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IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA
CIVIL ACTION

BEVERLY WHITE, et al.,
individually and on behalf of all
others similarly situated,

Plaintiffs,

Case No. 2016-CA-5528-NC
CLASS ACTION

v.

PLANTATION GOLF AND COUNTRY
CLUB, INC. and CONCERT PLANTATION,
LLC,

Defendants.
_______________________________________/

DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT ON FOURTH AMENDED COMPLAINT

Defendants, Concert Plantation, LLC ("Concert") and Plantation Golf and Country Club, Inc. ("Plantation" or the "Club") (collectively "Defendants"), file their Motion for Summary Judgment on Fourth Amended Complaint against Plaintiffs. In support of this Motion, [1] Defendants state as follows:

[1] In support of this Motion, Defendants rely on the following pleadings, declarations, and evidence: the Fourth Amended Complaint and attached exhibits (DIN 481, 498); each Defendant's Answer and Defenses to the Fourth Amended Complaint (DIN 505, 506); the hearing transcripts dated October 13, 2021, October 14, 2021, and November 1, 2021 on Plaintiffs' Motion for Class Certification filed on November 1, 2021, December 3, 2021, and March 10, 2022 (DIN 740, 741, 778); all exhibits admitted at the hearing on Plaintiffs' Motion for Class Certification (DIN 742-745, 750-758); the Interrogatory Responses of Carol Barnes, Robert Beaver, Jon Berry, James and Anna Brendel, Charles Holloway, Arthur and Carol Mayhew, Michael and Lauren McCormick, Anne Marie O'Brien, and Thomas Tyler attached as **Composite Exhibit 1** to DIN 959; Membership Certificates of certain Plaintiffs, attached as **Composite Exhibit 2** to DIN 959; Form Membership Applications attached as **Composite Exhibit 3** to DIN 959; the Declaration of Bill Trent (DIN 961); the deposition transcripts and exhibits of Alan Anderson, David Gartzke, Thomas Tyler, Carol Barnes, and Tom Kubik (DIN 960); and the deposition transcript of Jon Berry.

UNDISPUTED FACTS RELEVANT TO THE MOTION

PGCC was a private member owned golf and country club that originally started in or around September 1994. (Trent Decl. ¶ 4).[2] The purpose of the Club was to own and operate a private golf, tennis, swimming, and social club for the benefit of Club members and their guests. (PGCC Bylaws, dated April 1, 2016, Art. 1). PGCC was organized as a not-for-profit corporation under Florida law. (Id. at Art. 2). The club offered equity memberships, which constituted ownership of an equity interest in the club. (Id. at Art. 3). The rights of equity members related to their resignation, membership, and payments is contained in Article 3 of PGCC's Bylaws. Further, Article 3.10, titled Liquidation of Equity Memberships, provides:

> In the event the Club's **assets are liquidated**, distribution of the proceeds therefore shall be made to all Equity members entitled to such distribution and distributions **shall be pro-rated** on the basis of the joining fees paid by the applicable Equity Member for the Equity Membership. For purposes of Article XII of the Articles of Incorporation, the value of the Equity Membership Certificate shall be an amount equal to the equity portion of the joining fees actually paid but not deemed to have been paid by the applicable member.

(Id. at Art. 3.10) (emphasis added). "Equity Member," as used in Article 3.10, is defined as the owner of an Equity Membership. (Id. at p.3). Indeed, each and every iteration of the Bylaws provided that, in the event the Club's assets were liquidated, distribution of the proceeds would be made on a pro rata basis.

PGCC's Bylaws also provided that it was to be governed by a Board of Directors, made up of nine Equity Members of the Club. (Id. at Art. 5). The Board was responsible for managing the Club, including adoption or amendment of Club policies, and establishing the price for equity membership. To become a member

[2] The Declaration of Bill Trent will be cited herein as "(Trent Decl. __)."

of the Club, each Plaintiff was required to fill out a membership application. The membership application throughout the years provided that: 1) the member agreed to be bound by the terms and conditions of the Club's Bylaws and General Rules; 2) the member understood that the Bylaws and General Rules could be amended from time to time; and 3) memberships were for the purpose of acquiring a membership to use the Club facilities and the "**membership should not be viewed or acquired as an investment and no person purchasing a membership should expect to derive any economic profits for the membership in the Club."** (Membership Applications, DIN 959 Composite Exhibit 3) (emphasis added). In addition, Equity Members received a Membership Certificate, which noted their interest in the Club and the amount of their equity contribution. (Membership Certificates, DIN 959 Composite Exhibit 2).

There were three types of equity memberships: golf, tennis, and social. (Oct. 14, 2021 Hrg. Trans. p. 16). A member could upgrade or downgrade their membership from one type to another. (Id.). The membership agreement provided that members were required to pay joining fees, which was comprised of the equity component[3] and an initiation fee. (Id. at p. 17). Not every equity member paid the same fee to join. For example, Beverly White and Carol Barnes paid $18,000 to join; Larry and Joan Yelding paid $20,000; and David Gartzke paid $24,000 for their respective memberships. (Membership Certificates, DIN 959, Composite Ex. 2; Interrogatory Responses, DIN 959, Composite Ex. 1)

[3] The equity contribution is not the same thing as a member deposit and member owned clubs do not typically have membership deposits. (Oct. 14, 2021 Hrg. Trans. p. 17). PGCC did not require a membership deposit.

Each of Plaintiffs' claims in the Complaint is based on the underlying premise that, as former equity members of PGCC, Plaintiffs were entitled to a refund of a portion of their equity buy-in to PGCC (the "Refund Amount") once they reached the top of a waiting list (the "Resignation Waiting List") for their respective categories of membership: i) golf; ii) tennis; and iii) social. (Compl., ¶¶ 16-19). Copies of the Resignation Waiting List for each membership category are attached to Defendants' Response in Opposition to Motion for Class Certification (DIN 707) as Exhibit 1 (Golf Waiting List), Exhibit 2 (Social Waiting List), and Exhibit 3 (Tennis Waiting List), respectively. The Resignation Waiting List consisted of the resigned equity members of PGCC ordered according to their date of resignation, with those who resigned first at the top of the list. (Oct. 14, 2021 Hrg. Trans. p. 20).

