IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY FLORIDA

JAMES OWENS
a.k.a JAMES R. OWENS
and
AMELIA OWENS
a.k.a./f.k.a. AMELIA M. RODRIGUEZ,

CASE NO. 50-2022-CA-004273-XXXX-MB

Plaintiffs,

vs.

BOCA VIEW CONDOMINIUM ASSOCIATION, INC., a Florida not-for-profit corporation, DIANA KUKA, President

Defendants.
_____/

DEFENDANT BOCA VIEW CONDOMINIUM ASSOCIATION, INC., AND ITS PRESIDENT, DIANA KUKA'S MOTION TO DISMISS THE COMPLAINT AND/OR TO STRIKE (DE#3) FROM THE COURT DOCKET AS A SHAM PLEADING

Defendant Boca View Condominium Association, Inc. ("Association") and Diana Kuka, the Association's President[1] ("President") (jointly "Defendants"), by and through undersigned counsel and pursuant to the Florida Rules of Civil Procedure 1.130, 1.140(b), (e) and (f) and 1.150 files its Motion to Dismiss the Plaintiff's Complaint and/or to Strike It from the Court Docket As A Sham Pleading against James Owens a.k.a James R. Owens and Amelia Owens a.k.a./f.k.a. Amelia M. Rodriguez (jointly "Owenses" or "Plaintiffs"), and their legal counsel, Bart Thomas Heffernan, Esq., William D. Beamer, Esq. as well as any law firms[2] they are associated with including, but not limited to, Lawstaff, Inc., and in support state as follows:

[1] The President has never been served the Summons in this action.

[2] According to the Florida Bar website, William D. Beamer's law firm is named *William D Beamer Chartered*. However, as of September 27, 2019, that law firm shows an *Inactive* status in the Florida Sunbiz.org.

BRIEF BACKGROUND OF THE CASE

1. This case involves a unique situation of the sole unit ("Unit") at the Association's condominium building which did not undergo asbestos abatement at the inception of the Association in 2004 when the Developer converted an apartment building into a condominium and conducted asbestos abatement in 71 of the condominium's entire 72 units.

2. It also involves these Plaintiffs who routinely attempt to circumvent the Association's governing documents as well as the City of Boca Raton Building Code Compliance and ordinances. They tried to conduct asbestos abatement in the Unit by attempting to use unlicensed contractors and refusing any supervision with complete disregard for the health and safety concerns and liability arising from asbestos exposure of other condominium residents in a fully occupied building[3]. After the City of Boca Raton Code Enforcement Bureau stopped the unauthorized, unpermitted work in said unit, conducted without the Association's prior approval, they have resorted to harassment against the Association and its individual members and directors, including the instant action which may also constitute slander of title of several condominiums at the Association as well as a nuisance and breach of the Association governing document and covenants.

3. The Plaintiffs have filed a five (5) count complaint of which two (2) counts are against the Association. In an effort to intimidate her and, out of sheer personal rancor, the remaining three (3) counts are against its President (*See* DE# 3). However, the Plaintiffs'

[3] See also *Cohen v. Clark, 945 N.W. 2d 792 (Iowa, June 30, 2020)* "The law provides that nothing in the act "requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others." 42 U.S.C. § 3604(f)(9); *see Hunt v. Aimco Props., L.P.*, 814 F.3d 1213, 1225 (11th Cir. 2016)"

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Complaint ("Complaint") must be dismissed and sanctions should be entered against Plaintiffs and counsel for this frivolous sham pleading.

STANDARD FOR A MOTION TO DISMISS

4. A motion to dismiss tests the legal sufficiency of the complaint. *Grove Isle Ass'n, Inc. v. Grove Isle Assocs., LLLP*, 137 So. 3d 1081 (Fla. 3d DCA 2014) citing *Fla. Bar v. Greene,* 926 So.2d 1195, 1199 (Fla. 2006).

5. The primary purpose of a motion to dismiss for failure to state a cause of action is to request that the trial court determine whether the complaint properly states a cause of action upon which relief can be granted, and, if it fails to do so, to enter an order of dismissal. *Provence v. Palm Beach Taverns, Inc.*, 676 So. 2d 1022, 1024 (Fla. 4th DCA 1996). Fla. R. Civ. P. 1.140(b). Where the allegations of the complaint do not establish a legal right to relief, and the ultimate facts, if proven, would not establish a cause of action for which relief may be granted, a plaintiff's cause of action may be dismissed. *Newton v. Davis Transp. & Rentals, Inc.*, 312 So. 2d 200, 201 (Fla. 1st DCA 1975). Further, Rule 1.110(b), Fla. R. Civ. P., requires that a plaintiff set forth a "short and plain statement of the ultimate facts showing that the pleader is entitled to relief."

6. On a motion to dismiss, the trial court is "confined to the well-pled facts alleged in the four corners of the complaint." *Lewis v. Barnett Bank of South Florida, N.A.*, 604 So. 2d 937, 938 (Fla. 3d DCA 2003) (citing *Pizzi v. Cent. Bank & Trust Co.*, 250 So. 2d 895, 897 (Fla. 1971)). "[M]ere legal conclusions inserted into a complaint are insufficient to state a cause of action unless substantiated by allegations of ultimate fact." *Doyle v. Flex*, 210 So. 2d 493, 494 (Fla. 4th DCA 1968). Plaintiffs must state their pleadings with sufficient particularity for a

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defense to be prepared. *Horowitz v. Laske*, 855 So. 2d 173 (citing *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.*, 537 So. 2d 561 (Fla. 1988)).

7. Simply put, "[t]o state a cause of action, a complaint must allege sufficient ultimate facts to show that the pleader is entitled to relief," otherwise, dismissal is appropriate. *W.R. Townsend Contracting, Inc.*, 728 So. 2d 297, 300 (Fla. 1st DCA 1999) (citing *Perry v. Cosgrove*, 464 So. 2d 664, 664 (Fla. 2d DCA 1985)). Moreover, if a complaint fails to state a cause of action, and no amendment could cure the defect, dismissal with prejudice is proper. *See, e.g., Kates v. Robinson*, 786 So. 2d 61, 65 (Fla. 4th DCA 2001).

A. <u>THE COUNTS AGAINST THE ASSOCIATION</u>

8. The two (2) Counts in the Complaint (Count One for Declaratory Relief; Count Two for Statutory Liability (Fla. Stat. 718.303)) are duplicative and improper. Each count essentially alleges the same thing; specifically that the Association and its President *failed to approve Plaintiffs' requests for approval for renovations and improvements to Plaintiffs' unit*. (See generally Complaint at ¶s 27, 37, 46 and 61).

PLAINTIFFS HAVE NOT ALLEGED STANDING; CANNOT STATE A CLAIM FOR DECLARATORY RELIEF; THIS ACTION IS PREMATURE; THIS COURT MUST, RESPECTFULLY, DEFER TO THE ASSOCIATION'S BUSINESS JUDGMENT; AND THE ASSOCIATION'S DEFENSE IS IN THE FACE OF THE COMPLAINT

<u>POINT I.</u> *Plaintiffs Have Alleged no Standing to Challenge Association's Governing Documents*

9. Plaintiffs seek relief under the Association's Declaration of Condominium, a contractual instrument between the Association and its <u>members</u>. However, Plaintiffs do not allege under what <u>capacity</u> they are seeking said relief and by what virtue, ownership or otherwise, they hold title of any units at the Association or belong to its membership.

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10. A declaration of a condominium is more than a mere contract spelling out mutual rights and obligations of the parties thereto — it assumes some of the attributes of a covenant running with the land. *Pepe v. Whispering Sands Condominium Association,* 351 So.2d 755 (Fla. 2nd DCA 1977).

11. Without a specific allegation in their Complaint determining ownership of the subject condominium and subsequent membership in the Association, Plaintiff's lack standing to collaterally attack the failure of the Association to abide by its procedural requirements of the Association's governing document. See *Backus v. Smith,* 364 So.2d 786 (Fla. 1st DCA 1978).

12. Even if simply added within the four corners of any future amended complaint, in the context of a motion to dismiss, any such allegation would present a grave concern to the Association and this Honorable Court in determining the suspicious circumstances under which an instrument[4] was recorded in the official records of Palm Beach County.

POINT II. ***Count One of the Complaint, Seeking Declaratory Relief Should Be Dismissed, As It Involves the Same Factual Dispute as Plaintiffs' Claim(s) of Statutory Liability (Counts Two and Three)***

13. This Honorable Court should also summarily dismiss Count One of the Plaintiffs' Complaint seeking Declaratory Relief, as it involves the same factual dispute as

[4] Said document (*see Official Records Book* 30348, Page 1630, of the *Public Records* of *Palm Beach County*) was executed on December 21, 2018, twelve (12) days prior to the January 3, 2019 demise of the late Julia J. Lanier ("Mrs. Lanier") mother of Plaintiff James R. Owens (*see* https://www.dignitymemorial.com/obituaries/boca-raton-fl/julia-lanier-8109992). Parenthetically, the aforesaid document was recorded in the Public Records of Palm Beach County on or about January 7, 2019, four (4) days after Mrs. Lanier's passing. Upon information and belief, Mrs. Lanier was admitted to the Boca Raton Hospital on December 21, 2018 and her state of mind at the time of the signing of said document is suspect and crucial to determining her real intent. Said recorded document which contains a barely legible signature of Mrs. Lanier. The document in question is quite similar to another recorded deed (See *Official Records Book* 27232, Page 397, of the *Public Records* of *Palm Beach County*), dated November 22, 2014, for the transfer of ownership of the house of Devon E. Owens currently in possession of his brother, Plaintiff James R. Owens, under eerily similar circumstances. Again, upon information and belief, Devon E. Owens, was either in the hospital or in a hospice setting at the time of the "execution" of that document such as his state of mind was also suspect and crucial in determining his real intent.
At that juncture, this Honorable Court "must consider… **matters of public record**, as well as undisputedly authentic documents... *See, e.g., Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.,* 998 F.2d 1192, 1196 (3d Cir.1993)." *See Mayer v. Belichick,* 605 F.3d 223, 230 (3d Cir. 2010) and may decide to address the matter accordingly, including, but not limited to, the potential commission of fraud or elderly abuse.

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Plaintiffs' Statutory Liability claim against the Association (Count Two) and/or Statutory Liability claim against the President (Count Three); namely, that *the Association is failing in its duty to approve a reasonable application*, as noted in the Complaint at ¶ 46. In this regard, Florida law is clear that "[t]he purpose of a declaratory judgment is to determine the rights and duties of a party *without resorting to a tort or contract action." Van Loan v. Heather Hills Prop. Owners Ass'n, Inc.,* 216 So. 3d 18, 22 (Fla. 2d DCA 2016) (emphasis added).

