IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT, IN AND FOR MIAMI-DADE COUNTY, FLORIDA

10295 COLLINS AVENUE, HOTEL CONDOMINIUM ASSOCIATION, INC.

Plaintiff,

vs.

CASE NO. 2019-003480-CA-01

THE RESIDENCES AT ONE BAL HARBOUR CONDOMINIUM ASSOCIATION, INC.,

Defendant.

DEFENDANT'S MOTION TO DISMISS AND MOTION TO STRIKE ATTORNEY'S FEE CLAIM WITH MEMORANDUM OF LAW

Defendant, The Residences at One Bal Harbour Condominium Association, Inc. ("the Residences"), moves to dismiss Plaintiff's Complaint and also moves to strike Plaintiff's claim for attorney's fees on the following grounds:

1. The Residences moves to dismiss to Plaintiff's Complaint with prejudice.

2. Plaintiff, one of three condominiums contained within the One Bal Harbour Property ("Property"), brought this action ostensibly to challenge the 2014 "Amended Tower Dec", (attached to Plaintiff's Complaint as Exhibit "D"), of the "Original Tower Dec", (attached to Plaintiff's Complaint as Exhibit "A".) The Original Tower Dec was the governing document of the Property from 2007 until 2014, when the Property was purchased by a subsidiary of the Residences. Reducing the Complaint to its basics, Plaintiff alleges that the Residences did not have the legal authority to exercise its rights to amend the Original Tower Dec. Plaintiff's misapprehension of the plain language of the Original Tower Dec and its vague and conspiratorial allegations of a plot to "change the balance of power" are nothing more than a smoke screen to deflect from the plain facts shown from within the four corners of the documents attached to Plaintiff's Complaint; namely, (1) the "Hotel Lot Owner" was and is the

successor Declarant of One Bal Harbour and under the Original Tower Dec had full legal authority to amend the Original Tower Dec, including the expense allocation to Plaintiffl and (2) the Residences, through its subsidiaries, has been at different times the Hotel Lot Owner with legal authority to amend the Original Tower Dec.

3. In Count I, Plaintiff seeks a declaration that the amendments were unlawful and, in Count II, seeks damages for the implementation of those amendments over the course of these last five years.

4. As demonstrated below, Plaintiff has not now, and never could, allege sufficient facts to state a cause of action supporting its claim that the amendments of the Original Tower Dec were unlawful and that the Amended Tower Dec is invalid in whole or in part.

5. Alternatively, the Complaint should be dismissed because it fails to join One Bal Harbour Corporation ("OBH Corporation") and Lionstone as indispensible parties. Apart from the fact that adverse rulings by this Court would impact the rights and obligations of both of these entities, in fact it is OBH Corporation which promulgates the budget of which Plaintiff complains, as set forth in the Amended Tower Dec.

6. Finally, the Residences moves to dismiss Plaintiff's claim for attorney's fees which are not recoverable under either contract or statute.

MEMORANDUM OF LAW

I. OVERVIEW

Five years ago, during the Elcom bankruptcy proceedings described in the Complaint, Plaintiff did not challenge that it had no veto power under the terms of the Original Tower Declaration while, at the same time, the Residences confirmed that it would not grant Plaintiff such veto power. At that same hearing, Plaintiff actually supported the sale of the Property by Elcom to the Residences -- even though the Residences would thus become the owners of the

Property in addition to owning and controlling its own condominium association. As noted in the Amended Tower Dec, Plaintiff did not object to the sale of the Property from to the Residences from the Elcom Bankruptcy.

Notwithstanding its clear acquiescence in 2014, Plaintiff filed this meritless action in which Plaintiff reverses its position entirely, alleging now that it had a right to veto decisions by the Hotel Lot Owner and, because it can no longer do so, the amendment to the Original Tower Dec is invalid. Based upon the plain terms of both the Original and Amended Tower Decs, Plaintiff is wrong and could never allege any facts which would support the relief it is seeking in this case. The Residences thus moves to dismiss Plaintiff's entire claim with prejudice for the reasons more fully set forth below.

II. CHRONOLOGY OF KEY EVENTS

The following condensed chronology identifies the parties and events with respect to the two Declarations to the extent those parties and events are relevant to this lawsuit.[1] Relevant terms and entities are highlighted for ease of reference.

October 21, 2007 **WCI records the Original Tower Dec**

WCI, the Developer of the Property, recorded the Original Tower Dec on October 21, 2007 and later amended it on June 24, 2009. WCI is referred to as the "Declarant" in the Original Tower Dec. The Original Tower Dec defined the successor to the Declarant ("WCI") as the **"Hotel Lot Owner**."

