STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC. **SUPERIOR COURT**

[Filed: October 18, 2018]

CARNEGIE AT ONE TOWER DRIVE, LLC,	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. NC-2016-0235**
	:	
CARNEGIE HEIGHTS CONDOMINIUM ASSOCIATION, CARNEGIE HARBOR RESIDENCE CONDOMINIUM ASSOCIATION, CARNEGIE ABBEY CLUB ACQUISITION I, LP, BUTTONWOOD ACQUISITION, LP, CARNEGIE VILLAGE DEVELOPMENT CO., INC., OC RESIDENCES, LP, O'NEILL PROPERTIES GROUP, CARNEGIE TOWER AT CARNEGIE ABBEY CONDOMINIUM ASSOCIATION, AND THE COTTAGES AT CARNEGIE ABBEY CONDOMINIUM ASSOCIATION,	:	
Defendants.	:	

DECISION

STERN, J. Plaintiff Carnegie at One Tower Drive, LLC (Plaintiff) has filed a motion for summary judgment on its claims (1) that it is entitled to use forty-three prepaid golf memberships Plaintiff was assigned at the Carnegie Abbey Club (the Golf Club) in connection with the sale of residential condominium units at the Tower at Carnegie Abbey (the Tower), and (2) that an October 9, 2009 Agreement (the 2009 Agreement), to which Plaintiff claims it was not a party, does not restrict the use of such memberships or otherwise require any additional payments to the Golf Club from Plaintiff or the Tower unit purchasers. Defendants and

Counterclaim Plaintiffs Carnegie Heights Condominium Association (the Heights), Carnegie Harbor Residence Condominium Association (the Harbor), and The Cottages at Carnegie Abbey Condominium Associations (the Cottages) (collectively, the Associations) have timely objected to Plaintiff's motion and have filed a cross-motion for summary judgment which requests that the 2009 Agreement is an enforceable contract and that all parties to the 2009 Agreement—including their respective successors and assigns such as Plaintiff—are bound by it. Jurisdiction is pursuant to Super. R. Civ. P. 56(c) and G.L. 1956 §§ 9-30-1, *et seq*.

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Facts and Travel

> "Golf is the closest game to the game we call life. You get bad breaks from good shots; you get good breaks from bad shots—but you have to play the ball where it lies." – Robert Tyre (Bobby) Jones, Jr.[1]

The Carnegie Abbey complex is a residential condominium located in Portsmouth, Rhode Island with several separate sub-condominiums. The complex includes the Golf Club, which is an eighteen-hole golf course comprised of members who pay dues and other fees for access to the facilities. Deposition of J. Brian O'Neill (O'Neill Dep.) 11:15-21. Peter deSavary (deSavary) was the original owner and developer of Carnegie Abbey and the Golf Club. *Id.* at 12:1-4. He created the Carnegie Harbor Condominium (the Master Condominium), which contains "Master

[1] Bobby Jones (March 17, 1902—December 18, 1971) was an amateur golfer and a lawyer by profession; he founded and helped design the Augusta National Golf Club and co-founded the Masters Tournament. *See* Larry Schwartz, Bobby Jones was Golf's Fast Study, *ESPN.com*, https://www.espn.com/sportscentury/features/00014123.html; The Founders, *The Masters*, https://www.masters.com/en_US/tournament/founders.html. His biggest success in the sport was when he achieved a feat no other golfer has ever accomplished: winning a "grand slam" in one calendar year (1930), which consisted—at the time—The British Amateur, The British Open, The U.S. Amateur, and the U.S. Open. *See* The Greatest Year in Golf, *Sports Illustrated*, https://www.si.com/specials/100-greatest/?q=69-the-greatest-year-in-golf.

Units" or sub-condominiums.[2] A sub-condominium declaration was recorded which created the Carnegie Tower at Carnegie Abbey Condominium, consisting of a seventy-nine unit residential tower structure and appurtenant common elements. O'Neill Dep. 142:9-143:1; Pl.'s Mot., Ex. 19. Three other sub-condominium associations are the Heights, the Harbor, and the Cottages.

Beginning in 2003, deSavary sold various residential properties in the Carnegie Abbey complex—including those associated with the Heights, the Harbor, the Cottages, and the Golf Club—to J. Brian O'Neill (O'Neill) through his various entities. O'Neill Dep. 17:2-18, 141:14-18. The first relevant transaction occurred pursuant to a September 5, 2003 Purchase and Sale Agreement (the September 5, 2003 PSA) when deSavary, through his company Carnegie Harbor Village, LP (LP), sold to O'Neill's company, the O'Neill Properties Group (OPG), the land where the Tower would eventually be built for $17 million. O'Neill Dep. 142:2-145:2; Pl.'s Mot., Ex. 3 § 1.1; Carnegie Abbey Club Acquisition I, LP's Responses to Pl.'s Am. First Set of Reqs. for Admis. (O'Neill RFA) ¶ 13. The property consisted of approximately 5.4 acres in the Carnegie Abbey complex and a certain percentage of the common areas in the Master Condominium. Pl.'s Mot., Ex. 3 § 1.1.

As part of the transaction, OPG purchased twenty-three Golf Club memberships for $100,000 each, or $2.3 million total.[3] O'Neill Dep. 142:2-145:2; Pl.'s Mot., Ex. 3 §§ 10.1-10.2;

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[2] This lawsuit focuses on Master Unit 2A, which is defined as the following:

> "That certain condominium unit designated as Master Unit No. 2A of the Carnegie Harbor Condominium, a condominium created by Declaration of Carnegie Harbor Condominium dated February 3, 2003 and recorded in Book 864 at Page 244 of the Portsmouth Land Evidence Records, as such Declaration has been amended to date Master Unit No. 2A is shown on the plan of survey recorded with said Declaration, as amended." Pl.'s Mem. Supp. Mot. Summ. J. (Pl.'s Mot.), Ex. A to Ex. 19.

[3] OPG was also entitled to purchase up to twelve more memberships at the same price within three years, as well as a minimum of fifteen and a maximum of twenty additional memberships

O'Neill RFA ¶ 14. Section 10.1 of the September 5, 2003 PSA provides that all of the Golf Club memberships "have all of the privileges of full memberships in the Golf Club and shall be subject to the rules and regulations adopted from time to time for the Golf Club." Pl.'s Mot., Ex. 3 § 10.1. In addition, all the memberships were "fully assignable to the subsequent owner(s) from time to time" of the Tower units to be developed. *Id.* Separately, pursuant to a September 17, 2003 Purchase and Sale Agreement (the September 17, 2003 PSA), OPG purchased the land known as the Harbor, which consisted in part of approximately 9.5 acres, along with ten Golf Club memberships for $100,000 each with the right to purchase six more at $100,000 and five more at ninety percent of the then-market value. O'Neill Dep. 145:6-146:13; Pl.'s Mot., Ex. 4 §§ 1.1(a), 10.1-10.2; O'Neill RFA ¶ 15.

In accordance with and "in consideration of the payments made" pursuant to the September 5, 2003 PSA and September 17, 2003 PSA, on February 12, 2004, Carnegie Abbey Club, LLC—a deSavary affiliate owning the Golf Club—executed a "Golf Membership Transfer Agreement" which transferred and assigned "all right, title and interest in and to" thirty-six Golf Club memberships "with the privileges of full membership in the Club" to OC Tower Associates, L.P., an O'Neill entity then owning the Tower property, and three other O'Neill entities owning other properties in the complex. O'Neill Dep. 149:1-24; Pl.'s Mot., Ex. 14; O'Neill RFA ¶¶ 6-12, 16. The Golf Membership Transfer Agreement stated that "[a]ll of the Memberships are hereby transferred together with the right to transfer, pledge and assign such Memberships to buyers of units in the Tower, Village and Carnegie Harbor Residence Condominium, and to the Transferees' lenders, successors and assigns." Pl.'s Mot., Ex. 14. On

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within three years after the closing date. If executed, the price of such memberships would have been ninety percent of the then market price established in arms' length transactions for golf memberships at the Golf Club. O'Neill Dep. 142:2-145:2; Pl.'s Mot., Ex. 3 §§ 10.1-10.2.

the same date, in a document entitled "Allocation of Golf Membership Interests," the four O'Neill entities allocated the thirty-six Golf Club memberships among themselves. O'Neill Dep. 150:2-151:1; Pl.'s Mot., Ex. 15; O'Neill RFA ¶ 18. Of the thirty-six Golf Club memberships, OC Tower Associates was assigned twenty-six Golf Club memberships. O'Neill Dep. 150:2-151:1; Pl.'s Mot., Ex. 15; O'Neill RFA ¶ 19.

