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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/Third-Party Plaintiff. Linda Moyer and Richard Stewart, Third-Party Defendants.	Case No. CV2015-012458 **DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** (Hon. Roger Brodman) (Oral Argument Requested)

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Introduction

Plaintiffs' motion for class certification does not comply with the standards for obtaining class certification. A plaintiff seeking certification has the burden of presenting evidence and a trial plan that describes plausible legal theories that can be proved through common, classwide proof. Obtaining class certification is not the easy process that Plaintiffs posit. Before certification is granted the court must conduct a "rigorous analysis" of Rule 23's requirements that "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Wal-Mart Store, Inc. v. Dukes*, 564 U.S. 338, 351 (2011) (citation omitted). If the court then decides to grant certification, it must prepare an order with findings that explains the reasons for certification and describes the evidence supporting the court's decision. Ariz. R. Civ. P. 23(c)(1)(B)(iii)-(iv).

Plaintiffs' motion's lack of evidence and superficial analysis make it impossible for the court to rigorously analyze Rule 23's requirements and make a reasoned, evidence-based decision. For example, although Plaintiffs claim that two transfer-fee statutes (A.R.S. §§ 33-442 and 33-1806) were violated, they provide no information on how the statutes were violated or what common evidence would be used to prove the violations. *See* Pls.' Mem. at 2:5-8. In fact, except for a half dozen or so exhibits, Plaintiffs present no evidence to support any of their legal theories. And the exhibits that Plaintiffs do submit are not discussed or presented in a way that would allow the court to make evidentiary findings. Plaintiffs' unconscionability claim illustrates this. Except for a copy of the Facilities Agreement, Plaintiffs provide no evidence whatsoever to support the unconscionability claim. They simply rely upon assertions of counsel to describe what they contend is unconscionable conduct. *Id.* at 3:7-15. It is impossible for the court to use non-evidentiary statements of counsel to conduct a proper Rule 23 analysis and make evidentiary findings.

The superficial nature of Plaintiffs' motion is also unfair to Defendant (for short RCSC). Because of the lack of a trial plan and the perfunctory description of Plaintiffs' legal theories, RCSC cannot adequately respond to Plaintiffs' certification request. This deprives the court of the adversarial briefing needed for a rigorously analyzed certification order. And it is unfair to RCSC because Plaintiffs are now able to file a reply that attempts to cure their motion's deficiencies with no opportunity for RCSC to respond.

Yet even with the incomplete and conclusory record that exists, Plaintiffs' motion exposes multiple reasons why class certification is improper. One is that Plaintiffs are improperly attempting to certify a class for money damages under Rule 23(b)(1). Claims for money damages are confined to Rule 23(b)(3) classes. A second is that Plaintiffs lack standing to make a claim for improper transfer fees under A.R.S. § 33-1806. The statute allows only sellers to sue for improper fees. *See* A.R.S. § 33-1806(C) and (G) and further discussion *infra* at 8. Because Plaintiffs are buyers, they cannot adequately represent sellers. The other transfer-fee statute (A.R.S. § 33-442) exposes a third flaw in Plaintiffs' motion. That statute provides a safe-harbor for nonprofit corporations like RCSC that collect fees solely to support recreational facilities. *See* A.R.S. § 33-442(C)(7) and further discussion *infra* at 8. The safe harbor plainly covers RCSC's recreational-fee assessments. The unconscionability claim raised by the two proposed classes is a fourth example. It is largely refuted by RCSC's articles of incorporation and bylaws. Pls.' Ex. 2 & 4. The articles and bylaws show that Plaintiffs had voting rights that allowed them to elect new directors and make amendments to the governing documents that Plaintiffs wrongly contend they had no control over. *See infra* at 12-13. Fifth, on the Assessment Class's claims, Plaintiffs present no evidence to show that there is a common understanding of the words "equal responsibilities" in RCSC's articles that renders the Facilities Agreements unconscionable. Much less do Plaintiffs offer any authority or

evidence to show that the "equal responsibilities" clause prohibited RCSC's board from making a prospective change in assessments that had no unequal financial or other impact on existing homeowners. And finally, the Assessment Class is overly broad and includes subsets of homeowners with individualized claims unsuitable for class treatment.