These refunds were to be paid according to PGCC's Bylaws, which were amended over the years. A brief timeline of the relevant Bylaw provisions and their amendments is outlined below:

a) March 26, 2001 – Amended Bylaws (the "March 2001 Bylaws")

> 3.9.2 The resigned Equity Membership shall be placed on a waiting list to be purchased by the Club. The resigned Membership will be purchased at eighty percent (80%) of the equity portion of the membership fee in effect as of the effective date of the resignation.
>
> 3.9.3 Prior to the initial issuance of all Equity Memberships in the resigned Member's Membership category, every fifth (5) Membership issued in that category shall be a resigned Equity Membership from the resale list.
>
> 3.9.4 Although not obligated, the Club may repurchase an Equity Membership under hardship circumstances deemed appropriate by the Board.

b) April 11, 2005 – New Bylaws Adopted (the "April 2005 Bylaws")

3.9.2 [No Change]

3.9.3 The Club shall maintain an Escrow Account into which monies from the sale of memberships shall be placed. These monies shall be the net amount of monies received after the Club has deducted the Club's initiation or transfer fee. All monies in this account shall be paid out to the resigned categories in accordance with the priority on the Resigned Members Waiting List.

3.9.4 [No Change]

c) March 17, 2008 – New Bylaws Adopted

3.9.2 [No Change]

3.9.3 [No Change]

3.9.4 [No Change]

d) March 22, 2010 – New Bylaws Adopted

3.8.2 [Same as prior 3.9.2]

3.8.3 [Same as prior 3.9.3]

3.8.4 [Same as prior 3.9.4]

e) November 15, 2010 – Amended Bylaws (the "November 2010 Bylaws")

3.7.2 The resold Equity membership shall be transferred, and an appropriate Certificate of Membership issued to the purchaser, upon the purchaser's payment of one hundred percent (100%) of the then current Equity Membership price to the Club. Upon receipt of the then current Equity Membership price, the Club will pay to the selling Member the following: eighty percent (80%) of the Equity Membership price originally paid or deemed to be paid by such selling Member in the case of Tennis Equity I or Social Equity I Member, and fifty percent (50%) of the Equity Membership price originally paid by such selling Member in the case of a Tennis Equity II or Social Equity II Member, less any amounts due from the selling member to the Club. In the case of a Regular Equity Member, the Club will pay to the selling Member the following

percentage of the Equity Membership price originally paid or deemed to be paid by such selling member, as applicable, less any amounts due from the selling Member to the Club: Regular Equity Member I – eighty percent (80%); Regular Equity Member II – seventy percent (70%); Regular Equity Member III – sixty percent (60%); Regular Equity Member IV – fifty percent (50%); Regular Equity Member V – forty percent (40%); Regular Equity Member VI – zero percent (0%).

3.8.2 The resigned Equity Membership shall be placed next in line on the Resigned Members Waiting List to be purchased by the Club. The purchase price shall be an amount equal to the percentage of the Equity Membership price originally paid or deemed to be paid by such selling Member for the applicable type and class of Equity Membership set forth in Article 3.7.2 of these Bylaws.

3.8.3 [No Change]

3.8.4 [No Change]

f) March 25, 2013 – Amended Bylaws

3.7.2 [No Change]

3.8.2 [No Change]

3.8.3 [No Change]

3.8.4 [No Change]

g) April 1, 2016 – Amended and Restated Bylaws (the "April 2016 Bylaws")

3.7.1 The Club currently offers Equity Memberships with a non-refundable equity portion of the Joining Fees. Nevertheless, if a resigned member is entitled to receive a refund of a percentage of the equity portion such member paid to the Club pursuant to the Prior Bylaws ("Refundable Equity Member"), the Club shall refund the Refundable Amount to such resigned member in accordance with these Bylaws. The "Refundable Amount" in each such case shall be equal to eighty percent (80%) of the equity portion of the Joining Fees the Club receives for issuance of an Equity Membership to a new Equity Member, less any amounts still owed to the Club by the resigning member. Notwithstanding the preceding sentence,

> the Club shall not pay any Refundable Amount until the Joining Fees have been paid in fully by the new member.
>
> 3.7.2 The Club previously issued, but is no longer offering, Regular Equity Memberships. For purposes of repayment of a Refundable Amount, resigned Regular Equity Memberships shall be considered to be in either the Full or Golf Equity Membership category, as applicable, and resigned Regular Equity Memberships shall be placed on the same Resigned Members Waiting List as Full and Golf Equity Memberships. Resigned Tennis Equity Memberships and Social Equity memberships shall be placed on the respective separate Resigned Members Waiting List accordingly.
>
> 3.8.2 If a Refundable Equity member resigns, the resigned Equity Membership shall be placed next in line on the Resigned Members Waiting List in order to receive from the Club the Refundable Amount, if any, upon payment to the Club of the then current Joining Fees by a new member.
>
> 3.8.3 The Club shall maintain an escrow account into which the Club shall deposit eighty percent (80%) of the equity portion of the Joining Fees paid by each new Equity Member (the "Escrow Account"). All monies in the Escrow Account shall be paid out to the applicable resigned members in accordance with the priority on the Resigned Members Waiting List. Within thirty (30) days of the Club's receipt of the Club's receipt of one hundred percent (100%) of the Joining Fees, the Club will pay to the resigned member in the first position on the Resigned Members Waiting List the applicable Refundable Amount, if any. Notwithstanding anything to the contrary in these Bylaws, the Escrow Account shall be the sole source of funds used to pay Refundable Amounts, if any, to resigned members. From and after the date upon which all Refundable Amounts which may be payable to Refundable Equity members have been paid, the Escrow Account will be closed and terminated.
>
> 3.8.4 [No Change]

Over the years, the forgoing amendments were made to the equity provisions of the Bylaws based on member and Club needs, as well as economic conditions. (Trent Decl. ¶ 7). In particular, with respect to the 2016 Bylaw

amendments, market conditions significantly affected the price of equity memberships. (Oct. 14, 2021 Hrg. Trans. Pp. 24-26). During that time, the market conditions experienced throughout the private club world forced PGCC to reduce the price of its equity memberships, resulting in the increasing inability to pay its resigned equity members within what had been historically a reasonable period of time. (Id.). Indeed, as a result of the dramatic decrease in the prices of PGCC private club membership, it would take decades (if not centuries) for some of the Plaintiffs to receive any refund, to the extent they were otherwise eligible if and when they reached the top of the Resignation Waiting List. The 2016 Bylaw amendments were made because the price of a membership in 2016 was $5,000 for golf, $1600 for tennis and $1000 for social, whereas previously, the prices the Club had charged were $30,000 for golf, $4200 for tennis, and $2,400 for social. (Id.); (Trent Decl. ¶ 7). The refund payments were only to be paid from an escrow account funded by the sale of new memberships net of PGCC's initiation or transfer fees (the "Escrow Account"). (Oct. 13, 2021 Hrg. Trans. Pp. 86-88).