In early 2005, Defendant Carnegie Abbey Club Acquisition I, LP (Carnegie Club Acquisition)—an O'Neill entity—acquired the Golf Club from deSavary.[4] O'Neill Dep. 8:11-14; 140:23-141:5; Answer of Carnegie Club Acquisition, et al. to Compl. (O'Neill Entities' Answer) ¶ 4. Then, on April 14, 2005, OPG entered into an agreement with Peter Koch, Chairman of the Carnegie Abbey Acquisition Committee, which represented then-existing Golf Club members (the Koch Agreement). O'Neill Dep. 17:2-20:8; Associations' Mem. Supp. Cross-Motion Summ. J. and Opp'n to Pl.'s Mot. Summ. J. (Associations' Mot.), Ex. B. In the Koch Agreement, OPG agreed, in return for the resolution of certain objections that existing members had to aspects of the acquisition, that "[t]he deposit or fee to become a member [of the Golf Club] shall be not less than $150,000." O'Neill Dep. 17:2-20:8; Associations' Mot., Ex. B. According to the Associations, the Golf Club considers the Koch Agreement to remain in effect as of today. Associations' Mot., Ex. C.

On July 12, 2005, in addition to its twenty-six Golf Club memberships, OC Tower Associates purchased from Carnegie Club Acquisition, pursuant to a "Golf Membership Transfer

[4] According to an opinion letter later referenced in this Decision, *see infra* 11, the property on which the golf course is situated is owned in fee simple by the Order of St. Benedict (the Order) and is leased in turn to the Golf Club and its successors under the terms of a ninety-nine-year ground lease executed in 1999, as subsequently amended (the Ground Lease). O'Neill Dep. 8:7-10; Pl.'s Mot., Ex. 33. In 2005, the lessee's rights under the Ground Lease were assigned to one or more of the O'Neill entities, with the Order's consent, when OPG and its affiliates acquired rights in the Golf Club and the surrounding complex. *See* O'Neill Dep. 8:11-14; Pl.'s Mot., Ex. 33.

Agreement," all "right, title and interest in and to" an additional twenty-seven Golf Club memberships "with the privileges of full membership" in the Golf Club at a price of $3,225,000.[5] O'Neill Dep. at 151:2-152:7; Pl.'s Mot., Ex. 16; O'Neill RFA ¶¶ 21-27. Like the prior Golf Club Transfer Agreement, this agreement provided: "All of the Golf Memberships are hereby transferred together with the right to transfer, pledge and assign such Golf Memberships to buyers of units in the Tower and Village," and to the purchasers' "lenders, successors and assigns." Pl.'s Mot., Ex. 16. Thus, as of that date, OC Tower Associates owned fifty-three Golf Club memberships in the Golf Club. Pl.'s Mot., Ex. 27.

On December 22, 2006, in two separate documents entitled "Assignment and Assumption of Golf Membership Interests," OC Tower Associates—an O'Neill entity—transferred all of its "right, title and interest" in the fifty-three prepaid Golf Club memberships, including the "right to transfer, pledge and assign such Golf Memberships to buyers of the Tower units" to be developed, to Carnegie Tower Development Company, Inc. (Carnegie Tower Development), another O'Neill entity that acquired title to the Tower, together with its "lenders, successors, and assigns." O'Neill Dep. 152:8-154:5; Pl.'s Mot., Exs. 17-18; O'Neill RFA ¶¶ 29-38.

Subsequently, from 2005 through 2009, O'Neill began developing the Tower and other properties within the Carnegie Abbey complex. Deposition of Edward T. Lopes (Lopes Dep.) 76:25-77:5. In connection with the Tower development, Carnegie Tower Development recorded the Declaration of Condominium for the Tower on July 13, 2009 (the Tower Declaration). O'Neill Dep. 59:5-11, 97:15-18; Pl.'s Mot., Ex. 19. The Tower Declaration requires each initial unit owner to be a member of the Golf Club. Pl.'s Mot., Ex. 19 § 8:18. As part of the

[5] In the same agreement, Carnegie Club Acquisition sold six additional Golf Club memberships to OC Villages Associates I, LP, the owner of the Cottages, for the price of $810,000. O'Neill Dep. at 152:1-4; Pl.'s Mot., Ex. 16.

development, O'Neill's entities obtained various loans to finance the project. O'Neill Dep. 23:9-24.

Sometime in 2009, O'Neill contemplated expanding the Carnegie Abbey complex, and was interested in constructing thirty-six new townhouses and ensuring the number of allowable units at the Tower was as high as eighty. Lopes Dep. 22:6-18, 26:11-27:5, 35:12-36:4. At the time, O'Neill controlled the condominium associations for both the Tower and the Cottages.[6] *Id.* at 42:23-43:22, 77:21-78:11; O'Neill Dep. 181:8-182:2; Deposition of Michael Collins (Collins Dep.) 61:16-19; Deposition of Kathryn Luckett (Luckett Dep.) 7:6-10, 50:12-14. In particular, O'Neill needed to obtain zoning relief from the Town of Portsmouth, Rhode Island in connection with the development of the townhouses, and approval by the sub-condominium associations for an amendment to the Master Condominium to ensure he could construct a tower with at least eighty units. O'Neill Dep. 41:7-43:6; Lopes Dep. 22:6-18, 26:11-27:5, 35:12-36:4. Residential owners of the Associations became concerned about O'Neill's intentions, raised a series of objections and grievances, and planned to object to the zoning variances that O'Neill needed to build the townhouses before the Zoning Board of Review for the Town of Portsmouth, Rhode Island. O'Neill Dep. 24:9-13; Lopes Dep. 22:6-18; Collins Dep. 85:15-87:13; Barone Dep. 68:7-9. Among other things, they expressed concern about any relaxation of rental rules or policies, the influx of golf play by non-owners, and the impact, if any, of additional development on the value of their investments in their homes and in the Golf Club. Barone Dep. 46:17-48:22; Lopes Dep. 29:25-30:25. After negotiations, O'Neill, through various entities at the complex and as the

[6] As of 2009, the Heights and the Harbor were fully under the control of private residents not associated with O'Neill or any development entities, pursuant to G.L. 1956 § 34-36.1-3.03(d)(1). Lopes Dep. 14:23-15:5; Collins Dep. 60:25-61:19. Michael Collins was the President of the Harbor Association and remains in that position today. Collins Dep. 15:18-16:3, 18:13-17. Michael Barone was the President of the Heights Association and remains in that position today. Deposition of Michael Barone (Barone Dep.) 26:16-28:11.

Golf Club owner—specifically, Defendants Carnegie Tower Development, Carnegie Club Acquisition, Carnegie Village Development Company, OC Residences, LP, Buttonwood Acquisition, LP, and OPG (collectively, the Applicants)—reached an agreement with the Associations and the condominium association for the Tower (the Tower Association),[7] culminating in the 2009 Agreement. Pl.'s Mot., Ex. 21.

In exchange for the Harbor and the Heights' withdrawal of objections to the townhouses and assent to amending the Master Condominium, O'Neill and his entities agreed to a number of restrictions or provisions governing development of the townhouses, an entrance location for non-residents, and limitations on rental periods for various townhouse and other residential units.[8] Pl.'s Mot., Ex. 21 at 1-3. The O'Neill entities also promised that anyone renting a unit in the complex that was not a Golf Club member would be deemed a guest and would not have golf-playing privileges except on very limited conditions. *Id.* ¶ 7. Additionally, the 2009 Agreement stated that it was governed by Rhode Island law and was "binding upon the parties, their heirs, representatives, successors, affiliates, and assigns." *Id.* ¶ 11.

Paragraph five of the 2009 Agreement, which concerns membership in and payments to the Golf Club, states the following:

> "Applicant agrees that all initial owners and subsequent owners of Townhouses must be Carnegie Abbey members which will be changed from the current policy which only requires initial owners to be members. All buyers of townhouses must purchase an equity/refundable membership. All initial buyers of properties owned by Applicant, (Tower Units, Suites, Townhouses, Cottages or O'Neill Units in Residences), must purchase equity/refundable memberships, ($150,000 minimum Golf Membership; $75,000

[7] As mentioned above, in addition to representing the Applicants in the 2009 Agreement, O'Neill also represented the Tower Association and the Cottages. O'Neill Dep. 181:8-182:2; Collins Dep. 61:16-19; Luckett Dep. 7:6-10; Lopes Dep. 42:23-43:22, 77:21-78:11.

[8] Despite the language in the 2009 Agreement, the townhouses were never built. O'Neill Dep. 24:7-8.

> minimum Social Membership). It is understood and agreed that sales agreement for all Townhouse Units and other aforementioned O'Neill properties must separately state the membership price."[9] *Id.* ¶ 5.

This provision of the 2009 Agreement is also consistent with the Tower Declaration which, as mentioned above, requires each initial Tower unit owner to be a member of the Golf Club. Pl.'s Mot., Ex. 19 § 8.18.

