

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT,  
IN AND FOR POLK COUNTY, FLORIDA

Case No: 2015CA-004499-0000-00

PETER JOLLY, VICTOR DESTREMPS,  
and ANNETTE BROWN,

Plaintiffs,

v.

ASSOCIATION OF POINCIANA VILLAGES, et al.,

Defendants.

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**DEFENDANT ASSOCIATION OF POINCIANA VILLAGES, INC.'S MOTION TO  
DISMISS WITH PREJUDICE PLAINTIFFS' FOURTH AMENDED COMPLAINT**

Defendant, ASSOCIATION OF POINCIANA VILLAGES, INC. (hereinafter "APV"),  
by and through its undersigned attorney, hereby files this Motion to Dismiss with Prejudice  
Counts I, II, III and VIII of Plaintiffs' Fourth Amended Complaint pursuant to Fla. R. Civ. P.  
1.140 and in support thereof states as follows:

1. APV moves this Court pursuant to Fla. R. Civ. P. 1.140(b)(6) for an order dismissing with prejudice Counts I, II, III and VIII of Plaintiffs' Fourth Amended Complaint.
2. Like Plaintiffs' original Complaint, Amended Complaint, Second Amended Complaint and Third Amended Complaint, Plaintiffs' Fourth Amended Complaint fails to state any claims upon which relief can be granted against Defendant APV.
3. Plaintiffs' Fourth Amended Complaint seeks damages from Defendant APV for the same claims Plaintiffs previously alleged against APV, including Count I, breach of contract; Count II, breach of fiduciary duty; and Count III, breach of third-party beneficiary under a

contract.

4. Plaintiffs also seek a “preliminary injunction” against Defendant APV in Count VIII, “preliminary injunction against Defendant APV and Defendant Village One.”

### Summary of Arguments

5. Count I, breach of contract, fails to state a cause of action against APV because the Plaintiffs are not parties to the June 5, 1985 Agreement attached to the Fourth Amended Complaint; therefore Plaintiffs may not make a claim for breach of the Agreement.

6. Count II, breach of fiduciary duty, fails to state a cause of action against APV because the statute cited by the Plaintiffs, Section 720.303(1), Fla. Stat., only creates a fiduciary relationship between the Plaintiffs and “[t]he officers and directors of an association,” not APV.

7. Count III, breach of third-party beneficiary contract, fails to state a cause of action against APV because the June 5, 1985 Agreement does not prohibit APV from removing property (portions of Village Four) from its jurisdiction.

8. Count III also fails because it does not allege or evidence that the property removed was “real property owned by Avatar” subject to the property removal restriction contained in Section 3(b) of the June 5, 1985 Agreement.

9. Count III further fails because Plaintiffs’ claimed damages relate to election disputes that are outside this Court’s jurisdiction.

10. In addition, Count III fails because Plaintiffs did not comply with Section 720.311, Fla. Stat.’s mandatory pre-suit mediation requirements before filing suit against APV and thus Chapter 720, Fla. Stat. did not authorize Plaintiffs to file suit against APV.

11. Count VIII fails because, although paragraph 105 claims that Plaintiffs lack any adequate remedy at law, paragraphs 102-108 of Count VIII seek to temporarily enjoin APV from collecting “fees and assessments from its members,” “accounts receivable debts,” “wrongfully collected fees and assessments,” “amount[s] owed by the members in arrears,” “wrongful additional fees and penalties,” and “any fees,” which are all money damage claims, for which there is a remedy at law.

12. Count VIII also fails because Plaintiffs fail to allege that they were personally harmed, instead pleading harm to “homeowners” and “members in arrears.”

### **Count I – Breach of Contract by Defendant APV**

13. Count I is incomprehensible in that it seeks in a single count to bring separate claims for the supposed breach of three different documents plus a Statute, i.e. a June 5, 1985 Agreement, APV’s By-Laws, APV’s Articles of Incorporation and Chapter 720, Fla. Stat.

14. Paragraph 58 of Count I, without explanation or reference to any contract, also mentions APV’s sale of some of its homeowners’ accounts receivable debts to a Nevada debt collection company as if such sale constitutes a breach of any of the foregoing documents or an unidentified contract or governing document.

