

1 Jonathan A. Dessaules (019439) – jdessaules@dessauleslaw.com
2 Jacob A. Kubert (027445) – jkubert@dessauleslaw.com
3 Ashley C. Hill (032483) – ahill@dessauleslaw.com

DESSAULES LAW GROUP
4 5353 North 16th Street, Suite 110
5 Phoenix, Arizona 85016
6 Tel. 602.274.5400
7 Fax 602.274.5401

Attorneys for Plaintiffs

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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.

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

Third-Party Plaintiff,

vs.

LINDA MOYER and RICHARD STEWART,

Third-Party Defendants.

No. CV2015-012458

**PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

(Oral Argument Requested)

(Assigned to the Honorable Roger Brodman)

INTRODUCTION

The Court previously ruled that Defendant Recreation Centers of Sun City, Inc. (“RCSC”) is subject to the Planned Community Act (“PCA”). Plaintiffs now move for summary judgment on the invalidity of the Transfer Fees and Property and Improvement Fund (“PIF”) fees (collectively the “Transfer Fee Charges”) that RCSC charges every time a change in ownership occurs; RCSC’s liability for changing certain Plaintiffs’ assessments from per person to per property without their permission; RCSC’s failure to comply with the PCA; and RCSC’s

1 failure to comply with its own governing documents. Plaintiffs are also separately filing an
2 Amended Motion for Class Certification seeking class certification solely on the Transfer Fee
3 issue and a Response to Defendant’s Motion for Partial Summary Judgment. Both are
4 incorporated, in their entirety, herein by reference.

5 **RELEVANT FACTS¹**

6 **A. Transfer Fees and PIF Fees.**

7 RCSC charges two fees to Sun City owners every time a change in ownership occurs: a
8 \$300 Transfer Fee and a \$3,500 PIF. [Plaintiffs’ Separate Statement of Facts (filed
9 contemporaneously herewith) (“PSOF”), ¶ 3] These Transfer Fee Charges are collected from the
10 new owners upon the transfer of each Sun City property and are deposited into RCSC’s general
11 operating account. [PSOF, ¶ 8] The PIF funds are transferred to a restricted account once per
12 month while the \$300 Transfer Fee funds remain comingled with RCSC’s other revenue sources
13 in the operating account. [PSOF, ¶ 9] RCSC has utilized PIF funds for renovations and repairs
14 to several golf courses, snack shops, and pro shops. [PSOF, ¶ 12] Any member of the public is
15 free to play golf, so long as they pay green fees, or frequent any of the several snack shops and
16 pro shops. [PSOF, ¶ 12] The Transfer Fee is collected “for administrative costs, for recording
17 the facilities agreement, for cards, for, et cetera, for the cost of changing ownership.” [PSOF,
18 ¶ 4]

19 **B. Changing Assessment Rates from Per Person to Per Property.**

20 Virginia Baughman, Sherry Johnson-Traver, and Elizabeth Mercer were charged annual
21 assessments on a per person basis when they purchased their properties. [PSOF, ¶¶ 43, 49, 53]
22 The per person assessment is half the rate of the per property assessment. [PSOF, ¶¶ 44, 50, 55]
23 RCSC reclassified each of these Plaintiffs’ from per person to per property without their
24

25 ¹ Plaintiffs provided a historical overview of this dispute in their Motion for Partial
26 Summary Judgment (filed March 30, 2018). Plaintiffs offer the following additional facts with
respect to the issues raised in this motion.

1 knowledge or approval. [*Id.*, PSOF, ¶ 46]

2 **C. Failure to Comply with the PCA.**

3 RCSC denies certain classes of Sun City homeowners any right to participate in RCSC
4 governance. [PSOF, ¶¶ 56, 58-61] Though RCSC lets some members attend and speak at board
5 meetings, inspect its financial records, run for a seat on the board of directors, petition the
6 removal of a board member or to hold a special meeting, it is nevertheless more restrictive than
7 the PCA permits. [PSOF, ¶¶ 62-72] RCSC further refuses to provide resale disclosure
8 information required by the PCA, yet, as discussed above, it collects the fees from homeowners
9 that can only be collected in exchange for providing that information.

