IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT

IN AND FOR POLK COUNTY, FLORIDA

NORMAN GUNDEL, WILLIAM MANN, and BRENDA N. TAYLOR, individually and on behalf of all similarly situated persons,

Plaintiffs,

Case No.: 2017-CA-001446

v.

Section: 11

AV HOMES, INC., and AVATAR PROPERTIES, INC.,

Defendants.

_____/

AVATAR PROPERTIES, INC.,

Counter-Plaintiff

v.

NORMAN GUNDEL, WILLIAM MANN, and BRENDA N. TAYLOR, individually and on behalf of all similarly situated persons,

Counter-Defendants.

_____/

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON COUNTERCLAIM AND FOR AWARD OF ATTORNEYS' FEES AND COSTS UNDER FLORIDA'S ANTI-SLAPP STATUTES

THIS CAUSE came before this Court for a hearing on May 7, 2019, pursuant to the *Motion to Dismiss, for Judgment on the Pleadings, or for Summary Judgment on Counterclaim and for Award of Attorneys' Fees and Costs Under Florida's Anti-SLAPP Statutes* ("Motion"), filed October 19, 2017, by Plaintiffs/Counter-Defendants, NORMAN GUNDEL, WILLIAM MANN, and BRENDA N. TAYLOR (collectively, "Plaintiffs"). The Court, having reviewed the Motion, the Motion's supporting October 19, 2017, sworn *Declaration of NORMAN GUNDEL*

and its exhibits ("Declaration"); Defendant/Counter-Plaintiff's, AVATAR PROPERTIES, INC. ("Defendant"), November 27, 2017, *Response* thereto; and Plaintiffs' December 11, 2017, *Reply to Defendant's Response*; in addition to all other attachments and exhibits, together with the Court record, applicable statutory and case law, and having considered the arguments of counsel, and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law:

Findings of Fact

1. Requisite for purchasing a home in the Solivita residential community, Poinciana, Polk County, Florida ("Solivita"); homeowners pay mandatory monthly club membership fees ("Fees") and other expenses for a non-exclusive license to use separate and privately-owned community amenities (the "Club") in perpetuity. Residents are Club members. The Club's owner or Defendant, as the developer of Solivita and a subsidiary of AV HOMES, INC., retained complete control of the Club, including the right to sell and modify the Club's real property and facilities at its sole discretion.

2. The Solivita community is governed by duly recorded documents, including the Master Declaration and the Amended and Restated Solivita Club Plan ("Club Plan"). *See* Sept. 15, 2017, Second Am. Class Action Compl. & Demand for Jury Trial ("Complaint") at Ex. D(1) & at ¶ 27, (3), (4); & (5) (the Club Plan) at ¶¶ 4.9, 5.1, 5.2, 5.4, 6.1, 7.1, 7.2, 8.0, 8.1, & 8.2.

3. The provisions of the Club Plan at issue include but not limited to the following:

> 4.5 Material Considerations...Each Owner and Builder acknowledges that the Club Owner is initially investing substantial sums of money and time in developing the Club Facilities on the basis that eventually the Club will generate a substantial profit to Club Owner...
>
> 5.1 Club Property. Club Owner presently owns all of the real property comprising the Club Property...
>
> 5.2 Club Facilities. Club Owner has constructed certain club facilities on the Club Property..., which will be and shall remain the property of the Club Owner...
>
> 5.3 Construction of the Club. Club Owner has constructed the Club Facilities at its sole cost and expense.
>
> 7.2 Transfer of Club. Club Owner may sell, encumber or convey the Club to any person or entity in its sole and absolute discretion at any time.
>
> 8 Club Dues. In consideration of the construction and providing for use of the Club by the Owners, each Owner...to pay all Club Dues which are set forth herein.

8.2 Membership Fee. Each Owner of any Home within in Solivita shall pay...the club membership fee...

8.5 Perpetual. Each Owner's...obligation to pay Club Dues shall be perpetual....

29 Release...ACCORDINGLY, AN ESTOPPEL AND WAIVER EXISTS PROHIBITING EACH OWNER FROM TAKING THE POSITION THAT ANY PROVISION OF THIS CLUB PLAN IS INVALID IN ANY RESPECT ("Waiver"). *See also* Club Plan at ¶¶ 4.2, 4.4, 4.6, 4.7, 4.8, & 17.7.