15. Plaintiffs’ combination of multiple contracts / governing documents, Statutes and unexplained mention of homeowners’ accounts receivable into a single breach of contract count is a clear violation of this Court’s October 14, 2016 and March 23, 2017 Orders, both of which directed Plaintiffs “to sufficiently state cause(s) of action and cure pleading deficiencies in accord with the minimal pleading standards of Fla. Rule Civ. P. 1.110(2016)” or their “subsequent amended complaint risks dismissal with prejudice and no leave to amend.”

### **June 5, 1985 Agreement**

16. Paragraph 53 of the Fourth Amended Complaint claims that “Plaintiffs and Defendants entered into a valid, binding and enforceable contract. (Attached Exhibit A – 1985 Agreement) . . . .”

17. However, the June 5, 1985 Agreement clearly and expressly contradicts and disproves Plaintiffs’ assertion that Plaintiffs were parties to or entered into the June 5, 1985 Agreement.

18. The parties to the June 5, 1985 Agreement are identified in the first paragraph of the Agreement and include Defendant APV, Defendant AVATAR PROPERTIES, INC. and Defendant POINCIANA VILLAGE ONE ASSOCIATION, INC.

19. None of the three Plaintiffs are named parties to the June 5, 1985 Agreement.

20. In addition, paragraph 69 of Plaintiffs’ Fourth Amended Complaint states, “Plaintiffs are not parties to the contract.”

21. Where allegations in a complaint are contradicted by its exhibits, the plain meaning of the exhibits control and may be the basis for a motion to dismiss per *Hunt Ridge at Tall Pines, Inc. v Hall*, 766 So.2d 399, 401 (Fla. 2d DCA 2000). *See also, Franz Tractor Company v J.I. Case Company*, 566 So.2d 524 (Fla. 2d DCA 1990). (Action dismissed because agreement attached to complaint contradicted allegations in complaint.)

22. Fla. Jury Inst. 416.4 Breach of Contract – Essential Factual Elements, states that, “[t]o recover damages from (defendant) for breach of contract, (claimant) must prove all of the following: 1. (Claimant) and (defendant) entered into a contract . . . .”

23. As none of the three Plaintiffs entered into the June 5, 1985 Agreement none of

the three Plaintiffs can state a cause of action for breach of contract against Defendant APV.

24. Plaintiffs may argue that as homeowners they are third party beneficiaries per paragraph six of the Agreement titled “Third Party Beneficiaries,” which states, “The parties acknowledge that this Agreement is intended to inure to the benefit of all owners of property within Poinciana.”

25. However, Fla. Jury Inst. 416.2, Third Party Beneficiary, declares that an essential element of this claim is “(Claimant) is not a party to the contract”; therefore, Plaintiffs may not use their third party beneficiary status to assert that they are parties to or entered into the June 5, 1985 Agreement.

#### **By-Laws and Articles of Incorporation**

26. Paragraph 55 of Count I claims “APV materially breached its By-laws, Articles of Incorporation and Fla. Stat. 720 by failing to provide notice to its members of the Executive Committee meeting held in November of 2011,” however, this claim is not supported by a plain reading of the By-Laws and Articles of Incorporation attached together as Exhibit “F” to the Fourth Amended Complaint.

27. Article X of APV’s By-Laws addresses “Notice of Meetings” and provides in full, “Unless required by a resolution of the Board of Directors, no formal notice of any meeting shall be required and no notice needs state the business to be transacted thereat.”

28. The Articles of Incorporation make no mention of meeting notices.

29. As the By-Laws attached to the Fourth Amended Complaint do not require “formal notice of any meeting” and the Articles of Incorporation do not impose any meeting notice requirements there can be no breach of these governing documents.

30. Plaintiffs do not allege or attach a resolution of the Board of Directors requiring

any meeting notice; therefore, the Court and parties can only rely on the By-Laws the Plaintiffs provided with their Fourth Amended Complaint.

