

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

CAROLYN NOLEN, WINDY
KELLEY, CARA KELLEY, and
PAULA LITTON, on behalf of
themselves and all others similarly
situated,

Plaintiffs,

v.

FAIRSHARE VACATION OWNERS
ASSOCIATION,

Defendant.

Case No: 6:20-cv-00330-PGB-EJK

CLASS ACTION

**DEFENDANT’S ANSWER AND AFFIRMATIVE DEFENSES TO
PLAINTIFFS’ AMENDED COMPLAINT**

Defendant Fairshare Vacation Owners Association (“Fairshare”), by way of its Answer and Affirmative Defenses to Plaintiffs’ Amended Complaint, states as follows.

ANSWER

**IN RESPONSE TO THE ALLEGATIONS CONTAINED IN THE
AMENDED COMPLAINT’S “JURISDICTION AND VENUE” SECTION¹**

1. Admitted for jurisdictional purposes only. Otherwise, denied.

¹ The headings restated in the Answer are taken from the Amended Complaint. Fairshare makes no admissions related to the language used in any of the headings in the Amended Complaint.

2. Fairshare admits that venue is proper in this Court and that it is subject to personal jurisdiction in this district; Fairshare denies the other allegations in Paragraph 2.

**IN RESPONSE TO THE ALLEGATIONS CONTAINED IN THE
AMENDED COMPLAINT'S "THE PARTIES" SECTION**

3. Admitted.
4. Fairshare lacks knowledge or information sufficient to form a belief about the truth of the allegations contained in Paragraph 4.

**IN RESPONSE TO THE ALLEGATIONS CONTAINED IN THE
AMENDED COMPLAINT'S "THE TRUST" SECTION**

5. Admitted.
6. Admitted.
7. Admitted.
8. Fairshare admits that in Paragraph 8 Plaintiffs have correctly quoted from a portion of the definition of "Trust Properties" in the Second Amended and Restated Fairshare Vacation Plan Use Management Trust Agreement ("Trust Agreement").
9. Fairshare denies that in Paragraph 9 Plaintiffs have correctly quoted from a portion of the definition of "Property Interest" in the Trust Agreement.
10. Denied.
11. Fairshare admits that Wyndham timeshare owners who assign the use rights component of their timeshare interest to the Trust are Beneficiaries of the Trust

and that Fairshare owes a duty of loyalty to Beneficiaries of the Trust; Fairshare denies the other allegations in Paragraph 11.

**IN RESPONSE TO THE ALLEGATIONS CONTAINED IN THE
AMENDED COMPLAINT'S "WVR'S TIMESHARE BUSINESS" SECTION**

12. The allegations of this paragraph are not directed at Fairshare, therefore denied.

13. The allegations of this paragraph are not directed at Fairshare, therefore denied.

14. The allegations of this paragraph are not directed at Fairshare, therefore denied.

**IN RESPONSE TO THE ALLEGATIONS CONTAINED IN THE
AMENDED COMPLAINT'S "DEFENDANT'S AFFILIATED
RELATIONSHIP WITH WYNDHAM VACATION RESORTS
AND WYNDHAM CONSUMER FINANCE, INC." SECTION**

15. Fairshare admits that that it is governed by a Board of Directors. Fairshare denies the other allegations in Paragraph 15.

16. Denied.

17. Denied.

18. Fairshare admits that Wyndham Vacation Resorts, Inc. ("WVR") serves as the Plan Manager for the Trust pursuant to a Management Agreement; Fairshare denies the other allegations in Paragraph 18.

**IN RESPONSE TO THE ALLEGATIONS CONTAINED IN THE
AMENDED COMPLAINT'S "EXCESSIVE FEES
AND SURPLUS FUNDS" SECTION**

19. Denied.

20. Fairshare admits that all Beneficiaries except WVR must pay a “Fairshare Plus Assessment,” consisting of the sum of a “Program Fee” and an “OA Fee.” Fairshare admits that the Program Fee is used in part to cover the operation, maintenance, repair, and replacement of the Trust’s properties. Fairshare denies the other allegations in Paragraph 20.

21. Denied.

**IN RESPONSE TO THE ALLEGATIONS CONTAINED IN THE
AMENDED COMPLAINT’S “THE NOLEN TRANSACTION” SECTION**

22. Admitted.

23. Denied.

24. Fairshare admits that Nolen assigned the use rights component of her timeshare interest to the Trust; Fairshare denies the other allegations in Paragraph 24.

**IN RESPONSE TO THE ALLEGATIONS CONTAINED IN THE
AMENDED COMPLAINT’S “THE KELLEY/LITTON
TRANSACTION” SECTION**

25. Admitted.

26. Fairshare admits that the Kelleys and Litton financed \$62,156.30 through WVR at an 11.49% interest rate and that their loan was serviced by WCF; Fairshare denies the other allegations in Paragraph 26.

27. Fairshare admits that the Kelleys and Litton assigned the use rights component of their timeshare interest to the Trust; Fairshare denies the other allegations in Paragraph 27.

**IN RESPONSE TO THE ALLEGATIONS CONTAINED IN THE
AMENDED COMPLAINT’S “CLASS ALLEGATIONS” SECTION**

28. Fairshare admits that Plaintiffs bring this action as a putative class action under Federal Rule of Civil Procedure 23.
29. Fairshare admits that Plaintiffs define the Proposed Class as stated in Paragraph 29.
30. Admitted.
31. Denied.
32. Denied.
33. Fairshare admits that the Proposed Class satisfies Federal Rule of Civil Procedure 23(a)(1)’s numerosity requirement.

**IN RESPONSE TO THE ALLEGATIONS CONTAINED IN THE
AMENDED COMPLAINT’S “EXISTENCE AND PREDOMINANCE
OF COMMON QUESTIONS OF LAW AND FACT” SECTION**

34. Fairshare denies that the Proposed Class satisfies Federal Rule of Civil Procedure 23(a)(2)’s commonality requirement.
 - (a) Fairshare denies that this purportedly common question is any indication that the Proposed Class satisfies Federal Rule of Civil Procedure 23(a)(2)’s commonality requirement.
 - (b) Fairshare denies that this purportedly common question is any indication that the Proposed Class satisfies Federal Rule of Civil Procedure 23(a)(2)’s commonality requirement.

- (c) Fairshare denies that this purportedly common question is any indication that the Proposed Class satisfies Federal Rule of Civil Procedure 23(a)(2)'s commonality requirement.
- (d) Fairshare denies that this purportedly common question is any indication that the Proposed Class satisfies Federal Rule of Civil Procedure 23(a)(2)'s commonality requirement.
- (e) Fairshare denies that this purportedly common question is any indication that the Proposed Class satisfies Federal Rule of Civil Procedure 23(a)(2)'s commonality requirement.
- (f) Fairshare denies that this purportedly common question is any indication that the Proposed Class satisfies Federal Rule of Civil Procedure 23(a)(2)'s commonality requirement.
- (g) Fairshare denies that this purportedly common question is any indication that the Proposed Class satisfies Federal Rule of Civil Procedure 23(a)(2)'s commonality requirement.

**IN RESPONSE TO THE ALLEGATIONS CONTAINED IN THE
AMENDED COMPLAINT'S "TYPICALITY AND
NUMEROSITY" SECTION**

35. Fairshare admits that the Proposed Class satisfies Federal Rule of Civil Procedure 23(a)(1)'s numerosity requirement; Fairshare denies that the Proposed Class satisfies Federal Rule of Civil Procedure 23(a)(3)'s typicality requirement.

IN RESPONSE TO THE ALLEGATIONS CONTAINED IN THE

AMENDED COMPLAINT’S “ADEQUATE REPRESENTATION” SECTION

36. Fairshare denies that the Proposed Class satisfies Federal Rule of Civil Procedure 23(a)(4)’s adequate representation requirement.

**IN RESPONSE TO THE ALLEGATIONS CONTAINED IN THE
AMENDED COMPLAINT’S “SUPERIORITY” SECTION**

37. Fairshare denies that the Proposed Class satisfies Federal Rule of Civil Procedure 23(b)(3)’s superiority requirement.

38. Fairshare denies that the Proposed Class satisfies Federal Rule of Civil Procedure 23(b)(3)’s predominance requirement.

**IN RESPONSE TO THE ALLEGATIONS CONTAINED IN
“COUNT 1 – DECLARATORY JUDGMENT”**

39. Fairshare adopts and incorporates its responses to Paragraphs 1 through 38, as if fully set forth herein.

40. Admitted.

41. Admitted that Plaintiffs have identified an alleged controversy, but denied that the controversy should be resolved on a class basis. Otherwise, denied.

42. Fairshare admits that Plaintiffs contend that Fairshare has breached its fiduciary duties; Fairshare denies that it has breached its fiduciary duties.

43. Fairshare admits that Plaintiffs seek a declaratory judgment; Fairshare denies that Plaintiffs are entitled to the declaratory judgment they seek.

(a) Admitted.

(b) Admitted.

(c) Admitted.

(d) Denied, as framed. Admitted that the Trust is a non-profit entity that does not earn a profit. Otherwise, denied.

(e) Denied.

(f) Denied.

44. Denied.

**IN RESPONSE TO THE ALLEGATIONS CONTAINED IN
“COUNT 6 – BREACH OF FIDUCIARY DUTY”²**

83. Fairshare adopts and incorporates its responses to Paragraphs 1 through 38, as if set forth fully herein.

84. Admitted.

85. Denied.

(a) Denied.

(b) Denied.

(c) Denied.

(d) Denied.

(e) Denied.

(f) Denied.

(g) Denied.

² On March 18, 2021, the Court issued an Order granting dismissal of Counts 2-5 of the Amended Complaint and denying dismissal of Counts 1 and 6. Doc. 67. And on April 9, 2021, the Court issued an Order striking the Second Amended Complaint and directing that this “case will proceed on Counts 1 and 6 of the Amended Complaint.” Doc. 76. Fairshare thus does not respond to the allegations in Counts 2-5 of the Amended Complaint, which are no longer live claims.

86. Denied.

87. Denied.

**IN RESPONSE TO THE ALLEGATIONS CONTAINED IN THE
AMENDED COMPLAINT'S PRAYER FOR RELIEF**

Fairshare denies that Plaintiffs are entitled to any of the relief requested in the Amended Complaint's prayer for relief, or to any other relief that may be requested elsewhere in the Amended Complaint.

**ANY ALLEGATIONS OF THE AMENDED COMPLAINT NOT
PREVIOUSLY ADDRESSED ARE DENIED.**

AFFIRMATIVE DEFENSES

FIRST DEFENSE

The Amended Complaint fails to state a claim upon which relief can be granted. Count 1 contains the same allegations as Counts 2-5, which the Court dismissed for the reasons set forth in the Order granting in part and denying in part Fairshare's motion to dismiss the Amended Complaint. *See* Doc. 67 at 4-8. Count 6 also contains the same allegations as Counts 2-5, and thus Count 6 also fails to state a claim. *Id.* Finally, the allegations in Counts 1 and 6 contradict the transactional documents incorporated by reference in Fairshare's motion to dismiss the Amended Complaint.

SECOND DEFENSE

Plaintiffs allege that Fairshare has violated the Arkansas Trust Code and breached its fiduciary duty as Trustee of the Trust by taking certain actions, but those actions are authorized by the terms of the Trust and hence are not actionable.

THIRD DEFENSE

Plaintiffs allege that Fairshare has violated the Arkansas Trust Code and breached its fiduciary duty as Trustee of the Trust by taking certain actions. But as Beneficiaries of the Trust, Plaintiffs and the rest of the Proposed Class have consented to those actions, ratified them, or released Fairshare from liability for them.

FOURTH DEFENSE

Plaintiffs have waived their declaratory judgment and breach of fiduciary duty claims.

FIFTH DEFENSE

The Proposed Class includes Trust Members from March 14, 2008 to the present. But their declaratory judgment and breach of fiduciary duty claims are barred in part by the respective statute of limitations applicable to each of the two claims.

WHEREFORE, having fully answered and asserted defenses to Plaintiffs' claims, Defendant Fairshare Vacation Owners Association prays that the Court enter final judgment in its favor on all claims, together with an award of Fairshare Vacation Owners Association's reasonable attorneys' fees and costs pursuant to 28 U.S.C. § 1927 and Ark. Code Ann. § 28-73-1004.

Respectfully submitted,

CARLTON FIELDS, P.A.

/s/ Kevin P. McCoy

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