Argument

I. PLAINTIFFS' MOTION IS NOT SUPPORTED BY THE EVIDENTIARY RECORD REQUIRED FOR CLASS CERTIFICATION.

Plaintiffs' superficial, nonevidentiary approach to class-certification is inconsistent with both U.S. Supreme Court precedent and amendments to Arizona Rule 23 that track the Supreme Court's decisions. Contrary to Plaintiffs' assertion that they are entitled to have the court assume the truth of their complaint's allegations and liberally apply Rule 23, the Supreme Court has explicitly held that, "Rule 23 does not set forth a mere pleading standard." *Wal-Mart*, 564 U.S. at 350; *accord Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). Quite the contrary; "certification is proper only if the trial court is satisfied, after *a rigorous analysis*, that the prerequisites of Rule 23(a) have been satisfied." *Wal-Mart*, 564 U.S. at 350-51 (emphasis added) (citation omitted). To enable the court to make this rigorous analysis, a class plaintiff must provide the court with an evidentiary record. *Comcast*, 569 U.S. at 33 ("The party must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)."). This evidence must be presented in a way that enables the trial court to understand how the case, if certified, "would actually be tried." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996).

Arizona law tracks these federal principles. In 2003, the Arizona legislature enacted class-action statutes requiring that before certifying a class, a court must hold a hearing, make findings, and describe the evidence on which its findings are based. *See* A.R.S. §§ 12-1871─1873. These statutes are now codified in Rule 23(c)(1), which requires that a certification order "*set forth the court's reasons* for maintaining the case as

a class action; *and describe the evidence* supporting the court's determination." (Emphasis added).

Because of its conclusory approach to certification, Plaintiffs' motion does not provide the court with a sufficient record to make the findings that Rule 23 requires. Consequently, Plaintiffs have not carried their burden of proof under Rule 23.

II. CERTIFICATION UNDER RULE 23(b)(1) IS PRECLUDED BECAUSE DAMAGES ARE THE PRIMARY REMEDY THAT PLAINTIFFS SEEK.

Other reasons also compel denial of certification. One reason concerns limitations on the relief that is available when, as here, the plaintiff seeks certification of a Rule 23(b)(1) class. That rule cannot be used to certify a class that predominately seeks money damages.

It is obvious from Plaintiffs' motion that the primary remedy Plaintiffs seek is damages based on what Plaintiffs characterize as illegal PIF fees, transfer fees, and assessment fees. The claims for injunctive and declaratory relief regarding these fees are distant, secondary claims.

Rule 23(b) is structured to permit three types of class actions. Subsection (b)(1) allows certification where a classwide decision is essential because individual adjudications would lead to inconsistent, impossible, or unworkable decisions. *Wal-Mart*, 564 U.S. at 362. Subsection (b)(2) allows certification where injunctive or declaratory relief would perforce affect the entire class. *Id.* By their nature, (b)(1) and (b)(2) class actions require mandatory membership. *Id.* Consequently, there is no right to opt out of a (b)(1) or (b)(2) class. Ariz. R. Civ. P. 23(c)(2)(A)-(B); *Wal-Mart*, 564 U.S. at 362. By contrast, classes in Rule 23(b)'s third category—(b)(3) classes—involve non-mandatory classes in which a class action is a superior means of adjudication because common questions of fact and law predominate. *Id*. In (b)(3) class actions, class members must be given notice and the right to opt out. Ariz. R. Civ. P. 23(c)(2); *Wal-Mart*, 564 U.S. at 362.

Given the Rules 23's structure, the Supreme Court in *Wal-Mart* found it "clear that individualized monetary claims belong in Rule 23(b)(3)," where class members have opt-out rights. 564 U.S. at 362. The Court reasoned that "plaintiffs with individual monetary claims" should be allowed "to decide *for themselves* whether to tie their fates to the class representatives' or go it alone." *Id.* at 365 (emphasis in original). To proceed otherwise and certify mandatory damage classes without notice and opt-out rights would likely violate due process. *Id.* at 363. For this reason, the Court refused to read Rule 23(b)(2) to include monetary claims. *Id.* In reaching this conclusion, the Court jointly analyzed (b)(1) and (b)(2) classes and left no doubt that a mandatory, non-opt-out class for damages under Rule 23(b)(1) would involve the same due-process violations as a similar class under Rule 23(b)(2). *See id.* at 361-63.

