

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**UNIVERSITY COMMONS RIVERSIDE
HOME OWNERS ASSOCIATION, INC.,**

Petitioner,

v.

Case No. 11-1577

**UNIVERSITY COMMONS MORGANTOWN, LLC;
KOEHLER DEVELOPMENT, LLC; COLLEGIATE
HOMES, INC.; RICHARD KOEHLER; FRANK
KOEHLER; ADAM SHARP; RICHARD DUNLAP;
O.C. CLUSS PROFESSIONAL SERVICES, LLC; R.E.
CRAWFORD CONSTRUCTION, INC.; POZZUTO
AND SONS, INC.; BUILDING CODE
ENFORCEMENT OFFICIAL OF STAR CITY;
HERRON ENGINEERING; EAGLE INTERIORS,
INC.; BUH CONSTRUCTION; TRIAD
ENGINEERING, INC.; and UNIVERSAL FOREST
PRODUCTS,**

Respondents.

Petitioner's Brief

On Certified Questions from the Circuit Court
of Monongalia County
Honorable Susan B. Tucker
Civil Action No. 09-C-85

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Key Statutory Provisions

W. Va. Code § 36B-1-103. Definitions.

In the declaration and bylaws . . . , unless specifically provided otherwise or the context requires, and in this chapter:

...

(2) “Allocated interests” means the following interests allocated to each unit: (i) In a condominium, the undivided interest in the common elements, the common expense liability, and votes in the association[.]

(3) “Association” or “unit owners’ association” means the unit owners’ association organized under section one hundred one, article three of this chapter.

(4) “Common elements” means: (i) In a condominium or cooperative, all portions of the common interest community other than the units; and (ii) in a planned community, any real estate within a planned community owned or leased by the association, other than a unit.

...

(7) “Common interest community” means real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance or improvement of other real estate described in a declaration[.]

(8) “Condominium” means a common interest community in which portions of the real estate are designated for separate ownership and the remainder of the real estate is designated for common ownership solely by the owners of those portions. A common interest community is not a condominium unless the undivided interest in the common elements are vested in the unit owners.

...

(33) “Unit” means a physical portion of the common interest community designated for separate ownership or occupancy, the boundaries of which are described pursuant to subdivision (5), subsection (a), section one hundred five, article two of this chapter. If a unit in a cooperative is owned by a unit owner or is sold, conveyed, voluntarily or involuntarily encumbered or otherwise transferred by a unit owner, the interest in that unit which is owned, sold, conveyed, encumbered, or otherwise transferred is the right to possession of that unit under a proprietary lease, coupled with the allocated interests of that unit, and the association's interest in that unit is not thereby affected.

(34) "Unit owner" means a declarant or other person who owns a unit, or a lessee of a unit in a leasehold common interest community whose lease expires simultaneously with any lease, the expiration or termination of which will remove the unit from the common interest community, but does not include a person having an interest in a unit solely as security for an obligation. In a condominium or planned community, the declarant is the owner of any unit created by the declaration. . . .

* * * * *

W. Va. Code § 36B-2-101. Creation of common interest communities.

(a) A common interest community may be created pursuant to this chapter only by recording a declaration executed in the same manner as a deed and, in a cooperative, by conveying the real estate subject to that declaration to the association. The declaration must be recorded in every county in which any portion of the common interest community is located and must be indexed in the grantee's index in the name of the common interest community and the association and in the grantor's index in the name of each person executing the declaration.

* * * * *

W. Va. Code § 36B-3-102. Powers of unit owners' association.

(a) Except as provided in subsection (b), and subject to the provisions of the declaration, the association, even if unincorporated, may:

...

(4) Institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the common interest community.

Certified Questions Presented, with Proposed Answers

The Circuit Court of Monongalia County certified six questions to this Court:

1. **Pursuant to West Virginia Code § 36B-3-102(a)(4), what constitutes a “matter affecting the common interest community” and what constitutes “unit specific” damages?**

Plaintiff’s Answer: Under the plain language of the Uniform Common Interest Ownership Act (“the Act”), the common interest community for which a condominium owners’ association may pursue claims on behalf of two or more of its members encompasses the entire condominium complex, including the common elements of the complex as well as individual units. See W. Va. Code § 36B-1-101(4), (7), (33); *id.* § 36B-3-102(a)(4). There are no “unit specific” damages for which the association may not pursue claims.

2. **Is a Unit Owners’ Association an adequate representative when a lawsuit is instituted by a Unit Owners’ Association on behalf of two or more unit owners pursuant to West Virginia Code § 36B-3-102(a)(4) when the damages sought include “unit specific” damages affecting only individual units?**

Plaintiff’s Answer: Yes. In light of the Act’s broad definition of “common interest community,” a Unit Owners’ Association such as Plaintiff can pursue claims for damages to individual units and is an adequate representative of unit owners’ interests. See W. Va. Code § 36B-1-101(4), (7), (33); *id.* § 36B-3-102(a)(4).

3. **If the Court answers “yes” to question number 2, is a unit owner nonetheless a necessary and indispensable party pursuant to Rule 19 of the West Virginia Rules of Civil Procedure?**

Plaintiff’s Answer: No. Because Plaintiff is empowered by the Act to pursue all claims concerning matters affecting the common interest community on behalf of two or more of its members, and because the unit owners will be bound to any resolution or settlement of this case under the doctrine of *res judicata*, the individual unit owners need not be joined as parties to this litigation under Rule 19 of the West Virginia Rules of Civil Procedure.

4. **If the individual unit owners are not joined pursuant to Rule 19, does the Association have the authority under West Virginia Code § 36B-3-102(a)(4) to settle and release any and all claims of the unit owners where said individual unit owners have been provided reasonable notice of and have made no objection to said settlement and release?**

Plaintiff's Answer: Yes. Because Plaintiff represents the interests of its members, and because its members will be bound by any resolution reached in this case under the doctrine of *res judicata*, Plaintiff necessarily may settle and release any and all claims against Defendants. Moreover, the Court is not required to give the unit owners notice and an opportunity to object to any settlement and released agreed to by the parties because this case is not a class action.

