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

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

Plaintiffs,

vs.

Case No.: 2016-CA-5528
CLASS ACTION

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

Defendants.
_____/

PLAINTIFFS' MOTION FOR REHEARING OF SUMMARY JUDGMENT

Plaintiff class members respectfully move this Court to rehear summary judgment for the reasons set forth below. This Court's two opinions and orders on summary judgement in this matter (DIN 1008; DIN 1060) are inconsistent regarding the treatment of "Equity Members" and claim that an express, enforceable contract exists but that it is freely modifiable by one party to that contract. As such, plaintiffs respectfully move for rehearing under Florida Rule of Civil Procedure 1.530.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

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

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

A. Equity Memberships

Equity members paid a one-time "equity contribution" to obtain an equity membership in the club. (DIN 959, Composite Ex. 2; DIN 648, p. 78, ¶3.1.2). To maintain regular access to the club, equity members had to pay annual dues. (DIN 704, p. 19 [p.16, ln. 9-12]). Equity members also had to agree to be bound by the club's bylaws and general rules. (DIN 959, Composite Ex. 3). In exchange, equity members received the rights attendant in equity membership.

Equity members had ownership rights in the club. (DIN 481, p.86, ¶3.11; DIN 648, p. 78, ¶3.1; p. 79, ¶3.2.1). Equity members were entitled to vote on matters affecting the club, including amendments to the bylaws. (DIN 481, p.95, Art. 13; DIN 648, p. 79, ¶3.3). Only equity members were permitted to serve on the club's board of directors. (DIN 648, p. 83, ¶5.1). Equity members could access the club and use the facilities in accordance with their membership. (DIN 960, p. 6 [p. 13, ln. 4 – 7]); DIN 648, p. 78, ¶1). Equity memberships also included the right to an equity refund. (DIN 648, p. 81, ¶3.8.2; DIN 704, p. 14 [p.11, ln. 13-18]; DIN 756, p. 2). All versions of the bylaws contained provisions for a refund of part of the equity contribution after the resignation of an equity member. (DIN 481, p.33, ¶3.9.2; p.52, ¶3.9.2; p.69, ¶3.9.2; p. 86, ¶3.8.2; p.101, ¶3.8.2; p.118, ¶3.8.2; p.136, ¶¶3.8.1, 3.8.2).

B. The Resignation Process

The club permitted equity members to resign at will, subject to a constraint on when those resignations would become effective. (DIN 481, p.85, ¶3.8.1). Equity members were required to provide written notice of their intent to resign. (DIN 481, p.85, ¶3.8.1). Once the club received notice, it would confirm the effective date of that resignation, based on the bylaws in effect at the time of the member's resignation. (DIN 481, pp. 148-165; DIN 704, p.16, ln. 10-15). The club typically sent written confirmation to resigned members accepting the resignation, stating the effective date, and confirming the amount of the refund owed to the member based on the bylaws in effect at the time of the resignation. (DIN 481, pp. 148-165; DIN 704, p.16, ln. 10-15).

C. Effect of Resignation on Membership

Once resigned, equity members ceased being members of the club. (DIN 960, p. 87 [p. 106, ln. 15-24; p. 107, ln. 12-13]; DIN 1073, p.98, ln. 13-14 ("But they were resigned members. They were no longer members of the club.")). They were not allowed to vote on club issues. (DIN 960, p. 70 [p. 41, ln.16-19]). They were not permitted to attend informational meetings about changes to the club's bylaws that occurred after they were members. (DIN 960, p. 89 [p. 115, ln. 14-21]). They did not receive any communications about anticipated bylaw changes. (DIN 960, p. 71 [p. 42, ln. 12-16]; DIN 971, p. 28 [p. 99, ln. 2-11]). They could not sit on the club's Board of Directors. (DIN 960, p. 89 [p. 116, ln. 8-11]). The only right that survived

resignation was the right of a former equity member to receive a refund. (DIN 960, p. 87 [p. 107, ln. 6-19]). Former Board member Tom Kubik testified that the rights of an equity member (other than their right to a refund) were eliminated once their resignation had been accepted:

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

(DIN 960, p. 87 [p. 107, ln. 6-19]). These refunds were calculated based on the bylaws in effect at the time of the former member's resignation. (DIN 648, p. 81, ¶3.8.2; DIN 704, p. 16 [p. 13, ln. 13-15]; DIN 756, p. 2).

D. Operation of the Waiting List and Payment of Refunds

Once resigned, equity memberships would be placed on a refund waiting list to be repurchased by an incoming equity member (in chronological order of resignation). (DIN 971, p. 39 [p. 20, ln. 13-23]). Former members were permitted to contact the club to inquire about the status of their refund but were not allowed to examine or inspect the refund list. (DIN 960, p. 89 [p. 115, ln. 2-11]). As new equity members joined the club, a portion of their equity fees (20%) went to the operational fund for the club. (DIN 971, p. 25 [p. 86, ln. 15-19]). The remaining 80% went towards the purchase of the membership itself. (DIN 971, p. 25 [p. 87, ln. 5-9]). The funds used to purchase the membership (the 80%) were deposited in an escrow account. (DIN 971, p. 25 [p.87, ln. 5-9]; DIN 1073, p.43, ln. 18-19). This account did

not exist prior to 2005. (DIN 1073, p.43, ln. 23-24; *compare* DIN 481, p. 33, §3.9 *with* DIN 481, p.52, ¶3.9.3). Once the escrow account was established, money from the escrow account was used to refund resigned members when their membership certificate reached the top of the resigned member waiting list. (DIN 960, p. 70 [p.40, ln. 3-10]).

E. The Bylaws Prior to Litigation

Prior to the bylaw amendments that are the subject of this litigation, the bylaws of the club included the following provisions:

3.1 EQUITY MEMBERSHIP

An Equity Membership shall constitute ownership of an equity interest in the Club.

[. . .]

3.2 EQUITY MEMBER

3.2.1 An Equity Member is the owner of an Equity Membership. . . The owner's name shall appear on the Equity Membership Certificate.

[. . .]

3.8 RESIGNATION OF AN EQUITY MEMBERSHIP

3.8.1 The owner(s) of an Equity Membership may resign said Membership by submitting a written letter of resignation to the Board. Resignations received between August 31 and January 1 shall be effective thirty (30) days after the date of receipt of the resignation. A resignation received after January 1 shall be effective September 30. All resignations shall only be effective if the Member's account is current.

3.8.2 The resigned Equity Membership shall be placed on the Resigned Members 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.

[. . .]

3.11 LIQUIDATION OF EQUITY MEMBERSHIPS

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.

[. . .]

4.1 ANNUAL MEETING

An Annual Meeting of the Club's Equity Members shall be held on the fourth Monday in March, commencing in 2009, for the purposes of receiving reports of officer and others, to elect the Members of the Board, and for such other business as may be properly brought before the Meeting.

