

**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 Reeder
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 Reeder
Resolution: Judge Lorensen**

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

Counterclaim Defendant.

**ORDER DENYING DEFENDANTS EMCO AND GSR'S PARTIAL MOTION TO
DISMISS PLAINTIFF'S THIRD AMENDED COMPLAINT**

This matter came before the Court this _____ day of May, 2024 upon the Partial Motion to Dismiss filed by Defendants EMCO Glade Springs Hospitality, LLC ("EMCO") and GSR, LLC

(“GSR”) (collectively, “Defendants”). The parties 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. In June 2023, the Supreme Court of Appeals of West Virginia determined in *Justice Holdings, LLC v. Glade Springs Vill. Property Owners Ass’n*, No. 22-0002, 2023 W. Va. LEXIS 280 (W. Va. June 15, 2023), that Glade Springs Village (“GSV”) is a common interest community, governed by the whole of the Uniform Common Interest Ownership Act (“UCIOA”), W. Va. Code § 36B-1-101 *et seq.* This is not disputed by the parties.

2. On October 31, 2023, Plaintiff Glade Springs Village Property Owners Association, Inc. (hereinafter “Plaintiff” or “POA”) filed its Third Amended Complaint in this civil action, alleging various causes of action against the Defendants, Elmer Coppoolse, James Terry Miller and R. Elaine Butler (hereinafter “Defendants” or “Individual Defendants”) as well as against Defendants EMCO Glade Springs Hospitality, LLC and GSR, LLC.

3. On November 20, 2023, Defendants filed the instant Partial Motion to Dismiss Plaintiff’s Third Amended Complaint, moving this Court to dismiss the claims asserted against them in Plaintiff’s Third Amended Complaint pursuant to Rules 12(b)(1)-(5) and (7) of the West Virginia Rules of Civil Procedure, but stating that “[a]t this time, however, Defendants are only briefing why dismissal is warranted under Rule 12(b)(6)”. *See* Def’s Mot., p. 1. Specifically, Defendants seek the dismissal of Counts IV and VI of the Third Amended Complaint. Defendants argue dismissal is warranted because West Virginia law does not recognize a claim

for aiding and abetting a breach of fiduciary duty under UCIOA or the West Virginia Non-Profit Corporation Act. *Id.* at 3-4. Further, in the alternative, Defendants argue they cannot aid and abet the Individual Defendants because they are corporate entities. *Id.* at 5-6. Finally, Defendants argue Plaintiff did not plead sufficient facts to establish a claim for aiding and abetting breach of fiduciary duty. *Id.* at 7.

4. On January 12, 2024, Plaintiff filed Glade Springs Village Property Owners Association, Inc.'s Response in Opposition to Defendants EMCO Glade Springs Hospitality, LLC and GSR, LLC's Partial Motion to Dismiss Plaintiff Glade Spring Village Property Owners Association, Inc.'s Third Amended Complaint, arguing West Virginia law does recognize a claim for aiding and abetting a breach of fiduciary duty. *See* Pl's Resp., p. 7. Further, Plaintiff argues GSR and EMCO are separate legal entities and can, therefore, aid and abet the breach of fiduciary duties. *Id.* at 10. Finally, Plaintiff claims it has pled sufficient facts to establish a claim for aiding and abetting breach of fiduciary duty. *Id.* at 13.

5. On January 22, 2024, Defendants filed their Reply, reiterating their arguments that West Virginia law does not recognize a claim for aiding and abetting a breach of fiduciary duty and that GSR and EMCO, as separate legal entities, cannot aid and abet the Individual Defendants, stating the response does not cite to controlling authority on this argument. *See* Reply, p. 1-3. Finally, Defendants also reiterate their position that Plaintiff did not plead sufficient facts to support its claim for aiding and abetting breach of fiduciary duty. *Id.* at 4.

6. The Court finds the issue ripe for adjudication.

STANDARD OF LAW

This matter comes before the Court upon a motion to dismiss. Motions to dismiss are governed by Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. "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

Defendants seek to dismiss Counts IV and VI of the Third Amended Complaint with prejudice. *See* Reply, p. 5. The motion surrounds claims for aiding and abetting breach of fiduciary duty. Defendants first argue dismissal is warranted because West Virginia law does not recognize a claim for aiding and abetting a breach of fiduciary duty under UCIOA or the West Virginia Non-Profit Corporation Act. *See* Def’s Mot., p. 3-4. Further, in the alternative, Defendants argue they cannot aid and abet the Individual Defendants because they are corporate entities. *Id.* at 5-6. Finally, Defendants argue Plaintiff did not plead sufficient facts to establish a claim for aiding and abetting breach of fiduciary duty. *Id.* at 7. The Court will take the arguments up in turn.

