

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

WHITE ROCK MOUNTAIN RETREAT  
PROPERTY OWNERS ASSOCIATION, INC.,  
a West Virginia corporation,

Plaintiff,

Civil Action No. 20-C-96  
Honorable Robert E. Richardson

v.

WHITE ROCK LAND VENTURES, LLC;  
JOHN DOES 1 TO 3, MEMBERS OF WHITE  
ROCK LAND VENTURES, LLC

MICHAEL S. PATTEN;  
THE PATTEN COMPANIES;

PATTEN SPECIAL ASSETS, LLC;

JON RILEY;

MIKE GREENWAY; and.  
FREIGHT TRAIN, LLC,

Defendants.

**SECOND AMENDED COMPLAINT**

For its Complaint in this matter, Plaintiff, White Rock Mountain Retreat Property Owners Association, Inc. states as follows:

**I. PARTIES**

1. Plaintiff, White Rock Mountain Retreat Property Owners Association, Inc., (hereafter the "Association"), is a West Virginia non-profit corporation organized in 2002 for the purpose of managing the rights, and discharging the legal duties, of owners of the common elements in the real estate Retreat know as White Rock Mountain Retreat (hereafter the "Retreat"), in Greenbrier County, West Virginia.

2. The Retreat was created, pursuant to the Uniform Common Interest Ownership Act (hereafter the "Act"), W. Va. Code 36B-1-1 et seq., and incident to the July 17, 2002 execution of a

Declaration of Covenants, Restrictions, Easements, Reservations Term and Conditions Governing White Rock Mountain Retreat (hereafter “Declaration”) (**EXHIBIT “A”**), filed on July 26, 2002 with the Office of the Clerk of the County Commission of Greenbrier County, in Deed Book 476 at Pages 69 to 117, as amended by the Amended Declaration of Covenants, Restrictions, Easements, Reservations Term and Conditions Governing White Rock Mountain Retreat (hereafter “Amended Declaration”)(**EXHIBIT “B”**) executed on October 25, 2103 and recorded in Deed Book 561 at pages 175 – 177 on November 21, 2013.

3. By the terms of the Act, the Declaration and the Amended Declaration, adopted pursuant to the Act and Declaration, the Association is a “common interest community” charged with managing the common elements and obligations of homeowners and property owners, including the payments of the costs of real estate taxes, insurance premiums, maintenance and improvement of the common elements the Retreat. W. Va. Code §36B-1-103(7).

4. Pursuant to the Declaration, the Amended Declaration, and the Act, the Plaintiff is authorized to institute, defend, intervene in, or settle any litigation or administrative proceeding in matters affecting the Common Elements, or enforcement of the Declaration, the Bylaws, or the rules and regulations of the Association. (Section 4.13 of the Bylaws, Deed Book 476 at page 100 (hereinafter "Bylaws"))(**EXHIBIT C** at p. 6)

5. The Act defines “common elements” in a planned community to include “any real estate within a planned community owned or leased by the association, other than a unit,” i.e., the roads and other land committed to the collective use of the owners of units in the Retreat. W. Va. Code §36B-1-103(4).

6. A ”unit” is defined as the “physical portion of the common interest community designated for separate ownership or occupancy;” in short, the individually owned lots intended for construction of residences, as defined on plats of record within the Retreat. W. Va. Code §36B-1-103

(33).

7. The Retreat, as created in the 2002 Declaration, included approximately 23 acres of land, but was expanded over time to include approximately 800 acres, consisting of 165 units of the Retreat, as of the date in 2013 on which Defendant White Rock Land Ventures, LLC was assigned the Developer rights. Those 165 units are depicted as individual lots on **EXHIBIT “D”** to this Amended Complaint. Also depicted on **EXHIBIT “D”** are a road system, a “Lodge and Grotto,” numerous “green space” common elements disbursed throughout the Retreat, and on the East side of the Retreat a “FUTURE DEVELOPMENT” area consisting of a heavily wooded 350.585 tract including a “mountain bike and hiking trail,” “wilderness campsites,” and “green space,” as described and depicted graphically in promotional literature distributed by the developers as **EXHIBIT “E”**.

8. The “Declarant” in 2002 for purposes of the Act, and initial developer of the Retreat, was White Rock, LLC, a West Virginia limited liability company. Upon the death of Charles Ausburn, the White Rock, LLC principal who signed the 2002 Declaration, the rights and obligations of White Rock, LLC were assumed, in sequence, by North-South Properties, LLC, a North Carolina limited liability company, ATLAS TRI STATE SPE, LLC, a North Carolina limited liability company and, ultimately in 2013, White Rock Land Ventures, LLC, nominally the current developer.

9. Defendant White Rock Land Ventures, LLC is a Foreign Limited Liability Company organized under the law of the State of Delaware, which does business in West Virginia. Pursuant to the records of the WV Secretary of State, its Principal place of business is located at 183 Water Street, Williamstown, MA 01267 and a notice of process address at National Registered Agents, Inc. 1627 Quarrier St., Charleston, WV 25311-2124. Defendant White Rock Land Ventures, LLC has declined to identify its members in discovery. Accordingly, and without waiver of Plaintiff’s right to name individual defendants hereafter when their identity is disclosed, Defendants John Does 1 to 3 are the members of the limited liability company known as White Rock Land Ventures, LLC.

10. Defendant White Rock Land Ventures, LLC became the successor developer to White Rock, LLC by an Assignment (**EXHIBIT “F”**) executed on August 6, 2013 and recorded in Assignment Book 20 at page 856. Defendant White Rock Land Ventures, LLC acquired all of the land of the Retreat not previously sold, by deed dated August 6, 2013, and recorded in the Office of the Clerk of Greenbrier County in Deed Book 559 at Page 83. (**EXHIBIT “G”**) .

11. Defendant Patten Special Assets, LLC is the managing member of White Rock Land Ventures, LLC's and has a principal place of business at 183 Water Street, Williamstown, MA 01267.

12. Because Defendant White Rock Land Ventures, LLC has declined to disclose their names and addresses in discovery requests propounded by the Plaintiff, the names of the individual members of Defendant White Rock Land Ventures, LLC have been derived from the names of individuals purporting to exercise the power to transfer land in listed on deeds of record in Greenbrier County, West Virginia. Plaintiff in good faith believes these persons to be members of Defendant White Rock Land Ventures, LLC, but is not able to serve them at this time,

13. Defendant Michael S. Patten resides at 920 Mercato Way, Naples, Florida 34108, he is an owner and/or CEO of the Patten Companies. He has been identified by the Patten Companies, LLC as the sole member of that limited liability company, and Patton Special Assets, LLC has identified him as the sole member of that limited liability company. Defendant Michael S. Patten, or those acting on his behalf or on behalf of the Patten Companies, LLC and/or Patten Special Assets, LLC, participated in the management and control of the Association during the relevant time period.

14. Defendant Patten Companies, LLC, in which Michael S. Patten is CEO, is a Foreign Limited Liability Company organized under the laws of the State of Delaware with a principal place of business at 9128 Strada Pl. Suite 210, Naples FL 34108 but of record at 183 Water Street, Williamstown, MA 01267. Its registered agent is CT Corporation System, 1200 South Pine Island Road, Plantation, FL 33324. It, and/or its employees, agents or assigns, participated in the management and control of the Association

during the relevant time period.

15. Defendant Patten Special Assets, LLC is a Foreign Limited Liability Company organized under the laws of the State of Delaware with a principal place of business at 183 Water Street, Williamstown, MA 01267. The registered Agent for Patten Special Assets, LLC is CT Corporation System, 1200 South Pine Island Road, Plantation, FL 33324. It is listed as the record manager of White Rock Land Ventures, LLC with the WV Secretary of State. It, and/or its employees, agents or assigns, participated in the management and control of the Association during the relevant time period.

16. Defendant Jon Riley was a managing member of Defendant White Rock Land Ventures, LLC and resides at 320 Mt. McGurder Road, Ellijay, GA 30536-4171, he also was/is an employee, agent or assign of the Patten Company, and during the relevant time period, he acted in the capacity as an officer and/or director of the Association.

17. Defendant Mike Greenway resides and/or conducts business at 102 Farleigh Pl. Daniels, WV 25832. He previously acted in the capacity as an agent of White Rock Land Ventures, LLC, the Patten Companies, LLC, Patten Special Assets, LLC and/or as an officer and/or director and/or a property manager of White Rock Retreat Property Owners Association, either as an individual and/or in his capacity with Freight Train, LLC, the Patten Companies, LLC, Patten Special Assets, LLC and/or White Rock Land Ventures, LLC.

18. Defendant Freight Train, LLC was formed under the laws of the State of West Virginia located at PO Box 135, Daniels, WV 25832 acted in the capacity of providing property management services to the Association, and/or was an agent or assign of White Rock Land Ventures, LLC, and its joint venturers, the Patten Companies and/or Patten Special Assets, LLC during the relevant time period.