31. As noted in paragraph 21 of this Motion to Dismiss, where allegations in a complaint are contradicted by its exhibits, the plain meaning of the exhibits control and may be the basis for a motion to dismiss per *Hunt Ridge at Tall Pines, Inc. v Hall*, 766 So.2d 399, 401 (Fla. 2d DCA 2000). See also, *Franz Tractor Company v J.I. Case Company*, 566 So.2d 524 (Fla. 2d DCA 1990). (Action dismissed because agreement attached to complaint contradicted allegations in complaint.)

32. In the event Plaintiffs seek to argue a breach of the Articles and By-Laws based on the general allegations in paragraphs 32 – 38 of the Fourth Amended Complaint, the claims in these paragraphs are, notwithstanding Plaintiffs’ contrary assertions, all related to APV’s elections; therefore not subject to the jurisdiction of this Court. See paragraph 33, “APV Board Elections were to be every year . . .” and paragraph 34, “the Board voted to extend voting hours . . .” and paragraph 35, “APV does not have the authority to conduct or modify election procedures on behalf of the other Villages without the consent of the Village’s Boards” and paragraph 36, “the Directors of each Village will serve 3 year terms . . .” and paragraph 37, “APV changed the date of the Elections . . . without the Villages consent” and paragraph 38, “there should have been an election for 2015 . . . .”

33. Instead, the remedy for APV’s adoption or implementation of any allegedly improper election procedure is to petition for election arbitration pursuant to Sections 720.306(a)(c) and 720.311(1), Fla. Stat. through the Department of Business and Professional Regulation, Division of Condominiums (hereinafter “Division”) which has exclusive jurisdiction to adjudicate homeowners’ association election disputes.

34. Section 720.306(9)(c), Fla. Stat. provides, “Any election dispute between a member and an association must be submitted to mandatory binding arbitration with the division.”

**Chapter 720, Fla. Stat.**

35. Paragraph 55 of Count I claims that APV violated “Fla. Stat. 720 by failing to provide notice to its members of the Executive Committee meeting held in November of 2011 . . . ,” however, this is a Florida Statute, not a contract; therefore, Plaintiffs’ claim of a “breach of Chapter 720” is wholly misplaced when addressing a supposed breach of contract.

36. Compounding the unexplained “breach of Chapter 720” claim is Plaintiffs’ failure to allege the notice required by Chapter 720, Fla. Stat. for the 2011 meetings of APV’s executive committee.

37. In summary, Count I should be dismissed because Plaintiffs are not parties to and did not enter into the June 5, 1985 Agreement, which is an essential element of their breach of contract claim; APV did not breach its Articles and By-Laws since neither imposed a meeting notice requirement for the 2011 executive committee meetings; Chapter 720, Fla. Stat. is not a contract, and Plaintiffs failed once again to specify how APV breached this Statute.

**Count II – Breach of Fiduciary Duty by Defendant APV**

38. Paragraph 60 of Count II of the Fourth Amended Complaint asserts that “Defendant, APV, owed Plaintiffs a fiduciary duty of care as expressly stated in pertinent part in Fla. Stat. 720.303(1): ‘The officers and directors of an association have a fiduciary relationship to the members who are served by the association.’”

39. While the quoted Statute creates a “fiduciary relationship” between the “officers and directors” of APV “to the members who are served by the association,” the Statute does not

create a fiduciary relationship between APV and its members or APV and the three individual Plaintiffs.

40. Furthermore, as a matter of law, a homeowners' association does not owe a fiduciary duty to individual members of its association. *Harvick v Oak Hammock Preserve Community Owners Association, Inc.*, 2015 WL 667985 (M.D. Fla. 2015). (An individual homeowner cannot impose a liability against a homeowners' association for breach of fiduciary duty solely due to his or her status as a member of the association.)

41. As the plain and unambiguous language in Section 720.303(1), Fla. Stat. does not create a fiduciary duty by APV in favor of the individual Plaintiffs; Plaintiffs fail to state a valid cause of action for breach of Section 720.303(1), Fla. Stat. fiduciary duty against APV.

