Filing # 139904379 E-Filed 12/07/2021 05:05:54 PM

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

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

Plaintiffs,

v.

Case No.: 2016-CA-5528
CLASS ACTION

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

Defendants.
_______________________________________/

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

/s/ Christina E. Unkel
Christina E. Unkel, Esquire
FL Bar No.: 99203
mctlaw | MAGLIO CHRISTOPHER &
TOALE LAW FIRM
1605 Main Street, Suite 710
Sarasota, Florida 34236
Telephone: 941-952-5242
Facsimile: 941-952-5042
Primary: cunkel@mctlaw.com
Secondary: ebanfelder@mctlaw.com
Secondary: abytnar@mctlaw.com

TABLE OF CONTENTS

I. UNDISPUTED FACTS 1
II. SUMMARY JUDGMENT STANDARD 5
III. BREACH OF CONTRACT (PGCC) 6
A. The only reasonable interpretation of the membership agreement is that resigned members were owed a refund of 80% of their equity portion. 7
B. The contract was breached by the reduction of equity refunds. 9
IV. UNJUST ENRICHMENT (Concert) 12
V. FRAUDULENT TRANSFER (PGCC) 14
VI. FRAUDULENT TRANSFER (Concert) 17
VII. DEFENDANTS' AFFIRMATIVE DEFENSES ARE LEGALLY INSUFFICIENT 19
A. Defendant's assertion that no breach was committed is belied by their actions and the nature of the contracts. 19
B. The affirmative defenses of release and waiver are not applicable as the written releases were insufficient to operate as a waiver of a contract right. 19
1. The releases themselves created confusion and ambiguity as to the contract rights being waived and therefore could not have been signed with the requisite knowledge. 20
2. Acceptance of the release and waiver of the right to refund could not have been fully voluntary because the release is unconscionable. 23
C. The affirmative defense that a condition precedent was not met is unavailable to Defendants as they rendered any such condition impossible. 34
D. The statute of limitations has not run. 35
E. The transfer was not made in good faith. 36
F. Plaintiffs have suffered damages 36
VIII. CONCLUSION 36

TABLE OF AUTHORITIES

Cases

14th & Heinberg, LLC v. Terhaar and Cronley Gen. Con., Inc.,
43 So. 3d 877 (Fla. 1st DCA 2010) ... 12
Agritrade, LP v. Quercia,
253 So. 3d 28 (Fla. 1st DCA 2017) ... 12
Alston v. Alston,
960 So.2d 879 (Fla. 4th DCA 2007) ... 20
Amjad Munim, M.D., P.A. v. Azar,
648 So. 2d 145 (Fla. 4th DCA 1994) ... 14
Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) ... 6
AT&T Mobility, LLC v. Concepcion,
563 U.S. 333 (2011) ... 27, 28
Basulto v. Hialeah,
141 So. 3d 1145 (Fla. 2014) ... 24, 25
Beefy King, Int'l, Inc.,
267 So. 2d 853 (Fla. 4th DCA 1972) ... 9
Belcher v. Kier,
558 So. 2d 1039 (Fla. 2d DCA 1990) ... 24, 32, 33
Bhd.'s Relief Comp. Fund v. Cagnina,
155 So. 2d 820 (Fla. 2d DCA 1963) ... 7, 19
Feldkamp v. Long Bay Partners, LLC,
773 F. Supp. 2d 1273 (M.D. Fla. 2011) ... Passim
Fireman's Fund Ins. Co. v. Vogel,
195 So.2d 20 (Fla. 2d DCA 1967) ... 20
First Fla. Bank, N.A. v. Fin. Trans. Sys., Inc.,
552 So. 2d 891 (Fla. 2d DCA 1988) ... 7, 10
Fla. Holdings, III, LLC v. Duerst ex rel. Duerst,
198 So. 3d 834 (Fla. 2d DCA 2016) ... 32
Fonte v. AT&T Wireless Svcs. Inc.,
903 So. 2d 1019 (Fla. 4th DCA 2005) ... 28, 31
General Elec. Co. v. Chuly Intern., LLC,
118 So. 3d 325 (Fla. 3d DCA 2013) ... 15
Graef v. Hegedus,
698 So. 2d 655 (Fla. 2d DCA 1997) ... 15
Hamlet Country Club, Inc. v. Allen,
622 So. 2d 1081 (Fla. 4th DCA 1993) ... 6
Hobby Lobby Stores, Inc. v. Cole,
287 So. 3d 1272 (Fla. 3d DCA 2020) ... 25
Hurchalla v. Homeowners Choice Prop. & Cas. Ins. Co., Inc.,
281 So. 3d 510 (Fla. 4th DCA 2019) ... 19
In re Forfeiture of: £1992 Pontiac Firebird No. 1G2FS23T3NL212004,
47 So. 3d 344 (Fla. 2d DCA 2010) ... 36

J.J. Gumberg Co. v. Janis Servs. Inc.,
847 So. 2d 1048 (Fla. 4th DCA 2003).. 9
J.R.D. Mgmt. Corp. v. Dulin,
883 So. 2d 314 (Fla. 4th DCA 2004).. 7
JF & LN, LLC v. Royal Oldsmobile-GMC Trucks Co.,
292 So. 3d 500 (Fla. 2d DCA 2020).. 9
Johnson v. Dowell,
592 So. 2d 1194 (Fla. 2d DCA 1992).. 15
Kendall Imports, LLC v. Diaz,
215 So. 3d 95 (Fla. 3d DCA 2017)... 27, 28, 31
Kenf, LLC v. Jabez Restorations, Inc.,
303 So. 3d 229 (Fla. 2d DCA 2019).. 12
L.R. v. Dep't of Children & Families,
822 So.2d 527 (Fla. 4th DCA 2002).. 20
Marchisio v. Carrington Mortgage Serv., LLC,
919 F.3d 1288 (11th Cir. 2019) 9
Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,
475 U.S. 574 (1986) 6
McCalla v. E.C. Kenyon Const. Co., *Inc.*,
183 So.3d 1192 (Fla. 1st DCA 2016) 18
Mejia v. Ruiz,
985 So. 2d 1109 (Fla. 3d DCA 2008)... 14, 15
Myers v. Brook,
708 So. 2d 607 18
N. Am. Van Lines v. Collyer,
616 So. 2d 177 (Fla. 5th DCA 1993)... 34
Orkin Exterminating Co. v. Petsch,
872 So. 2d 259 (Fla. 2d DCA 2004).. 31
Orkin Exterminating Co., Inc. v. F.T.C.,
849 F.2d 1354 (11th Cir. 1988) 6
Osprey Healthcare Ctr. LLC v. Pascazi,
2021 WL 4760114 (Fla. 2d DCA 2021).. 32
Paparone v. Lake Placid Holding Co.,
438 So. 2d 155 (Fla 2d DCA 1983)... 35
Powertel, Inc. v. Bexley,
743 So. 2d 570 (Fla. 1st DCA 1999) ....Passim
Practice Mgmt. Assoc., Inc. v. Bitet,
654 So. 2d 966 (Fla. 2d DCA 1995).. 9
Raymond James Fin. Servs., Inc. v. Saldukas,
896 So.2d 707 (Fla. 2005) 20
Reynolds v. The Surf Club,
473 So. 2d 1327 (Fla. 3d DCA 1985).. 6
Romano ex rel. Romano v. Manor Care, Inc.,
861 So.2d 59 (Fla. 4th DCA 2003).. 25
Soknoh Partners, LLC v. Audio Visions S., Inc.,
319 So. 3d 175 (Fla. 2d DCA 2021).. 5

Spears v. SHK Consulting and Dev., Inc.,
338 F.Supp. 3d 1272 (M.D. Fla. 2018) 12
Susi v. St. Andrews Country Club, Inc.,
727 So. 2d 1058 (Fla. 4th DCA 1999) 6
Totura & Co., *Inc. v. Williams*,
754 So. 2d 671 (Fla. 2000) 35
United States v. Fernon,
640 F.2d 609 (5th Cir. 1981) 15
Verandah Dev., LLC v. Gualtieri,
201 So. 3d 654 (Fla. 2d DCA 2016) .... Passim
VoiceStream Wireless Corp. v. U.S. Commc'ns, Inc.,
912 So. 2d 34 (Fla. 4th DCA 2005) 27
Wilderness Country Club P'ship Ltd. v. Groves,
458 So. 2d 769 (Fla. 2d DCA 1984) 9
Williams v. Walker–Thomas Furniture Co.,
350 F.2d 445 (D.C.Cir. 1965) 24
Winans v. Weber,
979 So. 2d 269 (Fla. 2d DCA 2007) 20
Woebse v. Healthcare and Ret. Corp. of America,
977 So. 2d 630 (Fla. 2d DCA 2008) 32, 34
Yusem v. South Fla. Water Mgmt. Dist.,
770 So. 2d 746 (Fla. 4th DCA 2000) 17
Zephyr Haven Health & Rehab. Ctr., Inc. v. Hardin ex rel. Hardin,
122 So. 3d 916 (Fla. 2d DCA 2012) 32

