IN THE CHANCERY COURT FOR CUMBERLAND COUNTY, TENNESSEE

GARY HAISER, ET Al,	)	
	)	
Plaintiff,	)	
	)	**Case No. 2011-CH-508**
	)	
MICHAEL MCCLUNG, ET AL,	)	**(2012-CH-527 consolidated)**
	)	
Defendants.	)	

MEMORANDUM AND ORDER

This case involves two consolidated actions brought by two opposing boards of directors of a residential development community club, Renegade Mountain. The Moy Toy board was represented by Michael McClung and Phillip Guettler, and the Owners Board was represented by John Moore. Each board claimed legitimacy. This case is on remand pursuant to the memorandum and opinion released by the Court of Appeals on August 29, 2018. In its twenty-six-page opinion, the Court of Appeals made extensive rulings with express directions to this court on the issues which were to be tried on remand.

On December 19, 2019, the Court conducted a hearing in order to ascertain from the parties what they considered to be the issues on remand pursuant to the Court of Appeals' opinion. At the hearing, it became clear that there was no consensus between the parties as to the directives set forth by the Court of Appeals. As a result, the Court was required to enter an order setting forth those issues which are as follows:

1. The Owner Board challenged whether Moy Toy possessed developer rights. In turn, the Moy Toy board relied upon the first 2005 amendments as evidence of Moy Toy's developer rights to prove its affirmative defense that Moy Toy received developer rights

pursuant to its agreement with Renegade Resort, LLC, which allegedly received such rights as a result of the first 2005 amendments. Pursuant to the directive from the Court of Appeals, Moy Toy was tasked with the burden of proving the validity of those 2005 amendments since Moy Toy was relying on the validity of the amendments in order to support its claim of possessing developer rights. Accordingly, the Court determined that the evidence on this issue would concern 1) the chain of title of Moy Toy's developer rights in Renegade Mountain; and 2) whether the requirements for the adoption of the 2005 amendments were properly followed. The findings as to those issues would determine Moy Toy's voting rights.

2. Based upon the Court's determination of the issues set forth in paragraph 1 regarding the 2005 amendments, the Court was required to make a determination of which members were in good standing at the time of the September 2, 2011 special election. In reaching this decision, the Court was to consider whether any prior versions of the restrictions and/or bylaws should apply.

3. After determining whether Moy Toy maintained developer's rights and which version of the restrictions and bylaws were to be applied, the Court was directed to then consider 1) whether Moy Toy as developer, could retain title to the common areas of Renegade Mountain without being obligated to convey title to those common areas to the Renegade Mountain Community Club; and 2) whether Moy Toy had the power to control the unplatted roads of Renegade Mountain with the exception of the entrance road and bridge.

4. Because the Court of Appeals reversed the trial court's finding as to attorney's fees, the Court determined the issue of attorney's fees for both parties would be retried, including the $20,000 McClung loan.

In addition to the issues which the Court of Appeals directed this Court to determine, each party then filed various motions regarding what they considered to be additional remaining issues for trial. Moy Toy requested the Court to order that each property owner must be joined as a party to the case, and that Michael McClung, Phillip Guettler and Darren Guettler be dismissed as individual party defendants. Those motions were denied. The Owner board filed a motion for leave to file a fourth amended complaint which added additional parties, and set forth facts which allegedly occurred since the filing of the appeal. That motion was also denied since the trial court does not have the authority to expand the directive or the purpose of a specific remand from the appellate court. Melton v. Melton, 2004 W.L. 63437 *5 (Tenn. Ct. App. 2004).

Finally, there were findings made by the prior trial court which were not appealed, and therefore were final determinations which could not be retried. Those are as follows:

1. The Moy Toy Board consisting of Phillip Guettler, Michael McClung and Darren Guettler was not elected by the membership. Instead, they appointed themselves and their family as board members, which was not in compliance with state statutes or the relevant bylaws. This Board existed in name only without complying with the bylaws or state laws.

2. The Plaintiffs in the 508-case acted in good faith in attempting to call the September 2, 2011 meeting. The residents in Renegade Resort made repeated requests to the Moy Toy Board to see the books and minutes of the RMCC. Those requests were ignored. The indifference demonstrated by the Moy Toy Board regarding the termination of services in the resort in 2010 and 2011 would have upset any reasonable resident.

3. Notice of the recordation of the restrictive covenants and bylaws from 2005 was constructive notice to the public as to when the documents were recorded in the Register of Deed's Office.

4. The Moy Toy Board and the Owner Board are required to provide an accounting as to monies paid to and distributed from each Board since January 1, 2010. The accounting will delineate all funds spent for maintenance, road repair and expenses that would be typical for proper functions of the Association.

5. The claim for punitive damages is denied.

6. Moy Toy, LLC, Michael McClung and Phillip Guettler had unclean hands in its action towards the residents of Renegade Mountain.

Prior to the commencement of trial, the Court allowed certain property owners, who had purchased lots after the original trial of this case, to intervene for the purpose of demonstrating to the Court certain owner's objections to the Owner board's position and instead to show their support of the Moy Toy board.

Findings of Fact

Renegade Mountain is located in Cumberland County, Tennessee. The original developer, American Recreation Services, Inc. established a set of original covenants and restrictions for Renegade Resort in August 1972 after selling 555 building lots. The remaining unsold lots and undeveloped land in the 9,000-acre resort were transferred by deed from one developer to the next until 1986 when Renegade Limited Partnership purchased the remaining undeveloped land and unsold lots. Later, Renegade Limited Partnership, which was controlled by a group of Germans, changed its name to Cumberland Gardens Limited Partnership. It then took out loans from DG Bank, a German bank, and continued to develop the resort. By all accounts, the golf course on Renegade Mountain was one of the finest in the State. In 1987, Cumberland Gardens Limited Partnership recorded an amendment to the original covenants and restrictions for Renegade Resort and established the Cumberland Gardens Community Club

(formerly known as the Renegade Mountain Club "RMC"). The 1987 amendments also contained new bylaws. Ultimately, Cumberland Gardens Limited Partnership defaulted on its loans to DG Bank, and in June 1991, Joseph Looney, acting as substitute trustee for the German bank foreclosed upon a master deed of trust comprised of three separate deeds of trusts encumbering Cumberland Gardens Limited Partnership.

Mr. Looney has been an attorney practicing in Cumberland County since 1971. His practice has mainly concentrated in real estate and representing homeowners' associations. From 1985 to 1988, Mr. Looney worked for the Germans who were developing the mountain. When Cumberland Gardens defaulted on their loans; Mr. Looney prepared the trustee's deed for DG Bank that transferred the property at foreclosure to Cumberland Gardens Acquisitions Corp ("CGAC"). According to Mr. Looney, the sole purpose of the trustee's deed was to take title in the property, and only the real property was conveyed. No personal property was conveyed, and Mr. Looney testified that developer's rights were not discussed when CGAC received the property at foreclosure. CGAC was the wholly owned subsidiary of DG German Bank. Mr. Looney had no knowledge of the original loan documents between DG Bank and Cumberland Gardens Limited Partnership; however, his client's (CGAC's) intent was to maintain the property as a whole for sale. CGAC was not interested in developing the property and over the nine years that CGAC owned the property, there was no development at all. Its goal was simply to maintain the property for a potential buyer, and the only marketing which was done was for attracting players to the golf course.

