

**IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
LEE COUNTY, FLORIDA** **CIVIL ACTION**

**JOHN J. KLOCKO III and
CYNTHIA J. WHITE, individually and
on behalf of all persons similarly situated,**

Plaintiffs,

**09 – CA – 004318
CASE NO. Judge: McHugh, Michael T**

v.

CLASS REPRESENTATION

**BONITA BAY PROPERTIES, INC. and
DAVID LUCAS,**

Defendants.

CLASS ACTION COMPLAINT

Plaintiffs, JOHN J. KLOCKO III and CYNTHIA J. WHITE, individually and on behalf of all persons similarly situated, sue the Defendants Bonita Bay Properties, Inc. (“BBP”) and David Lucas (“Lucas”) and allege as follows:

Introduction

1. BBP is a Florida corporation formed in 1984 to develop the Bonita Bay community located in Lee County. Today, the Bonita Bay community is virtually sold out. Nearly 3,000 residential units and 2,000 “club” memberships have been purchased for many hundreds of millions of dollars by residents who relied on the Defendants’ promises and sales pitches, which have turned out to be false.

2. From its inception, the Bonita Bay community was planned as a residential and private membership country club and golfing community, and the Defendants eventually built and opened five golf courses and related recreational facilities in conjunction with the community. However, merely purchasing residential property within

the community did not entitle one to play any of the golf courses or use any of the recreational facilities. Additional payment of an "initiation deposit" for membership in the "club" was required to enjoy the golf courses and recreational facilities.

3. To induce individuals to purchase real estate and memberships in the "club," Defendants engaged in a scheme of unfair, unlawful, and deceptive business practices by issuing promissory notes to the members in exchange for "initiation deposits" and falsely promising that the "initiation deposits" would be subject to "instant refundability" or "30-day refundability" upon the death or resignation of a member.

4. However, after collecting many hundreds of millions of dollars from sales of real estate and "club" memberships, Defendants announced that they would no longer honor the promise of "instant refundability" or "30-day refundability" that had formed the basis of the bargains at the time of the sales, and they proceeded to default on their legal obligations to repay the promissory notes.

5. Lucas "actively participated in" and had a significant "measure of control over" BBP's deceptive and unfair practices. In a letter dated January 6, 2007, a copy of which is attached as Exhibit A, Mr. Lucas claimed credit for establishing the "policy of 30-day refundability of membership deposits," and in a letter dated November 7, 2008, a copy of which is attached as Exhibit B, he announced the suspension of that policy.

6. Furthermore, without providing any notice to the holders of the promissory notes and without their consent, Defendants encumbered the assets of the "club" by pledging and repledging those assets as part of the collateral for bank loans totaling approximately \$120,000,000, knowing that this mortgage would interfere with the eventual conversion of the "club" to a member owned club. Defendants then used the proceeds of

the bank loans to promote their other enterprises, rather than applying the proceeds for the benefit of the “club.” By borrowing excessively and irresponsibly and by pledging all the assets of the “club” in this manner, Defendants seriously diminished the value of the promissory notes to the detriment of the members. This deceptive practice is inconsistent with the representations made to the members to induce them to purchase their properties and memberships and inconsistent with the terms that were agreed upon.

7. The Defendants, in addition to receiving more than one hundred million dollars (\$100,000,000) for “initiation deposits,” also received millions of dollars in dues from members each year, along with substantial other revenues. Defendants then misapplied these “initiation deposits”, dues and other revenues generated by the “club” for their own purposes. Rather than utilizing those funds exclusively to benefit the “club” that generated them, Defendants used portions of the funds to promote their other ill-fated ventures.

8. Moreover, Defendants’ references to the “Bonita Bay Club” were false and misleading in themselves, as the “Bonita Bay Club” did not even exist as a separate legal entity with segregated assets, liabilities and a bank account. The “initiation deposits”, revenues and profits of the “club” were commingled with BBP’s other funds and applied for various uses, including uses wholly unrelated to the “club” facilities within the Bonita Bay community.

9. As explained below, Defendants’ conduct repudiated the terms of the promissory notes, breached fiduciary duties, violated Florida’s Deceptive and Unfair Trade Practices Act, and resulted in unjust enrichment.

10. Plaintiffs have retained the undersigned law firms to represent them in this action and have agreed to pay a reasonable fee for the legal services rendered.

The Parties

11. Plaintiff John J. Klocko III is a resident of Lee County, Florida who purchased real estate in the Bonita Bay community and became a member of the "club" in 2001, and is the owner of a \$95,000 promissory note issued by BBP, dated April 30, 2001.

12. Plaintiff Cynthia J. White is a resident of Lee County, Florida who purchased real estate in the Bonita Bay community and became a member of the "club" in 1996, and is the owner of a \$57,500 promissory note issued by BBP, dated July 16, 1996.

13. BBP is a Florida corporation with its principal place of business in Lee County, Florida. BBP owns and operates the "club" facilities within the Bonita Bay community.

14. Lucas was the Chairman of BBP at all relevant times.

Jurisdiction and Venue

15. This is a claim for damages, declaratory relief, injunctive relief and other supplemental relief, where the amount in controversy exceeds \$100,000,000.

16. Venue is proper in Lee County because one or more of the Defendants resides in Lee County, the property at issue is located in Lee County and the causes of action accrued in Lee County.

Background Facts: The Sales Pitch

17. For approximately twenty years, Defendants enjoyed phenomenal success in selling their high-end golf course community known as Bonita Bay. The community has over 3,000 residences, and only a small number of lots remain unsold. Over 2,000 members paid "initiation deposits" to join the "club" within the community.

18. One of the principal reasons for Defendants' phenomenal success in a highly competitive marketplace was its focus on marketing a country club lifestyle with an attractive financial arrangement that was rare — if not unique — among country club communities.

19. Specifically, Defendants induced individuals to purchase homes with the promise that they would have access to extensive club facilities, including five golf courses, tennis courts, a swimming pool, and two clubhouses (the "Facilities"),¹ if they paid an "initiation deposit" to join the "club". Defendants further promised that the "initiation deposits," which were obligations of BBP evidenced by promissory notes, would be fully refundable immediately following the death or resignation of the member.

20. The promise of "instant refundability" of the initiation deposits was an extraordinarily effective sales pitch because it was far more attractive than terms offered by competing private membership country club communities in Florida and elsewhere. Indeed, most, if not all, other upscale country club communities require nonrefundable deposits, forfeiture of all or a significant part of a deposit upon resignation of a membership, or significant limitations upon obtaining refunds (such as a requirement that one or more new members join before a resigning member may obtain a refund).

21. In addition to promising "instant refundability" to induce sales, Defendants also pitched their own purported integrity, as well as their commitment to the best interests of the members. According to its website, the Bonita Bay Group, which includes BBP, "is

¹ The legal description of the Facilities is set forth on Exhibit E to this Complaint.

committed to four enduring core values” including “to conduct ourselves with integrity in everything we do.” The website goes on to assure prospective purchasers that “integrity is not only the cornerstone of our company philosophy, it guides everything we do. . . . It means keeping our promises, and exceeding expectations, every single day.” Defendants further pledged “never to do anything other than the right thing by our residents.”

22. In sharp contrast to their representations and stated “core values,” Defendants ignored the interests of the members, defaulted on their legal obligations, failed to fulfill their promises, and disregarded the pledge to “never do anything other than the right thing by our residents,” as explained below.

The False Promise of “Instant Refundability”

23. The unique marketing scheme of “instant refundability” was memorialized in a variety of documents. Upon payment of their “initiation deposits,” members were issued promissory notes in which BBP promised to repay the full amount of the “initiation deposit” upon the “resignation of the Payee as a member of Bonita Bay Club...even if such event occurs prior to the Maturity Date.” Copies of two representative promissory notes, which were issued to Plaintiffs, are attached as Exhibit C and Exhibit D.

24. In the “Rules and Regulations for the Bonita Bay Club,” Defendants described the arrangement that is reflected in the promissory notes, in its own words, as providing for “instant refundability of the membership deposits evidenced by the [promissory note].”

25. However, after selling many hundreds of millions of dollars worth of real estate and memberships with the promise of “instant refundability,” and after issuing more than one hundred million dollars (\$100,000,000) worth of promissory notes, Defendants, in a letter dated November 7, 2008, announced their unilateral decision that “[e]ffective today,

we are amending our membership plans to suspend the immediate refund of membership deposits....” A copy of that letter is attached as Exhibit B. Through this letter, Defendants effectively repudiated their obligations under the promissory notes issued to the members.

26. Subsequently, at a meeting on May 21, 2009, the “Chief Restructuring Officer” for BBP, Tim Boates, announced unequivocally that BBP “will never write another check to refund another membership.” In a follow up letter dated May 27, 2009 to “All Bonita Bay Group Club Members,” Mr. Boates wrote: “I am confirming that BBG is not able to make any such refunds of club memberships, either those already requested or any that may be requested in the future.” Thus, Defendants have anticipatorily and materially breached all of the promissory notes held by members.

27. In summary, the unique marketing concept of “instant refundability,” having served its purpose of inducing sales worth many hundreds of millions of dollars, has now been repudiated by BBP in a fraudulent and unlawful attempt to retain all of the money it obtained from members regardless of what it previously promised in its sales pitch.

The Ponzi Scheme

28. Although Defendants collected in excess of \$100,000,000 in “refundable deposits” and issued promissory notes in a like amount, Defendants failed to establish reserves or create a fund from which reasonably foreseeable demands of members for refunds could be paid. Instead, the members’ funds were used for Defendants’ own purposes, both related and unrelated to the club. As a result, Bonita Bay’s unique instant refundability policy was impractical and unsustainable.

29. Because Defendants did not maintain adequate reserves, their ability to refund “initiation deposits,” as promised, depended to a large extent on the receipt of

additional "initiation deposits" from new members, and in that respect Defendants' operation constituted or resembled a classic Ponzi scheme in which investors are repaid with money from subsequent investors and which collapses when the flow of money from new investors stops.

30. Because Defendants failed to maintain adequate reserves to refund "initiation deposits," as promised, Defendants knew or should have known that when a downturn in the real estate market occurred – which was inevitable given the cyclical nature of the real estate market, particularly in Southwest Florida – they would be unable to perform their obligations to the members.

31. In marketing the real estate, club memberships and promissory notes, Defendants failed to disclose that they would not maintain adequate reserves to pay refunds, as promised, and that funds paid by members would be used for Defendants' own purposes, including investments and operations unrelated to the club. Nor did Defendants disclose that if the flow of funds from the payment of "initiation deposits" by new members ever stopped, Defendants would have difficulty repaying the funds, as promised, that they had received from existing members.

Class Representation Allegations

32. This action is brought by Plaintiffs as a class action, on their own behalf and on behalf of all others similarly situated who are members of the "club" and hold promissory notes from BBP that are dated prior to January 1, 2004.

33. The exact number of members of the class, as identified and described in this Complaint, is not known, but it is estimated to be in excess of 1,500 members. The class is so numerous that joinder of individual members in this action is impracticable.

34. The claims of the representative parties raise questions of law and fact that are common to the claims of each member of the class and which predominate over any questions affecting only individual members. These common questions include:

- a) Whether Defendants have the right to (i) rescind promises to refund each member's "initiation deposit" upon the agreed terms, (ii) default on the repayment of the promissory notes issued to members of the "club"; (iii) encumber the Facilities with debt without notice to or approval by the members; and (iv) use the proceeds of the bank loans and the revenues, profits and initiation deposits of the "club" for purposes unrelated to the Facilities;
- b) Whether the Court should impose (i) a constructive trust on all revenues and profits of the "club" to ensure that those funds are used solely for the benefit of the Facilities and (ii) a constructive trust or an equitable lien on the Facilities in favor of the members;
- c) Whether Defendants violated Florida's Deceptive and Unfair Trade Practices Act by (i) rescinding promises to refund each member's "initiation deposit" upon the agreed terms, (ii) repudiating the promissory notes issued to members of the "club"; (iii) encumbering the Facilities with debt without notice to or approval by the members; and (iv) using the proceeds of the bank loans for which the Facilities were pledged, along with the revenues, profits and initiation deposits of the "club," for purposes unrelated to the Facilities.

35. The claims of Plaintiffs are typical of the claims of all members of the class as

they purchased memberships in the “club” and received promissory notes under circumstances substantially similar to the circumstances under which other members of the class purchased memberships and received promissory notes. Defendants have declared that they will no longer honor the promise of “instant refundability” as to all members of the class, including Plaintiffs. Moreover, all members of the class, including Plaintiffs, are impacted by the fact that Defendants have encumbered the Facilities to the serious detriment of the members, who hold the promissory notes. By proving their own claims, Plaintiffs will presumptively prove the claims of the class, and the remedies they seek will benefit all members of the class.

36. Plaintiffs, as representative parties, can fairly and adequately protect and represent the interests of each member of the class because: they have interests in common with the proposed class members; they are determined to obtain an appropriate resolution of the issues; they have support and assets available to them to prosecute this case to a conclusion, and they are represented by experienced counsel who will prosecute the case appropriately.

37. The claims in this Complaint may be maintained on behalf of the class pursuant to Rule 1.220(b), Florida Rules of Civil Procedure, because the prosecution of separate claims would create a risk of either: (a) inconsistent or varying adjudications concerning individual members of the class which could establish incompatible standards of conduct for the parties opposing the class; or (b) adjudications concerning individual members of the class which might, as a practical matter, be dispositive of the interests of other members of the class who are not parties to the adjudications, or substantially impair or impede the ability of other members of the class who are not parties to the adjudications

to protect their interests.

38. Additionally, the claims may be maintained as a class because Defendants have taken actions, such as declaring that they will no longer honor the promises of “instant refundability,” which are generally applicable to all members of the class, thereby making declaratory relief concerning the class as a whole appropriate.

39. Furthermore, the questions of law or fact common to the claims of Plaintiffs and the claims of each member of the class predominate over any questions of law or fact affecting only individual members of the class, and class representation is superior to other available methods for the fair and efficient adjudication of the controversy.

COUNT I

DECLARATORY JUDGMENT – PROMISSORY NOTES

40. Plaintiffs incorporate the allegations set forth above in Paragraphs 1 through 39.

41. The statement by Defendants that they were amending the membership plans “to suspend the immediate refund of membership deposits,” along with the statement by the agent of Defendants that it “will never write another check to refund another membership,” constitute an anticipatory repudiation of the promissory notes issued to Plaintiffs by BBP and of the repeated promises by Defendants and their agents that “initiation deposits” would be repaid in full immediately following the death or resignation of a member.

42. Defendants have taken the position that they have the right to market their products with the promise of “instant refundability” and then rescind that promise after the sales have been made and the promissory notes issued.

.. ..

43. Plaintiffs contend that BBP has no right to rescind the promises of instant refundability and repudiate the terms of the promissory notes.

WHEREFORE, Plaintiffs demand judgment declaring that:

- A. The promissory notes are valid and enforceable,
- B. The promissory notes become due upon resignation or death of the member who holds the note; and
- C. BBP is obligated to pay the promissory notes in accordance with their terms.

Plaintiffs also demand supplemental relief as may be appropriate, along with an award of costs and such other relief as the Court deems to be fair and equitable.

COUNT II

DECEPTIVE AND UNFAIR TRADE PRACTICES ACT

44. Plaintiffs incorporate the allegations set forth above in Paragraphs 1 through 39, 41 and 42.

45. Section 501.204, Florida Statutes, which is part of Florida's "Deceptive and Unfair Trade Practices Act" (FDUTPA), provides that: "Unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."

46. According to PNR, Inc. v. Beacon Property Management, Inc., 842 So.2d 773, 777 (Fla. 2003), "an unfair practice" is "one that offends established policy and one that is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." In that case, the Florida Supreme Court further states that a prohibited deception occurs if there is a "representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."

47. The conduct of BBP, as alleged herein, is unfair and deceptive.

48. Individuals who “actively participated in or had some measure of control over the corporation’s deceptive practices” are individually liable pursuant to FDUTPA. K.C. Leisure, Inc. v. Haber, 972 So.2d 1069 (Fla. 5th DCA 2008).

49. Lucas “actively participated in” and had a significant “measure of control over” BBP’s deceptive and unfair practices. In a letter dated January 6, 2007, a copy of which is attached as Exhibit A, Mr. Lucas claimed credit for establishing the “policy of 30-day refundability of membership deposits,” and in a letter dated November 7, 2008, a copy of which is attached as Exhibit B, he announced the suspension of that policy.

50. As a result of Defendants’ violations of FDUTPA, Plaintiffs have suffered substantial damages.

51. Section 501.211(2), Florida Statutes, provides that Plaintiffs may recover attorneys’ fees from Defendants for violations of FDUTPA.

WHEREFORE, Plaintiffs demand judgment against Defendants for damages, costs, attorneys’ fees and such other relief as the Court deems to be fair and equitable.

COUNT III

BREACH OF FIDUCIARY DUTY

52. Plaintiffs incorporates the allegations set forth above in Paragraphs 1 through 39, 41 and 42.

53. Plaintiffs paid “initiation deposits” to Defendant BBP with the understanding that such deposits would be refunded immediately following the death or resignation of a member or, at the option of the member, ultimately applied towards the purchase of the “club” Facilities.

54. By paying “initiation deposits” to Defendant under these circumstances, Plaintiffs reposed trust and confidence in Defendant BBP.

55. By accepting the “initiation deposits” under these circumstances, Defendant BBP accepted the trust and confidence that Plaintiffs reposed in it.

56. In furtherance of the relationship of trust and confidence, BBP assured Plaintiffs that it would always act with “integrity” and that it would “never do anything other than the right thing by our residents.”

57. The conduct of Defendant BBP, as set forth herein, has abused the relationship between the parties and resulted in the unjust enrichment of Defendant BBP at the expense of Plaintiffs.

58. Plaintiffs lack an adequate remedy at law.

59. A constructive trust or equitable lien should be imposed on the Facilities, and a constructive trust should also be imposed on all dues, revenues and profits of the “club” to ensure that all such funds are utilized for the sole benefit of the club and its Facilities. In this regard, all future dues and other amounts paid by Plaintiffs and other members of the class to the club should be paid into the registry of the Court and disposed of in strict accordance with the constructive trust.

WHEREFORE, Plaintiffs demand judgment against Defendant BBP: (a) imposing a constructive trust or equitable lien on the Facilities, as well as a constructive trust on all revenues and profits of the “club” to ensure that said funds are utilized solely for the benefit of the club and its Facilities, (b) ordering that all future dues and other amounts paid by Plaintiffs (and other members) to the “club” be deposited into the registry of the Court, and (c) granting any other relief the Court deems to be fair and equitable.

COUNT IV

CONSTRUCTIVE FRAUD

60. Plaintiffs incorporate the allegations set forth above in Paragraphs 1 through 39, 41, 42, and 53 through 59.

61. As alleged above, Defendant BBP had a fiduciary relationship with the members.

62. Defendant BBP abused that relationship.

63. As a result of BBP's abuse of the fiduciary relationship, the members have suffered damages but have no adequate remedy at law.

WHEREFORE, Plaintiffs demand judgment against Defendant BBP: (a) imposing a constructive trust or equitable lien on the Facilities, as well as a constructive trust on all revenues and profits of the "club" to ensure that said funds are utilized solely for the benefit of the club and its Facilities, (b) ordering that all future dues and other amounts paid by Plaintiffs (and other members) to the "club" be deposited into the registry of the Court, and (c) granting any other relief the Court deems to be fair and equitable.

COUNT V

UNJUST ENRICHMENT

64. Plaintiffs incorporate the allegations set forth above in Paragraphs 1 through 39, 41, 42, and 53 through 59.

65. By paying the initiation deposits, dues and other amounts to Defendant BBP, Plaintiffs have conferred a benefit on the Defendant BBP.

66. Defendant BBP voluntarily accepted and continues to retain the benefit conferred.

67. The circumstances, as described above, render the Defendant's retention of the benefit inequitable without paying the value of the benefit to the Plaintiffs.

68. Plaintiffs have been damaged by Defendant BBP's conduct.

WHEREFORE, Plaintiffs demand judgment against Defendant BBP for damages, costs and such other relief as the Court may deem to be fair and equitable. Plaintiffs also respectfully request that the Court (a) impose a constructive trust or equitable lien on the Facilities, as well as a constructive trust on all revenues and profits of the "club" to ensure that said funds are utilized solely for the benefit of the club and its Facilities, and (b) grant any other relief the Court deems to be fair and equitable.

COUNT VI

INJUNCTION

69. Plaintiffs incorporate the allegations set forth above in Paragraphs 1 through 39, 41, 42, and 53 through 59.

70. The conduct of Defendant BBP has irreparably harmed Plaintiffs, and Defendant's misapplication of the revenues, profits and initiation deposits generated by the "club" will continue to inflict irreparable harm unless equitable relief is issued to prevent this improper conduct.

71. Plaintiffs lack an adequate remedy at law.

72. The allegations contained herein establish a clear legal right to the relief requested, and the requested relief will not be contrary to the interests of the general public.

WHEREFORE, Plaintiffs demand judgment against Defendant BBP: (a) ordering that all future dues and other amounts paid by Plaintiffs (and other members) to the

“club” be deposited into the registry of the Court to ensure that said funds are utilized solely for the benefit of the club and its Facilities; (b) forbidding Defendant BBP from closing the Facilities; (c) awarding costs; and (d) granting any other relief the Court deems to be fair and equitable.

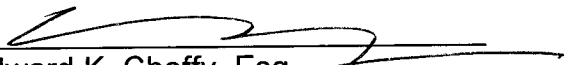
Notice of Intention to Add Claim for Punitive Damages

Plaintiffs give notice of their intention to seek leave to add a claim for punitive damages in accordance with Florida law.

JURY DEMAND

Plaintiffs demand a trial by jury.

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