10 **D. Failure to Comply with RCSC’s Governing Documents.**

11 Though RCSC’s bylaws must provide that “the voting rights of all Members shall be
12 equal and all Members shall have equal rights and privileges, and be subject to equal
13 responsibilities,” they do not. [PSOF, ¶¶ 73, 75-80] RCSC also incurs liability in excess of
14 \$750,000 and increased its quorum without the authorization of its members. [PSOF, ¶¶ 74, 81-
15 83]

16 **ARGUMENT**

17 **I. RCSC’S \$300.00 TRANSFER FEE IS INVALID.**

18 **A. RCSC’s \$300.00 Transfer Fee Does Not Comply with A.R.S. § 33-1806.**

19 The PCA allows associations to charge a transfer fee of no more than \$400.00:

20 to compensate the association for the costs incurred in the preparation and delivery
21 of a statement or other documents furnished by the association pursuant to this
22 section for purposes of resale disclosure, lien estoppel and any other services
related to the transfer or use of the property.

23 A.R.S. § 33-1806(C). An association is otherwise prohibited from charging or collecting transfer
24 fees “relating to the services of resale disclosure, lien estoppel and any other services related to
25 the transfer or use of a property, except as specifically authorized in this section.” A.R.S. § 33-
26 1806(D). The documents that an association can charge to prepare and deliver include governing

1 documents, budget, its most recent financial report, a copy of its most recent reserve study, and
2 a statement summarizing pending non-collection lawsuits. A.R.S. § 33-1806(A).

3 RCSC contends that its Transfer Fee is “for administrative costs, for recording the
4 facilities agreement, for cards, for, et cetera, for the cost of changing ownership.” [PSOF, ¶ 4]
5 However, RCSC makes no effort to comply with the statute and does not provide any of these
6 documents to purchasers. [PSOF, ¶¶ 70-72] It literally makes no resale disclosures before a
7 member transfers their property to new owners and allows members to obtain the information
8 after the sale is complete. [PSOF, ¶ 71]

9 The right to charge transfer fees of no more than \$400.00 under § 33-1806 is intended to
10 offset an association’s costs for delivering, prior to closing, the resale disclosure information.
11 RCSC does not prepare or delivery any of these documents and, therefore, fails to comply with
12 § 33-1806. Because it is not entitled to charge Transfer Fees under the plain language of the
13 statute, each Plaintiff and each class member (should the Court certify the Transfer Fee class) is
14 entitled to an award of \$300.00 for the improper Transfer Fee. In the event the Court grants the
15 Amended Motion for Class Certification, which is limited to the singular issue of the improper
16 Transfer Fee class, Plaintiffs are entitled to damages in the amount of \$5,604,281.77 as it has
17 charged \$300.00 transfer fees at least 18,680.94 times since approximately October 2009 in
18 violation of the statute. [PSOF, ¶ 84]

19 **B. The Fact that RCSC Charges the Buyer, Not the Seller, is Not a Defense.**

20 RCSC interprets § 33-1806 as applying only to transfer fees charged to sellers. Thus, the
21 argument goes, it is free to charge a buyer any amount in fees without the statute providing any
22 application or restriction.

23 While Plaintiffs recognize that § 33-1806(G) defines a “member” as “the seller of the
24 unit title,” the subsection states that the definition applies “unless the context otherwise
25 requires.” Clearly, the restrictions and limitations in the statute were not simply to protect
26 existing owners and allow an association, such as RCSC, to flay an incoming member with

1 thousands of dollars in charges under the nondescript heading of “transfer fees” without
2 preparing or delivering a single document. Under RCSC’s logic, it has no limitation on the
3 amount it can charge in transfer fees and no obligation to actually perform any services in
4 exchange for the transfer fees it charges simply because it charges the incoming owner and not
5 the existing owner. This deliberately ignores the caveat that the definition of “member” as “the
6 seller of the unit title” applies “unless the context otherwise requires” and improperly elevates
7 form over substance. *See State v. Heylman*, 147 Ariz. 97, 99, 708 P.2d 778, 780 (App. 1985).