When a new member joined the Club, they paid joining fees. The equity portion (80 percent) went into the equity reserve account, or the Escrow Account. (Id.). To be entitled to a refund, the member had to 1) reach the top of the waiting list as a result of payment of the equity refund amounts due to those who were ahead of such Member; and 2) a membership had to be sold that provided the funds to repay the resigning member's refund. (Oct. 14, 2021 Hrg. Trans. pp. 21-22). The process was the same for all equity memberships regardless of whether the member had a golf, tennis, or social membership. (Oct. 14, 2021 Hrg. Trans.

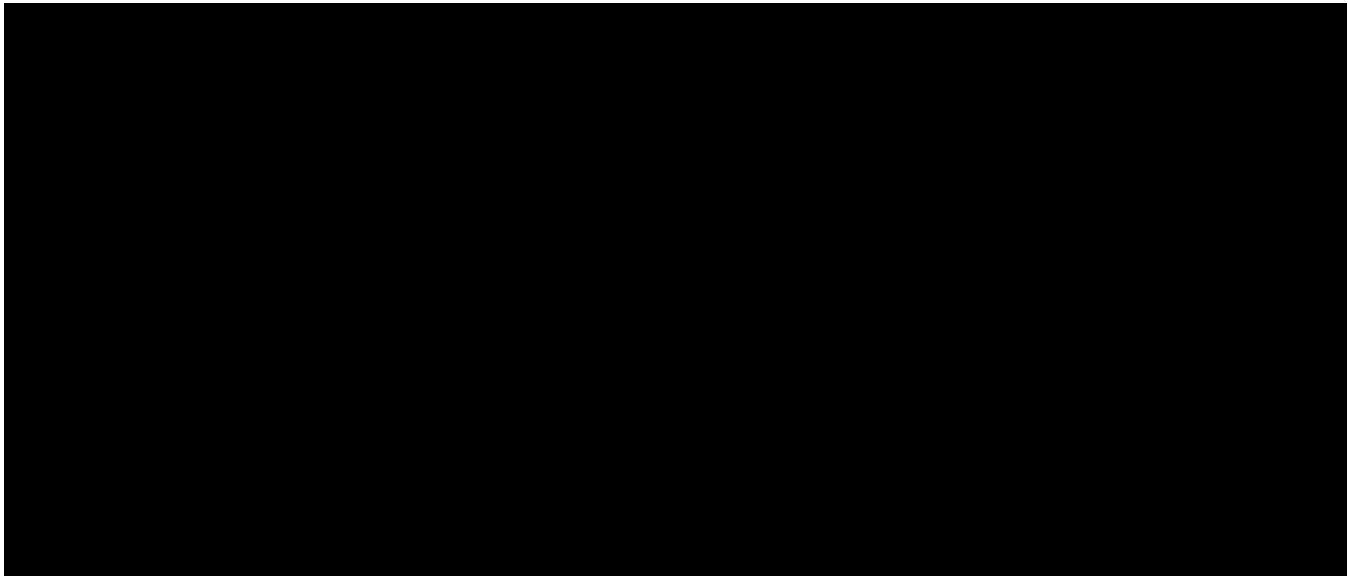
p. 24). Once enough memberships were sold that the Club could refund the person at the top of the list (to the extent the person was entitled to a refund), PGCC would issue a check to the person at the top of the list. (Id. at pp. 22-24). In determining the amount of refund a member received, PGCC was governed by the Bylaws in effect at the time the member reached the top of the waiting list. (Nov. 1, 2021 Hrg. Trans. pp. 12-13). To the extent there were no funds in the Escrow Account because no new memberships being sold, no resigned equity members would be paid their Refund Amount. (Id. at pp. 11-13).