5. **Whether matters pertaining to a unit owner's claim for lost rent or inability to rent are matters that affect the common interest community for which the Unit Owners' Association may institute litigation pursuant to West Virginia Code § 36B-3-102(a)(4)?**

Plaintiff's Answer: Yes. Plaintiff may pursue claims for lost rent or inability to rent or sell condominium units on behalf of the owners of affected units because those claims arise from damage to the common interest community and are shared by more than two unit owners.

6. **Is a representative example of unit owners sufficient to offer deposition and trial testimony in this matter to establish defects and damages that are matters affecting the common interest community?**

Plaintiff's Answer: Yes. Testimony from a representative sample of unit owners will allow Plaintiff an opportunity to present its case efficiently and with proof sufficient to support its allegations, and at the same time will afford Defendants a fair opportunity to defend against Plaintiff's claims.

Statement of the Case

Plaintiff/Petitioner University Commons Riverside Homeowners Association, Inc. is a condominium owners' association that brought suit on behalf of itself and its members, the owners of eighty-four condominium units at the University Commons Riverside Condominium Complex in Star City, West Virginia ("the Complex").

Defendants designed, constructed, and marketed those condominiums as a sound investment for the families of students attending nearby West Virginia University. But instead of constructing those condominiums in a workmanlike manner according to approved design plans, Defendants built a financial, structural, and environmental disaster that will cost millions of dollars to repair.

In October 2005, Defendants Frank and Richard Koehler, acting as representatives of the Developer Defendants,¹ purchased a seven-acre plot located between the Monongalia River and the Rail Trail in Star City for construction of the eighty-four-unit, seven-building Complex. Shortly thereafter, the Developer Defendants contracted to have Defendant R.E. Crawford serve as the General Contractor pursuant to a design-build agreement. R.E. Crawford in turn subcontracted the design and construction of the complex to numerous engineers and subcontractors, including several of the Defendants.

Before licensed engineers prepared and finalized the construction plans, and before construction had commenced, the Developer Defendants began to aggressively market the Complex to families of West Virginia University students. The Developer Defendants also issued a public offering statement required by West Virginia Code

¹ The Developer Defendants are University Commons Morgantown LLC, Koehler Development, Collegiate Homes, Richard Koehler, Frank Koehler, Adam Sharp, and Richard Dunlap.

§ 36B-4-102–106. The public offering statement should have included a copy of the construction plans that accurately described the development and construction of the Complex. It did not.

Instead, the development and construction of the Complex proceeded without regard to the plans issued and approved by Defendant William McLaughlin, the Building Code Enforcement Officer for Star City. Although those plans were filed with the City, Plaintiff alleges that Mr. McLaughlin unlawfully allowed construction to proceed inconsistently with and in ignorance of the plans. J.A. 000065- 66 (First Amended Compl. ¶¶ 35-37). Moreover, the plans were materially altered on an *ad hoc* basis during the development and construction of the Complex, but the Defendants failed to amend the plans to reflect those changes. J.A. 000065 & 66 (Compl ¶ 37).

The Developer Defendants also made false and misleading statements in promoting the condominiums as an investment and in depicting the elements, benefits, and improvements of the Complex. Specifically, Defendant Frank Koehler, acting as an authorized agent and representative of the Developer Defendants, made misleading factual representations and promises to prospective purchasers, Plaintiff, and its members, including:

- the promise that transportation would be provided for owners and tenants to and from the West Virginia University campus;
- the representation that purchasing individual units represented a safe investment; and
- the representation that all materials contained within the public offering statement were true and accurate, including the annual budget.

J.A. 000067-68 (Compl. ¶ 46). The Developer Defendants also falsely represented that the condominium units and common elements of the Complex were suitable for their

ordinary uses, that the Complex would be free from defective materials, constructed in accordance with all applicable laws, constructed consistent with sound engineering and construction standards, and constructed in a workmanlike manner. J.A. 000068 (Compl. ¶ 4-7).

Plaintiff's members did not get the benefit of their bargain. The Complex was poorly constructed, and unit owners have experienced extensive and severe problems, including:

- improper and inadequate drainage of rain water and ground water in and around the building and foundation, leading to leaching of water and humidity through the concrete slabs and sidewalks;
- erosion and collection of water around the foundation walls due to faulty installation of downspouts;
- cracks in and around the concrete walkways due to improper spacers, angle breaks and compaction in and around the walkways;
- separation and detachment of multiple pieces of the siding of the buildings;
- multiple water intrusions and resulting water damage;
- freezing of exposed water lines and resulting damage;
- replacement of brass fittings where the plumbing main lines feed into the mechanical rooms in each structure, related to the installation of plumbing rough-ins;
- multiple water leaks, including but not limited to leaks in the sprinklers, plumbing water lines, and connections leading to common fixtures;
- malfunctioning of sewage pump/lift stations;
- lack of a vapor barrier for grade-level concrete slab construction, improper compaction and/or grading of foundation concrete and substrata related to the foundation;
- defective and improperly installed HVAC mechanical systems of insufficient size and inadequate air returns, resulting in deficient air flow;

- stone façade falling and pulling away from the buildings;
- visible and latent mold growth; and
- improperly installed railings consisting of improper and inferior materials.

J.A. 000068- 69 (Compl. ¶ 49).

Those systemic design and construction flaws are “matters affecting the common interest community” within the meaning of the Uniform Common Interest Ownership Act, W. Va. Code § 36B-1-103(7) (“Uniform Act” or “Act”). They have damaged the common areas of the Complex as well as individual condominium units, which together comprise the “common interest community.” Plaintiff and its members have suffered great financial losses. J.A. 000070 (Compl. ¶ 54). Plaintiff has been forced to nearly double the initial monthly association fee established by the Developer Defendants in the public offering statement to attempt to pay for repairs to the common areas and to fund this litigation. *Id.* Defendants have not communicated with Plaintiff or its members about these problems, and none of these issues have been properly remedied.

Plaintiff commenced this action on February 13, 2009, in the Circuit Court of Monongalia County, asserting claims for breach of express and implied warranty of quality, failure to comply with public offering statement requirements, material omission in promotional materials, failure to complete and restore, negligence and strict liability, and breach of the implied warranties of merchantability, fitness and habitability. J.A. 000057-90 (Compl.). Plaintiff brought suit on its own behalf and on behalf of its members as authorized by the Uniform Act.

