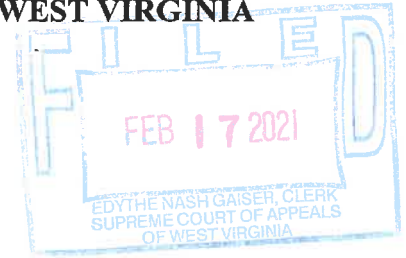


**IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA**

**THE MOUNTAIN LODGE ASSOCIATION,**  
a West Virginia unincorporated non-profit association

**Plaintiff,**



**v.**

**Civil Action No.: 20-C-24**

**(Supreme Court of Appeals Action No. 21-BCD-5)**

**SNOWSHOE MOUNTAIN, INC.,**  
a West Virginia corporation,

**Defendant.**

**DEFENDANT SNOWSHOE MOUNTAIN, INC.'S REPLY IN OPPOSITION TO  
PLAINTIFF'S MOTION FOR REFERRAL TO BUSINESS COURT**

Pursuant to Trial Court Rule 29.06(4), Defendant Snowshoe Mountain, Inc. ("Snowshoe") files this Reply in Opposition to the Motion to Refer to Business Court filed by Plaintiff The Mountain Lodge Association, Inc.'s ("Association"). The Chief Justice of the West Virginia Supreme Court of Appeals should deny Plaintiff's Motion for Referral to Business Court ("Motion") because this is not a dispute that requires specialized treatment to improve the expectation of a fair and reasonable resolution and thus does not meet the criteria for referral to Business Court under West Virginia 29.04. In further support of its Reply in Opposition, Snowshoe offers the following:

**I. INTRODUCTION**

In short, this case involves only two parties, their respective obligations to one another under two documents (a deed and a condominium declaration), and the application of West Virginia's Uniform Condominium Act, as amended by West Virginia's Uniform Common Interest Ownership Act. Given the straightforward nature of the parties' dispute, it is unclear why the Association would attempt to have this case referred to Business Court. It is also unclear why the

Association waited until discovery was almost concluded before seeking a referral to Business Court. The last day the Association can serve written discovery under the operative scheduling order is February 22, 2021, and the deadline to file dispositive motions is April 19, 2021. Indeed, the presiding judge, Judge Robert A. Richardson, is currently holding in abeyance a ruling on Snowshoe's motion to dismiss the First Amended Complaint, which the Court converted into a motion for summary judgment, until the hearing on dispositive motions set for May 15, 2021.<sup>1</sup> Regardless, given the straightforward nature of this case, a referral to Business Court is not necessary; in fact, a referral to Business Court at this juncture would only unnecessarily delay the resolution of this matter.

## **II. Background and Procedural History**

This matter concerns the Snowshoe Mountain Lodge Condominium, a condominium common interest community located on Snowshoe Mountain. The Mountain Lodge complex sits on a 5.01 acre tract of land located in Pocahontas County, West Virginia. Mountain Lodge complex was built in 1982 by a third party, The Commonwealth Group. See Pl.'s Second Am. Compl. Ex.

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<sup>1</sup> During the hearing on Snowshoe's motion to dismiss, Judge Richardson informed Plaintiff's counsel that he had "grave doubts as to the viability of some of the claims asserted by plaintiff. . . ." See Ex. A (10/28/20 Hearing Tr. at 17:24-25. Indeed, Judge Richardson made clear that he understood the issues alleged by the Association. He further summarized the issues when explaining why he had "grave concerns" about the viability of the Association's claims, stating:

I will express that my concern about the plaintiff's claim relates largely to the concept of the right to contract . . . If the parties had, for the past 40 years, conducted their dealings within a contractual framework that does not come under the auspices of West Virginia statutory law as to common-interest ownership properties, I am struggling to see what basis for the Court's intervention to change that contractual arrangement would be . . . that is a fundamental issue that the defendants have – that the defendant has raised in this case and that at least at this stage appears to have some merit.

See *id.* 18:24-19:17.