Following *Wal-Mart*, courts have denied Rule 23(b)(1) certification for declaratory and injunctive-relief claims where class members have substantial damage claims. *Cannon v. BP Products N. Am., Inc.*, 2013 WL 5514284, at *17 (S.D. Tex. Sept. 30, 2013) ("Because each of the putative Plaintiffs seeks individualized damages for property value diminution—which vary significantly from plaintiff to plaintiff and do not flow directly from their request for injunctive relief—the Court determines that Plaintiffs fail to meet the requirements of certification under Rule 23(b)(1) and (b)(2) as propounded in *Wal-Mart* and *Allison*."); *Altier v. Worley Catastrophe Response, LLC*, 2011 WL 3205229, at *14 (E.D. La. July 26, 2011) ("Because monetary relief predominates in plaintiffs' complaint, certification under Rule 23(b)(1) must be denied."). These decisions largely based their rulings on the lack of due process that would arise from certifying damage claims in a Rule 23(b)(1) class from which the class members have no right to exclude themselves.

In summary, Plaintiffs seek millions of dollars in damages regarding PIF fees and annual assessments. The court's decision on declaratory or injunctive relief would also

decide the class members' potential claims for monetary damages, even though they have no ability to opt out of the class. As in *Wal-Mart*, the only potentially proper means of certifying these claims is under Rule 23(b)(3).

III. CERTIFICATION UNDER RULE 23(b)(3) IS ALSO IMPROPER.

A. Plaintiffs' liability theories.

Plaintiffs' memorandum identifies three theories of liability on which class certification is supposedly appropriate. As to the proposed Transfer Fee Class, Plaintiffs allege that (1) Property Improvement Fees (PIF fees) and other transfer fees that they paid "violate A.R.S. §§ 33-442 and/or 33-1806," and (2) "portions of the Facilities Agreements they were forced to sign are unconscionable." Pls.' Mem. at 4. As to the Assessment Class, Plaintiffs claim that the Facilities Agreements are unconscionable contracts that violate RCSC's articles of incorporation because in 2003 RCSC prospectively changed the assessment rate from a per person rate to a per property rate. Pls.' Mem. at 2-3.

Because Plaintiffs have only sketched their legal theories and have provided no evidence to show how they would prove liability, it is impossible for RCSC to fully respond to Plaintiffs' motion. Even so, the information Plaintiffs have provided is enough to show that Plaintiffs' claims are not appropriate for certification.

B. Because they overlap with class-certification issues, the merits of Plaintiffs' claims are properly considered.

Before turning to the specifics of why Plaintiffs' claims are not certifiable, we make an important point regarding the court's right to consider the merits of Plaintiffs' claims. Some older cases that Plaintiffs cite employed a bright-line rule holding that the merits should never be considered in connection with class certification. Those cases are no longer good law. They have been debunked by the U.S. Supreme Court. *E.g.*, *Comcast*, 569 U.S. at 33 ("Repeatedly, we have emphasized that it may be necessary for

the court to probe behind the pleadings before coming to rest on the certification question . . . ." (citation omitted)). The "rigorous analysis" required for class certification will frequently "overlap with the merits of the plaintiff's underlying claim." *Wal-Mart*, 564 U.S. at 351. This occurs because the "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* (citation omitted). Consequently, as explained by the Ninth Circuit, "it is not correct to say a district court *may* consider the merits to the extent that they overlap with class certification issues; rather, a district court *must* consider the merits if they overlap with the Rule 23(a) requirements." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011) (emphasis in original). In this case, as in most, consideration of the merits of Plaintiffs' claims is essential to a proper class-certification ruling.

C. The Transfer Fee Class is not certifiable under Rule 23(b)(3).

1. Alleged improper fees under A.R.S. § 33-1806.

Plaintiffs' memorandum asserts that the PIF and transfer fees that Plaintiffs paid somehow violated A.R.S. § 33-1806. No information is provided as to how Plaintiffs would prove the statute was violated. Instead, Plaintiffs simply proceed on the basis that the court should assume that they can prove a violation. But if we dispense with conclusions, it is apparent that Plaintiffs would not be able to prove a statutory violation if certification is ordered.

As an initial matter, the statute will not apply if the court rules in RCSC's favor on Plaintiffs' motion for partial summary judgment. The statute, § 33-1806, is part of the Planned Communities Act. So if the court denies Plaintiffs' motion for partial summary judgment by holding that the Act does not apply to RCSC, Plaintiffs will have no legal basis for suing under the statute.

