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IN THE SUPERIOR COURT OF ARIZONA

COUNTY OF MARICOPA

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

Plaintiffs,

vs.

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

Defendant.

No. CV2015-012458

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR CLASS CERTIFICATION

(Complex Case)

(Assigned to the Hon. Roger Brodman)

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

Third-Party Plaintiff,

vs.

LINDA MOYER and RICHARD STEWART,

Third-Party Defendants.

Introduction

Defendant Recreation Centers of Sun City, Inc. has asked the Court to strictly construe the rules governing class actions even though Arizona law requires that they "be construed liberally, and doubts concerning whether to certify a class action should be resolved in favor of certification."[1] It suggests that Plaintiffs have failed to meet their burden to obtain certification of their claims because they have not yet proven their case. That is not the standard. Class certification is appropriate for each of Plaintiffs' proposed classes.

Argument

I. PLAINTIFFS SATISFY ALL RULE 23(A) ELEMENTS.

The required execution of a standard Facilities Agreement establishes the elements of Rule 23(a). Every transferee since October 15, 2009 has been required to sign a Facilities Agreement whereby he or she agrees as follows:

> A. To pay in advance and when due to RCSC: (a) The annual property assessment for said Property regardless of the use or non-use of any recreational facilities, and regardless of whether such Owner or any occupants are qualified under the RCSC Restated Articles of Incorporation, Corporate Bylaws, or Board Policies to use any such facilities; and (b) A Transfer and Preservation and Improvement Fee upon the purchase, acquisition, transfer, inheritance, gift or any change in ownership of legal or beneficial interest in the title to property located in Sun City, Arizona pursuant to any deed, contract for sale, will or other instrument or document transferring an interest in said Property, so long as the original payer sf such Transfer Fee or Preservation and Improvement Fee no longer retains a majority ownership interest in said Property.

[1] *ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc.*, 203 Ariz. 94, 98, 50 P.3d 844, 848 (App. 2002).

* * *

E. To require, as a condition of any future transfer of the Property, that the buyer/transferee execute, and deliver to RCSC at the closing, a RCSC Facilities Agreement signed by all the deeded Owners.[2]

In executing a Facilities Agreement, every Sun City owner agrees that:

A. This agreement is binding upon the parties, their heir(s), executor(s), personal representative(s), successor(s), assign(s), guardian(s), conservator(s), trustees and beneficial owner(s).

B. This agreement, or notice thereof, shall be recorded in the office of Recorder of Deeds, Maricopa County, Arizona.

C. This agreement cannot be changed, altered or amended in anyway except by the Recreation Centers of Sun City, Inc.[3]

All owners must pay a $300 Transfer Fee, a $3,500 Preservation and Improvement Fee ("PIF"), and the first year's assessment at a "per property" rate.[4] By Defendant's own admission, subject to limited exceptions, Sun City homeowners who acquired their property prior to February 2003 pay assessments at a "per person" rate one-half the "per property" rate.

There are at least two problems with these fees that equally affect every Sun City owner. The first is that transfer fee provisions are generally invalid if they bind successors in title and obligate the transferee to pay a fee on any transfer. The Transfer Fee Class seeks to address this issue. The second is that Defendant's articles of incorporation provide that "the voting rights of all Members shall be equal and all Members shall have equal rights and privileges, and be subject to equal responsibilities."[5] The Assessment Class seeks to address this issue. These, and other, issues with the Facilities Agreements, which Defendant has the power to unilaterally amend, affect each Plaintiff and putative class member equally. The validity of Transfer Fees and PIF, the obligation to pay assessments, and related issues relate to all owners.

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[2] *See* Plaintiffs' Motion for Class Certification, filed March 30, 2018 ("Class Cert. Motion"), Exhibit 3 (Facilities Agreement).

[3] *Id.*

[4] The Preservation and Improvement Fee increased from $3,000 in 2009 to $3,500.

[5] *See* Class Cert. Motion, Exhibit 4 (Articles of Incorporation) at Art. VII(5).

II. THE TRANSFER FEE CLASS IS CERTIFIABLE UNDER RULE 23(B)(3).

The Transfer Fee Class seeks a judicial declaration that the "Transfer Fee" and PIF that Defendant charges are invalid. Plaintiffs seek to recover those fees charged in excess of what Arizona law permits and an injunction against the future collection of such fees.

Subject to limited exceptions, A.R.S. § 33-442(A) generally prohibits transfer fees:

> A provision in a declaration, a covenant or any other document relating to real property in this state is not binding or enforceable against the real property or against any subsequent owner, purchaser, lienholder or other claimant on the property if it purports to do both of the following:
>
> (1) Bind successors in title to the specified real property;
>
> (2) Obligate the transferee or transferor of all or part of the property to pay a fee or other charge to a declarant or a third person on transfer of an interest in the property or in consideration for permitting such transfer.

A.R.S. § 33-442(C)(7) does provide an exception for fees charged "*for the sole purpose* of supporting recreational activities within the association." (emphasis added) Defendant relies on this provision as a "safe harbor" for its fees, but nothing in Defendant's governing documents indicate that the fees are for the sole purpose of supporting recreational activities in Sun City.

A.R.S. § 33-1806 provides an additional exception to A.R.S. 33-442(A)'s blanket prohibition on transfer fees. It allows an association to collect a fee, not to exceed $400 in most cases, to cover its costs of complying with presale disclosure obligations. Included among these obligations are the requirement that the association furnish the buyer with certain materials, including the association's governing documents. The statute carries with it a civil penalty of up to $1,200 against "an association that charges a fee in violation of [A.R.S. § 33-1806]."[6] As set forth above, Defendant admits that it collects a $300 fee to make certain information available to its members but fails to provide all of the information required by A.R.S. § 33-1806. If Defendant is determined to be an "association" subject to the Planned Community Act, this provision may be relevant to whether the transfer fees are valid.

[6] A.R.S. § 33-1806(D).

The obligation to pay transfer fees is uniformly and indiscriminately imposed.[7] Thus, determining whether transfer fees are valid does not require an individualized inquiry. The question of the validity of the transfer fee provisions imposed against the prospective members of the Transfer Fee Class predominates over any theoretical individualized questions and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.[8] "When a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating."[9] Plaintiffs seek an indivisible injunction benefitting all current and prospective owners on Sun City property as to limit the fees collected to only those that are valid under Arizona law. A class action is the superior method of adjudicating the dispute.[10]

III. THE ASSESSMENT CLASS IS CERTIFIABLE UNDER RULE 23(B)(3).

Defendant neither denies that its articles of incorporation require that "all Members shall have equal rights and privileges, and be subject to equal responsibilities," nor that it charges different rates. The Assessment Class seeks to determine whether Defendant's governing documents allow for varying rates of assessment, and if not, the class seeks to enjoin Defendant from similar conduct in the future and to obtain damages for excess amounts paid.

Defendant contends that the common legal question as to whether it may charge different rates under its articles of incorporation cannot equally resolve the claims of all people paying assessments at the greater, "per property" rate. It suggests that the class be divided into those owners who originally paid assessments at the "per person" rate but are now required to pay assessments at the "per property" rate on the same, separate from those owners who acquired

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[7] *See* Class Cert. Motion, Exhibit 3 (Facilities Agreements).

[8] *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011).

[9] *Id.* 564 U.S. at 362.

[10] *Id.* 564 U.S. at 361.

their property after February 2003 and have always paid assessments at the higher, "per property" rate. While those homeowners may have a claim regarding Defendant's right to modify that material terms of their Facilities Agreement, that issue need not be resolved to determine whether Defendant may charge different rates to different members.

Whether a member pays assessments at the "per property" rate or the "per person" rate is easily determinable by reviewing Defendant's membership records. They are the only two rates at which assessments are imposed, and all members pay assessments. Moreover, Plaintiffs do not allege that Defendant deviates from its policy that delineates who pays assessments on a per property basis and who pay on a per person basis, as set forth in Defendant's Board Policy # 28. Determining whether the variation in assessments violates the equal rights, privileges, and responsibility clause of Defendant's articles of incorporation is a legal question that does not require an inquiry into a discretionary decision as to why any individual homeowner pays assessments at a certain rate. The Assessment Class poses a common question of law that predominates over any questions affecting only individual members.

The class seeks an indivisible injunction against Defendant from imposing unequal rights, privileges, and responsibilities on its members. Individual actions against Defendant regarding the same issues would likely lead to unworkable and impossible standards to apply going forward. Class action is therefore superior to other available methods for fairly and efficiently adjudicating the controversy.[11]

IV. BOTH CLASSES ARE CERTIFIABLE UNDER RULE 23(B)(1).

Class certification is appropriate under Rule 23(b)(1) when a class-wide decision is essential because individual adjudications would lead to inconsistent, impossible, or unworkable decisions.[12] Defendant argues that Rule 23(b)(1) certification is improper because Plaintiffs' claims predominately seek money damages. This is where Defendant misses the mark and has

[11] *See Wal-Mart*, 564 U.S. at 362.

[12] *Id.*

since the start of this litigation. Defendant has spent significant resources to scare the named Plaintiffs into leaving the case, repeatedly threatening to obtain judgment for its attorneys' fees in amounts far exceeding any small amount most might recover. Defendant questions why anyone without significant money damages might risk an award of attorneys' fees. Such is the nature of class actions. While all class members have been financially damaged, that is not what is driving this litigation. Defendant has acted unilaterally and without the meaningful input from its members to collect fees from them without any form of accountability. That is why this litigation exists and underscores why it is not predominately based on money damages.

This is not a class action where all the potential class members purchased a faulty washing machine, and everyone just wants their money back. While Plaintiffs seek damages for what they and other potential class members should never have had to pay, they also seek a class-wide decision as to the validity of Defendant's transfer fees under Arizona law and Defendant's right to impose assessments at unequal rates among its members. These are questions that, if resolved in individual adjudications, would near certainly lead to inconsistent, impossible, or unworkable standards by which Defendant must comport its actions in the future.

Though Plaintiffs alleged damages are substantial, they are incidental to the issue of the validity of Defendant's actions as they relate to the collection of transfer fees and unequal assessments. Damages are incidental because they "flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief."[13] The damages would "not require additional hearing to resolve the disparate merits of each individual's case," they would "neither introduce new substantial legal or factual issues, nor entail complex individual determinations."[14]

The calculation of damages suffered as a result of Defendant's challenged action will be easily discernible based on the liability imposed. Though PIF fees increased to $3,500 at some

[13] *See Wal-Mart*, 564 U.S. at 365-66.

[14] *Id.*, 564 U.S. at 366.

point since 2009, the fees collected from the potential class members have otherwise been uniform. There is no reason why a fee collected from one class member would be valid while another would not. Therefore, the damages could easily be apportioned across the whole class based on the two amounts the members may have paid. Likewise, it is clear to Defendant who is paying which rate. If the Assessment Class succeeds, damages could easily be calculated based on who has paid twice the rate of others.

Defendant argues that certification, however, is inappropriate under Rule 23(b)(1) because it would deprive the mandatory members of their due process rights. To support its argument, Defendant relies on district court cases from Texas and Louisiana seeking individual damages that varied significantly from plaintiff to plaintiff. This is not the case here. Defendant does not dispute that class members will be provided fair and adequate representation if class is certified. Even if the Court does not agree that class certification is appropriate under Rule 23(b)(1), it is still within its discretion to certify the classes under Rule 23(b)(3).

V. A.R.S. § 10-3304 DOES NOT PRECLUDE CLASS CERTIFICATION.

Plaintiffs do not dispute that A.R.S. § 10-3304(B)(2) provides important protections for homeowners seeking to challenge *ultra vires* acts of their association. The statute secures important protections for members of planned communities, protections to which Plaintiffs hope to soon be entitled. In any event, Defendant fails to establish how A.R.S. § 10-3304 limits the certifiability of Plaintiffs' proposed classes or why it needs to be resolved before certification.

To be certain, even if the class claims are properly characterized as *ultra vires* challenges, A.R.S. § 10-3304(B) does not limit Plaintiffs right to recover damages from Defendant. By simply providing that members of an association may sue to enjoin an *ultra vires* act, the statute does not expressly limit homeowners to injunctive relief when they challenge an *ultra vires* act.

VI. INCLUSION IN A CLASS IS NOT LIMITED TO MEMBER CARD HOLDERS.

Relying on both its articles of incorporation and A.R.S. § 10-3304(B), Defendant attempts to limit who is eligible to be included in Plaintiffs' proposed classes to only those

owners that it deems eligible for a Member Card under its Bylaws, as opposed to those owners of property located in Sun City, each of whom, under the threat of foreclosure, is responsible for the payment of assessments and fees as determined by Defendant's Board of Directors.

Defendant contends that only those eligible to obtain a Member Card are subject to the equal rights, privileges, and responsibility clause in the articles of incorporation, and therefore cannot be members of the Assessment Class. That provision expressly states that "[t]he Bylaws of the Corporation shall prescribe the qualifications of Members and the terms of admission to membership… Such Bylaws shall also provide the method for determining assessments to be paid by the Members."[15] Defendant's Bylaws then provide "Members shall be Deeded Real Estate Owners ("Owner(s)") of property located in the area entitled 'Sun City General Plan, Maricopa County, Arizona.'"[16]

In providing a "method for determining assessments to be paid by the Members," the Bylaws provide that "[e]ach Owner shall be responsible for the payment of assessments of fees… Assessments and fees shall be determined by the Board and shall be payable by property Owners pursuant to the Facilities Agreement."[17] Though Defendant is only authorized in its articles of incorporation to assess its *members*, its Bylaws clearly provide for an assessment imposed on all *owners*. Unless it is Defendant's position that it is not entitled to the assessments it collects from the Owners it contends are "non-members," all Owners subject to Defendant's assessments and fees under the threat of foreclosure must be members of Defendant and subject to equal rights, privileges, and responsibilities.

Likewise, Defendant attempts to limit in the same way the "members" who can challenge *ultra vires* acts. As Plaintiffs explain in their motion for partial summary judgment, all owners of Sun City property are members of Defendant for purposes of the Planned Community Act.

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[15] *See* Class Cert. Motion, Exhibit 4 (Articles of Incorporation), Art. VII(5).

[16] *See* Class Cert. Motion, Exhibit 2 (Bylaws), Art II, Sect. 1.

[17] *See* Class Cert. Motion, Exhibit 2 (Bylaws), Art. II, Sect. 4(B).

All owners of Sun City property who pay assessments at a rate greater than any other owner of Sun City property is a proper member of the Assessment Class. Likewise, all owners of Sun City property who have paid transfer fees to Defendant is a proper member of the Transfer Fee Class. To find otherwise would promote Defendant's practice of taxation without representation of those owners it unilaterally disqualifies as members, who are thereby rendered powerless to challenge the designation.

VII. PLAINTIFFS' HAVE SATISFIED THEIR CLASS CERTIFICATION BURDEN.

While a rigorous analysis of Rule 23 is required, Plaintiffs do not have a burden of proving likelihood of prevailing. Though it contends that "Plaintiffs have not carried their burden of proof under Rule 23," Defendant fails to identify a single portion of the Rule 23 analysis that the Court is ill-equipped to address.[18] Plaintiffs' claims stem from the terms of the Facilities Agreement, which require the payment of transfer fees and assessments.

A.R.S. § 33-442's prohibition against transfer fees is a common question. Defendant also does not deny that it charges unequal assessments. These are common questions that could be decided in a single case or thousands of individual cases. While certification of a class action is subject to the Court's discretion, Arizona law requires that Rule 23 "be construed liberally, and doubts concerning whether to certify a class action should be resolved in favor of certification."[19] Such is the case here

VIII. DEFENDANT'S POTENTIAL INDIVIDUALIZED AFFIRMATIVE DEFENSES SHOULD NOT PRECLUDE THE CERTIFICATION OF EITHER OF PLAINTIFFS' PROPOSED CLASSES.

Defendant contends that its individualized affirmative defenses stand in the way of Plaintiffs certifying their claims against it. They claim that the "voluntary" payment of fees and

[18] It is worth remembering that the parties bifurcated discovery in this case to "save the parties from incurring significant fees and expenses because discovery on the merits of the parties' claims and defenses is largely dependent on the outcome of [the motions for class certification and applicability of the Act]." *See* Second Joint Report, at 3, filed on August 26, 2016.

[19] *ESI Ergonomic Solutions*, 203 Ariz. at 98, 50 P.3d at 848.

assessments at issue in this lawsuit is too large of an issue for Plaintiffs to overcome and cites *Moody v. Lloyd's of London* for the proposition that "a party cannot by direct action…recover money voluntarily paid with a full knowledge of facts…although no obligation to make such payment existed."[20] In other words, Defendant incredulously argues Plaintiffs had no obligation to make the payments to Defendant. As every Sun City owner must pay assessments and fees under the threat of foreclosure. Defendant does not ensure that owners have advance notice that they will be expected to pay nearly $5,000 immediately upon taking ownership of Sun City property. Even where the purchaser has previously purchased Sun City property, Defendant's governing documents do not keep Plaintiffs apprised of the fees they will incur if they purchase another property. Nevertheless, whether any individual owner would prefer to pay more than Defendant is entitled to collect from them is not a valid defense that should compromise class certification.

Finally, Defendant wants to rely on the fact that it does not have a record of every homeowner having signed a Facilities Agreement, and that different legal theories will apply to those who it has record of having signed one and those who it does not. Defendant collects assessments from the owners of each and every Sun City residential property. If assessments are imposed against a Sun City property, it is because the owner of the property or a predecessor in title at some point signed a Facilities Agreement agreeing to pay assessments binding its successor in title to do the same. Defendant should be precluded from further advancing a theory that relies on the absence of Facilities Agreements from which it nevertheless benefits.

Conclusion

Plaintiffs have met the four Rule 23(a) requirements and has shown that the Transfer Fee Class and Assessment Class should be certified under Rule 23(b)(1) and (3). This Court may exercise its broad discretion under Rule 23 and grant Plaintiffs' motion for class certification.

[20] 152 P.3d 951, 935, 61 Ariz. 534, 540 (1944).

DATED this 22nd day of June 2018.

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COPY of the foregoing electronically served through AZTurbo Court on this 22nd day of March 2018 to:

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