B (“Conference Center Deed”). It is a four-story building which consists of two, distinct parts: a ground floor, a part of which is designated for a “Conference Center;” and the upper three floors, which are designated for 229 luxury condominium units (“Mountain Lodge Condominium”). *See id.*

By deed dated November 10, 1982, The Commonwealth Group conveyed to Snowshoe Company, Defendant Snowshoe Mountain, Inc.’s (“Snowshoe”) predecessor in interest, the Conference Center located on the ground floor of Mountain Lodge complex. *See* Conference Center Deed. In the Conference Center Deed, The Commonwealth Group excepted, reserved and retained ownership of the remaining portions of the Mountain Lodge building, which make up the Mountain Lodge Condominium, as well as certain rights to and easements for specific uses of the Conference Center that are necessary for the joint ownership of the Mountain Lodge complex. Conference Center Deed at 2, 9-13. The Snowshoe Company was granted corresponding rights and easements with respect to the Mountain Lodge Condominium. Conference Center Deed at 5-8. The Conference Center Deed also imposed certain responsibilities upon the parties with respect to the portions of the Mountain Lodge complex that each party owned, such as insuring, repairing, and maintaining their respective portion of Mountain Lodge, unless otherwise agreed upon. *See* Conference Center Deed at 5-17.

Importantly, the Conference Center Deed was executed in conjunction with a declaration creating a condominium association, which acquired all of the Commonwealth’s rights, interests, and responsibilities created, excepted, reserved, or retained would be transferred to that condominium association. The Association is the condominium association created by that declaration. *See* Pl.’s Second Am. Compl. at ¶ 10. In the thirty years since the Association took

over governance of the Mountain Lodge Condominium, Snowshoe and the Association complied with the declaration with respect to Mountain Lodge Condominium and the Conference Center.

Then, on July 17, 2020, the Association filed suit against Snowshoe. Snowshoe moved to dismiss the Association's original complaint on September 11, 2020. In response, the Association amended its complaint on October 2, 2020. In its Amended Complaint, the Association asserted the following causes of action: Count I (Conference Center Must be Declared a Unit); Count II (Declaratory Judgment under UCIOA); Count III (Declaratory Judgment under UCA); Count IV (Conference Center Part of the Condominium Subject to UCA); Count V (Declaratory Judgement at Common Law); Count VI (Breach of Contract in the Conference Center Deed); Count VII (Quantum Meruit); Count VIII (Unjust Enrichment); Count IX (Rescission of the Conference Center Deed). Snowshoe moved to dismiss the Association's Amended Complaint on October 16, 2020.

The current presiding judge, Judge Robert A. Richardson, scheduled a hearing on Snowshoe's motion to dismiss on October 28, 2020. Prior to the hearing, the Association filed a Rule 56(f) Affidavit in which it attested that it disputed certain factual statements in Snowshoe's motion to dismiss and thus requested additional time to develop an evidentiary record. During the October 28, 2020, this Court converted Snowshoe's motion to dismiss into one for summary judgment and held its ruling on Snowshoe's motion to dismiss in abeyance pending the development of additional evidence in discovery. To that end, the parties mutually agreed to a scheduling order with expedited discovery deadlines. The parties also agreed to a hearing on the motion for summary judgment, which is scheduled for May 19, 2021.

It should be noted that on January 29, 2021, the same day it served its Motion for referral to Business Court, the Association moved for leave to file a Second Amended Complaint to raise

an alternative theory for recovery – namely, the Conference Center Deed should be reformed, which Judge Richardson granted on February 3, 2021. Mountain Lodge advised the Court that its amendment would not interfere with the existing deadlines or the hearing scheduled for May 19, 2021.

### **III. ARGUMENT**

This is a basic, straightforward contract interpretation case. It requires only the application of West Virginia law to two basic documents, a deed and a declaration creating a common ownership community. While the Association goes to great lengths to overcomplicate this case in its Motion for Referral to Business Court, when the actual causes of action asserted in the Second Amended Complaint are reviewed, it is evident no specialized knowledge is required to reasonably and fairly adjudicate this matter. Indeed, it is telling that nowhere in its Motion for Referral to Business Court does the Association actually identify its causes of action.

Specifically, the Association’s primary causes of action are declaratory judgment actions that seek to have the Conference Center owned and operated by Snowshoe declared a unit subject to the declaration creating the Mountain Lodge Condominium, thus making Snowshoe liable for common element expenses.<sup>2</sup> To quote verbatim from the Association’s prayer for relief in its Second Amended Complaint, it seeks the following declarations as part of its primary causes of action for declaratory judgment:

- The Conference Center is a ‘unit’ under UCIOA [West Virginia’s Uniform Common Interest Ownership Act] or UCA [West Virginia’s Uniform Condominium Act].

