20160248

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT IN AND FOR POLK COUNTY, FLORIDA

CASE NO.:_____

DEER CREEK GOLF AND TENNIS RV RESORT, PHASE TWO, a Florida Cooperative Corporation,

Plaintiff,

vs.

DEER CREEK RV GOLF & COUNTRY CLUB, INC.,

Defendant.
_____/

COMPLAINT

Plaintiff, DEER CREEK GOLF AND TENNIS RV RESORT, PHASE TWO, a Florida Cooperative Corporation ("Association"), by and through its undersigned attorneys, sues Defendant, DEER CREEK RV GOLF & COUNTRY CLUB, INC. ("Golf Club"), and alleges as follows:

JURISDICTION AND VENUE

1. This is an action for damages which exceeds $15,000.00, exclusive of interest, costs and attorney's fees, and which is otherwise within the jurisdiction of this Court.

2. Venue is proper in Polk County, Florida, as this cause of action involves real property located in Polk County, Florida, and this cause of action accrued in this county. The Plaintiff Association is a cooperative association, located in Davenport, Polk County, Florida, and is organized under the provisions of Florida Statute 719.301, *et seq.*, and is responsible for the operation of the Cooperative Association.

3. Defendant, Golf Club, is a Florida corporation, not-for-profit, with its principal place of business in Davenport, Polk County, Florida.

4. The real property that is the subject of this action is a "Planned Unit Development" ("PUD"), as established by Polk County PUD 86-24, with a Master Plan of Platted Lots and/or Units, consisting of up to 2,238 Lots or Units, as a Multi-Phase Recreational Development, known as the DEER CREEK GOLF AND TENNIS RV RESORT (hereinafter, the overall residential development, "Deer Creek").

GENERAL ALLEGATIONS

5. The Association, as a Florida Cooperative Association, is subject to the "Amended and Restated Declaration of Covenants, Conditions and Restrictions for Deer Creek Golf and Tennis RV Resort, Phase Two" ("Declaration"), and as amended, recorded in the Public Records of Polk County, Florida in Official Records Book 3721, Pages 2100, *et seq.*, of the Public Records of Polk County, Florida ("Declaration", a copy of which is attached hereto as Exhibit "A").

6. The Defendant Golf Club, is a Florida not-for-profit corporation, responsible for the operation and maintenance of certain amenities located in Deer Creek, including the roadways, clubhouse, and certain specified recreational facilities, some of which facilities, including the golf course, are available only to members of the Golf Club, and other facilities, including the roadway, clubhouse, pool and play area, are available to other residents of Deer Creek, who may not be members of the Golf Club.

7. The Golf Club is the Assignee of the developer of Deer Creek, Deer Creek. Ltd., a Florida limited partnership, and Successor Developer, by virtue of the "Assignment of Declarant's Rights under Declaration of Covenants, Conditions and Restrictions of Deer Creek

Golf & Tennis Resort, Phase III-A", of December 5, 2013 (hereinafter "Assignment", a copy of which is attached as Exhibit "B").

8. Under the terms of the Declaration, the members of the Association, as "Shareowners", are obligated to pay an "Annual Maintenance Fee" to the Golf Club (as the Successor Developer).

9. The obligation of the Shareowners to pay an Annual Maintenance Fee under the Declaration, is, in part, set forth in Article V, Paragraph 2 "Annual Maintenance Fee" of the Declaration, which states, in Subparagraph (a), as follows:

> "(a) Each Class I UDI Owner and Class A UDI Owner, by acceptance of conveyance of Undivided Interests through a deed thereon, covenants and agrees to pay an Annual Maintenance Fee for use of the PRD Property. The Annual Maintenance Fee shall be imposed by the Declarant (or its successors or assigns in interest to the Property) to meet the expenses of managing and maintaining and as otherwise attributable to the PRD Property. The Annual Maintenance Fee shall be established by Declarant in its sole and absolute discretion on an annual or semi-annual basis and be payable by each Class I UDI Owner and Class A UDI Owner monthly, semi-annually, or annually and if paid annually, may be discounted at Declarant's option. The Annual Maintenance Fee imposed by Declarant may be increased, on an annual basis, by the Declarant." (Emphasis added)

10. Under the specific terms of the Declaration, the Association, and its members, are only obligated to and only "agree[s] to pay an Annual Maintenance Fee for use of the PRD Property.", which property ("Property Retained by the Developer") is specifically defined under the terms of the Declaration.

11. On October 17, 2005, Deer Creek, Ltd., as Defendant's predecessor-in-interest, did record in the Public Records of Polk County, Florida, the "First Amendment to Amended and Restated Declaration of Covenants, Conditions and Restrictions for Deer Creek Golf and Tennis RV Resort, Phase Two" ("First Amendment", a copy of which is attached hereto as Exhibit "C").

12. Under the terms of the First Amendment, the "PRD Property" was reduced in size, and is specifically described as Exhibit "B" to the First Amendment.

13. On September 14, 2006, the Association and Deer Creek Ltd., as the Defendant's predecessor-in-interest, did enter into the "Deer Creek Golf and Tennis RV Resort, Phase Two, a Florida Cooperative Corporation, Easement and Mutual Maintenance Agreement for Boulevard" ("Mutual Maintenance Agreement-Boulevard").

14. Also on September 14, 2006, the Association and Deer Creek Ltd., as Defendant's predecessor-in-interest, did enter into the "Deer Creek Golf and Tennis RV Resort, Phase Two, a Florida Cooperative Corporation, Mutual Maintenance Agreement and Easement for PRD Property" ("Mutual Maintenance Agreement-PRD Property", and collectively referred to as the "Mutual Maintenance Agreements").

15. Under both of the above-referenced Mutual Maintenance Agreements, the specific property and obligation for which the Association and its Shareowners are obligated to pay maintenance assessments is defined, as well as the formula for establishing the pro rata share of the costs of maintaining the specified property, otherwise payable to the Golf Club.

16. Under the Mutual Maintenance Agreement-Boulevard, the Agreement states:

> "IT IS FURTHER AGREED between the Parties that the Cooperative shall pay a pro rata share of the costs of maintaining the guardhouse, including without limitation the cost of security personnel, and road constructed on the Boulevard described in Exhibit 1, which pro rata share shall be based the following ratio: number of Class A Lots (as defined in the Second Amendment to the Declaration) over the number of total lots in the DEER CREEK GOLF AND TENNIS RV RESORT, Master Plan, including all future phases or units, as platted in the public records of Polk County, Florida." (Emphasis added)

17. Under the terms of the Mutual Maintenance Agreement-PRD Property, the Agreement provides the specific obligations for payment as to "the cost of maintaining" the specified PRD property, and states the following:

"IT IS FURTHER AGREED between the Parties that the Cooperative shall pay a pro rata share of the costs of maintaining the club house, pool, and play area constructed on the PRD described in Exhibit 1, which pro rata share shall be based on the following ratio: number of Class A Lots (as defined in the Second Amendment to the Declaration) over the number of total lots in the DEER CREEK GOLF AND TENNIS RV RESORT, Master Plan, including Phase I and all future phases or units, as platted in the public records of Polk County, Florida." (Emphasis added)

(Copies of the Mutual Maintenance Agreement-Boulevard and Mutual Maintenance Agreement-PRD Property are attached hereto as Exhibit "D").

18. As required by the Florida Cooperative Statute, (Florida Statutes, Section 719.504), Deer Creek, Ltd. provided, as part of its "Prospectus", the "Frequently Asked Questions & Answers Sheet", as required by the statute. (A copy of the "Frequently Asked Questions & Answers Sheet" is attached hereto as Exhibit "E").

19. As set forth in the "Frequently Asked Questions & Answers Sheet", under Answer No. 6, the developer confirmed that the payment obligations of the members of the Association is controlled by the Declaration and the Mutual Maintenance Agreements (as set forth in Exhibit "D"), and the answer to Question No. 6 states as follows:

"A: You are required to pay a land use fee for use of recreational facilities that the Cooperative does not own. See the Declaration of Covenants, Conditions and Restrictions for Deer Creek Golf and Tennis RV Resort, Phase Two, Amendments thereto, and the Mutual Maintenance Agreement and Easement for PRD Property located in Exhibit 18 to the Prospectus for specific land use rights and obligations." (Emphasis added)

20. Subsequent to the Golf Club's purchase of the property from the developer, in May of 2013, the Golf Club did, contrary to the explicit terms of the Declaration and Mutual Maintenance Agreements, attempt to charge the Association, and its Shareowners, for fees regarding the "use of common areas of Deer Creek RV Golf & Country Club", as opposed to charging the Association an "Annual Maintenance Fee for use of the PRD Property", and in

2014, the Golf Club did attempt to double the fees charged to the Association and its Shareowners (a copy of the February 25, 2014 "INVOICE" from the Golf Club to Association is attached hereto as Exhibit "F").