8 The statute is designed to ensure transparency in the real estate transaction, helping a
9 purchaser perform due diligence in relation to the association with which he will be
10 contractually bound upon purchase. Arizona courts construe “remedial statutes broadly to
11 effectuate the legislature’s purpose in enacting them.” *In re Estate of Wyatt*, 235 Ariz. 138, 140,
12 ¶ 6, 329 P.3d 1040, 1042 (2014). The remedial purpose of A.R.S. § 33-1806 would be
13 undermined if the Court adopts RCSC’s position that only sellers have standing to sue under
14 A.R.S. § 33-1806 even though it is the purchaser that the statute protects. This is especially true
15 given the language in A.R.S. § 33-1806(B), which allows either the seller *or the purchaser* to
16 recover damages from an association:

17 *A purchaser or seller who is damaged by the failure of a member or the*
18 *association to disclose the information required by subsection A of this section*
19 *may pursue all remedies at law or in equity against the member or the association,*
whichever failed to comply with subsection A of this section, including the
recovery of attorney fees.

20 While RCSC’s argument serves as an admission that it fails to comply with A.R.S. § 33-
21 1806 by charging the fee to the wrong party in the real estate transaction, subsection G does not
22 excuse RCSC from its liability to those from whom it improperly collected its Transfer Fees.

23 **C. RCSC is Liable for Civil Penalties.**

24 Each Plaintiff, and each class member (should the Court certify the Transfer Fee class), is
25 also entitled to civil penalties of “not more than one thousand two hundred dollars.” A.R.S.
26 § 33-1806(D). Although the determination of the appropriate civil penalty for each Transfer Fee

1 charged or collected can be addressed in a brief evidentiary hearing following a ruling on this
2 motion, the circumstances of this case warrant the maximum allowable penalty.

3 RCSC has a long history of disregarding the PCA while availing itself of its benefits,
4 including but not limited to exercising the right to foreclose under A.R.S. § 33-1807. [PSOF, ¶
5 57] Based on A.R.S. § 33-1806, transfer fees at or below \$400.00 are commonplace in real
6 estate transactions and generally expected when purchasing a home in a planned community.
7 As a result, homeowners tend not to question it when they are charged a nondescript “Transfer
8 Fee” in that amount and pursuant to a document that imposes mandatory assessment obligations.

9 Moreover, RCSC’s failure to fully comply with the PCA’s resale disclosure
10 requirements has served to disadvantage a large, vulnerable subset of the population the PCA is
11 clearly meant to protect. Though they were entitled to receive the information under A.R.S.
12 § 33-1806, and paid a fee for it, potential Sun City homeowners are not directly furnished with
13 RCSC’s governing documents with which they must adhere. To the same end, the homeowners
14 are not provided with any information about the rate of RCSC’s assessments and fees, its budget
15 or financial statements, or with any information about its pending lawsuits. [PSOF, ¶ 72] While
16 this information might be generally available online and at RCSC’s membership office, § 33-
17 1806 is meant to relieve purchasers of the burden of locating and collecting this information
18 themselves and shifts the burden on the association to get the information to the homeowner and
19 lets them collect a fee for the trouble. RCSC collects the fee while still imposing the burden on
20 the home purchaser.

21 **D. RCSC’s \$300.00 Transfer Fee Also Violates A.R.S. § 33-442.**

22 Transfer fee covenants can impair the marketability of title and constitute an
23 unreasonable restraint on alienation. *See* S.C. Code § 27-1-70(B)(2) (Feb. 1, 2012). Arizona is
24 one of several states that have enacted statutes generally prohibiting transfer fees. Specifically,
25 A.R.S. § 33-442(A) provides:

1 A provision in a declaration, a covenant or any other document relating to real
2 property in this state is not binding or enforceable against the real property or
3 against any subsequent owner, purchaser, lienholder or other claimant on the
4 property if it purports to do both of the following:

- 1 1. Bind successors in title to the specified real property.
- 2 2. Obligate the transferee or transferor of all or part of the property to pay a fee or
3 other charge to a declarant or a third person on transfer of an interest in the
4 property or in consideration for permitting such a transfer.

5 RCSC's transfer fee covenant, recorded against each property, purports to bind
6 successors-in-title to the specified real property and obligates the transferee to pay \$3,800 in
7 transfer fees in violation of A.R.S. § 33-442(A). [PSOF, ¶ 2]

8 Like most other states with transfer fee prohibitions, Arizona makes exceptions for
9 certain transfer fees under narrow sets of circumstances. *See* A.R.S. § 33-442(C) and A.R.S.
10 § 33-1806. RCSC argues that its transfer fees fall within the exception set forth in A.R.S. § 33-
11 442(C)(7), which it refers to as its "safe harbor provision." Under § 33-442(C)(7), the general
12 prohibition on transfer fees set forth in § 33-442(A) does not apply to "[a]ny fee or charge that is
13 imposed by a document and that is payable to a nonprofit corporation for the sole purpose of
14 supporting recreational activities within the association."

