

**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 DEFENDANTS' MOTION TO DISMISS SECOND AMENDED
COMPLAINT**

This matter came before the Court this 9th day of September 2021, upon Defendants,
Elmer Coppoolse, James Terry Miller, and R. Elaine Butler's Motion to Dismiss Second

Amended Complaint. The Plaintiff, Glade Springs Village Property Owners Association, Inc., by counsel, Mark A. Sadd, Esq., and Defendants, Elmer Coppoolse, James Terry Miller, and R. Elaine Butler, by counsel, Bryan N. Price, 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 Second Amended Complaint¹, wherein Plaintiff, Glade Springs Village Property Owners Association, Inc. (hereinafter “Plaintiff” or “POA”), asserted claims against Defendants, EMCO Glade Springs Hospitality, LLC, GSR, LLC, Elmer Coppoolse, James Terry Miller, and R. Elaine Butler premised upon their alleged respective breach of various contracts with GSVPOA, as well as accounting claims and a claim of unjust enrichment. *See* Second Am. Compl. Specifically, with regard to the instant motion is Count III against Elmer Coppoolse, James Terry Miller, and R. Elaine Butler (hereinafter “Defendants”) which is a cause of action for breach of fiduciary duty. *See* Def’s Mot., p. 3; *see also* Second Am. Compl. The Court also notes that the Second Amended Complaint alleges that Glades Springs Village is a common interest community governed by the Uniform Common Interest Ownership Act (hereinafter “UCIOA”). *See* Second Am. Compl., ¶1.

2. The Declaration is specifically referred to in Plaintiff’s *Second Amended Complaint*. Additionally, the Declaration, as well as the May 15, 2001 Plat Map incorporated in

¹ The Court notes that by Agreed Order Granting Plaintiff’s Motion for Leave to File Second Amended Complaint, entered May 20, 2021, the Second Amended Complaint in this civil action is deemed filed as of May 20, 2021. *See* Ord., 5/20/21.

the Declaration by reference, are both of public record with the office of the Clerk of the County Commission of Raleigh County, West Virginia. The Court finds that it may take judicial notice of the Declaration and Plat Map, and otherwise give consideration to the Declaration and Plat map as referenced by, and an integral part to, the *Second Amended Complaint*.

3. On June 9, 2021, Defendants, Elmer Coppoolse, James Terry Miller, and R. Elaine Butler, filed the instant Motion to Dismiss Second Amended Complaint, arguing this civil action should be dismissed pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil

Procedure:

Because the 2001 Declaration does not reserve development rights or special declarant rights which would have enabled the GSV declarant to add the property/units of the individuals Plaintiff purports to represent to GSV, no fiduciary duty is owed to them by Coppoolse, Miller, and/or Butler. Likewise, since no vote of at least 67% of the GSV unit holders approved amendment of the initial 2001 Declaration to add the property/units of the individuals Plaintiff purports to represent, no fiduciary duty is owed to them by Coppoolse, Miller, and/or Butler.

Motion at p. 12.

4. On July 15, 2021, Plaintiff filed its Response to Motion By Elmer Coppoolse, James Terry Miller, and R. Elaine Butler to Dismiss Plaintiff's Second Amended Complaint, arguing the following:

- 1) W. Va. Code § 36B-2-103(d) precludes this Court from ruling on whether defects to the Declaration are substantial failures that impair marketability to the Lots subject to the Declaration under UCIOA, because UCIOA expressly states that it has no bearing on the issue.
- 2) Cooper Land, as declarant, properly reserved and exercised their development rights as under W. Va. Code § 36B-2-105(a)(8).
- 3) Regardless of whether the Declaration properly reserved development rights, the individual deeds to lots in GSV create a common interest community and subject each lot to the Declaration.
- 4) Under W. Va. Code § 36B-2-117(b), the individual defendants are barred from challenging any amendments to the GSV declaration.

- 5) Defendants should be estopped from asserting that no property was added to GSV after the recording of the Declaration.
- 6) As members of the GSVPOA Board of Directors, Defendants also owed a duty of care and a duty of loyalty to GSVPOA and the property owners of GSV under the West Virginia Non-Profit Corporation Act (W. Va. Code § 31E-1-101 *et seq.*).

