

**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 GRANTING PLAINTIFF AND THIRD-PARTY DEFENDANTS' MOTION TO  
DISMISS FRAUD AND CONSPIRACY TO COMMIT FRAUD AS WELL AS CIVIL  
RICO COUNTS IN GSR, LLC'S COUNTERCLAIM**

This matter came before the Court this 27<sup>th</sup> day of September 2021, upon Plaintiff, Glade Springs Village Property Owners Association, Inc., and Third-Party Defendants, David McClure,

Cindy Fernald, Allen Tienhert, Rick Lay, and Rennie Hill’s Motion Dismiss Fraud and Conspiracy to Commit Fraud As Well As Civil RICO Counts in GSR, LLC’s Counterclaim. The Plaintiff, Glade Springs Village Property Owners Association, Inc., and Third-Party Defendants, David McClure, Cindy Fernald, Allen Tienhert, Rick Lay, and Rennie Hill, by counsel, Ramonda C. Marling, Esq. and Mark A. Sadd, Esq., and Defendants, GSR, LLC, and EMCO Glade Springs Hospitality, 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 Second Amended Complaint<sup>1</sup>, 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.

2. Thereafter, on June 9, 2021, Defendant GSR, LLC (hereinafter “Defendant” or “GSR”), filed its Answer, Counterclaims, and Third-Party Complaint of GSR, LLC and Answer of EMCO Glade Springs Hospitality, LLC. *See* Ctrclm. Relevant to the instant motion are the

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<sup>1</sup> 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.

counts, which are not numbered, titled “Fraud and Conspiracy to Commit Fraud” and “Civil RICO”. *Id.* at ¶¶68-78

3. On July 15, 2021, Plaintiff filed the instant motion, arguing GSR’s fraud claim fails under Rules 9(b) and 12(b)(6) of the West Virginia Rules of Civil Procedure, the claim for conspiracy to commit fraud fails because the underlying fraud claim fails, and because there can be no conspiracy between a corporation and its board members, and the RICO count fails to plead the necessary elements and does not satisfy Rule 9(b)’s heightened pleading standard which also applies to it. *See* Pl’s Mot., p. 2-3.

4. On August 2, 2021, Defendants EMCO and GSR, LLC (hereinafter “Defendants”) filed their Response in Opposition to Glade Springs Village Property Owners Association, Inc. and Third-Party Defendants’ Motion Dismiss Fraud and Conspiracy to Commit Fraud As Well As Civil RICO Counts in GSR, LLC’s Counterclaim, arguing the conduct alleged supports the counts pled, without having to regurgitate the RICO statute or elements of fraud. *See* Def’s Resp., p. 2.

5. On August 16, 2021, Plaintiff and Third-Party Defendants filed their Reply, reiterating its position that the fraud and RICO counts were not pled with particularity, and averring that the Response to the instant motion did nothing to save said claims. *See* Reply, p. 2.

6. The Court finds the issue ripe for adjudication.

### **STANDARD OF LAW**

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 W.Va. 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**

In this matter, Plaintiff alleges dismissal of the counts, which are not numbered, titled “Fraud and Conspiracy to Commit Fraud” and “Civil RICO” is appropriate. First, Plaintiff argues dismissal of the “Fraud and Conspiracy to Commit Fraud” count is appropriate because GSR, LLC did not plead such facts constituting fraud with the required particularity required under Rule 9(b) of the West Virginia Rules of Civil Procedure, and because it does not contain the fundamental elements of a claim for fraud. *See* Pl’s Mot., p. 7-8. Therefore, Plaintiff argues that the cause of action conspiracy to commit fraud fails because there is no viable underlying claim for fraud. *Id.* at 10. Second, Plaintiff argues dismissal of the “Civil RICO” count is appropriate because GSR, LLC fails to assert a viable claim under the relevant RICO statutes and fails to plead the necessary elements of a RICO claim, including failing to establish a pattern/continuity of racketeering activity or a threat of future criminal conduct. *Id.* at 2, 12-17. The Court will address both of these causes of action in turn.

#### **“Fraud and Conspiracy to Commit Fraud”**

It is well-established that “[t]he essential elements in an action for fraud are: “(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied on it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied on it.” *Horton v. Tyree*, 104 W.Va. 238, 242, 139 S.E. 737 (1927); Syl. Pt. 1, *Lengyel v. Lint*, 167 W.Va. 272, 280 S.E.2d 66 (1981); *Sneberger v. Morrison*, 235 W. Va. 654, 670, 776 S.E.2d 156, 172 (2015).

As a general rule, the West Virginia Rules of Civil Procedure permit the assertion of claims by “short and plain statements.” R.C.P., 8(a). Rule 9(b) of the Rules, however, specifically requires that “[i]n all averments of fraud ... the circumstances constituting fraud ... shall be stated with particularity....” R.C.P., 9(b).