And even if the Act does apply, there are additional reasons why certification is improper. The only persons who may sue for excessive fees under § 33-1806 are association members. *See* A.R.S. § 33-1806(C)-(D). "Member" is a defined term that means a *seller*. *See id*. § 33-1806(G). All of the named Plaintiffs are *purchasers* rather than sellers of a Sun City property. Plaintiffs therefore lack standing to sue under § 33-1806 and are not adequate representatives of sellers who sold their property.

Additionally, even if Plaintiffs had standing, it is difficult to imagine what evidence would provide a basis for a classwide finding that PIF fees violate the statute. The statute caps at $400 the fees that can be charged for preparing and delivering a series of disclosure documents listed in subsection (A) of the statute. Plaintiffs describe no evidence to explain how a class could prove that PIFs—Preservation and Improvement Fees—are the type of document-preparation fees that § 33-1806 regulates.

2. Alleged improper fees under A.R.S. § 33-442.

Here again Plaintiffs' memorandum is silent on how this statute was violated or what evidence would allow a classwide liability determination. Section 33-442 does not provide for civil liability, so it is difficult to understand on what basis a class could prove damages.

More fundamentally, nonprofit corporations like RCSC that collect fees "for the sole purpose of supporting recreational facilities" are exempt from the statute. A.R.S. § 33-442(C)(7).[1] Plaintiffs leave us to speculate what evidence they would use to prove liability in the face of this safe harbor for recreational fees. *Cf. Nickerson v. Green Valley Recreation, Inc.*, 228 Ariz. 309, 316 ¶ 12, 265 P.3d 1108, 1115 (App. 2011) (upholding new-member fee charged by homeowner's recreational association and noting that § 33-442 legislatively exempts fees assessed to support recreational facilities).

[1] Section 33-442(E)(1) defines "Association" to include nonprofit organizations under 26 U.S.C. § 501(c)(3) or (c)(4). RCSC is a 501(c)(3) nonprofit organization.

D. Neither class is certifiable under Plaintiffs' unconscionability theory.

The Transfer Fee and Assessment Class both seek damages on the theory that the Facilities Agreements are unconscionable. Plaintiffs contend the Agreements are unconscionable on two grounds. Pls.' Mem. at 3:7-10. First, they say the Agreements are unconscionable because they allow RCSC to unilaterally amend the Agreements while denying anyone else the right to modify them. Pls.' Mem. at 3. Second, Plaintiffs contend the Agreements are unconscionable because RCSC does not provide a resale disclosure document or other information disclosing the amount of its fees. *Id.*

Plaintiffs do not explain whether they are claiming procedural or substantive unconscionability or both. The distinction is important because the proof required for the two forms of unconscionability is different. *See Nickerson*, 228 Ariz. at 318-21 ¶¶ 20-28, 265 P.3d at 1117-20. Procedural unconscionability would require classwide evidence of common facts showing "unfair surprise, fine print clauses, mistakes or ignorance of important facts or other things that mean bargaining did not proceed as it should." *Id.* at 319 ¶ 21, 265 P.3d at 1118 (citation omitted). On the other hand, substantive unconscionability turns on "the relative fairness of the obligations assumed by the parties, including whether the 'contract terms [are] so one-sided as to oppress or unfairly surprise an innocent party,' whether there exists 'an overall imbalance in the obligations and rights imposed by the bargain,' and whether there is a 'significant cost-price disparity.'" *Id.* at 319-20 ¶ 23, 265 P.3d at 1118-19 (alteration in original) (citation omitted).

As a general matter, claims of procedural unconscionability (unfairness in the bargaining process) depend upon individualized determinations of what each class member knew during the contract-formation process. The only part of Plaintiffs' unconscionability claim that might be considered an allegation of procedural unconscionability is the nonevidentiary assertion that RCSC's fees are not disclosed at closing. We are left to guess how Plaintiffs might prove that all class members uniformly

closed escrow without knowing the fees they would pay. Plaintiffs concede that all owners received a Facilities Agreement. Pls.' Mem. at 3:7-9. Although the Agreement does not state the amount of the fees, paragraph II(C) notified purchasers that PIF and transfer fees would be charged. *See* Pls.' Ex. 3. Other information that Plaintiffs submit includes RCSC's interrogatory answers. Those answers explain that the amount of the fees was posted on RCSC's website; that RCSC provides the amount of the PIF fee to the title company; and that when there is a non-sale change of ownership, RCSC's normal practice is to communicate the amount of the PIF directly to the record owner. Pls.' Ex. 5, at 9:2-11. In the face of this evidence, it is nearly inconceivable that the putative class uniformly signed Facilities Agreements without knowledge of RCSC's fees. In any event, Plaintiffs have the burden of proof on class certification, and they have failed to provide evidence showing they could prove that homeowners uniformly (without exception) closed escrow without knowing the fees they would be charged.

