, the Condes fail to acknowledge the appropriate standard of review. The trial court did not make any factual findings on disputed facts, as it would in a typical trial. Stipulated facts were presented to the Court and the Court made purely legal findings on those stipulated facts. Those legal findings are afforded no deference by this Court.

Second, the Condes fail to adequately explain how *Dogwood Valley Citizens Ass'n v. Shifflett*, 275 Va. 197, 654 S.E.2d 894 (2008) ("*Dogwood II*") and *Anderson v. Lake Arrowhead Civic Ass'n*, 253 Va. 264, 483 S.E.2d 209 (1997) are consistent with the Virginia Property Owners Association Act ("VPOAA") as those cases impose mandatory requirements for establishing a property owners' association that directly contradict the applicable provisions of the VPOAA.

[1] The Shepherd Parties incorporate all defined terms used in their Opening Brief and in the Opposition Brief filed by the Condes.

Third, the Condes erroneously assert that the common road that serves the Saddle Ridge Community is not common area and that, despite the express language of the Declaration, the Association is not required to maintain the road. Fourth, the Condes misunderstand the Association's power to impose assessments and to amend its Declaration – powers which are found both in the Declaration and in the VPOAA.

Lastly, the Condes, in a brazen effort to avoid a decision on the merits of this appeal, again argue that the Shepherd Parties failed to preserve errors for appeal – a baseless argument that ignores the record before this Court as well as numerous instances in that record in which the Shepherd Parties objected to the trial court's legal rulings.

## ARGUMENT

### I. The Condes misstate the standard of review.

Despite the Condes' assertion to the contrary, this case does not involve mixed questions of law and fact. This Court is required to "give deference to the trial court's factual findings." *Caplan v. Bogard*, 264 Va. 219, 225, 563 S.E.2d 719, 722 (2002) (emphasis added). Trial in this matter was held on October 19, 2015 on stipulated facts and exhibits. There was no testimony presented at trial nor was any dispute or question regarding the stipulated facts tendered to the trial court. The trial court was

tasked solely with reviewing purely legal issues, which is subject to *de novo* review by this Court. *Tuttle v. Webb*, 284 Va. 319, 324, 731 S.E.2d 909, 911 (2012). In fact, counsel for the Condes admitted as such during the final hearing:

> The Court: It's almost like summary judgment.
> Mr. Hook: It is. Ms. Tadros and I have talked about this at length. We feel like the relevant evidence is in the book. Really, it's our legal arguments –

Joint App. at 207.

Accordingly, the trial court made no factual findings and, therefore, the Condes are only entitled to *de novo* review in this appeal.

## II. <u>The applicable Virginia Supreme Court cases are inconsistent with the VPOAA.</u>

The Condes concede that the § 55-509 of VPOAA only requires that the Declaration *either* "(i) impose on the association maintenance or operational responsibilities for the common area *or* (ii) create the authority in the association to impose on lots . . . any mandatory payment of money in connection with the provision of maintenance and/or services for the benefit of . . . the common area." Opposition Brief, pg.10.

Despite their concession, the Condes argue that the holding in *Dogwood II*, and *Anderson* are somehow consistent with the VPOAA. *Dogwood II* held:

> Qualification as a property owners' association under the POAA requires that a declaration recorded in the land records where the development is located **impose on an association** both the power to assess fees for road and common facilities maintenance and the duty to perform such maintenance.

*Dogwood II*, 275 Va. at 200, 654 S.E.2d at 895 (emphasis added).

Similarly, *Anderson* held that, "it is clear that in order to qualify under the VPOAA, an association must possess both the power to collect a fixed assessment or to make a variable assessment <u>and</u> a corresponding **duty to maintain** the common area." *Anderson*, 253 Va. at 271-272. The above language in *Dogwood II* and *Anderson* directly conflicts with the standard set forth in § 55-509 of the VPOAA and fails to acknowledge that the VPOAA provides the Association with the authority (but not necessarily the duty) to provide maintenance and service. This Court should clarify the rulings in *Anderson* and *Dogwood II* so that they are consistent with the VPOAA.