Further, the Master Declaration provided that the Club Plan was incorporated therein. *See* Master Declaration at ¶ 27.

4. Following negotiations, the Poinciana Community Development District and Poinciana West Community Development District (the "CDDs"), on or about December 5, 2016, agreed to purchase the Club from Defendant for $73.7 million, to be financed by the issuance and selling of bonds in accord with Fla. Stat. chapters 75, 170, & 190 (2016) and paid for by Solivita homeowners through annual special assessments for thirty years. The prospective purchase price accommodated the Club's "income stream" Defendant receives via payment of Fees. Plaintiffs (and other homeowners) challenged the prospective purchase and bonds issuance. Plaintiffs obtained their own real property/"market value" appraisal of the Club, valued at $19.25 million as of on or about April 11, 2017 ("Appraisal"). Ultimately, in bond validation case no. 2016-CA-004023, the Court entered a December 7, 2017, *Final Judgment Not Validating and Not Confirming Bond Issuance Herein Described for Failing to Properly Apportion the Special Assessment Among the Real Properties Specially Benefited* ("Final Judgment"). The Florida Supreme Court dismissed without prejudice appeal of the Final Judgment. *See Mann v. Poinciana Community Development District*, 2018 WL 1151932 (Fla. 2018). In case no. 2017-CA-003547, a second bond validation was voluntarily dismissed. *See* Dec. 3, 2018, Notice of Voluntary Dismissal.

5. By bringing this action, Plaintiffs, as Solivita residents, have challenged several aspects of the legal/contractual relationships and obligations between themselves and Defendant concerning the Club. *See generally* Compl.

6. Defendant counterclaimed; pleading 1) breach of contract, 2) breach of affirmative covenant, 3) declaratory judgment, and 4) tortious interference with contractual relations. Defendant's principal stance was that the Waiver includes waiver of Plaintiffs' constitutionally protected acts where such acts involve Plaintiffs taking the position that Club Plan provisions were invalid; including "(1) the mandatory nature of the membership in the Club," "(2) the Club Dues and Membership Fees…[including] right to collect," and (3) Defendant's "right to sell the Club Facilities at its sole discretion." Defendant argued that contractual waiver of free speech-rights is legally permissible, including under anti-SLAPP statutes; *citing Navellier v. Sletten*, 52 P.3d 703, 712 (Cal. 2002); *DaimlerChrysler Motors Co. v. Lew Williams, Inc.*, 48 Cal.Rptr.3d 233, 240 (Cal. Ct. App. 2006); *see also S.J. Business Enterprises, Inc. v. Colorall Technologies, Inc.*,

755 So. 2d 769, 771 (Fla. 4th DCA 2000). Defendant argued that Plaintiffs' "actively and vocally…contesting the validity…enforceability of the Club Plan…" and its various provisions resulted in contractual breaches and tortious interference. *See* Countercl. at ¶¶ 16, 39, 45, 56, & 67; *see also* Def.'s Resp. to Counter-Defs.' Mot. to Dismiss at pages 9-11 & 13.

7. Defendant alleged Plaintiffs' conduct included the following:

> posting misleading information on Solivita's "Next Door" Blog...
>
> handing out fliers to residents that included inaccurate information and contesting API's right to collect Club Dues...
>
> Gundel also attended at least three meetings of the Jewish Philosophy Club (on February 2, 2017, March 10, 2017, and March 17, 2017) contesting API's right to sell the Club Facilities to the CDDs for the negotiated price because of...(inaccurate) position that API should not be allowed to collect Club Dues...
>
> [Plaintiffs] also asked residents to sign petitions contesting API's right to sell the Club Facilities, with some residents complaining that they were being "bullied" to sign the petition...
>
> By virtue of filing this action, Counter-Defendants are continuing to frustrate API's contractual by attacking the validity of the Club Plan.... *See* Def.'s Answer & Affirmative Defenses to Second Am. Class Action Compl. & Demand for Jury Trial & API's Countercl. at ¶¶ 36-39 ("Counterclaim(s)").

8. The Court entered the January 23, 2018, *Order Granting in Part and Denying in Part Defendants' Motion for Final Summary Judgment* ("Summary Judgment Order"). Subsequently, the Court entered the July 2, 2018, *Order Granting in Part Plaintiffs' Amended Motion for Class Certification* ("Class Certification Order"); certifying a narrowed class of current Solivita homeowners for Counts II, V, VIII, and partially VI (for direct violation of Fla. Stat. sec. 720.308 (2016)) of the Complaint but only against Defendant as the developer. *See* Class Certification O. at page 16.