Statutes

Fla. Stat. § 95.11(b) 35
Fla. Stat. § 726.102 14
Fla. Stat. § 726.105 .... 14, 15, 17
Fla. Stat. § 726.108 17

Rules

Fla. R. Civ. P. 1.510(c) 1, 5

Plaintiffs hereby move this Court for a summary judgment as to Count I of the Amended Complaint (Breach of Contract) against Defendant Plantation Golf and Country Club ("PGCC"); Count III (Unjust Enrichment) against Defendant Concert Plantation, LLC ("Concert"); and Count IV (Fraudulent Transfer) against both PGCC and Concert; pursuant to Florida Rule of Civil Procedure 1.510. For the reasons set forth below, this motion is ripe for summary judgment. The material facts of this case are either agreed upon or established beyond a doubt and the Plaintiffs are entitled to a judgment as a matter of law on the aforementioned counts. If summary judgment is not granted for all counts, in the alternative the Plaintiffs move in the alternative for a determination of material facts not in controversy; and an order specifying those facts and the amount of damages or other relief not in controversy.

I. UNDISPUTED FACTS

Plaintiffs adopt and incorporate as much of paragraphs 3-8 from Defendants' Joint Response in Opposition to Plaintiffs' Motion for Class Certification (renumbered as ¶ 1-6) as is restated below. Deletions are represented by ellipsis. Additional facts are supplied with Docket Identification Numbers (DIN) or Exhibit Numbers for reference.

1. 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, to wit: i) golf; ii) tennis; iii) social. . . .

2. 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.

3. Once a resigned equity member reached the top of the Resignation Waiting List, they were next in line to be refunded their respective Refund Amount. The payment of this Refund Amount was contingent on PGCC selling new memberships and a portion of those funds being put in an escrow account.

4. 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 repurchased 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.

. . .

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.

. . .

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.

. . .

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 Gees the Club receives for issuance of an Equity Membership to a new Equity Member, less any amounts still owed 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 has 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 Membership shall be placed on the same Resigned Members Waiting List as Full and Golf Equity Memberships. Resigned Tennis Memberships shall be placed on the respective separate Resigned Members Waiting List accordingly.

…

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 Member's Waiting List. Within thirty (30) days 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.
> …

5. The refund payments were only to be paid from an escrow account funded by the sale of new memberships net PGCC's initiation or transfer fees (the "Escrow Account"). To the extent there were no funds in the Escrow Account due to no new memberships being sold, no resigned equity members would be paid their Refund Amount.

6. On November 15, 2018, PGCC entered into a Purchase and Sale Agreement[1] (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 ceased selling new club memberships, as such, no additional funds have been added to the Escrow Account since the sale.

7. The property, valued by the county at $10,800,000.00, was eventually purchased for $4,533,577.45 according to the property records and special warranty deed. (Ex. A; Ex. B).

[1] Due to the confidentiality order in place, this document will be referred to by Bates number for reference, and the entire Motion for Partial Summary Judgment will be filed under seal.

8. After the sale, resigned members were offered a payment of $1,200.00, $480.00, or $240.00 (depending on their membership class) on the condition that they signed a "release." If they did not sign the purported release, they did not receive any payment. (Testimony of Barbara J. Camarota, DIN 741, p. 44, ln. 20-21: "No, if they did not sign the release, they did not receive a payment."). This would be the only opportunity a resigned member had to receive any payment. (Email from Camarota, DIN 757, p. 4 "Be advised, however, that since the old Club has been sold and no longer sells memberships, no further Equity refund payments will be made to resigned members and you will receive nothing at any time in the future.").

9. Resigned members, such as the Dorsos, who attempted to obtain documents from PGCC related to the resigned member waiting lists and equity refunds were told by the General Manager that "resigned members no longer have the rights and privileges (nor responsibilities) of active members. This would include the right to request copies of internal Club documents." (Ex. G, Ltr. from J. Leinaweaver).

II. SUMMARY JUDGMENT STANDARD

"A movant is entitled to summary judgment if the pleadings and summary judgment evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Soknoh Partners, LLC v. Audio Visions S., Inc.*, 319 So. 3d 175, 178 (Fla. 2d DCA 2021) (citing Fla. R. Civ. P. 1.510(c)). The summary judgment standard provided for in Rule 1.510 "shall be construed and applied in accordance with the federal summary judgment standard." Fla. R. Civ. P. 1. 510(a). "[T]his standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986)

(emphasis in original). The non-moving party must "do more than show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (citations omitted). *See also*, *Feldkamp v. Long Bay Partners, LLC*, 773 F. Supp. 2d 1273, 1275-76 (M.D. Fla. 2011), *aff'd*, 453 F. App'x 929 (11th Cir. 2012) ("To avoid the entry of summary judgment, a party faced with a properly supported summary judgment motion must come forward with extrinsic evidence, i.e., affidavits, depositions, answers to interrogatories, and/or admissions, which are sufficient to establish the existence of the essential elements to that party's case, and the elements on which that party will bear the burden of proof at trial.") (citations omitted).

III. BREACH OF CONTRACT (PGCC)

"The relationship between a social club and its members is one of contract, which must be judged in accordance with its terms." *Feldkamp*, 773 F. Supp. 2d at 1279 (citing *Susi v. St. Andrews Country Club, Inc.*, 727 So. 2d 1058, 1061 (Fla. 4th DCA 1999); *Hamlet Country Club, Inc. v. Allen*, 622 So. 2d 1081, 1082 (Fla. 4th DCA 1993); *Reynolds v. The Surf Club*, 473 So. 2d 1327, 1335-36 (Fla. 3d DCA 1985)). The legal effect of unambiguous language in a contract is a question of law. *Id*. at 1280 (citing *Orkin Exterminating Co., Inc. v. F.T.C.*, 849 F.2d 1354, 1360 (11th Cir. 1988)). Likewise, the existence of and resolution of ambiguous language is also a question of law in Florida. *Id*. (citations omitted). PGCC acknowledged in its Answer that the membership agreements were enforceable contracts. (DIN 506, p. 4, ¶ 43). The only questions left to this court are: what were the terms (in light of the most reasonable interpretation), and did PGCC breach those terms?

A. The only reasonable interpretation of the membership agreement is that resigned members were owed a refund of 80% of their equity portion.

"When possible, a contract must receive a construction which will render it valid and enforceable." *Feldkamp*, 773 F.Supp. 2d at 1284 (citing *J.R.D. Mgmt. Corp. v. Dulin*, 883 So. 2d 314, 316-17 (Fla. 4th DCA 2004)). If one party "retains to itself the option of fulfilling or declining to fulfill its obligations under the contract, there is no valid contract and neither side may be bound." *Id*. at 1283 (citations omitted). Critically for this case, "where one interpretation of a contract would be absurd and another would be consistent with reason and probability, the contract should be interpreted in the rational manner." *Verandah Dev., LLC v. Gualtieri*, 201 So. 3d 654, 657 (Fla. 2d DCA 2016) (citations omitted).

The court in *Feldkamp* builds upon this concept, quoting approvingly from *First Fla. Bank, N.A. v. Fin. Trans. Sys., Inc.*, 552 So. 2d 891, 892 (Fla. 2d DCA 1988): "It is firmly established that a corporation is prohibited from amending its bylaws so as to impair a member's contractual right." *Feldkamp*, 773 F.Supp. 2d at 1283. The court continued: "even though an express reservation of the power of amendment has been made, the general consent that a member thereby gives to be bound by all present and future enactments of the association does not contemplate that it may be made a means of depriving him of those right that became vested upon his admission to membership." *Id*. (citing *Bhd.'s Relief Comp. Fund v. Cagnina*, 155 So. 2d 820, 824 (Fla. 2d DCA 1963)).

