IN THE SECOND DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

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

Appellants,

Case No. 2D21-3895
Lower Tribunal No.:
2016-CA-005528 NC

vs.

JOHN DORSO, et al.,

Appellees.
_____/

ANSWER BRIEF OF APPELLEE

On appeal from the Twelfth Judicial Circuit in and for
Sarasota County, Florida

/s/ Jennifer Anne Gore Maglio
Jennifer Anne Gore Maglio
Florida Bar Number 88013
jmaglio@mctlaw.com
Benjamin A. Christian
Florida Bar Number 1033821
bchristian@mctlaw.com
mctlaw
1605 Main Street, Suite 710
Sarasota, FL 34236
Phone: (888) 952-5242
Fax: (877) 952-5042

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I. STATEMENT OF THE CASE AND FACTS

Appellee adopts the factual portion of the Appellant's Initial Brief and submits the following facts in addition.

Plantation Golf and Country Club ("PGCC") existed as a social club organized for the benefit of its members. (A.051, Art. 1; A.719, Art. 1; A.737, Art. 1). It offered members the options to play golf, tennis, or to avail themselves of other amenities, and structured equity memberships around these activities. (A.051; A.719; A.737). Primarily, these equity memberships were organized as one of three types: Golf, Tennis, or Social. (A.052, Art. 3.3). The cost of these memberships roughly corresponded to the amenities offered for each, with a Golf membership being the most expensive and a Social membership the least expensive. (A.120-21).

Equity memberships provided the member with ownership rights in the club, voting rights, the ability to be elected to the Board of Directors, and other privileges. (A.051-054). Equity memberships were also entitled to an equity refund upon the member's resignation from PGCC. (A.054, ¶3.8.2; A.073, ¶3.8.2; A.090; ¶3.8.2; A.107, ¶3.8.2; A.250; A.493). All class members resigned at a time where the amount of the refund was calculated

as a percentage of the equity amount being charged at the time of resignation.[1] (A.054, ¶3.8.2; A.073, ¶3.8.2; A.090; ¶3.8.2; A.107, ¶3.8.2; A.120-22, ¶¶3.3.1, 3.3.2, 3.3.3, ¶3.8.2; A.137-9, ¶¶3.3.1, 3.3.2, 3.3.3, 3.7.2).

Club members who resigned were placed on a waiting list to receive their refunds. (A.073, ¶3.9.5; A.107, ¶3.8.2; A.122, ¶3.8.2; A.139, ¶3.8.2). PGCC did not maintain a funded account to pay members as they resigned. (A.437, ln. 1-4). Rather, once a member resigned, they were placed on their respective membership's waiting list based on the effective date of their resignation. (A.073, ¶3.9.5; A.107, 3.8.2; A.122, ¶3.8.2; A.139, ¶3.8.2; A.154). As new equity memberships were purchased by incoming members, a portion of that equity was used to fund the refund to the resigned member at the top of the waiting list in that membership class. (A.054, ¶3.8.2; A.073, ¶3.8.2; A.090; ¶3.8.2; A.107, ¶3.8.2). Thus, if new equity

[1] In 2010, PGCC twice amended their bylaws to base refund amounts on the equity amount "paid or deemed to have been paid" by the member, rather than the equity amount in effect at the time of the member's resignation. (*Compare* A.107, ¶3.8.2 *with* A.122, ¶3.8.2 *and* A.139, ¶3.7.2). With regard to the class, this became a distinction without a difference, as previously-resigned members were deemed to have paid the full equity amount previously in effect. (A.120-21, ¶¶3.3.1, 3.3.2, 3.3.3; A.137-38, ¶¶3.3.1, 3.3.2, 3.3.3; A.499).

memberships were not sold, resigned members could not be refunded. (A.437-38).

Once a member's resignation was accepted and became effective, they no longer had any rights in the club. (A.805). They had no access to internal club documents (including copies of any waitlists they are on). (A.400-401; A.805). They also had no right to use club facilities while waiting for their refund. (A.805).

All class members joined PGCC at a time where equity memberships were required by the club's bylaws. (A.015, ¶2). All class members resigned at a time where equity refunds were guaranteed by the club's bylaws. (A.015, ¶2). Many class members were sent letters or emails from PGCC at the time of their resignation. (A.169-237; A.804-806). These communications confirmed that their equity refunds were being calculated based on the bylaws in effect at the time of their resignations and each stated a specific sum to be refunded. (A.169-237; A.804-806). For Regular or Golf members, this sum amounted to $24,000. (E.g., A.047).

After each class member had resigned their rights in PGCC and been placed on the resigned member refund waiting list, PGCC amended its bylaws. (A.151-168). Effective April 1, 2016, the First

Amended and Restated Bylaws untethered the calculation of the equity refund amount from the equity price. (*Compare* A.157, ¶3.7.1 *with* A.107, ¶3.8.2). Instead, refunds after April 1, 2016 were to be based on a percentage of the "joining fees" to the club. (A.157, ¶3.7.1) The "joining fees" were a substantially smaller amount than previous equity purchase prices. (A.427). The net effect of this bylaw change was to reduce the purchase price of an equity membership by 95%. (A.427). PGCC took the position that these amendments likewise reduced the refund amount due to a resigned equity member by 95%. (A.187). PGCC applied this amendment to previously resigned members, reducing the amount that they had previously agreed to refund (in writing for many class members) by 95%. (A.797-98). PGCC was sued based on this reduction in a series of suits that would eventually be consolidated and give rise to this class action. (A.023, ¶1).

PGCC made reduced payments to resigned equity members between April 1, 2016 and February 2, 2019 based on the amended bylaws. (A.187; A.385-388; A.401). On February 2, 2019; Concert Plantation, LLC ("Concert") completed the purchase of PGCC and ceased selling new equity memberships. (A.459; A.797-98). After the

sale, there was no mechanism to fund the equity refunds owed to resigned equity members still on the various waitlists. (A.437-38).

