**IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA**
**BUSINESS COURT DIVISION**

**GLADE SPRINGS VILLAGE PROPERTY OWNERS ASSOCIATION, INC., a West Virginia non-profit corporation,**

**Plaintiff,**

**vs.**

**Civil Action No.: 19-C-357**
**Presiding: Judge Dent**
**Resolution: Judge Lorensen**

**EMCO GLADE SPRINGS HOSPITALITY, LLC, a West Virginia limited liability company; ELMER COPPOOLSE, an individual; JAMES TERRY MILLER, an individual; R. ELAINE BUTLER, an individual; and GSR, LLC, a West Virginia limited liability company,**

**Defendants,**

**and**

**EMCO GLADE SPRINGS HOSPITALITY, LLC, a West Virginia limited liability company, and GSR, LLC, a West Virginia limited liability company,**

**Counterclaim Plaintiffs,**

**vs.**

**Civil Action No.: 19-C-357**
**Presiding: Judge Dent**
**Resolution: Judge Lorensen**

**GLADE SPRINGS VILLAGE PROPERTY OWNERS ASSOCIATION, INC., a West Virginia non-profit corporation**

**Counterclaim Defendant.**

## ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter came before the Court this 19th day of March, 2021, upon Plaintiff's Motion for Summary Judgment to Provide Food and Beverage at The Haven. The Plaintiff, Glade Springs Village Property Owners Association, Inc., by counsel, Ramonda C. Marling,

Esq., and Defendants, EMCO Glade Springs Hospitality, LLC and GSR, LLC, by counsel, Arie M. Spitz, Esq., have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

## FINDINGS OF FACT

1. This matter surrounds the claims in the Amended Complaint, wherein GSVPOA asserted claims against EMCO and GSR (the Moving Defendants) premised upon their alleged respective breach of various contracts with GSVPOA. *See* Am. Compl.

2. On August 25, 2020, this Court entered an Order granting Defendants' motion for a preliminary injunction, wherein Defendants obtained a preliminary injunction enjoining the POA from operating its restaurant, The Haven, which is located on the POA's Woodhaven Golf Course property. *See* Ord. Granting Prelim. Inj., 8/25/20.

3. On December 29, 2020, Plaintiff, Glade Springs Village Property Owners Association, Inc. (hereinafter "Plaintiff" or "POA"), filed Plaintiff's Motion for Summary Judgment to Provide Food and Beverage at The Haven, moving this Court to grant it summary judgment as to unenforceability of the noncompete covenant in the Declaration for Glade Springs Village and the POA's "unencumbered property right to provide food and beverage services at The Haven and, accordingly, to dissolve the preliminary injunction restraining [the POA] from providing such services. *See* Pl's Mot., p. 1-2. Specifically, Plaintiff contends the doctrines of laches and equitable estoppel/acquiesce bar Defendant GSR from enforcing the noncompete covenant because it abandoned its right to enforce the noncompete when it declined to object to the POA operating food and beverage services at The Haven since 2010 in direct

competition with it. *Id.* at 12-13. Additionally, Plaintiff argues its motion should be granted because it has now terminated the noncompete covenant via termination letter to Justice Holdings, LLC, who it avers is the current Declarant under the Declaration, under its rights under West Virginia Code §36B-3-105. *Id.* at 2-4, 8-9.

4. On January 28, 2021, Defendants, EMCO Glade Springs Hospitality, LLC and GSR, LLC (hereinafter "Defendants" or "the Resort") filed their Response in Opposition to Plaintiff's Motion for Summary Judgment to Provide Food and Beverage at The Haven, arguing the motion should be denied because laches and equitable estoppel do not apply because the Resort's restaurants did not actually compete with The Haven until 2020 because EMCO managed both The Haven and the Resort's restaurants. *See* Defs' Resp., p. 5-6. Further, Defendants argued the POA failed to brief the key issue upon which the UCIOA argument is based. *Id.* at 14. Specifically, Defendants averred if the POA argues Judge Burnside's Orders in another civil action should apply to this litigation, and the UCIOA should apply to Glade Springs, Defendants must be given the opportunity to read and respond to such arguments. *Id.* at 15. Defendants thus requested the Court rule on the issue of laches now and to order further briefing as to the UCIOA's applicability and Judge Burnside's Orders applicability. *Id.* at 14-15.

