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CLERK OF DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

SKY CANYON PROPERTIES, LLC, ET AL,)
) *Plaintiffs,*)
vs.))
))
THE GOLF CLUB AT BLACK ROCK, LLC,)
) *Defendant.*)
))
))

)

Case No. **CV 2011 2786**

**MEMORANDUM DECISION AND
ORDER ON SKY CANYON’S
MOTION TO STRIKE, AND ON
CROSS-MOTIONS FOR SUMMARY
JUDGMENT**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on the parties’ cross-motions for summary judgment on the issue of whether defendant The Golf Club at Black Rock, LLC (Golf Club) is a proper successor “declarant” pursuant to the Assignment of Declarant Rights clause of the July 31, 2001, “Black Rock, Covenants, Conditions and Restrictions” (CCRs). Black Rock Development, Inc. (BRD) was the original developer of the Black Rock Development. Complaint, p. 2, ¶ 7. Plaintiffs (hereinafter Sky Canyon, collectively) are seven individual members of the Black Rock Homeowners Association (HOA) and each hold fee simple title to at least one lot in Black Rock. *Id.*, ¶¶ 1-2. The CCRs provided for formation of the HOA. *Id.*, at ¶ 9. The CCRs provide BRD is the “Declarant” and therefore “retained the exclusive power to appoint, remove, and replace Directors and officers” of the HOA until expiration of the “Period of Declarant Control.” *Id.*, p. 3, ¶¶ 13-14. The period of Declarant Control began July 31, 2001, and ended

the earlier of: (a) July 31, 2021 (twenty years from recordation of the CCRs) or (b) the date on which the Declarant has recorded the plats of all Expansion Property and sold 90% of the Lots to Owners other than Declarant or Builder in each of the Plats. *Id.*, at ¶ 15. There is no dispute that the parties are still in the “Period of Declarant Control.”

On August 11, 2010, BRD assigned its declarant’s rights to Washington Trust Bank (WTB) in conjunction with its property being foreclosed upon, including the golf course, club house and other club amenities. *Id.*, at ¶¶ 19-20. On August 23, 2010, WTB assigned the Declarant Rights to West Sprague Avenue Holdings, LLC. *Id.*, p. 4, ¶ 22. On October 29, 2010, West Sprague Avenue Holdings, LLC assigned the Declarant Rights to Golf Club in conjunction with conveyance of the club property to Golf Club. *Id.*, at ¶¶ 23- 24. On November 5, 2010, BRD assigned to Golf Club, via a “Conditional Assignment of Declarant Rights” any declarant rights it may have retained following its August 11, 2010, assignment to WTB. *Id.*, at ¶ 25.

On April 1, 2011, Sky Canyon filed its Complaint, seeking declaratory relief that “Defendant does not qualify as a Successor Declarant under the Declaration or alternatively, the period of declarant control has expired and Defendant shall not exercise the rights of the Declarant as provided in the Declaration.” Complaint, p. 6, ¶ 41(1). Sky Canyon also seeks attorney’s fees under I.C. § 12-121. *Id.*, p. 6, ¶ 2. Golf Club filed its Answer and Counterclaim on May 5, 2011, seeking “entry of declaratory relief adjudging and decreeing that it is the duly-qualified Successor to the Declarant Rights of BRD under the Declaration, it is entitled to all rights and benefits as Successor Declarant.” Answer and Counterclaim, p. 9, ¶ 19. Golf Club also seeks an award of attorney’s fees pursuant to I.C. § 12-120(3). *Id.*, at ¶ 21.