14. Indeed, while "the existence of another adequate remedy at law shall not preclude a decree, judgment or order of declaratory relief pursuant to section 86.011, Florida Statutes, "a trial court should *not* entertain an action for declaratory judgment on issues which are properly raised in other counts of the pleadings and already before the court, through which the plaintiff will be able to secure full, adequate and complete relief." *Mcintosh v. Harbour Club Villas Condo. Ass'n,* 468 So. 2d 1075, 1081 (Fla. 3d DCA 1985) (Nesbitt, J. specially concurring) (emphasis added); *see also Taylor v. Cooper,* 60 So. 2d 534, 535-36 (Fla. 1952); *Kies v. Fla. Ins. Guar. Asso,* 435 So. 2d 410, 411 (Fla. 5th DCA 1983); *Vior Funeral Homes, Inc. v. Hartford Fire Ins. Co.,* No. 16-24427-CIV, 2017 U.S. Dist. LEXIS 95766, at *4 (S.D. Fla. June 19, 2017).

15. In the instant case, by way of asserting a Declaratory Judgment claim, Plaintiffs are actually and <u>improperly</u> seeking legal advice from the Court as to the correct procedure to follow in litigating *the antagonistic and adverse interests* [] *all before the court by proper process*. (Complaint at ¶ 52) Plaintiffs are not really in doubt as to their rights under the Governing Documents; rather, Plaintiffs claim the Association and/or its President violated their statutory duties (while also alleging that the Association has already ceased to exist in Count Four of the Complaint – Piercing the Corporate Veil – Alter Ego) by engaging in the

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acts and omissions enumerated in the Complaint, and are simply uncertain as to what course of action he should employ to enforce his rights. "The [D]eclaratory [J]udgment [A]ct is not to be used as a tool to advise attorneys as to the proper path to pursue." *Mcintosh,* 468 So. 2d at 1081 (citing *Kelner v. Woody,* 399 So. 2d 35, 38 (Fla. 3d DCA 1981)). Accordingly, Count One of the Complaint, Declaratory Relief, should be summarily dismissed, with prejudice.

POINT III. ***The Instant Action Should Be Dismissed Because It Is Premature AND Association was NOT Required to Answer Plaintiffs' Request for Renovations***

16. The Complaint incorrectly alleges that [*a*]*ll conditions precedent to this action have been satisfied, occurred or waived* (Complaint at ¶ 8) However, this is untrue.

17. Plaintiffs allege that "[on] February 8, 2022, Mr. Owens entered into a contract with Decon Environmental & Engineering, Inc. ["Contract" [5]] a licensed and insured contractor, for asbestos abatement (**Exhibit "E"**)." Complaint at ¶ 31.

18. When ruling on a motion to dismiss, the trial court must limit itself to the four corners of the complaint, **including any attached or incorporated exhibits**. *Grove Isle Ass'n, Inc. v. Grove Isle Assocs., LLLP*, 137 So.3d 1081, 1089 (Fla. 3d DCA 2014). (emphasis added) See also Rule 1.130(b), Fla.R.Civ.Pro. ("Any exhibit attached to a pleading must be considered a part thereof for all purposes.").

19. Exhibit "E" attached to the Plaintiffs' Complaint is a 'revised Proposal FOR: ASBESTOS ABATEMENT" prepared by Decon Environmental & Engineering, Inc. for Plaintiff James Owens. It indicates the "Project Site: Residence at 1000 Spanish River Road Boca Raton, FL 33432" without specifying the unit number.

20. The Proposal, or Contract, at its Page 3, states in pertinent part:

[5] To the extent that Plaintiff Amelia Owens may claim any contractual rights deriving under said Contract with Decon Environmental & Engineering, Inc., she is not a party thereto and, therefore, has no standing to make any such claims.

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> **RESPONSIBILITIES OF OWNER:**
> No work shall commence until the following items are furnished:
> …
> b) Where applicable, a copy of the general or prime contractor's payment bond to owner showing the bond certification number.

21. No sign of *general or prime contractor* or *bond certification number* has been included in the instant Complaint or alleged to have been presented to the Association.

22. Additionally, the Proposal, or Contract, at its Page 4, states in pertinent part:

> **AIR MONITORING & FINAL CLEARANCES:**
>
> ANY REQUIRED AIR MONITORING, OTHER THAN OSHA PERSONAL MONITORING, SHALL BE PERFOMED BY A LICENSED, INDEPENDENT CONSULTING FIRM AND SHALL BE THE FINANCIAL RESPONSIBILITY OF ***OWNER***.

23. Plaintiffs' Complaint is devoid of any allegations and provides no proof that Plaintiffs carried out their responsibility to hire said *licensed, independent consulting firm* to monitor the air quality crucial to the health and safety the condominium building residents or that any such information was submitted to the Association.

24. Until Plaintiffs fulfill said conditions precedent and provisions in the Contract as well as follow the procedures outlined in Exhibit "**A**" (Mr. Rubinstein's August 17, 2021 Letter to Plaintiffs – See the detailed discussion *infra* in POINT V, Paragraphs 32-36 *infra*) and submit same to the Association for final approval, there is actually nothing before the Association, no obligation to do anything or no basis to issue an authorization.

25. Therefore, in the absence of any proof that a *general or prime contractor* and a *bond certification number* is provided accordingly and a *licensed, independent consulting firm* to monitor the air quality within the occupied condominium building is hired by Plaintiffs, the deficiency of this action cannot be cured at this juncture such that it should be dismissed, with

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prejudice, as premature. Any subsequent cause(s) of action may only start accruing after the complete documentation is presented to the Association for approval.

26. In a very recent decision in the realm of community association law, a Court of Appeals in Kentucky held that an architectural committee did not have to respond to a request that did not meet certain minimum requirements. See *Ciochetty* v. *Fountain Trace Homeowners' Association, Inc.,* Nos. 2021-CA-0171-MR, 2021-CA-0177-MR, 2021-CA-0243-MR (Ky Ct. App. Apr. 1, 2022).

27. There, the case was remanded for the trial court to enter judgment in the Fountain Trace Homeowners' Association, Inc.'s favor. The appeals court found no ambiguity as to the minimum requirements that the association's covenants imposed on owners to provide plans and specifications to be submitted for the Fountain Trace Architectural Review Committee (ARC)'s review. The owners of a lot in a subdivision governed by the Association, the Ciochettys, failed to provide sufficiently detailed information when they sent an e-mail to the ARC. Because the Ciochettys' email did not meet the minimum requirements for architectural submissions, the ARC was not required to respond to their request. Therefore, the Ciochettys did not have authorization to begin construction.

28. Here too, the Association was not required to respond to the Plaintiff because they did not meet the minimum requirements of the Contract. Accordingly, this action should be dismissed with prejudice.

POINT IV. ***The Authorization For Renovations Sought From the Association and its Board of Directors Is Subject To Business Judgment Deference by this Honorable Court***

29. In a fresh-off-the-presses decision, in *New Horizons Condominium Master Association, Inc. v. Harding*, 47 Fla.L.Weekly D491b (Fla. 3d DCA 2022), the Third District Court of Appeal reviewed issues related to a condominium Association's business judgment rule.

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30. The business judgment rule is a critical rule which shields anyone serving on a board from personal liability for their decisions. This important rule assures protection the volunteers who serve on the board of directors of a community association deriving from their "*decision to take or not to take action*". It also added that "Florida courts have extended business-judgment **deference** to common interest associations" since "directors are, in most cases, **more qualified to make business decisions than are judges**." Specifically the *Harding* Court decision states in pertinent part:

> [B]orn of the recognition that directors are, in most cases, more qualified to make business decisions than are judges," Royal Harbour Yacht Club Marina Condo. Ass'n, Inc. v. Maresma, 304 So. 3d 1268, 1269 (Fla. 3d DCA 2020) (quoting Int'l Ins. Co. v. Johns, 874 F.2d 1447, 1458 n.20 (11th Cir. 1989)), "[t]he business judgment rule has been part of English and American common law for more than 200 years." Gerard V. Mantes & Emily S. Fields, The Business Judgment Rule, 99 Mich. B.J. 30, 30 (Jan. 2020). While "[t]he precise verbal formulation of [the] rule varies from jurisdiction to jurisdiction, and there are some substantive differences among the various versions of the rule . . . the essence of the rule is clear." Mark A. Sargent & Dennis R. Honabach, D&O Liability Handbook § I:3 (Sept. 2020) (footnote omitted). The rule protects officers and directors from judicial review of their acts, provided that "business judgments are made in good faith based on reasonable business knowledge." Action Against Directors and Officers—Business Judgment § 12:7.50 (2021).
>
> **In Florida, the business judgment rule has been codified by statute for corporations, limited liability companies, and not-for-profit corporations.** *See* § 607.0831(1), Fla. Stat. (2021) ("A director is **not** personally liable for monetary damages to the corporation or any other person for any statement, vote, **decision to take or not to take action, or any failure to take any action**, as a director . . . ."); § 605.04093(1), Fla. Stat. ("A manager in a manager-managed limited liability company or a member in a member-managed limited liability company is not personally liable for monetary damages to the limited liability company, its members, or any other person for any statement, vote, decision, or failure to act regarding management or policy decisions . . . ."); § 617.0834(1), Fla. Stat. (extending **business-judgment deference** to nonprofit officers and directors). **As drafted, these statutes protect directors from liability under most circumstances, absent a showing of bad faith, self-dealing, or a violation of criminal law.**

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In conformity with these statutory and common law tenets, Florida courts have extended business-judgment deference to common interest associations, uniformly shielding "a condominium association's decision if that decision is within the scope of the association's authority and is reasonable — that is, not arbitrary, capricious, or in bad faith" from judicial review. *Hollywood Towers Condo. Ass'n, Inc. v. Hampton*, 40 So. 3d 784, 787 (Fla. 4th DCA 2010).

…

The statutes affording business-judgment protection render directors immune unless there is a showing of bad faith, self-dealing, or criminal conduct. Although the Florida Legislature could have defined the business judgment rule as an affirmative defense that the defendant must raise, it did not do so. See State v. Ellis, 723 So. 2d 187, 190 (Fla. 1998). Instead, it enacted a presumptive framework consistent with that adopted in other jurisdictions.