Edward Hill, an attorney from Connecticut represented Renegade Resort, LLC, the buyer in the transaction with Cumberland Gardens Acquisition Corp.[1] Mr. Hill began practicing law in

[1] The initial contract for sale listed the buyer as Ole South Golf Properties, Inc. which then assigned the contract to Renegade Resort, LLC. Phillip Guettler was president of Ole South Golf.

1972. He concentrated in estate and tax planning, real estate, and later in representing lenders in commercial transactions. Mr. Hill dealt mainly with Mr. Looney, the authorized representative for CGAC, and it took approximately a year to negotiate the contract. At the time, Renegade Resort, LLC was acquiring an eighteen-hole golf course, a lodge, and a water system which was being run by CGAC. Although Mr. Hill believed the contract for sale contained language in paragraph 1.01 ("All rights in connection therewith") which would include developer rights, he acknowledged that nowhere in any of the purchase and sale documents was "developer rights" ever mentioned.[2] His testimony is also consistent with Mr. Looney's testimony that the issue of developer rights was never brought up between the two negotiators. Schedule 101B to the contract for sale is a schedule of intangible personal property which is being transferred to the buyer; however, it fails to list developer rights. Although Mr. Hill indicated that this was not an exhaustive list of intangible personal property, one would expect to see these rights if they were as important to the transaction as indicated by Mr. Hill. Perhaps the explanation for Mr. Hill's conduct concerning developer rights is because he had a title insurance policy which protected his client. As a result, he intentionally did not investigate whether Cumberland Gardens Acquisition Corp obtained developer rights when it foreclosed on the German developers.[3]

Mr. Hill also brought up the fact that Mr. Looney requested a paragraph in the deed of trust (Section 3.12) which prohibited amendments to the declaration of covenants and restrictions as long as there was a balance due on the note to CGAC without prior written consent. Mr. Looney also addressed this issue. He indicated there was never any discussion that Renegade Resort was going to amend those developer rights. This provision was something Mr. Looney

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[2] Exhibit 62 is a letter of intent with D G Bank. Although the letter describes what Phillip Guettler was buying, it also fails to list developer rights.

[3] Hill testified there was an exception from coverage for title defects that are known to the insured but are not known to the company. If he had discovered that no developer rights were transferred during the foreclosure and not disclosed that to the title company, he could have lost coverage for his client.

requested to protect his client and when Mr. Looney approved the 2005 first amendments, it was only to protect CGAC's collateral.

With regard to the HOA, Mr. Looney indicated that CGAC had spent hundreds of thousands of dollars each year for maintenance of the property, especially the golf course which was not making a profit. Apparently CGAC was not interested in billing homeowners while it controlled the HOA. Accordingly, the bill of sale represented that there had been no assessments to CGAC because it was entitled to a credit for all of the money it had spent on maintenance.

Phillip Guettler owned seventy-five percent (75%) of Renegade Resort, LLC when it purchased the property from Cumberland Garden Acquisition Corp. However, by 2003, Mr. Guettler had sold off his interest to four other principals so that each of the five had twenty percent (20%) ownership in Renegade Resort, LLC. It was at that point that Mr. Guettler dropped out of any management position. Mr. Guettler's partner, Mike McClung became involved with Renegade in 2000. From 2003 to 2005, McClung and Guettler made loans to Renegade Resort, LLC which were then used as a credit toward the purchase price when Moy Toy bought the property. Mr. McClung was not involved in the management of the Renegade Mountain Community Club from 2003 to 2010. It was in 2009, when McClung contacted Guettler to ask if he would be interested in getting involved with Renegade again.[4] Guettler agreed and as a result, he and McClung created Moy Toy to purchase the property in 2010.

After the purchase by Renegade Resort, a meeting of homeowners was called for June 27, 2000. The purpose of the meeting was to present amendments to the declarations and restrictive covenants. Exactly what took place at the meeting on June 27, 2000 is disputed. Moy Toy relied upon the testimony of Mr. Guettler to support its version, while the Owner board relied upon the

[4] According to Guettler, by 2009, he was completely out of Renegade Resort, LLC and that the other principals had lost interest in it.

testimony of Joe Matchak. Mr. Matchak has owned property on Renegade since 1997. He acknowledged receiving notice of a special meeting of the Renegade Mountain Community Club for June 27, 2000. The notice indicated that the agenda would include new amendments to the restrictive covenants. Mr. Matchak attended the June 27, 2000 meeting. Mr. Matchak testified that although proposed amended declarations were handed out and discussed at the meeting, no vote was taken. Mr. Matchak kept a copy of the proposed declarations which he received at the meeting (Exhibit 16).[5] Mr. Matchak's copy of the proposed amendments were substantially different from the first amendments that were recorded in October 2005. Mr. Matchak never saw any minutes of the meeting of June 27, 2000, and that to his knowledge there was never another homeowners meeting called until the special meeting of September 2, 2011.

Mr. Guettler also attended the June 27, 2000 meeting where he claimed he was elected as a director. According to Mr. Guettler, written ballots for the proposed amendments were handed out at the door; he then claimed it was actually approved by a voice vote by the members; and finally changed his mind one more time, indicating that members voted by raising their hands. The Court finds Mr. Guettler's testimony not to be credible.

No minutes of this meeting have ever been produced. Mr. Guettler claimed that the approved amendments and the minutes of the meeting on June 27, 2000 were destroyed when the lodge burned down. It is also undisputed that the amended declaration and restrictive covenants which Mr. Guettler claimed were voted on at the June 27, 2000 meeting were not recorded until 2005, which every expert in this case testified was highly unusual. What is clear to the Court is that the first 2005 amendments were recreated and were not the same amendments given to the

[5] The only reason Mr. Matchak had a copy of the proposed declarations was due to the fact that Mrs. Matchak is one of those persons who keeps everything, and when this issue surfaced years later, Mrs. Matchak found the documents.

members at the June 27, 2000 meeting. Moreover, the Court accepts Mr. Matchak's testimony that no formal vote was taken on the proposed amendments.

The second 2005 amendments, which were recorded a few hours later, remain a mystery. Although Mr. Looney's stamp as the preparer is contained in the document, Mr. Looney never prepared this document. Clearly, it was a "cut and paste job" and a poor one at that. Who prepared these documents and who recorded them will never be known, nor can the Court discern any purpose for their recording. There is no evidence these amendments were voted on and approved by the RMCC members. They are a null and void.

After Renegade Resort, LLC's purchase in 2000, for the next ten years it is difficult to ascertain what was occurring with the resort and the RMCC board. Both Mr. Guettler and Mr. McClung indicated that they were not involved in the affairs of Renegade Resort, LLC or the RMCC for most of this time. Joe Wucher testified by deposition. Mr. Wucher was an early owner of Renegade Resort, LLC and was the managing member. He executed all of the land transfers from Renegade Resort, LLC to various other parties from 2003 to 2010. He signed both the 2005 amendments to the declarations for Renegade Resort, LLC, and executed the contract for purchase by the LKM Group, LLC on September 15, 2005. Mr. Wucher oversaw the maintenance operations and the amenities in Renegade Resort from 2007 to 2010. At the time Moy Toy purchased the property in September 2010, Mr. Wucher executed the deeds for both J. L. Wucher Company, LLC and Renegade Resort, LLC.