The same requirement is included in Rule 9(b) of the Federal Rules of Civil Procedure, the rule on which West Virginia's Rule 9(b) is based. *See* 5 Wright and Miller, Federal Practice and Procedure: Civil 2d § 1297 (1990). In *Hager v. Exxon Corporation*, 161 W.Va. 278, 241 S.E.2d 920 (1978), the West Virginia Supreme Court of Appeals examined the rationale behind the requirement of Rule 9(b) that fraud be stated with particularity. The Court concluded that fraud is of such gravity that the strict requirements of Rule 9(b) were included to afford a party charged with fraud an opportunity to prepare an adequate defense. *See Pocahontas Min. Co. P'ship v. Oxy USA, Inc.*, 202 W. Va. 169, 171, 503 S.E.2d 258, 260 (1998).

Here, the Counterclaims here are centered around Defendant's allegation that the POA issued false invoices to GSR. *See* Pl's Mot., p. 3, 5; *see also* Counterclaim, ¶17, 18, 69. The Court finds the invoices clearly set forth the POA's basis for issuing the invoices and, in three instances, designate the amount due as an estimate while inviting an exchange of information and documents to finalize the invoices. *Id.* at 5.

Issues and disputes with the invoices have come before the Court in prior motions practice in this civil action. The Court has found in a prior Order that the Deed of Easements (“DOE”) lays out a reconciliation process and allows the Resort to be timely reimbursed but gives the POA the opportunity to review and contest the Resort’s charges. *See* Ord., 5/24/21, p. 11.

Further, the Court found that:

The DOE dictates that the parties complete this process by receiving an invoice on the 15<sup>th</sup> of each month, and receiving a **final** reconciliation in reasonable detail for the previous calendar to be made on February 15 of each year. [] It appears that the DOE contemplates good faith actions between the parties monthly, including monthly invoicing and maintaining the expenditures at necessary and prudent levels. It is then anticipated that “to the extent” there has been any “over[payment]” or “under[payment]”, a **final** reconciliation is then mandated in February of each year.

*Id.*

Paragraphs 71-72 to the GSR Counterclaim allege that “The POA and the Third-Party Defendants utilized these false invoices as a basis to refuse to pay GSR the amounts owed to GSR by the POA for GSR’s services rendered from March 2019 through May 2020” and “GSR has suffered, and continues to suffer, damages as a result of the fraudulent conduct and conspiracy of the POA and the Third-Party Defendants.” *See* Counterclaim ¶¶ 71-72.

However, clearly the invoice system is designed to be a system that contemplates good faith actions between the parties monthly, reserving a later reconciliation process. Although GSR disputes POA’s invoices, and thus refers to them as false invoices, this is exactly what the reconciliation process was designed to alleviate.

The Court considers GSR’s Response, which stated as follows: “GSR has alleged that the POA has used the false invoices detailed above to attempt to justify its refusal to pay money owed to GSR and that the POA has not paid GSR’s outstanding invoices. (*See* Counterclaim at ¶¶ 71-72). By

failing to pay GSR the money it's owed, and using the false invoices as the justification for doing so, the POA has forced GSR's reliance." *See Resp.*, p. 5.

The Court has reviewed this argument in the Response and compared it to the language used in the Counterclaim itself. After its review, the Court finds that reliance was not specifically pled in the Counterclaim. A review of the Counterclaim reveals that the requisite particularity does not appear. *See also Bowens v. Allied Warehousing Servs.*, 729 S.E.2d 845, 2012 W. Va. LEXIS 299, 2012 WL 2226447 (W. Va. 2012) (dismissing fraud claim for failing to plead with particularity justifiable reliance on material and false fraudulent conduct).

The Court finds that three of the four of the subject invoices are clearly estimates and invite a discussion. For these reasons, the Court applies this finding to the four elements of fraud.

First, as to the first element of fraud, "that the act claimed to be fraudulent was the act of the defendant or induced by him" (*See Syl. Pt. 1, Lengyel v. Lint*, 167 W.Va. 272, 280 S.E.2d 66 (1981)), the Court finds the POA did issue the invoices at the heart of the fraud claim.

Second, as to the second element of fraud, that "it was material and false" (*See Syl. Pt. 1, Lengyel v. Lint*, 167 W.Va. 272, 280 S.E.2d 66 (1981)), the Court cannot find that the Counterclaim pled that the invoices were material and false. Although GSR calls the invoices false, because it disagrees with the POA's charges, the parties contemplated that they would not see eye to eye on what was included in the invoices, as created a process wherein the invoices were the first step in the billing process, to be followed by a reconciliation process. For these reasons, the invoices cannot be pled to be "false" because they are in dispute.

Third, as to the third element of fraud, that "plaintiff [in this case, Counterclaim Plaintiff Defendant GSR, LLC] relied on it and was justified under the circumstances in relying upon it" (*See Syl. Pt. 1, Lengyel v. Lint*, 167 W.Va. 272, 280 S.E.2d 66 (1981)), the Court cannot find that

reliance has been pled. GSR did not allege that it ever acted upon the invoices or actually paid the disputed invoices. *See* Pl’s Mot., p. 5, 9, 10. Thus, the Court finds the Counterclaim contains no fact or allegation that GSR, LLC relied on the referenced invoices or that any reliance upon such invoices was justified.