9. Both Plaintiffs and Defendant are appealing the Class Certification Order. *See* Aug. 1, 2018, Notice of Appeal; Aug. 10, 2018, Cross-Notice of Appeal. Consequently, the Court entered a November 5, 2018, *Order Granting Motion to Stay* as to substantive issues ("Stay"). Defendant's and AV HOMES, INC.'s, April 3, 2018, *Motion for Summary Judgment on All Counts of Plaintiffs' Second Amended Complaint* remains pending.

10. Per their Motion and supporting Declaration, Plaintiffs sought resolution of Defendant's three Counterclaims of breach of contract, breach of affirmative covenant, and tortious interference with contractual relations in their favor under Florida's anti-"strategic lawsuits against public participation" ("SLAPP"/anti-SLAPP) statutes, Fla. Stat. sec. 768.295 (2019) and Fla. Stat. sec. 720.304(4) (2019). Plaintiffs argued their conduct were constitutionally protected acts and Defendant's Counterclaims were for the purpose of chilling Plaintiffs' protected acts.

11. Except for the act of filing the instant action, the Declaration flushed out the generic references of Plaintiffs' conduct as alleged in Defendant's Counterclaims:

a. GUNDEL repeatedly commented on Solivita's online "Next Door" blog/website ("Nextdoor"/www.nextdoor.com is a social networking service for neighborhoods); including its newsfeed and discussion group(s) webpages, broadly regarding the CDDs' purchase of the Club and associated lawsuits and efforts to challenge (the "Next Door Comments"). *See* Declaration at ¶¶ 8-9 & Ex. B.

b. Plaintiffs distributed handouts at the February 10, 2017, and April 19, 2017, CDD meetings (the "Handouts"). The Handouts broadly discussed Plaintiffs' challenge to the CDDs' purchase of the Club and the basis thereon and Plaintiffs' Appraisal. *See* Declaration at ¶¶ 13 & 16 & Exs. E & H.

c. Plaintiffs had 1,578 Solivita homeowners sign a SOLIVITA PROPERTY OWNER PETITION TO POINCIANA CDD SUPERVISORS to request the CDDs themselves obtain a real property/market value appraisal of the Club ("Petition"). *See* Declaration at ¶¶ 10 & 12 & Ex. C.

d. GUNDEL attended only two Jewish Philosophy Club meetings on February 17, 2017, and March 10, 2017 ("Club Attendance"). GUNDEL sought Solivita homeowners' signatures for the Petition. *See* Declaration at ¶ 12.

e. Plaintiffs maintained a non-profit organization and its internet website, "Save Solivita Amenities Fund, Inc."/www.savesolivita.org ("Website"). Broadly, the Website posted document links and updates of Plaintiffs' legal challenges to the CDDs' purchase of the Club, including the bond validation cases and the instant action. The Website further linked to five related news articles. Plaintiffs asked for financial support to help pay their legal fees. *See* Declaration at ¶¶ 7-8 & Ex. A.

f. GUNDEL spoke at several CDD meetings on February 10, 2017, March 15, 2017, April 19, 2017, May 17, 2017, July 26, 2017, and September 20, 2017 ("Speeches"). Broadly, GUNDEL spoke in opposition to the CDDs' purchase of the Club and the basis thereon, presentation of the Petition, and contrasting a real property/market value appraisal amount versus the prospective purchase price. *See* Declaration at ¶¶ 13-14, 16-17 & Exs. D, F-G, & I-K.

12. After a December 21, 2017 hearing thereon, the Court entered a February 9, 2018, *Order Denying Plaintiffs' Motion to Dismiss Under Florida's Anti-SLAPP Statutes* ("SLAPP Order"). The Court principally found that a motion for summary judgment or judgment on the pleadings cannot substitute a motion to dismiss in a single motion. Under the dismissal standard, the Court found that, given the Counterclaims' vague description thereof, Plaintiffs failed to show their conduct were protected acts and Defendant's claims lacked merit. The Court did note that the Defendant's claim for declaratory judgment had been substantially adjudicated by the Court's Summary Judgment Order.