5. On February 11, 2021, Plaintiff filed its Reply to Defendants' Response in Opposition to Plaintiff's Motion for Summary Judgment to Provide Food and Beverage at The Haven, arguing laches and equitable estoppel are appropriate because EMCO merely provided management services for both The Haven and the Resort's restaurants, and the profits from the Resort's restaurants went to GSR, while the profits from The Haven went to EMCO and Plaintiff, and importantly, not to GSR, and thus GSR and Plaintiff were competing, and had been competing since 2010. *See* Reply, p. 5-6. Further, Plaintiff put forth in argument in the Reply

that because of the doctrine of collateral estoppel, Defendants are precluded from arguing the UCOIA does not apply to Glade Springs Village, explaining why it believes Judge Burnside's Orders from another litigation should apply to this case. *Id.* at 5-19.

6. On February 25, 2021, this Court entered an Order Denying Plaintiff's Motion for Summary Judgment in Part and Ordering Further Briefing, denying the motion in part on the issue of laches/equitable estoppel/acquiesce, and ordering further briefing on the issue of collateral estoppel, giving Defendants an opportunity to read and respond to Plaintiff's Reply argument regarding the same. *See* Ord. 2/25/21.

7. On March 12, 2021, Defendants filed EMCO and GSR's Response Brief Addressing Collateral Estoppel, arguing the POA has not satisfied the elements of collateral estoppel in order to apply Judge Burnside's orders to the case at bar, and because they have not, their motion for summary judgment should be denied. *See* Def's Resp. Brief, p. 2.

8. The Court finds the issue ripe for adjudication.

## STANDARD OF LAW

This matter comes before the Court upon a motion for partial summary judgment. Motions for summary judgment are governed by Rule 56, which states that "judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c). West Virginia courts do "not favor the use of summary judgment, especially in complex cases, where issues involving motive and intent are present, or where factual development is necessary to clarify application of the law." *Alpine Property Owners Ass'n, Inc. v. Mountaintop Dev. Co.*, 179 W.Va. 12, 17 (1987).

Therefore, "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. Pt. 3, *Aetna Cas. and Surety Co. v. Fed. Ins. Co. of New York*, 148 W.Va. 160, 171 (1963); Syl. Pt. 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992); Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52 (1995). A motion for summary judgment should be denied "even where there is no dispute to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom." *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59 (internal quotations and citations omitted).

However, if the moving party has properly supported their motion for summary judgment with affirmative evidence that there is no genuine issue of material fact, then "the burden of production shifts to the nonmoving party 'who must either (1) rehabilitate the evidence attacked by the movant, (2) produce additional evidence showing the existence of a genuine issue for trial or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f)." *Id.* at 60.

## CONCLUSIONS OF LAW

The Plaintiff filed the instant Plaintiff's Motion for Summary Judgment to Provide Food and Beverage at The Haven, arguing the doctrines of laches and equitable estoppel/acquiesce bar Defendant GSR from enforcing the noncompete covenant because it abandoned its right to enforce the noncompete when it declined to object to the POA operating food and beverage services at The Haven since 2010 in direct competition with it. *See* Pl's Mot., p. 12-13.

The Court notes that on February 25, 2021, it denied the instant motion in part on the laches and equitable estoppel/acquiesce argument. The Court has now received and reviewed full briefing on the collateral estoppel issue. The Court turns now to that issue.

Plaintiff has made an argument surrounding the doctrine of collateral estoppel and the application of Judge Burnside's Orders in the "Justice Holdings litigation"[1] cited by the parties, as well as the application of the Uniform Common Owners Interest Act (West Virginia Code §36B-3-105 *et seq.*). Plaintiff has argued that summary judgment in its favor is appropriate because it has now terminated the noncompete covenant at the heart of this motion via termination letter to Justice Holdings, LLC (who Plaintiff avers is the current Declarant under the Declaration) under its rights under West Virginia Code §36B-3-105. *See* Pl's Mot., p. 2-4, 8-9. Plaintiff argues this is because the POA provided notice of termination of that covenant under West Virginia Code §36B-3-105, it has the power to terminate contracts with Justice Holdings, LLC under the Uniform Common Owners Interest Act (West Virginia Code §36B-3-101 *et seq.*), and that the Uniform Common Owners Interest Act (West Virginia Code §36B-3-101 *et seq.*) applies to Glade Springs Village in this litigation because Judge Burnside ruled the same via Order in the Justice Holdings litigation. *Id.* at 18.