The only reasonable interpretation of the membership agreement is that the right to a refund vested at the time that the resignation became effective. This is the plain meaning taken from the bylaws themselves: "[t]he 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*." (emphasis added). Once a member's resignation became effective, they had

performed all that was necessary to be eligible for their refund. The only remaining actions were on behalf of the club in administering the waiting lists and the refunds. Once vested, the right could not have been impeded absent a breach of contract.

PGCC's present position for the purposes of litigation would render the contract illusory and unenforceable. It's position is that by inserting language that the bylaws were subject to amendment from time to time, the club could unilaterally decide to amend those bylaws to reduce or eliminate any refund promised to members. This is the same position that was resoundingly rejected in *Feldkamp*. *See also*, *Verandah Dev., LLC v. Gualtieri*, 201 So.3d 654, 657-58 (Fla. 2d DCA 2016) (relying on the reasoning in *Feldkamp* to reject theory that refund provisions remained amendable). PGCC goes further, in this instance, in that it wishes to make these changes retroactive against members who had resigned prior to the changes in the bylaws.

Both *Feldkamp* and *Verandah* involved club members who resigned their memberships *after* the changes to refund policy were attempted. The Middle District and Second District Court of Appeal rejected the idea that the clubs could unilaterally modify a material provision in their membership agreement in a way that would infringe on a member's contractual rights. The case at bar is far more egregious in that every Plaintiff, whether they resigned completely from the club or resigned one membership in favor of procuring a less expensive one, made that resignation prior to the bylaw change. The contract was set. Both parties had agreed, upon the member's resignation, as to the rights still owed the member: that they would be paid 80% of the equity amount *in effect at the time of their resignation*. PGCC now argues that it can unilaterally modify that contract after one party's performance has ended in order to reduce the amount owed to that party. This flies in the face of the most fundamental interpretations of contract law.

B. The contract was breached by the reduction of equity refunds.

"The elements of an action for breach of contract are: (1) the existence of a contract, (2) a breach of the contract, and (3) damages resulting from the breach." *JF & LN, LLC v. Royal Oldsmobile-GMC Trucks Co.*, 292 So. 3d 500, 508 (Fla. 2d DCA 2020) (citation omitted). A breach must be "material" in nature. *See, e.g.*, *J.J. Gumberg Co. v. Janis Servs. Inc.,* 847 So. 2d 1048, 1049 (Fla. 4th DCA 2003). To constitute a material breach, the party's nonperformance must "go to the essence of the contract." *Beefy Trail. Inc. v. Beefy King, Int'l, Inc.*, 267 So. 2d 853, 857 (Fla. 4th DCA 1972). *See also*, *Marchisio v. Carrington Mortgage Serv., LLC*, 919 F.3d 1288 (11th Cir. 2019). Price terms and the timing of payments go to the essence of the contract. *See Practice Mgmt. Assoc., Inc. v. Bitet*, 654 So. 2d 966, 969 (Fla. 2d DCA 1995) (citing *Wilderness Country Club P'ship Ltd. v. Groves*, 458 So. 2d 769, 772 (Fla. 2d DCA 1984). As discussed below, this case presents the quintessential breach of contract claim. PGCC had a contract with each Plaintiff and breached the most material term of all: that of payment.

Florida courts have found a material breach of contract on a summary judgment motion in nearly identical circumstances. In *Feldkamp v. Long Bay Partners, LLC*, the Middle District of Florida addressed the non-payment of a membership refund after the Feldkamps attempted to resign their membership in Shadow Wood Country Club. 773 F.Supp. 2d at 1276-79. There, the membership application provided for a 100% refund of the membership deposit within thirty days of written notice of resignation. *Id*. at 1280. When their club attempted to "suspend" this policy in November of 2008, the Feldkamps submitted their written resignation in March the next year. *Id*. at 1279. The defendants argued that because the Feldkamps agreed to be bound by "Rules & Regulations" which were subject to change, they effectively forfeited their right to a refund when the rules were amended to suspend that right. *Id*. at 1281-82. The court found that

the club was unable to amend its own bylaws so as to impair a fundamental contractual right (which most certainly included the refund) and ruled in favor of the plaintiffs at summary judgment. *Id*. at 1283. (citing *First Fla. Bank, N.A. v. Fin. Trans. Sys., Inc.*, 522 So. 2d 891, 892 (Fla. 2d DCA 1988)).

The Second District Court of Appeals relied on this reasoning to uphold (in part) a summary judgment in favor of the plaintiffs in *Verandah*. *Verandah Dev., LLC v. Gualtieri*, 201 So. 3d 654, 657 (Fla. 2d DCA 2016). Although the plaintiff-appellees did not have an equity membership in their golf club, they nevertheless were entitled to a full refund of their $40,000 membership deposit upon resignation. *Id*. at 656. In 2006, when the Gaultieris joined the club, the refunds were paid via a waiting list structure. *Id*. For each new member to join Verandah, one resigned member would be refunded from the list. *Id*. In 2009, Verandah changed their refund policy to a "three in, one out" policy, requiring three new members to join for a single resigned member to be refunded. *Id*. The Gualtieris did not lodge an objection to the policy when it was changed and did not resign until 2014. *Id*. The Second District sided with the Gualtieries and the trial court, finding that the alteration of the refund schedule constituted a breach (boilerplate language about rules being "amended from time to time" notwithstanding). *Id*. at 659.

This case turns on the same points of law and contract interpretation as *Feldkamp* and *Verandah*. Each Plaintiff had a written contract with PGCC. While the form of said contracts may vary slightly from one Plaintiff or group of Plaintiffs to another, the material provisions are the same: every Plaintiff was an equity member of PGCC and every contract provided for a return of some portion of the equity fee upon the member's resignation *based on the bylaws in effect at the time of the resignation*. The case at bar is stronger than that in either *Feldkamp* or

Verandah in that the Plaintiffs in this case all resigned prior to the bylaw change. Therefore, their rights had already vested and were no longer subject to any changes.

The April 2016 amendment to the PGCC bylaws materially breached every existing contract with a resigned member. This amendment eliminated the promise to pay a percentage of the equity fees and significantly reduced the amount of money the club was willing to refund. Instead of eighty percent of their equity fees, the amendment promised to pay resigned members eighty percent of the "joining fees" current upon their resignation. The joining fees were a much lower amount ($1500.00) compared to the equity fees in effect at the time the Plaintiffs resigned ($30,000.00). (*Compare* DIN 755 *with* DIN 756). PGCC attempted to make this amendment retroactive, thereby attempting to substitute the figure of $1200.00 (eighty percent of the $1500.00 joining fee) for the previously promised $24,000. This would result in a refund that was only 5% of what was originally promised.

This contradicts PGCC's own interpretation of it's obligation to resigned members. Many Plaintiffs received a letter prior to 2016 confirming their resigned member refund at the higher amount. (DIN 756, 758). Whether or not each Plaintiff received such a letter is immaterial: the content of the letters serves to evidence PGCC's understanding, as a party to the contract, as to the meaning of an essential term of the contract. Further, previous versions of PGCC's own bylaws in effect prior to April 1, 2016 clearly state that "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*."

In sum, PGCC entered into a contract with each Plaintiff whereupon it agreed to refund them a percentage of the equity fees in effect at the time of their resignation. The Plaintiffs all resigned. Most, if not all, received a letter stating that they were entitled to a refund of 80% of

the equity fees in effect at the time of their resignation. PGCC then later attempted to amend that agreement, significantly reducing the amount of that refund, and thereby materially breaching the contract it had with each Plaintiff. The damages are the original refund amounts owed to each Plaintiff, as calculated based on the bylaws in effect at the time of each Plaintiffs' resignation. For these reasons, the Plaintiffs make the requisite showing for summary judgment and are entitled to a judgment in their favor, as in *Feldkamp* and *Verandah*.