The parties have engaged in extraordinary discovery efforts over nearly three years of litigation. To date, as the Court docket reveals, the parties have taken forty-four depositions, many of which lasted more than one day and three of which still need to be

continued on additional days. Fifteen unit owners have been deposed; those owners own a total of nineteen units that are spread throughout each of the seven buildings at the Complex. The parties have identified thirty-one experts—eleven for Plaintiff and twenty for Defendants. Defendants and their experts have conducted two rounds of on-site inspections at the Complex, spanning a total of six days. During that time, Defendants had access to the exteriors and interiors of all seven buildings and entered virtually all of the condominium units. They conducted invasive testing, which included cutting holes in drywall and removing siding. Plaintiff alone has produced almost 60,000 pages of documents and provided Defendants with at least twenty-six supplemental discovery responses. Counsel for Plaintiff has expended thousands of hours on discovery, which is ongoing.

By motion dated November 17, 2010, some of the Defendants argued that all of the unit owners should be joined as plaintiffs to this litigation under Rule 19 of the West Virginia Rules of Civil Procedure; by response, the remaining Defendants agreed. Although Defendants conceded that the Act confers standing upon Plaintiff to represent its members as to matters affecting the common interest community, Defendants contended that Plaintiff may only bring claims involving the common elements of the Complex, not claims for damage to individual units. Additionally, during the course of discovery, the Defendants have indicated a desire to depose more than 200 persons, including all of the unit owners, past and present, along with tenants and lenders. *See* J.A. 000224. Concerned about the burdensome scope of discovery, and seeking to protect its right to bring suit on behalf of its members, Plaintiff moved for a protective order on July 7, 2011. *See Id.* 228.

The Circuit Court granted the Defendants' motion to join all unit owners, denied the motion for protective order, and certified six questions to the West Virginia Supreme Court of Appeals on November 2, 2011, asking this Court to explicate the ability of a common interest community owners' association to bring suit in a representative capacity on behalf of its members. *Id.* 000609. The Circuit Court also asked this Court to determine the proper scope of discovery and trial testimony in this case.

In proposing answers to those questions, the Circuit Court held that, despite clear statutory language to the contrary, Plaintiff could not bring suit on behalf of its members to remedy what it determined were "unit specific" damages (a phrase that does not appear in the applicable statute), including faulty construction claims affecting the individual units, or assert claims seeking remedy for financial losses suffered by individual unit owners, including lost rents or inability to sell. *See Id.* 000609-10. The Circuit Court also held that all unit owners, past and present, should be joined in this litigation under Rule 19 and made available for deposition.

Summary of Argument

“[A unit owners’] association may . . . institute, defend or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the common interest community.”

Uniform Common Interest Ownership Act,
W. Va. Code § 36B-3-102(a)(4).

This provision of West Virginia’s Uniform Common Interest Ownership Act plainly authorizes the Plaintiff Homeowners’ Association to bring an action in its own name and “on behalf of” its members, who collectively own eighty-four units at the subject development, each beset by severe and systemic construction flaws that will cost millions of dollars to repair. This case is about whether the statute’s grant of authority to the Homeowners’ Association can be employed to achieve the efficiencies it was designed to promote: to allow a group of unit owners to pool resources through an association that they have established, fund, comprise and control, so they may efficiently pursue litigation through a single proceeding regarding matters that affect not only the Association as a whole, but the individual members themselves.

Defendants appear to have a different agenda. Perhaps recognizing the strength in numbers that the representative-action provision of the Uniform Act allows, Defendants have opted for a divide-and-conquer approach, and challenge the Association’s standing to pursue its claims and the unit owners’ claims on their behalf. ***Instead, Defendants propose to force the joinder of all past and present unit owners, and to depose both those unit owners and their tenants—well in excess of 200 people.*** If successful, Defendants’ efforts will lead to hundreds of

additional depositions, add weeks of trial time, and cause already massive litigation costs to skyrocket, with no corresponding benefit for the litigants or the Court.

Defendants base their contorted view of how the litigation should proceed on a similarly contorted view of the Uniform Act. Although Defendants concede, as they must, that the Act permits the Association to sue “on matters affecting the common interest community,” they create from whole cloth a limitation that the Association may only sue on a narrow subset of matters involving areas outside individual condominium units (so-called “common elements”). Claims affecting individual units, Defendants say, must be pursued by individual unit owners. This assertion finds no support in the Act whatsoever.

This case profoundly implicates the oft-overlooked yet foundational principle of Rule 1 of the West Virginia Rules of Civil Procedure: that the Rules “shall be construed and administered to secure the just, speedy, and inexpensive determination of every matter.” W. Va. R. Civ. P. 1. It gives the Court its first opportunity to explicate the representative-action provision of the Uniform Act, and to provide critical guidance to the circuit court regarding how best to effectuate Rule 1’s directive within the context of Uniform Act cases. The solid weight of authority from other jurisdictions that have adopted the Uniform Act—not to mention the commentary of the Act itself—supports the Association’s capacity to litigate all claims in a single, cost-effective proceeding that allows the presentation of trial evidence by common proof. Perhaps one salient fact best illustrates the unit owners’ faith in the Association’s ability to act as their statutory representative: since this case was filed in February 2009, no unit owner has elected to pursue an individual claim through a separate action; each has relied and continues to rely on the Association to represent his or her interests. And the Association has done

so vigorously, expending thousands of attorney hours and hundreds of thousands of dollars in litigation costs to date.

At bottom, the Act's representative-action provision is designed to allow the efficient pursuit of unit owners' claims, the conservation of judicial resources, and the reduction of litigation costs. In a case where the parties have already devoted enormous resources to the litigation, there is no need or statutory basis to join and depose hundreds of unit owners and tenants or to force them to testify at trial. Accordingly, the Court should reverse the decision of the Circuit Court, and answer the certified questions as proposed herein.

Statement Regarding Oral Argument

The Court should hear oral argument under Rule 20 of the West Virginia Revised Rules of Appellate Procedure. The certified questions raise issues of first impression and fundamental public importance, the resolution of which will have far-reaching and significant consequences for condominium and other common interest developments across the State, judicial efficiency, and efforts to control litigation costs. As such, this case merits oral argument.