In 2012, O'Neill, through his entities, sought to refinance the Tower. As part of refinancing, in March 2012, he transferred the Tower's ownership from Carnegie Tower Development to Carnegie Holdings, LLC (Carnegie Holdings), another O'Neill entity. Pl.'s Mot., Ex. 32. As part of the refinancing, on March 16, 2012, Carnegie Tower Development transferred forty-seven of the fifty-three prepaid Golf Club memberships to Carnegie Holdings. O'Neill Dep. 155:14-156:5; Pl.'s Mot., Ex. 28; O'Neill RFA ¶¶ 45-48. Specifically, in the "Assignment and Assumption of Golf Membership Interests," Carnegie Tower Development assigned and conveyed all "right, title and interest in, to and under the Golf Memberships, including the right to transfer, pledge and assign such Golf Memberships to buyers of condominium units in Carnegie Tower," and to Carnegie Holdings' "lenders, successors, and assigns." O'Neill Dep. 155:14-156:11; Pl.'s Mot., Ex. 28; O'Neill RFA ¶ 47.

In addition, the Golf Club, through a series of consents, confirmed the validity and authorization to transfer the forty-seven prepaid Golf Club memberships to Carnegie Holdings. O'Neill Dep. 157:12-159:14; Pl.'s Exs. 29-31; O'Neill RFA ¶¶ 49-58. On March 16, 2012, the Chairman of the Golf Club also executed a Chairman's Certificate stating in part:

[9] The parties to the 2009 Agreement agreed to strike a portion of the last sentence to paragraph five which stated: "that is, the purchase prices and the membership cost shall not be bundled in any manner." *Id.*

> "F. Carnegie Holdings, LLC, a Delaware limited liability company ('CH'), is the owner of forty seven (47) full Golf Memberships (refundable) in the Club and of seventy-three (73) condominium units in the Tower ('Tower Units').
>
> "G. The Club has granted CH the right to convert one (1) full Golf Membership (refundable) in the Club into two (2) Social Memberships in the Club (refundable) ('Conversion') and the Club recognizes CH's Conversion right and will continue to allow CH to exercise its Conversion right until all the initial purchasers of the seventy-three (73) Tower Units owned by CH have applied for membership in the Club." Pl.'s Mot., Ex. 29; O'Neill RFA ¶¶ 56-58.

The express purpose of the transfer of the prepaid Club memberships was the "Club's desire to facilitate each resident of the Tower ('Tower Resident') becoming a member of the Club." Pl.'s Mot., Ex. 29 ¶ D. The Chairman's Certificate was also consistent with the Golf Club's March 5, 2012 letter to "To Whom It May Concern," confirming that Carnegie Tower Development had purchased a number of refundable Golf Club memberships, and that these memberships "may be divided into refundable social memberships and the ratio is 2 social refundable memberships is equivalent to one golf refundable membership." Pl.'s Mot., Ex. 26; O'Neill RFA ¶¶ 40-44. The letter further provided: "[a] membership is assigned upon closing of real estate and at that time the assigned member is responsible for all dues and associated fees as outlined in the Membership Plan." O'Neill Dep. 154:17-155:12; Pl.'s Mot., Ex. 26. According to Plaintiff, the President/General Manager of the Golf Club was authorized to send such a letter. O'Neill Dep. 154:17-155:12; O'Neill RFA ¶¶ 40-44; Collins Dep. 149:10-12; Luckett Dep. 40:11-16.

On March 20, 2012, O'Neill, through Carnegie Tower Development, Carnegie Holdings and a third company of his (collectively, the O'Neill Borrowers), refinanced the existing construction loans with a new lender, The Union Labor Life Insurance Company (ULLICO), a life insurance company that through its Separate Account J, acts as a lender and investor in real

estate financing and development. O'Neill Dep. 156:12-15, 159:16-22; Pl.'s Mot., Ex. 34. The O'Neill Borrowers and ULLICO executed an Amended and Restated Loan Agreement (Amended Loan Agreement), under which ULLICO agreed to refinance the existing loans in excess of $60,000,000, including additional loan proceeds not to exceed $16,000,000, with O'Neill agreeing to personally guarantee the loans. O'Neill Dep. 156:12-15, 159:16-22; Pl.'s Mot., Exs. 24, 34.

Pursuant to Section 5.4 of the Amended Loan Agreement, the O'Neill Borrowers, as "additional security" for the payment of the debt, transferred and assigned to ULLICO all of the O'Neill Borrowers' right, title and interest, but not its obligations, in, under and to the forty-seven prepaid Golf Club memberships, including "the right to convert each such golf membership into two (2) social memberships, all of which are available for assignment as Mortgagor may designate to purchasers of Units . . . ." O'Neill Dep. 93:22-94:1, 159:15-160:23; Pl.'s Mot., Ex. 34 §§ 1.1(ll), 5.4; Deposition of Herbert Kolben (Kolben Dep.) 37:16-39:17, 40:13-19, 41:9-12. At the time, Plaintiff maintains that O'Neill represented to ULLICO that the prepaid Golf Club memberships were valid and binding on the Golf Club. Kolben Dep. 42:19-43:17, 45:16-22.

On the same day, March 20, 2012, O'Neill and the O'Neill Borrowers' attorney provided an opinion letter to ULLICO on behalf of Carnegie Tower Development, Carnegie Holdings and Carnegie Club Acquisition (the Opinion Letter). O'Neill Dep. 66:4-12, 83:19-84:13; 156:12-157:1; Pl.'s Mot., Ex. 33. The Opinion Letter stated the following, in part:

> "1. CTDC [Carnegie Tower Development] has duly and validly transferred forty-seven (47) full Golf Memberships (refundable) in the Club to CH [Carnegie Holdings], free and clear of liens and encumbrances other than the lien and security interest of The Union Labor Life Insurance Company, a Maryland corporation, on behalf of its Separate Account J (also referred to as 'Ullico').

> "2. CH [Carnegie Holdings] [has] the right to convert each one (1) of the forty-seven (47) full Golf Memberships (refundable) in the Club assigned and transferred to CH [Carnegie Holdings] by CTDC [Carnegie Tower Development] into two (2) non-golf (refundable) Social Memberships in the Club ('Conversion Right').
>
> . . . .
>
> "6. The execution and delivery by CTDC [Carnegie Tower Development], CACAILP [Carnegie Club Acquisition], and the Club of the Club Membership Documents does not constitute a breach or default under any other written agreements known to us to which CTDC [Carnegie Tower Development], CACAILP [Carnegie Club Acquisition], or the Club each are bound." Pl.'s Mot., Ex. 33.

On March 23, 2012, Edward T. Lopes, Senior Vice President of Development at O'Neill Properties, on O'Neill's behalf, wrote to Barone as President of the Heights and Collins as the President of the Harbor, requesting that they consider amending the 2009 Agreement—and particularly the provisions on golf membership prices—to assist with the marketability of the Tower units (the Lopes Letter). Lopes Dep. 50:13-23; Associations' Mot., Ex. K. The Lopes Letter also stated that the O'Neill Entities were required to seek an amendment to the 2009 Agreement as part of the refinancing with ULLICO, and that a discussion was needed between the parties to lower the membership price points highlighted in the 2009 Agreement to "make the [T]ower more viable in the current market." Associations' Mot., Ex. K; *see also* Lopes Dep. 50:13-53:10, 54:5-56:1, 60:5-14. According to the Associations, the Heights and the Harbor subsequently engaged in such discussions, independently and through counsel, and offered at times in such discussions to entertain lower prices for Golf Club memberships as required under the 2009 Agreement. Lopes Dep. 55:10-60:14; O'Neill Dep. 72:8-73:7; Collins Dep. 107:4-108:9. However, the parties never amended the 2009 Agreement. Lopes Dep. 56:16-20. Furthermore, in 2013, O'Neill confirmed that the provisions of the 2009 Agreement were

applicable to further development in or around the marina area of the Carnegie complex in exchange for Barone and others associated with the Heights and the Harbor withdrawing objections to that proposed development. Associations' Mot., Ex. M.

On May 8, 2013, the 2009 Agreement was recorded in the land evidence records for the Town of Portsmouth, Rhode Island. Pl.'s Mot., Ex. 21; O'Neill Dep. 177:5-178:5; Lopes Dep. 92:9-15. By that time, however, Carnegie Tower Development no longer owned the Tower or the forty-seven prepaid Golf Club memberships. Pl.'s Mot., Ex. 32. Carnegie Holdings, which was not a party to the 2009 Agreement, was the owner. *Id.*

Despite the assistance from ULLICO, O'Neill and his Borrowers defaulted on the Amended Loan Agreement. O'Neill Dep. 102:18-103:3. On April 10, 2014, O'Neill and the O'Neill Borrowers entered into a Forbearance Agreement with ULLICO (the Forbearance Agreement) that provided O'Neill and the O'Neill Borrowers additional time to market and sell the Tower so that the loan could be repaid. O'Neill Dep. 161:4-11; Pl.'s Mot., Ex. 38. The Forbearance Agreement confirmed that the O'Neill Borrowers had the right to freely assign forty-three full prepaid Golf Club memberships and the right to convert each one into two non-golf social memberships.[10] O'Neill Dep. 161:4-23; Pl.'s Mot., Ex. 38 § 14(c). As a condition to the Forbearance Agreement, the O'Neill Borrowers were required to deliver, *inter alia*, the executed deed conveying the Tower to a ULLICO affiliate to an escrow agent with authorization to record upon the occurrence of a default.[11] O'Neill Dep. 103:10-104:16; Pl.'s Mot., Ex. 38 §§ 3.1, 14. Section 14(c) of the Forbearance Agreement stated:

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[10] The remaining four of the forty-seven prepaid Golf Club memberships were pledged to Amalgamated Bank, another lender alongside ULLICO, along with four units. Pl.'s Mot., Exs. 24-25.