### **Count III – Breach of Third-Party Beneficiary Contract by Defendant APV**

42. Defendant APV agrees that Plaintiffs are third party beneficiaries of the June 5, 1985 Agreement but disputes that APV breached the Agreement, that Plaintiffs were damaged or that Plaintiffs complied with their mandatory presuit obligations before bringing this claim.

#### **No Breach**

43. Paragraph 71 of Count III claims that “Defendant APV materially breached the contract when APV wrongfully removed parcels of Village 4 from the APV in January of 2012 without properly achieving the votes necessary from the various Village Directors consenting to such amendment to the 1985 Agreement.”

44. Regarding removal of land from APV, Section 3(b) of the June 5, 1985 Agreement, titled “Removal of Land,” states, “**Avatar** shall take no action, nor consent to or agree to any action, which would result in **any real property owned by Avatar** being removed from the effect of the Restrictions.” (Emphasis added)



45. As evidenced by the plain meaning of Section 3(b) of the June 5, 1985 Agreement, the contract does not prohibit APV from removing real property from APV's restrictions.

46. Where allegations in a complaint are contradicted by its exhibits, the plain meaning of the exhibits control and may be the basis for a motion to dismiss per *Hunt Ridge at Tall Pines, Inc. v Hall*, 766 So.2d at 401.

47. In addition, Plaintiffs once again fail to allege that the property removed from APV's restrictions was "real property owned by Avatar," which is the only property subject to the Section 3(b) property removal restrictions, and thus Plaintiffs have, for the fifth time, failed to state a valid claim for breach of the June 5, 1985 Agreement.

#### **No Damages**

48. Plaintiffs fail to provide a short and plain statement regarding how they were damaged by the removal of "parcels of Village 4 from the APV," which is required by Fla. R. Civ. P. 1.110(b)(2), especially when the Fourth Amended Complaint states that Plaintiffs are owners in Villages One and Five, not Village Four.

49. Plaintiffs may argue that paragraph 72 satisfies the pleading requirements for damages; however, paragraph 72 proves otherwise since the allegations focus on "manipulated votes" and "the voting pool," which "allowed and assisted AVATAR to maintain wrongful control of APV," all of which are election issues subject to the exclusive jurisdiction of the Division.

50. Plaintiffs may point to the lone phrase in paragraph 72 that APV "diminished the fee base from which the membership fees are premised . . ."; however, this underscores Plaintiffs' repeated failure and refusal to identify the owners of the removed property over the

course of five versions of their lawsuit since per Section 2 of the June 5, 1985 Agreement titled “Payments in lieu of Assessments” AVATAR is not obligated to pay assessments on its property.

### **Presuit Mediation**

51. Additional grounds to dismiss Count III include that the alleged breach of contract was the January 2012 “amendment to 1985 Agreement” attached to the Fourth Amended Complaint, which subjects Plaintiffs’ Count III claims to Section 720.311, Fla. Stat.’s mandatory pre-suit mediation process.

52. Section 720.311(2)(a), Fla. Stat. provides in part regarding pre-suit mediation,

**Disputes between an association and a parcel owner regarding use of or changes to the parcel or the common areas and other covenant enforcement disputes, disputes regarding amendments to the association documents, disputes regarding meetings of the board and committees appointed by the board, membership meetings not including election meetings, and access to the official records of the association shall be the subject of a demand for presuit mediation served by an aggrieved party before the dispute is filed in court.**  
(Emphasis added)

53. Paragraphs 16 - 27 of the general allegations and paragraph 71 of Count III state that the removal of property from Village Four was an “amendment to the 1985 Agreement,” which constitutes “amendments to the association documents” subject to Section 720.311(2)(a), Fla. Stat.

54. In addition, the allegations related to the executive committee meetings and vote for removal of property described in paragraphs 16 – 27 of the Fourth Amended Complaint under the heading “Wrongful Removal of Village 4 Property from the APV” all involve “meetings of the board and committees appointed by the board.”

55. Furthermore, Count III’s claims concerning “when APV wrongfully removed

parcels of Village 4 from the APV,” relate to the “use of or changes to the parcel or the common areas.”

