

**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,

Case No.: 17-CA-001446

Division: 11

vs

AVATAR PROPERTIES, INC.,

Defendant.

_____ /

**MOTION FOR FINAL DISTRIBUTION TO THE SOLIVITA CLASS AND
APPROVAL OF CLASS COUNSEL FEES AND EXPENSES
AND INCENTIVE AWARDS TO PLAINTIFFS**

Plaintiffs, on behalf of the Solivita Class, along with Class Counsel, pursuant to Fla. R. Civ. P. 1.220, hereby move for final distribution of the common fund recovered against Defendant, Avatar Properties, Inc. (“Avatar”), and request an award of Class Counsel’s attorneys’ fees and expenses, and Incentive Awards to each Class Representative, Plaintiffs Norman Gundel, Brenda Taylor, and William Mann.

As a preliminary matter, this motion is being filed now for updating the Solivita Class official website maintained by the Class Administration, AB Data Ltd. A further filing by Plaintiffs and AB Data, to include a report on class membership and anticipated distribution amount, (CMC Order, Doc. 735, 1/17/24), will be made prior to a final hearing, which is being scheduled as soon as practicable.

Summary of Final Distribution and Requested Awards

1. The Solivita Class recovered a final judgment worth at least \$276,514,608 in damages, interest, and equitable relief.

2. This common fund recovery thus far includes \$50,545,719 in damages; statutory interest of \$14,120,469; additional prejudgment interest of \$22,000,000 that remains at issue; and injunctive relief of \$189,848,420 (based on a calculated 30 years of future savings to class members who no longer have to pay Club Membership Fees).

3. Further, and added to this class common fund recovery, the Solivita Class is seeking a separate prevailing party attorneys' fees award and taxable costs from Avatar (scheduled for hearing July 29-30, 2024). *See* Plaintiff's Memorandum of Law In support filed July 17, 2024, the "Procedural History & Relevant Filings" of which are specifically incorporated herein by reference to avoid lengthy repetition.

4. The Solivita Class common fund currently includes the principal amount, \$64,665,695.72 initially paid by Avatar in December 2023 by agreement (CMC Order, Doc. 735, 1/17/24). This amount represents \$50.5 Million in damages and statutory interest of only \$14.1 Million, while the Solivita Class awaits rulings on its claim for additional prejudgment interest and an award of prevailing fees and costs. The common fund is invested with Raymond James Trust, N.A., accruing interest since December 2023 at an average rate of 5.27%% (\$1,922,613.34), less estimated fees of \$26,148 and estimated taxes paid of \$250,186, for a total common fund account of \$66,311,974.92 as of the date of this filing.

5. Upon the completion of the class member data review and accounting by AB Data (estimated completion by August 1, 2024) and Avatar's payment of the remaining prejudgment interest award, if any, and payment of prevailing party fees and taxable costs award into the class

common fund, the Solivita Class seeks final court approval pursuant to Fla. R. Civ. P. 1.220 for the distribution of the common fund recovery to Solivita class members, and requests an award of attorneys' fees and expenses to Class Counsel in accordance with the controlling Florida Supreme Court's decision in *Kuhnlein v. Dep't of Revenue*, 662 So. 2d 309 (Fla. 1995), and an incentive award to each of the court appointed Class Representatives, Plaintiffs Norman Gundel, Brenda Taylor, and William Mann. Both awards will be paid from the class common fund with the remainder being distributed directly to each class member.

Governing Legal Principles & Analysis

6. Many jurisdictions set common fund fee awards using what is described as the "percentage approach," in which a reasonable fee is calculated as a percentage of the fund. *See Camden I Condo. Ass'n, Inc. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991).

7. Other jurisdictions use the "lodestar method," requiring that the court first ascertain a reasonable base lodestar which may then be enhanced to take into account factors such as contingent fee risk and results. *See Lindy Bros. Builders, Inc. of Phila. V. Am. Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3d Cir. 1973).

8. In *Kuhnlein, supra*, the Florida Supreme Court weighed in on the long running debate over which method best furthers the public policy of incentivizing but not overcompensating counsel, opting for the lodestar approach with a maximum multiplier of 5.