Standard of Review

“The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*.” Syl. pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 475 S.E.2d 172 (W. Va. 1996); accord *Huston v. Mercedes-Benz USA, LLC*, 711 S.E.2d 585, 588 (W. Va. 2011).

Argument

I. *Plaintiff's Answer to Certified Question One:*

Under the plain language of the Uniform Common Interest Ownership Act, a “matter affecting the common interest community” for which an owners’ association may pursue claims on its members’ behalf includes the entire condominium complex, including the common elements as well as individual condominium units.

The plain language of the Uniform Common Interest Ownership Act authorizes a condominium owners’ association to pursue claims on behalf of two or more of its members for “*matters affecting the common interest community*”—including, critically for purposes of this case, claims arising from the common elements of the condominium complex as well as from individual condominium units. *See* W. Va. Code § 36B-41-101(4), (7), (33); *id.* § 36B-3-102(a)(4); *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 215 P.3d 697, 699 (Nev. 2009). The Circuit Court erred in holding that so-called “unit specific damages” (a phrase that appears nowhere in the Act) are not matters affecting the common interest community.

West Virginia adopted the Uniform Act in 1986, joining states including Alaska, Colorado, Connecticut, Delaware, Minnesota, Nevada and Vermont. The Act “is a comprehensive act that governs the formation, management, and termination of a common interest community,” including “a condominium.” *Foster v. Orchard Dev. Co., LLC*, 705 S.E.2d 816, 818 n.2 (W. Va. 2010) (internal quotation marks omitted).

This Court’s analysis should begin with the Act’s definitional section, which warrants special attention, and is reproduced *supra* at iv. It defines a “common interest community” as “real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance or

improvement of other real estate described in a declaration.” W. Va. Code § 36B-1-103(7). “Condominiums” are common interest communities

in which portions of the real estate are designated for separate ownership and the remainder of the real estate is designated for common ownership solely by the owners of those portions. A common interest community is not a condominium unless the undivided interest in the common elements are vested in the unit owners.

Id. § 36B-1-103(8).

A purchaser of a condominium unit owns his or her individual unit, along with an undivided interest in “common elements,” defined as “all portions of the common interest community other than the units.” *Id.* § 36B-1-103(2), (4), (8). A “unit” is “a physical portion of the common interest community designated for separate ownership or occupancy,” *id.* § 36B-1-103(33), and “unit owners” are “the owner of any [condominium] unit[,]” *id.* § 36B-1-103(34).

The Act empowers owners’ associations such as Plaintiff to, *inter alia*, adopt and amend bylaws, rules and budgets; collect assessments from unit owners; hire and discharge managing agents; make contracts; regulate the use, maintenance and repair of common elements; hold title to property; impose and receive payments, fees or charges for the use or operation of common elements; and exercise any powers provided for by the declaration or bylaws. *See id.* § 36B-3-102(a). Most pertinent to this case, the Act also empowers an association to “[i]nstitute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the common interest community.” *Id.* § 36B-3-102(a)(4) (emphasis added). The overarching issue raised by the Circuit Court’s certified questions is whether Plaintiff’s claims involve “matters affecting the common interest

community” such that Plaintiff may maintain this suit in a representative capacity without having to join the individual unit owners as plaintiffs. *Id.*

The affirmative answer to that question is found in the plain language of the Act: “common interest community” is broadly defined and encompasses the common elements as well as individual condominium units. Individual condominium units are those “physical *portion[s] of the common interest community* designated for separate ownership.” *Id.* § 36B-1-103(33) (emphasis added). The definition makes clear that units are *portions of*, not separate from, the common interest community.

Condominium units combine with the common elements² to make up the entire common interest community—the Complex, its seven buildings, and its eighty-four condominium units. *See* W. Va. Code § 36B-1-103(4), (7), (19); *see also* J.A. 000009 (Complex Declaration).

The phrase “*matters affecting the common interest community*” only further underscores the breadth of the Association’s authority. A “matter” is “a subject under consideration,” and to “affect” something is “to influence in some way.” Black’s Law Dictionary (8th ed. 2004). It is beyond cavil that the damages at issue in this case are “matters affecting the common interest community.” Defendants’ contrary arguments are not rooted in the actual language of the Uniform Act. Their cramped interpretation of the Act would insert the phrase “common elements” where it does not appear. They would have this Court read the Act to say that an association may “institute, defend, or

² The common elements include all foundations, columns, girders, beams, supporting walls, utility systems, mechanical systems, sprinkler systems, exhaust and ventilation systems, storage areas, parking garages, chimneys, drainage facilities, patios, balconies, decks, porches, stoops, exits, and entrances. *See* J.A. 000012-13. The Complex also has so-called limited common elements that are shared by more than one unit but less than all of the units, including doors, windows, and fireplaces. *See id.*; *see also* W. Va. Code § 36B-1-103(19) (defining limited common elements).

intervene in litigation or administrative proceedings on behalf of itself or two or more unit owners on matters **affecting [the common elements of]** the common interest community.” That limiting phrase does not appear in § 36B-3-102(a)(4).

Other courts interpreting identical statutory language from the Uniform Act have concluded that individual units are part of the common interest community such that an owners’ association may pursue individual unit claims on behalf of their members. For example, the Colorado Court of Appeals examined the same language adopted from the Uniform Act, and held—in direct conflict with the Circuit Court—that individual units were part of the common interest community for which an owners’ association could maintain suit on behalf of its members. *See Yacht Club II Homeowners Ass’n, Inc. v. A.C. Excavating*, 94 P.3d 1177, 1177-1180 (Colo. App. 2003) (“*Yacht Club*”); *see also* Colo. Rev. Stat. § 38-33.3-302(1)(d) (using language identical to that in the West Virginia Act). The court reasoned that the association had standing to pursue damages claims related to individual units because “[t]he only limitation on an action on behalf of unit owners is that the matter be one ‘affecting the common interest community.’” *Yacht Club*, 94 P.3d at 1179-80. And because a “unit” is “a physical *portion of* the common interest community,” those units “are *part of* the ‘common interest community.’” *Id.* at 1180 (emphasis added) (internal quotation marks omitted); *accord Heritage Vill. Owners Assoc. v. Golden Heritage Investors*, 89 P.3d 513, 514-15 (Colo. App. 2004) (following *Yacht Club*).