During the 2000's, Renegade Resort, LLC began selling off various sections of property in the resort to other persons or entities who believed they received developer rights as part of their land purchase transaction. In September 2005, Mr. Wucher executed a contract for the sale and operation of Renegade Mountain to Larry McMeans of the LKM Group, LLC. LKM Group

(Larry McMeans) began running Renegade Resort, including the RMCC.[6] LKM Group operated the resort as it pleased, and the owners remained completely uninvolved. During this time, these "developer rights" were passed informally, but were never challenged or became an issue. It appears Mr. Wucher intended for Renegade Resort, LLC to transfer the development of the resort to LKM Group, and Mr. McMeans asserted control over the resort and the RMCC, while Mr. Wucher acting on behalf of Renegade Resort, LLC, dropped out of any development or management of the RMCC. Mr. Wucher also sold one hundred acres to Wendell Harkleroad, who created Eagles Nest, LLC to develop his one hundred acres. Mr. Harkleroad purchased this property in 2004, but never was able to develop it for many reasons. Three of his acres were bound by the restrictive covenants of the original Renegade development, which would have entitled him to be a member of the RMCC. However, Mr. Harkleroad never received a notice of any meeting by the RMCC from the date of his purchase until the special meeting called by the Owners board for September 2011.

Thus, it appears that Renegade Resort, LLC, acting through Mr. Wucher, authorized multiple other developers to operate within Renegade Resort (LKM Group, Eagles Nest, and J L Wucher Company) prior to the recording of the first 2005 amendments on October 20, 2005. Even more problematic is the fact that these amendments allegedly were adopted on June 27, 2000, which would require the persons in control as of that date to acknowledge that these amendments were the ones adopted on June 27, 2000. Mr. Wucher testified he did not attend the 2000 meeting, and of course, no one has ever seen any minutes of the meeting. Moreover, while Mr. Wucher signed the 2005 amendments as the developer on October 20, 2005, he had no involvement with Renegade Resort, LLC until 2002, long after the June 27, 2000 meeting.

[6] John Moore dealt with Larry McMeans, who represented himself as the developer. Mr. Moore received documents stating that LKM Group was the developer, and Mr. Moore paid Mr. McMeans for utility installation and hook-up fees when Mr. Moore built his house.

Likewise, the documents which do exist create conflicts. The annual report with the Secretary of State (Exhibit 43) indicates Mr. Wucher was the president of the RMCC and a director in March 2005. However, the first 2005 amendment was signed on October 20 by Edward Curtis as president of the RMCC. Although the 2006 annual report shows Edward Curtis as president of the RMCC, Mr. Wucher testified Edward Curtis resigned prior to the execution of the amendments on October 20, 2005. Instead, Mr. Wucher testified that Larry McMeans controlled the RMCC from the date of his purchase on September 15, 2005 until sometime in 2008. Both sides portrayed Mr. McMeans as a scoundrel, who never fulfilled any of his promises to the owners, never made much of an attempt to develop the property which he purchased, and never paid any dues to the HOA. In fact, according to Terry Stevens, an accountant hired by Mr. McClung, the LKM Group owed the HOA $261,000 in unpaid dues. Larry McMeans of the LKM Group was not called as a witness.

On September 28, 2010, Moy Toy (controlled by Guettler and McClung) purchased the property from Renegade Resort, LLC. According to Moy Toy's accountant, Terry Stevens, all of the expenses which were incurred for the year 2010 were by the prior owner before Moy Toy took over. The dues collected for 2010 came to $69,376. The total expenses that were disbursed came to $208,220.18 and from that amount, there were attorney's fees of $54,147.41. After crediting the dues which were paid, there was $84,687 in expenses in excess of dues collected (not including attorney's fees).

Once Moy Toy took over, there was no communication with any of the homeowners in 2010. Both McClung and Guettler and later, Guettler's son, claimed to be the only board members of the RMCC from 2011 to 2016. The RMCC hired a company owned by Guettler called Renegade Resources to perform services on behalf of the HOA. In 2011, McClung

appointed himself as president of the RMCC. McClung directed that the streetlights be turned off. He also terminated the guards at the guardhouse. Moy Toy has never marketed, has never advertised any lots for sale, and has conducted no development since its purchase in 2010. It has never prepared a development plan or any proposed plats. As a result of its purchase, Moy Toy owned three condominiums, the two German houses inside the platted properties, and twenty-five hundred additional acres of unplatted lots. This is the same status that existed at the time of trial, ten years later. Not a single lot has been developed.

For reasons that remain unexplained, Moy Toy never sent an invoice to the homeowners to pay dues in 2011. In fact, the first statement sent by Moy Toy for dues occurred in January of 2012, and it was an invoice for 2011 and 2012 dues.

The winter of 2010 – 2011 was a tough one. Moy Toy stopped clearing the roads of snow. When spring approached in 2011, Moy Toy failed to mow the common areas. Two culverts collapsed in 2011. Although Moy Toy paid for the stone, the labor was provided by the residents.

One of the owners, John Moore, began meeting with his neighbors. Together, they created a list of complaints (Exhibit 42) which Moore presented to McClung in April 2011. When the meeting produced no results, the residents then requested records from the officers that were identified by the filings in the Secretary of State's office. Again, there was no response.

The homeowners lead by Moore, decided to call a special meeting of the homeowners. Gerald Nugent sent a letter dated June 23, 2011 to the registered agent for the RMCC requesting a special meeting. Mr. Nugent bought a lot on Renegade Mountain in 1987. He testified that at the time he wrote his letter in June 2011, the gated community was gone; the golf course, along with the swimming pool and tennis courts were closed. Mr. Nugent paid his dues in 2010 at the

rate of $20 a month; however, since he received no invoice for 2011, he did not pay anything.[7] The residents then attempted to qualify various homeowners as members in good standing by requesting records and cancelled checks for dues which had been paid in 2009 for the 2010 year. After going through the cancelled checks, the residents came up with twenty-seven members who were considered to be in good standing for 2010. On July 27, 2011, Mr. Nugent sent a written notice of the special called meeting for the Renegade Mountain Community Club which was set on September 2, 2011. Moy Toy responded with a flurry of letters from its attorneys in which Moy Toy objected to the meeting, but then proposed that the president of the HOA would call an annual meeting to discuss the homeowners' concerns. The owners, through their attorney, responded that Moy Toy's efforts were "too little and too late" and that they intended to go forward with the special meeting.

The meeting on September 2, 2011 took place. Michael McClung and his attorney, Dan Moore, appeared on behalf of Moy Toy. McClung initially chaired the meeting and objected to the calling of the meeting. Moy Toy contended that the special meeting had insufficient signatures of members in good standing and that it controlled three hundred and twenty-five votes which it received as a proxy from TIG Holdings on August 24, 2011.[8] Several members then objected that TIG had not offered any proof that it had paid their dues. In fact, TIG had not paid any membership dues and of course, neither had LKM Group.[9] McClung claimed that the only members in good standing at the September 2, 2011 meeting were himself and his family

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[7] In his letter of September 2, 2011, counsel for Moy Toy, Dan Moore, enclosed a list of members who were in good standing in 2010. Gerald Nugent is included in that list. (Exhibit 48).

[8] TIG Holdings purchased the property formally owned by Larry McMeans doing business as The LKM Group at a foreclosure sale in March 2011.

