

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

Case No. 2D23-0637

BEVERLY WHITE, ET AL.,

Appellants,

v.

PLANTATION GOLF AND COUNTRY CLUB, INC., ET AL.,

Appellees.

APPELLEES' ANSWER BRIEF

**On Appeal From the Twelfth Judicial Circuit
in and for Sarasota County, Florida**

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PRELIMINARY STATEMENT

This brief is filed on behalf of both Plantation Golf and Country Club, Inc. (“PGCC” or the “Club”) and Concert Plantation, LLC (“Concert”). PGCC and Concert are referred to collectively herein as “Appellees.” References to the record on appeal shall be in the form of (R. [page number]). References to the Appellants’ appendix to the Initial Brief shall be in the form of (A. [page number]).

STATEMENT OF THE CASE AND FACTS

This appeal by Beverley White, et al., individually and on behalf of a class of resigned members (collectively, “Appellants”), arises from a final summary judgment (the “Final Judgment”) entered in favor of PGCC and Concert. The action below originally began as three separate lawsuits, which were later consolidated. (R. 95-96). While the separate lawsuits originally contained different causes of action, the crux of each lawsuit was Appellants’ claim that Appellees breached their respective membership agreements by not paying Appellants the refund amounts they would have received under a prior version of PGCC’s bylaws.

In May 2021, Appellants filed their Fourth Amended Class Action Complaint (the “Complaint”) against PGCC and Concert on

behalf of 98 named Plaintiffs, and all other similarly situated members. (A. 153-363). The Complaint asserted five counts against Appellees: Count I - Breach of Contract (against PGCC and Concert), Count II - Unjust Enrichment (against PGCC), Count III – Unjust Enrichment (against Concert), Count IV – Fraudulent Transfer (against PGCC and Concert), and Count V – Declaratory Judgment: Account Stated (against PGCC and Concert).

On July 15, 2021, Appellants filed their motion for class certification. (R. 172-96). The trial court granted the motion on December 6, 2021. (R. 1338-50, the “Order Granting Class Certification”). The certified class (“Class”), consisted of over seven hundred individuals (the “Class Members”), and is defined as:

All individuals (or their guardians or representatives) who had an effective resigned equity memberships [sic] before April 1, 2016, and who have not received their full refund amount. Excluded from the Class are defendants, any officers or directors thereof, together with the legal representatives, heirs, successors, or assigns of any defendant, and any judicial officer assigned to this matter and his or her immediate family.

(R. 1348). PGCC and Concert appealed the Order Granting Class Certification (the “Class Certification Appeal”), and this Court

affirmed. *See Plantation Golf and Country Club, Inc. v. Dorso*, 352 So. 3d 914 (Fla. 2d DCA 2022).

On December 7, 2021, Appellants filed their motion for partial summary judgment. (R. 1353-1453). Appellants sought summary judgment against: i) PGCC for breach of contract; ii) Concert for unjust enrichment; and iii) both PGCC and Concert for fraudulent transfer. On February 10, 2022, PGCC and Concert filed their own motion for partial summary judgment, seeking judgment on the affirmative defenses of waiver and release. (R. 1562-1623).

On March 22, 2022, the trial court conducted a hearing on the competing motions for partial summary judgment. (A. 1105-97). Subsequently, on April 13, 2022, the trial court entered an order denying Appellants' motion and granting Appellees' motion (the "Partial Summary Judgment Order"). (R. 1972-84). In the Partial Summary Judgment Order, the trial court denied Appellants' motion for partial summary judgment because the right to a refund was not contained in the membership contract, but was instead contained in the bylaws, which could be amended without limitation. (R. 1975-77).

The trial court granted Appellees' motion for partial summary judgment on the affirmative defenses of release and waiver, finding that the written releases signed by more than five hundred members of the class barred their claims against Appellees. (R. 1979-80). Appellants do not challenge the ruling regarding the releases on appeal. PGCC and Concert filed a Notice of Cross-Appeal with respect to portions of the Partial Summary Judgment Order. However, in light of Appellants' failure to challenge the trial court's findings in the Summary Judgment Order regarding the releases, the Cross-Appeal is moot, and PGCC and Concert have filed a notice of voluntary dismissal contemporaneously with this brief.

PGCC and Concert filed a joint motion for summary judgment on the Complaint (R. 1924-55), which the trial court granted (R. 2180-86, the "Summary Judgment Order"). Following issuance of the mandate by this Court in the Class Certification Appeal, the trial court entered the Final Judgment. (R. 2222-27).

Appellants filed a motion for rehearing that raised a number of arguments, including arguing for the first time that PGCC did not follow proper procedures in connection with a 2016 bylaw amendment. (R. 2450-88). PGCC and Concert filed a response in

opposition to the motion for rehearing. (R. 2491-2525). The trial court denied the motion for rehearing on February 23, 2023. (R. 2526-28). Appellants timely filed their notice of appeal on March 23, 2023. (R. 2529-41).

A. FACTUAL BACKGROUND

PGCC was a private member owned golf and country club that originally started in or around September 1994. (R. 1810, ¶ 4). The purpose of the Club was to own and operate a private golf, tennis, swimming, and social club for the benefit PGCC's members and their guests. (A. 280, Art. 1). PGCC was organized as a not-for-profit corporation under Florida law. (A. 280, Art. 2).

PGCC offered equity memberships, which constituted ownership of an equity interest in the club. (R. 280-84, Art.3). To become a member of the Club, each Plaintiff was required to fill out a membership application, which was a binding agreement once accepted by the Club (the "Membership Agreement"). (R. 1705-12). The Membership Agreement provided that: 1) the member agreed to be bound by the terms and conditions of the Club's Bylaws and General Rules; 2) the member understood that **the Bylaws and General Rules could be amended from time to time**; and 3)

memberships were for the purpose of acquiring a membership to use the Club facilities and the “membership should not be viewed or acquired as an investment and no person purchasing a membership should expect to derive any economic profits for the membership in the Club.” (R. 1706, 1708, 1710) (emphasis added).

The rights of equity members related to their resignation, membership, and payments are contained in Article 3 of PGCC’s Bylaws. Further, Article 3.10, titled Liquidation of Equity Memberships, provides:

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

(A. 284, Art. 3.10) (emphasis added). Indeed, each and every iteration of the Bylaws provided that, in the event the Club’s assets were liquidated, distribution of the proceeds would be made on a pro rata basis. (A. 180, Art. 3.12; A. 200, Art. 3.12; A. 217, Art. 3.12; A. 233, Art. 3.11; A. 249, Art. 3.11; A. 266, Art. 3.11; A. 284, Art. 3.10).

PGCC's Bylaws also provided that it was to be governed by a Board of Directors, made up of nine Equity Members of the Club. (A. 182, 201-02, 218-19, 235, 250-51, 267-68, 286). The Board was responsible for managing the Club, including adoption or amendment of Club policies, and establishing the price for equity membership.

In their Complaint, Appellants alleged that they, or their respective representatives, all owned a "Resigned Equity Membership" on or before January 1, 2016. (A. 156, ¶¶ 2, 3). They further alleged that they were entitled to receive 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. (A. 156, ¶ 2). The relevant membership categories are: (1) golf; (2) tennis; and (3) social. (A. 158, ¶¶ 16-19). Each membership category had a separate Resignation Waiting List. (R. 532).

The Resignation Waiting List was a list of resigned equity members of PGCC, listed in order of their date of resignation. (R. 1358). Those who resigned first were at the top of the list. (R. 1358). Once a resigned equity member reached the top of the Resignation

Waiting List for their membership category, they were next in line to be refunded their respective Refund Amount. (R. 1359). However, refunds were never guaranteed. As PGCC's former chief financial officer, Barbara Jean Camarota ("Camarota") testified, payments were contingent on the resigned equity member reaching the top of the Resignation Waiting List and new memberships being sold. (R. 834, 873, 888). (*See also* A. 216, Art. 3.9; A. 232-33, Art. 3.8; A. 248, Art. 3.8; A. 265, Art. 3.8; A. 283, Art. 3.8).

Additional factors influenced a Resigned Equity Member's ability to receive a refund if and when they reached the top of the Resignation Waiting List. Camarota, who was responsible for processing refunds, testified about the process that she went through to determine whether a member was entitled to a refund, and if so, how to determine the amount of that refund. (R. 874-75).

When a membership was sold I was notified by the membership department, and at that point in time I would take a look at the refund, the resignation list to see who was at the top, determine if they were in fact due to a refund, if they were in fact entitled to a refund, and – and I basically had to pull their membership files and read through the entire file. You had to look at the membership agreement that was signed, you had to look at their ledger to see if they were delinquent in what they owed to the Club, you had to see if they had downgraded to another

membership. So there were any number of things that you really had to look at.

(R. 874-75). In addition, the right to a refund could be impacted by whether the membership was purchased through a payment plan, as opposed to purchasing their membership through a one-time payment. (R. 871).

These refunds were to be paid according to PGCC's Bylaws, which were amended over the years. In particular, with respect to the 2016 Bylaw amendment ("2016 Bylaw Amendment"), market conditions significantly affected the price of equity memberships. (R. 877-79). During that time, the market conditions experienced throughout the private club world forced PGCC to reduce the price of its equity memberships, resulting in the inability to pay its resigned equity members within what had been historically a reasonable period of time. (R. 879).

Indeed, as a result of the dramatic decrease in the prices of PGCC private club membership, it would have taken decades (if not centuries) for most of the Appellants (or their heirs) to receive any refund, to the extent they were otherwise eligible, if and when they reached the top of the Resignation Waiting List. (R. 882). The Bylaws

were amended in 2016 because the prices for each membership category decreased dramatically due to market conditions. (R. 1811-12, ¶ 8). In 2016, the price for golf memberships was \$5,000, tennis memberships were \$1,600, and social memberships were \$1,000. (R. 1811, ¶ 8). Previously, golf memberships were \$30,000, tennis memberships were \$4,200, and social memberships were \$2,400. (R. 1811, ¶ 8).

Refund payments to resigned equity members were only to be paid from an escrow account funded by the sale of new memberships net of PGCC's initiation or transfer fees (the "Escrow Account"). (A. 661-63). When a new member joined the Club, that member paid joining fees. (A. 661). The equity portion (80 percent) of the joining fee went into the Escrow Account. (A. 661). For a resigned equity member to be entitled to a refund, the resigning member had to: 1) reach the top of the Resignation Waiting List after refunds were paid to the members ahead of the resigning member on the Resignation Waiting List; and 2) a membership had to be sold that provided the funds to repay the resigning member's refund. (R. 834, 873, 888-89). The process was the same for all equity memberships regardless

of whether the member had a golf, tennis, or social membership. (R. 873-74).

Once enough memberships were sold that the Club could refund the person at the top of the list (to the extent the person was entitled to a refund), PGCC would issue a check to the person at the top of the list. (R. 874, 877, 886). In determining the amount of refund a member received, PGCC was governed by the Bylaws in effect at the time the member reached the top of the waiting list. (R. 1265-66). To the extent there were no funds in the Escrow Account because no new memberships being sold, no resigned equity members would be paid their Refund Amount. (R. 1264-66).

PGCC entered into a Purchase and Sale Agreement (the "PSA") whereby it agreed to sell certain Club assets to Concert. (R. 1812, ¶10). The sale of those assets was effectuated as of February 2, 2019. (R. 1812, ¶ 10). In the period between the April 2016 Bylaw Amendment and the sale on February 2, 2019, PGCC continued to pay resigned members in accordance with its 2016 Bylaw Amendment, which allowed more resigned members to reach the top of the Resignation Waiting List in a shorter time period. During this time (from April 2016 through February 2019), the Club sold a total

of 124 Golf Equity Memberships contributing \$147,080.00 towards the Escrow Account, 20 Tennis Equity Memberships contributing \$9,600.00 towards the Escrow Account, and 40 Social Equity Memberships contributing \$9,600.00 towards the Escrow Account. (R. 887-897). Those funds were used in accordance with the Bylaws to pay out the Resigned Equity Members at the top of the Resignation Waiting List. (R. 887-897).

During this period, PGCC issued golf equity refunds in the amount of \$1,200.00 per member, which were sent to 100 members on the Resignation Waiting List (“Refunded Resigned Golf Equity Members”). (R. 886-88). Additionally, PGCC issued tennis equity refunds in the amount of \$480.00 per member, which were accepted by 20 equity members on the Resignation Waiting List (“Refunded Tennis Equity Members”). (R. 894). Finally, PGCC issued social equity refunds in the amount of \$240.00 per member, which were accepted by 37 social members on the Resignation Waiting List (“Refunded Social Equity Members”) (collectively, the “Refunded Equity Members”). (R. 891). All of the aforementioned payments were made from the time that the April 2016 Bylaws were adopted until PGCC sold its assets to Concert. (R. 886-894).

Upon the sale of PGCC's assets to Concert, PGCC ceased operating as a Club and did not sell any new Club memberships. (R. 1812, ¶ 10). As such, no additional funds have been added to the Escrow Account since the sale. (R. 1812, ¶ 10). Thus, if the amounts of the refunds to be provided to resigned members had not been amended through the 2016 Bylaw Amendment, only six golf members, two tennis members and five social members would have reached the top of their respective Resignation Waiting Lists. (R. 887-97).

Accordingly, at the time of the sale to Concert, there were three potential outcomes for Appellants. First, there was a very small number of resigned members who would have reached the top of the Resignation Waiting List regardless of the 2016 Bylaw Amendment. Second, there were some resigned members who only reached the top of the Resignation Waiting List because of the 2016 Bylaw Amendment. Finally, there were many resigned members who never would have reached the top of the Resignation Waiting List regardless of the 2016 Bylaw Amendment.

As part of the sale of PGCC's assets to Concert, immediately after closing of the sale, PGCC and Concert offered to pay **all** of the

resigned equity members the **full** amount of the Equity Refund payment they would have received under the 2016 Bylaw Amendment. (R. 1975). In exchange, the Resigned Members executed a release of any claims against PGCC or Concert related to their former membership in PGCC. (R. 1975).

Indeed, over 500 Class Members accepted this offer, and they were paid in full. (R. 1975). In exchange, those Class Members released any claims against PGCC and Concert related to their membership, including any claims for any portion of their equity buy-in to the Club. (R. 1606-08). With respect to former tennis equity members, all members on the Resignation Waiting List accepted payment, thereby releasing all claims against PGCC and Concert. (R. 895, 900-02).

SUMMARY OF THE ARGUMENT

The trial court properly granted summary judgment in favor of PGCC and Concert because the Class Members did not have a vested right to a refund, and the Refund Amount was amended before any Class Members reached the top of the Resignation Waiting List. Appellants did not argue that there was any error in the Bylaw amendment process until their Motion for Rehearing, after entry of

the Final Judgment. The trial court did not err by failing to deny summary judgment based on an unpled, unidentified defense. Further, the trial court did not abuse its discretion by denying rehearing based on an argument that was not raised in opposition to summary judgment. Moreover, even if Appellants had preserved this issue for review, they have not demonstrated that there was any genuine issue of material fact regarding the enforceability of the 2016 Bylaw Amendment.

The trial court also did not err by rejecting Appellants' argument that the 2016 Bylaw Amendment is illusory, and by declining to rewrite the terms of the parties' contract. The Class Members' Membership Agreements are all subject to the Bylaws, which can be amended from time to time. The ability to amend the Bylaws does not render them illusory. Florida courts have consistently held that provisions that allow private clubs to amend their bylaws are enforceable.

The trial court did not err by finding the Class Members' status as resigned members was immaterial. The Class Members' right to a refund, if any, was contained within the Bylaws, and did not vest unless and until the Class Member reached the top of the Resignation

Waiting List. The Bylaws could be amended without limitation. There is nothing in the Membership Agreements or Bylaws that limits the ability to amend to only current, active members. The trial court properly found that Bylaws could be amended regardless of a members' status.

The trial court properly rejected Appellants' argument that PGCC and Concert rendered the Class Members' performance of a condition precedent impossible. There is nothing in the Membership Agreements or Bylaws that require PGCC to continue selling memberships in perpetuity. Indeed, the Bylaws expressly contemplate that PGCC may liquidate its assets, and thus, stop selling equity memberships. The Bylaws further set forth the procedure that PGCC will follow under those circumstances. The Class Members cannot complain about the occurrence of a contingency specifically contemplated by the Bylaws.

Finally, the trial court also granted summary judgment on PGCC and Concert's affirmative defenses of waiver and release, and on Appellants' claims for unjust enrichment, fraudulent transfer and account stated. Appellants have not challenged those rulings on

appeal. Accordingly, PGCC and Concert respectfully request that this Court affirm on these grounds.

STANDARD OF REVIEW

A trial court's ruling on a motion for summary judgment on pure questions of law is subject to a de novo standard of review. See *Volusia Cnty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000).

A trial court's decision not to consider new arguments on motions for rehearing is reviewed for abuse of discretion. *Fision Corp v. Frueh*, 369 So. 3d 1211, 1217-18 (Fla. 2d DCA 2023). A trial court has broad discretion to grant rehearing of a summary judgment when the party seeking rehearing submits a new argument, but is under no obligation to permit rehearing based on claims that are raised for the first time after entry of summary judgment. *Id.*

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT BECAUSE THE RIGHT TO A REFUND WAS CONTAINED IN THE BYLAWS, WHICH WERE SUBJECT TO AMENDMENT WITHOUT LIMITATION.

Appellants argue that the trial court erred by granting summary judgment because the 2016 Bylaw Amendment was not valid.

Specifically, Appellants argue that the 2016 was an ultra vires amendment because resigned equity members were not given notice and an opportunity to vote. The Court should reject this argument for at least two reasons. First, Appellants raised this argument for the first time in their motion for rehearing, after the trial court granted PGCC and Concert's Motion for Summary Judgment. The trial court did not abuse its discretion by denying rehearing based on an unpled theory that was raised for the first time in a motion for rehearing.

Second, Appellants read too much into the trial court's finding in the Summary Judgment Order that each Class Member still owned an "Equity Membership" as long as that member remained on the Resignation Waiting List. The Summary Judgment Order is not based on a finding that the Class Members were all still "Equity Members" as that term is defined in the Bylaws. As the trial court specifically stated, the Class Members' "status as resigned members is irrelevant" because the Bylaws could be amended "regardless of a members' status." The trial court did not purport to make any findings about what rights and obligations resigned members may

have during the time period that they were on the Resignation Waiting List.

A. Appellants failed to preserve their argument that the 2016 Bylaw Amendment was invalid.

Appellants first argued that the 2016 Bylaw Amendment was a void, ultra vires amendment in their Motion for Rehearing. The Complaint does not include any allegations that PGCC breached the Membership Agreements by failing to provide Appellants with notice and an opportunity to vote on the 2016 Bylaw Amendment. Further, both PGCC and Concert raised affirmative defenses expressly asserting that the Bylaws were properly amended.

Specifically, PGCC raised the following as its First Affirmative Defense:

Plaintiffs' and the purported Plaintiffs' Class' claims are barred in whole or in part because PGCC did not breach the respective Membership Agreements. The respective Membership Agreements are subject to the Club's Bylaws, which may be amended from time to time. Plaintiffs' and the purported Plaintiffs' Class' rights under their respective Membership Agreements are qualified and have always been subject to amendment. *PGCC amended its Bylaws in accordance with all procedural requirements thereof.* [...]

(R. 136) (emphasis added). Similarly, Concert asserted the following as its Fifth Defense:

Plaintiffs' and the purported Plaintiff Class' claims are barred, in whole or in part, because whether any payments and in what amount which might become due to Plaintiffs were governed by PGCC's Bylaws, which were subject to change by vote of the members and/or board of managers, *and PGCC complied with its own Bylaws at all times.*

(R. 119) (emphasis added). Appellants did not file a reply or avoidance to these affirmative defenses.

Appellants did not argue that the 2016 Bylaw Amendment was invalid in their motion for summary judgment, or in response to either of PGCC's and Concert's motions for summary judgment. They did not raise this argument at either of the summary judgment hearings.

Throughout this litigation, Defendants repeatedly stated that there was no objection to the amendment process itself, or the vote that approved the 2016 Bylaw Amendment, a claim which was never challenged by Plaintiffs. "Plaintiffs cannot establish a breach of the Bylaws as properly amended as of April 15, 2016. The Bylaws set forth the procedure for amendment. That process was followed, **and there is no claim otherwise.**" (R. 1636) (emphasis added). "There is no claim that PGCC did not properly follow the Bylaws or Florida law during any amendment process, and Plaintiffs have **raised no issues**

related to the passing of the Bylaws.” (R. 1649) (emphasis added). Appellants never disputed or objected to these statements.

Florida law is clear that a court may not grant relief outside of the pleadings. See *Don Facciobene, Inc. v. Hough Roofing, Inc.*, 225 So. 3d 323, 328 (Fla. 5th DCA 2017); *Wachovia Mortg. Corp. v. Posti*, 166 So. 3d 944, 945 (Fla. 4th DCA 2015) (“[a] trial court is without jurisdiction to award relief that was not requested in the pleadings or tried by consent.”); *Bank of New York Mellon v. Reyes*, 126 So. 3d 304, 309 (Fla. 3d DCA 2013) (“a judgment which grants relief wholly outside the pleadings is void.”); *Pond v. McKnight*, 339 So. 2d 1149, 1149 (Fla. 2d DCA 1976).

Additionally, pursuant to Florida Rule of Civil Procedure 1.510(c)(5), a party opposing summary judgment on the ground of a dispute of material fact “must serve a response that includes the nonmovant’s supporting factual position...” Fla. R. Civ. P. 1.510(c)(5) (emphasis added); see also *Lloyd S. Meisels, P.A. v. Dobrofsky*, 341 So. 3d 1131, 1135 (Fla. 4th DCA 2022) (“The amended rule required defendants to serve a response to the motion for summary judgment. Rule 1.510(c)(5) states that ‘the nonmovant must serve a response.’ There is no wiggle room in the word ‘must.’”).

Under Florida’s amended summary judgment rule, when the non-moving party does not properly address the movant’s assertion of facts, the trial court may consider the facts undisputed for the purposes of the motion for summary judgment. *See Fla. R. Civ. P. 1.510(e)(2)*; *see also Lloyd S. Meisels*, 341 So. 3d at 1136 (“[b]ecause the defendants failed to file a response with their supporting factual position, as required under the amended rule, the trial court was permitted to consider the facts set forth in plaintiff’s motion for summary judgment as ‘undisputed for the purposes of the motion.’” Nothing in the record demonstrates that the trial court abused its discretion in this regard.”) (internal citations omitted) (emphasis added).

Appellants first argued that the 2016 Bylaw Amendment process was invalid in their Motion for Rehearing, after entry of the Final Judgment. This Court has previously held that an argument made for the first time in a motion for rehearing is not properly preserved for appeal. *See Riviera-Fort Myers Master Ass’n, Inc. v. GFH Invs., LLC*, 313 So. 3d 760, 769 n. 4 (Fla. 2d DCA 2020) (“It raised that contention for the first time in its motion for reconsideration of the partial final judgment, so it therefore cannot be considered on

appeal.”); *Sch. Bd. of Pinellas Cnty. v. Pinellas Cnty Comm’n*, 404 So. 2d 1178, 1178 (Fla. 2d DCA 1981).

Although a trial court may have discretion to grant rehearing of a summary judgment when a party submits new matters on rehearing, it is under no obligation to do so. *Fision*, 369 So. 3d at 1217-18 (“trial courts need not grant rehearing when the movant raises a new argument that could have, and should have, been raised prior to entry of summary judgment.”). In the instant case, the Motion for Rehearing was filed more than nine months after entry of the Partial Summary Judgment Order and more than seven months after the Order Granting Summary Judgment. Moreover, neither the Motion for Rehearing nor the Initial Brief includes any explanation for why this unpled claim was raised for the first time on rehearing.

Appellants failed to preserve their argument that the 2016 Bylaw Amendment was invalid, and this argument should not be considered on appeal. Accordingly, PGCC and Concert respectfully request that the Court affirm the Summary Judgment Order and the Final Judgment.

B. The trial court properly granted summary judgment because the Class Members did not have a vested right to a refund.

The trial court granted summary judgment in favor of PGCC and Concert because the right to a refund payment was contained in the Bylaws, which were expressly subject to amendment, without limitation, and the Bylaws were amended to change the Refund Amount before any of the Class Members reached the top of the Resignation Waiting List. (R. 2181-83). The trial court specifically held that “the alleged right to a refund was not a vested contractual right unless and until a resigned member reached the top of the waiting list, and a new membership was sold.” (A. 2182).

Florida law is clear that a vested right is “an immediate, fixed right of present or future enjoyment.” *See Fiddlesticks Country Club, Inc. v. Shaw*, 363 So. 3d 1177, 1181 (Fla. 6th DCA 2023).

The fixed nature of vested rights distinguishes these categories of rights from those that are merely expectant (and therefore dependent upon the continued existence of the present condition of things until the happening of some future event) or contingent (those that only come into existence on an event or condition which may not happen).

Id. It is clear that a vested contractual right may not be unilaterally amended. However, an expectant or contingent contractual right (such as a right contained within a corporation’s bylaws) may be amended in accordance with the parties’ contract. *See Id.*

In *Fiddlesticks*, several homeowners sued their homeowners' association seeking a declaration that the association was prohibited from imposing an assessment and offsetting that assessment against the redemption of the homeowners' equity certificates. Specifically, the homeowners claimed that their equity refunds were fixed contractual rights that could not be impaired. *Id* at 1180. Much like the instant case, the right of redemption for the members' equity certificates was found exclusively in the bylaws, which were subject to amendment from time to time. *Id* at 1181.

In rejecting the homeowners' claims, the Sixth District held:

The bylaws in place at the time each Homeowner purchased his or her Equity Certificate contained an unconditional amendment provision. In other words, there is no language to suggest that the redemption rate is somehow exempt from amendment by majority vote. Examining the bylaws as a whole, there is simply no basis to conclude that the Club's governing documents fixed, or vested, a right to a specific Equity Certificate redemption rate.

Id at 1182 (emphasis added).

Simply put, rights that emanate from a private club's bylaws do not create vested contractual rights when those bylaws are subject to unconditional amendment. *See also Share v. Broken Sound Club, Inc.*, 312 So.3d 962, 970 (Fla. 4th DCA 2021). ("A private club's

bylaws governing the terms of membership do not create vested rights and are subject to amendment.”); *Hamlet Country Club Inc. v. Allen*, 622 So.2d 1081, 1082 (Fla. 4th DCA 1993).

The holding in *Hamlet* is instructive. In *Hamlet*, the plaintiff members of the defendant club sought redemption of their memberships. *Id.* at 1082. On appeal, the Fourth District considered whether the club could amend its bylaws to change the terms under which members were entitled to resign or transfer their membership or whether those provisions were vested rights that could not be altered. *Id.* The court held that the members did not have vested rights because the rights emanated from the bylaws which were subject to amendment from time to time. *Id.* at 1082-83. Accordingly, the defendant club was not liable for damages based on a breach of contract theory. *Id.*

Similarly, Appellants’ claim to a refund was not a vested contractual right because it was only contained in the Bylaws, as opposed to the Membership Agreements. (A. 180, Art. 3.9.2; A. 248, Arts. 3.7.2, 3.8.2; A. 283, Arts. 3.7.1, 3.7.2, 3.8.2, 3.8.3). Indeed, the Membership Agreements are completely silent on the issue of equity refunds.

Moreover, Appellants' rights to refunds did not accrue until two specific conditions were met: i) the individual member reached the top of the Resignation Waiting List, and ii) the Club sold a new membership. It is undisputed that none of the Appellants reached the top of their Resignation Waiting List prior to the 2016 Amendment. Accordingly, the trial court properly found that the right to a refund (if any), was not a vested contractual right until the member reached the top of the Resignation Waiting List and a new membership was sold.

Appellants devote several pages of their Initial Brief to arguing that the Bylaws were incorporated into the Membership Agreement, and thus part of the Membership Agreement. (Initial Brief, pp. 20-22). However, they appear to concede that the Membership Agreement and the Bylaws themselves both expressly state that the Bylaws are subject to amendment. (Initial Brief, pp. 23-24). Thus, they do not argue that the Refund Amount could not be amended, but instead take issue with whether the resigned equity members should have been given notice and an opportunity to vote on the 2016 Amendment.

This argument appears to hinge entirely on the trial court's statement that the Class Members still owned an "Equity Membership" as long as they remained on the Resignation Waiting List. (R. 2182). Thus, Appellants argue that all Class Members should have had all rights of "Equity Members," as that term is defined in the Bylaws. This includes the right to receive notice and vote on Bylaw amendments. In making this argument, Appellants read too much into the trial court's statement and ignore important record facts.

Appellants argue that the trial court's alleged finding that the resigned equity members were still Equity Members was essential to the summary judgment, but this argument is directly contrary to the trial court's express holding. The trial court specifically stated that the "class members' status as resigned members" was "irrelevant because the membership agreements contemplated that the Bylaws could be amended regardless of a member's status." (R. 2181). Thus, the trial court expressly found that whatever rights the resigned equity members may or may not have after their resignation was irrelevant, because the Bylaws could still be amended during the time that those resigned members were on the Resignation Waiting List.

The trial court's statement that the Class Members owned "Equity Memberships" was not a finding that the Class Members remained active members with all of the privileges associated with membership (i.e., use of the facilities and the ability to vote, in exchange for the payment of dues). Instead, the trial court found that the Class Members' rights to refunds had not yet vested, because they had not reached the top of the Resignation Waiting List and their Equity Memberships had not been purchased by PGCC.

Appellants' argument that "no resigned members received notice of impending meetings or the opportunity to vote on any amendments" is flatly contrary to the record evidence. Many Class Members did have the opportunity to vote on the 2016 Bylaw Amendment. For example, 244 Class Members resigned between November 2016 and September 30, 2018, after the 2016 Bylaw Amendment at issue. (R. 1650). Similarly, a number of Class Members downgraded their memberships to a different membership status (for example, from golf to social), and thus retained the ability to vote. (R. 841-42, 1299-1300). Thus, many of the Class Members (including named plaintiffs) had the opportunity to vote on the 2016 Bylaw Amendment.

For example, named plaintiff Thomas Tyler testified as follows during his deposition:

Q. Okay, so you were familiar with the amendments to the bylaws in 2016?

A. No. I wasn't familiar at all.

Q. Okay. Are you aware –

A. I never went to any of the meetings or anything like that. I looked upon the club as being a social institution. That's all.

Q. Are you aware that the bylaws were amended in 2016?

A. Yes, I was aware they were amended.

Q. And you were still an equity member at that time, correct?

A. Yes.

Q. And did you vote on that bylaw change?

A. I don't remember, but I probably did, just to go – just to, you know, participate, but – and I don't recall whether I – if I voted, I voted for. I never voted against.

(R. 1752).

Similarly, named plaintiff Carol Barnes testified:

Q. Now, you testified that you resigned from your golf equity membership 2008 and then you resigned from

your social membership in 2017. Did that get that right?

A. That's right.

Q. Do you recall an amendment to the bylaws in 2016 –

A. Yes, I do.

Q. -- in April of 2016?
Okay.

A. Yes, I do.

Q. Were you told about that amendment –

A. yeah.

Q. -- by the –
You were?

A. Yes.

Q. Okay. Did you vote on that amendment?

A. Yes, I did.

(R. 1762).

When the Class Members joined the Club, they were expressly advised that their membership was “subject to approval and payment of the required membership contribution, dues, fees and charges.” (R. 1706, 1708, 1710). Moreover, it was undisputed that once the Class Members resigned their memberships, they were relieved of

their obligation to pay membership dues. (A. 298, 336; R. 2509). However, in exchange, they forfeited the privileges of membership, including use of the Club's facilities, and notice and the ability to vote at meetings. (R. 360-61, 1799). In the 2016 Bylaw Amendment, PGCC expressly clarified that resigned members were no longer eligible to vote. (A. 282). However, this was PGCC's existing policy prior to the 2016 Bylaw Amendment, and consistent with the Membership Agreements.

The right to a refund was not a vested right, and the Refund Amount in the Bylaws was properly amended through the 2016 Amendment. The failure to provide some Class Members with notice and the right to vote did not render the 2016 Amendment void. Accordingly, the trial court properly granted the Motion for Summary Judgment, and PGCC and Concert respectfully request that this Court affirm the Summary Judgment Order and the Final Judgment.

II. THE TRIAL COURT'S RULING DOES NOT RENDER APPELLANTS' CONTRACT RIGHTS ILLUSORY.

Appellants argue that the trial court erred by finding that the Bylaws could be amended "without limitation" because that interpretation would render the refund provisions in the Bylaws

illusory. Accordingly, Appellants suggest that the trial court was required to rewrite the parties' contract and find that their right to a refund vested immediately upon their resignations. This argument is incorrect for a number of reasons.

First, Appellants did not plead that the Bylaws were illusory or improperly amended. The Complaint does not contain any allegations that the Bylaws are illusory or that the process used for the 2016 Bylaws (or any other amendments to the Bylaws) was improper. As set forth above, Appellants also did not file a reply or avoidance to Appellees' affirmative defenses, and they did not otherwise allege that the Bylaws were illusory before filing their motion for partial summary judgment. (R. 1365).

Second, the ability to amend the Bylaws does not render the Bylaws illusory. Contrary to Appellants' argument, the trial court's finding that the Bylaws could be amended "without limitation" was not the equivalent of finding that PGCC had the unilaterally modify the contract. The Class Members signed Membership Agreements in which they expressly agreed that the Bylaws and Club rules could "be modified in accordance with those documents." (R. 1706, 1708, 1710). Further, all versions of the Bylaws contemplated that they

could be altered, amended, or repealed by a majority vote of Board Members and Equity Members. Thus, the Bylaws could not be modified “unilaterally” by PGCC, but instead through a majority vote of the Board Members and Equity Members, as required by the Bylaws.

The cases cited by Appellants are inapposite. In *Univ. of S. Fla. Bd. of Trustees v. Moore*, 347 So. 3d 545, 548 (Fla. 2d DCA 2022), this Court found that the University of South Florida could not assert the defense of sovereign immunity to defeat a claim for breach of an express written contract, because a contract that cannot be enforced against one party is an illusory contract. *Pan-Am Tobacco Corp. v. Dept. of Corrs.*, 471 So. 2d 4, 5 (Fla. 1984) also involves the issue of whether a state agency can assert the defense of sovereign immunity to defeat a breach of contract claim. In *SCG Harbourwood, LLC v. Hanyan*, 93 So. 3d 1197, 1198 (Fla. 2d DCA 2012), this Court held that one party to a contract could not unilaterally opt out of an arbitration provision months after the parties entered into a contract. None of these cases involve a situation where a contract is expressly subject to amendment by a majority vote and the majority votes to make such an amendment.

The ability to amend the Bylaws does not render them illusory or unenforceable. Private clubs are entitled to designate a process for amendments in their bylaws. This is consistent with the holdings of *Fiddlesticks*, *Hamlet*, and *Share*.

In finding that the Bylaws could be amended “without limitation,” the trial court did not find that they could be amended unilaterally and arbitrarily by PGCC. Instead, this language distinguishes the Bylaws in the instant case from the bylaws at issue in *Feldkamp v. Long Bay Partners, LLC*, 773 F. Supp. 2d 1273, 1281-82 (M.D. Fla. 2011) and *Verandah Dev., LLC v. Gualtieri*, 201 So. 3d 654, 658 (Fla. 2d DCA 2016). The language in the governing documents in *Feldkamp* allowed amendments to the resignation notice procedure, but not the refund obligation itself. *Feldkamp*, 773 F. Supp. 2d at 1282. The governing documents in *Verandah* allowed amendments regarding the members’ rights in or to use the club facilities, but not to the refund policy contained in the membership agreement. *Verandah*, 201 So. 3d at 658. By contrast, the Bylaws in the instant case do not contain any limitations on the rights and obligations that can be amended.

Appellants argue that the refund provision is illusory because the resigned equity members did not vote on the 2016 Amendment. Accordingly, they suggest that the trial court should have “interpreted” the Bylaws to find that resigned members refund rights to a particular refund amount vested on their resignation. However, this is not a reasonable interpretation, and it would require the trial court to rewrite the parties’ contract. The right to a refund is not a vested right in the Membership Agreements. It is contained only in the Bylaws, which are subject to amendment, and were in fact amended multiple times.

Florida law is clear that a court does not have the power to rewrite the terms of a contract.

When contracting parties elect to adopt a term or condition, including one addressing the question of modification, it is not the province of a court to second guess the wisdom of their bargain, or to relieve either party from the burden of that bargain by rewriting the document.

Fiddlesticks, 363 So. 3d at 1182 (quoting *Okeechobee Resorts, L.L.C. v. E Z Cash Pawn, Inc.*, 145 So. 3d 989, 993 (Fla. 4th DCA 2014)).

Appellants continually attempt to frame the 2016 Bylaw Amendment as current, active members voting for a change that

would detrimentally impact resigned equity members. In reality, the amendment impacted all members because it changed the refund amount for all members. Further, as set forth above, if not for the 2016 Bylaw Amendment, only six golf members, two tennis members and five social members would have reached the top of their respective Resignation Waiting Lists. (R. 887-897). Thus, of the approximately 700 Class Members, only a handful would have ever become entitled to a refund before the 2016 Bylaw Amendment.

The trial court's interpretation of the Bylaws did not render the rights under the Bylaws illusory. Instead, the trial court properly determined that the Bylaws set forth a process for amendments. PGCC complied with the amendment requirements in connection with the 2016 Amendment. Accordingly, the trial court properly granted summary judgment in favor of PGCC and Concert, and PGCC and Concert respectfully request that this Court affirm the Summary Judgment Order and the Final Judgment.

III. THE TRIAL COURT PROPERLY FOUND THAT CLASS MEMBERS' STATUS AS RESIGNED MEMBERS WAS IRRELEVANT TO THEIR REFUND RIGHTS.

In the Summary Judgment Order, the trial court found as follows:

PGCC did not breach the membership agreement(s) with the class members, because the alleged right to a refund exists solely in the Bylaws, which were always subject to amendment from time to time. The Court finds that the class members' status as resigned members is irrelevant because the membership agreements contemplated that the Bylaws could be amended regardless of a members' status.

(R. 2181). Appellants argue that the trial court erred in finding that their status was irrelevant because the Club Bylaws could not apply to them if they were no longer members.

This argument ignores the fact that the right to a refund, if any, arises only through a Class Member's status as a resigning member of PGCC. In connection with their purchase of their memberships, the Class Members signed Membership Agreements and expressly agreed: (1) to be bound by the Bylaws; and (2) that they understood that the Bylaws could be modified.

Appellants cite a number of cases for the proposition that strangers to a contract cannot be bound by that contract. *See City of Tampa v. Thornton-Tomasetti, P.C.*, 646 So. 2d 279, 282 (Fla. 2d DCA 1994); *Onderko v. Advanced Auto Ins., Inc.*, 477 So. 2d 1026, 1028 (Fla. 2d DCA 1985); *Delta Air Lines, Inc. v. Wilson*, 210 So. 2d 761 (Fla. 3d DCA 1968); *State v. Citrus Cnty*, 157 So. 4, 6 (Fla. 1934).

These cases are inapposite because the Class Members are *not* strangers to the relevant contract. They are seeking to enforce rights that only flow through their purchase of memberships with PGCC. The fact that those rights may not vest until many months (or years) after the Class Members resigned their membership interests does not impact PGCC's ability to amend its Bylaws or mean that the Class Members will not be bound by any Bylaw amendments.

Contrary to Appellants' arguments, *Hamlet*, *Share*, and *Fiddlesticks* are not meaningfully distinguishable. Appellants attempt to distinguish these cases on the basis that the plaintiffs in these cases were still members of their respective clubs at the time that the bylaws were amended. However, none of these cases make this distinction. Instead, each of these cases hold that the rights that the plaintiffs sought to enforce were not vested rights because they were contained within bylaws that were subject to amendment. See *Hamlet*, 622 S. 2d at 1082 (“[w]e conclude that the members did not have vested rights and reverse.”); *Share*, 312 So. 3d at 970 (“[a] private club’s bylaws governing the terms of membership do not create vested rights and are subject to amendment.”); *Fiddlesticks*, 363 So. 3d at 1182 (“[e]xamining the bylaws as a whole, there is

simply no basis to conclude that the Club’s governing documents fixed, or vested, a right to a specific Equity Certificate redemption rate.”)

As the trial court properly recognized, “*Hamlet* and *Share* are applicable to the facts of this case,” and are not distinguishable based on the fact that the Class Members resigned before the 2016 Bylaw Amendment. (R. 2182). The Class Members’ status as resigned equity members is not relevant to PGCC’s right to amend the Bylaws. Accordingly, PGCC and Concert respectfully request that the Court affirm the Summary Judgment Order and the Final Judgment.

IV. THE TRIAL COURT PROPERLY FOUND THAT PGCC HAD NO OBLIGATION TO CONTINUE SELLING EQUITY MEMBERSHIPS IN PERPETUITY

Appellants argue that the trial court erred by finding that Class Members were not entitled to a refund until they reached the top of the Resignation Waiting List. As Appellants correctly note, this means that any questions regarding the propriety of the 2016 Bylaw Amendment would be moot for the majority of the Class Members, “who did not, in fact, reach the top of the waiting list and have their membership certificates repurchased.” (Initial Brief, 47). Appellants argue that this finding was an error because Appellees allegedly made

it impossible for many Class Members to fulfill this condition precedent when PGCC sold its assets to Concert and stopped selling equity memberships.

This argument ignores the express language of the Bylaws, which specifically contemplate that PGCC may liquidate its assets and stop selling equity memberships. There is nothing in the Bylaws that requires PGCC to continue selling equity memberships in perpetuity. Instead, each and every iteration of the Bylaws contained a liquidation clause that provided for payment of equity refunds if the Club's assets were liquidated. "In the event the Club's **assets are liquidated, distribution of the proceeds thereof** 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." (A. 180, Art. 3.12; A. 200, Art. 3.12; A. 217, Art. 3.12; A. 233, Art. 3.11; A. 249, Art. 3.11; A. 266, Art. 3.11; A. 284, Art. 3.10) (emphasis added). It is undisputed that each and every individual member agreed to this provision.

Clearly, if the Club's assets were liquidated then PGCC would be unable to sell new memberships, which was a condition precedent

for resigned members to reach the top of the waiting list and be entitled to a refund. With full knowledge of that scenario, the parties agreed that, in the event the Club's assets were liquidated (which they were), all Equity Members would receive a pro rata share of the proceeds from the sale. Accordingly, if the Club was sold, no new memberships would be sold, no additional refunds would be paid into the Escrow Account, no additional funds would be available to repurchase memberships from resigned members on the Resignation Waiting List. This is a scenario that all Class Members acknowledged when joining the Club.

Here, PGCC did not receive any funds as part of the sale. Rather, Concert agreed to assume PGCC's debt, and to make millions of dollars in capital contributions to improve the Club's facilities. (R. 2502). Since there were no proceeds, the Class Members were not entitled to receive anything under the terms of the Bylaws. However, as part of the sale, Concert agreed to pay each and every resigned member their full refund amount – as calculated by the 2016 Amendment. (R. 2503-04). While the Class Members may not be satisfied with the outcome, there can be no claim for breach of

contract when a contingency contemplated by the contract actually occurs.

This result is also consistent with the Class Members' express agreement in the Membership Agreements that:

Memberships are being offered exclusively for the purpose of permitting persons acquiring a membership to use the Club facilities. Memberships should not be viewed or acquired as an investment and no person purchasing a membership should expect to derive any economic profits from membership in the Club.

(R. 1706).

Appellants argue that the Court erred by finding that Class Members were required to reach the top of the Resignation Waiting List as a condition precedent to receiving a refund, because PGCC stopped selling equity memberships, rendering it impossible to fulfill this condition. However, the Bylaws expressly contemplate the fact that PGCC may liquidate its assets, and thus, stop selling equity memberships. Accordingly, PGCC and Concert respectfully request that the Court affirm the Summary Judgment Order and the Final Judgment.

V. THERE ARE ADDITIONAL GROUNDS ON WHICH THE COURT CAN AFFIRM THE FINAL JUDGMENT.

In addition to granting summary judgment on the breach of contract claim because the Class Members did not have a vested contractual right to refund payments unless and until they reached the top of the Resignation Waiting List, the trial court also granted summary judgment on a number of other grounds. Appellants do not challenge these rulings in their Initial Brief. Accordingly, this Court should also affirm on these grounds.

The trial court found that PGCC and Concert were entitled to summary judgment on their affirmative defenses of release and waiver with respect to the 550 Class Members who executed releases and were paid \$1200. (R. 1979-80). The trial court also granted summary judgment in PGCC on Appellants' unjust enrichment claim because there was an express and enforceable contract between the parties (the Membership Agreements) and because there was no evidence that PGCC or Concert received any direct benefit from the Class Members' equity payments. (R. 2183, ¶¶ 8, 9). The trial court granted summary judgment in favor of Concert on Appellants' fraudulent transfer claim because the sale was made for reasonably equivalent value, and there was no intent to defraud, hinder or delay the Class Members. (R. 2183-84, ¶¶ 10, 11). The trial court granted

summary judgment on Appellants' claim for account stated because the resignation acknowledgment letters did not create any vested contractual rights, did not alter PGCC's right to amend under the Bylaws, and there was no evidence that Concert sent any of the letters that Plaintiffs claim constitute an account stated. (R. 2185, ¶ 13).

Appellants do not assert any error with respect to any of these matters in their Initial Brief. Issues not raised in the initial brief are considered waived or abandoned. *See State v. City of Weston*, 316 So. 3d 398, 408 (Fla. 1st DCA 2021). The trial court's unchallenged rulings are res judicata. *Id.* (quoting *Fla. Dept. of Transp. v. Juliano*, 801 So. 2d 101, 107 (Fla. 2001)). Accordingly, PGCC and Concert respectfully request that this Court affirm the Partial Summary Judgment Order, the Summary Judgment Order and the Final Judgment as to the 550 Class Members who executed releases, and as to all Class Members on Appellants' claims for unjust enrichment and fraudulent transfer.

CONCLUSION

For the reasons set forth herein, PGCC and Concert respectfully request this Court affirm the Final Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of January, 2024, a true and correct copy of **ANSWER BRIEF** has been electronically filed with the Clerk of Court by using the Florida Courts E-Filing Portal System, which will send a notice of electronic filing and copy to Benjamin A. Christian, bchristian@mctlaw.com, mctlaw, 1605 Main Street, Suite 710, Sarasota, FL 34236.

/s/ Lindsay Patrick Lopez
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the type style and size used in this brief is Bookman Old Style 14-point and that this brief complies with the requirements of Florida Rule of Appellate Procedure 9.210(a)(2), because it contains 9,797 words.

/s/ Lindsay Patrick Lopez
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