15 Arizona is one of seventeen states that prohibits transfer fees but makes an exception for
16 fees collected for the purpose of supporting recreational activities.² Notably, Arizona is the only
17 one of these seventeen states that limits the fee's use to "the sole purpose of supporting
18 recreational activities." With the exception of Utah, the remainder of the states permit transfer
19 fees for the purpose of supporting "**cultural, educational, charitable, recreational,**

20
21
22 ² *See* Fl. Stat. § 689.28(2)(8) (July 1, 2008); Utah Code § 57-1-46(1)(i) (March 16, 2010);
23 N.J. Rev. Stat. 46:3-29(a)(2)(h) (Dec. 8, 2010); Wash. Rev. Code § 64.60.010(3)(h) (April 23,
24 2011); Colo. Rev. Stat. § 38-35-127(2)(b)(V) (May 23, 2011); Mich. Comp. Laws
25 § 565.881(a)(viii) (May 24, 2011); Ala. Code § 35-4-431(h) (May 25, 2011); Tenn. Code Ann. §
26 66-37-102(4)(D) (June 10, 2011); Tex. Prop. Code Ann. § 5.202(b)(9)(c) (June 17, 2011); Ark.
Code Ann. § 18-12-107(a)(5)(c)(iv) (July 27, 2011); N.D. Cent. Code § 47-33-01(1)(h) (Aug. 1,
2011); NY Real Prop. Law § 472(a)(2)(h) (Sept. 23, 2011); Me. Rev. Stat. tit. 33
§ 163(1)(A)(10) (Sept. 28, 2011); S.C. Code § 27-1-70(A)(4)(d) (Feb. 1, 2012); Ky. Rev. Stat. §
382.792(2)(h) (Apr. 11, 2012); Conn. Gen. Stat. § 47-17A(a)(2)(B)(viii) (Oct. 1, 2014).

1 **environmental, conservation, or other similar activities.**” *Id.* South Carolina also includes
2 “social” in its definition, while Maine includes “preservation,” and Colorado includes
3 “affordable housing, preservation of open space [and] transportation.” *Id.* All of these states
4 include a far more expansive list of purposes for which a transfer fee may be used. In contrast,
5 Arizona limits the enforceability of a transfer fee provision to one for “[a]ny fee or charge that is
6 imposed by a document and that is payable to a nonprofit corporation for the **sole purpose of**
7 **supporting recreational activities within the association.**” A.R.S. § 33-442(C)(7). In light of
8 the foregoing, it is clear that when enacting A.R.S. § 33-442(C)(7), the Arizona legislature
9 clearly meant to carve out only a narrow exception to the general prohibition on transfer fees,
10 for those that solely support recreational activities within an association. *State v. Arthur*, 125
11 Ariz. 153, 155, 608 P.2d 92, 92 (App. 1980) (“[w]henver possible, a statute will be given such
12 an effect that no clause, sentence, or word is rendered superfluous, void, contradictory or
13 insignificant.”). Fees collected to support “cultural, educational, charitable, environmental,
14 conservation or other similar activities” do not fit any of the other A.R.S. § 33-442(C)
15 exceptions and are, therefore, not permitted under Arizona law.

16 *I. RCSC’s \$300 Transfer Fees Support More Than Recreational Activities.*

17 RCSC asks the Court to interpret the phrase, “the sole purpose of supporting recreational
18 activities,” in the broadest possible sense. In urging this interpretation, RCSC essentially
19 removes the words, “sole purpose,” and concludes its argument with the following tautology:
20 since its “only activity is holding, maintaining, and operating Sun City recreational facilities,”
21 all fees collected necessarily go “towards supporting recreational activities.” [DSOF, ¶ 5]

22 Merriam-webster.com defines “recreation” as “refreshment of strength and spirits after
23 work” or “a means of refreshment after work.” *See Riepe v. Riepe*, 208 Ariz. 90, 103, 91 P.3d
24 312, 325 (App. 2004) (“When language... is not expressly defined we may also consider
25 definitions from accepted dictionaries”). RCSC’s circular logic, that all funds collected must
26 support recreational activities because RCSC provides recreational activities, does not satisfy

1 the statutory requirement in § 33-442.

