

DISTRICT COURT, ADAMS COUNTY, STATE OF COLORADO 1100 Judicial Center Drive Brighton, CO 80601 (303) 659-1161	DATE FILED: May 10, 2023 5:36 PM FILING ID: 9BAFCA9045703 CASE NUMBER: 2023CV30537
Plaintiff: EDIE APKE; <i>et al.</i> vs. Defendants: TODD CREEK FARMS HOMEOWNERS’ ASSOCIATION, a Colorado nonprofit corporation; <i>et al.</i>	▲ COURT USE ONLY ▲ Case No.: 2023CV030537
<i>Attorneys for Defendant Todd Creek Farms Homeowners’ Association:</i> ORTEN CAVANAGH HOLMES & HUNT, LLC Jonah G. Hunt, No. 34379 Marcus T. Wile, No. 49471 Address: 1445 Market Street, Suite 350 Denver, CO 80202 Phone Number: (720) 221-9780 Fax Number: (720) 221-9781 Email: jhunt@ochhoalaw.com	Div.: C
DEFENDANT TODD CREEK FARMS HOMEOWNERS’ ASSOCIATION’S MOTION TO DISMISS	

Defendant Todd Creek Farms Homeowners’ Association (“Association” or “Defendant”), by and through its attorneys Orten Cavanagh Holmes & Hunt, LLC, pursuant to C.R.C.P. 12(b)(1) and/or (5), submits its motion to dismiss, as follows:

C.R.C.P. 121, §1-15(8) Certification: Undersigned counsel has conferred with opposing counsel, who opposes this motion.

Legal Standard

1. Under C.R.C.P. 12(b)(5), the Court must accept all well-pleaded facts as true, and the allegations of the complaint must be viewed in the light most favorable to the plaintiff. *Hemmann Mgmt. Servs. v. Mediacelli, Inc.*, 176 P.3d 856, 857 (Colo. App. 2007). “However, the court is not required to accept as true legal conclusions couched as factual allegations.” *Western Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo. App. 2008) (citing *Bell Atl. Corp., v. Twombly*, 550 U.S. 544, 557-58 (2007)); see also *Warne v. Hall*, 373 P.3d 588, 595 (Colo. 2016) (adopting the *Twombly* standard for testing the viability of a claim for relief). Further, “only a complaint that states a plausible claim for relief survives a motion to dismiss.” *Warne*, 373 P.3d at 591 (internal citation omitted).

First Claim for Relief (Breach of Fiduciary Duty – Election Violations)

2. In relevant part, Plaintiffs allege as follows:
- “[O]n November 15, 2022, Pardikes conspired with the other directors to subvert the TCF HOA membership’s rights with a “swap” of Board positions, not for the good of the TCF HOA, but for what was best for Pardikes personally.” *Compl.*, ¶102.
 - “While unilateral or board appointment of a director, generally, may not violate the letter of the TCF HOA Bylaws, the November 15, 2022 “swap” was different in that it certainly violated the spirit and notions of democracy, and most importantly good-faith corporate governance.” *Compl.*, ¶106.
 - “Pardikes and Setchfield’s swap amounts to a breach of fiduciary duty by the TCF HOA Board as a whole, Pardikes and Setchfield, and caused damage to the TCF HOA and it’s voting members.” *Compl.*, ¶113.
3. Plaintiffs’ claim for breach of fiduciary duty cannot be sustained and is legally subsumed within Plaintiffs’ claims for breach of contract.

4. A breach of fiduciary duty only results in damages for breach of contract and does not give rise to independent tort liability. *Cary v. United of Omaha Life Ins. Co.*, 68 P.3d 462, 466 (Colo. 2003); citing *Wheler v. Reese*, 835 P.2d 572, 578 (Colo.App.1992).

5. Stated differently, as a matter of law, a violation of the duty of good faith and fair dealing, as alleged by Plaintiffs, only gives rise to a claim for breach of contract. *City of Golden v. Parker*, 138 P.3d 285, 292 (Colo. 2006).

6. “In contrast to a claim for bad faith breach of insurance contract ... which gives rise to liability in tort and a broader range of damages, breach of the implied duty of good faith and fair dealing in a non-insurance context is a contract claim subject to the traditional limitations on contract remedies.” CJI 30:16, n. 10.

7. A claim may properly be dismissed “if the substantive law does not support the claims asserted.” *Keith v. Kinney*, 140 P.3d 141, 153 (Colo. App. 2005); see also *Mishek v. Stanton*, 616 P.2d 135, 137 (Colo. 1980). Here, Colorado case law clearly and unequivocally does not support breach of fiduciary duty as an independent cause of action outside a claim for breach of contract.

8. Therefore, Plaintiffs’ First Claim for Relief is legally subsumed within Plaintiffs’ breach of contract claim, and there exist no set of facts which can be proven which would entitle Plaintiffs to the requested relief under the foregoing breach of fiduciary duty claim.

