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,
v.

Case No.: 2017-CA-001446
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 IN PART PLAINTIFFS' AMENDED MOTION FOR CLASS CERTIFICATION

THIS CAUSE came before this Court for an evidentiary hearing on April 6, 2018 pursuant to the *Amended Motion for Class Certification,* filed March 21, 2018, by Plaintiffs, NORMAN GUNDEL, WILLIAM MANN, and BRENDA N. TAYLOR (collectively, "Plaintiffs"). The Court, having reviewed the Motion, Plaintiffs' *Memorandum in Support of Motion for Class Certification*, Plaintiffs' *Reply in Support of Class Certification*, and Defendants', AV HOMES, INC. ("AV HOMES") and AVATAR PROPERTIES, INC. ("AVATAR") *Response to Plaintiffs' Amended Motion for Class Certification and Incorporated Memorandum of Law* ("Response"), in addition to all attachments, exhibits, and sworn record evidence, 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:

I. Factual & Procedural History

Plaintiffs allege the Solivita Homeowners have been required to pay unlawful Club Membership Fees - - "assessments" as defined under the Homeowners Association Act, chapter 720, Florida Statutes - - which violate section 720.308(1)(a) and (3), in that they are not based on the homeowner's "proportional share of expenses." In their Second Amended Complaint

("ComplaInt"), Plaintiffs seek: 1) declaratory relief as to whether Chapter 720 applies to the Club and Club Plan, and Defendants, as the developer(s) of Solivita; 2) declaratory relief as to whether Solivita Homeowners have the right to elect the majority of the board of directors of the entity that oversees the Amenities in accord with Fla. Stat. sec. 720.307; 3) declaratory relief as to whether Defendants turn over ownership of the Clubs, as common areas, to the Association in accord with Section 720.307(4)(a) ("At the time the members are entitled to elect at least a majority of the board of directors of the homeowners' association, the developer shall, at the developer's expense, within no more than 90 days deliver the following documents to the board: (a) All deeds to common property owned by the association."); 4) declaratory relief whether Defendants, as the developer(s), owe a fiduciary duty to Solivita Homeowners themselves; 5) declaratory relief as to whether payment of Club Membership Fees is terminable at will or perpetual; 6) injunctive relief from improper profiting via Defendants' collection of Club Membership Fees in violation of section 720.308 and their fiduciary duty; 7) injunctive relief from varied FDUTPA violations (which likewise may be violations of chapter 720); 8) direct violation of section 720.308 via said improper profiting; 9) actual breach of fiduciary duty; 10) aiding and abetting a breach of fiduciary duty; 11) damages under FDUTPA; and 12) unjust enrichment. Counts I through XII of the Complaint are in order as summarized above. See generally Complaint.

The parties agreed to allow this Court to proceed on the *Defendants' Motion for Final Summary Judgment* (filed October 5, 2017), as to the threshold issue of whether Chapter 720, Florida Statutes applied to the Defendants. See Hearing Transcript (October 27, 2017) at pp. 35-36. The Court may rule on the "basic merits of a claim before even deciding whether it may proceed as a class action." Americquest Mortgage Co. v. Scheb, 995 So. 2d 573, 574 (Fla. 2d DCA 2008) (Altenbernd, J., concurring) (While affirming class certification, the concurring judge reasoned that ruling on summary judgment before class certification was appropriate.).

Following the January 23, 2018, hearing on the *Defendants' Motion for Final Summary Judgment*, this Court entered an *Order Granting in Part and Denying in Part Defendants' Motion for Final Summary Judgment*, ("Summary Judgment Order"). This Court incorporates those findings herein below:

- As to Count I, the Court found that chapter 720 applied (at least in part) to AVATAR as the developer of Solivita; and that chapter 720 applied to the Club Plan to the extent the Club Plan was a governing document under Fla. Stat. sec. 720.301(8)(a) as an exhibit to the Master Declaration. However, the Court found chapter 720 does not

apply to the Club where the Club is commercial property under Fla. Stat. sec. 720.302(3)(b); and does not apply to AV HOMES who was not the "developer" of Solivita.

- As to Count III, the Court found that based upon the governing documents[1], the Club's real property and facilities are not common areas under chapter 720.

As to the remaining Counts:

- As to Counts IV, IX, and X, the Court made no explicit ruling as to whether AVATAR, as the Solivita developer, owes the Solivita Homeowners a fiduciary duty.