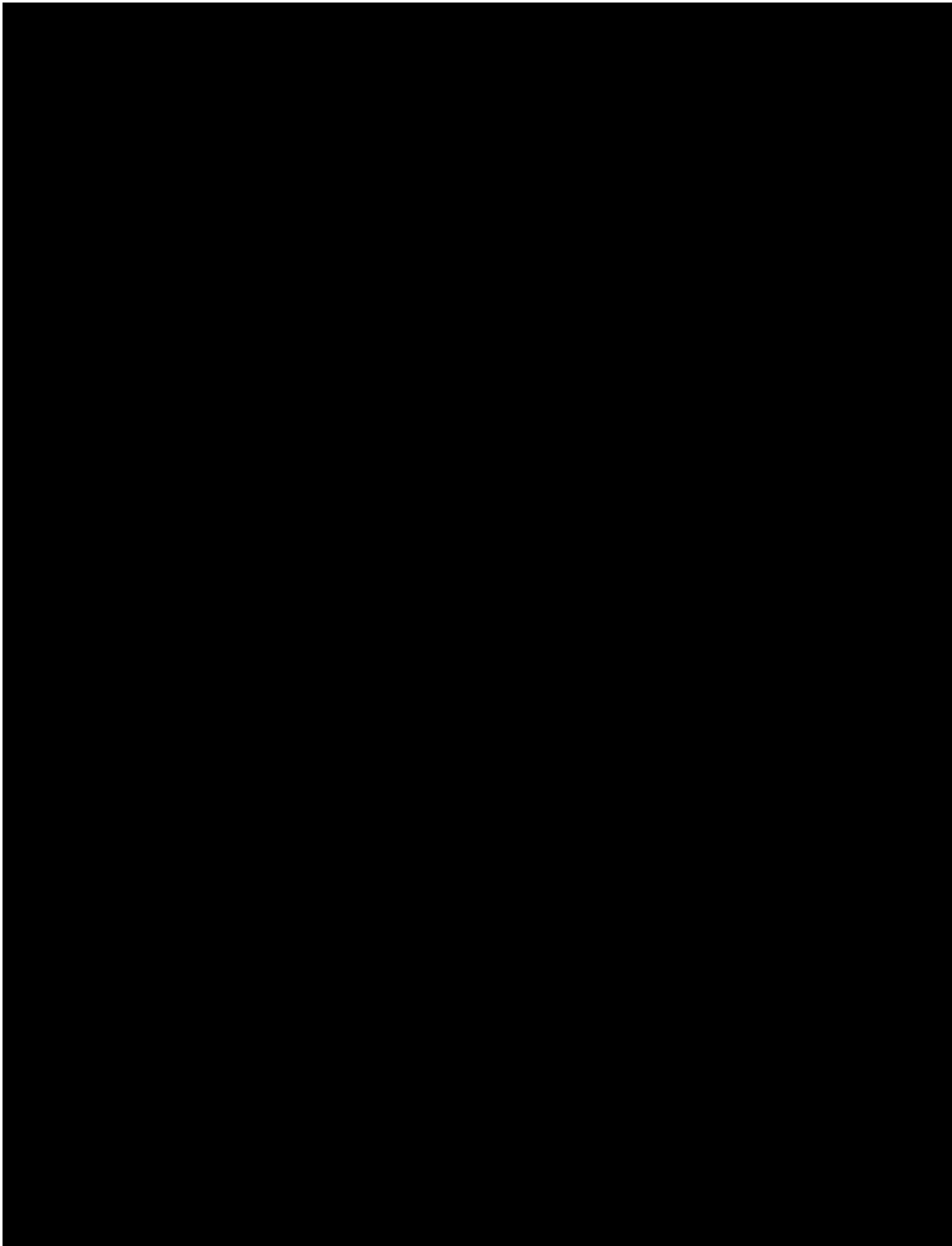
Immediately after the April 2016 Bylaw Amendment, until the Club was sold to Concert on February 2, 2019, PGCC continued to pay resigned members in accordance with its Bylaws, which resulted in a drastically shorter time for resigned members to reach the top of the waiting list. During this time period (from April 2016 through February 2019), the Club sold a total of 124 Golf Equity Memberships contributing $147,080.00 towards the Escrow Account, 20 Tennis Equity Memberships contributing $9,600.00 towards the Escrow Account, and 40 Social Equity Memberships contributing $9,600.00 towards the Escrow Account. (Oct. 14, 2021 Hrg. Trans. pp. 34-44).Those funds were used in accordance with the Bylaws to pay out the Resigned Equity Members at the top of the Resignation Waiting List. (Id.).

Specifically, prior to the sale of the Club assets to Concert, PGCC issued golf equity refunds in the amount of $1,200.00 per member, which were accepted by 110 equity members on the Resignation Waiting List ("Refunded Resigned Golf Equity Members"). (Id.). Additionally, PGCC issued tennis equity refunds in the

amount of $480.00 per member, which were accepted by 20 equity members on the Resignation Waiting List ("Refunded Tennis Equity Members"). (Id.). Finally, PGCC issued social equity refunds in the amount of $240.00 per member, which were accepted by 40 social members on the Resignation Waiting List ("Refunded Social Equity Members") (collectively, the "Refunded Equity Members"). (Id.). All of the aforementioned payments were made from the time that the April 2016 Bylaws were adopted until PGCC sold its assets to Concert. (Id.).

Subsequently, on November 15, 2018, PGCC entered into a Purchase and Sale Agreement (the "PSA") whereby it agreed to sell certain Club assets to Concert. The sale of these assets was effectuated as of February 2, 2019. Upon the sale of PGCC's assets to Concert pursuant to the PSA, PGCC ceased operating as a Club and did not sell any new club memberships. As such, no additional funds have been added to the Escrow Account since the sale. The PSA provides:





Over 500 resigned equity members accepted this offer, and they were paid in exchange for their release of any claims against PGCC and/or Concert related to their former membership, including any claims of any portion of their equity buy-in to the Club (the "Releasing Resigned Equity Members"). (Oct. 14, 2021 Hrg. Trans. pp. 47-49). With respect to former tennis equity members, all members on the Resignation Waiting List accepted payment, thereby releasing all claims against Concert and PGCC. (Id.). Examples of the Receipt and Releases of Social, Golf, and Tennis Resigned Club Members executed by these resigned equity members (the "Releases") are attached to Defendants' Response to Motion for Class Certification (DIN 707) as Composite Exhibit 5.

ARGUMENT

A. SUMMARY JUDGMENT STANDARD

The Supreme Court of Florida recently made two amendments to Florida Rule of Civil Procedure 1.510 regarding summary judgments. First, on December

31, 2020, the Court amended the Rule to "align Florida's summary judgment standard with that of the federal courts. . .". *In re Amends. to Fla. Rule of Civ. Pro. 1.510*, 309 So. 3d 192, 192 (Fla. 2020). Then, on April 29, 2021 the Court further amended the Rule "to adopt almost all of the text of Federal Rule of Civil Procedure 56" and the "federal summary judgment standard." *In re Amends. to Fla. Rule of Civ. Pro. 1.510*, No. SC20-1490, p. 22 (Fla. Apr. 29, 2021) (Court Notes, 2021 Amendment). Florida now "adhere[s] to the principles established in the *Celotex* trilogy. In the broadest sense, those cases stand for the proposition that 'summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part' of rules aimed at 'the just, speedy and inexpensive determination of every action."' *Id*. at p. 5 (citation omitted). The amendments govern any summary judgment motion decided on or after May 1, 2021. *Id*. at p. 13.

The new Rule abandons "certain features of Florida jurisprudence that have unduly hindered the use of summary judgment in" Florida. *In re Amends. to Fla. Rule of Civ. Pro. 1.510*, 309 So. 3d at 192-93. It is now no longer "plausible to maintain that 'the existence of *any* competent evidence creating an issue of fact, however credible or incredible, substantial or trivial, stops the inquiry and precludes summary judgment, so long as the 'slightest doubt' is raised.'" *In re Amends. to Fla. Rule of Civ. Pro. 1.510*, No. SC20-1490 at p. 8. The new test "is whether 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party."' *Id*. at p. 7. If a party's story on which a claim is based is

"blatantly contradicted by the record . . . a court should not adopt that version of the facts" when ruling on a motion for summary judgment. *Id*.