Aiding and Abetting Recognized Under West Virginia Law

First, the Court addresses Defendants’ argument that dismissal is warranted because West

Virginia law does not recognize a claim for aiding and abetting a breach of fiduciary duty under UCIOA or the West Virginia Non-Profit Corporation Act. *See* Def’s Mot., p. 3-4.

As an initial matter, the Court notes that the POA alleges that Defendants Elmer Coppoolse, Terry Miller, and Elaine Butler (the “Individual Defendants”) breached their fiduciary duties owed to GSVPOA under the Uniform Common Interest Ownership Act (“UCIOA”) and the West Virginia Non-Profit Corporation Act (“WVNPCA”). (*See* Third. Am. Compl. ¶¶ 124-138, 145-154). The POA further alleges that Defendants aided and abetting the Individual Defendants in breaching their fiduciary duties owed to GSVPOA under UCIOA and WVNPCA. (*See* Third Am. Compl. ¶¶ 139-144, 155-160). As stated, Defendants argue that West Virginia does not recognize a private cause of action for aiding and abetting breach of fiduciary duty under UCIOA or the WVNPCA. (*See* Mot. at 3-5; Reply at 1-2).

In making their argument, GSR and EMCO posit that had the legislature intended to provide a private cause of action for aiding and abetting breach of fiduciary duty under UCIOA and WVNPCA it would have done so as it did under the West Virginia Human Rights Act (“WVHRA”) and other statutes. *See* Def’s Mot., p. 4.

Although the words “aiding” and “abetting” need not appear in an underlying statute to give rise to liability for abiding and abetting a breach of a statutory duty, the Supreme Court of Appeals of West Virginia has recognized aiding and abetting tortious conduct can give rise to liability: “[f]or harm resulting to a third person from the tortious conduct of another, one is subject to liability if he knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.” Syl. pt. 5, *Courtney v. Courtney*, 186 W. Va. 597, 413 S.E.2d 418 (1991). The Court reaffirmed this point in *Mountaineer Fire & Rescue*:

This Court has found that “[f]or harm resulting to a third person from the tortious conduct of another, one is subject to liability if he knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.” Syl. pt. 5, *Courtney v. Courtney*, 186 W. Va. 597, 413 S.E.2d 418 (1991).

Mountaineer Fire & Rescue Equip., LLC v. City Nat’l Bank of W. Va., 244 W. Va 508, fn. 11 854 S.E.2d 870, fn. 11 (2020).

The Court has reviewed the relevant case law. The Court acknowledges Defendants’ assertion that had the Legislature wanted to create a private cause of action for aiding and abetting breach of fiduciary duty under the UCIOA or the WVNPCA, it would have done so, and its example of the language of the West Virginia Human Rights Act (“WVHRA”), wherein it was specifically stated that it is a violation of the statute to aid or abet another’s unlawful discriminatory practices. *See* Def’s Mot., p. 4-5.

The Court finds *Mountaineer Fire & Rescue Equip., LLC v. City Nat’l Bank of W. Virginia*, 244 W. Va. 508, 854 S.E.2d 870 (2020) to be instructive. There, the Supreme Court of Appeals reversed a trial court’s dismissal of aiding and abetting a breach of fiduciary duty.

There, the Supreme Court found as follows:

We find the circuit court's conclusion to be clearly wrong. The petitioners are not asserting City National violated a fiduciary duty; they claim City National assisted a third party in breaching the third party's duty. Viewing the counterclaims as a whole, the petitioners asserted that (1) Mr. Beam breached his corporate, fiduciary duties toward Mountaineer Fire, (2) City National knew or should have known he was acting against the interests of Mountaineer Fire, and (3) City National assisted that breach. We find the petitioners have stated a claim upon which relief could be granted and, therefore, permit the claims to be developed below.

Mountaineer Fire & Rescue Equip., LLC v. City Nat’l Bank of W. Virginia, 244 W. Va. 508, 530, 854 S.E.2d 870, 892 (2020).

Further, in a footnote to the above-quoted holding, the Court discussed whether a cause of action for aiding and abetting a breach of fiduciary duty could be asserted.