IV. UNJUST ENRICHMENT (Concert)

A claim for unjust enrichment requires proof of: "(1) a benefit conferred upon a defendant by the plaintiff, (2) the defendant's appreciation of the benefit, and (3) the defendant's acceptance and retention of the benefit under circumstances that make it inequitable for him to retain it without paying the value thereof." *Kenf, LLC v. Jabez Restorations, Inc.*, 303 So. 3d 229, 231 (Fla. 2d DCA 2019) (citation omitted). Unjust enrichment is not a claim on a contract, but a claim under an implied contract in order to maintain equity between the parties. *See 14th & Heinberg, LLC v. Terhaar and Cronley Gen. Con., Inc.*, 43 So. 3d 877, 880 (Fla. 1st DCA 2010). It is an "obligation imposed by the court to bring about justice and equity, without regard to the intent of the parties and without regard to whether they have an agreement." *Id.* at 881 (citation omitted). Unjust enrichment is not barred by the existence of an express contract (even one that "concerns the same subject matter") when the parties in the unjust enrichment action are different than those who are parties to the contract. *See Agritrade, LP v. Quercia*, 253 So. 3d 28, 34 (Fla. 1st DCA 2017). *See also*, *Spears v. SHK Consulting and Dev., Inc.*, 338 F.Supp. 3d 1272, 1278 (M.D. Fla. 2018) ("Florida law bars unjust enrichment claims only when *both* parties

to the lawsuit are *also* parties to a written agreement that covers the same subject matter.") (citation omitted) (emphasis in original).

The benefit conferred on Concert by the Plaintiffs is the sum of their equity fees. These monies were originally used to develop and grow PGCC into a fully functioning golf club and later were used to continue to keep PGCC operating by paying off previously resigned members. Without the membership equity, there would be no PGCC. Without PGCC, Concert would not have been able to purchase the club, an act which it did for its own benefit.

Concert appreciated this benefit, in that it was aware of the status of both parties to the express contracts between PGCC and its resigned members. Concert had direct knowledge of the potential for liability to each resigned member beyond $1,200.00 based on the membership contracts, applications, membership documents, records, bylaws, and information provided to it as per the PSA with PGCC. (CONCERT 001579, ¶1.3). [REDACTED]

Further, Concert has taken the step of eliminating all equity memberships and the escrow fund used to refund resigned memberships. The escrow fund was a separate fund into which incoming membership equity is placed. These escrowed funds were then used to pay out obligations to resigned members as the funds accumulate. By eliminating new equity memberships, Concert guaranteed that the escrow account would be unfunded and therefore no refunds could be paid to resigned members. This not only cements its claim to the unjustly retained equity fees but furthers the injustice and inequity against the Plaintiffs.

Without being subject to the full extent of the contractual liability owed to the Plaintiffs, Concert will have received an enhanced value of its asset beyond what it should have received. Concert has profited from and continues to profit from PGCC's breach of contract in that it has retained the majority of the equity funds paid in by Plaintiffs and refuses to disgorge these funds to Plaintiffs in the form of their contractually-obligated refunds. Lastly, Concert has removed any chance of recoupment of these refunds by eliminating the equity structure – thereby preventing new members from ever paying out resigned members. For these reasons, the Plaintiffs have met the summary judgment standard by showing that it would be inequitable for Concert to continue to retain the benefit of the equity refunds owed to the Plaintiffs.

V. FRAUDULENT TRANSFER (PGCC)

"Florida has long recognized the principle that a voluntary conveyance by one who is indebted is presumptively fraudulent when attacked by a judgment creditor upon a debt existing at the time of the conveyance." *Amjad Munim, M.D., P.A. v. Azar*, 648 So. 2d 145, 152 (Fla. 4th DCA 1994). A transfer made by a debtor is fraudulent as to a creditor if the creditor's claim arose before the transfer and the debtor made the transfer with the actual intent to hinder, delay, or defraud any creditor. Fla. Stat. § 726.105. A creditor is broadly defined as "a person who has a claim." Fla. Stat. § 726.102. A "claim" is "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." *Id*. Therefore, the resigned members – even if they were to remain on a "waiting list" – are creditors of PGCC and PGCC is a debtor to them.

The fraudulent transfer statute lists several "badges of fraud" which can be used to establish the fraudulent nature of the transfer. *See, e.g.*, *Mejia v. Ruiz*, 985 So. 2d 1109, 1113

(Fla. 3d DCA 2008). Among the "badges of fraud" included in Fla. Stat. § 726.105 are whether the value of consideration received by the debtor was reasonably equivalent to the value of the asset transferred, whether the debtor had been sued or threatened with suit prior to the transfer, and whether or not the transfer was of substantially all the debtor's assets. Fla. Stat. § 726.105(2). A combination of a number of these badges of fraud will support a presumption of fraudulent intent and justify a finding of fraud. *Mejia*, 985 So. 2d at 1113 (citing *United States v. Fernon*, 640 F.2d 609, 613 (5th Cir. 1981); *Johnson v. Dowell*, 592 So. 2d 1194, 1197 (Fla. 2d DCA 1992)). Courts may also consider other factors, taking into account the totality of the circumstances surrounding the conveyance. *Id*. (citations omitted). *See also, General Elec. Co. v. Chuly Intern., LLC*, 118 So. 3d 325, 327 (Fla. 3d DCA 2013). In the instant case, PGCC's actions display not only numerous badges of fraud, but create a set of circumstances that evidence fraudulent intent. In total, these actions prove fraudulent transfer beyond the preponderance of the evidence standard required to reach summary judgment.

Sale of assets for less than reasonably equivalent value can give rise to an implication of fraud. *See* Fla. Stat. § 726.105(2)(h); *Graef v. Hegedus*, 698 So. 2d 655, 656 (Fla. 2d DCA 1997) (reversing summary judgment for further consideration of potentially fraudulent transfer "given the alleged disparity between the value of the…assets and the consideration paid for the purchase"). (CONCERT

001582, ¶2.2). Publicly available property records show that the building and land sold to Concert in this transaction were valued at $10,811,000.00. (Ex. A, p. 1). Concert ultimately paid $4,533,577.45 for these assets according to the Special Warranty Deed executed in it's favor. (Ex. B).

Beyond the indicator of the minimal consideration paid for PGCC's assets, the transfer between PGCC and Concert displays another classic badge of fraud: that the seller had already been sued prior to the transfer. PGCC was the subject of lawsuits from both the White and Dorso Plaintiffs prior to its sale to Concert. These lawsuits concerned the limited refund payouts and the attempt by PGCC to wipe its substantial debt to its resigned members by amending its bylaws and applying that amendment retroactively.

The transfer displayed a further badge of fraud: though it retained the housing development, PGCC transferred substantially all its assets regarding the golf club itself. The transfer included all the real and personal property, intangible personal property, leases, contracts, rights, liabilities, debts, and claims of PGCC. (CONCERT 001577-001581). Given the circumstances at play, this constitutes a badge of fraud in that, by transferring substantially all of its assets with regard to the golf club, PGCC seeks to avoid any liability for debts remaining to the golf club.

Lastly, although not an enumerated badge of fraud, the totality of the circumstances surrounding the transfer of PGCC's assets gives rise to further indications. PGCC's own internal communications, board minutes, and communications with members show a sea change in 2015 from their previous assessment that members were owed the refunds specified by the bylaws in

effect at the time of their resignation. (*Compare* Ex. C, p. 2 and Ex. D, p. 1 *with* Ex. E and Ex. F, p. 2 ¶6). The 80% equity refunds had been the policy for decades; and despite financial difficulties, had been the line steadfastly maintained by board members and general members alike. The refunds were sacrosanct until their sudden alteration in 2016 (supported by an "education" campaign with the membership). This change, in theory, significantly reduced the debt owed to resigned members, which, in turn, made PGCC a more attractive purchase for Concert. Ultimately, PGCC attempted to divert any liability to resigned members whatsoever by selling the entirety of their club. Taken in totality, these machinations by PGCC constitute a fraudulent transfer under Fla. Stat. § 726.105 and satisfy the preponderance of the evidence standard required to award summary judgment.

VI. FRAUDULENT TRANSFER (Concert)

In accordance with Fla. Stat. § 726.108, "a creditor. . .may obtain: (a) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim; (b) An attachment or other provisional remedy against the asset transferred or *other property of the transferee* in accordance with applicable law. . .[or] Any other relief the circumstances may require." Fla. Stat. § 726.108 (emphasis added). A fraudulent transfer action "is either an action by a creditor against a transferee directed against a particular transaction, which, if declared fraudulent, is set aside thus leaving the creditor free to pursue the asset, or it is an action against a transferee who has received an asset by means of a fraudulent conveyance and should be required to either return the asset or pay for the asset (by way of judgment and execution)." *Yusem v. South Fla. Water Mgmt. Dist.*, 770 So. 2d 746, 749 (Fla. 4th DCA 2000). In such a case, a money judgment against the transferee for the value of the asset transferred, or an amount necessary to satisfy the

claim, is appropriate. *McCalla v. E.C. Kenyon Const. Co., Inc.*, 183 So.3d 1192, 1195 (Fla. 1st DCA 2016) (citing *Myers v. Brook*, 708 So. 2d 607, 610 n. 1 (Fla. 2d DCA 1998)). Further, this matter is appropriate for summary judgment, assuming the requisite factual basis exists. *Id.* at 1194.