13. Plaintiffs appealed the Court's SLAPP Order. The Florida Second District Court of Appeal quashed the SLAPP Order and directed the Court to expeditiously address the merits of Plaintiffs' Motion ("Mandate"). The Second District ruled that the Court must consider Plaintiffs' single Motion both as a motion for dismissal and, in the alternative, as a motion for summary judgment as permitted under subsection 768.295(4). Further, the Second District specifically found that the Court shall reconsider Plaintiffs' Motion on the record pleadings and evidence as of the date of the hearing of the motion to dismiss. Second, the Second District ruled that, in accordance with shifting of burdens under subsection 768.295(3), Plaintiffs have the initial burden "to set forth a prima facie case" under Florida's anti-SLAPP protection, that their conduct were constitutionally protected acts. Thereafter, the burden shifts to Defendant to demonstrate that its three Counterclaims were "not 'primarily' based" on protected acts and have merit. *See Gundel v. AV Homes, Inc.*, 264 So. 3d 304, 313-14 (Fla. 2d DCA 2019).

14. In keeping with the Second District's Mandate following a hearing thereon, the Court considered the merits of Plaintiffs' Motion, limited by the pleadings and evidence presented to the Court on December 21, 2017. Therefore, the Court considered Plaintiffs' Motion and supporting Declaration, Defendant's *Response* thereto, and Plaintiffs' *Reply to Defendant's Response*, in addition to all exhibits.[1] Defendant did not submit counteraffidavit(s) or other evidence challenging Plaintiffs' Declaration. Defendant's only exhibit was a copy of the Club Plan. *See* Def.'s Resp. at Ex. A. Consequently, Plaintiffs' description of their conduct was **un**contested.

15. At the May 7, 2019, hearing, the Court lifted the Stay for the limited purpose to consider Plaintiffs' Motion in keeping with the Second District's Mandate.

16. Subsection 768.295(3) provides that "a person or government entity" may not file a lawsuit or counterclaim "against another person or entity **[A]** without merit and **[B]** primarily because such a person…exercised the constitutional right of **[1)]** free speech in connection with a public issue, **[2)]** or right to peacefully assemble, **[3)]** to instruct representatives of government, **[4)]** or to petition for redress of grievances before the various governmental entities of this state,…." Subsection 768.295(2) (a) further defines "free speech in connection with public issues" as "any written or oral statement that is protected under applicable law and is made before a government entity in connection with an issue under consideration or review by a government entity, or is made in or in connection with a play, movie, television program, radio broadcast, audiovisual work, book, magazine article, musical work, news report, or other similar work." Subsection 768.295(2)(b) further defines "government entity" to include "the independent establishments of the state, counties, municipalities, corporations primarily acting as instrumentalities of the state, counties, or municipalities, districts, authorities, boards, commissions, or any agencies thereof."

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[1] The Parties principally disputed whether Defendant, as a public figure, would have to show Plaintiffs spoke with actual malice; whether the fair reporting and litigation privileges applied, whether said conduct constituted a material breach of contract; as to tortious interference, the applicability of certain contract vulnerabilities, in addition to whether the Waiver constituted Plaintiffs' waiver of their constitutional right to contest the Club Plan.

17. While section 720.304(4) is substantially similar to section 768.295; however, subsection 720.304(4)(b) does provide that lawsuits or counterclaims may not be filed "against a parcel owner **[A]** without merit and **[B]** solely because such parcel owner has exercised **[1)]** the right to instruct his or her representatives or **[2)]** the right to petition for redress of grievances before the various governmental entities of this state,…."

Findings of Law

Summary Judgment Findings

18. Given Plaintiffs' description of their conduct was uncontested and neither Party challenged as ambiguous any provision or term of subject contracts (such as the Club Plan); the Court finds no genuine issues of material fact for anti-SLAPP purposes. Therefore, the Court finds that Plaintiffs satisfied their initial burden showing no genuine issues of material fact, shifting summary judgment burden to Defendant. In keeping with the Court's findings below regarding the Counterclaims' lacking merit, the Court finds Defendant failed in its burden to show genuine issues of material fact. Plaintiffs are entitled to a judgment as a matter of law. As to summary judgment standard, *see generally Fields v. Devereux Foundation, Inc.*, 244 So. 3d 1193, 1195-96 (Fla. 2d DCA 2018); *Knowles v. JPMorgan Chase Bank, N.A.*, 994 So. 2d 1218, 1219 (Fla. 2d DCA 2008).