- As to Count V, the Court made no explicit ruling as to whether Club Membership Fees are terminal at will or perpetual.

- As to Counts VI, VIII, and XII, it remains clear to the Court that genuine issues of material fact exist. The Court explicitly found the Club Plan is a governing document subject to chapter 720 and found the Club's real property and facilities constituted "commercial property," and not subject to chapter 720. In the course of discovery, third party billing records show Club Membership Fees under the heading of "assessments," the exact meaning of which is disputed by the Parties (whether such constitutes the term "assessment," under section 720.308(1)(a)). See Compl., Ex. 39 (Jan. 1, 2017 third party billing statement for NORMAN GUNDEL that stated "Assessment-SV-Base-Club Fee"); BRENDA N. TAYLOR Dep. 19:10-19:18, March 9, 2018 (Filed April 2, 2018), (Plaintiff references third party billing statements identifying the Club Membership Fee as an "assessment.").

- As to Counts VII and XI, genuine issues of material fact exist. For example, not every FDUPTA allegation was solely based on chapter 720.

As shown above, contrary to the Defendants' Response, a number of Plaintiffs' claims remain viable following the Summary Judgment Order.

On the other hand, Plaintiffs cannot adequately represent the class nor can their claims be typical of the claims of the class, given that the sole legal basis for Plaintiffs' Count III was adjudicated in AVATAR's favor, where this Court found neither the Club's real property nor facilities to be "common areas" under chapter 720.[2] See Summary Judgment Order of January 23,

[1] The Solivita community is governed by the following duly recorded documents: (1) the Master Declaration; (2) Amended and Restated Articles of Incorporation ("Articles of Incorporation"); (3) Amended and Restated By-Laws of Solivita Community Association, Inc. ("By-Laws"); and (4) Amended and Restated Solivita Club Plan ("Club Plan") (collectively "Solivita governing documents"). See Summary Judgment Order at ¶2.

[2] On a more fundamental level, given that Count III was adjudicated in AVATAR's favor and all claims under chapter 720 have been adjudicated in AV HOMES' favor per the Summary Judgment Order, Plaintiffs lack standing for class

2018, at ¶24. Additionally, since the Court has ruled on all issues of Count I, Plaintiffs lack standing, for class certification purposes, as no present case or controversy exists between the Parties as to Count I. Cf. Sosa v. Safeway Premium Finance Company, 73 So. 3d 91, 117 (Fla. 2011).

As to the FDUPTA claims, the Court finds a FDUPTA claim is a distinct cause of action from that of a claim under section 720.402, and therefore, neither the four-year statute of limitation period under Fla. Stat. sec. 95.11(3) (2018), nor the one-year statute of limitation period under Fla. Stat. sec. 720.402 apply to this case. See Grove Isle Association, Inc. v. Grove Isles Associates, LLLP, 137 So. 3d 1081, 1088 & 1095 (Fla. 3d DCA 2014); see also Viera v. City of Lake Worth, Florida, 230 So. 3d 484, 487 (Fla. 4th DCA 2017); Winn-Dixie Stores, Inc. v. Dolgencorp, LLC, 746 F.3d 1008, 1043 (11th Cir. 2014); Castle & Cookie Florida, LTD v. Scheeringa, 2016 WL 6663925 (Fla. 9th Jud. Cir. Ct. 2016); Parra v. Minto Town Park, LLC, 2008 WL 4773272 (S.D. Fla. 2008); Garcia v. Santa Maria Resort, Inc., 528 F. Supp. 2d 1283, 1296 (S.D. Fla. 2007).

II. Class Certification Legal Standard Under Rule 1.220

In consideration of class certification, the Court focuses on whether Plaintiffs have satisfied the elements of Rule 1.220, without regard to the merits of the claims. See Sosa, 73 So. 3d at 105; Freedom Life Insurance Company of America v. Wallant, 891 So. 2d 1109 (Fla. 4th DCA 2004). The Court must also determine if the class representative has standing to represent the class members. "To satisfy the standing requirement for a class action claim, the class representative must illustrate that a case or controversy exists between him or her and the defendant, and that this case or controversy will continue throughout the existence of the litigation...[a] case or controversy exists if a party alleges an actual or legal injury...[a]n actual injury includes an economic injury for which the relief sought will grant redress...[t]hat injury must be distinct and palpable, not abstract or hypothetical." Sosa, 73 So. 3d at 116-17 (citations omitted).