We have considered whether a multiplier is needed in this case to give effect to the contingency factor and in recognition of the substantial benefit class counsel conferred upon the class members. First, we find that the instant case presents another distinct class of attorney-fee cases, in addition to those presented in *Quanstrom*, in which a multiplier is appropriate. Next, we set the *maximum* multiplier available in this common-fund category of cases at 5. By allowing for this increased maximum multiplier, we recognize that it is appropriate in common-fund cases, as differentiated from fee-shifting cases where the multiplier is capped at a 2.5 multiplier pursuant to *Quanstrom*, to place greater emphasis on the monetary results achieved. Furthermore, a

multiplier which increases fees to five times the accepted hourly rate is sufficient to alleviate the contingency risk factor involved and attract high level counsel to common fund cases while producing a fee which remains within the bounds of reasonableness. We emphasize that 5 is a maximum multiplier, and what multiplier, if any, applies depends on the particular case. Based upon the record before us, we conclude that class counsel in this case is entitled to the maximum multiplier available.

662 So. 2d at 315.

9. In setting a reasonable fee award in a common fund class action, the trial court determines the hours reasonable expended and appropriate hourly rates (lodestar), and then considers a contingency risk and results achieved multiplier. *Kuhnlein, supra*; *Standard Guar. Ins. Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990); *Fla. Patient's Comp. Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985).

10. ***This is a rare and extraordinary case.*** No other consumer class action in Florida state court has been as successful as the Solivita Class. The results achieved here are extraordinary and unprecedented. The first of its kind for residents of homeowner's associations across the State of Florida, the monetary results delivered are truly exceptional – 100% of all dollars paid by Solivita class members to Avatar for its illegal Club Member (\$50.5 Million), plus statutory interest (\$14.1 Million), with additional interest (\$22 Million), if awarded, and future savings of \$189.8 Million.¹

¹ The future savings of \$189,848,420 to the Solivita Class is based on calculations of the Club Membership Fees (2024-2050) and included in the value of the class common fund. *See* Plaintiffs' Amended Notice, (Doc. 541). *See also In re Checking Account Overdraft Liti.*, 2013 WL 11319243 at *13 (S.D. Fla. Aug. 2, 2013) (holding when non-cash relief by way of injunction can be reliably valued, "court may include such relief as part of the value of a common fund"); *Ramos v. Phillip Morris Cos.*, 743 So. 2d 24 (Fla. 3d DCA 1999) (class common fund of \$300 Million medical foundation fund, without any monetary relief paid to class members, but other evidentiary stipulations).

11. In the final appeal to the Sixth District Court of Appeal, the Court took a moment at the Oral Argument held on May 18, 2023 to note that it was acutely and painfully aware of the complexity of the case. *See* Cohen, J., Oral Argument at 1:51:49, *Avatar Properties, Inc. v. Gundel*, 372 So. 3d 715 (Fla. 6th DCA 2023), *rev. denied*, SC2023-0946, 2023 WL 7220822 (Fla. Nov. 2, 2023), <https://www.youtube.com/watch?v=vIVWCQX6n9o> (“Counsel, for what it’s worth, we are not unaware of the significance of this case and our decision in this case. We are very well aware of it, which is why I made the comment about the amicus brief saying it was a simple case. There is nothing simple about this case. And we are acutely aware of it, painfully aware of it . . .”).

12. The Sixth District also noted that it was cognizant of Avatar's assertion that the ruling could have far-reaching effects on homeowners' associations throughout the State, and with this in mind, the Sixth District sought a pronouncement from the Florida Supreme Court on the following certified question, one of great public importance: “Whether an assessment or amenity fee, pursuant to section 720.301(1), which if not paid can result in a lien against a residential owner's parcel of land, can include charges for fees to the developer or others in excess of the actual expenses for the amenities?” *Id.*²

13. It is also rare and extraordinary for class members to receive a direct monetary payment in a consumer class action. Here, each Solivita class member will receive a direct payment from the class common fund and has been relieved permanently of any obligation to pay the illegal

² Even more, based on that complexity and importance, the Sixth District *sua sponte* increased the time for oral argument and noted the lengthy preparation required for the oral argument. Stargel, J., Oral Argument at 32:20 (“Well, before we get started, my colleagues and I had a discussion this morning, and we figured that you’d all spent at least 8-10 hours preparing for this per day, over the last ever how many months. Ya’ll don’t have to use it, but we feel based on questions we have, that we are going to increase the time to 30 minutes per side.”). *Id.*

Club Membership Fee that Avatar hoped to secure in perpetuity (a collective savings of \$189.8 Million).