Similarly, the high court of Nevada, another Uniform Act state, has held that “a homeowners’ association has standing to file a representative action on behalf of its members for constructional defects in individual units of a common-interest community.” *D.R. Horton, Inc.*, 215 P.3d at 699-702; *see also* Nev. Rev. Stat. §

116.3102(1)(d) (containing language identical to the West Virginia Uniform Act). In that case, the defendant developer, like the Defendants in this case, argued that claims involving individual units are not “matters that affect the common interest community” and that, as a consequence, the homeowners’ association did not have standing to assert constructional defect claims arising from individual units. *See D.R. Horton*, 215 P.3d at 702. The court rejected that argument, concluding that units are a part of the common interest community. *See id.* “Unit” is defined in Nevada as it is in West Virginia as “a physical *portion* of the common interest community.” *Id.* (emphasis added) (internal quotation marks omitted). Based on that definition, the court held that “[t]he unit . . . is . . . part and parcel of the common interest community.” *Id.* (internal quotation marks omitted). The homeowners’ association therefore had standing to assert claims concerning individual units.³ *See id.*

³ Courts in jurisdictions that have not adopted the Uniform Act have nevertheless permitted owners’ associations to pursue claims for damages to individual units based on similar (if not identical) statutory language. *See, e.g., Owens v. Tiber Island Condo. Ass’n*, 373 A.2d 890, 894-95 (D.C. 1977) (concluding that the condominium owners’ association was authorized by statute and its own bylaws to bring suit related to the common elements of the condominium or to more than one unit); *Ass’n of Apartment Owners of Newtown Meadows ex. rel. Bd. of Dirs. v. Venture 15, Inc.*, 167 P.3d 225, 250-55 (Haw. 2007) (holding that the owners’ association could pursue claims on behalf of individual apartment owners because Hawaii statute allowed association to pursue claims with respect to either the common elements or to more than one apartment); *Sandy Creek Condo. Ass’n v. Stold & Enger, Inc.*, 642 N.E.2d 171, 175-76 (Ill. App. Ct. 1994) (holding that a condominium association had standing under Illinois law to bring an action on behalf of its members for matters affecting more than one condominium unit even though not all unit owners were affected by the allegedly fraudulent statements); *Milton Co. v. Council of Unit Owners of Bentley Place Condo.*, 729 A.2d 981, 988-90 (Md. 1999) (holding that because the Maryland statute allows a condominium owners’ association “to act in a representative capacity for two or more unit owners, so long as the subject of the litigation or administrative proceeding is one ‘affecting the condominium,’” the association “could sue on behalf of the unit owners for claims based on the plumbing and HVAC defects that were common to many individual units”); *Brickyard Homeowners’ Ass’n Mgmt. Comm. v. Gibbons Realty Co.*, 668 P.2d 535, 537-41 (Utah 1983) (holding that a homeowners’ association could bring suit for

The Circuit Court held that Plaintiff could not pursue claims for “unit specific damages,” J.A. 000610, a term that does not appear in the Act. Instead, the Act broadly defines “common interest community,” *see* W. Va. Code § 36B-1-103(4), (7), (8), (33), (34); *id.* § 36B-3-102(a)(4), and authorizes Plaintiff to pursue all claims arising from matters affecting the common interest community on behalf its members, including claims arising from damage to individual units as well as to the common elements of the Complex. That conclusion is in complete accord with the intent of the Act—to allow owners’ associations to pursue representative actions on behalf of two or more members. *See id.* § 36B-3-102(a)(4). Allowing associations to act in a representative capacity serves several important public policies, including the promotion of judicial efficiency and the reduction of litigation costs. As the commentary to the Uniform Act explains, the “representative action” provision of the Act was intended to make it “clear that the association can sue or defend suits *even though the suit may involve only units*

damages arising from misrepresentation claim because it filed suit under Utah statute authorizing a representative action on behalf of two or more unit owners concerning the common areas and facilities as well as damages to more than one unit), *superseded by constitutional amendment on other grounds as recognized by State v. Drej*, 233 P.3d 476, 484 & n.4 (Utah 2010); *see also Poulet v. H.F.O., L.L.C.*, 817 N.E.2d 1054, 1060-61 (Ill. App. Ct. 2004) (collecting cases); *cf. Bd. of Managers of Fairways at N. Hills Condos. v. Fairways at N. Hills*, 545 N.Y.S.2d 343, 346-47 (N.Y. App. Div. 1989) (holding that, although New York statute did not create new causes of action, it did provide a board of managers of a condominium with standing to maintain an action asserting recognized common-law claims on behalf of the unit owners with respect to common areas or to more than one unit).

These cases are distinguishable from those in jurisdictions with more restrictive statutes. For example, in Massachusetts and New Jersey, condominium associations are statutorily authorized to bring suit on behalf of their members *only* for damage to the common elements of a common interest community. *See Golub v. Milpo, Inc.*, 522 N.E.2d 954, 957 (Mass. 1988); *Siller*, 461 A.2d at 570-73. Indeed, in some jurisdictions such as North Dakota, condominium associations are not even authorized to bring suit in a representative capacity with regard to the common elements. *See Jablonsky v. Klemm*, 377 N.W.2d 560, 569 (N.D. 1985). They only may bring suit on their own behalf.

as to which the association itself has no ownership interest.”⁴ Uniform Common Interest Ownership Act § 3-102 cmt. 3, at 96 (emphasis added). Allowing associations to represent their members

follows the national trend acknowledging the representative capacity of the association . . . [,] enabling the association to represent more effectively its owners in such matters as construction defects, . . . avoiding the necessity of assignment of claims, powers of attorney or class actions in many circumstances, and thereby simplifying and making more practical the prompt action in the association’s and owners’ common interests.

Yacht Club, 94 P.3d at 1180 (alterations omitted) (internal quotation marks omitted); see also *Milton Co. v. Council of Unit Owners of Bentley Place Condo.*, 729 A.2d 981, 989 (Md. 1999) (stating that “the likely purpose [of the Legislature]” in adopting a representative-action provision “was to avoid a multiplicity of suits”).