As part of the purchase of PGCC, Concert agreed to pay resigned members who were still on waitlists the amounts that they would be due under the amended bylaws, regardless of what position they were on the list. (A.457). However, Concert conditioned receipt of this payment on the execution of a document purporting to release Concert and PGCC from any and all liability related to the equity refund or any other rights or causes of action stemming from membership in or interaction with the club. (A.333-335; A.337-350; A.457).

Prior to class certification, the trial court conducted a three-day evidentiary hearing that took place over multiple weeks. (A.351-664). Based on the evidence presented, the court certified the proposed class. (A.642-646). A written order followed which described the basis for the decision and confirmed the ruling from the bench. (A.002-015). PGCC and Concert ("Club Owners") now appeal the certification of the class by arguing that the class does not satisfy the requirements of Rule 1.220 of the Florida Rules of Civil Procedure.

II. SUMMARY OF THE ARGUMENT

All class members were entitled to refunds of their equity in the club based on the bylaws in effect when they joined and when they resigned from the club. All class members had these refunds materially altered by changes to the bylaws that were made by the Club Owners after class members had resigned from the club and no longer had any membership rights in the club. Each class claim originates with the actions of the Club Owners. Therefore, the trial court was not arbitrary, capricious, or unreasonable in viewing the actions of the Club Owners through a common lens as applied to the class.

That all claims are ultimately based on action by the Club Owners provides unifying legal theories and unifying recourse to class members. These theories and recourse permeate all claims and therefore class action is a superior method of adjudication. Likewise, these common legal theories make class representatives' claims typical of the class members they represent and render them adequate representatives. For these reasons, the trial court did not abuse its discretion in certifying the class in this matter.

III. STANDARD OF REVIEW

Club Owners are correct that an order granting class certification is reviewed for abuse of discretion. *See, e.g.*, *Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 102–03 (Fla. 2011). "Under the abuse of discretion standard, a trial court's ruling will be upheld unless the judicial action is arbitrary, fanciful, or unreasonable. . .discretion is abused only where no reasonable person would take the view adopted by the trial court." *Jordan v. State*, 176 So. 3d 920, 927 (Fla. 2015) (internal citations and quotations omitted). *See also*, *Bender v. State Dept. of Fin. Servs.*, 17 So. 3d 770, 772 (Fla. 1st DCA 2009) ("If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.") (citing *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980)).

IV. ARGUMENT

The trial court properly certified this class on two discrete issues that permeate each class member's claims. (A.013). As the court recognized in its order, factual dissimilarities between class members can be dealt with as they arise by grouping similarly

situated class members together to aid in the resolution of like issues or defenses. (A.013). Issue certification is permitted by Florida Rule of Civil Procedure 1.220(d)(4). In no way did the trial court abuse its discretion or overstep its bounds by making these determinations.

A. The trial court did not abuse its discretion by finding that the class met the requirements of 1.220(b)(3).

At the class certification stage, a trial court is responsible for assessing whether putative class members meet the requirements for class certification as described in Fla. R. Civ. P. 1.220. *See*, *Sosa*, 73 So. 3d at 105. The burden is on the putative class members to plead and prove the elements required for satisfaction of at least one of the three subdivisions of Rule 1.220(b). *Id.* at 106. However, the trial court should resolve all doubts in favor of certification. *Id.* at 105.

The trial court appropriately analyzed the issues of predominance and superiority under Rule 1.220(b)(3) and certified the class under this subsection. (A.012-015). Relying on evidence produced at the class certification hearing, the trial court found the

class had established predominance. The judge's written order stated that the "common legal and factual issues identified in this case are significantly more substantial [than] the individualized issues emphasized by Defendants." (A.014). Based primarily on the size of the class and the comparatively small value of the claims raised by each class member, the trial court determined that class certification was superior to other methods for adjudication. (A.015). Neither of these findings was an abuse of discretion.

1. Class claims satisfy the predominance requirement.

In order to satisfy the requirements of certification under Rule 1.220(b)(3), "the party moving for class certification must establish that the class members' common questions of law and fact predominate over individual class member claims." *Sosa*, 73 So. 3d at 111. Predominance poses a more stringent requirement than the "commonality" requirement of Rule 1.220(a), but, if "a trial court finds that common issues of fact and law impact more substantially the efforts of every class member to prove liability than the

individual issues that may arise, then class claims predominate." *Id.* at 111–112.

The putative class must show that common issues "have a direct impact on every class member's effort to establish liability and on every class member's entitlement to relief." *Morgan v. Coats*, 33 So. 3d 59, 66 (Fla. 2d DCA 2010) (internal quotations omitted). There is no requirement to show that every question of law or fact is common, only that "some questions are common, and that they predominate over individual questions." *Sosa* at 112. "Florida courts have held that common questions of fact predominate when the defendant acts towards the class members in a similar or common way." *Id.* at 111. *See also*, *Morgan*, 33 So. 3d at 66.

Here, the trial court did not abuse its discretion by finding that common questions predominate the class. Two questions predominate each class member's claims: 1) whether the club was able to eliminate or reduce refunds due to resigned members by altering its bylaws; and 2) whether these changes could be applied retroactively to members who had already resigned. (A.013). The trial court focused on these issues in finding that the putative class had met their burden of establishing predominance. (A.013).

These two issues are predominant in the class's claims because both serve as threshold questions. If the club violated its obligations to the class by reducing their refunds, that finding becomes central to every class member's claim (and potentially enlarges the class). Conversely, if the club was permitted to amend its bylaws to alter the refund amount, the trial court must still determine whether that amendment applied to club members who had resigned prior to the bylaw change and no longer had rights in the club. The entire class is composed of members who had an effective resignation prior to the April 1, 2016 bylaw change, and therefore these essential questions affect every class claim.