Based on the inherent assumption that a transfer of a debtor's assets while the debt remains outstanding is fraudulent, the badges of fraud displayed in the transfer between PGCC and Concert, and the totality of the circumstances surrounding the transfer, PGCC's sale of it's golf course to Concert in 2018 was a fraudulent transfer. Proof abounds in this case that Concert knew the transfer was fraudulent and, in an attempt to avoid debt, structured the transfer with this in mind. First, Concert took the property for far less than market value, as described *supra*.

[REDACTED] Concert did this – as it has admitted in this litigation – by eliminating the sale of new equity memberships as part of their management of the club. (DIN 707, p. 7, ¶8). Without new equity memberships funding the escrow account used to pay refunds for resigned memberships, there effectively was no money for refunds. (*Id.*; DIN 741, pp. 80-81). Concert claims that it has offered partial refunds as a gesture of good faith, but in reality, it was a "take-it-or-leave-it" bargain. (*See infra* Sec. VII(B)(2)(a)(iii)). The acceptance of the refund checks was conditioned on signing a release, which Concert sought to reduce it's liability both for the litigation that was already pending at the time of the sale, and for future refund claims. Therefore, Concert not only benefitted from the post-hoc reduction in membership refunds, but actively attempted to cement this windfall by eliminating any ability for resigned members to remain on a refund list.

VII. DEFENDANTS' AFFIRMATIVE DEFENSES ARE LEGALLY INSUFFICIENT

Both Defendants have raised numerous affirmative defenses in their answers to the Complaint in this matter. An examination of their various defenses to the counts referenced above will show that none are supported by the facts in this case or are insufficient to impede summary judgment. *See, e.g.*, *Hurchalla v. Homeowners Choice Prop. & Cas. Ins. Co., Inc.*, 281 So. 3d 510, 513 (Fla. 4th DCA 2019) ("Where the defendant has raised affirmative defenses, the plaintiff must factually refute them or establish that they are legally insufficient before being entitled to summary judgment in its favor.") (citations omitted).

A. Defendant's assertion that no breach was committed is belied by their actions and the nature of the contracts.

In PGCC's First Affirmative Defense and Concert's Fifth Affirmative Defense, both claim that they did not breach the respective Membership Agreements, as these are subject to the Club's bylaws, which may be amended from time to time. This argument is addressed in Section III, *supra*. In short: an organization may not amend its bylaws to impair a member's contractual right. *See, Feldkamp*, 773 F.Supp. 2d at 1283 (citing *Bhd.'s Relief & Comp. Fund v. Cagnina*, 155 So. 2d 820, 824 (Fla. 2d DCA 1963)).

B. The affirmative defenses of release and waiver are not applicable as the written releases were insufficient to operate as a waiver of a contract right.

The Defendants are in the precarious position of arguing both that the Plaintiffs had no contractual right to a refund of their equity payment *and* that they waived any such right by virtue of signing what the Defendants have styled as "releases."[2] In order to operate as a waiver of contract rights, a waiver must voluntarily and intentionally relinquish known rights. *See*

[2] Although the effect of this "release" is disputed, for simplicity's sake, they are referred to hereinafter as "releases." This is not meant to imply any agreement or acknowledgment that they do indeed operate as releases.

Raymond James Fin. Servs., Inc. v. Saldukas, 896 So.2d 707, 711 (Fla. 2005). Without delving into any individualized facts that may have precipitated the signing of any release in particular, it is evident from the face of the document that any purported waiver of the rights by the Plaintiffs could not have been fully knowing and voluntary. The document itself created confusion as to the contract rights the signor purported to waive; and the fundamental inequities in the circumstances surrounding the issue of the releases prevented their execution from being fully voluntary.

1. The releases themselves created confusion and ambiguity as to the contract rights being waived and therefore could not have been signed with the requisite knowledge.

"The supreme court has defined a 'waiver' as a voluntary and intentional relinquishment of a known right." *Winans v. Weber*, 979 So. 2d 269, 274 (Fla. 2d DCA 2007) (citing *Raymond James Fin. Servs., Inc. v. Saldukas,* 896 So.2d 707, 711 (Fla. 2005)). In order to demonstrate that a party has waived a right afforded by law or contract, the party relying on the waiver must show: "the existence at the time of the waiver of a right, privilege, or advantage; the actual or constructive knowledge thereof; and an intention to relinquish that right, privilege, or advantage." *Id.* The knowledge aspect is critical as "there can be no waiver if the party against whom the waiver is invoked did not know all of the material facts, or was *misled* about the material facts." *Id.* (emphasis added) (citing *Fireman's Fund Ins. Co. v. Vogel,* 195 So.2d 20, 24 (Fla. 2d DCA 1967); *Alston v. Alston,* 960 So.2d 879, 881 (Fla. 4th DCA 2007); *L.R. v. Dep't of Children & Families,* 822 So.2d 527, 530 (Fla. 4th DCA 2002)).

The second "Whereas" clause of the release serves to obfuscate the nature of the rights being waived and misleads the reader. (DIN 743, p. 2, ¶2; DIN 744, p. 2, ¶2). The clause states, in part, that the resigned member "is eligible at some time in the future for a refund of a portion

of the membership contribution previously paid by the Resigned Club Member to the Old Club, pursuant to the amended bylaws of the old club, in an amount which cannot be determined at this time…" (DIN 743, p. 2, ¶2; DIN 744, p. 2, ¶2). This statement belies the facts of the case and the circumstances in which these releases were issued.

First, the acknowledgment that the resigned member is eligible for a partial refund of their membership contribution runs counter to the position of Defendants prior to and during this lawsuit (and during the lawsuits that were pending at the time of these releases, which were eventually joined in this current proceeding). The Defendants' position is and has been that any resigned member who had not reached the top of the resignation waiting list – which includes all resigned members who were provided releases to sign – was not eligible for a refund of their equity contribution. (Sec. VII(C), *infra*; DIN 505, p. 7; DIN 506, p. 6, ¶78). The pertinent facts of this case also contradict the waiver clause in a practical sense, in that: presuming a resigned member was eligible for a refund of part of their equity contribution, no refund would ever be forthcoming as the club no longer sold equity memberships at the time of this release and therefore had no method in place for funding the escrow account used to refund resigned memberships. (DIN 741, pp. 80-81; DIN 707, pp. 6-7, ¶¶7-8). If Plaintiffs had chosen not to sign the release, they would have never received any refund whatsoever. (CONCERT 001591; DIN 741, p. 44, ln. 20-21).

Second, the clause references amended set of bylaws without specifying which amended set of bylaws or the effect of that amendment. It is important to bear in mind that once a club member resigned their membership, they had no rights in the club, no access to club documents, and no way to view current or previous versions of the bylaws. (DIN 741, p. 106, ln. 2; DIN 741, pp. 105-106; Ex. G, ¶ 2). They were not given notice of upcoming votes, major club decisions,

or the reasoning behind them, as they were no longer considered members of the club. (DIN 741, p. 34, lns. 13, 17; p. 135, ln. 5-9). For all they knew, the club was operating on the version of bylaws in effect at the time they resigned. This was certainly the position that was conveyed to many of them when they received letters tabulating their refunds in amounts dictated by the bylaws that were in effect at the time. (DIN 756, 758). For nearly all class members, that was their last official communication in writing from the club prior to receiving the release. The contrast between the amounts promised in those letters together with the reasoning behind those amounts (to wit: that they were tabulated based on the bylaws in effect at the time of the member's resignation), and the new amount offered contingent on signing the waiver, was a sharp one. Resigned golf members were now being offered 5% of the amount they were entitled to based on "amended bylaws" that were referenced in these releases but effectively inaccessible and amended without any input or say from resigned members.