[. . .]

4.4 NOTICES FOR ANNUAL AND SPECIAL MEETINGS

The Club's Secretary shall give notice of Annual and Special Meetings by mail and/or electronic transmission, including e-mail and facsimile, at least fifteen (15) days, but not more than sixty (60) days prior to the date of such Meeting, to all Equity Members of the Club. The notice shall state the Meeting's place, date and time, and in the case of a Special Meeting, the purpose or purposes for which the Special Meeting is called. . .

4.5 QUORUM

The presence, either in person or by proxy, of Equity Members having more than fifty percent (50%) of the votes then entitled to be voted shall constitute a quorum at any Meeting of the Equity Members.

4.6 VOTING PERCENTAGE

A majority of the votes cast in person or by proxy is necessary for the passage of any motion, except as otherwise expressly provided herein.

[. . .]

7.7 NO ACTION REDUCING VALUE OF EQUITY MEMBERSHIP

No action shall be taken that will result in the reduction in the value of an Equity Membership or lessen the rights or privileges of any Member without the amendment of these bylaws.

[. . .]

ARTICLE 13 – AMENDMENTS

These Bylaws may be altered, amended, or repealed, or new Bylaws may be adopted, only by a majority vote of all Board Members and a majority of votes cast by the Equity Members in person or by proxy at any duly called and constituted Annual or Special Meeting of the Club's Equity Members at which a quorum of Equity Members is present either in person or by proxy. The proposed amendment shall be set forth in the notice of the Meeting.

[. . .]

(DIN 481, pp. 83-95).

F. The Bylaws After April 1, 2016

At or just prior to the annual meeting in March 2016, an amendment to the bylaws was voted on. (DIN 1073, pp.109-10, ln. 25-2; DIN 704, p.210). Resigned equity members whose certificates were still on the refund list were not given notice of this meeting, permitted to attend this meeting, or allowed to vote at this meeting. (DIN 1073, pp. 98-99). Pursuant to the March 2016 vote, new bylaws were adopted, effective April 1, 2016, which made the following pertinent changes:

3.3.3 The number of votes for each Equity Membership that is in good standing shall be as follows:

[. . .]

For clarity, resigned members shall not be entitled to vote.

[. . .]

3.7 CALCULATION OF REFUNDABLE AMOUNT

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 80% of the equity portion of the Joining Fees the Club receives for the 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 full by the new member.

[. . .]

(DIN 481, pp. 135-6). The "equity portion" of the "Joining Fees" payable to resigned equity members was equivalent to 5% of the refundable amount due under previous bylaws. (DIN 971, p.12 [pp. 37, ln. 8-11]). No notice was provided to resigned equity members that their refunds were to be reduced prior to the Annual Meeting in March. (DIN 1073, pp. 98-9, ln. 23-15). No notice was provided to resigned members after the meeting that the Club had altered the bylaws to reduce these refunds. (DIN 1073, pp. 98-9, ln. 23-15).

G. The Sale of PGCC to Concert

PGCC entered into a Purchase and Sale Agreement ("PSA") with Concert Plantation, LLC ("Concert") which became effective on February 2, 2019 (DIN 961, ¶10). Due to the sale, PGCC ceased operating as a club and did not sell any new equity memberships. (DIN 971, p. 30 [p. 109, ln. 6-10]). Concert did not offer equity

memberships. (DIN 961, ¶10). As such, no funds were added to the escrow account. (DIN 961, ¶10). Without new equity funds added to the escrow account, previously resigned memberships could not be refunded. (DIN 971, p. 25 [p. 87, ln. 14-25; p. 88, ln. 1-4]). Without prior memberships being refunded, more recently resigned memberships could not move up the list towards a refund. (DIN 971, p. 43 [p. 35, ln. 18 – p. 36, ln. 2]). As part of the sale agreement, Concert agreed to pay the resigned equity members the reduced rate from the 2016 Bylaws, provided that they sign a release. (DIN 704, p.108, ln. 19-25).

H. The Current Litigation

As former members of PGCC moved up the resignation waiting list, they received refunds that were 5% of the amounts previously provided to them. (DIN 971, p.12 [pp.35-7]). Some of these resigned members sued upon receipt of these reduced payments. (DIN 971, p. 12 [p.37, ln. 8-12]). After filing their Fourth Amended Complaint, plaintiffs moved for and were granted class certification. (DIN 784). The class is composed of all "individuals (or their guardians or representatives) who had an effective resigned equity membership before April 1, 2016, and who have not received their full refund amount" exclusive of defendants and former officers and directors of the club. (DIN 784, p.11).

Plaintiffs moved for summary judgment on their claims for breach of contract, unjust enrichment, and fraudulent transfer. (DIN 787). Defendants moved for summary judgment on their affirmative defenses of release and waiver. (DIN

929). This Court denied plaintiffs' motion for summary judgment finding that the "membership agreement does not contain an express right to a refund, but rather incorporated the by-laws by reference and expressly states that the by-laws are subject to amendment, without limitation. . .the Court finds that the resigned member's entitlement to a refund did not accrue until that member reached the number one spot on the waiting list." (DIN 1008, p.3).

Defendants later moved for summary judgement on all counts. (DIN 977). At summary judgment, the counsel for PGCC argued that:

> The bylaws define "equity member" as the owner of an equity membership, and that's what these folks were. They still owned their equity membership until they were redeemed or purchased by the club when they reached the top of the waiting list.

(DIN 1074, p.9, ln.9-13). This Court granted defendants' motion for summary judgment, finding that:

> 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. By way of example, all applicable versions of the Bylaws contained a liquidation clause that governed the respective members' right to a refund, if any, in the event PGCC's assets were sold. Pursuant to the Bylaws, each and every member of the class still owned an "Equity Membership" as long as they were on the resignation waiting list.

(DIN 1060, pp.2-3, ¶¶3-4).

This Court did not address in either opinion on summary judgment how the determination that "Equity Memberships" included memberships still on the resignation waiting list impacted other provisions of the bylaws. Defendant PGCC

has maintained throughout the lawsuit that the bylaws were amended in accordance with the terms contained therein. (DIN 506, p.3, ¶28; DIN 1074, p.11, ln.10-11).