These two threshold issues serve as instances where the Club Owners have acted towards class members in a similar or common way. *See*, *Morgan*, 33 So. 3d at 66. Every class member suffered a significant reduction to their promised refund when PGCC amended the bylaws in 2016. (A.187). Every class member's membership agreement with PGCC incorporated the bylaws, and therefore a change to the bylaws altering their rights as resigned members had a unifying impact on the class.

The same can be said about Concert's decision not to sell any further equity memberships. This single decision impacted every class member still on the refund waiting list at the time of sale and affected each in the same way: it ensured that the refund list would remain unfunded, and they would never receive a refund. Thus, two distinct acts not only permeated the claims of the class but had a uniform impact throughout.

a. Club Owners' claims regarding individualized issues do not disturb these predominant issues.

Club Owners argue that numerous issues were raised in the litigation that are too individualized for class treatment. Chief among these is their contention that each class member still on the refund waiting list at the time of PGCC's sale to Concert has interests that are antagonistic to every other class member on the list. (App. Initial Brief, pp. 20-23). Further, Club Owners contend that since different versions of the bylaws control some class members' claims, their claims are inappropriate for class certification. (App. Initial Brief, pp. 23-24). Lastly, they argue that

certain affirmative defenses raise further individualized issues that preclude class certification. (App. Initial Brief, pp. 24-25).

The arguments raised by Club Owners are not sufficient to overcome the trial court's finding of predominance. In fact, some arguments raised by the Club Owners highlight further issues that predominate class claims.

b. List position is immaterial.

Club Owners structure their primary argument around class members' varying positions on the refund waiting list. However, this argument overlooks the fact that their actions towards those on the list were uniform and rendered the list meaningless. Further, their actions in defunding the refund waiting list increased the number of unifying legal issues amongst class members.

Club Owners rely on this Court's decision in *Verandah Dev., LLC v Gualtieri* for the proposition that a class member's place on the refund waiting list goes to the issue of liability. (App. Initial Brief, p. 21). In that case, this Court found that the "Gualtieris will not suffer damages until the point in time when they would have been due for a refund under the original policy." *Verandah Dev.,*

LLC v. Gualtieri, 201 So. 3d 654, 659 (Fla. 2d DCA 2016). Critically, however, there was a list that the Gualtieris could return to. *Id.* Therefore, the trial court's judgment was reversed insofar as it ordered an immediate refund and remanded for "proceedings to determine when the Gualtieris would be entitled to a refund." *Id.*

Here, Club Owners focus on the fact that the members occupied different positions on the resigned equity refund list, without acknowledging the fact that the list became inoperable due to their decision to cease offering equity memberships. Without new equity memberships, there were no new equity fees collected. Without new equity fees collected, resigned equity members were unable to be paid their refunds. (A.437-38). Without resigned members receiving refunds, no resigned member could move up the list at all, and thus no member could receive a refund.

Appellees maintain their contention that being first in line to receive nothing is equivalent to being last in line to receive nothing. Thus, all class members still on the refund list at the time of sale have a similar legal claim. Class member claims are not antagonistic to one another based on their position on the list,

because there is effectively no list to return them to (unlike in *Verandah*).

Additionally, the adjudication of the Club Owners' actions toward those on the refund list reveals further predominant legal issues. Namely: 1) whether there was a valid condition precedent to receiving a refund (e.g., rising to the top of the refund list); 2) whether actions by Club Owners rendered the condition precedent impossible (e.g., deliberately defunding the list); and 3) whether such actions breached the contract with class members. These questions go to the heart of the claims involving every class member still on the refund list at the time of sale. Regardless, although the putative class members still on the list when the club was sold may have occupied different positions on the list at the time of sale, the sale affected each in the same way: it prevented them from ever reaching the top of the list and receiving a refund.

c. Multiple sets of bylaws do not defeat predominance.

Club Owners further argue that "when different contracts control different class members' claims, class certification is not

appropriate because individual issues predominate." (App. Initial Brief, p. 23). They acknowledge the fact that individual membership agreements were subject to the bylaws, which were universally applicable to members, but seem to claim that because the club had differing bylaws at different points in time, class treatment fails. (App. Initial Brief, p. 24). This argument lacks merit for two reasons. First, the existence of differing contracts is not necessarily a bar to class certification. Second, to the extent that the class members' refunds are governed by differing sets of bylaws, at most this creates differences in damage calculations which are not significant enough to prevent class certification.

In *Morgan*, this Court overturned a denial of class certification and remanded for further consideration. 33 So. 3d at 67. *Morgan* involved claims for breach of contract, unjust enrichment, and quantum meruit based on the allegation that the sheriff's office was not paying detention deputies for work done on their lunch breaks in accordance with their employment agreements. *Id.* at 62-3. The appellant-plaintiff conceded there was no common, formal contract between deputies and the Sheriff. *Id.* at 64. At best there was a common, oral contract. *Id.* However, this Court found that claims

were still maintainable as a class because the appellee-defendant's conduct was the same towards all plaintiffs, and thus a common legal theory and remedy predominated all claims. *Morgan*, 33 So. 3d at 65.

Importantly, this Court acknowledged that "there will be some factual variations among the claims of each class member" (deputies had worked for differing lengths of time, taken differing numbers of breaks, worked more or less than other deputies during those breaks, etc.); but that "those variations go to the determination of each class member's damages rather than to the elements of the claims." *Id.* at 66. Such differences did not disrupt certification. This concept was adopted and expanded upon by the Supreme Court of Florida in 73 So. 3d at 113. In *Sosa*, the Supreme Court found that common claims predominated because "class questions. . .require generalized proof and not individual inquiries or mini-trials." Further, "any minor variance in factual circumstances would be with regard to the issue of damages and not liability, which does not preclude class certification." *Id.* "In order to establish predominance, the class representative must demonstrate the existence of a reasonable methodology for

generalized proof of class-wide impact and damages." *InPhyNet Contracting Svcs., Inc. v. Soria*, 33 So. 3d 766, 771 (Fla. 4th DCA 2010) (internal quotations omitted). Damages that are calculable using a systematic formula or calculation strengthen the case for predominance. *See, Sosa*, 73 So. 3d at 113.

