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

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

Plaintiffs,

vs

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

Defendants,

_____/

Case No.: 17-CA-001446

Division: 11

AVATAR PROPERTIES, INC.,

Counter-Plaintiff,

vs.

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

Counter-Defendants.

_____/

PLAINTIFFS' REPLY TO DEFENDANTS' ANSWER AND MOTION TO STRIKE AFFIRMATIVE DEFENSES

Plaintiffs, Norman Gundel, William Mann, and Brenda N. Taylor, individually and on behalf of all those similarly situated, pursuant to Rule 1.100(a) of the Florida Rules of Civil Procedure, deny each affirmative defense raised by Defendants, AV Homes, Inc. and Avatar Properties, Inc., in their Answer and Affirmative Defenses. In addition, pursuant to Rule 1.140 of the Florida Rules of Civil Procedure, Plaintiffs move to strike Defendants' affirmative defenses and in support state as follows:

BACKGROUND

1. Plaintiffs, on their own and on behalf of all those similarly situated, filed their Second Amended Class Action Complaint and Demand for Jury Trial on September 15, 2017.

2. On September 29, 2017, Defendants filed their Answer and Affirmative Defenses, which raises 35 affirmative defenses, all of which should be stricken.

LEGAL STANDARD

3. "An affirmative defense is a pleading that, in whole or in part, *bars or voids* the cause of action asserted by an opponent in the preceding pleading." *Lynn v. Feldmeth*, 849 So. 2d 481 (Fla. 2d DCA 2003).

4. Therefore, an affirmative defense that merely denies the allegations of the complaint and does not raise any new matters is insufficient as an affirmative defense. *Gatt v. Keyes Corp.*, 446 So. 2d 211, 212 (Fla. 3d DCA 1984); *Wiggins v. Portmay Corp.*, 430 So. 2d 541, 542 (Fla. 1st DCA 1983) ("Affirmative defenses do not simply deny the facts of the opposing party's claim. They raise some new matter which defeats an otherwise apparently valid claim.") (citing *Tropical Exterminators, Inc. v. Murray*, 171 So. 2d 432, 433 (Fla. 2d DCA 1965)).

5. In addition, Florida is a fact-pleading jurisdiction. *Horowitz v. Laske,* 855 So.2d 169, 173 (Fla. 5th DCA 2003). This applies to both allegations and defenses. *Bliss v. Carmona*, 418 So. 2d 1017, 1019 (Fla. 3d DCA 1982) ("[c]ertainty is required when pleading defenses and claims alike").

6. Accordingly, affirmative defenses are legally insufficient if they are not pled with any specific facts upon which the plaintiff could take issue. *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.*, 537 So. 2d 561, 563 (Fla. 1988); *Cady v. Chevy Chase Savings and Loan, Inc.*, 528 So. 2d 136, 138 (Fla. 4th DCA 1988) (affirming summary

judgment that conclusory affirmative defenses are insufficient as a matter of law); *Zito v. Washington Fed. S&L Ass'n of Miami Beach, Inc.*, 318 So. 2d 175 (Fla. 3d DCA 1975) (summary judgment as to vague, non-specific affirmative defense properly granted); *Bliss*, 418 So. 2d at 1019 ("Pleading conclusions of law unsupported by allegations of ultimate fact is legally insufficient.").

7. An affirmative defense that does not raise any new matters and merely denies the plaintiff's allegations fails to state a valid legal defense and must be struck under Rule 1.140(b). *See Gatt v. Keyes Corp.*, 446 So. 2d 211, 212 (Fla. 3d DCA 1984) (the trial court struck an affirmative defense that merely denied the allegations of the complaint and did not raise any new matters); *Wiggins v. Portmay Corp.*, 430 So. 2d 541, 542 (Fla. 1st DCA 1983) ("Affirmative defenses do not simply deny the facts of the opposing party's claim. They raise some new matter which defeats an otherwise apparently valid claim.") (citing *Tropical Exterminators, Inc. v. Murray*, 171 So. 2d 432, 433 (Fla. 2d DCA 1965)).