56. Plaintiffs’ Count III claims therefore must be submitted to pre-suit mediation per Section 720.311(2)(a), Fla. Stat., which further provides, “[a]n aggrieved party shall serve on the responding party a written demand to participate in presuit mediation” in substantially the following form . . . .”

57. Paragraph 12 of the Fourth Amended Complaint states that “Plaintiff (sic) served upon Defendants, APV and Village One, Inc., the statutory offer to mediate in accordance with 720.311 on April 20, 2016. Mediation subsequently occurred with Plaintiffs, APV and Village One, resulting in an impasse.”

58. While at first glance the statement in paragraph 12 would seem sufficient to fulfill Plaintiffs’ Section 720.311, Fla. Stat. pre-suit mediation obligations, this Court’s record incontrovertibly disproves Plaintiffs followed the requirements of Section 720.311, Fla. Stat.

59. The statutory form letter contained in Section 720.311(2)(a), Fla. Stat. states that APV, as the responding party, must respond within 20 days from the date of the Plaintiffs’ letter offering pre-suit mediation or Plaintiffs, as the aggrieved party, “will be authorized to proceed with the filing of a lawsuit . . . .”

60. Instead of giving APV the required 20 days to respond to Plaintiffs’ April 20, 2016 pre-suit mediation offer, Plaintiffs initially filed suit against APV on December 22, 2015 and filed their amended suit on April 26, 2016 as evidenced by this Court’s docket.

61. The plain meaning of Section 720.311(2)(a), Fla. Stat. provides that Plaintiffs were not “authorized to proceed with the filing of a lawsuit ” against APV until APV was given 20 days to respond.

62. A common definition of “authorized” is “having official permission or approval.”

63. In the instant case, Plaintiffs’ April 26, 2016 amended lawsuit against APV was not “authorized” as it was filed less than 20 days after Plaintiffs’ April 20, 2016 pre-suit mediation letter; therefore, Plaintiffs did not have “official permission or approval” to sue APV on April 26, 2016.

64. The obvious purpose of giving APV 20 days to respond is to allow APV to engage in pre-suit mediation to avoid a lawsuit, a purpose which Plaintiffs thwarted when they filed their “unauthorized” suit six days after offering pre-suit mediation.

65. As evidenced by paragraph 12 of Plaintiffs’ Fourth Amended Complaint, “mediation subsequently occurred” between Plaintiffs and APV because APV responded to Plaintiffs’ Section 720.311, Fla. Stat. pre-suit mediation letter.

66. Upon APV accepting pre-suit mediation, Section 720.311, Fla. Stat. provides, “The mediation conference must be held within ninety (90) days of” the date of the Plaintiffs’ letter, “unless extended by mutual written agreement.”

67. Although APV and Plaintiffs had 90 days from Plaintiffs’ April 20, 2016 letter to mediate, this Court’s docket shows that Plaintiffs filed an amended lawsuit against APV on June 20, 2016, which was within the 90 day time period for APV to participate in pre-suit mediation with Plaintiffs.

68. Pursuant to *Conrad v Hidden Lakes Homeowners Association, Inc.*, (Circuit Court, 15<sup>th</sup> Judicial Circuit, Case Number 502004CC013458XXXXSB, July 13, 2007), Plaintiffs were required to comply with all Section 720.311, Fla. Stat. “mandatory presuit mediation” requirements as a condition precedent to filing their lawsuits against APV.

69. In *Conrad*, a homeowners' association filed suit for injunctive relief against a homeowner without submitting the required Section 720.311, Fla. Stat. pre-suit demand for mediation, the homeowner filed a motion to dismiss and the Circuit court, in its appellate capacity, held that the trial court had no choice but to dismiss the suit for failure to comply with a condition precedent to filing suit.

70. In the instant case, the Plaintiffs circumvented the mandatory pre-suit mediation process and in so doing, were not authorized and thus did not have statutory permission to sue APV until after they had fully complied with all Section 720.311, Fla. Stat. requirements, subjecting their Count III claims to dismissal per *Conrad*.

71. Plaintiffs may argue that they should be allowed to proceed because they mediated with APV after suit was filed, however, *Conrad* stands for the proposition that Plaintiffs' suit should be dismissed for failure to comply with a condition precedent to filing suit.