5. On July 29, 2021, Defendants filed their Reply.

6. On August 3, 2021, Plaintiff filed a Motion for Leave to File Sur-Reply

Memorandum in Opposition to Motion by Elmer Coppoolse, James Terry Miller, and R. Elaine Butler to Dismiss Plaintiff's Second Amended Complaint, arguing the reply presented a number of arguments warranting response and rebuttal by the POA. *See* Mot. for Leave, p. 2. On August 5, 2021, Defendants filed their Response in Opposition to Plaintiff's Motion for Leave to File Sur-Reply, arguing the POA should not be afforded permission to supplement their Response because Defendants' Reply showed why the Response was flawed. *See* Defs' Resp. to Mot. for Leave, p. 3. On August 6, 2021, the POA filed its Reply in Support of Its Motion for Leave to File Sur-Reply, arguing it should be granted leave to file its requested sur-reply because Defendants made a demonstrably false assertion of fact in its Reply when it averred the Supplemental Declarations were not recorded properly, and the POA is ready and able to "submit to the Court substantial and comprehensive documentary evidence" to support the averment that the Supplemental Declarations were, in fact, recorded properly. *See* Reply to Mot. for Leave, p. 1-2. On August 9, 2021, this Court granted said Motion for Leave, and ordered the requested Sur-Reply be filed by August 19, 2021. On August 9, 2021, the POA filed its Sur-Reply, averring Defendants' alleged defects in the Declaration do not invalidate the creation nor affect title to any Lot or unit and do not affect Glade Springs Village as a common interest community. *See* Sur-Reply, p. 2. The POA also directed the Court to a brand new decision on point from Alabama, there being no West Virginia cases on point, *Brett/Robinson Gulf Corp. v.*

Phoenix on the Bay II Owners Ass'n, 2021 Ala. LEXIS 66, 2021 WL 2677854 (Ala. June 30, 2021), which held that under UCIOA's sister statute, the Uniform Condominium Act (as adopted in Alabama), defects in a declaration creating a condominium by operation of law do not affect title to units conveyed to others. *Id.* at 2. Further, the POA avers that contrary to what was alleged in the Reply, the Supplemental Declarations are indexed properly in the Raleigh County Clerk's Office. *Id.* at 8.

7. On August 17, 2021, the POA filed their Supplement to Sur-Reply in Opposition to Motion by Elmer Coppoolse, James Terry Miller, and R. Elaine Butler to Dismiss Plaintiff's Second Amended Complaint, with regard to Exhibit N of its Sur-Reply, "to evidence that the Developer placed the Supplemental Declarations, together with plats of subdivision depicting the Lots described in them of record in the Clerk's office over a period of many years". *See* Suppl. Sur-Reply, p. 3.

8. The Court finds the issue ripe for adjudication.

STANDARD OF LAW

First, this matter comes before the Court upon a motion to dismiss under Rule 12(b)(6). "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syl. Pt. 3, *Chapman v. Kane Transfer Co., Inc.*, 160 W.Va. 530 (1977). "Since the preference is to decide cases on their merits, courts presented with a motion to dismiss for failure to state a claim construe the complaint in the light most favorable to the plaintiff, taking all allegations as true." *Sedlock v. Moyle*, 222 WVa. 547, 550, 668 S.E.2d 176, 179 (2008). "We recognized, however, that

liberalization in the rules of pleading in civil cases does not justify a carelessly drafted or baseless pleading.” *Par Mar v. City of Parkersburg*, 183 W.Va. 706, 711 (1990).

A motion to dismiss under Rule 12(b)(6) enables a circuit court to weed out unfounded suits.” *Williamson v. Harden*, 214 W.Va. 77, 79 (2003).

CONCLUSIONS OF LAW

As an initial matter, the Court addresses the matter of the various exhibits the parties have submitted with the briefing on the instant motion to dismiss.

The West Virginia Supreme Court of Appeals has held: This Court has previously held that “[o]nly matters contained in the pleading can be considered on a motion to dismiss under Rule 12(b) R.C.P., and if matters outside the pleading are presented to the court and are not excluded by it, the motion should be treated as one for summary judgment and disposed of under Rule 56 R.C.P. if there is no genuine issue as to any material fact in connection therewith...” Syl. pt. 4, *United States Fid. & Guar. Co. v. Eades*, 150 W.Va. 238, 144 S.E.2d 703 (1965), *overruled on other grounds by Sprouse v. Clay Communication, Inc.*, 158 W.Va. 427, 211 S.E.2d 674 (1975). *Accord* Syl. pt. 1, *Poling v. Belington Bank, Inc.*, 207 W.Va. 145, 529 S.E.2d 856 (1999). *See also* Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 12(b)(6)[3], at 354 (3d ed. 2008) (“Only matters contained in the pleading can be considered on a motion to dismiss under Rule 12(b)(6). However, if matters outside the pleading are presented to the court and are not excluded by it, the motion must be treated as one for summary judgment and disposed of under Rule 56.”).