ARGUMENT

8. Each of Defendants' 35 affirmative defenses are pled as conclusions of law without any allegations of ultimate fact. Therefore, every affirmative defense alleged by Defendants is deficient. That is, none of them provide any specificity or particularity that would reasonably inform Plaintiffs of what the defense is proposed to prove to provide a fair opportunity to meet it and prepare the appropriate evidence. *See Bowmar Instrument*, 537 So. 2d at 563; *Cady*, 528 So. 2d at 138.

9. Also, there are additional substantive grounds to strike and/or avoid affirmative defenses alleged by Defendants, the specific bases for which are as follows:

Response to First Affirmative Defense
(Failure to state a cause of action against AV Homes, Inc.)

10. Defendants' First Affirmative Defense, alleging a failure to state a cause of action against AV Homes, Inc. is without merit and is insufficient without allegations of ultimate fact. Accordingly, the First Affirmative Defense should be stricken. Further, Defendants' own pleadings belie this First Affirmative Defense, as the first page of both Exhibits A and B to Defendants' Answer and Counterclaim show that both the recorded Amended and Restated *Solivita* Club Plan Declaration (Exhibit A) and the recorded Amended and Restated Master Declaration for *Solivita* (Exhibit B) were both prepared by and recorded by Defendant, AV Homes, Inc. Otherwise denied.

Response to Second Affirmative Defense
(Lack of standing)

11. Defendants' Second Affirmative Defense, alleging a lack of standing, is without merit and is denied. Plaintiffs have the necessary standing to bring each and every claim. *Gen. Telephone Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982) (class representative must be a part of the class, have the same interest, and suffer the same injury as the class members). Standing involves injury, causation, and redressability. *Wooden v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262, 1273-74 (11th Cir. 2001). Moreover, Plaintiffs have the right to contest the validity of certain provisions of and rights in various documents underlying the actions of a governmental entity and the propriety of that governmental entity paying $73.7 million to purchase property appraised at $19.25 million—a sale that would have direct financial implications on Plaintiffs and their fellow residents, who must repay the bond debt incurred by the government entity. The *Solivita* resident property owners (including Plaintiffs), though perhaps not direct parties to the Asset Sale and Purchase Agreement, were named parties in *Poinciana Community Development District et al v. The State of Florida et al*, Case No. 2016-CA-004023 (Fla. 10th Jud. Cir. 2016) and would

ultimately be saddled with the obligation of paying 30-31 years of special assessments to repay the bonds. This, together with the fact that the *Solivita* CDDs' supervisors entered into the purchase agreement and interlocal agreement in their capacity as elected officials for *Solivita* resident owners, gives Plaintiffs standing.

Response to Third Affirmative Defense
(Club Plan Not Subject to the HOA Act)

12. Defendants' Third Affirmative Defense, alleging that the Club Plan is not subject to the provisions of the Homeowners' Association Act ("HOA Act"), Chapter 720, Fla. Stat., does not constitute an affirmative defense to Plaintiffs' claims, but instead amounts to a mere denial of the allegations in the class action complaint. *See Gatt*, 446 So. 2d at 212; *Wiggins*, 430 So. 2d at 542. Accordingly, the Third Affirmative Defense should be stricken. Furthermore, the allegations in support of Defendants' Third Affirmative defense, all of which allegations are denied, do not give rise to a legally sufficient affirmative defense in that Defendants' admitted recording of the Club Plan Declaration against all of the residential parcels in *Solivita*—in order to implement its Club Fee Scheme, under which Defendants sought to make Club membership mandatory while also giving Defendants and the *Solivita* Homeowner's Association the authority to collect assessments for all Club Fees and, if unpaid, the right to place a lien and foreclose on homestead protected homes—precludes Defendant's assertion of the Third Affirmative Defense. Defendants also incorporated the Club Plan Declaration as an exhibit to, and incorporated the Club Plan Declaration by reference in, the concurrently executed and recorded *Solivita* Master Declaration, thus making the Club Plan subject to the HOA Act. Defendants have also waived and are estopped from asserting this defense based on their actions and omissions against Plaintiffs and the Class in violation of Florida law, as alleged in this matter, including, without limitation, advertising and marketing *Solivita* to prospective home purchasers as a residential community and thereafter asserting that it is actually

not a residential community but instead, a community that contains both residential parcels and parcels intended for commercial or industrial use.