[11] Since the 2009 Agreement was recorded by this time, it was listed in the executed deed. *See* Pl.'s Mot., Ex. 40 at 6.

> "At all times following a Forbearance Termination, the Borrower Parties, and any and all affiliates thereof, shall fully cooperate with Lender to effectuate the orderly transfer and transition of the Mortgaged Property and all other Collateral to Lender (or Lender's designee) and to ensure that Lender (or its designee) receives all of the rights, privileges and benefits accruing or intended to accrue to the Mortgaged Property (including, without limitation, all Sales Amenities and the right to freely assign the remaining 43 full pre-paid golf memberships in the Carnegie Abbey Golf Club and the right to convert each one of the remaining 43 full golf memberships into two (2) non-golf social memberships)." Pl.'s Mot., Ex. 38 § 14(c).

Subsequently, the O'Neill Borrowers breached the Forbearance Agreement. O'Neill Dep. 105:2-106:1. As a result, on January 14, 2015, Plaintiff—ULLICO's affiliate—took title to the unsold units in the Tower by recording the deed in lieu of foreclosure. *Id.* at 105:15-106:1; Pl.'s Mot., Ex. 40; Kolben Dep. 96:23-97:11. On the same date, in an agreement titled "Assignment and Assumption of Golf Membership Interests," Carnegie Holdings transferred and assigned its forty-three prepaid Golf Club memberships to Plaintiff with the right to convert each one to two social memberships.[12] O'Neill Dep. 108:1-16, 147:21-148:8; Pl.'s Mot., Ex. 39; O'Neill RFA ¶¶ 59-71; Kolben Dep. 58:17-59:4. The assignment from Carnegie Holdings to Plaintiff, which recognized that Carnegie Holdings held "all right, title and interest in and to forty-three (43) full golf memberships . . . with the privileges of full membership in the Carnegie Abbey Club," provided in pertinent part:

> "NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:
>
> > "1. Assignor [Carnegie Holdings] hereby assigns, conveys, sets over and transfers to Assignee [Plaintiff] all of Assignor's [Carnegie Holdings'] right, title and interest in, to and under the Golf Memberships, including the right to

[12] The four remaining prepaid Golf Club memberships were transferred to Amalgamated Bank after the O'Neill Borrowers' default. Pl.'s Mot., Ex. 25.

> transfer, pledge and assign such Golf Memberships to buyers of Units in Carnegie Tower at Carnegie Abbey, A Condominium, located in the Town of Portsmouth, Rhode Island, and to Assignee's, successors, and assigns, and Assignee hereby accepts same.
>
> "2. Assignor [Carnegie Holdings] hereby represents and warrants to Assignee [Plaintiff] that
>
> > "(a) Assignor [Carnegie Holdings] is the holder of all unencumbered right, title and interest in and to the Golf Memberships;
> >
> > "(b) the Golf Memberships are fully prepaid; and
> >
> > "(c) Assignee [Plaintiff] has the right to convert each one (1) of the forty-three (43) Golf Memberships into two (2) Social Memberships in the Club.
>
> "3. This Assignment shall be binding upon and inure to the benefit of the parties hereto and their respective successors and/or assigns.
>
> "4. This Assignment shall be construed in accordance with the laws of the State of Rhode Island and Providence Plantations." Pl.'s Mot., Ex. 39.

The Golf Club agrees that Plaintiff received forty-three prepaid Golf Club memberships with the privileges of full membership in the Golf Club, the right to convey each membership to initial purchasers of the Tower units, and the right to divide each membership into two social memberships. O'Neill RFA ¶¶ 65-66. The Golf Club will honor each prepaid full or social membership without requiring Plaintiff or any other individual to make any payment to the Golf Club, and each buyer can use the Golf Club facilities in accordance with their membership without requiring that individual to pay an initiation fee, deposit or any other one-time fee at the Golf Club. *Id.* ¶¶ 67-69. Moreover, the Golf Club does not contest any of the transfers that resulted in Plaintiff obtaining ownership of the prepaid Golf Club memberships. *Id.* ¶ 71.

By letter dated January 20, 2015, undersigned counsel for the Heights and the Harbor wrote to Plaintiff to demand that Plaintiff comply in all relevant respects with the 2009 Agreement with regard to any future sales of residential units in the Tower. Associations' Mot., Ex. N; Kolben Dep. 61:19-62:16. The Associations claim that Kolben, a corporate designee testifying in this case on behalf of ULLICO and Plaintiff, testified that Plaintiff and ULLICO were never aware of the existence of, or the terms of the 2009 Agreement until after receipt of the aforementioned letter dated January 20, 2015. Kolben Dep. 25:5-26:1. The Associations assert, however, that Plaintiff had actual and constructive notice of the 2009 Agreement as early as April 17, 2014, when it executed the deed which contained a reference to the 2009 Agreement, and no later than late January 2015, when it received the aforementioned letter from undersigned counsel. Pl.'s Mot., Ex. 40; Kolben Dep. 61:19-62:16.

After the O'Neill Borrowers defaulted, ULLICO brought suit in the United States District Court for the District of Rhode Island against O'Neill to enforce the personal guaranty he signed. Pl.'s Mot., Ex. 11. The District Court ruled that O'Neill is liable for breach of the Amended Loan Agreement and the Forbearance Agreement, and the parties are in the damages phase of the case. *Id.*

Since taking title to the Tower on January 14, 2015, Plaintiff has sold four residential units.[13] Pl.'s Mot., Exs. 47-50; Luckett Dep. 63:18-64:7. In each instance, Plaintiff did not use

[13] Richard Sugerman (Sugerman) acquired Unit 403 in the Tower on or about January 8, 2016; he has not joined the Golf Club at any time since he acquired his Tower unit. Pl.'s Mot., Ex. 10 ¶ 1. On or about August 22, 2016, Bruce and Donna Henry (the Henrys) acquired Unit 601 in the Tower, and joined the Golf Club on or about that same date. *Id.* ¶ 2. The Henrys paid $40,000 as an initial deposit for a full Golf Club membership. *Id.* On or about May 18, 2017, Dr. Seema Byahtti (Byahtti) acquired Unit 501 in the Tower, and joined the Golf Club on or about that same date. *Id.* ¶ 3. Byahtti paid $20,000 as an initial deposit for her social membership in the Golf Club. *Id.* These monetary amounts were consistent with the Golf Club's 2017 Schedule of Fees. *Id.* ¶ 4. Then, on or about August 29, 2017, Dr. Adelaide

any of the forty-three prepaid Golf Club memberships in the sales. Pl.'s Mot., Ex. 10 ¶ 5; Kolben Dep. 98:22-99:3. In 2016, Plaintiff filed suit against Defendants in the Superior Court, seeking a declaration that Plaintiff and any Tower unit owner are not bound by the 2009 Agreement and the extent of its rights with respect to the forty-three prepaid Golf Club memberships. Both parties filed cross-motions for summary judgment on these counts now before this Court.

II

Standard of Review

"'Summary judgment is an extreme remedy and should be granted only when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as [a] matter of law.'" *Rose v. Brusini*, 149 A.3d 135, 139 (R.I. 2016) (quoting *Plunkett v. State*, 869 A.2d 1185, 1187 (R.I. 2005)). "'Only when a review of the admissible evidence viewed in the light most favorable to the nonmoving party reveals no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law, will this Court . . . grant . . . summary judgment.'" *Id.* at 139-40 (quoting *Nat'l Refrigeration, Inc. v. Standen Contracting Co., Inc.*, 942 A.2d 968, 971 (R.I. 2008)). "The party opposing 'a motion for summary judgment carries the burden of proving by competent evidence the existence of a disputed material issue of fact and cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions.'" *Id.* at 140 (quoting *Nat'l Refrigeration, Inc.*, 942 A.2d at 971).

Nardone (Nardone) and Thomas Gleason (Gleason) acquired Unit 801 in the Tower; Dr. Nardone already owned another Tower unit and was already a pre-existing Club member. Associations' Mot., Ex. S. The Associations assented to this sale without insisting on the acquisition of a new Golf Club membership. Associations' Mot., Ex. P ¶ 5.