However, the West Virginia Supreme Court of Appeals has also recognized that “[n]otwithstanding this general rule, it has been recognized that, in ruling upon a motion to dismiss under Rule 12(b)(6), a court may consider, in addition to the pleadings, documents

annexed to it, and other materials fairly incorporated within it. This sometimes includes documents referred to in the complaint but not annexed to it. Further, Rule 12(b)(6) permits courts to consider matters that are susceptible to judicial notice. *Id.* § 12(b)(6)[2], at 348 (footnote omitted).

The West Virginia Supreme Court of Appeals has analyzed and discussed this rule and exception as follows:

“In general, material extrinsic to the complaint may not be considered on a Rule 12(b)(6) motion to dismiss without converting it to a Rule 56 motion for summary judgment, but there are certain exceptions this rule. As the Second Circuit has explained:

‘The complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference. Even where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint.

... [G]enerally, the harm to the plaintiff when a court considers material extraneous to a complaint is the lack of notice that the material may be considered. Accordingly, where plaintiff has actual notice of all the information in the movant's papers and has relied upon these documents in framing the complaint the necessity of translating a Rule 12(b)(6) motion into one under Rule 56 is largely dissipated.... [O]n a motion to dismiss, a court may consider documents attached to the complaint as an exhibit or incorporated in it by reference, ... matters of which judicial notice may be taken, or ... documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit. Because this standard has been misinterpreted on occasion, we reiterate here that a plaintiff's reliance on the terms and effect of a document in drafting the complaint is a necessary prerequisite to the court's consideration of the document on a dismissal motion; mere notice or possession is not enough.”

Chambers v. Time Warner, Inc., 282 F.3d 147, 152–53 (2d Cir.2002) (citations, alterations in original, and internal quotation marks omitted); *see also New Beckley Mining Corp. v. Int'l Union*,

United Mine Workers of Am., 18 F.3d 1161, 1164 (4th Cir.1994) (citing *Cortec Indus. v. Sum Holding, L.P.*, 949 F.2d 42, 47–48 (2d Cir.1991)); *Miller v. Pac. Shore Funding*, 224 F.Supp.2d 977, 984 n. 1 (D.Md.2002); 5A Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure: Civil* § 1327 & n. 7 (3d ed. 2004) (citing cases). *cited by Forshey v. Jackson*, 222 W. Va. 743, 748, 671 S.E.2d 748, 753 (2008).

Here, the Defendants have proffered the Declaration of Covenants and Restrictions of Glade Springs Village, West Virginia as Exhibit A to the instant motion. POA has proffered the West Virginia Secretary of State’s Certificate of Incorporation for the POA as Exhibit A to the Response, an Order by Judge Burnside in *Justice Holdings LLC v. Glade Springs Village Property Owners Association, Inc.*, Raleigh County Civil Action No. 19-C-481 as Exhibit B to the Response, a Development Map recorded at the Office of the Clerk of the Raleigh County Commission at Deed Book 5004, Page 5046, and Map File 4-262 which Defendants aver was “[r]ecorded along with...the “May 4, 2001 Deed” as Exhibit C to the Response, a May 4, 2001 Option Agreement recorded at Clerk of the Raleigh County Commission at Deed Book 5004, page 5047 and Memorandum of Lease Clerk of the Raleigh County Commission at Deed Book 5004, page 5047 and Deed Book 5004, page 5048 wherein Cooper Land entered into an Option Agreement and a Lease with Glade Springs Resort, Limited Liability Company, and others as Exhibits D and E to the Response, deeds in which Cooper Land as Declarant or “Developer” purportedly conveyed the common elements to the POA and conveyed the individual lots to the purchasers of those lots, subject to the Declaration once real estate was subjected to the Declaration, as Exhibits F and G to the Response, a May 4, 2001 deed as Exhibit H to the Response, Supplemental Declarations as Exhibits I, J, and K to the Response, and Orders entered by Judge Burnside in Civil Action No. 19-C-481-P as Exhibits L and M to the Response. Further, the POA