Response to Fourth Affirmative Defense
(API and Club Plan Not Subject To HOA Act)

13. Defendants' Fourth Affirmative Defense, like the previous defense, does not constitute an affirmative defense to Plaintiffs' claims, but instead amounts to a mere denial of the allegations in the class action complaint. *See Gatt*, 446 So. 2d at 212; *Wiggins*, 430 So. 2d at 542. Accordingly, the Fourth Affirmative Defense should be stricken. Furthermore, the allegations in support of Defendants' Fourth Affirmative defense, all of which allegations are denied, do not give rise to a legally sufficient affirmative defense in that Defendants' admitted recording of the Club Plan Declaration against all of the residential parcels in *Solivita*—in order to implement its Club Fee Scheme, under which Defendants sought to make Club membership mandatory while also giving Defendants and the *Solivita* Homeowner's Association the authority to collect assessments for all Club Fees and, if unpaid, the right to place a lien and foreclose on homestead protected homes—precludes Defendant's assertion of the Fourth Affirmative Defense. Defendants also incorporated the Club Plan Declaration as an exhibit to, and incorporated the Club Plan Declaration by reference in, the concurrently executed and recorded *Solivita* Master Declaration, thus making the Club Plan subject to the HOA Act. Defendants have also waived and are estopped from asserting this defense based on their actions and omissions against Plaintiffs and the Class in violation of Florida law, as alleged in this matter.

Response to Fifth Affirmative Defense
(Section 720.31 of the HOA Act)

14. Defendants' Fifth Affirmative Defense, like the previous defense, does not constitute an affirmative defense to Plaintiffs' claims, but instead amounts to a mere denial of the allegations

in the class action complaint. *See Gatt*, 446 So. 2d at 212; *Wiggins*, 430 So. 2d at 542. Accordingly, the Fifth Affirmative Defense should be stricken. Furthermore, the allegations in support of Defendants' Fifth Affirmative defense, all of which allegations are denied, do not give rise to a legally sufficient affirmative defense in that Defendants' admitted recording of the Club Plan Declaration against all of the residential parcels in *Solivita*—in order to implement its Club Fee Scheme, under which Defendants sought to make Club membership mandatory while also giving Defendants and the *Solivita* Homeowner's Association the authority to collect assessments for all Club Fees and, if unpaid, the right to place a lien and foreclose on homestead protected homes—precludes Defendant's assertion of the Fifth Affirmative Defense. Defendants also incorporated the Club Plan Declaration as an exhibit to, and incorporated the Club Plan Declaration by reference in, the concurrently executed and recorded *Solivita* Master Declaration, thus making the Club Plan subject to the HOA Act. Defendants have also waived and are estopped from asserting this defense based on their actions and omissions against Plaintiffs and the Class in violation of Florida law, as alleged in this matter.

Response to Sixth Affirmative Defense
(Club Plan Not Subject to the HOA Act)

15. Defendants' Sixth Affirmative Defense, like the previous defense and similar to its Third, Fourth, and Fifth Defenses all alleging different statutory provision under the HOA Act, does not constitute an affirmative defense to Plaintiffs' claims, but instead amounts to a mere denial of the allegations in the class action complaint. *See Gatt*, 446 So. 2d at 212; *Wiggins*, 430 So. 2d at 542. Accordingly, the Sixth Affirmative Defense should be stricken. Furthermore, the allegations in support of Defendants' Sixth Affirmative defense, all of which allegations are denied, do not give rise to a legally sufficient affirmative defense in that Defendants' admitted recording of the Club Plan Declaration against all of the residential parcels in *Solivita*—in order to implement its Club Fee

Scheme, under which Defendants sought to make Club membership mandatory while also giving Defendants and the *Solivita* Homeowner's Association the authority to collect assessments for all Club Fees and, if unpaid, the right to place a lien and foreclose on homestead protected homes—precludes Defendant's assertion of the Sixth Affirmative Defense. Defendants also incorporated the Club Plan Declaration as an exhibit to, and incorporated the Club Plan Declaration by reference in, the concurrently executed and recorded *Solivita* Master Declaration, thus making the Club Plan subject to the HOA Act. Defendants have waived and are estopped from asserting this defense based on their actions and omissions against Plaintiffs and the Class in violation of Florida law, as alleged in this matter.