21. In late 2014, the Association was notified that the assessments being charged, listed as fees for "the use of common areas of Deer Creek Golf & Country Club", had increased to $58.00 per Lot (please see "INVOICE" of December 29, 2014, attached hereto as Exhibit "G").

22. The Golf Club failed to provide an adequate explanation for the significant increase in the Annual Maintenance Fees, nor provide an accounting and an apportionment of the expenses of the Golf Club, to determine and verify that the Annual Maintenance Fees charged the Association were limited to the property described in the Mutual Maintenance Agreements and otherwise described in the Declaration.

23. By letter dated March 4, 2015, Mr. James Lee, as President of the Golf Club, merely stated that "We believe that all assessments included in the corporation's invoices are authorized by the Declaration and applicable Florida law" (please see Exhibit "H").

24. Subsequently, an agreement was entered into, whereby the Association did pay and has paid the amount of $17.00 per month, under the terms of the "Agreement to Accept Partial Payment" of April 24, 2015.

25. In November of 2015, members of the Golf Club and the Association met, in an attempt to resolve the ongoing dispute with regard to the basis for the apportionment of the Annual Maintenance Fee to the Association and its members, as well as to determine whether the expenses of the Golf Club, assessed against members of the Association, were authorized assessments for the maintenance of the PRD Property.

26. At a meeting on November 4, 2015, a document labeled "Golf and DC Common Area Assessment" was provided to members of the Board of Directors of the Association (a copy of said "Golf and DC Common Area Assessment" is attached hereto as Exhibit "I").

27. A review of the DC Common Area Assessment itemization indicates many expenses unrelated to the maintenance of the PRD Property, including mortgage expenses, salaries, and other expenses unrelated to the operation or maintenance of the PRD.

28. In December of 2015, the agreement allowing the Association to make, and requiring the Golf Club to accept partial payments, was cancelled by the Golf Club.

29. On February 10, 2016, demand was made by then counsel for the Golf Club, Tabitha S. Etlinger, Esquire, to pay purported past due assessments, collection costs, and late fees and purported attorney's fees, and additionally, to pay assessments for 2016 at the rate of $74.09 per month, per Lot (please see enclosed copy of letter of Tabitha S. Etlinger, attached as Exhibit "J").

30. The Golf Club has and continues to refuse to provide a sufficiently detailed Annual Statement to the Association, which was due at least 30 days before the Annual Meeting of the Association, whereby the Golf Club establishes its budget for the costs of maintaining the specified PRD Property, all as required under the terms of the Mutual Maintenance Agreements.

31. All conditions precedent to the institution and maintenance of this lawsuit have been performed, have occurred, or have been waived.

32. The Association is obligated to pay its attorneys, Clayton & McCulloh, P.A., a reasonable fee for their services.

COUNT I – DECLARATORY JUDGMENT

33. This is an action for Declaratory Judgment under Fla. Stat. Ch. 86.

34. The Plaintiff Association realleges Paragraphs 1 through 32 above, as if set forth in their entirety.

35. Under the terms of the Declaration, the Association and its members are required to pay an "Annual Maintenance Fee", which is specified under Article V, Paragraph 2, of the Declaration and which limits the right and authority of the Golf Club to impose an Annual Maintenance Fee for any matter other than "to meet the expenses of managing and maintaining and as is otherwise attributable to the PRD Property".

36. The extent of the PRD Property is specifically limited, and as set forth in the First Amendment to the Declaration (Exhibit "C") and the Mutual Maintenance Agreements (Exhibit "D"). Neither the Declaration nor any other governing documents of the Association obligate the Association and its members to pay for "common expenses" or any other charges imposed by the Golf Club.

37. The express terms of the Mutual Maintenance Agreements provide the basis for establishing the pro rata share of the Shareowners and members of the Association with regard to the maintenance fees for the PRD Property.

38. Under the Mutual Maintenance Agreements, the pro rata share is based on a ratio, of the total number of Class A Lots, and "the number of total Lots in the DEER CREEK GOLF AND TENNIS RV RESORT, Master Plan, including all future phases or units, as platted in the public records of Polk County, Florida".

39. The Agreements may be amended from time to time by the parties, but no amendment shall be binding unless reduced to writing and acknowledged by both the parties hereto.

40. The Golf Club's unilateral change in the number of Lots upon which the Association's pro rata share of the maintenance costs is based, is in direct violation of the terms of the Declaration and the Easement and Mutual Maintenance Agreements.

41. The above set of facts and circumstances has created problems, uncertainty, doubt, questions, ambiguities, risks and potential liability to the Association and its members, including, but not limited to the threat of litigation by the Golf Club against the Association (see Exhibit "J").

42. The Association, and the Shareowners of the Association, have justiciable questions as to the existence of their rights, duties and obligations under and with respect to the Declaration, including, but not limited to Article V of the Declaration and under the terms of the Mutual Maintenance Agreements, which are part of the governing documents of the Association.

43. The facts, circumstances, and issues alleged herein show the existence of a real and substantial controversy between the Association and the Golf Club. There is a bona fide, actual, and present need for Declaratory Judgment of this Court, and if one is not granted, the rights of the Association and its Shareowners will be irreparably damaged.

44. The Association, on behalf of its Shareowners, requests that this Court enter a Declaratory Judgment determining:

a. The legal basis of the Golf Club to impose an "Annual Maintenance Fee" upon the Association and its Shareowners;

b. The specific expenses, charges, and other items that the Golf Club may legally charge the Association with regard to the maintenance fee for the "PRD Property";

c. Whether the pro rata share of the Annual Maintenance Fee to be assessed against members and Shareowners of the Association may otherwise be changed by unilateral action of the Golf Club, and;

d. Whether the number of Lots upon which the pro rata share of the Annual Maintenance Fee is based may be other than as set forth in the Deer Creek Golf and Tennis RV Resort Master Plan, as platted in the Public Records of Polk County, Florida.

WHEREFORE, the Plaintiff, DEER CREEK GOLF AND TENNIS RV RESORT, PHASE TWO, a Florida Cooperative Corporation, requests this Court to enter a Declaratory Judgment regarding the issues set forth herein, for an award of the Association's attorney's fees and costs, pursuant to the Declaration and Fla. Stat. §719.111, and for such other and further relief as this Court deems just and proper.

COUNT II – BREACH OF CONTRACT/BREACH OF COVENANTS

45. This is an action for Breach of Contract/Breach of Covenants.

46. The Plaintiff Association realleges Paragraphs 1-32 above, as if set forth in their entirety.

47. The Golf Club has, and continues to breach the terms of the Declaration, including, but not limited to Article V, Paragraph 2, by attempting to impose an Annual Maintenance Fee, and assessing fees not related to the use of the PRD Property. The Golf Club has, and continues to breach the terms of the Declaration, by assessing fees against the

Association, for expenses related to "common property", unrelated to the PRD Property or property set forth in the Mutual Maintenance Agreements.

48. The Golf Club has, and continues to breach the terms of the Mutual Maintenance Agreements, by charging, assessing and collecting against the Association and its Shareowners, fees in excess of the pro rata share to be paid by the Association and its members to the Golf Club.

49. The Golf Club has breached the terms of the Mutual Maintenance Agreements, and the terms of the Declaration, by arbitrarily, unilaterally and unlawfully reducing and changing the number of Lots upon which the pro rata share of the Annual Maintenance Fee is based.

50. As a direct and proximate result of the Golf Club's breach of covenant and breaches of contract, the Association and its Shareowners have suffered damages, in the overpayment of the Annual Maintenance Fee, since on or before May 12, 2013.

51. As a direct and proximate result of the Golf Club's breaches of contract and breaches of the covenants contained in the Declaration, including the Golf Club's expenditure of Annual Maintenance Fees not related to the PRD Property and the Golf Club's unauthorized reduction in the number of Lots upon which the pro rata share of the Association's cost of maintenance is to be determined, the Association and its Shareowners have suffered damages.

WHEREFORE, the Plaintiff, DEER CREEK GOLF AND TENNIS RV RESORT, PHASE TWO, a Florida Cooperative Corporation, demands judgment against the Golf Club for damages resulting from the unauthorized use of Annual Maintenance Fees for purposes other than the maintenance of PRD Property and including, but not limited to damages for the Golf Club increasing the pro rata share of the Association and its Shareowners' costs of the Annual

Maintenance Fee, for pre-judgment and post-judgment interest, and for attorney's fees and costs pursuant to the Declaration and Fla. Stat. §719.111, and for such other and further relief as the Court deems just and proper.

COUNT III – UNJUST ENRICHMENT

52. This is a cause of action for Unjust Enrichment.

53. The Plaintiff realleges Paragraphs 1-32 and 47-51 above, as if set forth in their entirety.

54. The Defendant, Golf Club, has been unjustly enriched by the Association and its Shareowners by accepting payments designated only for the maintenance and use of PRD Property, which payments have been used for other unauthorized purposes.

55. The Defendant has been unjustly enriched, by the payment and acceptance of Annual Maintenance Fees, where the Association and its Shareowners have paid in excess of their lawful pro rata share to the Golf Club for Annual Maintenance Fees.

56. The Defendant, Golf Club, has and continues to accept and retain the benefits of the payments made by the Association and its Shareowners, unjustly enriching the Golf Club.

57. The circumstances created by the Golf Club's acceptance and retention of the excess payments made by the Plaintiff Association and its members are inequitable, as the Golf Club has retained a benefit without providing any value to the Association and its members where payments meant for the maintenance and use of the PRD Property have been diverted to other uses and for other expenses.

WHEREFORE, Plaintiff, DEER CREEK GOLF AND TENNIS RV RESORT, PHASE TWO, a Florida Cooperative Corporation, demands judgment against the Golf Club for the unjust enrichment of the Golf Club for the overpayments made to the Golf Club, for

pre-judgment and post-judgment interest, and for attorney's fees and costs, pursuant to the Declaration and Fla. Stat. §719.111, and for such other and further relief as is just and proper.

COUNT IV – FRAUDULENT INDUCEMENT

58. This is an action for fraudulent inducement.

59. The Plaintiff realleges Paragraphs 1-32, 47-51 and 54-57 above, as if set forth in their entirety.

60. The Golf Club, in invoices submitted to the Association in 2013, 2014 and 2015, did misrepresent the pro rata share of the costs of maintaining the PRD Property to the Association.

61. The Golf Club, in invoices submitted to the Association in 2013, 2014, and 2015, did misrepresent the costs attributable to the use and maintenance of the PRD Property to the Association.

62. The Golf Club knew or should have known that the pro rata share of the Annual Maintenance Fee upon which the invoices and statements sent to the Association were otherwise false.

63. The Golf Club knew or should have known that the statements and invoices submitted to the Association falsely misrepresented that the statements were only for the maintenance or use of the PRD Property.

64. The statements and invoices submitted by the Golf Club to the Association were intended by the Golf Club to induce the Association to make payment upon said invoices.

65. The Association suffered damages in its justifiable reliance upon the accuracy and legitimacy of the Golf Club's invoices and balances sent to the Association in 2013, 2014 and 2015.

WHEREFORE, Plaintiff, DEER CREEK GOLF AND TENNIS RV RESORT, PHASE TWO, a Florida Cooperative Corporation, demands judgment for damages against the Golf Club for unjust enrichment for all payments received by the Golf Club in excess of the amount lawfully required to be paid by the Association and its members to the Golf Club as part of the Association's pro rata share of the Annual Maintenance Fee and for payments made and diverted to expenses not related to the use and maintenance of the PRD property, for pre-judgment and post-judgment interest, and for attorney's fees and costs, pursuant to the Declaration and Fla. Stat. §719.111, and for such other and further relief as this Court deems just and proper.

COUNT V – EQUITABLE ACCOUNTING

66. This is an action for an equitable accounting.

67. The Plaintiff realleges Paragraphs 1-32 and 47-51 above, as if set forth in their entirety.

68. The Golf Club has, and continues to require payments be made, purportedly under the terms of the Declaration for "Common Area Assessment".

69. The Golf Club is required, under the specific terms of the Mutual Maintenance Agreements, to provide an annual statement to the Association, of the expenses, budget and costs of maintaining the PRD Property by the Golf Club.

70. The Golf Club, without providing any sufficiently detailed "annual statement" or other financial information, has, over a period of two years, attempted to increase the Annual Maintenance Fee and/or other payments demanded of the Association by over 400%.

WHEREFORE, Plaintiff, DEER CREEK GOLF AND TENNIS RV RESORT, PHASE TWO, a Florida Cooperative Corporation, requests this Court to provide a full accounting of the basis used to establish the pro rata share of the Annual Maintenance Fee due and owing by the

Association to the Golf Club and an accounting as to the use and expenditures of the Annual Maintenance Fees made by members of the Association to the Golf Club, for an award of the Association's attorney's fees and costs, pursuant to the Declaration and Fla. Stat. §719.111, and for such other and further relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands trial by jury for all issues so triable.

DATED this 14th day of March, 2016.

RUSSELL E. KLEMM, ESQ.
Florida Bar No.: 0292826
Clayton & McCulloh
1065 Maitland Center Commons Blvd.
Maitland, Florida 32751
(407) 875-2655 Telephone
(407) 875-3363 Facsimile
E-mail: rklemm@clayton-mcculloh.com (Primary)
sroe@clayton-mcculloh.com (Secondary)
Attorneys for Plaintiff