2 The only case that RCSC cites in support of its position is *Nickerson v. Green Valley*
3 *Recreation, Inc.*, 228 Ariz. 309, 265 P.3d 1108 (App. 2011), in which the Court of Appeals’
4 entire consideration of Subsection (C)(7) is contained in a single sentence:

5 In A.R.S. § 33-442, which generally prohibits and renders unenforceable the
6 assessment of fees in connection with the transfer of property, the legislature
7 expressly exempted fees imposed for the purpose of supporting recreational
facilities, with no requirement that the servitude further touch and concern the
land in order to be valid.

8 *Id.* at 316, ¶ 12, 1115. A.R.S. § 33-442 had no bearing in the outcome of *Nickerson. Id.* The
9 Court of Appeals made no findings that the transfer fees in that case fell within what RCSC
10 commonly refers to as the “safe harbor provision.” *Id.*

11 RCSC contends that the \$300 Transfer Fee is collected to make RCSC’s governing
12 documents available to owners. [PSOF, ¶ 20] The act of making documents available to its
13 members is *not* an act whose “sole purpose is to support recreational activities within the
14 association.” It is not an act that supports recreational activities in any way. In fact, many of the
15 owners for whom the documents are made available are not even allowed to access RCSC’s
16 recreational facilities. [PSOF, ¶ 21]

17 Moreover, it is implausible and factually unsupported to suggest that RCSC spent
18 \$750,994.71 in 2017 to host documents on a website and to print the occasional document in
19 response to a member request. [PSOF, ¶¶ 5, 84] The remainder of the Transfer Fee, not spent
20 making documents available, is expended on RCSC’s general operating expenses. [PSOF, ¶ 16]

21 In addition, RCSC spends money on all administrative, legal, and accounting expenses
22 for a separate charitable corporation, the Sun City Foundation, and a portion of some of RCSC’s
23 employees’ salaries relate to work performed for this separate entity. [PSOF, ¶ 23] This is
24 money that is paid for a charitable entity, literally to exist and operate, that is limited to carrying
25 out “exclusively charitable and health educational purposes” and has nothing to do with the
26 recreational activities within RCSC. [PSOF, ¶ 24]

1 RCSC also pays at least \$1,800 to lobbyists to monitor bills at the legislature that might
2 be of interest to RCSC. [PSOF, ¶ 25] This is money paid to a company simply to keep abreast of
3 current legislation and lobby on RCSC’s behalf for or against bills. [PSOF, ¶ 26] These include
4 payments to lobbyists to try to alter Arizona law to obtain a different outcome in this case.
5 [PSOF, ¶ 27] The purported explanation that RCSC has given for its active lobbying efforts
6 following this Court’s prior summary judgment ruling is that the Court’s ruling somehow
7 jeopardizes Sun City’s retirement community status.³ [PSOF, ¶ 30] Payments to lobbyists,
8 which come out of the same general operating account into which the Transfer Fees are
9 deposited and comingled, cannot be described as “for the sole purpose of supporting recreational
10 activities within the association.”

11 RCSC also uses the general operating account funds that includes comingled Transfer
12 Fees to fund lawsuits against owners. [PSOF, ¶ 31] Here again, such payments cannot be
13 described as “for the sole purpose of supporting recreational activities within the association.” It
14 also uses these funds to buy food, beverages, and inventory that it sells at facilities that it holds
15 open to the general public. [PSOF, ¶ 32] Legal, political, charitable, and business activities are
16 *not* recreational activities within the common meaning of the term.