## III. <u>The Declaration provides the Association with both the authority and obligation to maintain the common area.</u>

In their Opposition Brief, the Condes claim that there is no common area within the Association because the road is not common area and, further, that the Association is not required to maintain the road. Both of these claims are fundamentally wrong.

First, the road within the Association is undoubtedly common area. The Condes argue that, "The [road] may be altered and made into a public thoroughfare upon agreement of all lot owners…The ability of the lot owners to change the nature of the maintenance of said road reaffirms the Condes' position that the roadway is not a common area, even by implication, as required by the VPOAA." Opposition Brief, pg. 18. This argument ignores the statutory definition of 'common area,' which is set forth in Va. Code Ann. § 55-509: "property within a development which is owned, leased <u>or required by the declaration to be maintained or operated by a property owners' association… for the use of its members and designated as common area in the declaration</u>." (emphasis added).

Nowhere in the definition of common area is there a requirement that the common area be forever designated as such in the Declaration, nor have the Condes cited to any authority to support their spurious assertion, as no such authority exists. The only statutory requirement is that the road be maintained by the Association and designated as common area in paragraph 21 of the Declaration. Both of these elements are satisfied.

Second, the Association has both the authority and duty to maintain the road. Paragraph 23 of the Declaration states:

> Until such time the road becomes state maintained, all lot owners agree to pay their pro-rata share of road maintenance.

> If a lot owner does not pay his pro-rata assessment, a lien <u>shall be placed</u> upon the land for the cost of same, which lien shall be inferior only to taxes and deeds of trust.

Joint App. at 48-49 (emphasis added).

This provision makes clear that that the ACC, as the executive organ of the Association, is required to maintain the road and to impose an assessment on the lot owners for such road maintenance. To the extent that the Condes assert that paragraph 23 must be strictly construed because it is a restraint on land, their argument misunderstands Virginia law. Contrary to their assertion, Virginia law allows restrictive covenants such as those found in paragraph 23. *Riordan v. Hale*, 215 Va. 638, 641, 212 S.E.2d 65 (1975) states, "Restrictive covenants that do not contain unconstitutionally discriminatory provisions are widely accepted contractual devices designed to maintain property values in residential subdivisions…when applicable, the covenants will be enforced." Thus, the covenant in paragraph 23 of the Declaration, which is designed to provide the Association with the duty to maintain the road and impose assessments for such maintenance, must be enforced as it is not discriminatory, nor is it unreasonable.

## IV. <u>The assessment provision in the Declaration is proper and not violative of the VPOAA.</u>

The Condes appear to take issue with the fact that the Association was given the ability to charge a variable assessment. In their Opposition Brief, they argue that, "While the term 'variable assessment' is not defined in § 55-509 or elsewhere in the code, a properly drafted covenant would certainly include a basis for the calculation of said assessment and the criteria for which such calculation is made." Opposition Brief, pg. 21. The Condes also insist that the Declaration was required to state who is to make the assessment, how the assessment would be calculated, when it would be assessed and how collection would be enforced. *Id.* at 20.

These arguments are misguided as they ignore both *Dogwood II* and *Anderson*, both of which acknowledge the Association's ability to impose a variable assessment on lot owners. *Dogwood Valley Citizens Ass'n v. Winkelman*, 267 Va. 7, 10, 590 S.E.2d 358, 13 (2004); *Anderson v. Lake Arrowhead Civic Ass'n*, 253 Va. 264, 271-272, 483 S.E.2d 209, 213 (1997). The *Dogwood* and *Anderson* decisions are consistent with Va. Code Ann. § 55-514, which provides the Association with the authority to impose a special assessment in an undefined amount. That code section provides, in part, "In addition to all other assessments which are authorized in the

declaration, the board of directors shall have the power to levy a special assessment against its members…" Va. Code Ann. § 55-514.

