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6 *Attorneys for Plaintiffs*

7
8 IN THE SUPERIOR COURT OF ARIZONA
9 COUNTY OF MARICOPA

10 BOLTON and FLORENCE ANDERSON;
10 SHARON ATWOOD; MICHAEL BAKER;
11 DAVID and DAWNNA BARNES; JEAN
11 BATTISTA; VIRGINIA BAUGHMAN;
12 EDWARD BERGER; OLGA CARLSON;
12 LAVINA DAWSON; CATHERINE FULLER;
13 KENNETH GEGG; MARY GRANSDEN;
13 JOANNE GREATHOUSE; REGINA HECK;
14 RAY and LINDA HICKS; SHERRY
14 JOHNSON-TRAVER, as Trustee of the Sherry
Sue Johnson-Traver Trust; SHIRLEY KOERS;
15 SUSAN MARSH; GEORGE and SHERYL
15 MCCLAIN; ELIZABETH MERCER, as
16 Trustee of the Elizabeth Scott Mercer Trust;
16 ARLEF MOYER; JAMES NAPIER; ARTHUR
17 NEAULT, as Trustee of the Arthur D. Neault
Living Trust; DIANE PATRAKIS; PETUNIA
18 LLC; CAROLE POPEROWITZ; PAUL and
18 GLORIA RICHMAN; DONNA SIES; GAY
19 SOUSEK; ANNE RANDALL STEWART, as
Trustee of the Stewart Trust; THERESE
20 TERRIS; WENDY and CHARLES WOOD;
21 and ANGELO ZAPPELLA, individually and
on behalf of the similarly situated,

22 Plaintiffs,

23 vs.

24 RECREATION CENTERS OF SUN CITY,
25 INC., a nonprofit corporation,

26 Defendant.

No. CV2015-012458

**PLAINTIFFS’ MOTION FOR PARTIAL
SUMMARY JUDGMENT REGARDING
APPLICABILITY OF THE PLANNED
COMMUNITY ACT**

Oral Argument Requested

(Assigned to the Honorable Roger Brodman)

1 RECREATION CENTERS OF SUN CITY,
2 INC., a nonprofit corporation,
3
4 Third-Party Plaintiff,
5
6 vs.
7 LINDA MOYER and RICHARD STEWART,
8
9 Third-Party Defendants.

7 **Introduction**

8 Plaintiffs move for partial summary judgment on their claim that Defendant Recreation
9 Centers of Sun City, Inc. (“RCSC”) is subject to the Arizona Planned Community Act, A.R.S.
10 § 33-1801, *et seq.* (the “Act”). RCSC effectively concedes, in this litigation, in public records,
11 and its own governing documents that the Act applies. Sun City is a planned community and
12 RCSC is an association that imposes mandatory assessments on Sun City owners to defray the
13 costs and expenses it incurs owning and operating recreational facilities in Sun City for their
14 benefit. The only difference between RCSC and the thousands of garden-variety homeowners’
15 associations throughout Arizona is that RCSC does not have the words “homeowners’
16 association” in its corporate name. Accordingly, Plaintiffs are entitled to a declaratory judgment
17 as a matter of law that RCSC is subject to the Act and that the owners are entitled to the
18 protections the Act affords.

19 **Historical Overview¹**

20 In 1959, Del E. Webb Development Co. (“Del Webb”) began construction of Sun City, a
21 9,000-acre planned community that today has more than 40,000 homes. [¶2]² Del Webb initially
22 created Sun City Civic Association (“SCCA”) in 1961 and Sun City Town Hall Center
23

24 ¹ Plaintiffs refer the Court to their Statement of Facts, which contains a comprehensive
25 factual background, and hereby incorporates the same by reference as if set forth herein.
26 Plaintiffs have summarized their Statement of Facts herein for the Court’s convenience.

² All ¶ references herein refer specifically to Plaintiffs’ Statement of Facts being filed
contemporaneously herewith.

1 (“SCTHC”) in 1963 to own and operate separate recreational facilities in Sun City. [¶83-85]
2 SCTHC operated recreational facilities in six Sun City subdivisions (Units 2-6) and SCCA
3 operated facilities in two Sun City subdivisions (Sun City Unit 1 and New Life). [¶72-75]
4 SCTHC and SCCA merged into the Sun City Community Association (the “Community
5 Association”) in 1968. [¶64] The Community Association later changed its name to RCSC in
6 1972. [¶105]

7 RCSC owns and operates all recreational facilities in Sun City. [¶8-10, 12] It pays the
8 costs and expenses of managing, maintaining, and improving the recreational facilities through
9 mandatory assessments imposed on the owners of Sun City properties. [¶14] Owners are
10 responsible for paying assessments irrespective of whether they use (or are even allowed to use)
11 the facilities. [¶11] Although all owners must pay assessments, RCSC unilaterally decides
12 whether an owner qualifies under its Bylaws as a “Member” – *i.e.*, someone who is entitled to a
13 Membership Card granting them the right to use RCSC facilities and the right to vote in RCSC
14 elections. [¶57]

15 The obligation to pay assessments is expressly set forth in the Facilities Agreements that
16 RCSC and its predecessors (including Del Webb itself) have required owners to sign as a
17 condition of purchasing property in Sun City. [¶24] RCSC’s Bylaws provide:

18 Each and every Deeded Real Estate Owners (“Owners(s)”) of property located in
19 the area entitled “Sun City General Plan, Maricopa County, Arizona,” as prepared
20 by the Del E. Webb Development Company and dated July 1972, November
21 1974, August 1975, and September 1978 with subsequent amendments thereto
shall join in a Facilities Agreement. Each Owner shall be responsible for the
payment of assessments and fees.

22 Owners must execute a Facilities Agreement in the form required by the
23 Corporation, obligating property Owners to pay property assessments when due.
The Facilities Agreement shall obligate Owners to pay assessments whether or not
Owners occupy the property or use RCSC facilities.

24 [¶11]

25

26

1 that it can avoid these important protections given to Sun City elderly resident. However, it is
2 clear that both squarely fit the definitions under the Act.

3 **II. SUN CITY IS A “PLANNED COMMUNITY.”**

4 A.R.S. §33-1802(4) defines a “planned community” as:

5 **A real estate development that includes real estate owned and operated by...a**
6 **nonprofit corporation...that is created for the purpose of managing,**
7 **maintaining or improving the property and in which the owners of separately**
8 **owned lots, parcels or units are mandatory members and are required to pay**
9 **assessments to the association for these purposes.**

10 We address each of these bolded elements in turn.⁵

11 **A. Sun City is a “Real Estate Development.”**

12 Del Webb created Sun City as a planned community. Its Development Master Plan
13 identified physical boundaries, a “general plan,” and maps. [¶3] “Sun City will ultimately
14 extend from Olive Avenue on the south, seven miles north to Beardsley Road. Sun City lies
15 between the Agua Fria River and New River and is about two miles wide from east to west.”
16 [¶3]

17 RCSC, then known as the Community Association entered into a Master Agreement with
18 Del Webb (the “Master Agreement”) that included a map of the “Sun City General Plan.” [¶3]
19 RCSC also regularly states that Sun City is a “planned community.” New owners who fail to
20 sign Facilities Agreements at closing, for example, receive a letter informing them that:

21 Sun City is an unincorporated part of Maricopa County, therefore not a city. It is a
22 planned community and all Sun City properties must comply with the Declaration
23 of Covenants, Conditions and Restrictions (“CCRs” available at
24 www.suncityhoa.org). These deed restrictions are recorded against each Sun City
25 property (lot) and are enforced by the Sun City Homeowners Association
26 (SCHOA). Execution of a Facilities Agreement in favor of the Recreation Centers
of Sun City, Inc. (RCSC) and payment of the annual homeowner fees is required
by each lot pursuant to the CC&Rs. We have enclosed a Facilities Agreement for

⁵ It should also be noted that the Arizona legislature included the introductory qualifying language, “unless the context otherwise requires” to express its intent that courts not value form over substance and not apply the statute “mechanistically and rigidly.” See *State v. Heylman*, 147 Ariz. 97, 99, 708 P.2d 778, 780 (App. 1985).

1 each Deeded Owner's signature to be returned to RCSC at your earliest
2 convenience.

3 [¶36] Clearly, Sun City is a real estate development with formal boundaries.

4 **B. Sun City “Includes Real Estate Owned and Operated by a Nonprofit
5 Corporation.”**

6 RCSC's business, according to its Articles of Incorporation and amendments thereto, is:

7 [T]o purchase, acquire, develop, sell, lease, *own, operate and manage* theaters,
8 playhouse, agricultural projects, riding stables, and corrals, libraries, opera houses,
9 golf courses, baseball and football games, tennis courts, dancing facilities, lawn
10 bowling rinks, horseshoe pits, croquet courts, travel clubs, card games,
shuffleboard, swimming pools, skating rinks, lecture and conference rooms, and
facilities and equipment for such arts and crafts as ceramic work, sewing,
woodworking, leathercraft, lapidary, photography, fine arts, jewelry, shellcraft,
mosaics, etc., *and any and all facilities necessary* or incidental to accomplish the
general purpose of the corporation.

11 [¶95] The Master Agreement identifies some of RCSC's real estate holdings. [¶98-99] RCSC
12 received warranty deeds from Del Webb for other real estate. [¶8]

13 **C. RCSC Was “Created for the Purpose of Managing, Maintaining or
14 Improving the Property.”**

15 The excerpt quote from RCSC's Articles of Incorporation establish this element. RCSC
16 consistently states that it was created for this purpose. In an Offering Statement filed with New
17 York in 1972 (the “Offering Statement”), for example, RCSC stated that its “primary function”
18 was “the operation and maintenance of the recreational facilities under its ownership.” [¶115]

19 **D. “The Owners of Separately-Owned Lots Are Mandatory Members” of RCSC.**

20 RCSC denies that Sun City is a planned community largely, if not solely, on the basis
21 that it denies having “mandatory members.” RCSC admits that it has “members” but denies they
22 are “mandatory” members because its Bylaws allow RCSC – not the members - to unilaterally
23 decide who is a “Member” entitled to receive a “Membership” card and the right to vote.

24 The fact is that owners do not get to decide whether they are or are not members. RCSC
25 makes that determination for them.⁶ Those who meet RCSC's changing definition of a

26 ⁶ Presently, a “Member” is a “Deeded Real Estate Owner” who is “55 years of age or
older and occup[ies] the Sun City property as his/her primary residence unless his/her other

1 “Member” automatically get to vote and use the facilities. [¶55] In other words, membership is
2 not voluntary. Owners who qualify as “Members” are clearly mandatory members.

3 The lack of voluntariness on an owner’s part to decide whether he or she is a “Member”
4 demonstrates they are “mandatory members.” A mandatory, or involuntary, member is not a
5 “voluntary” one.⁷ In *Shamrock*, the Court of Appeals held that an association’s Bylaws were
6 immaterial in determining whether there were mandatory members and that this determination
7 turned on deed restrictions and declarations.⁸ In fact, Arizona courts have recognized that
8 owners are “mandatory members” based solely on ownership in a planned community.⁹ The
9 existence of recorded documents and Facilities Agreements requiring owners to pay assessments
10 and otherwise abide by RCSC’s governing documents and rules, as discussed in Section III,
11 establishes they are mandatory members even if they are not deemed to be official “Members”
12 entitled to a Membership card based on whatever criteria RCSC might be using at the time to
13 decide whether an owner is also a “Member.”¹⁰

14 Significantly, Del Webb conveyed several properties via warranty deeds to developers
15 expressly requiring membership in RCSC. Two such Warranty Deeds dated March 19, 1982
16 expressly provided that occupants “shall be members of Recreation Centers of Sun City, Inc.

17
18
19 Arizona residence is farther than seventy-five (75) miles from Sun City in which the Owner(s)
must provide proof that he/she occupies the Sun City residence as well.” [¶57]

20 ⁷ *Shamrock v. Wagon Wheel Park Homeowners Ass’n*, 206 Ariz. 42, 43, 75 P.3d 32, 33
21 App. 2003).

22 ⁸ *Id.*

23 ⁹ See *Comanche Heights Homeowners Ass’n v. Pollard*, 2016 WL 1592759 at ¶ 2 (April
24 21, 2016) (“owners are ‘mandatory members’ of a planned community” based on home
ownership within a planned community); *Ahwatukee Board of Management, Inc. v. Feng Qin*,
2015 WL 6088168, ¶ 2 (October 15, 2015) (“By owning a home in the community, Qin is a
member of ABM”). A copy of each is attached as Exhibits A and B, respectively.

25 ¹⁰ The only difference between an RCSC “Member” and an owner, according to RCSC,
26 is that the former receives a Membership card and has the right to vote. [¶21] Members and non-
Members, alike, are required to pay all assessments and other charges. [¶55]

1 and shall comply with all Articles, Bylaws, and regulations of such organization.” [¶19] A third
2 Warranty Deed, dated December 30, 1981, provided:

3 All purchasers of any parcel or parcels of such property, which will be used for
4 residential purposes, shall be required to execute a Sun City Recreation Facilities
5 Agreement and agree to be members of and abide by the rules and regulations of
6 Recreation Centers of Sun City, Inc. This express condition and covenant is
7 hereby declared to run with and bind the land conveyed.¹¹

8 [¶52]

9 In fact, Del Webb’s original Facilities Agreements provided that:

10 [Del Webb] will convey, at no cost to me, the entire community facilities to a non-
11 profit corporation formed by [Del Webb] for the benefit of the home owners. I
12 realize that while this transfer will be free to me as a homeowner, subsequently the
13 operation and maintenance of the community facilities will be an expense of the
14 non-profit corporation *whose members will be the home owners*.

15 [¶ (emphasis added)] SCTHC’s (RCSC’s predecessor) Facilities Agreement, likewise, stated
16 that its “members are the homeowners and for whose benefit the said facilities are operated and
17 maintained.” [¶] Subsequent fee agreements until roughly 1972 state that RCSC and its
18 predecessor was “a non-profit corporation of the homeowners.” [¶]

19 RCSC’s Offering Statement further confirms that:

20 Upon the purchase of a home in Sun City, a purchaser signs the Community
21 Facilities Agreement, a copy of which is set forth in Exhibit A. Upon the payment
22 of the annual membership assessment, *the purchaser becomes a member in good
23 standing of Recreational Centers of Sun City, Inc.*, and, as such, is entitled to all of
24 the privileges of Association membership, including the use and enjoyment of all
25 of the various recreational facilities in accordance with the Rules and Regulations
26 of the Association.

[¶77 (emphasis added)]

The Act does not define the term, “member,” for purposes of A.R.S. § 33-1802(4).¹²
Given the Act’s stated purpose of applying to “all planned communities” in the State of Arizona,
it is clear that planned communities and associations cannot skirt the Act by retaining a right to

¹¹ Notably, these deeds highlight the fact that Sun City was the archetypal planned
community, referencing the “scheme of development of Sun City.” [¶¶52-53]

¹² The term “member” is defined in A.R.S. § 33-1806(G) as “the seller of the unit title.”

1 unilaterally determine who is a “member” or not. Owners are “mandatory members” by virtue
2 of their ownership of properties in Sun City, their obligation to pay assessments, and their
3 obligation to sign Facilities Agreements. Sun City owners meet all of these requirements.

4 Indeed, the Arizona Court of Appeals has recently determined that the requirement to pay
5 assessments alone is enough to make owners “mandatory members.” In *Dreamland Villa*
6 *Community Club, Inc. v. Raimey*,¹³ a community attempted to amend its deed restrictions to
7 force lot owners to pay assessments levied by a voluntary recreational club that claimed it was
8 providing value to the community so that the club could maintain the facility.¹⁴ The Court of
9 Appeals interpreted the amendment as requiring membership in the recreational club, thereby
10 attempting to impose “mandatory membership” on those owners whose properties were subject
11 to the deed restriction.¹⁵ In other words, the Court of Appeals held that the requirement to pay
12 assessments equated to mandatory membership.¹⁶ The determination of “mandatory
13 membership,” therefore, turns principally on the obligation to pay assessments.¹⁷

14 This is consistent with the Restatement, definition of a member of a common-interest-
15 community as “the owner of property burdened by a servitude” to pay “for the use of, or
16 contribute to the maintenance of, property held or enjoyed in common by the individual owners,
17 or to pay dues or assessments to an association that provides services or facilities to the common
18 property or to the individually owned property....”¹⁸ The Restatement defines a common-
19 interest community as “a real-estate development or neighborhood in which individually owned
20 lots or units are burdened by a servitude [to pay or contribute to maintenance, as set forth above]

21 _____
22 ¹³ 224 Ariz. 42, 226 P.3d 411 (App. 2010).

23 ¹⁴ *Id.* at 44, 49, 226 P.3d at 413, 418.

24 ¹⁵ *Id.* at 48, 226 P.3d at 417.

25 ¹⁶ 224 Ariz. 42, 226 P.3d 411.

26 ¹⁷ *Bordas v. Virginia City Ranches Ass’n*, 102 P.3d 1219, 1223 (Mont. 2004) (“the precondition to mandatory payment of assessment is mandatory membership”).

¹⁸ Restatement (Third) of Property: Servitudes §§ 6.2(1) and (4) (2000).

1 that imposes an obligation that cannot be avoided by nonuse or withdrawal.”¹⁹ Arizona courts
2 look to the Restatement to interpret restrictive covenants and for guidance in the absence of
3 controlling authority.”²⁰

4 There is no functional distinction between Sun City and a traditional planned community
5 or a common-interest community under the Restatement. In a traditional planned community,
6 owners are obligated to pay assessments to a nonprofit corporation by virtue of recorded deed
7 restrictions imposing the requirement to do so.²¹ In Sun City, instead of a single deed restriction,
8 the requirement to pay assessments is imposed in RCSC’s Bylaws (“Each and every Deeded
9 Real Estate Owner...shall join in a Facilities Agreement...[and] shall be responsible for the
10 payment of assessment and fees”), subdivisions’ recorded deed restrictions (“Each Owner of a
11 lot shall execute a Recreation Facilities Agreement...and such Recreation Facilities Agreement,
12 including the obligation to pay the annual homeowner fee and special assessments...shall be
13 binding upon and inure to each Owner’s assigns and successors....”), and the Facilities
14 Agreements themselves (Owner agrees to pay “annual property assessment for each Lot,
15 regardless of the use or non-use of any recreational facilities and regardless of whether such
16 owner is qualified ...to use any such facilities”). [¶24] Indeed, RCSC has affirmatively
17 represented in all Facilities Agreements since at least 2009, in some cases falsely, that a new
18 purchaser’s “Amended and Restated Declaration of Covenants, Conditions and
19 Restrictions...require each Owner to execute a Facilities Agreement in favor of RCSC,
20 including an obligation to pay assessments and fees imposed.” [¶25]

21 Sun City homeowners must also abide by the RCSC articles of incorporation, corporate
22 bylaws, board policies, and any and all other rules and regulations of RCSC. Homeowners who

24 ¹⁹ Restatement (Third) of Property: Servitudes § 6.2(1) (2000).

25 ²⁰ *Powell v. Washburn*, 211 Ariz. 553, 557 ¶14, 125 P.3d 373, 377 (2006); *Tierra*
Ranchos Homeowners Ass’n v. Kitchukov, 216 Ariz. 195, 201, 165 P.3d 173, 179 (2007).

26 ²¹ *Dreamland*, 224 Ariz. at 47, ¶ 19, 226 P.3d at 416.

1 have signed a Facilities Agreement, or who are otherwise required to sign one, cannot opt out of
2 their obligations to RCSC, even if they do not use or intend to use the facilities owned and
3 operated by RCSC. The only way such a homeowner can be relieved of its obligations to pay
4 what essentially amounts to RCSC’s “membership dues” is to sell his or her Sun City property.

5 Owners in both settings have no say. Owners do not get to decide whether they want or
6 do not want to pay assessments; owners do not get to decide whether they want to follow the
7 non-profit corporation’s governing documents; owners do not get to decide whether they are
8 subject to the nonprofit corporation’s rules and regulations. These are the elements of mandatory
9 membership.²² It would exalt form over substance to say Sun City is not a planned community
10 simply because RCSC has artfully drafted its governing documents to declare who is a
11 “Member,” entitled to a Membership Card and access to the facilities, and who is not. The law
12 neither recognizes nor justifies a distinction between two owners since both are obligated to pay
13 the same assessments.²³

14 **E. Owners are “Required to Pay Assessments for These Purposes.”**

15 RCSC admits that it owns property in Sun City and that the assessments it imposes “are
16 used, at least in part, to fund the management, maintenance, or improvement of RCSC
17 property.” [¶14] RCSC also admits that “residential property owners (or their predecessors) who
18 sign a facilities agreement have an actionable legal obligation to pay assessments.” [¶13] In
19 other words, RCSC admits that owners must pay assessments if they or a predecessor-in-interest
20 ever signed a Facilities Agreement.

21 Based on the foregoing, Sun City is a “planned community” under A.R.S. §33-1802(4). It
22 is a real estate development that includes real estate owned and operated by RCSC. RCSC is a

23 _____
24 ²² *Bordas*, 102 P.3d at 1223.

25 ²³ *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 345 (1977)
26 (refusing to “exalt form over substance” in holding that a trade commission that lacked formal
members was, nevertheless, an association because it contained all the traditional indicia of an
association”).

1 nonprofit corporation that is created for the purpose of managing, maintaining or improving the
2 property in Sun City. And, the owners are mandatory members required to pay assessments to
3 RCSC for these purposes.

4 **III. RCSC IS AN “ASSOCIATION.”**

5 The Act applies to “associations” which A.R.S. §33-1802(1) defines as:

6 [A] nonprofit corporation... that is created pursuant to a declaration to own and
7 operate portions of a planned community and that has the power under the
8 declaration to assess association members to pay the costs and expenses incurred
9 in the performance of the association’s obligations under the declaration.

9 **A. RCSC is a Nonprofit Corporation with the Power to Collect Assessments to
10 Pay for the Costs and Expenses of Managing, Maintaining and Improving the
11 Recreational Facilities It Owns in Sun City.**

11 It is undisputed that RCSC is a nonprofit corporation and that it collects assessments
12 from all homeowners who have signed Facilities Agreements. RCSC admits both of these
13 elements of the definition of an “association.” [¶¶1, 11] RCSC also admits that the assessments
14 pay for its management, maintenance, and improvement of the facilities it owns. [¶¶11, 14]

15 **B. RCSC is Created Pursuant to a Declaration to Own and Operate Portions of
16 Sun City and Has the Power Under the Declaration to Assess Association
17 Members to Pay for its Obligations.**

17 RCSC was “created pursuant to a declaration,” which is defined in A.R.S. § 33-1802(3)
18 as “any instruments, however denominated, that establish a planned community and any
19 amendment to those instruments.”²⁴ Unlike a traditional planned community where a single
20 document creates the association, several documents comprise the instruments establishing Sun
21 City and creating RCSC and its predecessors. This is not surprising given Sun City’s massive
22 size as it was contemplated to include numerous subdivisions and communities comprising over
23 40,000 homes.

24 ²⁴ A.R.S. § 33-1802(3).

1 The instruments comprising the “declaration” creating RCSC consist of, among other
2 documents, the recorded Articles of Incorporation (including amendments) of RCSC and its
3 predecessors [¶] and the recorded Consolidation Agreement between SCTHC and SCCA [¶].
4 Article III, Section 1, of the former created RCSC to “purchase, acquire, develop, sell, lease,
5 own, operate and manage” portions of Sun City. The latter further establishes, in paragraph 9,
6 the creation of the obligation to manage and maintain recreational facilities for the benefit of
7 Sun City owners. [¶85 (“The new corporation shall receive all assets, physical and fiscal, of the
8 two Corporations known as [SCTHC] and [SCCA] and shall assume all obligations of both
9 centers”)] It further imposes in paragraph 4 the obligation of Sun City owners to pay
10 assessments. [¶85] The numerous Warranty Deeds from Del Webb to RCSC and its
11 predecessors [¶96] further establish RCSC’s ongoing obligation “for the purpose of operating
12 and maintaining a community center and recreational facilities...for the benefit of property
13 owners in Sun City....” [¶¶9, 72, 78, 104]

14 The Consolidation Agreement further incorporates by reference the Articles of
15 Incorporation and By-Laws of RCSC (named as “new Corporation” in the Consolidation
16 Agreement). The Bylaws of RCSC, as discussed above, establish the obligation to pay
17 assessments. [¶11] This obligation has continued to present day. [¶25]

18 Numerous other instruments further corroborate RCSC’s ongoing obligations to own and
19 operate portions of Sun City and impose assessments. These include the Master Agreement
20 (generally and paragraph 9 in particular), the earlier Agreement between Del Webb and
21 SCTHC, and the various recorded CC&Rs of the subdivisions recorded against approximately
22 16,775 Sun City properties that state as follows in paragraph 16:

23 Each Owner of a lot shall execute a Recreation Facilities Agreement in favor of
24 Recreation Centers of Sun City, Inc., in the form adopted from time to time by
25 Recreation Centers of Sun City, Inc., and such Recreation Facilities Agreement,
26 including the obligation to pay the annual homeowner fee and special assessments
imposed from time to time, shall be binding upon and inure to each Owner’s
assigns and successors, shall be a lien on such lot subordinate only to a first
mortgage or first deed of trust on such lot, and may be foreclosed in the same

1 manner as a mortgage under Arizona law. Each owner and all persons residing on
2 said lot shall abide by the Articles of Incorporation and Bylaws of Recreation
Centers of Sun City, and any amendments thereto. [¶32]

3 Finally, the Facilities Agreements themselves establish that RCSC is “a nonprofit,
4 Arizona corporation,” and as applied to each Sun City property (“Property”) in relation to which
5 the Facilities Agreements has been signed since October 15, 2009:

6 The Amended and Restated Declaration of Covenants, Conditions, and
7 Restrictions (“CC&Rs” or “Declarations”) run with the land and are binding on all
8 persons owning said Property and require each Owner to execute a Facilities
9 Agreement in favor of RCSC, including an obligation to pay assessments and fees
imposed. Each Owner and all persons residing on said Property, shall abide by the
RCSC Articles of Incorporation, Corporate Bylaws, Board Policies and any and
all other rules and regulations of the corporation. [¶25]

10 As further set forth in RCSC’s non-negotiable Facilities Agreement, RCSC agrees to
11 “operate the recreational facilities for the benefit of homeowners and residents of Sun City,
12 Arizona,” and to “impose an annual property assessment upon [the subject] property and its
13 owner(s)... to cover the costs of maintaining, operating and developing the common community
14 recreational facilities in Sun City, Arizona.” [¶40]

15 These instruments, the amendments to them, and any other documents incorporated into
16 them by reference, including the Sun City General Plan, therefore constitute the “declaration”
17 for purposes of the Act.²⁵ These instruments also give RCSC the power to impose assessments
18 on the members to pay for its obligations.

19 **IV. RCSC IS ESTOPPED FROM DENYING THAT IT IS SUBJECT TO THE ACT.**

20 The positions that RCSC has taken in judicial proceedings over the years is inconsistent
21 with its positions in this litigation. In fact, in the recent case *RCSC v. Yanovick*, Case No.
22 CV2015-094087, RCSC sought leave to file a first amended complaint and argued:

23 _____
24 ²⁵ *Weatherguard Roofing Co. v. D.R. Ward Constr.*, 214 Ariz. 344, 346, 52 P.3d 1227,
25 1229 (App. 2007) (“to contract by reference, the reference must be clear and unequivocal and
26 must be called to the attention of the other party, he must consent thereto, and the terms of the
incorporated document must be known or easily available to the contracting parties...it is not
necessary that a contract state specifically than other writing is incorporated by reference
herein”).

1 **The Sun City community, developed by Del Webb, was one of the first large**
2 **master-planned communities in Arizona** and was, in many ways, the forerunner
3 to the modern HOA. Del Webb developed Sun City with two nonprofit
4 corporations to oversee the operations and business of the community. The two
5 nonprofit corporations, RCI and SCHOA, work jointly to keep the community
6 running smoothly and to preserve property values. While both corporations work
7 together for a common goal, they have different functions. The CC&Rs mandate
8 that all property owners are members of SCHOA by virtue of their property
9 ownership. SCHOA is charged with the obligation to enforce the use restrictions
10 found in the CC&Rs and is afforded an automatic lien for recovery of amounts
11 incurred by SCHOA to enforce the use restrictions. **The CC&Rs likewise**
12 **confirm that all property owners must execute a Sun City Community**
13 **Facilities Agreement (“Facilities Agreement”), which obligates property**
14 **owners to pay assessments to RCI that are used to maintain the common area**
15 **and recreational facilities.** Subsequent to the development of Sun City,
16 developers began combining the authority to enforce the use restrictions of the
17 CC&Rs and the authority to impose assessments for the maintenance and upkeep
18 of the common areas into one corporation. However, with Sun City, these two
19 obligations are bifurcated: **RCI holds the assessment authority as set forth in**
20 **the CC&Rs and the Facilities Agreements;** while SCHOA holds the authority to
21 enforce compliance with the use restrictions. The two corporations, however,
22 jointly govern the properties within the Sun City community and have interests
23 that are aligned.

24 [¶113 emphasis added]

25 RCSC has also invoked the Act several times over the years to derive its benefits. Among
26 the most recent examples:

- 27 • In 2015, RCSC filed a lawsuit in Maricopa County Superior Court, *RCSC v. Morgan*, Case No. CV2015-090055, seeking to foreclose an assessment lien and a money judgment. [¶108] Both the Complaint and Stipulated Judgment in that action explicitly invoked the Act, namely the Act’s lien foreclosure statute, A.R.S. § 33-1807. [¶109]
- 28 • In 2015, RCSC invoked A.R.S. § 33-1807(H) seeking an award of attorneys’ fees under the Act in *Quality Loan Service Corporation v. Maricopa County*, Case No. CV2015-007358, and *MTC Financial Inc. v. Maricopa County Treasurer*, Case No. CV2015-055577. It was awarded those fees and costs in both cases. [¶110]
- 29 • In both the *Quality Loan Service* and *MTC* cases, RCSC filed petitions seeking to recover surplus funds following a trustee’s sale “to enforce its perfected continuing lien of assessment pursuant to A.R.S. § 33-1801, et seq.,” and for

1 the proposition that it “has a superior ownership and/or lien position and
2 interest” under the Act. It also invoked the Act as a basis for an award of
attorneys’ fees.²⁶ [¶111]

- 3 • In 2016, RCSC filed a First Amended Complaint in *RCSC v. Yanovick*, Case
No. CV2015-094087, again invoking the Act’s lien foreclosure statute. [¶113]
- 4 • In 2016, RCSC filed lawsuits in Maricopa County Superior Court, *RCSC v.*
5 *Bright*, Case No. CV2016-091709, and *RCSC v. Doi*, Case No. CV2016-
6 094411, seeking to foreclose an assessment lien and a money judgment and
invoking the Act, specifically A.R.S. § 33-1807(C). [¶114]

7 RCSC is barred from denying that it is subject to the Act having previously declared in
8 several judicial proceedings that it is subject to the Act. RCSC cannot invoke the Act when it
9 wants to avail itself of the rights and remedies it affords but deny the application of the Act
10 when it is sued.²⁷ The doctrine of judicial estoppel and/or the countless judicial admissions
11 preclude RCSC from denying that it is a homeowners’ association simply because it is
12 advantageous to do so at this time.²⁸

13 **Conclusion**

14 RCSC looks and acts like a homeowners’ association. It has successfully invoked the
15 Planned Community Act in the past when it was to its advantage. Because it is beyond rational
16 debate that RCSC is an association that owns and operates property within Sun City, a planned
17 community, that has mandatory members who are required to pay assessments, the Court should
18 grant summary judgment for Plaintiffs on Count One of the First Amended Complaint.

19 ///

20 ///

22 ²⁶ Although RCSC later amended its petition in the *MTC* case, it continued to invoke the
Act as a basis for its superior interest in the surplus funds. [¶112]

23 ²⁷ *Bank of America Nat. Trust and Sav. Ass’n v. Maricopa County*, 196 Ariz. 173, 176,
24 993 P.2d 1137, 1140 (Ct. App. 1999).

25 ²⁸ See *State v. Brown*, 212 Ariz. 225, 228, 129 P.3d 947, 950 (2006) (stating that the
26 intent of the doctrine of judicial estoppel is to “protect the integrity of the judicial process by
preventing a litigant from using the courts to gain an unfair advantage” (quoting *State v.*
Towery, 186 Ariz. 168, 182, 920 P.2d 290, 304 (1996))).

1 DATED this 30th day of March 2018.

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