The other aspect of Plaintiffs' unconscionability claim involves substantive unconscionability and concerns the assertion that only RCSC has the right to amend the Facilities Agreements. A similar claim was made and rejected in *Nickerson*, 228 Ariz. at 320 ¶¶ 25-28, 265 P.3d at 1119. In *Nickerson*, the plaintiffs charged a recreational-facilities association with unconscionability because it supposedly had the right to unilaterally modify the parties' rights including the unfettered right to increase fees or terminate the plaintiffs' contracts. *Id.* at 320 ¶¶ 25-26, 265 P.3d at 1119. The court rejected plaintiffs' contentions because the association's bylaws and articles included voting rights that allowed the members to elect new board members and modify the governing documents. *Id.* at 320 ¶ 27, 265 P.3d at 1119. The same is true here. Plaintiffs attached copies of RCSC's bylaws and its articles to their motion. *See* Pls.' Exs. 2 & 3. The bylaws allow RCSC's members to propose and vote on amendments to the bylaws and the articles and to elect new directors. Ex. 2, *Bylaws*, Art. III (regarding

amendments), *id.* Art. IV (regarding directors), Ex. 3, *Articles*, Arts. VIII, IX, XIII, and XIV (regarding amendments and electing directors). These rights were widely publicized in Sun City. *See, e.g.*, C. LaVoy Decl., Ex. 41 (12/4/02 Sun City Independent newspaper article reporting Plaintiff Anne Randall Stewart's plan to circulate a petition to remove board members and amend RCSC's bylaws). Given these voting rights, there can be no classwide evidence Plaintiffs could marshall to prove that homeowners had no ability to force amendments to the Facilities Agreements. RCSC's Articles and bylaws refute that possibility.

E. The Assessment Class is not certifiable for additional reasons.

For the Assessment Class, Plaintiffs seek damages on the theory that the Facilities Agreements are unconscionable contracts that violate an "equal responsibilities" phrase in RCSC's articles. Pls.' Mem. at 2-3. Plaintiff describe the alleged unconscionability as the "common thread" that unites these class members. *Id.* at 3:7. The unconscionability claim is not appropriate for certification for the reasons just discussed in Part 4(D). Other factors also weigh against certification of the Assessment Class.

The Assessment Class challenges RCSC's conduct in prospectively changing the way it assesses fees from a per-person rate to a per-property rate. Pls.' Mem. at 2. Because the change was prospective, those homeowners who bought before 2003 continued to be assessed at the per-person rate. For those owners, if a husband or wife died, the surviving spouse paid only for one person. This results in widows and widowers who purchased before 2003 paying lower assessments than new buyers who purchased after 2003.

Now, twelve years after the fact, Plaintiffs claim that grandfathering the pre-2003 widows and widowers under the old per-person rate violates an equal-responsibilities clause in RCSC's Articles. The relevant clause reads in context:

> The Bylaws of the Corporation shall prescribe the qualifications of Members and the terms of admission to membership, provided 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*. *Such Bylaws shall also provide the method for determining assessments to be paid by the Members.*

Pls.' Ex. 4, Art. VIII(5) (emphasis added).

The Assessment Class challenges this grandfathering as ultra vires, *i.e.*, on the ground that that RCSC lacked the power under its articles to adopt the policy. A.R.S. § 10-3304 expressly prohibits such a challenge, *unless* 1) RCSC qualifies as a planned community under the Planned Communities Act, or 2) Plaintiffs number at least 50 or represent 10% of RCSC's membership. A.R.S. § 10-3304(A) & (B). Plaintiffs do not satisfy the second exception, leaving them only with the possibility of the first. If the Court denies Plaintiffs' motion for partial summary judgment, they will be without standing to pursue the challenge.