Response to Seventh Affirmative Defense
(Plaintiffs Knowingly Agreed to Club Plan & Subsequent Club Plan)

16. Defendants' Seventh Affirmative Defense is without merit and is denied. The provision of the Club Plan Declaration quoted by Defendants, which provisions are incorporated into the *Solivita* Master Declaration and therefore subject to the HOA Act, is unconscionable, illegal, against public policy, and unenforceable. The original Club Plan and subsequent Club Plan, implemented by Defendants as part of their Club Fee Scheme, must be read in conjunction with the protections afforded to Plaintiffs, as consumers and residents of Florida, under state and federal law. Further, Defendants' unclean hands, through the use of unconscionable, unfair, and deceptive business practices as well as *per se* violations of Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"), §§ 501.201 *et seq.*, Florida Statutes, result in a waiver and/or estop Defendants from asserting this defense. Otherwise denied.

Response to Eighth Affirmative Defense
(Waiver, Ratification, and Estoppel Under Club Plan)

17. Defendants' Eighth Affirmative Defense is without merit and is denied. The provision of the Club Plan Declaration quoted by Defendants, which provisions are incorporated into the *Solivita* Master Declaration and therefore subject to the HOA Act, is unconscionable, illegal, against public policy, and unenforceable. Florida's Homeowners' Association Act provides that "[i]t is declared that the public policy of this state prohibits the inclusion or enforcement of certain types of clauses in homeowners' association documents, including declaration of covenants, articles of incorporation, bylaws, or any other document of the association which binds members of the association, which either have the effect of or provide that . . . [a] homeowners' association is prohibited or restricted from filing a lawsuit against the developer, or the homeowners' association is otherwise effectively prohibited or restricted from bringing a lawsuit against the developer." Fla. Stat. § 720.3075. Moreover, a release that attempts to prospectively insulate a party from liability for violation of a statute or ordinance enacted to protect public policy is unenforceable. *See JM Family Enterprises, Inc. v. Winter Park Imports, Inc.*, 10 So. 3d 1133 (Fla. 5th DCA 2009) (and cases cited therein). Further, "any attempt to limit FDUTPA liability is contrary to public policy." *Hall v. O'Brien Imports of Ft. Myers*, 862 So. 2d 87, 89 (Fla. 2d DCA 2003). The original Club Plan and subsequent Club Plan, implemented by Defendants as part of their Club Fee Scheme, must be read in conjunction with the protections afforded to Plaintiffs, as consumers and residents of Florida, under state and federal law. Defendants' unclean hands, through the use of unconscionable, unfair, and deceptive business practices as well as *per se* violations of FDUTPA, also bar them from asserting this equitable defense.

Response to Ninth Affirmative Defense
(Voluntary Payment)

18. Defendants' Ninth Affirmative Defense is without merit and is denied. Plaintiffs' payments are not subject to the voluntary payment doctrine. *See City of Key W. v. Florida Keys Cmty. Coll.*, 81 So. 3d 494, 500 (Fla. Dist. Ct. App. 2012) ("A payment is considered to have been tendered 'involuntarily' if payment is demanded, and the potential consequences of non-payment are sufficiently severe so as to leave little or no choice but to tender payment."). Further, payment of an illegal tax, as Plaintiffs have alleged here, do not constitute a voluntary payment. *See N. Miami v. Seaway Corp.*, 9 So. 2d 705, 706 (1942) ("[w]here the levy of an illegal tax may become a cloud upon the title to real estate, payment of the tax to avoid a cloud on the real estate or to avoid the imposition of substantial burdens upon property rights of the owner is not a voluntary payment"); *Broward Cnty. v. Mattel*, 397 So. 2d 457, 459-60 (Fla. 4th DCA 1981) ("[p]ayment of an illegal tax, even without protest, in order to avoid forfeiture of the right to do business is not a voluntary payment"). In addition, Defendants have waived and are estopped from asserting this defense based on their actions and omissions against Plaintiffs and the Class in violation of Florida law, as alleged in this matter.

Response to Tenth Affirmative Defense
(Failure to state a cause of action for declaratory relief)

19. Defendants' Tenth Affirmative Defense, alleging a failure to state a cause of action for declaratory relief is without merit and is insufficient without allegations of ultimate fact. Accordingly, the Tenth Affirmative Defense should be stricken. Moreover, Defendants allege in their Counterclaim (Count III) that there is a bona fide, actual, present, and practical need for a declaration. Otherwise denied.