Third, the clause blatantly denies the ability to calculate the amount of the refund that a given resigned member was entitled to. These refunds had been tabulated in some form or fashion since the inception of the club. As testified to by the former chief financial officer of PGCC, there was a process to the determination which was objective and based entirely on documents already present in the resigned member's file at the time they resigned. (DIN 778, p. 16, ln. 14-15). At the time of the waiver, these documents and files were in the possession of Concert, having been turned over as part of the purchase and sale. (CONCERT 001579, ¶1.3). The clause is misleading in that it states that the amount *cannot* be determined at the time of the release, when in fact: whatever means existed to determine the refund amount were as available at the time of the release as they had ever been and were then in the possession of the party claiming that they were incalculable.

Lastly, by the time the releases were sent to resigned members, PGCC was already being sued over the refusal to pay full refunds to resigned members. (CONCERT 001753-001755 Sch. 5.2(c)). Therefore, clearly there was a dispute as to the exact rights that resigned members were entitled to and remedies that resigned members were able to avail themselves of. This fact was not disclosed in the release. (DIN 741, p. 43, ln. 2-18; p. 134, ln 10-14). Plaintiffs posit that – particularly in light of the complete absence of official communication from PGCC or Concert other than the release – the fact that the refund entitlement was already being litigated was a material fact that should have been disclosed in the release.

In sum: Plaintiffs had resigned their memberships in PGCC (some, many years ago) and were therefore cut off from any official communication. For most, if not all, the last written communication they had received was a letter describing their refund amount and that they were entitled to it based on the bylaws in effect *at the time of their resignation*. They then received, out of the blue, a release with extremely limited information stating that they were entitled to a refund of their equity contribution, but that the amount cannot be determined. They were not provided any reason for this abrupt and costly change, nor were they notified that PGCC and Concert were – at the very time the releases were sent – being sued over the change that prompted the releases. Due to the ambiguous nature of the release, the lack of information available to resigned members regarding the impact of the sale on membership refunds, and the lack of explanation regarding the bylaw change, the releases could not have been signed with the requisite knowledge.

2. Acceptance of the release and waiver of the right to refund could not have been fully voluntary because the release is unconscionable.

The doctrine of unconscionability has been used by courts to prevent enforcement of a contract that is inequitable or one-sided. *See, e.g.*, *Basulto v. Hialeah Auto.*, 141 So. 3d 1145,

1157 (Fla. 2014). The determination of unconscionability is a matter of law. *Belcher v. Kier*, 558 So. 2d 1039, 1040 (Fla. 2d DCA 1990). Therefore, this determination can be made at the summary judgment phase. Further, this doctrine can be applied to any part of a contract, including a modification or waiver. *See Powertel, Inc. v. Bexley*, 743 So. 2d 570, 573 (Fla. 1st DCA 1999) (appeal of nonfinal order denying motion to compel arbitration based on language in a purported modification).

"Unconscionability is a common law doctrine that courts have used to prevent the enforcement of contractual provisions that are overreaches by one party to gain an unjust and undeserved advantage which it would be inequitable to permit him to enforce." *Basulto*, 141 So. 3d at 1157 (citations and internal quotations omitted). Generally, unconscionability has been recognized to "include an *absence of meaningful choice* on the part of one of the parties together with contract terms which are *unreasonably favorable to the other party*." *Id*. (quoting *Williams v. Walker–Thomas Furniture Co.,* 350 F.2d 445, 449 (D.C.Cir. 1965)). Doctrinally, the "absence of meaningful choice when entering into the contract is often referred to as procedural unconscionability, which 'relates to the manner in which the contract was entered,' and the unreasonableness of the terms is often referred to as substantive unconscionability, which 'focuses on the agreement itself'." *Id*. at 1157-58 (citing *Powertel*, 743 So. 2d 570, 574 (Fla. 1st DCA 1999)).

Both procedural and substantive unconscionability need to exist in order to prevent the enforcement of a contract or contract term. *Id*. at 1160. The Supreme Court of Florida has adopted a sliding scale approach, where both elements must be present, but not to the same degree. *Id*. Rather, a stronger showing of one of the two elements can make up for a lack of the other, if both are present in some capacity. *Id*. (citing with approval *Romano ex rel. Romano v.*

Manor Care, Inc., 861 So.2d 59, 62 (Fla. 4th DCA 2003)). "In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." *Id*. "Courts must bear in mind the bargaining power of the parties involved and the interplay between procedural and substantive unconscionability." *Id.*

a. Procedural Unconscionability

Procedural unconscionability is determined based on a totality of the circumstances surrounding the entry into the contract – or contract modification in this case. *See Hobby Lobby Stores, Inc. v. Cole*, 287 So. 3d 1272, 1275 (Fla. 3d DCA 2020). In considering whether "the complaining party lacked a meaningful choice in entering into the contract" courts look to four factors: "(1) the manner in which the contract was entered into; (2) the relative bargaining power of the parties and whether the complaining party had a meaningful choice at the time the contract was entered into; (3) whether the terms were merely presented on a 'take-it-or-leave-it' basis; and (4) the complaining party's ability and opportunity to understand the disputed terms of the contract." *Id*. (quoting *Basulto*, 141 So. 3d at 1160). All four of these factors weigh in favor of a finding of procedural unconscionability.

i. The modification was unsolicited and to the benefit of one party.

Consideration of the way these releases were issued gives rise to the first indicia of unconscionability. The Plaintiffs - targets of these releases - were resigned members who had left PGCC prior to April 1, 2016. It had been years since they had received any official communication from the club, and for most, the last communique was a letter confirming that PGCC agreed they were owed an 80% refund of the equity membership in effect at the time of

their resignation. Resigned golf members were expecting payments of $24,000.00. Instead, they received a mailer with the release enclosed.

While the letter attached to the release acknowledged that the recipient was "a former member of the Prior Club who resigned membership and is currently wait listed to receive a payment from the Prior Club. . ."; it also explained that PGCC had been purchased by Concert, LLC. (DIN 648, p. 295). What effect this purchase had on the refunds owed to resigned members is not clearly delineated. Instead, resigned members are succinctly told that Concert is willing to pay them "$1,200.00 which is the amount which the Prior Club paid to wait listed resigned members who reached the top of the wait list maintained by the Prior Club in accordance with its Bylaws." *Id*. PGCC had sent letters promising payment of $24,000.00. PGCC had paid every resigned member similar amounts for all the years prior to 2016. Now, the same club that had confirmed the previous amount in writing, was offering 5% of that amount and passing it off as what PGCC was in the habit of paying. While this is glossed over in a matter-of-fact manner, PGCC had in fact already been sued by multiple resigned members who were faced with the same terms that this release now proposed. (CONCERT 001753-001755, Sch. 5.2(c)). These facts were not disclosed. (DIN 741, p. 43, ln. 2-18; p. 134, ln 10-14).

It must also be considered that this was not a case of two parties entering into a bargain, both having certain interests in mind. Resigned members already had a contract with PGCC and were entitled to certain payments based on that contract. PGCC had, for their part, confirmed their interpretation of the contract terms in writing to many of these resigned members by indicating in letters that refund amounts were calculated based on the bylaws *in effect at the time of the member's resignation*. (DIN 756, 758). Now, one party sought to unilaterally ratify their breach by mailing unsolicited releases to unsuspecting parties. The fact that the resigned member

cohort was elderly, unrepresented, and had lacked notice of the sale of the club only adds to the biased nature of this transaction.

ii. Bargaining power was wholly one-sided and Plaintiffs were given no meaningful choice whatsoever.

In terms of bargaining power: on one side sat two organizations represented by counsel, fully staffed and funded; and on the other side sat elderly individuals, many unsophisticated as to business and contracts, many on fixed incomes, many who by that time had limited contact with the club and had left the area. (DIN 704, p. 92, ln. 8-12; DIN 741, p. 115, ln. 14-15). In terms of the choice presented to the Plaintiffs, it was a relatively simple one prior to the genesis of this class action: they could sign the release and accept $1,200; they could refuse the $1,200 and get nothing; or they could sue as an individual over an amount that was at most $24,000.00. The unspoken fourth choice, to remain on the waiting list until they were paid what they were owed, was not an option after the club ceased selling equity memberships. Without any funding of the escrow account that paid for equity refunds, the choice effectively became "$1,200 or nothing."

iii. The releases were offered on a "take it or leave it" basis.