[9] McClung contradicted himself at this point. At one point he testified that LKM Group did not have to pay dues because McMeans was the developer; however, when he was discussing Moy Toy's purchase of developer rights from Wucher and Renegade Resort, LLC, he claimed that McMeans was not a developer; otherwise, Wucher would not have had developer rights to convey to Moy Toy.

members since he was the only one who paid dues for 2011. However, the reason for that is due to the fact that Moy Toy never sent an invoice to any member to pay 2011 dues. The Court finds that there were eighty-six eligible votes present either in person or by proxy at the meeting of September 2, 2011, more than the ten percent quorum required of eligible members. Additionally, the TIG proxy of three hundred twenty-five votes were not authorized due to the fact that no dues had ever been paid by LKM Group; nor did LKM Group have developer rights to excuse its nonpayment of dues; nor did TIG make any application for membership as required for voting rights to attach to the new owners of these lots. As a result, Moy Toy only had three votes and even if Moy Toy had ten votes to every one of its lots, it would still only have thirty votes and would not control the HOA.

Moy Toy refused to turn over any of the assets to the Owner board. This required the Owner board to collect its own dues in order to pay for the maintenance and upkeep of the roads, signs, lights, etc. In addition, Moore sent out a newsletter requesting "donations" for attorneys' fees to fund the Owners Board's lawsuit against Moy Toy. Owners sent checks for their dues and separate checks for legal fees. Moore placed all of the funds in the same bank account, but he kept an accounting and separated for each person the money paid for dues and the money which went to legal fees. (See Exhibits 50, 51 & 52). Moore provided mowing, road repair, maintenance, and administrative work for which he was paid by the RMCC. While this was not the best accounting practice, it does appear that any fees spent by the Owner board on attorney's fees was done with donations from individual members, by separate check, over and above each member's dues.

The intervenors called Thomas Holly, Jr. the gist of Mr. Holly's testimony was that John Moore should not represent the HOA due to his abrasive personality. While the Court does not

disagree with Mr. Holly's assessment that Mr. Moore can be overbearing, a know-it-all, and hard to get along with, that remains a political decision which is up to the homeowners, not this Court.

Each side presented expert proof. The Owner board called Jack Atkins and Moy Toy called Joe Huey. Both Mr. Huey and Mr. Atkins have been practicing attorneys since the 1970's or 1980's. Both of these gentlemen made excellent witnesses. Each was well qualified, gave straight forward answers, and advocated for their client's positions.

Mr. Atkins testified that developer rights are based upon the restrictive covenants and the plat recorded in the Register of Deeds office. These documents establish the developer's rights to govern the homeowner's association and add property to the development, along with amenities. In this particular case, Mr. Atkins noted that no property has been added to the plan since 1987, and there has been no development since that time. Mr. Atkins noted that the substitute trustee's deed to Cumberland Gardens Acquisition Corp on June 4, 1991 did not have broad language that could arguably include developer rights such as "all rights, title and interest." This deed only conveyed real property, no personal property. When CGAC conveyed the property to Renegade Resort, LLC on January 6, 2000, it was the same property that CGAC received from the trustee's deed in 1991. The only evidence of developer rights was when Wucher and Renegade conveyed the property to Moy Toy. Those bills of sale do have specific language which includes developer rights. However, Atkins opined that neither Wucher nor Renegade had developer rights to convey in the first place because it does not appear that CGAC retained developer rights when it received the property from the DG German bank upon foreclosure. The only purpose of this corporation was to sell the property. There was never any development, only maintenance.

Mr. Atkins also considered the Interimages, Inc. v. Newman case in which the court ruled that a developer will not have an unlimited amount of time to control the HOA. The factors which the Interimages court considered were: 1) the number of lots that had been sold; 2) the date that the last home was actually built; and 3) how long the developer rights had existed. Comparing Interimages to the case at bar, Mr. Atkins noted that there was a 1987 amendment to the declarations, but the property described in the 1987 amendment was not any different from the property described in the 1972 declaration except for two single family lots and the condominiums. Comparing the property descriptions in the 1987 amendment to the 2005 amendments, there has been no change for eighteen years. Atkins also discussed Mr. Wucher's deposition and noted that Wucher's idea of a developer is not correct. Instead, Wucher is actually describing a builder as opposed to a developer.

Atkins agreed that the Hughes v. New Life case stands for the proposition that developer rights are personal property which requires a court to consider the purchase and sale agreement and any other documents showing the intent to convey those types of rights. However, he opined that one always considers the deed for any contrary intent, and in this case, there was no mention of developer rights in any of the deeds.

Joe Huey was actually involved when Moy Toy purchased the property. Mr. Huey reviewed the chain of title performed by Atkins, Atkins' prior affidavit, Ed Hill's deposition, and Joe Looney's trial testimony. According to Mr. Huey, if Renegade Resort LLC did not possess developer rights, then the legal effect of the 2005 amendments was a nullity. He pointed out that the letter from Attorney Hicks was unusual but that it was intended to make clear that Moy Toy considered themselves to be the developer. Mr. Huey pointed out that there are no plats which designate any common property and therefore the Plaintiffs cannot request this Court to convey

those common areas to the HOA. Although Mr. Huey indicated that Mr. Atkins limited himself to looking only at the deeds, that conclusion is incorrect. If Mr. Huey focused only on the Atkins affidavit, that might be true, but Mr. Atkins' trial testimony went far beyond the deeds. Mr. Huey did agree that Joe Looney's substitute trustee deed only conveyed real property, and that Mr. Looney indicated he did not believe that CGAC maintained any developer rights to convey. Mr. Huey also acknowledged that although Ed Hill and Mr. Looney negotiated for many months over this particular transaction, there was no specific mention of developer rights being conveyed. Finally, Mr. Huey admitted that his opinion was based upon the assumption that DG Bank acquired developer rights in its security instruments when it foreclosed on Cumberland Gardens.

Conclusions of Law

The Validity of the 2005 Amendments

In order to determine whether Moy Toy possessed developer rights pursuant to the first 2005 amendments, those developer rights would have to be transferred through the chain of title up to the time when Moy Toy acquired the property in September 2010. In Hughes v. New Life Development Corp., 387 S.W. 3d 453 (Tenn. 2012), the Supreme Court found that intent to transfer developer rights are found in ancillary documents such as purchase and sale agreements and other work product in order to ascertain the intent of the parties. Those documents are then compared to the deed to ensure there is no conflict between the two. No one has questioned the validity of Cumberland Gardens Limited Partnership as being the developer of the property in the 1980's. In fact, it was Cumberland Gardens Limited Partnership which recorded an amendment to the original covenants and restrictions for Renegade Resort with bylaws in 1987.