Further, the Condes' argument that there is no collection method set forth in the Declaration itself is flawed as it ignores the explicit methods for collection set forth in the VPOAA. Va. Code Ann. § 55-516(A) (Lien for Assessments) provides, in part, that, "Once perfected, the association shall have a lien on every lot for unpaid assessments levied against that lot…" Moreover, Va. Code Ann. § 55-516(E) provides the Association with the authority to file suit to enforce the lien. This language is wholly consistent with paragraph 22 of the Declaration that provides that each of the lot owners "agree to pay their pro-rata share of road maintenance, [and] if a lot owner does not pay his pro-rate [sic] assessment, a lien shall be placed upon the land for the cost of the same…." Joint App. at 280-81. Additionally, the Association can always sue to recover sums due for the failure to pay assessments, like any other creditor in this Commonwealth. Thus, there are several mechanisms for collection set forth within and without the Declaration, contrary to the Condes' assertions.

Lastly, it is clear that the ACC, as the executive organ of the Association, is the entity charged with imposing and collecting assessments. This authority is contained in paragraphs 1-2 of the

Declaration, which provide that, "In order to insure that the intent and purpose of these Covenants and Restrictions are complied with, an [ACC] is hereby established which shall have full authority in enforcing same. Each lot owner shall automatically be a member of the [ACC]…." Joint App. at 275-76. Thus, there is no basis by which to claim that the Association, through the ACC, cannot impose and collect assessments.

### V. Unanimous consent is not required to amend the Declaration.

Paragraph 27 of the Declaration provides that it can be modified by a two-thirds vote of the record lot owners:

> These Covenants are to run with the land and shall be binding on all parties and all persons claiming under them and must be in full force and effect for a period not less than twenty-five years from date of recordation and shall automatically be extended for successive twenty-five year periods. Changes cannot be made unless passed by a vote of two-thirds of the then record owners of the lots in the subdivision.

Joint App. at 291, 310 (emphasis added).

The Condes appear to take issue with the fact that the Declaration was amended without their consent. The Condes' assertion that the Declaration requires that 100% of the lot owners agree to any amendment is directly contradicted by paragraph 27 of the Declaration, which became binding on the Condes when they purchased their lot. That language is likewise consistent with Virginia law, which provides that, "A declaration of

covenants, conditions, and restrictions is in the nature of a contract between the condominium association and the owners. *Dye v. Sully Station II Community Ass'n*, 47 Va. Cir. 188, 189 (1982).

Further, the Condes' assertion that a restrictive covenant cannot be modified without agreement of all the parties entitled to enforce the covenant is another misreading of Virginia law. In *Barris v. Keswick Homes, LLC*, 268 Va. 67, 597 S.E.2d 54 (2004), the Virginia Supreme Court held that a restrictive covenant "may provide for a mechanism by which the parties, <u>or some number of them</u>, may modify or terminate the restriction." (emphasis added); *see Hening v. Maynard*, 227 Va. 113, 313 S.E.2d 379 (1984) (holding that parties can agree that less than 100% consent is required to amend restrictive covenants).

Additionally, this Court should reject the Condes' argument that the amendment must be unanimous because the Declaration, which was not drafted by the parties, should be construed in favor of the free use of land.

The Washington Supreme Court has held:

> The time has come to expressly acknowledge that where construction of restrictive covenants is necessitated by a dispute not involving the maker of the covenants, but rather among homeowners in a subdivision governed by the restrictive covenants, rules of strict construction against the grantor or in favor of free use of land are inapplicable. The court's goal is to

> ascertain and give effect to those purposes intended by the covenants.

*Riss v. Lee Angel*, 131 Wn.2d 612, 934 P.2d 669 (1997).

Lastly, for reasons that are unclear, the Condes cite to paragraph 24 of the Declaration, which provides that, "the declarant…reserves the right to modify any of the provisions of these covenants to alleviate hardship." Opposition Brief, pg. 21. This provision clearly contemplates modifications to the Declaration while the Saddle Ridge Community was under declarant control, which has long since passed since the declarant sold all lots in the community to third party purchasers. Further, the Condes suggest that paragraph 24 is unclear because the Declaration does not define hardship and therefore the entirety of the Declaration fails to designate a mechanism by which the Covenants can be modified. *Id.*

This argument fails for several reasons. First, paragraph 24 is separate from paragraph 27, which expressly provides the lot owners with the ability to modify the Declaration. Second, even if paragraph 24 had some bearing on the interpretation of paragraph 27 (which it does not), the term hardship has been defined in case law. *See Perel v. Brannan*, 267 Va. 691, 594 S.E.2d 899 (2004) ("In order to establish the hardship defense, a defendant must show that specific performance would create a hardship or injustice that is out of proportion with the relief sought").