"While a contract of adhesion could indicate procedural unconscionability in some circumstances, 'the presence of an adhesion contract alone does not require a finding of procedural unconscionability.'" *Kendall Imports, LLC v. Diaz*, 215 So. 3d 95, 110 (Fla. 3d DCA 2017) (quoting *VoiceStream Wireless Corp. v. U.S. Commc'ns, Inc.*, 912 So. 2d 34, 40 (Fla. 4th DCA 2005)). Courts have recognized that many consumer contracts are essentially contracts of adhesion, and therefore, that indicator has become less consequential in certain agreements. *Id.* (citing in part, *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 346-47 (2011) ("the times in which consumer contracts were anything other than adhesive are long past")). However, many of these more recent decisions, like the Supreme Court of the United States' decision in

Concepcion, are reached in the context of consumer goods such as cell phone plans and automotive sales. *Cf. Kendall*, at 97 (Appellant-Buyers attempted to avoid the arbitration clauses in the sales contracts for their vehicles) *and Fonte v. AT&T Wireless Svcs. Inc.*, 903 So. 2d 1019, 1021 (Fla. 4th DCA 2005) (purported class action case against a wireless services provider); *with Powertel, Inc. v. Bexley*, 743 So. 2d 570, 572 (finding an after-the-fact arbitration agreement inserted in a cell phone plan unconscionable in large part because it was an adhesion contract). These cases are easily distinguished from the case at bar as they are consumer transactions of a routine nature.

Regardless of the weight given to the adhesiveness of a particular contract provision or modification, even skeptical courts encourage the consideration of the totality of the circumstances involving the "take it or leave it" nature of the agreement. "It is important to inquire into additional surrounding circumstances, such as whether a party could obtain the desired product or services elsewhere, whether one party pressured or rushed the other into signing a contract, or whether the party was otherwise precluded from inquiring into the terms of the agreement." *Kendall*, 215 So. 3d at 110. The fact that the case at bar did not involve a consumer contract for a common good or service (such as a cell phone plan), but a unilateral modification of an existing contract for a significant sum; taken together with the circumstances surrounding that modification indicate that this was an adhesion contract of the exact kind that courts have historically nullified.

Although somewhat antiquated in light of modern consumer contracts, the reasoning in *Powertel* is nevertheless illustrative of the same concepts at play in this class action. The case involved an arbitration provision that the cell phone provider, Powertel, attempted to insert into existing contracts. *Powertel*, 743 So. 2d at 572. "Powertel prepared the arbitration clause

unilaterally and sent it along to its customers as an insert to their monthly telephone bill." *Id*. at 572-73. Recipients were given the option to cancel their cell phone plans within ten days as their only method for opting out of the modification. *Id*. Furthermore, Powertel was already embroiled in a potential class action lawsuit brought by the plaintiff-appellee on an unrelated issue when they attempted to modify the contract to require arbitration. *Id*.

The court found the clause procedurally unconscionable because it was an adhesion contract that left customers with little option. *Id*. at 575. "The customers did not bargain for the arbitration clause, nor did they have the power to reject it." *Id*. The court also focused on the fact that a customer's only form of rejecting the provision would cause inconvenience and expense due to the requirement that they would have to switch providers and purchase new phones and equipment. *Id.* "Many customers may have continued their service. . .simply because they had no economically feasible alternative." *Id.*

The use and interoperability of cell phones has changed, which in turn has prompted a change in the prevailing legal view with regard to that specific style of contract. However, the indicia of unconscionability that the First District Court of Appeals exposed in *Powertel* are evident in the case at bar. Much like the contract modification that was discussed in *Powertel*, the releases in this case were mailed to Plaintiffs unbidden. Plaintiffs had a singular choice: to sign or not. (DIN 741, p. 44, ln. 20-21; DIN 757, p. 4). They did not bargain for the release, nor did they have the power to reject it. If the court in *Powertel* considered it economically unfeasible to replace a cell phone and associated equipment; how would it have viewed the release that these Plaintiffs were faced with? They had been promised as much as $24,000.00 and now were being told that their new option was $1200.00 or nothing. (*Compare* DIN 756, 758 *with* DIN 755; *see also* DIN 741, p. 44, ln. 20-21). Defendants PGCC and Concert eliminated the

funding of the escrow account prior to sending the releases, ensuring that Plaintiffs who received releases would be left with no viable economic alternative. (DIN 741, p. 22, ln. 20-25; p. 23, ln. 8-10; DIN 778, p. 13, ln. 4-9; DIN 757, p. 3).

Additionally, PGCC had already been sued at the time these releases were mailed. (CONCERT 001753-001755, Sch. 5.2(c)). More egregious than the circumstances in *Powertel*, the Defendants were being sued over the *exact issues* that were to eventually give rise to this class action. PGCC was sued in *Dorso*, *et al.* and *White* (and threatened with suit by many others) and disclosed this ongoing litigation in its purchase and sale agreement with Concert. The defendants in *Powertel* had been sued over an unrelated contract provision in relation to their long-distance phone charges. However, both defendants sought to reduce legal liability by the post-hoc modification of a contract clause. In *Powertel*, the defendants sought to bind the plaintiff(s) to arbitration after litigation had already been initiated. *Powertel*, 743 So. 2d at 577. The court wisely struck down that provision. *Id.* Here, the Defendants have sought to limit their exposure to litigation by having potential plaintiffs sign releases. As discussed above, the release does not notify the recipient that the club is already involved in litigation over its amendment of the bylaws. Therefore, the Plaintiffs in this case were facing a situation that was costing them up to $22,800.00, far more than the economic hardships contemplated in *Powertel*; their contracts had been unilaterally amended (as in *Powertel*); and the company that was seeking to unilaterally modify the contracts had already been sued over these modifications. As such, the facts of this case are far more egregious than those in *Powertel* and serve to demonstrate that the releases were contracts of adhesion.

iv. The complaining Plaintiffs had no opportunity to learn the context necessary to make a conscious choice.

In terms of the "complaining party's ability and opportunity to understand the terms of the contract," this case is distinguishable from the typical consumer contract and far more egregious. Many of the cases evaluating unconscionability discuss consumer contracts that are presented to the signing parties as part of a single transaction. *See, e.g., Kendall Imports*, 215 So. 3d at 97-98 (discussing the terms of a contract agreed to on the spot during a vehicle sale); *Fonte*, 903 So. 2d at 1021-22 (discussing terms of cell phone contract included in product packaging); *Orkin Exterminating Co. v. Petsch*, 872 So. 2d 259, 265 (Fla. 2d DCA 2004) (declining to find procedural unconscionability when arbitration provision was included in the original contract between the parties in large type on the first page of the contract). Conversely, here, as in *Powertel*, the Plaintiffs had agreed to a contract many years ago that incorporated all the terms. Both parties were in agreement as to the meaning of the contract provisions, as evidenced by the letters received by various Plaintiffs stating unequivocally the refunds they were entitled to. (DIN 756, 758).

What makes matters worse, in this instance, is that the Plaintiffs were kept from the underlying information that predicated the release. Whether still members in some capacity or whether they had fully resigned from the club, Plaintiffs were not permitted to view the resigned waiting list or even to know how many individuals were on it. (Ex. G, ¶2). Members who were fully resigned from the club had no opportunity to attend informational meetings or receive communication as to the changes and the reasons behind them. Further, unlike consumer contracts that are offered to a broad swath of society, the releases were mailed to a limited group of people. The releases referenced a contract that had been entered into years, even decades prior, and that had ended upon the member's resignation. The alteration of a previously vested

contract right by written waiver, mailed to a recipient years after the contract has ended, provided Plaintiffs with extremely limited opportunity to understand the terms of the contract.

b. Substantive Unconscionability

The Second District Court of Appeal has adopted an admittedly high threshold for substantive unconscionability: "whether the terms are so outrageously unfair as to shock the judicial conscience." *Osprey Healthcare Ctr. LLC v. Pascazi*, --So. 3d--, 2021 WL 4760114 at *2 (Fla. 2d DCA 2021) (quoting *Zephyr Haven Health & Rehab. Ctr., Inc. v. Hardin ex rel. Hardin*, 122 So. 3d 916, 920 (Fla. 2d DCA 2012)). In *Woebse* the court adopted reasoning from the 4th DCA in finding that interference with a plaintiff's statutory rights did rise to the level of substantive unconscionability. *See, Woebse v. Healthcare and Ret. Corp. of America*, 977 So. 2d 630, 634-35 (Fla. 2d DCA 2008).

