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

CENTRAL FLORIDA TOURISM OVERSIGHT DISTRICT,

Plaintiff,

v. **CASE NO.: 2023-CA-011818-O**

WALT DISNEY PARKS AND RESORTS U.S., INC.,

Defendant.
_____/

PLAINTIFF'S MOTION TO DISMISS DEFENDANT'S COUNTERCLAIM FOR DECLARATORY, INJUNCTIVE, AND OTHER RELIEF

Plaintiff, Central Florida Tourism Oversight District (the "District"), moves for dismissal under Florida Rule of Civil Procedure 1.140 on Defendant Walt Disney Parks and Resorts U.S., Inc.'s ("Disney") Counterclaim for Declaratory, Injunctive, and Other Relief ("Counterclaim"). In support of this motion, the District states as follows:

I. INTRODUCTION

All of Disney's counterclaims fail as a matter of law—primarily (though not exclusively) due to the fact that the Development Agreement and Restrictive Covenants are void as a matter of Florida law and therefore have never had any legal force or existence. Disney cannot possibly be entitled to declaratory and injunctive relief requiring compliance with contracts that are null and void under state law. For this reason and for the other reasons explained below, Disney has failed to state a claim for relief, and the Court should grant this motion and dismiss Disney's Counterclaim in its entirety.

II. BACKGROUND[1]

In February 2023, the Legislature passed House Bill 9B, Chapter 2023-5, Laws of Florida ("HB 9B"), which reconstituted the Reedy Creek Improvement District ("RCID") into the new Central Florida Tourism Oversight District (the "District"). Countercl. ¶¶ 2, 28. Shortly prior to its reconstitution as the District, however, RCID executed a major development agreement with Disney (the "Development Agreement"), which exclusively vested in Disney all of the development rights authorized in the District's Comprehensive Plan. *Id.* ¶¶ 16-25. RCID and Disney also executed a Declaration of Restrictive Covenants (the "Restrictive Covenants") based on the Development Agreement (collectively, the "Agreements" or "Contracts"). *Id.* ¶¶ 21-22, 26-27. These Agreements attempted to place major restrictions and obligations on the new District board. *Id.* ¶¶ 25-27.

When HB 9B took effect, the Governor announced the new board members for the District. *Id.* ¶¶ 28, 30. Approximately one month later, on March 29, 2023, these board members announced that they had "just discovered" the Agreements. *Id.* ¶ 31. The Governor also took notice of the Agreements and vowed legislation to nullify them and promised "additional actions" by the new District board. *Id.* ¶ 32.

The District board then heard presentations from counsel about the illegality of the Agreements and voted to adopt a resolution (the "Legislative Declaration")[2] to declare the Agreements void ab initio based on numerous "alleged contract infirmities." *Id.* ¶¶ 34-39. The

[1] For purposes of this Motion, the District recites the facts based on the allegations in Disney's Counterclaim.

[2] *See* Legislative Findings of the Central Florida Tourism Oversight District Board of Supervisors Relating to the February 8, 2023, Development Agreement and Declaration of Restrictive Covenants, available at https://www.rcid.org/wp-content/uploads/2023/05/Legistative-Findings-executed.pdf (the "Legislative Declaration").

District's Legislative Declaration also included findings of fact to support the District's legal conclusion. *Id.* The District then filed this declaratory judgment action on May 1, 2023, seeking a judicial declaration that the Development Agreement and the Restrictive Covenants are indeed void, unenforceable, and invalid under Florida law. *See generally* Compl. Despite this pending action, Disney alleges that the District "has made clear that it intends to abide by the legislative findings and declaration by refusing to comply with the terms of the Contracts." Countercl. ¶ 39.

Around the same time, the Legislature passed Senate Bill 1604 which states,

> An independent special district is precluded from complying with the terms of any development agreement, or any other agreement for which the development agreement serves in whole or part as consideration, which is executed within 3 months preceding the effective date of a law modifying the manner of selecting members of the governing body of the independent special district from election to appointment or from appointment to election.

Id. ¶ 41 (quoting § 5, Ch. 2023-31, Laws of Fla.) Multiple members of the Legislature "tied Senate Bill 1604 to the Contracts" executed by RCID and Disney in February. *Id.* ¶ 43-44. The Governor signed Senate Bill 1604 on May 5, 2023. *Id.* ¶ 45.

On August 17, 2023, Disney filed nine counterclaims to the District's declaratory judgment action. Count I seeks damages for the District's alleged breach of the Agreements. Countercl. ¶¶ 46-53. Count II seeks a declaration that the Agreements are still valid and enforceable. *Id.* ¶¶ 54-62. Counts III and IV seek specific performance and injunctive relief based on the District's alleged breach of the Agreements. *Id.* ¶¶ 63-80. Count V also seeks injunctive relief based on an alleged breach of the duty of good faith and fair dealing. *Id.* ¶¶ 81-88. Finally, Counts VI through IX seek relief from both the Legislative Declaration and Senate Bill 1604 based on violations of the Florida Constitution's Contract Clause, Takings Clause, Due Process Clause, and Free Speech Clause. *Id.* ¶¶ 89-116. Most of Disney's constitutional counterclaims assert that the Legislative Declaration and Senate Bill 1604 were

retaliatory measures for Disney's public advocacy against House Bill 1557 in March 2022, nearly one year prior to the new District. *Id.* ¶¶ 8-15, 94, 99, 108, 112-115.

The District hereby moves to dismiss all counterclaims.

III. MOTION TO DISMISS STANDARD

A motion to dismiss is designed to test the legal sufficiency of the complaint. *The Fla. Bar v. Greene*, 926 So. 2d 1195, 1199 (Fla. 2006). When ruling on a motion to dismiss, the trial court is limited to the four corners of the complaint and its attachments, accepting all well-pled allegations as true and drawing all reasonable inferences in a light most favorable to the non-moving party. *Sigma Funding Grp., LLC v. Sec. First Ins. Co.*, 345 So. 3d 960, 961 (Fla. 5th DCA 2022). The court may also consider documents incorporated by reference into the complaint. *KC Quality Care, LLC v. Direct Gen. Ins. Co.*, 343 So. 3d 1255, 1256 (Fla. 5th DCA 2022); *see also Enlow v. E.C. Scott Wright, P.A.*, 274 So. 3d 1192, 1194 (Fla. 5th DCA 2019) (quoting *One Call Prop. Servs. Inc. v. Sec. First Ins. Co.*, 165 So.3d 749, 752 (Fla. 4th DCA 2015)) ("But where the terms of a legal document are impliedly incorporated by reference into the complaint, the trial court may consider the contents of the document in ruling on a motion to dismiss."). If the complaint, including any document attached or incorporated, does not contain allegations that are legally sufficient to state a cause of action, dismissal is warranted. *Kidwell Grp., LLC. v. Am. Integrity Ins. Co. of Fla.*, 339 So. 3d 1068, 1069 (Fla. 5th DCA 2022).

IV. MEMORANDUM OF LAW

Disney has failed to state a cause of action for the requested declaratory, injunctive, and other relief.

Counts I-IX: All Counterclaims

All of Disney's counterclaims depend on the legal conclusion that the Agreements are valid contracts which are binding on the District. *See* Countercl. ¶¶ 22, 49, 57, 66, 76, 84, 93, 104, 106, 113, 116. In the District's Motion for Summary Judgment filed on August 15, 2023, the District explained, in depth, why the Agreements are invalid, void, and unenforceable as a matter of law based on the undisputed facts. Disney's most recent allegations do not contradict those undisputed facts in the least; therefore, the District incorporates its Motion for Summary Judgment into this Motion. Thus, Disney's Counterclaim should be dismissed in its entirety for the same reasons identified in the Motion for Summary Judgment, which are summarized below.

A. The Agreements are legally invalid for numerous reasons.

First, the District's predecessor, RCID, failed to mail a notice to all affected property owners of its intent to consider the Development Agreement, in violation of section 163.3225(2)(a), Florida Statutes. *See* Mot. for Summ. J. at 5-10. This violation renders the Development Agreement void *ab initio*, as well as the Restrictive Covenants that depend on the Development Agreement. *Id*. Disney's Counterclaim remains silent on this central fact about notice to all affected property owners. But considering that Disney's Counterclaim was filed two days after the District's Motion for Summary Judgment and three and a half months after the District's Complaint – both of which made this fact about notice to affected property owners central to the case – Disney's silence speaks volumes. Accordingly, Disney has failed to allege the facts necessary to show compliance with section 163.3225(2)(a), Florida Statutes. Even if Disney somehow contends that no other property owners are affected by the Development Agreement – a contention that is contradicted by the face of the Development Agreement itself – Disney does not even allege that ultimate fact and legal conclusion. As such, Disney's

Counterclaim fails to allege that RCID and Disney fully complied with section 163.3225, Florida Statutes, to enter into a valid Development Agreement.

The other arguments in the District's Motion for Summary Judgment are pure legal issues: (i) RCID did not have the legal authority to enter into the Development Agreement because it never passed the ordinance required by section 163.3223, Florida Statutes, *see* Mot. for Summ. J. at 10-14; (ii) RCID did not have the legal authority to enter into the Development Agreement because it affects property located within the municipal boundaries of Bay Lake and Lake Buena Vista, yet those municipalities control land development therein, *see id*. at 14-19; (iii) RCID did not have the legal authority to obligate itself to issue bonds payable from ad valorem taxation to finance the capital projects in the Development Agreement, absent a prior vote of the electors, because such obligation violates Article VII, Section 12 of the Florida Constitution, *see id*. at 19-21; and (iv) RCID did not have the legal authority to contract away its discretionary legislative power, *see id*. at 22-26.[3]

In addition to these arguments, full dismissal is warranted because the Agreements are legally invalid for lack of consideration. To start, a development agreement for Walt Disney World is most unusual because there have been development activities in the area for more than

[3] By unlawfully delegating legislative authority to Disney, the Agreements are also void as against public policy, namely the public policy embodied in HB 9B, which reconstituted the Board so that it would provide meaningful public oversight of the District and all regulated entities in it. Moreover, "restrictive covenants are not enforceable against governmental units," and that principle is equally applicable here. *Isacks v. Walton Cnty.*, No. 3:20-cv-1472, 2021 WL 4992757, at *3 (N.D. Fla. June 29, 2021) (cleaned up). And even if this case were to proceed to discovery, the District would also show that the Development Agreement was inconsistent with the District's comprehensive plan adopted in 1991 (and occasionally amended), which was the legally operative comprehensive plan at the time, and that the Agreements are unconscionable: procedurally, because they were adopted by a Board whose members were elected and controlled by Disney, without independent counsel for both sides; and substantively, because they purport to grant one-sided, long-term benefits to one party (Disney).

55 years without any development agreement. Although Disney still has "plans to continue to develop Walt Disney World," it makes no promises to develop anything in exchange for the extensive powers and promises it received from the District. *See* Compl. Ex. 1 at 2. Rather, in return for the extensive powers and promises that Disney gained through the Development Agreement, all that Disney promised was to demand no more than fair market value for any Disney-owned lands that the District might need in order to construct the public facilities that Disney may obligate the District to construct pursuant to the Development Agreement. But the District already had the power to take private lands for public projects and to pay only fair market value for them. *See* HB 9B § 8(5); *Dep't of Transp. of Fla. v. Nalven*, 455 So. 2d 301, 307 (Fla. 1984). Thus, Disney's purported consideration for the Development Agreement was merely a promise to provide no more than what it was obliged to provide. Consideration requires more than what a party is already legally obliged to do. *See Mangus v. Present*, 135 So. 2d 417, 418 (Fla. 1961). Thus, there is no legally sufficient consideration to support the Development Agreement. And Disney's consideration for the Restrictive Covenants, which consisted of "the commitments made by [Disney] . . . under the Development Agreement," Compl. Ex. 2 at 2, are thus similarly void for lack of either valid or independent consideration.

B. The Legislature did not ratify the Agreements through HB 9B.

Disney suggests that the provisions of HB 9B validated or ratified the Agreements, because the bill stated that "[a]ll lawful . . . contracts . . . of the Reedy Creek Improvement District are validated and shall continue to be valid and binding on the Central Florida Tourism Oversight District in accordance with their respective terms, conditions, and covenants." (Countercl. ¶¶ 2, 29 (quoting § 2 (Charter § 1), Ch. 2023-5, Laws of Fla.). But Disney overlooks

the important qualifier that only "lawful" contracts are validated under the new CFTOD name. The Legislature could not and did not turn an unlawful contract into a lawful contract.

The Legislature made clear that HB 9B "shall not affect existing contracts that the district entered into prior to the effective date of this act." § 1, Ch. 2023-5, Laws of Fla. It only meant to "avoid any events of default or breach under . . . the district's existing and *legally valid* contracts." *Id*. (emphasis added). Disney could not possibly read these provisions in context, *see Ham v. Portfolio Recovery Associates, LLC*, 308 So. 3d 942, 946-47 (Fla. 2020), and conclude that the Legislature intended to validate the *legally invalid* Development Agreement and Restrictive Covenants, which were executed mere hours before the Legislature voted on HB 9B when there was no indication the legislators were even aware of the Agreements. When the Legislature eventually became aware of the Agreements, it responded by enacting SB 1604 to nullify the last-minute Agreements if they were legally "in effect on" May 5, 2023, when SB 1604 became effective. *See* Countercl. ¶¶ 40-44. Thus, Disney's contention that the Legislature reaffirmed, ratified, or otherwise validated the Agreements through HB 9B is meritless.

Because the Agreements are invalid as a matter of law, Counts I through IX should be dismissed in their entirety. But if the Court does not agree, the following sections discuss why Counts I and III-IX should be dismissed for additional reasons.

Count I: Breach of Contract

A. The Contracts do not obligate Disney to develop any specific project, so Disney's promises are illusory.

As noted above, Disney makes no promises to actually develop any property subject to the Development Agreement for the next thirty years. Compl. Ex. 1. In other words, Disney could do nothing while benefiting from the extraordinary grant of control the District ceded to it. Disney could then enforce the District's obligations against it, but the District has nothing to

enforce against Disney. "The rule is well settled that a contract which is not mutually enforceable is considered an illusory contract." *Pullam v. Hercules Inc.*, 711 So. 2d 72, 74 (Fla. 1st DCA 1998); *see also Rosenberg v. Lawrence*, 541 So. 2d 1204, 1206 (Fla. 3d DCA 1988) ("Where one party retains to itself the option of fulfilling or declining to fulfill its obligations under the contract, there is no valid contract and neither side may be bound."). For this reason, the Development Agreement is an illusory contract that cannot support an action for breach.

B. Disney has failed to plead ultimate facts demonstrating any damages.

"The elements of a breach of contract action are: (1) a valid contract; (2) a material breach; and (3) damages." *People's Tr. Ins. Co. v. Valentin*, 305 So. 3d 324, 326–27 (Fla. 3d DCA 2020) (quoting *Grove Isle Ass'n, Inc. v. Grove Isle Assocs., LLLP*, 137 So. 3d 1081, 1094–95 (Fla. 3d DCA 2014)). Disney has failed to allege any facts that demonstrate the existence of damages. The Counterclaim merely concludes that "Disney has suffered and will continue to suffer damages, including consequential damages." Countercl. ¶ 53. But courts need not accept conclusory allegations or mere legal conclusions made by a party. *W.R. Townsend Contracting, Inc. v. Jensen Civ. Const., Inc.*, 728 So. 2d 297, 300 (Fla. 1st DCA 1999). Accordingly, Disney has failed to allege the necessary element of damages to sustain a claim for breach of contract. *See Canon v. Ziadie*, 327 So. 3d 327, 330 n.1 (Fla. 4th DCA 2021) (concluding that a counterclaim which simply stated that the defendant "has suffered damages" failed to allege "any ultimate facts elucidating the damages allegedly sustained").

C. Damages over a 30-year period are entirely speculative.

Because Disney has made no promises to develop any specific projects over the next thirty years, it is impossible to measure what damages Disney might incur based on the District's future noncompliance with the Agreements. For example, without knowing where and how

Disney might further develop the Walt Disney World Resort, there is no way to assess the injury to Disney over a thirty-year period caused by, for example, the District's potential refusal to construct the capital improvements listed in Exhibit 3 of the Development Agreement or refusal to otherwise expand the public infrastructure systems and facilities. Given the entirely speculative nature of Disney's damages, dismissal is warranted on Disney's breach of contract claim. *See Rader v. Allstate Ins. Co.*, 789 So. 2d 1045, 1047 (Fla. 4th DCA 2001) (affirming the dismissal of an action for breach of contract where the damages were too speculative based on an alleged anticipatory breach); *Hope v. Nat'l Airlines, Inc.*, 99 So. 2d 244, 246 (Fla. 3d DCA 1957) (affirming the dismissal because the "damages would be so speculative as to render them impossible of determination").

Counts III-IV: Specific Performance, Injunctive Relief

Unlike Count I, which seeks the legal remedy of damages, Counts III and IV seek equitable remedies for the District's anticipatory breach of the Agreements. The equitable remedy for breach of an affirmative contractual obligation is an order requiring specific performance, while the equitable remedy for breach of a negative contractual obligation is an injunction. *Melbourne Ocean Club Condo. Ass'n, Inc. v. Elledge*, 71 So. 3d 144, 146 (Fla. 5th DCA 2011).

A. Disney has failed to state a claim for specific performance.

First, Disney has failed to plead the affirmative obligation(s) for which it seeks specific performance by the District. Count III simply asks for a general order "directing and ordering the District to do all such acts as may be required under the terms of the Contracts . . . ." Countercl. at 44. Disney explains, "The District has a duty under the terms of the Contracts to do such further acts and assurances as shall be reasonably requested by Disney to carry out the

intent of the Contracts and give effect thereto." *Id*. ¶ 68. This vague level of generality, giving Disney discretion on what the District is obligated to do, is insufficient to support an order for specific performance. "In order for a court of equity to decree specific performance of a contract, the terms of the agreement must be clear, definite, certain and complete, for the equitable remedy of specific performance is granted only where the parties have actually entered into an agreement that is definite and certain in all of its essential elements." *The Bay Club, Inc. v. Brickell Bay Club, Inc.*, 293 So. 2d 137, 138 (Fla. 3d DCA 1974); *see also de Vaux v. Westwood Baptist Church*, 953 So. 2d 677, 682 (Fla. 1st DCA 2007) ("In order for a contract to be subject to specific performance, it must appear from the writing constituting the contract that the obligations of the parties with respect to [the] conditions of the contract and actions to be taken by the parties are clear, definite and certain." (quoting *Brown v. Dobry*, 311 So. 2d 159, 160 (Fla. 2d DCA 1975))). The fact that Disney cannot point to any particular contractual obligation the District owes, but has failed to perform, demonstrates that specific performance has not been properly pled.

Furthermore, Disney has failed to plead that it has performed or will perform its particular obligations under the Agreements. The Florida Supreme Court explained long ago that "equity will not enforce specific performance of a contract as against the defendant, unless the complainant has either already performed all that is to be done on his part, or has placed himself in a situation where he can be compelled specifically to perform his side of the contract sued on, all of which must be made to appear in complainant's bill of complaint." *Calumet Co. v. Oil City Corp.*, 154 So. 141, 143 (Fla. 1934). Because Disney has no obligation to perform – no development obligations, no financial obligations (beyond what is already legally required), and

no negative obligations (beyond what is already forbidden by law) – Disney is not entitled to enforce performance against the District.

Relatedly, there is a lack of mutuality of obligation under the Agreements to support a claim for specific performance. "In suits for specific performance of a contract there must be mutuality of obligation and remedy." *DiMauro v. Martin*, 359 So. 3d 3, 7 (Fla. 4th DCA 2023) (quoting *Con-Dev of Vero Beach, Inc. v. Casano*, 272 So. 2d 203, 206 (Fla. 4th DCA 1973)). "Mutuality of obligation means that both parties are bound or neither is bound. In other words there must be a valid consideration. Without a valid consideration, a contract cannot be enforced in law or in equity." *Hope v. Nat'l Airlines, Inc.*, 99 So. 2d 244, 247 (Fla. 3d DCA 1957) (quoting *Meadows v. Radio Industries, Inc.*, 222 F.2d 347, 348 (7th Cir. 1955)). As explained above, the Agreements are invalid due to a lack of consideration by Disney, therefore there is no mutuality of obligation to support a claim for specific performance.

Finally, justice does not require specific performance. "A decree of specific performance can be granted only when 1) the plaintiff is clearly entitled to it, 2) there is no adequate remedy at law, and 3) the judge believes that justice requires it." *Boardwalk at Daytona Dev., LLC v. Paspalakis*, 220 So. 3d 457, 461 (Fla. 5th DCA 2016) (quoting *Invego Auto Parts, Inc. v. Rodriguez*, 34 So. 3d 103, 104 (Fla. 3d DCA 2010)) (internal quotation marks omitted). No court could reasonably conclude that justice favors Disney's one-sided deal with its former puppet government. From their inception, the Agreements represent Disney's last-minute attempt to circumvent the Legislature's effort to add public accountability to the local government overseeing development of one of the most visited areas of Florida. Unhappy with such public accountability, Disney attempted to seize back control of all development authority through the Agreements without offering anything in return. This court should not reward

Disney's unprecedented attempt to flout the will of the Legislature by sustaining a claim for specific performance under any banner of "justice."

B. Disney's requested injunction is legally improper.

In Counts III and IV, respectively, Disney seeks "an order . . . permanently enjoining the District from taking any action to violate and breach the Contracts" and "an injunction requiring the District to comply with the terms of the Development Agreement." Countercl. ¶¶ 73, 80. But an injunction to comply generally with a contract is improper.

Rule 1.610(c) requires that "[e]very injunction . . . shall describe in reasonable detail the act or acts restrained without reference to a pleading or another document." Rule 1.610(c), Fla. R. Civ. P. Simply enjoining a party "from violating" certain agreements does not comply with Rule 1.610(c). *Dickerson v. Senior Home Care, Inc.*, 181 So. 3d 1228, 1229 (Fla. 5th DCA 2015). Although "there is no legal requirement or rule requiring the party seeking an injunction to include within the complaint the specific wording of the injunction requested," the complaint for injunctive relief must contain "every necessary fact" that "clearly, definitely, and unequivocally" supports the issuance of an injunction and "there must be something more than the conclusions and opinions of the plaintiffs.'" *Polk Cnty. v. Mitchell*, 931 So. 2d 922, 925 (Fla. 2d DCA 2006) (quoting *Cent. & S. Fla. Flood Control Dist. v. Scott*, 169 So. 2d 368 (Fla. 2d DCA 1964)). Disney has not clearly, definitely, and unequivocally alleged the necessary facts to restrain any particular "breach of a negative contractual obligation" within the Agreements through an injunction against the District. *Melbourne Ocean Club Condo. Ass'n, Inc.*, 71 So. 3d at 146. Based on the facts alleged, Disney has failed to state a claim for injunctive relief that would comply with Rule 1.610(c), which requires the Court to "describe in reasonable detail the act or acts restrained without reference to" the Agreements as a whole.

Count V: Breach of Duty of Good Faith and Fair Dealing

Next, Disney has failed to allege the necessary elements to support a claim for breach of the duty of good faith and fair dealing. The duty of good faith and fair dealing arises where an agreement affords one party substantial discretion over the means of performance. *Cox v. CSX Intermodal, Inc.*, 732 So. 2d 1092, 1097-98 (Fla. 1st DCA 1999). "[U]nder an agreement that appears by word or silence to invest one party with a degree of discretion in performance sufficient to deprive another party of a substantial proportion of the agreement's value, the parties' intent to be bound by an enforceable contract raises an implied obligation of good faith to observe reasonable limits in exercising that discretion, consistent with the parties' purpose or purposes in contracting." *Id*. (quoting *Centronics v. Genicom Corp.*, 562 A.2d 187, 193 (N.H. 1989)). "Thus, where the terms of the contract afford a party substantial discretion to promote that party's self-interest, the duty to act in good faith nevertheless limits that party's ability to act capriciously to contravene the reasonable contractual expectations of the other party. *Id*. Disney has simply not alleged how the District has breached its substantial discretion in a way that contravened the reasonable contractual expectations of Disney.

Relatedly, "[t]here can be no cause of action for a breach of the implied covenant [of good faith and fair dealing] absent an allegation that an express term of the contract has been breached." *Progressive Am. Ins. Co. v. Rural/Metro Corp. of Fla.*, 994 So. 2d 1202, 1207 (Fla. 5th DCA 2008) (quoting *Snow v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 896 So. 2d 787, 791–92 (Fla. 2d DCA 2005)). In other words, Disney has to point to the particular contractual provision which gives the District discretion and then allege that the District breached that particular provision. Nowhere in the Counterclaim has Disney alleged that the District breached an express term of the Agreements.

The District's alleged actions simply cannot support a violation of the implied duty of good faith and fair dealing. Expressing an opinion that the Agreements are *void ab initio* and seeking a declaratory judgment toward that conclusion does not breach any implied duty of good faith and fair dealing. Otherwise, every declaratory judgment action over the validity of a contract would give rise to this counterclaim. Accordingly, Count V should be dismissed.

Count VI: Florida Constitution Contracts Clause Violation

A. The District's Legislative Declaration does not impair Disney's contract rights.

All of Disney's constitutional counterclaims (Counts VI-IX) take aim at the District's Legislative Declaration as an unconstitutional action by the District. *See* Countercl. ¶¶ 38-39, 93, 101, 106, 108, 113-14. But Disney erroneously attributes legal significance to the Legislative Declaration which it does not have.

The Legislative Declaration merely announced the Board's opinion that the Development Agreement and Restrictive Covenants are void under existing law.[4] The Board's findings did not purport to change the law in any way – the Agreements are either void or they are not under Florida law, wholly apart from the Legislative Declaration. At most, the findings would constitute a simple breach of the Agreements, and an anticipatory one at that, i.e., a "repudiat[ion]" of "a duty" to perform before "a breach by non-performance." *Hosp. Mortg. Grp. v. First Prudential Dev. Corp.*, 411 So. 2d 181, 182 (Fla. 1982) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 253 (1979)). When a government merely breaches a contract, it does not use government power in the way that the Contracts Clause seeks to restrain.

[4] *See* Legislative Findings of the Central Florida Tourism Oversight District Board of Supervisors Relating to the February 8, 2023, Development Agreement and Declaration of Restrictive Covenants, available at https://www.rcid.org/wp-content/uploads/2023/05/Legistative-Findings-executed.pdf (the "Legislative Declaration").

The Contracts Clause in the Florida Constitution only prohibits a "law impairing the obligation of contracts." Art. I, § 10, Fla. Const. The Legislative Declaration is not a law; it is merely an opinion that the Agreements are invalid or illegal. If this Court holds, contrary to the Legislative Declaration, that the Agreements are valid, those Agreements will continue in effect (putting aside SB 1604 for the sake of this argument). Moreover, the District filed this declaratory judgment action to confirm its opinion that the Agreements are invalid or illegal.

B. The Contracts Clause does not protect a government contract that surrenders an essential attribute of the government's sovereignty.

The government cannot "bargain away" its sovereign power to a private entity. *U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 23 (1977). As a result, the Contracts Clause does not protect a government contract "that surrenders an essential attribute of [the government's] sovereignty." *Id.*; *see also United States v. Winstar Corp.*, 518 U.S. 839, 888 (1996); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241 (1978).[5]

As detailed in the Board's Legislative Declaration, the Development Agreement and Restrictive Covenants "bargain away" the Board's sovereign authority to Disney in multiple ways. The Development Agreement provides that if, at the time of agreement, "there is any conflict between the Agreement and the Comprehensive Plan or [the District's Land Development Regulations,] this Agreement shall prevail." Compl. Ex. 1 at 7. This elevates a contractual agreement above the District's binding legislative acts, turning on its head the State-law requirement that any development agreement be "*consistent* with the local government's

[5] "The test of whether there has been an unconstitutional impairment of contract, in violation of the Florida Constitution, art. 1, s. 10 or of the Constitution of the United States, art. 1, s. 10, cl. 1, is essentially the same." *Yellow Cab Co. of Dade Cnty. v. Dade Cnty.*, 412 So. 2d 395, 396 (Fla. 3d DCA 1982). Furthermore, under Florida law, a local government cannot contract away the exercise of its police powers. *Hartnett v. Austin*, 93 So. 2d 86, 89 (Fla. 1956).

comprehensive plan and land development regulations." § 163.3227(1)(g), Fla. Stat. (emphasis added). This Agreement also gives Disney control over all development rights and entitlements in the District—functions that the Florida Legislature first gave to the Board when establishing the District in 1967 and reaffirmed in the Board with HB 9B—and enables Disney to obligate the District to finance and construct facilities in aid of Disney's growth. *See* Compl. Ex. 1.

The Development Agreement eliminates the District's authority to periodically reassess its planned projects. Instead, it requires the District to "fund[], design[] and construct[]" public facilities to accommodate Disney's future growth, and it further requires the District to commit future ad valorem tax revenues to do so. Compl. Ex. 1 at 3, § II(C). And it does so contrary to Florida law mandating the periodic reassessment by local governments of their planned projects. For example, section 163.3177(3)(b), Florida Statutes, requires the District to review the capital improvements element of its comprehensive plan "on an annual basis," and authorizes the District to update the 5-year capital improvement schedule by way of ordinance, rather than by amendment to the comprehensive plan itself. The Development Agreement's decades-long lock-in of the District's capital improvement schedule and use of future ad valorem tax revenue violates this statutory review and updating schedule.

Meanwhile, the Restrictive Covenants cede land-use authority over the District's own property by (1) limiting the District to those uses of its property existing on the date of the agreement, (2) enabling Disney to censor the District by banning the District from speaking on its own property about anything other than the District, and (3) prohibiting the District from altering its property absent Disney's review. *See* Compl. Ex. 2 at 3–4.

The Contracts Clause does not protect such agreements.

C. Disney's challenge to SB 1604 fails with the ineffectiveness of the Agreements.

As this Court has already ruled, SB 1604 "applies to the Agreements only if they were 'in effect on' May 5, 2023." *See* Order, July 28, 2023, at 7 (quoting Ch. 2023-31, Laws of Fla. § 5). "Put differently, if the Agreements were void and thus *never effective* as the District asserts, Disney's argument regarding SB 1604 is irrelevant." *Id*. Accordingly, Disney's counterclaims against SB 1604 fail if the underlying Agreements are invalid for the reasons above.

Even if the Agreements were valid, and SB 1604 applied to preclude the District's compliance with them, Disney's Contract Clause counterclaim still fails.

"[T]he first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Pomponio v. Claridge of Pompano Condo., Inc.*, 378 So. 2d 774, 779 (Fla. 1979) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-45 (1978)). When the Development Agreement was entered, the Florida Local Government Development Agreement Act expressly provided, "[i]f state or federal laws are enacted after the execution of a development agreement which are applicable to and preclude the parties' compliance with the terms of a development agreement, such agreement shall be modified or revoked as is necessary to comply with the relevant state or federal laws." § 163.3241, Fla. Stat. Against this backdrop, Disney could not reasonably have expected that the Development Agreement and Restrictive Covenants would be exempt from the effect of State law throughout the 30-year term of the Development Agreement. Where "parties are operating in a heavily regulated" field, and where "the contracts expressly recognize the existence of extensive regulation" by citing it, the operation of that regulation cannot constitute a substantial impairment. *Energy Rsrvs. Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 413, 416 (1983); *accord S&M Brands, Inc. v. Georgia ex rel. Carr*, 925 F.3d 1198, 1203 (11th Cir. 2019).

Second, even a substantial impairment "may be constitutional if it is reasonable and necessary to serve an important public purpose." *Scott v. Williams*, 107 So. 3d 379, 385 (Fla. 2013) (quoting *U.S. Tr. Co. of N.Y.*, 431 U.S. at 25-26). Disney's Contracts Clause counterclaim against SB 1604 fails because of the important public purpose supporting SB 1604. The Florida Legislature passed a law (HB 9B) intended to ensure public control over the District. Disney's purported Agreements with the District attempt to subvert that intent by sapping away authority the Legislature vested in the new Board. Ensuring that the State's policies are not subverted by such last-minute maneuvers, and that government authority remains with the government, is an intrinsically important public purpose. And that is the effect of SB 1604. SB 1604 is a law of general applicability that will prevent other special districts from attempting such maneuvers in the future. This important purpose necessarily defeats Disney's Contracts Clause counterclaim.

Count VII: Florida Constitution Takings Clause Violation

Next, Disney's Takings Clause counterclaim fails for similar reasons. While *valid* contracts can sometimes qualify as property for purposes of the Takings Clause, the Agreements are not, and never were, valid contracts under Florida law, as already described above. And Disney cannot have a property interest in a void contract. *See, e.g.*, *United States v. Willow River Power Co*., 324 U.S. 499, 502 (1945); *Parella v. Ret. Bd. of R.I. Emps.' Ret. Sys.*, 173 F.3d 46, 58 (1st Cir. 1999); *ProEco, Inc. v. Bd. of Comm'rs of Jay Cnty.,* 57 F.3d 505, 510–11 (7th Cir. 1995).[6]

[6] "The Takings Clause of the Fifth Amendment of the United States Constitution is interpreted by Florida courts to operate coextensively with article X, section 6(a) of the Florida Constitution." *Orlando Bar Grp., LLC v. DeSantis*, 339 So. 3d 487, 490-91 n.2 (Fla. 5th DCA 2022).

Even if the Development Agreement were a valid contract such that Disney could have a property interest in it, that property interest was necessarily limited by subsequent enactments of state law. Again, the Florida Local Government Development Agreement Act specifically provides that "[i]f state . . . laws are enacted after the execution of a development agreement which are applicable to and preclude the parties' compliance with the terms of a development agreement, such agreement shall be modified or revoked as is necessary to comply with the relevant state . . . laws." § 163.3241, Fla. Stat. This is a key feature of the Florida Local Government Development Agreement Act.

Disney entered the Development Agreement against the backdrop and by the authority of the Development Agreement Act. Compl. Ex. 1 at 3. SB 1604 is precisely the type of law contemplated by Section 163.3241, which responds to a newly appreciated risk posed by development agreements: the risk that a locality and private entity will use a development agreement to attempt to thwart the Legislature's determination to change the governing structure of the locality. SB 1604 therefore provides that localities are "precluded from complying with the terms of any development agreement, or any other agreement for which the development agreement serves in whole or in part as consideration," in circumstances where this risk is elevated. § 189.031(7), Fla. Stat.

Therefore, whatever property interest Disney could possibly have in the Development Agreement contains the inherent limitation that a subsequently enacted state law could preclude compliance with the Development Agreement and result in its revocation. SB 1604 thus cannot have effected a taking of any property interest Disney could have in the Development Agreement, even if it were a valid contract. *See Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2079 (2021) (no taking occurs when the State acts "consistent with longstanding background

restrictions on property rights"). And without any valid property interest in the Development Agreement, any claim to a property interest in the Restrictive Covenants evaporates, as well.

Even if Section 163.3241 does not eliminate any property interest Disney could have claimed in the Development Agreement and Restrictive Covenants altogether, it at a minimum negates any reasonable investment-backed expectations Disney could claim to have in the continued validity of the Agreements for the life of their stated terms. And that alone defeats any regulatory takings claim Disney asserts with respect to the Agreements, because "the extent to which the regulation has interfered with distinct investment-backed expectations" is of "particular significance" in regulatory taking analysis. *See Pa. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

Furthermore, because Disney seeks declaratory and injunctive relief based on this counterclaim, *see* Countercl. at 50, it should be dismissed. No equitable relief is available in a Takings Clause challenge. *See Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2176 (2019) ("[B]ecause the federal and nearly all state governments provide just compensation remedies to property owners who have suffered a taking, equitable relief is generally unavailable.").

Count VIII: Florida Constitution Due Process Clause Violation

A. The District's Legislative Declaration and SB 1604 satisfy rational basis scrutiny.

Disney's next counterclaim asserts that the District's Legislative Declaration and SB 1604 violate the Due Process Clause of the Florida Constitution because they "abrogate the Contracts without any rational basis and for only impermissible reasons . . . ." Countercl. ¶ 106.

The Legislative Declaration states a rational basis on its face. It describes the procedural and substantive problems with the Development Agreement and Restrictive Covenants and concludes based on reasoned support that those agreements are unenforceable as a matter of state law. The Board sought and received the advice of outside counsel in evaluating the legality of

the Development Agreement and Restrictive Covenants and in drafting the legislative declaration in accordance with applicable state law. *See* Legislative Decl. at 1. While Disney may disagree with that analysis, it cannot claim that it is *irrational*.

With respect to SB 1604, because it "does not create a suspect class or infringe upon a fundamental right," Disney's substantive due process claim fails if SB 1604 "bears a rational basis to a legitimate government purpose." *KOS 11838, LLC v. City of Panama City Beach*, 326 So. 3d 1173, 1177 (Fla. 1st DCA 2021) (quoting *Silvio Membreno & Fla. Ass'n of Vendors, Inc. v. City of Hialeah*, 188 So. 3d 13, 19 (Fla. 3d DCA 2016)).[7] SB 1604 most certainly bears a rational basis to a legitimate government purpose. As described above, there is an important government interest in protecting against the actions of an outgoing, lame duck board that might improperly bind, contrary to the intent of the Legislature, an incoming, new board of a special district.

Furthermore, for the reasons already stated, *supra* 5-7, the Development Agreement and Restrictive Covenants are void, and Disney cannot have a substantive due process claim to preserve void contracts.

B. SB 1604 is not an arbitrary or unreasonable restraint on the freedom of contract.

Disney also alleges that SB 1604 is an arbitrary or unreasonable restraint on the freedom of contract, because it was "enacted to further an official State campaign of retaliation against Disney for expressing a viewpoint that Governor DeSantis and his legislative allies disagree with." Countercl. ¶ 108. But none of Disney's factual allegations support Disney's conclusion about the purpose of SB 1604 being a campaign of retaliation against Disney's protected *speech*. Rather, Disney's factual allegations expressly tie the purpose of SB 1604 to Disney's *actions* in

[7] The test is the same under the Fourteenth Amendment to the federal Constitution. *KOS 11838, LLC*, 326 So. 3d at 1177.

executing "the agreements" that attempted to frustrate the Legislature's intent for the District. Countercl. ¶ 32. Disney repeatedly acknowledges that SB 1604 targets the Agreements, even quoting from House members who "explicitly tied Senate Bill 1604 to the Contracts." *Id*. ¶¶ 40-44. Thus, Disney's own allegations support the non-arbitrary rationale that a lame duck government board should not be permitted to bind an incoming, new board to defeat the Legislature's purposes. And because the provisions of SB 1604 employ means that have a "real and substantial relationship to the avowed or ostensible purpose," it is not an arbitrary or unreasonable restraint on the freedom of contract in violation of the Due Process Clause. *The Fla. Bar*, 349 So. 2d 630, 634 (Fla. 1977).

Count IX: Florida Constitution Free Speech Clause Violation

Finally, Disney alleges that the Legislative Declaration and SB 1604 are measures of unconstitutional retaliation against Disney for its protected speech, in violation of the Free Speech Clause of the Florida Constitution, article 1, section 4. Countercl. ¶¶ 110-16. Disney also recognizes that "[t]he scope of the protection accorded to freedom of expression in Florida under article I, section 4 is the same as is required under the First Amendment." Countercl. ¶ 113 (quoting *Dep't of Educ. v. Lewis*, 416 So. 2d 455, 461 (Fla. 1982)). For the following reasons, Disney's counterclaim should be dismissed under federal and state principles of free speech.

A. Disney's Agreements are not protected speech, but the District's Legislative Declaration is.

Disney contends that the District and Legislature were motivated by an "express retaliatory and punitive intent," Countercl. ¶ 113, but according to Disney's allegations, the target of this retaliatory intent was the Agreements themselves. *Id*. ¶¶ 114-15.

The Agreements do not constitute protected activity under the Free Speech Clause. They are documents reflecting two parties' obligations and commitments between them – that is, a memorialization of future conduct. In determining whether conduct is expressive, a court asks "whether the reasonable person would interpret it as *some* sort of message, not whether an observer would necessarily infer a *specific* message." *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 6 F.4th 1247, 1254 (11th Cir. 2021) (quoting *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1240 (11th Cir. 2018)). Nothing in the Agreements, or in Disney's conduct in executing the Agreements, could be interpreted by a reasonable person as some sort of expressive conduct by Disney. Nor has Disney alleged that the Agreements are expressive conduct or protected free speech.

Ironically, through its Free Speech counterclaim, Disney seeks to declare unconstitutional the District's Legislative Declaration, which is unmistakably protected speech. The Declaration itself did not *do* anything other than state the Board's opinion that, under principles of Florida law, the contracts were void *ab initio*. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009) ("A government entity has the right to speak for itself" and to "select the views that it wants to express" (cleaned up)). Because the Legislative Declaration was a form of speech by elected officials, it does not "qualify as a materially adverse action" to support Disney's retaliation counterclaim. *Houston Cmty. Coll. Sys. v. Wilson*, 142 S. Ct. 1253, 1261 (2022).

B. Disney has failed to plausibly allege a causal relationship to its protected speech.

The only protected speech Disney alleges are its "public statements on House Bill 1557." Countercl. ¶ 112. But Disney's allegations make clear that this protected speech occurred in March 2022. *Id*. ¶¶ 7-10. It was not until April and May of 2023 – more than one year later – that the District and the Legislature adopted the Legislative Declaration and SB 1604,

respectively. *Id*. ¶¶ 37-45. This stretch of time prevents any inference of causation between Disney's protected activity and the alleged retaliation; therefore, Disney's counterclaim should be dismissed.

"If there is a substantial delay between the protected expression and the adverse action in the absence of other evidence tending to show causation, the complaint of retaliation fails as a matter of law." *Higdon v. Jackson*, 393 F.3d 1211, 1220 (11th Cir. 2004). More than twelve months between Disney's speech and the alleged retaliation is a substantial delay and cannot support an inference of causation. *See Mitchell v. Young*, 309 So. 3d 280, 286 (Fla. 1st DCA 2020) (citing *DeBose v. USF Bd. of Trustees*, 811 F. App'x 547, 557 (11th Cir. 2020)) (holding that causation cannot be inferred by temporal proximity when the adverse action occurred more than three or four months after the protected activity).

Disney has alleged no other facts tending to show causation between its public speech in March 2022 and the actions of the District and the Legislature in April 2023 and May 2023, respectively. Disney's conspiracy theory about a "climate of escalating retaliation against Disney by the Florida government," *see* Countercl. ¶ 15, is not supported by any alleged facts incorporated into Count IX that could tie the District's or Legislature's actions to Disney's speech more than a year prior. This Court need not accept Disney's bald conclusion that the District and the Legislature had an "express retaliatory and punitive intent . . . at the Governor's directive," *id*. ¶ 113, particularly when the express allegations of the Counterclaim show that the District and the Legislature targeted the Agreements and only the Agreements, which have no direct, proximate, or plausible connection to Disney's public statements about HB 1557. Accordingly, Count IX should be dismissed due to Disney's failure to allege facts that

demonstrate that the Legislative Declaration and SB 1604 were enacted in retaliation for Disney's protected free speech.

C. Legislative motives cannot support a Free Speech retaliation claim.

Finally, Disney's Free Speech counterclaim depends entirely on the purported motive behind Senate Bill 1604 and the Legislative Declaration rather than anything on the face of those measures themselves. *See* Countercl. ¶¶ 113, 115. Under the Eleventh Circuit's decision in *In re Hubbard*, 803 F.3d 1298 (11th Cir. 2015), this fact dooms Disney's retaliation claim.

Hubbard involved a retaliation claim closely analogous to this case. There, a public-sector union, the Alabama Education Association (AEA), argued that an Alabama statute "violate[d] the First Amendment rights of AEA and its members because the subjective motivations of the lawmakers in passing the Act were to retaliate against AEA for its political speech on education policy." *Hubbard*, 803 F.3d at 1301. Specifically, the union said the legislation "was an act of political retribution against AEA for its past opposition to education policy proposals by [then-]Governor Riley and other Alabama Republicans." *Id.* at 1304. The Court held that "the First Amendment does not support the kind of claim AEA makes here: a challenge to an otherwise constitutional statute based on the subjective motivations of the lawmakers who passed it." *Id.* at 1312. The Court grounded its analysis in the Supreme Court's decision in *United States v. O'Brien*, 391 U.S. 367 (1968), which "held that, as a 'principle of constitutional law,' courts cannot 'strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.'" *Id.* (quoting *O'Brien*, 391 U.S. at 383). The Eleventh Circuit's "precedent applying *O'Brien*," the Court explained, "recognizes that, when a statute is facially constitutional, a plaintiff cannot bring a free-speech challenge by claiming that the lawmakers who passed it acted with a constitutionally impermissible purpose." *Id.* The

Eleventh Circuit has recently reaffirmed the principle of *Hubbard*. *See NetChoice, LLC v. Moody*, 34 F.4th 1196, 1224 (11th Cir. 2022).

Hubbard controls here. Senate Bill 1604 and the Legislative Declaration do not even regulate private speech at all—let alone protected speech. And Disney does not attempt to suggest otherwise. Therefore, the "only basis for [Disney's] retaliation claim is the alleged retaliatory motive that [Florida's] lawmakers had when passing" these provisions, which "is precisely the challenge that *O'Brien*," and the Eleventh Circuit's "decisions following it, foreclose." *Hubbard*, 803 F.3d at 1313.

In sum, Disney's Free Speech challenge to Senate Bill 1604 and the Legislative Declaration runs headlong into *Hubbard*. Because Disney's challenge to these provisions rests *exclusively* on the alleged illicit motives of the lawmakers who enacted them, Disney's retaliation counterclaim fails. On this basis alone, the Court should dismiss Count IX.

V. CONCLUSION

For the reasons above, Disney has failed to state a claim for relief, and the Court should grant this motion and dismiss Disney's Counterclaim in its entirety.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was electronically filed with the Clerk of the Court on September 6, 2023, by using the Florida Courts eFiling Portal, which will provide electronic notification to all counsel of record in this action as set forth herein:

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