## VI. <u>The Shepherd Parties preserved their errors at the trial court.</u>

The Condes' argument that the Shepherd Parties failed to preserve their issues for appeal is disingenuous, at best. In *Brandon v. Cox*, this Court held that, "When considering whether an issue has been preserved for appellate review, because the purpose of Va. Sup. Ct. R. 5:25 is to ensure that a trial court has the opportunity to rule upon an argument, the record on appeal must affirmatively demonstrate that the trial court was made aware of the argument." 284 Va. 251, 736 S.E.2d 695 (2012); *see United Leasing Corp. v. Lehner Family Bus. Trust*, 279 Va. 510, 518, 689 S.E.2d 670, 674 (2010) ("[F]or an argument to remain preserved for appeal, the court must be aware of a litigant's legal position.").

First, the Condes tellingly failed to disclose in their Opposition Brief that the Shepherd Parties filed a Post-trial Memorandum, raising many of the legal issues outlined in their pleadings, including the power of the Association to amend the Declaration, as well as the establishment of the Association at the time the Declaration was created. Joint App. at 419-24.

Second, at the hearing for entry of competing final orders, the Shepherd Parties submitted a final order to the trial court which noted their objections but through inadvertence, was not initially made part of the record on appeal. Their final order and legal arguments tendered at trial

and in their post-trial memorandum preserved all the objections for appeal purposes. This Court entered the final order tendered by the Plaintiffs on January 19, 2016. Joint App. at 434-37. The Court waived the signature of counsel pursuant to Va. Sup. Ct. R. 1:13. *Id.* As the final, entered order was tendered by the Condes, it did not include the objections of the Shepherd Parties, which were fully outlined in their own proposed final order.

Once the Shepherd Parties determined that clerk of the trial court did not include their proposed final order (that included their objections) in the record initially transmitted to the Supreme Court of Virginia, the Shepherd Parties filed a Motion to Alter Record on Appeal pursuant to Va. Sup. Ct. R. 5:10, which was granted by the trial court. The trial court entered the attached June 7, 2016 Order, which was transmitted to this Court on June 8, 2016 and is part of the record on this appeal. **Exhibit 1**. The Order states, in pertinent part:

> FURTHER APPEARING to the Court that on January 19, 2016 that counsel for the Respondents in fact presented the attached draft order to the Court for review and consideration; and it
>
> …..
>
> FURTHER APPEARING to the Court that this Court entered Petitioners' draft order and dispensed with signatures pursuant to Va. Sup. Ct. R. 1:13 **after due consideration of the Respondents' objections contained in Respondents' draft order**; and it

> FURTHER APPEARING to the Court that through inadvertence and/or omission that the Clerk of the Court did not make the attached draft order prepared by Respondents' counsel as part of the record in connection with the Respondents' appeal to the Virginia Supreme Court; it is
>
> ORDERED that the Motion to Amend Record on Appeal is granted and the proposed order presented by the Defendants is hereby incorporated into the Record on Appeal…

Tr. Ct. Order, June 7, 2016 (emphasis added).

The Condes conveniently do not make mention of the June 7, 2016 Order in their contention that the Shepherd Parties did not preserve their objections in the trial court. Because the Shepherd Parties filed a Post-trial Memorandum, submitted a competing order noting their objections, and because the trial court entered the June 7, 2016 Order, there is no basis supporting the Condes' claim that the Shepherd Parties failed to preserve their objections or that the trial court did not have an opportunity to consider their objections.

## CONCLUSION

For the reasons set forth in the Opening Brief and in this Reply Brief, the Shepherd Parties request that the Court grant the relief sought in their appeal.