But, to the extent Plaintiffs can proceed, only those who qualify as a "member" of RCSC may do so. A.R.S. § 10-3304(B). Not all of the Plaintiffs, nor all of the proposed Assessment Class, are members; some have been denied membership because they are ineligible under RCSC's bylaws. C. LaVoy Decl., Ex. 32 (Pls.' Suppl. Resp. to Def.'s NUIs; see response to NUI No. 6). The proposed class is thus overbroad.

Plaintiffs who are "members" could at most sue "to enjoin the act" (*i.e.*, the grandfathering), not for damages. A.R.S. § 10-3304(B). Plaintiffs are silent regarding how they would overcome this damages prohibition if the Assessment Class were certified.

Plaintiffs still face another problem. The contract between RCSC and its members is a mosaic of agreements—articles, bylaws, and Facilities Agreements. Proper contract construction requires these documents to be read together as a harmonious whole. *See, e.g., Sun-Air Estates, Unit 1 v. Manzari*, 137 Ariz. 130, 132, 669 P.2d 108, 110 (App.

1983) (association's bylaws should be harmonized with its declaration). There are provisions in these documents that directly address assessments. Nothing in them precludes prospective amendments that impose higher rates on future homeowners.

The 2003 change in assessment methods had no financial impact on RCSC's members. The assessment rate for all existing homeowners remained the same, thereby treating all homeowners equally. Plaintiffs offer no evidence to show how a prospective change like this imposed "unequal responsibilities." Higher rates for new members who join clubs and other organizations are ubiquitous. The only reasonable, common-sense interpretation of RCSC's articles is that its board has discretion to make prospective changes that do not impose unequal obligations on existing members. This is consistent with (a) the Restatement, which provides that "assessments may be allocated among the individually owned properties on any reasonable basis" (RESTATEMENT (THIRD) OF PROPERTIES (SERVITUDES) § 6.5(1)(b) (2000)), and (b) Arizona law holding that decisions by an association's board are valid unless homeowners establish that the board's conduct was unreasonable. *See Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 201-02 ¶ 26, 165 P.3d 173, 179-80 (App. 2007). Plaintiffs have provided no evidence to show that the change in assessment methods was unreasonable or that any homeowner ever interpreted the "equal responsibilities" language to bar prospective amendments that have no impact on existing homeowners. By not providing such evidence, Plaintiffs have failed to carry their Rule 23 burden of proof.

F. The Assessment Class is overbroad and includes subsets of homeowners with individualized claims.

The Assessment Class also sues for a small subgroup who contend RCSC wrongfully switched them from the pre-2003 rate (per person) to the post-2003 rate (per property). The Assessment Class is overbroad as to the allegedly switched Plaintiffs; the non-switched Plaintiffs cannot adequately represent the switched ones.

Even if a new "switched" sub-class were created, the motion does not address how this alleged switching can be adjudicated on a classwide basis. It does not describe a recurring mistake of a particular type that can be isolated and adjudicated through common proof. It is difficult to see how mini-trials on the individualized circumstances of each switch could be avoided. Nor does the motion explain how the improperly switched persons could be identified.

The Assessment Class is overbroad as to another small subgroup: owners who contend is it unlawful for RCSC to charge them assessments when they are ineligible for a Member Card. This subgroup mainly consists of rental-property owners who are ineligible because they do not occupy the residence. It is difficult to see how rental-property owners who agreed to pay assessments subject to RCSC's eligibility rules by signing a Facilities Agreement have a claim. Plaintiffs contend the Facilities Agreement is unconscionable, but, as explained above, this argument raises individualized issues not suited for class relief. Class relief is also inappropriate for this subgroup because not everyone is similarly situated; some signed Facilities Agreements, while others did not, necessitating different legal theories and evidentiary presentations (compare Virginia Baughman with Elizabeth Mercer). C. LaVoy Decl., Ex. 32 (Pls.' Suppl. Resp. to Def.'s NUIs; see response to NUI No. 9 reflecting there are no signed Facilities Agreements for Regina Heck and Elizabeth Mercer).

G. Individualized issues related to RCSC's affirmative defenses foreclose certification.

RCSC has alleged the affirmative defenses of waiver and estoppel based on Plaintiffs voluntarily agreeing to pay, and paying for many years without protest, the assessments and fees they now try to claw back, all while the vast majority of them used and enjoyed RCSC's facilities:

> The general rule as to voluntary payments is . . . as follows: 'Except where otherwise provided by statute, a party cannot by direct action or by way of set-off or counterclaim recover money voluntarily paid with a full knowledge of all the facts, and without any fraud, duress, or extortion, although no obligation to make such payment existed.'

Moody v. Lloyd's of London, 152 P.2d 951, 953, 61 Ariz. 534, 540 (1944) (quoting *Merrill v. Gordon*, 140 P. 496, 501, 15 Ariz. 521, 532 (1914)); *see also Pima County v. Weddle*, 97 P.2d 531, 533, 54 Ariz. 525, 530 (1939) ("It appearing that the taxes were paid voluntarily, plaintiff is in no position to ask that they be returned to him."); *BMG Direct Marketing, Inc. v. Peake*, 178 S.W.3d 763, 780 (Tex. 2005) ("estoppel and waiver seem to be the basis of the voluntary payment doctrine").

Baughman is a compelling example. She owns three residences, buying the first two before the 2003 rate change and the third one afterwards. Am. Compl. ¶ 77. With full knowledge of the per-person rate applicable to pre-2003 owners from her first two residences, she bought a third residence that she knew would be subject to the per-property rate. C. LaVoy Decl., Ex. 34 (her 2007 Facilities Agreement providing for per-property assessment). She concedes in a 2011 letter to RCSC that "there is no question" the per-property rate is correct for her third residence. *Id*., Ex. 35 (copy of letter). She now sues to recover her per-property payments that she knowingly agreed to pay by signing the Facilities Agreement and has voluntarily paid for ten years.

Jean Battista bought her first residence in 2004, paying a PIF and per-property assessment, and then, with full knowledge of these fees, bought a second residence and paid them again in 2007. Am. Compl. ¶ 76. Erasing any doubt, in 2017, after joining in this lawsuit challenging the PIF and per-property assessment, she bought a third residence and knowingly and voluntarily paid the fees a third time. C. LaVoy Decl., Ex. 40 (her 2017 Facilities Agreement).

Petunia, LLC bought one residence in May 2013, for which it paid a PIF, and then, with full knowledge of the fee, bought a second residence in September 2013, for which

it paid another PIF. Am. Compl. ¶ 96; C. LaVoy Decl., Ex. 36 (billing histories for two residences). Lavina Dawson bought her first residence subject to a per-property assessment in 2006, and then, with full knowledge, bought a second residence subject to it in 2012. *Id*. ¶ 80.

Voluntary payment is a substantial, credible defense as these examples demonstrate. "We note that several courts have determined that application of the voluntary-payment rule causes individual issues to predominate and therefore precludes class certification." *BMG*, 178 S.W.3d at 778. This is because individualized inquiry will be necessary as to whether each class member had full knowledge. "As decisions from these courts indicate, the voluntary-payment rule may well involve some individualized inquiry." *Id*. at 778; *see also U-Haul Co. of Alabama, Inc. v. Johnson*, 893 So. 2d 307, 312 (Ala. 2004) (holding trial court exceeded its discretion in certifying class without considering company's voluntary payment defense); *Spagnola v. Chubb Corp.*, 264 F.R.D. 76, 99 (S.D.N.Y. 2010) (refusing to grant class certification because of "the potential unique defense of voluntary payment" because, "while Plaintiffs were successful in overcoming the comparatively lower hurdle of commonality and typicality under Rule 23(a), they have failed to prove the 'more demanding' requirement of predominance of common issues under Rule 23(b)(3)").

As a leading treatise explains, "[t]he test is whether adjudication of the class representatives' claims, taking into consideration (among other things) how damages must be proved in the case and any affirmative defense available to defendant, will effectively establish a right of recovery for all other class members without the need to inquire into each individual's circumstances. *Rule 23(b)(3)—Predominance of Common Questions of Law or Fact*, 1 McLaughlin on Class Actions § 5:23 (14th ed.). Especially when coupled with other individualized questions, such as unconscionability, the individualized voluntary-payment issue upsets predominance.

Conclusion

Plaintiffs have not met their burden of proof. They have not provided the analysis and evidentiary support for their claims that Rule 23 and U.S. Supreme Court interpretations of the federal counterpart of Arizona's Rule 23 require. Because of the conclusory nature of Plaintiffs' motion, the court cannot conduct a proper analysis and make the evidentiary findings that Rule 23 requires. For the same reason, RCSC has been denied the opportunity to fairly respond to Plaintiffs' motion. Plaintiffs' motion should be denied.

RESPECTFULLY SUBMITTED this 18th day of May, 2018.

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