…

In this regard, whether formally codified or not, the business judgment rule is generally viewed as a historically accepted principle of managerial prerogative. See Bruce T. Rosenbaum, The Presumptions and Burdens of the Duty of Loyalty Regarding Target Company Defensive Tactics, 48 Ohio St. L.J. 273, 274 ([redacted]); see also Data Key Partners v. Permira Advisers LLC, 849 N.W.2d 693, 701 (Wis. 2014) (second alteration in original) (quoting Reget v. Paige, 626 N.W.2d 302, 310 (Wis. Ct. App. 2001)) ("[T]he business judgment rule 'immunize[s] individual directors from liability and protects the board's actions from undue scrutiny by the courts.'"). Consistent with this view, the rule does not need to be raised in defensive pleadings to shield corporate conduct from judicial review. Instead, it applies presumptively by operation of law. See In re Great Lakes Comnet, Inc., 586 B.R. 718, 725 (Bankr. W.D. Mich. 2018) ("The business judgment rule is not an affirmative defense. Rather, it is a substantive and procedural presumption . . . ."); Kaye v. Lone Star Fund V (U.S.), L.P., 453 B.R. 645, 679 (N.D. Tex. 2011) ("[D]escribing the presumption created by the business judgment rule as an affirmative defense is, at best, a dubious characterization of the rule."); Marsalis v. Wilson, 778 N.E.2d 612, 616 (Ohio Ct. App. 2002) ("Civ.R. 8(B) [General rules of pleading] suggests that the defendants might be obligated to plead the business judgment rule as a defense, though that is probably not required, since a presumption in defendants' favor exists by operation of law, whether or not it is pleaded."). Several cases even stand for the proposition that a party seeking to challenge a business decision must first establish facts rebutting the presumption of reasonableness. See Cuker v. Mikalauskas, 692 A.2d 1042, 1046 (Pa. 1997) (quoting Rosenfield v. Metals Selling Corp., 643 A.2d 1253, 1262 (Conn. 1994)) ("The fact is that liability is rarely imposed upon corporate directors or officers simply for bad judgment and this reluctance to impose liability for unsuccessful business decisions has been doctrinally labeled the business judgment rule. Shareholders challenging the wisdom

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> of a business decision taken by management must overcome the business judgment rule."); Solomon v. Armstrong, 747 A.2d 1098, 1111–12 (Del. Ch. 1999) ("Under the business judgment rule, the burden of pleading and proof is on the party challenging the decision to allege facts to rebut the presumption."); Ferris Elevator Co., Inc. v. Neffco, Inc., 674 N.E.2d 449, 453 (Ill. App. Ct. 1996) ("The burden is on the party challenging the decision to present facts rebutting the presumption."); Oliveira v. Sugarman, 152 A.3d 728, 736 (Md. 2017) (quoting Boland v. Boland, 31 A.3d 529, 549 (Md. 2011)) ("To overcome the 'dangerous terrain' of the business judgment rule presumption, the plaintiff must assert facts that suggest the corporate directors did not act in accordance with the rule."); Gantler v. Stephens, 965 A.2d 695, 706 (Del. 2009) ("Procedurally, the plaintiffs have the burden to plead facts sufficient to rebut that presumption."); Powell v. W. Ill. Elec. Coop., 536 N.E.2d 231, 235 (Ill. App. Ct. 1989) ("[T]he directors' decision is presumed proper, and the burden is properly placed on the shareholder plaintiffs to show that the directors are not now acting in good faith and independently in desiring to prosecute the lawsuit."); see also 13 Summ. Pa. Jur. 2d, Business Relationships § 8:75 (2021) ("Where there is a prima facie showing that the directors or majority shareholders have a self-interest in a particular corporate transaction, or that the board has acted fraudulently or in bad faith, the business judgment rule does not apply and the burden shifts to the directors to demonstrate that the transaction is intrinsically fair."). Against this weight of authority and in the absence of any controlling precedent to the contrary, we decline to engraft a pleading requirement into the law. See Lori McMillan, The Business Judgment Rule as an Immunity Doctrine, 4 Wm. & Mary Bus. L. Rev. 521, 569 (2013) ("As long as the conditions for the application of the business judgment rule are met, the courts will not assess the quality of the decision. This has a direct parallel to immunity.").
>
> *New Horizons Condominium Master Association, Inc. v. Harding*, 47 Fla.L.Weekly D491b (Fla. 3d DCA 2022)

31. The instant case presents a very unique, complex and challenging situation involving asbestos remediation and abatement in a condominium unit within an occupied building with closed, air-conditioned hallways. The Complaint, including its Exhibits, does not even present a specific plan of how such project is carried out in the occupied building where asbestos particles may contaminate the Association's pool deck adjacent to the Unit (Complaint, at Exhibit "H") and, subsequently, compromise the health and safety of unsuspecting residents sunbathing or relaxing there.

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32. It is the perfect example of when the Court must defer to the business judgment of the condominium Association Board. In the alternative, this Court may find itself in a position of micromanaging the Plaintiffs, bringing them into compliance with the Association's governing covenants, overseeing the contractors performing the work in the Unit as well as the City of Boca Raton inspectors and Association maintenance personnel, reviewing the work of the Association's attorneys protecting the interests of the Association, all the while providing long-term safeguards for the health and safety of the Boca View residents or even people who may "have sensitivity to the fumes" which are used in the asbestos abatement process as outlined in the Contract attached as Exhibit "E" to the Complaint.

33. The Association respectfully submits that is not the function of a Court such that this matter should be dismissed with prejudice.

POINT V. ***The Complaint, On Its Face, Demonstrates the Defense That the Association Has, Indeed, Addressed the Plaintiffs' Actions Regarding Renovations in the Unit***

34. The Complaint, at ¶ 26, states that [*o*]*n July 12, 2021, Mr. Owens submitted an Approval Request Form* (***Exhibit "D"***)[6]. The Complaint, at ¶ 28, goes on to state that [*d*]*uring the term of Mr. Owens' requests for approval, the Association has failed to address the merits of Mr. Owens' applications and has* ***referred to nonsensical matters*** *in efforts to delay and prevent Mr. Owens from performing interior construction upgrades to his property*. (emphasis added) Further, the Complaint, at ¶ 33, alleges, in pertinent part, that [*a*]*s of the date of this Complaint,* ***the Association has failed to answer****, or to grant or deny the application.* (emphasis added). Lastly, the Complaint, at ¶ 87, refers to *a harassing letter writing campaign* and *Plaintiffs receiving* ***numerous letters*** *by* [the Association's] *attorneys*. (emphasis added).

[6] Plaintiff Amelia Owens cannot claim any rights deriving under said Approval Request Form, or any subsequent one, because she is not a signatory thereto and, therefore, has no standing to raise any claims under said Form(s).

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35. Although not within its four corners, the allegations on the face of the Complaint, namely that the Association ***referred to nonsensical matters***, ***failed to answer*** *the* [Plaintiffs'] *application* and, most importantly, refer to a *letter writing campaign* and *Plaintiffs receiving* ***numerous letters*** (in plural – although, the Complaint has attached only one (1) such letter, at its Exhibit "H"), demonstrate the Association's own defense, specifically, that on August 17, 2021, the Association's attorney wrote a[nother] letter ("Letter") which promptly, directly and specifically addressed the Plaintiffs' illegal actions to renovate the Unit as well as making false reports to the City of Boca Raton Code Enforcement to harass the Association's Board Vice President. The Letter went on to outline a procedure to be followed if Plaintiffs wish to make renovations to the unit. Said Letter is attached hereto as Exhibit "**A**".

36. Affirmative defenses can be raised in a motion to dismiss if the face of the complaint demonstrates the defense. *See Neapolitan Enters. LLC v. City of Naples,* 185 So. 3d 585 (Fla. 2d DCA 2016) citing *Bolz v. State Farm Mut. Auto. Ins. Co.,* 679 So.2d 836, 837 (Fla. 2d DCA 1996); *Jasser v. Saadeh,* 103 So.3d 982, 984 n. 2 (Fla. 4th DCA 2012); *Ramos v. Mast,* 789 So.2d 1226, 1227 (Fla. 4th DCA 2001). Accordingly, this Honorable Court should consider the Letter in its analysis of the instant Motion.

37. As outlined in the Letter, the Association pointed to specific violations by the Plaintiffs' for which it sought compliance with the Association's governing documents and also made specific demands to follow a certain procedure for renovation projects in the Unit, to wit (emphasis added):

> Therefore, demand is made for you to immediately cease any and all unit renovations, alterations, improvements, construction and installations, time being of the essence, and proceed to **obtain all required building permits** for any and all work in your unit, **submit a true architectural review board** form requesting approval for any and all work in your unit **with all supporting documentation**, such as, but not limited to: the **fully executed contract** with

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> each contractor performing work stating the scope of work and materials to be used, **contractor's insurance certificate** showing **coverage for worker's compensation** and showing the **Association as a named insured**, the **contractor's license** and full contact information, and all **documentation submitted to the city** to obtain building permits for all work to be done, including asbestos remediation and any subsequent clean up necessary for the adjacent vents and structures... Further, demand is made for you to **remove the Ring video doorbell** within 5 days from the date of this letter, time being of the essence. Additionally, you must **immediately cease and desist threatening and harassing Board members and other neighbors**. Last, demand is made that you **allow the Association's representatives to inspect and confirm compliance of any work being performed in your unit**.

38. The Complaint reflects no efforts made by the Plaintiffs to address or satisfy any of the Association's demands made in the Letter. It is clear that the Plaintiffs and their legal Counsel knew or should have known the Association's position and the fact that it addressed in specificity the procedure to be followed by the Plaintiffs for any renovations. Said procedure is dated after and also addresses in specificity the procedural pitfalls clearly not fulfilled in the Plaintiffs' request dated July 12, 2021 and attached to the Complaint as its Exhibit "D". Plaintiffs or their counsel have not provided any documents responsive to the Letter. However, the Plaintiffs, in concert with their legal Counsel, have decided to ignore the Letter, not attach it to the Plaintiffs' Complaint and, instead, to file the instant legal action in bad faith.

39. As also noted in Exhibit "H" of the Complaint (see also Complaint at ¶ 36), Plaintiffs placed cameras inside the Unit and pointed them towards the community pool and pool deck where Association residents sunbathe in swimming suits. Such cameras may also record any "wardrobe malfunctions" of community residents and their guests and there is no telling where the recorded footage may broadcast. Again, the Association attempted to bring the Plaintiffs in compliance with the Association's governing documents.

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40. Based on the foregoing, until and when Plaintiffs comply with Association's demands as stated in the Letter and Exhibit "H" of the Complaint there is nothing before the Association to do.

41. Additionally, the Plaintiffs' request did not meet the minimum requirements outlined in the Letter such that this case must be dismissed pursuant *Ciochetty* v. *Fountain Trace Homeowners' Association, Inc.,* Nos. 2021-CA-0171-MR, 2021-CA-0177-MR, 2021-CA-0243-MR (Ky Ct. App. Apr. 1, 2022).

42. Therefore, in the absence of any proof of compliance with the Association's demands on the part of the Plaintiffs, this action should be dismissed with prejudice as premature. Any subsequent cause(s) of action would only accrue after the complete documentation and compliance, as demanded, is submitted to the Association.

43. If the Court is not inclined to review the Letter in the context of a motion to dismiss, it must at least dismiss the Complaint with leave to amend to attach the Letter pursuant Rule 1.130(a), Fla.R.Civ.Pro. ("All… documents on which action may be brought or **defense made**… must be incorporated in or attached to the pleading." (emphasis added)).

B. THE COUNTS AGAINST THE ASSOCIATION'S PRESIDENT

44. The three (3) Counts in the Complaint against the President (Count Three, for Statutory Liability (Fla. Stat. 718.303); Count Four, for Piercing Corporate Veil – Alter Ego; and, Count Five, for Trespassing) are not only redundant, but also outlandish and further a patently false narrative with the intent to slander the title of the President's condominium units.

45. Count Three against the President essentially makes the same allegations as the counts against the Association, specifically that the Association President *has impeded Plaintiffs' applications, has otherwise stonewalled and ignored Plaintiffs' renovation requests, and has*

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otherwise engaged in conduct to deprive or prevent Plaintiffs from performing interior construction upgrades to their unit. (See generally Complaint at ¶s 22, 68, 84) In short, this count allegedly derives from the President's *decision not to take action* an act for which she has full immunity under Florida law. Additionally, the foregoing constitute mere conclusions of law.

46. Count Four is unheard of in Florida caselaw in the context of a condominium Association setting, where elections for the Board of Directors take place annually and wherein Board members, including the President, are freely and democratically elected in a vote of the entire membership. Plaintiffs lack standing because the claim is derivative not direct. Similarly, Plaintiffs cannot maintain a cause of action without even alleging the usurpation of that process. Additionally, allegations that the President *used her position to obtain condominium units from residents at a lesser value than the then-current value* (Complaint at ¶ 81) is easily rebutted by a cursory review of the public records which this Honorable Court must consider in a motion to dismiss, strike the claim as a sham pleading and strike DE# 3 from the Court Docket as a potential slander of title of the aforesaid units.

47. Lastly, setting aside the rest of the incendiary, baseless rhetoric therein, on the one hand, the count alleges that *at one point* (when exactly?) the President *attempted to use her position to convince [Plaintiff] James Owens' mother to deed the property to* the President, while, allegedly, *Plaintiffs were able to prevent Diana Kuka from obtaining their family property* (how exactly?) (Complaint at ¶ 82) and, on the other hand, the President allegedly had James Owens' mother *sign some documents* and, subsequently, the next morning the President *left without returning the documents* (Complaint at its Exhibit "A", an apparently self-serving letter written by Plaintiff James R. Owens).

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48. In Count Five of Trespassing, the most offensive, defamatory, libelous and equally meritless of the three, Plaintiffs ludicrously allege in the Complaint that bringing a *plate of food* to Mrs. Lanier constitutes trespassing (again at Complaint at Exhibit "A", the apparently self-serving letter written by Plaintiff James R. Owens). Plaintiffs' have also failed to state a cause of action by failing to allege ownership of the unit in question on or about October 2018. Additionally, Plaintiffs allege no damages and their counsel have mis-cited and misrepresented caselaw to this Honorable Court for nominal damages such that sanctions against both Plaintiffs and their legal counsel are appropriate.

Count III ***Against the President Fails As a Matter of Law***

49. The President reavers and realleges the grounds upon which the Association seeks dismissal of the instant matter, i.e. I. *Plaintiffs Have Alleged no Standing to Challenge Association's Governing Documents*; II. *Count One of the Complaint, Seeking Declaratory Relief, Should Be Dismissed, As It Involves the Same Factual Dispute as Plaintiffs' Claim(s) of Statutory Liability (Counts Two and Three)*; III. *The Instant Action Should Be Dismissed Because It Is Premature AND Association was NOT Required to Answer Plaintiffs' Request for Renovations*; IV. *The Authorization For Renovations Sought from the Association and Its Board of Directors is a Question of Business Judgment Which Cannot be Substituted by the Judgment of this Honorable Court*; as well as, V. *The Complaint, On Its Face, Demonstrates the Defense That the Association Has, Indeed, Addressed the Plaintiffs' Actions Regarding Renovations in the Unit*.

50. Additionally, the President submits to this Honorable Court that the Plaintiffs cannot state a cause of action for statutory liability against her under the allegations of the Complaint. Again, the holding in *New Horizons Condominium Master Association, Inc. v.*

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Harding, 47 Fla.L.Weekly D491b (Fla. 3d DCA 2022), outlined in detail *supra*, fully supports the President's position that she has immunity against frivolous actions such as the Plaintiffs'. *Harding*'s holding that **absent a showing of bad faith, self-dealing, or a violation of criminal law**, (clearly missing from Count Three of the Complaint), warrants dismissal of this matter with prejudice.

51. Similarly, in *Munder v. Circle One Condominium, Inc.,* 596 So.2d 144 (Fla. 4th DCA 1992), the Fourth District reiterated the longstanding proposition that condominium association directors are immune from individual liability, **absent a crime, fraud, self-dealing or unjust enrichment.** Indeed, it would undoubtedly be difficult to find persons willing to serve on condominium boards of directors-which generally comprise volunteers from among the condominium owners-if immunity from individual liability in instances, such as those alleged in the Complaint in this matter, was not upheld.

52. In *Munder,* the developer-director was found to have breached his fiduciary duty by failing to renew fire insurance on the development's clubhouse, yet the Fourth District did not hold the director personally liable. The *Munder* court reasoned that individual directors cannot be held liable for negligent actions even if such actions were clearly wrong. *See also Taylor v. Wellington Station Condominium Ass'n, Inc.,* 633 So.2d 43 (Fla. 5th DCA 1994) (restating the general rule of director immunity from suit; however, holding that there was enough evidence of self-dealing to preclude summary judgment for the directors); *Olympian West Condominium Ass'n, Inc. v. Kramer,* 427 So.2d 1039 (Fla. 3d DCA 1983) (directors not personally liable for failure to correct construction defects); *Bodin Apparel, Inc. v. Superior Steam Service, Inc.,* 328 So.2d 533 (Fla. 3d DCA 1976) (directors not personally liable in tort action despite failure to provide workers compensation insurance for employee).

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53. In *Perlow v. Goldberg*, 700 So. 2d 148 (Fla. 3d DCA 1997), the Third District held that condominium association directors are not personally liable for failure to carry out their duties, i.e. administer insurance funds properly, in absence of criminal activity, fraud, unjust enrichment, or self-dealing. See also *Cedar Cove Efficiency Condo Ass'n., Inc. v. Cedar Cove Props., Inc.,* and 558 So. 2d 475 (Fla. 1st DCA 1990) ("business judgment rule" protects condominium association's board of directors making business decisions in good faith). Therefore, the President's actions or omissions set forth in the Complaint are not enough to impose personal liability upon the Association's President.

54. To reiterate, in the instant case, Count Three of the Complaint is devoid of any allegations of criminal activity, fraud, unjust enrichment or self-dealing committed by the President.

55. As the Plaintiffs cannot sue a Board Member, including the Association President, the action against DIANA KUKA must be dismissed with prejudice. *See, e.g., Curbelo v. Sweetwater Creek Homeowners Condominium Ass'n, Inc.,* 653 So.2d 1073 (Fla. 3d DCA 1995), *review denied,* 662 So.2d 933 (Fla.1995).

Count IV ***[Against the President] is a Derivative Action Which Plaintiffs Cannot Maintain; It Does Not Comply With the Pre-Suit Requirements in F.S. §617.07401; Has No Basis in Florida Law; It Can be Easily Rebutted By a Cursory Review of Public Records; It Must Stricken as a Sham Pleading Which Slanders Title of Units and, DE# 3 Should Be Removed from the Court Docket Before It May Cause Irreparable Slander of Title and other Damages***

56. The President reavers and realleges the grounds upon which the Association seeks dismissal of Counts One and Two of the instant matter, as well as those on Count Three against the President, as outlined *supra*.

A.

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57. The gravamen of Counts Four of the Complaint is based on an alleged injury to *the Association as a whole* and its members *generally,* and not any separate and distinct injury to Plaintiffs, and thus, said Counts should be dismissed, as Plaintiffs lack standing to pursue such derivative claims. The unsubstantiated and ludicrous allegation that *the Association's existence is in fact inexistent* (Complaint at ¶ 83) lacks any detailed, ultimate factual support whatsoever. The Plaintiffs essentially ask this Court to overthrow the duly elected President of the Association and its Board of Directors in one fell swoop.

58. As derivative and direct claims cannot be maintained in the same lawsuit, and as derivative claims are subject to mandatory, and statutory, presuit requirements, this Honorable Court should dismiss Count Four with prejudice.

59. In seeking to Pierce the Corporate Veil of or allege Alter Ego on the part of the duly elected President of the Association by the entire Association membership at large, Plaintiffs have represented more than their own individual interests.

60. However, Plaintiffs lack standing to bring such action against the President because their cause of action belongs to the corporation. In *Sharma v. Ramlal,* 76 So.3d 955 (Fla. 2d DCA 2011), members and directors of a not-for-profit corporation sued the president of the corporation and the corporation itself, alleging breaches of fiduciary duties and fraud, among other charges. In a concurrence, Judge LaRose questioned the plaintiffs' standing, noting that **their cause of action appeared to belong to the corporation**, and they did not allege compliance with section 617.07401. *Id* at 956-57 (LaRose, J., concurring); *see also Udick v. Harbor Hills Dev., L.P.,* 179 So.3d 489, 491 (Fla. 5th DCA 2015) (noting that derivative suit requirements apply to corporations not for profit); *Collado v. Baroukh,* 226 So.3d 924, 926 (Fla.

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4th DCA 2017) (holding that condominium owner's action did not adequately comply with section 617.07401).

61. Specifically, under Florida law, a shareholder or member of a corporation (such as a condominium association) *does not* have standing to bring a direct, or individual, action for injuries allegedly suffered by the corporation and its members generally, and any such action "would have to be brought as a derivative action." *See Angelino v. Santa Barbara Enter LLC,* 2 So. 3d 1100, 1104-05 (3d DCA 2009) (citing *Chaul v. Abu-Ghazaleh,* 994 So. 2d 465, 467 (Fla. 3d DCA 2008) (dismissing shareholders' direct claims for failure to bring them as derivative claims, holding that the shareholders had no standing to sue directly for harm allegedly suffered by the corporation and by the shareholders indirectly) (citing *Alario v. Miller,* 354 So. 2d 925, 926 (Fla. 2d DCA 1978); *Braun v. Buyers Choice Mortgage Corp.,* 851 So. 2d 199 (Fla. 4th DCA 2003) (holding that a shareholder plaintiffs claim that a director breached his fiduciary duty to a subsidiary corporation by selling the corporate parent, should have been brought as a shareholder derivative claim rather than a direct claim by the individual shareholder, as all shareholders, not just the plaintiff shareholder, would have been equally harmed by the alleged breach); *Checkers Drive--ln Restaurants, Inc. v. Tampa Checkmate Food Services, Inc.,* 805 So. 2d 941 (Fla. 2d DCA 2001) (holding that a plaintiff shareholder of franchisee corporation could not recover individually under Florida Franchise Act, where violation of the Act caused direct injury to franchisee corporation, but only indirect injury to the plaintiff shareholder).

62. In other words, "[if] the damages are only indirectly sustained by the stockholder as a result of injury to the corporation, the stockholder does not have a cause of action as an individual" *Alario,* 354 So. 2d at 926. Accordingly, Florida case law requires that a

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determination be made at the motion to dismiss stage as to whether the plaintiff has a "cause of action in [his or her] own right or whether [his or her] cause of action is derived from the corporation's right to bring the action." *Id.* Whether a claim is considered to be direct or derivative is a question of law to be determined from "the body of the complaint." *Id.*

63. To that end, the legal question of whether a plaintiffs claim is derivative or direct is based on "the *nature of the injuries alleged* and the wrongs sought to be remedied" as set forth in "the body complaint." *Id.* (emphasis added). The Florida Second District Court of Appeal explained in *Alario* that:

> A stockholder's derivative action is an action brought by one or more stockholders of a corporation to enforce a corporate right or to prevent or remedy a wrong to the corporation in cases where the corporation, because it is controlled by the wrongdoers or for other reasons, fails and refuses to take appropriate action for its own protection. An action brought by a stockholder is derivative if the gravamen of the complaint is injury to the corporation or to the whole body of its stock or property and **not** injury to the plaintiff's individual interest as a stockholder.

Id. (emphasis added) (quoting 19 Am. Jur. 2d Corporations § 528 (1965)). The Second District similarly explained in *Citizens National Bank v. Peters,* that:

> [A] direct action, or as some prefer, an individual action, is a suit by a stockholder to enforce a right of action existing in him . . . What these definitions attempt to convey is that a stockholder may bring a suit in his own right to redress an injury sustained directly by him, and which is **separate and distinct** from that sustained by other stockholders. If, however, the injury is *primarily* against the corporation, or the stockholders *generally,* then the cause of action is in the corporation and the individual's right to bring it is derived from the corporation.

175 So. 2d 54 (Fla. 2d DCA 1965) (emphasis added). *See also Hill v. Brady,* 737 So. 2d 1243, 1244 (Fla. 5th DCA 1999) (affirming final summary judgment in favor of the

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defendant finding that the plaintiff shareholder had no right to bring an individual action, as any injury to the plaintiff was *"primarily"* caused by alleged injury to the corporation and its members *"generally"* and, thus, plaintiff's claims were derivative) (emphasis added) *(citing Alario,* 354 So. 2d at 925).

64. Analogous to the claim asserted in the instant case, in *AmSouth Bank v. Wynne,* 772 So. 2d 574 (Fla. 1st DCA 2000), the court considered the distinction between individual and derivative claims discussed above, in the context of direct breach of fiduciary duty claims brought by plaintiff shareholders against a corporation. *Id.* at 575. The plaintiffs in *AmSouth* alleged that as a result of the defendant's false representations, the plaintiff shareholders' corporation failed, thereby injuring the plaintiff shareholders. *Id.* The *AmSouth* court, in reliance on *Alario,* found that the plaintiffs' damages "flowed *primarily* from injuries to [the corporation]", and "the injuries to [the plaintiff shareholders] were *indirect, indistinct* from injuries to other shareholders, and **did not** provide a basis for the[ir] individual suits." *Id.* (emphasis added). Thus, the *AmSouth* court ordered the trial court to enter judgment in favor of the defendant. *Id.*

65. Similar to *Alario* and *Wynne*, in Count Four of the instant case, Plaintiffs are impermissibly seeking relief for alleged wrongs to the Association as whole, by way of a direct action (brought in Plaintiffs' individual capacity), as opposed to a derivative action on behalf of the Association and its members. Indeed, despite the label Plaintiffs have assigned to their claims in Count Four, it is apparent Plaintiffs are seeking redress for their overall dissatisfaction with the way the Association and its employees are being *dominated and controlled*, (Complaint at ¶s 78, 79) or how the Association and its corporate lawyer *referred to nonsensical matters* (Complaint at ¶s 28) and the existence of *a harassing letter writing*

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campaign because of the *Plaintiffs receiving numerous **letters** by* [the Association's] *attorneys* (Complaint, at ¶ 87) i.e. how the Association is managed and operated, and an alleged injury to the Association as a whole, and its membership generally.

66. Because Count Four constitutes a derivative action, and because F.S. §§718.303(1) and 617.07401 do not conflict, the court must dismiss said Count because Plaintiffs did not comply with F.S. §617.07401 pre-suit requirements as stated in *Iezzi Family Ltd. P'ship v. Edgewater Beach Owners Ass'n, Inc.*, 254 So.3d 584 (Fla. 1st DCA 2018).

67. As discussed in detail above, under Florida law, Plaintiffs do not have standing to bring a direct, or individual, action for the above-quoted alleged injuries suffered by the Association as a whole, and its members generally; such an action would have to be brought as a separate derivative action, subject to multiple statutory, and mandatory, presuit requirements. *See Angelino,* 2 So. 3d at 1104-05; *Chaul,* 994 So. 2d at 467; *Alario,* 354 So. 2d at 926. *See also Collado v. Baroukh,* 226 So. 3d 924 (Fla. 4th DCA 2017) (holding that condominium owner's "[n]oncompliance with the pre-suit requirements of section 617.07401 mandates dismissal of the suit"); *Iezzi Family Ltd. P 'ship v. Edgewater Beach Owners, Ass 'n,* 254 So. 3d 584, 585 (Fla. 1st DCA 2018) ("Section 617.07401, Florida Statues, restricts the ability of members to bring lawsuits 'in the right of their non-profit corporation.... *[P]laintiffs may **not** decide that they are not subject to statutory requirements merely by labeling their allegations [as direct] in an effort to avoid them")* (emphasis added).

68. Based on the foregoing, Counts Four should be summarily dismissed. Additionally, as derivative claims are subject to mandatory, and statutory, presuit requirements, and as derivative and direct claims cannot be maintained in the same lawsuit, this Honorable Court should dismiss Count Four, and preclude Plaintiffs from later attempting to assert such

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derivative claims in the instant lawsuit. *See Dep 't of Ins. v. Coopers & Lybrands,* 570 So. 2d 369, (Fla. 3d DCA 1990) (stating that Fla. R. Civ. P. 1.110 (g) "forbids the joinder of causes of actions which rise out of separate rights). In other words, this Court should dismiss Counts Four, with prejudice, with respect to this particular case number. *See id.* Indeed, the Florida Rules of Civil Procedure state, in pertinent part, that "[a] pleader may set up in the same action as many claims or causes of action or defenses **in the same right** he has . . ." *Id.* (quoting Fla. R. Civ. Pro 1.110 (g) (emphasis added)). *See also Angelino,* 2 So. 3d at 1104-05; *Chaul,* 994 So. 2d at 467; *Alario,* 354 So. 2d at 926; *Collado,* 226 So. 3d at 926 (holding that condominium owner's "[n]oncompliance with the pre-suit requirements of section 617.07401 mandates dismissal of the suit"); *Iezzi,* 254 So. 3d at 585. Accordingly, this Honorable Court should summarily dismiss Counts Four, with prejudice.

B.

69. Count Four is also unheard of in Florida caselaw in the context of a condominium or community association setting, where elections for an Association's Board of Directors take place annually and wherein Board Members, including the President, are freely and democratically elected in a vote of the entire membership. Plaintiffs cannot maintain a cause of action without even alleging ultimate facts of the usurpation of that process of how exactly "*the corporation is a mere instrumentality or alter ego of the defendant*", (a mere conclusion of law stated in Complaint at ¶ 77, allegedly citing *Beltran v. Miraglia*, 125 So. 3d 855 (Fla. 4th DCA 2013, which is blatantly false and citing incompletely *Priskie v. Missry*, 958 So. 2d 613 (Fla. 4th DCA 2007)) e.g. Plaintiffs will have to allege that there were no elections held by the Association just over four months ago, on January 21, 2022; that the Plaintiffs did not vote in that election or participate in the meeting where the ballot counting process by an independent

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elections monitor took place; that the Board of Directors and its President were not democratically elected on January 21, 2022, etc.. Of course, all those allegations would be patently false and constitute fraud upon this Honorable Court, but without them, Plaintiffs cannot maintain a cause of action alleged on Count Four.

70. More falsity surrounds the way caselaw is cited in ¶77 of the Complaint and it should raise grave with regards to any potential lack of candor towards this Honorable Tribunal.

71. *Beltran v. Miraglia*, 125 So. 3d 855 (Fla. 4th DCA 2013) states nothing of the sort alleged in ¶ 77 of the Complaint by the Plaintiffs' attorneys. Because it includes three (3) very specific elements to be proven in order to "pierce the corporate veil", *Beltran* is mis-cited and misrepresented to this Honorable Court by the Plaintiffs' legal counsel.

72. *Beltran* specifically states, in pertinent part (emphasis added):

> A general principle of corporate law is that a corporation is a separate legal entity, distinct from the individual persons comprising them, and, absent some basis to pierce the corporate veil, there is no basis for imposing liability for corporate debts and obligations upon the individuals. *See Gasparini v. Pordomingo,* 972 So.2d 1053, 1055 (Fla. 3d DCA 2008). **Three factors must be proven to "pierce the corporate veil"** and hold an individual shareholder liable for the debts of the corporation:
>
> "**(1)** the shareholder dominated and controlled the corporation to such an extent that the corporation's independent existence, was in fact non-existent and the shareholders were in fact alter egos of the corporation;
> **(2)** the corporate form must have been used fraudulently or for an improper purpose; and
> **(3)** the fraudulent or improper use of the corporate form caused injury to the claimant."
>
> *Id.* (quoting *Seminole Boatyard, Inc. v. Christoph,* 715 So.2d 987, 990 (Fla. 4th DCA 1998))

73. Similarly, Plaintiffs' counsel has failed to bring to the attention of this Court the entire pertinent part of the holding in *Priskie v. Missry,* 958 So.2d 613 (Fla. 4th DCA 2007). *Priskie* states in specific and pertinent part:

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> "Generally, the rule is that the corporate veil will not be pierced absent a showing of improper conduct." *Seminole Boatyard, Inc. v. Christoph,* 715 So.2d 987, 990 (Fla. 4th DCA 1998).
>
> Three factors must be proven by a preponderance of the evidence: (1) the shareholder dominated and controlled the corporation to such an extent that the corporation's independent existence, was in fact non-existent and the shareholders were in fact alter egos of the corporation; (2) the corporate form must have been used fraudulently or for an improper purpose; and (3) the fraudulent or improper use of the corporate form caused injury to the claimant.
>
> *Id.* Stated succinctly, in order to pierce the corporate veil, a plaintiff is required to prove both that the corporation is a mere instrumentality or alter ego of the defendant and that the defendant engaged in "improper conduct." *Id.* (quoting *Dania Jai-Alai Palace, Inc. v. Sykes,* 450 So.2d 1114, 1120-21 (Fla.1984)).

74. Both the holdings in *Beltran* and *Priskie* outline the three (3) foregoing elements which have intentionally either not have been presented at all or in their entirety to this Honorable Court such that sanctions are warranted. This is because there are no ultimate facts or details alleged in the Complaint to support Plaintiffs' mere conclusions of law that *the corporation's independent existence, was in fact non-existent* or that *the corporate form must have been used fraudulently or for an improper purpose*. See also ¶ 69 *supra*.

75. Further, the Complaint, at ¶ 78, alleges that the President, *through her actions, dominated and controlled the Association and the employees working there that perform services on the grounds where Plaintiffs' unit is located*. Whatever said *actions* may be or labels the Plaintiffs or their counsel may attempt to place on them, they fall well within the province of the actions of a community leader during the course of regular business and no real wrongdoing is alleged. To pose a rhetorical question, would the Plaintiffs prefer it better if the President and the Board dispatched its employees to "*perform services on the grounds*" of a completely different condominium building not governed by the Association?

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76. "Moreover, even if a corporation is merely an alter ego of its dominant shareholder or shareholders, the corporate veil cannot be pierced so long as the corporation's separate identity was lawfully maintained. *See Mayer v. Eastwood, Smith & Co., Inc.,* 122 Fla. 34, 42, 164 So. 684, 687 (1935) (holding that "[s]o long as proper use is made of the fiction that [the] corporation is [an] entity apart from stockholders, [the] fiction will not be ignored.") (citation omitted)." See *Lipsig v. Ramlawi,* 760 So. 2d 170, 188 (Fla. 3d DCA 2000).

77. Needless to say, Plaintiffs make no allegations whatsoever in their Complaint that the Association/corporation's separate identity was **not** lawfully maintained.

C.

78. Plaintiffs' allegation that the President *used her position to obtain condominium units from residents at a lesser value than the then-current value* (Complaint at ¶ 81) is preposterous. It is also patently false and made in bad faith because Plaintiffs and their counsel know or should know such a claim can be easily rebutted by a cursory review of the public records.

79. In deciding a motion to dismiss, this Honorable Court "must consider only the complaint, exhibits attached to the complaint, **matters of public record**, as well as undisputedly authentic documents if the complainant's claims are based upon these documents. *See, e.g., Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.,* 998 F.2d 1192, 1196 (3d Cir.1993)." *See Mayer v. Belichick,* 605 F.3d 223, 230 (3d Cir. 2010). Therefore, this Honorable Court must consider the public records cited below, outlined in detail in footnotes and which will be filed under separate cover, and determine the Plaintiffs' claim to be a sham pleading and proceed to strike DE# 3 from the Court Docket, in order to avoid a slander of the title of the President's condominium units and any additional damage which it may cause.

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80. A cursory review of the public records for the purchase of each of the unit owned by the President makes it clear that the Plaintiffs' and their counsel's conclusion of law that the President *used her position to obtain condominium units from residents at a lesser value than the then-current value* are patently false, scandalous, made in bad faith, and without any basis in law or fact such that they warrant sanctions inherently vested to this Court. The specific purchase transactions for each of the President's units, as shown in the official records of Palm Beach County, along with similar acquisitions which occurred around the same time frame are outlined *infra*.

UNIT 2U

> Specifically, in ¶ 81 of the Complaint, Plaintiffs alleges that the President purchased Unit **2U** for $260,000. This is patently false. The President and her brother purchased, and did **not** just obtain, as Plaintiffs falsely allege, their first Unit **2U** from Boca View Condominium Association, LLC., the Developer's company which converted the Association's building into a condominium, prior to her even being the Association President as the Board of Directors was controlled by the Developer-appointed Directors. This purchase is documented in the *Official Records Book* 18976, Page 992, of the *Public Records* of *Palm Beach County,* Florida at the price of **$286,975.00** and was executed on or about May 31, 2005. How exactly could the President have *used her position to obtain condominium unit* **2U** *from* the Developer *at a lesser value than the then-current value* prior to her becoming the President of the Association[7] or even before she was a member of the Association?
>
> Ironically, around the same timeframe, public records show that, on or about April 28, 2005, Julia J. Lanier, the mother of Plaintiff James R. Owens, purchased the unit next door to the President, Unit *2V*, for *$280,990.00*[8]. Public records also show that, on January 21, 2005, another next door unit, Unit *2T*, was purchased for *$279,000.00*[9]. Thus, both units were purchased [from the developer] for cheaper than the President's Unit 2U. Plaintiffs' knew or should have known at least [Plaintiff James R. Owens' own mother] Mrs. Lanier's purchase price of Unit *2V* and should have researched other purchases

[7] As indicated on the website of the Florida Division of Corporations, www.sunbiz.org.

[8] *Official Records Book* 18653, Page 280, of the *Public Records* of *Palm Beach County, Florida*

[9] *Official Records Book* 18257, Page 1809, of the *Public Records* of *Palm Beach County, Florida; Purchasers:* Harry Marcellino & Ulrike M. Marcellino.

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at the time. On the other hand, Plaintiffs and their legal counsel may have intentionally alleged a deflated purchase price of $260,000 for Unit **2U** by the President in order to fit their false narrative. This allegation, as others below, is clearly patently false, made in bad faith and if not stricken from the Court Docket, it may provide the grounds for a potential slander of title claim.

UNIT 3V

As per the *Official Records Book* 23033, Page 265, of the *Public Records* of *Palm Beach County, Florida*, Unit **3V** at Boca View was purchased for **$205,000.00** on December 31, 2008 by the President's brother. The President became an owner more than two (2) years later via a Quit Claim Deed executed on or about January 7, 2011[10]. Clearly, this transaction also does not support the false narrative and bad faith argument furthered by Plaintiffs and their legal counsel.

Even indulging the Plaintiff's meritless argument a bit further, even though this purchase had nothing to do with the President, around the time when the President's brother purchased Unit **3V**, Unit *1E* was purchased, on or about November 20, 2008 for *$185,000.00*[11], whereas Unit *3W*, one of the largest units in the building, was purchased on or about January 27, 2009 for *$185,000.00*[12].

UNIT 3G

Similarly with Unit *3V supra*, *Official Records Book* 24050, Page 455, of the *Public Records* of *Palm Beach County, Florida* indicates that Unit **3G** at Boca View was also purchased by the President's brother for **$140,000.00** on August 20, 2010. Here too, The President became an owner via a Quit Claim Deed executed on or about January 7, 2011[13].

Again, even though this purchase had nothing to do with the President, records around the same time indicate that there were two (2) purchases prior to the purchase of Unit **3G** by the President's brother: Unit *4F* for *$140,000.00* on or about August 4, 2010[14] and Unit *3G* August 5, 2010 for *$104,800.00*[15].

[10] *Official Records Book* 24302, Page 1395, of the *Public Records* of *Palm Beach County, Florida;*

[11] *Official Records Book* 22971, Page 1157, of the *Public Records* of *Palm Beach County, Florida;* Purchasers: Stan Kowalewski & Victoria Kowalewski.

[12] *Official Records Book* 23071, Page 86, of the *Public Records* of *Palm Beach County, Florida;* Purchasers: Lucia Marcigliano & Giuseppe Marcigliano.

[13] *Official Records Book* 24302, Page 1394, of the *Public Records* of *Palm Beach County, Florida;*

[14] *Official Records Book* 24084, Page 1940, of the *Public Records* of *Palm Beach County, Florida;* Purchasers: Joseph Ambrosini & Roseann Ambrosini.

[15] *Official Records Book* 23991, Page 699, of the *Public Records* of *Palm Beach County, Florida*;

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Furthermore, there also were three (3) subsequent purchases: Unit *2A*, purchased on or about September 28, 2010 for *$90,500.00*[16]; Unit *4H*, purchased on or about November 30, 2010, for *$160,000.00*[17]; Unit *4E*, purchased on or about December 30, 2010, for *$140,000.00*[18].

UNIT 3E

Per the *Official Records Book* 25205, Page 461, of the *Public Records* of *Palm Beach County, Florida*, the President purchased Unit **3E** for **$140,000.00**, on April 17, 2012.

Five (5) unit sales preceded the Unit **3E** purchase: Unit *3O*, purchased on or about January 18, 2012, for *$113,600.00*[19]; Unit *1D*, purchased on or about January 26, 2012, for *$144,000.00*[20]; Unit *3M*, purchased on or about February 14, 2012, for *$139,000.00*[21]; Unit *2R*, purchased on or about February 22, 2012, for *$110,000.00*[22]; Unit *1E*, purchased on or about March 30, 2012, for *$150,000.00*[23]. Three (3) additional purchases succeeded the President's **3E** purchase: Unit *3O*, on or about April 25, 2012, for *$145,000.00*[24]; Unit *2D*,

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Purchaser: CITI Investments LLC.

[16] *Official Records Book* 24106, Page 1058, of the *Public Records* of *Palm Beach County, Florida;* Purchaser: Bank of Mellon.

[17] *Official Records Book* 23991, Page 699, of the *Public Records* of *Palm Beach County, Florida;* Purchaser: Maria C. Palacios.

[18] *Official Records Book* 24314, Page 1567, of the *Public Records* of *Palm Beach County, Florida;* Purchaser: John N. Kopatsis.

[19] *Official Records Book* 24963, Page 1652, of the *Public Records* of *Palm Beach County, Florida*; Purchaser: US Bank NA Trustee.

[20] *Official Records Book* 24998, Page 966, of the *Public Records* of *Palm Beach County, Florida*; Purchaser: Maria F. Gomes.

[21] *Official Records Book* 25030, Page 464, of the *Public Records* of *Palm Beach County, Florida*; Purchaser: Neil B. Getz.

[22] *Official Records Book* 25041, Page 923, of the *Public Records* of *Palm Beach County, Florida*; Purchaser: Lourenco O. Faria.

[23] *Official Records Book* 25108, Page 638, of the *Public Records* of *Palm Beach County, Florida*; Purchaser: Teresa Zaccheo.

[24] *Official Records Book* 25290, Page 1714, of the *Public Records* of *Palm Beach County, Florida*; Purchaser: Giovana Milaneze.

purchased on or about, July 5, 2012, for *$160,000.00*[25]; Unit *2L*, purchased on or about July 6, 2012, for $*144,200.00*[26].

UNIT 2I

Unit **2I** was purchased by the President for **$153,000.00** on November 11, 2013. See *Official Records Book* 26455, Page 641, of the *Public Records* of *Palm Beach County, Florida*.

Before that, three (3) purchases occurred: Unit *4F*, purchased on or about June 24, 2013, for *$131,900.00*[27]; Unit *4P*, purchased on or about July 22, 2013, for *$172,000.00*[28]; Unit *3I*, purchased on or about September 26, 2013, for *$164,400.00*[29]. A subsequent purchase, that of Unit *2H*, occurred on or about November 21, 2013, for *$180,000.00*[30].

UNIT 3M

The *Official Records Book* 27192, Page 1569, of the *Public Records* of *Palm Beach County, Florida*, reflects the purchase of Unit **3M** by the President for **$205,000.00** on November 17, 2014.
There was no immediately preceding purchase around the same time frame and three (3) subsequent purchases: Unit *3I*, purchased on or about January 15, 2015, for $215,000.00[31]; Unit *4L*, purchased on or about March 16, 2015, for *$175,800.00*[32]; Unit *2M*, purchased on or about April 22, 2015, for *$182,800.00*[33].

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[25] *Official Records Book* 25324, Page 1561, of the *Public Records* of *Palm Beach County, Florida*; Purchasers: Rosario Varricchione & Carmelina Dettorre.

[26] *Official Records Book* 25317, Page 1071, of the *Public Records* of *Palm Beach County, Florida*; Purchasers: Deborah K. Glick & Richard Kirschner.

[27] *Official Records Book* 26129, Page 1682, of the *Public Records* of *Palm Beach County, Florida*; Purchaser: Wells Fargo Bank NA TR.

[28] *Official Records Book* 26283, Page 1393, of the *Public Records* of *Palm Beach County, Florida*; Purchasers: Manuel Guedes & Anita Yavor.
[29] *Official Records Book* 26350, Page 742, of the *Public Records* of *Palm Beach County, Florida*; Purchaser: Federal Natl Mtg Assn.

[30] *Official Records Book* 26507, Page 347, of the *Public Records* of *Palm Beach County, Florida*; Purchasers: Marina Chernyak & Zinoviy Chernyak.

[31] *Official Records Book* 27289, Page 354, of the *Public Records* of *Palm Beach County, Florida*; Purchaser: Maria Haskamp.
[32] *Official Records Book* 27401, Page 1874, of the *Public Records* of *Palm Beach County, Florida*; Purchaser: HSBC Bank USA Ntl Assn Tr.

[33] *Official Records Book* 27487, Page 925, of the *Public Records* of *Palm Beach County, Florida*; Purchaser: Spanish2M LLC.

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UNIT 4N

Official Records Book 29903, Page 166, of the *Public Records* of *Palm Beach County,* Florida reflect the purchase of Unit **4N** for **$190,000.00** on or about May 25, 2018. There were no purchases within about eleven (11) months before and five (5) months after that purchase.

UNIT 4T

Official Records Book 32645, Page 1324, of the *Public Records* of *Palm Beach County,* Florida reflects that the President purchased Unit **4T** for **$250,000.00** on June 21, 2021.

Three (3) purchases preceded said **4T** acquisition: Unit *2T*, purchased on or about March 26, 2021, for *$222,000.00*[34]; Unit *2K*, purchased on or about April 8, 2021, for *$248,422.00*[35]; Unit *2B*, purchased on or about June 11, 2021, for *$260,000.00*[36]. There was also one (1) contemporaneous purchase, of Unit *3I*, on or about June 21, 2021 for *$250,000.00*[37].

UNIT 2E

Lastly, the President purchased Unit **2E** on January 21, 2022, for **$260,000.00**. See *Official Records Book* 33269, Page 1768, of the *Public Records* of *Palm Beach County, Florida*.

There were one (1) preceding and another subsequent similarly situated, direct purchases, as the **2E** acquisition, respectively: Unit *2M*, purchased on or about October 29, 2021, for *$245,250.00*[38]; and, Unit *4C*, purchased on or about March 10, 2022, for *$250,000.00*[39].

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[34] *Official Records Book* 32337, Page 881, of the *Public Records* of *Palm Beach County, Florida*; Purchasers: Benjamin Wellmann & Giovana Milaneze Wellman.

[35] *Official Records Book* 32399, Page 1314, of the *Public Records* of *Palm Beach County, Florida*; Purchasers: Scott H. Silvera & Maria G. Silvera.

[36] *Official Records Book* 32635, Page 601, of the *Public Records* of *Palm Beach County, Florida*; Purchaser: Kimberley Vogt Hurley.

[37] *Official Records Book* 32645, Page 1374, of the *Public Records* of *Palm Beach County, Florida*; Purchaser: Valentina Gorodetsky.

[38] *Official Records Book* 33021, Page 147, of the *Public Records* of *Palm Beach County, Florida*; Purchaser: Janna Wolk.

[39] *Official Records Book* 33396, Page 505, of the *Public Records* of *Palm Beach County, Florida*; Purchasers: James E. Coath & Justin C. Coath.

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D. *Public Records Clearly Demonstrate The Falsity of the Plaintiffs' Narrative Such That the Pleading Should be Stricken As Sham*

81. As demonstrated *supra* for each single unit owned by the President, there is no evidence to support the Plaintiffs' baseless conclusion of law that the President *obtain*[ed] *condominium units from residents at a lesser value than the then-current value* let alone that she *used her position* [improperly].

82. The Court can take judicial notice of the fluctuating real estate prices from the real estate boom and busts since year 2005, the time frame material to this litigation. Plaintiffs' claim is patently false, scandalous, made in bad faith, and without any basis in law or fact and should be sanctioned.

83. Additionally, Plaintiffs acknowledge that the President's purchase transactions of her units from other *residents* did not involve them or the Association in any fashion such that they have no standing to interfere in any of the said transactions.

84. Furthermore, any attempt on the part of the Plaintiffs to decide or attempt to persuade this Honorable Court as to which market values they deem acceptable to them outside the most basic market forces of *supply and demand* would constitute unreasonable and unlawful restraints on alienation.

85. Additionally, the Plaintiffs' pleading is a sham, it is scandalous and it should be stricken from the docket. Fla. R. Civ. Pro. Rule 1.140 (f) states in pertinent part (emphasis added): **Motion to Strike**. A party may move to strike or the court may strike redundant, immaterial, impertinent, or **scandalous matter** from any pleading at any time. Moreover, Fla. R. Civ. Pro. Rule 1.150 (a) (**Sham Pleadings**) states in pertinent part (emphasis added): **Motion to Strike**… if the motion [to strike] is sustained, the pleading to which the motion is directed shall be stricken.

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Count V ***Against the President Fails As a Matter of Law***

86. In Count Five, Trespassing, is the most offensive, defamatory, libelous and meritless of the three; Plaintiffs ludicrously allege in the Complaint that bringing a *plate of food* to Mrs. Lanier constitutes trespassing (again at Complaint at Exhibit "A", the apparently self-serving letter written by Plaintiff James R. Owens).

87. Specifically, Plaintiffs allege that [*o*]*n October 2, 2018, Diana Kuka, President of the Association, entered Plaintiffs' unit without Plaintiffs' permission* ***(Exhibit "A")*** (Complaint, at ¶s 9 and 93).

88. The Complaint, at its Exhibit "A", a self-serving letter written by Plaintiff James R. Owens, alleges that the President *proceeded down the hallway to [Plaintiff James Owens'] mother's room carrying a plate of food* and that, when Plaintiff James Owens called his mother [Mrs. Lanier], [*s*]*he said she was fine and that Diana Kuka had brought over a plate of food.*

89. In what universe exactly does bringing *over a plate of food* constitute trespassing when the only person in the Unit *said she was fine*, by the Complaint's own admission at its Exhibit "A"?

90. Of course, by the Complaint's own admission at its Exhibit "A", the late Mrs. Lanier (see Paragraph 12 and footnote 4, *supra*) was the only witness present in the Unit at the time in question. It will be impossible for this Court to ascertain the existence of proof of entry without consent without her testimony.

91. Moreover, having failed to allege established ownership, homestead or residence of the unit in question on or about October 2, 2018, the time material to Count Five, Plaintiffs' have failed to state a cause of action such that this count should be dismissed.

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92. Furthermore, Plaintiffs allege no damages and disingenuously argue that bringing *over a plate of food* constitutes trespassing, Plaintiffs' counsel have mis-cited and misrepresented caselaw to this Honorable Court for nominal damages such that sanctions against Plaintiffs' legal counsel are appropriate.

93. Specifically, Plaintiffs' counsel misrepresent the holding in *Leonard v. Nat Harrison Assocs., Inc.,* 122 So.2d 432 (Fla. 2d DCA 1960), in ¶ 97 of the Complaint, stating that *Plaintiffs are entitled to recover damages associated with the trespass* and also that *(even no actual damages are proven, the plaintiff is still entitled to* ***nominal damages*** *and costs).* (emphasis added).

94. *Leonard* is of no import here. There, as a direct and proximate result of the wrongful breaking and entering by the defendant, the breaking of an enclosure and damage to the steps of the plaintiff occurred and plaintiff subsequently fell and sustained great bodily injury. The Court found that the plaintiff is entitled to at least nominal damages (for the aforementioned damage to the enclosure and steps) on proof of entry without consent.

95. Here there are no damages, no subsequent injury, just an act of neighborly love.

96. Based on the foregoing, Count Five should be summarily dismissed as having no basis in law or in fact. Therefore, Plaintiffs' counsel should be sanctioned.

ADDITIONAL GROUNDS TO DISMISS THE MATTER

Dismissal is Appropriate for Failure to Plead Ultimate Facts, For Pleading Conclusions of Law Which Require a More Definite Statement

97. Lastly, the Complaint should be dismissed for failure to plead ultimate facts and pleading utterly confusing allegations, such that the Complaint should be dismissed in order to provide a more definite statement.

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98. Parenthetically, Plaintiffs allege that the Association President *has impeded Plaintiffs' applications, has otherwise stonewalled and ignored Plaintiffs' renovation requests, and has otherwise engaged in conduct to deprive or prevent Plaintiffs from performing interior construction upgrades to their unit*. (See generally Complaint at ¶s 22, 68, 84). These allegations are conclusory and are **not** accompanied by any ultimate facts to explain how the President has done so.

99. Also, Plaintiffs allege that the President: *through her actions, dominated and controlled the Association and the employees working there that perform services on the grounds where Plaintiffs' unit is located* (Complaint, at ¶ 78); *through her actions, took it upon herself to dominate and control the Association's decision-making process in all Approval Request Forms submitted by Plaintiffs* (Complaint, at ¶ 79)*; used her position to deliberately cause the the Association to impede the processing of Plaintiffs' applications* (Complaint, at ¶ 80); *engaged in bullying and pressure tactics, which included trespassing in Plaintiffs' property*... (Complaint, at ¶ 85); *has manufactured purported violations of the governing documents and rules, to create a harassing letter campaign, resulting in Plaintiffs receiving numerous letters by attorneys all acting at* [the President's] *instance* [sic.] (Complaint, at ¶ 87).

100. Said allegations beg the questions as to how the President conducted the alleged domination and control acts, or the bullying and pressure tactics?; what proof is there of any trespassing?; what purported violations of the [Association's] rules are being referenced and where are said rules attached to the Complaint?; how many letters constitute a letter *writing campaign*?; where are all the *campaign* letters attached to the Complaint?; and how are the Association's attorneys acting and for what purpose?

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101. Based on the foregoing, there are no ultimate facts whatsoever in the foregoing paragraph, no proof to support any of the allegations. Instead, Plaintiffs have only stated mere conclusory of law, conspiracy theories, and other nonsense for which a response cannot formulated. Such allegations must be stricken and the Complaint summarily dismissed.