## **II. THE JOINT VENTURE – JOINT AND SEVERAL LIABILITY**

19. Pursuant to the “safe harbor” provisions of Rule 11 (b), W. Va. R. Civ. Proc., Plaintiff in

good faith believes, and therefore here alleges, that a reasonable opportunity for discovery will adduce evidence that Defendant White Rock Land Ventures, LLC and the other defendants constituted a joint venture, and disregarded corporate and limited liability company formalities, and under the standards established by the West Virginia Supreme Court of Appeals, in *Dailey v. Ayers Land Dev., LLC*, 825 S.E.2d 351(W. Va. 2019) are individually liable for all Plaintiff's damages.

20. Defendants Michael Patten, The Patten Companies, Patten Special Assets, LLC, Jon Riley, Mike Greenway, and Freight Train, LLC, were all agents of, and/or alter egos, of White Rock, Land Ventures, LLC and subject to all obligations of the declarant as set forth in the Act, the Declaration, the Amended Declaration, Articles, and Bylaws.

21. To the extent that any of the actions or omissions, negligent or intentional, of the foregoing defendants are alleged to be, or to have been: (a) employees, agents or independent contractors, but not principals in the joint venture consisting of the other defendants, or (b) prior defendants in this action who have been dismissed as defendants, the joint venturer defendants are respondent for the actions of employees, agents and/or independent contractors under the doctrine of respondeat superior and/or negligent hiring, retention and supervision.

22. Defendant White Rock Land Ventures, LLC, and its joint venturers participated in the management of the property and/or were members of the Board of the Association and/or officers of the Association during and following the Declarant Control Period and acted on behalf of the Association, either with or without proper authority to do.

23. The behavior enumerated in *Dailey* as appropriate criteria for entry of an order to pierce corporate and/or limited liability company veils, include the following, one or more of which Plaintiff alleges Defendants engaged in, individually and/or collectively: (a) commingling of funds and other assets of the corporation with those of the individual shareholders; (b) diversion of the corporation's funds or assets to noncorporate uses; (c) failure to maintain the corporate formalities necessary for the issuance of

or subscription to the corporation's stock; (d) an individual shareholder representing to persons outside the corporation that he or she is personally liable for the debts or other obligations of the corporation; (e) failure to maintain corporate minutes or adequate corporate records; (f) identical equitable ownership in multiple entities; (g) common identity of the directors and officers of multiple entities; (h) failure to adequately capitalize a corporation for the reasonable risks of the corporate undertaking; (i) absence of separately held corporate assets; (j) use of a corporation as a mere shell or conduit to operate a single venture or some particular aspect of the business of an individual or another corporation; (k) sole ownership of all the stock by one individual or members of a single family; (l) use of the same office or business location by the corporation and its individual shareholder(s); (m) employment of the same employees or attorney by the corporation and its shareholder(s); (n) concealment or misrepresentation of the identity of the ownership, management or financial interests in the corporation, and concealment of personal business activities of the shareholders; (o) disregard of legal formalities and failure to maintain proper arm's length relationships among related entities; (p) use of a corporate entity as a conduit to procure labor, services or merchandise for another person or entity; (q) diversion of corporate assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors, or the manipulation of assets and liabilities between entities to concentrate the assets in one and the liabilities in another; (r) contracting by the corporation with another person with the intent to avoid the risk of nonperformance by use of the corporate entity; or the use of a corporation as a subterfuge for illegal transactions; (s) the formation and use of the corporation to assume the existing liabilities of another person or entity.

24. Plaintiff further alleges that Defendant White Rock Land Ventures, LLC and the other defendants, as members of a joint venture, individually and collectively, directly and through shell companies, have breached fiduciary duties owed this Plaintiff, have disregarded corporate and limited liability formalities, and have engaged in one or more of the activities enumerated in balance

of this Complaint, repeatedly and in a manner sufficient to warrant disregard of formalities.

25. As a consequence of Defendants actions, Plaintiff is entitled to pierce the veil or the corporate and/or limited liability Defendants, and is entitled to judgment, individually and collectively, against all Defendants and personally against all Defendants corporate or limited liability company members, without regard to any defenses otherwise available to Defendants and their “shell companies.

### **III. JURISDICTION**

26. Jurisdiction is appropriate in the Circuit Court of Greenbrier County, West Virginia, because the Circuit Court of Greenbrier County, West Virginia has original and general jurisdiction of all matters all matters in law where the amount in controversy exceeds \$7,500.00, and in equity, to remove any cloud on the title to real property, or any part of a cloud, and to determine questions of title with respect to the real property without requiring allegations or proof of actual possession of the real property W.Va. Code Section 51-2-2(b) and (d).

27. Venue is appropriate in the Circuit Court of Greenbrier County, West Virginia, because the causes of action herein arose from actions which occurred in Greenbrier County, and because the land which the Association seeks to recover and subject to debt is in Greenbrier County, West Virginia.

### **VI. CAUSES OF ACTION**

#### **COUNT 1 – NEGLIGENCE**

28. Plaintiff incorporates the preceding paragraphs herein by reference as if fully set forth herein.

29. Defendant White Rock Land Ventures, LLC, as successor developer and as the exclusive controlling party on the board of directors of the Association (the "Board") prior to

November 17, 2019, the date on which the Association organized itself as a unit-owner elected board of directors. Defendant White Rock Land Ventures, LLC and its joint venturers, its other agents, successors, and assigns had a duty to exercise good faith and reasonable care in the completion, operation and maintenance of the Retreat's common elements following the purchase by Developer. Developer Defendant White Rock Land Ventures, LLC and Developer's Agents breached their duties to exercise good faith and reasonable care by failing to properly operate and maintain the common elements.

30. The common elements, including, but not limited to, the roadways and appurtenant areas including but not limited to the main entrance, construction entrance, ditches, culverts, waterfall system, maintenance building, and water system pump houses, the Allegheny Lodge and the appurtenant property, were never completed and/or were never properly maintained and, due to the Defendants' failure to complete these common elements and Defendants' lack of completion and/or maintenance, have deteriorated and are in need of extensive repairs.

31. Assessments were issued to the property owners of White Rock Retreat for purported maintenance of the common elements. However, said funds were either not used for the purposes authorized by the "Act", the Declaration, Articles or Bylaws, and/or were not sufficient to properly maintain the common elements, excluding minor repairs.

32. Defendant Defendant White Rock Land Ventures, LLC its joint venturers agents and employees knew or should have known of the deteriorating condition of the roadways, the Allegheny Lodge, and the remaining common elements, and should have assessed and utilized revenue collected in the form of annual assessments, penalties and interest to care for the same.

33. As a result of Defendant White Rock Land Ventures, LLC its joint venturers agents and employees' breach of duties of good faith and reasonable care and their negligence in maintaining the common elements, the Association, the Retreat, and the remaining owners of lots within the

Retreat, have suffered, and will continue to suffer, damage to their property values, inconvenience, and other damages resulting therefrom, including, but not limited to, those identified in W. Va. Code § 36B-3-111.

## **COUNT 2 - BREACH OF FIDUCIARY DUTY**

34. Plaintiff incorporates the preceding paragraphs herein by reference as if fully set forth herein.

35. During the course of conduct of the business of the Retreat, Defendant White Rock Land Ventures, LLC and its joint venturers, sold the minimum number of lots to trigger a mandatory requirement for election of unit owners to the board of directors of the Association. The first requirement to elect 25% of the board by unit owners occurred 60 days after the July 14, 2006 sale of 42 lots (25% of 165)(**EXHIBIT H** at line **118**). The second statutory trigger for election of 33 1/3 % of the board by unit owners was reached on November 12, 2014, sixty days after the sale of 83 lots (50% of 165)(**EXHIBIT H** at line **287**). And the last trigger, which required the election of a majority of the board by unit owners, was reached at either: (a) November 30, 2015, sixty days after the October 1, 2015 sale of 124 lots (75% of 165)(**EXHIBIT H** at line **336**), or (b) at the latest on May 15, 2106, sixty days after the March 15, 2015 sale of 131 lots (75% of 175 lots)(**EXHIBIT H** at line **350**). For the reasons set out below Plaintiff rejects the attempted creation of 10 additional lots (5 lots on November 14, 2014 and 5 lots on October 21, 2015) by Defendant White Rock Land Ventures, LLC and its joint venters was lawful under the Act.

36. In any event, as of May 15, 2016, at the latest, despite sufficient lots being sold to require inclusion of property owners on the Board, the Developer failed to notify the property owners or add property owners to the Board.

37. Moreover, as of May 15, 2016, again at the latest, the Declarant Control Period

expired pursuant to the terms of W. Va. Code§ 36B-3-103, i.e., within 60 days of the date when seventy-five percent (75%) of the units (whether 165 or 175) had been sold.

38. Continuously from their purchase of the Retreat in August 2013, including nearly four years after the expiration of the Declarant Control Period, the members of the board of the Association were appointed exclusively by Defendant White Rock Land Ventures, LLC and its joint venturers; none of the board members were elected by unit owners prior to that time, not following the sale of 25% of the lots, not following the sale of 50% of the lots, and not following the sale of 75% of the lots and the expiration of the Declarant Control Period.

39. Pursuant to W. Va. Code§ 36B-3-103(a), as an agent of the homeowners, and as an entity in control of a portion of the homeowners' property rights in their individual lots and the common elements, Defendant White Rock Land Ventures, LLC and its joint venturers had fiduciary responsibilities which compelled it to act in the best interests of the unit/property owners.