Plaintiffs Met Their Initial Burden Under SLAPP

19. The Court finds that Plaintiffs met their initial burden and satisfactorily demonstrated their conduct were constitutionally protected acts subject to Florida's anti-SLAPP protection.

    a. The Court finds the CDDs are government entities. *See* Fla. Stat. sec. 190.003(6) (2019); *Schwarz v. The Villages Charter School, Inc.*, 165 F.Supp.3d 1153, 1159 (M.D. Fla. 2016).

    b. The Court finds Plaintiffs' Next Door Comments and Website constituted free speech in connection with a public issue made in or in connection with "other similar work" under subsection 768.295(2)(a). As persuasive authority, *see Tobinick v, Novella*, 108 F.Supp.3d 1299, 1308 (S.D. Fla. 2015) (Under California's anti-SLAPP statute(s), the subject blog posts, which the court found to be "issue[s] in connection with an issue of public interest," were published on a publicly available website which the Court found to be a "public forum.").

    c. The Court finds Plaintiffs' Speeches, Handouts, and Petition; as part of their presentation before the CDDs in connection with the CDDs' consideration of the Club purchase, constituted free speech in connection with a public issue made before a government entity in connection with an issue under consideration or review under subsection 768.295(2)(a).

    d. Further, the Court finds Plaintiffs' Petition and initiating the instant action constituted petition(s) for redress of grievances before a government entity under subsection 768.295(3). As persuasive authority, *see Fla. Committee for Liability Reform v. McMillan*, 682 F.Supp. 1536, 1542 (M.D. Fla. 1988) (The court entered

an injunction against restricting soliciting voters' signatures within 150 feet of a polling place because, in part "will work…irreparable harm to the...exercise of its right to petition the government for redress of its grievances."); *Baker v. Firstcom Music*, 2017 WL 9510144,*4 (C.D. Cal.) (In an anti-SLAPP suite, the court stated "filing a lawsuit is an exercise of one's constitutional right to petition....").

e. The Court finds Plaintiffs' Club Attendance constituted the right to peacefully assemble under subsection 768.295(3). *See Wyche v. State,* 619 So. 2d 231, 234 (Fla. 1993) ("Further, the First Amendment and article I, section 5 of the Florida Constitution protect the rights of individuals to associate with whom they please and to assemble with others for political or for social purposes."); *Whole Foods Market Group, Inc. v. Sarasota Coalition for a Living Wage,* Case no. 2007-CA-002208-NC, 2010 WL 2380390 (Fla. 12th Jud. Cir. Ct.) (A sister trial court stated "[t]he First Amendment…protect against government infringement of a person's right to assemble,…Under the First Amendment…there is no right for a person to engage in free speech or other political activity on private property without the consent of the property's owner." (citations omitted)). The Court notes that neither Party argued that, if occurred on private property, the Jewish Philosophy Club meetings met without the property owner's permission.

Defendant Failed Its Burden Under SLAPP

20. Plaintiffs having met their initial burden, the burden shifted to Defendant for anti-SLAPP purposes. Under section 768.295, the Court finds that Defendant failed to meet its burden by failing to demonstrate that the three Counterclaims were not filed primarily based on protected acts and have merit under subsection 768.295(3).

Defendant Failed Its Burden of "Not 'Primarily Based'"

21. First, the Court has found every act by Plaintiffs identified by Defendant and the Declaration to be constitutionally protected acts. Defendant has not identified any conduct by Plaintiffs that were not constitutional protected acts. Therefore, the Court finds that Defendant's three Counterclaims were filed primarily based on protected acts.

Except for Filing the Instant Action, Plaintiffs' Conduct Did Not Take a Position that Club Plan Provisions Were Invalid

22. Second, except for filing the instant action, after a careful review of the uncontested Declaration and its exhibits compared to the explicit language of the provisions of the Club Plan that Plaintiffs have allegedly breached; the Court finds that Plaintiffs' conduct, in total, did **not** take a position that any provision of the Club Plan was invalid. Throughout the entirety of their conduct, Plaintiffs' principal and consistent objection was, in their opinion, the **high** purchase price of $73.7 million the CDDs were prepared to pay.