Under the Uniform Declaratory Judgments Act (UDJA), this Court possesses the "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Sec. 9-30-1. A decision to grant or deny relief, however, is purely discretionary under the UDJA. *Sullivan v. Chafee*, 703 A.2d 748, 751 (R.I. 1997). The stated purpose of the UDJA is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations . . . ." Sec. 9-30-12; *see also Millett v. Hoisting Eng'rs' Licensing Div. of Dep't of Labor*, 119 R.I. 285, 291, 377 A.2d 229, 233 (1977) ("The purpose of declaratory judgment actions is to render disputes concerning the legal rights and duties of parties justiciable without proof of a wrong committed by one party against another, and thus facilitate the termination of controversies."). Factors to be considered when determining whether declaratory judgment relief is appropriate include the following:

> "the existence of another remedy, the availability of other relief, the fact that a question may readily be presented in an actual trial, and the fact that there is pending, at the time of the commencement of the declaratory action, another action or proceeding which involves the same parties and in which may be adjudicated the same identical issues that are involved in the declaratory action." *Berberian v. Travisono*, 114 R.I. 269, 273, 332 A.2d 121, 123-24 (1975).

III

Analysis

A

Plaintiff and the Tower Unit Owners Are Not Bound by the 2009 Agreement

Plaintiff argues that the 2009 Agreement does not apply to or bind Plaintiff. Specifically, Plaintiff contends that neither itself nor Carnegie Holdings—from which Plaintiff received title to the Tower and the forty-three Golf Club memberships—were parties to the 2009 Agreement. Additionally, Plaintiff argues that the 2009 Agreement was personal to the O'Neill entities and

does not run with the land, and that by the time the 2009 Agreement was recorded, Carnegie Tower Development had already conveyed the Tower and assigned forty-seven prepaid Golf Club memberships to Carnegie Holdings which was not a party to the 2009 Agreement. In response, the Associations assert that Plaintiff is bound by the 2009 Agreement for three reasons: (1) it is a successor in interest under the 2009 Agreement; (2) it is bound by the 2009 Agreement because it had actual and constructive notice of the inclusion of the 2009 Agreement in the deed; and (3) the 2009 Agreement runs with the land.[14]

This Court first finds that Carnegie Holdings and Plaintiff are successors in interest and assigns to Carnegie Tower Development, a party to the 2009 Agreement. In construing the language of the assignments and deeds in this matter, this Court applies contract interpretation law. *See, e.g.*, *Kinder v. Westcott*, 107 A.3d 321, 325 (R.I. 2015). "'The determination of whether a contract's terms are ambiguous is a question of law . . . .'" *High Steel Structures, Inc. v. Cardi Corp.*, 152 A.3d 429, 433-34 (R.I. 2017) (quoting *JPL Livery Servs., Inc. v. R.I. Dep't of*

[14] The Tower Association joined Plaintiff's motion, and the O'Neill entities filed a partial objection and partial joinder to Plaintiff's motion. Specifically, the Tower Association sought from this Court the granting of the following relief, or in the interim, relief consistent with Plaintiff's motion: (1) that the 2009 Agreement is not enforceable against Plaintiff or purchasers of Tower units from Plaintiff; (2) that the 2009 Agreement does not require Plaintiff or any purchaser to take any action with Golf Club memberships; (3) that the 2009 Agreement does not require any purchaser of a Tower unit from Plaintiff to pay the listed prices in the 2009 Agreement for Golf Club memberships; and (4) that any purchaser of a Tower unit from Plaintiff satisfies its obligations under the 2009 Agreement, if any, by obtaining an equity/refundable membership by any means available to that purchaser, including the purchase of a pre-paid Golf Club membership from Plaintiff. The O'Neill entities have requested this Court declare that (1) the 2009 Agreement is binding on Plaintiff; (2) Plaintiff owns forty-three Golf Club memberships and can divide them into social memberships if needed; (3) the 2009 Agreement requires Plaintiff to sell Tower units only if the buyer also purchases an equity/refundable Golf Club membership; (4) Plaintiff can use the prepaid Golf Club memberships to satisfy the 2009 Agreement; (5) Plaintiff may retain all of the proceeds of that Golf Club membership sale without any accounting to the Golf Club owner or any other party; and (6) the Golf Club must honor that prepaid Golf Club membership fully and admit such buyer into the Golf Club without requiring any additional deposit or compensation (other than annual membership dues).

Admin., 88 A.3d 1134, 1142 (R.I. 2014)). "When there is only one reasonable interpretation of a contract, the contract is deemed unambiguous." *Roadepot, LLC v. Home Depot, U.S.A., Inc.*, 163 A.3d 513, 519 (R.I. 2017) (citing *Botelho v. City of Pawtucket Sch. Dep't*, 130 A.3d 172, 176 (R.I. 2016)). "In determining whether language in a contract is ambiguous, '[the Court] give[s] words their plain, ordinary, and usual meaning.'" *Botelho*, 130 A.3d at 176 (quoting *DiPaola v. DiPaola*, 16 A.3d 571, 576 (R.I. 2011)). "However, a reviewing court should not seek out ambiguity where there is none." *Roadepot*, 163 A.3d at 519 (citing *Botelho*, 130 A.3d at 177). "The court should consider 'whether the language has only one reasonable meaning when construed . . . *in an ordinary, common sense manner*.'" *Id.* (quoting *Sturbridge Home Builders, Inc. v. Downing Seaport, Inc.*, 890 A.2d 58, 63 (R.I. 2005)). "[I]f the contractual language is unambiguous, the intention of the parties must govern 'if that intention can be clearly inferred from the writing and . . . can be fairly carried out in a manner consistent with settled rules of law.'" *A.F. Lusi Constr., Inc. v. Peerless Ins. Co.*, 847 A.2d 254, 258 (R.I. 2004) (quoting *W.P. Assocs. v. Forcier, Inc.*, 637 A.2d 353, 356 (R.I. 1994)). Furthermore, "'in situations in which the language of a contractual agreement is plain and unambiguous, its meaning should be determined without reference to extrinsic facts or aids.'" *Botelho*, 130 A.3d at 176-77 (quoting *JPL Livery Servs., Inc.*, 88 A.3d at 1142).

Upon reviewing the assignments, this Court finds them to be clear and unambiguous. *Roadepot, LLC*, 163 A.3d at 519. Specifically, in March 2012, O'Neill, through his entities, transferred the Tower's ownership as well as forty-seven prepaid Golf Club memberships from Carnegie Tower Development to Carnegie Holdings. O'Neill Dep. 155:14-156:5; Pl.'s Mot., Exs. 28, 32; O'Neill RFA ¶¶ 45-48. Carnegie Holdings is controlled by O'Neill, who was the principal of multiple parties to the 2009 Agreement; therefore, Carnegie Holdings, through

O'Neill, was fully aware of the 2009 Agreement when it took title to the Tower, even if the 2009 Agreement was not recorded at that time. *See, e.g.*, *Speedy Muffler King, Inc. v. Flanders*, 480 A.2d 413, 416 (R.I. 1984) (holding that plaintiff had actual and constructive notice of freeway lines when it purchased subject property because prior to purchase, plaintiff retained an engineer to construct a survey map which contained said freeway lines); *see also Brimbau v. Ausdale Equip. Rental Corp.*, 440 A.2d 1292, 1295 (R.I. 1982) (approving of jury instruction that "a corporation acts only through its officers, agents, and employees, who in turn bind the corporation by the acts they commit or the knowledge they obtain when furthering the business of the corporation"); *Cook v. Am. Tubing & Webbing Co.*, 28 R.I. 41, 65 A. 641, 655 (1905) (finding "upon grounds of public policy . . . a corporation shall be held responsible for the knowledge which is possessed by those whom it appoints to represent it").