40. While subject to fiduciary responsibilities, the Board -- which until December 2019 was appointed exclusively by Defendant White Rock Land Ventures, LLC its joint venturers agents and employees -- Defendant White Rock Land Ventures, LLC and its joint venturers failed to adequately maintain even a minimal level of care that any reasonable board member would have known was required by, inter alia:

1. failing to prepare a complete annual budget that included the cost of maintaining the roadways, Allegheny Lodge and other common elements;
2. failing to enforce liens or collect fines or penalties;
3. failing to file liens against Developer as an Owner or collect fines or penalties;
4. failing to hold and conduct meetings or publish and obtain approval of annual budgets, and
5. failing to turn over common elements in a condition sufficient to meet the terms of the "Act", Declaration, Amended Declaration, Articles and Bylaws as required by W. Va. Code § 36B-1-116(a) and the Declaration Article IV, Sections 3 and 4.31,

Article VIII, and the Bylaws of the Association.

41. In addition to failing to conduct meetings and publish and obtain approval of annual budgets, the Board -- until December 2019 while the board was elected exclusively by Defendant White Rock Land Ventures, LLC its joint venturers agents and employees – took no action to complete and/or maintain the interior finishes of the Allegheny Lodge/pool and/or pay for all completion, maintenance expenses associated with the Allegheny Lodge/pool, and/or maintain the roadways and other common elements generally, all in violation of W. Va. Code §§ 36B- 3-107, 4-119(a).

42. As a result of Defendant White Rock Land Ventures, LLC its joint venturers agents and employees' chronic ongoing breaches of their fiduciary duties, the Association, the Retreat, and the owners of lots within the Retreat, have experienced and will continue to experience significant financial harm, all as a proximate and foreseeable result of the Defendant's intentional breach of their fiduciary duties.

**COUNT 3 - FRAUD**

43. Plaintiff incorporates the preceding paragraphs herein by reference as if fully set forth herein.

44. Beginning in 2016, Defendant White Rock Land Ventures, LLC its joint venturers agents and employees began to publish, but not obtain proper approval, of annual budgets. In those budgets which were distributed to Property Owners within the Association, Developer and Developer's Agents indicated assessments from the homeowners would be used to maintain the Allegheny Lodge, the pool, and their appurtenant property, among other things.

45. Defendant White Rock Land Ventures, LLC its joint venturers agents and employees subsequently took the position that the Allegheny Lodge, pool, and their appurtenant property are not, and never were, common elements. To be sure, Defendant White Rock Land Ventures, LLC attempted

to sell the Allegheny Lodge to a third party unrelated to the Retreat and not a unit owner.

46. Subsequently Defendant White Rock Land Ventures, LLC executed a deed to the Association transferring title to the Allegheny Lodge and appurtenances in an instrument accepted by the Association -- only because it explicitly acknowledged continuing liability for any and all prior claims arising out of the Developer's construction, operation and maintenance of that property as a common element of the Retreat. **(EXHIBIT I).**

47. In addition, common element assessments were not utilized for the maintenance of certain major common elements, such as the Lodge and roadways, despite it being the clear pursuant to W. Va. Code§ 3-115 and Article 4, Section 4 of the Declaration found at Deed Book 476, Page 69,76 that assessments be utilized for a limited purpose. Among the extraordinary expenses incurred by the Defendant appointed board was the payment of an inherently suspicious, extraordinarily large \$30,000 annually for the house cleaning of the Lodge.

48. The Association and its property owners were justified in relying upon the budgets and marketing materials promulgated by Defendant White Rock Land Ventures, LLC its joint venturers agents and employees for information regarding what the common elements of the Retreat are.

49. As a result of Defendant White Rock Land Ventures, LLC its joint venturers agents and employees' breaches of fiduciary duties and the fraudulent misappropriations of funds, the Association, the Retreat, and the owners of lots within the Retreat, have experienced and will continue to experience financial harm caused by the Defendants' intentional actions.

50. Defendant White Rock Land Ventures, LLC its joint venturers agents and employees's ongoing failure to prepare budgets, its chronic neglect of maintenance and its persistent refusal to admit owners of units in the Retreat to the board of the Property Owners Association, entitles Plaintiff to a full accounting for all income and expenditures during the Declarant Control

Period.

**COUNT 4 - FAILURE TO COMPLETE COMMON ELEMENTS**

51. Plaintiff incorporates the preceding paragraphs herein by reference as if fully set forth herein.

52. West Virginia Code § 36B-4-119(a) provides that: "[T]he declarant shall complete all improvements depicted on any site plan or other graphic representation."

53. Defendant White Rock Land Ventures, LLC its joint venturers agents and employees failed to complete the Allegheny Lodge, pool, roadways, their appurtenant property or the area designated "FUTURE DEVELOPMENT" in promotional material, which included green space, bike trails, campsites and hiking trails.

54. The Declaration states at Article II, Section 7 at page 70, "Prior to the expiration of the Declarant Control Period as provided below, the Declarant shall convey by Special Warranty or Non-Warranty deed or by an easement instrument ownership and/or use of the Common Elements to the Association."

55. Defendant White Rock Land Ventures, LLC its joint venturers agents and employees represented to the Association and its members through its records of common expenses, marketing materials, and other oral and written representations that the Allegheny Lodge, pool, and other appurtenant property were common elements. Plaintiff members of the White Rock Property Owners Association reasonably relied upon the representations of Developer and Developer's Agent.

56. Pursuant to the Declaration at Article II, Section 7 at page 70 and plats of record in the Clerk of Greenbrier County, the common elements also include the roadways, appurtenant property, and the area designated "FUTURE DEVELOPMENT" in promotional material, which included green space, bike trails, campsites and hiking trails.

57. Thus, since the filing of the July 26, 2002 Declaration, the Association has had a

future interest in the common elements, including the Allegheny Lodge, pool, roadways, appurtenant property and the area designated “FUTURE DEVELOPMENT” in promotional material, which included green space, bike trails, campsites and hiking trails.

58. As a result of Defendant White Rock Land Ventures, LLC its joint venturers agents and employees' failure to complete and/or maintain these common elements, the Association, the Retreat, and the owners of lots within the Retreat, have experienced and will continue to experience financial harm caused by the Defendants' actions.

**COUNT 5 - INJUNCTION COMPELLING DEFENDANTS  
TO COMPLETE AND MAINTAIN COMMON ELEMENTS**

59. Plaintiff incorporates the preceding paragraphs herein by reference as if fully set forth herein.

60. Pursuant to the Act, Declaration, and Bylaws, assessments may only be used for items identified therein.

61. Pursuant to the Act, Defendant White Rock Land Ventures, LLC its joint venturers agents and employees had a limited right to create units and common elements within the Retreat, withdraw property/units, etc. during the Declarant Control Period, consistent with the Developer's fiduciary duty to act in the best interests of the Association.

62. As evidenced by Defendant White Rock Land Ventures, LLC its joint venturers agents and employees' inclusion of the common expenses for the payment of the Allegheny Lodge, the graphic depictions of the Allegheny Lodge/pool in marketing materials to purchasers, and the representations to purchasers that upon purchase they would have the use of the Allegheny Lodge/pool, the Allegheny Lodge and the lodge property constitute common elements.

63. Pursuant to the Declaration, Amended Declaration, and plats of record in the Clerk of Greenbrier County, the common elements also include the roadways.

64. The common elements, including, but not limited to, the roadways and the Allegheny Lodge/pool, have not been maintained by Defendant White Rock Land Ventures, LLC its joint venturers agents and employees as required by the Act, the Bylaws, and the Declaration or Amended Declaration.

65. As a result of Defendant White Rock Land Ventures, LLC its joint venturers agents and employees' failure to comply with their obligations to repair and maintain/pay for all expenses related to the common elements, including, but not limited to, the roadways and the Allegheny Lodge/pool, during the Declarant Control Period and periods of control by the Declarant in violation of the Act, the Association, the Retreat, and the remaining owners of lots within the Retreat, have suffered, and will continue to suffer, damage to their property values, inconvenience, and other damages resulting therefrom

66. Defendant White Rock Land Ventures, LLC its joint venturers agents and employees have, and have had, an obligation to complete and maintain the common elements, including, but not limited to, the roadways and Allegheny Lodge. Plaintiff is entitled to an order requiring Defendant White Rock Land Ventures, LLC its joint venturers agents and employees to complete and/or return all common elements to the condition it/they should have been prior to transfer of the common elements to Plaintiff.

#### **COUNT 6 - BREACH OF CONTRACT**

67. Plaintiff incorporates the allegations of the above stated paragraphs as if fully set forth herein.

68. According to Article II, Section 7 of the Declaration, "Prior to the expiration of the Declarant Control Period, as provided below, the Declarant shall convey by Special Warranty or Non-Warranty deed or by an easement instrument ownership and/or use of the Common Elements to the Association . . . . "Common Elements" shall include at a minimum the private road(s) providing

access from Monroe Draft Road to the Lots as hereinafter defined."

69. According to West Virginia Code § 36B-3-103(d), the Declarant Control Period ends "sixty days after conveyance of seventy-five percent of the units that may be created to unit owners other than a declarant." At least seventy-five percent of the units in White Rock Retreat had been conveyed by April 29, 2016, at the latest.

