

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

GLENN AND CAROLE BOLLES,

Plaintiffs,

Case No. 09-4357-CA

-vs-

LONG BAY PARTNERS d/b/a
THE CLUB AT MEDITERRA,

Defendant.
_____ /

HEARING BEFORE: The Honorable Hugh D. Hayes

DATE: November 17, 2009

TIME: 11:20 a.m. to 12:33 p.m.

LOCATION: Collier County Courthouse
Naples, Florida

REPORTER: Barbara A. Donovan, RMR, CRR

APPEARANCES:

For the Plaintiffs: CHRISTOPHER R. GROTE, ESQ.
Lindquist & Vennum, PLLP
4200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402

KENNETH H. HANEY, ESQ.
Quarles & Brady, LLP
1395 Panther Lane, Suite 300
Naples, FL 34109

For the Defendant: G. DONALD THOMSON, ESQ.
Henderson, Franklin, Starnes
& Holt, P.A.
3451 Bonita Bay Boulevard
Suite 206
Bonita Springs, FL 34134

1 THE COURT: Okay. This is on the plaintiffs'
2 motion, I believe. And the -- for your benefit or
3 not, I -- I received two packets of materials from
4 both sides that I reviewed. And if you've sent me
5 anything other than this, then I'm not really aware of
6 it so -- at this point. Okay. If you'd like to go
7 ahead and proceed then.

8 MR. GROTE: Thank you, Your Honor. My name is
9 Chris Grote. I'm here with co-counsel Ken Haney on
10 behalf of plaintiffs, Glenn and Carole Bolles. With
11 this motion the Bolles respectfully request that the
12 Court grant its summary judgment on their breach of
13 contract claim against Long Bay Partners, the owners
14 and operators of the Mediterra Club. This case
15 involves the parties' membership agreement contract,
16 and that membership agreement contract, Exhibit A to
17 the affidavit of Mr. Bolles, provides, quote, The club
18 agrees that it will unconditionally repay to the
19 applicant 100 percent of the membership deposit paid
20 by applicant to the club without any interest thereon
21 within 30 days after resignation of the membership.

22 Now, the club concedes the membership agreement
23 contract. It concedes the Bolles have resigned, and
24 it concedes that the club has not refunded the
25 \$180,000 membership deposit that the Bolles made.

1 Now, the interpretation of the parties'
2 membership agreement contract is a question of law.
3 Because the club unconditionally agreed to refund the
4 Bolles' membership deposit and because it's not done
5 so, the Bolles are entitled to summary judgment.

6 The brief recitation of the facts, Your Honor:
7 On July 28th the Bolles completed the Exhibit A
8 membership agreement contract and paid the \$180,000
9 deposit to join the club. Mr. Bolles has provided
10 affidavit testimony that he would not have joined the
11 club but for the fact that the \$180,000 was to be
12 unconditionally returned to him and his wife upon
13 their termination of the membership. That was on July
14 28th that it occurred.

15 About two months later on November 9th,
16 Mr. Bolles received an e-mail from the club including
17 a November 7th letter. In the November 7th letter the
18 Mediterra Club advised the Bolles that effective on
19 November 7th, quote, We are amending our membership
20 plans to suspend the immediate refund of membership
21 deposits. The club concedes that there was no
22 consultation with the Bolles in advance of the
23 November 7th decision or the service of that letter
24 and that no consideration was provided to the Bolles
25 for the amendment of the membership plan and in

1 effect.

2 As a result of the suspension and termination and
3 the membership refunds, the Bolles resigned their
4 membership effective November 20th, so immediately the
5 Bolles acted in an effort to secure the refund of
6 their membership deposit. Communication between the
7 parties after that, which is attached to the affidavit
8 of Mr. Bolles, indicates that the club claiming that
9 they have properly suspended the refunds, declined to
10 refund their membership, and this action ensued. Now
11 we're at summary judgment, Your Honor. The resolution
12 of this case depends exclusively on the construction
13 of the parties' written membership agreement and the
14 incorporated membership plan. Now, the membership
15 plan is Exhibit B to the affidavit of Mr. Bolles. And
16 there is no disagreement or dispute about which are
17 the operative documents here. The question before the
18 Court is, therefore, one of law only and determinable
19 by summary judgment.

20 If you take a brief look at that American Medical
21 International, Incorporated, versus Scheller case, it
22 talks about the fact that it's error for a court to
23 send contract interpretation issues to the jury. The
24 meaning and the legal effect of a contract is for
25 determination by the Court alone.

1 And some of the guiding principles for today,
2 Your Honor, on page -- well, that would be page 10 of
3 the document, the case itself. Where a contract is
4 clear, unambiguous, and does not involve any
5 absurdities or contradictions, it is the best evidence
6 of the intent of the parties, and its meaning and
7 legal effect are questions of law, then the Court went
8 to italicize the following -- for determination by the
9 Court alone. The Court also noted that true
10 ambiguities do not exist merely because a contract can
11 possibly be interpreted in more than one manner.
12 Indeed, it says, fanciful, inconsistent, absurd
13 interpretations of plain language are always possible.
14 It is the duty of the trial court to prevent such
15 interpretations.

16 Also, the City of Winter Haven versus Ridge Air
17 case that's cited in our brief, quote, When a contract
18 is clear and unambiguous, the Court cannot give it any
19 meaning beyond that expressed. So, again, Your Honor,
20 on page 4 of the membership agreement, which is
21 Exhibit A, the club agreed that it will
22 unconditionally repay to the applicant 100 percent of
23 the membership deposit within 30 days of resignation.
24 The contract here is clear and unambiguous, and the
25 Bolles request that it be enforced.