II. AUTHORITY TO REHEAR AND GROUNDS FOR REHEARING

As stated by the Second District Court of Appeal, the "grounds for rehearing under rule 1.530 are broad, and the rule's purpose is to afford 'the trial court an opportunity to consider matters which it overlooked or failed to consider.'" *Howarth v. Lombardi*, 313 So. 3d 729, 731 (Fla. 2d DCA 2020) (quoting *Balmoral Condo. Ass'n v. Grimaldi*, 107 So. 3d 1149, 1151 (Fla. 3d DCA 2013)) (further citations omitted). The Third District Court of Appeal has described a rehearing under Rule 1.530 as "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." *Balmoral Condo. Ass'n*, 107 So. 3d at 1151. "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)). Such grounds include "the contention that the final order conflicts with the governing law and is otherwise simply wrong on the merits." *Id*. Plaintiffs respectfully contend that this Court's previous decisions denying plaintiffs' motion for summary judgment and granting defendants' motion for summary judgment contain inconsistent findings of fact and misapply the law to the facts. (DIN 1008; DIN 1060).

Plaintiffs argued at summary judgment that resigned equity members of the club were no longer members of the club and thus bylaw changes subsequent to their resignation were inapplicable to them as they were non-members. (DIN 1047, pp. 7-9). The position that resigned club members were no longer members of the club was confirmed by the testimony of PGCC's corporate representative (not filed prior to the summary judgment hearing) as well as other testimony. (DIN 960, p. 70 [p. 41, ln.16-19]; p. 71 [p. 42, ln. 12-16]; p. 89 [p. 115, ln. 14-21]; DIN 971, p. 28 [p. 99, ln. 2-11]; DIN 1073, pp. 98-99).

To counter plaintiff's argument that bylaw modifications were inapplicable as to resigned members, PGCC argued at summary judgment – in contravention of their corporate representative's testimony – that resigned members were no longer members of the club and that the phrase "Equity Member" in the liquidation clause of the bylaws included resigned members who owned certificates of membership that were still on the refund waiting list. (DIN 1074, p.9, ln. 9-13). The Court, without evidence, accepted defendant PGCC's position that the phrase "Equity Members" in the bylaws included resigned equity members, and thus any changes to the provisions for Equity Members were applicable to resigned equity members. (DIN 1060, pp. 2-3, ¶4 ("Pursuant to the Bylaws, each and every member of the class still owned an 'Equity Membership' as long as they were on the resignation waiting list."); DIN 1074, p.9, ln. 9-13 ("The bylaws define 'equity member' as the owner of an equity membership, and that's what these folks were. They still owned

their equity membership until they were redeemed or purchased by the club when they reached the top of the waiting list.")).

The Court's interpretation aligns with the bylaws reasonably enough: Equity Members are defined as those who own Equity Memberships. (DIN 481, p.84, ¶3.2.1 ("An Equity Member is the owner of an Equity Membership.")). Prior to 2016, a majority vote of "Equity Members" was required to amend the bylaws and there was no "clarification" in the bylaws that resigned equity members could not vote. (*Compare* DIN 481, pp. 83-95 *with* DIN 481, pp. 135-6, ¶¶3.3.3). If the phrase "Equity Member" includes resigned members, then those resigned members should have received notice and an opportunity to vote on the 2016 bylaw amendments (and prior amendments). The evidence is uncontroverted that they did not. (DIN 960, p. 70 [p. 41, ln.16-19]; p. 71 [p. 42, ln. 12-16]; p. 89 [p. 115, ln. 14-21]; DIN 971, p. 28 [p. 99, ln. 2-11]; DIN 1073, pp. 98-99). As such, under this Court's interpretation of the bylaws, the 2016 bylaw amendment is a nullity and without effect. *See, Word of Life Ministry, Inc. v. Miller*, 778 So. 2d 360, 363 (Fla. 4th DCA 2001). This Court did not resolve this inconsistency in either order on summary judgment. Plaintiffs now seek rehearing to determine the impact of this definition on the bylaw amendments in 2010 and 2016 and the sale of PGCC to Concert (which required approval of the Equity Members).

Additionally, from a contract perspective, the Court appears to simultaneously hold that there is a valid and enforceable contract, but that it is subject to alteration "without limitation" by only one party to that contract.

(*Compare* DIN 1060, ¶2 ("The contracts at issue in this action, the membership agreements, are enforceable written contracts between the class members, and Defendant, Plantation Golf and Country Club, Inc.") *with* DIN 1060, ¶3; DIN 1008, p.6 ("The membership agreement does not contain an express right to a refund, but rather incorporates the by-laws by reference and expressly states that the by-laws are subject to amendment, *without limitation*.") (emphasis added)). A contract provision that is freely modifiable by one party is not a valid provision. *See*, *Feldkamp v. Long Bay Partners, LLC*, 773 F.Supp. 2d 1273, 1283 (M.D. Fla. Feb. 18, 2011) (Finding that, under Florida law, if one party "retains to itself the option of fulfilling or declining to fulfill its obligations under the contract, there is no valid contract and neither side may be bound."). This Court did not resolve the apparent inconsistency of finding that the part of the contract between members and the club that dealt with refunds was freely modifiable by the club *without limitation* but was simultaneously an enforceable contract provision that bound the resigned members.

For these reasons, as supported by the argument below, plaintiffs seek rehearing of the motions for summary judgment pursuant to Rule 1.530.

III. ARGUMENT

From the defendants' perspective (as adopted by the Court): resigned members did not stop being members upon resignation, only once their membership certificates had been repurchased by the club. If that is the case, then resigned members were still entitled to all the rights of "Equity Members," including the

right to notice of proposed amendments, the right to vote on proposed amendments, and the right to attend meetings concerning proposed amendments. The unrebutted evidence in the record shows that class members were not afforded these rights when the bylaws were amended in 2016, and as such, the 2016 amendment to the bylaws is a nullity.

Viewed from the plaintiffs' perspective (and the testimony of PGCC's corporate representative): resigned members ceased to be members of the club when they resigned. They forfeited rights in the club, but as such were not affected by subsequent changes to the club's bylaws, as they were non-members. To hold otherwise would hold that the contract between member and club was freely modifiable by the club even once the member had lost any rights to vote in, participate in, or even leave the club. This contradicts the accepted principles of contract and is an inaccurate application of the law.

A. "Equity Members" and Bylaw Amendments

A private social club, or indeed any nonprofit, may be entitled to amend its own bylaws from time to time. However, in amending those bylaws, the organization must comply with the existing bylaws. *See Word of Life Ministry, Inc. v. Miller*, 778 So. 2d 360, 363 (Fla. 4th DCA 2001). Otherwise, the amendment is ultra vires and without effect. *Id.* According to the interpretation of the bylaws adopted by this Court, resigned members were entitled to vote on bylaw amendments until their resigned certificates were repurchased by the club. (DIN

1060, pp. 2-3, ¶4). The uncontroverted evidence demonstrates that they were not permitted to vote on amendments. Indeed, resigned members did not receive notice before or after purported bylaw changes. As such, based on the Court's interpretation, the club's own bylaws, and the testimony of PGCC's corporate representative, the 2016 bylaw amendments (which attempted to remove the voting rights of resigned members) were a nullity and without effect.

