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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Desert Mountain Club, Inc., Plaintiff, vs. Eric Graham and Rhona Graham, husband and wife, et al. Defendants.	No. CV2014-015333 No. CV2014-015334 No. CV2014-015335 **Motion to Compel Responses to Defendants' Non-uniform Interrogatories** (Assigned to the Honorable David Gass)

The Clark defendants served seven non-uniform interrogatories upon plaintiff on July 22, 2015. Plaintiff objected to each interrogatory and only provided minimally responsive information to just one of them. Plaintiff specifically stated that it would not provide information responsive to three of the interrogatories unless the court ordered it to do so. For another two interrogatories, plaintiff indicated that a protective order had to be in place before it would produce any information.

Counsel for the parties met at plaintiff's counsel's offices on January 14, 2016, to try to resolve this issue before bringing it to the court's attention. Unfortunately, the parties were unsuccessful and now need court assistance.

This motion is brought pursuant to Rule 37(a)(2) Ariz. R. Civ P. The separate statement of counsel certifying that the parties have been unable to satisfactorily resolve this matter after personal consultation and good faith efforts is attached as exhibit A. The separate statement required by Rule 3.2(h) of the Local Rules of Superior Court for Maricopa County is attached as exhibit B. This motion is supported by the following memorandum of points and authorities, the attached exhibits, and the entire case file.

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

A. Facts

Plaintiff is a nonprofit corporation that operates a golf club in north Scottsdale. A person pays a membership fee to become an equity member of the club. In the past, this fee was as much as $325,000.00. The equity member then had to pay monthly dues and other charges until he was no longer a member.

An equity member cannot sell the membership on the open market; transfer or sale can only be done through the club. Originally, when an equity member sold a membership through the club, the club would refund the member 80% of the fee received from the membership and retain 20% as a transfer fee. For example, if the membership was sold through the club for $325,000.00, the selling member would receive a refund of $260,000.00 and club would keep 20%, or $65,000.00. This was the idea when the defendants became members.

The price of an equity membership has declined. The club amended its bylaws, without defendants' consent, so that the transfer fee became the greater of 20% of the money received upon sale through the club or $65,000.00.

There are legal questions about the ability of a nonprofit to impose substantive changes on a membership agreement without the affected member's consent via a bylaw; a bylaw change can be made by a majority vote of the members or a board of directors. Bylaws, after all, are the mechanisms "for managing the business and regulating the affairs of the corporation," A.R.S. § 10-206, not forcing a member into an agreement imposing different obligations on the member. A bylaw is analogous to the rules of civil procedure in litigation, which can affect the how and when and procedure of litigation but not the substantive law applicable to a case.

The bylaw changes in this case resulted in an unforseen effect. As the prices of the equity membership fee declined, it eventually reached the point where members could not receive any proceeds from the sale; instead, they were forced to come up with money out-of-pocket if they decided to sell or transfer their membership through the club in accordance with the bylaws. For example, the equity membership fee has dropped to $30,000.00, so instead of receiving a payment

of 80% (or $24,000.00) from the club and paying a transfer fee of $6,000.00, a selling member, the club argues, has to pay the difference between what the club got for selling the membership and $65,000.00.

This penalty is not what defendants and many other equity members had in mind when they purchased their memberships. The defendants have always thought they could either (1) walk away from their memberships or (2) sell them through the club. Walking away made no sense, generally speaking, when the value of a membership was $325,000.00 because it meant walking away from $260,000.00, but a walk-away rather than a sale through the club makes perfect sense when the club is selling memberships for $30,000.00 and wants a $65,000.00 fee for conducting the sale.