Response to Eleventh Affirmative Defense
(Failure to state a cause of action for declaratory relief –
Invalid perpetual obligation to pay Club Dues)

20. Defendants' Eleventh Affirmative Defense, like their previous defense alleging a failure to state a cause of action for declaratory relief, is without merit and is insufficient without allegations of ultimate fact. Accordingly, the Eleventh Affirmative Defense should be stricken. Otherwise denied.

Response to Twelfth Affirmative Defense
(Cannot state cause of action under FDUTPA)

21. Defendants' Twelfth Affirmative Defense, alleging a failure to state a cause of action under FDUTPA, is without merit and is insufficient without allegations of ultimate fact. Accordingly, the Twelfth Affirmative Defense should be stricken. Otherwise denied.

Response to Thirteenth Affirmative Defense
(Civil Penalty For Violations of FDUTPA)

22. Defendants' Thirteenth Affirmative Defense, like many of their previous defenses, does not constitute an affirmative defense to Plaintiffs' claims, but instead amounts to a mere denial of the allegations in the class action complaint. *See Gatt*, 446 So. 2d at 212; *Wiggins*, 430 So. 2d at 542. Plaintiffs and the Class include senior citizens and those with disabilities, which entitle them to a civil penalty against the Developer in the amount of $15,000 for each violation of FDUTPA under Section 501.2077(2), Florida Statutes, if it is found that Defendants are willfully using, or has willfully used, a method, act, or practice in violation of FDUTPA that victimizes or attempts to victimize a senior citizen or a person who has a disability. Accordingly, the Thirteenth Affirmative Defense should be stricken. Otherwise denied.

Response to Fourteenth Affirmative Defense
(*Per Se* Violation of FDUTPA Due To Violations of the HOA Act)

23. Defendants' Fourteenth Affirmative Defense, alleging a failure to state a cause of action for *per se* violations of FDUTPA, is without merit. Under FDUTPA, unconscionable, unfair, and deceptive acts or practices in the conduct of trade or commerce are unlawful. Fla. Stat. § 501.204(1). In addition, the violation of any "law, statute, rule, regulation, or ordinance which proscribes unfair methods of competition, or unfair, deceptive or unconscionable acts or practices" constitutes a *per se* violation of FDUTPA. Fla. Stat. § 501.203(3)(c). Among the purposes of the HOA Act are to (a) "provide procedures for operating [HOAs]" and (b) "**protect the rights of association members** without unduly impairing the ability of such associations to perform their functions." Fla. Stat. § 720.302(1) (emphasis supplied); *see also* Fla. S. Comm. on Govt'l. Ops., CS/SB 1058 (1992) Staff Analysis 1 (March 5, 1992) (describing concerns over developers "retaining control of homeowners' associations, or missing funds"); FDUTPA at Fla. Stat. § 501.203(3) (providing *per se* statutory violations under FDUTPA when consumer protection statutes like the HOA Act are violated); *see generally In re Majorca Isles Master Ass'n, Inc.*, 560 B.R. 824, 850-51 (Bankr. S.D. Fla. 2016); *Williams v. Edelman*, 408 F. Supp.2d 1261, 1272-73 (S.D. Fla. 2005) (citing *Beacon Prop. Mgmt., Inc. v. PNR, Inc.*, 890 So. 2d 274 (Fla. 4th DCA 2004)). Accordingly, the Fourteenth Affirmative Defense should be stricken. Otherwise denied.

Response to Fifteenth Affirmative Defense
(FDUTPA Claims Barred Under Section 720.401(1))

24. Defendants have waived and are estopped from asserting this defense based on their actions and omissions against Plaintiffs and the Class in violation of Florida law, as more fully alleged in the Second Amended Class Action Complaint. Otherwise denied.

Response to Sixteenth Affirmative Defense
(Failure to state a cause of action for breach of fiduciary duty)

25. Defendants' Sixteenth Affirmative Defense, alleging a failure to state a cause of action for breach of fiduciary duty, is without merit and is insufficient without allegations of ultimate fact. Accordingly, the Sixteenth Affirmative Defense should be stricken. Otherwise denied.