The appropriateness of a representative action is particularly compelling here, where the vast majority of the alleged damages are rooted in systemic design and construction errors. For example, Plaintiff has alleged damages to, *inter alia*, foundations, roofing, support walls, utility systems, mechanical systems, exhaust and ventilation systems, and electrical wiring. J.A. 000057-90. These common-element claims can best be addressed at trial, not by unit-by-unit testimony that will take weeks of trial time, but efficiently, through expert testimony supported by the already exhaustive inspection efforts that have been conducted to date.

In sum, perhaps out of recognition that narrowing the scope of damages available through a representative action would lead to the sort of inefficiencies and needlessly duplicative litigation efforts the Defendants propose in this case, the statute allows

⁴ Although the Uniform Act has been twice revised, comment 3 to § 3-102 has remained constant, emphasizing the importance of representative suits.

Plaintiff to pursue *all* claims affecting the common interest community without restriction.

II. *Plaintiff's Answer to Certified Question Two:*

In light of the Act's broad definition of "common interest community," a unit owners' association like Plaintiff can pursue claims for damages to individual units and is an adequate representative of unit owners' interests.

As discussed extensively above, West Virginia Code § 36B-3-102(a)(4) broadly defines the "common interest community" for which a unit owners' association such as Plaintiff may pursue claims on behalf of two or more of its members. The category of so-called "unit specific" damages for which the Circuit Court held Plaintiff could not represent its members appears nowhere in the statute. Rather, under the plain language of the Act, Plaintiff may bring suit as the unit owners' representative on *all* matters influencing or affecting the common interest community, including claims for damages to the common elements as well as to individual units. *See* W. Va. Code § 36B-41-101(4), (7), (33); *id.* § 36B-3-102(a)(4); *see also* *Yacht Club*, 94 P.3d at 1177-1180; *D.R. Horton, Inc.*, 215 P.3d at 699-702. Units are part and parcel of, not separate from, the common interest community.

III. *Plaintiff's Answer to Certified Question Three:*

Individual condominium owners need not be joined under Rule 19 because Plaintiff adequately represents its members' interests and the doctrine of *res judicata* protects Defendants from inconsistent judgments.

Because Plaintiff is empowered to represent the condominium unit owners as to all matters affecting the common interest community, and because the doctrine of *res judicata* protects Defendants from the risk of inconsistent judgments, those owners

need not be joined as plaintiffs in this litigation under Rule 19 of the West Virginia Rules of Civil Procedure.

Rule 19 provides in pertinent part:

A person who is subject to service of process shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

W. Va. R. Civ. P. 19(a).

The Circuit Court held that the condominium unit owners must be joined as plaintiffs under Rule 19 for two reasons. First, even though the Act empowers Plaintiff to bring suit on its own behalf and on behalf of its members, *see* W. Va. Code § 36B-3-102(a)(4), the Circuit Court speculated that the association and its members could have inherently conflicting interests because “[c]onstructional defect cases relate to multiple properties and will typically involve different types of constructional damages . . . [so that] individual parties must substantiate their own claims” J.A. 000599 (Order Certifying Stay) (internal quotation marks omitted) (quoting *D.R. Horton, Inc.*, 215 P.3d at 703-04). If that were true, an association could never bring suit in a representative capacity under the Act, nullifying the Act’s representative-action provision.

Second, the Circuit Court had no basis to believe that Plaintiff and its members have conflicting interests. Plaintiff brought suit on behalf of all of its members, challenging systemic damage to the Complex. This action concerns damage to the Complex caused by third parties and the owners have no claims against or conflicting interests with the association. The unit owners clearly believe that Plaintiff adequately

represents their interests—they have chosen to allow Plaintiff to pursue claims on their behalf, and Plaintiff has represented their interests vigorously for almost three years. In that time, no unit owner has exercised the right to file their own action.⁵ The court imagined a conflict where none exists.

Moreover, the Circuit Court erroneously relied on the quoted language from *D.R. Horton*, 215 P.3d at 703-04. *See* J.A. 000599. The *D.R. Horton* court did *not* hold that an owners' association could never pursue claims on behalf of its members for constructional defects, as the Circuit Court apparently believed. Rather, the Nevada Supreme Court held that an association could represent its members in pursuing claims for constructional defects under the Uniform Act, but that it must do so in accordance with class action principles. The court therefore remanded the case to the trial court to determine the extent to which common claims predominated over individual claims. *See D.R. Horton*, 215 P.3d at 703-04. That part of the court's holding is inapplicable to this case because it unnecessarily imports class action principles into a case controlled by the Uniform Act, and one that all parties agree is not a class action. *See id.* Common interest community owners' associations are permitted by statute to act on behalf of

⁵ Deposition testimony supports this conclusion. For example, unit owner Stephen Mick testified as follows:

Q: Do you consider yourself to be a party participating in the lawsuit?

A: Personally, no. I feel that the Homeowners' Association would represent me.

Q: Do you feel that the lawsuit is intended to address claims or concerns that you might have within the four corners of your unit 4312?

A: Yes. I would hope that whatever remedy comes out of this would remedy some of my issues, yes.

J.A. 000785 (Mick Dep. Tr. at 75 (Oct. 18, 2010)).

their members, in lieu of their members filing their own suits. See W. Va. Code § 36B-3-102(a)(4). If any member believes the association will not adequately represent his or her interests, the member may choose to bring an individual action alleging damage to his or her individual unit. Plaintiff is acting in a representative capacity, not as a class representative.

The Circuit Court also held that joinder was necessary because, if the owners were not joined under Rule 19, they would be able to seek relief from Defendants after this litigation is resolved, exposing Defendants to the risk of inconsistent or double obligations. J.A. 000601. There is no such risk. All of Plaintiff's members will be bound under established principles of claim preclusion, which "preclude the expense and vexation attending to relitigation of causes of action which have been fully and fairly decided." *Myers v. W. Va. Consol. Pub. Ret. Bd.*, 704 S.E.2d 738, 752 (W. Va. 2010) (internal quotation marks omitted). If an owner tries to bring suit against Defendants for damage to his condominium unit after this case is resolved, his suit will be barred by the doctrine of *res judicata*. *Res judicata* applies because: (1) there would have been a final adjudication on the merits in this action; (2) the actions would involve either the same parties or persons in privity with those parties; and (3) the unit owner's causes of actions would either be identical to those presented in this case or would be such that they could have been resolved in this action had they been presented. See Syl. Pt. 4, *Blake v. Charleston Area Med. Ctr., Inc.*, 498 S.E.2d 41 (W. Va. 1997) (outlining the elements of *res judicata*).