[1] The dates and events included in this Section are found within the four corners of Plaintiff's Complaint as part of the Amended Tower Declaration. Should the Court wish to review a comprehensive history of the Property's ownership history, the Residences refers the Court to the "History of the Dedication" set forth in the Amended Tower Dec, pg. 1, §A.

Portions of the Property were thereafter dedicated to the condominium form of ownership to create the **Residences Condominium** (i.e., Defendant, the Residences) and the **Hotel Condominium** (i.e., the Plaintiff). The balance of the Property consisted of the **Hotel Lot, the Spa Lot, and the Restaurant Lot**.

August 8, 2008 – June 22, 2009 WCI files bankruptcy and sells to Elcom

WCI filed for bankruptcy on August 8, 2009. On June 22, 2009, WCI conveyed the Property, less the two condominium associations, to **Elcom** Hotel and Spa, LLC ("Elcom") in addition to 51 hotel condominium units. Under the Original Tower Dec, Elcom became the successor Declarant, the Hotel Lot Owner, the Spa Lot Owner, and the Restaurant Lot Owner, as defined therein.

January 2, 2013 – January 27, 2014 Elcom files bankruptcy and sells to OBHHF

Elcom filed for bankruptcy on January 2, 2013. On January 27, 2014, Elcom sold the Property, less the two condominium associations, to **One Bal Harbour Hotel Facilities ("OBHHF".)** OBHHF was as a for-profit subsidiary of the Residences formed in order to take title. **Upon the sale by Elcom to OBHHF, OBHHF became the successor Declarant, the Hotel Lot Owner, the Spa Lot Owner, and the Restaurant Lot Owner**. Plaintiff did not object to this transaction and not object when the Court was advised Plaintiff did not have veto power as to any amendments the Residences would make to the Original Tower Dec.

September 25, 2014 OBHHF files the Amended Tower Dec

Upon taking title, OBHHF – as the Hotel Lot Owner -- amended the Original Tower Dec and recorded the **Amended Tower Dec** on September 25, 2014.

Contemporaneously with this amendment and pursuant to the Original Tower Declaration, OBHHF created within the Property a third condominium known as the **"Hotel Facilities Condominium**" which consisted of the Spa Lot, the Restaurant Lot, and the newly designated "**Lobby Unit**." The Lobby Unit was created from the portions of the Hotel Lot required to operate the Hotel and was sold to LK Hotel (Lionstone), a non-party to this action.

Contrary to Plaintiff's erroneous allegation, it is LK Hotel, the owner of the Lobby Unit, which has the right, among others, to select the flag of the hotel in accordance with the standards set forth in the Amended Tower Dec. The Hotel Lot and the Hotel Lobby Unit are entirety different parts of the Property, as are their respective owners.

At or around this time, the Residences also formed a not-for-profit subsidiary, **One Bal Harbour Corporation ("OBH Corporation")**, to own and operate the Hotel Lot, which was re-named the "**OBH Facilities**". The OBH Facilities consisted of the Hotel Lot, as depicted by the Original Tower Dec, less the Hotel Facilities Condominium and less the Residential Swimming Pool which was conveyed to the Residences.

Upon the conveyance by OBHHF to the Corporation, all powers of the Hotel Lot Owner set forth in the Original Tower Dec vested in OBH Corporation, not LK Hotel.

III. MOTION TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION

A. APPLICABLE STANDARD

A motion to dismiss tests the legal sufficiency of the complaint. *Fla. Bar v. Greene*, 926 So. 2d 1195 (Fla. 2006). In determining the merits of a motion to dismiss, the trial court must limit itself to the four corners of the complaint, including any attached or incorporated exhibits,

assuming the allegations in the complaint to be true and construing all reasonable inferences therefrom in favor of the non-moving party. *Greene,* 926 So. 2d at 1199. Affirmative defenses are generally matters raised in an answer and not a motion to dismiss. *Rigby v. Liles*, 505 So. 2d 598, 601 (Fla. 1st DCA 1987). However, where the facts constituting the defense affirmatively appear on the face of the complaint and establish conclusively that the defense bars the action as a matter of law, a motion to dismiss raising the defense is properly granted. *Saltponds Condo. Ass'n v. Walbridge Aldinger Co.,* 979 So. 2d 1240, 1244-45 (Fla. 3d DCA 2008); *Alexander v. Suncoast Builders, Inc.,* 837 So. 2d 1056, 1057 (Fla. 3d DCA 2002).