On October 19, 2011, Sky Canyon filed its motion for summary judgment on its claim for relief and seeking dismissal of Golf Club's counterclaim. Plaintiff's Motion for Summary Judgment, p. 2. Sky Canyon argues Section 27.7 of the CCRs only allows assignment of the Declarant's Rights where any successor "...takes title to all or a part of the Property, in a bulk purchase for the purpose of development and sale." Plaintiff's Memorandum in Support of Motion for Summary Judgment, p. 8. It is Sky Canyon's contention that, although it concedes Golf Club took title to part of the "Property", there was no "bulk purchase" and the Golf Club did not purchase the portion of the property for the purpose of development and sale. *Id.*, pp. 9, *et seq.*

Also on October 19, 2011, Golf Club filed its cross-motion for summary judgment, requesting its counterclaim for declaratory relief be granted and Sky Canyon's claim for declaratory relief be denied. Motion for Summary Judgment, p. 2. Golf Club argues, *inter alia*, the Period of Declarant Control, defined in Article 2.43 of the CCR, remains in effect and retains the right to develop and sell potential expansion property; "a primary purpose of annexing Expansion Property in conformance with the terms of the CC&Rs would be to develop and sell the same." Memorandum in Support of Motion for Summary Judgment by Defendant/Counterclaim Plaintiff the Golf Club at Black Rock, LLC, p. 15.

On November 4, 2011, Sky Canyon filed its Motion to Strike, asking that the Court strike extensive portions of the Affidavits of Roger Rummel and John Magnuson, both filed in support of Golf Club's cross motion for summary judgment. In response, Golf Club filed its Memorandum in Opposition to Plaintiff's Motion to Strike on November 10, 2011.

Oral argument was held on November 16, 2011; at the conclusion of which, this Court took the motion to strike and the cross-motions for summary judgment under

advisement. These motions are at issue, and the case is currently scheduled for a two-day court trial beginning February 27, 2012.

II. STANDARD OF REVIEW.

In considering a motion for summary judgment, the Court is mindful that summary judgment may properly be granted only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. I.R.C.P. 56(c). In determining whether any issue of material fact exists, this court must construe all facts and inferences contained in the pleadings, depositions, and admissions, together with the affidavits, if any, in the light most favorable to the non-moving party. I.R.C.P. 56(c); *Sewell v. Neilson, Monroe Inc.*, 109 Idaho 192, 194, 706 P.2d 81, 83 (Ct. App. 1985). A mere scintilla of evidence or only slight doubt as to the facts is not sufficient to create a genuine issue for purposes of summary judgment. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134, Idaho 84, 87, 996 P.2d 303, 306 (2002). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. *Smith v. Meridian Joint School District No. 2*, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996). Where, as here, both parties file motions for summary judgment relying on the same facts, issues and theories, the judge, as trier of fact, may resolve conflicting inferences if the record reasonably supports the inferences. *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 518-20, 650 P.2d 657, 661-62 (1982). Where both parties have moved for summary judgment on the same evidentiary facts and on the same theories and issues, the parties have effectively stipulated that there is no genuine issue of material fact, and the judge is entitled to draw all reasonable inferences from the facts presented. *Dunham v. Hackney Airpark, Inc.*, 133 Idaho 613, 990 P.2d 1224 (Ct.App. 1999). “Moreover, when the evidentiary

facts are not disputed and the judge rather than the jury will be the ultimate trier of fact...the judge may draw the inferences he or she deems most probable since the judge alone would be responsible for drawing such inferences from the same facts at trial.” *Id.* Because this case will involve a court trial, the court in this case is entitled to draw all reasonable inferences from the facts presented. *Id.*

Evidentiary rulings, such as ones on the motion to strike before the Court, are reviewed under an abuse of discretion standard. *Perry v. Magic Valley Reg'l. Med. Ctr.*, 134 Idaho 46, 50, 995 P.2d 816, 820 (2000).

III. ANALYSIS.

A. Plaintiff's Motion to Strike.

Sky Canyon filed its motion to strike extensive portions of the Affidavit of Roger Rummel and John F. Magnuson on November 4, 2011. On November 10, 2011, Golf Club filed its Memorandum in Opposition to Plaintiffs' Motion to Strike. Reviewing Courts apply the abuse of discretion standard when evaluating whether testimony offered in connection with a motion for summary judgment is admissible. *Gem State Ins. Co. v. Hutchison*, 145 Idaho 10, 15, 175 P.3d 72, 177 (2007) (citing *McDaniel v. Inland Northwest Renal Care Group-Idaho, LLC*, 144 Idaho 219, 221, 159 P.3d 856, 858 (2007)). In Idaho, a party may wait until hearing on a summary judgment motion to object to an opposing party's affidavits. *Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778, 782-83, 839 P.2d 1192, 1196-97 (1992). In *Shane v. Blair*, 139 Idaho 126, 75 P.3d 180 (2003), the Idaho Supreme Court wrote:

We have held that the question of admissibility of affidavits under Idaho Rule of Civil Procedure 56(e) is a threshold question to be analyzed before applying the liberal construction and reasonable inferences rules required when reviewing motions for summary judgment. *Rhodehouse v. Stutts*, 125 Idaho 208, 211, 868 P.2d 1224, 12227 (1994). The trial court must look at the affidavit or deposition testimony and determine whether it

alleges facts, which if taken as true, would render the testimony admissible. *Dulaney v. St. Alphonsus Regional Med. Ctr.*, 137 Idaho 160, 163, 45 P.3d 816, 819 (2009). When reviewing the trial court's evidentiary rulings, this Court applies an abuse of discretion standard. *Sulaney*, 137 Idaho at 163-64, 45 P.3d at 819-20.

139 Idaho 126, 128, 75 P.3d 180, 182. Idaho Rule of Civil Procedure 56(e) requires affidavits be made upon personal knowledge, "shall set forth such facts as would be admissible in evidence", and affirmatively show the affiant is competent to testify to the matters stated. I.R.C.P. 56(e).

With respect to the Affidavit of Roger Rummel, Sky Canyon takes issue with 40 statements, making five hearsay objections and arguing the remaining objected-to portions call for a legal conclusion and/or lack foundation. In response, Golf Club notes Roger Rummel was the Golf Club's Rule 30(b)(6) designee (and therefore has personal knowledge of the transactions at issue); and Golf Club addressed each objection in turn, and thoroughly disputing each as inappropriate, in large part because the statements made are meant to provide context for the CCRs and other documents (an assignment, a Deed, etc.) submitted without objection. Memorandum in Opposition to Plaintiffs' Motion to Strike, p. 3, *et seq.* Interestingly, Sky Canyon objects to several statements about Assignments and Deeds being attached to the Affidavit of Mr. Magnuson as lacking foundation, but does not object to the substantive Exhibits themselves attached. Motion to Strike, pp. 3-4. To these objections, Golf Club states the actual Deeds and Assignments were submitted to the Court without objection and that the affiant "is familiar with what he has submitted in support of his request for relief from the Court." Memorandum in Opposition to Plaintiffs' Motion to Strike, pp. 9, *et seq.* In *Sprinkler Irrigation Co., Inc. v. John Deere Ins. Co., Inc.*, 139 Idaho 691, 85 P.3d 667 (2004), the Idaho Supreme Court affirmed the District Court's striking of Sprinkler's

expert's Affidavit, determining the entire Affidavit "is filled with rambling, nonspecific, inaccurate and unsupported statements." 138 Idaho 691, 697, 85 P.3d 667, 673. In the present case, it is the motion to strike which itself sets forth inaccurate and unsupported arguments. Golf Club concedes that the objection to ¶ 22, in which Mr. Rummel refers to Golf Club as the "successor declarant" is the only objection raising an "arguable" point. Memorandum in Opposition to Plaintiffs' Motion to Strike, p. 15; see Motion to Strike, p. 5. Given the parties' cross summary judgment motions on this very issue, and only this issue, Mr. Rummel's reference to Golf Club as the "successor declarant" certainly improperly calls for a legal conclusion and must be stricken. To that extent only, Sky Canyon's Motion to Strike is granted.

Sky Canyon's other objections to the Affidavit of John F. Magnuson take issue with language describing the various assignments from BRD to WTB, from WTB to Sprague Avenue Holdings, and ultimately from Sprague Avenue Holdings to Golf Club. Motion to Strike, pp. 5-6. Again, Golf Club is correct in arguing against this Court's striking of the statements because each assignment described was properly executed and delivered; "[t]he legal force and effect of those assignments is for this Court to determine. However, the Assignment, as a matter of fact, were executed and delivered by and between the parties so stated." Memorandum in Opposition to Plaintiffs' Motion to Strike, p. 16. In all other aspects, Sky Canyon's Motion to Strike is denied.