REES BROOME, PC

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## CERTIFICATE OF SERVICE

1. The names of the Appellants are Kenneth M. Shepherd, Patricia E. Shepherd, David W. Emerick, Sr., Sandra E. Emerick, Cheryl A. Kinsey, George P. Kinsey III, Anita L. Rau, Morton D. Rau, Elizabeth M. Schlenker, John S. Schlenker, Jr. and Saddle Ridge Farms Homeowners Association.

2. The Appellants are represented by:
   Robert J. Cunningham, Jr.
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   Virginia State Bar No. 75502
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3. The names of the Appellees are Rachelle Conde and Norman Conde.

4. The Appellees are represented by:
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   Virginia State Bar No. 83131
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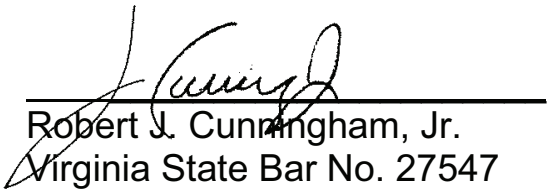
5. An electronic copy of the Reply Brief of Appellants was filed, via VACES, and ten paper copies of the Reply Brief of Appellants were hand-filed with the Clerk of this Court. On this same day, an electronic copy of the Reply Brief of Appellants was served, via email, upon counsel for The Condes on December 5, 2016.

6. This brief is shorter than 15 pages, in compliance with the Virginia Supreme Court Rules, exclusive of the cover page, table of contents, table of authorities, and certificate.



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# EXHIBIT 1

VIRGINIA:

IN THE CIRCUIT COURT FOR FAUQUIER COUNTY

| | | |
|---|---|---|
| RACHELLE CONDE, *et al.* | : | |
| Petitioners | : | |
| v. | : | Case No CL14-289 |
| KENNETH M. SHEPHERD, *et al.* | : | |
| Respondents | : | |

**ORDER**

This matter came before the Court upon the Defendants' Motion to Amend Record on Appeal; and

IT APPEARING that the parties appeared before this Court on January 19, 2016 for presentation of competing orders memorializing this Court's rulings in its letter opinion dated November 6, 2015; and it

FURTHER APPEARING to the Court that on January 19, 2016 that counsel for the Respondents in fact presented the attached draft order to the Court for review and consideration; and it

FURTHER APPEARING to the Court that Petitioners' counsel presented their own order to the Court; and it

FURTHER APPEARING to the Court that this Court entered Petitioners' draft order and dispensed with signatures pursuant to Va. Sup. Ct. R. 1:13 after due consideration of Respondents' objections contained in Respondents' draft order; and it

FURTHER APPEARING to the Court that through inadvertence and/or omission that the Clerk of Court did not make the attached draft order prepared by Respondents' counsel as part of the record in connection with the Respondents' appeal to the Virginia Supreme Court; it is

FURTHER APPEARING to the Court that the Motion should be granted; it is

ORDERED that the Motion to Amend Record on Appeal is granted and the proposed order presented by the Defendants is hereby incorporated into the record on appeal; it is further

ORDERED that the Clerk of the Court is directed to transmit the proposed order, along with a copy of this Order, to the Supreme Court of Virginia.

Entered the 7 day of June, 2016 JUN - 7 2016

Hon. Jeffrey W. Parker

Seen and objected to:

Objected on the grounds that the trial court does not have the authority to add a proposed order that was rejected and not endorsed by the court.

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Counsel for Respondents/Counter-Petitioners

VIRGINIA:

IN THE CIRCUIT COURT FOR FAUQUIER COUNTY

| | | |
|---|---|---|
| RACHELLE CONDE, *et al.* | ) | |
| Petitioners | ) | |
| v. | ) | Case No CL14-289 |
| | ) | |
| KENNETH M. SHEPHERD, *et al.* | ) | |
| Respondents | ) | |

ORDER

Came the 19th day of October the parties by counsel, to be heard on the Petitioner's 1st Amended Motion for Declaratory Judgment and the Respondents Second Amended Motion for Declaratory Judgment (the Counter Claim), and