23. For example, the Club Plan explicitly but only provides "Club Owner may sell, encumber or convey the Club to any person or entity in its sole and absolute discretion at any time." *See* Club Plan at ¶ 7.2. However, the Court does not find the Next Door Comments to be challenging Defendant's literal right to sell the Club but principally only the high $73.7 million purchase price the CDDs were prepared to pay. Further, the Court finds that almost all GUNDEL's statements were factual in nature in keeping with the website's "no advocating" policy. *See* Declaration, Ex. B at pages 1, 6, & 9-10 (For example, GUNDEL stated "[t]he annual debt service plus O&M expense we would each pay the CDDs is pretty much the same as 12 times the monthly Club fee we pay now. However, the fact that we CAN borrow 93.5 million without increasing our fees does NOT mean we SHOULD borrow that much to buy property that may be worth much less. Only an independent fair market value appraisal of what an unrelated third party would pay can answer that question...." In fact, GUNDEL repeatedly stated "[w]e seek to improve the purchase transaction, not prevent it." (or statements to that effect)).

24. The Court again finds the Handouts and Website principally challenged the CDDs' purchase of the Club at $73.7 million, not the explicit language of any provision of the Club Plan. *See* Declaration at ¶ 7 (GUNDEL declared that the purpose of the Website was to "explore legal options to hopefully lower the $73.7 million Club Facilities purchase price.") & Exs. E (One Handout, in bold and increased size font, stated "Court Opposition to Excessive Purchase Price." Further, the Handout stated "[t]he Save Solivita Amenities Fund wants to improve the purchase transaction, not prevent it.") & H (The second Handout, discussing the details of the Appraisal, provided "AV Homes...terminated the Club Plan and the $85/month Club Membership Fee and selling the assets it used to conduct that business. This transaction is the purchase of those assets, nothing more. This is the proper valuation for an asset purchase.").

25. The Court finds that the Petition and GUNDEL's Club Attendance only sought signatures for the Petition, not challenging explicit Club Plan provisions. *See* Declaration at ¶ 12 & Ex. C (The Petition provided "[w]e the undersigned Solivita residents request that the...CDD obtain an independent Fair Market Value Appraisal of the Solivita Amenities to ensure that the CDD is not overpaying for those amenities.").

26. The Court again finds the Speeches principally challenged the CDDs' purchase of the Club at $73.7 million, not challenging explicit Club Plan provisions, particularly read in the context of the entirety of each Speech. *See* Declaration, Exs. D & I. (For example, the February 10, 2017, Speech provided "[w]e seek to improve the purchase transaction, not prevent it... AV Homes may have already recovered that amount in Club fees over the last fifteen years, which would mean that the entire Purchase Price of the Existing Amenities is exorbitant profit, lacking public purpose under Florida law. AV Homes and the Districts can remedy this defect by...negotiating an appropriate-and legal- purchase price." The May 17, 2017, Speech provided "[i]f AV Homes suggest it will sell for less to a third party buyer, AV Homes should sell to the CDDs for that same lower price.").

27. Except for initiating the instant action, in the entirety of the Declaration and all its exhibits; the Court found only two isolated statements in GUNDEL's May 17, 2017,

Speech that may be interpreted as taking a position that provisions of the Club Plan were invalid. The May 17, 2017, Speech further provided "[t]he $86 per month per home Club Membership Fee is illegal under the Florida Homeowners Association Act…[and]…[i]n 2016 alone, AV Homes receive $3.8 million in pure profit from the Club Membership Fee—which is illegal under the Florida Homeowners Association Act." *See id.* However, reading the May 17, 2017, Speech in its entirety, the Court does not find two isolated statements in one Speech sufficient to find that GUNDEL took a position that Club Plan provisions were invalid. In fact, in the very same Speech, GUNDEL made contradictory statements: "We are trying to do what is best for the community. We support, and have always supported, the purchase of the amenities at a fair price...If AV Homes suggests that it will sell for less to a third party buyer, AV Homes should sell to the CDDs for that same lower price." *See id.*

Filing the Instant Action Did Take a Position that Club Plan Provisions Were Invalid

28. The Court finds the remaining act of Plaintiffs' initiating the instant action does take a position that Club Plan provisions were invalid. For example, Count V of the Complaint seeks declaratory relief that perpetual payment of Fees under provision 8.5 be struck down.