B. Cross-Motions for Summary Judgment.

In its memorandum in support of its motion for summary judgment, Sky Canyon presents the issue before the Court as being whether Golf Club qualifies as a "successor declarant" to whom the Declarant's rights could have been assigned pursuant to Section 27.7 of the CCRs. Plaintiffs' Memorandum in Support of Motion for Summary Judgment, p. 5. Sky Canyon quotes Section 27.7 in its entirety:

27.7 Assignment. Declarant may assign all or any part of the Special Declarant Rights or any of Declarant's other rights and reservations hereunder to any successor who takes title to all or part of the Property in a bulk purchase for the purpose of development and sale. Such successor will be identified, the particular rights being assigned will be specified, and, to the extent required, concomitant obligations will be expressly assumed by such successor, all in a written instrument duly recorded in the records of the Recorder of Kootenai County, Idaho. (Emphasis Added).

Id., p. 8; see also Exhibit 2 to the Plaintiffs' Submission of Certified Documents in Support of Their Motion for Summary Judgment. (underlining added). Sky Canyon concedes that "there is no question that Defendant took title to part of the Property." Plaintiff's Memorandum in Support of Motion for Summary Judgment, p. 9. However, Sky Canyon argues there was no "bulk purchase" as that phrase is defined either by BLACK'S LAW DICTIONARY or the Merriam-Webster website. *Id.*, p. 10. Sky Canyon notes the Plat of Black Rock created a number of blocks reserved for future residential lots, but these individual lots were not platted at the time the Black Rock Plat was recorded. *Id.*, p. 11. Sky Canyon then argues it follows there can have been no undivided, bulk purchase based on the platting activity because there was no "purchase of part of the Property reserved for future residential use under the original Plat." *Id.*, p. 12. Sky Canyon goes on to argue the purchase of Golf Club's sale was not for development and sale as contemplated by the CCRs, but rather for development and sale of golf club memberships. *Id.*, p. 15. "...[A]n intent to develop and sell the property contingent on future events (such as a plan to develop and sell the applicable property if the golf club is not profitable) does not meet the requirements of Section 27.7." *Id.* Ultimately, Sky Canyon argues, Golf Club fails to meet the definition of a "successor declarant", found in Section 2.50 (defining "Successor Declarant" as any party or entity to whom a Declarant assigns any or all of its rights, obligations or interest

as Declarant “as permitted by Section 27.7., evidenced by recordation of an assignment or deed of record) of the CCRs because it did not take title to part of the property “in a bulk purchase for the purpose of development and sale.” *Id.*, pp. 16-17.

In its memorandum in support of its cross motion for summary judgment, Golf Club makes several arguments: (1) the period of Declarant Control remains in effect such that “expansion property” can still be acquired; (2) Golf Club acquired part of the “Property” in bulk via its purchase of approximately 206 acres, the Clubhouse, all related equipment, fixtures, inventories, etc. for the discounted bulk sale price of \$6 million; (3) and at the time the Golf Club made the purchase, there were no existing memberships in or to the Club property, therefore, the intent to sell membership to “create a vibrant and collegial golf course and recreational community atmosphere”, while retaining the right to develop and/or sell the property, satisfies Section 27.2. Memorandum in Support of Motion for Summary Judgment by Defendant/Counterclaim Plaintiff The Golf Club at Black Rock, LLC, pp. 9, *et seq.*

In their responsive briefing, the parties have further clarified their arguments for the Court. In the Golf Club’s November 3, 2011, Memorandum in Opposition to Motion for Summary Judgment, Golf Club argues the period of Declarant control remains in effect, the CCRs’ definition of “property” includes both the Club Property purchased by Golf Club (the golf course, practice facilities, clubhouse, etc.) and possible future “expansion property”, the sale of the property was in bulk as it included within the 206 acre purchase the Clubhouse, all associated equipment, and fixtures etc. for the “bulk price of \$6 million”, where the property (including the Beach Club purchased for \$1.5 million) was assessed by the County shortly after purchase at over \$14 million, and Golf Club’s sale of 172 golf memberships alone satisfies Section 27.7’s requirement that the bulk purchase be for “development and sale.” Memorandum in Opposition to Motion for