Under Rule 1.220(a) Plaintiffs must satisfy the following four elements:

> (1) the members of the class are so numerous that separate joinder of each member is impracticable;
> (2) the claim or defense of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim or defense of each member of the class;

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certification purposes because a present case or controversy no longer exists between Plaintiffs and Defendant(s) on those claims under chapter 720.

> (3) the claim or defense of the representative party is typical of the claim or defense of each member of the class; and
>
> (4) the representative party can fairly and adequately protect and represent the interests of each member of the class.").
>
> See Fla. R. Civ. P. 1.220(a)

In addition to these four elements, Plaintiffs must satisfy one of the three alternative requirements of Rule 1.220(b). Plaintiffs allege their declaratory and injunctive relief claims satisfy Rule 1.220(b)(2) and (b)(3), respectively, below:

> (2) [T]he party opposing the class has acted or refused to act on grounds generally applicable to all the members of the class, thereby making final injunctive relief or declaratory relief concerning the class as a whole appropriate; or
>
> (3) [T]he questions of law or fact common to the claim or defense of the representative party and the claim or defense of each member of the class predominate over any question of law or fact affecting only individual members of the class [i.e. predominance], and class representation is superior to other available methods for the fair and efficient adjudication of the controversy [i.e. superiority]. The conclusions shall be derived from consideration of all relevant facts and circumstances, including (A) the respective interests of each member of the class in individually controlling the prosecution of separate claims or defenses, (B) the nature and extent of any pending litigation to which any member of the class is a party and in which any question of law or fact controverted in the subject action is to be adjudicated, (C) the desirability or undesirability of concentrating the litigation in the forum where the subject action is instituted, and (D) the difficulties likely to be encountered in the management of the claim or defense on behalf of a class.").

See Motion at pp. 27 & 29.

A. Narrowing the Class Definition

Plaintiffs request the class be defined as "[a]ll persons who currently own, or previously owned, a home in Solivita and who have paid, or have been obligated to pay, a Club Membership Fee under the Club Plan on or after April 26, 2013." See Pls.' Am. Mot. for Class Certification at p. 11. Defendants argue against same contending former homeowners are no longer obligated to pay Club Membership Fees, and thus, have no "actual, present, and practical need for" declaratory relief. See Defs.' Resp. at p. 15.

As more fully addressed below, for those claims that the Court has found amendable to class certification ("Class Claims"), the Court has found that monetary damages, prospectively in the

form of refunds/credits if Plaintiffs demonstrate that Club Membership Fees violate section 720.308(1)(a) and exceed members' proportionate share of expenses, do not predominate and are incidential to the declaratory relief sought by Plaintiffs. Having found that declaratory relief dominates the Class Claims, the Court finds Defendants' argument to be well taken. However, it is within the Court's discretion to "redefine a proposed class in a manner which will allow utilization of the class action." Canal Insurance Co. v. Gibraltar Budget Plan, Inc., 41 So. 3d 375, 377 (Fla. 4th DCA 2010).

Accordingly, the Court redefines the class to include ***("[a]ll persons who currently own a home in Solivita and who have paid a Club Membership Fee under the Club Plan on or after April 26, 2013.")*** (emphasis added)

B. Claims not Amenable to Certification

1. FDUPTA (Counts VII and XI) and Unjust Enrichment (Count XI)

The Court finds that Counts VII, XI, and XII, the FDUPTA and unjust enrichment claims are **not** amendable to class certification. The Court finds both FDUPTA claims fail (at least) Rule 1.220(a) element of typicality and Count XI, the FDUPTA damages claim, fail Rule 1.220(b)(3) element of predominance.

A claim for damages under FDUPTA has three elements: (1) a deceptive act or unfair practice, (2) causation, and (3) actual damages. See Kia Motors America Corp. v. Butler, 985 So. 2d 1133, 1140 (Fla. 3d DCA 2008). Where reliance goes to proving causation and damages, the Court rejects Plaintiffs' argument that Plaintiffs need not demonstrate actual, individual reliance on deceptive materials/practices but only a likelihood such would deceive a reasonable consumer in the same circumstances. See Pls.' Reply in Supp. of Class Certification at p. 8. The Court recognizes the split of authority and finds more persuasive the Florida Second District Court of Appeals' decision applying actual reliance in Rollins, Inc. v. Butland, 951 So. 2d 860, 875 (Fla. App. 2 Dist. 2006)[3].

Having found that actual reliance is applicable, Plaintiffs' FDUPTA claims cannot be typical of members of the class, even allowing for factual differences. There are potentially thousands of

[3] There is a split in Florida precedent as to the need of actual reliance. See Rosen v. J.M. Auto Inc., 270 F.R.D. 675, 681 (S.D. Fla. 2009) (citing *Davis v. Powertel Inc.*, 776 So. 2d 971, 974 (Fla. 1st DCA 2000) (holding that it is not necessary); *Philip Morris USA Inc. v. Hines*, 883 So. 2d 292, 294 (Fla. 4th DCA 2003) (criticizing *Powertel's* analysis that reliance is not necessary); *Black Diamond Properties, Inc. v. Haines*, 940 So. 2d 1176, 1179 n. 1 (Fla. 5th DCA 2006)).

members of the class and twenty-two alleged separate violations of FDUPTA, resulting in enumerable possibilities of one or more combination of deceptive acts or unfair practices that may have cause damage to any particular member of the class. For example, contrary to Plaintiffs' testimony, many members of the class may have thoroughly read the respective sale and purchase agreements, Club Plan, and other Solivita governing documents, not relied on marketing and advertising materials, and fully understood the bargain into which they have entered. Other members of the class may have heavily relied on marketing materials despite having thoroughly read their respective sale and purchase agreement and other Solivita governing documents but not the Club Plan nor the Master Declaration. The necessity for individual inquiry and determination to prove causation per each class member's individual FDUPTA claim defeats Plaintiffs' ability as class representatives to possess the same legal interest and endure the same legal injury as all the class members. Likewise, the numerous combinations of alleged deceptive practices, the complexity of real estate purchases, and thousands of possible class members defeat predominance where the necessity of individual determination of causation overwhelms common legal issues, make Plaintiffs' FDUPTA damage claim unmanageable as a class action. See Rollins, 951 So. 2d at 871-73.

In Count XII, Plaintiffs allege Defendants' "**deceptive** and unlawful conduct" resulted in their unjust enrichment. See Complaint at ¶¶ 183, 185-87 (emphasis added). The elements of unjust enrichment are "(1) the plaintiff has conferred a benefit on the defendant, who has knowledge thereof; (2) the defendant voluntarily accepts and retains the benefit conferred; and (3) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying the value thereof to the plaintiff." Greenfield v. Manor Care, Inc., 705 So. 2d 926, 930-31 (Fla. 4th DCA 1997). Under the same reasoning as applied against the FDUPTA damage claim, the Court finds Count XII, the claim for unjust enrichment, fails predominance under Rule 1.220(b)(3), because the necessity for individual inquiry and determination of the equities of the circumstances per member overwhelms common questions. Porsche Cars North America, Inc. v. Diamond, 140 So. 3d 1090, 1100 (Fla. 3d DCA 2014) ("'A claim for unjust enrichment…requires examination of the particular circumstances of an individual case as well as the expectations of the parties to determine whether an inequity for the defendant to retain the benefit without paying the value thereof to the plaintiff.'") (citing Kunzelmann v. Wells Fargo Bank, N.A., 2013 WL 139913 (S.D. Fla. 2013)). See

also Hutson v. Rexall Sundown, Inc., 837 So. 2d 1090, 1093 (Fla. 4th DCA 2003); Green, 2005 WL 3388158, at *9.

2. Fiduciary Duty Claims (Counts IV, partially VI, IX, and X

The Court finds the following claims **not** amendable to class certification: Count IV and Count VI, to the extent injunctive relief relies on fiduciary duty (see Compl. at ¶¶ 118, 122, & 123), and Counts IX and X, the fiduciary duty claims. Count IV and partially Count VI, for declaratory relief finding a fiduciary duty owed to Solivita Homeowners themselves, constitute "declaration[s] of liability;" which the primary purpose is to facilitate monetary relief under Counts IX and X - - the claims for damages resulting from a breach of fiduciary duty. The Court finds where Count IV and partially Count VI are declarations of liability, monetary recovery predominates and not declaratory relief, and thus, fail to satisfy Rule 1.220(b)(2). See Freedom Life Ins. Co. of America v. Wallant, 891 So. 2d 1109, 1118 (Fla. 4th DCA 2004).

Because Count IV and partially Count VI fail, Counts IX and X, the damages claims, also fail typicality and adequacy under Rule 1.220(a). The interests of Plaintiffs, as class representatives, will be antagonistic to the interests of the class. For class certification purposes, the damage claims based on breach of fiduciary duty have no legal basis for liability, but Plaintiffs' individual damage claims do have a legal basis for liability if declaratory relief for Count IV and partially Count VI are later found in Plaintiffs' favor.

C. Class Claims Amenable to Class Certification

Based upon the foregoing, the Court finds the remaining Counts II, V, partially VI (as to alleged direct violation of section 720.308), and VIII (hereinafter "Class Claims") satisfy Rule 1.220 requirements for class certification, and are amendable for class certification, as narrowly redefined above.

1. Standing

Plaintiffs have demonstrated standing to represent the class members. Paragraph 8.2 of the Club Plan, provides Plaintiffs, as homeowners and members of the Association and the Club, are obligated to pay Club Membership Fees. While the Membership Fee Schedule provides for annual increases in the amount of Club Membership Fees, there is no end date for payments (i.e. perpetual). See Compl., Ex. C at ¶ 8.5. The aforementioned third party billing records have columned Club Membership Fees under the heading of "assessments;" the exact meaning of that term is in dispute (whether section 720.308(1)(a) is applicable). As to the Class Claims, Plaintiffs

take the principal position the Club Membership Fees are subject to section 720.308(1)(a) and, as presently mandated, are not in the members' proportional share of expenses and, therefore, are in violation thereof. The Court finds Plaintiffs have illustrated an actual or legal controversy exists between themselves individually and AVATAR, which will continue throughout the litigation. Further, as an actual injury, if Plaintiffs prove their position, Plaintiffs will have paid money in excess (through the litigation) of their obligations.

2. Numerosity

"No specific number and no precise count are needed to sustain the numerosity requirement...[r]ather, class certification is proper if the class representative does not base the projected class size on mere speculation." Sosa, 73 So. 3d at 114 (citations omitted). The Court finds Plaintiffs have demonstrated numerosity. In this early stage of litigation, while Plaintiffs have not identified every literal homeowner, they have demonstrated in the record evidence there are "thousands" of current Solivita Homeowners where they have paid and are presently obligated to pay Club Membership Fees. See Anthony S. Iorio, Jr. Dep. 163:17-164:04, 165:05-166:15, and Ex. 11 (list(s) of current Solivita Homeowners on compact disk), March 5, 2018 (filed April 5, 2018). All current Solivita Homeowners are mandated to pay Club Membership Fees, or otherwise risk foreclosure by the Association or the developer. Consequently, the Court finds Plaintiffs have demonstrated beyond mere speculation a projected class size for which individual joinder would be impractical.

3. Commonality

"The primary concern in the consideration of commonality is whether the representative's claim arises from the same practice or course of conduct that gave rise to the remaining claims and whether the claims are based on the same legal theory...the threshold of the commonality requirement is not high...[a] mere factual difference between class members does not necessarily preclude satisfaction...individualized damage inquires will also not preclude class certification...the commonality prong only requires...that the subject of the class action presents a question of *common general interest*...the *object* of the action, the *result sought*, or the general *question* implicated in the action." Sosa, 73 So. 3d at 107 (citations omitted).

The Court finds Plaintiffs have demonstrated commonality. As discussed above, if Solivita Homeowners fail to pay the monthly Club Membership Fees, then they risk foreclosure under the Solivita governing documents; they have no option to opt out of Club membership. The Court has

considered, per the Membership Fee Schedule, Homeowners' monthly Club Membership Fees presently range between $67.00 and $87.00 per month. The Court finds this "mere factual damage," this potential "individualized damage inquir[y]" does not defeat commonality. As previously mentioned, Plaintiffs have taken the principal position that the Club Membership Fees are subject to section 720.308(1)(a) and, as presently mandated, are not in the members' proportional share of expenses and, therefore, in violation thereof. The Court finds this is a material common question of law/fact. The Court finds that Plaintiffs' claims have arisen "from the same practice or course of conduct that gave rise to the remaining claims" and based "in the same legal theor[ies]." The Plaintiffs, in common with the class members, presented a "question of common interest" and seek the same "result;" a determination whether Club Membership Fees are subject to section 720.308(1)(a) and, if so, could be reduced to members' proportional share (include but not limited to refunds/credits for excess amount previously paid). Additionally, neither Plaintiffs nor Defendants has taken the position that a Solivita Homeowner who currently pays $67.00 per month for Club Membership Fees is paying his or her proportional share under section 720.308(1)(a) but the Solivita Homeowner who pays $87.00 per month is paying in excess. Regardless of the varied monthly amounts owing, evidence appears to show that Club Membership Fees are charged without reference to Club members' proportional share thereof (of course, the merits of whether this is legally impermissible is not before the Court). See Complaint at Ex. 39 (The illustrative third party billing record makes no reference to NORMAN GUNDEL's proportionate share in relation to the monthly charge of the Club Membership Fee.) The obligation to pay Club Membership Fees in any amount without reference to Solivita Homeowners' proportional share is the principal cause at issue.

As the Court has found the Class Claims amendable to class certification, the Court notes that other questions of law/fact may be more specific to a particular claim, but, given this, the Court finds such specific questions no less common to the Plaintiffs and class members. For example, Count II seeks declaratory relief that Solivita Homeowners may elect the majority of the Board of Directors for the Club under section 720.307. Again, all current Solivita Homeowners are subject to the Club Plan, a governing document, and Solivita Homeowners' ultimate right (or not) to elect the Club's Board of Directors would impact such matters as the amount actually expended on the Club's facilities and, consequently, impact Solivita Homeowners' proportional share if Club Membership Fees are found subject to section 720.308(1)(a). Another example, Count V seeks declaratory relief that Club Membership Fees are not perpetual but terminable at will (such in the event the Club

ceases to exist). Again, all current Solivita Homeowners are subject to the Club Plan, including the continuing obligation to pay Club Membership Fees separate from the status of the Club. Perpetuity is a common question even if distinctive from whether Club Membership Fees amounts are subject to section 720.308(1)(a).

4. Typicality

"The key inquiry for a trial court when it determines whether a proposed class satisfies the typicality requirement is whether the class representative possesses the same legal interest and has endured the same legal injury as the class members...[m]ere factual differences between the class representative's claims and the claims of the class members will not defeat typicality...the typicality requirement is satisfied when there is a strong similarity in the legal theories upon which those claims are based and when the claims of the class representative and class members are not antagonistic to one another." Sosa, 73 So. 3d at 114-115 (citations omitted).

In the same vein of reasoning as for standing and commonality, the Court finds that Plaintiffs have demonstrated typicality. Both Plaintiffs and class members are subject to the Club Plan and are obligated to pay Club Membership Fees or risk foreclosure. If payment of Club Membership Fees is found in violation of section 720.208(1)(a), all class members would share in the same result of future payment based on their proportionate share and possible refund(s)/credit(s). Even more count-specific legal issues such as perpetuity and election of the Club's Board of Directors are the same legal theories upon which Plaintiffs' individual claims and the claims of class members are based. The Court does not find Plaintiffs' individual claims antagonistic to that of class members.

5. Adequacy

As to adequacy, Plaintiffs must satisfy a two-prong test. "The first prong concerns the qualifications, experience, and ability of class counsel to conduct the litigation. The second prong pertains to whether the class representative's interests are antagonistic to the interests of the class members...[the class representative's interests] paralleled the interests of the class members…." Sosa, 73 So. 3d at 115 (citations omitted).

Plaintiffs and their counsel have demonstrated adequacy under Rule 1.220(a). Plaintiffs are willing and knowledgeable of their roles as class representatives, Plaintiffs' interests are in accord with that of the class, and Plaintiffs' counsel are competent to likewise serve as class counsel. Further, all Plaintiffs have filed sworn *Affidavit(s)* to attest to their willingness to be class

representatives and understanding of their duties and obligations. See Compl., Exs. 6-1, 6-2, & 6-3. Plaintiffs testified as to their knowledge of the instant action and their role as class representatives (and related issues such as funding this action and community outreach). See NORMAN GUNDEL Dep. 24:20-28:25, 33:01-:13, 36:04-78:15; BRENDA N. TAYLOR Dep. 17:14-42:09; WILLIAM MANN Dep. 20:18-65:04. The Court reviewed Plaintiffs' *Affidavit(s)* and testimony.

Further, the Court's reasoning above as to typicality is likewise applicable here. The Court does not find Plaintiffs' interests antagonistic to that of the class' interests.

Further, Plaintiffs' counsel filed sworn *Affidavit(s)* to attest to their competency; their qualifications, experience, and ability to conduct the litigation. See Compl., Exs. 7-1, 7-2, 7-3, 7-4, 7-5, 7-6, & 7-7. The Court reviewed Plaintiffs' counsel's *Affidavit(s)*.

D. Rule 1.220(b)(2) and (b)(3) Requirements

1. Counts II, V, and partially VI (as to alleged direct violation of section 720.308) Satisfy Rule 1.220(b)(2)

As to Rule 1.220(b)(2), "certification is appropriate only for the resolution of class claims that rest on the same grounds and apply equally to all members of the class...Second, (b)(2) certification '"does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages..."' Monetary relief predominates unless such relief is incidental to the requested declaratory relief, meaning that 'damages flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief...[I]ncidental damages should be only those to which class members automatically would be entitled once liability to the class (or subclass) as a whole is established...[S]uch damages should at least be capable of computation by means of objective standards not dependent in any significant way on the intangible, subjective differences of each class member's circumstances,' nor require additional hearings or evidence to ascertain." Freedom Life Ins. Co. v. Wallant, 891 So. 2d 1109, 1117-18 (Fla. 4th DCA 2004); Discount Sleep of Ocala, LLC v. City of Ocala, 2018 WL 300228, at *6 (Fla. 5th DCA Jan. 5, 2018) ("Monetary relief is incidental to the declaratory relief, which is the focus of Appellants' class petition.").

The Court addresses below the prospective lack of individualized determination of damages, as refunds/credits, if Plaintiffs and class members prove Club Membership Fees violate section 720.308(1)(a) and class members have been paying more than their respective proportionate share of expenses for the Club as assessment(s). In addition to future payments in their proportional share

of expenses, all class members would anticipate prospective refunds/credits for past overpayments back to April 26, 2013. While a determination of what constitutes a proportionate share will likely need to be determined, such a determination would apply to all class members as members of the Club who were obligated to pay Club Membership Fees. Even if the methodology for such a determination varied (such as each Club member pays an equal amount or an amount based on residential square footage, so forth), such a determination can be objectively applied to all class members. Further, such a determination would likely be the responsibility of the Board of Directors for either the homeowners' association or the Club. Once the proportionate share is determined, the amount refunded/credited to each individual class member will likely need to be determined. While class members' payment amount(s) under the Club Membership Schedule will have to be accounted for, again, refund/credit determinations will likely be based objectively on discovered billing records. For example, a homeowner's payments made since April 26, 2013, above the proportionate share, would represent the refund/credit (i.e. disgorgement of profits) to which an individual member is entitled. Further, even if accounting for the Membership Fee Schedule leads to a small number (if any) class members' proportionate share resulting in no refund/credit, the purpose of such damage is equally applicable to all class members, to bring Club Membership Fees into alignment with proportionate share of expenses under section 720.308(1)(a). For class certification purposes, the Court does **not** find that determination of damages is so individualized and subjective as to **in**validate the elements of class certification.

The Court found the instant action analogous to Discount Sleep of Ocala, Inc. Cf. Rollins, Inc. v. Butland, 951 So. 2d 860, 881–82 (Fla. 2d DCA 2006) (single count for declaratory relief of a six-count complaint sought to invalidate disclaimers, which served only to lay a legal foundation for the recovery of money; therefore, issues pertaining to money damages predominated making certification under rule 1.220(b)(2) inappropriate).

The Court finds Counts II, V, and partially VI (as to alleged direct violation of section 720.308), for declaratory and injunctive relief, satisfy Rule 1.220(b)(2). First the Court finds class members' claims rest on the same grounds and apply equally. Second, the Court finds monetary relief does not predominate and is incidental to the declaratory relief sought. While accounting for the Membership Fee Schedule, all Solivita Homeowners are obligated to pay standardized Club Membership Fees which are uniformly billed to all class members through the use of third party billing services. If Plaintiffs' common question, whether or not Club Membership Fees are in

violation of section 720.308(1)(a), is substantively found in Plaintiffs' and class members' favor, the Court finds damages, likely credit(s)/refund(s) principally, are incidental to declaratory relief sought because all class members would automatically be entitled to such a credit or refund. While the Membership Fee Schedule may result in individual class members being entitled to varying credit/refund amounts, such a computation would be objectively based on review of discovered billing records. The Court finds such damages do not significantly rely on intangible, subjective differences of class members' circumstances nor require additional hearings or evidence.

