

1 Jonathan A. Dessales (019439) – jdessales@dessauleslaw.com

2 Jacob A. Kubert (027445) – jkubert@dessauleslaw.com

3 Ashley C. Hill (032483) – ahill@dessauleslaw.com

4 **DESSAULES LAW GROUP**

5 5353 North 16th Street, Suite 110

6 Phoenix, Arizona 85016

7 Tel. 602.274.5400

8 Fax 602.274.5401

9 *Attorneys for Plaintiffs*

10 IN THE SUPERIOR COURT OF ARIZONA

11 COUNTY OF MARICOPA

12 BOLTON and FLORENCE ANDERSON, et
13 al.,

14 Plaintiffs,

15 vs.

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

18 Defendant.

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

21 Third-Party Plaintiff,

22 vs.

23 LINDA MOYER and RICHARD STEWART,

24 Third-Party Defendants.

No. CV2015-012458

**PLAINTIFFS' RESPONSE TO
DEFENDANT'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
(DAMAGES)**

(Oral Argument Requested)

(Assigned to the Honorable Roger Brodman)

INTRODUCTION

25 For the reasons set forth in Plaintiffs' Motion for Summary Judgment and their Amended
26 Motion for Class Certification separately filed on this same day, Plaintiffs, and similarly situated
Sun City homeowners, are entitled to damages under both A.R.S. § 33-1806 and A.R.S. § 33-
442 for RCSC's unlawful collection of transfer fees. Both motions are incorporated, in their
entirety, herein by reference. For the reasons set forth in greater detail below, questions of fact

1 preclude summary judgment in Defendant’s favor and do not limit Plaintiffs to injunctive relief
2 in this action. Defendant’s Motion for Partial Summary Judgment must be denied in its entirety.

3 **FACTUAL BACKGROUND**

4 The Court previously ruled that Defendant Recreation Centers of Sun City (“RCSC”) is
5 subject to the Planned Community Act (“PCA”). In reliance on the terms of the Facilities
6 Agreement that each Sun City homeowner must sign, RCSC charges and collects \$3,800.00 in
7 fees every time the name on the deed changes. [Plaintiffs’ Separate Statement of Facts (filed
8 contemporaneously herewith) (“PSOF”), ¶ 2]

9 The \$3,800 total is comprised of two transfer fees (collectively, the “Transfer Fee
10 Charges”). The first is what RCSC calls its Transfer Fee (the “Transfer Fee”). With each
11 transfer of Sun City property, the new owners are charged \$300.00 “for administrative costs, for
12 recording the facilities agreement, for cards, for, et cetera, for the cost of changing ownership.”
13 [PSOF, ¶ 4] RCSC uses the Transfer Fee to give new owners online access to the governing
14 documents and to make hard copies available for pickup. [PSOF, ¶ 5] RCSC does not provide
15 new owners a copy of its operating budget, its financial report, reserve study, a statement
16 summarizing non-collection pending litigation, or the amounts held in reserves before they
17 close. [PSOF, ¶ 6]

18 The Transfer Fee is deposited into RCSC’s general operating fund to make non-
19 recreational charitable donations, fund lobbyists to change Arizona law (upon unfavorable
20 rulings from this Court) and fund services to the general public. [PSOF, ¶ 7] Between January
21 and August 2018, RCSC collected a total of \$14,983,501.00 in operating income, an estimated
22 \$483,411.43 of which was from Transfer Fees. [PSOF, ¶ 87] In that time, RCSC incurred
23 approximately \$12,630,342 in operating expenses. [*Id.*] By the end of the year, RCSC collected
24 a total of \$21,823,409.00 in operating income and incurred only \$18,493,005.00 in operating
25 expense. [*Id.*] RCSC ended 2018 with a net operating excess of \$3,330,404.00. [*Id.*]