The Court notes that by prior Order, Defendants obtained a preliminary injunction enjoining the POA from operating its restaurant, The Haven, which is located on the POA's Woodhaven Golf Course property, due to the restrictive covenant not to compete. *See* Ord. Granting Prelim. Inj., 8/25/20.

The Non-Compete Covenant reads as follows:

> 22. Non-competition. No commercial lot or any parcel of land subject to these Protective Covenants or to this Declaration shall be used to operate any business which competes in any manner with Glade Springs Resort L.L.C.[2]'s food....

[1] The Court notes this case is Raleigh County Civil Action No. 19-C-481-P, J. Burnside presiding. *See* Pl's Mot., p. 3.

[2] The Court notes it has been proffered that Defendant GSR, LLC is successor-in-interest to Glade Springs Resort, L.L.C. *See* Reply, p. 3.

*See* Defs' Resp., p. 3.

The Court also notes it has already found in its August 25, 2020 Preliminary Injunction Order that in 2010, Cooper Land Development, Inc. deeded the Woodhaven property, including the property upon which The Haven sits, to the POA. *See* Ord. Granting Prelim. Inj., 8/25/20, ¶18. This deed specifically stated that the conveyance was made subject to the covenants and restrictions set forth in the May 25, 2001 Declaration for Glade Springs Village (hereinafter "Declaration")[3]. *See* Defs' Resp., p. 3.

However, Plaintiff subsequently filed the instant motion, stating that circumstances changed since the Court's August 2020 Order when, in or around October 2020, Plaintiff unilaterally terminated Restrictive Covenant No. 22 regarding non-competition via letter to Justice Holdings, LLC. As such, the issue before the Court is whether Plaintiff is able, under the UCIOA, to unilaterally terminate Restrictive Covenant No. 22 regarding non-competition in this civil action.

First, the Court addresses the issue of the applicability of Judge Burnside's Orders in the "Justice Holdings litigation" cited by the parties, specifically regarding the application of the Uniform Common Owners Interest Act (West Virginia Code §36B-3-101 *et seq.*).

"The application of the doctrine of collateral estoppel is discretionary with the trial court and rests upon a number of factual predicates, therefore, a writ of prohibition will not issue on the basis that the trial court abused its discretion in failing to enforce collateral estopped." Syl. Pt. 7, *Conley v. Spillers*, 171 W. Va. 584, 301 S.E.2d 216. The doctrine of collateral estoppel "is

[3] The Court noted and explained in its prior Order that Woodhaven golf course was not included in this original Declaration, but was annexed via the May 4, 2010 Supplemental Declaration which was executed by Glade Springs Resort Limited Liability Company and Cooper Land Development, Inc., annexing the Woodhaven golf course property, and making Woodhaven subject to the original Declarations, including the non-compete clause. *See* Ord. Granting Prelim. Inj., 8/25/20, ¶¶11, 16.

designed to foreclose re-litigation of issues in a second suit which have actually been litigated in the earlier suit even though there may be a difference in the cause of action between the parties of the first and second suit." *Conley v. Spillers*, 301 S.E.2d 216, 219 (W. Va. 1983). Collateral estoppel has four elements under West Virginia law, all of which must be satisfied in order for the doctrine to be invoked:

> (1) the issue previously decided is identical to the one presented in the action in question;
> (2) there is a final adjudication on the merits of the prior action;
> (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and
> (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

*Bell v. Perkins*, No. 19-0019, 2021 W. Va. LEXIS 43, at *12–13 (W. Va. Feb. 16, 2021); *see also Peters v. Rivers Edge Mining, Inc.*, 224 W. Va. 160, 179, 680 S.E.2d 791, 810 (2009) (The satisfaction of all four elements are required for an issue to be collaterally estopped).