Accordingly, all unit owners will be bound by any settlement or judgment reached by the parties in this case—a conclusion strongly supported by persuasive appellate authority. See *Owens v. Tiber Island Condo. Ass'n*, 373 A.2d 890, 894-95

(D.C. 1977) (holding that the trial court properly granted summary judgment in a case filed by condominium owners challenging an earlier settlement because the owners' association was statutorily entitled to bring and settle the earlier claims on behalf of the owners); *Gomez-Ortega v. Dorten, Inc.*, 670 So.2d 1107, 1108 (Fla. Dist. Ct. App. 1996) (holding that condominium purchasers were barred by the doctrine of *res judicata* from asserting their claims in a subsequent suit because they were in privity with the original plaintiff, the condominium association). As the Utah Supreme Court held in interpreting the Uniform Act,

[i]f any unit owner represented [by the management committee that brought suit on behalf of 108 owners] subsequently seeks to raise the same issues which are now advanced by the management committee, *res judicata* would protect these defendants from that subsequent litigation. Where the management acts as the legal representative to the claims here litigated, present and successive owners asserting identical claims would be barred from subjecting the defendants to multiple suits.

Brickyard Homeowners' Ass'n Mgmt. Comm., 668 P.2d at 541.

In concluding that a settlement or other resolution in this case would not bind individual owners, the Circuit Court wrongly relied on *Siller v. Hartz Mountain Assocs.*, 461 A.2d 568, 570 (N.J. 1983), a case that involved a statute wholly different from the Uniform Common Interest Ownership Act. In *Siller*, the association and the unit owners had filed suit against the defendant developer: the association brought claims for damage to the common elements and the owners brought claims against the developer for damage to their individual units. The court was asked to determine whether the association could settle its claims relating to the common areas and bind unit owners to that settlement. The court held that such a settlement would be binding on the unit owners. *See id.* at 570-75. The owners could, however, still maintain claims for damage to their individual units. *See id.* That case has no persuasive value because

such a settlement could not be binding on claims involving individual units under New Jersey law—although that state’s statute gives associations the exclusive right to bring claims arising from the common elements, it does not give an association any authority to bring suit for damage to individual units. *See id.* at 573-75. New Jersey has not adopted the Uniform Act.

West Virginia’s Act is very different. It allows unit owners to bring their own suit or to allow the association to do so on their behalf. *See W. Va. Code § 36B-3-102(a)(4)*. In doing so, “the Legislature was attempting to give the unit owner at the outset a choice as to whether to bring his suit individually or whether to allow the management committee to bring his suit in connection with other unit owners.” *Brickyard Homeowners’ Ass’n Mgmt. Comm.*, 668 P.2d at 542. Such a choice is logical because “[i]n many cases the unit owners are best represented by the management committee since the amount of damage suffered to each individual owner may not warrant the legal expense each would incur in seeking redress.” *Id.* The Legislature clearly “did not intend to authorize both means of suit in contravention of the principle of *res judicata*.” *Id.*

Because the unit owners and Plaintiff do not have conflicting interests and because unit owners will be bound by any resolution in this case under the doctrine of *res judicata*, Rule 19 does not require that the unit owners be joined as plaintiffs. Complete relief may be afforded without their participation, and Defendants are not subject to the risk of double or inconsistent judgments. *See W. Va. R. Civ. P. 19(a)*. Plaintiff therefore may pursue its claims in a representative capacity on behalf of those owners, and may settle and release all claims against Defendants in the event that the

parties agree to a settlement.⁶ “Nothing would be gained by forcing a class action upon the [complex] unit owners nor in requiring that each of them be made parties as the statute offers a less burdensome alternative for legal representation.” *Id.* Indeed, allowing the association to speak with one voice on behalf of its more than 200 members would greatly benefit not only the continued litigation and trial of the case, but also will greatly facilitate settlement negotiations and increase the likelihood of settlement.

IV. *Plaintiff's Answer to Certified Question Four:*

Because Plaintiff represents its members' interests and because its members will be bound by any resolution reached in this case under the doctrine of *res judicata*, Plaintiff necessarily may settle and release any and all claims against Defendants.

The Circuit Court held that Plaintiff could not settle and release claims on behalf of the unit owners. J.A. 000610. The Circuit Court was wrong. As explained *supra*, Plaintiff may pursue all claims on behalf of its members as to matters affecting the common interest community. *See* W. Va. Code § 36B-3-102(a)(4). And as discussed above, the unit owners and their successors in interest will be bound by any settlement reached between Plaintiff and Defendants under the doctrine of *res judicata*. *See Owens*, 373 A.2d at 894-95; *Gomez-Ortega*, 670 So.2d at 1108; *Brickyard Homeowners' Ass'n Mgmt. Comm.*, 668 P.2d at 541-42. Plaintiff may therefore settle all claims on behalf of its members.

⁶ Should the Association not pursue this case in good faith or in the best interests of the unit owners, the unit owners could seek recompense from the Association. *See* W. Va. Code § 31E-1-101 *et seq.* (the Nonprofit Corporations Act, which provides that nonprofit corporations must act in good faith and in the corporation's best interests).

The Circuit Court also asked this Court to determine how individual unit owners could be given reasonable notice of any settlement and release. J.A. 000610. Such notice is unnecessary—all parties agree that this case is not a class action. Plaintiff brought suit under the Act as the owners’ legal representative, not as a class member. It essentially stands in the shoes of the owners. Accordingly, the owners do not need to participate in or have notice of any settlement reached by the parties. Nonetheless, to address Defendants’ concerns, and out of an abundance of caution, the parties reached an agreement that culminated in the entry of an Agreed Order Establishing Procedure for Resolving Claims on December 17, 2010. J.A. 000215. Under that Order, the unit owners will be given notice of the terms of any settlement reached between Plaintiff and Defendants, and will be given the opportunity to object to such settlement. *Id.* The parties also agreed to allow the Court to approve any settlement. *Id.* While that procedure is not required by the Act, Plaintiff concluded that procedure would facilitate settlement in this case, and agreed to its implementation.