72. In summary, Count III should be dismissed because (a) APV is not barred from removing land from its restrictions; (b) Plaintiffs fail to allege that the Village Four parcels removed "was real property owned by Avatar"; (c) Plaintiffs fail to properly allege damages; and (d) Plaintiffs failure to comply with the mandatory pre-suit mediation requirements of Section 720.311, Fla. Stat. warrants dismissal.

#### **Count VIII – Preliminary Injunction Against Defendant APV and Defendant Village One**

73. Count VIII of the Fourth Amended Complaint seeks a "preliminary injunction" against APV "from collecting any fees . . ." because, per paragraph 102 of the Fourth Amended Complaint, "APV and VILLAGE ONE no longer have the authority to collect fees and assessments from its (sic) members . . . ."

74. Paragraph 103 contends that "APV's Board sold accounts receivable debts owed

by more than 4,000 Poinciana Homeowners to a Nevada collection company”, which resulted in “having their debts illegally raised . . .” while paragraph 104 adds that “APV continues to sell account receivable debts owed by its members thus resulting in the loss of thousands of homes of the membership.”

75. Paragraph 106 asserts that “Plaintiffs will incur irreparable harm absent the entry of an injunction if APV and VILLAGE ONE continue to attempt to collect unlawful fees and assessments . . . and . . . attempt to wrongfully initiate collection actions and eventually will foreclose on its members’ homes for failure to pay unlawful fees and assessments.”

76. It has long been determined that a party seeking mandatory injunctive relief must establish that irreparable harm will result to the party if the injunction is not issued and the party or parties do not have an adequate remedy at law. *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 275 (2d Cir. 1985). (“[T]he single most important prerequisite for the issuance of a preliminary injunction [whether it be preventive or mandatory] is a demonstration that, if it is not granted, the applicant is likely to suffer irreparable harm before [the court can render] a decision on the merits.”)

77. Moreover, it is equally well-established that “an injury is ‘irreparable’ only if it cannot be undone through monetary remedies.” *Cate v. Oldham*, 707 F.2d 1176, 1189 (11th Cir. 1983).

#### **No Irreparable Harm to Plaintiffs**

78. Count VIII of Plaintiffs’ Fourth Amended Complaint once again fails to allege that the three Plaintiffs will personally suffer irreparable harm.

79. Instead, it is abundantly clear that the Plaintiffs alleged harm is not to themselves but to the unnamed “4,000 Poinciana Homeowners” and “the members in arrears,”

as none of Plaintiffs allege they are in arrears, had their accounts sold to a debt collection company, or had their homes foreclosed upon for non-payment of assessments and fees.

80. Plaintiffs' claims on behalf of an unnamed group of "homeowners" and "members" in arrears is a return to Plaintiffs' earlier dismissed pleadings in which they were found by this Court to be "allegedly representing the interest of the homeowners of the subject residential community development [identified as 'Poinciana']" per the first paragraph of this Court's October 14, 2016 Order.

#### **Adequate Remedy at Law**

81. Count VIII clearly centers on the collection of "assessments and fees"; therefore, Plaintiffs again fail to explain why any claimed irreparable harm cannot be addressed or undone through monetary remedies since the judicial foreclosure of unpaid homeowners' association assessments must comply with the procedures in Section 720.3085, Fla. Stat.

82. Section 720.3085, Fla. Stat. grants to each and every one of APV and VILLAGE ONE'S members the right to challenge any foreclosure, including through a Section 720.3085 (1)(b), Fla. Stat. notice contesting any assessment lien as well as judicial determination of amounts owed and recovery of prevailing party attorneys' fees and costs per Section 720.305(1) if assessments and fees are wrongfully sought.

83. As all assessment claims are quantifiable for purposes of a money damage award, i.e. assessments and fees, there is an adequate remedy at law barring a preliminary injunction. *Hu v Hu*, 942 So.2d at 995 (Fla. 5<sup>th</sup> DCA 2006).