A. **Defendants Are Entitled to Summary Judgment on Plaintiffs' Claim for Breach of Contract Because the Claim to a Refund Was Not a Vested Right.**

In Count I, Plaintiffs assert a cause of action against PGCC and Concert for breach of contract, alleging that Plaintiffs entered into a binding contractual relationship with PGCC governed by the Bylaws. (Compl. ¶ 43). Plaintiffs claim that PGCC breached the terms of the Bylaws "by taking the position that they are entitled to unilaterally divest Plaintiffs of the right to receive the proper refund amount in accordance with the refund formula by retroactively applying the 2016 Bylaws to Plaintiffs." (Id. at ¶ 49). Plaintiffs do not allege any contractual relationship between Plaintiffs and Concert but instead claim that "upon information and belief by acquiring the assets of PGCC, Concert has assumed some or all liability under the relationship between Plaintiffs and PGCC." There is no evidence of any contract between Plaintiffs and Concert, and Plaintiffs have not pled any claim that they are a third party beneficiary as to any contract between PGCC and Concert.

Only the Bylaws provide the right for an equity member to receive a refund of a portion of the equity contribution and only under certain conditions. (See e.g. Bylaws March 26, 2001, Section 3.9.2; Bylaws November 15, 2010, Sections 3.7.2, 3.8.2; Bylaws April 1, 2016, Sections 3.7.1, 3.7.2, 3.8.2, 3.8.3). The membership application does not mention any right to a refund. (See Membership Applications, DIN 959, Composite Ex. 3). During the time of its operation, PGCC amended its Bylaws on numerous occasions to deal with numerous issues, including to address

issues related to equity membership. There is no dispute that each and every named Plaintiff and class member agreed that the Bylaws could be amended from time to time. (See Membership Applications, DIN 959, Composite Ex.3). Each time PGCC amended its Bylaws, PGCC followed the procedures set forth in the Bylaws for doing so. (Trent Decl. ¶ 8). There is no claim that PGCC did not properly follow the Bylaws or Florida law during any amendment process, and Plaintiffs have raised no issues related to the passing of the Bylaws. Indeed, Plaintiffs cannot present any evidence or argument that the Bylaws were not properly amended.[4]

Hamlet Country Club Inc. v. Allen, 662 So.2d 1081 (Fla. 4th DCA 1993) is instructive in this case. In *Hamlet*, the plaintiff members of the defendant club sought redemption of their memberships. The issue on appeal involved whether the club could amend its bylaws to change the terms under which members were entitled to resign or transfer their membership or whether those provisions were vested rights that could not be altered. *Id.* at 1082. The Fourth District Court of Appeal held that the members did not have vested rights because the rights came from the bylaws which were subject to amendment. This situation was distinguishable from amending a vested contractual right.

Here, much like in *Hamlet*, the right to a refund was not a vested contractual right because it was only a provision in the Bylaws, and the Bylaws could be

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[4] Thus, many of the class members in this lawsuit (including named plaintiffs) had the opportunity to vote on the 2016 Bylaw Amendment that they now claim is illusory and does not apply to them. (Tyler Depo. Trans. p. 13; Barnes Depo. pp 9-10);(Interrogatory Responses, Composite, Ex. 1).

amended from time to time, as agreed by all members in their membership agreements. *See Share v. Broken Sand Club, Inc.*, 312 So.3d 962 (Fla. 4th DCA 2021). ("A private club's bylaws governing the terms of membership do not create vested rights and are subject to amendment."). As explained in *Hamlet*, the amendment does not make the Bylaws illusory because the rights provided by the Bylaws are not vested rights since they are subject to amendment.

To this point, Plaintiff Alan Anderson, at the time of his resignation in 2014, received a letter confirming his resignation; stating that the March 25, 2013 Bylaws applied; and notifying him that he would receive 60% of his equity contribution of $20,000 in the amount of $12,000. (Anderson Depo. Tran. Pp. 19-24 and Ex. 2). Later, after Mr. Anderson resigned, the Bylaws were changed such that resigning equity members were to receive 80% of their equity contribution. (See Bylaws, dated April 2016). Mr. Anderson claims that, pursuant to those Bylaws, he is entitled to 80% of his equity contribution, despite the fact that when he resigned he was only entitled to 60% of his equity contribution. (Anderson Depo. Tran. pp. 19-24 and Ex. 2). Thus, Plaintiffs appear to argue that the Bylaw amendments that increase their refund are applicable to them after they resign but not those that decrease their refunds. This record evidence demonstrates that the right to a refund or the amount of the refund was never a vested right, and the 2016 Bylaw Amendment dictates the amount of refund for each Plaintiff.

Furthermore, the Bylaws make it clear that the named Plaintiffs and class members did not have a vested right to a refund payment, because in the event the Club's assets were sold (which they were), the named Plaintiffs and class

members were entitled to a pro rata share of the proceeds of the sale. (PGCC Bylaws, dated April 1, 2016, Art. 3.10). In other words, the named Plaintiffs and class members would no longer be entitled to a payment based on a refund formula in effect at the time they reached the top of the waiting list. Indeed, there is no dispute that each and every iteration of the Bylaws provided for pro rata payments in the event of a sale. Accordingly, Plaintiffs cannot prove that there was a vested right to an equity refund, which brings this case squarely within *Hamlet* and *Share*.

Further, even if the named Plaintiffs and class members had a vested contractual right to a refund payment (they did not), nearly all of the class members have expressly released their claims by executing a written release or have waived their claims by accepting payment from PGCC.[5] In other words, claims that are not expressly waived by contractual releases, are barred by the doctrine of accord and satisfaction.

More specifically, one hundred and seventy (170) of the Resigned Members accepted payment from PGCC from the time the 2016 Bylaws went into effect, until the Club's assets were sold on February 2, 2019. Importantly, it is undisputed that: i) these payments were made by negotiable instrument, i.e. a check; ii) PGCC advised the Resigned Members that payment was being made in full satisfaction of the refund; and iii) that the amount of the purported refunds were disputed by the Resigned Members at the time they cashed the checks. Florida law is clear that in these circumstances there is an accord and satisfaction of the claim.

> (1) If a person against whom a claim is asserted proves that that **person in good faith tendered an instrument to the**

[5] The issue of the written releases was raised by Defendants' Motion for Partial Summary Judgment, which is scheduled for hearing on March 23, 2022.

claimant as full satisfaction of the claim, that the amount of the claim was unliquidated or subject to a bona fide dispute, and that the claimant obtained payment of the instrument, the following subsections apply.