proffered additional exhibits to its Sur-Reply, which are Supplemental Declarations attached as Exhibit N to the Sur-Reply, a spreadsheet it created for reference to book and page numbers for the Supplemental Declarations attached as Exhibit O to the Sur-Reply, and copies of the computer-based indices of the index from the Raleigh County Clerk's office attached as Exhibit P to the Sur-Reply. Additionally, the POA proffered an Affidavit of Mark A. Sadd contemporaneously with the Sur-Reply, verifying certain exhibits which were of record with the County Clerk's office. The Court notes the Response also referred repeatedly to a previous Order Granting Defendants' Motion for Preliminary Injunction ("PI Order"). *See* Def's Resp., p. 4. Further, the Court notes the POA filed its Supplemental Sur-Reply and included additional exhibits, namely an Excel spreadsheet itemizing Supplemental Declarations and Supplemental Declarations attached as Exhibits Q, R, and S to the Supplemental Sur-Reply, which it avers is documentary evidence tendered in response to Defendants' Response argument that the Developer as a matter of law failed to add thousands of lots to Glade Springs Village. *See* Suppl. Sur-Reply, p. 3-4. In considering exhibits and attachments were proffered to it in the briefing on the instant motion, the Court hereby concludes that these items are either attached to the Complaint or are of record, allowing the Court to take judicial notice. Therefore, the Court concludes it is not necessary to convert the instant Motion to Dismiss to a Motion for Summary Judgment.

Second, with regard to the issue contained in the instant motion, Plaintiff alleges in its *Second Amended Complaint* that it is a common interest community and, as such, "GSV [Glade Springs Village] is governed by West Virginia's *Uniform Common Interest Ownership Act* ('UCIOA'). *See* W. Va. Code § 36B-1-101 *et seq.*" Specific to Defendants Coppoolse, Miller and Butler (collectively "Individual Defendants"), Plaintiff's *Second Amended Complaint* asserts that UCIOA placed upon them a statutory fiduciary duty during their tenure on the GSVPOA executive

board of directors in favor of the GSV members, and that Coppoolse, Miller and/or Butler breached that fiduciary duty. The instant motion asserts that no fiduciary duty existed under UCIOA because the property of the GSV members that Plaintiff purports to represent was never made subject to the GSV declaration as required by UCOIA. Specifically, the Individual Defendants aver that the Declaration only contains a one-acre tract of land which is not owned by any of the members of GSV and/because the Declaration did not properly reserve development or special declarant rights so as to permit the developer to add property to GSV in compliance with UCIOA. Therefore, this Court is tasked with analyzing the issue of whether or not Glade Springs Village is part of a common interest community under the UCIOA and therefore governed by the UCIOA, and a result thereof, whether the Individual Defendants owe a fiduciary duty as directors under the statutory requirements of the UCIOA.

The determination of whether a defendant in a particular case owes a duty to the plaintiff is not a factual question for the jury; rather the determination of whether a plaintiff is owed a duty of care by a defendant must be rendered by the court as a matter of law. Syl. Pt. 5, *Aikens et al. v. Debow*, 208 W. Va. 486, 541 S.E.2d 576 (emphasis added). Moreover, “Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review.” Syl. Pt. 1, *United Bank v. Stone Gate Homeowners Ass’n, Inc.*, 220 W. Va. 375, 647 S.E.2d 811 (2007); citing Syl. Pt. 1, *Appalachian Power Co. v. State Tax Department of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424 (1995).

UCIOA is a comprehensive statute; it provides rules for both the (1) creation of common interest communities and (2) ongoing management of common interest communities by an association of unit owners. UCIOA, as codified in West Virginia, is divided into four articles. Article 1 contains definitions and general provisions. Article 2 governs the creation of common

interest communities, while Article 3 governs association management. Lastly, Article 4 of UCIOA provides a set of rules to protect purchasers of future interests. A common interest community “may be created pursuant to [UCIOA] only by recording a declaration executed in the same manner as a deed.” W. Va. Code § 38B-2-201. 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. *Id.* Under UCIOA, a “Declaration” includes any instruments, however denominated, that create a common interest community, including any amendments to those instruments. W. Va. Code § 36B-1-103(13).