However, when Cumberland Gardens Limited Partnership defaulted on its obligations, the DG Bank in Germany foreclosed on the property. Attorney Joe Looney prepared the trustee's deed that transferred the property at foreclosure to Cumberland Gardens Acquisitions Corp. It was undisputed that the sole purpose of the trustee's deed was to take title in the property and only the real property was conveyed. Mr. Looney testified that developer rights were never discussed when CGAC received the property at foreclosure. CGAC was the wholly owned subsidiary of DG Bank, and Mr. Looney had no knowledge of the original loan documents between DG Bank and Cumberland Gardens Limited Partnership. However, it was undisputed that CGAC, acting as the wholly owned subsidiary of DG German Bank had no interest in developing the property. Instead, its sole purpose was to maintain the property and sell it as a whole. Nine years later, when Attorney Edward Hill representing Renegade Resort, LLC negotiated the purchase of the property, neither he nor Mr. Looney ever discussed developer rights, and there is no evidence in any of the ancillary documents such as the contract for sale that mentions the transfer of developer rights in the property. The Court concludes that at the time CGAC transferred the property to Renegade Resort, LLC, it had no developer rights to convey. Joe Looney's testimony indicated that all he intended to transfer was the real property and no personal property. He also indicated that there was no other collateral document which existed to transfer developer rights to Renegade Resort, LLC. Thus, there was a break in the chain of title where developer rights were not transferred in the foreclosure sale and the substitute trustee's deed from Cumberland Gardens Limited Partnership to Cumberland Gardens Acquisition Co. While Mr. Hill and Renegade Resort, LLC may have possessed the intent to purchase developer rights from CGAC, this intent was never communicated either orally or in any document. On the other hand, Mr. Looney testified that he intended to convey only the personal property identified in the

bill of sale, and developer rights were not included. Both parties had excellent attorneys representing them, the negotiations lasted for a year, so if developer rights were intended to be included, they would have been mentioned or referenced somewhere in the conveyance documents. Since Renegade Resort, LLC did not acquire title to developer rights through the chain of title, Moy Toy cannot possess developer rights because of this break in the chain of title.

Even if Renegade Resort received developer rights from Cumberland Acquisition Corp, no entity actually possessed developer rights in Renegade Resort when the 2005 first amendments were recorded on October 20, 2005. Joseph Wucher testified he conveyed developer rights to Larry McMeans of the LKM Group, LLC in September 2005 and that Larry McMeans took over the property and was acting as the developer at the time the 2005 first amendments were recorded. Mr. Wucher sold off various sections of property in Renegade Resort to other "developers". It appears Renegade Resort, LLC informally and by contract transferred developer rights to the LKM Group as of September 15, 2005 to operate and develop Renegade Mountain. However, those same developer rights were never transferred back to Renegade Resort, LLC and therefore Renegade Resort, LLC had no developer rights to transfer to Moy Toy. If LKM Group, LLC was the developer for Renegade Resort, then Renegade Resort, LLC could not name itself as the developer when the first 2005 amendments were recorded on October 20, 2005. While Mr. Wucher's testimony is inconsistent at times, he was clear that he and Renegade Resort, LLC had no intent to develop Renegade Resort once he transferred the development process and responsibilities to LKM Group. Although McClung and Guettler contended that Larry McMeans and LKM Group never received developer rights, the Court gives little weight to their testimony since neither demonstrated they had any role or responsibility in managing or operating the property in 2005.

Even if one assumes Moy Toy possesses developer rights in Renegade Mountain, the Court of Appeals directed this Court to determine whether the requirements for the adoption of the 2005 amendments were properly followed. This analysis requires the Court to return to the purported adoption of these amendments on June 27, 2000. On June 27, 2000, Renegade Resort, in conjunction with the Renegade Mountain Community Club attempted to present for adoption a Restated and Amended Declaration of Covenants and Restrictions for Renegade Resort, as well as a set of bylaws. Article XV, Section 5 of the Restrictions in effect at the time of the 2000 meeting provides that "the provisions of this Declaration may be amended if such amendment is adopted by affirmative vote of a majority of the votes cast by the voting members of the Club and such amendment is also adopted by the Developer. Any such amendment must be in writing and properly executed and recorded." (Exhibits 3 & 4). These proposed set of restrictions and bylaws were purportedly passed by a vote of the RMCC membership on June 27, 2000; however, they were not recorded in the Register's office for Cumberland County, Tennessee until October 20, 2005. Then, on the same day, a second set of Restrictions with a set of bylaws, signed by the RMCC and Renegade Resort, LLC were recorded.

Joel Matchak attended the meeting of the RMCC on June 27, 2000. Although he received a copy of the 2000 draft Restrictions, he claimed that no proper vote of the membership was ever taken at the meeting. Instead, he testified that the purported developer simply declared the draft document was approved without a vote. No minutes of this meeting have ever been produced. Moreover, the copy which Mr. Matchak kept over the years is significantly different from the documents which were recorded in October 2005.

The only other person to testify regarding the events of June 27, 2000 was Phillip Guettler, whom the Court has already determined not to be credible. Accordingly, the Court

concludes that no vote of the members was taken regarding the proposed amending governing documents at the June 27, 2000 RMCC special meeting.

A property owner's right to own, use, and enjoy private property is a fundamental right, and Tennessee law does not favor restrictive covenants. Hughes v. New Life Development Corp., *supra* *474. Covenants, conditions, and restrictions are property interests that run with the land and arise from a series of overlapping contractual transactions. Restatement (Third) Property: Servitudes § 4.1 cmtc. As a result, covenants and restrictions should be viewed as contracts and construed using the rules of construction generally applicable to other contracts. Clem v. Christole, Inc., 582 N.E. 2d 780, 782 (IND. 1991); Xinos v. Village of Oak Brook, 298 IL App. 3d 520, 232 (IL. Dec. 576, 698 N.E. 2d 667, 669 (1998)).

The Court concludes that the 2000 set of restrictions and bylaws were not approved by a vote of the RMCC membership which was required by the 1987 amendments. Moreover, even if there was a proper vote, the first 2005 amendments which were recorded on October 20, 2005, are not the same version of the documents which were presented to the members in June of 2000. It was concerning to every expert who testified in this case and to this Court that it took over five years to record the first 2005 amendments. It is impossible to determine what happened to the 2005 first amendments. However, there were modifications and deletions between the restrictions which were handed out to the members in June of 2000 and the restrictions which were ultimately recorded in October 2005. For example, owners of Lots 1 – 9 who were required to pay dues in the earlier version were now exempt in the 2005 version. On the other hand, owners of Lots 15-19 who were exempt from paying dues in the 2000 version were now required to pay dues in the 2005 version. These are not the only lot owners who were exempt from paying dues in the 2000 version who were now required to pay dues in the 2005 version.

Another problem concerning the validity of the 2005 first amendments occurred in the execution and recording. The restrictions allegedly were adopted on June 27, 2000. If this were the case, then those persons in control of the RMCC were required to sign these documents when they were recorded in October 2005, or at least acknowledge their validity. Joe Wucher signed these amendments indicating that he was the managing member, representing Renegade Resort, LLC as the "developer" on October 20, 2005. However, it is undisputed Mr. Wucher was not involved with Renegade Mountain in 2000 and did not attend the June 27, 2000 meeting. He only heard about the meeting and admitted that he had never seen any minutes of that meeting. Mr. Wucher also testified that Edward Curtis was not the president of Renegade Mountain Community Club on October 20, 2005 and therefore, he had no authority to execute the 2005 restrictions. The annual report filed with the Secretary of State in 2005 indicates Mr. Wucher was the president of the RMCC, not Mr. Curtis. Mr. Guettler and Mr. McClung's testimony on this point is not helpful since they both testified, they were not involved in the affairs of Renegade Resort, LLC in the mid-2000's.

Although Moy Toy argues that Tenn. Code Ann. § 66-26-110 prohibits the Plaintiffs from contesting the authority of the signatories to the 2005 amendments, that statute is inapplicable to the Plaintiffs. The Court of Appeals has already determined that it is Moy Toy who has the burden of proving the validity of the first 2005 amendments, as an affirmative defense. Accordingly, the Plaintiffs were not required to respond to an affirmative defense in their pleadings.

With regard to the second 2005 amendments, no one in this case has vouched for their validity, and no one has provided any explanation for why they were recorded in the first place.

The Court finds the second 2005 amendments to be null and void for the same reasons that the first 2005 restrictions are null and void.