Additionally, in that same transaction, Carnegie Tower Development assigned its declarant rights and obligations to Carnegie Holdings. Associations' Mot., Ex. J. Specifically, in receiving "all of the Assignor's [Carnegie Tower Development] right, title and interest, if any, as declarant," Carnegie Holdings, as assignee, "accept[ed] and assum[ed] all of the Transferred Rights and agree[d] to be bound by and perform all of the terms, covenants and agreements to be performed by the Assignor [Carnegie Tower Development] thereunder." *Id.* ¶¶ 1-2; *High Steel Structures, Inc.*, 152 A.3d at 435. One of the agreements to be performed by Carnegie Tower Development was the 2009 Agreement.[15]

[15] Moreover, the warranty deed between Carnegie Tower Development as Grantor and Carnegie Holdings as Grantee stated that "[t]he benefits and *obligations hereunder shall be deemed covenants running with the land* and shall inure to be binding upon the heirs, executors, administrators, successors and assigns of the respective parties hereto." Pl.'s Mot., Ex. 32 (emphasis added). One of Carnegie Holdings' obligations listed under the warranty deed was the following: "[t]he Grantee [Carnegie Holdings], by accepting and recording this Deed, accepts the covenants, restrictions, easements, liens, charges and other provisions contained or referred to

As a result of the default under the Forbearance Agreement, Carnegie Holdings granted Plaintiff the Tower and the forty-three prepaid Golf Club memberships. O'Neill Dep. 105:15-106:1; Pl.'s Mot., Ex. 40; Kolben Dep. 96:23-97:11. Specifically, the executed deed between Carnegie Holdings as Grantor and Plaintiff as Grantee stated that Carnegie Holdings "affirms that it is Grantor's [Carnegie Holdings] express intention to vest absolute title to the Property and rights and other real property described herein in Exhibit A attached hereto and incorporated herein and its appurtenant interests in the Grantee [Plaintiff]." Pl.'s Mot., Ex. 40. Under Exhibit A to the executed deed, the property granted to Plaintiff was described as follows:

> "ALL THAT CERTAIN PIECE OR PARCEL OF REAL PROPERTY, with the improvements therein contained, situate and being a part of a condominium in the Town of Portsmouth, County of Newport and State of Rhode Island, known as CARNEGIE HARBOR CONDOMINIUM . . . TOGETHER WITH AND SUBJECT TO the provisions, benefits, rights, privileges, easements, burdens, covenants and restrictions of the Master Condominium Declaration and of the By-Laws of the Master Condominium recorded simultaneously with and as a part of the Master Condominium Declaration . . . shall constitute covenants running with the land . . . TOGETHER WITH THE BENEFITS OF THE FOLLOWING WHICH ARE APPURTENANCES TO THE ABOVE DESCRIBED TOWER CONDOMINIUM UNITS:
>
> . . . .
>
> > "That certain Agreement recorded May 8, 2013 in the Land Evidence Records of the Town of Portsmouth in Book 1605 at Page 292." *Id.* at Ex. A.

"It is well established that Rhode Island law gives 'the broadest possible effect to constructive notice.'" *Option One Mortg. Corp. v. Aurora Loan Servs., LLC*, 78 A.3d 781, 786 (R.I. 2013) (quoting *Speedy Muffler King, Inc.*, 480 A.2d at 415 n.1). "'The purpose of . . .

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herein *and agrees to perform the obligations imposed by the Declaration*." *Id.* (emphasis added). As noted above, the Tower Declaration requires each initial unit owner to be a member of the Golf Club. Pl.'s Mot., Ex. 19 § 8:18.

constructive notice is to bind subsequent purchasers and all other affected parties by restrictions that are clearly set forth in prior conveyances or other instruments appropriately recorded.'" *In re Barnacle*, 623 A.2d 445, 447 (R.I. 1993) (quoting *Speedy Muffler King, Inc.*, 480 A.2d at 415). Here, Plaintiff had at least constructive notice of the 2009 Agreement because at the time it was granted title to the Tower, the 2009 Agreement was recorded in Portsmouth's Land Evidence Records and was referenced in the executed deed between Carnegie Holdings and Plaintiff.[16] *See Speedy Muffler King, Inc.*, 480 A.2d at 416.

Moreover, the property description in the executed deed treats the golf memberships in paragraph five of the 2009 Agreement as an "appurtenance" to the Tower units. *See* Pl.'s Mot., Ex. 21 ¶ 5, Ex. 40 at Ex. A; *High Steel Structures, Inc.*, 152 A.3d at 435. Additionally, by receiving "the condominium property and rights and other real property at One Tower Drive," Plaintiff also agreed to be bound by the restrictions in the Tower Declaration; specifically, that each initial unit owner had to be a member of the Golf Club. *See* Pl.'s Mot., Ex. 19 § 8.18; *High Steel Structures, Inc.*, 152 A.3d at 435.

However, even if Carnegie Holdings and Plaintiff are successors in interest to Carnegie Tower Development, a party to the 2009 Agreement, the 2009 Agreement is an affirmative covenant that does not run with the land. By way of background,

> "[a] covenant is an agreement or promise of two or more parties that something is done, will be done, or will not be done. That is, a 'covenant' is an agreement to act or refrain from acting in a certain

[16] Plaintiff's argument that it could not have had notice of the 2009 Agreement when it was not properly notarized and did not contain a legal description of the property is without merit. With constructive notice of recorded instruments, Rhode Island case law is adamant on not taking the stance of form over substance. *See R.I. Joint Reinsurance Ass'n v. Santana-Sosa*, 92 A.3d 192, 197-98 (R.I. 2014) (citing *Carrozza v. Carrozza*, 944 A.2d 161, 165 (R.I. 2008)) (noting that "[e]ven if [a] mortgage lacked proper notarization . . . this would not render it void" under G.L. 1956 § 34-11-1); *Barnacle*, 623 A.2d at 449 (technical deficiency with property description and missing signature of one of parties was not enough to negate constructive notice).

> way. Thus, all covenants are either affirmative or negative; while an 'affirmative covenant' requires the covenantor either to perform some act, or to continue the status quo as represented, a 'negative covenant' binds the covenantor not to perform an act. The term generally describes promises relating to real property that are created in conveyances or other instruments . . . . The chief historical distinction between a condition and a covenant in an instrument of conveyance is that a breach of condition subjects the grantee's estate to forfeiture, but a breach of covenant gives rise to an action for damages." Blum, 21 C.J.S. *Covenants* § 1 (2018).

The Rhode Island Supreme Court has not discussed the elements in determining whether a covenant runs with the land; however, in terms of a restrictive covenant, the Court "'construe[s] the terms of any restrictive covenant in favor of the free alienability of land while still respecting the purposes for which the restriction was established.'" *Ashley v. Kehew*, 992 A.2d 983, 989 (R.I. 2010) (quoting *Martellini v. Little Angels Day Care, Inc.*, 847 A.2d 838, 843 (R.I. 2004) (internal quotation marks omitted)). Moreover, "[t]his Court 'will not . . . seek ambiguity where none exists but rather [this Court] will effectuate' the [affirmative] covenant's objective." *Id.* (quoting *Ridgewood Homeowners Ass'n v. Mignacca*, 813 A.2d 965, 972 (R.I. 2003)). "'[I]n those instances when the limitation in issue is unambiguous, [affirmative] covenants are to be strictly construed.'" *Id.* (quoting *Martellini*, 847 A.2d at 843).

The consensus of jurisdictions requires the following for a covenant to be real or run with the land: "(1) the covenanting parties intended to create such a covenant; (2) privity of estate exists between the person claiming the right to enforce the covenant and the person upon whom the burden of the covenant is to be imposed; and (3) the covenant 'touches and concerns' the land in question." Blum et al., Am. Jur. 2d *Covenants* § 21 (2018); *see also Friends of the Sakonnet v. Dutra*, 749 F. Supp. 381, 393-94 (D.R.I. 1990) ("For this duty . . . to be binding on . . . successors-in-interest (a running of the burden), the promise . . . must be one relating to the

use of the land; it must have been made with the intention that the . . . successors-in-interest be bound; and the successors-in-interest must had notice of the promise.”).

This Court notes that affirmative covenants running with the land were never recognized in English common law. *See* 1 Poliakoff, *Law of Condominium Operations* § 4.4 (2017) (citing *Austerberry v. Oldham Corp.*, 55 LJ Ch. 633 (1885); *Haywood v. Brunswick Permanent Benefit Bldg. Society*, 8 LR QBD 403 (1881)). However, in the United States, no distinctions between restrictive and affirmative covenants running with the land are made. *Id.* (citing *Murphy v. Kerr*, 5 F.2d 908 (8th Cir. 1925); *Bronson v. Coffin*, 108 Mass. 175 (1871)). New York recognizes a general rule that affirmative covenants do not run with the land; however, “the exceptions to [that] rule . . . are so numerous and varied as to make the rule generally unenforceable.” *Id.* (citing *Guaranty Trust Co. of N.Y. v. N.Y. & Queens County Railway Co.*, 282 U.S. 803 (1930); *Neponsit Prop. Owners’ Ass’n, Inc. v. Emigrant Industrial Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938)). Thus, many jurisdictions in the United States subject affirmative and restrictive covenants to the same test. *See, e.g.*, *Terry Weisheit Rental Props., LLC v. David Grace, LLC*, 12 N.E.3d 930, 937 (Ind. App. Ct. 2014); *Union Exploration Partners, Ltd. v. AmSouth Bank*, 718 F. Supp. 552, 554 (S.D. Miss. 1989); *Hunt v. DelCollo*, 317 A.2d 545, 549 (Del. Ch. 1974).