1. A private social club is bound to act in accordance with its own bylaws.

It is axiomatic that a private social club has the right to alter its bylaws. Fla. Stat. § 617.0302(5). *See also*, *Cat Cay Yacht Club, Inc. v. Diaz*, 264 So. 3d 1071, 1075 (Fla. 3d DCA 2019). However, the organization and its directors and officers are also bound by and must act in accordance with those same bylaws. *See Yarnall Warehouse & Transfer, Inc. v. Three Ivory Bros. Moving Co.*, 226 So. 2d 887, 890 (Fla. 2d DCA 1969) ("The corporation and its directors and officers are bound by and must comply with the charter and bylaws.") (citation omitted). *See also*, *Word of Life Ministry, Inc.*, 778 So. 2d at 363 ("A corporation must act in accordance with its articles of incorporation and duly adopted by-laws."); *Share v. Broken Sound Club, Inc.*, 312 So. 3d 962, 970 (Fla. 4th DCA 2021) (Finding that the Board of a members-only private golf club acted in good faith partly because "nothing in the record shows that the Board acted outside its authority specified in the controlling documents" which included the bylaws). Throughout this litigation, PGCC has maintained that the club's actions in amending the bylaws complied with the bylaws in existence prior to amendment. (DIN 506, p.3, ¶28; DIN 1074, p.11, ln.10-

11). The Court found that PGCC had complied with the bylaws when it amended the bylaws in 2016. (DIN 1008, p.6 (Finding that the membership agreements incorporated the bylaws, and PGCC did not breach the membership agreements when it amended the bylaws.)).

2. The term "Equity Member" in the bylaws includes resigned equity members.

Based on the language in the "liquidation clause" and PGCC's arguments, the Court found that the term "Equity Member" includes resigned equity members whose certificates have not been repurchased. (DIN 1060, pp. 2-3, ¶4). If resigned equity members are "Equity Members" for the purposes of the liquidation clause, then they must be "Equity Members" for the purposes of the other provisions in the bylaws as well. *See, e.g.*, *Kel Homes, LLC v. Burris*, 933 So. 2d 699, 703 (Fla. 2d DCA 2006) (citing *Leisure Resorts, Inc. v. City of W. Palm Beach*, 864 So. 2d 1163, 1166 (Fla. 4th DCA 2003) ("Sophisticated lawyers must be presumed to know how to use parallel construction and identical wording to impart identical meaning when they intend to do so.")).

The bylaws define an "Equity Member" as "the owner of an Equity Membership." (DIN 481, p.84, ¶3.2.1). They state that the "owner's name shall appear on the Equity Membership Certificate." (DIN 481, p.84, ¶3.2.1). This Court found that so long as the equity member's name remained on the certificate, they were an equity member. (DIN 1060, p.3, ¶4). This would mean that all of the class member plaintiffs waiting for their certificates to be purchased were still "Equity Members" unless and until their certificates were repurchased by the club. The

Court extended this rationale to hold that the resigned status had no effect on whether a member was subject to the bylaws. (DIN 1060, p.2, ¶3). This further illustrates that, under this Court's interpretation of the phrase "Equity Member," all class members were still considered "Equity Members" at the time the purported 2016 bylaw amendments were made.

3. A majority vote of "Equity Members" is required to amend the bylaws.

Prior to April 1, 2016, there was no language in the bylaws that restricted an Equity Member's right to vote. (*Compare* DIN 481, p.135, ¶3.3.3 *with* DIN 481, pp. 83-95). In order to amend the bylaws, a majority vote of a quorum of Equity Members at a duly constituted Special or Annual Meeting was required. (DIN 481, p.95, Art.13). A duly constituted Special or Annual Meeting required notice to be provided to Equity Members. (DIN 481, p.87, ¶4.4). "The presence, either in person, or by proxy, of Equity Members having more than fifty percent (50%) of the votes then entitled to be voted shall constitute a quorum at any Meeting of the Equity Members." (DIN 481, p.87, ¶4.5). Further, the club was prohibited from taking any action that would "result in the reduction in the value of an Equity Membership or lessen the rights or privileges of any Member without amendment" of the bylaws. (DIN 481, p.92, ¶7.7). The purported amendment of the bylaws in 2016 took away the right to vote from resigned equity members (plaintiff class members) and effectively reduced their refunds by 95%. (DIN 481, pp. 135-6, ¶¶3.3.3, 3.7.1).

4. Plaintiff class members were not permitted to vote on the 2016 Amendment; as such it is without effect.

The evidence is uncontroverted that resigned members were not provided notice of the proposed bylaw amendments in 2016, were not permitted to vote on those purported amendments, and did not receive notice after the amendments had purportedly passed. (DIN 960, p. 70 [p. 41, ln.16-19]; p. 71 [p. 42, ln. 12-16]; p. 89 [p. 115, ln. 14-21]; DIN 971, p. 28 [p. 99, ln. 2-11]; DIN 1073, pp. 98-99). Ms. Barbara Jean Camarota, testifying as a corporate representative of the club in 2018, stated the following in relation to the 2016 bylaw amendments:

> Q: But the resigned members didn't get to vote on the changes that were made to the price –
>
> Camarota: No. They did not.
>
> Q: Okay. So when did the resigned members become notified that the refund they would be provided upon reaching the top of the list was no longer going to be the refund amount represented to them in their letters?
>
> Camarota: They were not, because we don't know what that refund amount was going to be.
>
> Q: Did you provide them notice of the change that was made to the bylaws?
>
> Camarota: No.
>
> Q: Do you think they should have been provided notice?
>
> Camarota: As resigned members, no.

(DIN 1073, pp. 98-99, ln.20-15). Ms. Camarota, speaking for the club, makes their position clear: resigned members were not allowed to vote on the amendments; they were not provided notice that such amendments were being considered; and, after

the votes were taken, were not even provided notice that such amendments had been voted on in their absence.

Although this deposition was not entered into the record prior to summary judgment, Ms. Camarota provided similar testimony that was on the record prior to the summary judgment hearings at a deposition in 2021. (DIN 704, p.126, ln.7-15. ("...they were a resigned member. They no longer had any standing with the club. They had no voting rights.")). Further, Ms. Camarota asserted an identical position at the class certification hearing before this Court which was held prior to summary judgment. (DIN 971, p.28 [p.99, ln.2-11]).

