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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,

vs.

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

Defendants.
_____/

Case No.: 2016-CA-5528
CLASS ACTION

AMENDED RESPONSE TO
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
[Amended to correct DIN number references only]

Defendants' motion for summary judgment is inadequately supported by law and fact and should be denied. The underpinning of their entire case, that former members of a social club remained subject to that club's bylaws and rules after their memberships ceased, defies Florida statutory law, caselaw, the defendants' own interpretation of their contract with former members, and common sense. Their other defenses to the class's claims against them likewise fail for similar reasons and should be denied. In support of their response, class members state:

I. Factual Premise for Argument

Defendant Plantation Golf and Country Club ("PGCC") was a social club organized as a nonprofit under Florida law. (DIN 648, p. 78, ¶2.1). It operated as a

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private, member-owned golf and country club in 1994. (DIN 648, p. 78, ¶1; DIN 961, ¶4). The club offered equity and non-equity memberships. (DIN 648, p. 78, ¶3.1; DIN 704, pp. 20-21).

Equity members were entitled to ownership rights in the club. (DIN 648, p. 78, ¶3.1; p. 79, ¶3.2.1). Such memberships came with a host of rights in the club. Equity members were entitled to vote on matters affecting the club, including amendments to the bylaws. (DIN 648, p. 79, ¶3.3). Only equity members were permitted to serve on the club's board of directors. (DIN 648, p. 83, ¶5.1) ("The Board shall be made up of equity members. . ."). Equity members could access the club and use the facilities in accordance with their membership. (DIN 960, p. 6 [p. 13, ln. 4 – 7]); DIN 648, p. 78, ¶1).

To secure these rights, equity members had to purchase an equity membership in the club. (DIN 959, Composite Ex. 2; DIN 648, p. 78, ¶3.1.2, "The price and terms of payment of an equity membership shall be established by the Board and may include both an equity contribution and initiation fee, as well as other fees, assessments, and charges established by the Board."). To retain access to the club, equity members had to pay annual dues. (DIN 704, p. 19 [p.16, ln. 9-12]). Equity members also had to agree to be bound by the club's bylaws and general rules. (DIN 959, Composite Ex. 3). In exchange, equity members received the rights attendant in equity membership, including the right to an equity refund. (DIN 648, p. 81, ¶3.8.2; DIN 704, p. 14 [p.11, ln. 13-18]; DIN 756, p. 2).

Non-equity members were not required to purchase an equity certificate and had no attendant equity rights. (DIN 648, p. 261). They could not vote on club matters, serve on the Board, had no ownership rights in the club, and were not promised a refund of any part of their membership fees. (DIN 648, p. 261).

Members were free to terminate their membership in the club by following the club's process for resignation. (DIN 704, p. 17-18 [p.14-15]; DIN 648, p. 80-81, ¶3.8). Once resigned, former equity members were no longer considered members of the club. (DIN 960, p. 87 [p. 106, ln. 15-24; p. 107, ln. 12-13]). They could not vote on club issues. (DIN 960, p. 70 [p. 41, ln.16-19]). They could not attend informational meetings about changes to the club's bylaws that occurred after they were members. (DIN 960, p. 89 [p. 115, ln. 14-21]). They did not receive any communications about anticipated bylaw changes. (DIN 960, p. 71 [p. 42, ln. 12-16]; DIN 971, p. 28 [p. 99, ln. 2-11]). They could not sit on the club's Board of Directors. (DIN 960, p. 89 [p. 116, ln. 8-11]). The only right that survived resignation was the right of a former equity member to receive a refund. (DIN 960, p. 87 [p. 107, ln. 6-19]).

> Q: So is it your position that once they submitted their resigned equity – sorry, their resignation letter, at that date and time, resigned equity members no longer had rights to PGCC, whether it's votes or access to the country club?
>
> Kubik: They didn't have rights to vote or access to the country club. They certainly had rights to their refund.

These refunds were calculated based on the bylaws in effect at the time of the former member's resignation. (DIN 648, p. 81, ¶3.8.2; DIN 704, p. 16 [p. 13, ln. 13-15]; DIN 756, p. 2). As members resigned, PGCC would provide them with a letter stating the amount of their refund and providing them with a copy of the relevant

part of the bylaws then in effect. (DIN 704, p. 16 [p. 13, ln. 10-13]; DIN 756, p. 2). Once resigned, their membership would be placed on a refund waiting list to be repurchased by an incoming equity member (in chronological order of resignation). (DIN 971, p. 39 [p. 20, ln. 13-23]). Former members were permitted to contact the club to inquire about the status of their refund but were not allowed to see the refund list. (DIN 960, p. 89 [p. 115, ln. 2-11]).

As new equity members joined the club, a portion of their equity fees (20%) went to the operational fund for the club. (DIN 971, p. 25 [p. 86, ln. 15-19]). The remaining 80% went towards the purchase of the membership itself. (DIN 971, p. 25 [p. 87, ln. 5-9]). The funds used to purchase the membership (the 80%) were deposited in an escrow account. (DIN 971, p. 25 [p.87, ln. 5-9]). Money from the escrow account was used to refund resigned members as their membership number reached the top of the refund list. (DIN 960, p. 70 [p.40, ln. 3-10]).

[redacted]

(DIN 961, ¶10). Without new equity funds added to the escrow account, previously resigned memberships could not be refunded. (DIN 971, p. 25 [p. 87, ln. 14-25; p. 88, ln. 1-4]). Without prior memberships being refunded, more recently resigned

memberships could not move up the list towards a refund. (DIN 971, p. 43 [p. 35, ln. 18 – p. 36, ln. 2]).

II. Standard for summary judgment

Florida courts employ the federal summary judgment standard. *See*, Fla. R. Civ. P. 1.510(a) ("The summary judgment standard provided for in this rule shall be construed and applied in accordance with the federal summary judgment standard."). Summary judgment may only be rendered if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Kovalivker v. Team Real Estate Management, LLC*, 2020 WL 3305674, at *3 (S.D. Fla. 2020). Courts are to draw all reasonable inferences in favor of the party opposing summary judgment, without weighing evidence. *Id.*; *Lewis v. City of Union City, Ga.*, 934 F.3d 1169, 1179 (11th Cir. 2019). "If more than one inference could be construed from the facts by a reasonable fact finder, and that inference introduces a genuine issue of material fact," summary judgment should not be granted. *Bannum, Inc. v. City of Fort Lauderdale*, 901 F. 2d 989, 996 (11th Cir. 1990). Likewise, "if reasonable minds might differ on the inferences arising from the undisputed facts, then the Court should deny summary judgment." *Kovalivker v. Team Real Estate Management, LLC*, 2020 WL 3305674, at *4.

III. The right to an equity refund was included in the contract between class members and PGCC.

The membership agreements between the class members and defendant PGCC were contracts that specifically incorporated the bylaws of the club and were

thus binding on members of the club. Upon resigning from the club, class members ceased to be members of PGCC, gave up their membership certificates, and became creditors of the club. The terms of this contract were undisputed by PGCC and guided its performance until the 2016 bylaw change gave rise to a dispute.

Since defendants did not honor the terms of that contract, their motion for summary judgment on their defenses to breach of contract must now fail and be denied. There was in fact a contract between class members and PGCC, Concert did stand in the shoes of PGCC and accept liability for that contract, and both defendants did breach material provisions of that contract. As shown below, the fundamental argument in defendants' motion for summary judgment, that they were free to amend their contract with class members at any time, is a fallacy and unsupported by law.

A. The bylaws were part of the membership contract.

The membership agreements between the class members and defendant PGCC were contracts that specifically incorporated the bylaws of the club and were thus binding on members of the club. "It is a generally accepted rule of contract law that, where a writing expressly refers to and sufficiently describes another document, that other document. . .is interpreted as part of the writing." *OBS Co., Inc. v. Pace Const. Corp.*, 558 So. 2d 404, 406 (Fla. 1990). It is a case cited by defendants, *Share v. Broken Sound Club, Inc.*, that confirms that when bylaws are referenced in a membership agreement, they become part of the contract between a club and its member and are enforceable. 312 So. 3d 962, 972 (Fla. 3d DCA 2021).

See also, *Franzen v. Lacuna Golf Ltd. P'ship*, 717 So. 2d 1090, 1092 (Fla. 4th DCA 1998) (Finding that appellants were bound by Declaration attached to Agreement when Agreement referenced Declaration, even absent specific language stating Agreement was "subject to" Declaration).

That the "respective membership agreements were enforceable contracts, subject to the Bylaws, as amended from time to time" is not in dispute. (PGCC Answer, DIN 506, ¶¶ 43, 44). The membership agreements specifically referenced the bylaws and PGCC has admitted in their Answer that the contracts were "subject to" the bylaws. (*Id.*) *See*, *Franzen* at 1092. Therefore, it is incontrovertible that the bylaws were incorporated into the contracts between PGCC and club members.

B. Refund amounts became fixed upon resignation from PGCC.

PGCC maintains that because bylaws were amendable, it was free to amend the bylaws to reduce the refund amount payable to class members. This runs counter to the basic principles of contract law for two reasons: first, class members were no longer members of PGCC and thus not parties to any contract modifications that occurred after their memberships ceased; second, PGCC's own course of conduct evidenced an interpretation of the refund entitlement that supports class claims.

1. Non-members cannot be bound by the bylaws of an organization they do not belong to.

A nonprofit corporation has the right to alter or amend its bylaws. Fla. Stat. § 617.0302(5). A "member" of a nonprofit corporation is one who has "membership

rights in a corporation in accordance with the provisions of its articles of incorporation or bylaws or the provisions of [state law]." Fla. Stat § 617.01401(12). Members are, broadly speaking, subject to the bylaws so long as the bylaws comport with the law. *See, e.g., Boca West Club v. Levine*, 578 So. 2d 14, 16 (Fla. 4th DCA 1991) ("The appellees purchased their membership in the club with full knowledge of its rules and regulations. . .[They] cannot now be heard to complain about the actions taken by the Board given their assent to be bound by the provisions of the bylaws and rules.").

It is well established that Florida law provides social organizations the right to regulate their own membership. *See, Cat Cay Yacht Club, Inc. v. Diaz*, 264 So. 3d 1071, 1075 (Fla. 3d DCA 2019). The obvious corollary to this rule is that non-members are in no way bound by the edicts of membership. After all, membership is a privilege rather than a right, "terminable at the will of either the group or the individual." *See, Everglades Protective Syndicate, Inc. v. Makinney*, 391 So. 2d 262, 266 (Fla. 4th DCA 1980).

Further, it is axiomatic that a modification to a contract requires consent of both parties as well as a meeting of the minds of the parties whose rights are to be affected by the modification. *See, SCG Harbourwood, LLC v. Hanyan*, 93 So. 3d 1197, 1200-1201 (Fla. 2d DCA 2012) (citations omitted). Unilateral modifications of contracts are unenforceable. *Id.* at 1200. Further, any modification of a contract must be supported by new consideration. *Id.* at 1200-1201. *See also, Charlotte 650, LLC v. Phillip Ricks Citrus Nursery, Inc.*, 320 So. 3d 863, 867 (Fla. 2d DCA 2021).

Class members are all individuals who had terminated their membership in PGCC prior to the 2016 bylaw changes. (DIN 784, p. 11, ¶2). After their resignations, when class members were no longer members of PGCC, PGCC amended their bylaws. (DIN 960, p. 87 [p. 106, ln. 15-24; p. 107, ln. 12-13]). Class members were unable to participate in this amendment, as they no longer had voting rights in the club. (DIN 960, p. 70 [p. 41, ln. 16-19]). This rendered the amendment unilateral on the part of PGCC and devoid of the consent of the class members (resigned club members). Further, the amendment was unsupported by new consideration to the resigned (class) members. It is therefore without effect to those members. While it may be true that a nonprofit social club such as PGCC can freely amend its bylaws, it can only do so with respect to its members.[1] It lacks the authority to affect non-members.

2. PGCC's interpretation of its responsibilities under the contract was made clear in writing before any controversy arose.

Contract construction is governed by the intent of the parties. *See, e.g.*, *Hirsch v. Jupiter Golf Club LLC*, 232 F.Supp. 3d 1243, 1251 (S.D. Fla. 2017) (citations omitted). "A court should strive to give effect to the intent of the parties in accord with reason and probability as gleaned from the whole agreement and its purpose." *Feldkamp*, 773 F.Supp. 2d at 1280-81 (citations omitted). Regarding the intent of the parties, "the practical interpretation of a contract by the parties to it

[1] Similarly to the bylaws, a corporation may only amend its articles of incorporation with respect to existing members of the corporation. It cannot affect a change of the rights of non-members via an amendment. *See* Fla. Stat. § 617.1009.

for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence." *Hirsch*, at 1251 (citing *Old Colony Trust Co. v. City of Omaha*, 230 U.S. 100, 118 (1913)).

Communications between the parties can become evidence of their post-agreement course of performance. *Id.* at 1252. Such evidence is not precluded by the parol evidence rule because it occurs after the agreement was made. *Id.* at 1253. Furthermore, in a class action, a writing evidencing post-contract course of performance may be "interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing." *Id.* In other words, the defendant's course of performance, as evidenced by the writing can be used to show its universal conduct in a class proceeding. Critically, course of performance is not "cast aside" when a contract is assigned. *Id.* ("The more accepted view espoused by courts seems to be that course of performance by predecessors-in-interest to a contract is relevant in interpreting the meaning of a contract, especially when that course of performance is undisputed.") (citation omitted).

PGCC confirmed its interpretation of the contract with resigned members in writing. (DIN 481, 148-216; DIN 756, p. 2). On June 8, 2012, then-Membership Director Elaine Dexter sent a letter to Mrs. Beverly White acknowledging her resignation, confirming an effective date of October 1, 2007; and stating that her equity refund will be "80% of the equity portion of the equity membership contribution in effect as of the effective date of [your] resignation" which amounted

to $30,000. (DIN 756, p. 2). Similar letters were mailed to resigning members for years and represented the policy of the club. (DIN 704, p. 16 [p. 13, ln. 10-17]).

These letters reflect a clear understanding of the contract terms and a course of performance under those terms. Resigned members were consistently paid out at a refund rate calculated based on the date of their effective resignation. That PGCC has now changed its bylaws to alter the calculation of refund payments 1) is immaterial as it only affects those who were members of the club when the changes occurred and is unenforceable against resigned members as a unilateral modification unsupported by consideration; and 2) flies in the face of their undisputed course of performance (documented in writing) that continued for years before there was any dispute as to refund calculation.

Lastly, Concert claims that "Plaintiffs cannot establish any evidence of a contract between Plaintiffs and Concert or any breach of such contract." (DIN 975, p. 19). However, as *Hirsch* makes clear, course of performance is not "cast aside" when a contract is assigned. *Hirsch* at 1253. Thus, PGCC's course of performance, as evidenced by the numerous letters it sent former members, can be attributed to Concert. This Court has previously acknowledged that Concert was aware of the legal dispute between the former members and PGCC as it had notice of the numerous lawsuits and threatened lawsuits in the PSA. (DIN 1008, p. 8). Therefore, that course of performance can be attributed to Concert as assignee.

3. PGCC's course of performance evinced a present right to the future enjoyment of a refund.

Equity membership in PGCC, as distinguished from non-equity membership, gave rise to a refund right that vested upon the equity member's resignation from the club. A "vested right" has been described as a "present fixed right of future enjoyment." *See*, *Clausell v. Hobart Corp.*, 515 So. 2d 1275, 1276 (Fla. 1987) (quoting *In re Will of Martell*, 457 So. 2d 1064, 1067 (Fla. 2d DCA 1984)). Such a right must give rise to the present or future enforcement of a demand. *Id.*

For example, in *Power v. Power*, the Fifth DCA considered whether a party to a judgment clause had effectively exercised his rights (thus creating a vested interest) prior to his death. *See*, *Power v. Power*, 864 So. 2d 523, 524 (Fla. 5th DCA 2004). When the Powers' marriage was dissolved, the trial court ordered the marital home sold, but granted Mr. Power the right of first refusal to purchase the property. *Id.* Mr. Power exercised that right by sending written notice in accordance with the judgment. *Id.* Unfortunately, he died prior to the closing of the real estate sale. *Id.* The trial court awarded the right to purchase the property to Ms. Power, and the DCA overturned, finding that Mr. Power had created a vested (and inheritable) right under the terms of the judgment. *Id.* at 525.

Defendants cite to two cases for the proposition that vested rights cannot come from the club's bylaws because the bylaws are subject to amendment. (DIN 977, pp. 15-16). *See*, *Share v. Broken Sound Club, Inc.*, 312 So. 3d 962, 970 (Fla. 4th DCA 2021) (citing *Hamlet Country Club v. Allen*, 622 So. 2d 1081, 1082-83 (Fla. 4th DCA 1993)). The critical difference between both cases cited by defendants and the

case at bar is that in each case cited by the defendant, the plaintiff was still an active member of the club they were suing. *See*, *Share* at 969 (Ms. Share stopped paying dues but did not terminate her membership); *Hamlet* at 1082 (suit was brought in 1988 by certain members of the club). Members of a voluntary organization are bound by the rules of that organization so long as they are members – even rules governing their very expulsion from the organization. *See*, *e.g.*, *Boca West Club v. Levine*, 578 So. 2d 14, 16 (Fla. 4th DCA 1991).

Every class member had effectively terminated their membership in PGCC prior to the April 2016 bylaw amendments. (DIN 784, p. 11 ¶2). This is, indeed, the very definition of the class. (DIN 784, p. 11 ¶2). Upon their resignation from the club, PGCC made clear in writing that they had become entitled to a fixed, calculable refund. (DIN 481, p. 148-216; DIN 756, p. 2). That refund was based on the bylaws in effect at the time of each member's resignation, as it had to be – members could not be a party to future amendments to the bylaws as they were no longer members of the club. (*Id.*) The only tie left to the club was the right of a refund, in a fixed amount, payable at a future date. (DIN 960, p. 87 [p. 107, ln. 6-19]). In *Power*, Mr. Power exercised his purchase option by executing a signed writing in accordance with the terms of the court's judgment. *Power*, 864 So. 2d at 524. In this instance, members exercised their option for a refund in accordance with their contract by resigning from the club and relinquishing their rights in the club. Such actions entitled them to a refund of part of their equity contribution as fixed by the terms of their contract and as confirmed by letters sent by PGCC.

This understanding of the contract between PGCC and its members and PGCC's obligation to prior (resigned) members is not only supported by caselaw, but common sense. So long as individuals remain members of their clubs, they have both implicitly and explicitly agreed to be bound by the rules of that club. Since association is voluntary, their continued membership is an acquiesce to any changes in club bylaws. Therefore, courts faced with facts like those in *Hamlet* and *Share* are unsympathetic to members who try to redirect their clubs via the judicial process while remaining members of those same clubs. The class members in this case are on a completely different footing. Not only had they already exercised their option to leave the club prior to the alteration of the bylaws; they were incapable of assenting to the changes made once they had left. They had no voting rights, participation rights, or even rights to view club documents. (DIN 960, p. 70 [p. 41, ln.16-19]; DIN 960, p. 89 [p. 115, ln. 14-21]); DIN 960, p. 71 [p. 42, ln. 12-16]; DIN 971, p. 28 [p. 99, ln. 2-11]).

PGCC's argument that the liquidation provision somehow obliterates any unrealized right to refund is subject to the same limitation as their bylaw amendments: it only applies to members of the club. (DIN 977, p. 16-17). The provision reads:

> In the event the Club's assets are liquidated, distribution of the proceeds therefore shall be made to all Equity Members entitled to such distribution and distributions shall be pro-rated on the basis of the joining fees paid by the applicable Equity Member for the Equity Membership.

Distributions were to be made to *equity members*. The class is made up entirely of former members who no longer have any rights in the club. PGCC conflates class

members with then-current equity members at the time of the sale. (DIN 977, p. 16) ("In other words, the named Plaintiffs and class members would no longer be entitled to a payment based on a refund formula. . ."). Class members and equity members are two very different groups of people; that is, in essence, the genesis of this lawsuit.

If, as PGCC claims, there was no right to a refund (since bylaws could theoretically always be amended to eliminate it entirely), then what was the difference between an equity and a non-equity membership? What were members paying for when they purchased an equity membership certificate if not the right to one day redeem that certificate for a refund? The bylaws of PGCC are clear that equity membership provided the member with an ownership interest in the club. The distinguishing feature of this ownership, as opposed to a non-equity membership, was the ability to redeem the membership certificate for a refund upon resignation.

C. If reaching the top of the resignation list was a pre-condition to receiving a refund; PGCC cannot benefit from preventing the occurrence of that condition.

Class members maintain their assertion that reaching the top of the resignation waiting list merely effected the timing of the refund and not the right to a refund. Should this Court determine that reaching the top of the equity refund waiting list was a precondition to receiving a refund, then the law is clear that defendants cannot benefit from rendering this condition impossible. A party cannot render impossible a condition upon which his liability is contingent and then avail

himself of that performance. *See*, *Head v. Sorensen*, 220 So. 3d 569, 573-74 (Fla. 2d DCA 2017) (citing *Paparone v. Lake Placid Holding Co.*, 438 So. 2d 155, 157 (Fla. 2d DCA 1983). "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). Furthermore, when a fact question is raised as to whether one party has acted to prevent the performance of another party, summary judgment is improper. *Head* at 573.

If rising to the top of the equity refund list was a precondition to receiving a refund, defendants acted together to render that condition impossible. The equity refund list was funded by the sale of new equity memberships. (DIN 971, p. 25 [p. 87, ln. 14-17]). As sufficient equity funds came in, memberships were purchased off the waiting list. (DIN 960, p. 70 [p.40, ln. 3-10]). Without any new equity memberships sold, the list would be unfunded. (DIN 971, p. 25 [p. 87, ln. 14-17]). If the list was unfunded, it would be impossible for anyone on the list to progress up the list. (DIN 971 p. 43 [p. 35, ln. 18 – p. 36, ln. 2]). PGCC was aware of this and aware that Concert did not intend to sell any equity memberships. However, the sale to Concert took place and the refund list was defunded. Therefore, assuming *arguendo* that reaching the top of the refund waiting list was a precondition to receiving a refund, PGCC and Concert acted to prevent any former members from reaching the top of the list. They cannot now claim the benefits of such actions to avoid liability to members who were on the waiting list.

D. Defendants' argument that an accord was reached is improperly pleaded and legally insufficient.

Defendants now rely on an affirmative defense that was subsumed in a paragraph related to a separate defense, not properly pleaded, and unsupported in the pleadings by any factual basis or evidence. Further, even if allowed to proceed on this defense, the defense as stated is legally insufficient because the purported accord gave rise to the dispute it was purported to alleviate.

1. The defense of accord and satisfaction was improperly pleaded.

Florida Rule of Civil Procedure 1.110(f) requires that "each defense, other than denials, shall be stated in a separate count or defense when a separation facilitates the clear presentation of the matter set forth." Further, the pleadings must "appraise the other party of the nature of the contentions that he will be called upon to meet and enable the court to decide whether same are sufficient." *George v. Beach Club Villas Condo. Assoc.*, 833 So. 2d 816, 820 (3d DCA 2002) (citing *Brown v. Gardens by the Sea South Condo. Assoc.*, 424 So. 2d 181, 183 (Fla. 4th DCA 1983)). In furtherance of this, Rule 1.130(a) requires the attachment to the pleadings of all documents "on which action may be brought or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings."

Accord and satisfaction requires proof of two elements: "[f]irst, that the parties mutually intended to settle an existing dispute by entering into a superseding agreement; and, second, that there was actual performance with satisfaction of the new agreement discharging [the] prior obligation." *U.S. v. Morrison*, 28 So. 3d 94, 101 (Fla. 1st DCA 2009). In Florida, two statutes have

codified the defense of accord and satisfaction by use of instrument. *See,* Fla. Stat §673.3111; Fla. Stat. § 725.05. Defendants' motion for summary judgment relies on Fla. Stat. § 673.3111 (uncited in their pleading), which provides that:

> [a] claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

In other words: to claim accord and satisfaction, one needs proof of an accord. In this case, a written communication or conspicuous statement on an instrument.

PGCC's Third Affirmative Defense alleges that "Plaintiffs' and the purported Plaintiffs' Class' claims are barred in whole or part based on the doctrine of waiver." (DIN 506, p. 8). The following sentence claims that "certain Plaintiffs have voluntarily relinquished their right to any refund by accepting the amount tendered to PGCC pursuant to the Bylaws as amended from time to time, which constitutes an accord and satisfaction of the alleged debt." (*Id.*) In this context, it appears as though the second sentence is meant to clarify the first – to add factual support for the waiver defense. No document purporting to be an accord was attached to the Answer. The ambiguity generated by this pleading is in part why this issue has not been addressed by the plaintiffs until now.

To the extent that PGCC meant to plead an affirmative defense of accord and satisfaction, that pleading failed to state a sufficient factual basis for the defense. By their own acknowledgement, the defense requires a showing of a written communication or conspicuous statement on an instrument. (DIN 977, p. 18). Fla. Stat. § 673.3111. Neither of these is alleged in the pleading. (DIN 506, p. 8). The

pleading simply states that money was tendered and accepted. (*Id.*). This is not an accord. An accord is a "superseding agreement" that parties enter by mutual assent that satisfies an *existing* dispute. It is not the mere tendering of monies. To the extent that PGCC is implying that the amended bylaws constituted an accord; as discussed *supra* § I.B.1., the bylaws were not mutually amended and therefore unenforceable as an accord or otherwise.

2. PGCC's defense of accord and satisfaction is legally insufficient.

As stated, accord and satisfaction requires the intent to settle an existing dispute. *U.S. v. Morrison*, 28 So. 3d 94, 101 (Fla. 1st DCA 2009). When a purported accord gives rise to a dispute, it cannot be said to constitute an accord. *See*, *Brody Irrevocable Grantor Trust No. 2 v. Brody*, 322 So. 3d 150, 154-55 (Fla. 2d DCA 2021). In *Brody*, the Second DCA dealt with a case where one party to a settlement agreement (Mr. Brody) tendered what he believed to be full payment of the settlement amount based on his understanding of the agreement. *Id.* at 152-53. Once the Trustee received Brody's payment, a dispute arose as to whether the amount fully satisfied the agreement. *Id.* The DCA found that there was neither a dispute that preexisted the tendering of the money, nor an agreement to accept partial payment. *Id.* at 154. The court found that Brody's offer to pay what he believed was the full amount, not a *new* "agreed amount" could not have been an accord. *Id.* at 155. *See also*, *Republic Funding Corp. of Fla. v. Juarez*, 563 So. 2d 145, 146-47 (Fla. 5th DCA 1990) ("Accord and satisfaction results when there is an *existing dispute* as to the proper amount due from one party (the debtor) to another

party (the creditor) and the parties mutually intend to effect settlement of the *existing dispute* by a superseding agreement. . .") (citations omitted) (emphasis added).

When class members terminated their memberships in PGCC, they were provided written statements of PGCC's understanding as to the terms of their agreement: they were to be paid a refund based on the bylaws in effect at the time of their resignation, and payment would occur when their membership reached the top of the refund waiting list. (DIN 481, p. 148-216; DIN 756, p. 2). They were not provided any notice that PGCC had purported to change this agreement based on a bylaw amendment that occurred after they had left the club. (DIN 960, p. 89 [p. 115, ln. 14-21]). They were not privy to votes or information regarding bylaw changes. (DIN 960, p. 71 [p. 42, ln. 12-16]; DIN 971, p. 28 [p. 99, ln. 2-11]; DIN 960, p. 70 [p. 41, ln.16-19]).

The facts in this case mirror *Brody* in that the first notice that class members received that there was a disagreement regarding what they were owed was the check sent by PGCC. Mrs. Beverley White testified that she was shocked to receive an amount so different from what she was expecting and quickly sought the advice of a lawyer. (DIN 971, p. 12 [p. 36, ln. 24-25; p. 37, ln. 1-12]).

PGCC relies on the deposition of Mr. Jon Berry as an example of a purported accord and satisfaction. (DIN 977, p. 19). Under questioning from PGCC, Mr. Berry states that he expected more than he received. (DIN 980, p. 5 [p.12, ln. 13-19]). Under questioning from plaintiffs' counsel, Mr. Berry reiterated that he believed he

was owed 80% of the equity fee in effect at the time of his resignation. (DIN 980, p. 6 [p. 14, ln. 4-7]). Based on this deposition, defendants admit that former members "disputed the amount of their respective refunds at the time they received their checks." (DIN 977, p. 19). This is exactly the case: *at the time they received their checks*, a dispute arose. Not before. For the check or any document enclosed with it to be an accord, the dispute would have had to predate the purported accord. *See, e.g.*, *Juarez* at 146-47. Mr. Berry was clear that up until he received a check from PGCC, he was expecting a far greater sum. It was the receipt of the smaller sum that gave rise to the dispute.

Therefore, the defense of accord and satisfaction fails with respect to the class members who received partial payment from PGCC prior to Concert's purchase of the club. The small payouts, 5% of what was owed class members, served to notice those people that their refund was suddenly in dispute. This dispute was founded on PGCC's misapprehension, discussed *supra*, that they were able to change the bylaws of their club to affect people who were no longer members of their club. The premise of that argument fails because non-members cannot be controlled by a voluntary organization that they do not belong to. Summary judgment on all defenses to breach of contract should be denied.

IV. Defendants are not entitled to summary judgment on the claim of unjust enrichment.

Defendants seek summary judgment on the class members' claims for unjust enrichment, arguing first that no unjust enrichment occurred because the class members benefitted from their memberships and second, that the class members did not confer a *direct* benefit on defendant Concert. (DIN 977, pp. 20-21). These arguments are supported by limited caselaw and misapply the facts to that caselaw. Defendants were unjustly enriched by retaining money owed to class members and there is no requirement that they received this money directly.

Unjust enrichment creates a legal fiction: a contract implied in law regardless of any agreement - or lack thereof - between the parties. *14th & Heinburg, LLC v. Terhaar and Cronley Gen. Contractors, Inc.*, 43 So. 3d 877, 880 (Fla. 1st DCA 2010). This quasi contract created provides a remedy in unjust circumstances. *Id.* A defendant will be found liable for unjust enrichment where: 1) the plaintiff confers a benefit on the defendant; 2) the defendant has knowledge of and appreciates the benefit; 3) the defendant retains the benefit; and 4) the circumstances are such that it would be inequitable for defendant to retain the benefit without paying fair value. *Kenf, L.L.C. v. Jabez Restorations*, Inc., 303 So. 3d 229, 231 (Fla. 2d DCA 2019); *Commerce Partnership 8098 Ltd. V. Equity Contracting Co.*, 695 So. 2d 383 (Fla. 4th DCA 1997). The purpose of an action for unjust enrichment is to "prevent the wrongful retention of a benefit, or a retention of money…in violation of good conscience and fundamental principles of justice or equity." *Kenf*, 303 So. 3d at 231.

A. Defendants received an inequitable windfall when they chose not to refund class members for their equity contributions.

Defendants contend the class members received a benefit in exchange for their equity buy-in and thus, defendants were not unjustly enriched. (DIN 977, p. 20). This argument, however, misapprehends the nature of the class members' equity contributions and overlooks the annual dues requirement. Equity memberships came with ownership, voting, and usage rights in the club. DIN 648, p. 78, ¶1, 3.1; p. 79, ¶3.2.1, 3.3). They also entailed a refund provision. (DIN 648, p. 81, ¶3.8.2; DIN 704, p. 16 [p. 13, ln. 10-23]; DIN 756, p. 2). The equity portion of the membership fee was segmented, with 20% going to the operating fund of the club and 80% being used to pay previously resigned members. (DIN 971, p. 25 [p. 86, ln. 15-19]; DIN 971, p. 25 [p. 87, ln. 5-9]). Notably, in addition to their equity membership purchase, class members paid annual dues every year until they resigned their membership. (DIN 704, p. 19 [p. 16, ln. 9-12]). The annual dues payment was required for their continued use of the club. (DIN 704, p. 14 [p.11, ln. 5-6]).

The significance of the equity refund is brought into focus when compared with the non-equity members of PGCC. Non-equity members were allowed to join the club, but did not receive ownership, voting, or equity refund rights. (DIN 648, p. 261). This makes clear that the annual dues are for the use of the club and the other rights are tied to the equity contribution. Once equity members resigned and ceased paying dues, they no longer maintained any rights in the club; but retained the right to a refund. (DIN 960, p. 87 [p. 107, ln. 6-19]). Thus, they became creditors of the club, awaiting repayment of the refundable portion of their equity contribution.

Class members conferred a benefit on defendants by making equity contributions to the club, 20% of which went into the club's operating account and 80% of which went to the servicing of previously incurred equity debt. The defendants had knowledge of these contributions and accepted the equity contributions. Defendants retained the benefit of these contributions and did not repay class members. Further, defendants acknowledge in their resignation confirmation letters that these contributions were refundable and that they intended to pay plaintiffs specified amounts. (DIN 704, p. 16 [p. 13, ln. 10-23]; DIN 756, p. 2). As such, it would be inequitable for defendants to retain these funds when both parties understood they were to be repaid. *See*, *Florida Power Corporation v. City of Winter Park*, 887 So. 2d 1237, 1241 (Fla. 2004) (power company's retention of payments intended for city was an inequitable windfall and unjust enrichment).

At best, by arguing that class members have received a fair value in consideration for their equity contributions, defendants have created a factual dispute which precludes summary judgment. *See, e.g.*, *Mira Group, Inc. v. Duran*, 748 So. 2d 339, 341 (Fla. 3d DCA 1999) ("sufficiency of consideration is a question of fact to be tried and resolved by the trier of fact"); *Williams v. Wells Fargo Bank, N.A.*, 2011 WL 4901346, at *6 (S.D. Fla. 2011) (for unjust enrichment claim, whether consideration was in fact adequate was not appropriate question to resolve at motion to dismiss). Plaintiffs contend that any value received from defendants

was compensated for by the payment of annual dues separate from their equity contributions; defendants disagree.

B. Class members were not required to pay Concert directly to satisfy the elements of unjust enrichment.

Defendants additionally argue that defendant Concert is not liable for unjust enrichment because it did not receive the equity contributions *directly* from class members and thus, did not receive a direct benefit from class members. (DIN 977, p. 21). In support, defendants cite to *Saagen Developments and Trading Ltd. v. Quail Cruises Ship Management*, 2013 WL 2250793 (S.D. Fla. 2013). However, *Saagen* is easily distinguished from the facts at bar. Further, subsequent cases as well as other, controlling cases confirm that a direct benefit is not required to establish unjust enrichment.

Saagen, an action sounding in admiralty law, addressed unjust enrichment where a company chartering a vessel failed to pay the fuel supplier, which then claimed the owner of the vessel was enriched by the chartering company's use of the fuel. *Saagen*, 2013 WL 2250793 at *1-4. The Southern District found that the vessel owner did not directly benefit from the fuel and denied summary judgment on unjust enrichment. *Id.* at *7. *Saagen* is distinguishable from the facts in this case because the equity funds contributed by class members for the maintenance and improvement of the club were invested in the club which defendant Concert purchased. Unlike the fuel in *Saagen*, which was used by another party; Concert, as the successor in interest to PGCC, received the benefit of the improvements made and debt repaid with the equity funds.

The Southern District has since clarified its holding in *Saagen*, finding in subsequent cases that a direct benefit requirement does not equate to a requirement of privity of contract or even direct contact between parties. *See, Rubinstein v. Keshet Inter Vivos Trust*, 2019 WL 4739402, at *5 (S.D. Fla. 2019) (argument that direct benefit requires direct contact or privity between plaintiff and defendant "is a misunderstanding of the law"); *Rapar, LLC v. Mansfeld*, 2020 WL 9549665, at *6 (S.D. Fla. 2020) (many cases in district make it clear direct contact is not required); *Kovalivker v. Team Real Estate Management, LLC*, 2020 WL 3305674, at *7 (S.D. Fla. 2020). Rather, a direct benefit may be conferred through intermediaries. *Id*. Critically, in an opinion that is controlling on this court, the Florida Supreme Court likewise found the defendant need not have accepted the benefit directly from the plaintiff to establish a quasi contract through unjust enrichment. In *Commerce P'ship 8098 Ltd. P'ship v. Equity*, the Court explained, "Because the basis for recovery does not turn on the finding of an enforceable agreement, there may be recovery under a contract implied in law even where the parties had no dealings at all with each other." 695 So. 2d 383, 386 (Fla. 1997).

Here, although the class members did not make their equity contributions directly to Concert, those contributions benefited Concert as the club owner succeeding PGCC. Equity funds were used to maintain the club as well as pay down the debt owed to previously resigned members. (DIN 971, p. 25 [p. 86, ln. 15-19]; [p. 87, ln. 5-9]). Thus, although PGCC was an intermediary in collecting the monies, the improvements to the club paid for by those funds and the access to and use of

the class members' unrefunded equity payments to the club accrued to Concert when it took control of the club. Since Concert reaped the benefit of those payments, which were always intended to be repaid in fixed amounts, they should not be permitted to reap a windfall by paying anything less than the amount previously fixed by PGCC. *See*, *Hirsch v. Jupiter Golf Club LLC*, 232 F.Supp. 3d 1243, 1253 (S.D. Fla. 2017) (course of performance is not "cast aside" when a contract is assigned).

Where a non-moving plaintiff presents evidence that the defendant received a benefit, the parties' "competing versions of the facts militate against summary judgment." *Kovalivker*, 2020 WL 33305674 at *8 (denying defendants' motion for summary judgment where parties disputed direct benefit issue). *See also*, *Rubinstein*, 2019 WL 4739402 at *5 (denying defendants' motion for summary judgment on unjust enrichment where plaintiffs presented evidence creating factual disputes). The *Kovalivker* decision further warned against granting summary judgment "even where the parties agree on the basic facts but, disagree about the inferences that should be drawn from those facts." 2020 WL 33305674 at *4. In this case, while the law does not require direct payment to establish conferral of a benefit, to the extent the parties dispute the material fact of whether defendant Concert received a benefit from class members, summary judgment is inappropriate and should be denied.

V. Summary judgment as to fraudulent transfer is unwarranted.

Defendants seek summary judgment on the class members' claim for fraudulent transfer under Fla. Stat. § 726.105. As this Court has previously noted, summary judgment is rarely granted in fraudulent transfer cases. (DIN 1008, p. 8). "Ordinarily, the issue of fraud is not a proper subject of a summary judgment. Fraud is a subtle thing, requiring a full explanation of the facts and circumstances of the alleged wrong to determine if they collectively constitute a fraud." *Gorrin v. Poker Run Acquisitions, Inc.*, 237 So. 3d 1149, 1154 (Fla. 3d DCA 2018) (citations omitted). *See also, German Am. Cap. Corp. in interest to Branch Banking & Tr. Co. v. Morehouse*, No. 14-80681-CIV, 2018 WL 2007048, at *6 (S.D. Fla. Mar. 21, 2018) ("The Court's analysis begins with the general proposition that the issue of whether a fraud has occurred ordinarily should not be resolved at summary judgment."); *Nationsbank, N.A. v. Coastal Utilities, Inc.*, 814 So. 2d 1227, 1231 (Fla. 4th DCA 2002) ("[I]n fraud cases, summary judgment is available only in extraordinary circumstances.").

Seeking to overcome this caselaw, which weighs heavily against summary judgment, Defendants raise two arguments in support of their motion for summary judgment on fraudulent transfer. They first argue that PGCC did not transfer assets to Concert which were applicable to the debt owed class members. (DIN 977, p. 22). Such argument misconstrues the requirements of Fla. Stat. § 726.105. Defendants next assert that there is no evidence of the badges of fraud set forth in the statute which would show an intent to defraud under the statute. (DIN 977, p.

24, 29-30) As the class members can show prima facie evidence of three badges of fraud, defendants' argument to rebut these badges of fraud creates genuine issues of fact on the material issue of fraudulent intent, precluding summary judgment.

A. PGCC conveyed assets to Concert which could be used to pay the class members' claims.

Fla. Stat. § 726.105 provides that 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. In interpreting this provision, courts have set forth three elements for a claim of fraudulent transfer: 1) there is a creditor to be defrauded; 2) a debtor intending fraud; and 3) a conveyance of property which is applicable by law to the payment of the debt due. *Johnson v. Dowell*, 592 So. 2d 1194, 1196 (Fla. 2d DCA 1992).

Relying on this test, defendants assert that they did not convey property which could be applied in payment of the class members' unpaid equity refunds because the only asset which could pay the claim was the escrow account. (DIN 977, pp. 22-23). Notably, this novel interpretation of a fraudulent transfer requirement does not appear in the fraudulent transfer statute. *See,* Fla. Stat. § 726.105. Nor does it reasonably arise from the elements for fraudulent transfer set forth in caselaw. *See, e.g.*, *Johnson v. Dowell*, 592 So. 2d at 1196; *Nationsbank, N.A. v. Coastal Utilities, Inc.*, 814 So. 2d at 1229. As creditors with a claim for payment against the club, class members' claim could be paid from any asset of the club. Defendants' reliance on the bylaws to suggest only one discrete portion of

defendants' property could be used to pay their debt lacks support in either the facts or the law.

On its own recitation of supportive facts, defendants' argument falters. At the same time defendants contend the only property applicable to the payment due was the escrow account, they concede that the account had funds. (DIN 977, p. 23). [redacted]

[redacted] Even applying defendants' unfounded interpretation of the fraudulent transfer conveyance requirement, this element is satisfied because defendants conveyed the very property they concede is applicable to the debt.

Further, class members are creditors who may look to any assets of their debtor for payment of the debt owed. *See*, *2-Bal Bay Prop., LLC v. Asset Mgmt. Holdings, LLC*, 291 So. 3d 617, 620 (Fla. 2d DCA 2020) (an asset is defined as property of a debtor) (citations omitted). As resigned club members, class members are not bound by the bylaws and are not barred from collecting on the amounts owed them because the defendants have defunded a single bank account. *See*, *supra*, § I.B.1. Any requirement in the bylaws as to payments does not apply to the class members. Nor should they lose their claim to repayment where defendants have acted to prevent payment by closing bank accounts. Defendants' argument here gives further proof to their fraudulent conduct by attempting to restrict the pool of funds available to repay class members to a single, defunded bank account.

The evidence shows that PGCC conveyed the club property to Concert in the sale of the club. Defendants' transfer of the club property thus constituted a conveyance of property applicable to payment of the debt owed the class members for their equity contribution refunds. As such, the class members' claim satisfies the elements for fraudulent transfer set forth by the caselaw and defendants' argument for summary judgment on fraudulent transfer lacks merit.

B. Evidence submitted by defendants to counter class members' prima facie showing of badges of fraud creates issues of material fact.

Defendants argue that class members are unable to show evidence of the badges of fraud set forth in Fla. Stat. § 726.105. To the contrary, the transfer of assets from PGCC to Concert exhibited at least three of the badges of fraud the statute looks to in determining fraudulent intent. Defendants' argument against the existence of these badges of fraud creates a genuine issue of material fact, precluding summary judgment. *See*, *Gorrin*, 237 So. 3d at 1155 ("Summary judgment is rarely granted in fraudulent transfer cases, as the determination of intent often presents a genuine issue of material fact.") (citations omitted).

The fraudulent transfer statute lists several "badges of fraud" which can be used to establish the fraudulent nature of a transfer. *See, e.g.*, *Mejia v. Ruiz*, 985 So. 2d 1109, 1113 (Fla. 3d DCA 2008). The evidence adduced in this matter shows that PGCC's sale to Concert exhibited at least three of the badges of fraud listed in Fla. Stat. § 726.105(2). While defendants have discussed each badge of fraud in their motion for summary judgment, class members will focus their response on the

evidence supporting the three badges of fraud identified in Fla. Stat. § 726.105(2)(d), (e), and (h).

The existence of badges of fraud creates a prima facie case and raises a rebuttable presumption that the transaction is void." *Wiand*, 753 F.3d at 1200 (quoting *Gen. Elec. Co. v. Chuly Int'l, LLC*, 118 So. 3d 325, 327 (Fla. 3d DCA 2013)). *See also*, Chase *Bank USA, N.A. v. Jacucci*, No. 19-62318-CIV, 2021 WL 2689995, at *6 (S.D. Fla. Feb. 22, 2021). Under this statutory structure, once class members have submitted evidence showing badges of fraud, they have established a prima facie case and the burden shifts to defendants to rebut the presumption of fraudulent transfer. *Id.* To the extent defendants present such evidence, factual issues can arise, mitigating against summary judgment. "This is because a determination of fraud requires a full explanation of the collective facts and circumstances." *German Am. Cap. Corp. in interest to Branch Banking & Tr. Co. v. Morehouse*, 2018 WL 2007048 at *6.

1. Fla. Stat. § 726.105(2)(d)

Fla. Stat. § 726.105(2)(d) provides that a court, when determining fraudulent intent, may consider whether "before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit." On this factor, defendants concede that at the time it sold the club to Concert, [redacted] These suits were later consolidated into the present class action. (DIN 99). As PGCC had been sued at the time of the transfer, the facts establish this badge of fraud.

Having conceded the facts establishing this badge of fraud, the burden shifts to defendants to rebut the presumption of fraud with additional facts. *United States v. Romano*, 757 F. Supp. 1331, 1337 (M.D. Fla. 1989), aff'd, 918 F.2d 182 (11th Cir. 1990) ("Nevertheless, when a debtor transfers property after being sued, an indication of fraud results that the debtor must rebut."). Here, defendants attempt to rebut this badge of fraud by arguing first that Concert, the transferee, assumed liability for the class members' claims and second, that the liquidation provision of the bylaws provided for a pro rata distribution of the proceeds of the sale of assets. (DIN 977, pp. 25-26)

Concert argues first that the sale of the club was not an attempt to avoid the class members' claims because Concert agreed to pay resigned equity members a refund *pursuant to the bylaws in effect at the time of closing*. (DIN 977, p. 25). This was not an agreement to pay the class members' claims in full because the class members' claims are for a refund *pursuant to the bylaws in effect at the time of their resignation*, as previously calculated by the club. (DIN 704, p. 16 [p. 13, ln. 10-23]; DIN 756, p. 2). The fact that the value of class members' claims calculated at the time of their resignation far exceeded the size of the claims, if calculated at the time of closing, casts doubt on Concert's argument that the sale was not an attempt to avoid payment of the claims.

In its second counter to the badge of fraud associated with transfers during litigation, Concert points to the liquidation clause in the bylaws. (DIN 977, p. 26).

This argument erroneously assumes that as resigned members, the class was subject to the bylaws and its provisions. *See*, *supra*, § I.B.1.

In their attempt to rebut the presumption of fraud, defendants have raised additional facts and questions of fact regarding their intent with respect to the pending litigation and claims of class members. Against these facts, summary judgment on fraudulent transfer is inappropriate.

2. Fla. Stat. § 726.105(2)(e)

Fla. Stat. § 726.105(2)(e) states a badge of fraud exists where the transfer was of substantially all of the debtor's assets. In the first sentence addressing this badge of fraud, defendants concede it. (DIN 977, p. 26). [redacted]

With defendants' concession, this badge of fraud is established and the burden shifts to defendants to rebut the presumption of fraud. To counter this badge of fraud, defendants argue that the transfer was made for the reasonably equivalent value of the club. While not providing a value for the club for purposes of comparing the value paid, [redacted]

Class members submit that the evidence shows this accounting of the sale is not accurate. [redacted]

[redacted] Subtracting this illusory sum from Concert's $8.6 million reduces the total value given for the club by a little more than a third, to $5 million.

While having submitted facts as to the value given by Concert for the club, albeit facts disputed by class members, Defendants have not offered a valuation of the club so that this Court could determine if the value is reasonably equivalent, as they claim. Based on a certified copy of the property appraiser's valuation of the club property, the value of the club, in real property assets alone, was $9,763,900. (Ex. A). This value far exceeds the $5 million Concert was obligated to pay in purchasing the club.

Class members have demonstrated the badge of fraud regarding the transfer of all of a debtor's assets existed in this case, creating a presumption of fraud. Defendants have sought to rebut this presumption, claiming they paid a reasonably equivalent value for the club. [redacted] Class members further submit evidence that the value of just the club's real property exceeded Concert's payment obligation for the club. As a result, defendant's argument to rebut the presumption of fraud cannot stand and there are material issues of fact precluding summary judgment.

3. Fla. Stat. § 726.105(2)(h)

A third applicable badge of fraud is set forth in Fla. Stat. § 726.105(2)(h), which considers whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred. To counter this badge of fraud, defendants raise the same arguments concerning reasonably equivalent value as made in their rebuttal to the presumption of fraud under Fla. Stat. § 726.105(2)(e). For the reasons already discussed, defendants cannot prevail on this factor.

As class members showed, [redacted] These facts establish the badge of fraud set forth in Fla. Stat. § 726.105(2)(h) and the burden shifts to defendants to rebut the presumption. *F.T.C. v. Jordan Ashley, Inc.*, No. 93-2257-CIV-NESBITT, 1994 WL 485793, at *4 (S.D. Fla. July 29, 1994) ("Under section 726.105(2)(h), the fact that the consideration received by the transferor is not reasonably equivalent to the value of the property transferred is evidence of fraudulent intent.")

As shown, Concert's rebuttal of the presumption of fraudulent transfer relies on its recitation of the value paid. Class members dispute this interpretation of the PSA and the value Concert claims. Class members further submit defendants have not offered a valuation of the club at the time of sale to compare to the sale price. Thus, genuine issues of fact exist as to the value given by Concert for the club and as to whether the sale price was reasonably equivalent to the value of the club.

Courts are hesitant to enter summary judgment for fraudulent transfer because the issue of fraudulent intent is a fact specific inquiry prone to these very types of factual disputes. *Gorrin v. Poker Run Acquisitions, Inc.*, 237 So. 3d at 1154–55; *German Am. Cap. Corp. in interest to Branch Banking & Tr. Co. v. Morehouse*, 2018 WL 2007048 at *6; *Nationsbank, N.A. v. Coastal Utilities, Inc.*, 814 So. 2d at 1230-31. Accordingly, summary judgment is not appropriate and should be denied.

VI. Plaintiff class members have sufficiently alleged a claim for account stated and defendants have failed to effectively rebut it.

The letters sent to plaintiffs after their resignation of membership in PGCC constitute accounts stated as they represent the defendant's agreement to pay a sum certain. "To prevail under an account stated theory, Plaintiff must prove that the defendant expressly or impliedly agreed that an amount owed was correct and, that the defendant promised to pay the balance." *RealBiz Media Group, Inc. v. Monaker Group, Inc.*, No. 16-61017-CIV, 2017 WL 3107177 at *7 (citation omitted). The standard jury instructions for a claim of account stated lay out succinct elements:

1. Claimant and defendant had a transaction between them;
2. Claimant and defendant agreed upon a balance due;
3. Defendant expressly or implicitly promised to pay this balance;
4. Defendant has not paid claimant any/all of the amount owed under the account.

In re standard Jury Instructions–Contract and Business Cases, 116 So. 3d 284, 331 (Fla. 2013). The presumption of correctness of an account stated may be overcome by proof of fraud, mistake, or error. *Home Health Svcs. Of Sarasota, Inc. v. McQuay-*

Garrett, Sullivan, & Co., 462 So. 2d 605, 606 (Fla. 2d DCA 1985). "The burden of establishing those defenses is on the party asserting them, and unless that party carries the burden, the presumptive correctness of the account stated becomes conclusive." *Id.* (citing *Gendzier v. Bielecki*, 97 So. 2d 604 (Fla. 1957)).

Plaintiffs have alleged and proved a *prima facie* case for account stated. The parties had a transaction between them: the relinquishment of an equity membership in exchange for a refund. PGCC agreed upon a balance due by sending letters via various representatives of PGCC stating a sum certain. PGCC explicitly promised to pay this balance. (DIN 756, p. 2) ("The Resigned Regular Equity Membership *will* be purchased at 80% of the equity portion. . .") (emphasis added). To date, PGCC has not paid the full amount of this balance to any of the plaintiffs. Thus, plaintiffs have sufficiently stated a case for account stated.

Defendants rely on a series of arguments in defense to the claim of account stated, many of which were addressed *supra*. Notably absent from defendants' arguments is any proof of fraud, mistake, or error. Defendants argue that plaintiffs "may or may not have been entitled to a partial refund of their equity contribution if certain conditions occurred." (DIN 977, p. 30). The letters place a condition on the timing of payment, not the amount owed or the fact that PGCC owes it. The defendants' next argument that the club bylaws changed the refund amount due to then-members is inapplicable to former members of PGCC who had resigned prior to these bylaw changes. Equally inapplicable is the argument that plaintiffs would somehow receive a share of club assets in the event of a sale of the club. Not only is

this inapplicable to class members, as none were equity members at the time of sale; but it is not evidence of fraud, mistake, or error. There is no requirement in caselaw or in the jury instructions that account stated be part of an ongoing series of business transactions. As such, defendants have failed to state any adequate defense to the claim of account stated, much less one of the required defenses of fraud, mistake, or error.

VII. Conclusion

Defendants have not put forth sufficient support for their defenses on summary judgment and should be denied. The fundamental premise of their argument, that non-members of a private social club are somehow still subject to that club's bylaws, is belied by caselaw and evidence. The evidence against this proposition includes both witness testimony and written communication from PGCC's own agents. Their defense to unjust enrichment misinterprets the facts and runs contrary to controlling caselaw. Defendants fail to carry their burden in rebutting a presumptive case for fraudulent transfer. Likewise, they cannot surmount a presumptive claim for account stated. For these reasons, their motion for summary judgment should be denied.

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