14. Class Counsel has also required Avatar to maintain a \$60.5 Million bond, securing future payments of prejudgment interest, and prevailing party attorneys' fees and costs.

15. ***Eight Intense Years of Litigation and Appeals.*** The parties have litigated fiercely now going into the 8th year of the case. There were: 100,000s of pages of documents; numerous and lengthy depositions; over 50 hours of hearings in more than 35 hearings; over 795 docket filings to date, consisting of over 25,000 pages of motions, briefing, exhibits and other filings.

16. The Solivita Class faced three separate appeals and a cross-appeal. The dockets of just the first two appeals to the Second District included 300 pages of briefing and over 11,000 pages of court records on appeal, *see Gundel v. AV Homes, Inc. and Avatar Properties, Inc.*, 264 So. 3d 304 (Fla. 2d DCA Feb. 1, 2019) (prevailing on appeal regarding Avatar's Counterclaim), and *Gundel v. AV Homes, Inc. & Avatar Properties, Inc.*, 290 So. 3d 1080 (Fla. 2d DCA Feb. 21, 2020) (prevailing on class certification). The final appeal to the Sixth District included over 400 pages of briefing and appendix, over 28,000 pages of record on appeal, and *Amicus* briefs, *see Avatar Properties, Inc. v. Gundel*, 372 So. 3d 715 (Fla. 6th DCA June 22, 2023). The Florida Supreme Court later denied review after a full jurisdictional briefing on Avatar's request.

17. ***Effort Expended by Class Counsel.*** Class Counsel included 8 premier law firms in Florida, with board certified civil trial attorneys and members of the American Board of Trial Advocates (ABOTA), AV rated lawyers by Martindale-Hubbell, all with extensive experience in complex litigation, class actions, and appeals – with the most senior attorneys having a range of 25-48 years in the practice of law.

18. Class Counsel, to date, have spent over 11,000 hours and \$450,000 in costs and expenses representing the Solivita Class without any payment and on a full contingency.

19. Class Counsel also successfully protected the Solivita Class's interest in the collateral bond proceeding in *Poinciana Community District v. State of Florida et al*, Case No. 53-2016-CA-004023 (Fla. 10th Jud. Cir. Polk County, FL), and in an appeal to the Florida Supreme Court, Case No. SC2017-1807, which ensured no negative ruling would impact further proceedings.³

20. Compare the Solivita Class success with these reported Florida state court cases:

- (1) In *Kuhnlein, supra*, the class successively recovered a class common fund of \$188.1 Million after a Florida tax statute was held unconstitutional. The Kuhnlein class counsel incurred 6,730.9 hours prosecuting the lawsuit, which the trial court noted was a “substantial effort” in a “complicated and intense” lawsuit, with 5 separate appeals. 662 So. 3d at 319. The Kuhnlein class counsel were awarded a 5 multiplier.
- (2) In *Ramos v. Phillip Morris Cos.*, 743 So. 2d 24 (Fla. 3d DCA 1999), a class settlement, as opposed to a final judgment, was reached in which class members did not receive any money, but instead a \$300 Million

³ In the separate bond validation proceeding, Avatar (who had not only developed Solivita but also created community development districts (CDDs) that taxed residents for infrastructure), attempted to cash out 30 years of its anticipated profit from collecting “Club Membership Fees” (at issue in this class action) via bonds issued by the CDDs to pay Avatar. Had the validation effort succeeded – it did not, see Final Judgment Not Validating and Not Confirming Bond Issuance (Judge Randall McDonald, Case No. 53-2016-CA-004023, Doc. 217, 9/1/17) – Avatar would have been paid in excess of \$70 Million and the illegal Club Membership Fee would have been effectively converted to a CDD assessment Plaintiffs would be required to pay for another 30 years. Over 2,300 hours were spent protecting the Solivita Class interests in the Bond Validation Proceeding. J. Carter Andersen of Bush Ross and Kristin Norse of Kynes, Markman & Felman represented Taylor and Mann, as intervening defendants in the proceeding and on appeal to the Florida Supreme Court.

On a separate note, Avatar's Counterclaim against Plaintiffs in this class action (Doc. 33, 9/29/17), sought damages of \$70 Million from Plaintiffs because of the failed bond issuance. As shown, the Counterclaim was later dismissed after a successful appeal and a Final Judgment was entered in Plaintiffs' favor, (Doc. 373, 6/4/19).

medical foundation fund was established with the Ramos class benefitting from other evidentiary results (i.e., waiver of statute of limitation defenses; shifting of burden of proof; resolution of venue and choice of law issues, etc.). *Id.* at 33. The Ramos class counsel spent 67,166 hours “or 10,333 hours per year,” with chances of success “much lower than 50/50.” *Id.* The *Ramos* court upheld the class counsel’s award of a 5 multiplier.

- (3) In *Dreidame v. Vill. Ctr. Cmty. Devel. Dist.*, 2008 WL 707074 (Fla. Cir. Ct., 5th Cir. 2008), a class common fund of \$13.2 million paid immediately, and another \$28 Million over 13 years, was reached by settlement. The Dreidame class counsel spent 3,753.4 hours. The trial court awarded a 5 multiplier, while also approving \$300,000 in incentive awards to class representatives.

Incentive Awards To Named Plaintiffs As Court Appointed Class Representatives

21. The risk and amount of work by Plaintiffs Gundel, Taylor, and Mann were equally exceptional and unprecedented. All faced substantial risk of losing and potentially paying Avatar’s attorneys’ fees – as Avatar repeatedly threatened that in pleadings under both Section 57.105(7) based on the Club Plan and Section 720.305, Florida Statutes, as well as during questioning at their depositions. Then, Plaintiffs faced Avatar’s multi-million-dollar Counterclaim that attempted to recover damages of \$70 Million from Plaintiffs because of the failed bond issuance, based solely on Plaintiffs’ protected exercise of their First Amendment rights and legal actions they took to oppose Avatar’s unlawful conduct.

22. At each phase of the litigation, Plaintiffs pushed forward when Avatar failed and refused any settlement option. As the record makes clear, Plaintiffs were involved at every stage: in depositions; attending hearings, including testifying at the class certification hearing; reviewing voluminous documents during discovery; attending hours of meetings; preparing for trial and mock jury trials. As explained by one Florida court:

“The position of fiduciary for the class is less an honor than a headache.” Indeed, “[c]lass representatives [take] risks, [bear] hardships, and [make] sacrifices that absent class members [do] not.” Class representatives “[are] identified as a

class litigant in public records (potentially affecting credit reports and disclosures for financing), [are] subject to fiduciary duties to the class, may be deposed and required to produce records, and must meet with counsel and appear in court, for example.”

Incentive awards are used to reward class representatives who “diligently and completely fulfil[l] [their] obligations as representative[s] for the class . . . [by] filing suit on behalf of Class Members[,] . . . [being] involved in the negotiations and decision making[,] and participat[ing] in discovery, including sitting for deposition. In addition, when class representatives are “act[ing] as private attorneys general seeking a remedy for what appear[s] to be a public wrong[,]” approval of incentive awards “is warranted as a matter of policy and is appropriate under applicable precedents.” “The factors for determining [an incentive] award include: (1) the actions the class representative took to protect the interests of the class; (2) the degree to which the class benefited from those actions; and (3) the amount of time and effort the class representatives expended in pursuing the litigation.”

Weaver v. City of Wildwood, 22 Fla. L. Weekly Supp. 537b (Fla. 5th Jud. Cir. Ct. Nov. 13, 2014) (footnotes deleted).