In this case, the documents attached to the Complaint establish conclusively that Plaintiff's Complaint fails to state a cause of action. "When considering a motion to dismiss, a trial court is required to consider any exhibit attached to, or incorporated in the pleading." *Bott v. City of Marathon, 949* So. 2d 295, 296 (Fla. 3d DCA 2007), citing *Harry Pepper & Assoc., Inc. v. Lasseter*, 247 So. 2d 736, 736 (Fla. 3d DCA 1971). Moroever, the documents attached to the Complaint establish as a matter of law that Plaintiff fails to state a cause of action – and that it never could. "A trial court should give leave to amend a deficient complaint unless . . . the complaint shows on its face that there is a deficiency which cannot be cured by amendment." *Unitech Corp. v. Atl. Nat'l Bank of Miami*, 472 So. 2d 817, 818 (Fla. 3d DCA 1985); *see also Thompson v. Bank of N.Y.*, 862 So. 2d 768, 770 (Fla. 4th DCA 2003). This is such a case.

Plaintiff's Complaint should be therefore dismissed with prejudice.

B. RULES OF CONSTRUCTION

The Original Tower Dec provides that it shall be liberally construed to protect the Hotel Lot Owner's rights, benefits, and privileges under that Declaration. *See OTD, §1.2* As

explained below, the rights of the Hotel Lot Owner under the Original Tower Dec were vested in the Residences' subsidiaries at various times. Thus, pursuant to the document governing this action, this Court is required to construe liberally the provisions at issue in favor of protecting those rights.

C. THE THREE FUNDAMENTAL FALLACIES IN PLAINTIFF'S CLAIM

Plaintiff rests its entire case on three fundamentally flawed arguments which are unsupported by the documents attached to the Complaint or by Florida law, requiring dismissal of the entire claim.

First, Plaintiff posits that the Residences did not have the authority to amend the Original Tower Dec such that all or part of the Amended Tower Dec is invalid. The plain language of the Original Tower Dec demonstrates that Plaintiff is wrong.

Second, Plaintiff fails to distinguish among the various entities under both Declarations and conflates, confuses, ignores them, or deliberately mischaracterizes them – demonstrating a stunning lack of understanding (or candor) as to how the two Declarations operate.

And third, Plaintiff's overarching leitmotif, that the Amended Tower Declaration is invalid because it somehow "shifted the balance of power", even if true, is not actionable as a matter of law.

The following analysis of these three fallacies establishes that Plaintiff's entire Complaint should be dismissed for failure to state a cause of action.

1. The Hotel Lot Owner Had the Sole Right Unilaterally to Amend.

As clearly stated in the Original Tower Dec, the Property is not a condominium nor any sort of master association. It is a fee simple parcel of real property owned solely by OBH Corporation, subject only to the terms and conditions of its governing documents.

WCI Communities and then Elcom Hotel and OBH Corporation, as each of the successive Hotel Lot Owners, had the authority under the Original Tower Declaration to amend any or all provisions of the Declaration pursuant to Section 14.7 of the Original Tower Declaration, entitled "Amendment". That provision states as follows in relevant part:

> **14.7 Amendment**. In addition, but subject, to any other manner herein provided for the amendment of this Declaration, ***the covenants, restrictions, easements, charges, liens and other provisions of this Declaration may be amended, changed or added to at any time and from time to time*** upon execution and recordation of an instrument executed by Declarant and Declarant's Mortgagee, prior to the Sellout Date and thereafter ***by the Hotel Lot Owner.*** ....
>
> (Emphasis added.)

Each of the amendments Plaintiff cites as invalid in this litigation falls squarely within the grant of authority to amend under Section 14.7. Relevant to this action is the plain language in this provision allowing the Hotel Lot Owner, as the successor to the Developer WCI, to amend the covenants, restrictions, charges, liens, ***and other provisions*** of the Declaration.

As a matter of Florida law, OBHHF's amendments to the Original Tower Declaration are ***"clothed with a very strong presumption of validity."*** *See, Woodside Vill. Condo. Ass'n v. McClernan*, 806 So. 2d 452, 457 (Fla. 2002) (emphasis added.) This presumption arises from the fact that "each individual unit owner purchases its unit knowing of and accepting the restrictions to be imposed. Such restrictions are very much in the nature of covenants running with the land and they will not be invalidated absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental

constitutional right." *Woodside* at 806 So. 2d 452, 457 (Fla. 2002), citing *White Egret Condominium, Inc. v. Franklin,* 379 So. 2d 346 (Fla. 1979). *See also, Flagler Fed. Sav. & Loan Ass'n v. Crestview Towers Condo. Ass'n*, 595 So. 2d 198, 200 (Fla. 3d DCA 1992), citing *Hidden Harbour Estates v. Basso*, 393 So. 2d 637, 639 (Fla. 4th DCA 1981).

