IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

FIDDLESTICKS COUNTRY CLUB, INC., a Florida not for profit corporation,

Appellant,

v.

PERRY A. POTTER, LEE SHAW, LOWELL D. HAMRIC AND KATHERINE M. KAMRIC, LLOYD MULLIN AND NANCY JAMIESON-MULLIN, PHILLIP ALLEN, JR., JEFFREY LITTLE, ALAN FOSTER, CORKEY GREY, DONNA MULLEN, ROCKY PASSINTINO, VERNON SMEDLEY, WILLIAM WEFEL, AND JEFFREY WOOD, each individually,

Appellees.
_____/

Case No. 2D21-2022

L.T. Case No. 2019-CA-4901

BRIEF *AMICUS CURIAE* OF NATIONAL CLUB ASSOCIATION IN SUPPORT OF APPELLANT

Frank A. Shepherd, Esq.
GRAYROBINSON, P.A.
333 S.E. 2nd Avenue, Suite 3200
Miami, Florida 33131
frank.shepherd@gray-robinson.com
T: (305) 416-6880
F: (305) 416-6887
Attorney for Amicus Curiae National Club Association

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IDENTITY AND INTEREST OF AMICUS CURIAE

The National Club Association (NCA) is the national trade association for private clubs in the United States. NCA was founded in 1961 to represent the interests of private clubs before Congress and administrative agencies in Washington, DC. Since then, it has expanded its focus to provide a wide range of resources and services for private clubs covering all areas of club operations and governance. For example, during the Coronavirus pandemic, NCA held more than 50 webcasts to assist NCA members as well as anyone in the private club industry regardless of NCA membership status. Through quarterly, weekly, and bi-weekly publications, conferences, and collaboration with other business organizations such as the Club Management Association of America (CMAA) and the Professional Golfers' Association (PGA), NCA assists club managers and volunteer leadership on all aspects of club operations and governance. NCA currently has a membership of more than 430 clubs, 63 of which are in the State of Florida. Further detail on the extent of operations and services provided by NCA can be found on its website, www.nationalclub.org

The issue in this case is whether a By-Law provision in effect at the time the Plaintiffs, equity members of the Fiddlesticks Country Club, purchased their membership that stated special assessments would be refunded upon resignation can be prospectively amended by a vote of the entire membership to eliminate the refundability of future special assessments. The trial court held that the Club had no right to amend the By-Laws, notwithstanding an express provision in the By-Laws permitting amendments upon a majority vote of members at a duly called meeting. The Court reasoned broadly that "the Plaintiffs have a vested contractual right to the terms of the **Bylaws** in place at the time of their purchase of the Equity Certificates." (emphasis added). The trial court's ruling turns the law upside down. Private clubs throughout the United States routinely amend their bylaws and other governing documents *prospectively* for the club's fiscal well-being and to benefit their members. The trial court's decision freezes a private club's governance in place at the moment a member joins, and prohibits it from adapting to changing times and markets. It admits of no limiting principle. Importantly, if the trial court rule stands and is

followed by other courts, it potentially opens private clubs throughout Florida to significant liability claims for member-approved prospective amendments to their by-laws over the last decade. NCA supports Fiddlesticks Country Club's prayer for reversal of the trial court's decision in this case.

ARGUMENT

I. PRIVATE CLUBS AMEND BYLAWS AS NEEDED TO ADDRESS FINANCIAL ISSUES PROSPECTIVELY

Private clubs have been established over decades with a variety of structures, based on where the club was located geographically, whether a part of a homeowner's association or as a stand-alone club, and whether it was created by its members, a real estate developer or a golf industry company. However, whatever their culture or origin, all private clubs rely upon a governance amendment process to sustain themselves and serve their members. Just last year, the Florida Chapter of the Club Management Association of America (FLCMAA) surveyed its members regarding their recent changes to their governing documents.[1] Of those responding, nearly 80% said they were Florida nonprofit corporations and 30% said they, like

[1] A copy of the survey is attached as pages A3-A18 of the Appendix.

Fiddlesticks Country Club in this case, were homeowner associations governed by the Homeowner's Association Act, Chapter 720, Fla. Stat. One hundred percent (100%) of respondents said their bylaws provided for the bylaws to be amended, and 94.6% of respondents said they had amended their bylaws in the last ten years.

Of those who had amended their bylaws in the last ten years, the following was reported: 27.5% said they changed the refund amount a member receives when they resign or their membership is reissued; 17% said they changed their members' obligations or rights regarding assessments; 44.8% said they changed another right, benefit or privilege contained in the club's bylaws in a way that is arguably more restrictive to the members; and 41.4% said they changed another financial obligation the members have to the club.

Of those who had amended their bylaws in the last ten years, the clubs relied on the following for the process to make that change or to understand what changes were allowed: the club's bylaw provisions on how the bylaws may be amended (87.5%); the Florida Not for Profit Corporations Act provisions governing how bylaws may be amended (28%); existing laws that allowed a club to amend its bylaws so long the amendment did not change a standalone written

contract with a member (56.25%); and any other contractual document between the club and its members (40.6%).

Respondents that were homeowner associations reported that their covenants were subject to amendment (74%) and that they had amended their covenants in the last ten years (58%). Of those that amended their covenants, they relied on: the Homeowners' Association Act provisions governing how covenants may be amended (58%); the covenants' provisions on how the covenants may be amended (66.7%); existing laws allowing a homeowners' association to make prospective changes to its covenants on the range of the changes implemented (75%); and other contractual documents between the homeowners' association and its members (50%).

II. CLUBS HAVE LIMITED FINANCIAL OPTIONS TO MAINTAIN THEMSELVES AND MEET MEMBER INTERESTS

Most homeowner associations and member-owned clubs are non-profit corporations. With rare exceptions, they operate on a break-even basis with some funds set aside year to year for larger capital repairs or improvements. By its nature, a club or association has only a few ways to generate revenue: joining fees/transfer fees, monthly capital fees, dues, and assessments. Club members jointly

decide through their elected representatives or by a member vote what level of amenities and services they desire and how they want to pay the cost to obtain them. Over the years, as club management and leadership have become better informed, the practices of clubs and homeowner associations have evolved in their thinking concerning how to structure the entity, price memberships, and how to structure dues, assessments and other charges. This evolution has occurred within the confines of what is allowed by applicable Florida law in conjunction with the entity's governing documents. In contrast to the reality of how clubs operate, the trial court's reasoning and decision effectively holds that club bylaws are fixed and static for each member at the moment a member joins the club. There is no principled reason for such a result. The trial court's decision either forces clubs into the use of an outdated business model, or requires the entity to impose vastly different financial burdens on members who have identical privileges, based solely on the date those members joined.

Courts have ruled that members are on notice that the bylaws and other governing documents can be amended by a member vote, whenever the governing documents provide for such an amendment,

provided, of course, that there is no separate agreement between the club and the member on the subject. This Court should uphold the members' expectation and allow this club and similar club and homeowner association entities to make decisions as allowed under statute and their governing documents and consistent with the members' collective best judgment.

III. STUDIES CONDUCTED BY INDUSTRY EXPERTS SUPPORT THE MAINTENANCE OF MEMBER FLEXIBILITY IN FINANCIAL DECISION-MAKING

For many years, the private club industry has been a fragmented, almost cottage industry. In recent times, however, various industry stakeholders have come together to study and assist clubs in developing a sustainable club model and environment for their members. One of those organizations is Club Benchmarking (CB). CB is a data driven industry expert that has studied more than 1,000 clubs annually since 2010. CB has published numerous articles and white papers specifically addressing club finance and business models for residential community clubs such as Fiddlesticks. One such white paper, published in Spring, 2019, is

entitled "Measuring Capital Health."[2] As the paper indicates, one of the most critical aspects of club sustainability is capital income from the members and capital investment in the physical assets of the club to meet member expectations. This capital emanates almost exclusively from joining fees and such special assessments as may be required to support the fiscal health of the club.

Fiddlesticks was a developer created club. Developer created clubs are structured to use the club and associated amenities to sell real estate within the community. Thus, the initial financial model may not stand the test of time after the community and club assets are turned over to the homeowners and members. Contrary to a traditional for-profit business, operational revenues (e.g., dining charges and recreation fees) are not a financial driver to the health and capital position of a club. As CB explains in its article and other resources, a one-hundred percent return on the capital investments paid by an equity member is not sustainable. The full refund model essentially means that a club member never has to pay for the assets they consumed during their tenure as members. That model does

[2] A copy of the white paper is attached as pages A19-A24 of the Appendix"

not account for the members' share of depreciation expense. Looking at the current market and club's future needs, Fiddlesticks' Board and its members recognized this reality and *prospectively* reduced the return on member investment and special assessments to sustain the viability of the club. As CB suggests, if Fiddlesticks were not to recognize this reality, the club would ultimately fail.

Fiddlesticks did what knowledgeable private clubs do: they followed a democratically established member approval process that was set forth in its governing documents, in compliance with Florida statutes, and adopted a path forward that was in the club's and members' best interest. NCA submits these processes, and the club's ability to adopt to operational realities is lawful and necessary and should be approved by this Court.

IV. THE TRIAL COURT MISAPPLIED THE LAW

The contractual issue before the Court is not complicated. The question is simply whether the by-laws of a private club create vested contractual rights, not subject to amendment. Amicus has not been able to locate any published Florida opinion that has concluded a club's bylaws create any such "vested" right. In fact, the only Florida appellate court that has seemingly considered the issue – the Fourth

District Court of Appeal – has concluded that a club's bylaws do not create vested rights because they are subject to amendment. For the reasons below, this Court should reach the same conclusion.

As the Fourth District Court of Appeal has stated, "[t]he relationship between a social club and its members is one of contract," which must be judged in accordance with its terms. *Susi v. St. Andrews Country Club, Inc.*, 727 So. 2d 1058, 1061 (Fla. 4th DCA 1999). The operative contract for purposes of this matter is the Club's bylaws. Contracts, of course, may be subject to amendment. Many contracts contain provisions stating how they can be amended; others are subject to amendment by the conduct of the parties. Here, it is beyond any dispute that, at all times, Fiddlesticks Country Club's bylaws, like those of many other clubs around the State and beyond, contained a provision stating that they were subject to amendment from time to time. Therefore, if the Court reaches the issue of "vested rights,"[3] the only issue for the Court to decide on this

[3] Amicus acknowledges there are other issues before this Court – i.e. whether, in their pleadings, the plaintiffs/appellees sought the relief they were awarded and/or whether the plaintiffs/appellees could challenge the non-refundability of the 2018 Assessment even though they did not challenge the 2013 Amendment, which made the 2018 Assessment non-refundable. This Brief does not address those

issue is whether, under a simple contractual analysis, the Appellees had a "vested right," not subject to amendment, relating to the refund of assessments to members of the Club. Amicus submits that such a conclusion is not supported by law and, if the trial court's decision on this issue is not overturned, it portends substantial difficulty and harm for the Club industry.

"A vested right has been defined as 'an immediate, fixed right of present or future enjoyment' and also as 'an immediate right of present enjoyment, or a present, fixed right of future enjoyment." *R.A.M. of South Florida, Inc. v. WCI Communities, Inc.*, 869 So. 2d 1210, 1218 (Fla. 2d DCA 2004). "[T]o be vested, a right must be more than a mere expectation based on an anticipation of the continuance of an existing law; it must have become a title, legal or equitable, to the present or future enforcement of a demand [ ]...." *Id*. (internal quotations omitted). "Vested rights are distinguished not only from expectant rights but also from contingent rights." *Id*.

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issues and, instead, only addresses the contractual analysis the Court should apply if the other issues are not dispositive of the appeal.

Hamlet Country Club, Inc. v. Allen, 622 So. 2d 1081 (Fla. 4th DCA 1993), is instructive in the vested rights analysis. There, individual members of a country club sued the club over an amendment to the club's bylaws. *Id*. at 1082. Specifically, members of the country club paid $16,500 to obtain membership therein. *Id*. The resignation/redemption of such a member's membership was governed by the club/appellant's bylaws. *Id*. One provision of the bylaws purported to make redemption of the membership conditional upon the club having 365 members, while another provision allowed for resignation/redemption. *Id*. In 1986, the members voted and adopted an amendment to the bylaws making it clear that a member was not entitled to redemption if there were less than 365 members. Two years later, the plaintiffs/appellees sued seeking redemption of their memberships. The trial court found in their favor, finding there was no need for the defendant/appellant club to have 365 members.

The Fourth District reversed the trial court's decision. *Hamlet*, 622 So. 2d at 1082. The issue presented to the Court was "whether a country club can amend its bylaws to change the terms under which members are entitled to resign or transfer their memberships, or whether these provisions are vested rights which cannot be

altered." *Id*. The Fourth District concluded "that the members did not have vested rights" because "the alleged vested rights are all contained in the bylaws which were subject to amendment." *Id*. at 1082-83. The same result should obtain in this case.

Less than a year ago, the Fourth District reaffirmed its conclusion that a club's bylaws do not create vested rights. *See Share v. Broken Sound Club, Inc.*, 312 So. 3d 962, 970 (Fla. 4th DCA 2021). While *Share* involved different claims – i.e. a breach of contract claim by the club and counterclaims by Share for injunction and a breach of the implied covenant of good faith and fair dealing – the dispositive question was whether the appellee country club could make amendments to its bylaws or whether Share had a "vested right" by virtue of the bylaws in place at the time she joined the club. *Id*. at 968-69. After extensive analysis of the applicable law, the Court concluded, as it did in *Hamlet*, that "[a] private club's bylaws governing the terms of membership do not created vested rights and are subject to amendment." *Id*. at 970.

This Court and the United States District Court for the Middle District of Florida have considered similar cases, and have applied the same legal principles and reasoning as the Fourth District applied

in *Hamlet* and *Share*, albeit have reached different results on the facts presented.

One such case is *Feldkamp v. Long Bay Partners, LLC*, 773 F. Supp. 2d 1273 (M.D. Fla. 2011). *Feldkamp* is factually distinguishable from this case because the "contract" at issue was comprised of several documents, not one set of by-laws as in the present case. *Id.* at 1280. One document – a membership application – included an unqualified right to a refund of the monies at issue in the case. *Id.* at 1281. The country club denied the right to the unqualified refund found in the membership application adverting to other documents (the membership plan and the rules and regulations) referenced in the membership application, which were subject to amendment from time to time. *Id.* The court found the club's interpretation unreasonable because, *inter alia*, the membership application, the document signed by the Feldkamps, was not amendable. *Id.* at 1282. The *Feldkamp* court distinguished the factual scenario before it from that in *Hamlet*, noting that "[i]n *Hamlet*, the right of redemption emanated solely from the bylaws, which were clearly subject to amendment . . . ." *Id.* In *Feldkamp*, the dispositive document was not subject to amendment.

Verandah Dev., LLC v. Gualtieri, 201 So. 3d 654 (Fla. 2d DCA 2016) is a decision of this court involving a club and its members with facts analogous to those in *Feldkamp*. As in *Feldkamp*, this Court in *Verandah* had multiple documents to consider: a membership agreement, a membership plan, and rules and regulations. *Id*. at 655-56. The membership agreement referenced the membership plan and rules and regulations. *Id*. at 655. The membership plan and the rules and regulations, but not the membership agreement, were amendable. *Id*. The refund policy provided in the membership agreement was also contained in the membership plan. *Id*. at 656. Several years later, the club amended the membership plan (but not the membership agreement) making the refund policy subject to a "three in, one out" plan rather than a "one in, one out" arrangement. *Id*. The club argued this change was permissible because the membership plan and the rules and regulations were subject to amendment. *Id*. at 657-58. This Court concluded that, while the club had the right to amend certain things in the membership plan, it did not have a right to alter the membership agreement – which included the refund policy but no provision permitting amendments. *Id*. Of course, the by-laws in the

case before the Court at present plainly contain a clause allowing amendments. Applying the reasoning of the *Verandah* Court, this Court should reverse the decision of the trial court in this case.

First Florida Bank v. Fin. Transaction Sys., Inc., 522 So. 2d 891 (Fla. 2d DCA 1988), is another decision from this Court, but factually dissimilar from the instant case in that it does not involve the rights of members of a club such as Fiddlesticks, *Verandah*, or *Feldkamp*. Like in *Feldkamp* and *Verandah*, there were also multiple documents comprising the contractual relationship at issue, rather than just by-laws like in this matter. *Id*. at 891-92. In *First Florida Bank*, the Bank attempted to change the appellant's rights under one document – the corporate charter – by making amendments to other documents – i.e. the by-laws and bank operating rules. *Id*. at 892. Not surprisingly, this Court found that the changes to the bylaws and operating rules could not alter the original agreement between the parties – as memorialized in the charter. Id.

Comp. Fund v. Cagnina, 155 So. 2d 820 (Fla. 2d DCA 1963) is a third decision of this Court that the parties have discussed. There, employees, who were members of a non-profit organization for similarly situated employees in their industry, rather than members

of a private club, challenged the defendant's amendment to its bylaws which eliminated certain rights promised to the employees in other documents – namely a constitution and membership certificate. *Id.* at 821-22. The court held that such an amendment was invalid because the employees had vested rights – by virtue of the constitution/membership certificate (rather than any bylaws). *Id.* at 825.

The common theme in *Feldkamp*, *First Florida Bank*, *Verandah* and *Cagnina* is that the defendant association/club/organization attempted to amend policies in one contractual document through amendments to other documents. If all of the documents at issue in those actions were subject to amendment, the outcomes of those matters likely would have been different.

In this matter, the only document at issue is a set of by-laws that are undisputedly subject to amendment. Following a simple contractual analysis, this Court should find that that amendments made by Fiddlesticks County Club to those bylaws, which were always subject to amendment, were proper.

CONCLUSION

Club operators look to their bylaws and the applicable statutes to determine the process and substance for any bylaw or covenant amendments. NCA is unaware of any set of club bylaws that does not contain a method of amendment. Nor is there any provision in either Chapter 617 or 720 of the Florida Statutes, the primary chapters of the Florida Statutes applicable to homeowner's associations, that prohibits the type of amendment to bylaws made by Fiddlesticks in this case. The Florida Legislature knows how to restrict club and homeowner's associations ability to legislate on this this issue if it desires to do so. This Court should allow clubs to follow the Florida statutes and their bylaws as written, without adding an extra-legislative, new requirement that would effectively prohibit all future bylaw amendments.

Respectfully submitted,

GRAYROBINSON, P.A.
Counsel for Amicus Curiae
National Club Association
By: /s/ *Frank A. Shepherd*
Frank A. Shepherd
Florida Bar No. 152620
frank.shepherd@gray-robinson.com
333 SE 2nd Avenue, Suite 3200
Miami, Florida 33131
Telephone: (305) 416-6880
Facsimile: (305) 416-6887

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, pursuant to and in compliance with Rule 2.516, Florida Rules of Judicial Administration, the foregoing was e-filed with the Court and e-mailed on January 18, 2022, to

Steven L. Brannock, Esq. Brannock, Humphries & Berman 1111 W. Cass Street, Suite 200 Tampa, Florida 33606 sbrannock@bhappeals.com eservice@bhappeals.com	C. Richard Mancini, Esq. Henderson, Franklin, Starnes & Holt, P.A. 3451 Bonita Bay Blvd., #206 Bonita springs, FL 34134 richard.mancini@henlaw.com
Terrance W. Anderson, Jr., Esq. Nelson Mullins 1905 NW Corporate Blvd. Suite 310 Boca Raton, Florida 33431 tw.anderson@nelsonmullins.com	Amanda K. Barritt, Esq. Henderson, Franklin, Starnes & Holt, P.A. P.O. Box 280 Fort Myers, FL 33902 amanda.barritt@henlaw.com
Asher E. Knipe, Esq. Knott Ebelini Hart 1625 Hendry Street, Floor 3 Fort Myers, Florida 33901 aknipe@knott-law.com	Scott A. Beatty, Esq. Henderson, Franklin, Starnes & Holt, P.A. 8889 Pelican Bay Blvd. #400 Naples, FL 34108 scott.beatty@henlaw.com

By: *Frank A. Shepherd*
Frank A. Shepherd

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this document was prepared in Bookman Old Style 14-point font and complies with the font and word requirements of Florida Rules of Appellate Procedure 9.045(b)(e) and 9.370(b).

By */s/ Frank A. Shepherd*