First, the Court considers the first factor, whether the issue decided in the related Justice Holdings matter is identical to the one presented in the case at bar. The Court considers that while the Defendants readily concede that Judge Burnside's Orders find that UCIOA applies to the Glade Springs Village Declaration, Judge Burnside's Orders do not contain any finding concerning, whether The Haven specifically is subject to the Glade Springs Village Declaration under UCIOA. *See* POA's Exhibits A, B, and T (Judge Burnside's Orders). This is especially important because it has been proffered to the Court that the POA and Justice Holdings are currently litigating the extent to which various real properties ostensibly within Glade Springs Village are properly subject to the Declaration pursuant to UCIOA. *See* Def's Suppl. Resp. Brief, p. 13. For these reasons, the POA cannot invoke the doctrine of collateral estoppel in this case to obtain a ruling that UCIOA applies to The Haven because Judge Burnside never

addressed it specifically. The POA cannot satisfy the first element of collateral estoppel: that "the issue previously decided is identical to the one presented in the action in question." Syl. Pt. 1, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114.

Second, the Court addresses the second factor, whether there is final adjudication on the merits of the prior action. Importantly, the Justice Holdings matter is still pending. *See* Def's Suppl. Resp. Brief, p. 10. As such, there has not been "a final adjudication on the merits of the prior action" necessary to meet the second element of collateral estoppel, which requires adjudication of a prior *action* and not merely adjudication of an *issue*. *See Rovello v. Lewis Cty. Bd. of Educ.*, 381 S.E.2d 237, 239 (W. Va. 1989). Syl. Pt. 3, *Conley v. Spillers*, 301 S.E.2d 216 (W. Va. 1983), and Syl. Pt. 1, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). Therefore, even if this Court were to find that the issue previously decided was identical to the one presented in the case at bar, which it does not, there has not been the required final adjudication of the prior action. As such, the POA has not satisfied the second element of collateral estoppel.

Third, the Court considers the third factor, whether "the party against whom the doctrine is invoked was a party or in privity with a party to a prior action". Here, Defendants' supplemental response brief has put forth sufficient evidence that the necessary privity is not present in this instance. Defendants have shown that the person in against whom collateral estoppel is being asserted against (Defendants) have not had a prior opportunity to litigate the issue. *See* Def's Suppl. Resp. Brief, p. 8. The Supreme Court of Appeals of West Virginia has stated: that [a] fundamental due process point relating to the utilization of collateral estoppel is that any person against whom collateral estoppel is asserted must have had a prior opportunity to have litigated his claim." Syl. Pt. 8, *Conley v. Spillers*, 171 W. Va. 584, 301 S.E.2d 216. The Supreme Court of Appeals of West Virginia has stated:

> "Privity is not established . . . from the mere fact that persons may happen to be interested in the same question or in proving the same facts." 46 Am. Jur. 2d Judgments § 532 (1969). While the concept of privity is difficult to define precisely, it has been held that "a key consideration for its existence is the sharing of the same legal right by the parties allegedly in privity." *BTC Leasing, Inc. v. Martin*, 685 S.W.2d 191, 198 (Ky. App. 1984). This consideration is to ensure that the interests of the party against whom collateral estoppel is being asserted have been adequately represented because of his purported privity with a party at the initial proceedings. *See BTC Leasing Inc., supra*; 46 Am. Jur. 2d Judgments § 532.

*State ex rel. Clifford v. W. Va. Office of Disciplinary Counsel*, 745 S.E.2d 225, 234 (W. Va. 2013)(citing *State v. Miller*, 459 S.E.2d 114, 124 (W. Va. 1995)).

The Supreme Court of Appeals of West Virginia has incorporated federal courts' approach to privity, noting that the following types of relationships are "sufficiently close" to justify preclusion:

> First, a non-party who has succeeded to a party's interest in property is bound by any prior judgments against the party . . . . Second, a non-party who controlled the original suit will be bound by the resulting judgment . . . Third, federal courts will bind a non-party whose interests were represented adequately by a party in the original suit.

*Conley*, 301 S.E.2d at 225.

