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8
9 SUPERIOR COURT OF ARIZONA
10 MARICOPA COUNTY

11 DESERT MOUNTAIN CLUB, INC.,
12 Plaintiff,
13 v.

14 ERIC GRAHAM and RHONA GRAHAM,
husband and wife,
15 Defendants.

No. CV2014-015333
No. CV2014-015334
No. CV2014-015335
(Consolidated)

**PLAINTIFF'S RESPONSE TO REQUEST
FOR RULE 56(f) RELIEF AND EXPEDITED
HEARING BY CLARK AND GRAHAM
DEFENDANTS**

(Consolidated Action: Assigned to the Hon. David
Gass)

(Oral Argument Requested)

16 DESERT MOUNTAIN CLUB, INC.,
17 Plaintiff,
18 v.

19 THOMAS CLARK and BARBARA
CLARK, husband and wife,
20 Defendants.

21 DESERT MOUNTAIN CLUB, INC.,
22 Plaintiff,
23 v.

24 husband and wife,
25 Defendants.

1 Plaintiff Desert Mountain Club, Inc. (the “Club”) respectfully requests that the Court deny
2 the Request for Rule 56(f) Relief and Expedited Hearing (the “Request”) filed by Defendants
3 Thomas Clark and Barbara Clark (the “Clarks”) and Eric Graham and Rhona Graham (the
4 “Grahams”), seeking Rule 56(f) relief.¹ Specifically, the Clarks and the Grahams wish to conduct
5 discovery that they allege will provide information vital to their responses to the Club’s motions
6 for summary judgment currently pending against them. As detailed in the Club’s Response to
7 Motion to Compel Responses to the Clarks’ Non-Uniform Interrogatories filed concurrently
8 herewith (“Response to Motion to Compel”), the information sought by the Clarks² is neither
9 relevant nor reasonably calculated to lead to the discovery of admissible evidence. For the same
10 reasons, the information sought is not essential to justify the Clarks’ and the Grahams’ opposition
11 to the Club’s summary judgment motions, as required for Rule 56(f) relief. In addition, the Rule
12 56(f) affidavit submitted by the Clarks and the Grahams is insufficient.

13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 **I. BACKGROUND**

15 The Club moved for summary judgment against the both the Clarks and the Grahams on
16 January 13, 2016. The Club incorporates the facts set forth in its motions for summary judgment
17 against the Clarks and the Grahams and separate statements of facts in support thereof. *See* Ariz.
18 R. Civ. P. 5(g)(2)(D); Plaintiff’s Motion for Summary Judgment in CV2014-015333 (Grahams)
19 (1/13/16); Plaintiff’s Separate Statement of Facts in Support of Its Motion for Summary
20 Judgment in CV2014-015333 (Grahams) (1/13/16); Plaintiff’s Motion for Summary Judgment in
21 CV2014-015334 (Clarks) (1/13/16); Plaintiff’s Separate Statement of Facts in Support of Its
22 Motion for Summary Judgment in CV2014-015334 (Clarks) (1/13/16).

23 The Clarks served the Club with seven non-uniform interrogatories on July 22, 2015 (the

24 _____
25 ¹ References to rules are to the Arizona Rules of Civil Procedure unless otherwise stated.

26 ² The Court should note that the Grahams have not served interrogatories on the Club. The
27 Clarks served the Interrogatories before the Court consolidated the Clark and Graham cases. *See*
28 Case Consolidation (12/14/15). It is unclear whether opposing counsel filed the Motion to
Compel on behalf of both the Grahams and the Clarks. As a result, this Response assumes the
Motion to Compel was filed solely on behalf of the Clarks, although the same arguments apply
equally to the Grahams.

1 “Interrogatories”). In the Interrogatories, the Clarks requested that the Club identify all current
2 and former Members of the Club. The Club objected to the Interrogatories on various grounds
3 including that the Interrogatories seek information that is neither relevant nor reasonably
4 calculated to lead to the discovery of admissible evidence, are overly broad, and seek confidential
5 and private information. *See* Plaintiff’s Responses to the Clarks’ Non-Uniform Interrogatories,
6 attached as Exhibit 1 to the Clarks’ Motion to Compel (1/26/16). The Clarks and the Grahams
7 filed the Request on January 26, 2016. On the same day, the Clarks filed a Motion to Compel
8 Responses to their Non-uniform Interrogatories (“Motion to Compel”). In the Request, the Clarks
9 and the Grahams seek additional time to discover “the names of all current and former members”
10 of the Club through the Motion to Compel complete responses to the Interrogatories. Request at
11 2:11–12, 2:20–22. The Clarks and the Grahams claim that they need additional time to discover
12 the names of all current and former members so that they can respond to the pending motions for
13 summary judgment. *See* Request.

14 **II. RULE 56(F) RELIEF SHOULD BE DENIED BECAUSE THE DISCOVERY**
15 **SOUGHT IS IMMATERIAL TO THE ISSUES BEFORE THE COURT.**

16 To satisfy Rule 56(f), the requesting party must lack “evidence **essential** to justify its
17 opposition.” Ariz. R. Civ. P. 56(f)(1) (emphasis added). To be “essential” for purposes of Rule
18 56(f), the evidence must be material. *See Alberta Sec. Comm’n v. Ryckman*, 200 Ariz. 540, 548,
19 ¶ 30, 30 P.3d 121, 129 (App. 2001) (affirming denial of Rule 56(f) relief when the evidence
20 sought to discover was not material to the issues before the court); *Birth Hope Adoption Agency,*
21 *Inc. v. Doe*, 190 Ariz. 285, 287–88, 947 P.2d 859, 861–62 (App. 1997) (same). Rule 56(f) relief
22 is properly denied when the proposed discovery will not produce relevant evidence that would
23 raise a genuine issue as to any material fact and, therefore, is unnecessary to decide the motion for
24 summary judgment. *Advanced Cardiac Specialists, Chartered v. Tri-City Cardiology*
25 *Consultants, P.C.*, 222 Ariz. 383, 388, ¶¶ 17–18, 214 P.3d 1024, 1029 (App. 2009); *Maricopa*
26 *Cty. v. Kinko’s Inc.*, 203 Ariz. 496, 501, ¶¶ 19–21, 56 P.3d 70, 75 (App. 2002).

27 The discovery sought here is immaterial. It is not even relevant or reasonably likely to
28 lead to the discovery of admissible evidence. *See* Response to Motion to Compel at 2:16–9:16.

1 Both the Clarks and the Grahams entered into valid, enforceable Contracts,³ which clearly and
2 unambiguously provide that: (1) they can terminate their Equity Memberships only by
3 transferring them through the Club; and (2) they must pay all Club dues, assessments, and other
4 charges until that transfer is complete. The Clarks and the Grahams have not complied with the
5 terms of their Contracts. Instead, they have attempted unilaterally to resign their Equity
6 Memberships in a manner contrary to the Contracts, and have stopped paying Club dues and other
7 charges. The Clarks and the Grahams claim that they need to conduct discovery to prepare their
8 “defense” of “whether all members of the club were treated equally with respect to paying the
9 penalty transfer fee.” Request at 1:22–24. Even if the Club treated Members differently in the
10 past, such conduct provides neither the Clarks or the Grahams any legally cognizable defense
11 because the Club, as a private association, is entitled to treat its Members differently in the
12 exercise of its discretion, as a matter of law and under the express terms of their Contracts.
13 Response to Motion to Compel at 4:2–6:22. As a result, any different treatment as to other
14 Members is immaterial and cannot serve as a basis for Rule 56(f) relief.

15 Furthermore, it is well-established that a court’s procedural and discovery rules, like Rule
16 56(f), do not permit parties to perform preparatory discovery, allegedly needed to obtain
17 information as support for possible claims, but also for possible defenses. *See, e.g., Alberta Sec.*
18 *Comm’n v. Ryckman*, 200 Ariz. 540, 547–48, ¶¶ 24–30, 30 P.3d 121, 128–29 (App. 2001)
19 (finding no abuse of discretion in denying Rule 56(f) request despite the fact that movant’s
20 motion to compel was pending because the discovery sought was not material to the issues before
21 the court and movant provided no authority showing that Rule 56(f) relief should be granted to
22 allow preparatory discovery); *City of Phoenix v. Peterson*, 11 Ariz. App. 136, 141, 462 P.2d 829,
23 834 (1969) (providing that the discovery rules of the Arizona Rules of Civil Procedure cannot be
24 used to discover a cause of action and frame an original complaint); *cf. Boone v. Superior Court*

25
26 ³ The Clarks’ and the Grahams’ “Contracts” are comprised of their Membership Conversion
27 Agreements with the Club, the Desert Mountain Club Bylaws (“Bylaws”), and the Club’s Rules
28 and Regulations. *See* Plaintiff’s Separate Statement of Facts in Support of its Motion for
Summary Judgment in CV2014-015334 (Clarks) (1/13/16) ¶ 6; Plaintiff’s Separate Statement of
Facts in Support of its Motion for Summary Judgment in CV2014-015333 (Grahams) (1/13/16) ¶
6.