This Court agrees with Plaintiff that *Raintree Corp. v. Rowe*, 38 N.C. App. 664, 248 S.E.2d 904 (1978) is directly relevant and persuasive to the within matter. In *Raintree Corp.*, the plaintiff purchased the original developer’s interest in a planned residential community. 38 N.C. App. at 665, 248 S.E.2d at 906. Pursuant to recorded covenants, every owner of a lot in the residential community needed to be a mandatory member of a golf club in the residential community and was obligated to pay golf club dues. *Id.* at 665-66, 248 S.E.2d at 906. After

determining that the covenant was affirmative,[17] the court examined whether it was real or personal. *Id.* at 668-71, 248 S.E.2d at 907-09. Since the Declaration of Covenants, Conditions and Restrictions stated that the covenants were to run with the land, the court found that the parties intended the covenants to run with the land. *Id.* at 669, 248 S.E.2d at 908. However, in analyzing the element that the affirmative covenant must touch and concern the land, the court found that it did not, holding,

> "This covenant creates an affirmative duty, a charge or obligation to pay money, *i.e.*, country club dues, for the services and use of the country club facilities which are not upon, connected with, or attached to the defendants' land in any way. The defendants are required to pay, whether they use the facilities or not. The payment of a collateral sum of money does not concern the land. *Nesbit v. Nesbit*, 1 N.C. 490, 495 (1801). Courts have generally held that covenants to pay money do not touch and concern the land. *Neponsit Property Owners' Ass'n, Inc.*, 278 N.Y. at 255, 15 N.E.2d at 795 . . . . We find that the performance by the defendants of this covenant is not connected with the use of their land and does not touch or concern their land to a substantial degree." *Id.* at 670, 248 S.E.2d at 908-09.

The North Carolina Court of Appeals then addressed the issue again in *Midsouth Golf, LLC v. Fairfield Harbourside Condo. Ass'n, Inc.,* 187 N.C. App. 22, 652 S.E.2d 378 (2007) and further discussed why performance of a similar covenant was not sufficiently connected to the use of the defendants' land. In that case, an owner of a development's recreational facilities brought suit against the development's time share communities to recover past due amenity fees for the use of the recreational facilities allegedly owed pursuant to the development's master condominium. *Id.* at 23-26, 652 S.E.2d at 380-82. In finding that the affirmative covenant to

[17] Although North Carolina law does not have a general rule like New York that does not permit affirmative covenants running with the land, it does recognize that "'the requirements for a covenant to run are to be more strictly applied to affirmative covenants than negative covenants.'" *Midsouth Golf, LLC v. Fairfield Harbourside Condo. Ass'n, Inc.*, 187 N.C. App. 22, 32, 652 S.E.2d 378, 385 (2007) (quoting *Raintree Corp.*, 38 N.C. App. at 670, 248 S.E.2d at 908).

pay amenity fees did not run with the land, the court distinguished *Neponsit*, which found that a covenant to pay a fee touched and concerned the land because the grantees of lots within the development received an easement in the common areas and amenities financed by those fees. *Id.* at 34-35, 187 S.E.2d at 386-87 (citing *Neponsit Prop. Owners' Ass'n, Inc.*, 278 N.Y. at 258, 15 N.E.2d at 797). In *Midsouth Golf*, the defendants did not have any easement rights in the recreational amenities in question, but merely a revocable license to use such facilities. *Id.*, 187 S.E.2d at 387. The court therefore found that the affirmative covenant did not touch and concern the land. *Id.*; *see also Four Seasons Homeowners Ass'n, Inc. v. Sellers*, 62 N.C. App. 205, 210-11, 302 S.E.2d 848, 852-53 (1983) (distinguishing, *in dicta*, *Raintree Corp.* that affirmative covenant for payment of maintenance assessments in common areas and amenities in which lot owners had easement rights touched and concerned the land because facilities were not in a country club but were on a subdivision "for the benefit of lot owners").

Here, paragraph five to the 2009 Agreement is an affirmative covenant, because it is an agreement between the parties that requires Carnegie Tower Development to perform an act; namely, to ensure that each initial Tower unit owner purchase a Golf Club membership for the stated price. *See Raintree Corp.*, 38 N.C. App. at 668-71, 248 S.E.2d at 907-09. Moreover, the parties to the 2009 Agreement clearly had the intent for the covenant in paragraph five to run with the land, because the agreement explicitly states that it is "binding upon the parties, their heirs, representatives, successors, affiliates, and assigns." Pl.'s Mot., Ex. 21 ¶ 11; *see also Ridgewood Homeowners Ass'n*, 813 A.2d at 971 ("The limitations, restrictions, covenants, and uses enumerated in the declaration were intended to be 'covenants running with the land . . . for the benefit of and limitation on all future owners' of land in the subdivision."); Blum et al., Am. Jur. 2d *Covenants* § 21 (2018); *Friends of the Sakonnet*, 749 F. Supp. at 393-94; *Raintree Corp.*,

38 N.C. App. at 669, 248 S.E.2d at 908. However, the affirmative covenant in paragraph five does not touch and concern the land because it is a requirement for initial Tower unit owners to purchase memberships in the Golf Club "which [is] not upon, connected with, or attached to the [Tower units] in any way." *See Raintree Corp.*, 38 N.C. App. at 670, 248 S.E.2d at 908; *see also Ebbe v. Senior Estates Golf and Country Club*, 61 Or. App. 398, 407, 657 P.2d 696, 701-02 (1983) (payment of an initiation fee for membership into a golf club did not touch and concern land when membership was mandatory for initial purchasers, but neither mandatory nor guaranteed for subsequent purchasers).

Furthermore, once the initial unit owners become members of the Golf Club, they are merely granted a revocable license—not an easement—to use the Golf Club facilities.[18] Pl.'s Mot., Ex. 41 at 14, Ex. 42 at 18; *see also Pelletier v. Laureanno*, 46 A.3d 28, 36-37 n.15 (R.I. 2012) (quoting 25 Am. Jur. 2d *Easements and Licenses* §§ 117 at 612, 120 at 615 (2004)) ("'[A license] is a personal, revocable, and unassignable privilege . . . . A license does not pass with the title to the property, but is only binding between the parties . . . .'"); *Midsouth Golf*, 187 N.C. App. at 35, 652 S.E.2d at 387; *Four Seasons Homeowners Assoc.*, 62 N.C. App. at 210-11, 302 S.E.2d at 852-53. Therefore, because the covenant in question concerned payment of fees for a Golf Club membership and the initial Tower unit owners did not have any easement rights to the

[18] The Associations rely on *Friends of the Sakonnet* to prove that the 2009 Agreement runs with the land. In that case, the homeowners had an easement to use the subject sewage system, and the court, in analyzing easement law, determined that there was an agreement—within the easement documents—between the original developers and the homeowners that the developers would be responsible for maintaining said sewage system. 749 F. Supp. at 391-93. In finding that the covenant touched and concerned the land, the court noted, *inter alia*, that "[t]he promise clearly increased the usefulness of the buyers' land" and that without the promise of this system, "the land could not easily have been developed for residential use." *Id.* at 394. The covenant in that case was not to use facilities in a golf course via a revocable license, but rather to use a sewage system that had direct ties to the homeowners' land through an easement. For these reasons, this Court finds *Friends of the Sakonnet* to be distinguishable from the case at bar, and the Associations' reliance on same to be misplaced.

Golf Club facilities, the covenant did not touch and concern the land and thus is a personal covenant between the contracting parties.[19] *See Smith v. Zoning Bd. of Review of City of Pawtucket*, 170 A. 75, 76 (R.I. 1934) (restriction in deed that reverted title back to sellers so long as they owned the adjoining property if any buildings other than dwelling houses or garages were built upon lot that buyers owned was a personal restriction and did not run with land). Plaintiff, as a successor-in-interest to Carnegie Tower Development, is thus not bound by the 2009 Agreement.[20]

B

Even if Plaintiff Were Bound by the 2009 Agreement, Plaintiff Can Use the Prepaid Golf Club Memberships to Satisfy the 2009 Agreement

Even if this Court were to find that Plaintiff was bound by the 2009 Agreement, a plain reading of the 2009 Agreement allows Plaintiff to use the forty-three prepaid Golf Club memberships to satisfy its requirements. Plaintiff first claims that the Harbor, the Heights and the Cottages lack standing to challenge the prepaid Golf Club memberships because they were never a party or affiliated with any party to any of the transactions, transfers or agreements that

[19] The Associations also argue that the 2009 Agreement runs with the land because it increases the value of the Golf Club and the neighboring sub-condominiums when unit owners invest money into the Golf Club to become members. While this Court recognizes that the Carnegie Abbey complex is a gated community, and that the purchase of Golf Club memberships may enhance the value of the community, the 2009 Agreement still does not touch and concern the land because the unit owners would merely have a license to use the Golf Club facilities. *See Midsouth Golf*, 187 N.C. App. at 38, 652 S.E.2d at 388 (citing *Bermuda Run Country Club v. Atwell*, 121 N.C. App. 137, 142, 465 S.E.2d 9, 13 (1995)). Moreover, even if the 2009 Agreement never existed, the initial Tower unit owners would still be required, under the terms of the Tower Declaration, to become members of the Golf Club. *See* Pl.'s Mot., Ex. 19 § 8:18. Therefore, this Court finds this argument to be without merit.