V. *Plaintiff’s Answer to Certified Question Five:*

Plaintiff may pursue claims for lost rent or inability to rent or sell units on behalf of the owners of affected units because those claims arise from damage to the common interest community and are shared by two or more unit owners.

Because Plaintiff may pursue claims involving any and all matters affecting the common interest community on behalf of two or more of its members without restriction, *see* W. Va. Code § 36B-3-102(a)(4), as discussed in greater detail above, Plaintiff may pursue claims for lost rent or inability to sell. The Circuit Court concluded that Plaintiff could not pursue those claims. J.A. 000610. But the Circuit Court failed to recognize that those claims arise from damage to and defects in the common interest

community and involve more than two unit owners—the owners cannot rent or sell their units because of the systemic damage to the Complex. *See id.*; *see also Owens*, 373 A.2d at 895 (holding that property values are matters affecting the common interest community for which an owners’ association may bring suit in a representative capacity); J.A. 000001 (Chart of Owner Complaints reflecting that twenty-eight unit owners have tried to rent or sell their units and were unable to do so); *cf. Sandy Creek Condo. Ass’n v. Stold & Enger, Inc.*, 642 N.E.2d 171, 176 (Ill. App. Ct. 1994) (although the misrepresentation claims did not apply to all of the owners in the common interest community, the association could pursue those claims because “[a]lthough not all unit owners were affected by the allegedly fraudulent statements of the defendants, the Act statutorily grants the Association standing to bring an action if more than one unit is affected”).

If allowed to stand, the Circuit Court’s ruling would lead to extraordinary and frankly intolerable judicial inefficiencies. As the Circuit Court would have it, on one hand the Association would be permitted to pursue claims affecting only the common elements, but, on the other, would not be able to recover lost-rent damages the unit owners suffered as a result of defects affecting the common elements. Those claims would have to be pursued separately, if at all. There is no benefit to this approach, other than to serve the Defendants’ apparent divide-and-conquer strategy.

Plaintiff may pursue claims for lost rent or inability to rent or sell under the Act.

VI. Plaintiff's Answer to Certified Question Six:

Testimony from a representative sample of unit owners will allow Plaintiff an opportunity to present its case efficiently and with proof sufficient to support its allegations, and at the same time will afford Defendants a fair opportunity to defend against Plaintiff's claims.

Finally, the Circuit Court has asked that this Court determine the appropriate scope of depositions and trial testimony from unit owners and tenants. The Circuit Court concluded that deposition and trial testimony from *all* past and present unit owners and tenants—upwards of 200 persons—was appropriate. Under the circumstances of this case, and given the mandate that courts reject attempts to conduct discovery that “is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome, or less expensive,” W. Va. R. Civ. P. 26(b)(1)(A), the Circuit Court’s conclusion was wrong.

Where, as in this case, the damages sought affect all or nearly all units in a condominium development, only a representative group of unit owners need testify at deposition and trial. The case of *Milton Co. v. Council of Unit Owners of Bentley Place Condominium*, 708 A.2d 1047, 1055 (Md.App. 1998), is instructive. In *Milton*, the court upheld a jury verdict for damages stemming from plumbing and HVAC defects in favor of all 240 unit owners—and only seven unit owners testified at trial. *Id.* The Court reasoned that where Maryland’s Condominium Act authorized the homeowners’ association to sue in its own name on behalf of the unit owners, and the jury received evidence that the alleged defects affected nearly all 240 units, testimony from a small representative sample of unit owners was sufficient to support the association’s claim for damages to all individual units. *Id.*

As in *Milton*, Plaintiff is statutorily authorized to sue on its behalf and on behalf of two or more affected units, and the claims at issue affect all or nearly all units and unit owners. For example, Plaintiff's negligent marketing and sales claims, W. Va. Code §§ 36B-4-108, -118, arise from the marketing and sales activities of one individual, Defendant Frank Koehler. Mr. Koehler, retained by Defendant Collegiate Homes, mailed uniform marketing materials to the parents of incoming WVU freshmen. The materials, which remained unchanged during the marketing campaign, falsely represented that transportation would be provided for owners and tenants to and from campus, that purchasing a unit would be a safe investment, and that all materials contained within the public offering statement were true and accurate.

The alleged design and construction flaws are similarly amenable to common proof. All eighty-four units were built using the same plans and specifications, and revisions to those plans were applied across-the-board to all units. The flaws include inadequate HVAC systems, erosion and collection of water around foundation walls, improper roofing installation, malfunctioning sewage pump and lift stations, freezing of exposed water lines, separation of siding from the building, improperly installed railings, electrical box placement in violation of code and cracked sidewalks. *See supra* at 4-6.

In discovery, Plaintiff has provided voluminous materials outlining these flaws and the monetary damages necessary to correct them. An association officer has testified as Plaintiff's Rule 30(b)(7) designee regarding all complaints and repairs. All Association officers have been deposed, as have members who own units in each of the seven buildings. And Plaintiff's expert witnesses have provided extensive reports outlining the flaws and repair costs, and have given or will be deposed by the

Defendants, all of whom have their own expert witnesses. Moreover, those experts have conducted six days (and counting) of on-site inspections of the exterior and interior areas of the Complex, including invasive testing.

Under these circumstances, testimony from a representative sample of unit owners and from Rule 30(b)(7) designees, coupled with complete testimony from both sides' expert witnesses, is sufficient both for discovery and trial purposes. To require testimony from all unit owners and tenants would be wasteful, inefficient, and duplicative, and runs counter to the representative-action provisions of the Uniform Act.

Conclusion

For these reasons, Plaintiff urges the Court to answer the certified questions as proposed herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of January, 2012, true and accurate copies of the foregoing **Petitioner's Brief** were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

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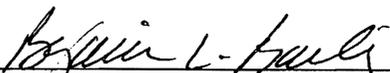
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