“This Court has found that “[f]or harm resulting to a third person from the tortious conduct of another, one is subject to liability if he knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself.” Syl. pt. 5, *Courtney v. Courtney*, 186 W. Va. 597, 413 S.E.2d 418 (1991). However, neither party has suggested the precise elements of a cause of action for aiding and abetting the breach of a fiduciary duty. While we reach no conclusion, our research reveals that other courts have recognized the action as a stand-alone tort. See, e.g., *Sierra Enterprises Inc. v. SWO & ISM, LLC*, 264 F. Supp. 3d 826, 838-39 (W.D. Ky. 2017) (“Kentucky law recognizes a claim for aiding and abetting tortious conduct, which covers fiduciary-breach claims. To prevail on this claim, Plaintiffs must show: (1) the existence and breach of a fiduciary duty; (2) the defendant gave the breaching party substantial assistance or encouragement in effectuating the breach; and (3) the defendant knew that the party's conduct breached that fiduciary duty.” (Cleaned up)); *Baker v. Wilmer Cutler Pickering Hale & Dorr LLP*, 91 Mass.App.Ct. 835, 81 N.E.3d 782, 793 (2017) (“The elements of the tort of aiding and abetting a breach of fiduciary duty are: (1) there must be a breach of fiduciary duty; (2) the defendants must know of the breach; and (3) the defendants must have actively participated or substantially assisted in or encouraged the breach to such a degree that they could not reasonably have been acting in good faith.”); *Nasrawi v. Buck Consultants LLC*, 231 Cal.App.4th 328, 179 Cal. Rptr. 3d 813, 824 (2014) (“A defendant is liable for aiding and abetting another in the commission of an intentional tort, including a breach of fiduciary duty, if the defendant knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act. The elements of a claim for aiding and abetting a breach of fiduciary duty are: (1) a third party's breach of fiduciary duties owed to plaintiff; (2) defendant's actual knowledge of that breach of fiduciary duties; (3) substantial assistance or encouragement by defendant to the third party's breach; and (4) defendant's conduct was a substantial factor in causing harm to plaintiff.” (Cleaned up)).”

Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Virginia, 244 W. Va. 508, 530, 854 S.E.2d 870, 892 (2020).

This Court considers that while the Supreme Court declined to “reach a conclusion”, it discussed the cause of action in detail, and reversed a trial court’s dismissal of such a claim. This Court also considers *Mountaineer Fire & Rescue Equip.*, involved allegation of aiding and abetting a breach of fiduciary duty under the Uniform Limited Liability Company Act (the “ULLCA”). Notably, the word “aiding” and “abetting” do not appear in the ULLCA. *See* Pl’s Resp., p. 8-9.

Further, as discussed in this Court’s Order Denying Individual Defendants’ Motion to Dismiss Plaintiff’s Third Amended Complaint, West Virginia Code § 36B-1-108, titled “Supplemental general principles of law applicable”, provides that “[t]he principles of law and equity, including the law of corporations and unincorporated associations, the law of real property, and the law relative to capacity to contract, principal and agent, eminent domain, estoppel, fraud, misrepresentation, duress, coercion, mistake, receivership, substantial performance, or other validating or invalidating cause supplement the provisions of this chapter, except to the extent inconsistent with this chapter.” W. Va. Code § 36B-1-108. As *Mountaineer Fire & Rescue Equip.* is not inconsistent with UCIOA, the Court finds UCIOA itself does not preclude a claim for aiding and abetting fiduciary duty.

Finally, the Court notes that although not authoritative, this Court’s own research included a review of relevant secondary sources to guide its decision. In *O’Neal and Thompson’s Close Corporations and LLCs: Law and Practice*, the following was stated with regard to West Virginia law on the issue:

Courts have recognized the possibility of aiding and abetting liability in claims based on breach of fiduciary duty.

...

In a West Virginia case, the Supreme Judicial Court of Appeals allowed a claim to survive a motion to dismiss when alleging that a bank used by an LLC “knew or should have known” a member of the LLC was acting against the LLC's interests, first when the bank allowed that member to open a new bank account in the LLC's name without notice or authorization from other members and “without a properly adopted corporate resolution,” and later when it refused to close the account or allow other members authority over it. [citing *Mountaineer Fire & Rescue*].

§ 9:45. Fiduciary duty: procedural questions, 2 Close Corp and LLCs: Law and Practice § 9:45 (Rev. 3d ed.).