17 RCSC hosts and facilitates more than 120 chartered clubs that do not all constitute
18 “recreational activities.” These include cultural clubs, educational clubs, and political clubs such
19 as the Computer Club of Sun City, the Illinois Club, the Sun City Democrats, the Republican
20 Club of Sun City, the Lifelong Learning Club, and the Spanish Club. [PSOF, ¶ 33] The
21 operating account funds, which includes comingled Transfer Fees, are expended to host and
22 facilitate these clubs. [PSOF, ¶ 34] While fees collected to support these clubs might qualify in
23 the other sixteen states’ statutory exemption to the prohibition on transfer fees, they do not fit
24

25 ³ Conforming its conduct to the PCA will have no adverse impact on RCSC’s ability to
26 maintain its 55+ status, or to continue its practice of restricting the use of certain (but not all)
facilities to Sun City residents who are 55 years or older.

1 into the narrower definition that the Arizona Legislature deliberately chose. A.R.S. § 1-213; *see*
2 *also State v. Johnson*, 171 Ariz. 39, 41, 827 P.2d 1134, 1136 (App. 1992) (“[Courts] must
3 presume the legislature expressed itself in as clear a manner as possible.”).

4 Because RCSC does more than provide recreational activities to Sun City owners, the
5 Transfer Fees cannot be sustained under § 33-442. The Transfer Fees are invalid under Arizona
6 law and all Transfer Fees collected must be disgorged.

7 2. *RCSC’s \$300 Transfer Fee Does Not Solely Support Recreational*
8 *Activities “Within the Association.”*

9 The general operating funds, which include Transfer Fee funds, are used to maintain golf
10 courses and to purchase food, beverages, and products sold at snack shops and pro shops that are
11 open to the general public. [PSOF, ¶ 35] These operating funds are also used to maintain and
12 operate bowling alleys that are also not limited to RCSC members. [PSOF, ¶ 36] These facts, as
13 discussed further below, demonstrate that the Transfer Fees are not used solely to benefit RCSC
14 members (*i.e.* “within the association”) but that benefit members of the general public, who
15 have no ties to Sun City property or the collection of RCSC’s Transfer Fee, and RCSC
16 cardholders alike.

17 RCSC also uses the funds that include collected Transfer Fees to pay lobbyists to try to
18 change the law, both to try to avoid liability under A.R.S. § 33-442 and to exempt itself from the
19 PCA following this Court’s ruling. [PSOF, ¶¶ 26-30] The impacts of RCSC’s efforts extend far
20 beyond Sun City and the RCSC. Both bills have a statewide impact on other associations and
21 homeowners who live in other communities.

22 **II. RCSC’S PIF FEES ARE INVALID.**

23 The above analysis of § 33-442 applies equally to the PIF Fees that RCSC collects from
24 all purchasers. Since 2010, RCSC has collected approximately \$60,228,585.00 in PIF Funds and
25 has spent only \$42,098,338.55 of it. The PIF Funds have been spent on projects with costs
26 ranging between \$722.02 and \$4,910,557.13. [PSOF, ¶ 37] These projects have not solely

1 supported recreational activities within the association. Likewise, the approximately \$21 million
2 currently sitting in RCSC’s restricted bank accounts, collecting interest, are not solely
3 supporting recreational activities within the association.

4 A substantial portion of PIF funds, \$24,587,982.61 according to RCSC, was used to
5 renovate the golf courses, snack shops, and pro shops since 2011. [PSOF, ¶ 38] As the use and
6 enjoyment of these facilities is not limited to RCSC cardholders, but can be used by the general
7 public on the same terms as RCSC members and their guests, it cannot be said that the PIF
8 funds support recreational activities “within the association.” The PIF funds used to improve
9 these facilities, in other words, benefit more than just the RCSC members forced to pay them.

10 Since PIF funds are not used “for the sole purpose of supporting recreational activities
11 within the association,” Plaintiffs are entitled to a refund of the PIF funds paid and RCSC
12 should be enjoined from continuing to collect transfer fees that are not for the sole purpose of
13 supporting recreational activities within the association.

14 **III. RCSC’S UNILATERAL MODIFICATIONS OF THE FACILITIES**
15 **AGREEMENTS FOR PLAINTIFFS VIRGINIA BAUGHMAN, SHERRY**
16 **JOHNSON-TRAVER, AND ELIZABETH MERCER ARE INVALID AS A**
17 **MATTER OF LAW.**

18 The rate at which each owner’s assessments will be charged is set forth in the Facilities
19 Agreement signed by that owner. Each Facilities Agreement is a non-negotiable contract RCSC
20 drafts, entered into by both RCSC and the undersigned Sun City property owners. [PSOF, ¶ 75]

21 Prior to 2003, the Facilities Agreements required each deeded homeowner to pay
22 assessments at identical per-person rates. [PSOF, ¶ 76] The assessments were akin to mandatory
23 club membership dues payable by each owner. In 2003, RCSC started utilizing Facilities
24 Agreements that imposed assessments against the Sun City property rather than the individual
25 owners of each property. [PSOF, ¶ 77] Like a typical HOA, RCSC has since charged the new
26 owners assessments at equal rates, regardless of how many people are on the deed.

1 Because the modification to RCSC’s Facilities Agreements was only prospective, those
2 homeowners who signed a Facilities Agreement prior to 2003 are still only contractually
3 obligated to pay assessments at a per-person rate. However, there are also people, including
4 three plaintiffs, Virginia Baughman, the Sherry Johnson-Traver Trust, and the Elizabeth Scott
5 Mercer Trust (collectively the “Per Person Plaintiffs”), who own their properties by themselves,
6 have not signed a new Facilities Agreement since 2003, but who are nevertheless charged the
7 assessments at a per-property rate. [PSOF, ¶¶ 39-55] By switching their assessment rates from
8 per-person to per-property (at double the cost), RCSC modified the terms of the Per Person
9 Plaintiffs’ Facilities Agreements.

10 RCSC does not have the power to unilaterally alter the contracts it has with Sun City
11 homeowners. To modify a contract, “there must be: (1) an offer to modify the contract, (2)
12 assent to or acceptance of that offer, and (3) consideration.” *Demasse v. ITT Corp.*, 194 Ariz.
13 500, 506, ¶ 18, 984 P.2d 1138, 1144 (1999) (internal citations omitted). “Under Arizona law,
14 consideration necessary to modify an existing contract is any detriment to promisee, or benefit
15 to promisor that supports the new promise.” *Id.* at ¶ 20. “[L]egal consideration, like every other
16 part of a contract, must be the result of agreement.” *Id.* at 507, ¶ 20, 1145.

17 RCSC made no offer for the Per Person Plaintiffs to accept, it simply started charging
18 them assessments at a per property rate instead of a per person rate. [PSOF, ¶¶ 44, 50, 55]
19 Likewise, RCSC provided no consideration for the modification, it simply charged them at the
20 same rate as the owners who signed Facilities Agreements after 2003 and, of course, it did so
21 under the threat of foreclosure. [PSOF, ¶ 46] Accordingly, the modification is not valid.
22 Because the Per Person Plaintiffs have paid assessments at rates double the amount they owed
23 under their Facilities Agreements, each of them is entitled to a refund of their overpayments and
24 an injunction preventing RCSC from charging them at the per property rate under their current
25 Facilities Agreements.

26

1 **IV. RCSC IS NOT COMPLYING WITH THE PCA.**

2 RCSC does not consider itself subject to the PCA. As recently as March 28, 2019, RCSC
3 substantially modified its bylaws to declare as much to be true. [PSOF, ¶ 56] In accordance with
4 its age and residency qualifications, RCSC wholly denies entire groups of homeowners the
5 transparency and rights to hold RCSC accountable that are prescribed to them under the PCA.
6 [PSOF, ¶¶ 58-61] Even those homeowners who have “membership rights” in RCSC are limited
7 in their ability to attend and speak at board meetings, contrary to A.R.S. § 33-1804; to inspect
8 records, contrary to A.R.S. § 33-1805; to receive resale disclosures, contrary to A.R.S. § 33-
9 1806. [PSOF, ¶¶ 61-72] Likewise, RCSC denies Sun City homeowners of their exclusive right
10 to remove board members under A.R.S. § 33-1813 within 30 days of submitting a petition
11 signed by 1,000 members. [PSOF, ¶¶ 63-64] RCSC should be enjoined from operating in
12 violation of the PCA.