"[P]rivity exists if a nonparty either substantially controlled a party's involvement in the initial litigation or conversely, permitted a party to the initial litigation to function as its *de facto* representative." *Gribben v. Kirk*, 466 S.E.2d 147, 157 n.21 (W. Va. 1995) (citing 18 Wright & Miller, et al., *Federal Practice and Procedure* § 4466 at 430 (1981) (stating that "preclusion is fair so long as the relationship between the nonparty and a party was such that the nonparty had the same practical opportunity to control the course of the proceedings that would be available to a party")). The requirement of "adequate representation" requires "either special procedures [in the first suit] to protect the nonparties' interests or an understanding by concerned parties in the

first suit that it was brought in a representative capacity." *Taylor v. Sturgell*, 553 U.S. 880, 897 (2008). Notably, an individual's appearance in a representative capacity, such as the representative of a corporate entity, does not trigger application of the doctrine of collateral estoppel to claims involving that individual personally. *See Conley v. Spillers*, 171 W. Va. 584, 595, 301 S.E.2d 216, 226 ("A party appearing in an action in one capacity, individual or representative, is not thereby bound by or entitled to the benefits of the rules of *res judicata* in a subsequent action in which he appears in another capacity.").

Here, Defendants have asserted that no Defendant is a successor in interest to Justice Holdings, LLC. *See* Def's Suppl. Resp. Brief, p. 11. Defendants have further proffered that Justice Holdings does not have any ownership interest in EMCO or GSR and no Defendant has ownership interest in Justice Holdings. *Id.* Further, Defendants pointed out that while Mr. George is now listed as counsel of record as co-counsel for Defendants in this civil action, he was not at the time that the two Burnside Orders were being argued in the Justice Holdings Action. *Id.* Defendants proffered Mr. George represents Justice Holdings in the Justice Holdings action – he does not represent the interests of any Defendant in this action in the Justice Holdings action. *Id.* at 5. He was not permitted to represent nonparty Justice Holdings, LLC at a deposition in this matter. *Id.* at 4. Likewise, Defendants showed that Mr. Spitz, counsel for Defendants in the instant civil action, was not permitted by Judge Burnside to participate in a hearing in the Justice Holdings action. *Id.* at 4-5, 11, *see also Id.* at Exhibit 6 (Justice Holdings Litigation Hearing Transcript).

In short, Mr. George was not permitted by this Court to represent nonparty Justice Holdings, LLC in matters in this civil action, and Mr. Spitz was not permitted by Judge Burnside to represent Defendants in this matter (who are nonparties to the Justice Holdings litigation) in

hearings in the Justice Holdings Litigation. The Court finds that these facts indicate that the Defendants *in this matter* were not adequately represented in the Justice Holdings litigation. West Virginia law is clear that there must be more than a common interest between the parties, and it is apparent to this Court that the requisite privity is not present in the case at bar for the application of collateral estoppel. As such, the POA has not satisfied the third element of collateral estoppel.

The Court next examines the fourth element of collateral estoppel, whether the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action. As explained above in the Court's analysis of the purported privity between the Defendants in the instant civil action and in the Justice Holdings litigation, the Defendants in this action did not have an opportunity to litigate the issues decided by Judge Burnside in the Burnside Orders in the Justice Holdings litigation. Importantly, Defendants have proffered evidence of counsel for these Defendants attending a hearing related to the Burnside Orders and was specifically not permitted to participate or object, because he did not represent anyone in that litigation. *Id.* at 4; *see also Id.* at Exhibit 6 (Justice Holdings Litigation Hearing Transcript).

For these reasons, the POA has not satisfied the fourth element of collateral estoppel. As the Court has concluded that the POA has not satisfied any of the necessary elements of collateral estoppel, the Court declines to apply the doctrine of collateral estoppel to the instant issues.

However, second, even if the Court were to find at this time that the Uniform Common Owners Interest Act (West Virginia Code §36B-3-101 *et seq.*) applies, the Court would still deny the instant motion. A review of the "Act" reveals West Virginia Code §36B-3-105 clearly applies to the ability of an "executive board elected by the unit owners" to terminate certain

"contract[s] or lease[s] between the association and a declarant or an affiliate of a declarant", *not provisions of a Declaration.* W. Va. Code Ann. § 36B-3-105 (West). The Court considers while the word "contract" (and not the word "declaration") is used throughout West Virginia Code §36B-3-105, Declarations are addressed in other statutes within the Act. For example, West Virginia Code §36B-2-101, which governs the creation of common interest communities, clearly explains the role of a recorded Declaration. West Virginia Code §36B-2-101 provides as follows:

> (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 Ann. § 36B-2-101 (West).