23. Other Florida courts have likewise acknowledged the right of a class representative to recover an incentive award. *See Dreidame*, 2008 WL 707074 *12 (Fla. Cir. Ct., 5th Cir. 2008) (discussing incentive awards and approving \$300,000 award to named plaintiffs “given their unique and extraordinary contributions”); *Altamonte Springs Imaging v. State Farm Ins. Co.*, 12 So. 3d 850, 857 (Fla. 3d DCA 2009) (approving incentive award). *See also AFO Imaging, Inc. v. Peak Property & Casualty Ins. Corp.*, 17 Fla. L. Weekly 458b (Fla. 13th Jud. Cir. Ct. May 5, 2010); *Brinkman v. Florida Public Utilities Co.*, 18 Fla. L. Weekly Supp. 390b (Fla. 15th Jud. Cir. Ct. Feb. 11, 2011); *All Family Clinic of Daytona Beach, Inc. v. Esurance Ins. Co.*, 20 Fla. L. Weekly Supp. 1157b (Fla. 7th Jud. Cir. Ct. July 22, 2013). *But see Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244 (11th Cir. 2020) (rejecting incentive awards in class settlements contrary to other federal circuits). Such an award is especially merited here under controlling Florida law.

CONCLUSION

24. In pursuing this complex, multi-years long litigation, Plaintiffs and Class Counsel, on behalf of the Solivita Class, successfully obtained a result that is unprecedented, a first of its kind consumer class action against Avatar, who was unrelenting and unyielding until the Florida Supreme Court ultimately denied review on November 2, 2023.

WHEREFORE, Plaintiffs, on behalf of the Solivita Class, along with Class Counsel, pursuant to Fla. R. Civ. P. 1.220, hereby move for final distribution of the common fund recovered against Defendant, Avatar Properties, Inc., an award of Class Counsel's attorneys' fees and expenses, and Incentive Awards to each Class Representative, Plaintiffs Normal Gundel, Brenda Taylor, and William Mann, and for such other and further relief as the Court deems just and proper.

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

CERTIFICATE OF SERVICE

I HERBY CERTIFY that a true and correct copy of the foregoing has been Electronically served through Florida Courts E-filing portal to all counsel of record, on this 17th day of July 2024.



John Marc Tamayo, FBN 030910
CAMPBELL, TROHN, TAMAYO & ARANDA
1701 S. Florida Avenue
Lakeland, FL 33803
Telephone: (863) 686-0043
Primary: J. Tamayo@cttalaw.com
Secondary: C.velez@cttalaw.com

Chris W. Altenbernd, FBN 197394
BANKER LOPEZ GASSLER, P.A.
501 E. Kennedy Boulevard, Suite 1700
Tampa, FL 33602
Telephone: (813) 221-5100
Primary: caltenbernd@bankerlopez.com
Secondary: service-caltenbernd@bankerlopez.com

Kenneth G. Turkel, FBN 0867233
TURKEL CUVA BARRIOS, PA.
100 N. Tampa Street, Suite 1900
Tampa, FL 33602
Telephone: (813) 443-2199
Primary: kturkel@tcb-law.com

Kristin A. Norse, FBN 965634
Stuart C. Markman, FBN 322571
KYNES, MARKMAN & FELMAN, P.A.
Post Office Box 3396
Tampa, FL 33601
Telephone: (813) 229-1118
Primary: smarkman@kmf-law.com
Primary: knorse@kmf-law.com

J. Daniel Clark, FBN 0106471
CLARK | MARTINO, P.A.
3407 West Kennedy Boulevard
Tampa, FL 33609
Telephone: 813-879-0700
Primary: dclark@clarkmartino.com
Secondary: jliza@clarkmartino.com

J. Carter Andersen, FBN 143626
Harold Holder, FBN 118733
BUSH ROSS, P.A.
1801 North Highland Avenue
Tampa, FL 33602
Telephone: (813) 224-9255
Primary: candersen@bushross.com
Secondary: kpomponio@bushross.com
Primary: hholder@bushross.com

Matthew A. Crist, FBN 0035539
CRIST LEGAL, PA
2904 W Bay to Bay Blvd
Tampa, FL 33629
Telephone: (813) 575-5200
cristm@crystallegal.com

Samuel J. Salaro, Jr., FBN 083460
Jessica Slatten, FBN 27038
LAWSON HUCK GONZALEZ, PLLC
1700 S. MacDill Avenue, Suite 300
Tampa, FL 33629
813-765-5113
samuel@lawsonhuckgonzalez.com
jessica@lawsonhuckgonzalez.com
michelle@lawsonhuckgonzalez.com
Attorneys for Plaintiffs