Second Claim for Relief (Breach of Contract: Bylaws/HOA Rules RE: Elections)

A. Filling Vacancies is Authorized by Governing Documents

9. Plaintiffs allege, in relevant part that “[t]he TCF HOA is bound by its Bylaws and other HOA rules, as are its directors. These are contractual obligations. The November 15, 2022

“swap” allowing for Pardikes to remain a Director until November 2024 without being elected was unlawful. This action violated multiple TCF HOA Bylaws, and Code of Conduct provisions and therefore is a breach of contract.” *Compl.*, ¶¶ 115-118.

10. In relevant part, Plaintiffs refer to the following passages of the Association’s Bylaws and Code of Conduct:

- Section 4.1 of the Bylaws which provides, “An annual meeting of the Members shall be held during each of the Association’s fiscal years, at such time of the year and date as determined by the Board. At these meetings, the directors shall be elected by the Members, in accordance with the provisions of these Bylaws. The Members may transact other business as may properly come before them at these meetings. Failure to hold an annual meeting shall not be considered a forfeiture or dissolution of the Association.”
- The Voluntary Code of Conduct and Ethics provides that directors should, “[c]onduct open, fair, and well-publicized elections” and “[s]trive at all times to serve the best interests of the Association regardless of their personal interests.”

11. Critically, Plaintiffs admit that “[w]hile unilateral or board appointment of a director, generally, may not violate the letter of the TCF HOA Bylaws, the November 15, 2022 “swap” was different in that it certainly violated the spirit and notions of democracy, and most importantly good-faith corporate governance.” *Compl.*, ¶106.

12. Despite Plaintiffs’ editorializing, they admit that, pursuant to Section 5.6 of the Bylaws,

Vacancies on the Board caused by any reason (other than removal) may be filled by appointment by a majority vote of the remaining Board at any time after the occurrence of the vacancy, even though the directors present at that meeting may constitute less than a quorum. Each person so appointed shall be a director who shall serve for the remainder of the unexpired term. [Emphasis provided].

See **Exhibit 1.** (*Bylaws*)

13. Nothing alleged by Plaintiffs as it relates to the “swap” by Mr. Pardikes and Ms. Setchfield is in contradiction to the requirements of the Association’s governing documents. Rather, Plaintiffs’ rely on a fundamental misapplication of provisions of the Bylaws related to elections by members, rather than properly considering the authority of the Board to fill vacancies *at any time after such vacancy occurs*. There is no requirement or suggestion in the Bylaws that such vacancy be filled by vote of the membership.

B. Plaintiffs’ Lack Standing

14. C.R.C.P. 23.1 provides that:

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs. [Emphasis provided].

15. The above requirements are understood to mean that Plaintiffs must “exhaust their intra-corporate remedies” prior to obtaining standing to bring a derivative action. *DeHaas v. Empire Petroleum Company*, 286 F. Supp. 809 (D. Colo. 1968).

16. Redress must first be sought from the directors. Courts will not interfere with the internal affairs and management of a corporation on the complaint of an individual stockholder or a small group of stockholders, unless it appears from the allegations of the complaint that all efforts to

obtain redress from the directors have been exhausted or would have been futile. *Bell v. Arnold*, 175 Colo. 277, 487 P.2d 545 (1971).

17. Redress must then be sought from stockholders. When a stockholder or group of stockholders has exhausted all efforts to obtain redress from the directors, or where such efforts would have been futile, the stockholders must then make demand upon and seek relief from the stockholders of the corporation. *Id.*

18. Here, there exists an express mechanism to obtain the relief sought by Plaintiffs which has not been utilized in seeking redress prior to the filing of the present action. Section 5.5 of the Bylaws provides that,

One or more directors or the entire Board of Directors may be removed at a Special Meeting of Members called pursuant to these bylaws, with or without cause, by a vote of at least sixty-seven percent (67%) of the Members present and entitled to vote at a meeting at which quorum is present. Notice of a Special Meeting of the Members to remove directors shall set forth that the meeting is being conducted for that purpose and shall be provided to every Member of the Association, including the directors sought to be removed, as provided in these Bylaws. Directors sought to be removed shall have the right to be present at this meeting and shall be given the opportunity to speak to the Members prior to a vote to remove being taken.

Exhibit 1 (Bylaws).

19. Section 4.3 of the Bylaws provides that “[s]pecial meetings of the Association may be called by ... the secretary upon receipt of a petition signed by Owners comprising at least 25% of the votes in the Association.” *Id.*

20. Given that the above remedy may be accomplished and requires no involvement or cooperation of the Board of Directors, Plaintiffs cannot sustain an argument that utilizing such recourse would have been futile, as may be argued with a demand directed to the Board.