1 Every circumstance that triggers RCSC's collection of the \$300.00 Transfer Fee
2 described above also triggers its collection of a \$3,500.00 transfer fee RCSC refers to as its
3 Preservation and Improvement Fee ("PIF"). [PSOF, ¶ 2] Like the Transfer Fee, PIF is charged
4 to the new owner of each Sun City property and deposited into RCSC's general operating
5 account. [PSOF, ¶ 8] PIF money remains with RCSC's other revenue in the operating account
6 until it is transferred to a restricted account once per month. [PSOF, ¶ 9] The PIF funds are then
7 held in a separate bank account, for either investment projects or to fund large-scale building
8 and renovation projects. [PSOF, ¶ 10] RCSC pays for these projects out of its general operating
9 account and later transfers funds from the restricted PIF account for reimbursement. [PSOF, ¶
10 11]

11 Between 2010 and 2018, RCSC collected a total of \$60,228,585.00 in PIF money from
12 Sun City homeowners. [PSOF, ¶ 84] Since October 2009, RCSC's records show it allocated at
13 least \$24,587,982.61 of that amount for renovations to golf courses that it operates for the
14 benefit of the public-at-large. [PSOF, ¶ 38] Between January and August 2018, RCSC collected
15 \$5,639,800.00 in PIF, in addition to the \$14,938,501.00 it had already collected in operating
16 income on the year. [PSOF, ¶ 84] At the end of 2018, RCSC had \$21,870,129.00 of PIF funds
17 set aside to be spent at the will of RCSC's board of directors. [PSOF, ¶ 85]

18 Plaintiffs' claims under A.R.S. § 33-1806 and A.R.S. § 33-442 are based on RCSC's
19 collection of the above fees.

20 ARGUMENT

21 **I. PLAINTIFFS ARE ENTITLED TO AN AWARD OF DAMAGES FOR** 22 **RCSC'S UNLAWFUL COLLECTION OF ITS THREE HUNDRED** 23 **DOLLAR TRANSFER FEE AND ITS PRESERVATION AND** 24 **IMPROVEMENT FEE.**

25 Arizona law generally prohibits the collection of transfer fees. A.R.S. § 33-442. Though
26 there are exceptions to the general prohibition contained in A.R.S. § 33-442(C) and A.R.S. § 33-
1806(C), for the reasons set forth in Plaintiffs' separately filed Motion for Summary Judgment,

1 those exceptions do not apply.¹ Accordingly, each Plaintiff who has been charged these
2 prohibited fees has a valid, tenable claim for damages against RCSC. Its motion for summary
3 judgment must be denied as to those claims. Even if the Court finds that Plaintiffs are not
4 entitled to summary judgment, as requested in their separate motion, questions of fact preclude
5 an award of summary judgment in RCSC's favor.

6 **II. QUESTIONS OF FACT PRECLUDE RCSC FROM OBTAINING**
7 **SUMMARY JUDGMENT IN ITS FAVOR.**

8 “Summary judgment is appropriate only if no genuine issues of material fact exist and the
9 moving party is entitled to judgment as a matter of law.” *Wells Fargo Bank v. Arizona Laborers,*
10 *Teamsters and Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 482, 38 P.3d
11 12, 20 (2002). With any motion for summary judgment, “[c]redibility determinations, the
12 weighing of the evidence, and the drawing of legitimate inferences from the facts are jury
13 functions, not those of a judge.... The evidence of the non-movant is to be believed, and all
14 justifiable inferences are to be drawn in his favor.” *Thompson v. Better-Bilt Aluminum Products*
15 *Co., Inc.*, 171 Ariz. 550, 558, 832 P.2d 203, 211 (1992). “Affidavits that only set forth ultimate
16 facts or conclusions of law can neither support nor defeat a motion for summary judgment.”
17 *Florez v. Sargeant*, 185 Ariz. 521, 526, 917 P.2d 250, 255 (1966); *see also Orme School v.*
18 *Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990) (subscribing to the view that the law
19 does not authorize trials on affidavits).

20 RCSC has offered no more evidence in support of its Motion for Partial Summary
21 Judgment than a self-serving declaration of its General Manager, Jan Ek, that “none of [its]
22 revenue is used for non-recreational activities,” and that it is all “used or reserved to operate,
23 maintain, and improve the recreational facilities that RCSC owns and manages.” [Defendant’s
24 Statement of Facts in Support of Motion for Partial Summary Judgment (filed August 10, 2018)]

25 ¹ Plaintiffs incorporate herein by reference Plaintiffs’ Motion for Summary Judgment
26 filed this same day.

1 (“DSOF”), ¶ 6]. Summary judgment in favor of RCSC would require the Court to find Ms. Ek’s
2 conclusory, self-serving statement, limited to a single issue, more credible than the whole of
3 Plaintiffs’ evidence to the contrary.

4 RCSC’s Motion for Partial Summary Judgment primarily raises three issues: (1) whether
5 RCSC’s transfer fees violate A.R.S. § 33-1806(D); (2) whether RCSC’s transfer fees violate
6 A.R.S. § 33-442(A); and (3) whether A.R.S. § 10-3304(B)(2) precludes Plaintiffs from
7 obtaining an award of damages. As detailed below, RCSC failed to submit evidence to address
8 all of the issues it raised, and the evidence it did submit does not establish that it is entitled to
9 summary judgment.

10 **A. RCSC Has Not Established That It Is Entitled to Judgment as a Matter**
11 **of Law in relation to Plaintiffs’ A.R.S. § 33-1806 Claims.**

12 RCSC’s transfer fees violate A.R.S. § 33-1806 if it is an association and it charges “a fee
13 relating to services for resale disclosure [or] any other services related to the transfer or use of a
14 property” but fails to make certain mandatory disclosures. In September 2018, the Court ruled
15 that RCSC is an association for purposes of the Planned Community Act, A.R.S. § 33-1801, *et*
16 *seq.* In its Statement of Facts, RCSC admits that it charges two different transfer fees “in
17 connection with the purchase, acquisition, transfer, inheritance, gift or any change in ownership
18 greater than 50% of legal or beneficial interest in the title to a residential property in Sun City.”
19 [DSOF, ¶ 5] RCSC did not establish that the \$3,800 in fees it charges “in connection with the...
20 transfer... in the title to a residential property in Sun City” is “a fee relating to services for resale
21 disclosure [or] any other services related to the transfer or use of property.”

22 Specifically, in its motion for summary judgment, RCSC only addressed the PIF but
23 failed to even make a legal argument that the Transfer Fee portion is not a fee relating to
24 services for the transfer or use of property. In her deposition, Ms. Ek testified the Transfer Fee is
25 charged in relation to services for the transfer of property. [PSOF, ¶ 4] Specifically, Ms. Ek
26 explained that RCSC charges the Transfer Fee “for administrative costs, for recording the

1 facilities agreement, for cards, for, et cetera, for the cost of changing ownership.” *Id.* Summary
2 judgment cannot be granted in RCSC’s favor as to Plaintiffs’ claim that RCSC’s transfer fee
3 violates A.R.S. § 33-1806.

4 **B. RCSC Has Not Established That It Is Entitled to Judgment as a Matter**
5 **of Law in relation to Plaintiffs’ A.R.S. § 33-442 Claims.**

6 RCSC can only succeed on its argument that Plaintiffs’ claim under A.R.S. § 33-442 is
7 untenable if the Transfer Fee Charges are (1) not charged “on transfer of an interest in the
8 property;” or, if they are (2) “payable to a nonprofit corporation for the sole purpose of
9 supporting recreational activities within the association.” RCSC admits that the entirety of its
10 \$3,800 transfer fee is charged on transfer of an interest in Sun City property. [DSOF, ¶ 6] To
11 establish that it instead satisfies the second prong, RCSC relies on Ms. Ek’s assertion that
12 RCSC’s revenue “is used or reserved to operate, maintain, and improve the recreational
13 facilities that RCSC owns and manages [and] [n]one of [its] revenue is used for non-recreational
14 activities.” [DSOF, ¶6] It provides no further detail. Discovery has since shown this statement to
15 be incorrect.

16 For instance, RCSC financially supports the Sun City Foundation which must “carry out
17 exclusively charitable and health educational purposes.” [PSOF, ¶ 24] Expenditures related to
18 the Sun City Foundation are not made for the sole purpose of supporting recreational activities
19 but are paid out of RCSC’s operating account using money comingled with the Transfer Fee.
20 Accordingly, RCSC cannot establish that its Transfer Fee solely supports recreational activities.

21 Likewise, completely missing from RCSC’s evidence is any showing that the recreational
22 activities allegedly supported by the Transfer Fee Charges are solely “within the association.”
23 The discovery process has revealed that, since October 2009, Plaintiff spent \$24,587,982.61 in
24 PIF funds renovating RCSC’s golf courses that it operates for the benefit of the public-at-large.
25 [PSOF, ¶ 38] Specifically, anyone over the age of twelve may golf on Sun City’s golf courses.
26 [PSOF, ¶ 19] Unlike with its recreational facilities, RCSC does not limit access to its golf

1 courses to people who live in Sun City, or who are a guest of someone who does. [PSOF, ¶ 19]
2 Even if RCSC is correct that the PIF solely supports recreational activities, it does not establish
3 how the fee, which RCSC primarily uses to subsidize the costs of operating its public golf
4 course, only supports activities “within the association.”

5 RCSC further fails to account for its lack of segregation of the PIF from the Transfer Fee,
6 and the questions of fact presented by that practice. RCSC admits that it receives both fees
7 together in a single check from each new property owner. [PSOF, ¶ 15] The funds of both fees
8 are deposited together into RCSC’s operating account, where they stay together for as long as a
9 month. [PSOF, ¶ 15] Though RCSC claims that the money it collects as part of its PIF is used
10 for the sole purpose of supporting recreational activities, it fails to establish how that is true
11 when “PIF projects” are paid for out of RCSC’s operating account, which is reimbursed only as
12 often as once a week with money that it previously segregated into the restricted PIF or Capital
13 Reserve accounts.

14 **C. The Only Issue of Fact Presented in RCSC’s A.R.S. § 10-3304**
15 **Argument was Resolved on September 6, 2018.**

16 Even though it was presented to the Court before a ruling was issued on Plaintiffs’
17 Motion for Partial Summary Judgment as to the applicability of the Planned Communities Act,
18 RCSC’s A.R.S. § 10-3304(B)(2) argument recognized that Plaintiffs are members of a planned
19 community. The Court affirmed the same in its September 6, 2018 Ruling. The remainder of
20 RCSC’s A.R.S. § 10-3304 argument is limited to questions of law.

21 **III. A.R.S. § 10-3304 DOES NOT LIMIT THE COURT’S AUTHORITY TO**
22 **AWARD PLAINTIFFS THE DAMAGES CLAIMED IN THIS ACTION.**

23 RCSC appears to argue that A.R.S. § 10-3304 prohibits any claim for damages against it.
24 While Plaintiffs agree that the appropriate remedy for RCSC’s alleged violations of its articles
25 of incorporation and by-laws would be declaratory or injunctive relief, RCSC appears to cite
26 A.R.S. § 10-3304 for the more general proposition that RCSC cannot be sued for damages. To
the extent that RCSC is attempting to challenge claims for damages arising from improper

1 transfer fees, PIF, or assessments, RCSC is incorrect in seeking to apply § 10-3304 to such
2 claims. A planned community association is not immune from an action for damages.

3 Four sentences in RCSC’s otherwise brief motion (at 6) raises the concern that it is
4 attempting to expand § 10-3304 to apply to all damages claims:

5 [B]y statute, “the validity of corporate action shall not be challenged in the ground
6 that the corporation lacks or lacked power to act” except “in a proceeding by any
7 member of a ...planned community association...to *enjoin* the act.” A.R.S. § 10-
8 3304(A) & (B)(2) (emphasis added). A damages claim is not permitted. The only
remedy for an *ultra vires* action is an injunction. Plaintiffs’ damages claim thus
fails as a matter of law.

9 Given RCSC’s deliberately curt analysis of the statute, it is unclear whether RCSC is
10 arguing that all claims for damages are barred or simply whether the allegations accusing RCSC
11 of violating its articles of incorporation or by-laws are not ones that can be remedied by
12 damages. It is unclear, for example, whether RCSC is arguing that the statute bars any claims
13 for damages relating to the unlawful collection of transfer fees or PIF.