84. In summary, Count VIII should be dismissed because Plaintiffs fail to allege irreparable harm to themselves, Plaintiffs appear to be making claims on behalf of other unnamed "homeowners" and "members in arrears," and quantifiable money damages provide an

adequate remedy at law for anyone subject to assessment collection and foreclosure.

### **Dismissal with Prejudice**

85. Plaintiffs' Fourth Amended Complaint is the Plaintiffs' fifth attempt to state viable causes of action against Defendant APV for breach of contract (Count I), breach of fiduciary duty (Count II); breach of third-party beneficiary under a contract (Count III) and to obtain a preliminary injunction against Defendant APV (Count VIII).

86. As addressed above, Plaintiffs have once again failed to state any valid causes of action against APV.

87. Due to Plaintiffs repeated failure and refusal to state valid causes of action against APV, Plaintiffs' Fourth Amended Complaint warrants dismissal, with prejudice.

88. When deciding whether to dismiss Plaintiffs' Fourth Amended Complaint with prejudice this Court should consider the following three factors: (A) The number of failed amendments; (B) This Court's prior warnings; and (C) The futility of affording Plaintiffs leave to again amend their pleadings.

#### **Number of Failed Amendments**

89. Florida courts have consistently held that "as an action progresses, the privilege of amendment progressively decreases to the point that the trial judge does not abuse his discretion in dismissing with prejudice. *Kohn v. City of Miami Beach*, 611 So.2d 538, 539 (Fla. 3d DCA 1992). *See also Alvarez v. DeAguirre*, 395 So.2d 213 (Fla. 3d DCA 1981).

90. Although there is no "magical number" of allowable amendments, courts "have previously observed that with amendments beyond the third attempt, dismissal with prejudice is generally not an abuse of discretion." *Kohn*, 611 So.2d at 539 and *Horton v. Freeman*, 917 So.2d



1064, 1066 (Fla. 4<sup>th</sup> DCA 2006). (“Generally, a trial court is within its discretion to dismiss a complaint with prejudice after three opportunities to amend.”)

91. As the courts have recognized, “[T]here is simply a point in litigation when defendants are entitled to be relieved from the time, effort, energy, and expense of defending themselves against seemingly vexatious claims.” *Kohn*, 611 So.2d at 539 and *Feigin v. Hospital Staffing Servs., Inc.*, 569 So.2d 941 (Fla. 4th DCA 1990).

92. This Court has granted Plaintiffs leave to amend four times to correct their claims against APV and the other Defendants and, in every instance, Plaintiffs have failed to state any valid causes of action in their original and amended pleadings.

93. Worse than failing to state valid causes of action is Plaintiffs’ failure and refusal to heed this Court’s prior directives regarding election related claims that are outside this Court’s jurisdiction, Plaintiffs’ attempts to makes claims in a representative capacity instead of asserting individual claims, and Plaintiffs’ failure to “sufficiently state cause(s) of action and cure pleading deficiencies in accord with the minimal pleading standards of Fla. Rule Civ. P. 1.110(2016) . . . .”

#### **Prior Warnings**

94. Florida courts have generally held that where a party has been given leave to amend, “[a] trial court cannot dismiss a case with prejudice under rule 1.420(b) for failure to amend if it has not first notified the offending party of the consequences of failing to amend.” *Schindler v. Bank of New York Mellon Trust Company*, 190 So.3d 102, 105 (Fla. 4th DCA 2015).

95. “Refusal to grant leave to amend was not an abuse of the court’s discretion since this was the seventh complaint filed over a four-year period and the record clearly reflects

the court's warning that this was the plaintiff's 'last bite at the apple.'" *Feigin v. Hospital Staffing Services, Inc.*, 569 So.2d 941 (Fla. 4th 1990).

96. In this case, the Court has issued two consecutive warnings to the Plaintiffs that "failure to sufficiently state causes(s) of action . . . in any subsequent amended complaint risks dismissal with prejudice and no leave to amend." See this Court's October 14, 2016 and March 23, 2017 Orders.

### **Futility**

97. Generally, "[a] trial court's refusal to permit an amendment of a pleading is an abuse of discretion unless it is clear that: (1) the amendment would prejudice the opposing party, (2) the privilege to amend has been abused, or (3) the amendment would be futile." *Laurencio v. Deutsche Bank Nat. Trust Co.*, 65 So.3d 1190, 1193 (Fla. 2d DCA 2011).