Again, the Individual Defendants argue that UCIOA only imposes a fiduciary duty with respect to unit owners and Glade Springs Village does not have any unit owners because the properties which would form the basis of such units were not added to Glade Springs Village in compliance with UCIOA since the Declaration did not properly reserve to the declarant the ability to add property. Specifically, the Individual Defendants argue the initial Declaration creating Glade Springs Village subjects a 1-acre parcel of property as common property of GSV. *See* GSV Declaration, recorded on May 30, 2001 with the Clerk of the County Commission of Raleigh County at Deed Book/Page 5004/6485 (Exhibit A of the Motion to Dismiss). The Individual Defendants assert that that single, 1-acre tract of property initially made subject of the Declaration is the only real property added to the Glade Springs Village common interest community in compliance with the provisions of UCIOA. Defendants argue, consequently the Glade Springs Village members Plaintiff purports to represent as alleged in the *Second Amended Complaint* are not unit owners under UCIOA and, therefore, are not owed a fiduciary duty under UCIOA.

The Court considers that Judge Burnside’s orders in Civil Action No. 19-C-481, which are not binding on this Court, but found and determined that Glade Springs Village is a common interest community. However, Judge Burnside was not faced with the argument that the Declaration was drafted in such a way that a single, 1-acre tract of property initially made subject of the Declaration is the only real property added to the Glade Springs Village common interest community in compliance with the provisions of UCIOA. Therefore, with that in mind, the Court analyzes as follows.

The Court considers that the Alabama case proffered by the POA is directly on point, and no West Virginia cases have addressed the instant argument. Said Alabama case, *Brett/Robinson Gulf Corp. v. Phoenix on the Bay II Owners Ass’n*, 2021 Ala. LEXIS 66, 2021 WL 2677854 (Ala. June 30, 2021), held that under UCIOA’s sister statute, the Uniform Condominium Act (as adopted in Alabama), defects in a declaration creating a condominium² by operation of law do not affect title to units conveyed to others. In that case, the Appellees (Association) contended that the four areas in dispute in that civil action were not lawfully created Units and that the same constituted common areas of the condominium. *Brett/Robinson*, at *1.

The Appellants argued that the trial court erroneously found that the provisions of the Second Declaration, and its exhibits (including the as-built plans), that purported to create and identify the four commercial units were invalid and of no force and effect and that the trial court erroneously reformed the Second Declaration in accordance with that finding. In their counterclaims and third-party complaints, the Appellees argued that the language in the Second Declaration and its exhibits that purported to create the commercial units did not comply with the requirements in the Act for the creation of a unit. Thus, they sought a judgment declaring that no

² In West Virginia, a “condominium” “is one of three types of common interest community under UCIOA. Glade Springs Village is a “planned community” type of common interest community.

commercial units existed and that the areas designated as commercial units were part of the common elements of POB II. *Id.* at *26-27.

The *Brett/Robinson* Court found that the Second Declaration:

[R]eferenced each of the commercial units by name, designated the square footage for each of the commercial units, and designated the ownership interest of the four commercial units. Thus, the Second Declaration and its exhibits, when read as a whole, make it clear that POB II would consist of 104 residential units and the 4 commercial units. Accordingly, the Second Declaration appears to satisfy the requirements of § 35-8A-205(a)(4).

Id. at *27-28.

The *Brett/Robinson* Court then turned to Code of Ala. § 35-8A-205(a)(5) and former Code of Ala. § 35-8A-209(a), which:

[P]rovide that a declaration must include “[a] description of the boundaries of each unit created by the declaration.” Former § 35-8A-209(a), Ala. Code 1975, provided that “[p]lats and plans are part of the declaration.” The as-built plans depicted each of the commercial units and showed boundary lines for each of those units. Thus, on its face, the Second Declaration satisfies the requirements of § 35-8A-205(a)(5).

Id. at *28; *see* W. Va. Code § 36B-2-105(a)(5); W. Va. Code § 36B-2-109 (“Plats and plans are a part of the declaration . . .”).

Importantly, the Court notes that the Court in *Brett/Robinson* wholly rejected Defendants in this civil action’s very same theory.

This Court finds that it must follow this same, sound logic. It must come to the same conclusion. Even if the Declaration in the instant civil action were defective, the Court, taking into account W. Va. Code § 36B-1-110, must conclude that the allegedly defective **future** special declarant development rights do not “result in a holding that such a unit was not validly

created” in the **past**. *Brett/Robinson*, at *28-29; *see* W. Va. Code § 36B-2-103(d); W. Va. Code § 36B-1-113.