Litigation Privilege Bars the Tortious Interference Counterclaim

29. However, first, the Court finds that the litigation privilege bars the tortious interference Counterclaim as to the act of Plaintiffs' initiating the instant action. *See Pace v. Bank of New York Mellon Trust Co. National Association*, 224 So. 3d 342 (Fla. 5th DCA 2017) (The plaintiff filed a foreclosure complaint. The defendant counterclaimed. The court found "[i]n the context of a tortious interference with business relationships claim, the act of filing the complaint is subject to absolute immunity under the litigation privilege."); *B&D Nutritional Ingredients, Inc. v. Unique Bio Ingredients, LLC*, 2017 WL 8751751, at *4 (S.D. Fla.) (As persuasive authority, on a tortious interference with a business relationship claim, the court further found that "[t]he litigation privilege precludes the use of B&D's filing of the Complaint and statements therein to establish intentional and unjustified interference.").

*Plaintiffs' Conduct in Its **Totality**, including Filing the Instant Action, Did Not Take a Position that Club Plan Provisions Were Invalid*

30. Yet the act of filing a complaint in the breach of contract context, in light of contractual waiver, may not be absolutely immune under the litigation privilege. As persuasive authority, *see Sun Life Assurance Co. of Canada v. Imperial Premium Finance, LLC,* 904 F.3d 1197, 1219 (11th Cir. 2018) ("In this case, therefore, we must ask whether Florida's litigation privilege would immunize a defendant from a breach of contract claim where the act that allegedly breached the contract was the filing of a lawsuit. We think it would not.").

31. Second, where the Court is considering anti-SLAPP for purposes of summary judgment with uncontested material facts, Defendant's three Counterclaims did not separate out specific acts by Plaintiffs as applied to specific Counterclaims. All three Counterclaims alleged Plaintiffs' conduct in its **totality** as having caused contractual breaches and tortious interference. Defendant did not distinguish the filing of the instant action from that of Plaintiffs' other acts which the Court has already found to be not taking a position that Club Plan provisions were invalid.[2] Therefore, in its **totality**, the Court finds that Plaintiffs' conduct was not taking a position that Club Plan provisions were invalid.

Defendant Failed Its Burden of "Not 'Without Merit'"
(Plaintiffs' Conduct in Its Totality Did Not Breach Club Plan and Violate Waiver)

32. Consequently, for anti-SLAPP purposes, the Court finds Defendant's three Counterclaims of breach of contract, breach of affirmative covenant, and tortious interference with contractual relations to be without merit. The Court already found that the litigation privilege was an absolute bar to the tortious interference Counterclaim. Further, because Defendant failed to demonstrate Plaintiffs' total conduct took a position that Club Plan provisions were invalid; the Court finds Defendant failed to even minimally show that Plaintiffs violated the Waiver and breached the Club Plan and subject Affirmative Covenant(s) based on the Club Plan (i.e. no basis of contesting the validity and enforceability of the Club Plan). As to elements of breach of contract, *see generally National Collegiate Student Loan Trust 2006-4 v. Meyer*, 265 So. 3d 715, 719 (Fla. 2d DCA 2019); *Mettler, Inc. v. Ellen Tracy, Inc.*, 648 So. 2d 253, 255 (Fla. 2d DCA 1994). As an additional finding, in keeping with the Court's reasoning above, the Court also finds that the tortious interference Counterclaim is without merit because Defendant failed to show that Plaintiffs' conduct contested the Club Plan itself and violated the Waiver.

33. As a contrast to considering anti-SLAPP under summary judgment (which lacks such flexibility), the Court found insightful Californian legal authority which provides anti-SLAPP protection through the procedural vehicle of a "special motion to strike." The Californian Supreme Court found that, as to a "mixed cause of action" or a specific count based on both alleged protected and unprotected acts, both meritless counts may be struck and/or specific protected-act allegations may be struck from otherwise viable counts. Previously, some Californian courts found a mixed cause of action either was struck or survived in its entirety an anti-SLAPP motion. *See* Cal. Code of Civil Procedure § 425.16(b)(1) (2019) (use of a "special motion to strike"); *Baral v. Schnitt*, 376 P.3d 604 (Cal. 2016) ("We agree with the *Cho* and *Wallace* courts that the Legislature's choice of the term 'motion to strike' reflects the understanding that an anti-SLAPP motion, like a conventional motion to strike, may be used to attack parts of a count as pleaded."), *citing Cho v. Chang*, 219 Cal.App.4th 521 (Cal. Ct. App. 2013) (The defendant counterclaimed