Response to Seventeenth Affirmative Defense
(Failure to state a cause of action for breach of fiduciary duty)

26. Defendants' Seventeenth Affirmative Defense, like its previous defense, is without merit and is insufficient without allegations of ultimate fact. Accordingly, the Seventeenth Affirmative Defense should be stricken. Otherwise denied.

Response to Eighteenth Affirmative Defense
(Failure to state a cause of action for aiding and abetting breach of fiduciary duty)

27. Defendants' Eighteenth Affirmative Defense, alleging a failure to state a cause of action for aiding and abetting breach of fiduciary duty, is without merit and is insufficient without allegations of ultimate fact. Accordingly, the Eighteenth Affirmative Defense should be stricken. Otherwise denied.

Response to Nineteenth Affirmative Defense
(Failure to state cause of action for aiding and abetting breach of fiduciary duty)

28. Defendants' Nineteenth Affirmative Defense, as their previous defense alleging a failure to state a cause of action for aiding and abetting breach of fiduciary duty, is without merit and is insufficient without allegations of ultimate fact. Accordingly, the Nineteenth Affirmative Defense should be stricken. Otherwise denied.

Response to Twentieth Affirmative Defense
(Failure to state cause of action for aiding and abetting breach of fiduciary duty)

29. Defendants' Twentieth Affirmative Defense, as their previous defense alleging a failure to state a cause of action for aiding and abetting breach of fiduciary duty, is without merit and is insufficient without allegations of ultimate fact. Accordingly, the Twentieth Affirmative Defense should be stricken. Otherwise denied.

Response to Twenty-First Affirmative Defense
(Failure to state cause of action for unjust enrichment)

30. Defendants' Twenty-First Affirmative Defense, as their previous defense alleging a failure to state a cause of action for aiding and abetting breach of fiduciary duty, is without merit and is insufficient without allegations of ultimate fact. Accordingly, the Twenty-First Affirmative Defense should be stricken. Otherwise denied.

Response to Twenty-Second Affirmative Defense
(Express contract exists)

31. Plaintiffs' claims for unjust enrichment are plead in the alternative, which is permitted. *See* Fla. R. Civ. P. 1.110(g). Otherwise denied.

Response to Twenty-Third Affirmative Defense
(Statute of Limitations)

32. Any statute of limitations is equitably tolled as a result Defendants' unconscionable, unfair, and deceptive business practices as well as well as *per se* violations of FDUTPA. *See Veal v. Crown Auto Dealerships, Inc.*, 236 F.R.D. 572 (M.D. Fla. 2006)(applying equitable tolling in class certification); *Chaplaincy of Full Gospel Churches v. Johnson*, 276 F. Supp.2d 79, 81 (D.D.C. 2003)(similar). Otherwise denied.

Response to Twenty-Fourth Affirmative Defense
(Statute of Limitations)

33. Any statute of limitations is equitably tolled as a result Defendants' unconscionable, unfair, and deceptive business practices as well as well as *per se* violations of FDUTPA. *See Veal v. Crown Auto Dealerships, Inc.*, 236 F.R.D. 572 (M.D. Fla. 2006)(applying equitable tolling in class certification); *Chaplaincy of Full Gospel Churches v. Johnson*, 276 F. Supp.2d 79, 81 (D.D.C. 2003)(similar). Otherwise denied.

Response to Twenty-Fifth Affirmative Defense
(Claims Barred by Doctrine of Laches)

34. Defendants have waived and are estopped from asserting this defense based on their actions and omissions against Plaintiffs and Class in violation of Florida law, as more fully alleged in the Second Amended Class Action Complaint. Further, Defendants' unclean hands through the use of unconscionable, unfair, and deceptive business practices as well as *per se* violations of FDUTPA result in a waiver and/or estop Defendants from asserting this defense. Otherwise denied.

Response to Twenty-Sixth Affirmative Defense
(Unjust enrichment)

35. Defendants have waived and are estopped from asserting this defense based on their actions and omissions against Plaintiffs and Class in violation of Florida law, as more fully alleged in the Second Amended Complaint. Further, Defendants' unclean hands through the use of unconscionable, unfair, and deceptive business practices as well as *per se* violations of FDUTPA result in a waiver and/or estop Defendants from asserting this defense. Otherwise denied.