Fourth, as to the fourth element of fraud, that GSR, LLC “was damaged because he relied on it” (*See* Syl. Pt. 1, *Lengyel v. Lint*, 167 W.Va. 272, 280 S.E.2d 66 (1981)), the Court finds that as it has found no reliance was pled, it follows that there has been no damage because GSR, LLC relied on it.

For these reasons, the Court finds that the elements of fraud have not been sufficiently pled.

Additionally, the Court considers that part of this cause of action encompassed conspiracy to commit fraud.

A civil conspiracy is not a *per se*, stand-alone cause of action; it is instead a legal doctrine under which liability for a tort may be imposed on people who did not actually commit a tort themselves but who shared a common plan for its commission with the actual perpetrator(s). *Kessel v. Leavitt*, 204 W.Va. 95, 129, 511 S.E.2d 720, 754 (1998).

With no viable fraud claim, there can be no conspiracy to commit fraud as a matter of law. Therefore, the Court finds that the cause of action contained in GSR, LLC’s Counterclaim titled “Fraud and Conspiracy to Commit Fraud” shall be dismissed.

#### Civil RICO

Next, the Court considers the cause of action contained in GSR, LLC’s Counterclaim titled “Civil RICO”. In the claim, GSR, LLC contends that third-party defendants conspired to



engage in multiple instances of mail fraud when it issued the disputed invoices. *See* Pl’s Mot., p. 12.

The Court addresses the necessary element of a pattern of racketeering activity. “For there to be a ‘pattern of racketeering activity,’ there must be ‘at least two acts of racketeering activity, one of which occurred after the effective date of [the RICO statute] and the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity.’ 18 U.S.C. § 1961(5).”

Thus, the analysis must center around the alleged “racketeering activity.” First, as the Court found in the above fraud section of this Order with regard to the subject invoices, spanning a period of two and one-half months, clearly three of the four invoices are estimates and invite a discussion. *See* Reply, p. 6.

“The duration of the alleged racketeering activity is ‘perhaps the most important element of RICO continuity.’” *Jennings v. Auto Meter Prods.*, 495 F.3d 466, 473, 2007 U.S. App. LEXIS 17618, 83 U.S.P.Q.2D (BNA) 1577 (7th Cir. 2007)(citation omitted). In *Jennings*, the Seventh Circuit find that the 10-month period at issue was too short to create a pattern. *Id.* at 475.

In its Response, GSR argues that “the POA’s use of these invoices is ongoing” and that they “pose, a threat of continued illicit activity’ because they continue to be relied upon by the POA and proffered as a basis and justification for the POA’s ongoing failure to properly pay and reimburse GSR.” *See* Def’s Resp., p. 11. However, as discussed in the above fraud section of this Order, reliance was not established. Indeed, it has been proffered that GSR did not pay the disputed invoices.

Further, the Court addresses the element of a threat of continued criminal activity, and finds that the POA’s sending of four invoices, three of which were estimates and invited a

discussion, (and which GSR did not pay) did not pose a threat of present or future criminal activity in the first place. *See Reply*, p. 8. For these reasons, GSR's Counterclaim fails to plead that there is a threat of continued criminal activity and does not meet the particularity requirements for a RICO Claim.

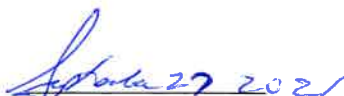
For these reasons, the Court finds that the cause of action contained in GSR, LLC's Counterclaim titled "Civil RICO" shall be dismissed.

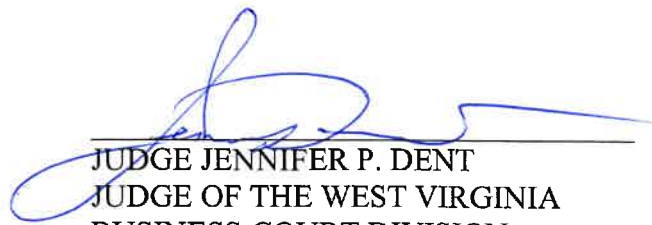
### **CONCLUSION**

Accordingly, it is hereby ADJUDGED and ORDERED Plaintiff and Third-Party Defendants' Motion Dismiss Fraud and Conspiracy to Commit Fraud As Well As Civil RICO Counts in GSR, LLC's Counterclaim is hereby GRANTED.

It is further hereby ADJUDGED and ORDERED that the Counts entitled "Fraud and Conspiracy to Commit Fraud" and "Civil RICO" of the Answer, Counterclaims, and Third-Party Complaint of GSR, LLC and Answer of EMCO Glade Springs Hospitality, LLC is hereby DISMISSED WITH PREJUDICE.

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.

  
date of entry

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