For all of these reasons, the Court finds the Defendants’ motion to dismiss this claim under this argument must be denied.

Ability of Corporate Entities to Aid and Abet the Individual Defendants

Second, in the alternative, Defendants argued they cannot aid and abet the Individual Defendants because they are corporate entities. *See* Def’s Mot., p. 5-6.

GSVPOA has alleged that the Individual Defendants, in their capacity as members of the declarant appointed board of directors, approved and entered into contracts with GSR, LLC that were detrimental to GSVPOA and beneficial to GSR, LLC. In turn, GSVPOA alleges that GSR encouraged the Individual Defendants to breach their fiduciary duty to GSVPOA and its members by exerting their power over GSVPOA and participated in the breach by executing the underlying contracts. Stated somewhat differently, the POA argues the Individual Defendants were on both sides of the transactions.

In support of their argument, Plaintiff cites to *MSGI Liquidation Trust v. Modell (In re Modell's Sporting Goods, Inc.)*, 2023 Bankr. LEXIS 1031. Therein, the bankruptcy trustee filed a

twelve-count complaint including claims for avoidance of transfers, business torts (including breach of fiduciary duty and aiding and abetting that breach) as well as breach of contract. *Id.* The Trustee alleged that Mitchell B. Modell (“Mitchell”), “aided in part by other defendants [the “Entity Defendants”]¹], made business decisions and deployed assets deliberately to enhance his own wealth, his family's wealth and the value of HMC at the expense of Debtor; ignored the advice of restructuring experts hired by Debtor on three (3) separate occasions; and finally filed for “long-overdue” bankruptcy protection on March 11, 2020.” *Id.* at * 108. Mitchell and Entity Defendants moved to dismiss the Complaint for various reasons. In support of the motion to dismiss the aiding and abetting claims, the Entity Defendants, like GSR and EMCO, argued that an entity cannot aid and abet a breach of fiduciary duty by its own principal. *Id.* at *109. In rejecting this argument, the Court reasoned that:

is an over-simplification of the rule and not the case here, where Mitchell was allegedly using other non-Debtor entities (the Entity Defendants) to implement (i.e., aid and abet) the plan that breached his fiduciary duty to the Debtors -- not to HMC or the M&M PropCos -- which are distinct legal entities in any event. In contrast, the cases cited by the Trustee, such as *Carlson* and *Carlton* and *Quadrant*, all acknowledge that a third-party entity or individual -- as a distinct legal entity -- an (sic) be liable for aiding and abetting the breach of fiduciary duty owed by its officers or directors to another entity. The Court finds this rationale and holding of these cases to be better reasoned and supported than *Endico* and therefore controlling here. Thus, the Entity Defendants, as distinct legal entities, can be held liable for aiding and abetting Mitchell's breach of fiduciary duty to other entities, such as the Debtors, even though Mitchell was an officer, owner and/or in control of all those entities. In fact, that common ownership and control, as proven, may make for an even stronger aiding and abetting case.

¹ The five M&M PropCos and HMC were collectively referred to as the “Entity Defendants” by the Bankruptcy Court. Mitchell was the CEO of the Debtors, the CEO of HMC and the managing member of five M&M PropCos. MSGI Liquidated Trust, 2013 Bankr. LEXIS

Further, in this Court's view, the *Entity Defendants' reliance on the concluding paragraphs of Endico cited above is based on the misapplication (and over-extension) of the principle that an entity cannot aid and abet its own fiduciary. . . this Court . . . finds that separate legal entities, such as HMC and the M&M PropCos, that are controlled by the same principal (here, Mitchell), may be held liable for aiding that individual's breach of fiduciary duty to other entities that he also controls (here, the Debtors).*

Id., at *109 – 112 (citing *Carlson v. Hallinan*, 925 A.2d 506 (Del. Ch. 2006); *Carlton Invs. ex rel. TLC Beatrice Int'l Holdings v. TLC Beatrice Int'l Holdings*, 1995 Del. Ch. LEXIS 140 (Del. Ch. 1995); *Quadrant Structured Prods Co., Ltd. v. Vertin*, 102 A.3d 155, 204 (Del. Ch. 2014)) (emphasis added).

On the other hand, Defendants GSR and EMCO cite *Best Med. Int'l, Inc. v. Wittmer*, 73 Va. Cir. 504 (2007) in support of their position.