The Special Election of 2011

Based upon the Court's determination of the issues regarding the 2005 amendments and whether Moy Toy was a developer, the Court of Appeals then directed the Court to make a determination of which members were in good standing at the time of the September 2, 2011 special election. Since the Court has determined that the 2005 amendments are not valid, the 1987 amendments and bylaws will apply in determining which members were in good standing at the time of the September 2, 2011 special election. Moy Toy claimed thirty votes in the RMCC election on September 2, 2011 based upon the three properties it owned at the time of the meeting. However, since the Court has determined that Moy Toy was not the developer, it was not entitled to ten votes per lot in the special election, only three. The minutes of the September 2, 2011 RMCC special meeting certify that there was a total of 115 potential members in good standing, and that 89 voting memberships were present (either in person or by proxy), or a quorum of seventy-seven percent present. The minutes of the meeting confirmed the vote removing the RMCC officers and directors by a vote of eighty-one to three, with four abstentions; the adoption of new bylaws by a vote of eighty-six to three; and the approval of three new directors for the RMCC.

Moy Toy takes the position that the only members in good standing were Michael McClung and the few members of his family whose dues he had paid with one check prior to the special meeting. However, the reason no other member had paid dues in 2011 was due to the fact that neither McClung nor Guettler on behalf of Moy Toy ever sent out an invoice for dues in

2011. Instead, Moy Toy sent an invoice for 2011 dues and 2012 dues in January of 2012. The last time RMCC dues were due from members prior to the September 2, 2011 meeting was in 2010. Moy Toy also ignored repeated requests from Mr. Moore and the group of homeowners for RMCC records in the homeowners' effort to determine members in good standing. This conduct by Moy Toy, McClung and Guettler demonstrates the finding of unclean hands found by the prior trial court. In other words, the Court will not allow Moy Toy to take advantage of its own wrongdoing or at the very least negligence to deny the other homeowners from being in good standing because Moy Toy failed to send invoices for the payment of dues. Gibson's Suits in Chancery, (7th Ed.) § 27.

In order to determine members who were in good standing, the Court will use the criteria from 2010. On June 23, 2011, Gerald Nugent and other members sent a letter requesting a special meeting. The Plaintiffs then notified all owners, including TIG Holdings of the special called meeting set for September 2. Although TIG was informed it was not eligible to vote due to unpaid dues, it did not object or respond by the requested date set by the Plaintiffs of August 15, 2011 for determining eligible voters. (See Tenn. Code Ann. § 48-57-107).

At the meeting on September 2, 2011, McClung arrived with a purported proxy from TIG signed by someone named Phil McCoy. The proxy fails to indicate any corporate title for McCoy, no proof of TIG's ownership, and no indication that a TIG officer designated McCoy as the authorized individual to sign for TIG. Although the RMCC bylaws in effect at the time, required TIG to select two individuals for its business membership and identify which one of the two could vote for the entity, there was no such information provided. Moreover, the property upon which TIG foreclosed was formerly owned by LKM Group, which had never paid dues.

Any person or entity who has never paid any dues cannot establish a membership and will not be in good standing to vote at an RMCC meeting.

The requirement to achieve and maintain good standing in the RMCC to vote at the September 2, 2011 special meeting and request a special meeting, was being an RMCC member, or holding an RMCC membership, and paying all dues and assessments within thirty days after the "due date". The operative 1987 bylaws provide when assessments are due in paragraph 2.11(1), 2.6(2), 9.05(1), and 9.05(2). Article X, Section 7 indicates that assessments for any calendar year are due and payable on the first day, or such other date as fixed by the board of directors, of February of each year. Thus, dues are due on the first day of February of each year or on such other day as fixed by the board of directors. The due date for the 2010 RMCC dues was December 1, 2009 (Exhibit 44). Moy Toy set the due date for the 2011 dues as of March 1, 2012 (Exhibit 33). In this case, all of the RMCC members that Plaintiffs determined had paid their 2010 RMCC dues to create their memberships, were in good standing in 2011 and therefore were eligible to vote.

Finally, the Court notes that although Moy Toy's attorneys brought a letter on the day of the September 2, 2011 meeting and attached a proxy from TIG, TIG never contacted the callers of the meeting any time prior, even though it was given written notice to respond by August 15. Even in Moy Toy's letter of September 2, 2011, it never provided any information or response as to why TIG should be allowed to vote its 325 lots, even though the notice advised TIG that it was not in good standing and could not vote at the special meeting. Whatever rights TIG may have had were waived by failing to timely respond.

Since Gerald Nugent was the author of the letters requesting a special meeting of the homeowners and providing notice, the Court specifically finds that he was a member in good

standing as of June 23, 2011 and September 2, 2011. In fact, McClung produced a document of paid members for 2010 which listed Gerald Nugent and other homeowners (Exhibit 48). Although McClung and Guettler held themselves out as the RMCC board, in fact they were not (See prior Court's finding which was not appealed), and they had no authority to deny the request for a special meeting.

Although Moy Toy relies on the accounting records provided by Mr. Stephens, who the Court finds to be credible, there was proof that the record keeping of Moy Toy and its predecessors was extremely sloppy and, in some cases, nonexistent. For example, the Plaintiffs produced a check written in November 2010 by Mr. Nugent for his dues which was not included in the records provided to Mr. Stephens. Likewise, the Cumberland Point Condominium Association made nine payments of $1,575 to the RMCC in 2010. This would entitle sixty-three-unit owners to be in good standing and to vote. Only sixty-one individuals participated in the special meeting. Although McClung pointed out that the association could not identify the sixty-three paid up members, the Court attributes the ultimate responsibility for the poor records to Moy Toy and its predecessors.

In conclusion, the Court determines that the September 2, 2011 RMCC meeting was legitimate and that the actions approved at this meeting were legal. The Owners board in existence on May 4, 2016 is reinstated as the correct RMCC board with all the powers necessary to govern the RMCC. Due to many factors, Renegade Mountain has not had an operating HOA for many years. Maintenance of the common area has been performed with donations and volunteer labor. As indicated earlier, any members who are dissatisfied with the present leadership will have an opportunity to vote in the upcoming meeting in 2021. The Board is directed, no later than September 30, 2021 to update all records, collect dues and back dues,

notice all owners of record, plan and conduct an annual meeting of the RMCC to elect a new slate of directors.

Common Areas

Since 1972, Renegade Resort was a planned community which provided a golf course, swimming pool, tennis courts, sports park and a guard shack for many years. The prior trial court addressed issues regarding these amenities and common areas in its order of July 1, 2016. It concluded that Moy Toy would continue to retain title in the unplatted amenities but could transfer title if it desired. However, the prior trial court's order was silent on the issue of the RMCC's members easement and right of enjoyment to these amenities. The prior trial court's order did provide that the Renegade Mountain Parkway and bridge were removed from Moy Toy and placed into the hands of the RMCC.

All members of the RMCC have an easement of enjoyment to use the roads, both platted and unplatted from the entrance on U.S. Hwy 70 to their unit or lot in the most practical direct manner. Likewise, all RMCC members in good standing have an easement of enjoyment to use all of the common properties listed herein subject to the governing documents for Renegade Resort. To secure these rights, all control, access, maintenance, and operation of these unplatted properties are transferred to the RMCC. The RMCC is required to provide Moy Toy as the fee simple owner proof of liability insurance with limits of at least $500,000 per incident.