70. Thereafter and continuing until October 3, 2019 Defendant White Rock Land Ventures, LLC its joint venturers agents and employees failed to convey the common elements to the Association, thus constituting a breach of the Declaration and WV Code 36B-3-103(d)

71. On or about October 3, 2019, Defendant, White Rock Land Ventures, LLC, offered to convey the common elements to the unit-owner constituted Association. However, at that time, Defendant White Rock Land Ventures, LLC its joint venturers agents and employees and assigns, had permitted the common elements to deteriorate into a condition that was in violation of the Uniform Common Interest Ownership Act and the Declaration/Amended Declaration and the fiduciary and good faith obligations it had to Plaintiff.

72. As a result of this breach, the Association, the Retreat, and the remaining owners of lots within the Retreat, have suffered, and will continue to suffer, damage to their property values, inconvenience, and other damages resulting therefrom.

#### **COUNT 7 - CONVERSION**

73. Plaintiff incorporates the preceding paragraphs herein by reference as if fully set forth herein.

74. Defendant White Rock Land Ventures, LLC its joint venturers agents and employees have failed to convey the common elements to the Association.

75. Defendant White Rock Land Ventures, LLC its joint venturers agents and employees

have continued to use the common elements as if the Association did not rightfully own them.

76. In performing these aforementioned acts, Defendant White Rock Land Ventures, LLC its joint venturers agents and employees have exerted dominion over the common elements, in denial of the Association's property rights.

77. As a result of this conversion, the Association, the Retreat, and the remaining owners of lots within the Retreat, have suffered, and will continue to suffer, damage to their property values, inconvenience, and other damages resulting therefrom.

**COUNT 8 - BREACH OF DUTY OF GOOD FAITH IN PERFORMANCE**  
**PURSUANT TO W.V. CODE SECTION 36B-3-103**

78. Plaintiff incorporates the allegations of the above stated paragraphs as if fully set forth herein.

79. The Act imposes an obligation of good faith in the performance or enforcement every contract or duty governed by it:

Every contract or duty governed by this chapter imposes an obligation of good faith in its performance or enforcement.

W. Va. Code §36B-1-112 (emphasis added).

80. Additionally, the Act imposes a fiduciary duty on members of the board of the Association who are appointed by the Declarant: In the performance of their duties, the officers and members of the executive board are required to exercise “the care required of fiduciaries of the unit owners.” W. Va. Code §36B-3-103(a).

81. As a result of the failures of the Defendant White Rock Land Ventures, LLC its joint venturers agents and employees to maintain or repair the roads, Allegheny Lodge/pool, and other common elements, and its violations of its fiduciary obligations to Plaintiff, Developer and Developer's Agents have breached their duty of good faith in performance, and their fiduciary duty to the unit owners.

82. Defendant White Rock Land Ventures, LLC its joint venturers agents and employees'

breach of the duty of good faith in performance has resulted in the damages to the Plaintiffs.

**COUNT 9 - WASTE**

83. Plaintiff incorporates the preceding paragraphs herein by reference as if fully set forth herein.

84. The Declaration states at Article II, Section 7 at page 70, "Prior to the expiration of the Declarant Control Period as provided below, the Declarant shall convey by Special Warranty or Non-Warranty deed or by an easement instrument ownership and/or use of the Common Elements to the Association."

85. The Allegheny lodge, pool, roads, and their appurtenant property are common elements of the Retreat, as defined in the Declaration.

86. Thus, since the filing of the July 26, 2002 Declaration, the Association has had a future interest in the common elements, including the Allegheny Lodge, pool, roadways, and other appurtenant property.

87. Any owner of real property subject to a future interest has a duty under W. Va. Code §37-7-1 and the common law to avoid waste by exercising ordinary care to maintain the real property.

88. Defendant White Rock Land Ventures, LLC its joint venturers agents and employees failed to exercise ordinary care in maintaining the common elements and allowing them to fall into disrepair.

89. As a result of Defendant White Rock Land Ventures, LLC its joint venturers agents and employees' failure to exercise ordinary care in maintaining these common elements, the Association, the Retreat, and the owners of lots within the Retreat, have experienced and will continue to experience financial harm caused by the Defendants' actions.

### **COUNT 10 - BREACH OF IMPLIED WARRANTIES**

90. Plaintiff incorporates the preceding paragraphs herein by reference as if fully set forth herein.

91. W. Va. Code § 36B-4-114(b) provides that White Rock Land Ventures, LLC and its joint venturers, warranted impliedly the following:

A declarant and any dealer impliedly warrants that a unit and the common elements in the common interest community are suitable for the ordinary uses of real estate of its type and that any improvements made or contracted for by him, or made by any person before the creation of the common interest community, will be:

(1) Free from defective materials; and

(2) Constructed in accordance with applicable law, according to sound engineering and construction standards, and in a workmanlike manner.

W. Va. Code § 36B-4-114(b)

92. The Allegheny lodge, pool, roads, and their appurtenant property are common elements of the Retreat, as defined in the Declaration.

93. The construction of the common elements is incomplete and/or otherwise defective, rendering their construction unworkmanlike and contrary to sound engineering and construction standards.

94. As a result of Developer's failure to exercise ordinary care in maintaining these common elements, the Association, the Retreat, and the owners of lots within the Retreat, have experienced and will continue to experience financial harm caused by the Defendants' actions.

### **COUNT 11- FRAUDULENT EXERCISE OF SPECIAL DEVELOPER RIGHTS AFTER EXPIRATION OF DECLARANT CONTROL PERIOD**

95. Plaintiff incorporates the preceding paragraphs herein by reference as if fully set forth herein. Pursuant to the requirements of Rule 9, W. Va. Rules of Civil Procedure, Plaintiff

pleads Counts 11, 12, 13 and 14 with particularity.

96. Pursuant to the terms of the Act at W. Va. Code §2-105(a)(8), a Developer of a planned community such as the Retreat is authorized to exercise Special Developer Rights during a defined Declarant Control Period. The Special Developer Rights authorized by the Declaration and Bylaws in this case included the right:

- (i) to complete improvements;
- (ii) to add properties to the Retreat pursuant to Article IX of the Declaration;
- (iii) to remove properties from the Retreat pursuant to Article IX of the Declaration;
- (iv) to maintain sales offices on the Retreat;
- (v) to use or create easements within the Retreat for access;
- (vi) to use or create easements within the Retreat pursuant to Article III of the Declaration;
- (vii) to subject the Retreat to another planned community;
- (viii) to make the Retreat subject to a master association;
- (ix) to appoint or remove directors of the Association;
- (x) to exercise special voting rights specified in the Bylaws;
- (xi) to exercise any other rights provided by law or the Declaration.

**EXHIBIT A** at p. 5, ¶23 (formatting added).

97. The exercise of Developer Rights authorized to be exercised during the Declarant Control Period -- including the right to add properties to, or remove properties from the Retreat -- was at all times subject to the obligation to act in good faith, and a fiduciary duty to act in the best interests of the Association.

98. W. Va. Code §36B-3-103 provides that during the Declarant Control Period,

[T]he declaration may provide for a period of declarant control of the association, during which a declarant, or persons designated by him, may appoint and remove the officers and members of the executive board.

W. Va. Code §36B-3-103(d)(emphasis added).

99. In the Declaration, the Developer defined a Declarant Control Period which

extended just short of infinity or, at the very least, to an undefined point in time at which the Declarant, acting alone acting with unfettered discretion, declared the end of the control period. The text of the definition was as follows:

“Declarant Control Period” shall mean the time in which Declarant has to exercise certain exclusive rights such as, but not limited to, Special Declarant Rights as hereinafter defined. The Declarant Control Period shall be the earlier of

- (i). twenty-five years after the date of the recording of this Declaration,
- (ii) when all of White Rock Mountain Retreat (platted at such times and in such phases) has been sold, or
- (iii) such earlier time as determined in Declarant’s sole discretion by the recording of a written instrument in the Greenbrier County Clerk’s Office executed by Declarant and expressly terminating the Declarant Control Period.

**EXHIBIT A** at p. 5 (formatting added).

100. In conspicuous contrast, the Act provides that the Declaration and ByLaws do **not** control the termination of the Declarant Control Period. Specifically, W. Va. Code §36B-3-103(d) provides that:

**Regardless of the period provided in the declaration, a period of declarant control terminates no later than ... Sixty days after conveyance of seventy-five percent of the units that maybe created to unit owners other than a declarant.**

W. Va. Code §36B-3-103(e)(bold, italics and underscoring added).

101. By October 1, 2015, 124 lots (75% of the 165 lot total at the time of Defendants’ acquisition of the Retreat)(**EXHIBIT H** at line **336**) were sold, and still no board members were elected by unit owners. The sole board member was an employee of the Developer, and the Developer and its Developer's Agents maintained 100% control over the Association board until 2019.

102. After acquiring the Developer role at the Retreat in August 2013, Defendant White Rock Land Ventures, LLC its joint venturers agents and employees, twice purported to add lots to the 165 lot total in the Retreat at the time of their 2013 acquisition; 10 additional lots (5 lots on November

14, 2014 **EXHIBIT H** at line **306** and 5 lots on October 21, 2015 **EXHIBIT H** at line **337**). For the reasons stated later in this Complaint, Plaintiff rejects, as violating the duty of good faith and the developer's fiduciary obligation to act in the best interests of the Association, the Defendant White Rock Land Ventures, LLC's two efforts at expanding the number of lots in the Retreat.