WHEREAS this Honorable Court did receive evidence as to both motions; and

WHEREAS this Honorable court did hear argument in regards to both motions; and

WHEREAS all of the properties subject to this Order are located in Fauquier County, Virginia and all deeds pertaining to the ownership of the properties by the parties are recorded amongst the land records of Fauquier County, Virginia; and,

WHEREAS Petitioners Norman S. CONDE and Rachelle C. CONDE are owners of certain real property as recorded in Deed Book 1379 at page 1552; and,

WHEREAS the Respondents Morton D. RAU and Anita L. RAU are owners of certain real property as recorded in Deed Book 690 at page 855; and,

WHEREAS the Respondents David W. EMERICK, Sr., and Sandra E. EMERICK are owners of certain real property as recorded in Deed Book 619 at page 912; and,

WHEREAS the Respondents Kenneth M. SHEPHERD and Patricia E. SHEPHERD are owners of certain real property as recorded in Deed Book 641 at page 1207; and,

WHEREAS the Respondents George P. KINSEY, III and Cheryl A. KINSEY are the owners of certain real property as recorded in Deed Book 688 at page 1275; and,

WHEREAS the Respondents John S. SCHLENKER, JR., and Elizabeth M. SCHLENKER are owners of certain real property as recorded in Deed Book 1350 at page 2265; and

Whereas all of the properties were initially subject to the Saddle Ridge Farms Declaration of Protective Covenants and Restrictions, recorded among the land records of Fauquier County, Virginia in Deed Book 604 at page 313 (hereinafter "Initial Declaration"); and,

WHEREAS there was also recorded an Amendment and Restatement of Saddle Ridge Farms Declaration of Protective Covenants and Restrictions, recorded among the land records of Fauquier County, Virginia in Deed Book 1457 at page 1069 (hereinafter the "First Amended Declaration); and

WHEREAS only the Respondents signed the First Amended Declaration; and,

WHEREAS there was also recorded a Second Amendment and Restatement of Saddle Ridge Farms Declaration of Protective Covenants and Restrictions, recorded among the land records of Fauquier County, Virginia in Deed Book 1470 at page 144 (hereinafter the "Second Amended Declaration); and

WHEREAS only the Respondents signed the Seconded Amended Declaration; and,

WHEREAS after hearing the parties, the Court issued a letter opinion dated the 6th day of November, 2015 and tasked the counsel of the Petitioners to reduce said letter to this Order.

Therefore it is ORDERED, ADJUDGED and DECREED as follows:

1. The Court's letter opinion is fully incorporated herein.
2. The Saddle Ridge Farms Declaration of Protective Covenants and Restrictions does not qualify as a "declaration" as defined by the Code of Virginia, 1950, §55-509, as amended, of the Virginia Property Owners Association Act; and,
3. The Architectural Control Committee created by the Initial Declaration has no powers under the Virginia Property Owners Association Act; and
4. The Saddle Ridge Farms Homeowners Association has no powers under the Virginia Property Owners Association Act; and,
5. Saddle Ridge Farms Homeowners Association can perform all of the functions for which it was created and that the Architectural Control Committee can perform all the functions for which it was created;
6. All of the parties' properties are subject to the Initial Declaration;
7. The Petitioners and their property are not subject to First or Second Amended Declarations;
8. Any Amendments to the Declaration require unanimous consent of all lot owners;
9. All lot owners are subject to the Bylaws adopted on May 21, 2011;
10. As no evidence was presented in regards to dues paid by the Petitioners to the Respondents, the Court therefore denies the request for reimbursement of assessments; and

WHEREAS it is further Ordered that the Clerk of the Circuit Court record this Order amongst the land records of Fauquier County, Virginia.

THIS ORDER IS FINAL.

Entered the ___ day of _____, 2015

_____
Hon, Jeffrey W. Parker

We ask for this:

_____
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540-347-6595
Counsel for the Petitioners

Seen and Objected to because the Petitioners were subject to the First Amended and Second Amended Declarations, the Initial Declaration was a valid declaration subject to the POAA and the amendments to the Declaration were valid as the Original Declaration did not require unanimous consent prior to modification. Respondents also object on the reasons set forth in their pleadings and at the November 6, 2015 hearing:

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