Plaintiffs cite the Court to Innerimages v. Newman, 579 S.W. 3d 29 (Tenn. App. 2019) as an additional legal theory which was developed after the Court of Appeals opinion was released in 2018, but before the trial of this case in 2020. Innerimages stands for the proposition that when the developer's authority to enforce restrictive covenants is challenged, courts should

consider the principles in the Restatement (Third) of Property: Servitude § 6.19 to determine if the developer has discharged its duties to the property owners and / or the HOA. Defendants have objected on the grounds that Plaintiffs are not entitled to set forth a new legal theory based on an appellate decision. The Court finds this objection to be without merit. In the Innerimages case, the homeowners did not seek to affirm the trial court's decision on the basis of the restatement. Nevertheless, the Court of Appeals chose to apply the principles articulated in the restatement in order to 1) prevent needless litigation, 2) to prevent injury to the interest of the public, and 3) to prevent prejudice to the judicial process. Tenn. R. App. P. 13 (b). Although the Court of Appeals in Innerimages found this to be an issue of first impression, it noted that the Restatement (Third) of Property directly addresses the issue in this case where a developer has failed to develop a property for many years, has provided only minimal services, and still wishes to enforce restrictive covenants. As a general rule, judicial decisions in civil cases are given retrospective effect Luna v. Clayton, 655 S.W. 2d 893, 899 (Tenn. 1983); Hill v. City of German Town, 31 S.W. 3d 234, 239 (Tenn. 2000). In this case, the Court of Appeals did not overrule a prior case, it simply adopted the Restatement (Third) of Property, which was in existence at the time of the 2016 trial.

In Innerimages, Inc. v. Newman, 579 S.W. 3d 29 (Tenn. Ct. App. 2019), the court adopted the Restatement (Third) of Property: Servitudes § 6.19:

> 1) The developer of a common-interest-community project has a duty to create an association to manage the common property and enforce the servitudes unless exempted by statute.
> 2) After the time reasonably necessary to protect its interests in completing and marketing the project, the developer has a duty to transfer the common property to the association, or the members, and to turn over control of the association to the members other than the developer.

Id. *45.

Comment (b) to Section 6.19 provides:

> In determining when control of a project reasonably must be turned over to the members, the percentage of lots or units that have been sold, the interval since the first unit was sold, and the level of the developer's construction and marketing activities are relevant. The Uniform Common Interest Ownership Act [UCIOA] provides a timetable for turnover of control based on these factors. In the absence of a controlling statute, a court may look for guidance to such a timetable in determining when the developer is required to cede control. Id. *45, 46.

Under the UCIOA, the developer of a common-interest community must cede control to a homeowner's association under any of the following circumstances:

> 1) [60] days after conveyance of [three-fourths] of the units that may be created to unit owners other than a declarant;
> 2) two years after all declarants have ceased to offer units for sale in the ordinary course of business;
> 3) two years after any right to add new units was last exercised; or
> 4) the day the declarant, after giving notice in a record to unit owners, records an instrument voluntarily surrendering all rights to control activities of the association.

UCIOA Sect. 1-103(d). Id. *46.

Applying these principles to the facts in this case, the Court notes that it has been over forty years since the first unit or lot was sold. Since Moy Toy purchased the property in 2010, it has not sold a single lot, undertaken any construction, and has failed to market the property in any significant way. In fact, from the very beginning, Moy Toy elected to allow the amenities to fall into disrepair and eliminate expenses for maintenance of roads, signs, security, lights, etc. Any reasonable amount of time for development by any purported developer has long since passed.

Numerous members and residents testified that they or other members used the common properties in question; were promised the common properties in question to purchase their property; relied on those promises; and paid dues which in the past were used to improve and maintain these common properties. Attorney Looney confirmed that RMCC members were

allowed to use common properties; that he considered those properties in question to be common properties; and that he was unaware these common properties were not platted.

Considering the testimony and exhibits, the Court finds that the entrance area, guard shack, platted roads, certain unplatted roads, sports park, pool and tennis courts were all intended, promised, promoted, used, operated and maintained in the past as common property for the benefit of the developer and the RMCC members. Control of this unplatted land, which was intended and used as common properties in this community by the developer is not absolute, and the property remaining in the hands of a developer may be held in equity to be subject to these rights of enjoyment. Innerimages, *supra*; Land Developers, Inc. v. Maxwell, 537 S.W. 2d 904, 912 (Tenn. 1976); Stracener v. Bailey, 737 S.W. 2d 536 (Tenn. Ct. App. 1987). While the common areas in Renegade Resort are not shown on plats, they are referenced in all versions of the restrictions, and lots were sold in reliance on these recorded equities. An easement of enjoyment is identified in every set of restrictions and in the 1987 bylaws for members of the RMCC who are in good standing. Here, Moy Toy effectively negated the RMCC's members easement of enjoyment by failing to maintain these common areas, thereby making them impossible to enjoy.

Roads

Plaintiffs have identified eight unplatted roads of concern. (See Exhibit 41). The first is the "Green" road marked as "A". This road was used by residents consistently from at least 1987 to access their lots until blocked by Moy Toy in 2015. In 2018, it was unblocked and has still continued to be used by residents. This road was maintained in past years by the RMCC using dues assessment money. Moy Toy is concerned about the unsafe area of this road and any

associated liability for it. This roadway is paved with street lighting, and the alternate route (Road "G") is dangerous, less passable, with no lights and no guardrail.

The Court finds this road shall be maintained and controlled by the RMCC. As part of its maintenance and control responsibilities, the RMCC, at its own expense will take necessary measures, including barricades, signs, etc. to block off and restrict the unsafe portion of this current road to users. Should Moy Toy or a subsequent fee simple owner of this portion of road desire to develop this area, the owner, at its own expense, may alter the course of this roadway in any such manner as necessary, provided the road connects and terminates into blocks 1 and 8 at the same location as it presently does.

The "Red" road marked "B" (Exhibit 41), is an unplatted road which begins at and terminates into Renegade Mountain Parkway. It is critical to providing ingress and egress to lots 1-7 of block 1 (Exhibit 22). This road was used by residents with unrestricted travel until it was blocked by Moy Toy in 2015. This road was maintained in past years by the RMCC using RMCC dues. This road shall be controlled and maintained by the RMCC.

The "Red" road marked "E" (Exhibit 41) is an unplatted road referred to as the "Ski Road" and intersects with Renegade Mountain Parkway and then terminates on Moy Toy property. This road serves no purpose to provide ingress or egress to any owner lots other than Moy Toy; and therefore, shall remain under the control and responsibility of Moy Toy.

The "Red" road marked "G" (Exhibit 41). This portion of the road runs between blocks 1 and 8 (Exhibit 22, Exhibit 23). This portion of roadway was used by residents to access their lots when road "A" was blocked by Moy Toy in 2015, and then became an alternate road to access block 8 lots. This portion of road was maintained in the past by the RMCC using dues assessment money and has been blocked for a period of time in the past. This portion of the

roadway shall be maintained and controlled by the RMCC. However, should Moy Toy or a subsequent fee simple owner of this portion of road desire to develop this area, the owner may, at its own expense, alter the course of this roadway in any such manner as necessary, provided the road connects and terminates into Blocks 1 and 8 at the same locations it presently does.