103. Solely for purposes of the narrow analysis of the number of lots, and without waiving its right to challenge the purported expansion of the number of lots in the Retreat, Plaintiff is treating the two referenced additions as part of the total count of lots in the Retreat.

104. The reality is that the addition of the purported additional lots does not alter the determination of the date of the termination of the Declarant Control Period and the special powers associated with it. Defendant White Rock Land Ventures, LLC's actions complained of herein were beyond the expiration of the Declarant Control Period under any analysis, i.e., whether the added lots were effective or not.

105. On November 14, 2014, Defendant White Rock Land Ventures filed MAP D-178 (**EXHIBIT J-A**) with the Clerk of the County Commission of Greenbrier County purporting to add three (3) lots and MAP D-179 (**EXHIBIT J-B**) purporting to add two (2) lots, for a net increase of five (5) lots, all of which, if effective, would increase the total number lots in the Retreat to 170. See **EXHIBIT H at line 306**.

106. Again, on October 21, 2015, Defendant White Rock Land Ventures filed MAP D-192 (**EXHIBIT J - C**) with the Clerk of the County Commission of Greenbrier County, purporting to add five (5) new lots to the Retreat, and renaming two, lots 54 and 55, as 54R and 55R, all of which, if effective, would increase the total number lots in the Retreat to 175. See **EXHIBIT H at line 337**.

107. If measured from the October 1, 2015 sale of 124 lots (75% of 165 lots) **EXHIBIT H at line 336**, the Declarant Control Period expired sixty days later on **November 30, 2015**

**EXHIBIT H at line 343.** If measured from the March 16, 2016 sale of 132 lots (75% of 175 lots) **EXHIBIT H at line 347,** the Declarant Control Period expired sixty days later on **May 15, 2016** **EXHIBIT H at line 350.**

108. Thus, regardless of the total lot count used for measurement of 75% of the total, the **Declarant Control Period expired, at the latest, on May 15, 2016,** and with it the Developer's Special Development Rights. Specifically, the right of Defendant White Rock Land Ventures, LLC and its joint venturers to remove property from the Retreat, expired, at the latest, on that date: May 15, 2016.

109. Notwithstanding the expiration of its Special Development Rights — whether on November 30, 2015 or on May 15, 2016— Defendant White Rock Land Ventures, LLC on behalf of itself and its joint venturers, executed a deed on May 23, 2016 (**EXHIBIT K**), eight days after the expiration of Defendants' Special Development Rights, purporting to remove from the Retreat 350.585 acres -- the same acreage designated “FUTURE DEVELOPMENT” on **EXHIBIT E** and **EXHIBIT E-1**, Developer promotional materials). Specifically, in a deed executed on May 23, 2016, and recorded on May 25, 2016 in Deed Book 581 at Page 678, Defendant White Rock Land Ventures, LLC deeded this large tract of land for \$333,500 (**EXHIBIT K-1, MAP OF 350.585 AC.**) to Roy Ellis Belcher and Rodena Faye Belcher.

110. The property description to the May 23, 2016 deed (**EXHIBIT K**) from Defendant White Rock Land Ventures, LLC to Roy Ellis Belcher and Rodena Faye Belcher, after providing a metes and bounds description of the property, added the common “being part of” phrase referencing the immediate prior chain of title. That “being part of” phrase in the May 23, 2016 deed read, *in toto*, as follows:

And **being part of the same real property conveyed unto White Rock Land Ventures, LLC,** a Delaware limited liability company, **by deed dated August 6, 2013 from Atlas Tri-State SPE, LLC,** a North Carolina limited liability company, and of record in the Office of the Clerk of the

County Commission of Greenbrier County, West Virginia in Deed Book 559 at page 83.

**EXHIBIT K** at page 2 (emphasis added).

111. The property conveyed by Atlas Tri-State SPE, LLC to Defendant White Rock Land Ventures, LLC, in August 2013 (**EXHIBIT G**) was explicitly made subject to the 2002 Declaration creating the Retreat by the following language:

**This conveyance is further made subject to the “Declaration of Covenants, Restrictions, Easement, Reservation, Terms and Conditions Governing White Rock Mountain Retreat,** Planned Community in Greenbrier County, West Virginia” its successors and/or assigns dated July 17, 2002, and placed of record in the aforesaid Clerk’s office in Deed Book 476 at page 69.

**Exhibit G** at pp. 9 and 22 (emphasis added).

112. The “being part of” language of **EXHIBIT K**, quoted in paragraph 110 above, was followed in the next paragraph of the May 23, 2016 deed by the typical reservation language:

Reference is made to **all prior instruments in the chain of title** for all reservation, restrictions, and limitations pertaining to the real estate hereby conveyed and for a more particular description of the property.

**EXHIBIT K** at p. 2 (emphasis added).

113. The “[A]ll prior instruments in the chain of title” of **EXHIBIT K** included the August 6, 2013 deed from Atlas Tri-State SPE, LLC to Defendant White Rock Land Ventures, LLC, (**EXHIBIT G**) which also included a reservation clause as follows:

**This conveyance is specifically made subject to** any and all terms, conditions, provisions, restrictions, exceptions, limitations, covenants, rights, powers, duties, rights-of-way, easements, severances, uses, estates, servitudes and limitations as made and imposed upon the Property by the Grantor, its predecessors in title, any duly-authorized government agency or authority, or **any other instrument, plat or survey of record** in the aforesaid County Clerk’s Office pertaining to or effecting said real estate.

**EXHIBIT G** at p. 1 (emphasis added).

114. Additionally, Defendant White Rock Land Ventures, LLC executed on October 26,

2013, and filed on November 21, 2013 – *two and one half months after the August 6, 2013 sale recorded in Deed Book 559 at page 83 from Atlas Tri-State SPE, LLC to Defendant White Rock Land Ventures, LLC, and two years and nine months before Defendant White Rock Land Ventures, LLC’s May 23, 2016 purported sale of the 350.585 tract to the Belchers* -- an “Amendment to the Declaration of Covenants, Restrictions, Easements, Reservations, Terms and Conditions, Restrictions, Easements, Reservation, Terms and Conditions Governing White Rock Mountain Retreat, A Planned Community” (hereafter “Amended Declaration”)(**EXHIBIT B**), removing any ambiguity about the inclusion of the 350.585 tract in the Retreat..

115. The Amended Declaration stated in a series of “whereas” clauses as follows:

**WHEREAS**, Atlas Tri-State SPE, LLC conveyed the herein described property unto White Rock Land Ventures, LLC by deed dated August 6, 2013 and of record in the aforesaid Clerk’ Office in Deed Book 559 at Page 83; and

**WHEREAS**, Atlas Tris-State SPE, LLC further assigned the Declarant’s Rights to White Rock Land Ventures, LLC by Assignment dated August 6, 2013 and of record in the aforesaid Clerk’s Office in Assignment Book 20 at page 856; and

**WHEREAS**, the original Declaration of Covenants and Restrictions of record in the aforesaid Clerk’s Office at Deed Book 476 at Page 69 provide that the Declarant has the right to make Amendments to the Declaration of Covenants and Restrictions; and

**WHEREAS, the intent of this Amendment is to subject all the property described in Exhibit A attached hereto to the Declaration, and to clarify that all of the property comprising White Rock Mountain Retreat** as the same is shown on recorded Plats, including all of the lots having been previously sold with reference to such Declaration **is intended to be included within the Association**, and the owners of all such lots are members of the Association subject to the terms of the Declaration of Covenants and Restrictions, **even if the real estate actually described in the original Declaration does not include every such lot.**

**EXHIBIT B** at p. 1 (emphasis added).

116. Following these “whereas” clauses, the Amended Declaration stated that Defendant White Rock Land Ventures, LLC and its successors

“covenant and agree with all persons, firms ,or corporations now owning or hereafter acquiring any portion of White Rock Mountain Retreat **“now owning or hereafter acquiring any portion of White Rock Mountain Retreat”** ... that the Lots making up White Rock Mountain Retreat...**including but not limited to all of the real property described on Exhibit A attached hereto**...is subjected to the use and occupancy thereof...set out in that certain Declaration of Covenants and Restrictions recorded in the Office of the Clerk of the County Commission of Greenbrier County, West Virginia in Deed Book 476 at Page 69.

**EXHIBIT B** at p. 2 (emphasis added).

117. Exhibit A attached to the Amended Declaration explicitly referenced the deed pursuant to which Defendant White Rock Land Ventures, LLC acquired the Retreat, and read in full as follows:

Being the **same real property conveyed to White Rock Land Ventures, LLC by deed dated August 6, 2013 and recorded in Deed Book 559 at Page 83** of the land records of Greenbrier County, West Virginia.

**EXHIBIT B** at p. 3 (emphasis added).

118. Why did Defendant White Rock Land Ventures, LLC go to such length to reassure prior purchasers that their land was part of the planned community known as White Rock Mountain Retreat?