1 Now, let's get to the nub of the response. The
2 club can't modify the membership agreement by a
3 claimed amendment to the membership plan. Here the
4 club says it can amend this agreement, this Exhibit A,
5 amend the obligation to, quote, unconditionally repay
6 through its unilateral modification of the membership
7 plan. Now, this claim is contrary to Florida law, and
8 it's contrary to the plain language in the membership
9 agreement and in the membership plan.

10 Let's take a look at the documents. The
11 membership agreement states that the Bolles', quote,
12 membership privileges will be subject to the terms and
13 conditions of this agreement and of the membership
14 plan and rules and regulations. Now, if you look at
15 the membership plan on page 12, the plan states that
16 the club, quote, reserves the right in its sole
17 discretion to modify the plan, the membership plan.
18 Importantly, Your Honor, the membership plan does not
19 include any reservation of rights by the club to
20 modify the membership agreement. If you read the
21 membership plan, it acknowledges and repeatedly
22 references and acknowledges that both documents are
23 there and they're independent.

24 Now, in its brief the club repeats time and time
25 again that it retained a right to modify the plan, and

1 that's acknowledged it retained a right to modify the
2 plan. But stuck with the fact that the plan doesn't
3 include a right to amend the agreement, the club then
4 blurs the distinctions between the documents and says,
5 well, it retained a right to amend the operative
6 agreements. Now, that's not right. Again, the right
7 reserved to amend the plan, not to amend the
8 unconditional obligations in the agreement.

9 Now, second, if you look at the membership
10 agreement on page 3, it says that only membership
11 privileges will be subject to the membership plan. My
12 membership privileges will be subject to the terms and
13 conditions of this agreement and the club membership
14 plan. So then at most, the club retained only the
15 ability to limit privileges, such as the availability
16 and use of club facilities.

17 If you look at Exhibit A, paragraph -- page 4, it
18 talks about it in there too. The company and the club
19 reserve the right, in their sole and absolute
20 discretion, to restrict or otherwise reserve the club
21 facilities for maintenance, tournament play, and other
22 special events from time to time.

23 Thirdly, and importantly, also, where the plan,
24 Exhibit B, references membership deposits, the plan
25 specifically says that membership deposits are

1 refundable only in accord with the plan. And then it
2 goes back to reference the membership agreement.
3 That's -- Exhibit B at page 6 notes that. And,
4 accordingly, throughout the document, the membership
5 plan -- it -- when it's talking about membership
6 deposit, it constantly refers back to the membership
7 agreement, as well as with regard to the plan itself.
8 Therefore, the plan itself states that the membership
9 deposit refunds will always be determined with
10 reference to the membership agreement.

11 Again, the plan recognizes distinctions between
12 the agreement and the plan itself where it talks about
13 membership deposits. It goes back to the agreement
14 where the plan talks about amendment of the plan.
15 However, it refers exclusively to the membership plan.
16 So, accordingly, by the clear terms of the documents
17 themselves, the club can't modify its contractual
18 obligations under the agreement, and the Bolles are
19 entitled to summary judgment.

20 Again, the club's claim that it can amend this,
21 quote, unconditional obligation to repay through
22 modification of the plan is contrary to Florida law.
23 The club's interpretation really just renders this
24 unconditional obligation to repay meaningless. Publix
25 Supermarkets Inc. versus Wilder Corp. of Delaware --

1 that's 876 So. 2d 652 at 654 -- it's a Florida
2 District Court of Appeals case. Now, I didn't include
3 that, but it's -- it really says something that's, you
4 know, noncontroversial. It says, Courts must construe
5 contracts to give reasonable meaning to all
6 provisions, quote, rather than leaving part of the
7 contract useless.

8 So the club's interpretation here, the Bolles
9 argue, renders the unconditional obligation, well,
10 useless because, according to the club, unconditional
11 doesn't mean unconditional. Instead any repayment
12 obligation is conditioned on the club's ability, as
13 they argue, their desire or even their whim to repay.
14 And that's not right under the Florida law, Your
15 Honor. Words must have meaning, and unconditional
16 must be given meaning by this Court.

17 Just as a side note, I'd also note that this
18 amendment to the membership agreement was made without
19 any consideration. And, of course, amendments to
20 contracts require consideration, and the club concedes
21 in its answers to the complaint that no consideration
22 was offered for this agreement. And that's not
23 surprising because their argument is they retained the
24 right to change the word "unconditional."

25 Now, if this membership agreement can be amended,

1 as the club claims, at its whim, well, the agreement
2 becomes completely illusory and unenforceable.

3 I would ask the Court to turn its attention to a
4 case that we provided the Court. It is the
5 ContractPoint Florida Parks, LLC, versus State of
6 Florida matter. And the cases that we cite, as the
7 club acknowledges in its responsive papers, are really
8 uncontroversial with regard to what's an illusory
9 contract and what's not. According to the
10 ContractPoint case, Where one party retains to itself
11 the option of fulfilling or declining to fulfill its
12 obligations under the contract -- well, there isn't a
13 valid contract, and neither side may be bound. And
14 the parties must be put into their previous position
15 prior to the contract.

16 The Office Pavilion case -- we didn't include it,
17 but it's been cited in our briefs -- the
18 noncontroversial position there, also, that, quote, A
19 promise or apparent promise isn't consideration if by
20 its terms the promisor or purported promisor reserves
21 a choice of alternative performances.

22 Okay. So how do we apply that here? If, as it
23 claims, the club retained the right to unilaterally
24 modify the unconditional deposit repayment term, well,
25 the agreement presents the exact "I'll perform if I so

1 choose case" that renders the contract illusory. In
2 response, the club says, well, gosh, no. The
3 agreement's not illusory because it continued to offer
4 the availability of the pool or the golf course or the
5 tennis courts.