When OBHHF purchased the Property from Elcom, OBHHF became the Hotel Lot Owner under the Original Tower Declaration. As the Hotel Lot Owner, OBHHF had the right to amend the provisions at issue without being subject to any veto power or approval right because Plaintiff (or, indeed, any other party) had no such rights. Plaintiff's Complaint conspicuously fails to cite to any provisions in the Original Tower Dec to the contrary because they do not exist. Thus, OBHHF amended the Original Tower Declaration lawfully when it executed and recorded the Amended Tower Declaration in accordance with Section 14.7 of the Original Tower Dec.

As to the more specific allegations in the Complaint which implicate the extent of the OBHHF's right to amend the Original Tower Declaration, Plaintiff challenges (1) the amendments to the allocation of expenses and (2) to the amendment to Section 14.7 itself as invalid.

Addressing the allegations pertaining to the reallocation of expense items, Plaintiff fails to allege any facts to support that such amendments fall outside the scope of Section 14.7. Plaintiff has not because it cannot. Moreover, Plaintiff also incorrectly alleges the Hotel Lot Owner could not deviate from certain set percentages to allocate expenses under the Original Tower Declaration, *Complaint, ¶60,* but could allocate the utility charges based on actual or estimated consumption. Plaintiff again ignores the plain language in both Declarations. First, under the Original Tower Declaration, the Hotel Lot Owner had the right to amend that

Declaration to change the percentage for charges for expenses under Section 14.7, Amendments, discussed above, as amendments to "charges, liens and other provisions." Second, the Hotel Lot Owner had the right under the Original Tower Declaration to charge for specific, non-General Allocation expenses under other provisions, including under Section 11.1.3, *Hotel Condominium Shared Facilities Assessments.* Finally, contrary to the unfounded implication throughout the Complaint that Plaintiff enjoyed some form of veto power or approval right in the allocation of expenses, the Original Tower Declaration establishes otherwise. Simply put, Plaintiff never had any veto power or any approval right in the allocation of expenses under the Original Tower Declaration and, similarly, has no veto power or any role in the allocation of expenses under the Amended Tower Declaration.

Turning to the allegation that the amendment to Section 14.7 is also unlawful, OBHHF had the authority under Section 14.7 of the Original Tower Declaration to amend Section 14.7 which would broadly fall in the category of "other provisions." Plaintiff again alleges no legal or factual grounds as to why amending Section 14.7 is unlawful.

In sum, Plaintiff fails to allege any facts to overcome the "very strong presumption of validity" that OBHHF's exercise of its power to amend the Original Tower Declaration was lawful in general or as to the specific issues raised in Plaintiff's Complaint. Under these facts, Plaintiff's Complaint should be dismissed in its entirety as a matter of law.

2. Plaintiff conflates, confuses, ignores, or mischaracterizes the various entities.

Whether intentional or not, Plaintiff's allegations are misleading in that they variously and improperly conflate, confuse, ignore, or mischaracterize the entities referred to as the "Hotel Lot Owner", the "Hotel Lobby Unit Owner", "the Residences", "the Corporation", and the "Hotel Facilities Condominium." Understanding the distinctions among these entities not only

demonstrates Plaintiff's own lack of basic understanding as to how the Declarations work, but proves fatal to Plaintiff's case.

In some instances, the Complaint refers to the Residences and the Hotel Lot Owner as two separate entities under the Amended Tower Declaration. These allegations are misleading and unsupported. The term "Hotel Lot Owner" is no longer used under the Amended Tower Declaration. Instead, the rights of the Hotel Lot Owner under the Original Tower Declaration are now vested in OBH Corporation as the sole owner of the OBH Facilities under the Amended Tower Declaration. The OBH Facilities include what was identified as the Hotel Lot in the Original Tower Dec, less the Hotel Facilities Condominium (consisting of the Hotel Lobby Unit, Spa Lot, and Restaurant Lot) and less the Residential Pool. The Hotel Facilities Condominium was created contemporaneously with the amendment of the Original Tower Declaration and its components are no longer part of the Hotel Lot as the Hotel Lot was defined under the Original Tower Declaration.