Two Arizona statutes dealing with membership in a nonprofit are at play in relation to the discovery in this case. Other principles of law are also at work,[1] but these two statutes are particularly germane to the discovery. One statute, A.R.S. § 10-3620, says "A member [of a nonprofit] may resign at any time, except as set forth in or authorized by the . . . bylaws."[2] Clearly, the bylaws can affect when a member can resign, which is a procedural issue, and the defendants do not argue otherwise. Indeed, the last antecedent rule of statutory construction says that the phrase "except as set forth in or authorized by the . . . bylaws" modifies "at any time," not whether a member may resign.[3]

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[1]Unconscionability, whether there has been a failure of the underlying assumption upon which the claimed contract is based, *etc.*

[2]Judge Dawn Bergin has entered a ruling that says this statute is trumped by the bylaws in this case. Minute entry order (Oct. 16, 2015).

[3]This argument was not made to Judge Bergin, but it is still viable under the terms of her interlocutory order because clearly erroneous, interlocutory rulings brought to the attention of the court must be corrected. *Powell-Cerkoney v. TCR-Montana Ranch Venture, II*, 176 Ariz. 275, 860 P.2d 1328 (App. 1993). This is particularly the case when an interlocutory order is made at the threshold of a case before factual development. *Id*. This case is at its threshold, and Judge Bergin's ruling violates the last-antecedent rule, making it clearly erroneous: The rule is simply stated:

> The plain meaning of a statute "will typically heed the commands of its

The discovery sought in this matter goes to the heart of a member's right to resign: how the club has dealt with other members who have left the club. Statutes are part of every contract in Arizona irrespective of any reference to them, *Banner Health v. Medical Savings Insurance Co.*, 216 Ariz. 146, 163 P.3d 1096 (App. 2007), and just as importantly, how the parties have construed a contract before its breach is the best indication of the contract's meaning. *Dobrola v. Free Serbian Orthodox Church "St. Nicholas,"* 191 Ariz. 120, 952 P.2d 1190 (App. 1998). The defendants are entitled to see how the club has dealt with resigning members in the past.

There is an additional reason for this discovery. A.R.S. § 10-3610 requires equal treatment of all members of a nonprofit. The plaintiff has allowed some of its members to abandon their equity memberships without paying a transfer fee at all or allowing some to pay a significantly discounted penalty or charge to abandon their membership. But the plaintiff has been unyielding and demanded full payment of the penalty or transfer fee from other members, even though the value of a membership has declined so significantly that equity members were forced to pay to walk-away or force suit. Such disparate treatment violates A.R.S. § 10-3610.

Defendants decided that paying a penalty to get out of the club was not their agreement. They did not agree to the changes in the bylaws that, in an *ultra vires* way, purported to change subtantive

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> punctuation." *United States Nat'l Bank v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 454, 113 S. Ct. 2173, 124L. Ed. 2d. 402 (1993). Among the rules of punctuation we consider is the "last antecedent rule." As applied in Arizona, the last antecedent rule "requires that a qualifying phrase be applied to the word or phrase immediately preceding as long as there is no contrary intent indicated." *Phoenix Control Sys., Inc. v. Ins. Co.*, 165 Ariz. 31, 34, 796 P.2d 463, 466 (1990); *see also* 2A N. Singer, *Sutherland Statues and Statutory Construction* § 47:33 (7th ed. 2011) ("Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent.").

Pawn 1st, LLC v. City of Phoenix, 231 Ariz. 309, 311–312, ¶ 16, 294 P.3d 147, 149–150 (App. 2013).

Judge Bergin's ruling wrongly applied the except-per-bylaws language to the right to resign rather than the immediately preceding phrase, "at any time."

obligations, so these changes cannot apply to them. Defendants tendered their resignations rather than attempt a transfer of their membership via the sell-through-the-club mechanism.

Plaintiff was not amused by defendants' resignation, so it sued them.[4] Plaintiff has pursued defendants aggressively because allowing equity members to resign without paying the transfer fee penalty would, according to the club, destroy the club financially because it relies upon these penalty fees to fund its operations.