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<sup>2</sup> The first four specific counts, as identified the Association in its First Amended Complaint, are Count I - “Conference Center Must Be Declared a Unit”; Count II – “Declaratory Judgment under UCOIA”; Count III - “Declaratory Judgment under UCA”; and Count IV - “Conference Center Part of the Condominium Subject to UCA.”

- All provisions of the Declaration that purport to exclude the Conference Center from the operation of UCIOA or UCA are void and unenforceable under UCIOA, UCA or other West Virginia law.
- In the alternative, declaring that all provisions of the Declaration purporting to exclude the Conference Center from the imposition of the Allocated Interests, the Common Expense Liability or liens are void and unenforceable under UCIOA, UCA or other West Virginia law.

Pl.'s Second Am. Compl. at Prayer for Relief (B)-(C), (I).

As is evident from the primary causes of action for declaratory judgment and the request relief, the only issue for Judge Richardson to determine is whether the Conference Center represents a “unit” under either UCA or UCIOA and thus liable for common element expenses. Judge Richardson can apply these two West Virginia statutes in relation to one document, a condominium declaration. No specialized knowledge is required.

In a recent similar case, a homeowner’s association sought referral to Business Court when the case involved only two parties and the legal issue in that case pertained to the application of UCIOA to a Loan Agreement and Promissory Note. *See* Motion and Reply filed in *Justice Holdings LLC v. Glade Springs Village Property Owners Association, Inc.* (Supreme Court Docket No. 20-BCD-02). There, then Chief Justice Armstead found that case did not “require specialized treatment to improve the expectation of a fair and reasonable resolution,” and therefore, denied the request to refer to the matter to Business Court. *Id.* at Admin. Or. The issues raised by the Association’s primary causes of action are no more complicated than that the issues raised in the *Glade Springs Village Property Owners Association* case.

With respect to the remaining six (6) causes of action asserted in the Association’s Second Amended Complaint, each are pled in the alternative to its primary causes of action. A recitation

of those causes of action and the basis for those claims demonstrate these alternative forms of relief are also straightforward, common law causes of action:

- For Count V (“Declaratory Judgment at Common Law”), the Association avers that “[i]n the event the Court does not declare that the Conference Center is a ‘unit’ under either UCIOA or UCA, then [Snowshoe] nonetheless under the common law or principles of servitudes is liable for its fair share of costs and expenses incurred by Plaintiff to maintain, operate, repair, or replace the elements shared in common with the unit owners of Mountain Lodge.” Pl.’s Second Am. Compl. at ¶ 74.
- For Count VI (“Breach of Contract in the Conference Center Deed”), the Association avers the “Conference Center constitutes a contract imposing on [Snowshoe] the costs, expenses, obligations, and liabilities for repairing, replacing, restoring, and maintaining ‘the Building and equipment in connect therewith owned by it unless otherwise mutually agreed upon,’ and Snowshoe breached this contract because of its “failure or refusal to bear or pay its fair share of the costs, expenses, obligations, and liabilities for them has directly and proximately caused [the Association] and its Members damages and injury.” *Id.* at ¶¶ 88, 96.
- For Count VII (“Quantum Meruit”) and Count VIII (“Unjust Enrichment”) the Association avers that it has “conferred upon [Snowshoe] significant value over the years in relation to maintaining, operating, repairing, and replacing the Buildings, Condominium, and the Conference Center,” while Snowshoe refuses to bear its fair share of those costs, which has unjustly enriched or improperly benefited Snowshoe to the detriment to the Association; therefore, the Association asserts is entitled to equitable relief for these costs in “an unknown amount to be determined by a jury.” *Id.* at ¶¶ 102-104, 107-109.
- For Count IX (Reformation of the Conference Center Deed and the Declaration), the Association avers that “[i]n the event that there is an adjudication that the Conference Center Deed and the Declaration, or clauses or provisions therein, or as enforced together, are or may be unconscionable, then This Honorable Court should refuse to enforce the same and, further, to reform and enforce the remainder of the Conference Center Deed and the Declaration without the unconscionable clause or clauses or provision or provisions to avoid the unconscionable result to Plaintiff.” *Id.* at ¶ 113.
- For Count X (“Rescission of Conference Center Deed”), the Association avers that “[i]n the event that there is an adjudication on any of the foregoing counts that [the Association] is not entitled to money damages at law or, in lieu thereof, to equitable relief in the form of reimbursement or a continuing obligation to pay its fair share of the costs of maintaining, operating, repairing and replacing the Building, the

Condominium and the Conference Center, then each party to the Conference Center Deed should be relieved of its rights and obligations thereunder.” ¶¶ 116.