A review of the Act shows that there are a host of requirements of a recorded Declaration that are not present regarding a contract. For instance, a Declaration must be recorded pursuant to §36B-2-101, whereas a contract is generally not recorded. *Id.* Further, a statute governs the construction of a Declaration; this is not so with a contract. W. Va. Code §36B-2-103. Additionally, West Virginia Code §36B-2-105 contains fourteen enumerated items[4] a

[4] West Virginia Code §36B-2-105 mandates that the "declaration must contain:
(1) The names of the common interest community and the association and a statement that the common interest community is either a condominium, cooperative or planned community;
(2) The name of every county in which any part of the common interest community is situated;
(3) A legally sufficient description of the real estate included in the common interest community;
(4) A statement of the maximum number of units that the declarant reserves the right to create;
(5) In a condominium or planned community, a description of the boundaries of each unit created by the declaration, including the unit's identifying number or, in a cooperative, a description, which may be by plats or plans, of each unit created by the declaration, including the unit's identifying number, its size or number of rooms and its location within a building if it is within a building containing more than one unit;

Declaration *must* contain. This is mandatory statutory language. Again, this is not the case with a contract. Finally, the Court notes West Virginia Code §36B-2-109 *requires* a Declaration to include plats and plans. W. Va. Code Ann. § 36B-2-109(a) (West). A contract does not.

The Court finds that if the drafters had meant for West Virginia Code §36B-3-105 to apply to Declarations, it would have used the word "declaration". Instead, West Virginia Code §36B-3-105 plainly only uses the word "contract" throughout.

Further, the Court considers the purpose of §36B-3-105's conferred ability for the board of a POA to terminate *contracts*. As explained in one secondary source, the public policy of such power is in allowing the owners associations power to terminate a management contract, not giving it the power to unilaterally terminate provisions it finds to be unfavorable in a Declaration or other deeds and binding covenants that run with the land. "To date, approximately one-half of the states have passed legislation aimed at protecting the condominium purchaser from the long-

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(6) A description of any limited common elements, other than those specified in section 2-102(2) and (4), as provided in section 2-109(b)(10) and, in a planned community, any real estate that is or must become common elements;
(7) A description of any real estate, except real estate subject to development rights, that may be allocated subsequently as limited common elements, other than limited common elements specified in section 2-102(2) and (4), together with a statement that they may be so allocated;
(8) A description of any development rights (section 1-103(14)) and other special declarant rights (section 1-103(29)) reserved by the declarant, together with a legally sufficient description of the real estate to which each of those rights applies, and a time limit within which each of those rights must be exercised;
(9) If any development right may be exercised with respect to different parcels of real estate at different times, a statement to that effect together with (i) either a statement fixing the boundaries of those portions and regulating the order in which those portions may be subjected to the exercise of each development right or a statement that no assurances are made in those regards, and (ii) a statement as to whether, if any development right is exercised in any portion of the real estate subject to that development right, that development right must be exercised in all or in any other portion of the remainder of that real estate;
(10) Any other conditions or limitations under which the rights described in paragraph (8) may be exercised or will lapse;
(11) An allocation to each unit of the allocated interests in the manner described in section 2-107;
(12) Any restrictions (i) on use, occupancy and alienation of the units, and (ii) on the amount for which a unit may be sold or on the amount that may be received by a unit owner on sale, condemnation or casualty loss to the unit or to the common interest community or on termination of the common interest community;
(13) The recording data for recorded easements and licenses appurtenant to or included in the common interest community or to which any portion of the common interest community is or may become subject by virtue of a reservation in the declaration; and
(14) All matters required by sections 2-106, 2-107, 2-108, 2-109, 2-115, 2-116 and 3-103(d).
(b) The declaration may contain any other matters the declarant considers appropriate.

term "sweetheart" management contract. Although the statutory approaches vary, the general trend is to set a time limit on the term that a management contract may bind the association once the unit owners have gained control." § 8:45. Other statutory approaches, 1 Law of Condominium Operations § 8:45 (*citing* 36B-3-105). For example, if in a state like West Virginia which has adopted a provision in its UCOIA that allows termination of contracts executed while the developer controlled the association, an association dissatisfied with the developer's contract for cable service can terminate the agreement after transition has occurred. § 8:62. Statutory limitations and termination provisions, 1 Law of Condominium Operations § 8:62. Although these are secondary sources, the Court finds this explanation of the public policy regarding §36B-3-105 instructive when examining contracts versus Declarations.