14 Nothing in § 10-3304 prohibits a party that has suffered damages from suing to collect
15 those damages. If an owner has suffered individual harm, she or he has the legal right to sue for
16 damages. *See, e.g.*, A.R.S. § 33-1806(B) (members have express right to obtain damages);
17 A.R.S. § 33-1257 (governing how owners’ monetary judgments are enforced against a
18 condominium association); A.R.S. § 33-420 (providing for monetary relief against homeowners’
19 associations for recording improper liens); *see also* Scott B. Carpenter, Esq., *Community*
20 *Association Law in Arizona*, 5th Ed. 2015, §1.46 (“It is possible for the condominium
21 association to incur liabilities. A.R.S. § 33-1251 addresses the tort and contract liability of the
22 association”).

23 A.R.S. § 10-3304 does not foreclose the right to pursue claims for damages where an
24 individual, or class, has suffered individualized harm but merely addresses derivative actions. In
25 corporations other than associations, there must be a requisite number of owners who can pursue
26 relief. In condominium and planned community associations such as RCSC, however, a single

1 owner has standing to enjoin a corporate act. This is precisely the relief that Plaintiffs seek with
2 respect to those acts being challenged as a violation of RCSC’s articles of incorporation. For
3 example, Plaintiffs do not dispute that their claims regarding RCSC’s violations of its own
4 governing documents are challenges to corporate acts and do not seek damages in relation to
5 those claims. *See* Plaintiffs’ Amended Complaint, ¶¶ 158 and 165.

6 Associations have an “ironclad” duty to refrain from violating their governing
7 documents. *Condos v. Home Development Co.*, 77 Ariz. 129, 136, 267 P.2d 1069, 1073 (1954).
8 When a homeowner’s association violates their “ironclad duty,” the members are entitled to
9 judicial recourse. *Johnson v. Pointe Community Association, Inc.*, 205 Ariz. 485, 490, 73 P.3d
10 616, 621 (App. 2003). This “judicial recourse” is not strictly limited to injunctive relief. *Id.* The
11 *Johnson* Court cited the following with approval from the California Supreme Court case
12 *Lamden v. La Jolla Shores Clubdominium Homeowners Ass’n.*, 980 P.2d 940, 942 (Cal. 1999):

13 Under well-accepted principles of condominium law, a homeowner can sue the
14 association for damages and an injunction to compel the association to enforce the
provisions of the declaration.

15 *Johnson*, 205 Ariz. at 489. Plaintiffs’ claim for damages for the individualized harm they
16 suffered from unlawful transfer fees and PIF or from having their assessments unilaterally
17 changed without their consent, however, does not fall within the purview of A.R.S. § 10-3304.

18 Section 10-3304 does not prohibit as a matter of law members from bringing claims for
19 damages against their associations. The fact that the Legislature explicitly carved out the right to
20 pursue civil penalties under A.R.S. § 33-1806 negates any suggestion that a planned community
21 association is immune from a suit for damages.

22 CONCLUSION

23 Defendant’s Motion for Partial Summary Judgment seeks judgment against Plaintiffs on
24 their damages claims because they are “untenable” and damages cannot be pursued without
25 violating A.R.S. § 10-3304, RCSC’s motion must be denied.

1 DATED this 9th day of April 2019.

2 DESSAULES LAW GROUP

3
4 By: /s/ Jonathan A. Dessaules

5 Jonathan A. Dessaules

6 Jacob A. Kubert

7 Ashley C. Hill

Attorneys for Plaintiffs

8 COPY of the foregoing electronically served
9 through AZTurbo Court
10 on this 9th day of April 2019 to:

11 Christopher A. LaVoy
12 HIENTON & CURRY, PLLC
13 5045 N. 12th Street, Suite 110
14 Phoenix, Arizona 85014
15 clavoy@hclawgroup.com
16 *Co-Counsel for Defendant/Third-Party Plaintiff*

17 Richard G. Himelrick
18 TIFFANY & BOSCO, PA
19 Seventh Floor Camelback Esplanade II
20 2525 E. Camelback Rd.
21 Phoenix, AZ 85016
22 rgh@tblaw.com
23 *Co-Counsel for Defendant/Third-Party Plaintiff*

24
25
26 /s/ Hilary Narveson