Likewise, certain plaintiffs testified that they had received no notice from PGCC nor any opportunity to vote on the bylaw amendments. Ms. Beverly White, one of the class representatives, testified during the class certification hearing that she had received no notice of the bylaw change prior to receiving her reduced refund in June of 2016. (DIN 971, p.13 [p.38, ln.1-13]). Mr. Giambrone testified that he had never been offered an opportunity to vote on any bylaw amendment. (DIN 971, p. 56 [p.87, ln. 5-7]). He further clarified that the club "changed the rules and only the existing members were able to vote on it and I was not – any resigned member was not at the meeting, so we couldn't vote, I didn't have any say, and I thought that was unfair." (DIN 971, p.57 [p.90, ln. 5-9]). This testimony aligns with the testimony of the club's representative, Ms. Camarota, that resigned equity members were not provided notice of pending changes to the bylaws and were not permitted to vote.

Under the bylaws, notice to "Equity Members" was required for Annual or Special Meetings (which were the only meetings where bylaws could be amended); and a quorum and majority vote of "Equity Members" was required to amend the bylaws. (DIN 481, pp. 83-95). An amendment to the bylaws was required to reduce or limit membership rights. (DIN 481, p.92, ¶7.7). This Court found that "Equity Members" included resigned members. (DIN 1060, p.3, ¶4). It is beyond dispute that resigned members were not permitted to vote. (DIN 1073, pp. 98-99, ln.20-15). As such, the 2016 purported amendments (and likely previous amendments) were carried out in contravention to the bylaws. Alterations of a corporation's governing documents that are made in contravention to those same documents are ultra vires and without effect. *See, Word of Life Ministry, Inc.*, 778 So. 3d at 363. Therefore, the April 1, 2016 amendments which were made without notice to or an opportunity to vote from resigned members (who are "Equity Members" according to this Court) were ultra vires and without effect.

B. The Court's Contract Is Illusory

This Court found that the "contracts at issue in this action, the membership agreements, are enforceable written contracts between the class members, and Defendant, Plantation Golf and Country Club, Inc." (DIN 1060, p.2, ¶2). The Court further found that the "membership agreement does not contain an express right to a refund, but rather incorporates the by-laws by reference and expressly states that the by-laws are subject to amendment, *without limitation*." (DIN 1060, ¶3; DIN

1008, p.6 (emphasis added)). Therefore, the Court found that the contracts were express, enforceable contracts composed of the membership agreements together with the bylaws, but that these contracts were freely modifiable by one party to the contract *without limitation*. A contract provision that is freely modifiable by one party is not a valid provision. *See*, *Feldkamp v. Long Bay Partners, LLC*, 773 F.Supp. 2d 1273, 1283 (M.D. Fla. Feb. 18, 2011). In particular, this Court's interpretation of the contract permitted a debtor free reign to determine how much of a debt it owed to a creditor. Such an interpretation is not consistent with contract law. This Court must either modify its interpretation of the contract or accept that the refund provision was illusory.

1. The Court is correct that the bylaws were incorporated and part of the membership contract.

No party to this lawsuit disputes that the "respective membership agreements were enforceable contracts." (DIN 506, ¶¶ 43, 44). Further, defendants have acknowledged that such contracts were "subject to" the club's bylaws. (DIN 506, ¶¶ 43, 44). "It is a generally accepted rule of contract law that, where a writing expressly refers to and sufficiently describes another document, that other document. . .is interpreted as part of the writing." *OBS Co., Inc. v. Pace Const. Corp*., 558 So. 2d 404, 406 (Fla. 1990). Courts have found that when a membership agreement to a social club expressly references and includes the club's bylaws, those bylaws become a part of the membership contract. *See*, *Share v. Broken Sound Club, Inc.*, 312 So. 3d 962, 972 (Fla. 3d DCA 2021). Language that a contract is "subject to" another writing expressly incorporates that writing into the contract. *See*

Franzen v. Lacuna Golf Ltd. P'ship, 717 So. 2d 1090, 1092 (Fla. 4th DCA 1998). Therefore, the membership agreements between the class members and defendant PGCC were contracts that specifically incorporated the bylaws of the club. (DIN 1060, p.2, ¶2). The entire contract, including the relevant portions of the bylaws, must be interpreted consistently with the established and binding principles of contract law. *See, OBS Co., Inc.*, 558 So. 2d at 406.

2. The class members bargained for the right to a refund.

The club offered both equity and non-equity memberships. (DIN 648, p. 78, ¶3.1; DIN 704, pp. 20-21). Equity members, in exchange for their one-time equity payment received ownership in the club and certain voting rights. (DIN 959, Composite Ex. 2; DIN 648, p. 78, ¶3.1.2; DIN 481, p.95, Art. 13; DIN 648, p. 79, ¶3.3). Each member of the class, based on the bylaws in effect at the time they joined the club, also received the right to a refund of 80% of their equity buy-in. (DIN 648, p. 81, ¶3.8.2; DIN 704, p. 16 [p. 13, ln. 13-15]; DIN 756, p. 2). As such, the refund was part of the bargain, subject to change only by a valid contract modification. *See SCG Harbourwood, LLC v. Hanyan*, 93 So. 3d 1197, 1201 (Fla. 2d DCA 2012).

3. If the refund provisions are freely modifiable without input from those owed the refunds, then they are illusory.

Modification of a contract requires the mutual assent of the parties. *SCG Harbourwood, LLC v. Hanyan*, 93 So. 3d 1197, 1201 (Fla. 2d DCA 2012). "Any subsequent modification [of a contract] requires consent and a meeting of the minds

of the parties to the contract whose rights or responsibilities are sought to be affected by the modification." *Id*. at 1200-1201 (quoting *Dows v. Nike, Inc.*, 846 So. 2d 595, 603 (Fla. 4th DCA 2003)). Unilateral modifications of contracts are unenforceable. *Id*. at 1200. If one party "retains to itself the option of fulfilling or declining to fulfill its obligations under the contract, there is no valid contract and neither side may be bound." *Feldkamp v. Long Bay Partners, LLC*, 773 F.Supp. 2d 1273, 1283 (M.D. Fla. Feb. 18, 2011) (interpreting Florida law) (citations omitted). *See also*, *Pan-Am Tobacco Corp. v. Dept. of Corr.*, 471 So. 2d 4, 5 (Fla. 1984) (same).

This Court found that there is a binding contract between PGCC and the class members. (DIN 1060, p.2, ¶2). That contract included the bylaws. (DIN 1060, p.2, ¶2). The contract also included a right to a refund, as bargained for and paid for by the class members upon their purchase of equity memberships. (DIN 648, p. 81, ¶3.8.2; DIN 704, p. 16 [p. 13, ln. 13-15]; DIN 756, p. 2). As with any contract, it would stand to reason that this contract is modifiable by the consent of the parties and with new consideration provided. *SCG Harbourwood, LLC v. Hanyan*, 93 So. 3d at 1200-1201.