Other cases serve to emphasize that substantive unconscionability must rise beyond some minor unfairness. For example, in *Belcher v. Kier*, the court examined a rent increase on lot fees in a mobile home park. 558 So. 2d 1039, 1044-45 (Fla. 2d DCA 1990). Although the court found that the modification to the rent was procedurally unconscionable, it did not find that a $18 increase in monthly rent over four years was substantively unconscionable. *Id*. at 1045. In *Florida Holdings,* the court found that the plaintiff's claim boiled down to a "quarrel with two standard features of arbitration," and therefore did not merit a finding of substantive unconscionability. *Fla. Holdings, III, LLC v. Duerst ex rel. Duerst*, 198 So. 3d 834, 843 (Fla. 2d DCA 2016). These cases serve to illustrate that unconscionability must rise beyond simple unfairness or inequity.

The case at bar presents a far more egregious set of circumstances than these two Second District cases. First, the very terms of the releases themselves are unconscionable. The releases

begin by acknowledging that the Plaintiffs are owed a refund of a portion of their equity contribution. (DIN 743, p. 2, ¶2). However, in order to receive *any* payment, the signor must release Concert and PGCC from any liabilities, including those unrelated to the refund (e.g. the release of any and all affiliates of Concert – including legal counsel – from "any and all claims, liabilities, complaints, obligations, or requests"). (*Id.*, ¶4). This places an additional burden on a party who has already performed their part of the contract and whose rights have vested. As discussed above, absent a signature on the release (and acquiescence to its terms), the resigned member would get nothing as there was no longer a mechanism to fund the refund escrow account. (DIN 741, p. 44, ln. 20-21; DIN 778, p. 13, ln. 4-9; DIN 757, p. 3).

Second, unlike the minor increases in rent discussed in *Belcher*, the economic effect of the release here was drastic. *Belcher* dealt with elevated lot rent that was between 6.6% and 15.9**%** above market-value. *Belcher*, 558 So. 2d at 1045. Though the court acknowledged that this was above market price, it declined to find that "no man in his right mind" would pay that rate, or that the increases were so "grossly excessive" as to render them unconscionable. *Id.* However, in this case, resigned golf members were being offered a mere 5% of their promised refund. (DIN 756). Indeed, it appears that the minimal value offered was mostly as an inducement to sign the release. (DIN 744, p. 2).

Lastly, the release asks the recipient to give up on a host of legal rights in order to receive money that they were already entitled to. (DIN 744, p. 2). The release requires indemnification of the released parties not only with respect to "future payments" related to the resigned member's equity refund, but also with respect to "any and all claims, liabilities, complaints, obligations, or requests relating to the Resigned Club Member's Resigned Club Membership in the Old Club known or unknown. . . ." (*Id.*). Courts have not hesitated to find substantive

unconscionability when a plaintiff's legal or statutory rights were significantly impaired by the purported agreement. *See, e.g.*, *Powertel*, 743 So. 2d at 576; *Woebse*, 977 So. 2d at 634-35. Here, Plaintiffs who signed releases would be giving up a host of rights, including, according to the terms of the release, even the right to make *requests* as to their refunds. (*Id.*). The release purports to indemnify against any claim or liability known or unknown. (*Id.*). Again, this sweeping release was to be executed "in consideration" for $1200.00 that Plaintiffs were already entitled to by virtue of their membership contracts with PGCC.

In sum, the releases were both procedurally and substantively unconscionable. They were true contracts of adhesion: unsolicited, not bargained for, and forced onto one party by the other party's creation of an inequitable situation that left no other feasible option. The releases were substantively unconscionable because they required recipients to give up not only their remaining contract rights, but a host of other rights, in exchange for a 95% reduction in a contractually-guaranteed payment. Plaintiffs who signed releases had little choice, other than to forego payment entirely. To hold these releases against the Plaintiffs would only further perpetrate the inequity.

C. The affirmative defense that a condition precedent was not met is unavailable to Defendants as they rendered any such condition impossible.

It is axiomatic that "a party who, by his own acts, prevents performance of a contract provision cannot take advantage of his own wrong." *N. Am. Van Lines v. Collyer*, 616 So. 2d 177, 179 (Fla. 5th DCA 1993). This principle provides a prevailing counterargument to a claim that a party has failed to satisfy a condition precedent. "If one prevents or renders impossible the performance or occurrence of a condition precedent, upon which his liability is contingent, he cannot avail himself of its nonperformance." *Paparone v. Lake Placid Holding Co.*, 438 So. 2d 155, 157 (Fla 2d DCA 1983) (citation omitted).

In PGCC's Fourth and Fifth Affirmative Defenses, they raise the argument that the Plaintiffs' claims are not ripe or are barred because the condition precedent of them reaching the top of the refund list did not occur. Concert asserts much the same defenses in its Fourth and Sixth Affirmative Defenses. Assuming that PGCC's refund liability to resigned members was contingent upon them reaching the top of the resigned member waiting list, then PGCC and Concert worked together to render this an impossibility. As stated in their joint response to the Motion for Class Certification, "[u]pon the sale of PGCC's assets to Concert pursuant to the PSA, PGCC ceased operating as a Club and ceased selling new club memberships, as such, no additional funds have been added to the Escrow Account since the sale." (DIN 707, pp. 6-7, ¶8). If no funds were added to the escrow account, no resigned memberships were purchased off the waiting list. If no resigned memberships were purchased off the waiting list, it was impossible for a resigned member to move up the waiting list. Since PGCC and Concert rendered the condition precedent an impossibility, they cannot now use it as a defense to payment.

D. The statute of limitations has not run.

Both Defendants assert the statute of limitations in their affirmative defenses. However, the statute of limitations has not run as to any action in this case. Legal and equitable actions on contract, when founded on a written instrument, must be brought within five years. Fla. Stat. § 95.11(b). Further, an amended complaint relates back to the motion for leave to amend, even if the statute of limitations has run in the interim. *See, e.g.*, *Totura & Co., Inc. v. Williams*, 754 So. 2d 671, 679-80 (Fla. 2000); *In re Forfeiture of: £1992 Pontiac Firebird No. 1G2FS23T3NL212004*, 47 So. 3d 344, 346 (Fla. 2d DCA 2010).

All claims asserted in this case are legal or equitable claims based on a written contract and therefore are subject to a five-year statute of limitations. At the earliest, breach occurred on

April 1, 2016. The final Motion for Leave to Amend Complaint in this matter was filed on March 26, 2021. The Fourth Amended Complaint was deemed filed as of May 6, 2021. Therefore, the claims alleged in this action are deemed filed as of March 26, 2021; within five years of the April 1, 2016 amendment to the bylaws.

E. The transfer was not made in good faith.

Defendants' defenses related to the transfer of club ownership between PGCC and Concert (PGCC's Ninth Affirmative Defense and Concert's Seventh Defense to Count IV) are addressed *supra* Sections V and VI.

F. Plaintiffs have suffered damages.

Defendant PGCC's Eighth Affirmative Defense, that the Plaintiffs have not suffered damages is addressed *supra* Section IV.B.

VIII. CONCLUSION

For the foregoing reasons, Plaintiffs move this Honorable Court to grant summary judgement in their favor on Count I, Count III, and Count IV of the Fourth Amended Complaint against the parties set forth above. In the alternative, should this Court not grant partial summary judgment, Plaintiffs move for a determination of material facts not in controversy; and an order specifying those facts and the amount of damages or other relief not in controversy.

<u>**CERTIFICATE OF SERVICE**</u>

I hereby certify that a true and correct copy of the foregoing has been served via electronic notification through the Florida E-Filing Portal upon the following:

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

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

Michelle Tanzer, Esq.
Terrance W. Anderson, Jr., Esq.
Nelson Mullins
1905 NW Corporate Blvd., Suite 310
Boca Raton, FL 33431
michelle.tanzer@nelsonmullins.com
tw.anderson@nelsonmullins.com
lucy.hellman@nelsonmullins.com

/s/ Christina E. Unkel
Christina E. Unkel, Esquire
FL Bar No.: 99203
mctlaw | MAGLIO CHRISTOPHER & TOALE LAW FIRM
1605 Main Street, Suite 710
Sarasota, Florida 34236
Telephone: 941-952-5242
Facsimile: 941-952-5042
Primary: cunkel@mctlaw.com
Secondary: ebanfelder@mctlaw.com
Secondary: abytnar@mctlaw.com
Attorney for Plaintiffs