There is nothing complicated in these remaining six (6) alternative causes of action that warrant referral to Business Court. They only require the application of basic common law or equitable principles and/or the interpretation of one deed. There is simply no compelling reason offered by the Association that requires a referral of this matter to Business Court. Such a referral would only slow down the ultimate resolution of this case. Accordingly, Snowshoe respectfully requests that the Chief Justice deny the Association’s Motion for Referral to Business Court.

#### **IV. CONCLUSION**

Based on the forgoing, the Chief Justice should deny Plaintiff The Mountain Lodge Association’s Motion for Referral to Business Court because this case does not require specialized treatment to improve the expectation of a fair and reasonable resolution.

Respectfully Submitted,  
**SNOWSHOE MOUNTAIN, INC.**  
By Counsel.

/s/ Seth P. Hayes

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**IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA**

**THE MOUNTAIN LODGE ASSOCIATION,**  
a West Virginia unincorporated non-profit association

**Plaintiff,**

**v.**

**Civil Action No.: 20-C-24**

**SNOWSHOE MOUNTAIN, INC.,**  
a West Virginia corporation,

**Defendant.**

**CERTIFICATE OF SERVICE**

I, Seth P. Hayes, do hereby certify that I served a true copy of “**DEFENDANT SNOWSHOE MOUNTAIN, INC.’S REPLY IN OPPOSITION TO PLAINTIFF’S MOTION FOR REFERRAL TO BUSINESS COURT,**” via Electronic Mail (E-Mail) and U.S. Mail, this 17<sup>th</sup> day of February 2021, to the following:

Mark A. Sadd, Esquire  
Ramonda C. Marling, Esquire  
John R. Bsharah, Esquire  
Lewis Glasser PLLC  
P.O. Box 1746  
Charleston, West Virginia 25326  
***Counsel for Plaintiff***

Honorable Robert E. Richardson  
Greenbrier County Courthouse  
912 Court Street North  
Lewisburg, WV 24901

Connie Carr, Circuit Clerk  
Circuit Court of Pocahontas County  
900 Tenth Avenue  
Marlinton, WV 24954

Lorri Stotler, Administrative Assistant  
Business court division  
Berkeley County Judicial Center  
380 W. South Street, suite 2100  
Martinsburg, WV 25401

A handwritten signature in black ink that reads "Seth P. Hayes". The signature is written in a cursive style with a large, stylized 'S' and 'H'.

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Seth P. Hayes, Esquire

1           IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA

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3  
4       THE MOUNTAIN LODGE ASSOCIATION,

5       a West Virginia unincorporated

6       Non-Profit Association,

7                       PLAINTIFF,

8       vs.

CIVIL ACTION NO. 20-C-24

9       SNOWSHOE MOUNTAIN, INC.,

10       a West Virginia Corporation,

11                       DEFENDANT.

12  
13  
14                       HEARING ON MOTION TO DISMISS

15  
16               Transcript of proceedings, taken by means of remote  
17       technology, had in the hearing of the above-styled action before  
18       the Honorable Robert E. Richardson, Judge, as reported by Jean  
19       B. Speights, RMR, on Wednesday, October 28, 2020.  
20  
21  
22  
23  
24  
25

PENGAD 800-631-6989

EXHIBIT

A

13:58:24 1 a -- in fact, a violation of its common law obligation if there  
13:58:30 2 is no obligation under the UCA or UCIOA to pay its fair share  
13:58:36 3 under -- under our count five.

13:58:38 4 And then under our Breach of Contract claim there is  
13:58:41 5 a specific contractual provision where -- that Snowshoe Mountain  
13:58:44 6 says that it will pay -- that the parties -- the participants --  
13:58:47 7 that the parties will pay for the elements that it owned.

13:58:51 8 We believe under the Act -- I'm sorry -- under the  
13:58:55 9 law, under the contract law and under the provisions of common  
13:59:00 10 law services, that would require that Snowshoe Mountain pay its  
13:59:05 11 fair share as a matter of its breach of contract.