As an initial matter, it is black letter law that aiding and abetting requires concerted action by two or more persons or entities. *See* Syl. pt. 3, *Boone v. Activate Healthcare, LLC*, 859 S.E.2d 419 (W. Va. 2021). The Court considers that a corporation is not a natural person.

Defendant cites to *Shenandoah Sales & Serv. v. Assessor of Jefferson County*, 724 S.E.2d 733 (W. Va. 2012) to make this point. In *Shenandoah Sales*, the Court held that a corporation is not a natural person. It is an artificial entity created by law. Being an artificial entity it cannot act *pro se*. *Shenandoah Sales & Serv. v. Assessor of Jefferson County*, 724 S.E.2d 733, 738 (W. Va. 2012). Specifically, in *Shenandoah Sales*, the Court found that a corporate party cannot act *pro se* in court in West Virginia, and must be represented by counsel. The Court finds this case does not, however, determine whether or not a corporate entity can aid or abet another in breach of fiduciary duty.

Defendant also cites *Kerns v. Range Res. - Appalachia, LLC*, Civil Action No. 1:10CV23, 2011 U.S. Dist. LEXIS 93920, at *19 (S.D.W. Va. Aug. 23, 2011) (citing *Ridgeway Coal Co. v.*

FMC Corp., 616 F. Supp. 404, 409 (S.D.W. Va. 1985) which holds that “under West Virginia law a corporation cannot conspire with itself, its agents, or its employees.” After review of *Kerns*, this Court finds this case also does not determine whether or not a corporate entity can aid or abet another in breach of fiduciary duty.

Mr. Coppoolse is the CEO of EMCO and General Manager and CEO of GSR. (See Third Am. Compl. ¶¶ 8, 44-45). Mr. Miller is a Manager of GSR. (See West Virginia Secretary of State Business Organization Detail for GSR, LLC, attached hereto as Exhibit 1). Ms. Butler was the Controller and CFO of EMCO and Secretary of GSR. (See Third Am. Compl. ¶¶ 13, 49-50). GSVPOA has alleged that the Individual Defendants, in their capacity as members of the declarant appointed board of directors, approved and entered into contracts with GSR, LLC that were detrimental to GSVPOA and beneficial to GSR, LLC. See Pl’s Resp., p. 10.

Finding no West Virginia Supreme Court of Appeals case directly on point, this Court finds that *MSGI Liquidation Trust*, a U.S. Bankruptcy Court case, should guide this Court’s decision. The Court notes that Defendants’ case, *Best Med.*, a Virginia case, is also not a controlling authority. After review, the Court determines *MSGI Liquidation Trust* to be the proper guidance.

As such, this Court finds that Defendants’ second argument in support of the Motion fails. The Court finds at this stage, Plaintiff’s cause of action can be pled, notwithstanding the fact that Defendants GSR and EMCO are corporate entities.

Sufficient Facts Pled

Finally, third, Defendants argued Plaintiff did not plead sufficient facts to establish a claim for aiding and abetting breach of fiduciary duty. See Def’s Mot., p. 7.

At this stage in the litigation, Plaintiff’s allegations must be accepted as true for purposes

of adjudicating the instant Motion to Dismiss. *Newton v. Morgantown Mach. & Hydraulics of W. Va., Inc.*, 838 S.E.2d 734, 736, 2019 W. Va. LEXIS 595 (quoting *Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W. Va. 603, 605, 245 S.E.2d 157, 158 (1978)). Here, GSVPOA has alleged that (1) the Individual Defendants had statutorily imposed duties to GSVPOA and its members under UCIOA and, alternately, WVNPCA and that they breached those duties, (2) that the Individuals Defendants did so to benefit GSR and EMCO with their knowledge and participation (*i.e.*, that GSR and EMCO knew or should have known the Individual Defendants were acting against the interests of GSVPOA) and (3) GSR and EMCO assisted the breach. The Court finds, at this stage, dismissal would be premature. This Court finds that GSVPOA has plead sufficient facts to establish an aiding and abetting claim against GSR and EMCO. As such, Defendants third and final argument in support of their Motion fails.

CONCLUSION

WHEREFORE, it is hereby **ORDERED** and **ADJUDGED** that Defendants EMCO Glade Springs Hospitality, LLC and GSR, LLC's Partial Motion to Dismiss Plaintiff's Third Amended Complaint is hereby **DENIED**.

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

5/8/24
date of entry



JUDGE JOSEPH K. REEDER
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION