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

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

Plaintiffs,

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

v.

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

Defendants.
_____/

**DEFENDANTS' RESPONSE IN OPPOSITION TO MOTION FOR REHEARING**

Defendants, Concert Plantation, LLC ("Concert") and Plantation Golf and Country Club, Inc. ("PGCC" or the "Club") (collectively "Defendants"), and pursuant to this Court's Order dated January 20, 2023, hereby file their Response in Opposition to Plaintiffs' Motion for Rehearing (the "Response"), filed by Plaintiffs on January 18, 2023 (the "Motion"). In support of this Response, Defendants state as follows:

**INTRODUCTION**

Rehearing is not warranted as the Court's Orders on the Summary Judgment motions (collectively, the "Orders"), were not erroneous. Based on the decisions in *Hamlet Country Club Inc. v. Allen*, 662 So. 2d 1081 (Fla. 4th DCA 1993) and *Share v. Broken Sand Club, Inc.*, 312 So. 3d 962 (Fla. 4th DCA 2021), the Court properly found that PGCC had the right to amend the Bylaws at any time and that the Membership Agreements, which incorporated the Bylaws, were not illusory.

In the Motion, and for the first time in this litigation, Plaintiffs argue a new cause of action that was never pled, was not briefed in any of the summary judgment motions or the responses thereto, and was not argued before the Court when the Orders were entered. Specifically, Plaintiffs now claim that because Plaintiffs each "owned" an equity membership that was on a waiting list to be purchased by the Club, Plaintiffs remained active members of the Club, and were entitled to vote on the 2016 Amendment (the "2016 Amendment"). In the Motion, Plaintiffs argue (for the first time), that the Club then breached the Bylaws by not allowing the Plaintiffs to vote on the 2016 Amendment. As more fully discussed below, Plaintiffs' reading of the Bylaws is incorrect. Regardless, the Motion should be summarily denied because Plaintiffs are seeking relief for an unpled claim.

In their Complaint, Plaintiffs alleged that PGCC breached the Membership Agreements by "divest[ing] the Plaintiffs of their rights to receive the proper Refund Amount…by retroactively applying the 2016 Bylaws…" (Compl., ¶ 49). Plaintiffs did not allege any breach in the Bylaw amendment process related to the vote on the 2016 Amendment, i.e. that Plaintiffs were deprived of their contractual right to vote.[1] Instead, Plaintiffs simply alleged and argued that PGCC breached the Bylaws by amending the Bylaws to reduce the amount of the equity refund. Accordingly, Plaintiffs' attempt to litigate this unpled theory is procedural improper, and the Motion should be denied.

[1] Further, the evidence in the record was that, at the time of the 2016 Bylaw amendment, many of the Class Members did still have the right to vote and could have voted or did vote on the 2016 Bylaw Amendment.

The Court correctly concluded, based on *Hamlet* and *Share*, that the right to a refund was not a vested right because: i) the right existed solely in the Bylaws which were subject to amendment from time to time; and ii) none of the Plaintiffs or class members had reached the top of the resignation waiting list when the 2016 Amendment was passed. Thus, summary judgment was proper. As the Court noted in its Order on Defendants' Motion for Summary Judgment on the Fourth Amended Complaint, 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*. Thus, the effect of a "determination of an Equity Member's status" is irrelevant to the issues in this case.

Next, the Court further properly found that, based on the record evidence, Plaintiffs could not establish a claim for unjust enrichment because: i) there was an express contract between PGCC and Plaintiffs; and ii) the evidence demonstrated that the contents of the escrow account were only used to refund members. Therefore, Plaintiffs could not establish that Plaintiffs conferred a benefit on PGCC or Concert.

Finally, the Court properly found that Defendants were entitled to summary judgment on the fraudulent transfer claims because there was direct evidence of the intent of the sale, which was to ensure that each and every resigned member was paid 100% of the equity refund to which they were entitled under the 2016 Amendment. Accordingly, the Motion should be denied.

## UNDISPUTED RECORD EVIDENCE ON WHICH THE SUMMARY JUDGMENT MOTIONS AND ORDERS WERE BASED.

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

PGCC's Bylaws also provided that it was to be governed by a Board of Directors, made up of nine Equity Members of the Club. (Id. at Art. 5). The Board was responsible for managing the Club, including adoption or amendment of Club policies, and establishing the price for equity membership. To become a member of the Club, each Plaintiff was required to fill out a membership application. The membership application throughout the years provided that: 1) the member agreed to be bound by the terms and conditions of the Club's Bylaws and General Rules; 2) the member understood that the Bylaws and General Rules could be amended from time to time; and 3) memberships were for the purpose of acquiring a membership to use the Club facilities and the "**membership should not be viewed or acquired as an investment and no person purchasing a membership should expect to derive any economic profits for the**

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

**membership in the Club."** (Membership Applications, DIN 959 Composite Exhibit 3) (emphasis added). In addition, Equity Members received a Membership Certificate, which noted their interest in the Club and the amount of their equity contribution. (Membership Certificates, DIN 959 Composite Exhibit 2).

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

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

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

Waiting List), respectively. The Resignation Waiting List consisted of the resigned equity members of PGCC ordered according to their date of resignation, with those who resigned first at the top of the list. (Oct. 14, 2021, Hrg. Trans. p. 20).

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

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

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

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

> 3.9.2 [No Change]
>
> 3.9.3 The Club shall maintain an Escrow Account into which monies from the sale of memberships shall be placed. These monies shall be the net amount of monies received after the Club has deducted the Club's initiation or transfer fee. All monies in this account shall be paid out to the resigned categories in accordance with the priority on the Resigned Members Waiting List.
>
> 3.9.4 [No Change]

c) March 17, 2008 – New Bylaws Adopted

> 3.9.2 [No Change]

3.9.3 [No Change]

3.9.4 [No Change]

d) March 22, 2010 – New Bylaws Adopted

3.8.2 [Same as prior 3.9.2]

3.8.3 [Same as prior 3.9.3]

3.8.4 [Same as prior 3.9.4]

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

3.7.2 The resold Equity membership shall be transferred, and an appropriate Certificate of Membership issued to the purchaser, upon the purchaser's payment of one hundred percent (100%) of the then current Equity Membership price to the Club. Upon receipt of the then current Equity Membership price, the Club will pay to the selling Member the following: eighty percent (80%) of the Equity Membership price originally paid or deemed to be paid by such selling Member in the case of Tennis Equity I or Social Equity I Member, and fifty percent (50%) of the Equity Membership price originally paid by such selling Member in the case of a Tennis Equity II or Social Equity II Member, less any amounts due from the selling member to the Club. In the case of a Regular Equity Member, the Club will pay to the selling Member the following percentage of the Equity Membership price originally paid or deemed to be paid by such selling member, as applicable, less any amounts due from the selling Member to the Club: Regular Equity Member I – eighty percent (80%); Regular Equity Member II – seventy percent (70%); Regular Equity Member III – sixty percent (60%); Regular Equity Member IV – fifty percent (50%); Regular Equity Member V – forty percent (40%); Regular Equity Member VI – zero percent (0%).

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

3.8.3 [No Change]

3.8.4 [No Change]

f) March 25, 2013 – Amended Bylaws

3.7.2 [No Change]

3.8.2 [No Change]

3.8.3 [No Change]

3.8.4 [No Change]

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

3.7.1 The Club currently offers Equity Memberships with a non-refundable equity portion of the Joining Fees. Nevertheless, if a resigned member is entitled to receive a refund of a percentage of the equity portion such member paid to the Club pursuant to the Prior Bylaws ("Refundable Equity Member"), the Club shall refund the Refundable Amount to such resigned member in accordance with these Bylaws. The "Refundable Amount" in each such case shall be equal to eighty percent (80%) of the equity portion of the Joining Fees the Club receives for issuance of an Equity Membership to a new Equity Member, less any amounts still owed to the Club by the resigning member. Notwithstanding the preceding sentence, the Club shall not pay any Refundable Amount until the Joining Fees have been paid in fully by the new member.

3.7.2 The Club previously issued, but is no longer offering, Regular Equity Memberships. For purposes of repayment of a Refundable Amount, resigned Regular Equity Memberships shall be considered to be in either the Full or Golf Equity Membership category, as applicable, and resigned Regular Equity Memberships shall be placed on the same Resigned Members Waiting List as Full and Golf Equity Memberships. Resigned Tennis Equity Memberships and Social Equity memberships shall be placed on the respective separate Resigned Members Waiting List accordingly.

3.8.2 If a Refundable Equity member resigns, the resigned Equity Membership shall be placed next in line on the Resigned Members Waiting List in order to receive from the

> Club the Refundable Amount, if any, upon payment to the Club of the then current Joining Fees by a new member.
>
> 3.8.3 The Club shall maintain an escrow account into which the Club shall deposit eighty percent (80%) of the equity portion of the Joining Fees paid by each new Equity Member (the "Escrow Account"). All monies in the Escrow Account shall be paid out to the applicable resigned members in accordance with the priority on the Resigned Members Waiting List. Within thirty (30) days of the Club's receipt of the Club's receipt of one hundred percent (100%) of the Joining Fees, the Club will pay to the resigned member in the first position on the Resigned Members Waiting List the applicable Refundable Amount, if any. Notwithstanding anything to the contrary in these Bylaws, the Escrow Account shall be the sole source of funds used to pay Refundable Amounts, if any, to resigned members. From and after the date upon which all Refundable Amounts which may be payable to Refundable Equity members have been paid, the Escrow Account will be closed and terminated.
>
> 3.8.4 [No Change]

Over the years, the forgoing amendments were made to the equity provisions of the Bylaws based on member and Club needs, as well as economic conditions. (Trent Decl. ¶ 7). In particular, with respect to the 2016 Bylaw amendments, market conditions significantly affected the price of equity memberships. (Oct. 14, 2021, Hrg. Trans. pp. 24-26). During that time, the market conditions experienced throughout the private club world forced PGCC to reduce the price of its equity memberships, resulting in the increasing inability to pay its resigned equity members within what had been historically a reasonable period of time. (Id.). Indeed, as a result of the dramatic decrease in the prices of PGCC private club membership, it would take decades (if not centuries) for some of the Plaintiffs to receive any refund, to the extent they were otherwise eligible if and when they reached the top of the Resignation Waiting List. The 2016 Bylaw

amendments were made because the price of a membership in 2016 was $5,000 for golf, $1,600 for tennis and $1,000 for social, whereas previously, the prices the Club had charged were $30,000 for golf, $4,200 for tennis, and $2,400 for social. (Id.); (Trent Decl. ¶ 7). The refund payments were only to be paid from an escrow account funded by the sale of new memberships net of PGCC's initiation or transfer fees (the "Escrow Account"). (Oct. 13, 2021, Hrg. Trans. Pp. 86-88).

When a new member joined the Club, they paid joining fees. The equity portion (80 percent) went into the equity reserve account, or the Escrow Account. (Id.). To be entitled to a refund, the member had to 1) reach the top of the waiting list as a result of payment of the equity refund amounts due to those who were ahead of such Member; and 2) a membership had to be sold that provided the funds to repay the resigning member's refund. (Oct. 14, 2021, Hrg. Trans. pp. 21-22). The process was the same for all equity memberships regardless of whether the member had a golf, tennis, or social membership. (Oct. 14, 2021, Hrg. Trans. p. 24). Once enough memberships were sold that the Club could refund the person at the top of the list (to the extent the person was entitled to a refund), PGCC would issue a check to the person at the top of the list. (Id. at pp. 22-24). In determining the amount of refund a member received, PGCC was governed by the Bylaws in effect at the time the member reached the top of the waiting list. (Nov. 1, 2021, Hrg. Trans. pp. 12-13). To the extent there were no funds in the Escrow Account because no new memberships being sold, no resigned equity members would be paid their Refund Amount. (Id. at pp. 11-13).

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

Specifically, prior to the sale of the Club assets to Concert, PGCC issued golf equity refunds in the amount of $1,200.00 per member, which were accepted by 110 equity members on the Resignation Waiting List ("Refunded Resigned Golf Equity Members"). (Id.). Additionally, PGCC issued tennis equity refunds in the amount of $480.00 per member, which were accepted by 20 equity members on the Resignation Waiting List ("Refunded Tennis Equity Members"). (Id.). Finally, PGCC issued social equity refunds in the amount of $240.00 per member, which were accepted by 40 social members on the Resignation Waiting List ("Refunded Social Equity Members") (collectively, the "Refunded Equity Members"). (Id.). All of the aforementioned payments were made from the time that the April 2016 Bylaws were adopted until PGCC sold its assets to Concert. (Id.).

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

a) Concert will establish and operate a new club, and Concert will have no liability or obligation to PGCC or any former or current members of the Club except as set forth in the PSA. (PSA, p. 1 Sec. A).

b) PGCC agreed to sell to Concert PGCC's real property, certain personal property associated with the operation of the Club, intangible property and property rights, and other items incident to establishing a new club (the "Club Property"). (Id. at § 1.1).

c) Concert agreed to assume certain contracts and leases of PGCC, with a value of approximately $300,000. (Id. at § 1.4 and Exhs. C and D); (Trent Decl. ¶ 9).

d) In exchange for the sale of the Club Property, Concert agreed to i) pay off PGCC's mortgage loan in the amount of $4,546,645.68; ii) pay off PGCC's remaining financial obligations under the SWAP agreement with SunTrust Bank in the amount of $35,000; iii) pay the resigned Members as set forth in Section 4.3 of the PSA and according to the Bylaws in effect at the time of the sale in the estimated amount of over $500,000; iv) fund capital improvements at the Club in

the amount of $3.25 million, with an initial deposit of $1,000,000.00 to start those projects; and v) pay PGCC's attorneys' fees in the amount of $50,000. (PSA at § 2.1, 4.1, 4.3, 5.5); (Trent Decl. ¶ 9).

e) Concert's new club would be a private club pursuant to which there would be no special, direct, or capital assessments to the new club members; there would be no new dues increases for a period of two years; new club members were provided reciprocity at other clubs in the Concert family; the current equity members forfeited any right to a future refund of their equity contributions; and Concert allowed PGCC's members to become members of the new club without payment of any membership fee or deposit. (PSA at § 5.5); (Trent Decl. ¶ 9).

f) PGCC was required to obtain approval of both the Board of Directors and the equity members of the Club as provided by PGCC's Bylaws and Florida law. (PSA at § 9.3, 10.1).

As part of the sale of PGCC's assets to Concert, and in addition to the items listed in (a) through (f) above, immediately after closing of the sale, PGCC and Concert offered to pay (i) **all** of the resigned equity members (ii) the **full** amount of the Equity Refund payment they would receive had they continued to observe the full term of matriculation of the wait list procedure and remain on the wait list for an unknown extended period of time, (iii) reached the top position of that waiting list and (iv) enough funds accumulated in the Escrow Account simply in exchange for execution and provision of their release of any claims against PGCC or Concert related to their former membership in PGCC. (PSA at § 5.5). Over 500 resigned equity members accepted this offer, and they were paid in exchange for their

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

## ARGUMENT

### A. Motion For Rehearing Standard.

Under rule 1.530, a party may move for rehearing of final orders "to give the trial court an opportunity to consider matters which it overlooked or failed to consider." *Balmoral Condo. Ass'n v. Grimaldi*, 107 So. 3d 1149, 1151 (Fla. 3d DCA 2013) (citing *Carollo v. Carollo,* 920 So.2d 16, 19 (Fla. 3d DCA 2004) (citing *Pingree v. Quaintance,* 394 So.2d 161 (Fla. 1st DCA 1981))). Under rule 1.530,

> [a] rehearing is a second consideration of a cause for the sole purpose of calling to the attention of the court any error, omission, or oversight that may have been committed in the first consideration. Upon the timely filing of a petition for rehearing, the court may reopen the case and reconsider any or all of the provisions of its final decree.

*Id.* (citing *Langer v. Aerovias, S.A.,* 584 So.2d 175, 176 (Fla. 3d DCA 1991)). Here, the Court did not overlook or fail to consider any matters, and rehearing is not warranted.

## B. The Court Properly Found That the Claim to a Refund Was Not a Vested Right.

In Count I, Plaintiffs asserted a cause of action against PGCC and Concert for breach of contract, alleging that Plaintiffs entered into a binding contractual relationship with PGCC, i.e. the Membership Agreements, which incorporated the Bylaws as amended from time to time. (Compl. ¶ 43). Plaintiffs claimed that PGCC breached the terms of the Membership Agreements "by taking the position that they are entitled to unilaterally divest Plaintiffs of the right to receive the proper refund amount in accordance with the refund formula by retroactively applying the 2016 Bylaws to Plaintiffs." (Id. at ¶ 49). In their Motion for Summary Judgment, Plaintiffs argued that the 2016 Amendment "breached every existing contract with a resigned member" because it "eliminated a promise to pay the equity fees and significantly reduced the amount of money the Club was willing to refund." (Pl. MSJ. p.11).

The Court's decision on the motions for summary judgment on Count I turned solely on the issue of whether or not PGCC had the right to amend the Bylaws. This was the issue that Plaintiffs raised in their pleadings and in their motion for summary judgment. No other breach of contract was alleged. The Court found that PGCC had the right to amend, as the Bylaws were always subject to amendment from time to time, as agreed to by each and every class member in their respective membership agreement(s). Because PGCC had that right, there was no viable cause of action for a breach of contract. The issue is and always has been whether PGCC was legally entitled to amend its Bylaws. Based on *Hamlet* and *Share*, which are still good law, the Court found that PGCC could

amend because the right to a refund was not a vested right until a resigned member reached the top of the waiting list.

The Court's Order denying Plaintiff's Motion for Partial Summary Judgment and Granting Defendants' Motion for Summary Judgment on the Fourth Amended Complaint was based primarily on the decision in *Hamlet Country Club Inc. v. Allen*, 662 So.2d 1081 (Fla. 4th DCA 1993). This case is still good law, and the Motion does not attempt to explain why the Court was incorrect in its reasoning in relying on this case. Indeed, Plaintiffs' Motion does not even address *Hamlet*.

In *Hamlet*, the plaintiff members of the defendant club sought redemption of their memberships. The issue on appeal involved whether the club could amend its bylaws to change the terms under which members were entitled to resign or transfer their membership or whether those provisions were vested rights that could not be altered. *Id.* at 1082. The Fourth District Court of Appeal held that the members did not have vested rights because the rights came from the bylaws which were subject to amendment. This situation was distinguishable from amending a vested contractual right.

The evidence needed to consider this legal issue is the language of the Bylaws and the Membership Agreement. Only the Bylaws provide the right for an equity member to receive a refund of a portion of the equity contribution and only under certain conditions. (See e.g. Bylaws March 26, 2001, Section 3.9.2; Bylaws November 15, 2010, Sections 3.7.2, 3.8.2; Bylaws April 1, 2016, Sections 3.7.1, 3.7.2, 3.8.2, 3.8.3). The membership application does not mention any right to a refund. (See Membership Applications, DIN 959, Composite Ex. 3). There is no

dispute that each and every named Plaintiff and class member agreed that the Bylaws could be amended from time to time. (See Membership Applications, DIN 959, Composite Ex.3).

Each time PGCC amended its Bylaws, PGCC followed the procedures set forth in the Bylaws for doing so. (Trent Decl. ¶ 8). The Court properly found that, here, much like in *Hamlet*, the right to a refund was not a vested contractual right because it was only a provision in the Bylaws, and the Bylaws could be amended from time to time, as agreed by all members in their membership agreements. *See Share v. Broken Sand Club, Inc.*, 312 So.3d 962 (Fla. 4th DCA 2021). ("A private club's bylaws governing the terms of membership do not create vested rights and are subject to amendment.").

In contrast, Plaintiffs rely on *Feldkamp v. Long Bay Partners, LLC*, 773 F. Supp. 2d 1273 (M.D. Fla. Feb. 18, 2011) and *Verandah Dev., LLC v. Gualtieri,* 201 So. 3d 654 (Fla. 2d DCA 2016), in support of their argument that PGCC could not apply the 2016 Amendment retroactively. However, the critical distinction between *Feldkamp* and *Verandah* is that the membership agreements in those cases specifically provided that the members were entitled to a fixed refund amount, within a specified period of time, after their resignation. In other words, the right to a refund was fixed, and defined in the contract itself – not the bylaws. Accordingly, each and every member of those clubs had a vested contractual right to a refund once they resigned.

Here, Plaintiffs' "right" to a refund only existed in the Bylaws and did not vest unless and until the member reached the top of the resignation waiting list. It is

undisputed that none of the Plaintiffs or class members reached the top of the resignation waiting list prior to the 2016 Amendment. Therefore, unlike *Feldkamp* and *Verandah*, none of the Plaintiffs had a vested contractual right to a refund. Plaintiffs ignore this critical distinction, and argue that the Court's decision rendered the Membership Agreements illusory. However, as explained in *Hamlet*, the 2016 Amendment does not make the Membership Agreements illusory because the rights provided by the Bylaws are not vested rights and are subject to amendment. *See Hamlet*, 662 So.2d at 1083.

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

Moreover, Plaintiffs' claim that the Membership Agreements are illusory was correctly rejected by the Court because all of the Plaintiffs received the benefit of their bargain. Prior to their resignations, all of the Plaintiffs were members of the Club. Once the Plaintiffs resigned their memberships, each and every class member was relieved of their obligation to pay membership dues. In exchange, the class members were no longer permitted to use of the Club's facilities. This is the very nature of a private club membership agreement, i.e. payment in exchange for membership and use. However, the class members retained ownership of their respective memberships, which were put on a list to be purchased by the Club once that member reached the top of the waiting list.

In the Motion, Plaintiffs now take issue with assertion that the class members retained ownership of an equity membership after their resignation. Plaintiffs now argue (for the first time) that if the class members retained ownership of an equity membership, then each class member was entitled to vote on the 2016 Amendment. While not pled, or argued at any of the hearings on the summary judgment motions, Plaintiffs now claim that since some of the class members did not vote, the 2016 Amendment is ineffective. Respectfully, Plaintiffs misconstrue Defendants' argument and the Court's holding.

In response to Plaintiffs' argument that the right to a refund was a vested right, the Defendants argued that the Bylaws always contemplated that the Club's assets could be liquidated, which would eliminate the resignation waiting list and potentially change the amount each member was entitled to receive. "In the event the Club's assets are liquidated, distribution of the proceeds therefrom to the

Equity Members shall be pro-rated on the basis of the Member's equity value." (DIN 481, p. 86, § 3.11) (emphasis added).

It is undisputed that each and every iteration of the Bylaws contained a provision providing for liquidation of the Club's assets. Obviously, if the Club was sold, it would be impossible for the Club to sell any new memberships, which was a requirement for a member to move up the resignation waiting list. Moreover, once the Club was sold, all members (resigned and current) that were entitled to an equity refund payment, would be allowed to share in the proceeds of the sale on a pro rata basis. Accordingly, if the Club was sold, no new memberships would be sold, and the amount of an equity refund was subject to change, i.e. the right to a refund was uncertain and not vested until a member reached the top of the waiting list. This is a scenario that all class members acknowledged when joining the Club.

Notwithstanding the liquidation clause, and their agreement to same, Plaintiffs now complain that that PGCC eliminated their ability to move up the waiting list when the Club was sold. Plaintiffs' argument is that their equity refund amounts vested once their resignations became effective, and the sale of the Club to Concert did not affect their right to a "full" refund. However, Plaintiffs theory would lead to an absurd result.

In Florida, courts may not interpret contracts to reach absurd results. *See Philip Morris USA Inc. v. Freeman*, 285 So. 3d 999, 1002 (Fla. 1st DCA 2019). Here, it is undisputed that the only source of funds for payment of equity refunds was an escrow account that was funded when a new membership was sold. When the Club was sold, PGCC was not able to sell new memberships. Therefore, the

escrow account could not be funded, and no memberships could be purchased from the waiting list. Accordingly, the only logical conclusion is that once the Club was sold, the liquidation clause would govern the resigned members' rights to a refund, if any. In other words, the amount of a refund was subject to change, and could not be vested as a matter of law.

Here, PGCC did not receive any funds as part of the sale. Rather, Concert agreed to assume all of PGCC's debt, and also agreed to make millions of dollars in capital contributions to improve the Club's facilities. 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.[4] 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.

Further, Plaintiffs never pled that PGCC did not properly follow the Bylaws or Florida law during any amendment process. Also, Plaintiffs did not plead any issues related to voting on or the passing of the Bylaws. Accordingly, there was no pleading, argument or evidence presented that the Bylaws were not properly amended. Instead, now that final judgment has been entered against them, Plaintiffs argue (for the first time) that as resigned equity members, they should have been able to vote on the 2016 Bylaw Amendment based on the Court's use

[4] This fact in and of itself also defeats Plaintiffs' claim for fraudulent transfer.

of the definition of “Equity Member” in an example in the order granting Defendants’ Motion for Summary Judgment.

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, 645 (Fla. 4th DCA 2015) (“[a] trial court is without jurisdiction of 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 (Fla. 2d DCA 1976).

Here, Plaintiffs did not plead a breach of contract based on their failure to vote on the 2016 Amendment. Moreover, Plaintiffs never raised this issue in support of their own motion for summary judgment, or in response to Defendants’ summary judgment motions. Indeed, Defendants repeatedly stated that there was no objection to the amendment process itself, or the vote that approved the 2016 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**.” (DIN 959, p. 2) (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**.” (*Id,* p. 15) (emphasis added). Accordingly, this Court has no jurisdiction to award Plaintiffs relief for an unpled claim, and the Motion should be denied.

Further, even if Plaintiffs could raise this issue now (they cannot), many of the class members actually voted on the 2016 Amendment. Specifically, 244 class members resigned between November 2016 and September 30, 2018, after the 2016 Amendment at issue. (PSA, Sched. 4.3(a)). Thus, many of the class members in this lawsuit (including named plaintiffs) had the opportunity to vote on the 2016 Amendment that they now claim they were not allowed to vote on, is illusory, and does not apply to them. (Tyler Depo. Trans. p. 13; Barnes Depo. pp 9-10);(Interrogatory Responses, Composite, Ex. 1). Further, Plaintiffs' argument is pure speculation as to whether the Class Members would have voted for the Bylaw amendment or whether they would have voted at all.

Plaintiffs further claim that Plaintiffs bargained for the right to a refund of 80% of their equity buy in. Based on the record evidence, this simply is not true. As discussed above, as an example, in March 2013, some of the equity members were only entitled to receive 60% of their equity contributions. (Anderson Depo. Tran., Ex. 2). Moreover, the percentage, amount, and timing of any refund was always subject to amendment in accordance with the Bylaws. Accordingly, it was not possible for anyone to determine, much less bargain for, a specific amount of a refund at the time the Membership Agreements were executed. Thus, Plaintiffs did not bargain for the right to an 80% refund of their equity contribution.

Again, Plaintiffs continue to rely on *Feldkamp* to support their claim. However, as the Court's order denying Plaintiffs' Motion for Summary Judgment recognizes, *Feldkamp* is distinguishable because, in that case, the governing club contract limited the club to amending the Bylaws pertaining to the members' use

of the club facilities, and because the right to a refund was contained in the membership agreement itself and not the bylaws. (Order, p. 5). There is no such limitation here, and the "right" to a refund only exists in the Bylaws which is subject to amendment from time to time.

Next, even if the named Plaintiffs and class members had a vested contractual right to a refund payment (which, as the Court found, they did not), nearly all of the class members have expressly released their claims by executing a written release or have waived their claims by accepting payment from PGCC. The Court granted summary judgment on Defendants' affirmative defenses of release and waiver, and that is not the subject of the Motion for Rehearing.

Further, the Court properly found that there was no evidence of any contract between Plaintiffs and Concert. Plaintiffs do not appear to challenge this finding in the Motion. However, Plaintiffs now argue that PGCC and Concert acted together to interfere with the condition precedent of reaching the top of the Resigned Waiting List. Again, there is no conspiracy claim, breach of the implied covenant of good faith or fair dealing claim, or tortious interference claim. Moreover, Plaintiffs did not file these claims as avoidances by way of a reply. Thus, even if these claims had merit (they do not), any argument based on an unpled theory does not warrant rehearing or change the Court's decision on the Motions for Summary Judgment.

In short, the Court properly found that the 2016 Amendment did not amend a right derived from any of Plaintiffs' vested contractual rights but only from non-vested rights found in the Bylaws. Accordingly, Plaintiffs did not (and cannot)

establish that PGCC breached any contract with Plaintiffs by amending the Bylaws or by failing to pay the refund amounts dictated by pre-2016 amendments to the Bylaws. Finally, even if there was a vested contractual right to a refund payment (there was not), the claims of the Releasing Resigned Equity Members are barred based on the express contractual releases. Accordingly, the Motion should be denied.

### C. The Court Correctly Found That The Undisputed Evidence Demonstrates That Plaintiffs Received An Equal Benefit in Exchange for Their Equity Contributions.

In Counts II and III, Plaintiffs asserted claims for unjust enrichment against PGCC and Concert. In Count II against PGCC, Plaintiffs claimed that they conferred a benefit upon PGCC by making their respective equity contributions and that PGCC continued to receive the benefit of the equity contributions. (Compl. ¶¶ 55, 56). In Count III, Plaintiffs alleged that they conferred a benefit upon PGCC by making the equity contribution to PGCC; that upon Concert acquiring the assets of PGCC, Concert accepted the benefit of Plaintiffs' respective equity contributions; and that Concert received and continued to receive a benefit. (Id. at ¶¶ 60-63).

The Court correctly found in favor of Defendants. First, it is undisputed that there was an express contract between PGCC and each class member, i.e. the Membership Agreements. It is well settled that a claim for unjust enrichment cannot stand when there is an express contract between the parties. "Florida courts have held that a plaintiff cannot pursue a quasi-contract claim for unjust enrichment if an express contract exists concerning the same subject matter." *Winfield*

*Investments, LLC v. Pascal-Gaston Investments, LLC*, 254 So. 3d 589, 592 (Fla. 5th DCA 2018).

In an effort to avoid this fatal defect, Plaintiffs attempt to bootstrap their argument that the Membership Agreements are illusory. "If, however, the contract is illusory and a nullity as argued, *supra*, then this finding cannot provide a basis for entering summary judgment for PGCC on unjust enrichment." (Motion, p. 29). Respectfully, Plaintiffs' argument falls short.

Again, there is no dispute that the Membership Agreements are enforceable contracts. Plaintiffs bargained for membership in the Club in exchange for payment of membership dues. The "right" to a refund existed only in the Bylaws and was subject to amendment in accordance with the Bylaws, which all parties agreed to. Accordingly, the Court correctly found that the unjust enrichment claim against PGCC could not stand, and the Motion should be denied.

Furthermore, in its Order denying Plaintiffs' Motion for Summary Judgment, the Court found that the only evidence before the Court established that the contents of the escrow account were only used to refund resigned members and that there was no evidence that PGCC or Concert used the funds for any other purpose. (Order, p. 7). Plaintiffs have not presented any contradictory evidence to warrant any rehearing on this issue.

Instead, Plaintiffs attempt to argue that because 20% of Plaintiffs' equity contribution went to an operational fund, PGCC or Concert were somehow enriched. However, Plaintiffs' claim is based on the refund amount and not for the full amount of the equity contribution. (See Compl. ¶ 64). Plaintiffs cannot now

claim that they are seeking 100% of the equity contribution to defeat summary judgment. Further, even if they were claiming that, such claim would fail because the record evidence was that, in exchange for their equity contribution, Plaintiffs received membership in the Club, an equity interest in the Club, and voting rights, which is exactly what the parties bargained for. Thus, the Court properly found in favor of Defendants on the Motion for Summary Judgment.

**D. <u>The Court Correctly Found That Defendants Were Entitled to Summary Judgment on Plaintiffs' Fraudulent Transfer Claim.</u>**

In Count IV, Plaintiffs asserted a cause of action for fraudulent transfer under Fla. Stat. § 726.105(1)(a), alleging that PGCC fraudulently transferred assets to Concert through the purchase and sale of the Club. The Court recognized that granting summary judgment on a fraudulent transfer claim was rare but found that such circumstances were warranted here. The Court was correct. A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

> (a) **With actual intent to hinder, delay, or defraud any creditor of the debtor**; . . . .
>
> (1) In determining actual intent under paragraph (1)(a), consideration may be given, among other factors, to whether:
>
> (a) The transfer or obligation was to an insider.
> (b) The debtor retained possession or control of the property transferred after the transfer.
> (c) The transfer or obligation was disclosed or concealed.
> (d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.

(e) The transfer was of substantially all the debtor's assets.
(f) The debtor absconded.
(g) The debtor removed or concealed assets.
(h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
(i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
(j) The transfer occurred shortly before or shortly after a substantial debt was incurred.
(k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Fla. Stat. § 726.105 (emphasis added).

**1. <u>The Court Correctly Found That There Was Direct Evidence That Defendants Did Not Intend to Hinder, Defraud or Delay Plaintiffs</u>**

In its Order granting summary judgment, the Court properly found that there was direct evidence of PGCC's intent. Specifically, PGCC insisted that Concert agree to pay each and every resigned member 100% of their equity refund under the 2016 Amendment. It further found that Concert's Letter Agreement demonstrated that there was no intent to defraud by either PGCC or Concert. Based on the direct undisputed evidence presented, the Court determined that Defendants were entitled to summary judgment because Plaintiffs could not prove the necessary element of intent. Plaintiffs have not set forth any valid reasons why this determination was incorrect or any evidence that disputes the record evidence. Instead, Plaintiffs ask the Court to look at its badges of fraud analysis again. Such consideration is unnecessary based on the direct undisputed evidence, and the Motion should be denied.

**2. The Court properly found that Plaintiffs Did Not Establish a Sufficient Number of Badges of Fraud to Demonstrate a Fraudulent Intent.**

Even if the Court was required to examine the badges of fraud (it is not), the Motion should still be denied. "The existence of badges of fraud creates a prima facie case and raises a rebuttable presumption that the transaction is void." *Namm*, 2017 WL 2901329, at *14 (citing *In re Bifani*, 580 Fed. Appx. 740, 745 (11th Cir. 2014)) "While a single badge of fraud may only create a suspicious circumstance and may not constitute the requisite fraud to set aside a conveyance[,] several of them when considered together may afford a basis to infer fraud." *Wiand v. Lee*, 753 F.3d 1194, 1200 (11th Cir. 2014) (citing *Johnson v. Dowell*, 592 So. 2d 1194, 1197 (Fla. 2d DCA 1992) (internal quotations omitted)); *see also In re Bifani*, 580 Fed. Appx. at 746. Here, based on the record evidence, Plaintiffs did not establish sufficient badges of fraud to infer that a fraudulent transfer occurred.

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

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

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

There is no evidence that PGCC retained any possession or control of the Club after the transfer. Instead, the undisputed evidence was that a new club was established that had new ownership, a new membership plan, new club rules, and

new employees. (Trent Decl. ¶ 12). PGCC does not have any management responsibilities of the Club; it does not have the books and records of the Club; it earns no income from the Club; and it has no possession or control of the Club. (Id. at ¶ 13). The record evidence further established that Concert Plantation possess and controls the Club property and runs its day-to-day operations. (Id. at ¶ 14). Thus, Plaintiffs cannot establish this badge of fraud.

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

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

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

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

While PGCC had been sued by some former members prior to the sale of the property, in the PSA, Concert agreed to pay the Resigned Equity Members 100% of the refund amounts to which they were entitled pursuant to the Bylaws in effect at the time of closing. (PSA § 5.1). As recognized in the Court's Order,

PGCC's Board of Directors insisted on this term as a condition of the sale. (Kubik Depo. pp. 75-76, 78, 82) Further, as the Court recognized, Concert specifically agreed to indemnify PGCC with respect to any claim by the Resigned Equity Members as it related to equity refund payments. (Trent Decl. ¶ 16). Accordingly, the sale was not an attempt to avoid claims by the Resigned Equity Members.

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

While the transfer was of substantially all of PGCC's assets, the evidence demonstrated that the transfer was in exchange for reasonably equivalent value. In exchange for PGCC's assets, Concert paid off PGCC $4.5 million loan; it paid off a $35,000 SWAP transaction; it paid $50,000 in legal fees; and it assumed numerous leases and contracts in the approximate amount of $300,000. (Trent Decl. ¶ 17). In addition, Concert agreed to pay resigned members their refund per the Bylaws in an amount it valued at approximately $500,000; it committed to fund $3.25 million in capital expenditures; and it agreed to freeze all member dues for two years. (Id.). Thus, Plaintiffs' did not establish this badge of fraud.

(f) PGCC did not abscond.

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

(g) PGCC did not remove or conceal assets.

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

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

The Court properly found that value of the consideration received by PGCC was reasonably equivalent to the value of PGCC's assets. In exchange for PGCC's assets, Concert paid off PGCC $4.5 million loan; it paid off a $35,000 SWAP transaction, it paid $50,000 in legal fees, and it assumed numerous leases and contracts in the approximate amount of $300,000. (Trent Decl. ¶ 17). In addition, Concert agreed to pay resigned members their refund per the Bylaws, which was valued at approximately $500,000; it committed to fund $3.25 million in capital expenditures; and it agreed to freeze all member dues for two years. Accordingly, the total purchase price was over $8.6 Million. (Id.).

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

A two-step analysis is necessary to determine whether a debtor has received reasonably equivalent value in exchange for its transfer of an interest in

its property to another. First, it must be shown that the debtor received value; secondly, the Court must determine whether the value was reasonably equivalent to what the debtor gave up. *In re GTI Capital Holdings, LLC,* 373 B.R. 671 (Bankr. D. Ariz. 2007).

There was no dispute that PGCC received value in having its debts paid, its leases and contracts assumed, and certain liabilities assumed by Concert, including the payments to the Resigned Equity Members, among other value, as detailed herein. *In re 21st Century Satellite Communications, Inc.,* 278 B.R. 577, 582 (Bankr. M.D. Fla. 2002) (under Florida fraudulent transfer law, the determination as to whether the debtor received "reasonably equivalent value" should be based on the specific facts and circumstances relevant to the transaction).

The record evidence demonstrated that there was more than sufficient consideration flowing between the parties in connection with the sale of the Club to Concert. The obligations that were owed by PGCC at the time of the closing were satisfied, and Concert provided value that its members requested such as a two year dues freeze; over $3 million in capital improvements; payments to the Resigned Equity Members; and the payoff of loan obligations, among other value. Based on the circumstances of the sale and the reasons that the members sought to sell the Club, PGCC received reasonably equivalent value in exchange for the transfer of the Club. Moreover, prior to selling the Club to Concert, PGCC pursued multiple alternatives, including: soliciting a bid from Concert's competitor; exploring the possibility of selling nine (9) holes to a developer; and selling land to a hotel

for development. However, none of those options were viable, and the Board of Directors for PGCC (along with its membership) voted in favor of the sale to Concert in exchange for reasonably equivalent value. Thus, Plaintiffs cannot establish this badge of fraud.

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

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

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

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

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

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

Based on the record evidence presented in the Motions for Summary Judgment, Plaintiffs did not establish the existences of any badges of fraud. To the contrary, Concert's provision for the payment to the Resigned Equity Members pursuant to the Bylaws and its agreement to indemnify PGCC demonstrates that neither PGCC nor Concert were attempting to defraud Plaintiffs through the sale of PGCC's assets. Accordingly, the Court properly granted summary judgment in favor of Defendants, and the Motion should be denied.

## CONCLUSION

Based upon the foregoing, Defendants respectfully request that the Court deny the Motion for Rehearing.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of February 2023, a true and correct copy of the foregoing has been electronically filed with the Clerk of Court by using the Florida Court's E-filing Portal System, which will send a notice of electronic filing to all counsel of record.

*/s/ Andrew P. Marcus*
Attorney