Stated another way, the Court concludes UCIOA itself cures the alleged defects in W. Va. Code § 36B-2-103(d): “Title to a unit and common elements is not rendered unmarketable or otherwise affected by reason of an insubstantial failure of the declaration to comply with this chapter. Whether a substantial failure impairs marketability is not affected by this chapter.” The Court concludes the UCIOA forbids adjudication of title (or marketability of title) to Lots when the dispute is only about special declarant or development rights, including whether they were properly reserved or created. *See* Pl’s Resp. p. 10-11. Defectively reserved or created special declarant or development rights have no effect on the title to Lots or units. *Id.* at 11. The Court notes the deeds to those Lots refer specifically to the Declaration and state that the Lot is subject to the Declaration. To extend that point, the Defendants may not claim that a defectively reserved or created special declarant or development right defeats the creation or existence of Glade Springs Village, its constituent Lots or unit or its character as a common interest community under UCIOA or even other West Virginia law. *Id.*

By deed dated May 4, 2001, Glade Springs Resort Limited Liability Company conveyed unto Cooper Land Development 463 acres. This deed acknowledged that Glade Springs Resort Limited Liability Company and Cooper entered into an Agreement for Sale of Real Property that covered the eventual sale of 2,950 acres; however, this deed conveyed only 463 of those 2,950 acres, while acknowledging that the parties entered into an Option Agreement that granted Cooper a lease on the remaining property and the exclusive right to purchase the remaining parts of the property in segments.” Recorded along with this deed was a map (the “Development

Map”) that contained not only the 463 acres, but the entire 2,950 which Cooper Land, had an option to purchase, along with a layout of lots of GSV.

On May 4, 2001, Cooper Land entered into an Option Agreement and a Lease with Glade Springs Resort, Limited Liability Company, and others. The Option Agreement and Memorandum of Lease are both of record. The Option Agreement refers to the May 4, 2001 Deed and Development Map and states:

The Map basically depicts two tracts of land, GSV West (Glade Springs Village West) and GSV East (Glade Springs Village East) containing an aggregate of 2,950 acres, more or less (herein referred to as the “Property”) and additionally shows the preliminary proposal for development of the Property (the “Development”) . . .

The property covered by this Option Agreement (**the “Option Property”**) is made up of multiple tracts, **contains in the aggregate 2,487 acres, more or less**, and consists of the Property less the Subject Property (2,950 acres, more or less, minus 463 acres, more or less, or 2,487 acres, more or less). As the parcels in the Subject Property are shaded and numbered "I" or "I G" on the Map, **the Option Property is not shaded** and each of the tracts comprising the Option Property is labeled and identified by one of the following designations: the numbers “2”, “3”, “4”, “5”, “6” or “7”; the letter “G”; the letters “MPCD”; or the letters “G” and “MPCD”.

See Exhibit D at Exhibit A (bold emphasis in original).

On May 25, 2001, Cooper Land Development, Inc. and Plaintiff Glade Springs Village Property Owners Association Inc. executed the Declaration of Covenants and Restrictions (hereinafter “Declaration”) which incorporated Protective Covenants. The Declaration provides that the “Developer” has the right to add property to the Declaration. Specifically, the Declaration states:

Section 2. Additions to Existing Property. Additional properties of the Developer situated in Raleigh County, West Virginia, as well as any other lands within Raleigh or an adjoining county, whether or not owned by the Developer, may be subjected to this Declaration or any part thereof in the following manner:

(A) The Developer, its successors and assigns, *shall have the right, but not the obligation*, to subject additional properties to the

provisions of this Declaration in future stages of development regardless of whether said properties are owned by the Developer. Any additional properties shall be compatible with the existing development. Such additional properties shall become subject to assessments as hereinafter provided. Under no circumstances shall this Declaration or any Supplemental Declaration or the plan of the Declaration bind the Developer, its successors and assigns, to make additions to the existing properties or in anywise preclude the Developer, its successors and assigns, from conveying lands it may own but which have not been made subject to this Declaration, free and clear of this Declaration or any Supplemental Declaration.

(B) The additions authorized hereunder shall be made by filing of record a Supplemental Declaration with respect to the additional property which shall extend the plan of this Declaration or any part thereof to such property, and the owners, including the Developer, in such additions shall immediately be entitled to all privileges herein provided.