119. For the simple reason that no prior Developer of the Retreat had incorporated into the Retreat any land beyond the initial 23 acres pursuant to the mandatory provisions of in Article IX of the original Declaration requiring an amendment to the Declaration in order to add new land to the Retreat. The land not previously incorporated by an Amended Declaration included 64 lots sold between the 2002 original Declaration and White Rock Land Ventures, LLC’s August 6, 2013 acquisition of the property from Atlas Tri-State SPE, LLC.

120. In short, Defendant White Rock Land Ventures, LLC was cleaning up potential

questions to chain of title to 64 previously sold lots in the Retreat and perfecting the chain of title for the land yet unsold but acquired with the intent to subject it to the Declaration, explicitly including the 350.585 acres acquired on August 6, 2013 from Atlas Tri-State SPE, LLC.

121. In addition to the foregoing narrative deed language, the marketing brochure distributed by Defendant White Rock Land Ventures, LLC included a graphic depiction of the 350.585 tract purportedly sold to the Belchers (**EXHIBIT E – 2**) as a part of the Retreat designated as “**FUTURE DEVELOPMENT**,” including a “mountain bike and hiking trail,” “wilderness campsites,” and “green space.” **EXHIBIT E -1**.

122. And, as noted, the Act barred all developers from displaying or delivering promotional material which depicted future developments without explicitly stating on the marketing material that the depicted future development was going to be built or not:

No promotional material may be displayed or delivered to prospective purchasers which describes or portrays an improvement that is not in existence unless the description or portrayal of the improvement in the promotional material is conspicuously labeled or identified either as "MUST BE BUILT" or as "NEED NOT BE BUILT".

W. Va. Code §36B-4-118 (emphasis added).

123. However, **EXHIBIT E**, while conspicuously describing improvements not in existence -- “mountain bike and hiking trail,” “wilderness campsites,” and “green space” – clearly omits the “**MUST BE BUILT**” OR “**NEED NOT BE BUILT**” language of W. Va. Code §36B-4-118, Article 4 of the Act entitled “**PROTECTION OF PURCHASERS**.”

124. Plaintiff and all unit owners, in particular the 64 lot purchasers prior to the Amended Declaration, were entitled to and in fact did reasonably rely to their detriment on the graphic depiction of **FUTURE DEVELOPMENT**, including “mountain bike and hiking trail,” “wilderness campsites,” and “green space,” as portrayed in the promotional material constituting **EXHIBIT E**.

125. As a proximate and totally foreseeable result of Defendant White Rock Land

Ventures, LLC and its joint venturer's illegal exclusion of the language of mandatory inclusion or optional exclusion, as specified in W. Va. Code §36B-4-118, Plaintiff was damaged and is entitled to compensatory damages in an amount to be proved at trial by a jury.

126. Further, because Defendant White Rock Land Ventures, LLC's was intentional, and made with the express purpose of concealing its intent to remove future developments from the Retreat, Plaintiff is entitled to punitive damages in an amount to be determined at trial by a jury.

**COUNT 12 – FRAUDULENT SALE OF “FUTURE DEVELOPMENT” ACREAGE**

127. Plaintiff incorporates by reference all prior paragraphs of this Complaint.

128. West Virginia Code §36B-3-103, entitled “Executive board members and officers,” provides in subsection (a) that:

In the performance of their duties, the officers and members of the executive board are required to exercise (i) if appointed by the declarant, the care required of fiduciaries of the unit owners and (ii) if elected by the unit owners, ordinary and reasonable care.

W. Va. Code §36B-3-103(a)(emphasis added).

129. White Rock Land Ventures, LLC, its joint venturers, agents and employees exercised Developer Rights at a time after the Declarant Control Period had expired and in derogation of their obligations to act in good faith and the best interests of the unit owners of the Retreat.

130. As a practical matter, the exercise of Developer Rights by White Rock Land Ventures, LLC, its joint venturers, agents and employees, was only possible because the Developer also failed in its statutory obligation to populate the board of directors of the Association with owners of units in the Retreat. W. Va. Code §36B-3-103 provides a specific schedule for election of unit owners to the board as follows:

(d) Not later than sixty days after conveyance of twenty-five percent of the units that may be created to unit owners other than a declarant, at least one member and not less than twenty-five percent of the members of the executive board must be elected by unit owners other than the declarant. Not later than sixty days after conveyance of fifty percent of the units that may be created to unit owners other than a declarant, not less than thirty-three and one-third percent of the members of the executive board must be elected by unit

owners other than the declarant.

W. Va. Code §36B-3-103(d) (emphasis added).

131. As reflected in EXHIBIT H at line 118 attached to this Complaint, 42 of those 165 lots (25% of 165) sold by May 24, 2006; sixty days later (EXHIBIT H at line 123) when the Developer was required by the Act to insure that 25% of the board of directors of the Association were elected by unit owners, none were. The board consisted in its entirety of one person who worked for the developer.

132. As reflected in EXHIBIT H at line 287 by September 15, 2014, eighty-three (83) lots (50% of the 165 lots) were sold. Sixty days later (EXHIBIT H at line 304) the board of the Association still consisted of one member, an employee of the Developer; no board member was elected by the unit owners.

133. Additionally, by May 15, 2016 (EXHIBIT H at line 350), sixty days after the March 16, 2016 (EXHIBIT H at line 347) sale of 75% of 175 units, a majority of the board members of the Association were required to be elected by unit owners other than the Developer. West Virginia Code §36B-3-103, and the Declarant Control Period expired in December, 2015.

134. In fact, no unit owners ever elected any member of the board of the Association until November 2019 (EXHIBIT L) – two years and six months after the latest possible date for expiration of the Declarant Control Period.

135. The Defendant White Rock Land Ventures, LLC and its joint venturers' purported creation of additional lots -- five on November 14, 2014 and another five on October 21, 2015 -- was subject to the standards of a fiduciary duty to the Association because, at the time the new lots were purportedly created, all members of the Association board were “**appointed by the declarant**” and required to exercise their power with “**the care required of fiduciaries of the unit owners.**” W. Va. Code W. Va. Code §36B-3-103(a)(emphasis added).

136. The primary duty of any fiduciary is straightforward: the duty of loyalty. The duty of loyalty requires a fiduciary to act solely in the interest of the beneficiaries. No fiduciary duty is clearer – and none more clearly violated by Defendant White Rock Land Ventures, LLC and its joint venturers – than the overriding duty of loyalty. No activity more clearly violates the fiduciary duty of loyalty than self-dealing, i.e., transactions involving the sale of beneficiary property for the fiduciary’s personal account.”

137. No plausible argument may be advanced to support the proposition that Defendant White Rock Land Ventures, LLC and its joint venturers’ seizure of the Association’s common elements and/or the conversion of them into new lots, satisfied the exercise of a power pursuant to a fiduciary duty owed to the Association, particularly when the proceeds of the sales of the newly-created lots were deposited in Defendant White Rock Land Ventures, LLC’s bank account.

138. Moreover, as it relates to the sale of the 350.585 Future Development acreage and its recreational amenities, had even one unit owner been elected to the Association board -- as required by W. Va. Code §36B-3-103(d) -- at the time of the May 23, 2016 sale of the 350.585 acres, that unit owner unquestionably would have objected vigorously to the sale for the obvious fact that the sale severed the Retreat from the immediately adjacent view shed, an extremely valuable feature of the Retreat. To be sure, the spectacular viewshed from the ridges of the Retreat was the overriding reason most of the unit owners were attracted to it, and Defendant White Rock Land Ventures -- and its joint venturers knew that.

139. To be sure, Defendant White Rock Land Ventures and its joint venturers aggressively promoted this viewshed as a prominent part of the promotion of the Retreat. The promotional literature distributed to potential purchasers in the Retreat included the following panegyric:

High atop **White Rock Mountain, amidst an ancient and storied landscape**, a new community is forming. One that envelops neighbors in serene mountain seclusion, offering ample time and space for reflection, relaxation and outdoor living, while also providing access to a vibrant

lifestyle full of diverse cultural possibilities. Located in Greenbrier County, in Southeastern West Virginia, **The Retreat is a 900-acre haven of scenic ridgelines and awe-inspiring vistas.**

**EXHIBIT M** (emphasis added).

140. Among the concerns any moderately diligent unit-owner elected member of the Association board would reasonably have been concerned about by the May 23, 2016 sale, was the potential timbering of the 350.585 acre tract and ensuing irreparable damage to the Retreat's viewshed. As matters developed, the purchasers of the 350.585 acres, *in fact*, did subject that land to a timber lease that authorized clearcutting, i.e., the total destruction of the Retreat's view unique view shed and a corresponding and commensurate diminution in the value of all lots in the Retreat.

141. On December 28, 2016, the Roy Ellis Belcher and Rodena Faye Belcher -- to whom Defendant White Rock Land Ventures, LLC and its joint venturers sold the Retreat's viewshed -- entered into a timbering lease with WestRock CP, LLC pursuant to which, as summarized in the Memorandum of Timber Purchase Agreement filed on January 5, 2017, the Belchers sold:

**All merchantable hardwood, pine and fuel chips** located, standing and growing upon that certain real estate situated in White Sulphur Springs District of Greenbrier County WV, **located and growing upon 350+/- acres** more or less described as The Belcher Harts Run tract (Tax Map 30, Parcel 2) explicitly described in the Timber Purchase Agreement designated with the Timber Sale Area shown on Exhibit A.