102. Plaintiffs go on to allege that [*w*]*ith respect to Plaintiffs… the Association's independent existence is in fact non-existent*. (Complaint, at ¶ 83) Did the Association's existence cease with respect to the Plaintiffs only? Does it still exist for others and who would that be? Is it being alleged, really, that the Association turns into the "*Invisible Man*" only when the Plaintiffs appear?

103. Furthermore, ironically, while on the one hand, the Complaint singles out the President therein, on the other hand, through its Exhibit "G" (February 24, 2022 police report), Plaintiff James Owens alleges that *there has been an ongoing feud between Owens* ***and the condo board***. (emphasis added). Is his feud with the entire board, or just the President?

104. The Complaint, at ¶ 82, speculatively alleges that, *at one point* (but when exactly?) the President *attempted to use her position to convince [Plaintiff] James Owens' mother to deed the property to* the President, while, allegedly, *Plaintiffs were able to prevent* [the President] *from obtaining their family property* (how exactly?), whereas, on the other hand, on October 2, 2018, the President allegedly had James Owens' mother *sign some documents* and, subsequently, the next morning the President *left without returning the documents* (Complaint at its Exhibit "A", an apparently self-serving letter written by Plaintiff James R. Owens).

105. Again, the confusing maze *supra* is so bewildering and convoluted that an answer to it cannot possibly be formulated.

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106. There is also the matter of Exhibit "A" attached to the Plaintiffs' Complaint. Two (2) pages of that Exhibit are in a foreign language, possibly Spanish. This action is brought before a Florida State Court, located in the United States of America and which conducts its business in English. Therefore, said portion of Exhibit "A", which is part of the Complaint, must also be stricken as its contents are not made known to this Honorable Court.

107. The allegations within the Plaintiffs' Complaint refer generically to allegations of Statutory Liability or piercing the corporate veil – alter ego, but do not set forth with any specificity how those allegations relate to any alleged acts, omissions, violations, negligence, or breach attributable to the Association and the President. Florida's pleading rule forces plaintiffs to recognize the elements of their cause of action and determine whether they have or can develop the facts necessary to support it, which avoids a great deal of wasted expense to the litigants and unnecessary judicial effort. *Continental Baking Co. v. Vincent*, 634 So. 2d at 244.

108. The Plaintiffs' Complaint does not provide enough information or factual allegations to allow the Association or its President to understand the basis of the Plaintiffs' allegations or to adequately respond to the Plaintiffs' claims. The Plaintiffs must state their pleadings with sufficient particularity for a defense to be prepared. *Horowitz*, 855 So. 2d 173 (citing *Arky*, 537 So. 2d 561).

109. The complaint must set out the elements of an action and the facts that support them so that the court and the defendant can clearly determine what is being alleged. *Barrett v. City of Margate*, 743 So. 2d 1160, 1162 (Fla. 4th DCA 1999). It is insufficient to plead opinions, theories, legal conclusions, or argument. *Id*. at 1163. As such, the Plaintiffs have failed to meet the applicable pleading requirements. *Id*. at 1162.

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110. As such, the Plaintiffs again failed to meet the applicable pleading requirements. *Id.* at 1162; *see also Doyle*, 210 So. 2d at 494.

111. The Plaintiffs' allegations are so vague and ambiguous that the Association cannot reasonably frame a response or prepare a defense. *Horowitz*, 855 So. 2d at 173 (citing *Arky*, 537 So. 2d 561). At a minimum, the Plaintiffs should provide a more definite statement of exactly what it is the Association and its President did wrong, when, and how they are in any way potentially liable to the Plaintiffs.

112. Accordingly, the Plaintiffs' Complaint must be dismissed for failing to state a cause of action, for failing to plead ultimate facts, thusly, failing to comply with the Florida Rules of Civil Procedure 1.110(b)(2). In the alternative, the Association requests a more definite statement pursuant to Florida Rule of Civil Procedure 1.140(e). The Plaintiffs should be required to provide a more definite statement clarifying and supplementing the Complaint as requested herein.

WHEREFORE, Boca View Condominium Association, Inc., its President, Diana Kuka, respectfully requests that the Court dismiss Plaintiffs' entire Complaint, with prejudice, sanction James Owens a.k.a James R. Owens and Amelia Owens a.k.a./f.k.a. Amelia M. Rodriguez (jointly "Owenses" or "Plaintiffs") and their legal counsel, Bart Thomas Heffernan, Esq., William D. Beamer, Esq. as well as any law firms they are associated with including, but not limited to, Lawstaff, Inc., and grant such other and further relief as this Court deems appropriate and just.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of June, 2022, that a true and correct copy of the foregoing was filed with the Court through the use of the Florida Courts eFiling Portal, and has been served upon all parties via the Florida Courts eFiling Portal eService in accordance with rule 2.516, Florida Rules of Judicial Administration.

By:_____
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EXHIBIT "A"

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West Palm Beach, Florida 33401

Becker

August 17, 2021

VIA EMAIL: JRO4@SBCGLOBAL.NET
AND CERTIFIED MAIL # 9414 8149 0237 0668 0255 11
RETURN RECEIPT REQUESTED

James R. and Amelia M. Owens
1000 Spanish River Rd., Apt. 2V
Boca Raton, FL 33432

Re: Unapproved, Illegal Asbestos Removal; Unapproved, Illegal Unit Renovations; Nuisance

Dear Mr. and Mrs. Owens:

Please be advised that this Firm represents **Boca View Condominium Association, Inc.** (the "Association").

It has come to our attention that you intended to begin removing the popcorn ceiling in your unit without obtaining Association approval, without obtaining a building permit, and without following Federal and State requirements for removing asbestos. Asbestos exposure and contamination is a health and safety hazard, especially since you left your air conditioning unit on and your air conditioning and exhaust vents open, which may spread the asbestos contamination to other units, adjacent hallways and/or other building common areas. In addition to violating the governing documents, as set forth below, you hiring the Patch Boys to remove asbestos or even conduct testing (as you allege) violates Florida Statutes, Section 469.003, which states:

> (1) No person may conduct an asbestos survey, develop an operation and maintenance plan, or monitor and evaluate asbestos abatement unless trained and licensed as an asbestos consultant as required by this chapter.
>
> (2) No person may prepare asbestos abatement specifications unless trained and licensed as an asbestos consultant as required by this chapter.

> (3) No person may conduct asbestos abatement work unless licensed by the department under this chapter as an asbestos contractor, except as otherwise provided in this chapter.

You also started other renovation work in your unit without obtaining Association approval or a building permit, including demolition and installation of tile flooring, and submitted false documentation concerning the contractor and scope of work when attempting to obtain Association approval. These are violations of Paragraphs 10(a)(2), (6), (10), (14), (15), and (21) of the Declaration of Condominium (the "Declaration"), which provide in pertinent part:

> (a) Specific Use Restrictions. No Unit Owner…shall:
>
> (2) Make any structural additions or alterations (except the erection or removal of non-support carrying interior partitions wholly within the Unit) to any Unit…without the prior written approval of the Board of Directors;
>
> (6) Make any use of a Unit which violates any laws, ordinances or regulations of any governmental body;
>
> (10) Commit or permit any nuisance, or illegal act in his Unit or in or on the Common Elements, Limited Common Elements or on the Association Property;
>
> (14) … each Unit…shall at all times be kept in a clean and sanitary condition.
>
> (15) Allow any…health hazard to exist;
>
> (21) Install in a Unit…any hard surfaced flooring without adequate padding or sound proofing materials, which shall be approved in advance by the Board of Directors;

Removing carpet, partially installing tile and leaving the remaining bare concrete slab exposed, and partially removing the popcorn ceiling, is also a violation of Paragraph 11(b) of the Declaration, which requires each owner to "maintain, repair and replace…everything within the confines of his Unit…"

Installing tile flooring without Association approval also violates Rule 6 of the Rules and Regulations, which states:

> 6. NOISE: Unless expressly permitted in writing by the Association, no floor covering shall be installed in the Unit other than carpeting, ceramic tile, marble or other floor covering installed by the Developer. If any such hard surface flooring is installed in a unit, it must be set upon a sound proofing bed approved by the Developer or the Association.

In order to draw attention away from your illegal and unapproved work, you called Code Enforcement and filed a false report alleging the Vice President of the Association and another neighbor were doing renovations in their units without a permit. You continually and repeatedly threaten and harass the Association's President, knock on the door of her private residence, incessantly e-mail and call and send text messages to her personal number and send letters to her private address demanding an approval for your illegal and unapproved work. These are nuisances and illegal acts in violation of Paragraph 10(a)(10) of the Declaration of Condominium, as set forth above.

You illegally installed a Ring video doorbell outside your unit front door on the common elements. That is a violation of Paragraphs 10(a)(4) and (5) of the Declaration, which prohibit changing the appearance of any exterior wall or any exterior surface and prohibit maintaining any equipment on the exterior of the building, and a violation of Paragraph 10(a)(19) of the Declaration, which prohibits using the common elements in such manner as to abridge the equal rights of other owners, including privacy rights.

Therefore, demand is made for you to immediately cease any and all unit renovations, alterations, improvements, construction and installations, time being of the essence, and proceed to obtain all required building permits for any and all work in your unit, submit a true architectural review board form requesting approval for any and all work in your unit with all supporting documentation, such as, but not limited to: the fully executed contract with each contractor performing work stating the scope of work and materials to be used, contractor's insurance certificate showing coverage for worker's compensation and showing the Association as a named insured, the contractor's license and full contact information, and all documentation submitted to the city to obtain building permits for all work to be done, including asbestos remediation and any subsequent clean up necessary for the adjacent vents and structures. All communications regarding this matter must be directed only to Pointe Management, the Association's management company. Further, demand is made for you to remove the Ring video doorbell within 5 days from the date of this letter, time being of the essence. Additionally, you must immediately cease and desist threatening and harassing Board members and other neighbors. Last, demand is made that you allow the Association's representatives to inspect and confirm compliance of any work being performed in your unit. Failing or refusing to cure the violations as set forth above by the deadline will leave no alternative, but to file a petition for arbitration, demand presuit mediation, or bring

other legal action against you to force compliance with the governing documents and statutes. Such legal action will expose you to liability for the Association's costs and attorney's fees, in addition to your own.

It is hoped that further legal action will not be necessary.

Sincerely,

Robert Rubinstein

Robert Rubinstein
For the Firm
RR/asm

cc: Board of Directors (via email)

Addressee (via regular U.S. Mail)

Addressee, PO Box 83, Boca Raton, FL 33429-0083 (via certified mail # 9414 8149 0237 0668 0255 28 return receipt requested and regular U.S. Mail)

Addressee, 1260 SW 2nd Ave., Boca Raton, FL 33432-7117 (via certified mail # 9414 8149 0237 0668 0255 35 return receipt requested and regular U.S. Mail)