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

POINCIANA COMMUNITY DEVELOPMENT DISTRICT, and POINCIANA WEST COMMUNITY DEVELOPMENT DISTRICT,

PLAINTIFFS, Case No. 2016-CA-004023

v.

WILLIAM MANN, BRENDA TAYLOR, MARTIN KESSLER, the STATE of FLORIDA, et al.,

DEFENDANTS,
_____/

WILLIAM MANN AND BRENDA TAYLOR'S CLOSING BRIEF

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STATEMENT OF ISSUES

(1) Public Purpose: Community development districts are not permitted to issue bonds when the purpose is to benefit a private party. A district can only issue bonds when there is a public purpose that is sufficiently strong to overcome any private benefit. Here, the districts propose to issue bonds to pay a developer $73.7 million for common areas the developer is required to turn over to resident control. The purchase price was undisputedly set by calculating the present value of 30 years of fees the developer intended to collect from residents. Those fees are illegal under Florida's Homeowners' Association Act. Is there a sufficiently strong public purpose to overcome the immense private benefit to the developer?

(2) Legal Requirements: Community development districts issuing bonds must determine the fair value of properties exchanged for bonds. "Fair value" must be determined by a licensed appraiser using uniform methods. Here, the districts failed to determine fair value. The purchase price was calculated by an unlicensed consultant who did not use uniform methods and based value not on the value of the property but on the illegal income stream purportedly expected by the developer. Did the districts comply with the "fair value" requirement necessary to issue bonds?

(3) Fair and Reasonable Apportionment: Special assessments must be fairly and reasonably apportioned according to the benefits received by the assessed properties. Here, the districts determined that each property receives an equal benefit from the amenities purchase. But instead of equally apportioning the assessments, the districts used a method of allocation that results in assessments that are higher for properties from

which the developer is collecting higher fees under an illegal club plan incorporated in the homeowners' association's master declaration. Those fees were arbitrarily set by the developer, they are illegal to collect, and they have nothing to do with the benefits that the properties receive from the amenities. Are the assessments fairly and reasonably apportioned?

RESPONSE TO THE DISTRICTS' INITIAL BRIEF

In response to the Districts' complaint for validation, Taylor and Mann raised the affirmative defense that validation should be denied because the developer, AV Homes Inc., is the primary beneficiary of the bonds and the purpose of the project is AV's profit. Answer & Aff. Defs. at 14–15, Filing No. 55401034 (Apr. 21, 2017). The evidence substantiates that defense. AV worked with the bond underwriter, MBS Capital Markets, to control the Districts' boards of supervisors and their consultants. This forced the Districts into an unconscionable agreement to pay $73.7 million to purchase amenities facilities that *Solivita* residents are already entitled to own through the homeowners' association.

The Districts try to sidestep these facts by arguing that they are collateral issues. *See* Initial Closing Arg. of Plfs. at 8–12, Filing No. 59989550 (Aug. 4, 2017). And the Districts try to sidestep two requirements of fairness that the Districts cannot meet—fair value and fair apportionment.

Taylor and Mann also raised the affirmative defense that validation is precluded by the Districts' failure to make a determination of fair value under § 190.016(1)(c). Answer & Aff. Defs. at 15–16. And when the Districts moved for summary judgment on Taylor and Mann's fair-value affirmative defense, they did not dispute the applicability of § 190.016(1)(c). Plfs.' Mot. Summ. J., ¶¶ 19–22, Filing No. 56528401 (May 16, 2017).

Six weeks later, the defendants deposed Scott Harder, the consultant that Districts relied on to calculate the amenities facilities' price. *See* Am. Notice Dep. Harder, Filing No. 58145731 (June 22, 2017). Consistent with his testimony at trial, Harder admitted

that his price calculation was not based on the facilities' fair value; he even admitted that he never determined the facilities' fair value. As a result, the Districts changed positions and argued at trial and in their closing brief that § 190.016(1)(c) does not apply. *See* Initial Closing Arg. of Plfs. at 12.

The Districts' Counsel and the Districts' Manager both testified that the transaction the Districts proposed is an exchange in which the Districts will issue bonds and receive properties. (Testimony of Eckert and Moyer; *see* Argument *infra* Part II.A). Thus, the Districts are exchanging bonds for properties under § 190.016(1)(c). For that reason, the Districts were required to determine the fair value of the properties to be exchanged for the bonds.

Taylor and Mann also raised the affirmative defense that validation is precluded because the Districts failed to fairly and reasonably apportion the proposed special assessments. Answer & Aff. Defs. at 16–18. It is undisputed that the assessment methodology adopted by the Districts will result in equally benefitted properties paying different assessments. In fact, the report prepared by the Districts' own assessment consultant, Kevin Plenzler, included the requirement that "the assessments must be fairly and reasonable allocated to the properties being assessed" in the section titled "requirements of a valid assessment methodology." (Jt. Ex. 45).

The fairness requirement identified in Plenzler's report is consistent with standard applied by the Florida Supreme Court—that "the assessment must be fairly and reasonably apportioned among the properties that receive the special benefit." *Donovan v. Okaloosa County*, 82 So. 3d 801, 813 (Fla. 2012) (quoting *City of Boca Raton v. State*,

595 So. 2d 25, 29 (Fla. 1992)). But by the time of trial the Districts side-stepped the fair-apportionment standard. At that point, the Districts' assessment consultant testified that the standard required only reasonableness, not fairness. (Testimony of Kevin Plenzler).

According to the Districts. the trial evidence defeating validation that was presented by Mann and Taylor was no more than "select email communications (taken out of context) and oral communications between various groups" (the Districts' Manager, the Districts' Counsel, the Districts' Engineer, the Districts' consultants, the underwriters from MBS, and AV), "to suggest some improper communication." (Districts' Closing at 8). And the Districts argue that "these communications were all ordinary for this type of transaction."

If the evidence presented by Mann and Taylor was really "taken out of context," then the Districts should have shown that at trial. They did not. Nor is there anything "ordinary" about the communications between AV, MBS, and the Districts' professionals and consultants. It is *not* "ordinary" for a developer to dictate the purchase price of properties being sold to a community development district, or to sell a community development district properties that are common areas of the community's homeowners' association. Nor is it "ordinary" for a district to rely on a valuation consultant who does not determine the fair value of the properties being exchanged for bonds but instead follows the seller's instructions and simply calculates the district's maximum bonding capacity. To the contrary, the Districts seek validation under extraordinary circumstances intended to confer a multimillion dollar profit benefit on a private developer.

FACTS

Overview

After developing the *Solivita* community and building amenities facilities for its residents, AV Homes illegally collected fees from those residents that exceeded the proportionate share of the expenses of owning and operating the facilities. Even now, AV still uses its control of the homeowners' association in *Solivita* to collect those illegal fees. Before the threshold of home sales that would require AV to turn over control of the homeowners' association to residents was reached, AV devised a scheme to sell the amenities facilities and cash in on 30 years of future profits that AV expected to receive from collecting the illegal fees.

The Club Membership Fees are illegal under Florida's Homeowners' Association Act, chapter 720, Florida Statutes, because assessments based upon mandatory deed restrictions are required to be based upon expenses of the association. Under chapter 720, mandatory deed restrictions cannot be used to create for-profit entities. In a separate case, Mann, Taylor, and a third homeowner from *Solivita* are suing AV and its subsidiary Avatar Properties Inc. for violating the Homeowners' Association Act by illegally collecting Club Membership Fees. *See* First Am. Class Action Compl. & Demand for Jury Trial, Filing No. 57480189 (June 8, 2017), *Gundel v. AV Homes Inc.*, Case No. 17-CA-1446 (Fla. 10th Cir. Polk Cnty.). The lawsuit also seeks a declaratory judgment that the amenities facilities are common areas of the association, which—under the Homeowners' Association Act—AV must deed over to the association within three months after selling 90 percent of the homes in *Solivita*. *See id.*

Through this bond validation proceeding, AV is attempting to monetize its illegal profit stream by selling the amenities facilities to the two community development districts that AV established for *Solivita*, Poinciana Community Development District and Poinciana West Community Development District. To achieve its goal, AV worked with bond underwriters from the firm MBS Capital Markets. In December 2015, MBS calculated an enormous target purchase price for the amenities—a price based not on fair market value but instead on the profit stream AV expected to receive from its continued collection of the illegal fees.

After calculating that target price, the underwriters from MBS worked with AV behind the scenes to unduly influence the bond issuance process. With the help of the Districts' Counsel, the Districts' Manager, and the Districts' Engineer—all of whom were originally retained by AV when AV established the Districts—AV and MBS kept the process on track for AV to receive its target price for the special assessment bonds.

To achieve their goal, AV and MBS proposed that, as part of the sale, AV would build new amenities. And AV and MBS led the Districts' boards of supervisors to believe that if the Districts did not issue bonds to purchase the amenities, AV would sell the existing amenities to an outside entity and the new amenities would never be built. That in turn caused the boards to fear that if an outside entity bought the facilities, the residents would lose amenities because the new buyer would make cuts to maximize profits.

The truth is—and the trial witnesses confirmed—there was no outside entity interested in purchasing the amenities facilities. AV fabricated the threat to frighten the Districts' boards of supervisors into issuing bonds at AV's target price.

Finally, AV paid and controlled the consultants the Districts' boards of supervisors relied on when they agreed to AV's target price. With the help of the Districts' Counsel, the Districts' Manager, and the Districts' Engineer—whose fees relating to the amenities purchase were also paid by AV—MBS and AV were able to monitor the consultants' work and control the conclusions of the consultants' reports. At the same time, the Districts' boards mistakenly thought their consultants were independent from AV. They agreed to issue bonds to purchase the amenities without knowing the extent of AV and MBS's control over the Districts' consultants.

The above facts were established by testimony and the documentary evidence presented at trial. That evidence is detailed below.

AV Records Master Declaration and Club Plan, Builds Amenities

AV Homes Inc.'s subsidiary Avatar Properties Inc. is the developer of the community *Solivita*. To sell homes in *Solivita*, AV built amenities facilities for residents. Before selling any homes, on August 10, 2000, AV established a homeowners' association for *Solivita* and incorporated in the association's declaration a Club Plan, which purportedly requires homeowners to pay monthly "Club Membership Fees," in addition to assessments for the monthly expenses of owning, operating, and maintaining *Solivita*'s amenities facilities. (Defs.' Ex. 18). AV has used its control of the

homeowners' association to illegally collect Club Membership Fees from *Solivita* residents. (Testimony of Moyer; Defs.' Ex. 19).

Solivita's amenities facilities include pools, activities buildings, a fitness center, dining areas, a ballroom, a bell tower, a park, tennis and pickleball courts, an administration building, and a grill. (Jt. Ex. 45 at 3-2–24). AV built these facilities during 2001–2009. (Jt. Ex. 45 at 3-2). Most of the facilities were completed by 2006 and are more than ten years old. (Testimony of Kath Leo). To operate the facilities, AV uses a management company, Evergreen Lifestyles Management. (Testimony of Harder).

AV unilaterally recorded the Amended and Restated Master Declaration for *Solivita* (Defs.' Ex. 19), which incorporated the Amended and Restated *Solivita* Club Plan (Defs.' Ex. 18; Jt. Ex. 48). The current monthly rates for Club Membership Fees are set forth in Schedule C to the Amended and Restated *Solivita* Club Plan. (Jt. Ex. 48). The monthly rates are different for different homeowners. (Jt. Ex. 48). But all phases of the development have access to the same amenities facilities, which means that the favoritism in monetary rates enjoyed by some homeowners has nothing to do with the extent to which their properties benefit from the amenities. (*See* Jt. Ex. 48).

The schedules provide for the monthly rates to increase by one dollar each year. (Jt. Ex. 48). According to the Amended and Restated *Solivita* Club Plan, the obligation to pay Club Membership Fees is perpetual. (Jt. Ex. 48).

AV Establishes the Districts

AV created two community development districts for *Solivita*. The first, Poinciana Community Development District, was established in 1999. (Jt. Ex. 6). The second, Poinciana West Community Development District, was established in 2006. (Jt. Ex. 17). The Districts' initial purpose was water management. (Jt. Ex. 7 ¶ (e); Jt. Ex. 20 ¶ (e)). While in control of the Districts, AV retained:

- Gary Moyer, Severn Trent Services, as the Districts' Manager;
- Michael Eckert, Hopping Green & Sams, as the Districts' Counsel; and
- Kathy Leo, Atkins North America, as the Districts' Engineer.

(Testimony of Moyer, Eckert, Leo). AV also hired MBS Capital Markets, LLC, an investment banking firm, to underwrite bonds for water-management infrastructure.

Before offering to sell the amenities facilities to the Districts, AV turned over control of the Districts to residents. (Testimony of Moyer). But AV selected most of the residents who currently serve as supervisors for the Districts (Testimony of Moyer). In addition, AV's Executive Vice President of Development, Tony Iorio, continued to serve as Chairman of Poinciana West CDD until March 2016. (Defs.' Ex. 128 at 1).

Sometime before October 2015, AV devised a plan to sell the amenities facilities to the Districts. AV's Executive Vice President and General Counsel, Gary Shullaw, contacted the Districts' Counsel to ask questions about the Districts' governance. (Defs.' Ex. 194). Shullaw said he was "in the process of getting up to speed on the currently contemplated sale of amenity assets and bond issuance" and "wanted to touch base with you separately with a request, since you are the most familiar with the CDDs as district

counsel." (Defs.' Ex. 194). Shullaw requested "an overview/primer on CDD governance, specifically as it relates to the Poinciana and Poinciana West CDDs. For example, who is on the current boards, how are they elected, how is their annual budget managed, etc." (Defs.' Ex. 194). The Districts' Counsel responded, "be glad to help," and set up a phone call. (Defs.' Ex. 194).

While AV was getting insight on the Districts from the Districts' Counsel, it was also working with MBS to put together a proposal for the Districts' boards of supervisors to issue bonds to purchase the amenities facilities from AV. (Defs.' Ex. 118; 128). Before the boards' joint meeting in November, the Districts' Manager and the Districts' Counsel each gave AV a "heads up" about board issues. (Defs.' Exs. 312, 313).

AV and MBS Propose that the Districts Issue Bonds to Purchase Amenities

On November 18, 2015, the Districts held a joint meeting at which Poinciana West CDD Chairman (and AV Executive VP) Tony Iorio proposed that the Districts purchase the amenities facilities from AV. (Defs.' Ex. 128 at 2–3; Defs.' Ex. 118). In his presentation, Chairman Iorio lied. He told the Districts that AV had a "very attractive" opportunity to sell the amenities facilities to an outside entity. He then told the boards that AV had also explored the idea of the residents taking ownership through a recreational CDD. (Defs.' Ex. 128 at 2). By using the threat that an outside entity would take control of the amenities facilities, Iorio was ultimately able to force the boards of supervisors into an unconscionable purchase agreement. (*See* Testimony of Zimbardi, Case; Excerpts admitted at trial from Brown Dep.).

At the same time it instilled fear with the stick that it might sell the existing amenities facilities to an outsider, AV tried to make its proposal more attractive by offering the carrot of construction of *new* amenities. (Defs.' Ex. 128 at 2–3; Defs.' Ex. 118). AV succeeded in convincing the Districts' boards that purchasing the existing amenities from AV was the only way that any new amenities would ever be built. (*See* Testimony of Moyer, Eckert, Zimbardi, Case; Excerpts admitted at trial from Brown Dep.; *see, e.g.*, Defs.' Ex. 102 (Iorio emailing Supervisor Stellfox in October 2016 that owning and expand amenities is a "window of opportunity" that is "quickly closing as the fickle bond market is starting to shift")).

After he proposed the Districts purchase the amenities from AV, Chairman Iorio introduced representatives from MBS Capital Markets. MBS proposed that the Districts issue bonds to finance the purchase. (Defs.' Ex. 128 at 2–3; Defs.' Ex. 118). During MBS's presentation, "the meeting became disorderly and a warning was noted that the meeting would need to be recessed if order was not restored." (Defs.' Ex. 128 at 3). The meeting was adjourned when the Districts' Manager announced that the fire marshal had ordered that the room had exceeded its capacity. (Defs.' Ex. 128 at 4).

MBS's presentation included its proposal that the boards hire Fishkind & Associates, a valuation consultant, to determine the purchase price for the amenities facilities. (Defs.' Ex. 118 at 40). The meeting was adjourned before Fishkind could present its proposal.

MBS Defines Objectives, Calculates Target Purchase Price for Amenities, and Obtains AV's Approval of $70-million Purchase Price

All of the work done by MBS for the amenities transaction was for the benefit of AV. Behind the scenes and unbeknownst to the Districts' boards, AV and MBS agreed to accomplish AV's objectives—get rid of the aging amenities facilities and cash out the illegal profit stream from Club Membership Fees.

Each of MBS's presentations to the boards included fine print noting that MBS "has financial and other interests that differ from those of the District," that it "does not have a fiduciary duty to the District," and is "not required by federal law to act in the best interests of the District without regard to its own financial or other interests." (Defs.' Ex. 118 at 45; *see also* Defs.' Ex. 63). But MBS never disclosed the extent to which it was working behind the scenes with AV and for AV's benefit—and to the detriment of the Districts.

Around the time AV and MBS first presented their proposal, MBS was calculating a target purchase price. On December 1, 2015, MBS sent AV's executives its calculation of the target price. (Defs.' Ex. 153-6 at 1). MBS calculated that $82.32 million could be used for acquisition and construction of amenities. (Defs.' Ex. 153-6 at 2-3). Subtracting $11.88 million for the planned capital improvements, MBS calculated a net purchase price of $70.45 million. (Defs.' Ex. 153-6 at 4). The following is an excerpt from the schedules that MBS prepared on December 1, 2015:

Objective:
30-years. Maximize proceeds. Then subtract $11 million of improvements with the balance being the purchase price.

Total Net Proceeds of Bonds (Scenario 3)	$82,322,854
Less, Above CIP Funding	-$11,875,000
Net Purchase Price of Amenities from Developer	$70,447,854

(Defs. Ex. 153-6 at 4).

Without telling the Districts, MBS calculated the target purchase price and obtained AV's approval in December 2015. Then, after AV approved the $70-million target purchase price, MBS spent the next year working behind the scenes to make the deal happen.

AV Convinces Districts' Boards to Consider Purchasing Amenities

AV began working to convince the boards of supervisors to approve the proposed sale. On November 19, 2015, the day after AV and MBS's initial proposal, MBS set up a conference call and sent a group email to:

- AV executives Jeff Mitchem, Matt Orosz, Steve Orosz, Tony Iorio, and Gary Shullaw;
- AV's outside counsel, GrayRobinson;
- District Manager Gary Moyer;
- District Counsel Michael Eckert;
- District Engineer Kathy Leo;
- Hank Fishkind and Joe MacLaren, both of Fishkind & Associates; and
- Various other professionals involved in the financing.

(Defs.' Ex. 47). MBS suggested to the group that the Districts post a Q&A sheet and a copy of AV and MBS's presentation on the Districts' websites. (Defs.' Ex. 47).

In response to MBS's email, AV's Central Florida Co-President, Matt Orosz, told the group that AV "will be releasing a statement today acknowledging the event did not go as planned and re-iterating several key points and putting this process back in a positive light to the residents." (Defs.' Ex. 47). Orosz also stated that "a formal Q&A site will be launched next week to help address questions in an organized way at a high level," and that "we will be working with Evergreen [Lifestyles Management] on coordinating several 'coffee talk' sessions in the immediate term." (Defs.' Ex. 47).

In his email, Orosz indicated that AV had engaged a PR firm "to assist in getting this process back on the right track." (Defs.' Ex. 47). The Districts' Counsel and the Districts' Manager also assisted AV in getting the process back on the right track— they suggested edits to AV's Q&As and presentations (*e.g.*, Defs.' Ex. 48, 89), and coordinated joint board meetings and workshops with AV's public relations campaign. (Defs.' Exs. 153-07, 153-11). Over the coming months, the Districts' Counsel and the Districts' Manager would also assist AV in keeping the process on the right track— tipping off AV's executives when there were issues with the boards of supervisors that might derail AV's plan. (Defs.' Exs. 154-37, 156-89, 312, 313).

AV published the Q&A on www.solivitastrong.com, a website created to promote the Districts' purchase of the amenities. Then, AV and MBS began coordinating a "coffee talk" to convince residents and the Districts' boards that the amenities purchase was in their best interest. (*See* Defs.' Ex. 154-22 (showing AV and MBS's preparations

for persuading the boards)). The coffee talk was coordinated with the Districts' joint workshop and joint meeting as follows:

- March 14, 2016: **AV's Coffee Talk** – AV presents proposal that the Districts issue bonds to purchase amenities.
- March 16, 2016: **Districts' Boards' Joint Workshop** – AV and MBS present proposal that Districts issue bonds to purchase amenities.
- March 30, 2016: **Districts' Boards' Joint Meeting** – Boards vote on funding and engagement of consultants for amenities purchase.

(Defs.' Exs. 42, 63; Plfs.' Ex. 8). AV and MBS tried to coordinate this set of meetings in February, but AV moved it back to March when it could not organize all of its public-relations efforts in time. (*See* Defs.' Exs. 153-7; 153-11).

On February 29, 2016, Poinciana CDD Supervisor Richard Kellogg sent an email to Districts' Counsel and the Districts' Manager expressing concerns about moving forward with the amenities purchase. (Defs.' Ex. 42 at 2). The Districts' Manager forwarded Supervisor Kellogg's email to AV's Iorio to give him an "FYI." (Defs.' Ex. 42 at 1).

On March 15, 2016, the day after AV's coffee talk and the day before the Boards' joint workshop, the Districts' Manager emailed Poinciana West CDD Supervisor Charles Case to see if he had attended AV's coffee talk and to get his thoughts on AV's presentation. (Defs.' Ex. 40 at 1). Supervisor Case responded that he had attended the presentation, that he thought "all of the members attended and gained enough info," and that he thought "Tony did an outstanding job of presenting the proposal." (Defs.' Ex. 40

at 1). This email confirmed for the Districts' Manager that things were on the right track for AV.

The next day, at the joint workshop, AV presented its proposal that the Districts purchase the existing amenities and build new amenities. (Defs.' Ex. 63). Then, MBS proposed that the Districts issue bonds to finance the project. (Defs.' Ex. 63).

MBS recommended that the Districts issue tax-exempt bonds, and assured the boards of supervisors that, although this would require them to allow non-residents to use the amenities facilities, the Districts could impose a fee that would deter non-resident use. (Defs.' Ex. 63). MBS suggested that setting a sufficiently high non-resident user fee would result in zero non-residents using the amenities. (Defs.' Ex. 63). MBS did not tell the Districts that the primary reason for issuing tax-exempt bonds was that lower, tax-exempt interest rates would allow AV and MBS to propose a higher purchase price to be paid to AV.

AV Pays for the Districts' Consultants for Amenities Purchase and Bond Issuance

On March 30, 2016, two weeks after the joint workshop, the Districts' boards held a joint meeting and among other things, the Poinciana West CDD Board accepted Chairman Tony Iorio's resignation. Each board voted to approve using the law firm Hopping Green & Sams as counsel for both of the Districts in the potential purchase of the amenities. (Plfs.' Ex. 8 at 4–6). Districts' Counsel disclosed a potential conflict from representing both Districts, but there was no discussion about the Districts' Counsel previously representing AV (*See* Plfs.' Ex. 8; Defs.' Ex. 107 (Districts' Counsel

admitting past dealings with AV when Supervisor Stellfox emailed and asked, but assuring Stellfox that "our firm is in the best position to protect the districts' interests in the negotiations")). Then the Poinciana CDD Board approved the Bond Financing Team Funding Agreement with AV (Plfs.' Ex. 8 at 7–10; Defs.' Ex. 26).

Under the Funding Agreement, AV paid the Districts' consultants to complete the proposed bond issuance and amenities purchase. And AV used its payment of the consultants' fees to control the content of the consultants' work. (*E.g.*, Defs.' Ex. 175). Under the Funding Agreement, AV had the right to terminate the funding without cause. (Defs.' Ex. 26 at 3). Upon termination, AV would only be responsible for fees incurred as of the date the Districts' received notice of the termination. (Defs.' Ex. 26 at 3). This meant AV could stop paying the consultants at any time. AV made certain that the consultants did not forget who was paying their bills. (*See, e.g.*, Defs.' Ex. 175 (Iorio telling Districts' valuation consultant that "You can appreciate we need to understand the numbers being presented in the Valuation Study we are paying for.")).

In addition to paying $561,612.89 to the Districts' Counsel before the filing of any opposition to the bond validation, AV has paid and is paying for the Districts' Counsel to litigate this case. It is paying counsel to seek validation of the proposed bond issuance to create an immediate $70-million-cash payment to AV. All the consultants the Districts' Counsel called to testify at trial were also paid by AV through its Funding Agreement with the Districts:

- Districts' Manager, Gary Moyer (AV paid $12,500 to his firm, Severn Trent);

- Districts' Counsel, Michael Eckert (AV paid more than $500,000 to his firm, Hopping Green & Sams);
- Districts' Engineer, Kathy Leo (AV paid more than $51,000 to her firm, Atkins);
- Districts' Assessment Methodology Consultant, Kevin Plenzler (AV paid more than $22,500 to his firm, Fishkind & Associates);
- Districts' Valuation Consultant, Scott Harder (AV paid more than $150,000 to his firm, EFG).

Though not paid through the Funding Agreement, MBS stands to receive 1.5% of the bond amount—estimated to be $1.3 million and potentially as much as $1.53 million. (Testimony of Moyer; Defs.' Ex. 162-150).

AV and MBS Control the Districts' Selection of Valuation Consultant

During the joint meeting on March 30, 2016, the boards considered proposals for valuation services from three firms—Fishkind & Associates, Public Resources Management Group, Inc., and Environmental Financial Group. (Plfs.' Ex. 8 at 11). Prior to the meeting and unknown to the boards of supervisors, AV ensured that all three firms would employ the valuation method that AV had created. Behind the scenes, AV and MBS dictated to EFG the purchase price and made sure that EFG was on the same page as AV, MBS, Fishkind, and PRMG.

AV and MBS had originally planned that the boards would only consider Fishkind's proposal. (Defs.' Ex. 118 at 40). In February 2016, AV "wanted to kick start the valuation process and engage Fishkind," according to an email sent by Iorio to the

Districts' Manager. (Defs.' Ex. 65). But the boards were suspicious of Fishkind. They wanted consultants who were independent from AV.

When Moyer emailed Fishkind and told him that the Districts getting proposals from other firms, Fishkind withdrew his proposal. (Defs.' Ex. 35). Moyer forwarded Fishkind's email to Iorio and wrote: "FYI. Let's wait until I hear back from Hank [Fishkind] before we get you involved but I may need your help getting Hank to reconsider withdrawing from the valuation selection." (Defs.' Ex. 35 at 1). Iorio responded, "Understood, keep me posted, we need Hank involved as he is intimately involved in the project since conception." (Defs.' Ex. 35 at 1). Later that day, Fishkind emailed Moyer that "based only on our longstanding relationship" he would not withdraw his firm's proposal. (Defs.' Ex. 36 at 1). Though Fishkind was not selected for the valuation, the Districts' Manager made sure Fishkind stayed on as the assessment consultant.

Moyer also suggested his friend Rob Ori of Public Resources Management Group, Inc., a consulting firm Moyer knew from the Villages, could serve as the consultant. (Defs.' Ex. 34 at 1). To keep things on track, Moyer made sure that Ori and PRMG would be on the same page with the target price calculated by MBS. Moyer told Ori "[t]he approach will be to use the income derived from fees that are paid by the residents pursuant to the deed restrictions and valuing that cash flow." (Defs.' Ex. 34 at 1).

Fishkind and PRMG were both on the same page with AV before the boards considered their proposals. The third firm, EFG, was lined up by MBS. On March 11, 2016, Mulshine of MBS sent the following email to Howard Osterman of EFG:

> Howard
> Nice talking to you today. For you reading please, I have enclosed the revenue models for the Solivita Club Membership. There are 5,500 units that are required to pay for use of the Club assets pursuant to the deed restriction. The package is very popular and impressive. You can also learn more on the website link below.
>
> http://solivitastrong.com
>
> Give me a call to discuss. I have also copied Gary Moyer, Rhonda Mossing and Tony Iorio on this email. Tone [sic] or Gary may reach out to you. Gary is the District Manager and Tony runs the Solivita project for AV Homes.

(Defs.' Ex. 154-27 at 1).

Mulshine attached to the email the same calculation of the purchase price that Mulshine sent to AV for approval in December 2015:

Objective:
30-years. Maximize proceeds. Then subtract $11 million of improvements with the balance being the purchase price.

Total Net Proceeds of Bonds (Scenario 3)	$82,322,854
Less, Above CIP Funding	-$11,875,000
Net Purchase Price of Amenities from Developer	$70,447,854

(Defs.' Ex. 154-27 at 4). Several phone calls followed the email—all weeks before the boards selected EFG. (*See* Defs.' Ex. 154-28 (showing a phone call two days later between Mulshine and Howard Osterman and Scott Harder of EFG); *see also* Defs.' Ex. 39 (showing Mulshine setting up phone call four days later with AV and EFG))..

On March 18, 2016, Mulshine emailed AV's executives and wrote: "I have known Fishkind [of Fishkind & Associates] and Osterman [of EFG] for 30 years. Both take a

cash flow approach and provide a great explanation as to why bricks and mortar are irrelevant." (Defs.' Ex. 154-33).

Rhonda Mossing of MBS also was making sure potential consultants were on the same page and on the right track. On March 21, 2016, while the Districts' Manager was collecting proposals from potential valuation consultants, Mossing emailed him the same calculation of the target purchase price:

18			
19	***Objective:***		
20	30-years. Maximize proceeds. Then subtract $11 million of improvements with the balance		
21	being the purchase price.		
22			
23			
24	Total Net Proceeds of Bonds (Scenario 3)	$82,322,854	
25	Less, Above CIP Funding	-$11,875,000	
26	Net Purchase Price of Amenities from Developer	$70,447,854	

(Defs.' Ex. 37). "Want to make sure all evaluators are on the same page. Let me know if you need anything else," Mossing wrote to the Districts' Manager. (Defs.' Ex. 37). Before AV paid the consultant's fees, AV was comfortable that each would use the target purchase price.

At the joint meeting on March 30, 2016, the Districts considered the proposals from Fishkind & Associates, Public Resources Management Group, Inc., and Environmental Financial Group. When they selected EFG, the boards thought they had chosen the one firm that was independent and not beholden to AV. The Districts' Counsel, the Districts' Manager, and the Chairmen of the Districts' boards all testified that independence from AV was the most important issue for the boards. (Testimony of Moyer, Eckert, Case, Zimbardi).

Five days before the joint meeting, on March 25, 2016, Poinciana CDD Supervisor LeRue "Skip" Stellfox sent the Districts' Manager an email that attached an article from BondBuyer.com about overvaluation of amenities at The Villages. (Defs.' Ex. 122). As Stellfox requested, the Districts' Manager forwarded the email to the other supervisors. (Defs.' Ex. 122 at 1–2).

Supervisor Stellfox wrote that "[t]he PCDD needs an Independent Property Appraiser." (Defs.' Ex. 122 at 1). "This article and my personal experiences of living in the Villages . . . dictates that we need a truly Independent Property Appraiser." (*Id.*) Stellfox was referring to an article about an IRS investigation of the Villages Center CDD over-issuing bonds "because at least 19 facilities acquired with the 2003 bond proceeds were overvalued." (Defs. Ex. 122 at 4).

The Districts' Manager—who also works as vice president of the developer of the Villages—admitted that the Villages Center CDD had to refund $172.4 million of tax-exempt bonds with taxable bonds in response to the IRS investigation. (Testimony of Moyer). He also admitted that the IRS closed its investigation after the taxable bonds were issued, and that the IRS never changed its findings that the recreational bonds were private activity bonds. The bonds were deemed private activity bonds because the issuer's payment of the purchase price to the developer was not a governmental use of the proceeds as the purchase price was not supported by the value of the facilities purchased. (Testimony of Moyer; Defs.' Ex. 339 at 34).

These issues were raised in the article cited by Supervisor Stellfox, which stated that "[a]ppraisals provided to the VCCDD by Fishkind & Associates, Inc. and Public

Resources Management Group Inc. had established a purchase price for the facilities [at the Villages] of about $60 million," when the facilities were only worth "between $6.8 million and $7.5 million." (Defs.' Ex. 122 at 4).

Supervisor Stellfox wanted the other supervisors to see the article before the joint meeting on March 30. At the joint meeting the boards would be considering proposals from the two firms referenced in the article, Fishkind and PRMG, as well as EFG. (Defs.' Ex. 122 at 2). "The CDD can afford to pay for our own Appraiser and not be beholden to Avatar. There have to be other firms beyond these three," Stellfox wrote. (Defs.' Ex. 122 at 1–2). But Fishkind, PRMG, and EFG were the only three firms that boards ever considered. (Plfs.' Ex. 8 at 11).

Poinciana West CDD Chairman Tony Iorio received Supervisors Stellfox's email when it was forwarded to the boards. (Defs.' Ex. 122). The same day Iorio received the email, on March 25, 2016, Iorio "spoke at length with Skip [Stellfox] on the appraisal," then sent an email to AV executives, MBS, and the Districts' Manager. (Defs.' Ex. 31-B). Iorio's email summarized his discussion with Stellfox, and then disclosed his intention to contact each supervisor individually to try to counter the impact of the article Stellfox sent by giving the board members something else to "cling to":

> I plan on reaching out to each Board member to further explain the appraisal process . . . . it may be worthwhile to have a prepared explanation to each Board member from me personally, that they can study and dig into to understand how this appraisal needs to be done and why . . . . My reasoning is that the depth of business knowledge of each member is truly varied and having something they can cling to prior to and during the meeting may give them some confidence and statute when [con]fronting residents and constituents especially when they read articles like the one Skip [Stellfox] attached.

(Defs.' Ex. 31-B). Witnesses at trial confirmed that Iorio met with each supervisor. (Testimony of Moyer, Eckert, Plenzler).

Chairman Iorio's subsequent email to Supervisor Stellfox, on March 29, 2016, makes it undeniably clear that AV dictated to the boards that they must use AV's valuation approach:

> I am concerned if the Board is seeking proposals from firms to provide a valuation based upon a replacement cost versus an income approach. I can share that if this is the direction of the Board, AV Homes would terminate the process for dealing with the CDD on acquisition and either seek in the future a third party buyer who will base a purchase decision and price on the cash flows generated by the current Club Membership Agreements or continue to retain ownership of the Club facilities.

(Defs.' Ex. 336-1). Iorio's description of AV's valuation approach as an "income approach" is misleading. AV's approach—which as discussed below was followed by the Districts' valuation consultant—is not the income approach to appraising the value of property. (Testimony of McElveen). Harder looked only at top line revenue numbers that he later admitted were overstated by 25%, and he never looked at any 2016 data for the Club Plan and had no information at all about the income related to the Club Plan.

At the joint meeting the next day, the boards considered the proposals from Fishkind, PRMG, and EFG. They selected EFG as their valuation consultant. (Plfs.' Ex. 8 at 12). While minutes from the meeting state that "Mr. Stellfox was comfortable with EFG," (*Id.*) it turned out that EFG was not the "Independent Property Appraiser" Stellfox said was needed in his email five days before. As discussed below, EFG's reports to the boards were not independent. And EFG was not a licensed property appraiser, which means it could not legally give the boards an opinion on the amenities facilities' value.

Minutes from the meeting also reflect that "Mr. Howard Osterman, one of the principles of EFG, discussed his company and their background, noting they are an independent company." Mr. Lane agreed with selecting EFG and commented: "The fact they are independent and do not work with anyone here makes it valid for us to take them seriously." (Plfs.' Ex. 8 at 12). Osterman misled the boards. He concealed that his firm was not licensed to value property and that he had already received a target price from MBS. When the boards selected EFG, they were under the mistaken impression that EFG was an independent consulting firm that could give an opinion on the value of the amenities facilities. (*See* Plfs.' Ex. 8 at 12–13; Testimony of Case, Zimbardi).

At trial, Poinciana CDD Chairman Robert Zimbardi and Poinciana West CDD Chairman Charles Case both testified that the boards thought EFG was independent. The Districts' Manager acknowledged that he knew that the consultant's independence was the single most important issue to the boards. (Testimony of Moyer). But he admitted that he did not tell the boards that MBS had calculated a target purchase price of $70 million, and that MBS sent that calculation to EFG and the Districts' Manager before the boards considered any of the proposals. (Testimony of Moyer).

The Districts' Manager admitted that he should have shared this material information with the boards, who relied on EFG's calculation of the purchase price and agreed to use that price in the Asset Sale and Purchase Agreement. (Testimony of Moyer). In fact, EFG's calculation was the only reason the boards agreed to the $73.7-million purchase price. (Testimony of Case, Zimbardi).

AV and MBS Control EFG's Calculation of Purchase Price

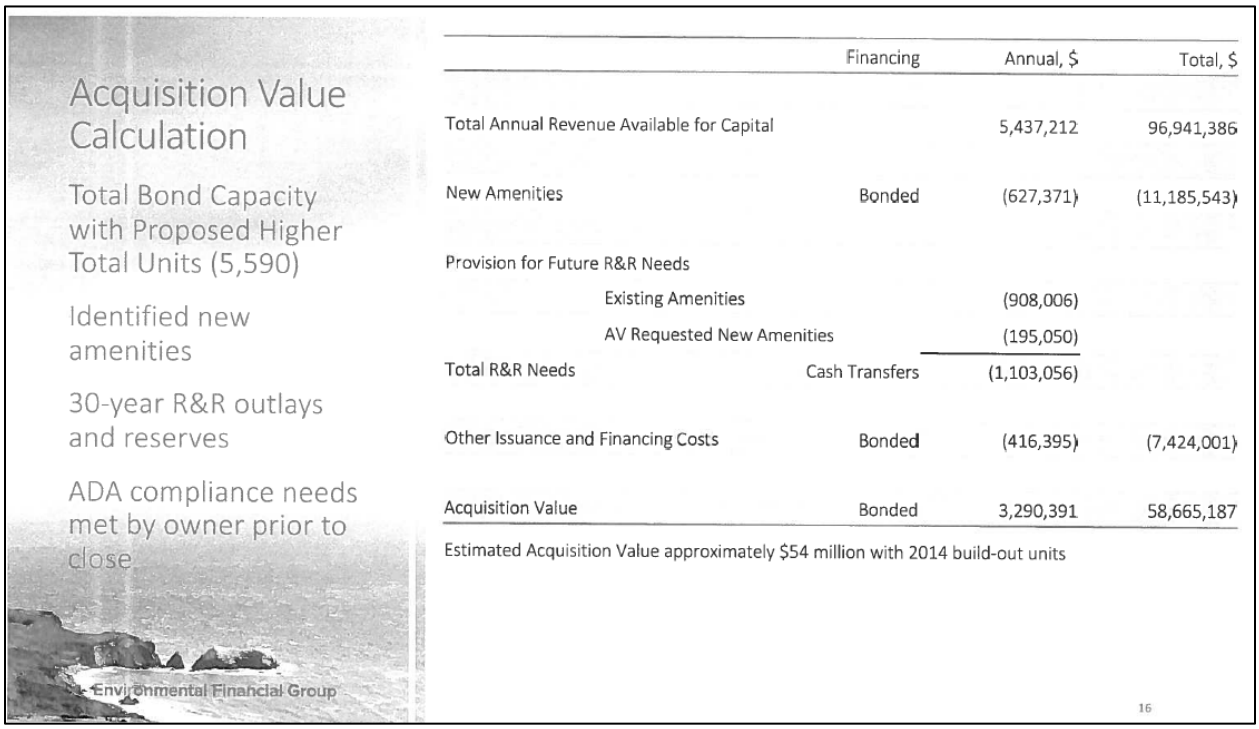
During its engagement, EFG provided three reports to the boards of supervisors. Beginning in the early stages (*see, e.g.*, Defs.' Ex. 211 (showing a phone call between Iorio and Harder before EFG presented any of its reports)) and throughout the process (*see* examples cited below), AV and MBS closely monitored EFG's work to make sure that EFG would ultimately hit the target price. In line with MBS's objective, EFG based its calculation of the purchase price on Club Membership Fees.

EFG accepted and assumed the accuracy of the rates of Club Membership Fees and the unit counts provided by AV. (Testimony of Harder) But that unit count was overstated by 25%. AV did not collect Club Membership Fees from undeveloped lots, which accounted for 25% of the unit count in EFG's calculations. (Testimony of Harder; Jt. Exs. 49–51). Harder admitted that this caused a $24-million overstatement of the "maximum affordable acquisition value." (Testimony of Harder).

EFG's first report was presented to the boards at a joint meeting on July 28, 2016. (Plfs.' Ex. 12; Jt. Ex. 49). It calculated the Districts' "maximum bonding capacity." (Jt. Ex. 49 at 7). This tracked MBS's own calculations. (*See* Defs.' Ex. 154-27 at 4). But AV rejected EFG's initial report because it deducted reserve and replacement funds in calculating the purchase price.

Based on the Condition Assessment Report prepared by Delta Engineering under the direction of the Districts' Engineer, EFG determined that $33.01 million would be needed for reserve and replacement. (Jt. Ex. 49 at 13). As shown in the following chart

from EFG's initial presentation, the maximum acquisition value should have been, at most, $54 million to $58.67 million:



Acquisition Value Calculation

Total Bond Capacity with Proposed Higher Total Units (5,590)

Identified new amenities

30-year R&R outlays and reserves

ADA compliance needs met by owner prior to close

Environmental Financial Group

	Financing	Annual, $	Total, $
Total Annual Revenue Available for Capital		5,437,212	96,941,386
New Amenities	Bonded	(627,371)	(11,185,543)
Provision for Future R&R Needs			
Existing Amenities		(908,006)	
AV Requested New Amenities		(195,050)	
Total R&R Needs	Cash Transfers	(1,103,056)	
Other Issuance and Financing Costs	Bonded	(416,395)	(7,424,001)
Acquisition Value	Bonded	3,290,391	58,665,187

Estimated Acquisition Value approximately $54 million with 2014 build-out units

16

(Jt. Ex. 49 at 16).

EFG's calculation of an acquisition value of $54 million to $58.67 million was at least $11.79 million lower than the target purchase price of $70.45 million. When EFG shared its initial report with AV on July 26, 2016—two days before the presentation to the joint boards—AV and MBS took immediate action.

On July 27, 2016, Mulshine of MBS emailed Iorio draft language for an email concerning EFG's initial report. (Defs.' Ex. 155-62). Iorio sent it to Harder and Osterman of EFG, as well as Mr. Eckert, the Districts' Counsel (Defs.' Ex. 326). In the email—which was never shared with the Districts' boards—Iorio told EFG and Eckert that "your

report is flawed and the underlying valuation is totally unacceptable and inconsistent with our stated position." (Defs.' Ex. 326 at 1). Iorio's email complained that:

- AV did not have input on the determination that $33 million was needed for reserve and replacement.
- Capitalized Interest of $3 million should not be deducted from the calculation of acquisition value.

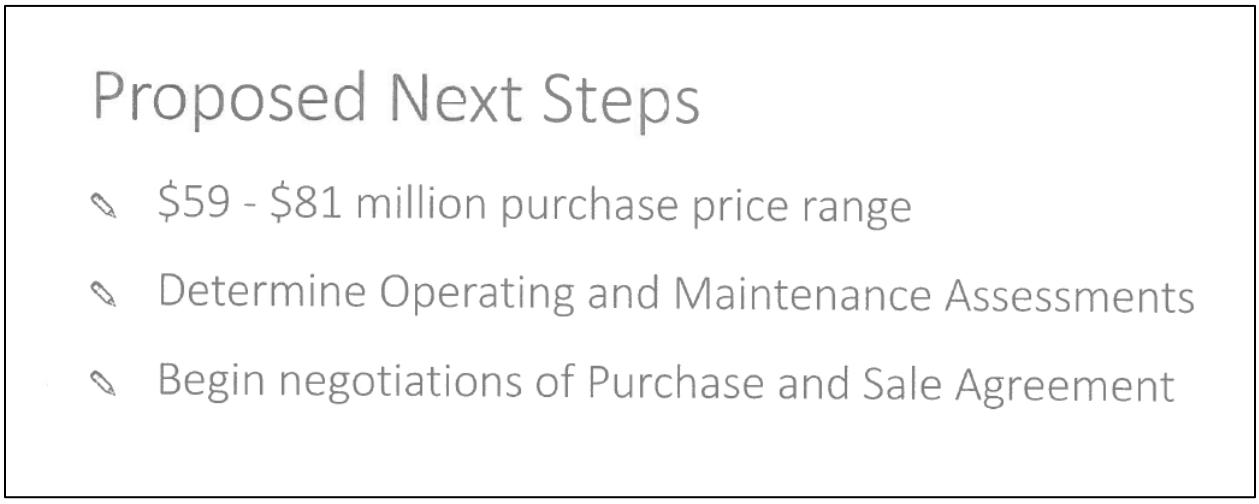
(Defs.' Ex. 326 at 1).

After informing EFG and Eckert of AV's concerns about EFG's calculation, Iorio reminded EFG of AV's termination rights to control the content of EFG's presentation. (Defs.' Ex. 326 at 2). "If this process is going to proceed forward, I would suggest that you provide, at the very least, a range of values that incorporate the facts that we stated above," Iorio threatened. (Defs.' Ex. 326 at 2).

Iorio followed up on his threat the next morning in an email directing Eckert to "make an adjustment to the slide presentation by EFG providing a range of asset values." (Defs. Ex. 327 at 3). Iorio mandated that the slides include a range, and Eckert and EFG both obeyed. (Defs. Ex. 327). Iorio wanted the range included in the presentation to the boards so that Iorio could "change and redirect their thinking." (Defs.' Ex. 327).

Eckert and EFG followed Iorio's instructions. They worked with AV to create the slide showing a range of asset values. (Testimony of Eckert, Harder). Eckert sent a draft of the slide to AV for approval, then instructed EFG to include it in the report to the boards. (Defs.' Ex. 92). EFG added the slide to the presentation an hour before the July meeting. (Testimony of Harder).

As discussed, EFG was selected as a valuation consultant because the boards believed EFG was independent from AV. But EFG's initial report to the boards was not independent. It included the following slide—prepared per AV's instructions—which inflated the purchase price range by $22 million:



(Jt. Ex. 49 at 20). This issue with EFG's independence is exactly what Supervisor Stellfox and the boards were concerned about in March, and when the boards became suspicious of EFG, the Districts' Counsel helped to conceal AV's influence. (*E.g.*, Defs.' Exs. 98, 111).

EFG and the Districts' Counsel led the boards to believe that AV was not making "any effort to bias the valuation" (Defs.' Ex. 111), but in fact AV was doing just that. (*See* Defs.' Ex. 326 (showing Iorio's threat to terminate the process "If the Districts Staff and Consultants do not see the value in meeting with AV Homes and the facilities manager [Evergreen Lifestyles Management] prior to locking in a Value"); Defs.' Ex. 332 (showing that EFG and AV met before EFG presented each of its next two reports to the boards).

As EFG prepared its second report for the joint boards, AV pressured EFG to include reserve and replacement in the Operations & Maintenance Assessments (Defs.' Ex. 175), and AV cut the reserve and replacement funding from $33 million to $10 million. This would have the effect of increasing the purchase price by $23 million. AV made this $23-million cut by making "corrections" to the Condition Assessment Report prepared by Delta Engineering. (Testimony of Leo, Harder). For example, Delta observed cracks in a parking lot and initially concluded that the parking lot needed resurfacing. But Delta's inspectors changed that conclusion when AV assured them that the cracking was part of the design and that resurfacing was not needed. (Testimony of Leo).

On August 23, 2016, Scott Harder had a two-hour ($500 in fees) phone call with AV. (Defs.' Ex. 283). During the next seven days, Harder spent 38.75 hours on "valuation analysis revisions." (Defs.' Ex. 283). And Harder billed half an hour for a phone call with his colleague from EFG, Howard Osterman, who also billed 21 hours for during those same seven days. (Defs.' Ex. 283). This adds up to fees of more than $15,000 for EFG for August 23 through August 31.All of the fees for time that EFG spent increasing the purchase price that AV would receive was paid for by AV. (Defs.' Ex. 283).

On September 1, 2016, Iorio followed up with Harder: "I have not heard back from you as promised and am hopeful you are making progress on making this deal a reality." (Defs.' Ex. 175 at 3). Iorio directed Harder to send him "the proforma being used in you analysis for R&R" and wrote that "You can appreciate we need to understand the numbers being presented in the Valuation Study we are paying for." (Defs.' Ex. 175

at 3). And Iorio directed EFG to "not cushion the study with excess revenues for R&R." (Defs. Ex. 175 at 3).

At trial, Harder admitted that it would be inappropriate for AV to remind him that they were paying for the valuation in an attempt to influence his conclusions. But when shown the email in which AV did exactly that, Harder baldly denied that he was influenced by it.

Not surprisingly, Harder also denied that he was influenced by Kevin Mulshine and Rhonda Mossing of MBS. Mulshine gave EFG the $70-million target price in March 2016 (Defs.' Ex. 154-27 at 1), and monitored EFG's work to keep the price calculations on target, emailing Harder to see if there was "Any progress with AV Homes in getting to a number?" (Defs.' Ex. 156-68). Harder cannot deny Mulshine gave Harder specific instructions on how to calculate the purchase price in his final report in October. (Defs.' Ex. 156-74, 156-84, 156-86, 157-96 (discussed below)).

EFG presented its second report, dated September 2016, to the joint boards at a meeting on October 4, 2016. (Plfs.' Ex. 6; Jt. Ex. 50). EFG's new calculation of the amenity acquisition value was $70.20 million, (Jt. Ex. 50 at 6, table 7), right on target with the number AV and MBS required. (*See* Defs.' Exs. 153-6, 154-27). Before EFG presented its second report to the boards, AV sent a representative from Evergreen Lifestyles Management to meet with individual board members to start persuading them to accept the $70-million price. (Defs.' Ex. 176 (recapping Evergreen Lifestyles Management's meetings with the supervisors)).

EFG hit the target price by plugging in $10 million instead of $33 million for reserve and replacement funding—a $23-million cut that was the product of AV's "corrections" to Delta's Condition Assessment Report. (Testimony of Harder; Jt. Ex. 50 at 15, Part 4). And EFG also reduced financing costs from $7.92 million to $4.92 million, following Iorio's instruction that capitalized interest of $3 million should not be deducted from the calculation of acquisition value. (Jt. Ex. 50 at 6, table 7; *see* Defs.' Ex. 326 at 1). Table 7 of EFG's report shows the revised calculation:

TABLE 7 :: Amenity Valuation Calculation

	Financing	Annual, $	Total, $
Total Annual Revenue Available for Capital		5,437,212	96,941,386
New Amenities	Bonded	(627,371)	(11,185,543)
Provision for Future R&R Needs			
Existing Amenities		(500,606)	
AV Requested New Amenities		(96,027)	
Total R&R Needs	Cash Transfers	(596,634)	(10,637,526)
Other Issuance and Financing Costs	Bonded	(275,662)	(4,914,847)
Acquisition Purchase Price	Bonded	3,937,546	70,203,470

1 – Assumes a 30-year bond term and 3.75 average bond interest rate.

2 – Taken from TABLE 1.

3 – In addition to the purchase of the recreational amenity assets, it is anticipated that the 2017 Assessment Bond will also finance several improvements requested by AV and needed to serve future residents.

(Jt. Ex. 50 at 6). As discussed below, the calculations in Table 7 would later be drastically changed in EFG's October 2016 Supplemental Report, but those changes were never disclosed to the boards.

EFG did not analyze the numbers supporting the calculation of the "Total Annual Revenue Available for Capital" of $5,437,212. (Testimony of Harder). EFG accepted as true the calculation shown in Table 3 of EFG's report, which shows 5,590 planned units

paying Club Membership Fees of $65 to $85 based on the 2016 rate. (Jt. Ex. 50 at 12 tbl.3). But as noted, this was not correct. The Club Membership Fee collections were overstated by 25% because the unit count was overstated by 25%. (Testimony of Harder).

Both the unit counts and the Club Membership Fees in EFG's report were only assumptions. (Testimony of Harder; *see* Defs.' Exs. 154-50, 155-53, 155-57, 155-58 (all showing Harder getting Club Membership Fee and unit counts from AV, MBS, Evergreen Lifestyles Management)). EFG did nothing to confirm the rates listed in Tables 3 and 4. EFG did not understand the basis for the rates, how they were determined, or why they were different for different properties. (Testimony of Harder). EFG never reviewed the Club Plan and knew nothing about its validity or the validity of the purported obligation to pay Club Membership Fees. (Testimony of Harder).

EFG did nothing to confirm that each phase actually included the number of units listed in Tables 3 and 4. EFG's first report, dated July 2016, footnoted the value if the actual unit counts as of 2014 were used. (Jt. Ex. 49 at 16; Testimony of Harder). But Harder did not explain why his second report, dated September 2016, did not even consider the number of actual units paying Club Membership Fees in 2016.

During the joint meeting on October 4, 2016, after EFG presented its second report, Iorio took the microphone. He said that, according to budgets prepared by Evergreen Lifestyles Management, the Districts' reserve needs would be met by AV paying O&M assessments on undeveloped lots. (Plfs.' Ex. 6 at 4). EFG planned to return for the boards' next meeting to give an updated report. (Plfs.' Ex. 6 at 3).

The agenda package for the joint meeting on October 4, 2016 included a copy of the Amended and Restated *Solivita* Club Plan. (Plfs.' Ex. 6). But the Districts' Counsel did not analyze the Club Plan to determine whether it was legal, much less advise the Districts' boards regarding its legality. Nor did the Districts' counsel give advice as to whether AV's collection of Club Memberships was allowed under Florida law. (Testimony of Eckert). In fact, neither the Club Plan nor the Club Membership Fees were analyzed or understood by the Districts' boards or any of the consultants or professionals the boards relied on. (Testimony of Moyer, Leo, Eckert, Harder, Plenzler, Zimbardi, Case). Despite that, EFG based its calculation of the purchase price on Club Membership Fees.

EFG presented its third report, dated October 22, 2016 (Jt. Ex. 51), at the boards' next joint meeting, on October 24, 2016 (Jt. Ex. 14 at 4). Before the meeting, AV arranged to meet with EFG and the Districts' Counsel "to make sure we are all squared away." (Defs.' Ex. 332). Before EFG issued report, Mulshine gave Harder specific instructions on how to calculate the purchase price in his final report in October. (Defs.' Ex. 156-84 (telling Harder to "put the R&R on the O&M side," which increased the purchase price that would have otherwise been decreased by the increased interest rates in the bond market, and which made room for the assessment equalization payment); *see also* Defs.' Ex. 156-74 (Mossing telling Harder to move R&R to O&M); Defs.' Ex. 157-96 (Mossing sending Harder calculations). And Mulshine reviewed EFG's report to make sure Harder got it right. (Defs.' Ex. 156-86).

EFG's third report was titled "Supplemental Report" (Jt. Ex. 51 at 1), and Harder testified that it had to be read together with EFG's prior report dated September 2016 (Jt. Ex. 50). But, as discussed below, the Supplemental Report misled the boards and did not explain how its conclusions and recommendations differed from the data and tables in the September 2016 Report. (*Compare* Jt. Ex. 51, *with* Jt. Ex. 50).

The benefits the Districts perceived from AV's payment of O&M assessments on undeveloped lots was illusory. (*See* Plfs.' Ex. 4 at 3–5; Jt. Ex. 51). EFG used the O&M assessments as a revenue source to increase the maximum supportable acquisition value. (Jt. Ex. 51 at 1–2). AV's offer to pay O&M assessments drove up the purchase price so that AV would receive millions more at closing in return for paying O&M assessments over time.

EFG concluded in its Supplemental Report that "Club Operations Fees paid on behalf of undeveloped lots taken together with revenues generated by 2016 Club Fees will support a maximum acquisition value of $73.7 million under current bond market conditions." (Jt. Ex. 51 at 1). With that, EFG increased the purchase price previously calculated in its September 2016 report by $3.5 million. (Jt. Ex. 50).

Unlike the July 2016 and September 2016 reports, the October 2016 Supplemental Report did not include a table showing EFG's calculation of the maximum acquisition value. (*Compare* Jt. Ex. 49 at 16 *and* Jt. Ex. 50 at 19, tbl.7 *with* Jt. Ex. 51). Harder admitted that the October 2016 Supplemental Report listed the maximum acquisition value without showing the underlying changes in how it was calculated. (Testimony of Harder).

Harder testified that the following changes to the September 2016 calculations affected his calculation of the maximum acquisition value in the October 2016 Supplemental Report:

- increased interest rates pushed the price down;
- accounting for reserve and replacement as O&M instead of debt service pushed the price up; and
- accounting for O&M on undeveloped lots pushed the price up.

But Harder was unable to articulate the quantitative effect of each of these changes; he could only testify that they affected the final number and caused it to be $73.7 million.

The recalculations in EFG's October 2016 Supplemental Report kept the price on target for AV and MBS. EFG found a way to stay on target despite interest-rate increases in the bond market. And it still left room for AV and the Districts to create a $3.9-million "assessment equalization payment" (discussed below), which enabled AV to take home $70 million. Until he was cross-examined, Harder had never disclosed to the Districts' boards or this Court that his numbers were inflated by $24 million. Nor had he told the Districts' boards or this Court that Table 7 of EFG's September report was rendered completely inaccurate by the changes in his October report.

Districts Rely on EFG's Calculation of Maximum Supportable Price

After reviewing EFG's October 2016 Supplemental Report, the Poinciana CDD voted to approve the Asset Sale and Purchase Agreement. (Plfs.' Ex. 14 at 6). Exhibit A to the Asset Sale and Purchase Agreement lists the 17 amenities facilities being conveyed under the agreement. (Plfs.' Ex. 52 Ex. A). Only these properties (and the related

personal property and inventory) are being conveyed—AV's purported rights under the Amended and Restated *Solivita* Club are not being conveyed (Plfs.' Ex. 52, § 2.1), and in fact the Club Plan is being terminated. (Plfs.' Ex. 52, § 4.2(viii)).

The Asset Sale and Purchase Agreement includes a $73.7-million purchase price, to be reduced by an "equalization amount" for the assessments (discussed below). (Jt. Ex. 52, §§ 1.1(lxxvii), 3.1). This equalization concept was created by Mulshine of MBS (Defs.' Ex. 156-84 (discussed above); Defs.' Ex. 156-87 (Mulshine telling Districts' Counsel to "draft a PSA that says the 'Value is $73.7 million but AV Homes is going to take $3.8 million as an 'assessment payment credit' to equalize the assessments"); *see also* Defs.' Ex. 157-98 and 157-100 (discussed below).

On November 30, 2016, Poinciana CDD Chairman Robert Zimbardi executed the Asset Sale and Purchase Agreement. (Jt. Ex. 52 at 46). During the next joint meeting, on December 13, 2016, the Poinciana West CDD Board voted to support ratification of the executed agreement (Plfs.' Ex. 15 at 2), and the Poinciana CDD Board voted to ratify the executed agreement (Plfs.' Ex. 15 at 3).

At trial, the chairs of Poinciana CDD and Poinciana West CDD, testified that:

- the boards selected EFG because they thought EFG was independent;
- none of the supervisors on either board were experts at determining the value of amenities facilities; and
- the boards relied solely on EFG's $73.7-million calculation as the basis for agreeing to the $73.7 million purchase price for the amenities facilities.

The sole basis for the Districts' agreement to the $73.7-million purchase price was their belief that EFG's October 2016 Supplemental Report had concluded that the amenities

facilities' value was really $73.7 million. (Testimony of Case, Zimbardi; Excerpts admitted at trial from Brown Dep.). The boards did not know that rather than calculate actual value, EFG had calculated the maximum supportable acquisition value. (*See id.*)

The Districts' Counsel led the boards to believe that EFG's report calculated the amenities' facilities value. EFG was presented as a valuation consultant (Plfs.' Ex. 8) to perform the task of conducting "due diligence to determine the value of the Facilities," which was identified in the summary of major tasks in the memorandum from the Districts' Counsel to the boards. (Defs. Ex. 104). And when a supervisor raised the issue of obtaining an independent valuation before the boards' vote on ratifying the Asset Sale and Purchase Agreement, Districts' Counsel wrote that "You have an independent valuation – EFG." (Defs.' Ex. 232 at 2).

The Districts' board of supervisors did not understand the requirements of chapter 190. (Testimony of Robert Zimbardi). And because he took the position that a determination of fair value was not required, the Districts' Counsel never advised the boards that chapter 190 required them to determine the fair value of the amenities facilities. (Testimony of Eckert). Instead, the Districts' Counsel testified that it is his opinion that the Districts could purchase the amenities facilities for any price they chose, so long as it was not arbitrary. (Testimony of Eckert). In other words, Eckert would have supported prices of $200 million or $300 million if AV and MBS had targeted those numbers and EFG had hit those targets.

Districts Rely on Fishkind's Assessment Methodology, which AV and MBS Controlled

On March 15, 2017, Poinciana CDD adopted Resolution 2017-08, which authorized the collection of special assessments to repay bonds issued to purchase the amenities facilities. (Jt. Ex. 45). In Resolution 2017-08, the Poinciana CDD Board authorized assessment of properties within the District using Fishkind's Master Assessment Methodology Report. That result was the special assessments set forth on the final assessment roll attached to the report. (Jt. Ex. 45 at 4, § 2(m)(iii)). Poinciana West CDD passed Resolution 2017-10, which adopted the same report and authorized the same assessments. (Jt. Ex. 46 at 4, § 2(m)(iii)).

The Master Assessment Methodology Report was prepared by Kevin Plenzler of Fishkind & Associates—the firm that the boards refused to hire as a valuation consultant because they feared that Fishkind was beholden to AV. (See discussion above). As the assessment consultant, Fishkind proved that they were in fact beholden to AV. (Defs.' Ex. 158-125 (Plenzler suggesting a way to "create some additional cash for AV")).

Fishkind's Master Assessment Methodology Report attached as Exhibit A the final assessment roll that stated the resulting special assessments for each property. (Ex. A to Ex. B of Jt. Exs. 45 and 46). The final assessment roll shows that the Districts will allocate different levels of special assessments to different properties. At the same time, Fishkind associate Kevin Plenzler stated in the report that he determined that each property receives an equal benefit of $15,171.68 from the amenities facilities. (Ex. B to Jt. Exs. 45 and 46, at 8, tbl.6). This means that the Master Assessment Methodology

Report allocates different levels of special assessments to properties that receive an equal benefit.

The unequal allocation of assessments results in part from an "Assessment Equalization Payment," which the Master Assessment Methodology Report describes as a "contribution of infrastructure reflected in a deduction from the purchase price." (Ex. B. to Jt. Exs. 45 and 46, at 4, § 2.2). Under the *Solivita* Master Declaration and its incorporated Club Plan, the Club Membership fees illegally collected by AV are different rates for different properties. (Defs.' Ex. 19). So AV and MBS invented the "Assessment Equalization Payment" as a method by which the Districts could charge higher levels of special assessments on properties from which AV was collecting higher Club Membership Fees. (Defs.' Exs. 157-98, 157-100, 157-103); *see* Testimony of Plenzler; Ex. B. to Jt. Exs. 45 and 46, at 4–6). This maximized the purchase price and AV's profit.

Like all of the other consultants and professionals the Districts relied on, Plenzler did not analyze the Club Plan or the legality of its provisions. (Testimony of Kevin Plenzler). Nor did Plenzler see any relationship between the differences in the rates of Club Membership Fees and the benefits that the properties received. (Testimony of Kevin Plenzler). And in fact there is no relationship between the benefits received and the differences in rates. The Master Assessment Methodology report confirmed this when it determined that the assessed properties receive an equal benefit from the amenities facilities. (Ex. B to Jt. Exs. 45 and 46, at 8, tbl.6).

Table 3 of the Master Assessment Methodology Report shows the adjustments that result from application of the "assessment equalization payment."

Table 3. Assessment Equalization Payment

Planned Units	Club Fee Per Unit (incl tax)	Club Fee Per Unit/Month (incl tax)	% of max	Net Proceeds Allocation	Net Proceeds / Unit (unadjusted)	Adjusted Allocation / Unit	Variance (Buydown) / Unit	Total Buydown
672	$834.60	$69.55	76.47%	$10,195,368.17	$15,171.68	$11,601.87	$3,569.81	$2,398,910.16
149	$950.16	$79.18	87.06%	$2,260,580.14	$15,171.68	$13,208.29	$1,963.39	$292,545.67
680	$963.00	$80.25	88.24%	$10,316,741.60	$15,171.68	$13,386.78	$1,784.90	$1,213,734.31
170	$1,078.56	$89.88	98.82%	$2,579,185.40	$15,171.68	$14,993.19	$178.49	$30,343.36
3,924	$1,091.40	$90.95	100.00%	$59,533,667.69	$15,171.68	$15,171.68	$0.00	$0.00
5,595				$84,885,543.00				$3,935,533.49

Source: Fishkind and Associates, Inc.

(Ex. B to Jt. Exs. 45 and 46, at 5 tbl.2). As shown in Table 3 and on the final assessment rolls, the adjustments result in different assessment for properties that receive the same benefit.

Plenzler also admitted that in his experience with assessment methodologies, he had never used the concept of an "assessment equalization payment." And Mulshine of MBS admitted that in his more-than-30 years of experience as an underwriter of more than $2 billion of CDD bonds, he has never been involved in a bond issuance that used an "assessment equalization payment" for special assessment allocation. (Excerpts admitted at trial from Mulshine Dep. 21:5–8; 146:22–147:1).

Mulshine invented the concept of an "assessment equalization payment" specifically for this case to accomplish AV's objectives and maximize AV's profit. (*See* Defs.' Ex. 157-98 (showing Mulshine's calculation of the payment); Defs.' Ex. 157-100 (showing a call between Mulshine and the Districts' counsel regarding the assessment equalization payment and Mulshine's explanation of his idea to "use the PSA as a vehicle to record an assessment credit"); Defs.' Ex. 157-103 (showing Mulshine's discussion of

the bond amounts and working with Fishkind on assessment equalization concept)). And Mulshine arranged for EFG's calculations to arrive at a purchase price that would leave room for AV to still take home $70 million after accounting for the assessment equalization payment. (Defs.' Ex. 156-84).

The "assessment equalization payment" is a misnomer. As Plenzler admitted, there was no payment at all. And it did not equalize anything; it actually made the assessments unequal. Not surprisingly, in the Districts' closing brief, the Districts avoid using the term "assessment equalization payment." They do not use the term even once in their brief.

Plenzler also admitted that the following demonstrative exhibit accurately reflects the differences in annual assessments for properties that all receive an equal benefit from the bonds:

Summary of Assessment Levels for Different Properties

Assessment Level	Number of Units	Annual Assessment	Increased Assessment	Years	Total Payments
1	672	780.88		30	$23,426.40
2	149	887.82		30	$26,634.60
3	680	899.70		30	$26,991.00
4	170	1,006.30		30	$30,189.00
5	2,828	1,018.17		30	$30,545.10
6	916	1,243.13	1,691.44	31	$45,709.99
7	180	1,301.37	1,968.94	31	$48,987.11
Total/Average	5595	1,017.38			$32,219.25

(Defs.' Ex. 340). The column labeled "Annual Assessment" reflects the unfair differences in assessments reflected in the final assessment rolls attached to the Master Assessment Methodology Report. (Ex. A to Ex. B of Jt. Exs. 45 and 46). The districts admit in their resolutions adopting the Master Assessment Methodology Report that it results in the special assessments set forth on the final assessment rolls attached to the report. (Jt. Exs. 45 and 46 at 4, § 2(m)(iii)).

The "assessment equalization payment" affects assessment levels 1–5 in the demonstrative exhibit, and the "wrap structure" affects levels assessment levels 6 and 7. (Testimony of Plenzler). The concept of the wrap structure was also developed by Mulshine of MBS to benefit AV (Defs.' Ex. 158-111). The wrap structure affects the undeveloped lots owned by AV and provides that AV pay lower, interest-only payments during the years in which AV expects to own the lots. (Testimony of Plenzler).

ARGUMENT

Under the Uniform Community Development District Act of 1980, chapter 190, Florida Statutes, special assessment bonds maturing over a period of more than 5 years must be validated by court decree before they may be issued by a community development district. § 190.016(12), Fla. Stat. Entitlement to validation depends on, among other things, whether:

- the bonds have a lawful public purpose;
- the issuance complies with the requirements of law; and
- the special assessments are fairly and reasonably apportioned.

Donovan v. Okaloosa County, 82 So. 3d 801 (Fla. 2012).

In this case, Poinciana Community Development District and Poinciana West Community Development District are seeking to validate issuance of up to $102 million in special assessment bonds that mature over 30 years. The proposed bonds should not be validated. The Districts have not met the requirements of a lawful public purpose, compliance with Florida law, and fair and reasonable apportionment of special assessments.

First, the Districts have not provide a lawful public purpose. Under the public-purpose requirement, if the primary beneficiary of a project is a private party, then the bonds may be validated only if the public interest is present and sufficiently strong. *Id.*; *Zedeck v. Indian Trace Cmty. Dev. Dist.*, 428 So. 2d 647, 648 (Fla. 1983). If the private benefit tarnishes the public nature of the project, then the bonds may not be validated. *Orange County Indus. Dev. Auth. v. State*, 427 So. 2d 174, 179 (Fla. 1983). In this case, the sole purpose of the project is to monetize 30 years of illegal profit for the developer, AV Homes. AV proposed the project to the Districts. It controlled the boards of supervisors and their consultants so that AV's profit was the priority of the project. This arrangement completely negates any incidental public benefits and bars an entitlement to validation.

Second, the Districts have not complied with Florida law in three respects. First, the boards did not determine the fair value of the properties for which the bonds are being exchanged, which is required under § 190.016, Florida Statutes. Second, the boards agreed to purchase the property for the maximum possible price calculated by a valuation consultant who was not licensed in Florida and who did not follow the standards required

under chapter 475, Florida Statutes. Third, rather than act reasonably, the boards acted arbitrarily and capriciously, and were under the undue influence of AV. Requiring compliance with Florida law provides a community development district's resident property owners with a minimum level of protection from the district's board of supervisors exercise of unlimited discretion and authority to issue bonds. Each of these three violations of law is a separate ground for denying validation.

Third, the Districts did not fairly and reasonably apportion the special assessments. The requirement of fair and reasonable apportionment of special assessments protects resident property owners from government favoritism in setting the amounts of special assessments. If a community development district assesses different properties at different levels, the differences must be based on a method of allocation that has a reasonable or rational relationship to the benefits received by the assessed properties. *Donovan*, 82 So. 3d at 813. In this case, the Districts adopted an arbitrary assessment methodology method that assessed properties differently based on AV's decision to make the assessments consistent with the rates of the fees AV was collecting through the Master Declaration under the Club Plan. Such private favoritism by AV cannot be the basis for government favoritism by the Districts.Validation should be denied because the proposed special assessments are not fairly and reasonably apportioned.

I. The bonds' purpose—maximizing AV's profit—is illegal.

Under Florida law, community development districts may only issue bonds if the purpose of the obligation is legal. *Donovan*, 82 So. 3d. at 805. In determining if the purpose is legal, the Florida Supreme Court applies the "public purpose" test when a community development district has not exercised its taxing power or pledged its credit. *Id.* at 809–10. When a public purpose is required, if a private party is the primary beneficiary of a project, then the bonds may only be validated "if the public interest, even though indirect, is present and sufficiently strong." *Id.* at 810. "[I]f the private benefits are the paramount purpose for a project, the bonds cannot be validated under the constitution even if there is some public benefit." *Id.*

The Florida Supreme Court has repeatedly applied the "public purpose" test to determine the validity of bond issuances that, as here, did not involve the exercise of taxing powers or the pledging of credit. In *Zedeck*, the Florida Supreme Court reviewed the validation of a bond issuance for the expansion of a water management system on property privately owned by the community development district's majority landowner. *Zedeck v. Indian Trace Community Development District*, 428 So. 2d 647, 647–48 (Fla. 1983). Another landowner contested the bond issuance's validity and claimed that the primary purpose was private benefit. *Id.* at 648. When it affirmed the issuance of the bonds, the Florida Supreme Court determined that "[e]ven though the system expansion affects primarily land owned by [the majority landowner], the public interest in this project is present and sufficiently strong to overcome [the contesting landowner's] claim." *Id.*

In *Orange County*, the Florida Supreme Court reviewed the validation of a bond issuance for the construction of a broadcasting facility for a privately-owned television station. *Orange County Industrial Development Authority v. State*, 427 So. 2d 174, 176, 178–79 (Fla. 1983). The county was not pledging its credit, but the court affirmed the invalidation of the proposed bonds, because private benefit was the paramount purpose of the project. *Id.* at 179.

In *Housing Finance*, 376 So. 2d 1158, the Florida Supreme Court reviewed the validation of a bond issuance to purchase mortgages of private residences to alleviate the shortage of housing in the county. *State v. Housing Finance Authority of Polk County*, 376 So. 2d 1158, 1159 (Fla. 1979). The court determined that there was no lending of public credit and, therefore, that the primary beneficiary of the project may be a private party "if the public interest, even though indirect, is present and sufficiently strong." *Id.* at 1160.

The Court explained that "Of course, public bodies cannot appropriate public funds indiscriminately, or for the benefit of private parties, where there is not a reasonable and adequate public interest." *Id.*; *cf.* 92-22 Op. Att'y Gen. Fla. (1992) (opining that special assessments could not be imposed to primarily benefit the private developer). When it affirmed the validation of the bonds, the court in *Housing Finance* determined that alleviating the shortage of housing was a reasonable, adequate, and sufficiently strong public interest. *Id.*

In this case, the core purpose of the proposed bonds is to create illegal profit for AV. The underwriters from MBS Capital Markets calculated a target price at which AV

would receive, upon issuance of the bonds, an immediate cash payment of the vastly overstated purported value of AV's expected future profits from collecting illegal Club Membership Fees. (*see* Summary of Facts *supra* at 27–37 and exhibits cited therein).

The proposed purchase of the amenities facilities has no public purpose. There is no actual benefit to the residents of the Districts. The Districts receive no benefit from paying AV the value of its expected profit from collecting Club Membership Fees because, as discussed below in subpart A, it is illegal for AV to collect those fees in the first place. Nor do the Districts receive any benefit from purchasing the amenities facilities from AV because, as discussed below in subpart A, the facilities are common areas of the *Solivita* homeowners' association, whose membership includes the Districts' residents. This means that the residents already have a right to not only use the amenities facilities, but to gain control of them when AV sells the threshold number of homes that requires it to turn over control of the homeowners' association to residents.

Under chapter 190, Florida Statutes, community development districts cannot spin off $70 million of profit to a developer over 30 years. Under chapter 720, Florida Statutes, homeowners' associations cannot spin off $70 million of profit to a developer over 30 years. Likewise, in this case, the Districts cannot pay $70 million to monetize 30 years of expected profit for AV.

A. AV is the primary beneficiary of the proposed bonds, which are designed to monetize AV's expected profit from collecting illegal and arbitrary Club Membership Fees.

In *Gundel v. AV Homes Inc.*, Case No. 17-CA-1446 (Fla. 10th Cir. Polk Cnty.), AV argued that the Homeowners' Association Act did not apply and moved to dismiss

the lawsuit. *See* Defs.' Mot. Dismiss Plfs.' First Am. Class Action Compl. & Demand for Jury Trial, Filing No. 57581716 (June 9, 2017), *Gundel v. AV Homes Inc.*, Case No. 17-CA-1446 (Fla. 10th Cir. Polk Cnty.). In an order denying AV's motion to dismiss the plaintiffs' claims under the Homeowners Association Act, the Court rejected "the argument that the Defendants are not a homeowners' association pursuant to Chapter 720, Florida Statutes." Order on Defs.' Mot. Dismiss Plfs.' Class Action Complaint, (Aug. 4, 2017), *Gundel v. AV Homes Inc.*, Case No. 17-CA-1446 (Fla. 10th Cir. Polk Cnty.).

AV's collection of Club Membership Fees is illegal. The Homeowners' Association Act defines an "assessment" as "sums of money payable to . . . the developer . . . or to recreational facilities . . . which if not paid by the owner of a parcel, can result in a lien against the parcel." § 720.301(1), Fla. Stat. And the Homeowners' Association Act provides that assessments "must be in the member's proportional share of expenses." *Id.* § 720.308(1)(a).

In this case, the *Solivita* Master Declaration incorporates a Club Plan that purportedly requires the payment of "Club Dues." (Defs.' Ex. 19, Club Plan § 8). The Club Dues include "Club Expenses" and a "Club Membership Fee." (*Id.*) The Club Expenses are broadly defined to include all costs of owning, operating, and maintaining the amenities facilities included in the Club Plan. (*Id.* § 8.1). The Club Membership Fees are collected *in addition to* Club Expenses, and the Club Owner, AV, purportedly has the right to collect and keep the Club Membership Fees as profit:

> 8.1 Club Expenses. Each Owner agrees to pay and discharge, in a timely fashion when due, its pro rata portion (as hereinafter set forth) of the Club Expenses. The Owners shall collectively bear all expenses associated with the Club so that Club Owner shall receive the Club Membership Fees without deduction of expenses or charges in respect of the Club. Commencing on the first day of the period covered by the annual budget, and until the adoption of the next annual budget, the Club Expenses shall be allocated so that each Owner shall pay his pro rata portion of Club Expenses based upon a fraction, the numerator of which is one (1) and the denominator of which is (i) the total number of Homes in Solivita conveyed to Owners or (ii) any greater number determined by Club Owner from time to time. Club Owner, in its sole and absolute discretion, may change the denominator from time to time. Under no circumstances will the denominator be less than the number of Homes owned by Owners other than Developer as of September 30 of the prior fiscal year.

(*Id.* (emphasis added); *see id.* § 8.2).

The Districts argue that the bond issue does provide a public benefit in that the Districts will "lower and cap the amount they pay to enjoy the amenities at or below the rates charged in 2016 under the Amended and Restated Club Plan." (Districts' Closing at 6; Testimony of Moyer, Michael Eckert, Robert Zimbardi, Charles Case, Kevin Plenzler). Lowering and capping an illegally collected fee is not a public benefit. The real purpose of the bond issuance is to monetize AV's expected profit from its illegal collection of fees before AV's home sales hit the 90% turnover threshold. At that point, AV will lose control of the homeowners' association and lose its ability to use the association to illegally collect the fees.

The Districts also argue that a public benefit of the bond issuance is that "the owners of property in the Districts will gain control over the amenities." (Districts' Closing at 6; Testimony of Moyer, Michael Eckert, Robert Zimbardi, Charles Case, Kevin Plenzler). But gaining control of amenities facilities is not an actual benefit. The

residents of the Districts already have a vested interest in gaining ownership and control of the amenities facilities through the homeowners' association.

The Districts contend the bond issue provides a public benefit because they will "receive an additional $11.2 million in renovated or new improvements at no additional cost." That is incorrect. First, the Districts will not receive construction and renovation at no cost. The cost is $11.2 million, which the Districts are borrowing and which the Districts' residents will have to repay through special assessments.

Second, the $11.2 million in construction and renovation is an incidental benefit that is not sufficiently strong to overcome the private benefit AV will realize when it receives an immediate $70-million payment for its expected profits derived from the illegal collection of 30 years' worth of Club Membership Fees. In fact, the Asset Sale and Purchase Agreement does not actually *require* AV to complete any of the construction and renovation. There is nothing to stop AV from deciding not to undertake that project.

B. AV controlled the Districts' consultants and made maximizing AV's profit the top priority.

As discussed above in the Facts, AV paid for the Districts' consultants. It used its right to terminate the consultants' funding to control the consultants' work and conclusions. With the help of the underwriters from MBS Capital, AV controlled the Districts' selection of EFG as the valuation consultant. AV and MBS then controlled EFG's calculation of the purchase price.

Under AV and MBS's control, EFG presented a final report to the boards that concluded the maximum acquisition value was $73.7 million. That figure left room to

deduct the "assessment equalization payment" and still hit the target price of $70 million, the price MBS calculated for AV at the beginning of the process, months before the Districts began considering proposals from valuation consultants.

AV and MBS also controlled the Districts' assessment consultant, Kevin Plenzler of Fishkind & Associates. Under AV and MBS's control, Plenzler created a methodology which used an "assessment equalization payment"—a device Mulshine of MBS created out of thin air—to accomplish AV's objectives of maximizing the bonding capacity by imposing higher special assessments on properties that receive the same benefit from the amenities but currently have higher rates of Club Membership Fees.

AV controlled the Districts' consultants to accomplish its objectives and monetize the profits it expected from collecting 30 years of illegal Club Membership Fees. The sole purpose of the bonds is to benefit AV. That fact undermines the attempts by the Districts' consultants to create the appearance of benefits to the Districts from the proposed bond issuance.

AV's control of the process is illustrated in an email in which Iorio recaps the progress of the Districts' bond issuance for higher-level executives at AV. (Defs.' Ex. 158-121). This email was produced to Mann and Taylor in response to their subpoena duces tecum to MBS. (*See generally* Excerpts admitted at trial from Mulshine Dep.). Mulshine and Mossing of MBS were copied on this email because one of the topics was the wrap structure for special assessments on undeveloped lots. (*See id.*). Other recap emails that Mulshine and Mossing were not copied on would further confirm AV's

control, but AV avoided producing any documents because their objections to subpoenas duces tecum were sustained.

C. AV forced the Districts' boards into an unconscionable agreement.

Throughout the process, the Districts' boards feared that if they did not accept AV's terms, the new amenities would never be built and the existing amenities would be sold to an outside entity. AV and MBS exploited this fear to control the Districts' boards of supervisors and force them into an unconscionable agreement. (*See*, *e.g.*, Defs.' Ex. 278 (Supervisor Zimbardi expressing concerns that "AV is trying to force feed this transaction"). At trial, Martin Kessler testified as an expert in economics and gave the uncontradicted opinion that the Asset Sale and Purchase Agreement was unconscionable. (Testimony of Kessler). Despite having taken Kessler's expert deposition two months earlier, the Districts did not attempt to refute Kessler's opinion. They did not cross examine Kessler, or call an expert economist of their own to offer a contrary opinion.

II. The Districts failed to comply with Florida law.

Entitlement to bond validation depends on "whether the bond issuance complies with the requirements of law." *Donovan*, 82 So. 3d at 805. Laws applicable to the bond issuance in this case include:

- the requirement of a fair-value determination under § 190.016(1)(c), Florida Statutes,
- the requirements of determining the value of real property under §§ 475.611, .612, .628, Florida Statutes; and
- the requirement that community development districts' boards of supervisors act reasonably, not arbitrarily or capriciously.

The Districts' boards violated each of these three requirements by relying on EFG as a valuation consultant. When they agreed to the amenities facilities' $73.7-million purchase price, the Districts' boards relied solely on the calculations in EFG's final report. (Testimony of Case, Zimbardi). Harder admitted that final report did not include a determination of the amenities facilities' fair value. The Districts' Counsel identified "determine the value of the facilities" as a "major task" in his memorandum to the boards on July 11, 2016. (Defs.' Ex. 2014). But at trial, the Districts' Counsel gave the opinion that a fair-value determination was not required. (Testimony of Eckert). As a result, the proposed bond issuance does not comply with § 190.016(1)(c), Florida Statutes.

In addition, Harder admitted that he was not licensed, that he did not follow the required standards of determining property value, and that he did not determine the value of the amenities facilities. The proposed bond issuance does not comply with §§ 475.611, .612, .628, Florida Statutes.

Moreover, EFG's calculations were based on AV's collection of Club Membership Fees. The fees are illegal, arbitrary, and capricious. For these reasons, relying on solely on EFG's calculations for the amenities facilities' purchase price was arbitrary and capricious, and the proposed bond issuance does not comply with requirement that the boards act reasonably.

The Districts concede that the Districts' boards must act reasonably, not arbitrarily or capriciously. (Testimony of Eckert; Districts' Closing *passim*). But the Districts argue that the other two requirements are inapplicable. (Districts' Closing at 10). In their written closing, the Districts argue that:

- "the valuation issue is a legal red herring;"

- "the Defendants insisted on litigating . . . irrelevant arguments regarding valuation;" and

- "[e]ven if valuation could somehow be relevant, the evidence at trial showed the Districts had a valid valuation of the transaction."

(Districts' Closing at 3 n.2, 10).

The Districts argument that "valuation" is a "red herring" is wrong as the following indisputable facts show:

- the Districts themselves engaged and relied on EFG as their "*valuation* consultant" (Plfs.' Ex. 8);

- the memorandum of the Districts' Counsel to the boards of supervisors summarizing the "Major Tasks Related to the Proposed Solivita Amenity Acquisition" states that "In order to determine the appropriate price to be paid to AV Homes for the proposed acquisition of the Facilities, it is first necessary to conduct certain due diligence to determine the *value of the Facilities*" (Defs.' Ex. 104);

- EFG ran up fees of more than $150,000 as a *valuation* consultant (Defs.' Ex. 7);

- EFG's first and second reports were each presented to the joint boards as a "Valuation Report" (Plfs.' Ex. 6 at 3; Plfs.' Ex. 12 at 2), and EFG's third report was presented under the agenda item "Valuation/Purchase Price" (Plfs.' Ex. 14 at 4);

- at trial, the Districts themselves called EFG's Harder as a witness.

In their written closing, the Districts decline to argue the "value of the facilities" is adequate to validate the bond issuance they propose. Instead, they argue that "the evidence at trial showed the Districts had a valid valuation ***of the transaction.***" (Districts' Closing at 10 (emphasis added)). There was no evidence that the Districts had a valuation ***of the amenities facilities***. There is no support for the Districts' argument that "the price

paid for the improvements was reasonable" based on EFG's report. (Districts' Closing at 10).

There has been only one valuation of the amenities facilities—the appraisal performed by Michael McElveen, MAI, a Florida-licensed property appraiser with the firm Urban Economics. (Defs.' Ex. 184). McElveen's appraisal follows the 2016–2017 Uniform Standards of Professional Appraisal Practice, which are the required methods of determining the value of real property under Florida law. § 475.628, Fla. Stat. Using the required methods, the amenities facilities are valued at $19.25 million. (Defs.' Ex. 184). This explains why AV tried to persuade the boards that its approach was normal. (See Defs.' Ex. 159-138 (showing AV asking MBS for examples of other districts using AV's approach—there were none)). And it explains why AV threatened to pull the plug if the Districts did not use AV's approach. (*See* Defs.' Ex. 336-1 (discussed above); *see also* Defs.' Ex. 193 ("[T]here is no circumstance under which AV Homes is willing to entertain or finance further valuations.").

In addition to their violation of the legal requirements relating to valuation, the Districts also violated applicable competitive-bidding requirements. In the Asset Sale and Purchase Agreement, they agreed to pay 5%—approximately $560,000—as a fee to AV to manage construction of new amenities. *See* §§ 190.002, 190.033, 255.20, 287.055, Fla. Stat.

A. The Districts failed to determine the fair value of the properties that will be exchanged for the bonds.

Section 190.016(1)(c), Florida Statutes, requires that a community development district's board of supervisors determine the fair value of any properties exchanged for bonds:

> The price or prices for any bonds sold, exchanged, or delivered may be . . . (c) In the case of special assessment or revenue bonds, the amount of any indebtedness to contractors or other persons paid with such bonds, or the *fair value* of any properties exchanged for the bonds, as determined by the board.

The transaction proposed in this case is an exchange in which the Districts will issue bonds and receive amenities facilities. The Districts' Manager testified that there are three conditions precedent to the closing of the bond transaction, all of which will happen simultaneously on the closing date:

- AV will deed the amenities facilities to the Districts;
- the Districts will deliver the bonds to the bondholders; and
- the bondholders will deliver the purchase price to AV.

(Testimony of Moyer).

The Districts' Counsel agreed that these three things were expected to occur, but suggested that they might not actually happen at the exact same time. (Testimony of Eckert). The Districts' Counsel admitted that the bond issuance would be undone if all three things did not occur. (Testimony of Eckert).

The testimony of the Districts' Counsel and the Districts' Manager establishes that the bonds are being exchanged for the amenities facilities. For that reason,

§ 190.016(1)(c) applies and the Districts' boards must determine the amenities facilities' fair value.

Not surprisingly, AV is paying for the Districts' Counsel to argue that the fair-value standard does not apply and that law allows the Districts to overpay AV for the amenities. (*see* Defs.' Ex. 26). The Districts argue that "[t]he subject transaction entails payment of cash at closing, not the exchange of bonds." (Districts' Closing at 10). The Districts admit that "the cash at closing is being generated through the issuance of bonds," but argue "that is not legally the same as exchanging property for bonds." (Districts' Closing at 10). And the Districts proposed a final judgment that wrongly concludes "The Indenture and the [Asset Sale and Purchase Agreement] do not contemplate the exchange of the Bonds for the Amenity Improvements." (Districts' Proposed Final Judgment ¶ 26).

The Districts' attempt to separate the bond issuance from the Asset Sale and Purchase Agreement fails. It is defeated by the agreement's plain language, which includes the following conditions to closing:

(iv) Buyer shall have obtained all material approvals and permits necessary to authorize the transactions contemplated by this Agreement, including but not limited to applicable consent from the owners of the Series 2012A-2 Bonds; Buyer and the PWCDD entering into an Interlocal Agreement governing the Purchased Assets and special assessments related thereto; adoption of debt assessment resolutions and operations and maintenance assessment resolutions by Buyer and the PWCDD related to the Purchased Assets; adoption of rules by the Buyer for annual user fees for the Facilities; negotiation, approval and execution of a management agreement by the Buyer for the Purchased Assets; and approval of such other resolutions and agreements as are necessary to authorize the acquisition of the Purchased Assets by Buyer.

(v) Buyer shall have obtained all necessary approvals to authorize the issuance of the Bonds pursuant to Chapters 170, 190, and 197, Florida Statutes, in sufficient amounts to acquire the Purchased Assets and constructed the Planned Community Improvements, including but not limited to the Bond Validation, with such Bonds being in a principal amount sufficient to: (a) pay the Purchase Price; (b) pay all Costs of Issuance; (c) pay all costs incurred in connection with the Closing and as otherwise provided by this Agreement; and (d) fund an acquisition and construction account sufficient to fund the construction and installation of the Planned Community Improvements; provided, however, in the event the Bond Validation is not obtained on or before one-hundred twenty (120) days following the Effective Date of this Agreement (the "Validation Date"), Seller shall have the right to elect, by delivering written notice to Buyer, to: (i) extend the Validation date for one or more periods of thirty (30) days each or (ii) terminate this Agreement, whereupon the parties shall be relieved of any further obligations hereunder, except with respect to those which expressly survive such termination;

(vi) Buyer shall have sold the Bonds and received funds from such sale in amounts as are necessary to acquire the Purchased Assets and construct the Planned Community Improvements and pay all Costs of Issuance, pursuant to such terms and conditions, which are acceptable to Buyer in its sole and absolute discretion;

(Jt. Ex. 52 at 16, § 4.2(iv)–(vi)). Under these provisions, issuing bonds is the only way the Districts may close the agreement and acquire the amenities facilities. (*Id.*) These provisions require that the Districts to validate and issue bonds, and give AV the right to terminate the agreement if the bonds are not validated. (*Id.*)

The testimony of the chairmen of the Districts' boards of supervisors proved that the Districts relied solely on EFG's calculation of the purchase price. (Testimony of Robert Zimbardi, Charles Case). Scott Harder of EFG admitted that EFG's calculation of the purchase price was not a determination of the fair value of the amenities facilities.

(Testimony of Harder). The Districts' boards—who relied solely on EFG to determine the purchase price—never determined the amenities facilities' fair value. The boards did not understand the requirements of chapter 190, Florida Statutes. And they relied on the advice of the Districts' Counsel, whose legal opinion was that a fair-value determination was not required. (Testimony of Eckert).

B. The Districts relied on a valuation consultant who failed to perform any valuation of the assets and failed to follow the required method of appraising property under Florida law.

As discussed above, the Districts argued at trial that the proposed bond issuance is not subject to the requirement that the Districts' boards determine the amenities facilities' fair value. But the Districts did engage a valuation consultant, EFG. And the Districts' boards relied solely on EFG to determine the purchase price for the amenities facilities.

Under Florida law, only licensed property appraisers may issue "appraisal reports," which are defined to include any communication of an "appraisal." An appraisal is defined as the rendering of an unbiased opinion or conclusion relating to the value of real property. §§ 475.611(1)(a), .611(1)(e), .612(1), Fla. Stat. Scott Harder of EFG admitted that he is not licensed to appraise property in Florida, and that the scope of EFG's work did not include obtaining an appraisal from a licensed appraiser. Harder could not legally give the Districts' boards an unbiased opinion or conclusion relating the value of the amenities facilities.

Under Florida law, appraisals must follow the standards adopted by the Florida Real Estate Appraisal Board, which requires compliance with the 2016–2017 Uniform Standards of Professional Appraisal Practice. § 475.628, Fla. Stat. The Districts

characterize EFG's calculation as an income approach to valuing property. (Districts' Closing at 10). But none of EFG's reports followed the Uniform Standards of Appraisal Practice required under Florida law, and none of EFG's reports use the income approach to valuing property. (McElveen Testimony).

C. The Districts' boards acted arbitrarily and capriciously.

The Districts deny that Florida law required a determination of the amenities facilities' fair value, and the Districts deny that Florida law prohibited EFG from giving the Districts' boards an opinion of the amenities facilities' value. (Testimony of Eckert; Districts' Closing at 9–11). According to the Districts, the only requirement is that the boards act reasonably and not arbitrarily or capriciously. (Testimony of Eckert; Closing Brief at 11).

The boards could not even clear that low bar. The Club membership fees are not only illegal—*see* discussion *supra* Part I.A—they are arbitrary and capricious. EFG's calculation of the purchase price for the amenities was based on the Club Membership Fees, which are illegal, arbitrary, and capricious. For that reason, it follow that EFG's calculation of the purchase price was also arbitrary and capricious. It was arbitrary and capricious for the boards to rely solely on EFG's calculation when they agreed to AV's desired purchase price.

Both the Club Membership Fees and the Club Plan under which AV collects the Club Membership Fees are arbitrary and capricious. The rate of Club Membership Fees—and in fact the entire Club Plan itself—is subject to sudden and unaccountable changes by AV:

5.4 Changes. Club Owner reserves the absolute right to, from time to time, alter or change the Club, including construction of additional Club Facilities and/or the removal or modification thereof, at any time.

30. Amendment. Notwithstanding any other provision herein to the contrary, no amendment to this Club Plan shall affect the rights of Developer or Club Owner unless such amendment receives the prior written consent of Developer or Club Owner, as applicable, which may be withheld for any reason whatsoever. No amendment shall alter the provisions of this Club Plan benefitting Lenders without the prior approval of the Lender(s) enjoying the benefit of such provisions. No amendment shall be effective until it is recorded in the Public Records. Club Owner shall have the right to amend this Club Plan as it deems appropriate, without the joinder or consent of any person or entity whatsoever. Club Owner's right to amend under this provision is to be construed as broadly as possible. By way of example, Club Owner may terminate this Club Plan (and all rights and obligations hereunder) in the event of partial or full destruction of the Club. Further, Club Owner may elect, in Club Owner's sole and absolute discretion, to subject property outside of Solivita to this Club Plan by amendment recorded in the Public Records. Likewise, Club Owner may elect, in Club Owner's sole and absolute discretion, to remove portions of Solivita from the benefit and encumbrance of this Club Plan by amendment recorded in the Public Records.

(Defs.' Ex. 19, Am. & Rest. Club Plan §§ 5.4, 30).

The Club Membership Fees are not based in any way on the amount of amenities available to *Solivita* residents. The Club Membership Fees do not change if the Club Owner (AV) decides for any reason to remove amenities facilities from the Club (*Id.* § 5.1). And without giving any reason, the Club Owner (AV) may charge different rates to different properties even though all properties have access to the same amenities facilities (*Id.* § 7.4). Finally, the Club Membership Fees do not change even if all of the amenities facilities are destroyed. (*Id.* § 19).

5. Club Facilities.

5.1 Club Property. Club Owner presently owns all of the real property comprising the Club Property. The Club Property may be expanded to include additional property in Club Owner's sole and absolute discretion. Likewise, Club Owner may elect to remove portions of real property from the definition of Club Property by amendment to this Club Plan. Such additions and deletions, while not causing an increase or decrease in the Club Membership Fees payable with respect to each Home, may cause an increase or decrease in Club Expenses.

7.4 Change In Terms of Offer. Club Owner has provided that some Owners pay Club Membership Fees on a different basis than other Owners. No Owner shall have the right to object to any other Owner paying greater or lesser Club Membership Fees so long as the Club Membership Fee applicable to any particular Home is in accordance with this Club Plan and the Club Membership Fee Schedule applicable to such Home.

19. Destruction. In the event of the damage by partial or total destruction by fire, windstorm, or any other casualty for which insurance shall be payable, any insurance proceeds shall be paid to Club Owner. If Club Owner elects, in Club Owner's sole and absolute discretion, to reconstruct the Club Facilities, the insurance proceeds shall be available for the purpose of reconstruction or repair of the Club; provided, however, Club Owner shall have the right to change the design or facilities comprising the Club in its sole and absolute discretion. There shall be no abatement in payments of Club Dues, including the Club Membership Fee, during casualty or reconstruction. The reconstruction or repair, when completed, shall, to the extent legally possible, restore the Club Facilities substantially to the condition in which they existed before the damage or destruction took place. After all reconstruction or repairs have been made, if there are any insurance proceeds left over, then and in that event, the excess shall be the sole property of Club Owner. If Club Owner elects not to reconstruct the Club Facilities, Club Owner shall terminate this Club Plan and the provisions of the Declaration relating to the Club by document recorded in the Public Records.

(Defs.' Ex. 19, Am. & Rest. Club Plan §§ 5.1, 7.4, 19).

In short, the Club Plan and the Club Membership Fees are both arbitrary and capricious. *See* Oxford Pocket Dictionary of Current English (defining ***arbitrary*** as "based on random choice or personal whim, rather than any reason or system"; defining ***capricious*** as "given to sudden and unaccountable changes"); Merriam-Webster.com (defining ***arbitrary*** as "based on or determined by individual preference or convenience" and "not limited in the exercise or power"; defining ***capricious*** as "governed or characterized by . . . an unpredictable condition").

Therefore, it was arbitrary and capricious for the boards to rely on EFG's calculation of a purchase price that had nothing to do with the value of the amenities facilities. Removing a portion of the assets from the sale would not impact EFG's calculation of the price—if anything it might have *increased* the price in EFG's first two

reports because there would be less need for reserve and replacement. (Testimony of Harder; *see also* 153-11 (Districts' Counsel reminding MBS that the complete list of assets needs to be finalized before the valuation process is started—this was for appearance only and did not actually matter to the valuation)).

III. The proposed special assessments are not fairly and reasonably apportioned.

Fair and reasonable apportionment requires that the method of allocating special assessments have a reasonable or rational relationship to the benefits received by the properties being assessed. Without such a relationship, the apportionment is arbitrary and the bonds may not be validated.

In *Sarasota Church*, the Florida Supreme Court considered whether the county's proposed assessments for stormwater utility services were "fairly and reasonably apportioned according to the benefits received." *Sarasota County v. Sarasota Church of Christ, Inc.*, 667 So. 2d 180, 184 (Fla. 1995). The county planned to assess developed properties differently depending on whether the properties were residential or commercial. *Id.* at 186. The county's plan did not assess undeveloped properties because they assisted in stormwater runoff and did not benefit from the stormwater utility service. *Id.* The court concluded that "this method of apportioning the costs of stormwater services is not arbitrary and ***bears a reasonable relationship to the benefits received*** by the individual developed properties in the treatment and control of polluted stormwater runoff." *Id.* (emphasis added).

In *Harris*, the Florida Supreme Court again considered "whether [Sarasota] County was arbitrary in its findings regarding the questions of special benefit and fair apportionment." *Harris v. Wilson*, 693 So. 2d 945, 947 (Fla. 1996). The county planned to assess residential property owners in unincorporated areas of the county because illegal dumping occurred in that area. *Id.* at 948–49. The county's plan did not assess commercial property owners or residential property owners within the city because the costs of waste disposal from those areas could be more efficiently collected through tipping fees. *Id.* The court concluded that the county's plan did not arbitrarily allocate the assessments because there was a rational relationship between the allocation and the benefits received by the properties assessed:

> Because the amount of the assessment reflects the actual cost of providing disposal services and facilities to the properties subject to the assessment, ***the cost is equally distributed among the assessed properties and bears a rational relationship to the benefits received by the properties assessed***, and the determination as to which residents are to be assessed is reasonable, we agree with the trial and district courts' conclusion that the method of apportionment of the assessment is not arbitrary.

Id. at 949 (emphasis added).

In *Sarasota County*, the Florida Supreme Court again considered whether assessments proposed by Sarasota County were "fairly and reasonably apportioned among the properties receiving the benefit." *State v. Sarasota County*, 693 So. 2d 546, 548 (Fla. 1997). The county planned to assess properties with impervious surfaces at a higher rate than properties without impervious surfaces because the county's geographic evaluations determined that properties with impervious surfaces caused more stormwater

runoff. *Id.* The Court found that the allocation was not arbitrary because "each parcel has been evaluated under a formula to determine the estimated contribution of stormwater runoff that is to be produced by the parcel and the parcels are assessed accordingly." *Id.* Thus, the Court upheld the assessments because they were allocated ***according to the benefits received*** by the assessed properties.

In *Donovan*, the Florida Supreme Court considered "whether the special assessment is fairly apportioned among the specially benefitting properties." *Donovan v. Okaloosa County*, 82 So. 3d 801, 813 (Fla. 2012). The county planned for recreation assessments to be allocated on a pro rata basis and for storm-damage-reduction assessments to be allocated based on factors such as lot size, units per lot, and linear beach frontage. *Id.* at 814. In affirming the validation, the court found that "the methodology for ***apportioning the costs*** of the project within each subassessment area ***with regard to the benefits afforded*** by the project . . . are ***based on reasonable, objective factors***." *Id.*

In each of the above cases, the Florida Supreme Court required that the special assessments be fairly and reasonably allocated according to the benefits received by the assessed properties. When a proponent of special assessment bonds uses an assessment methodology that allocates different amounts of assessments to different properties, that methodology cannot be fair and reasonable. Fair and reasonable apportionment requires a methodology that is reasonably or rationally related to the benefits received by the assessed properties.

A. The Districts adopted an arbitrary assessment methodology that lacks a reasonable or rational relationship to the benefits received by the properties being assessed.

Although the Districts never analyzed or determined the basis for the Club Membership Fees that were unilaterally set by AV Homes, the Districts now propose to assess properties differently based on the current rates of Club Membership Fees. As discussed above, the Club Membership Fees are illegal, arbitrary, and capricious. Because the assessment methodology in this case is based on the Club Membership Fees, the resulting assessments are arbitrary and capricious.

B. The "assessment equalization payment"—a misnomer—is a legal fiction designed to avoid the requirement of fair and reasonable apportionment.

The term "assessment equalization payment" is a misnomer. First, it is not a "payment" at all. Instead, it is a reduction of the purchase price that the Districts are paying AV to acquire the amenities. (Defs.' Exs. 45 and 46, at 4). Even so, the Districts are not allocating the price-reduction equally among the assessed properties. (*See* Defs.' Exs. 45 and 46, at 6 tbl. 3).

The second reason the term "assessment equalization payment" is a misnomer is that it does not actually cause an "equalization" of the assessments. Instead, it reduces certain properties' assessments to match their current Club Membership Fees, which were unilaterally set by the Developer. This selective reduction allowed AV to maximize its profit by preserving the illegal Club Plan's fee structure, under which AV collects higher fees from certain properties even though those properties receive the same benefit from the amenities received by properties with lower fees.

Although the Districts avoid using the term "assessment equalization payment" in their written closing, the Districts continue to rely on the fictional concepts that underlie it in an attempt to argue that "the assessments are reasonably apportioned." (Districts' Closing at 6). Notably, the Districts do not argue in their written closing that the assessments are fairly apportioned. (*See id.*). But the Districts proposed a final judgment that wrongly concludes that the assessments are fairly and reasonably apportioned. (Districts' Proposed Final Judgment ¶ 23).

The gymnastics involved in the Districts' attempt to rationalize their assessment methodology includes the following fictions:

- pre-financing benefit;
- initial principal assessment;
- post-financing satisfaction pursuant to a contribution of infrastructure; and
- avoidance of an "unnecessarily costly and complex" post-financing payment.

(Districts' Closing at 6–7).

The Districts only determined the benefit once, and they determined that it was equal for all properties. The fictional ***pre-financing benefit*** was invented to attempt to avoid the indisputable fact that—according to the Districts' resolutions adopting Fishkind's Master Assessment Methodology Report—the methodology results in the assessments set forth on the final assessment rolls attached to the report. The final assessment rolls show assessments at different levels for properties that receive the same benefit. The Districts argue that all of the properties receive the same pre-financing benefit and therefore have the same ***initial principal assessment***, which is also a fictional

concept. (Districts' Closing at 6). The only *actual* assessments are those that ultimately result from the assessment report, as shown on the final assessment rolls.

The fictional ***post-financing satisfaction pursuant to a contribution of infrastructure*** was invented to attempt to justify the unequal allocation of the purported reduction in the amenities facilities' purchase price. The Districts say that after the bond issuance and allocation of special assessments, AV could hypothetically choose to charitably pay the assessments on any property. (Districts' Closing at 7). The Districts argue that this hypothetical allows them to pretend that AV's reduction of the amenities facilities' purchase price is actually a contribution of (unidentified) infrastructure. (*Id.*) And the Districts argue that because this theoretical contribution of infrastructure could hypothetically occur after the Districts issue the bonds and impose special assessments, then the Districts might as well apply it before the bond issuance to whichever properties that AV chooses. (*Id.*) This, the Districts argue, avoids an ***"unnecessarily costly and complex" post-financing payment*** that would occur if AV did not make a pre-issuance "contribution of infrastructure" (read as reduction of purchase price) but instead took the cash from the sale of the amenities and charitably paid down assessments on properties after the Districts issued the bonds. (*Id.*)

"If this contribution concept were not incorporated," the Districts argue, then "the District would be issuing more bonds; the District would be paying more to [AV]; AV would immediately pay down assessments on various lots . . .; and the Districts would immediately repay the bondholders the money the bondholders just invested." (*Id.*) "It is

not in anyone's interest to jump through additional hoops to accomplish the same post-financing pay down of assessments," the Districts argue. (*Id.*).

The Districts neglect to mention the option of simply applying the purchase-price reduction equally so that equal assessments are allocated to the properties, all of which receive an equal benefit from the amenities. In addition to being the least "costly and complex" alternative, this option would also be fair. The "assessment equalization payment"—now referred to in the Districts' closing as the "contribution concept"—involves much more hoop jumping than simply allocating equal assessments to properties that receive an equal benefit.

The fictional concepts invented out of thin air by Mulshine of MBS involve so much hoop jumping that even Mossing of MBS had difficulty understanding them. (*See* Defs.' Ex. 262 (showing Districts' Counsel confirming his understanding that "the contribution of infrastructure is being deducted from the purchase price" and Mossing responding "I thought we were talking cash. What infrastructure??")).

CONCLUSION

A bond validation at the expense of residents should not be a vehicle to permit AV to cash in on millions of dollars of illegal assessments. It cannot be the law that this Court is required to validate bonds that are not based on fair value but rather are based on an arbitrary target amount specifically intended to allow a developer to cash out 30 years' worth of illegal fees it was never really entitled to collect.

Buying property without first determining its value is acting arbitrarily. When buying a house, a reasonable person would agree to pay what they determine to be the house's fair value. If a person buys a house without making any attempt to determine the house's fair value, but instead agrees to pay the maximum amount that he can afford in a mortgage payment, is he acting reasonably? Certainly not, especially if there's a big difference between the house's fair value and the person's purchasing power. The buyer's purchasing power is an arbitrary determinant of the property's value.

The same goes for community development districts. Agreeing to pay the maximum amount that the district can afford is arbitrary. The Districts in this case agreed to purchase the community's amenities facilities for $73.7 million. But instead of determining the facilities' fair value, they agreed to pay the maximum amount they could afford, as determined by their consultant, EFG. Take away half the swimming pools and EFG's calculation of the maximum supportable acquisition value does not decline. That is arbitrary.

The Legislature protected residents of community development districts by requiring validation by judicial decree before districts issue special assessment bonds that

mature over more than 5 years. Validation requires a public purpose, compliance with Florida law, and fairness in the allocation of the special assessments. In this case, the Districts failed to satisfy all three requirements. Each failure is a separate reason why validation must be denied.

First, AV's overreaching made its profit the priority, tarnishing any incidental public purpose. Underwriters from MBS Capital helped AV control the process to ensure that it reached a target price that will monetize AV's expected profit stream from its collection of illegal fees through the community's homeowners' association.

Second, the Districts failed to determine the fair value of the amenities facilities. Instead, the purchase price for the amenities facilities was calculated by a consultant who was not licensed to appraise property and who did not follow the required methods of appraising the value of property. Acting arbitrarily, the Districts agreed to purchase the amenities facilities for the maximum amount that the consultant determined that the Districts could afford.

Third, the proposed allocation of special assessments is unfair. Under the methodology adopted by the Districts, properties that receive an equal benefit from the amenities facilities will pay different levels of assessments. The differences in the levels of assessments have no relationship to the benefits received by the assessed properties. The allocation is arbitrary and unfair.

WHEREFORE, William Mann and Brenda Taylor respectfully request that this Court deny validation of the bond issuance proposed by Poinciana Community Development District and Poinciana West Community Development District.

Dated: August 11, 2017

Respectfully submitted,

/s/J. Carter Andersen

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of August, 2017 a true and correct copy of the foregoing has been by e-filed through the FL E-Filing Portal which has electronically sent copies to the following:

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