Summary Judgment of Plaintiffs/Counterclaim Defendants, pp. 3, *et seq.* Golf Club continues that even if the Court disagrees that selling of golf membership constitutes “development and sale” under the CCRs, it:

has the ability to develop and sell portions of the 206 +/- acre parcel that included, for any residential or other purpose not proscribed by the CC&Rs. This can be as an alternative to the operation as a golf club or in tandem with the same.

Id., p. 10. Finally, Golf Club argues its acquisition of the right to purchase potential “expansion property” in and of itself satisfies Section 27.7 as such “expansion property” constitutes “property” for the purposes of the CCRs, the rights to “expansion property” were acquired in bulk, and “the only purpose for acquiring ‘Expansion Property’ would be for development and sale.” *Id.*, pp. 11-12. In their objection to Golf Club’s motion for summary judgment, Sky Canyon again defines the term “bulk”, arguing “a ‘bulk purchase’ is a purchase of a part of the Property reserved for future residential use under the original Plat.” Plaintiff’s Objection to Defendant’s Motion for Summary Judgment, p. 7. Because the CCRs do not include personal property in the definition of “Property”, Sky Canyon posits that Golf Club’s “purchase of personal property is irrelevant” in response to Golf Club’s argument that it effected a bulk purchase via purchase of the 206 acres including the Clubhouse, associated equipment, fixtures, inventories, etc. *Id.*; see Memorandum in Opposition to Motion for Summary Judgment of Plaintiffs/Counterclaim Defendants, p. 7. And, Sky Canyon again vehemently argues Golf Club did not purchase the property “for the purpose of development and sale.” Plaintiff’s Objection to Defendant’s Motion for Summary Judgment, pp. 7, *et seq.* Essentially, Sky Canyon’s contention is Golf Club “purchased the Club Property for the purpose of owning and operating a golf club”, which Sky Canyon differentiates from the CCRs requirement of developing and selling property. *Id.*, pp. 8, *et seq.*

Two questions remain for this Court under Section 27.7: (1) whether the instant purchase of property qualifies as a “bulk purchase”, and (2) whether the intent to develop and sell golf club memberships can be treated as “development and sale” of Club Property.

As argued by the parties, Idaho recognizes covenants restricting the free use of land as valid and enforceable,

[h]owever, since restrictive covenants are in derogation of the common law right to use land for all lawful purposes, the Court will not extend by implication any restriction not clearly expressed. Further, all doubts are to be resolved in favor of the free use of land.

Berezowski v. Schuman, 141 Idaho 532, 535, 112 P.3d 820, 823 (2005). Courts apply the general rules of contract construction to covenants. *Pinehaven Planning Bd. v. Brooks*, 138 Idaho 826, 829, 70 P.3d 664, 667 (2003). A covenant is ambiguous if capable of more than one reasonable interpretation; if a covenant is unambiguous, the court must apply its plain meaning as a matter of law. *Id.*, 138 Idaho 826, 829, 70 P.3d 664, 667. If a covenant is ambiguous, its interpretation is a matter of fact.

Intermountain Eye and Laser Centers, PLLC v. Miller, 142 Idaho 218, 221, 127 P.3d 121, 125 (2005). Ambiguity is not established simply because a party presents differing interpretations to the court. *Rim View Trout Co. v. Higginson*, 121 Idaho 819, 823, 828 P.2d 848, 852 (1992). If the Agreement is ambiguous, this Court must view the Agreement as a whole to determine the intent of the parties at the time of contracting. See *Best Hill Coalition v. Halko, LLC*, 144 Idaho 813, 817, 172 P.3d 1088, 1092 (2007).