For example, Plaintiff alleges as follows in support of its contention that the amendment to the Original Tower Declaration represents an unlawful "change in the balance of power": ***"Under the Amended Tower Dec, the Residents have sole control over the OBH Facilities, to the exclusion of the Hotel Association and the Hotel Lot Owner."*** *Complaint, ¶¶51 – 52* (emphasis added). This allegation is nonsensical and thus non-actionable because, under the Amended Tower Declaration, (1) it is OBH Corporation, and not the Residences, which has sole control over the OBH Facilities; (2) OBH Corporation's sole control of the OBH Facilities is not *to the exclusion* of the Hotel Lot Owner because the Corporation ***is*** the Hotel Lot Owner; and (3) Plaintiff never had any control over what is now the OBH Facilities.

In addition to failing to recognize that the Corporation is the new "Hotel Lot Owner", Plaintiff also incorrectly misconstrues the concept of the "Hotel Lot Owner" with that of the "Lobby Unit Owner." In Paragraph 68 of the Complaint, for example, Plaintiff refers to Lionstone (LK Hotel) as the Hotel Lot Owner by virtue of having purchased the Lobby Unit, which is simply incorrect from the plain language of the document.

In yet another flagrant example of Plaintiff's failure to understand the Declarations, Plaintiff incorrectly alleges that the Residences amended the Original Tower Dec to usurp the right of the Hotel Lot Owner to control the "flag", the right to choose the five-star operator of the Hotel Facilities Condominium. *See Complaint, ¶53-56.* In actual fact, the Amended Tower Declaration provides that the Lobby Unit Owner has the sole right to select the Flag for the hotel operation, subject only to restrictions which require that a five-star-brand be the Flag at all time, fulfilling the Property's obligations to the Village of Bal Harbour under the 2004 Development Agreement for OBH. *See ATD,§10.24.* Plaintiff's entire line of argument that the Residence unlawfully changed the balance of power because it usurped the right of the Hotel Lot Owner to select the flag is therefore proven false by a mere reading of the Amended Tower Dec. This is one more graphic example of how Plaintiff has not and cannot state a cause of action.

3. The Amended Tower Declaration is enforceable even if it "shifted the balance of power" from the Original Tower Declaration.

Strewn throughout the Complaint are vague and unfounded claims that the Amended Tower Declaration somehow "shifted" or changed the balance of power among the Hotel Lot Owner, the Residences, and Plaintiff. This shift of power, according to Plaintiffs, renders the Amended Tower Declaration invalid. These allegations are factually unsupported and legally irrelevant and support dismissal of the entire Complaint with prejudice.

Factually, Plaintiff's claims are unfounded because Plaintiff had no power under the Original Tower Declaration. Specifically, Plaintiff had no right to vote upon, veto, or approve any decisions made by the Hotel Lot Owner, including the right to amend the Original Tower Declaration. The Original Tower Declaration did not give Plaintiff the right to vote or approve to any of the decisions within the purview of the Hotel Lot Owner, including the allocation of expenses to Plaintiff. Thus, vesting OBH Corporation under the Amended Tower Declaration with the exact same rights of the Hotel Lot Owner under the Original Tower Declaration did not "shift" the balance of power away from Plaintiff because Plaintiff simply never had any.

It should also be noted that Plaintiff concedes as much. In Paragraph 15 of the Complaint, Plaintiff correctly acknowledges the breadth of the scope of the Hotel Lot Owner's power under the Original Tower Dec, including over Plaintiff:

> ***"The Hotel Lot Owner's nearly unbridled power allowed it to exclude both the Residential Association and the Hotel Association from decisions involving the Property that did not pertain specifically to the individual Hotel Units or individual Residential Units themselves."***

(Emphasis added.)

This admission alone defeats Plaintiff's claim of loss of power.

Moreover, Plaintiff's suggestion that it had a right to have input into the amendment of the Original Tower Declaration during the Elcom bankruptcy proceedings is also unsupported by the record before this Court.