13 **V. RCSC IS NOT COMPLYING WITH ITS OWN GOVERNING**
14 **DOCUMENTS AND ALL ACTIONS TAKEN IN CONTRAVENTION OF**
15 **THOSE DOCUMENTS ARE INVALID AS A MATTER OF LAW.**

16 First, RCSC’s bylaws conflict with its articles of incorporation to the extent that the
17 bylaws must provide that all Members have equal rights and privileges, and that they are subject
18 to equal responsibilities. [PSOF, ¶ 73] When some households are required to pay assessments
19 at double the rate of other households, they cannot be said to have equal responsibilities.
20 Likewise, the articles of incorporation are clear that the bylaws shall provide the method for
21 determining assessments to be paid by Members. [PSOF, ¶ 78] All Sun City homeowners are
22 “Members” from whom RCSC is authorized to collect assessments. [PSOF, ¶¶ 78-80]
23 Nevertheless, RCSC picks and chooses who among those burdened with the responsibilities of
24 membership are also entitled to rights and privileges of membership, including the right to vote,
25 attend meetings, and otherwise participate in RCSC governance. [PSOF, ¶ 80] A member who
26 cannot be bound to any modifications to RCSC’s governing documents, as they would

1 unilaterally modify his rights without his consent. The concept that only certain portions of
2 RCSC's governing documents apply to certain members is untenable and the practical solution
3 is that RCSC provides equal rights and privileges to each of its members, which are the owners
4 of every Sun City home.

5 Second, RCSC's articles of incorporation require RCSC to obtain the authorization of its
6 members before it can incur liability in excess of \$750,000. [PSOF, ¶ 74] RCSC does not seek
7 authorization from its members for projects that cost more than \$750,000 to complete, or that
8 otherwise impose more than \$750,000 in liability. [PSOF, ¶ 81] RCSC should be enjoined from
9 spending more than \$750,000 on any pending or future projects without the authorization of its
10 members.

11 Finally, Article XIII(d) of RCSC's articles of incorporation requires that "[t]he Members
12 of the Corporation shall be provided with the opportunity to vote by proxy in... [a]ny other
13 matter requiring an act of the members." A bylaw amendment that fixes a greater quorum or
14 voting requirement for members "shall not be adopted, amended or repealed by the board of
15 directors." A.R.S. § 10-11023(B). Rather, only the "members may adopt or amend a bylaw that
16 fixes a greater quorum or voting requirement for members." A.R.S. § 10-11023(A). In May
17 2010, RCSC amended its bylaws as to increase its quorum from 100 to 1,250 members,
18 qualified by age and residency. [PSOF, ¶ 82] RCSC did not hold a vote of its members. The
19 quorum must be returned to 100 and any increase must be put to a vote of the members.

20 CONCLUSION

21 Plaintiffs are entitled to summary judgment that the \$3,800 RCSC collects in transfer fees
22 from each Sun City homeowner are invalid under A.R.S. § 33-1806 and A.R.S. § 33-442.
23 Homeowners who have been required to pay these fees under the threat of foreclosure are
24 entitled to a refund, and RCSC is liable for civil penalties as set forth in A.R.S. § 33-1806.
25 Moreover, Virginia Baughman, the Sherry Johnson-Traver Trust, and the Elizabeth Scott
26 Mercer Trust are entitled to refunds of the difference between the per-property assessments

1 RCSC demanded that they pay under the threat of foreclosure and the per-person rate of
2 assessment their Facilities Agreement contract actually obligates them to pay RCSC. Finally,
3 Plaintiffs are entitled to declaratory judgment and injunctive relief related to RCSC's violation
4 of the Planned Community Act and its own governing documents as set forth above.

5 DATED this 9th day of April 2019.

6 DESSAULES LAW GROUP

7
8 By: /s/ Jonathan A. Dessaulles
9 Jonathan A. Dessaulles
10 Jacob A. Kubert
11 Ashley C. Hill
12 *Attorneys for Plaintiffs*

12 COPY of the foregoing electronically served
13 through AZTurbo Court
14 on this 9th day of April 2019 to:

15 Christopher A. LaVoy
16 HIENTON & CURRY, PLLC
17 5045 N. 12th Street, Suite 110
18 Phoenix, Arizona 85014
19 clavoy@hclawgroup.com
20 *Co-Counsel for Defendant/Third-Party Plaintiff*

21 Richard G. Himelrick
22 TIFFANY & BOSCO, PA
23 Seventh Floor Camelback Esplanade II
24 2525 E. Camelback Rd.
25 Phoenix, AZ 85016
26 rgh@tblaw.com
Co-Counsel for Defendant/Third-Party Plaintiff

/s/ Hilary Narveson