**EXHIBIT N** (emphasis added).

142. A visual inspection of the perimeter of the 350.585 tract discloses that some timbering has occurred under the 2016 timber lease. Although the timber lease, by the terms published in the Memorandum summarizing its terms, was scheduled to expire on June 28, 2018, the published Memorandum explicitly provided that it was **not** a complete summary of the timber agreement, and any provision for the renewal of the underlying timber lease is not now known.

143. Further, nothing in the documents of record bar the entry into a new timber lease,

and any timbering of the 350.585 tract under the current timber lease, or one entered into hereafter, would subject the Retreat to irreversible catastrophic damage, both aesthetic and financial.

144. Additionally, because the sale of the tract was *after* the expiration of the Declarant Control Period, , Defendant White Rock Land Ventures, LLC and its joint venturers were obligated to turn over the \$333,500 in proceeds from the sale of the 350.585 acres -- upon which the law imposed a constructive trust -- to Plaintiff.

145. However, the damage to Plaintiff by the failure to deliver it such proceeds is *not* quantified by the \$333,500 sales price (\$951 per acre) listed on the deed to the Belchers. Had the Retreat, for reasons not now conceivable, elected to sell the 350.585 acre tract, there is no reason to believe that the Retreat could not have realized a price equal to the price per acre paid for a 780 acre tract, immediately adjoining the Retreat, which sold in March, 2006 for \$4,683,462.00 or \$6,004 per acre -- a price more than six times the price realized by Defendant White Rock Land Ventures, LLC and its joint venturers. **EXHIBIT O at p. 7.**

146. Apart from the removal of 350.585 acres, the additional lots created by Defendant White Rock Land Ventures, LLC and its joint venturers, *after* the expiration of the Declarant Control Period, including, but not limited to, lots 169, 170, 171, 60R-1, 60R-2 and 60R-3 (**EXHIBIT H at lines 374, 380, 381**), were illegally created and their sale was, or would be, adverse to the interests of Plaintiff.

147. Plaintiff has been damaged in an amount to be determined by a jury at trial by Defendant White Rock Land Ventures, LLC breach of the fiduciary duty of loyalty.

**COUNT 13 – FRAUDULENT REMOVAL OF “FUTURE DEVELOPMENT”  
ACREAGE FROM RETREAT WITHOUT AMENDING DECLARATION**

148. Plaintiff incorporates by reference all prior paragraphs of this Complaint.

149. W. Va. Code §36B-2-110, entitled “Exercise of development rights,” requires a

declarant to amend the declaration if it exercises and development right reserved under §2-105(a)(8). Specifically, §36B-2-110 provides in subsection (a) that:

**To exercise any development right reserved** under section 2-105(a)(8), the declarant shall prepare, **execute and record an amendment to the declaration** (section 2-117) and in a condominium or planned community comply with section 2- 109.

W. Va. Code §36B-2-110 (emphasis added).

150. Section 2-105(a)(8) defines development rights reserved as those rights set out in the Declaration which includes:

A description of any development rights (section 1- 103(14)) and other special declarant rights (section 1- 103(29)) reserved by the declarant, together with a legally sufficient description of the real estate to which each of those rights applies, and a time limit within which each of those rights must be exercised.

151. The exercise of special development right to remove properties from the Retreat, reserved in Article II, (23) of the Declaration (**EXHIBIT A** at p. 5, ¶23), entitled “Special Declarant Rights,” was subject to the requirement of §36B-2-110 to amend the Declaration.

152. Critically, Defendant White Rock Land Ventures, LLC and its joint ventures never complied with the requirement to amend the Declaration incident to its exercise of the special right to remove the 350.585 acres sold to the Belchers, and as a consequence such act was **ultra vires** and damaged Plaintiff in an amount to be determined by a jury at trial.

153. Moreover, Defendant White Rock Land Ventures, LLC and its joint ventures clearly knew full well of the obligation to amend the Declaration to add properties to, or remove properties from, the Retreat because they had themselves in October 25, 2013 exercised that exact power by executing and recording the Amended Declaration, referenced in paragraph 2 above as **EXHIBIT B**, as the lawful procedure for incorporating into the Retreat the 800+ acres they had just acquired.

154. The failure to comply with the declaration amendment requirements was intentional

and indispensable as a means of concealing the sale of the Retreat's viewshed from Plaintiff and its members.

155. Plaintiff has been damaged by an amount to be determined by a jury at trial and is entitled to compensatory and punitive damages.

**COUNT 14. FRAUDULENT SALE OF UNITS IN COMMON INTEREST  
COMMUNITY WITHOUT A PUBLIC OFFERING STATEMENT**

156. Plaintiff incorporates all prior paragraphs of this Complaint.

157. ARTICLE 4 of the Uniform Common Interest Owners Act, entitled "**PROTECTION OF PURCHASERS**," and codified at West Virginia Code §36B-4-101 et seq., provides, with exceptions not here applicable, that:

[A] declarant, before offering any interest in a unit to the public, shall prepare a public offering statement conforming to the requirements of sections 4-103, 4-104, 4-105 and 4-106.

W. Va. Code §36B-4-102.

158. West Virginia Code §36B-4-103, entitled Public offering statement; general provisions, provides in subsection (a) that "a public offering statement must contain or fully and accurately disclose," among other things, the following:

(3) The number of units in the common interest community;

(5) any current balance sheet and a projected budget for the association;

(17) The extent to which financial arrangements have been provided for completion of all improvements that the declarant is obligated to build pursuant to section 4-119 (Declarant's Obligation to Complete and Restore).

W. Va. Code §36B-4-103.

159. West Virginia Code §36B-4-119, entitled "Declarant's obligation to complete and restore," provides in subsection (a) that:

Except for improvements labeled "**Need Not Be Built**", the declarant shall complete all improvements depicted on any site plan or other graphic

representation, including any plats or plans prepared pursuant to section 2-109, whether or not that site plan or other graphic representation is contained in the public offering statement or in any promotional material distributed by or for the declarant.

W. Va. Code §36B-4-119.

160. No improvements were labeled “Need Not Be Built” in any promotional material distributed by Defendant White Rock Land Ventures, LLC and its joint venturers, who were therefore required to build out the “FUTURE DEVELOPMENT,” including a “mountain bike and hiking trail,” “wilderness campsites,” and “green space” depicted in **EXHIBIT E**.

161. West Virginia Code §36B-4-104, entitled “Same – Common interest communities subject to development rights,” further provides that if the declaration subjects the common interest community to “any development rights,” the public offering statement must also disclose:

(1) The maximum number of units and the maximum number of units per acre, that may be created;

W. Va. Code §36B-4-104.

162. Defendant White Rock Land Ventures, LLC was a declarant by virtue of its succession to a special declarant right, W. Va. Code §36B-1-103(12), but never distributed a public offering statement pursuant to W. Va. Code §§36B-4-104, never disclosed the improvement completion language of W. Va. Code §36B-4-119, and never disclosed the maximum number of units as required by W. Va Code 36B-4-104. And the Act clearly makes successor developers like Defendant White Rock Land Ventures, LLC and its joint venturers liable for failure to distribute a public offering that clearly states the maximum number of lots subject to development, discloses relevant financial information, and unambiguously indicates that future development either was, or was not, going to happen. W. Va. Code §36B-3-1049(e)(2)(i)(D)(3).

163. Plaintiff was damaged in an amount to be determined by a jury at trial, as a direct and foreseeable consequence of Defendant White Rock Land Ventures, LLC’s failure to: distribute

a public offering statement in compliance with W. Va. Code §§36B-4-103 and 104, which disclosed the maximum number of units in the Retreat, current and projected budgets, and financial arrangements in the event the “**FUTURE DEVELOPMENT**,” including a “mountain bike and hiking trail,” “wilderness campsites,” and “green space” depicted in **EXHIBIT E** were not created, and by Defendant White Rock Land Ventures, LLC’s failure to complete the improvements subject to W. Va. Code §36B-4-119.

#### **COUNT 15 – BREACH OF DUTY OF GOOD FAITH**

164. Plaintiff incorporates all prior paragraphs of this Complaint.

165. Defendant White Rock Land Ventures, LLC and its joint venturers used their power over the Association to prevent a properly constituted majority of the board of the Association from pushing for the completion, maintenance and repair of common elements, over which the Association had a future interest.

166. Defendant White Rock Land Ventures, LLC and its joint venturers used their power over the Association to collect assessments that were supposed to be used to repair and maintain the common elements, when those assessments were actually used to fund other projects that benefitted the Developer and Developer's Agents, to the detriment of the Association and the property owners.

167. Defendant White Rock Land Ventures, LLC and its joint venturers used their power over the Association to negligently and/or intentionally prevent the Association from collecting assessments, fines, and penalties which the Developer owed to the Association, and to prevent the Association from filing or enforcing liens against Developer-owned lots for failure to pay those assessments, fines, and penalties.

168. Defendant White Rock Land Ventures, LLC and its joint venturers used their power over the Association to negligently and/or intentionally prevent the Association from performing basic administrative tasks, such as holding or conducting annual meetings and approving budgets.