1 *In & For Maricopa Cty.*, 145 Ariz. 235, 240, 700 P.2d 1335, 1340 (1985) (providing that an
2 attorney cannot “file a claim or raise a defense based on nothing more than the fervent hope that
3 prolonged discovery may reveal some basis for the claim or defense.”). *See also Collens v. City*
4 *of New York*, 222 F.R.D. 249, 253 (S.D.N.Y. 2004) (explaining that although the Federal Rules of
5 Civil Procedure provide “for broad discovery, courts should not grant discovery requests based on
6 pure speculation that amount to nothing more than a ‘fishing expedition’ into actions or past
7 wrongdoing not related to the alleged claims or defenses.”)

8 To obtain Rule 56(f) relief, there must be some evidence already in the record which tends
9 to support movant’s claim. *See Simon v. Safeway, Inc.*, 217 Ariz. 330, 333–35, ¶¶ 8–11, 173 P.3d
10 1031, 1034–36 (App. 2007) (finding denial of Rule 56(f) request an abuse of discretion where
11 sufficient evidence existed in the record to support the claim on which movant requested
12 additional discovery). The Clarks and the Grahams have provided no such evidence here.
13 Instead, they seek discovery to conduct a fishing expedition in hopes of developing a defense
14 based on some kind of disparate treatment or violation of A.R.S. § 10-3610. Yet, the Clarks and
15 the Grahams failed to assert disparate treatment or A.R.S. § 10-3610 as defenses in their Answers
16 or any pre-Answer motion. *See Answer (3/23/15); Motion to Dismiss (6/25/15); Answer*
17 *(8/18/15); Response to Motion to Compel at 9:17–25*. Nor did they raise these alleged defenses
18 in the Clarks’ motion for judgment on the pleadings. *See Motion for Judgment on the Pleadings*
19 *(5/26/15)*. The Clarks and the Grahams have raised no counterclaim against the Club. Thus, they
20 have not alleged in a verified pleading that, based on their information and belief, the Club
21 engaged in disparate treatment or violated A.R.S. § 10-3610.

22 The Clarks and the Grahams did not state any defense based on disparate treatment or
23 A.R.S. § 10-3610 until the second Joint Status Reports in which they conclude, without any
24 supporting facts, that:

25 Arizona law, A.R.S. § 10-3610 requires that all members be treated the same and
26 that the Club has not done so over the years. The Club has allowed some
27 members to leave without payment of the claims that are being asserted against
the [Clarks/Grahams], so the [Clarks/Grahams] are entitled to the same treatment.

28 Second Joint Status Report and Request for Rule 16 Conference in CV2014-015334 (10/30/15) at

1 4:9–12; Second Joint Status Report (12/11/15) at 5:20–23. The Request and Motion to Compel
2 similarly fail to provide any facts that support these contentions. All that the Clarks and the
3 Grahams offer is their general belief that the Club has allowed some Members to depart the Club
4 without paying a transfer fee or by paying a reduced fee. See Request, Exhibit A, ¶ 6; Motion to
5 Compel at 4:8–14. The Clarks and the Grahams nowhere present specific facts to support their
6 claims. See Request at 1:22–24; Motion to Compel at 7:10–12.

7 The second Joint Status Reports were filed after the Court issued its October 19, 2015
8 ruling, which granted summary judgment in favor of the Club and against Defendants [redacted] and
9 [redacted] (the “F [redacted]”) and denied the [redacted] and Clarks’ Motions for Judgment on the
10 Pleadings. See Under Advisement Ruling (10/19/15); Second Joint Status Report and Request for
11 Rule 16 Conference in CV2014-015334 (10/30/15); Second Joint Status Report (12/11/15). In
12 other words, the Clarks and Grahams came forward with new, unsupported claims of disparate
13 treatment and violation of A.R.S. § 10-3610 only after the Court rejected other arguments raised
14 by the [redacted] ; and Clarks, which the Clarks and the Grahams would have relied upon in
15 responding to the Club’s motions for summary judgment against them. Consistent with *City of*
16 *Phoenix* and *Ryckman*, Rule 56(f) relief should not be used to allow the Clarks and Grahams to
17 explore possible defenses that they have not properly raised, especially where these alleged
18 “defenses” can provide them with no defense as a matter of law as set forth in the Response to
19 Motion to Compel.