Here, however, there was no meeting of the minds or consent of the affected party. Assuming arguendo that "consent" could have been achieved by a majority vote of the affected members per the bylaws, that did not occur in this case. (DIN 960, p. 70 [p. 41, ln.16-19]; DIN 1073, pp. 98-9). Since class members were not permitted to vote on the amendment, the amendment reducing their refund amounts constituted a unilateral modification to a contract. Contract modifications

made unilaterally without the input or consent of the affected party are unenforceable. *SCG Harbourwood, LLC v. Hanyan*, 93 So. 3d at 1200.

To hold otherwise would mean to find that a contract existed, that the contract included the refund, but that payment of the refund was freely modifiable by the party that was to make the payment. Such a provision would "subvert the contract by permitting one party to breach with impunity." *Blue Lakes Apartments, Ltd. v. George Gowing, Inc.*, 464 So. 2d 705, 709 (Fla. 4th DCA 1985). "When one party reserves the option not to perform under a contract, the contract is a nullity." *Leon County v. Stephen S. Dobson, III, P.A.*, 957 So. 2d 12, 13 (Fla. 1st DCA 2007). In this case, the purported amendment to the bylaws sought to modify the contracts between class members and the club. Under the Court's current interpretation, PGCC was free to amend the bylaws *without limitation* and without even providing notice to class members, let alone allowing class members to consent to or participate in that amendment. As such, PGCC was free to reduce the refunds owed to class members at any time, unilaterally, and without warning to any amount, including zero. As such, the refund provision was illusory.

4. If the club had discretion to modify certain contract provisions, such discretion was curtailed by good faith.

Even if PGCC had some ability to make a unilateral modification to the contract with its members, that ability was constrained by the implied duty of good faith and fair dealing. The Court previously found that the right to refund was freely amendable. (DIN 1060, p.2, ¶3; DIN 1008, p.6 ("[T]he by-laws are subject to amendment, without limitation.")). However, when a contract affords "a party

substantial discretion to promote that party's self-interest, the duty to act in good faith nevertheless limits that party's ability to act capriciously to contravene the reasonable contractual expectations of the other party." *Speedway SuperAmerica, LLC v. Tropic Ent., Inc.*, 966 So. 2d 1, 3 (Fla. 2d DCA 2007) (quoting *Cox v. CSX Intermodal, Inc.*, 732 So. 2d 1092, 1097-8 (Fla. 1st DCA 1999)).

The implied covenant of good faith is a "gap-filling default rule" that is read into contracts "when one party has the power to make a discretionary decision without defined standards." *Id*. (quoting *Publix Super Markets, Inc. v. Wilder Corp. of Del.*, 876 So. 2d 652, 654 (Fla. 2d DCA 2004)). "The implied covenant of good faith exists in virtually all contractual relationships." *Id*. (quoting *Sepe v. City of Safety Harbor*, 761 So. 2d 1182, 1184 (Fla. 2d DCA 2000)). The implied duty of good faith has been read into contracts between private clubs and their members. *See Share*, 312 So. 3d at 970 ("In exercising its discretionary powers under the Agreement and Bylaws, the Board was required to act in good faith in accordance with the duty the law implies."). However, "the duty of good faith performance does not exist until a plaintiff can establish a term of the contract the other party was obligated to perform and did not." *Snow v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 896 So. 2d 787, 792 (Fla. 2d DCA 2005).

Per this Court's finding that the term "Equity Members" included all former members still on the resigned member waiting list, those equity members were required, per the bylaws, to be offered notice and an opportunity to vote on bylaw amendments. Here, PGCC did not abide by the bylaws as it did not provide those

resigned members notice or an opportunity to vote. As such, the club failed to meet the barest requirement of good faith: that it abide by its own contract.

C. Condition Precedent

Should this Court find that the contract was in fact breached, it will have to address defendants' interference with the condition precedent of reaching the top of the resigned member waiting list. Defendants both asserted that conditions precedent were not met, as not all plaintiffs had reached the top of the resigned member waiting list. (DIN 505, p.3, ¶8; DIN 506, p.6, ¶78). This Court found that the "pre-2016 bylaws specify that a resigned member is not to be paid until they reach the top of the waiting list. . . the Court finds that the resigned member's entitlement to a refund did not accrue until that member reached the number one spot on the waiting list." (DIN 1008, p.6). The Court did not address in either summary judgment opinion how defendants were permitted to prevent any plaintiff from reaching the top of the resigned member waiting list and then benefit from that interference. (DIN 971, p. 25 [p. 87, ln. 14-25; p. 88, ln. 1-4]; p.43 [p.35-6, ln.18-2]). *See, e.g.*, *Paparone v. Lake Placid Holding Co.*, 438 So. 2d 155, 157 (Fla 2d DCA 1983) (citation omitted).

Payment was made at the point that a resigned member reached the top of the resigned member waiting list and a new member paid their equity contribution. (DIN 960, p. 70 [p.40, ln. 3-10]; DIN 971, p. 25 [p. 87, ln. 5-9]). Resigned members move up the list as the certificates ahead of theirs are purchased. (DIN 960, p. 70

[p.40, ln. 3-10]). This system is predicated on new equity members joining the club. (DIN 971, p. 25 [p. 87, ln. 14-25; p. 88, ln. 1-4]). In February 2019, after the club's sale to Concert, no new equity memberships were offered. (DIN 971, p. 30 [p. 109, ln. 6-10]). Thus, there was no way for resigned members to move up the list and have their certificates repurchased by the club. (DIN 971, p. 25 [p. 87, ln. 14-25; p. 88, ln. 1-4]).

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

If refund liability to resigned members was contingent upon them reaching the top of the resigned member waiting list, then PGCC and Concert worked together to render this an impossibility. As stated in their joint response to the Motion for Class Certification, "[u]pon the sale of PGCC's assets to Concert pursuant to the PSA, PGCC ceased operating as a Club and ceased selling new club memberships, as such, no additional funds have been added to the Escrow Account since the sale." (DIN 707, pp. 6-7, ¶8). If no funds were added to the escrow account, no resigned memberships were purchased off the waiting list. (DIN 971, p. 25 [p. 87,

ln. 14-25; p. 88, ln. 1-4]). If no resigned memberships were purchased off the waiting list, it was impossible for a resigned member to move up the waiting list. (DIN 971, p. 43 [p. 35, ln. 18 – p. 36, ln. 2]). Since PGCC and Concert rendered the condition precedent an impossibility, they cannot now use it as a defense to payment.

D. Unjust Enrichment

This Court previously found that there was no claim for unjust enrichment against PGCC as "there is an express and enforceable contract between the parties. . ." (DIN 1060, p.4, ¶8). 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.