(2) Unless subsection (3) applies, **the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim**.

(3) Subject to subsection (4), a claim is not discharged under subsection (2) if either paragraph (a) or paragraph (b) applies:

(a) The claimant, if an organization, proves that:

1. Within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place; and

2. The instrument or accompanying communication was not received by that designated person, office, or place.

(b) The claimant, whether or not an organization, proves that, within 90 days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. This paragraph does not apply if the claimant is an organization that sent a statement complying with subparagraph (a)1.

(4) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew that the instrument was tendered in full satisfaction of the claim.

Fla. Stat. § 673.3111 (emphasis added).

Here, there is no dispute that all payments made to the Refunded Equity Members was made by negotiable instrument, i.e. a check drawn on PGCC's bank account. There is also no dispute that the check was accompanied by written correspondence that contained a conspicuous statement that the amount being tendered was the "full payment of [the Refunded Equity Members'] Refundable Amount." (*See* Berry Depo. Tran., Ex. 1). Finally, there is no dispute that the Refunded Equity Members disputed the amount of their respective refunds at the time they received their checks. (Id, p. 12 lines 16-19). Accordingly, the claims of the Refunded Equity Members are barred.

In short, the 2016 Bylaw amendment did not amend a right derived from any of Plaintiffs' vested contractual rights but only from non-vested rights found in the Bylaws. Accordingly, Plaintiffs cannot establish that PGCC breached any contract with Plaintiffs by amending the Bylaws or by failing to pay the refund amounts dictated by pre-2016 amendments to the Bylaws. Moreover, even if there was a vested contractual right to a refund payment (there was not), the claims of the Refunded Equity Members and the Releasing Resigned Equity Members are barred based on accord and satisfaction, and/or express contractual releases.

Finally, as to Concert, Plaintiffs cannot establish any evidence of a contract between Plaintiffs and Concert or any breach of any such contract. As such, Defendants are entitled to summary judgment on Count I of the Complaint.

B. The Undisputed Evidence Demonstrates That Plaintiffs Received An Equal Benefit in Exchange for Their Equity Contributions.

In Counts II and III, Plaintiffs have asserted claims for unjust enrichment against PGCC and Concert. In Count II against PGCC, Plaintiffs claim that they

conferred a benefit upon PGCC by making their respective equity contributions and that PGCC continues to receive the benefit of the equity contributions. (Compl. ¶¶ 55, 56). In Count III, Plaintiffs allege that they conferred a benefit upon PGCC by making the equity contribution to PGCC; that upon Concert acquiring the assets of PGCC, Concert accepted the benefit of Plaintiffs' respective equity contributions; and that Concert received and continues to receive a benefit. (Id. at ¶¶ 60-63). Here, Plaintiffs cannot establish either a benefit to Concert or PGCC or that there was any unjust enrichment for which they did not also receive a benefit.

To prevail on a claim for unjust enrichment, a plaintiff must show: (1) a benefit was conferred on the defendant; (2) the defendant either requested or knowingly and voluntarily accepted the benefit; (3) the benefit flowed to the defendant; and (4) that it would be inequitable for the defendant to retain the benefit without paying. *W.R. Townsend Contracting, Inc. v. Jensen Civil Const., Inc.,* 728 So.2d 297, 303 (Fla. 1st DCA 1999). The record evidence establishes that Plaintiffs did receive a benefit in exchange for their equity contribution. Plaintiffs paid for the purchase of an equity membership in the Club, which provided an ownership interest in the Club, voting rights, and use of the Club. (PGCC Bylaws, dated April 1, 2016); (Membership Agreements, DIN 959, Composite Ex. 3); (Membership Certificates, DIN 959, Composite Ex. 2). There is no dispute that, after paying their equity contribution, every Plaintiff had voting rights in the Club and an ownership interest in the Club. (Tyler Depo. Trans. p. 13; Barnes Depo. Trans. pp. 9-10). Further, the record evidence demonstrates that every member did, in fact, use the Club. (See e.g. Interrogatory Responses, DIN 959, Composite

Ex. 1). Thus, neither PGCC nor Concert were unjustly enriched by Plaintiffs' payment of the equity contribution, and Plaintiffs claim fails as a matter of law.

Plaintiffs must also show that Concert received a direct benefit. *Sagaan Devlp. And Trading Ltd. v. Quail Cruises Ship Management*, 2013 WL 2250793 (S.D. Fla. 2013) at *7 (denying the plaintiff's motion for summary judgment because the plaintiff failed to present evidence that the defendant received a direct benefit). Plaintiffs have not shown how Concert received a direct benefit of the use of Plaintiffs' funds for a club that it purchased. Indeed, many of the Plaintiffs' equity contributions were made decades before Concert purchased the Club. Thus, Plaintiffs cannot show a direct benefit to Concert, and their claim fails. Accordingly, Defendants are entitled to summary judgment on Counts II and III of the Complaint.

C. <u>Defendants Are Entitled to Summary Judgment on Plaintiffs' Fraudulent Transfer Claim.</u>

In Count IV, Plaintiffs assert a cause of action for fraudulent transfer under Fla. Stat. § 726.105(1)(a), alleging that PGCC fraudulently transferred assets to Concert through the purchase and sale of the Club. Plaintiffs' claim fails, and Defendants are entitled to judgment as a matter of law. Section 726.105 of the Uniform Fraudulent Transfer Act provides:

> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> > (a) **With actual intent to hinder, delay, or defraud any creditor of the debtor**; . . . .
>
> (2) In determining actual intent under paragraph (1)(a), consideration may be given, among other factors, to whether:
>
> > (a) The transfer or obligation was to an insider.

(b) The debtor retained possession or control of the property transferred after the transfer.

(c) The transfer or obligation was disclosed or concealed.

(d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.

(e) The transfer was of substantially all the debtor's assets.

(f) The debtor absconded.

(g) The debtor removed or concealed assets.

(h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

(i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

(j) The transfer occurred shortly before or shortly after a substantial debt was incurred.

(k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Fla. Stat. § 726.105 (emphasis added).