(C) Such Supplemental Declarations, if any, may contain such complementary additions and modifications of the covenants, conditions and restrictions contained in this Declaration as may be necessary to reflect the different character, if any, of the added properties as are not inconsistent with the plan of this Declaration. In no event, however, shall such Supplemental Declarations revoke, modify or add to the covenants, conditions and restrictions established by this Declaration or any Supplemental Declaration with respect to the then Existing Property.

See Motion, Exhibit A, Declaration at Art. II, § 2 (emphasis added in italics; bold in original).

On June 22, 2001, Cooper Land recorded the first Supplemental Declaration of Covenants and Restrictions (together with a plat), which is of record. In addition to Supplemental Declaration, there are several other Supplemental Declarations to the Declaration of record. *See* Pl’s Resp., p. 7. During the period of time Cooper Land was Declarant (or “Developer”), once real estate was subjected to the Declaration, Cooper Land would then convey the common elements to GSVPOA and convey the individual lots to the purchasers of those lots, subject to the Declaration. *Id.* This Court previously made similar findings in regard to the

supplemental declarations in this civil action when the parties litigated the Stonehaven and Woodhaven golf courses and related facilities in motions practice before the undersigned.

The plain terms of the Declaration at Article II, Section 2(A) of the Declaration provide that the Developer, its successors and assigns, shall have the right, but not the obligation, to subject additional properties to the provisions of the Declaration in future stages of development. *Id.* at 13. The Development Map is clearly labeled as “Glade Springs Village.” *Id.* at 15. The Development Map also “shows the preliminary proposal for development of [Glade Springs Village].” *Id.* The Development Map shows the layout of lots that are to be added to GSV. *Id.* at 16. Clearly, future development was contemplated, the initial land had just not been developed yet. Further evidencing the contemplated development, is the fact that Individual Defendants signed one of the supplemental declarations. *Id.* at 22. On October 5, 2011, via the *Supplemental Declaration of Covenants and Restrictions*, (which is of record), the POA, the Declarant of Glade Springs Village, and GSV added land/property to GSV pursuant to Article 2, Section 2 of the Declaration, and subjected it to the Declaration. *Id.* at 21. This supplemental declaration was signed by Defendant Coppoolse, on behalf of GSR, LLC; Defendant Miller, on behalf of Justice Holdings, LLC, the Declarant of Glade Springs Village; and Defendant Butler, on behalf of GSVPOA. *Id.* at 22. It is contradictory for those Individual Defendants to now assert that in their capacity as Board Members of GSVPOA, they did not have the power to add property to GSV when they represented to others that they did have that power and exercised it. *Id.*

At the time the Declaration was recorded, the Developer owned the first 463 acres of the 2,950 acres of the property subject to the Cooper Land option. One would only need to look in the record room to see that (1) Cooper Land already owned 463 acres by virtue of the May 4, 2001 deed 463 acres in Raleigh County, which also contained a Development Map which

showed the layout of future development of Glade Springs Village (“GSV”) and (2) by virtue of the Option Agreement, had an option on the remaining 2,487 acres of GSV. Under UCIOA, a declaration consists of “any instruments, however denominated, that create a common interest community, including any amendments to those instruments.” W. Va. Code § 36B-1-103(13); *see also Restatement (Third) of Property: Servitudes* § 6.2(5). Thus, under the plain terms of the Declaration the property potentially subject to the Declaration is identified. However, because the Court has concluded that UCIOA itself cures the alleged defects, the Court does not need to analyze whether or not Cooper Land, as declarant, properly reserved and exercised their development rights as under W. Va. Code § 36B-2-105(a)(8). The Court finds that even if the UCIOA itself had not cured the alleged defects, the supplemental declarations and development map of record evidence the contemplation of, and clearly describe, the development of specific lots to become Glade Springs Village, a common interest community.

Likewise, it appears that clearly, under the terms of the Declaration and Option Agreement, there was a specific time period for the Declarant to exercise its Development rights. *Id.* at 17-18. However, again, because the Court has concluded that UCIOA itself cures the alleged defects, the Court does not need to analyze whether or not Cooper Land, as declarant, properly reserved and exercised their development rights as under W. Va. Code § 36B-2-105(a)(8).

For all of these reasons, the Court finds the instant motion must be DENIED.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Defendants, Elmer Coppoolse, James Terry Miller, and R. Elaine Butler’s Motion to Dismiss Second Amended Complaint 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.

September 9, 2021
date of entry

/s/ Jennifer P. Dent
JUDGE JENNIFER P. DENT
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION