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IN THE SUPERIOR COURT OF ARIZONA

COUNTY OF MARICOPA

BOLTON and FLORENCE ANDERSON, et al., Plaintiffs, vs. RECREATION CENTERS OF SUN CITY, INC., a nonprofit corporation, Defendant.	No. CV2015-012458 **PLAINTIFFS' AMENDED MOTION FOR CLASS CERTIFICATION** **Oral Argument Requested** **(Complex Case filed October 29, 2015)**
RECREATION CENTERS OF SUN CITY, INC., a nonprofit corporation, Third-Party Plaintiff, vs. LINDA MOYER and RICHARD STEWART, Third-Party Defendants.	(Honorable Roger Brodman)

Introduction

Arizona's Planned Communities Act, A.R.S. § 33-1801, *et seq.* ("PCA"), namely A.R.S. § 33-1806, prohibits an association from charging or collecting any transfer fee for services "related to the transfer or use of the property" except as compensation "for the costs incurred in the preparation and delivery of a statement or other documents" associations must furnish after receipt of a written notice of a pending sale. The PCA imposes a civil penalty of not more than

$1,200.00 if an association charges or collects a fee in violation of the statute.

Defendant Recreation Centers of Sun City, Inc. ("RCSC"), which this Court previously ruled is subject to the PCA, imposes a uniform Transfer Fee of $300.00 on all new owners (the "Transfer Fee") in connection with the services it provides in relation to the transfer of the property. However, RCSC does not furnish any of the statements or other documents that an association must provide in order to charge a transfer fee under the statute.

Accordingly, as discussed in greater detail in Plaintiffs' contemporaneously-filed Motion for Summary Judgment ("MSJ"), Plaintiffs' Response to Defendant's Motion for Partial Summary Judgment (Damages), and Plaintiffs' Separate Statement of Facts in Support of Motion for Summary Judgment and in Response to Defendant's Motion for Partial Summary Judgment (Damages) Plaintiffs' Response ("PSOF"), each of which Plaintiffs expressly incorporated herein by reference, RCSC's Transfer Fee is an unlawful and invalid fee under A.R.S. § 33-1806.[1] Because, RCSC uses the Transfer Fee for purposes that do not solely support recreational activities within the association, such as to make non-recreational charitable donations and to engage in lobbying activities, some of which it keeps secret from its members, and fund administrative it is also invalid under A.R.S. § 33-442.

Thus, the discrete question of the validity of the Transfer Fee and the civil penalty to be imposed is one that affects *every* Sun City owner who has obtained an interest in Sun City property in the last six years because each has been forced to pay it. Because the Transfer Fee is just $300.00, however, it is not an issue that most, if any, owners would pursue individually, as the cost and risks of an individual action would far surpass the potential benefit they would receive. Thus, Plaintiffs ask the Court to reconsider its prior ruling on class action and hereby submit this Amended Motion for Class Certification on this singular issue.

[1] Plaintiffs further incorporate herein by reference the March 30, 2018 Declaration of Jonathan A. Dessaules in Support of Motion for Class Certification attached as Exhibit 7 to Plaintiffs' March 30, 2018 Motion for Class Certification.

The Transfer Fee issue is a discrete, simple, and straightforward issue. It is unlawful under the PCA, everyone pays it, and RCSC admittedly fails to furnish the documents that are the predicate for charging it. Accordingly, Plaintiffs seek to certify a class of current and former Sun City homeowners who have paid the $300 Transfer Fee to RCSC since October 29, 2009, pursuant to Rule 23 of the Arizona Rules of Civil Procedure with Plaintiffs Virginia Baughman, Edward Berger, Ray Hicks and Linda Hicks, Susan Marsh, Arthur Neault, Petunia, LLC, Jean Battista, and Donna Sies as class representatives. Although *all* owners have paid this Transfer Fee, each of the purported class representatives have paid the Transfer Fees within the six years preceding the filing of this action. The Transfer Fee issue meets all of the elements of Rule 23 and this issue is uniquely suited for class action treatment.

Argument

Class actions brought in the Maricopa County Superior Court are governed by Rule 23 of the Arizona Rules of Civil Procedure. Because the state class action rule is identical to Rule 23 of the Federal Rules of Civil Procedure, the Court of Appeals views federal cases construing the federal rule as authoritative. *ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc.*, 203 Ariz. 94, 50 P.3d 844 (App. 2002). Rule 23 is "intended to allow a class action when it would 'achieve economies of time, effort, and expenses, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about undesirable results.'" *Id.* at 98, 50 P.3d at 848.

In order for a class to be certified, all four requirements of Ariz. R. Civ. P., Rule 23(a) must be satisfied along with one of the three requirements of Ariz. R. Civ. P., Rule 23(b). *See Amchen Prods. Inc. v. Windsor*, 521 U.S. 591, 592-93, 117 S. Ct. 2231, 2235, 138 L. Ed. 2d 689 (1997); *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1339 (9th Cir. 1976); *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998); *Gonzalez v. Proctor & Gamble Co.*, 247 F.R.D. 616, 620 (S.D. Cal. 2007). The court generally accepts as true the substantive allegations in the complaint on a motion to certify. *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975);

Eisen v. Carlise & Jacquelin, 417 U.S. 156, 178 (1974) ("The question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met."). Trial courts have discretion whether a class action should proceed or be denied. *Godbey v. Roosevelt School Dist. No. 66 of Maricopa County*, 131 Ariz. 13, 16, 638 P.2d 235, 238 (1981). Under Rule 23, a plaintiff's burden "is not a heavy one" and the rule is "liberally construed" in favor of class certification. *Irwin v. Mascott*, 96 F. Supp. 2d 968, 971-972 (N.D. Cal 1999) (citing Newberg and Conte, *Newberg on Class Actions*, 3d Ed., § 7.20; *citing Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 563 (2d Cir. 1968)).

I. PLAINTIFFS SATISFY THE REQUIREMENTS OF RULE 23(A).

Rule 23(a) requires that plaintiffs prove (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the representative parties' claims or defenses are typical of the claims or defenses of the class; and (4) the representative parties can fairly and adequately protect the interests of the class.

A. The Elements of Numerosity and Commonality Are Met.

In its September 6, 2018 Ruling, the Court found that the Rule 23(a)(1) and (a)(2) requirements were satisfied with respect to the broader class that Plaintiffs were then seeking to certify. The same conclusion should be met with respect to this narrower class on the issue of the Transfer Fees: everyone who bought a property or changed a property's ownership structure in a way that altered the owners by more than fifty percent in Sun City has paid the Transfer Fee. This includes *all* current and former owners. Numerosity and commonality are clearly met.

B. The Element of Typicality is Met.

The typicality element asks if the representatives' claims or defenses are typical of the claims or defenses of the class. To assess whether typicality is satisfied, courts generally examine: (1) whether common questions of law or fact exist, (2) whether the representatives' interests are antagonistic to those of the absent class members, and (3) whether the

representative has suffered the same grievances as the putative class. *Lennon v. First National Bank of Arizona*, 21 Ariz. App. 306, 309, 518 P.2d 1230, 1233 (1974). The typicality inquiry examines "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Parsons v. Ryan*, 754 F.3d 657, 685 (9th Cir. 2014) (citations omitted).

With respect to this narrowed class on the Transfer Fee issue, the element of typicality is clearly met. As discussed above, common questions of law and fact exist concerning the validity of the Transfer Fee, which do not turn on individual questions of fact. RCSC admits that it collects its Transfer Fee upon every transfer. As *all* homeowners have suffered this identical grievance of paying an allegedly unlawful Transfer Fee, the representatives' interests are typical of and not antagonistic to the absent class members. *Lennon*, 21 Ariz. App. at 309, 518 P.2d at 1233. Every current or former owner was charged the Transfer Fee and every current or former owner is entitled to the civil penalties set forth in A.R.S. § 33-1806(D).

Plaintiffs believe that the narrowing of the issues on which they are seeking class certification addresses most of the Court's concerns regarding typicality, or otherwise renders them moot. Unlike the larger issues that Plaintiffs' prior motion sought to tackle, which Plaintiffs could understand might raise concerns about financial interests or incentives concerning someone who resides in a Sun City property and someone who is a landlord or the nature and number of properties someone owns, the $300.00 Transfer Fee affects everyone the same. A person who is purchasing the property to reside there suffers the same harm (*i.e.*, paying the unlawful $300.00 charge) as someone who is purchasing to rent the property. They are charged a fee that may only be charged to compensate an association for furnishing a resale disclosure, but RCSC does not provide a resale disclosure. Likewise, the fees are not permissible under A.R.S. § 33-442 because they are not collected for the sole purpose of supporting recreational activities within the association. Rather, they are used to compensate

RCSC for the performance of administrative functions in relation to the transfer of properties, with the excess used in its confidential lobbying activities and non-recreational charitable purposes.

The only discernable difference between someone who purchases one property and one who has three properties is that the latter has paid $900 compared to just $300. As the sole question presented on the Transfer Fee claim is whether the fee violates the law, residents and landlords share the same interest in vindicating their statutory rights. This is true whether they own one, three, or ten properties. If the Transfer Fee is unlawful, as Plaintiffs argue in their MSJ, the fact that someone bought a second or third property already knowing about the Transfer Fee does not make their claims atypical. Knowledge that a fee will be charged does not provide a defense if the fee charged is, in fact, unlawful. An owner who purchases a property with knowledge of the fee charged does not lose the right under A.R.S. § 33-1806(D) to obtain a civil penalty.

Similarly, the owner who resides there and the landlord collecting rent are both being charged the Transfer Fee upon purchase. It is not a charge that discriminates between types of owners. And while someone who has more financial means might be willing to pay $300 and write it off as a cost of doing business, Arizona law clearly states that RCSC cannot charge it. The appropriate question should not be whether someone wants to pay it but rather whether RCSC was allowed to charge it.

With respect to the Court's concern regarding the financial incentives of someone who still owns their Sun City property and someone who no longer does, the interest is negligible. Between 2010 and 2018, RCSC collected approximately $5,162,450.14 in Transfer Fees. In 2018 alone, RCSC had a "Net Operating Excess" of $3,330,404.00. Moreover, RCSC has $21 million in a restricted account, $645,910.00 of which is investment income, not collected upon the transfer of property. RCSC has the financial means to reimburse those who it has forced to

pay unlawful fees without harming the viability of the corporation, and in turn harming RCSC members.

This is especially true since most owners may not want to pursue a claim concerning the Transfer Fee based on the fact that the costs and risks of pursuing it far outweigh the benefit (a civil penalty of, at most, $1,200). It is unlikely that an individual owner who believes the law has been violated would find an attorney to take a case to recover just $1,200.00.

A. The Named Class Representatives Will Adequately Represent the Absent Members of Each Proposed Class Following Certification if the Court Certifies this Case as a Class Action.

Rule 23(a)'s adequacy requirement is met if the representative can fairly and adequately protect the interests of the class. The adequacy requirement turns on two questions: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998).

"Rule 23(a)(4) requires that 'the representative parties will fairly and adequately protect the interests of the class.'" *Palmer v. Stassinos*, 233 F.R.D. 546, 550 (N.D. Cal. 2006); *see also Bogner v. Masari Investments, LLC*, 257 F.R.D. 529, 532-33 (D. Ariz. 2009). Representation is adequate in a claim, for class certification purposes, if counsel for the proposed class is competent and qualified, and if the class representatives do not have interests antagonistic to or conflicting with those of the unnamed class members. *Brink v. First Credit Res*., 185 F.R.D. 567, 571 (D. Ariz. 1999). To protect the interests of those whom the named plaintiffs claim to represent, a court inquires not only in the character and quality of the named representatives, but also considers the quality and experience of the attorneys representing the class. *Berry*, 226 F.R.D. at 404. Parties will be considered adequate representatives of absent class members if there are no conflicts of interest between the representatives and class members and if the Court is persuaded that counsel for the representatives will vigorously pursue the claims. *See London v. Green Acres Trust*, 159 Ariz. 136, 141, 765 P.2d 538, 543 (1988); *Brink*, 185 F.R.D. at 571.

The adequacy of representation is generally presumed and the burden is on the defendant to demonstrate that the representation will be inadequate. *Wehner v. Syntex Corp.*, 117 F.R.D. 641, 644 (N.D. Cal. 1987) (It is presumed plaintiffs' counsel is competent to litigate case and will fairly and adequately represent the interests of the class members.); *see also In re Madison Associates*, 183 B.R. 206, 217 (Bankr. C.D. Cal. 1995) (absent contrary evidence from the party opposing class certification, adequacy of representation is generally presumed). Representation is adequate if counsel for the call is competent and qualified, and the class representatives do not have interests antagonistic to or conflicting with those of unnamed class members. *Brink*, 185 F.R.D. at 571.

As discussed in Plaintiffs' prior motion for class certification, which is incorporated herein by reference, both the named class representatives and counsel are adequate. The Court did not question class counsel's adequacy. With respect to the class representatives, Plaintiffs who would serve as class representatives are able to allege and show the same personal injury (*i.e.*, $300 unlawfully charged to them) as each of the absent class members. *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 141, 108 P.3d 917, 920 (2005). They are willing to "'fairly and adequately…protect the interests' of all the class members." *Sandwich Chef of Texas v. Reliance National Indemnity Insurance Co.,* 202 F.R.D. 484, 493–94 (S.D.Tex.2001). They have demonstrated their active interest in this litigation as outlined in Plaintiffs' Motion for Class Certification (filed March 30, 2018), p. 9.

The class representatives on the Transfer Fee issue seek to represent the class to protect others who also were wrongfully charged, and paid, $300.00. They are familiar with the nature of the class claims and will vigorously pursue the case on behalf of the respective class. Plaintiffs' claims relating to the Transfer Fee coincide with the claims of the class members and they assert identical claims arising from the same core set of facts and there is nothing to suggest that any of them have any interest that is antagonistic to the vigorous pursuit of the class claims. There are no conflicts of interest between the Class Representatives and the absent class

members they seek to represent.

II. CLASS CERTIFICATION IS APPROPRIATE UNDER RULE 23(B).

"In addition to demonstrating that the Rule 23(a) requirements are met, a plaintiff seeking to represent a class also must establish one or more of the grounds enumerated in Rule 23(b) to maintain a class action suit." *Gonzalez*, 247 F.R.D. at 622. Rule 23(b)(1) provides that class actions are to be maintained if separate actions by individual plaintiffs could lead to inconsistent or varying judgments. A class action is maintainable under Rule 23(b)(3) where common question of law or fact predominate. *Godbey*, 131 Ariz. at 18, 638 P.2d at 240. Here, the Court should certify the class under both Rules 23(b)(1) and (3).

Rule 23(b)(3) allows the Court to certify a class where it "finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." S*ee In re Phenylpropanolamine (PPA) Products Liab. Litig*., 208 F.R.D. 625, 630 (W.D. Wash. 2002). "Rule 23(b)(3) focuses on the relationship between the common and individual issues, testing whether a proposed class is sufficiently cohesive to warrant adjudication by representation." *Gonzalez*, 247 F.R.D. at 622-23 (citing *Local Joint Executive Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001)). "When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is justification for handling the dispute on a representative rather than on an individual basis." *See id.* Furthermore, "[i]mplicit in the satisfaction of the predominance test is the notion that the adjudication of common issues will help achieve judicial economy." *In re Phenylpropanolamine*, 208 F.R.D. at 630 (citing *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996)).

The questions of individual members of the prospective class are inferior to those of the collective group of Sun City homeowners who have paid RCSC's transfer fees. As discussed

above, the common questions of law and fact predominate with respect to Transfer Fee. These common questions predominate over any issues that might affect an individual member of the class. Moreover, a class action is superior to other available methods because it avoids the possibility of inconsistent results, RCSC owes each of the class members the same duties and responsibilities, and a class action would permit others to participate who otherwise might not want to pursue their claims due to the limited recovery or risk.

A class action is clearly the superior method for the fair and efficient adjudication of the controversy. The amount in controversy in individual actions would be no more than $1,200.00-$1,500.00 (if an owner is entitled to both the civil penalty and a return of the $300). It is unlikely that individuals would engage in protracted, expensive litigation to recover $1,500.00, even if they might find a lawyer who would be willing to take on an individual action. Considering that one of the risks in litigation is that a party may not be awarded all of their attorneys' fees, it is very likely that a plaintiff in an individual action would pay more than $1,500.00 in unreimbursed attorneys' fees or costs in a lawsuit. As such, there is no viable solution for handling these claims individually. Individual actions, if brought, would be inefficient and likely result in plaintiffs paying far more in attorneys' fees than they might ever recover.

In addition, as explained in Plaintiffs' incorporated MSJ and response to RCSC's partial motion for summary judgment, RCSC's governing body suppresses the ability of Sun City homeowners to actively participate in the adoption and implementation of fee collection policies, including the Transfer Fee. While it wholly excludes certain classes of members from any right to participate, based on their age or residency, the remainder of its members have only limited rights to vote, attend and speak at meetings, inspect RCSC records, and petition the

recall of board members.[2] Accordingly, Sun City homeowners cannot compel RCSC to only collect transfer fees to which the law entitles it without judicial intervention.

Finally, Plaintiffs' claims relate to an unlawful action that affects all owners. It is unfair that just a handful of the 40,000 people who currently own in Sun City, and the tens of thousands of others who have sold in the preceding six years, do not get to reap the benefits if the Court determines that the imposition of the Transfer Fee violates Arizona law.

III. CONCLUSION.

Plaintiffs have met the four Rule 23(a) requirements and have shown that the a class should be certified with respect to the Transfer Fee issues. This Court should exercise its broad discretion under Rule 23 and grant Plaintiffs' amended motion for class certification.

DATED this 9th day of April 2019.

DESSAULES LAW GROUP

By: /s/ Jonathan A. Dessaules
Jonathan A. Dessaules
Jacob A. Kubert
Ashley C. Hill
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[2] Plaintiffs submitted several discovery requests on these issues but RCSC refused to provide substantive responses on the grounds that the information is irrelevant.

COPY of the foregoing electronically served
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on this 9th day of April 2019 to:

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IN THE SUPERIOR COURT OF ARIZONA

COUNTY OF MARICOPA

BOLTON and FLORENCE ANDERSON, et al., Plaintiffs, vs. RECREATION CENTERS OF SUN CITY, INC., a nonprofit corporation, Defendant.	No. CV2015-012458 **ORDER CERTIFYING CLASS ACTION** **(Complex Case filed October 29, 2015)** (Honorable Roger Brodman)
RECREATION CENTERS OF SUN CITY, INC., a nonprofit corporation, Third-Party Plaintiff, vs. LINDA MOYER and RICHARD STEWART, Third-Party Defendants.	

After considering Plaintiffs' Amended Motion for Class Certification, the evidence presented, other papers filed in this action, and the arguments of counsel, the Court finds as follows:

1. Plaintiffs Virginia Baughman, Edward Berger, Ray Hicks and Linda Hicks, Susan Marsh, Arthur Neault, Petunia, LLC, Jean Battista, and Donna Sies ("Class Representatives") are hereby certified to represent the class defined as:

> All current and former Sun City homeowners who have paid the $300 Transfer Fee to Recreation Centers of Sun City, Inc. at any time on or after October 29, 2009 through the present.

2. The Class is so numerous that joinder of all members is impracticable.

3. There are questions of law or fact common to the Class.

4. The claims of Class Representatives are typical of the claims of the members of the Class.

5. Class Representatives will fairly and adequately protect the interests of the members of the Class.

6. The questions of law or fact common to the members of the Class predominate over any questions affecting only individual members of the Class.

7. A class action is superior to the other available methods for a fair and efficient adjudication of this controversy.

8. Jonathan A. Dessaules, Jacob A. Kubert, and Ashley C. Hill of Dessaules Law Group are qualified to serve as class counsel for the Class Representatives in this litigation, in their individual and representative capacities, and for the Class as described above.

Good cause appearing therefore,

IT IS HEREBY ORDERED granting Plaintiffs' Amended Motion for Class Certification and stating that this action shall proceed as a class action.

IT IS FURTHER ORDERED defining the class as:

> All current and former Sun City homeowners who have paid the $300 Transfer Fee to Recreation Centers of Sun City, Inc. at any time on or after October 29, 2009 through the present.

IT IS FURTHER ORDERED that Plaintiffs Virginia Baughman, Edward Berger, Ray Hicks and Linda Hicks, Susan Marsh, Arthur Neault, Petunia, LLC, Jean Battista, and Donna Sies are certified to represent the Class as defined above.

IT IS FURTHER ORDERED that Jonathan A. Dessaules, Jacob A. Kubert, Ashley C. Hill, and the firm of Dessaules Law Group are appointed as class counsel pursuant to Rule 23(g)(1).

IT IS FURTHER ORDERED that Plaintiffs shall submit a proposed notice to be served on the class no later than forty-five (45) days from the date of this Order.

DATED this _____ day of _____, 2019.

_____
HONORABLE ROGER BRODMAN