[2] In fact, in their *Response* to Plaintiffs' Motion, the Court notes that Defendant specifically stated "[e]ven if the act of filing this lawsuit were the primary basis of the Counterclaim **(which it is not)**, the filing of a lawsuit does not implicate the litigation privilege." *See* Def.'s Resp. to Counter-Defs.' Mot. to Dismiss at page 14 (emphasis added).

for 1) defamation and 2) intentional and 3) negligent infliction of emotional distress based on both a) the protected acts of the plaintiff filing discrimination claims with federal and state agencies and b) the unprotected acts of the plaintiff's comments to coworkers. The appeals court affirmed the trial court's, after an anti-SLAPP analysis, striking the discrimination claims but not the comments to coworkers.).

34. Having found that Plaintiffs' total conduct did not even take a position that Club Plan provisions were invalid, the Court does not find it necessary to address the substantive arguments advanced by the Parties on the basis that said conduct was contesting the validity and enforceability of the Club Plan.

As to Section 720.304(4) Specifically

35. a. Finally, section 720.304(4) is more narrowly defined than section 768.295. To be subject to section 720.304(4), a lawsuit is brought solely against a parcel owner's right to petition or right to instruct representatives. In keeping with the Second District's Mandate, the Court concludes that shifting of burdens is as equally applicable to section 720.304(4) as section 768.295.

b. The Court found only two of Plaintiffs' seven acts constituted Plaintiffs' right to petition, but both acts were part of the basis for all three Counterclaims. The Court finds Plaintiffs met their initial burden under section 720.304(4).

c. Further, the Court must find, based on the plain language of section 720.304(4), that Defendant's Counterclaims were not brought solely on the rights to petition or instruct. Therefore, likewise, Defendant partially met its burden to show the Counterclaims were "not 'solely'" based on protected acts.

d. However, in accord with the Court's findings above, the Court still finds Defendant's Counterclaims to be without merit under section 720.304(4). The totality of all said seven acts was the basis of all three Counterclaims, regardless if a specific act was subject to section 720.304(4) or not.

Summation and Plaintiffs' Entitlement to Attorneys' Fees and Costs

36. In sum, having proceeded under summary judgment, the Court finds that Plaintiffs have met their initial burden for anti-SLAPP protection under both sections 768.295 and 720.304(4) as their conduct constituted protected acts. The Court finds that Defendant failed to meet its burden under anti-SLAPP that the three Counterclaims were not primarily based on protected acts, under section 768.295, and have merit, under both sections 768.295 and 720.304(4). Defendant did not plead that Plaintiffs committed other non-protected acts. The Court found that, its totality, Plaintiffs' conduct did not violate the Waiver by taking a position that Club Plan provisions were invalid; there was no basis for contractual breaches and tortious interference. Additionally, the litigation privilege barred the tortious interference Counterclaim. The Court did find that Defendant

partially met its burden under section 720.304(4) as the three Counterclaims were not solely based on right to petition or instruct.

37. Plaintiffs motioned for attorneys' fees and costs which is provided for prevailing parties under subsections 768.295(4) and 720.304(4)(c). As prevailing parties, the Court finds that Plaintiffs are entitled to attorneys' fees and costs under both statutes.

Accordingly, based upon the above findings of fact and conclusions of law, it is **ORDERED and ADJUDGED** that Plaintiffs,' NORMAN GUNDEL, WILLIAM MANN, and BRENDA N. TAYLOR, *Motion to Dismiss, for Judgment on the Pleadings, or for Summary Judgment on Counterclaim and for Award of Attorneys' Fees and Costs Under Florida's Anti-SLAPP Statutes* is hereby **GRANTED** against Defendant, AVATAR PROPERTIES, INC. The Court further finds that Plaintiffs, as prevailing parties under sections 768.295 and 720.304(4), are entitled to attorneys' fees and costs. The Court reserves jurisdiction as to the amount of attorneys' fees and costs.

DONE AND ORDERED in Bartow, Polk County, Florida, on this _____ day of JUN 04 2019, 2019.

/s/ JOHN RADABAUGH

JOHN RADABAUGH,
Circuit Judge

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