1. Defendants Did Not Transfer Property That Could Have Been Applicable To the Alleged Debt.

To succeed on a fraudulent transfer claim, Plaintiffs must prove that "(1) there was a creditor to be defrauded; (2) a debtor intending fraud; and (3) a conveyance of property that could have been applicable to the payment of the debt due." *TTT Foods Holding Co. LLC v. Namm*, 2017 WL 2901329, at *12–13 (S.D. Fla. May 19, 2017), *dismissed,* No. 17-14827-AA, 2018 WL 2022607 (11th Cir. Mar. 16, 2018) (citing *NationsBank*, *N.A. v. Coastal Utils.*, *Inc.*, 814 So. 2d 1227,

1229 (Fla. 4th DCA 2002)). "[A] conveyance of property which could have been applicable to the payment of the debt due" occurs when a debtor "divert[s] property that he control[s] and that could have been applicable to the debt due." *Id.*

Here, the undisputed evidence is that the only funds subject to refund were those kept in the Escrow Account. Tellingly, the Bylaws specifically state that:

> 3.9.3 The Club shall maintain an Escrow Account into which monies from the sale of memberships shall be placed. These monies shall be the net amount of monies received after the Club has deducted the Club's initiation or transfer fee. All monies in this account shall be paid out to the resigned categories in accordance with the priority on the Resigned Members Waiting List.

Thus, none of the property transferred to Concert could have been used to pay the Resigned Equity Members other than the funds that were maintained in the Escrow Account. At the time of closing, that amount was approximately $24,000. (Trent Decl. ¶ 10). Thus, there could be no fraudulent transfer as a matter of law as to the sale of the Club Property. Because Plaintiffs cannot establish an element of their claim as a matter of law, Defendants are entitled to summary judgment on Count V.

2. **Plaintiffs Cannot Establish a Sufficient Number of Badges of Fraud to Demonstrate a Fraudulent Transfer.**

"The existence of badges of fraud creates a prima facie case and raises a rebuttable presumption that the transaction is void." *Namm*, 2017 WL 2901329, at *14 (citing *In re Bifani*, 580 Fed. Appx. 740, 745 (11th Cir. 2014)) "While a single badge of fraud may only create a suspicious circumstance and may not constitute the requisite fraud to set aside a conveyance[,] several of them when considered together may afford a basis to infer fraud." *Wiand v. Lee*, 753 F.3d 1194, 1200

(11th Cir. 2014) (citing *Johnson v. Dowell*, 592 So. 2d 1194, 1197 (Fla. 2d DCA 1992) (internal quotations omitted)); *see also In re Bifani*, 580 Fed. Appx. at 746. Here, based on the record evidence, Plaintiffs cannot establish sufficient badges of fraud to infer that a fraudulent transfer occurred, and Defendants are entitled to summary judgment as a matter of law.

(a) The transfer was not to an insider of PGCC.

There is no evidence that Concert was an insider of PGCC. Rather, the undisputed evidence demonstrates that PGCC was a member-owned club that sold its assets to a new entity, Concert Plantation, which had no affiliation with PGCC. (Trent Decl. ¶ 11). Plaintiffs cannot establish this badge of fraud.

(b) PGCC did not retain possession or control of the property transferred after the transfer.

There is no evidence that PGCC retained any possession or control of the Club after the transfer. Instead, the undisputed evidence is that a new club was established that had new ownership, a new membership plan, new club rules, and new employees. (Trent Decl. ¶ 12). PGCC does not have any management responsibilities of the Club; it does not have the books and records of the Club; it earns no income from the Club; and it has no possession or control of the Club. (Id. at ¶ 13). The record evidence further establishes that Concert Plantation possess and controls the Club property and runs its day-to-day operations. (Id. at ¶ 14). Thus, Plaintiffs cannot establish this badge of fraud.

(c) The transfer or obligation was disclosed and it was not concealed.

The sale of the property from PGCC to Concert was disclosed to members of the Club, and it was not concealed, as it was voted on by the members of Club. Further, there were multiple newspaper articles and press releases about the pending sale. (Trent Decl. ¶ 15). Again, Plaintiffs cannot establish this badge of fraud.

(d) Before the transfer was made or obligation was incurred, PGCC had been sued or threatened with suit.

At the time the sale to Concert was consummated, PGCC was involved in litigation with fifteen individuals in two separate and unconsolidated lawsuits. The overwhelming majority of the current named Plaintiffs were not parties to this action, and none of the Plaintiffs sought to assert these claims on a class wide basis.

While PGCC had been sued by some former members prior to the sale of the property, in the PSA, [redacted]

[redacted] Accordingly, the sale was not an attempt to avoid claims by the Resigned Equity Members.

Finally, PGCC's Bylaws contemplated that, if the Club's assets were sold, the resigned members would receive a pro rata portion of any proceeds. [redacted] . Thus, Plaintiffs cannot establish this badge of fraud, as the record evidence demonstrates that neither PGCC nor Concert were attempting to avoid claims raised by some of the resigned members.

(e) <u>The transfer was of substantially all of PGCC's assets</u>.

While the transfer was of substantially all of PGCC's assets, the transfer was in exchange for reasonably equivalent value. [redacted] Thus, Plaintiffs' cannot establish this badge of fraud.

(f) <u>PGCC did not abscond</u>.

PGCC did not abscond with the assets as they were transferred to Concert for reasonably equivalent value, as discussed above. Plaintiffs cannot establish this badge of fraud.

(g) PGCC did not remove or conceal assets.

PGCC did not remove or conceal assets, and all of the assets were transferred to Concert for reasonably equivalent value pursuant to the PSA. Accordingly, Plaintiffs cannot establish this badge of fraud.

(h) The value of the consideration received by PGCC was reasonably equivalent to the value of the asset transferred.

The value of the consideration received by PGCC was reasonably equivalent to the value of PGCC's assets

The issue of whether a debtor received reasonably equivalent value must be evaluated as of the date of the transaction. *In re 8699 Biscayne, LLC*, 2012 WL 993942, at *5–7 (Bankr. S.D. Fla. Mar. 23, 2012). The concept of "reasonably equivalent value" does not require a precise dollar-for-dollar exchange. *In re Taylor,* 386 B.R. 361 (Bankr. S.D. Fla. 2008) (citing *Advanced Telecommunication Network, Inc., v. Allen,* 290 F.3d 1325, 1336 (11th Cir.2007)). The benefit received need not be entirely "direct;" a transaction can have indirect benefits. *Id.* (citing *Schaps v. Just Enough Corporation,* 93 B.R. 379, 389–90 (Bankr. E.D. Penn.1988)). Here, PGCC received value in the payoff of debts and

liabilities, including the payments to the Resigned Equity Members, as well as the value added to the Club such as capital improvements and a two year dues freeze.