The "Red" road marked "D" (Exhibit 41). This is a portion of the road referred to as "Running Deer", a two-lane paved road that exists between Renegade Mountain Parkway and the area of land identified as the sports park. This portion of roadway was used by residents continually since 1987, when the sports park was completed, until Moy Toy prohibited residents from using this road in 2014. Prior to this time, it was maintained by the RMCC using due assessment money. This portion of road is necessary for quick and efficient emergency service response to the sports park area. Moy Toy is concerned about limitations on future development. This portion of road is the only route to access the sports park. The lower two-thirds of this road, below the sports park, is impassable. The Court also notes that members in good standing have an easement of enjoyment to the area designated as the sports park and will need this portion of road to access it. This portion of Running Deer shall be maintained and controlled by the RMCC. Should Moy Toy or a subsequent fee simple owner of this portion of road desire to develop this area, the owner may, at its own expense, alter the course of this roadway in any such manner as necessary, provided the road connects to Renegade Mountain Parkway and terminates at the area designated as the sports park. The remaining portion of Running Deer, consisting of a one-lane gravel and dirt road between the area of land identified as the sports park and the entrance area (the "Old" Road) shall remain the responsibility and control of Moy Toy or the subsequent owner.

The "Red" road "C" (Exhibit 41) is a portion of Mohawk Drive, a one lane gravel and dirt road which exists between Renegade Mountain Parkway and the intersection of Black Foot Trail East in Block 10. Residents in the past had unrestricted travel over this portion of road to access lots in blocks 10, 10A, 11, 12 and 12A. This portion of road is the only access point to provide ingress and egress to these blocks. Moy Toy attempted to block residents and owners from using this road in 2014. This portion of road was maintained in the past by the RMCC using RMCC dues assessment money. It is presently used as a walking trail. This road shall be maintained and controlled by the RMCC. Should Moy Toy or the subsequent fee simple owner of this portion of road desire to develop this area, the owner may, at its own expense, alter the course of this roadway in any such manner as necessary, provided the road connects to Renegade Mountain Parkway and terminates at the intersection of Mohawk Drive and Blackfoot Trail East.

The "Red" road marked "F" (Exhibit 41). This is the portion of Running Deer Road extending south from block 6 to the southern boarder of Renegade Resort. This portion of roadway is a continuation of Running Deer Road. It is the only access to the adjoining fifty-seven hundred acres and has been maintained in the past by the RMCC using dues assessment money. It is a contiguous part of platted block 6, and it has had unrestricted travel by residents for years. Moy Toy has posted this road with no trespassing signs and restricted access. The RMCC shall be responsible for the maintenance and control of this road.

The "Red" road marked "H" (Exhibit 41). This portion of roadway is a portion of platted properties, and as such the RMCC is already responsible for its control and maintenance.

Accounting of Attorneys' Fees and Costs

The prior trial court accepted the special master's report that the Moy Toy board should be disgorged of $54,147.41, and the Owner board should be disgorged $143,513.78. Plaintiffs appealed the prior trial court's holding and executed a cash bond for the appeal. The Moy Toy board did not appeal and paid the disgorged amount of $54,147.41 to the RMCC. The Court of Appeals reversed and remanded the issue of payment of attorneys' fees back to the trial court. Since this Court was new to the case, it determined that the issue regarding disgorgement of attorneys' fees would be retried. As a result, the full amount of the Plaintiffs' bond was returned and Moy Toy received $31,000 from the RMCC account, along with a loan from the RMCC for an additional $22,000.

With regard to the Plaintiffs, the Court has determined that they were and will continue to be the duly elected officers and directors of the RMCC as a result of the special election held on September 2, 2011. Although the Owners board requested the records and assets of the RMCC from the Moy Toy board, it was rebuffed. As the prior trial court found, the Moy Toy board existed in "name only" and had no authority to retain the RMCC assets and records (which finding was not appealed). Based on the testimony of John Moore, Norman Renaud, Wendel Harkleroad, John Peters, Joel Matchak, and Thomas Bauer and after reviewing the accounting provided by Mr. Moore, the Court finds that the Plaintiffs spent a total of $143,513.78 in legal expenses from 2011 through 2016. The Plaintiffs received $124,336.09 in voluntary donations to the legal fund which was kept separate from the regular RMCC dues. This leaves a difference of $19,177.69 which the Owner board was not authorized to spend. Accordingly, the Plaintiffs shall disgorge the above amount to the RMCC within thirty days of the entry date of this order.[10]

[10] Working through Exhibit 50, which is the accounting provided by Mr. Moore, there are two exceptions, where the yearly figures do not match the corresponding years of tax filings (Exhibit 53). The 2016 tax filing is not of record, and the 2011 tax return fails to show where legal fees were reported separately from total income. However, the total income for 2011 of $19,265 corresponds and includes $4,050 of legal fees and $15,215 in dues

Adding all of the legal fees paid from 2011 through August 2016, (Exhibit 50) the Owner board spent a total of $146,513.78 in legal fees. However, the trial court did allow the Plaintiffs to pay $3,000 for the special master, which should be credited to the Plaintiffs' legal expenses and therefore brings the total expenses down to $143,513.78. In conclusion, the Court finds that because these voluntary funds were paid separately and were accounted for separately, they can be traced such that no comingling occurred with the regular dues that were assessed.

With regard to the Moy Toy board, Defendants spent $54,147.41 of RMCC dues assessments monies, which then went to pay for Defendants' personal legal expenses from 2010 to 2016. Mr. McClung and Mr. Guettler had no authority to expend any RMCC funds, since the Moy Toy board was not validly elected, and they simply appointed themselves as directors and officers in the RMCC. Moreover, Moy Toy is not entitled to credit for any 2010 expenses since Terry Stevens testified that those expenses were paid out by a previous RMCC board prior to September 10, 2010. Therefore, the loan executed between the RMCC and the Defendants is invalid. Accordingly, the RMCC will retain $23,147.41 of the initially disgorged amount of $54,147.41, and within thirty days of the entry of this order, Defendants shall disgorge $31,000 to the RMCC.

McClung Loan

The prior trial court held that a $20,000 loan negotiated between Moy Toy and the RMCC board was a conflict of interest transaction and a breach of fiduciary duty by Mr. McClung. These findings were not appealed.

This $20,000 loan, plus interest is void and unenforceable. It violates the 1987 bylaws which require that only RMCC directors approve and authorize contracts. In addition, the 1987

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assessment as reported for 2011 in the accounting. (Exhibit 50). This number for legal fees is also noted in Exhibit 52.

bylaws require any conflict of interest to be documented in the minutes, which was not done. Accordingly, within forty-five days of the date of entry of this order, Defendants shall take all necessary actions to release any security interests associated with the above loans.

Court costs are taxed to Defendants for which execution may issue.

It is so **ORDERED.**

ENTERED this 31 day of March, 2021.

ROBERT E. LEE DAVIES, SENIOR JUDGE

STATE OF TENNESSEE, COUNTY OF CUMBERLAND
I, THE UNDERSIGNED, CLERK & MASTER OF SAID
COUNTY AND STATE, DO HEREBY CERTIFY THAT
THIS IS A TRUE AND CORRECT COPY OF THE
ORIGINAL OF THIS INSTRUMENT.
THIS 5th DAY OF April, 2021.
CLERK & MASTER

CLERK'S CERTIFICATE OF SERVICE

A copy of this Order has been served by U.S. Mail upon all parties or their counsel named below:

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Sue Tollett
~~Deputy~~ Clerk and Master

April 5, 2021
Date