Although each membership agreement between a member and the club was technically a separate contract, each was subject to the bylaws. (A.430; A.487-88). Every class member joined the club and resigned from the club under bylaws that provided for a refund calculated as 80% of the equity contribution in effect at the time of their resignation. (A.054, ¶3.8.2; A.073, ¶3.8.2; A.090; ¶3.8.2; A.107, ¶3.8.2; A.120-22, ¶¶3.3.1, 3.3.2, 3.3.3, ¶3.8.2; A.137-9, ¶¶3.3.1, 3.3.2, 3.3.3, 3.7.2). That the refunds were calculated based on the bylaws in effect at the time of the member's resignation was confirmed in writing by PGCC numerous times. (A.169-186; A.188-236; A.804-806).

On April 1, 2016, the bylaws were amended to effectively reduce membership refunds by 95% for all class members. (A.157, ¶3.7.1; A.387; A.427). Further, the sale of PGCC to Concert and the cessation of equity memberships effectively doomed the refund of

every class member still on the refund waiting list at the time of the sale, which is an overwhelming majority of class members. These actions by the Club Owners had universal or near-universal impact on the class and provided the grounds for class certification. (A.013). In *Morgan*, the appellant-plaintiff conceded there was no common, formal contract involved but, recovery was still feasible because the appellee-defendant's conduct was the same towards all plaintiffs. *Morgan*, 33 So. 3d at 65. Unlike that case, there are limited sets of bylaws that are applicable to similar claimants. Further, as with *Morgan*, claims predicated on the same course of conduct are necessarily based on the same legal theories and thus, are appropriate for class certification.

As in both *Morgan* and *Sosa*, damages are readily calculable using an objective and systemic approach. In her testimony, the former CFO of PGCC, Barbara "BJ" Camarota, explained exactly how refunds would be calculated for resigned members. (A.490-91; A.505; A.590-93). During her testimony, Ms. Camarota acknowledged that the process for determining refunds was entirely based on the information contained in the member's file and that it was a document-based, objective process. (A.593). Ms. Camarota

acknowledged that virtually any person could examine the various files and calculate, based on the documents contained therein, the final refund amount due to the member. (A.593).

The trial court cited this evidentiary testimony and caselaw in its determination that "the need for individual damages calculations in this case does not defeat a finding of predominance." (A.014). The court pointed out that Ms. Camarota's testimony "provided specific guidance on how to calculate each class member's damages prior to the 2016 amended bylaws." (A.014). Further, based in part on this Court's decision in *Morgan*, the trial court found that the "need for individualized damages calculations in this case does not defeat a finding of Predominance" and that "common legal and factual issues identified in this case are significantly more substantial than the individualized issues emphasized by Defendants." (A.014). *See also*, *Morgan*, 33 So. 3d at 66. These findings were rooted in the testimony taken at the class certification hearing and supported by relevant caselaw and are thus not an abuse of discretion.

d. There is no requirement for subclasses.

Club Owners argue that the trial court's finding of predominance was predicated on the use of subclasses and that since subclasses were never certified by the court, class treatment is now inappropriate. (App. Initial Brief, pp. 26-29). Simultaneously, Club Owners seem to imply that should subclasses have been certified, they would be too numerous to allow for class treatment and would have likewise disrupted a class proceeding. (App. Initial Brief, p. 28). All of the arguments related to subclasses are immaterial. Florida allows for issue certification and to the extent that there are sub-issues within the class, these can be dealt with as needed – a fact the trial court recognized in its order.

Florida Rule of Civil Procedure 1.220(d)(4)(A) provides that "[w]hen appropriate, a claim or defense may be brought or maintained on behalf of a class concerning particular issues." Although there is limited caselaw defining the bounds of this rule, the Supreme Court of Florida has examined federal cases interpreting the similar provision of Federal Rule of Civil Procedure 23(c)(4)(A). *See generally*, *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1267–71 (Fla. 2006). In *Engle*, the Court granted the trial

judiciary a wide berth, reiterating that judges have broad leeway to bifurcate liability and damage phases in trial, decertify classes, and only certify on certain issues. *Id.* at 1269–70. Findings that impact liability for class members can be retained from trial phase to damage phase, even if later phases concern individualized questions on damages. *Id.* at 1270.

The trial court recognized its ability to modify and shape the class as needed based on unifying issues. (A.013; A.015). Acknowledging the "factual variations" that may exist amongst claims, the court nevertheless found that "those variations can be dealt with universally by grouping like Plaintiffs into distinct categories and dealing with those issues or defenses as a group as the case evolves." (A.013). This is an accurate statement of the court's authority and not an abuse of its discretion.

For example, if the affirmative defense of estoppel contains individualized issues; predominant class issues can be determined prior to allowing for individualized damage determinations. Club Owners claim that members who had downgraded (or, presumably upgraded) memberships prior to April, 2016 would still have been entitled to vote on the April bylaw changes and may be estopped

from arguing that the changes do not apply to them. (App. Initial Brief, p. 25). Club Owners further contend, without any supporting facts or argument, that "the application of the estoppel defense will require the trial court to analyze those individual members' claims." (App. Initial Brief, p. 25). Appellants have not put forth evidence or argument before the trial court that demonstrates how this is the case.