[20] Because this Court has found that the 2009 Agreement does not touch and concern the land, it is unnecessary to address whether privity of estate exists between the Associations seeking to enforce the covenant and Plaintiff, a successor in interest to Carnegie Tower Development. *See Raintree Corp.*, 38 N.C. App. at 670-71, 248 S.E.2d at 909 (holding that "[s]ince the covenant does not touch and concern the land, an essential requirement is absent and it is not necessary to discuss the question of privity of estate").

culminated in the memberships. In the alternative, Plaintiff argues that it was validly assigned the forty-three prepaid Golf Club memberships, and there is no language in the 2009 Agreement that precludes Plaintiff from using those memberships to satisfy said Agreement.

In response, the Associations as a preliminary matter insist that they are not challenging the validity of the prepaid Golf Club memberships or their assignment to Plaintiff; rather, they have standing in this case because they seek enforcement of a contract to which they were parties. The Associations next argue that the prepaid Golf Club memberships cannot be used to satisfy Plaintiff's obligations under the 2009 Agreement. Specifically, the Associations stress the difference between what the 2009 Agreement could have stated, such as initial Tower unit owners would merely be required to *join* the Golf Club, versus what the 2009 Agreement actually states, which is that memberships must be *purchased* at specific prices—*i.e.*, that the initial buyers have to make a monetary investment to join the Golf Club. In fact, the Associations contend that as the deadline for the 2009 Agreement drew near, the Lopes Letter signified that O'Neill and his entities would agree to the minimum prices in the 2009 Agreement. *See* Associations' Mot., Ex. K. Additionally, the Associations assert that those minimum prices were not only consistent with what many existing residents of the Associations had paid for their Golf Club memberships to date, but were consistent with the pre-existing Koch Agreement, which the Golf Club considers to be in force to this day. *See* Associations' Mot., Exs. B, C. According to the Associations, in connection with the drafting and execution of the 2009 Agreement, they were never made aware of the prepaid Golf Club memberships until sometime in early 2015 after Plaintiff took title to the Tower.

Addressing the standing issue first, this Court agrees with the Associations and finds that the Associations have standing to bring suit in this case. "'At its core, inquiries into standing

consider whether the party seeking relief has alleged such a personal stake in the outcome of the controversy as to ensure concrete adverseness that sharpens the presentation of the issues . . . .'" *Warfel v. Town of New Shoreham*, 178 A.3d 988, 991 (R.I. 2018) (quoting *1112 Charles, L.P. v. Fornel Entertainment, Inc.*, 159 A.3d 619, 625 (R.I. 2017) (internal quotation marks omitted)). "'The party asserting standing must have an injury in fact that is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical.'" *Id.* (quoting *1112 Charles, L.P.*, 159 A.3d at 625) (internal quotation marks omitted). The Associations are not challenging the validity of the prepaid Golf Club memberships; they concede that the memberships were validly purchased and eventually assigned to Plaintiff. Furthermore, the Associations are correct that they seek enforcement of a contract to which they were parties: a clear grounds to resolve the standing issue. *See 1112 Charles, L.P.*, 159 A.3d at 625 ("[A] party must be in privity of contract with the other party to have standing to challenge the contract's validity."); *Mruk v. Mortg. Elec. Registration Systems, Inc.*, 82 A.3d 527, 535 (R.I. 2013) (citing *DePetrillo v. Belo Holdings, Inc.*, 45 A.3d 485, 492 (R.I. 2012)). ("[I]n general, strangers to a contract lack standing to either assert rights under that contract or challenge its validity."). *Id.* at 536.

Turning now to the 2009 Agreement, this Court must determine whether paragraph five is clear and unambiguous and thus subject to only one reasonable interpretation. *Roadepot*, 163 A.3d at 519. In determining whether paragraph five is clear and unambiguous, this Court must also give the language its plain, ordinary, and usual meaning, and should not seek out ambiguity where there is none. *Id.*; *Botelho*, 130 A.3d at 176. Upon reviewing the 2009 Agreement, this Court finds that paragraph five is clear and unambiguous. Paragraph five states in pertinent part:

> "All initial buyers of properties owned by Applicant, (Tower Units, Suites, Townhouses, Cottages or O'Neill Units in Residences), must purchase equity/refundable memberships, ($150,000 minimum Golf Membership; $75,000 minimum Social

> Membership). It is understood and agreed that sales agreement for all Townhouse Units and other aforementioned O'Neill properties must separately state the membership price." Pl.'s Mot., Ex. 21 ¶ 5.

The plain and ordinary meaning of this paragraph is that the initial Tower unit owners must purchase equity/refundable memberships for, at a minimum, $150,000 if it is a Golf Membership and $75,000 if it is a Social Membership. The language of the 2009 Agreement leaves an opportunity for initial Tower unit owners to use the prepaid Golf Club memberships in order to satisfy the 2009 Agreement. Nowhere does paragraph five state that an initial Tower unit owner cannot use a prepaid Golf Club membership to satisfy the 2009 Agreement. Paragraph five also does not indicate that the initial Tower unit owners must purchase a new Golf Club membership, or even purchase a Golf Club membership directly from the Golf Club. *See JPL Livery Services, Inc.*, 88 A.3d at 1142 (plain and ordinary meaning of contract between parties did not require state to rely solely on plaintiff for its livery needs); *see also Inland Am. Retail Mgmt. LLC v. Cinemaworld of Florida, Inc.*, 68 A.3d 457, 464 (R.I. 2013) (quoting *Pearson v. Pearson*, 11 A.3d 103, 109 (R.I. 2011)) ("'[Rhode Island courts] decline to read nonexistent terms or limitations into a contract.'").

The Associations argue that they did not have notice of the prepaid Golf Club memberships until 2015. This argument, however, is irrelevant because the language is clear and unambiguous, and as a result, this Court cannot refer to extrinsic facts or aids.[21] *See Roadepot, LLC*, 163 A.3d at 521 (extrinsic evidence of lease executor's testimony that his understanding

[21] Furthermore, this Court also notes that one of the Associations—the Cottages—was aware of the prepaid Golf Club memberships at the time the 2009 Agreement was entered into because O'Neill controlled its condominium association. O'Neill Dep. 181:8-182:2; Collins Dep. 61:16-19; Luckett Dep. 7:6-10, 50:12-14; Lopes Dep. 42:23-43:22, 77:21-78:11. O'Neill, through his entities, purchased the prepaid Golf Club memberships between 2003 and 2005. O'Neill Dep. 142:2-145:2, 151:2-152:7; Pl.'s Mot., Exs. 12, 16; O'Neill RFA ¶¶ 14, 21-27.

and intent was that tenant was responsible for paying assessment and course of dealing between parties was properly excluded where the lease agreement was clear and unambiguous); *see also Cathay Cathay, Inc. v. Vindalu, LLC*, 962 A.2d 740, 746 (R.I. 2009) (quoting *Singer v. Singer*, 692 A.2d 691, 692 (R.I. 1997) (mem.)) ("The language employed by the parties to a contract is the best expression of their contractual intent, and when that language is 'clear and unambiguous, words contained therein will be given their usual and ordinary meaning and the parties will be bound by such meaning.'"). For these reasons, this Court declares that even if the 2009 Agreement binds Plaintiff, it may use the forty-three prepaid Golf Club memberships assigned to it to satisfy the obligations under the 2009 Agreement.[22]

IV

Conclusion

For the foregoing reasons, this Court declares the following: (1) the 2009 Agreement is a valid and enforceable contract but is not binding upon Plaintiff as a successor-in-interest to Carnegie Tower Development and Carnegie Holdings; (2) Plaintiff owns forty-three prepaid Golf Club memberships in the Golf Club; (3) Plaintiff has the right to divide any and all of the forty-three prepaid Golf Club memberships into two Social Memberships; (4) the Tower Declaration requires Plaintiff to ensure that every initial Tower unit owner is a member of the Golf Club; and (5) even if Plaintiff were bound by the 2009 Agreement, any purchaser of a Tower unit from Plaintiff may satisfy its obligations under the 2009 Agreement by purchasing an equity/refundable Golf Club membership for, at a minimum, $150,000 for a Golf Membership and $75,000 for a Social Membership by any means available to that purchaser, including the

[22] This Court notes that Plaintiff has the discretion to bundle the purchase price and membership cost with the sale of a Tower unit, since the provision prohibiting such action had been stricken by the parties. *See* Pl.'s Mot., Ex. 21 ¶ 5.

purchase of a prepaid Golf Club membership from Plaintiff. Plaintiff's motion for summary judgment is therefore granted, and the Associations' cross-motion for summary judgment is denied. Counsel shall prepare the appropriate order and judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Carnegie at One Tower Drive, LLC v. Carnegie Heights Condominium Association, et al.
CASE NO:	NC-2016-0235
COURT:	Newport County Superior Court
DATE DECISION FILED:	October 18, 2018
JUSTICE/MAGISTRATE:	Stern, J.
ATTORNEYS:	
For Plaintiff:	Andrew Tugan, Esq.; David A. Wollin, Esq.
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