169. As a result of Defendant White Rock Land Ventures, LLC and its joint venturers' negligent and/or intentional wrongful exercise of authority, the Association, and its Breach of Duty of Good Faith/Fiduciary Responsibility, the Retreat, and the owners of lots within the Retreat, have experienced and will continue to experience financial harm caused by the Defendants' actions.

**COUNT 16 - BREACH OF DUTY TO HOLD ANNUAL MEETINGS**

170. Plaintiff incorporates the preceding paragraphs herein by reference as if fully set forth herein.

171. Pursuant to W. Va. Code§ 36B-3-108,

1. A meeting of the association must be held at least once each year ....
2. Not less than ten nor more than sixty days in advance of any meeting, the secretary or other officer specified in the bylaws shall cause notice to be hand delivered or sent prepaid by United States mail to the mailing address of each unit or to any other mailing address designated in writing by the unit owner. The notice of any meeting must state the time and place of the meeting and the items on the agenda, including the general nature of any proposed amendment to the declaration or bylaws, any budget changes, and any proposal to remove an officer or member of the executive board.

172. Defendant White Rock Land Ventures, LLC and its joint venturers failed to hold annual meetings and/or obtain approval of annual budgets of the Association while in control over the Association from 2003 to 2019.

173. If any annual meetings were held, notices of those meetings were not given and/or meetings not held in accordance with the rule stated in W. Va. Code§ 36B-3-108.

174. As a result of Defendant White Rock Land Ventures, LLC and its joint venturers' negligent and/or intentional failure to hold these meetings, and its Breach of Duty of Good Faith/Fiduciary Responsibility, the Association, the Retreat, and the owners of lots within the Retreat, have experienced and will continue to experience financial harm caused by the Defendants'

actions.

**COUNT 17 - FAILURE TO PAY UNIT ASSESSMENTS**

175. Defendant White Rock Land Ventures, LLC and its joint venturers are and/or were the record owner of various lots at the White Rock Retreat within the last 3 years.

176. White Rock Land Ventures, LLC owns a lot behind Joy Intersection at North Slope & White Rock Trail in District 16 Map 25 Parcel Number 143 at Deed Book 559 at Page 83.

177. White Rock Land Ventures, LLC owns a .002 AC Lot at White Rock in District 8 Map 6 Parcel Number 21 at Deed Book 559 at Page 83.

178. White Rock Land Ventures, LLC owns a 1.53 AC Lot at White Rock in District 8 Map 6 Parcel Number 21 at Deed Book 559 at Page 83.

179. White Rock Land Ventures, LLC owns Lot 19 which is of record in District 16 Map 30 Parcel Number 7 at Deed Book 559 at Page 83.

180. White Rock Land Ventures, LLC owns lot 39A which is of record District 16 Map 30 Parcel Number 120 at Deed Book 559 at Page 83.

181. White Rock Land Ventures, LLC owns lot 43A which is of record at District 16 Map 30 Parcel Number 82 at Deed Book 559 at Page 83.

182. White Rock Land Ventures, LLC owns lot 54R which is of record at District 30 Map 36 Parcel Number 2.2 at Deed Book 559 at Page 83.

183. White Rock Land Ventures, LLC owns lot 55A which is of record at District 16 Map 30 Parcel Number 123 at Deed Book 559 at Page 83.

184. White Rock Land Ventures, LLC owns lot 60 which is of record at District 16 Map 25 Parcel Number 144 at Deed Book 559 at Page 83.

185. White Rock Land Ventures, LLC owns lot 60R-1 which is of record at District 16 Map 25 Parcel Number 145 at Deed Book 559 at Page 83.

186. White Rock Land Ventures, LLC owns lot 60R-3 which is of record at District 16 Map 25 Parcel Number 145 at Deed Book 559 at Page 83.

187. White Rock Land Ventures, LLC owns lot 73 which was of record at District 16 Map 30 Parcel Number 38 until June 21, 2017 at Deed Book 559 at Page 83.

188. White Rock Land Ventures, LLC owns lot 81 which is of record at District 16 Map 30 Parcel Number 76 at Deed Book 559 at Page 83.

189. White Rock Land Ventures, LLC owns lot 83 which is of record at District 16 Map 30 Parcel Number 78 at Deed Book 559 at Page 83.

190. White Rock Land Ventures, LLC owned lot 99 which is of record at District 16 Map 30 Parcel Number 67 until January 9, 2017 at Deed Book 559 at Page 83.

191. White Rock Land Ventures, LLC owned lot 100 which is of record at District 16 Map 30 Parcel Number 68 until January 12, 2018 at Deed Book 559 at Page 83.

192. White Rock Land Ventures, LLC owned lot 109 which is of record at District 16 Map 30 Parcel Number 96 until June 21, 2017 at Deed Book 559 at Page 83.

193. Developer owned lot 133 which is of record at District 8 Map 5 Parcel Number 1995 until March 31, 2017 at Deed Book 559 at Page 83.

194. Developer owns lot 144 which is of record at District 8 Map 6 Parcel Number 110 at Deed Book 559 at Page 83.

195. Developer owned lot 145 which is of record at District 8 Map 6 Parcel Number 111 from 2007 until March 31, 2017 at Deed Book 559 at Page 183.

196. Developer owns lot 146 which is of record at District 8 Map 6 Parcel Number 112 at Deed Book 559 at Page 83.

197. Developer owns lot 147 which is of record at District 8 Map 6 Parcel Number 113 at Deed Book 559 at Page 83.

198. Developer owns lot 149 which is of record at District 8 Map 6 Parcel Number 113 at Deed Book 559 at Page 83.

199. Developer owns lot 150 which is of record at District 8 Map 6 Parcel Number 113 at Deed Book 559 at Page 83.

200. Developer owned lot 151 which is of record at District 16 Map 30 Parcel Number 102 until January 12, 2018 at Deed Book 559 at Page 83.

201. Developer owns lot 153 which is of record at District 16 Map 30 Parcel Number 104 at Deed Book 559 at Page 83.

202. Developer owns lot 154 which is of record at District 16 Map 30 Parcel Number 108 at Deed Book 559 at Page 83.

203. Developer owns lot 154A which is of record at District 16 Map 30 Parcel Number 118 at Deed Book 559 at Page 83.

204. Developer owns lot 155A which is of record at District 6 Map 30 Parcel Number

205. 2.1 at Deed Book 559 at Page 83.

206. Developer owns lot 164 which is of record at District 16 Map 30 Parcel Number 118 at Deed Book 559 at Page 83.

207. Developer owns lot 166 which is of record at District 8 Map 6 Parcel Number 122 at Deed Book 559 at Page 83.

208. Developer owned lot 169 which is of record at District 8 Map 6 Parcel Number 125 until 2016 and repurchased it on December 28, 2017 at Deed Book 590 at Page 151.

209. Developer owns lot 170 which is of record at District 124 at Deed Book 559 at Page 83.

210. 8 Map 6 Parcel Number

211. Developer owns lot 171 which is of record at District 16 Map 30 Parcel Number

212. 123 at Deed Book 559 at Page 83.

213. Developer was and/or should have been issued assessments as a unit owner for each of the lots it owned during each year, or portion of a year, that is owned the same pursuant to WV Code Section the Uniform Common Interest Ownership Act and the Article IV, Section 3 of the Declaration.

214. Developer failed to pay the assessments owed in an amount above \$180,000.00, which is for each year/time period which they owned each lot, and is liable to Plaintiff for the assessments in addition to attorney's fees, interest, and costs associated with the collection of the same.

**WHEREFORE**, Plaintiffs request judgment, jointly and severally, against Defendants White Rock Land Ventures, LLC; Freight Train LLC; Jon Riley; Michael Patten; Patten Companies, LLC; Patten Special Assets, LLC; Mike Greenway, and John Does as follows:

1. Placement of the roads system in receivership until a determination is made with respect to obligations to complete, restore and repair the same;
2. Injunction directing Defendant to make all necessary repairs to the common elements, including, but not limited to, the roadways and the Allegheny Lodge and Pool, in compliance with the Act, the Bylaws and the Declaration;
3. Compensatory damages;
4. Consequential damages;
5. Punitive damages and attorney's fees pursuant to W. Va Code §36B-4-118
6. Pre and post- judgment interest and all costs of litigation, including the costs of depositions and expert witnesses;
7. Declaratory Judgment;
8. Receivership-placing the common elements of the roadways and land appurtenant to the same in receivership subject to proper completion, repair and maintenance;
9. Declaration that Defendants, individually and collectively, constitute a joint venture for purposes of determination of liability and subject to joint and several liability for all damages awarded herein;

10. Piercing of the veil of corporate and/or limited liability company Defendants, which constitute a joint venture, and entry judgment, individually and collectively, against all Defendants, their directors, officers, shareholders and/or members, personally, without regard to any otherwise available defenses based upon the formalities of the entities involved, and
11. Such other and further relief as the requirements of law provide, and the principles of equity and justice require or this Court may find appropriate.

**PLAINTIFF DEMANDS A TRIAL BY JURY.**

Respectfully submitted,

**WHITE ROCK MOUNTAIN RETREAT  
PROPERTY OWNERS ASSOCIATION, INC.**

By Counsel



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