Third Claim for Relief (Violation of CCIOA: Records Request)

21. Plaintiffs allege, in relevant part, that:

In over three weeks since receipt [of the records request], the TCF HOA has taken no action regarding the Demand and therefore the instant action is necessary for the Courts to intervene. The release of records by a Homeowners' Association is a right granted to homeowners under CCIOA. TCF HOA is in violation of CCIOA due to its de facto refusal to release such records. *Compl.*, ¶¶ 124-126.

22. Notably, Plaintiffs do not allege that the Association has withheld documentation nor that Plaintiffs do not have access to the requested documentation. Rather, Plaintiffs frame their allegation upon the purported inaction of the Association.

23. The Association, as a matter of course, makes records available to all owners online in conformance with the requirements of C.R.S. § 38-33.3-317 to make records “available for examination and copying by a unit owner or the owner’s authorized agent.”

24. Rather, Plaintiffs attempt to inject into the requirements of Section 317 of CCIOA additional obligations to produce such records in a physical manner.

25. “If the TCF HOA chooses to release this information to the TCF HOA community, or electronically through the above email address, that shall not obviate or satisfy the request that such records be made available for in-person inspection and copying at the Trinity Association Management office.” *P.’s Exhibit 6*.

26. The obligation to provide physical records for in-person inspection is unsupported by statute, Colorado law, or the Association’s governing documents, and cannot serve as the basis for alleged violations of statute.

Fourth Claim for Relief (Breach of Contract: Bylaws Violation – Records Request)

27. The Association incorporates by reference the arguments made in paragraphs 22-26 above as if fully set forth herein.

28. Again, Plaintiffs seek to manufacture causes of action against the Association by attempting to inject terms and requirements into the record production of the Association which do not exist and are unsupported by relevant authority. The same cannot be a basis for the above claim for relief.

Fifth Claim for Relief (Breach of Contract: Qualifications Violations)

29. Plaintiffs, in relevant part, allege that:

Upon information and belief, none of the TCF HOA Board of Directors, as of November 2022 [sic], had taken the requisite continuing education classes required under the TCF HOA Bylaws Section 5.2(f). Therefore, none of the Board of Directors as of November 15, 2022, were qualified to serve as Directors, and their positions were *all vacant* at that time per TCF HOA Bylaws Section 5.2(g). Therefore, their “swap” re-appointment of Pardikes and Setchfield was void due to lack of authority. *Compl.*, ¶¶ 136-138.

30. Pursuant to Plaintiffs’ argument and allegations, there existed no qualified members of the Board of Directors as of November 15, 2022 when the “swap” occurred.

31. Sean Holdren was appointed to the Board of Directors in March of 2022 to serve the remainder of a term which expired in late November 2022. Mr. Holdren had been in office for less than one year at the time of the “swap,” and thus, it is an impossibility for him to have been in violation of the educational requirements of Section 5.2(f) of the Bylaws at such time.

32. **Maryjo Montoya was elected in November 2021 to a term ending in 2024. Since her election, Ms. Montoya completed educational classes on workplace harassment and cyber security in October 2022.** The Board has confirmed that such educational requirements are compliant with

the requirements of the Bylaws for eligibility on the Board of Directors. *See Exhibit 2 (Affidavit of Jason Pardikes).*

33. Ben Cooper was elected in November 2020 to a term ending in 2023. Since his election, Mr. Cooper has completed courses in October 2021 regarding real estate investment, in February 2021 regarding real estate contracts and forms, and in November of 2021 regarding ethics of technology use in the modern age. The Board has confirmed that such educational requirements are compliant with the requirements of the Bylaws for eligibility on the Board of Directors. *See Exhibit 2 (Affidavit of Jason Pardikes).*

34. Jason Pardikes was originally elected to the Board of Directors in November 2019 to a term ending in 2022. Mr. Pardikes completed educational courses in February 2020 regarding duties of board members and in July 2021 regarding ballots, proxies and votes. Prior to the November 2022 “swap,” the third year of Mr. Pardikes’ term had not yet elapsed and thus it is an impossibility that he was noncompliant with the Bylaws’ education requirement prior to the “swap” occurring. The Board has confirmed that the education completed by Mr. Pardikes is compliant with the requirements of the Bylaws for eligibility on the Board of Directors. *See Exhibit 2 (Affidavit of Jason Pardikes).*

35. Wendi Setchfield was appointed in March of 2022 and was elected in March 2023 to a full three-year term. As Ms. Setchfield had been in office for less than one year at the time of the “swap,” it is an impossibility for her to have been in violation of the educational requirements of Section 5.2(f) of the Bylaws at such time. *See Exhibit 2 (Affidavit of Jason Pardikes).*

36. Even assuming, *arguendo*, that Board members who had served more than one year were not qualified at the time of the “swap,” it is indisputable that Mr. Holdren remained eligible as

one year had not yet elapsed since his appointment. Section 5.6 of the Bylaws permits the filling of vacancies by less than a quorum of the Board of Directors, and thus, even if Mr. Holdren were the only eligible Board member his approval alone of the November 15, 2022 “swap” is authorized by the Association’s governing documents. See **Exhibit 3** (*Board Resolution*).