2. Count VIII Satisfies Rule 1.220(b)(3)

As to Count VIII for damages, the Court finds Plaintiffs have satisfied Rule 1.220(b)(3). For Rule 1.220(b)(3), as to predominance, "common questions of fact predominate when the defendant acts toward the class members in a similar or common way...common questions must not only exist but also predominate and pervade... a class representative establishes predominance if he or she demonstrates a reasonable methodology for generalized proof of class-wide impact...by proving his or her own individual case, *necessarily* proves the cases of the other class members." Sosa, 73 So. 3d at 111-113 (citations omitted). Further, [i]f a class representative must still present a great deal of individualized proof or argue individualized legal points to establish most or all of the elements of his claims, class certification is not appropriate...[w]here both liability and damages depend on individual factual determinations, resolution of these claims can only be decided on an individual basis." InPhyNet Contracting Service, Inc. v. Soria, 33 So. 3d 766, 772 (Fla. 4th DCA 2010) (citations omitted).

Plaintiffs have demonstrated common question(s) predominate. If Plaintiffs prove their individual claims, the Court finds Plaintiffs necessarily prove class members' cases. The Court does not find the necessity for an individualized determination for most or all elements of individual claims for both liability and damages. While accounting for the Membership Fee Schedule, all current Solivita Homeowners, both Plaintiffs and class members, are obligated to adhere to the Club Plan, be Club members, pay Club Membership Fees, uniformly are billed through a third party service, or risk foreclosure. If Plaintiffs prove their individual claims, such as violation of section 720.308(1)(a), then Plaintiffs have necessarily proved class members' claims as to liability. The Court does not find both liability and damages dependent on individual factual determinations. Regarding damages, again the Court points out that prospective refunds/credits will likely be

objectively determined from discovered billing records without the necessity of individual determination such that common questions cease to predominate and pervade.

For Rule 1.220(b)(3), as to superiority, the Court considers three factors; "(1) whether a class action would provide the class members with the only economically viable remedy; (2) whether there is a likelihood that the individual claims are large enough to justify the expense of separate litigation; and (3) whether a class action cause of action is manageable." Sosa, 73 So. 3d at 116 (citations omitted).

The Court finds Plaintiffs have also satisfied the considerations for superiority. Hypothetically, even if $0.00 was found to be a Club member's proportionate share of expenses for the year 2018 under section 720.308(1)(a), a prospective refund of $87.00 per month (the current highest amount per month for Club Membership Fees under the Membership Fee Schedule) for forty-nine months (May 2013 through May 2018) would only be $4,263.00. The Court does not find such an approximate amount is large enough to justify the expense of individual litigation; in contrast to attorney's fees, court costs, and expenditure of judicial resources. Consequently, the Court finds that class action is the only economically viable remedy. Having narrowed the class, the Court finds that the class action is manageable where the Court has found questions are common and predominate as to all class members for liability and the sufficient lack of individualized determination of damages.

Finally, given that all class members are Solivita Homeowners, the Club's facilities and real property are in Solivita, and the Solivita governing documents are covenants running with the land, the Court finds this forum desirable for the litigation. The Court considered the respective interests of class members, individually, controlling of their respective claims, but finds such interests outweighed by likely small individual claim(s) and, if class members are victorious in their claims, both declaratory relief and damages would likely be universally applied.[4]

[4] The Court notes there is prrior and pending litigation in this forum involving Solivita and the Club under case no. 2016-CA-004023 and case no. 2017-CA-003547, pertaining to the bond validation and possible sale of the Club (and AVATAR's income stream via Club Membership Fees) to the Poinciana Community Development District and Poinciana West Community Development District. A final judgment not validating bond issuance was entered in case no. 2016-CA-004023 and a subsequent appeal to the Florida Supreme Court was dismissed for mootness. Case no. 2017-CA-003547 is in its preliminary stage as of the date of this Order. All three Plaintiffs have participated/are participating in both bond validation cases. Having considered the nature and extent of said litigation, the Court finds nothing in those pending actions which adjudicated the dispute(s) in the instant action.

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, *Amended Motion for Class Certification* is hereby **GRANTED, in part, and DENIED, in part,** consistent with this Court's findings above. The Court certifies the narrowed class, defined as "[a]ll persons who currently own a home in Solivita and who have paid a Club Membership Fee under the Club Plan on or after April 26, 2013," for Counts II, V, partially VI (as to alleged direct violation of section 720.308), and VIII of the *Second Amended Class Action Complaint and Demand for Jury Trial,* but only against Defendant, AVATAR PROPERTIES, INC.

DONE AND ORDERED in Bartow, Polk County, Florida, on this 29th day of June, 2018.

/s/ ANDREA TEVES SMITH
ANDREA TEVES SMITH
Circuit Judge

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