As an additional ground for entering summary judgment on this count, the Court found that neither PGCC nor Concert were unjustly enriched "because there is no evidence" that they "received any direct benefit from the class members' equity payments." (DIN 1060, p.4, ¶9). Conferral of a benefit upon the defendant by the plaintiff is the first element of an action for unjust enrichment. *See Ruck Bros. Brick v. Kellogg & Kimsey, Inc.*, 668 So. 2d 205, 207 (Fla. 2d DCA 1995) (citing *Rite-Way Painting & Plastering, Inc. v. Tetor*, 582 So. 2d 15 (Fla. 2d DCA 1991)). The Second District Court of Appeal has acknowledged that "in order to support a claim of unjust enrichment, a plaintiff must show that the defendant received a direct benefit from the plaintiff." *Malamud v. Syprett*, 117 So. 3d 434, 438 (Fla. 2d DCA

2013) (citing *Extraordinary Title Servs., LLC v. Fla. Power & Light Co.*, 1 So. 3d 400, 404 (Fla. 3d DCA 2009)).

Contrary to the Court's finding, the evidence in this case demonstrates that PGCC and Concert received a direct benefit from the "equity payment" made by the class members. In joining the club, the resigned members conferred a benefit on PGCC in the form of an equity contribution made in addition to their annual dues. (DIN 959, Composite Ex. 2; DIN 648, p. 78, ¶3.1.2; DIN 704, p. 19 [p.16, ln. 9-12])

The equity payments made to PGCC at the time of joining the club were divided into two parts, with 20% going into the club's operational fund and 80% going towards the purchase of a previously resigned membership. (DIN 971, p. 25 [p. 86, ln. 15-19]; [p. 87, ln. 5-9]). Prior to 2005, 100% of the equity contributions went into the operating account and any refund amounts were paid out from there (DIN 1073, p.43, ln. 23-24; *compare* DIN 481, p. 33, §3.9 *with* DIN 481, p.52, ¶3.9.3). By 2005, the club moved to a system where the 80% refund amount went into a separate escrow account to fund the refunds owed resigned members while 20% remained in the operating fund. (DIN 960, p. 70 [p.40, ln. 3-10]; DIN 971, p. 25 [p. 86, ln. 15-19], [p.87, ln. 5-9]; DIN 1073, p.43, ln. 18-19, ln. 23-24; *compare* DIN 481, p. 33, §3.9 *with* DIN 481, p.52, ¶3.9.3). Thus, PGCC received the benefit of the equity members' contributions, using 20% for operations, like improvements and upkeep of the club, and 80% to pay out resigned equity members.

Because equity members were entitled to an equity refund after resignation, a portion of their equity payments were, essentially, a loan to the club. (DIN 481,

p.33, ¶3.9.2; p.52, ¶3.9.2; p.69, ¶3.9.2; p. 86, ¶3.8.2; p.101, ¶3.8.2; p.118, ¶3.8.2; p.136, ¶¶3.8.1, 3.8.2; DIN 648, p. 81, ¶3.8.2; DIN 704, p. 14 [p.11, ln. 13-18]; DIN 756, p. 2). The club was able to use the funds in a completely unrestricted manner prior to 2005. (DIN 1073, p.43, ln. 23-24). After 2005, the club had full use of 20% of the contributions and maintained the 80% in a separate fund for the repayment of the equity contributions "loaned" to the club. In either system, PGCC directly benefited from its use of the funds paid by the equity members.

When PGCC sold its assets to Concert, this benefit was passed on to Concert. Concert received the assets of the club, which had been maintained and improved for years using, in part, the equity contributions of equity members. Since 100% of the equity contributions went into the operating fund prior to 2005 and 20% went into the operating fund after 2005, the club had operated for years using these funds, in addition to dues, to pay for all manner of things benefiting the club, including upkeep and improvements. (DIN 1073, p.44, ln. 2-3). The benefit to the club and its assets from the use of these equity payments was transferred to Concert when it purchased the assets of the club. Having purchased the assets of the club, the evidence shows Concert received a direct benefit from the equity members' contributions to the club.

This Court previously ruled that there was no evidence that PGCC or Concert used the equity payments for any purpose other than to refund resigned members. (DIN 1008, p. 7). Such finding does not account for the applicable provisions in the bylaws, the deposition of PGCC's corporate representative, or the other evidence

cited here. When the evidence that the equity payments were placed in the club's operating account is considered, the benefit conferred on the club and its assets – later purchased by Concert – becomes apparent. Having received the benefit of the equity payments from the class members and having used such funds to maintain and improve the club, the evidence establishes that both PGCC and Concert received a direct benefit from the class members.

E. Fraudulent Transfer

"Florida has long recognized the principle that a voluntary conveyance by one who is indebted is presumptively fraudulent when attacked by a judgment creditor upon a debt existing at the time of the conveyance." *Amjad Munim, M.D., P.A. v. Azar*, 648 So. 2d 145, 152 (Fla. 4th DCA 1994). A transfer made by a debtor is fraudulent as to a creditor if the creditor's claim arose before the transfer and the debtor made the transfer with the actual intent to hinder, delay, or defraud any creditor. Fla. Stat. § 726.105(1)(a).

A creditor is broadly defined as "a person who has a claim." Fla. Stat. § 726.102. A "claim" is "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." *Id*. Therefore, the resigned members – even if their debts were contingent on their reaching the top of the refund waiting list – were creditors.

1. Defendants hindered plaintiffs' ability to collect debts.

Florida's fraudulent transfer statute provides that a transfer is fraudulent where the debtor acts to hinder, delay, or defraud its creditors. Fla. Stat. § 726.105 (1)(a). Black's Law Dictionary defines "hinder" to mean, "to slow or make difficult; to hamper…To hold back…to impede, delay, or prevent." Black's Law Dictionary (11th ed. 2019). PGCC and Concert acted together to create a situation in which no resigned member could reach the top of the waiting list and collect their full refund. The transfer of the club from PGCC to Concert, by it terms, hindered the resigned equity members, who were creditors of PGCC, in their ability to collect the full equity refunds they were owed.

In 2016, PGCC, as the debtor of every resigned equity member, acted to reduce its debt by changing its bylaws to pay resigned members 5% of the amount owed them. (DIN 971, p.12 [p. 37, ln. 8-11]). Such action was taken without notice or the opportunity to vote on or otherwise consent to this reduction of debt. (DIN 1073, pp. 98-99). Therefore, PGCC hindered the resigned members' ability to collect their full refunds. Several resigned members, on learning of this debt reduction through their receipt of a check for 5% of the monies owed them, sued PGCC for payment of the full debt owed. (DIN 971, p. 12 [p.37, ln. 8-12]).

PGCC, as the debtor, transferred all club assets to Concert. (DIN 961, ¶10). The sale of the club required the approval of the "Equity Members." *See supra*, III.A. Despite this, the resigned equity members did not receive notice of the pending sale or its terms nor did they have the opportunity to vote on the sale as

equity members. (DIN 1073, pp. 98-99). The sale of the club, without notice to, or the vote of, the resigned members hindered their ability to collect their full equity refunds.