Club Owners highlight other affirmative defenses that they argue present individualized issues. Among these are accord and satisfaction, release, and set-off. (App. Initial Brief, pp. 24-25). No evidence was introduced at or before the class certification hearing as to what particular issues these defenses would create that could not be accommodated in class treatment. Mrs. Camorota testified that refunds were calculable using a repeatable and objective method. (A.593). Even if these defenses evolve to present certain individualized issues, the trial court is equipped to address that by determining facts or issues relevant to the class and then bifurcating for further adjudication if necessary. *See, Engle*, 945 So. 2d at 1270.

e. Unjust Enrichment claims do not prevent class certification.

Lastly, Club Owners argue that the class fails to satisfy predominance because the class's claims of unjust enrichment require individualized considerations. (App. Initial Brief, p. 26). Unjust enrichment is a quasi-contractual theory that allows for recovery in circumstances where preventing that recovery would manifest an injustice. "A contract implied in law is a legal fiction. . .the fiction was adopted to provide a remedy where one party was unjustly enriched, where that party received a benefit under circumstances that made it unjust to retain it without giving compensation." *Commerce P'ship 8098 Ltd. P'ship v. Equity Contracting Co.*, 695 So. 2d 383, 386 (Fla. 4th DCA 1997) (citations omitted). There are enumerated elements to a claim for unjust enrichment, but "[t]he most significant requirement for a recovery on quasi contract is that the enrichment to the defendant be unjust." *Id.* (citations omitted).

Claims for unjust enrichment have been certified for class action by various Florida courts. In *Arvida/JMB Partners v. Council of Villages, Inc.*, the Fourth District Court of Appeal upheld the

certification of a class of homeowners who were suing a property management company and country club for failing to relinquish ownership of the club and attendant property to the club members. *Arvida*, 733 So. 2d 1026, 1028-29. The Fourth DCA specifically upheld certification as to the unjust enrichment claims, finding that "the common interest of a substantial number of members of the class" was reflected in the count. *Id.* at 1031. In *Sosa*, the Supreme Court of Florida cited with approval this Court's previous decision in *Morgan* which found that a class certification for claims of breach of contract, quantum meruit, and unjust enrichment was proper. *Sosa*, 73 So. 3d at 108. The *Morgan* decision turned largely on the finding that, as the defendant had allegedly breached each oral or implied contract in the same manner for each plaintiff, class certification was appropriate. *Id. See also*, *Morgan*, 33 So. 3d at 66.

Club Owners' reliance on *Vega* is misplaced in this instance. (App. Initial Brief, p. 26). *Vega* involved claims against a telecommunications provider by its sales agent (Mr. Vega) who claimed that the contracts between the provider and sales agents were not honored. *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1274–75 (11th Cir. 2009). A fatal flaw in the way these claims were

structured was that while T-Mobile had introduced evidence that each contract with a sales agent was individualized, Vega made no showing of uniform circumstances. *Id. See also*, *Rollins, Inc. v. Butland*, 951 So.2d 860, 876 (Fla. 2d DCA 2006). Conversely, in this case, the factual circumstances of the class members (like those of the putative class in *Morgan*) mirror each other. Further, as in *Morgan*, defendant-appellants acted uniformly towards class members.

Every class member joined the club at a time when the bylaws guaranteed an equity refund of 80% of the equity fee being charged at the time of the class member's resignation from the club. (A.054, ¶3.8.2; A.073, ¶3.8.2; A.090; ¶3.8.2; A.107, ¶3.8.2; A.250; A.493). Each class member left the club at a time when the bylaws guaranteed the same offer. (A.054, ¶3.8.2; A.073, ¶3.8.2; A.090; ¶3.8.2; A.107, ¶3.8.2; A.120-22, ¶¶3.3.1, 3.3.2, 3.3.3, ¶3.8.2; A.137-9, ¶¶3.3.1, 3.3.2, 3.3.3, 3.7.2). Each class member did not receive the promised refund. (A.437-38). Club Owners make no effort to show how individualized circumstances might alter the inequities attendant to one class member's claims versus another's. (App. Initial Brief, p. 26).

The factual situation here resembles *Morgan*, in that the defendants acted uniformly towards all class members. All class members resigned before the April, 2016 bylaw changes and all had their expected refunds reduced by those changes. (A.015, ¶2; A.427). All class members still on the refund waiting list at the time of sale to Concert had their expected refunds cut to nothing, as there were no more equity membership sales to fund the refund list. (A.437-38). These actions by Club Owners permeate the inequities alleged by class members. Thus, certifying this claim for class treatment was not an abuse of discretion.

2. It was not an abuse of discretion to find class certification the superior method of adjudication.

One of the more noble benefits to a class action is that it can provide plaintiffs who have suffered damages too small to make ordinary litigation viable with a method to pursue their claims. The Supreme Court of Florida recognized this in *Johnson*, stating that the "purpose of a class action is to provide litigants who share common questions of law and fact with an economically viable means of addressing their needs in court." *Johnson v. Plantation*

Gen. Hosp. Ltd. P'ship, 641 So. 2d 58, 60 (Fla. 1994). This principle guides a judicial determination by the trial court as to whether a class action is a superior method of adjudication.

Johnson involved multiple claimants, many of whom had damages that fell below the $10,000 jurisdictional threshold of the circuit court. *Id.* at 59. The Court allowed for the aggregation of claims in order to meet jurisdictional thresholds precisely to increase access to courts for the claimants and permit them to take advantage of shared litigation of their common issues. Inherent in this was an acknowledgment that aggregation of smaller claims can make class action a superior method of adjudication for economic reasons.

Club Owners cite to *Miami Auto. Retail, Inc. v. Baldwin* to support their argument against superiority. 97 So. 3d 846, 859 (Fla. 3d DCA 2012). (App. Initial Brief, p. 29). However, this case is easily distinguished from *Baldwin* as that court found that the predominance requirement was not met, negatively impacting the plaintiffs' ability to meet the superiority requirement. Unlike *Baldwin*, in this matter, the trial court found that plaintiffs did

establish the predominance requirement, thus bolstering their claim of superiority.