All of these tenets run contrary to Sky Canyon’s position. Sky Canyon is advocating that this Court by implication extend this express language in the restrictive covenant (making it more restrictive), when the express language does not allow such additional restriction. This Court is prohibited from doing such. This Court is

constrained only to give reasonable interpretation to the contract language, and Sky Canyon's interpretation is not reasonable. Because Sky Canyon's interpretation is not reasonable, it cannot be used to create ambiguity. Even if Sky Canyon's interpretation was reasonable, Sky Canyon is advocating an interpretation of Section 27.7 which is not supported by the agreement as a whole.

The terms "bulk" and "bulk purchase" have been defined by the parties, and, indeed, little disagreement exists regarding how the terms have been defined in dictionaries. The plain language of the CCR at issue reads:

27.7 Assignment. Declarant may assign all or any part of the Special Declarant Rights or any of Declarant's other rights and reservations hereunder to any successor who takes title to all or part of the Property in a bulk purchase for the purpose of development and sale. Such successor will be identified, the particular rights being assigned will be specified, and, to the extent required, concomitant obligations will be expressly assumed by such successor, all in a written instrument duly recorded in the records of the Recorder of Kootenai County, Idaho.

Exhibit 2 to Plaintiff's Submission of Certified Documents in Support of Their Motion for Summary Judgment, at p. 63. The terms "bulk purchase", "development" and "sale" are not defined in Article 2 (Definitions) of the CCRs. This Court is constrained to give the CCR language its ordinary, plain meaning if found unambiguous and not capable of more than one reasonable interpretation. *Pinehaven Planning Bd.*, 138 Idaho 826, 829, 70 P.3d 664, 667. This Court could find no Idaho or foreign jurisdiction case law explicitly defining the term "bulk purchase." For purposes of criminal law, "bulk amount" has been defined in state statutes, but such definition is inapplicable here. See *e.g.* Baldwin's Ohio Revised Code § 2925.01(D). As noted by the parties, BLACK'S LAW DICTIONARY provides the following definitions:

bulk, *adj.* (of goods) not divided into parts <a bulk shipment of grain>

bulk discount. See *volume discount* under DISCOUNT

bulk sale. A sale of a large quantity of inventory outside the ordinary course of the seller's business * Bulk sales are regulated by Article 6 of the UCC, which is designed to prevent sellers from defrauding unsecured creditors by making these sales and then dissipating the sale proceeds- Also termed *bulk transfer*.

BLACK'S LAW DICTIONARY 190 (7th ed. 1999). It is Sky Canyon's contention that under its plain meaning:

...bulk means a purchase of a large quantity that is later divided into smaller quantities and sold. The Defendant [Golf Club] did not purchase a large quantity of land with the purpose of dividing and selling the real property. The Club Property was purchased to be used as a finished unit, not divided up into parts and sold.

Reply to Opposition to Motion for Summary Judgment of Defendant, p. 6. It is Golf Club's contention that no requirement existed in the CCRs:

...that the 'Club Property' be maintained in a static condition as it presently exists. Of the 206+/- acres, portions can be developed at the election of The Golf Club for purposes or development and sale.

Memorandum in Opposition to Motion for Summary Judgment of Plaintiffs/Counterclaim Defendants, p. 8.

Thus, the parties have differing interpretations of whether the phrase "for the purpose of development and sale" in Section 27.7 of the CCRs means development and sale of real property (as set forth by Sky Canyon), or development and sale of golf memberships with the possibility of future development and sale of expansion property (as argued by Golf Club). This Court finds Sky Canyon's interpretation not to be reasonable for several reasons. First, such an interpretation is not justified by the language itself. Section 27.7 is not limited by its terms to only "real" property. Second, such an interpretation requires this Court to imply more restrictive terms than are used in this section of the restrictive covenant, a task this Court is not allowed to perform. Third, as pointed out by counsel for Golf Club at oral argument, because The Club at Black Rock had terminated all golf memberships (Affidavit of Roger Rummel in support

of Defendant's Motion for Summary Judgment, p. 5, ¶ 14), Golf Club was purchasing from the bank a property with no memberships. And as Rummel stated in his affidavit, Golf Club hoped to then sell memberships (*Id.*, pp. 5-6, ¶ 19), but if that didn't work out, Golf Club intended to and had the right to sell the golf course property. *Id.* Golf Club purchased this property for the "purpose of development and sale" of golf memberships, and, alternatively, sale of the golf course property. Both are allowed under Section 27.7. As mentioned above, ambiguity is not established simply because a party presents differing interpretations to the court. *Rim View Trout Co. v. Higginson*, 121 Idaho 819, 823, 828 P.2d 848, 852 (1992). The Court finds Sky Canyon's interpretation to not be reasonable. Thus, there is no ambiguity.