Under the terms of the transfer, Concert agreed to pay the reduced debt amount to the resigned members, provided the resigned members/creditors executed a release of the full debt owed. (DIN 704, p.108, ln. 19-25; DIN 971, p.30 [pp.107-9]). This term of the transfer hindered the resigned members' ability to collect their full refunds.

Under the terms of the transfer, PGCC ceased operating as a club and did not sell any new equity memberships and Concert, as the new club operator, also did not sell new equity memberships. (DIN 971, p. 30 [p. 109, ln. 6-10]; DIN 961, ¶10). Under these terms, no new equity funds were to be added to the escrow account and previously resigned memberships could not be refunded. (DIN 961, ¶10; DIN 971, p. 25 [p. 87, ln. 14-25; p. 88, ln. 1-4]). By dismantling the method through which resigned members could collect the refund of their equity membership, PGCC and Concert, through these terms of the transfer, hindered the resigned members' ability to collect their full refunds.

2. Plaintiffs established intent to hinder/delay/defraud.

In granting summary judgement for Defendants on the count of fraudulent transfer, the Court acknowledged that "summary judgement is rarely appropriate in a fraudulent transfer case." (DIN 1060, pp. 4-5, ¶10). However, the Court determined that summary judgment was appropriate in this case, finding: 1) there

was direct evidence of intent and 2) plaintiffs could not establish any badges of fraud. (DIN 1060, p.5, ¶11).

First, the Court found PGCC, as the debtor, acted with, presumably, good intent, in selling the club to Concert because the sale included a term by which Concert agreed to pay resigned members the reduced amount of the debt owed resigned members, per the 2016 bylaw amendments. (DIN 1060, ¶11). However, this finding is founded on the Court's earlier finding that the 2016 bylaw amendments were properly adopted and applied to the resigned members, issues which have been addressed, *supra*. *See supra*, III.A.

Additionally, this finding ignores two important facts: that this term precluded the resigned members from collecting their full refunds and that Concert required a release from each resigned member receiving this payment. As such, this term of the transfer hindered the resigned members' ability to collect the debts owed them. It did not allow them to collect their full debt and it required a release of their full debt to receive any payment of the debt. At the very least, this term creates a factual issue as to whether PGCC and Concert acted with an intent to hinder collection of the debts.

Second, the Court found plaintiffs could not establish *any* of the badges of fraud listed in Fla. Stat. § 726.105(2), which the statute provides are factors to consider in determining intent to hinder, delay, or defraud. (DIN 1060, ¶11). Given the evidence adduced and the Court's findings regarding the status of resigned members as "Equity Members," plaintiffs submit that they have established at least

three badges of fraud. Per Fla. Stat. § 726.105(2), these badges should have been considered in determining intent and their presence in this case, at very least, requires a denial of summary judgment.

Under Fla. Stat. § 726.105(2)(c), if a transfer was concealed or not disclosed, the concealment or failure to disclose should be considered a badge of fraud. Here, PGCC provided the resigned members with no notice or opportunity to vote on either the 2016 amendments or the sale of the club to Concert, which adopted the 2016 refund provisions. (DIN 1073, pp. 98-99). PGCC never even notified the resigned members that the sale had occurred. (DIN 960, p.10 [p.29, ln.19-25]). By failing to notify resigned members of the transfer which hindered their ability to collect the refunds they were owed, PGCC acted to conceal the transfer or failed to disclose it to its creditors, the resigned members. Therefore, the facts of this case establish this badge of fraud.

Fla. Stat. § 726.105(2)(d) provides that a badge of fraud arises where the debtor has been sued on the debt before the transfer. In this case, it is undisputed that PGCC was sued prior to the transfer. The present class action arose from the consolidation of several cases filed by resigned members, including cases filed prior to the transfer of the club to Concert. (DIN 1008, p. 8). Further, Concert did not acknowledge this pending litigation in the releases it sent to resigned members, which were the first notice that the club's assets had been sold. (DIN 971, p.30 [pp.107-8]). Thus, this badge of fraud has been established.

A third badge of fraud arises from Fla. Stat. § 726.105(2)(e) which refers to a transfer where substantially all of a debtor's assets are transferred. Here, defendants conceded this factor, acknowledging PGCC sold all its assets to Concert. (DIN 975, p.26).

Given the factual bases for three of the badges of fraud set forth in the statute, the Court should have considered these factors. These factors show that the transfer was structured to delay and hinder the resigned members' efforts to collect the debt owed them. At the very least, the presence of these factors raises issues of fact, precluding summary judgment.

In sum, PGCC and Concert each took action to hinder the resigned members from collecting their full equity refunds. The transfer of the club from PGCC to Concert adopted and further hindered the ability of resigned members to collect the debts owed them. The transfer evidenced several badges of fraud showing the parties' intent to hinder payment to the resigned members. As a transfer made with the intent to hinder the resigned members/creditors, summary judgment on the count of fraudulent transfer was not merited.

IV. CONCLUSION

In conclusion, plaintiffs respectfully request that this Court rehear the motions for summary judgment to clarify certain aspects of the orders and opinions on summary judgment that are inconsistent with the facts and law. If the Court's interpretation of the bylaws – that "Equity Members" included resigned members

who had not yet received a refund – is correct, then the Court needs to acknowledge what that interpretation means for the rest of the bylaws. Further, this Court's finding that the membership agreements, which included the bylaws, were enforceable contracts contrasts with the finding that the refund provision was freely modifiable by one party to that contract *without limitation*. Surely, the ability to modify the contract was limited, at the very least, by the terms of the contract itself, which – as the Court all but pointed out – would have required the resigned members to have a say in that modification. Lastly, for the reasons discussed above, plaintiffs respectfully request that this Court rehear and re-evaluate its findings on the counts of Unjust Enrichment and Fraudulent Transfer.

/s/ Benjamin A. Christian
Benjamin A. Christian, Esquire
FL Bar No.: 1033821
mctlaw
1605 Main Street, Suite 710
Sarasota, Florida 34236
Telephone: 941-952-5242
Facsimile: 941-952-5042
Primary: bchristian@mctlaw.com
Secondary: ebanfelder@mctlaw.com
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served this 18th day of January, 2023 via notification through the Florida E-Filing Portal upon the following:

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

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

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

/s/ Benjamin A. Christian

Benjamin A. Christian, Esquire
FL Bar No.: 1033821
mctlaw
1605 Main Street, Suite 710
Sarasota, Florida 34236
Telephone: 941-952-5242
Facsimile: 941-952-5042
Primary: bchristian@mctlaw.com
Secondary: ebanfelder@mctlaw.com
Attorney for Plaintiffs