The Court's review of the Act also causes it to consider the eighteen enumerated powers conferred onto an association in §36B-3-102[5]. Amending or terminating a Declaration is not

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[5] W. Va. Code § 36B-3-102(a) provides that the association, even if unincorporated, may:
(1) Adopt and amend bylaws and rules and regulations;
(2) Adopt and amend budgets for revenues, expenditures, and reserves and collect assessments for common expenses from unit owners;
(3) Hire and discharge managing agents and other employees, agents, and independent contractors;
(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;
(5) Make contracts and incur liabilities;
(6) Regulate the use, maintenance, repair, replacement, and modification of common elements;
(7) Cause additional improvements to be made as a part of the common elements;
(8) Acquire, hold, encumber, and convey in its own name any right, title, or interest to real estate or personal property, but (i) common elements in a condominium or planned community may be conveyed or subjected to a security interest only pursuant to section one hundred twelve of this article and (ii) part of a cooperative may be conveyed, or all or part of a cooperative may be subjected to a security interest, only pursuant to section one hundred twelve of this article;
(9) Grant easements, leases, licenses, and concessions through or over the common elements;
(10) Impose and receive any payments, fees, or charges for the use, rental, or operation of the common elements, other than limited common elements described in subsections (1) and (4), section one hundred two, article two of this chapter, and for services provided to unit owners;
(11) Impose charges for late payment of assessments and, after notice and an opportunity to be heard, levy reasonable fines for violations of the declaration, bylaws, rules, and regulations of the association;
(12) Impose reasonable charges for the preparation and recordation of amendments to the declaration, resale certificates required by section one hundred nine, article four of this chapter, or statements of unpaid assessments;
(13) Provide for the indemnification of its officers and executive board and maintain directors' and officers' liability insurance;

listed in its enumerated powers. Further, § 36B-3-103(b) expressly provides that the "executive board may not act on behalf of the association to amend the declaration…". W. Va. Code Ann. § 36B-3-103(b) (West). The Court's review and analysis of the Act reveals it is clear that the Act did not intend for the POA to have the ability to unilaterally terminate a provision of the recorded Declaration by termination letter.

The Court considers the POA's argument that §36B-2-103 confers on it the ability to sever any provision of the Declaration and bylaws. *See* Pl's Reply, p. 12; *see also* Def's Mot., p. 17. The Court finds this argument unpersuasive as it relates to the POA's ability to terminate a contract. West Virginia Code § 36B-2-103(a) provides, "All provisions of the declaration and bylaws are severable." However, this means that even if one provision is deemed invalid and unenforceable, the Legislature has dictated that the other provisions of the declarations shall not be invalidated. West Virginia Code §36B-2-103 does not confer on owners associations the ability to sever covenants and other provisions of a recorded Declaration it does not like, only to be able to unilaterally then terminate them under §36B-3-105 as a contract.

Accordingly, because the Court finds the POA does not have the power to unilaterally terminate Restrictive Covenant No. 22 regarding non-competition, even if the Act were to apply to Glade Springs Village (including The Haven), Plaintiff's Motion for Summary Judgment to Provide Food and Beverage at The Haven must be denied.

## CONCLUSION

(14) Assign its right to future income, including the right to receive common expense assessments, but only to the extent the declaration expressly so provides;
(15) Exercise any other powers conferred by the declaration or bylaws;
(16) Exercise all other powers that may be exercised in this state by legal entities of the same type as the association;
(17) Institute litigation or administrative proceedings in its own name against a unit owner for the collection of dues or assessments that are overdue or in arrears; and
(18) Exercise any other powers necessary and proper for the governance and operation of the association.

Accordingly, it is hereby ADJUDGED and ORDERED that Plaintiff's Motion for Summary Judgment to Provide Food and Beverage at The Haven is hereby DENIED.

The Court notes the objections and exceptions of the parties to any adverse ruling herein. The Clerk shall enter the foregoing and forward attested copies hereof to all counsel, to any *pro se* parties of record, and to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

March 19, 2021
date of entry

JUDGE JENNIFER P. DENT
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION