APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

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NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

USHA JAIN, M.D. AND
MANOHAR JAIN,

Appellants,

v.

Case No. 5D21-791
LT Case No. 2016-CA-7260-O

DAVID BARKER, MARY-BETH VALLEY,
MICHAEL FURBUSH AND
ROETZEL & ANDRESS, L.P.A.,

Appellees.

_____/

Decision filed January 11, 2022

Appeal from the Circuit Court
for Orange County,
Jeffrey L. Ashton, Judge.

Andrew B. Greenlee, of Andrew B. Greenlee, P.A., Sanford, for Appellants.

Thomas P. Wert, of Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A., Orlando, for Appellees David Barker and Mary-Beth Valley.

Michael J. Furbush, of Dean, Mead, Egerton, Bloodworth, Capouano & Bozarth, P.A., Orlando, pro se.

No appearance on behalf of Roetzel & Andress, L.P.A.

PER CURIAM.

AFFIRMED.

HARRIS, NARDELLA and WOZNIAK, JJ., concur.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

USHA JAIN, M.D. AND
MANOHAR JAIN,

Appendix A2

Appellants,

v.

CASE NO. 5D21-0791
LT CASE NO. 2016-CA-7260-O

DAVID BARKER, MARY-BETH
VALLEY, MICHAEL FURBUSH AND
ROETZEL & ANDRESS, L.P.A.,

Appellees.
_____/

DATE: January 11, 2022
BY ORDER OF THE COURT:

ORDERED that "Appellees' Motion for Attorneys' Fees on Appeal," filed September 23, 2021, is provisionally granted, upon the lower court's determination, at the conclusion of the case, that pursuant to Florida Rule of Civil Procedure 1.442, Appellees, David Barker and Mary Beth Valley are entitled to attorney's fees pursuant to their proposal for settlement. It is also

ORDERED that "Furbush's Motion for Attorneys' Fees on Appeal," filed September 23, 2021, is denied.

I hereby certify that the foregoing is
(a true copy of) the original Court order.

Sandra B. Williams

SANDRA B. WILLIAMS, CLERK

Panel: Judges Harris, Nardella and Wozniak

cc:
Orange Cty Circuit Ct Clerk
Michael J. Furbush
Andrew B. Greenlee
Thomas P. Wert

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

USHA JAIN, M.D. AND
MANOHAR JAIN,

3a

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Appellants,

v.

CASE NO. 5D21-0791
LT CASE NO. 2016-CA-7260-O

DAVID BARKER, MARY-BETH VALLEY, MICHAEL FURBUSH AND ROETZEL & ANDRESS, L.P.A.,

Appellees.
_____/

DATE: February 16, 2022

BY ORDER OF THE COURT:

ORDERED that Appellants' "Motion for Rehearing En Banc and Motion for Issuance of Written Opinion," filed January 26, 2022, is denied.

I hereby certify that the foregoing is
(a true copy of) the original Court order.

Sandra B. Williams

SANDRA B. WILLIAMS, CLERK

Panel: Judges Harris, Nardella and Wozniak (acting on panel-directed motion (s))
En Banc Court (acting on en banc motion)
Judge Eisnaugle recused from en banc consideration

cc:

Andrew B. Greenlee Michael J. Furbush Thomas P. Wert

Appendix B1
IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO: 2016-CA-7260-O

USHA JAIN AND MANOHAR JAIN,

Plaintiff,

vs.

DAVID BARKER, MARY BETH VALLEY
AND MICHAEL FURBUSH,

Defendant.
_____/

ORDER DENYING JOINT MOTION OF DR. USHA JAIN AND MANOHAR JAIN FOR PROOF OF LACK OF JURISDICTION OF THE STATE COURT AND DEFENDANT'S MOTION FOR REHEARING

THIS MATTER came before the Court in chambers to address the following motions filed by the Parties:

1. Joint Motion of Dr. Usha Jain and Manohar Jain for Proof of Lack of Jurisdiction of the State Court
2. Defendant's Motion for Rehearing.

THE COURT, having reviewed the Motions, and being otherwise fully advised in the premises, hereby makes the following findings of fact and conclusions of law:

HISTORY OF THE CASE

The History of this case has been extensively discussed in this Courts Final Judgment for Attorneys' Fees signed March 1, 2021 and Order Granting Defendant's "Motion to Dismiss Plantiffs' '2nd Amended' Complaint with Prejudice" signed February 8th 2018. The following portion bears repeating. On January 20, 2021, Plaintiff's attempted to thwart the Court's ability to hear this matter by, for the third time, trying to remove the matter to federal court, despite the

absence of any material change in circumstance since it was last rejected. The matter remained on the docket pending remand, which was received February 10, 2021 and filed with this Court February 17, 2021. February 18, 2021 at 4:53 PM, Plaintiffs made their last attempt at delay by removing the case to federal court once again. The hearing commenced at February 19th 2021 at 9:05 AM, with all parties present. Upon learning of the last minute filing by the Plaintiffs, the Court recessed the hearing, instructing all parties to be on thirty-minute standby to resume the hearing, should the remand from the Court be received that morning. The Court was notified by United States District Court for the Middle District of Florida, that the matter was being remanded back to this Court. At 10:51 AM, the Court's JA emailed all parties to notify them that the hearing would return from recess at 1:30 PM that day. Upon calling the case, the Plaintiffs did not join the hearing. At approximately 1:35 PM, the Court called the Plaintiffs on the number they had utilized in the morning session. Plaintiffs declined to participate in the hearing. The hearing then proceeded to conclusion without the participation of the Plaintiffs.

CONCLUSIONS OF LAW

The Plaintiffs' argument and Defendant's trepidation are based upon provisions of 28 U.S.C. 1446 and 1447. The operative section, which effects the Courts ability to move forward, is U.S.C. 1446 (d) which reads in pertinent part:

> **Notice to adverse parties and State court**.--Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

As pointed out by the Fourth District Court of Appeals in Rici v. Ventures Trust, 276 So. 2d 5 (4DCA 2019), this section pauses pending state court proceedings, the resolution of the acceptance of the matter in Federal Court. It also very clearly sets forth the end point of the pause, when the case is remanded (see Rici above at 9). The Statute does nothing to divest the State Court of jurisdiction over the matter before it. During the period prior to the Federal Court's decision to exercise jurisdiction, both courts have jurisdiction in the matter. Berberian v. Gibney 514 F. 2d 790 (U.S.C.A. 1 1975).

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Plaintiffs argue that U.S.C. 1447 extends that end point even further. U.S.C. 1447 is titled Procedure After Removal Generally. It set forth procedures for implementation of the substantive provisions of U.S.C. 1446. Plaintiffs rely specifically on U.S.C. 14479 (c) and argues that it continues the pause in the state proceedings until a certified copy of the remand is physically delivered to the clerk of the State Court. The question then becomes whether it was the intent of Congress to extend the suspension of State proceedings beyond the issuance of the actual remand order by the Federal Court. The Court finds no logic to that argument. Had Congress intended to limit the ability of the State Courts to proceed surely that would have been contained in the statute, U.S.C. 1446, that suspended the proceeding in the first instance. U.S.C. 14479 (c) was intended to set forth procedural steps to be taken by the Clerk of the Federal court not a limitation on the power of the State Courts to proceed. Consistently, within the Federal cases discussing removal of cases, is the concept that these statutes are to be strictly construed against depriving the State Courts of jurisdiction.

The case illustrates that the interpretation urged by the Plaintiffs would render the State Court unable to function. All a litigant need do whenever a matter moves forward against their wishes is to simply repeatedly file for removal, regardless of how many times it had previously been rejected. During that lull between issuance of the remand and it's delivery to the State Clerk, they could simply file again, leaving the State Court, and the adverse party, forever chasings it's tail.

Joint Motion of Dr. Usha Jain and Manohar Jain for Proof of Lack of Jurisdiction of the State Court and Defendant's Motion for Rehearing are DENIED.

DONE AND ORDERED in chambers in Orlando, Orange County, Florida, this 2nd day of March, 2021.

eSigned by Jeffrey Ashton 03/02/2021 15:05:16 zol94nEF

Jeffrey L. Ashton
Circuit Judge

Copies furnished to:

A copy of the foregoing has been electronically filed with the Clerk of Courts by using the Florida Court E-Filing Portal.

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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO: 2016-CA-7260-O

USHA JAIN AND MANOHAR JAIN,

Plaintiff,

vs.

DAVID BARKER, MARY BETH VALLEY
AND MICHAEL FURBUSH,

Defendant.
_____/

FINAL JUDGMENT FOR ATTORNEYS' FEES

THIS MATTER came before the Court on February 19th 2021, to address the following motions filed by the Defendants:

1. Michael Furbush's Motion for Sanctions Under Fla. Stat. §57.105 (filed October 25, 2016);

2. Defendant's Motion for Sanctions Under Fla. Stat. §57.105 (filed October 25, 2016);

3. Defendants David Barker's and Mary Beth Valley's Amended Motion for Sanctions Under Fla. Stat. §57.105 (filed April 11, 2018), as to entitlement and amount of sanctions;

4. Defendants David Barker's and Mary Beth Valley's Motion for Award of Attorneys' fees and Costs and Memorandum of Law in Support Thereof (filed March 1, 2018), as to entitlement and amount attorney's fees;

5. Defendants David Barker's and Mary Beth Valley's Motion for an Order Determining the Amount of Award of Appellate Attorney's Fees (filed March 25, 2019);

THE COURT, having reviewed the Motions, having reviewed the evidence and heard the argument of counsel in support of, and in opposition to, the above-referenced motions

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and being otherwise fully advised in the premises, hereby makes the following findings of fact and conclusions of law:

RELEVANT HISTORY OF THE LITIGATION

The action began in this court with the filing of a complaint by the Plaintiffs. The complaint itself numbers some fifty pages, the first forty of which contain a lengthy narrative of Plaintiffs' dis-satisfaction with the course dispute of a involving the Defendant's clients, a Home Owner's Association. The factual background, as gleaned from the complaint, indicates that in preparation for mediation of the dispute with the HOA the Plaintiffs examined the file maintained by the HOA pertaining to their property. In the file was a copy of a letter, to Plaintiffs, from Defendant Barker with an indication that is was sent by certified mail[i]. The complaint goes on to draw the conclusion that " It was never sent to either address of the Plaintiff Jains, but was placed in the file to fulfill the requirements of Florida Statute 720.305 2(b)"[ii] . The complaint goes on to assert that all three Defendants were "asked for the tracking number for that letter". Defendant Furbush then "declined to resolve the matter".

At no point in the complaint does it state what Defendant Mary Beth Valley is alleged to have done to be involved in this matter[iii] . The complaint goes on in paragraphs sixteen through thirty six discussing some issue related to their efforts to obtain a copy of a power point that Defendant Barker used in a presentation to the HOA board in their case[iv]. The matter of enforcement was resolved long before the filing of the complaint in this case, without levy of any fines. Their litany of complaints leads to Paragraphs referred to as "Counts" which bear little resemblance to legally cognizable causes of action[v].

Count One is titled FALSE "ALLEGED CERTIFIED LETTER" THAT WAS NEVER SENT. It continues for fifteen numbered paragraphs repeating many of the factual allegation contained in the preceding forty pages. At no point does the count refer to a statute of principal of law that might arguably give rise to a cause of action.

Count Two is, redundantly, titled FRAUDULENT FALSIFICATION OF DOCUMENTS. At paragraph 194 they assert, without citation to legal authority or statute, "Defendants have a duty to produce accurate and faithful records related to disputes." At no

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point does the count refer to a statute of principal of law that might arguably give rise to a cause of action.

Count Three is titled UNETHICAL CONDUCT/NEGLIGENT & MISREPRESENTATION. Count Four is titled BREECH OF IMPLIED CONVENANTS OF GOOD FAITH AND FAIR DEALING. Both counts go on to ascribed various duties that Plaintiffs imagine the Defendants owed to them, again without citation to legal authority or statute.

Count Five does site to an actual statute placing a duty upon a Home Owners Association to make records available for inspection, but fails to set forth any reason that would give rise to a cause of action against the Defendants who represented the association. Once again a litany of complaints without citation to legal authority or statute establishing that these particular Defendants owed any duty to these Plaintiffs.

Count Six is titled UNJUST ENRICHMENT. It alleges, in essence that payments received by the Defendants, from the Home Owners Association, for work performed in the underlying matter establish that they were unjustly enriched, because they failed to perform those duties to the satisfaction of the Plaintiffs. The complaint fails to set forth any basis under which they would have standing to assert that cause of action.

The course of the early years of this litigation is summarized in the Judge Weiss's detailed order, dismissing with prejudice all of the claims in this case, dated February 8th 2018 that this Court attaches, adopts and incorporates by reference. The Plaintiffs filed a Notice of Appeal of Judge Weiss' order on April 9, 2018 and amended their notice on April 27, 2018. The Court granted a stay on July 3, 2018. The only outcome of the appeal was a remand to this Court to determine and assess attorneys' fees against the Plaintiffs.

To fully describe the course of the next three years of litigation would require an order the length of which rival the novel War and Peace. The sheer volume of pleadings filed by the Plaintiffs is almost unimaginable. Through the remainder of 2018, Plaintiffs filed thirty-three separate motions totaling four hundred and sixteen pages with attachments. The court file does not reflect that any of those motions were set for hearing by the Plaintiffs and only one resulted in orders favorable to them. Among the motions were six motion to stay proceedings and one motion alleging fraud or misrepresentation.

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With the remand of the case in January of 2019 Judge Weiss again attempted to set hearings on the matter of entitlement to attorney's fees. During that year, Plaintiffs filed sixty-seven separate motions totaling thirteen hundred and sixty two pages. Nine of the motion alleged fraud on the court, and occasionally by the court, and three requested Stays. In September 2019 Judge Weiss recused himself from the matter and the case was reassigned to Judge Renee Roche. The Order of Re-Assignment specified that the recusal would not delay the hearing on fees set for September 11, 2019. Finally, Judge Roche convened the long awaited hearing.

The Court Minutes reflect that the hearing started almost an hour later than scheduled, lasted approximately four and one half hours, and was recessed without being completed. It is notable that the minutes reflect that Plaintiff Usha Jain's cross-examination of the first witness was involuntarily terminated by the Court after approximately ninety minutes. Then after sixty minutes of cross-examination by Manohar Jain, the Court again involuntarily terminated his cross examination. The matter was to be reset within thirty days with tentative date of October 11th or 14th 2019.

Before the matter could be reset, the Plaintiffs attempted to transfer the case to Federal District Court thus resulting in a delay of six months, the case finally being reset for April of 2020.

Through no fault of the Plaintiffs, the April 2020 hearing was cancelled. In October 2020, unable to co-ordinate a hearing in compliance with the Florida Supreme Courts COVID 19 Guidelines, the Defendants filed a motion requesting the court to order the Plaintiffs to show cause why the hearing should not be conducted remotely. Plaintiffs filed a Response setting forth the consistent themes seen throughout the history of this case as a reason for repeated delay, Plaintiff's profession, her age, her ethnicity, and her language skills. Before Court could rule on the Defendant's motion, they filed a clarification that their Response was not actually a response but a request for more time to respond. It does not appear that any specific order was every issued on the Defendant's motion however the matter was finally set for hearing on February 19th 2021 before this Court.

On January 20, 2021, Plaintiff's attempted, once again, to thwart the Court's attempt to hear this matter attempting to move the matter to federal court, despite the absence of any material change in circumstance since it was last rejected. The matter remained on the docket pending remand, which was received February 10, 2021. The day before the instant hearing,

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Plaintiffs made their last attempt to delay by moving the case to federal court. The hearing was commenced at 9:05 AM, with all parties present. Upon learning of the last minute filing by the Plaintiffs, the Court recessed the hearing, instructing all parties to be on thirty-minute standby to resume the hearing, should the remand from the Court be received that morning. The Court was notified by United States District Court for the Middle District of Florida, that the matter was being remanded back to this Court. At 10:51 AM, the Court's JA emailed all parties to notify them that the hearing would return from recess at 1:30 PM that day. Upon calling the case, the Plaintiffs did not join the hearing. At approximately 1:35 PM, the Court called the Plaintiffs on the number they had utilized in the morning session. Plaintiffs declined to participate in the hearing. The hearing then proceeded to conclusion without the participation of the Plaintiffs.

For four and one half years, the Defendant's and the Court have danced to the tune chosen by the Plaintiffs, Defendant's now assert it is time to pay the piper.

LEGAL STADARD APPLIED TO ALL §57.105 CLAIMS

Florida statute §57.105(4) set forth, as a condition precedent to an award of Attorney's fees, the provision of what has come to be referred to as a "safe harbor letter ". The purpose of the letter is to inform the recipient of the issues related to the pending action, the senders intent to request sanctions under §57.105, and to give the recipient 21 days to withdraw the offending claim and avoid application of sanctions. Once the condition precedent is meet and the matter is not withdrawn the sender is free to pursue Sanctions under the act.

The issue then becomes one for the Court to determine, based upon evidence presented and the history and pleadings in the case, whether the standard for sanction set forth in §57.105(1) or (2) are meet.

§57.105(1) direct the court to evaluate the basis upon which the original claim was asserted and whether that claim was 1) not supported by the material facts necessary to establish the claim or 2) not supported by the application of then-existing law. The analysis next turns to the issue of whether the claimant knew or should have known of the deficiencies of their claim. In Muckenfuss v. Deltona Corp.[vi] the Supreme Court of Florida summarized the standard as:

> "Section 57.105, Florida Statutes (1983), authorizes an attorney's fee award to the prevailing party "in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party." The purpose

> of the section 57.105 is to discourage "baseless claims, stonewall defenses and sham appeals in civil litigation." ... Section 57.105 fees will not be awarded unless the court finds "a total or absolute lack of a justiciable issue, which is tantamount to a finding that the action is frivolous ... and so clearly devoid of merit both on the facts and the law as to be completely untenable." At 340.[vii]

The statute, in §57.105(3), then sets for various exceptions if 1) the claim was a good faith attempt to extend alter or reverse existing law or 2) if the attorney acted in good faith based upon factual representation form the client or 3) if the party was represented and the error was one of law or 4) on the court's own initiative under described circumstances.

I. MICHEAL FURBUSH'S MOTION FOR SANCTIONS UNDER FLA. STAT. §57.105 (FILED OCTOBER 25, 2016):

1) The Court finds that Defendant's exhibit 17 establishes that the requirements of 57.105 (4) have been met as the condition precedent to the application of that provision.
2) The Court finds that the complaints filed in this case, from the inception, had no basis in law or fact. The Court further finds that this claim were brought for the primary purpose of harassment.
3) The Court finds, based upon Defendants exhibits 19 and 20, that Defendant Furbush, expended, 177 hours at the rate of $450.00 per hour and 2.1 associate hour at the rate of $225.00 per hour, since the expiration of the safe harbor period under F.S. 57.105(4).
4) The Court finds that the rates requested are reasonable and that the hours expend were reasonable and necessary in Defending this matter.
5) The Court finds that none of the exceptions set forth in §57.105(3) are applicable to this case.

Therefore the Court grants the Defendant's Motion for Sanctions and awards attorney fees in the amount of $80.122.50

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II. DEFENDANT'S MOTION FOR SANCTIONS UNDER FLA. STAT. §57.105 (FILED OCTOBER 25, 2016); AND AMENDED MOTION FOR SANCTIONS UNDER FLA. STAT. §57.105 (FILED APRIL 11, 2018), AS TO ENTITLEMENT AND AMOUNT OF SANCTIONS;

1) The Court finds that Defendant's exhibit 23 establishes that the requirements of 57.105 (4) have been met as the condition precedent to the application of that provision.
2) The Court finds that the complaints filed in this case, from the inception, had no basis in law or fact. The Court further finds that this claim were brought for the primary purpose of harassment.
3) The Court, based upon Defendants exhibits 26, finds that, Defendants David Barker and Mary-Beth Valley, expended 655 hours at the rate of $425.00 per hour, 1.5 associate hours at the rate of $230.00 per hour and 19.6 paralegal hours at the rate of $170 per hour, since the expiration of the safe harbor period under F.S. 57.105(4).
4) The Court finds that the rates requested are reasonable and that the hours expend were reasonable and necessary in defending this matter.
5) The Court finds that none of the exceptions set forth in §57.105(3) are applicable to this case.

Therefore the Court grants the Defendant's Motion for Sanctions and awards attorney fees in the amount of $263,139.50.

III.DEFENDANTS DAVID BARKER'S AND MARY BETH VALLEY'S MOTION FOR AN ORDER DETERMINING THE AMOUNT OF AWARD OF APPELLATE ATTORNEY'S FEES (FILED MARCH 25, 2019)

Pursuant to the order of the Fifth District Court of Appeals in case 5D18-1215:

1) The Court, based upon Defendants exhibits 26, finds that Defendants David Barker and Mary-Beth Valley , expended 111.8 hours at the rate of $425.00 per hour, for the purpose of defending the appeal in this matter.
2) The Court finds that the rates requested are reasonable and that the hours expend were reasonable and necessary in defending this matter.

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Therefore, the Court assesses attorney fees for the appeal in this matter in the amount of $47,515.00.

IV.DEFENDANTS DAVID BARKER'S AND MARY BETH VALLEY'S MOTION FOR AWARD OF ATTORNEYS' FEES AND COSTS AND MEMORANDUM OF LAW IN SUPPORT THEREOF (FILED MARCH 1, 2018), AS TO ENTITLEMENT AND AMOUNT ATTORNEY'S FEES;

1) The Court finds that an offer of judgment was sent to the Plaintiff by the Defendants on January 10, 2017 offering to settle the matter by a payment of $300.00.
2) The Court finds that the case was resolved by dismissal of all counts of the complaint with prejudice with no award of damages to the Plaintiffs on February 21, 2018.
3) The Court, based upon Defendants exhibits 26, finds that Defendants, incurred attorney's fees for 140 hours at the rate of $425.00 per hour.
4) The Court based upon Defendants exhibits 27, finds that Defendants, incurred $1,233.21 in court reporting fees and expert witness fees in the amount of $21,462.50.

Therefore the Court awards attorney fees to the prevailing party in this matter, David Barker and Mary Beth Valle, in the amount of $59,500.00. This amount is included in the total of II. above. The Court also awards costs to the prevailing party in this matter, David Barker and Mary Beth Valle, in the amount of $22,695.71.

FINAL JUDGMENT

Based on the foregoing , IT IS ADJUDGED that Defendant, MICHEAL FURBUSH , shall recover from Plaintiff, USHA JAIN AND MANOHAR JAIN, attorney's fees in the amount of $80.122.50, for which let execution issue.

IT IS ADJUDGED that Defendants, DAVID BARKER AND MARY BETH VALLEY , shall recover from Plaintiff, USHA JAIN AND MANOHAR JAIN, attorney's fees in the amount

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of $322,639.50, together with costs and expert fees in the amount of $ 22,695.71 for a total judgment of $ 345,335.21, for which let execution issue.

DONE AND ORDERED in chambers in Orlando, Orange County, Florida, this 1st day of March, 2021.

Jeffrey L. Ashton,
Circuit Judge

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[i] The letter in question is attached to the complaint as exhibit 50. In the header the letter says VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED. The letter summarized the outcome of a hearing held by the Associations Board, which Plaintiffs had also attended. (see complaint paragraphs 76-79)

[ii] The complaint does not further explain the factual basis to support this conclusion as opposed to other more innocent explanations.

[iii] Testimony received at the hearing indicated that Ms. Valley was an associate of the firm who had the misfortune of being present at the time the Jains found the letter and being unable to give them any information as to it's provenance that time.

[iv] The power point was presented at the Board meeting referenced in footnote i

[v] These issues with the pleading might be attributed to a lack of legal knowledge from a pro-se litigant. In this case, the facts demonstrate otherwise. Plaintiffs had filed an almost identical complaint in Federal court (Def. ex. 13). The issues with the pleading were pointed out in the Defendant's Motion to Dismiss (Def. Ex. 14). Nonetheless, Plaintiff's replicated the errors in the instant complaint.

[vi] 508 So. 2d 340 (Fla. 1987)

[vii] While Muckenfuss was based upon an early version of the statute the interpretation also applies to the modern version Grove Key Marina LLC v. Casamayor 166 So. 3d 879 (3rd DCA 2015)

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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA

USHA JAIN, M.D. AND MANOHAR JAIN,

Plaintiffs,

vs.

DAVID BARKER, MARY-BETH VALLEY, MICHAEL FURBUSH and ROETZEL & ANDRESS, L.P.A.,

Defendants.
_____/

CASE NO.: 2016-CA-7260-O
DIVISION: 33-2

ORDER GRANTING DEFENDANTS' "MOTION TO DISMISS PLAINTIFFS' '2ND AMENDED' COMPLAINT WITH PREJUDICE"

THIS CAUSE comes before the Court for hearing on January 26, 2018, on Defendants', David Barker ("Barker") and Mary-Beth Valley ("Valley"), "Motion to Dismiss Plaintiffs' '2nd Amended' Complaint with Prejudice," filed on October 13, 2017, and Plaintiff Usha Jain's Responses to Oppose Defendants' Motion to Dismiss, filed on January 22 and 23, 2018. This Court, having reviewed the motions, the record, considered the arguments presented, and being otherwise fully advised in the premises hereby finds and decides as follows:

RELEVANT FACTS AND HISTORY

Dr. Usha Jain and Manohar Jain ("Plaintiffs") filed their original *pro se* Complaint against Defendants, Barker, Valley, Michael Furbush ("Furbush"), and Roetzel & Andress L.P.S. ("Roetzel"), on August 16, 2016.[1]

[1] The docket indicates that the Plaintiffs proceeded pro se until October 3, 2017, when attorney Erich Schuttauf appeared as counsel for "Defendant(s) MANOHAR JAIN." As Mr. Jain is a Plaintiff in this action, it appears the Notice of Appearance contained a scrivener's error.

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The factual allegations of the various causes of action surround a dispute Plaintiffs, homeowners in the Isleworth community, had with their community homeowners' association ("Isleworth") regarding Plaintiffs alleged failure to keep their property in a condition as required by Isleworth's Declaration of Covenants. Defendants are the attorneys and law firm that represented Isleworth at that time. According to Plaintiffs, they reached an agreement with Isleworth prior to filing the present suit. Consequently, Isleworth is not a party to this action. While attempting to resolve this matter with Isleworth, Plaintiffs discovered a letter from Barker, an attorney employed by the Roetzel law firm, in their Isleworth file. The letter advised that their property was not in compliance with the Declaration of Covenants and unless the violations were remedied, a maximum fine of $1,000.00 was forthcoming.[2] Plaintiffs maintain that although this letter states it was sent via certified mail, they never received it.

Plaintiffs claim that due to Defendants' willful actions they have been harmed in numerous ways. Plaintiffs claim that having to fight the fraudulent allegations of Defendants resulted in loss of their reputation in the community, financial losses due to time away from their businesses, and mental anguish.

In Count I of the original Complaint, Plaintiffs claim that an alleged certified letter, found in their Isleworth file, was never sent to them by Defendants. Plaintiffs maintain that this letter was falsely placed in their Isleworth filed by Defendants. In Count II, which is very similar to Count I, Plaintiffs claim that Defendants committed a fraudulent falsification of documents. In Count III, Plaintiffs allege that Defendants acted unethically and were negligent due to their misrepresentation of the status of Plaintiffs' Isleworth account. In Count IV, Plaintiffs claim that

[2] The Plaintiffs admitted that they were never fined by Isleworth.

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Defendants breached the implied covenant of good faith and fair dealing based upon Defendants' contractual agreement with Isleworth. In Count V, Plaintiffs maintain that Defendants violated *section 720.303(5), Florida Statutes*, when Defendants failed to provide a timely response to Plaintiffs' requests for Isleworth's records. Finally, in Count VI, Plaintiffs allege that Defendants were unjustly enriched by the attorneys' fees received from Isleworth.

On September 7, 2016, the Defendants filed their first Motion to Dismiss. In this Motion, Defendants maintained that Counts I, II, III, IV, and VI should be dismissed for failure to state a cause of action for which relief can be granted. In particular, Defendants claimed that the Complaint failed to provide a short and plain statement of the ultimate facts showing that the pleader is entitled to relief. Fla. R. Civ. P. 1.110. Defendants also contended that Plaintiffs cannot maintain a claim against them because *section 720.303(5), Florida Statutes*, applies to associations and not to the associations' agents or attorneys. Defendants further argued that Furbush, who at the time was the registered agent of Roetzel, had only limited communications with Plaintiffs in an attempt to resolve this issue with the other Defendants, and therefore had nothing to do with the pre-suit issues raised by Plaintiffs.

This Court conducted a hearing on October 27, 2016. On November 1, 2016, the Court entered an Order dismissing with prejudice Counts I and V and the claims against Furbush. The remaining counts were dismissed without prejudice.

On November 20, 2016, Plaintiffs filed their first Amended Complaint. On December 2, 2016, Defendants Roetzel, Barker, and Valley filed their second Motion to Dismiss.[3] Defendants

[3] It should be noted that while this Motion was pending, Roetzel and Plaintiffs came to a resolution that all claims against Roetzel would be dismissed with prejudice. This Court approved the joint stipulation of Plaintiffs and Roetzel and all claim against Roetzel were dismissed with prejudice on March 12, 2017.

alleged that the Amended Complaint, like the original, violated Rule 1.110, Florida Rules of Civil Procedure, and that Plaintiffs have again failed to state a cause of action for which relief can be granted.

In Count I, Plaintiffs claimed that Defendants had a duty to produce true records on behalf of Isleworth and breached that duty by placing copies of an undelivered letter in the Plaintiffs' Isleworth file. In Count II, Plaintiffs contended that Defendants were unjustly enriched because they continued to collect money from Isleworth and wrongfully retained the benefits of those monies. In Count III, Plaintiffs claimed that Defendants engaged in unethical conduct and were guilty of negligence and misrepresentation. Lastly, in Count IV, Plaintiffs alleged a breach of the implied covenant of good faith and fair dealing.

A hearing was held on Defendants' Motion on June 5, 2017. On June 12, 2017, this Court dismissed the Amended Complaint without prejudice. The Court determined that Plaintiffs had again failed to state a cause of action upon which relief could be granted. [4]

On July 12, 2017, Plaintiffs filed their Second Amended Complaint (third Complaint). On July 24, 2017, Defendants moved to dismiss claiming that this Complaint contained virtually the same material factual allegations as the prior Complaints. On September 26, 2017, before a hearing had been held on the Defendant's Motion, Plaintiffs filed a fourth complaint, titled "2nd Amended Complaint and Demand for Jury Trial." On October 13, 2017, Defendants filed the present Motion to Dismiss. The Defendants stated:

> Defendants...are moving to dismiss the Fourth Complaint with prejudice because Plaintiffs cannot possibly allege a cause of action based upon the facts alleged in four separate

[4] At the hearing, there were other motions before the Court regarding Furbush, attorneys' fees pursuant to Rule 1.525(1) Rules of Civil Procedure, and sanctions pursuant to section 57.105(1), Florida Statutes. Those motions and holdings will not be addressed as they are not relevant to the present disposition.

> attempts. We have simply reached a point in this litigation when Barker and Valley [the Defendants] should be entitled to be relieved from the time, effort, energy, and expense of defending themselves against Plaintiffs' vexatious claims.

Motion to Dismiss, Pg. 1.

On January 26, 2018, a hearing was held on Defendants' Motion.[5] This Order follows: [6]

STANDARD OF REVIEW

In considering a motion to dismiss, the Court is constrained to a consideration of the four corners of the pleading, including any exhibits attached thereto, and is required to take as true all of the Plaintiffs' well-pled factual allegations. *See Cyn-co v. Lancto*, 677 So. 2d 78, 79 (Fla. 2d DCA 1996). However, the Court need not accept internally inconsistent factual claims, unwarranted deductions, or mere legal conclusions of a plaintiff. See *Shands Teaching Hosp. and Clinics, Inc. v. Estate of Lawson*, 175 So. 3d 327, 331-32 (Fla. 1st DCA 2015) (citing *WR Townsend Contracting Inc. v. Jensen Civil Const., Inc.*, 728 So. 2d 297, 300 (Fla. 1st DCA 1999). Speculative allegations unsupported by ultimate facts or contradicted by other facts alleged in the complaint are insufficient to withstand a motion to dismiss. See *McCall v. Scott*, 199 So. 3d 359, 366 (Fla. 1st DCA 2016).

ANALYSIS AND RULING

In the Motion to Dismiss currently before the Court, the Defendants contend that Plaintiffs, in their "2nd Amended" Complaint (actually their fourth complaint), have pleaded virtually the same underlying facts and alleged the same causes of action based upon those facts as in their three

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[5] The hearing was held before Judge Kevin B. Weiss, assigned to Division 33 as of January 2018. This case was previously before Judges Higbee, Myers and White.

[6] Also addressed at this hearing, was Plaintiffs' attempt to default Defendants by claiming Defendants had not filing a timely request for extension of time in which to respond. The Court denied Plaintiffs' Motion for Default and deemed Defendants' present Motion to Dismiss as timely filed.

previous Complaints. Defendants request that the "2nd Amended" Complaint be dismissed with prejudice as Plaintiffs have failed to adequately allege any viable cause of action based upon these facts. Upon review of the present complaint, its predecessors, and the record, this Court agrees.

While the policy in Florida is to liberally allow amendments to pleadings where justice so requires, a trial judge in the exercise of sound discretion may deny further amendments where a case has progressed to a point the liberality ordinarily to be indulged has diminished. *Alvarez v. DeAguirre*, 395 So. 2d 213, 216 (Fla. 3d DCA 1981) (internal citations omitted). "Although it is highly desirable that amendments to pleadings be liberally allowed so that cases may be concluded on their merits, there is an equally compelling obligation on the court to see to it that the end of all litigation be finally reached." *Brown v. Montgomery Ward & Co.*, 252 So. 2d 817, 819 (Fla. 1st DCA 1971). See also *Noble v. Martin Mem'l Hosp. Ass'n, Inc.*, 710 So. 2d 567, 568-569 (Fla. 4th DCA 1997) ("There comes a point in litigation where each party is entitled to some finality.").

Dismissal with prejudice, after three attempts to amend, is generally not an abuse of discretion. *Dimick v. Ray*, 774 So.2d 830, 833 (Fla. 4th DCA 2000); *Myers v. Highway 46 Holdings, L.L.C.*, 65 So. 3d 58, 61 (Fla. 5th DCA 2011) (affirming dismissal with prejudice after the third attempted pleading failed to assert or any new facts or arguments). The relevant inquiry is whether "allowing the amendment would prejudice the opposing party, the privilege to amend has been abused, or amendment would be futile." *Cedar Mountain Estates, LLC v. Loan One, LLC*, 4 So. 3d 15, 16 (Fla. 5th DCA 2009) (quoting *State Farm Fire & Cas. Co. V. Fleet Fin. Corp.*, 724 So. 2d 1218, 1219 (Fla. 5th DCA 1998). Proposed amendments are futile when they are not pled with sufficient particularity or are insufficient as a matter of law. *Thompson v. Bank of NY*, 862 So. 2d 768, 770 (Fla. 4th DCA 2003). Claims are insufficient as a matter of law when they are conclusory and lack any real allegations of ultimate fact. *Thompson*, 862 So. 2d at 770.

Appendix B2

The Court finds that Plaintiffs' allegations in this fourth complaint remain conclusory and fail to provide ultimate facts upon which any of their causes of action could possibly be sustained. After four attempts, the allegations remain the effectively the same. Plaintiffs have provided no additional facts that support any viable causes of action. It is readily apparent that further attempt to amend these claims would be futile. Moreover, "[t]here is simply a point in litigation when defendants are entitled to be relieved from the time, effort, energy, and expense of defending themselves against seemingly vexatious claims." *Kohn v. City of Miami Beach*, 611 So. 2d 538, 539 (Fla. 3d 1992). While the Court recognizes that both Plaintiffs were pro se litigants when the original Complaint was filed, "a party's self-representation does not relieve the party of the obligation to comply with any appropriate rules of civil procedure." *Id.*

In accordance with the foregoing, it is hereby **ORDERED AND ADJUDGED** that:

1. Defendants' "Motion to Dismiss Plaintiffs' '2nd Amended' Complaint with Prejudice," filed on October 13, 2017, is **GRANTED**.
2. Plaintiffs shall take nothing by this action and Defendants shall go hence without day.
3. Plaintiff Usha Jain's request for leave to amend her complaint in "Plaintiff Dr. Usha Jain's Motion to Notify the Court that the Plaintiffs Were Not Provided with Binder with Index Tabs for the Hearing on the Motion to Dismiss on January 26, 2018 and Plaintiff Dr. Jain Also Notifies that Plaintiff's Amended Complaint Filed on January 12, 2018 is Moot Now." filed on January 28, 2018, is **DENIED**.
4. Plaintiff Manohar Jain's "Motion for Withdrawal of His Amended Complaint," filed by counsel on January 29, 2018, is **GRANTED**.

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5. The Court reserves jurisdiction regarding entitlement and amount of attorneys' fees and costs, if applicable, including but not limited to any sanctions related to Judge White's Order dated October 20, 2017.

DONE AND ORDERED in Chambers, at Orange County, Florida on this 8th day of Feb., 2018.

KEVIN B. WEISS
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was filed with the Clerk of the Court this 8th day of Feb, 2018 by using the Florida Courts E-Filing Portal System. Accordingly, a copy of the foregoing is being served on this day to all attorney(s)/interested parties identified on the ePortal Electronic Service List, via transmission of Notices of Electronic Filing generated by the ePortal System.

I HEREBY CERTIFY that a copy of the foregoing was furnished on this 8th day of Feb, 2018 by U.S. Mail to:

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