As previously stated, **the Property is not a condominium**. Nevertheless, case law is clear that even condominium owners have "no vested rights in the status quo *ante*" and, thus, Plaintiff is bound by the amendments to Original Tower Declaration notwithstanding any alleged loss of power. "In the absence of a provision either in the Amendment or in the original

Declaration, condominium owners do not have vested rights in the status quo *ante*." *Woodside,* 806 So. 2d 452, 460 (Fla. 2002), citing *Crest Builders, Inc. v. Willow Falls Improvement Association* (1979), 74 Ill. App. 3d 420, 30 Ill. Dec. 452, 393 N.E. 2d 107 (party challenging amendment has no vested interest in the Declaration as originally written); *McElveen-Hunter v. Fountain Manor Association, Inc.* (1989), 96 N.C. App. 627, 386 S.E.2d 435 (changes to a condominium declaration are binding upon both previous and subsequent owners). *See also, Flagler Federal Savings & Loan Ass'n of Miami v. Crestview Towers Condominium Ass'n*, 595 So. 2d 198 (Fla. 3d DCA 1992) (unit owners were on notice of the recorded declaration's provisions for amendments to the declaration when they purchased the unit and were bound by the subsequent amendments to the declaration.)

Under Florida law, therefore, Plaintiff has no vested rights in the alleged status it enjoyed under the Original Tower Declaration and thus no cause of action exists for the loss of that alleged status. The Original Tower Declaration included provisions setting forth the "nearly unbridled power" of the Hotel Lot Owner and also put the world on notice that the Hotel Lot Owner could amend any provision of the Original Tower Declaration. Plaintiff's claim that the amendments are unlawful because it resulted in a loss of its "power" is therefore not actionable and Plaintiff's Complaint should be dismissed with prejudice.

D. COUNT I – AS A MATTER OF LAW, COUNT I SHOULD BE DISMISSED WITH PREJUDICE.

Count I of Plaintiff's Complaint seeking declaratory relief for various alleged disputes over the validity of the amendments to the Original Tower Dec should be dismissed with prejudice.

Procedurally, Plaintiff is asking this Court to exercise its jurisdiction under the Federal declaratory judgment statute, 28 U.S.C. §§2201, et. seq. Because this Court is not "any court of

the United States," this Court does not have authority to exercise its own power under this statute. Count I should be dismissed without prejudice on this ground.

Substantively, however, Count I should be dismissed with prejudice because under no set of facts is Plaintiff able to allege that the amendment to the Original Tower Dec was unlawful for the reasons set forth above.

E. COUNT II – AS A MATTER OF LAW, COUNT II SHOULD BE DISMISSED WITH PREJUDICE

Count II, asserting breach of contract for damages resulting from the alleged unlawful amendments to the Original Tower Dec, should also be dismissed with prejudice. As a matter of law, Plaintiff failed to state a cause of action for breach of contract because it has not alleged facts to state a cause of action that the amendments to the Original Tower Declaration were invalid. Count II should be dismissed with prejudice.

IV. MOTION TO DISMISS FOR FAILURE TO JOIN INDISPENSIBLE PARTIES

In the alternative, pursuant to Fla.R.Civ.P. 1.140(b)(7), the Residences moves to dismiss the Complaint because it fails to join OBH Corporation and LK Hotel, each indispensible parties to this action. The Residences notes that this Motion is brought in the alternative if this Court were to deny the Motion to Dismiss. The Residences contends, for the reasons set forth above, that Plaintiff's Complaint is fatally deficient even if these two parties were to be joined in this action.

As to OBH Corporation, the Amended Tower Dec establishes that OBH Corporation is a subsidiary of the Residences and the owner of the OBH Facilities with those rights and obligations set forth in that Declaration, including the right to allocate expenses. OBH

Corporation is therefore indispensible to this action because any adverse ruling by this Court would directly affect the Corporation's rights and obligations.

LK Hotel should also be joined as an indispensible party because, according to the Complaint, it is the owner of the Lobby Unit and any adverse ruling by this Court would directly affect its rights and obligations.

V. MOTION TO STRIKE CLAIM FOR ATTORNEY'S FEES

Plaintiff's claim for attorney's fees should be stricken. Even if Plaintiff were to prevail in this matter, Plaintiff is not entitled to seek fees under either contract or Florida statute.

WHEREFORE, Defendant, The Residences at One Bal Harbour Condominium Association, Inc., respectfully request an order dismissing Plaintiff's Complaint in its entirety; alternatively, the Residences respectfully requests an order dismissing Plaintiff's Complaint for failure to join indispensible parties; and the Residences respectfully requests an order striking Plaintiff's claim for attorney's fees.

Respectfully submitted,

HINSHAW & CULBERTSON LLP

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 18, 2019, a true and correct copy of the foregoing was filed and served through the *Florida Courts E-Filing Portal* to all counsel of record.

/s/ Leonor M. Lagomasino
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