B. Defendants' Non-uniform Interrogatories

The Clark defendants served the following seven non-uniform interrogatories[5] upon plaintiff:

> 1. Identify all current and former members of the Desert Mountain Golf Club, Inc.,[6] and provide contact information to the extent it is known for each of these people, including mailing address, email address, and phone number.
>
> 2. Identify all officers and employees of the Desert Mountain Golf Club, Inc. since its inception, including name, residence address, email address, phone number, position held, and dates of employment.
>
> 3. What are the residence addresses, email addresses, and phone numbers for the individuals listed in answer to plaintiff's non-uniform interrogatory No. 11(b).
>
> 4. Identify each former member who was a member of Desert Mountain Golf Club, Inc. as of December 31, 2010.
>
> 5. How much did each former member identified in the answer to interrogatory number four pay or receive to get out of the membership?
>
> 6. Identify each member Desert Mountain Golf Club, Inc. has pursued—sued or sent to collection—after a resignation from Desert Mountain, a departure of that member from Desert Mountain, or the member was expelled, removed, or quit the club.

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[4] Two other equity members, the Fabians and the Grahams, also resigned from the club and were sued by plaintiff. All three cases have been consolidated into this action before this court.

[5] Plaintiff's responses are found in exhibit B-1 hereto.

[6] The name was a typographical error. Plaintiff's correct name is Desert Mountain Club, Inc. In its general objections, plaintiff pointed out the error and stated that all references to "Desert Mountain Golf Club, Inc." would be construed as meaning "Desert Mountain Club, Inc."

7. Identify members who have been expelled from Desert Mountain Golf Club, Inc. since 2010.

Defendants need to know the names of all members, past and present, to determine whether all departing members have been treated equally, because there is another statute that says a nonprofit must treat all members alike. A.R.S. § 10-3610. Failure to treat equally means the transfer fee is likely unenforceable. This is another of defendants' defenses.

Defendants also need this information to respond to plaintiff's motions for summary judgment filed on January 13.[7]

In response, plaintiff only partially answered interrogatory 2 by providing the names of seven employees.[8] Exhibit B-1, pp. 7–8. Otherwise, plaintiff objected to everything. Most importantly, for interrogatories 1, 4 and 7, plaintiff flatly stated it would not produce the requested information without an order compelling it to do so. *Id*. pp. 5, 6, 9, and 13. At the January 14 meet and confer, plaintiff remained firm on its need for a court order before it would produce information responsive to interrogatories 1, 4, and 7. Plaintiff also indicated that a confidentiality agreement had to be in place before it would produce anything in response to interrogatories 5 and 6. Plaintiff also refused to produce a copy of a recent settlement agreement with another equity member.

At a hearing before Judge Bergin on August 19, 2015, the subject of a protective order regarding the deposition of nonparty Robert Jones[9] was addressed. Minute entry, exhibit D hereto. However, the parties could not agree on the language so no protective order has been entered.

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[7] Defendants are contemporaneously filing a separate rule 56(f) request for an extension of time to respond to plaintiff's motions.

[8] At the meet and confer between counsel on January 14, defendants agreed to clarify what was sought in interrogatory number 2, and plaintiff agreed to produce additional information by January 29. Plaintiff also agreed to produce information, to the extent it had it, in response to interrogatory 3. *See* email correspondence attached hereto as exhibit C. There were no agreements regarding any of the other five interrogatories.

[9] That issue was brought to the court's attention by motion filed by Mr. Jones' personal attorney and joined in by plaintiff. However, neither the motion nor plaintiff's joinder included anything about plaintiff's responses to defendants' interrogatories.

Importantly, that discussion with the court was only directed to a protective order regarding a deposition, not to plaintiff's responses to defendants' interrogatories. Plaintiff has never filed a motion for a protective order regarding its responses to defendants' interrogatories.

II. LEGAL ARGUMENT

A. Order Compelling Responses

Amidst all of its objections, plaintiff unequivocally stated that it would not respond to interrogatories 1, 4, and 7 unless the court ordered it to do so. The January 14 meet and confer only confirmed that plaintiff would not respond unless the court so ordered. Court help is needed.