98. "[L]eave to amend a complaint should be freely granted when justice so requires and it should not be denied unless the privilege has been abused or it is clear the pleading cannot be amended to state a cause of action." *Dryden Waterproofing, Inc. v. Bogard*, 488 So.2d 672, 673 (Fla. 4th DCA 1986).

99. As to futility, this case is similar to *Gladstone v. Smith* in which the Court held that, "where no viable cause of action is asserted after repeated opportunities to amend, dismissal is appropriate." *Gladstone v. Smith*, 729 So.2d 1002, 1005 (Fla. 4th DCA 1999).

100. In *Gladstone*, the District Court affirmed the lower court's dismissal with prejudice after the Plaintiffs' repeated failures to state a cause of action and comply with the pleading requirements of Fla. R. Civ. P. 1.110(b)(2).

101. Even after *Gladstone* was given "a more than adequate opportunity to frame a viable cause of action," his claims failed to offer facts sufficient to state a cause of action. *Id.*

102. In this case no amount of amendments will ever state viable causes of action against APV because Plaintiffs will never be able to show that they were parties to the June 5, 1985 Agreement, that APV shares a Section 720.303(1), Fla. Stat. fiduciary relationship with the Plaintiffs, that the June 5, 1985 Agreement prohibited APV from removing property from its jurisdiction, or that Plaintiffs do not have an adequate remedy at law, i.e. money damages, for their sought after injunction regarding collection of assessments.

### **Conclusion**

This Court should dismiss Counts I, II, III and VIII against APV with prejudice because (a) Plaintiffs are not parties to the June 5, 1985 Agreement; therefore, cannot state a Count I cause of action for breach of contract; (b) Plaintiffs' Section 720.303(1), Fla. Stat. breach of fiduciary duty claim cannot be brought against APV because the Statute creates a fiduciary relationship between "officers and directors" and members, not homeowners' associations and members and, as a matter of law, Plaintiffs may not bring individual breach of fiduciary duty claims against APV; (c) Plaintiffs' Count III claims fail because APV is not barred by the June 5, 1985 Agreement from removing property, Plaintiffs again fail to allege the property removed was owned by Avatar, Plaintiffs fail to state how they were damaged other than to allege election related claims outside this Court's jurisdiction, and Plaintiffs failed to follow the Section 720.311, Fla. Stat. pre-suit mediation requirements; and (d) Count VIII fails to comply with the basic pleading requirements for preliminary injunctions including any allegations that the Plaintiffs are personally and irreparably harmed or that they do not have an adequate remedy at law since the harm is based on the collection of assessments and fees.

**Demand for Attorneys' Fees & Court Costs**

Defendant ASSOCIATION OF POINCIANA VILLAGES, INC. (APV) has agreed to pay its undersigned attorneys a reasonable attorney and paralegal fee for their services and hereby demands entitlement to and reimbursement of its attorneys' fees, paralegal fees and costs from Plaintiffs pursuant to Chapter 720, Fla. Stat. and APV's governing documents.

WHEREFORE, Defendant ASSOCIATION OF POINCIANA VILLAGES, INC. moves this Court to dismiss Counts I, II, III and VIII of the Fourth Amended Complaint, with prejudice, and award this Defendant its reasonable attorneys' fees and court costs and grant such other relief as this Court finds just and equitable.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been presented to the Clerk of Court for filing and uploading to the eFiling Portal. I further certify that a copy of the foregoing was sent to: Jennifer A. Englert, Esq., via email at JEnglert@theorlandolawgroup.com and cneedham@theorlandolawgroup.com, Christopher R. Parkinson, Esq., Moran Kidd Lyons Johnson, P.A., via email at cparkinson@morankidd.com, and Daniel F. Dill, Esq., The Dill Law Group, via email at ddill@dillawgroup.com and pleadings@dillawgroup.com, this 3rd day of May, 2017.

By: **/s/ Thomas R. Slaten, Jr.**  
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