6 But the club here is missing the point, Your
7 Honor. The point is, is that if the club is right and
8 it can amend the parties' contract as it pleases, the
9 club can eliminate any or all of these membership
10 privileges at its whim. According to the club's
11 theory then, it has no more obligation to provide any
12 amenities at all than they do to provide membership
13 refunds, and that's what renders the agreement
14 illusory under the club's interpretation. The answer
15 is simple for the Court, Your Honor. It's simply to
16 enforce the clear language of the agreement with
17 regard to the unconditional obligation to repay.

18 Think about what the club is saying it can do,
19 Your Honor. Mr. Bolles, you can play golf Tuesday
20 morning at 11 a.m., and that's it; or maybe,
21 Mr. Bolles, you just can't play golf at all; or maybe,
22 Mr. Bolles, we need another membership deposit out of
23 you, another \$180,000. The point here is, Your Honor,
24 is that under the club's interpretation, the
25 agreements themselves are completely meaningless

1 because they can change their performance at their
2 whim.

3 I'd like to move on to start to address some of
4 the issues that the club brings up in response because
5 they -- they fall on each other, Your Honor.
6 Contractual rights under Florida law cannot be limited
7 by the amendment of bylaws or membership plans. Now,
8 Florida law specifically rejects the notion that
9 contract provisions can be eviscerated by amenable
10 bylaws incorporated by reference in the contract. And
11 that's what we have here. We have the membership
12 agreement contract which references and incorporates
13 the membership plan, and at the back of the membership
14 plan buried in there is the club's ability to amend
15 the plan.

16 There's three important cases here, Your Honor.
17 And I've given you copies of all of those. And
18 they're -- they're briefed by both sides so, you know,
19 the Court's attention is drawn to the dispute. The
20 three cases are First Florida Bank versus Financial
21 Transaction Systems, Inc.; Surf Club versus Long; and
22 then the American Medical International, Inc., case
23 versus Scheller that I cited earlier.

24 Let's take a look at First Florida Bank, first of
25 all, because it's precisely dispositive of what's

1 going on here. First Florida Bank, the bank was a
2 member of this membership organization called
3 Financial Transaction Systems. And this FTSI
4 organization was formed for the purpose of processing
5 credit card transactions for the banks. The contract
6 between the bank and the club or the membership
7 organization provided that when a bank resigned, the
8 member forfeited its capital contribution. When the
9 bank applied for membership in this case, well, it
10 signed a statement saying that we'll agree to abide by
11 the existing bylaws of the FTSI and any future
12 amendments thereto.

13 So much like here you have a membership agreement
14 to start, and then you -- there's an agreement also to
15 abide by the bylaws and -- and the like as they are
16 amended. All right. So ultimately what happens here
17 is the bank -- the company, club, for lack of a better
18 term in this instance, amended their bylaws to say if
19 you resign without proper notice, we're going to
20 charge you a penalty. So the bank resigns and refuses
21 to pay the penalty.

22 The organization sues, and the Court of Appeals
23 here directed judgment for the bank. The Court of
24 Appeals said, quote, It is firmly established that a
25 corporation is prohibited from amending its bylaws so

1 as to impair a member's contractual right. And of
2 import here the Court also noted, quote, Although
3 First Florida signed a statement upon receiving its
4 membership to abide by all amendments to FTSI charter
5 and bylaws and operating rules, FTSI cannot validly
6 amend the parties' original agreement regarding
7 voluntary termination in a manner which deprives First
8 Florida of its contractual rights.

9 So you can see how it applies here, Your Honor.
10 Merely because we have a contract that then
11 incorporates the membership plan and in the membership
12 plan it says the bylaws of the club are subject to
13 amendment, the Court of Appeals in Florida has clearly
14 said that you can't go back and through that
15 eviscerate contractual rights in the initial
16 agreement.

17 Surf Club versus Long is also quite on point
18 here, Your Honor. And this is a club case. In Surf
19 Club the proprietary members of the club -- these are
20 members who were deemed to be the sole owners of all
21 the property and franchisees of the club. They sue
22 the club to avoid the club's decisions to pledge or
23 otherwise encumber their property assets to cover
24 operational deficits. The members' proprietary
25 certificates, the contract there, also contained the

1 bylaws, and the bylaws were subject to amendment.

2 Now, interestingly enough, something that
3 Mediterra Club brings up in its briefing, it says,
4 well, the club in Surf Club began to suffer huge
5 operational deficits. And, accordingly, to save the
6 club from closing, Surf Club amended its bylaws to
7 increase the club's indebtedness, to pledge club
8 property to secure that indebtedness, and to sell
9 property assets of the club. The Court of Appeals
10 voided those amendments saying that the general rule
11 established long ago said a corporation is prohibited
12 from amending its bylaws to impair members'
13 contractual rights. That's exactly what's happening
14 here, Your Honor. And that's why the proposed
15 amendment or the effort by the club to amend and
16 refuse to repay the membership deposit should be
17 voided.

18 The last case I would point out on this point
19 then, Your Honor, is American Medical versus Scheller.
20 We talked about that earlier. But I just want to note
21 that in American Medical they're talking, again, about
22 how you can have a membership organization, and you
23 can have amenable bylaws that are incorporated into a
24 contract. In Scheller it was an employment agreement.
25 But just by amending the bylaws you cannot eviscerate

1 the contractual rights and obligations pursuant to the
2 employment contract in that case. In finding for the
3 hospital in that case, the Court held that the
4 provisions of the parties' employment contract
5 governing termination were unambiguous, and in that
6 instance it was a 90-day termination provision.

7 The interesting quote there from Scheller I'd
8 like to draw the Court's attention to is that Scheller
9 says that, importantly, these issues are for the Court
10 to be determined on summary judgment. The Court said,
11 It was improper to rule that the entire contract
12 became totally subject to construction interpretation
13 by the jury by virtue of the incorporation of the
14 bylaws which contained everything but the kitchen
15 sink. So, again, courts are saying -- the Court of
16 Appeals is holding that you can't amend bylaws to
17 eviscerate contractual rights in the fashion that
18 Mediterra Club is trying to do here.

19 I do want to take just a couple of minutes to
20 talk about Hamlet, Hamlet Country Club, Inc., versus
21 Allen because it is a case upon which Mediterra Club
22 strongly relies.

23 The club also cites Susi versus St. Andrews
24 Country Club, Inc., and I've given the Court copies of
25 both those cases. Importantly, neither of these

1 cases, neither Hamlet nor Susi or any of the other
2 club cases that Mediterra cites for the proposition
3 that it can amend its bylaws in any fashion it
4 chooses, none of those cases involve trying to use
5 bylaws to eviscerate contractual rights. Rather,
6 those cases, the issues involve the provisions that
7 are being changed. The operative provisions rest
8 exclusively in the bylaws, not in a separate contract.

9 Now, in Hamlet the bylaws of the country club
10 were amended to clarify that a member was not entitled
11 to redemption of his membership certificate if there
12 were fewer than 365 members in the club. This right
13 of redemption did not arise from an independent
14 contract in Hamlet. Rather, it emanated solely from
15 the club's bylaws. Now, the Court found that the
16 amendment was proper, okay, and noted that the issue
17 of redemption was governed by and subject to the
18 bylaws rather than any separate membership agreement.

19 Here's the important part, Your Honor. The Court
20 in Hamlet was compelled to distinguish Hamlet from
21 First Florida Bank, which we just talked about
22 earlier. And that's if you just turn the page to the
23 third page of the Hamlet case, the bottom of the
24 second and into the third page. The Hamlet court
25 said, well, First Florida Bank involved attempts to

1 modify contractual rights through an amendment to an
2 entity's bylaws. The Hamlet court held, quote, We
3 find the case distinguishable because the corporation
4 was attempting to change contractual rights emanating
5 from its charter by altering the bylaws. The Hamlet
6 court continued, quote, In the present case, the
7 alleged vested rights were all contained in the bylaws
8 which were subject to amendment.

9 Same thing in Susi; same thing in National
10 Collegiate Athletic Association versus Brinkworth
11 which is cited by the club; the same thing in Orchard
12 Ridge Country Club versus Schrey; the same thing in
13 McCaffrey versus Pittsburgh Athletic Association.
14 These are all bylaw cases, amending the bylaw cases.

15 Respectfully concluding then, Your Honor, the
16 membership agreement provides an unconditional
17 obligation to repay the membership deposit upon
18 resignation. The plan states that the club reserves,
19 quote, the right in its sole discretion to modify the
20 plan, but it doesn't reserve the right to modify the
21 agreement. And the plan itself recognizes the
22 distinction between the membership agreement and the
23 plan. And, accordingly, the Bolles would ask this
24 Court respectfully to enforce the unconditional
25 obligation and grant the Bolles summary judgment.

1 Thank you, sir.

2 THE COURT: Okay.

3 MR. THOMSON: Good morning, Your Honor. May I
4 approach for a moment.

5 THE COURT: Surely.

6 MR. THOMSON: These are -- I provided Your Honor
7 with a few cases. These are just copies of the cases
8 in the order of being cited in our memorandum of law,
9 Your Honor. Thank you, Your Honor.

10 For the record, I'm Don Thomson with Henderson,
11 Franklin here on behalf of Long Bay Partners, LLC,
12 doing business as The Club at Mediterra. Of course,
13 we oppose the motion for summary judgment. We did
14 file and serve a memorandum of law and affidavit of
15 David Lucas in opposition. I would note to the Court
16 that we are very early in the case at this time.
17 There's been no discovery done, no depositions, no
18 nothing, with a complaint filed and our answer, and
19 plaintiffs moved immediately for summary judgment.

20 And I want to fill in some of the plain -- some
21 of the actual facts that plaintiff cited as supported
22 by the defendant Dave -- or I'm sorry -- defendant's
23 deposition (sic) provided by David Lucas. Long Bay,
24 of course, is the owner of The Club at Mediterra, and
25 plaintiffs are members. When the plaintiffs joined

1 the club, a requirement of membership was that they
2 pay a deposit in the amount of \$180,000, which is a
3 refundable deposit. When plaintiffs joined the club,
4 the deposits were -- were refundable within 30 days of
5 resigning.

6 Just to point out to Your Honor, for the record,
7 as set forth in Mr. Lucas's affidavit, Long Bay is
8 affiliated with the Bonita Bay Group. Bonita Bay
9 Group is not a party to this action, but they, along
10 with Long Bay and other entities, are developers of
11 numerous real estate communities here in Southwest
12 Florida. They've got six other similarly organized
13 golf and amenity clubs developed over 10,000 acres,
14 sold more than 9,000 homes, and have constructed 13
15 golf courses, marinas, beach clubs, and the like.

16 Late in 2008 Long Bay at Mediterra, as well as
17 the other Bonita Bay Group clubs, was faced with
18 significant increases in resignations and decreases in
19 new club memberships resulting basically from the
20 national economic crisis that this community, Florida,
21 the nation, and even the world was facing. We also
22 were faced with decreases in property sales and other
23 revenues to satisfy the refunds.

24 In November of 2008, Long Bay's president
25 notified the members, including plaintiffs, that Long

1 Bay was amending the membership plan to suspend the
2 immediate refund of membership deposits due to the
3 unprecedented economic conditions. The notice
4 informed the members that the number of resignations
5 and refund payments greatly exceeded the budgeted
6 expectations and why they were basically suspending
7 it.

8 Your Honor, as set forth in the deposition -- or
9 in the affidavit of David Lucas, it -- it basically
10 was threatening the economic stability and viability
11 of the clubs. If they didn't take some action,
12 bankruptcy was likely.

13 The suspension made it possible to continue club
14 operations for the benefit of a significant majority
15 of members who did not resign. In fact, between
16 November of '08 and November of '09, only 63 members
17 out of 198 have resigned or requested a downgrade of
18 membership at the Mediterra Club. Long Bay suspended
19 pay -- it should also be noted that Long Bay suspended
20 the payment of deposit refunds. They did not
21 terminate the obligation. The only obligation that's
22 in dispute here is not the obligation of repayment but
23 the obligation of timing. And, in fact, Long Bay has
24 now adopted a three-for-one refund policy which
25 basically results in a cash-neutral policy.

1 We would note, Your Honor, too, as set forth in
2 Mr. Lucas's affidavit, that the 30-day refund policy
3 worked well for 20 years for Bonita Bay Groups.
4 Owners of Bonita Bay Group affiliated clubs have
5 received refunds of hundreds of millions of dollars
6 during that time as to the residing members.

7 Your Honor, I want to point out to the Court the
8 core of the plaintiffs' complaint, and that is
9 basically it's a very simple set of facts overall that
10 they resigned, and they believe they're entitled to
11 receive a deposit back, notwithstanding my client's
12 suspension of the instant refund policy. We believe
13 that we're entitled to amend the agreement and the
14 plan in order to maintain the viability, basically
15 save the club for the many members that have remained.
16 And, again, we have adopted the new plan of three for
17 one.

18 The heart of this dispute is really that
19 plaintiffs are ignoring, we believe, the cases that
20 apply. And that is the club case rules that Your
21 Honor is familiar with and that plaintiff cited to
22 some. It's irrefutable that Florida has developed a
23 body of law governing club contracts and has
24 distinguished those types of agreements from other
25 contracts, including the contract that plaintiff cited

1 to in the Scheller case, which was an employment
2 contract, not a club contract. There's not one case
3 cited by plaintiffs in support of their motion for
4 summary judgment that really addresses Florida courts
5 handling of similar issues facing clubs and
6 relationships with members. Plaintiffs' attempt to
7 distinguish the applicable club cases by using nonclub
8 cases is mixing apples and oranges. Basically, Your
9 Honor, the bottom line with respect to the -- to the
10 club cases is that the courts are adamant they are not
11 going to interfere with the relationship and contracts
12 between the clubs and its members unless the club
13 doesn't follow its own rules.

14 I would point out to the Court some of the cases
15 with respect to summary judgment that I know Your
16 Honor is aware of, but for the record I'll cite them.
17 The plaintiffs must conclusively demonstrate that
18 there's no genuine issue of material fact and that the
19 movant is entitled to judgment as a matter of law.
20 That's the 2nd DCA Fielder case. The Court must draw
21 every inference in favor of defendant. That's the 2nd
22 DCA Schroeter case in our -- mentioned in our memo you
23 have there before you. Also, plaintiffs have the
24 burden to refute the defendant's affirmative defenses,
25 the Building Materials Corp. case from the 2nd DCA.

1 And then, of course, the DeVito Contracting case which
2 states, Even the slightest possibility of the
3 existence of a genuine issue of material fact
4 precludes the entry of summary judgment.

5 We would submit to the Court -- and I'll describe
6 it a little bit further later -- that to the extent
7 this Court is unable to determine the reasonability of
8 the club's deposit refund amendment as a matter of
9 law, that itself constitutes an issue of fact
10 requiring denial.

11 I would also cite to the Yardham versus Scalesi
12 (phonetic) case, 4th DCA, which states, Where a
13 written instrument lends itself to more than one
14 reasonable interpretation, it is ambiguous and,
15 therefore, summary judgment is improper for either
16 party.

17 With respect to the club's right to amend its
18 governing documents, as I've stated, Florida law has
19 developed the body of law relating to club contracts.
20 It's axiomatic under those cases that the relationship
21 between a member of a private club and the club itself
22 is one governed by contract.

23 And all of the cases refer to that. Basically
24 the relationship between the members and the club is a
25 contractual relationship. The courts will not

1 intervene in the internal affairs of the club in that
2 contractual relationship unless it's determined by the
3 club that the club has violated its own rules, which
4 has not been alleged here. And that's in the
5 Rewolinski case. Florida law strongly supports a
6 club's right to amend its internal governing rules,
7 and the members' rights, again, are defined by that
8 contract, and -- and the courts strongly support that
9 the contract may be amended provided that the contract
10 allows for such amendment. And all of the club cases
11 stand for that proposition.

12 The only qualification that the cases provide are
13 the amendment cannot be unarbitrary or unreasonable
14 and must have a reasonable purpose. The cases that
15 uphold the defendant's right in this regard include
16 the Susi case; the NCAA case; the Rewolinski case; the
17 Reynolds case; the Florida Yacht Club case; and, of
18 course, the Hamlet case, which Your Honor is aware of.
19 Judge, in many of those cases, yes, those were
20 amendments to bylaws. But what the cases stand for
21 the proposition is that the relationship between the
22 parties is contractual. And if the contract that the
23 parties entered into allows an amendment, then the
24 courts are going to -- to uphold that right to the
25 amendment. And here it's the contractual agreement

1 between the parties that the agreement and the plan
2 that allows, in several places, for an amendment.

3 And the only issue here is, number one, has the
4 club violated its own rules, which has not been
5 alleged; and, number two, with respect to the
6 amendment, has -- has the club decision been arbitrary
7 or unreasonable, and was it for a reasonable purpose,
8 the reasonability here.

9 I would point out just a little bit more facts
10 with respect to the Hamlet Country Club case which is
11 the case that is most on point. Of course, that was a
12 private golf course. The members' deposits were
13 refundable when the plaintiffs joined the club. In
14 that one it was a contract that allowed for the
15 amendment of the bylaws. Here it's a contract that
16 allows for the amendment of the contract in our case.
17 But in that case the club amended the bylaws as
18 allowed by the contracts that the members entered into
19 saying that they would not be able to resign and
20 receive their refund back if there were fewer than 365
21 members. The plaintiffs resigned.

22 The Court held, The club was within its rights to
23 amend the bylaws, the contract between the parties.
24 And the Court in that case referenced the -- the
25 Reynolds case for the proposition that such amendments

1 are proper where, as here, the amendment was required
2 to meet the economic necessities of time and to
3 perpetuate the club, which is exactly the situation
4 that we have here.

5 Susi is -- is very similar, only a little bit
6 different twist. In that case it was -- it was the
7 opposite. The plaintiff joins the club as tennis
8 members. And when they joined, they had the right to
9 upgrade to full golf members. The rules were changed
10 to reduce the number of golf memberships and gave
11 other property owners preference over plaintiffs in
12 upgrading the membership. Plaintiffs attempted to
13 upgrade, and the club refused.

14 The Court upheld the rule change and said, in
15 addition to that, the issue -- there was an issue of
16 conflicting portions of the bylaws, the contract
17 between the party. And the Court allowed the club's
18 board final interpretive authority which was given by
19 the bylaws noting that the interpretation was not
20 arbitrary or unreasonable. Again, the courts are
21 going back to the amendments are allowed so long as
22 there's a reasonability and it's not arbitrary or
23 unreasonable.

24 I'd like to point out a few more provisions of
25 the contract that I don't believe plaintiff did and

1 maybe in a little bit different context for the Court
2 with respect to the documents being one and the same
3 document. And I mean that as between the -- the
4 agreement and the plan. The agreement on page 3,
5 Section 2, provides my membership privileges will be
6 subject to the terms and conditions of this agreement
7 in the club membership plan and rules and regulations
8 which I acknowledge receipt of. Here in the
9 membership plan it's basically incorporating the
10 membership plan.

11 Also, on page 5, Section 8, I hereby acknowledge
12 receipt of The Club at Mediterra membership plan and
13 the rules and regulations and agree to be bound by the
14 terms and conditions thereof as they may be amended
15 from time to time. So in the agreement the plaintiffs
16 and all members are agreeing that this -- this
17 agreement and the membership plan are all part of each
18 other, and I'm agreeing to be bound by the terms and
19 conditions thereof as they may be amended from time to
20 time.

21 In fact, Your Honor, plaintiffs would have the
22 Court only look at the agreement as it relates to
23 refunds. The problem with that is the actual full
24 refund policy is in the plan, not the agreement. And
25 that's on page -- page 7 of the plan. There's very

1 little in the agreement about the refunds. The full
2 policies relating to the refunds is -- is, again,
3 within the plan on page 7. And I won't read it
4 because it's several pages.

5 I would also point out to the -- to the Court on
6 page 6 of the plan at the top, membership deposits are
7 refundable only in accordance with this membership
8 plan, the rules and regulations of the club, and the
9 membership agreement. The plaintiffs are trying to
10 say, Your Honor, we should look at the agreement but
11 not at the plan. Ignore that it really doesn't have
12 anything to do with the rights and obligations
13 relating to the refund policy. The refund policy's in
14 the plan, and the agreement, in effect, incorporates
15 the plan. You have to look at both documents when
16 interpreting and construing them.

17 I would note we've cited a few cases in our
18 memorandum of law. Of course, agreements executed as
19 part of the same transaction may modify or affect the
20 terms of the contract. That's the Freitag case.
21 Where a document expressly refers to and sufficiently
22 describes another, the other is to be referred to it
23 in interpreting. That's the OBS Company case.

24 I would submit to the Court, this isn't one where
25 it says you have to refer to the other. These

1 documents are all part of the agreement. The language
2 in both the agreement and the plan make it clear that
3 it's all part of the agreement, and -- and we would
4 submit that you can't ignore one in trying to
5 interpret it.

6 I would also note to the Court some of the
7 provisions relating to the right to amend the
8 agreement. As I mentioned a moment ago on page 5, it
9 specifically says at the bottom, I hereby acknowledge
10 receipt of The Club at Mediterra membership plan and
11 the rules and regulations and agree to be bound by the
12 terms and conditions thereof as the same may be
13 amended from time to time by the club.

14 And, of course, the plan is where all of the
15 refund policy provisions are. And then moving on to
16 the plan on page 12, at the top of the acknowledgment
17 of membership rights paragraph, membership in the club
18 permits the member to use the club facilities in
19 accordance with the membership plan and the rules and
20 the regulations as may be amended from time to time.

21 Down at the bottom of that -- or down in the next
22 paragraph which is -- which is another very clear
23 provision as to the right of amendment, the club
24 reserves the right in its sole discretion to modify
25 this membership plan and the rules and regulations --

1 and the rules and regulations.

2 Judge, with respect to the club case body of law
3 in reviewing the question of whether an amendment of
4 the club's agreement regarding membership is proper,
5 the first thing the club has to look at is the
6 agreement. Does it allow for amendments? I would
7 submit to the Court that it's irrefutable that it does
8 in this case. The next thing -- I would submit that
9 that's especially so in a case like this where
10 amendments are to meet the economic necessity of time
11 and to perpetuate the club. And, again, that's the
12 Susi case we -- we mentioned earlier.

13 Are there conflicting contract provisions here?
14 Yes. But Florida law requires that the membership
15 agreement in the plan must be read together as a
16 unified whole. I would submit that we can't just go
17 ahead and ignore one and adopt one sentence out of
18 another without reading it altogether and as a whole.
19 Because the deposit refund policy amendment adopted by
20 the club was authorized by the plan, the instant
21 dispute asked the Court to try to harmonize two
22 apparently conflicting contract provisions, the
23 unconditional promise to refund on the one hand and
24 the club's amendment of the refund policy on the other
25 hand. There's nothing absurd about recognizing

1 enforcing the amendment here. The right of amendment
2 was clear and unambiguous and was contained in the
3 very document that enunciated the refund policy.

4 And plaintiffs signed the document, agreed to it,
5 knew it could be amended. We don't have any
6 complaints from the plaintiffs or arguments that they
7 didn't read it or didn't understand it. The
8 plaintiffs fully and freely agreed to the amendment.
9 We would submit that the Court must read the contract
10 as a whole endeavoring to give every provision its
11 full meaning and operative effect. A single contract
12 provision should not be considered in isolation but
13 has to be construed according to the entirety of its
14 own terms, and that's the Aberdeen Golf & Country Club
15 case.

16 One of the things the plaintiffs point out to
17 Your Honor is that this amendment is not a whim. And
18 if the Court were not to -- if the Court were not to
19 rule in plaintiffs' favor, you'd basically be saying
20 that the club could amend as it pleases. They could
21 say you can only play golf one day a week or you can't
22 use the pool during a certain time period. That is
23 absolutely wrong and off base.

24 Florida law is clear in all of the club case law
25 -- laws or rules or cases are clear that unreasonable

1 or arbitrary amendments would not be proper. They
2 would be improper. It's got to be reasonable. It
3 can't be arbitrary. The reasonability of the
4 amendment here at issue is the real question before
5 the Court. And if it's found to be reasonable, then
6 Florida law requires that the amendment be given
7 effect.

8 The reasonability of the amendment here is
9 virtually unquestionable. The amendment allowed the
10 club to remain open and operating for the benefit of
11 the members in the face of a national calamity, a
12 national and global economic disaster that we haven't
13 seen since the great depression. Is there
14 reasonability here? We would certainly submit yes.
15 The amendment allowed hundreds of members, including
16 plaintiffs, to use the club and benefit from the club.
17 In fact, the plaintiffs, as set forth in the affidavit
18 of Dave Lucas, continued to use the club even after
19 they -- they resigned up until at least May of 2009,
20 six months later. The club's reserved right of
21 amendment allowed the club the flexibility to address
22 all manners of unforeseen issues, and it benefits all
23 of the members.

24 With respect to the Scheller case that the
25 plaintiffs cite, again, the contract at issue there

1 was an employment agreement. And in that case the
2 Court did rule a contract provision as absurd. But in
3 that case, again, it was an employment contract, and
4 the proposal that Dr. Scheller was promoting would
5 have, in effect, given him a guaranteed lifetime
6 tenure employment contract, a truly absurd result.

7 More importantly, the contracted issue in
8 Scheller was an employment agreement, not a contract
9 regarding a country club membership. Again, Florida
10 laws adopt a body of law governing country clubs. And
11 I would cite to the Florida Yacht Club case in which
12 it stated that there's a valid distinction between
13 institutions, such as trade unions and professional
14 associations, affecting a person's right to earn a
15 living and a private social club.

16 With respect to the bylaw argument submitted or
17 contended by the plaintiffs, it's not on point. Their
18 argument is that a party may not amend its contractual
19 obligations by amending its bylaws. That's not what's
20 being suggested here. That's not what is being
21 argued. It is the contract that we submit has been
22 and was properly amended in this particular case. And
23 it is the contract that the parties entered into that
24 specifically allows that amendment, the contract that
25 the plaintiff voluntarily entered into. The club has

1 not amended its bylaws, and it's not arguing that.
2 Again, it's the contractually reserved right of the
3 contract amendment. And, again, the question here is
4 reasonability. We would submit that the question of
5 the amendment's reasonability alone is a question of
6 fact that requires denial of the motion for summary
7 judgment.

8 I would submit a few cases, of course, Your
9 Honor, in addition to the Susi and Hamlet cases, which
10 basically state as long as it's reasonable, the
11 amendment should be supported. One would be the Palm
12 Beach Pain Management, Inc., case. And in that case
13 they -- the Court stated, Where there are two
14 reasonable interpretations of a contract, summary
15 judgment is inappropriate because there's a genuine
16 issue of material fact. Here there are clearly two
17 reasonable interpretations of these contract documents
18 entered into by the parties.

19 The next point that the plaintiffs make is that
20 the contract is either illusory or does not -- is not
21 supported by consideration. We would submit that,
22 number one, Long Bay has clearly provided sufficient
23 consideration in this case. Also, under the Hamlet
24 and Susi case and their progeny unambiguously holding
25 a club's right to amend the rules and policies

1 disposes of that argument. All of those cases allow
2 the right to amendment. None of them provide that
3 such a right of amendment is illusory as long as it's
4 reasonable and not arbitrary.

5 Plaintiffs cite to several cases that where a
6 promise is not supported by adequate consideration,
7 such a contract is illusory and, thus, unenforceable.
8 We don't dispute those cases. That's not an issue
9 here. It's axiomatic that a contract, such as the one
10 here, must proceed upon mutual promises, each
11 constituting consideration for the other.

12 A review of the cases cited by plaintiff -- and
13 two of them are the Johnson Enterprises of
14 Jacksonville case and the FPL Group case -- I'm
15 sorry -- FPL Group case and the Office Pavilion case.
16 The courts ruled in those finding the contract's
17 illusory, that there was no consideration at all. One
18 party didn't have to do anything or take any action
19 under the contract. They could have turned around and
20 walked away from all of their obligations under the
21 contract.

22 That's not present here. There's no question
23 that consideration is present. Plaintiffs' argument
24 suggests that the essence of this contract is
25 plaintiff providing a deposit that's refundable and

1 being able to, when they want to resign, receive their
2 deposit back and that there's no other give and take
3 or -- or there's no other consideration in the
4 contract. That's clearly not the case.