Response to Twenty-Seventh Affirmative Defense
(Vested property rights)

36. Defendants have waived and are estopped from asserting this defense based on their actions and omissions against Plaintiffs and Class in violation of Florida law, as more fully alleged

in the Second Amended Complaint. Further, Defendants' unclean hands through the use of unconscionable, unfair, and deceptive business practices as well as *per se* violations of FDUTPA result in a waiver and/or estop Defendants from asserting this defense. Otherwise denied.

Response to Twenty-Eighth Affirmative Defense
(Failure to state a cause of action)

37. This defense is without merit and is insufficient without allegations of ultimate fact. Accordingly, the defense should be stricken. Further, Defendants have waived and are estopped from asserting this defense based on their actions and omissions against Plaintiffs and Class in violation of Florida law, as more fully alleged in the Second Amended Class Action Complaint. Otherwise denied.

Response to Twenty-Ninth Affirmative Defense
(Adequacy)

38. This defense merely denies the allegations in support of class certification under Rule 1.220, Fla. R. Civ. P., and does not constitute an affirmative defense to Plaintiffs' claims. *See Gatt*, 446 So. 2d at 212; *Wiggins*, 430 So. 2d at 542. Accordingly, the defense should be stricken. Otherwise denied.

Response to Thirtieth Affirmative Defense
(Lack of standing as class representative)

39. This defense merely denies the allegations in support of class certification under Rule 1.220, Fla. R. Civ. P., and does not constitute an affirmative defense to Plaintiffs' claims. *See Gatt*, 446 So. 2d at 212; *Wiggins*, 430 So. 2d at 542. Accordingly, the defense should be stricken. Otherwise denied.

Response to Thirty-First Affirmative Defense
(Adequacy)

40. This defense merely denies the allegations in support of class certification under Rule 1.220, Fla. R. Civ. P., and does not constitute an affirmative defense to Plaintiffs' claims. *See Gatt*, 446 So. 2d at 212; *Wiggins*, 430 So. 2d at 542. Accordingly, the defense should be stricken. Otherwise denied.

Response to Thirty-Second Affirmative Defense
(Adequacy)

41. This defense merely denies the allegations in support of class certification under Rule 1.220, Fla. R. Civ. P., and does not constitute an affirmative defense to Plaintiffs' claims. *See Gatt*, 446 So. 2d at 212; *Wiggins*, 430 So. 2d at 542. Accordingly, the defense should be stricken. Otherwise denied.

Response to Thirty-Third Affirmative Defense
(Commonality, Typicality, Predominance, and Superiority)

42. This defense merely denies the allegations in support of class certification under Rule 1.220, Fla. R. Civ. P., and does not constitute an affirmative defense to Plaintiffs' claims. *See Gatt*, 446 So. 2d at 212; *Wiggins*, 430 So. 2d at 542. Accordingly, the defense should be stricken. Otherwise denied.

Response to Thirty-Fourth Affirmative Defense
(Class definition)

43. This defense merely denies the allegations in support of class certification under Rule 1.220, Fla. R. Civ. P., and does not constitute an affirmative defense to Plaintiffs' claims. *See Gatt*, 446 So. 2d at 212; *Wiggins*, 430 So. 2d at 542. Accordingly, the defense should be stricken. Otherwise denied.

Response to Thirty-Fifth Affirmative Defense
(Class definition)

44. This defense merely denies the allegations in support of class certification under Rule 1.220, Fla. R. Civ. P., and does not constitute an affirmative defense to Plaintiffs' claims. *See Gatt*, 446 So. 2d at 212; *Wiggins*, 430 So. 2d at 542. Accordingly, the defense should be stricken. Otherwise denied.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that the Court strike Defendant's affirmative defenses, award Plaintiffs their attorneys' fees and costs, and grant such other relief as the Court deems just and appropriate.

[Attorney's signature appears on the following page.]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was **electronically filed** with the Clerk and **electronically served** using the Florida Courts E-Filing Portal on October 19, 2017: Daniel J. Fleming, Esq., Gray Robinson, 401 East Jackson Street, Suite 2700, Tampa, FL 33602, daniel.fleming@gray-robinson.com; sarah.martin@gray-robinson.com.

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