If this Court found Sky Canyon's interpretation (that the phrase "for the purpose of development and sale" in Section 27.7 of the CCRs means development and sale of real property only) to be reasonable, then the CCRs would be ambiguous as a matter of law, requiring the Court to read the CCRs as a whole and determine the intent of the parties. While the Court does not find Sky Canyon's interpretation to be reasonable, the following analysis is provided by the Court as an additional or alternative ground for granting summary judgment in favor of Golf Club.

The CCRs Introduction states, in relevant part:

This Declaration is intended to regulate the [Black Rock] Project and use of the Black Rock Planned Unit Development for the mutual benefit of future Owners and occupants. The Project is to be an aesthetically pleasing family oriented residential development.

Exhibit 2 to Plaintiff's Submission of Certified Documents in Support of Their Motion for Summary Judgment, at p. 1. The Club Property is specifically addressed in Article 17, which reads:

17.1 Club Property. The golf course planned by Declarant will be privately owned and operated by the Club and is not part of the Common Area

hereunder. Nothing in this Declaration nor any designation or reference on any Plat, Final Development Plan, Black Rock Document, planned unit development document, approval document issued by any government entity, drawing, advertisement, brochure, or any other document in any way relating to Community or any oral representation of any agent of the Declarant or any party related to the Declarant shall give rise to any right, whether expressed or implied, of an Owner to play golf, or have access to the Club Property, become a member of the Club, require the Declarant to construct or maintain an area as a Club Property, or otherwise impose any obligation of the Declarant relating in any way to the proposed Club Property. All arrangements relating to any Owner and the planned Club Property must be in writing signed by the Owner and the planned Club Property and shall be separate and apart from the Black Rock Documents. The Club has the exclusive right to determine from time-to-time, in its sole discretion and without notice or approval of any change, how and by whom the Club Property shall be used. By way of example, but not limitation, the Club has the right to approve users and determine eligibility for use, to reserve use rights for future purchasers of Lots, to terminate any or all use rights, to change, eliminate or cease operation of any or all of the Club Property or the operation thereof to anyone and on any terms which it deems appropriate, to limit the availability of use privileges, and to require the payment of a purchase price, initiation fee, membership deposit, dues, and other charges for the use privileges.

OWNERSHIP OF A LOT OR ANY PORTION OF THE PROPERTY DOES NOT GIVE ANY VESTED RIGHT OR EASEMENT, PRESCRIPTIVE OR OTHERWISE, TO USE THE CLUB PROPERTY, OR TO ACQUIRE A MEMBERSHIP IN THE CLUB AND DOES NOT GRANT ANY OWNERSHIP OR MEMBERSHIP INTEREST IN THE CLUB OR THE CLUB PROPERTY.

Exhibit 2 to Plaintiff's Submission of Certified Documents in Support of Their Motion for Summary Judgment, at p. 50. (emphasis in original). Given the breadth of Section 17.1, and its explicit separation from the general introductory purpose of Black Rock being a residential development, the question of whether the Club Property was purchased for the purpose of development and sale has been answered. There is simply no requirement in the CCRs that the Club Property be developed for sale of real property (as opposed to development and sale of golf club memberships), and to read such a requirement into the CCRs would be an inappropriate act on the part of this Court. See *e.g. Bondy v. Levy*, 121 Idaho 993, 997, 829 P.2d 1342, 1346 (1992) (Court may not revise a contract to create a better agreement for one of the parties).