5 Plaintiffs paid the deposit to join the club and
6 enjoy all of the memberships of -- of the club. What
7 did plaintiff receive in return? The use of two
8 18-hole golf courses, practice areas, a
9 25,000-square-foot clubhouse, complete tennis center.
10 The list goes on, fitness, swimming, private beach --
11 private beach facility. Clearly the plaintiffs
12 received consideration, and clearly the contracts
13 relating to -- or the case law relating to illusory
14 contracts does not apply because there was certainly
15 consideration here. In fact, under the David Lucas
16 deposition, the collection of deposits did not come
17 close to funding the total cost to build and operate
18 the club. Long Bay and its owners expended over
19 thirty-four and a half million in excess from all of
20 the deposits received from members to build and
21 operate this club.

22 Finally, Your Honor, I would point out that the
23 parties' mutual performance of the contract is itself
24 valuable consideration that the Court must also look
25 at, what actually happened, what are the facts. The

1 issue of valid consideration for the contract at issue
2 can't be addressed without acknowledging the actual
3 performance between the plaintiff and the defendant
4 here. Plaintiffs made the required payments, and Long
5 Bay adhered to its contract by providing a first-class
6 premiere club membership to the plaintiffs.

7 We would submit to the Court that even if the
8 Court determined that Hamlet and Susi and its progeny
9 of cases should not be read to support the agreement,
10 the parties' performance alone under the contract and
11 the regular course of dealing are sufficient
12 consideration for the contract. Plaintiffs purchased
13 the membership, entered into the agreement with full
14 knowledge and full understanding of what they were
15 getting and that the contract was subject to
16 amendment.

17 We would submit to the Court that there's clearly
18 an issue of fact here. The case, again, is early on.
19 No discovery has occurred, and -- and it's certainly
20 ripe for continuing the discovery further in this
21 case. And we'd ask the Court to deny the motion for
22 summary judgment. Thank you.

23 THE COURT: Okay. Thank you very much to both of
24 you for your excellent presentation and the excellent
25 memoranda that you provided to the Court previously.

1 The Court is -- actually has had a case similar
2 to this probably about seven years ago, it seems like.
3 But, anyway, it was in Windstar community; I remember
4 that. And the Court is, as it is in this case, going
5 to grant the motion.

6 I -- I would find that this is a dispute that is
7 a matter of law, in other words, more -- it's an issue
8 of contract language interpretation which can be
9 disposed of by the Court through summary judgment
10 proceedings. Clearly in these cases, just as a
11 general drafting and general contract law case, these
12 are construed, to some extent, against the drafter of
13 the document them -- itself. I think that is -- there
14 is a clear distinction between the duties and the
15 obligations under the contractual agreement and the
16 language contained therein, i.e., the unconditional
17 repayment because, quite frankly, to rule that the
18 plan trumps the agreement would be to have the tail
19 wag the dog. And to determine that these apparent
20 inconsistencies must be determined in some kind of
21 factual basis really would only result in a
22 determination of an illusory contract. I -- I tend to
23 agree.

24 Likewise -- although the other cases that were
25 supplied, I -- and I'm particularly going -- speaking

1 of the 1947 case of Kensington that was out of
2 Pennsylvania was -- that was addressed by the Hamlet
3 Court in a 2nd District -- no. That was in the 4th
4 District's case of Hamlet. And even in that case they
5 distinguish the First Florida case, which I think is
6 controlling. And, as the Judge Klein says at the end,
7 he says, We find that the case -- and he's talking
8 about First Florida -- is distinguishable because the
9 corporation was attempting to change contractual
10 rights emanating from its charter by altering the
11 bylaws. In the present case the alleged vested rights
12 are all contained in the bylaws which were subject to
13 amendment.

14 So they did recognize the Pennsylvania case,
15 Kensington, which appears to probably have gone the
16 other way, and -- and can -- one can only observe what
17 the tenor of -- or philosophy of the country and the
18 government was in 1947 after having come out of the
19 second world war. But I think that probably has some
20 historical implication.

21 Here I think we're controlled by the First
22 Florida Bank case, the Surf Club, and to some extent,
23 the American International case. As I said, Hamlet is
24 distinguishable based on Judge Klein's observations,
25 and I think the same can be said for the Susi case.

1 As far as the economic hard times issue, it's
2 kind of interesting because that -- it was
3 intriguing -- out of the Pennsylvania case in 1947.
4 But it doesn't really seem to reflect what today we
5 would, in this almost-depression era, have to
6 recognize that, quote, economic hard times, end quote,
7 is a two-way street and not just from the point of
8 view of a golf course facility which, in all --
9 really, truly, in all respects is a recreation
10 resource. So I think that the -- if there is a
11 historical analysis, ours is different from in the
12 year 2009 as it was from 1947 where the State was
13 supreme. And at this point if we go into looking at
14 Wall Street, we surely know that the State is not
15 supreme. It may ultimately be, but it appears to be
16 somewhat of a failure at this point.

17 Irrespective, it's not relevant to the way we
18 look at the motion for summary judgment and the
19 documents that the parties signed in this case. So
20 the motion is granted. I would direct plaintiffs'
21 counsel to prepare an order and share it with opposing
22 counsel and submit it to the Court.

23 MR. HANEY: Thank you, Judge.

24 MR. THOMSON: Thank you, Your Honor.

25 THE COURT: Okay.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. GROTE: Thank you, Your Honor.
(Proceedings concluded at 12:23 p.m.)

COURT CERTIFICATE

STATE OF FLORIDA
COUNTY OF COLLIER

I, Barbara A. Donovan, Registered Merit and Certified Real-Time Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

Dated this _____ day of _____, 2009.

Barbara A. Donovan, RMR, CRR