Baldwin is further distinguished from the Florida Supreme Court's previous decision in *Sosa*, where the Court found that "common class questions. . .require generalized proof and not individual inquiries or mini-trials." *Id.* at 858. *Sosa* is a more applicable case here, as it turned on defendants acting in a uniform way towards numerous plaintiffs, many of whom had minimal damages. *Sosa*, 73 So. 3d at 113–114. ("Rather than have an unmanageable number of plaintiffs filing individual $20 lawsuits, this class action empowers the little guy and gives him leverage to fight an otherwise insurmountable foe. If plaintiff prevails, the big guy no longer lifts $20 from unsuspecting customers' pockets, the plaintiffs are made whole, and justice can reign supreme.").

In *Morgan*, this Court considered similar factors: "(1) whether class action status would provide the plaintiffs with their only economically viable remedy; (2) whether there is a likelihood that individual claims are sufficiently large to justify the expense of conducting separate litigation; and (3) whether the case is manageable as a class action." *Morgan*, 33 So. 3d at 66. These

factors dovetail with the considerations expressed by the Supreme Court in *Johnson* and subsequent cases. The Rule itself provides additional considerations. Fla. R. Civ. P. 1.220(b)(3)(A)-(D).

The case at bar lends itself to the application of the factors discussed in *Morgan*, *Johnson* and *Sosa*. Individual class members would be entitled to a maximum award of $24,000.00 on their claims if successful in this action. Many class members, who were resigned social and tennis members, would receive far lower awards. (A.427). Mrs. Beverley White testified that she had difficulty finding an attorney to take her case due to the economics involved. (A.389). Mrs. White is claiming $24,000 in damages as a resigned golf member who reached the top of the resignation waiting list. (A.386-387). Other class members may be claiming amounts as low as $1,680. The economics in this case parallel those discussed in *Johnson*, where individual claims are so low that, unless aggregated, it is not feasible to find adequate counsel.

The circumstances of this case resonate with the factors outlined in *Morgan*. In *Morgan*, nearly 1000 plaintiffs were seeking payment for 2.5 previously-unpaid hours of work for each week of their employment. *Morgan* at 66. Similarly, in this case more than

700 class members are seeking damages that range from $1,680 - $24,000. Class action is likely the only method to provide plaintiffs with an economically viable remedy and none of their individual claims are large enough to justify a separate trial. The trial court cited to these factors specifically in its order when it found that class certification would be a superior method of adjudication. (A.014). In further keeping with *Morgan* and the Rule, the court made an express finding that a class would be manageable. (A.014). Thus, a finding of superiority was not an abuse of discretion by the trial court, but well-supported by caselaw and testimony.

B. The trial court did not abuse its discretion by certifying this class under Rule 1.220(a).

A trial court abuses its discretion if it takes action that is arbitrary, fanciful, or unreasonable. *See*, *Jordan v. State*, 176 So. 3d 920, 927 (Fla. 2015). In this matter, the trial court heard three days of witness testimony, considered evidence submitted by both parties, and entertained extensive oral and written argument by counsel for both sides. After which, the court published a detailed, 13-page order stating its reasons for certifying the class. (A.005-

016). The court explained its findings that the putative class had satisfied the burdens of numerosity, commonality, typicality, and adequacy; and supported such findings with citations to the evidence, arguments, and caselaw. (A.009-011). The trial court's reasoned decision, based on evidence, was not arbitrary, capricious, or fanciful and therefore did not constitute an abuse of discretion.

1. Commonality

As previously stated by this Court, the "primary concern in considering the commonality of claims should be whether the representative's claim arises from the same practice or course of conduct that gave rise to the remaining claims and whether the claims are based on the same legal theory." *Morgan*, 33 So. 3d at 64 (internal quotations omitted). "[T]he commonality prong only requires that resolution of a class action affect all or a substantial number of the class members, and that the subject of the class action presents a question of *common or general interest*. . . [T]he commonality requirement is satisfied if the common or general interest of the class members is in the *object* of the action, the *result sought*, or the general *question* implicated in the action." *Sosa*, 73

So. 3d at 107 (citations omitted) (italics in original). Commonality between class members exists "if the questions linking the class members are substantively related to the resolution of the litigation even though the individuals are not identically situated." *Morgan* at 64 (quotation omitted). *See also*, *Clausnitzer v. Fed. Exp. Corp.*, 248 F.R.D. 647, 656 (S.D. Fla. 2008).

Club Owners contend that the class fails to achieve commonality for much the same reasons as their arguments on preponderance: class members were on different positions on the refund list, differing bylaws determine claim amounts, and different defenses may apply to certain class members. (App. Initial Brief, p. 32). However, they acknowledge that not all questions of law and fact need be common to all members of the proposed class. (App. Initial Brief, p. 32). *See*, *Discount Sleep of Ocala, LLC v. City of Ocala*, 245 So. 3d 842, 851 (Fla. 5th DCA 2018) ("Not all questions of law or fact raised in the litigation need be common because even a single common question will satisfy the commonality requirement.") (citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 369 (2011)).

The facts in *Morgan* are illustrative of this point. In an action for breach of contract, Deputy Morgan conceded that there was "no common, formal contract between the sheriff and all of the detention deputies." 33 So. 3d at 64. Although he contended there may have been a common oral contract linking all detention deputies, ultimately, he staked his case on the fact that the sheriff's failure to pay the deputies for work done during meal periods constituted a similar course of conduct. *Id.* Despite extensive variations between class members ("such as when each detention deputy was hired and the extent to which they spent their meal breaks performing services for the benefit of the sheriff's office"), this Court still found that the conduct by the defendant affected each class member in the same way and thus their claims would be based on the same legal theories. *Id.*

Here, the court found that the "threshold question for this litigation is whether the Defendants had the right to apply a bylaw amendment to resigned members of PGCC who were no longer active members of the club." (A.010). This central question relates to defendant PGCC's common conduct towards all class members.