Plaintiff also objected to these three interrogatories on relevance and confidentiality grounds, but neither of these has any merit. Defendants need to contact former club members to find out if they had to pay the full penalty transfer fee to leave the club or if they were treated differently or what their understanding of the contract with the club was. Interrogatories 1, 4, and 7 seek this contact information. This is relevant information defendants need to prepare their defense and respond to plaintiff's pending motions for summary judgment. Plaintiff's relevance objections should be overruled.

Plaintiff's confidentiality objections fare no better. Confidential does not equal privileged, so it is not a justifiable basis to refuse to respond to discovery. "While a confidentiality objection may be appropriate when a party seeks a protective order limiting the parties' use or disclosure of confidential information, it generally is not a valid objection for withholding discovery altogether." *McKellips v. Kumho Tire Co.*, 305 F.R.D. 655, 661 (D. Kan. 2015). Arizona courts recognize that obtaining a protective order is the way to protect allegedly confidential information, not simply refusing to produce it. *Cornet Stores v. Superior Court*, 108 Ariz. 84, 88, 492 P.2d 1191, 1195 (1972). If plaintiff believes the requested information is confidential, it should have asked this court to enter a protective order under rule 26(c). But plaintiff never did so; instead, it just objected and refused to produce anything. Plaintiff's confidentiality objections should be overruled.

Plaintiff's objections are groundless. Plaintiff has not sought a protective order. And plaintiff refuses to respond to defendants' valid interrogatories unless the court orders it to do so.

Accordingly, this court should order plaintiff to provide complete responses to interrogatories 1, 4, and 7 within ten days of the order.

B. Plaintiff Must Show Good Cause for Entry of a Protective Order

In response to interrogatories 5 and 6, plaintiff claims a protective order/confidentiality agreement must be in place before it will respond. But plaintiff did not ask the court for the entry of a protective order under rule 26(c). The party claiming confidentiality must seek a protective order; they cannot simply state, *ipse dixit*, that the subject matter is confidential and needs a protective order before it will be produced. To the contrary, the responding party must show good cause to the court that the requested information is worthy of a protective order. *See* Rule 26(c)(2) Ariz. R. Civ. P. ("The burden of showing good cause for an order shall remain with the party seeking confidentiality."). Plaintiff bears the burden to first move for a protective order and then satisfy the court that good cause exists for the entry of such an order. Plaintiff has done neither. This court should order plaintiff to provide complete responses to interrogatories 5 and 6 within ten days of the order.

C. No Substantial Justification

When a party refuses to produce discoverable information, "the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them, to pay the moving party the reasonable expenses incurred in making the motion, including attorney's fees." Rule 37(a)(4)(A) Ariz. R. Civ. P. The award is mandatory unless the court finds the failure to respond was substantially justified. *Id*.

Plaintiff has never moved for a protective order so it has never made the requisite good cause showing. Instead, contrary to the rules, plaintiff simply refuses to produce anything until a protective order is in place. More egregiously, plaintiff has steadfastly refused to respond to three of the interrogatories unless ordered by the court. This refusal has forced defendants to send a letter explaining why the non-responses were unacceptable, participate in a meet and confer, and eventually file this motion to compel thereby incurring attorney fees and costs. Plaintiff has no

substantial justification to withhold relevant and discoverable information. Plaintiff should be ordered to pay defendants' attorney fees and costs incurred in bringing this motion.

III. CONCLUSION

Plaintiff refuses to respond to defendants' valid interrogatories. Defendants need this information not only to prepare their defense, but, more pressingly, to respond to plaintiff's pending motions for summary judgment. This court should order plaintiff to provide complete responses to interrogatories 1, 4, 5, 6, and 7 within ten days of the order. If plaintiff fails to produce complete responses to interrogatories 2 and 3 by the agreed upon January 29 supplement date, then this court should order complete responses to those two interrogatories, as well. This court should also order plaintiff to provide defendants with a copy of the recent settlement agreement with another member.

Because plaintiff's refusal to respond was not substantially justified, this court must award defendants their reasonable attorney fees and costs incurred in bringing this motion. Once this court grants this motion, defendants will submit the necessary fee application for the court to determine a reasonable amount to award.

Respectfully submitted this 26th day of January 2016.

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