Sixth Claim for Relief (Breach of Fiduciary Duty: Method Contract/Payments); Seventh Claim for Relief (Violation of CCIOA: Method Contract/Payments); and Eighth Claim for Relief (Violations of C.R.S. Title 7: Method Contract)

37. Plaintiffs allege, in relevant part, that:

- Pardikes’ and the TCF HOA’s lack of disclosure and/or handling of the finances, the contracts with Method and bids for landscaping is a violation of fiduciary duty [and that] Pardikes’ undisclosed connection to Method is a violation of his fiduciary duty. *Compl.*, ¶150.
- Pardikes’ and the TCF HOA’s lack of disclosures, handling, and/or Pardikes’ undisclosed connections to Method/Leuthner is a violation of multiple requirements under CCIOA. *Compl.*, ¶ 160.
- Upon information and belief, there were a series of *conflicting interest transactions* in violation of various statutes under C.R.S. Title 7, including C.R.S. § 7-128-501, regarding payments to Method ... Pardikes’ and the TCF HOA’s lack of disclosures, handling and/or Pardikes’ undisclosed connections to Method/Leuthner are in violation of multiple requirements under C.R.S. Title 7. *Compl.*, ¶¶ 168, 170.

38. C.R.S. § 7-128-501 provides that:

[C]onflicting interest transaction” means: A contract, transaction, or other financial relationship between a nonprofit corporation and a director of the nonprofit, or between the nonprofit corporation and a party related to a director, or between the nonprofit corporation and an entity in which a director of the nonprofit corporation is a director or officer or has a financial interest ... For purposes of this section, a “party related to a director” shall mean a spouse, a descendant, an ancestor, a sibling, the spouse or descendent of a sibling, an estate or trust in which the director or a party related to a director has a beneficial interest, or an entity in which a party related to a director is a director, officer, or has a financial interest.

39. Mr. Pardikes is not, and has never been, a member or director of Method. Nor, at any time, has a party related to Mr. Pardikes been a member or director of Method. At no time has Mr. Pardikes, nor any party related to Mr. Pardikes, derived any financial interest or benefit from the relationship between Method and the Association. *See Exhibit 2 (Affidavit of Jason Pardikes)*, *See Exhibit 4 (Affidavit of Michael Ryan Leuthner)*.

40. As such, Plaintiffs claims regarding alleged conflicted interest transactions related to Method are premised upon falsities, confirmed to be false by multiple parties.

41. Financial records of the Association, including income, expenditures, variances (where relevant), and balance sheets (including receipts, invoices, and expenditures for payments to Method Landscaping Services LLC) are available to all members online for the following months: March, May-December 2018, 2019 (all months), 2020 (all months), 2021 (all months), 2022 (all months). *See Exhibit 2 (Affidavit of Jason Pardikes)*.

42. Plaintiffs, in this action, again and again rely on “information and belief” to justify claims which have no basis in reality and which are disproven by documentation which is readily available to all of the Association’s membership. Rather than reviewing the documentation available to them, Plaintiffs have concocted a conspiracy theory which has resulted in repeated attempts to litigate the same issues through a cohort of connected owners seeking to influence the direction and governance of the Association by fiat.

43. There exists no allegations of bad faith or impropriety of any kind upon which Plaintiffs’ claims may be sustained. There merely exists conclusory allegations and argument of counsel premised upon an intentional ignorance of the documentation available, history of the

disputes, and involvement of some of the Plaintiff owners in the very decisions now being complained of.

WHEREFORE, Defendant Todd Creek Farms Homeowners' Association respectfully requests that the Court find in its favor, dismiss all claims with prejudice, for an award of attorneys' fees and costs pursuant to C.R.S. § 38-33.3-123(1)(c), 302(1)(k), and/or Section 9.1(d) of the Amended and Restated Declaration of Protective Covenants for Todd Creek Farms, and for such other and further relief as the Court deems just and proper.

Dated this 10th day of May, 2023.

ORTEN CAVANAGH HOLMES & HUNT, LLC

By: /s/ Jonah Hunt
Jonah G. Hunt, No. 34379
Marcus T. Wile, No. 49471

*Attorneys for Defendant Todd Creek Farms
Homeowners Association*

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May, 2023, the foregoing was served via CCEF/Mail/Email upon the following:

All counsel of record.

/s/ Heather Shaughnessy
Heather Shaughnessy, Paralegal