All class members were in similar positions in that all had the bylaw change applied retroactively to their equity refund. (A.010).

Club Owners argue that the issue of retroactive application of the bylaws is largely immaterial because it would have applied only to those class members who reached the top of the list; and also that an individual's position on the list puts her at odds with every other individual on the list. (App. Initial Brief, p. 34). Both of these arguments overlook the fact that, through Club Owners' conduct, the list was ultimately defunded, and no further class members were able to reach the top of the list. This not only prevents class members from receiving their refund but makes list position immaterial.

The argument that certain class members are at odds because they were at different positions on the resigned member waiting list actually highlights a further common course of conduct. (App. Initial Brief, p. 33). When a refund list existed and was being funded, members moved up the list as new memberships were purchased by others and used to fund the list. (A.054, ¶3.8.2; A.073, ¶3.8.2; A.090; ¶3.8.2; A.107, ¶3.8.2; A.437-38). However, when Concert ceased selling equity memberships, they effectively

de-funded the list, ensuring that no resigned equity member could move up the list or receive a refund. (A.437-38). This action affected all class members on the refund list in the same manner: it deprived them of any chance at a refund. Therefore, it provided yet another common course of conduct that unified their claims. The trial court focused on a single common issue in certifying the class, but, as discussed: other unifying issues were attendant. (A.009-010). For these reasons, a finding of commonality was not an abuse of discretion.

2. Typicality

"The key inquiry for a trial court when it determines whether a proposed class satisfies the typicality requirement is whether the class representative possesses the same legal interest and has endured the same legal injury as the class members." *Sosa*, 73 So. 3d at 114 (citations omitted). The test to reach typicality is "not demanding." *Id.* (citing *Morgan*, 33 So. 3d at 65). Typicality is satisfied when there is a strong similarity between the legal theories upon which the representative claims are based and those of the other class members. *Id.* at 114–115. Factual differences between

claims will not defeat typicality. *Id.* at 114 (citing *Morgan*, 33 So. 3d at 65). *See also*, *Broin v. Phillip Morris Co., Inc.*, 641 So. 2d 888, 892 (Fla. 3d DCA 1994) (finding that claims by nonsmoker flight attendants based on inhalation of secondhand smoke during flights were sufficiently typical of each other); *Graham v. Pyramid Healthcare Sols., Inc.*, No. 8:16-CV-1324-T-30AAS, 2017 WL 2799928, at *5 (M.D. Fla. June 28, 2017) ("Even if the fact patterns are unique to each claim, the typicality requirement will be satisfied if the class representative and class members experienced the same unlawful conduct.").

Club Owners raise two arguments on appeal as to why the trial court abused its discretion in finding the class representatives' claims typical of the class members' claims. The first argument is that some class members (and representative plaintiffs) signed releases while others did not. (App. Initial Brief, pp. 35-36). Club Owners' second argument against typicality is that class members who occupied different positions on the refund waiting list have claims antagonistic to each other. (App. Initial Brief, p. 36). Neither of these arguments is availing.

Club Owners point out that several class representatives signed releases. (App. Initial Brief, p. 35). Further, they allege many class members signed releases. (App. Initial Brief, p. 11). Club Owners acknowledge that the same defense might apply to the class representatives who signed releases as to those class members who signed releases. (App. Initial Brief, pp. 35-36). Club Owners then argue that because some class representatives signed releases and others did not, and some class members signed releases while others did not, their claims are not typical of each other. (App. Initial Brief, p. 36). This overlooks the logical conclusion that class representatives who signed releases could represent the interests of class members who signed releases. Impliedly, those representatives who did not sign releases can represent the interests of class members who did not sign releases.

The argument that resigned members who were on the refund waiting list necessarily occupy different positions on the list and thus have claims antagonistic to one-another has been addressed *supra* Sec. IV.A.1.b.i. Assuming *arguendo* that a claimant at the fifth position in the list would have interests materially different from a claimant who was sixth on the list; both interests were

rendered substantially similar by the defunding of the entire list. Regardless of what position a class member previously occupied, by the discontinuation of equity memberships, Concert guaranteed that the list would remain unfunded and no class member would move up the list. None would ever get closer to a refund because none were refunded. Therefore, their interests in obtaining refunds are now the same.

Additionally, as stated by the trial court, "[a]lthough different Plaintiffs were at different positions on the resigned member list, all had their refund or potential refund limited by the bylaw change." (A.011). Even if class members were at different intervals as they approached the refund of their equity contribution, that refund was limited as to all by the April 2016 bylaw change. (A.157, ¶3.7.1). This unifying fact renders all class claims typical of one another.

As established repeatedly by the caselaw, factual differences amongst claimants will not serve to defeat typicality. The focus is whether class representatives were harmed by the same conduct by the defendants and thus avail themselves of the same legal theories as class members. The trial court considered evidence as to this issue and found that each class member (and representative) had

their refund or potential refund limited by the April 2016 bylaw changes. That claim, and the theories on which it is based, is uniform amongst class members and representatives alike.

Further, despite being in different places on the refund waiting list, all class members (including representatives) who were on the list at the time of sale ended up in the same boat: they were not able to receive any refund after the cessation of equity membership sales. Lastly, defendants are not unable to present their defenses against class representatives: they readily acknowledge that some of the named representatives may be subject to the defense of release, as are some class members. For these reasons, the trial court did not abuse its discretion in finding that the class representatives' claims were typical of the class claims.

3. Adequacy of Representation

Club Owners maintain that class representatives are unable to adequately represent class members since all of those on the refund waiting list would have occupied different positions and would therefore have antagonistic claims. This would, of course, prevent any representative from representing the interests of any class

member anywhere on the list other than themselves. Arguments regarding class member position on the refund waiting list are addressed *supra* Sec. IV.A.1.b.i and IV.B.2. Once Concert purchased the club and the list was defunded, each member on the list shared the same fate. Therefore, class representative interests and the interests of the class members are aligned and class representatives still on the refund waiting list at the time of sale are capable of representing the interests of those class members likewise on the list.