A two-step analysis is necessary to determine whether a debtor has received reasonably equivalent value in exchange for its transfer of an interest in its property to another. First, it must be shown that the debtor received value; secondly, the Court must determine whether the value was reasonably equivalent to what the debtor gave up. *In re GTI Capital Holdings, LLC,* 373 B.R. 671 (Bankr. D. Ariz. 2007).

There is no dispute that PGCC received value [redacted] among other value, as detailed herein. *In re 21st Century Satellite Communications, Inc.,* 278 B.R. 577, 582 (Bankr. M.D. Fla. 2002) (under Florida fraudulent transfer law, the determination as to whether the debtor received "reasonably equivalent value" should be based on the specific facts and circumstances relevant to the transaction).

Here, the record evidence demonstrates that there was more than sufficient consideration flowing between the parties in connection with the sale of the Club to Concert. [redacted]

Based on the circumstances of the sale and the reasons that the members sought

to sell the Club, PGCC received reasonably equivalent value in exchange for the transfer of the Club. Moreover, prior to selling the Club to Concert, PGCC pursued multiple alternatives, including: soliciting a bid from Concert's competitor; exploring the possibility of selling nine (9) holes to a developer; and selling land to a hotel for development. However, none of those options were viable, and the Board of Directors for PGCC (along with its membership) voted in favor of the sale to Concert in exchange for reasonably equivalent value. Thus, Plaintiffs cannot establish this badge of fraud.

(i) PGCC was not insolvent and did not become insolvent shortly after the transfer was made.

PGCC was not insolvent after the transfer was made; instead, all of PGCC's debts were paid off by the asset purchase. Plaintiffs cannot establish this badge of fraud.

(j) The transfer did not occur shortly before or shortly after a substantial debt was incurred.

PGCC did not incur a substantial debt close or near to the transfer of the Club. Plaintiffs cannot establish this badge of fraud.

(k) PGCC did not transfer the essential assets of the business to a lienor who transferred the assets to an insider of PGCC.

PGCC did not transfer the essential assets of the business to a lienor who transferred the assets to an insider of the debtor. Like the other badges of fraud, Plaintiffs cannot establish this badge of fraud.

Based on the record evidence, Plaintiffs simply cannot prove the existences of any badges of fraud. To the contrary,

[REDACTED] demonstrates that neither PGCC nor Concert were attempting to defraud Plaintiffs through the sale of PGCC's assets. Accordingly, Defendants are entitled to summary judgment as a matter of law.

D. Defendants Are Entitled to Summary Judgment on Plaintiffs' Claim for Account Stated.

In Count V of the Complaint, Plaintiffs assert a cause of action for account stated. An account stated comes into being when a *creditor* periodically bills a *debtor* for a certain amount, which amount is not objected to within a reasonable time. *Dudas v. Dade County*, 385 So. 2d 1144 (Fla. 3d DCA 1980) (citations omitted). For an account stated to exist, there must be an agreement that a certain balance is correct and due, and an express or implicit promise to pay that balance. *S. Motor Co. of Dade Cty. v. Accountable Const. Co.,* 707 So. 2d 909, 912 (Fla. 3d DCA 1998) (citing *Georges v. Friedman & Co., P.A.,* 499 So.2d 59, 59 (Fla. 4th DCA 1986)).

Here, Plaintiffs cannot establish a claim for account stated. As it relates to equity refunds, there is no record evidence that Plaintiffs had a debtor/creditor relationship with PGCC for which Plaintiffs regularly billed PGCC or Concert. Instead, Plaintiffs paid PGCC an equity contribution. Pursuant to the Bylaws, which governed the equity contribution, Plaintiffs may or may not have been entitled to a partial refund of their equity contribution if certain conditions occurred. Further, the Bylaws governing the partial refund of the equity contribution were subject to change, and did change, in April 2016. Finally, the Bylaws always provided that in the event the Club's assets were sold (which they were), Plaintiffs

would not receive any payment based on a refund formula, but instead a pro rata portion of the proceeds.

Simply put, this was not a business transaction for which the cause of action for account stated may lie. *See e.g. Merrill-Stevens Drying Dock Co. v. "Corniche Express,"* 500 So2d. 1286 (Fla. 3d DCA 1981) (account stated action brought where the plaintiff provided services and the defendant disputed the value of the services). Further, Plaintiffs did not render any statements to PGCC as required for a cause of action for account stated. *Dudas v. Dade County*, 385 so. 2d 1144 (Fla. 3d DCA 1980). Indeed, the Resignation Letters were sent by PGCC (the alleged *debtor*), and not by the Plaintiffs (the alleged *creditors*). Further, the Resignation Letters were not "statements" and instead memorialized the members' resignation, and restated the Bylaws that were in effect at the time the letters were sent. (Compl., Ex. E).

Further, there was no promise to pay by PGCC as the letters provided that the members' equity membership would be placed on a waiting list to be purchased and that PGCC expected "it to take many years before [the member's] resigned membership comes to the top of the refund sales list. . . ." (Id.). Thus, the Resignation Letters were not an explicit or implicit promise to pay any Resigned Equity Members any certain amount at any time.

Finally, even if Plaintiffs could prove a claim for account stated (they cannot), the claims of the Refunded Equity Members and the Releasing Resigned Equity Members are barred based on accord and satisfaction, and/or express contractual releases. Therefore, Plaintiffs cannot prove the elements of an account

stated cause of action as a matter of law, and Defendants are entitled to summary judgment on Count V.

CONCLUSION

Based upon the foregoing, Defendants respectfully request that the Court enter an order granting summary judgment in their favor and against Plaintiffs on all Counts of the Fourth Amended Complaint and awarding such other relief available to Concert under the circumstances.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of March, 2022, a true and correct copy of the foregoing has been electronically filed with the Clerk of Court by using the Florida Court's E-filing Portal System, which will send a notice of electronic filing to all counsel of record.

/s/ Andrew P. Marcus
Attorney