20 **III. RULE 56(F) RELIEF SHOULD BE DENIED BECAUSE THE AFFIDAVIT IS**
21 **INSUFFICIENT.**

22 The party seeking Rule 56(f) relief has the burden to assert by affidavit the reasons why it
23 cannot present evidence essential to justify its opposition. Ariz. R. Civ. P. 56(f); *Bobo v. John W.*
24 *Lattimore, Contractor*, 12 Ariz. App. 137, 141, 468 P.2d 404, 408 (1970). To satisfy Rule 56(f),
25 the requesting party must file an appropriate sworn statement specifically describing the reasons
26 justifying delay. *Grand v. Nacchio*, 214 Ariz. 9, 29, ¶ 72, 147 P.3d 763, 783 (App. 2006). The
27 reasons supporting delay must be specific, not general ones. *Magellan S. Mountain Ltd. P’ship v.*
28 *Maricopa Cty.*, 192 Ariz. 499, 502, 968 P.2d 103, 106 (App. 1998); *Boatman v. Samaritan Health*

1 *Servs., Inc.*, 168 Ariz. 207, 212, 812 P.2d 1025, 1030 (App. 1990); *Bobo*, 12 Ariz. App. at 141,
2 468 P.2d at 408. The affidavit must include specific reasons including “(1) the particular
3 evidence beyond the party’s control; (2) the location of the evidence; (3) what the party believes
4 the evidence will reveal; (4) the methods to be used to obtain it; and (5) an estimate of the amount
5 of time the additional discovery will require.” *Grand*, 214 Ariz. at 29, ¶ 72, 147 P.3d at 783.

6 Here, the Clarks and the Grahams seek discovery of “the names of all current and former
7 members of plaintiff’s golf club.” Request at 2:10–12 and Exhibit A, ¶ 4. They, however, fail to
8 meet all of the requirements for Rule 56(f) relief with regard to the names of all current Members
9 of the Club. More specifically, the Clarks and the Grahams fail to satisfy requirement (3) as to
10 the names of all current Members because the affidavit fails to provide any explanation as to what
11 they believe the names of all current Members of the Club will reveal. The affidavit summarily
12 states, “Defendants believe that many former members were allowed to depart the club either
13 without paying a transfer fee or were allowed to pay a significantly reduced fee.” Request,
14 Exhibit A, ¶ 6. Notably, the affidavit never discusses what will be revealed from **current**
15 Members of the Club.

16 Moreover, the affidavit fails to specifically explain how names of former Members will
17 reveal evidence material to the Clarks’ and the Grahams’ defenses. Although the Clarks and the
18 Grahams claim to “believe that many former members were allowed to depart the club either
19 without paying a transfer fee or were allowed to pay a significantly reduced fee” (Request,
20 Exhibit A, ¶ 6),⁴ they fail to explain how this is relevant and material to their respective
21 Contractual breaches.

22 Despite stating in the affidavit that the Clarks and the Grahams have no way to get the
23 names of all current and former Members of the Club other than to obtain it from the Club
24 (Request, Exhibit A, ¶ 4), the Clarks have been Members of the Club and its predecessor since
25 1996. Complaint (CV2014-015334), Exhibit A. Throughout this period, the Club and its
26 predecessor made a membership directory (which included Member names, telephone numbers,
27 and addresses) available to their Members. Thus, the Clarks themselves have had and *still have*

28 ⁴ As discussed, the Clarks and the Grahams offer no facts in support of this belief.

1 access to the names of all current and former Club Members. They do not need to obtain this
2 information from the Club and, in fact, have had access to this information throughout and prior
3 to this litigation. The same is true for the Grahams who have been Members of the Club and its
4 predecessor since 2006. Complaint (CV2014-015333), Exhibit A.

5 **IV. CONCLUSION**

6 Rule 56(f) relief should be denied because the discovery sought is not essential—it will
7 not produce relevant evidence that would raise a genuine issue as to any material fact and,
8 therefore, the discovery is unnecessary to decide the Club’s motions for summary judgment.
9 Further, the Rule 56(f) affidavit fails to explain what the Clarks and the Grahams believe the
10 names of current Members will reveal and how the names of former Members will reveal
11 evidence material to their defenses.

12 DATED this 12th day of February, 2016.

13 FENNEMORE CRAIG, P.C.

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