In fact, Section 17.1 provides the Club Property owner with the sole ability to determine how the property is to be used, including ceasing use of the property as a golf club at any time. But even if this Court were to find that “development and sale” inferred development and sale of real property only, Golf Club purchased this property to later sell it if the sale of memberships did not pan out. Affidavit of Roger Rummel in support of Defendant’s Motion for Summary Judgment, p. 5, 6, ¶ 14, ¶ 19.

Thus, the only remaining question is whether the Golf Club’s purchase of the Club Property was a “bulk purchase.” Again, the parties do not argue about the definition of the term, but rather about its application to the facts before the Court. Golf Club argues: “Every property right that currently exists, or that could exist in the future (through Expansion Property), was purchased in one lump and bulk transaction at a bulk discount of fifty percent (50%) off of the assessed valuation.” Memorandum in Opposition to Motion for Summary Judgment of Plaintiffs/Counterclaim Defendants, p. 9. On the other hand, Sky Canyon notes the purchase of the Club Property was of Tract A (holes 1-9 and 16-18 of the golf course), Tract C and a portion of Lot 1, Block 11 of the Plat (holes 10-15 of the golf course), Lot 1, Block 8 of the Fifth Addition (the Club House), A portion of Tract C (a short portion of Kimberlite Drive), the West 150 feet of the North half of the Southwest Quarter of the Southeast Quarter and Government Lot 10 (part of one hole of the golf course), and Lot 1, Block 15 of the Plat (the waterfront property), and argues that a “‘bulk purchase’ is a purchase of a part of the Property reserved for future residential use under the original Plat.”. Plaintiff’s Objection to Defendant’s Motion for Summary Judgment, pp. 5-7. The fact the Golf Club argues it received a “bulk discount” in its purchase of the Club Property and the Beach Club for 50% less than appraisal value is not determinative. Rather, the CCRs define Club Property as:

...all of the real property owned by the Club and its successors or assigns plus all of the recreational and social facilities and maintenance facilities constructed thereon, which will be operated by the Club or its successor or assigns and commonly known as the Club at Black Rock, including without limitation, the golf course, the golf clubhouse, golf practice facilities, tennis courts, swimming pool, private beach, and any other recreational facilities offered by the Club...

Exhibit 2 to Plaintiff's Submission of Certified Documents in Support of Their Motion for Summary Judgment, at p. 3. Here, it is evident that Golf Club purchased an undivided portion of real property, known as the Club Property, which included but was not limited to the golf course, golf clubhouse, golf practice facilities, golf maintenance facilities, tennis courts, swimming pool, private beach, etc. Had Golf Club purchased but one or two of the properties listed immediately *supra*, Sky Canyon's argument would make more sense. However, given the fact that the Club Property's was deemed real property separate and apart, and involving different rights and limitations, from the Black Rock development as a whole, it would not be appropriate for this Court to only consider Golf Club's purchase a "bulk purchase" if it were in conjunction with additional property bought for future residential development, given the facts of this case and viewing the contract in its entirety.

IV. CONCLUSION AND ORDER.

For the reasons stated above, this Court denies Sky Canyon's motion to strike, with the exception of the objection to the first portion of ¶ 22 of the Rummel Affidavit. This Court finds the CCR language not ambiguous as the interpretation posited by Sky Canyon is not reasonable; additionally, if such interpretation were reasonable, the CCR language at issue would be ambiguous as a matter of law, and the ambiguity is resolved in favor of Golf Club and against Sky Canyon. Accordingly, Sky Canyon's motion for summary judgment is denied and Golf Club's motion for summary judgment is granted.

IT IS HEREBY ORDERED Sky Canyon's Motion to Strike as pertains to the objection to the first portion of ¶ 22 of the Rummel Affidavit is GRANTED, and that objection is sustained. All other aspects of Sky Canyon's Motion to Strike are DENIED, and all other objections are overruled.

IT IS FURTHER ORDERED Sky Canyon's Motion for Summary Judgment is DENIED, and Golf Club's Motion for Summary Judgment is GRANTED.

IT IS FURTHER ORDERED the court trial beginning February 27, 2012, is VACATED.

Entered this 13th day of December, 2011.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of December, 2011, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer
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