13:59:08 12 And it's hard for us to argue, on one hand, where  
13:59:13 13 Snowshoe Mountain is conceding all of those issues, and if  
13:59:19 14 that's the case, then we think that perhaps we should move to a  
13:59:22 15 full briefing on summary judgment on those issues, if they're  
13:59:25 16 going to concede for all these points.

13:59:26 17 But right now, the issue has become relative to a  
13:59:30 18 dispositive motion under Rule 56(f), relative to dispositive  
13:59:36 19 motions filed under Rule 12(b)6, which is claiming that there is  
13:59:41 20 no claim under the law or as we have pled in our complaint.

13:59:50 21 THE COURT: Thank you, Mr. Sadd. The Court has  
13:59:58 22 reviewed the pleadings in this case as well as the motions and  
14:00:04 23 memoranda that have been submitted.

14:00:06 24 And while I have grave doubts as to the viability of  
14:00:12 25 some of the claims asserted by the plaintiff, the posture of

14:00:17 1 this case is such that the defendant has converted its motion to  
14:00:29 2 dismiss into one for summary judgment.

14:00:32 3 The Court further finds that the plaintiff should be  
14:00:44 4 afforded the opportunity to conduct discovery so as to fully  
14:00:50 5 respond to that motion. And so I am going to grant the  
14:00:57 6 plaintiff's motion pursuant to Rule 56(f).

14:01:01 7 Mr. Sadd, how -- with regard to the issues that would  
14:01:10 8 be needed to be developed for purposes of responding to the  
14:01:21 9 plaintiff's -- or the defendant's motion to dismiss, is that  
14:01:25 10 something that could be done on an expeditious basis?

14:01:32 11 MR. SADD: Your Honor, it depends on what *expeditious*  
14:01:34 12 would mean to the Court in this time of COVID. We feel that  
14:01:40 13 five to six months to attain that information in order to  
14:01:44 14 identify experts, in particular to review the building to be  
14:01:48 15 able to prepare reports, demonstrate in -- in testimony that, in  
14:01:54 16 fact, these elements -- that, alone, would be an issue.

14:01:58 17 We've already been gathering information as we seek  
14:02:01 18 discovery from Snowshoe Mountain of the expenses that it has  
14:02:04 19 incurred on behalf of the shared elements in this building. So  
14:02:10 20 we would say five to six months.

14:02:25 21 THE COURT: In light of the circumstances, I'm going  
14:02:28 22 to grant a period of five months from today for the conduct of  
14:02:38 23 discovery, as outlined in the Rule 56(f) affidavit.

14:02:47 24 Mr. Sadd, I will express that my concern about the  
14:02:55 25 plaintiff's claims relates largely to the concept of the right

14:03:02 1 to contract. And the -- I suspect that this would be apparent  
14:03:11 2 to counsel anyway, but the -- the notion that one can't avoid  
14:03:20 3 the application of a statute that applies to certain types of  
14:03:25 4 contracts by making sure that that contract didn't fit within  
14:03:31 5 the framework of the statutory regulation is somewhat novel.

14:03:41 6 If the parties had, for the past 40 years, conducted  
14:03:54 7 their dealings within a contractual framework that does not come  
14:04:05 8 under the auspices of West Virginia statutory law as to  
14:04:11 9 common-interest ownership properties, I am struggling to see  
14:04:20 10 what the basis for the Court's intervention to change that  
14:04:26 11 contractual arrangement would be.

14:04:28 12 I'm going to give you the opportunity to develop  
14:04:30 13 facts, because I think that the Court's ultimate decision on  
14:04:34 14 this may be better informed if those facts are developed.

14:04:38 15 But that is a fundamental issue that the defendants  
14:04:44 16 have -- that the defendant has raised in this case and that at  
14:04:48 17 least at this stage appears to have some merit.

14:04:51 18 So I would urge you to move forward promptly to get  
14:04:57 19 the factual development that you need so that we can address the  
14:05:02 20 issues that are raised in context of the -- of the particular  
14:05:09 21 facts of this case.

14:05:10 22 Now, at this point, the defendant has not yet filed  
14:05:17 23 an answer; is that correct, Mr. Hayes?

14:05:20 24 MR. HAYES: That is correct, Your Honor.

14:05:29 25 THE COURT: In order to expedite the full resolution