Club Owners further contend the trial court improperly found adequacy of representation and abused its discretion by certifying the class despite a purported delay in moving for class certification. (App. Initial Brief, pp. 38-39). In support, Club Owners cite to caselaw that is easily distinguished from the facts at bar. Club Owners rely on Judge Shepherd's dissent in the Third District case of *Browning v. Anglefish Swim School, Inc.*, 1 So. 3d 355, 361 (Fla. 3d DCA 2009). Judge Shepherd's dissent focuses on the delay in obtaining class certification. *Id.* ("In my view, the class representatives and their counsel have proven themselves

unqualified to prosecute this action on a more substantial ground – taking five years to get to this point.").

However, the facts that gave rise to Judge Shepherd's dissent are quite different from the facts at bar. In *Browning*, class counsel filed a motion to amend their original complaint to add class allegations, withdrew that motion, re-filed a similar motion eighteen months later, set and re-set hearing on the motion nine times, and did not move for class certification until almost sixteen months after the complaint had been amended. *Id.* Further, "potential for class treatment surfaced early" with the first motion to amend the complaint to add class allegations being filed three weeks after the complaint itself. *Id.* Unlike the case at bar, counsel for the plaintiffs in *Browning* remained the same throughout the litigation. *Id.*

Judge Shepherd took special note of the date that plaintiffs initially moved to amend the complaint to add class allegations. *Id.* This date is critical, because as other courts have noted, delays beyond this point may cause plaintiffs to sit on their rights under the assumption that class certification is imminent. *See*, *Osborne v. Emmer*, 184 So. 3d 637, 640-41 (Fla. 4th DCA 2016) (Adopting much of Judge Shepherd's opinion). However, until that time, there

is nothing indicating to potential claimants that class certification is being sought, and therefore nothing to discourage them from pursuing redress on their own initiative. The lapse in time between the first filing (later withdrawn) asserting class allegations and the actual certification of a class was five years in *Browning*, 1 So. 3d at 361.

Appellees filed their motion for class certification on July 15, 2021, a little more than two months after the amended complaint first asserting class allegations was deemed filed. After a multi-day hearing that took place over a number of weeks, the class was certified on December 6, 2021. Therefore, at most, the critical period between the filing of a complaint putting forth class allegations and the certification of the class was five months. This is a significantly different length of time from the five years decried by Judge Shepherd. It is far shorter a time than the five years from the date of the first filing of one of the underlying cases, as decried by Club Owners. Relying on the caselaw cited by Club Owners, no undue delay occurred in this case. As such, it was not an abuse of discretion to certify a class five months after the filing of the first complaint containing class allegations.

V. CONCLUSION

In summation: the trial court did not abuse its discretion by certifying the proposed class. The trial court held a multi-day evidentiary hearing, accepted written evidence and live witness testimony, and heard extensive argument from both sides. After which, the trial court properly found that the proposed class met the requirements of Rule 1.220 and issued an order detailing these findings. Such actions and the trial court's decision to grant class certification are well within the discretion of the trial court and are supported by relevant caselaw. Therefore, class members respectfully request that the decision of the trial court in certifying a class action be affirmed.

Respectfully submitted,

/s/ Jennifer Anne Gore Maglio
Jennifer Anne Gore Maglio
Florida Bar Number 88013
jmaglio@mctlaw.com
Benjamin A. Christian
Florida Bar Number 1033821
bchristian@mctlaw.com
mctlaw
1605 Main Street, Suite 710
Sarasota, FL 34236
Phone: (888) 952-5242
Fax: (877) 952-5042

CERTIFICATE OF COMPLIANCE

I hereby certify that the type style and size used in this brief is Bookman Old Style 14-point and that this brief complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Jennifer Anne Gore Maglio
Jennifer Anne Gore Maglio
Florida Bar Number 88013
jmaglio@mctlaw.com
Benjamin A. Christian
Florida Bar Number 1033821
bchristian@mctlaw.com
mctlaw
1605 Main Street, Suite 710
Sarasota, FL 34236
Phone: (888) 952-5242
Fax: (877) 952-5042

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing has been furnished to the following counsel of record via notification through the Florida Courts E-Filing Portal on this April 28, 2022:

Amy L. Drushal, Esq.
William A. McBride, Esq.
Lindsay Patrick Lopez, Esq.
Trenam, Kemker, Scharf, Barkin,
Frye, O'Neill
& Mullis, P.A.
101 E. Kennedy Blvd.,
Suite 2700
Tampa, FL 33602
adrushal@trenam.com
bmcbride@trenam.com
llopez@trenam.com
ranctil@trenam.com
lbehr@trenan.com

Attorneys for Appellant Concert Plantation, LLC

Andrew Marcus, Esq.
Law Office of
Andrew P. Marcus, P.A.
1625 Hendry Street, Suite 201
Ft. Myers, FL 33901
amarcus@defendswfl.com

Terrance W. Anderson, Jr., Esq.
Nelson Mullins
1905 NW Corporate Blvd.,
Suite 310
Boca Raton, FL 33431
tw.anderson@nelsonmullins.com
claudia.orozco@nelsonmullins.com

Attorneys for Appellant Plantation Golf and Country Club, Inc.

/s/ Jennifer Anne Gore Maglio
Jennifer Anne Gore Maglio
Florida Bar Number 088013
jmaglio@mctlaw.com
Benjamin A. Christian
Florida Bar Number 1033821
bchristian@mctlaw.com
mctlaw
1605 Main Street, Suite 710
Sarasota, FL 34236
Phone: (888) 952-5242
Fax: (877) 952-5042