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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 **Reply to Motion to Compel Responses to Defendants' Non-Uniform Interrogatories** (Assigned to the Honorable David Gass)

Plaintiff's response is masterful in its misdirection. Indeed, the first ten pages make substantive legal arguments about the underlying claims that are more appropriate for a summary judgment motion than a response to a motion to compel. The response reads as if plaintiff believes it has already won so it does not need to be bothered with complying with the rules of discovery. Contrary to plaintiff's wishes, though, the case is far from over and defendants still get to mount a defense. The relevant information plaintiff refuses to produce is essential to that defense. Defendants' motion to compel should be granted.

I. PLAINTIFF'S INCORPORATION OF ITS MOTIONS FOR SUMMARY JUDGMENT IS IMPROPER

Responding to a motion to compel does not require a detailed recitation of the underlying facts supporting the causes of action. Yet plaintiff has incorporated into its response the "facts" from its separate motions for summary judgment filed on January 13. Defendants have not yet responded to those motions because they have a pending request for rule 56(f) relief to obtain information

needed to respond to them.[1] Defendants object to plaintiff's incorporation of "facts" to which defendants have not – and indeed cannot – provide a complete response until plaintiff is compelled by this court to respond to defendants' interrogatories.

II. DEFENDANTS' INTERROGATORIES SEEK RELEVANT INFORMATION

Plaintiff provides pages of legal analysis to try to support its complaint. But the viability of plaintiff's causes of action are not at issue in defendants' pending motion to compel. What is at issue is whether plaintiff justifiably refused to produce relevant information that was likely to lead to the discovery of admissible evidence. "A dominant purpose of our Rules of Civil Procedure is to facilitate discovery, and they are to be liberally construed to that end." *City of Phoenix v. Peterson*, 11 Ariz. App. 136, 142, 462 P.2d 829, 835 (1969). Given the broad scope of discovery, plaintiff clearly was not justified in refusing to produce information that defendants need to prepare their defense. Plaintiff argues relevance, but its real concern is that it considers the requested information confidential and, consequently, will not provide it unless the court orders it. But confidentiality is not a valid basis to refuse to produce information. Plaintiff should have sought a protective order. Instead, it hides behind a relevance objection as cover for its unjustified refusal to produce discoverable information. Plaintiff's legal discussion about its substantive claims does not absolve it of its refusal to respond to defendants' interrogatories.

A. Plaintiff Cannot Treat Members Differently

Plaintiff is a non-profit corporation. As such, it is governed by Arizona's non-profit statutes. A.R.S. § 10-3601, et seq. Plaintiff wants this court to think that since it is a *private* club, it is somehow exempt from the non-profit statutes. Response, p. 4, lines 3-5. This is not so. Plaintiff goes a step further and cites cases from Pennsylvania and Massachusetts that allow private clubs to treat members differently. Notably, no Arizona case is cited on this point. In any event, just because plaintiff is a private club in north Scottsdale does not mean it is exempt from the non-profit corporation statutes passed by the Arizona legislature.

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[1] Defendants are contemporaneously filing their reply to their request for rule 56(f) request for extension. Defendants hereby incorporate that reply as if set forth herein.

Plaintiff argues that it can treat members differently because it has discretion on accepting or rejecting applications for membership or establishing a wait list for potential members. *Id*. p. 4, lines 20-26. But an applicant is not a member and therefore is not entitled to the rights afforded a member.

A.R.S. § 10-3610 requires a non-profit corporation to provide the same rights and obligations to its members regarding voting, dissolution, redemption, and transfer unless different classes of memberships with different rights are established. Therefore, while different classes of members can be treated differently, members in the same class cannot. In the case at bar, it is the class of equity golf members at issue: those who paid the membership fee and are now forced to pay a penalty if they want to leave the club. Defendants are entitled to know whether all equity golf members have been treated similarly with respect to the payment of the $65,000 penalty. The statute cuts against plaintiff's argument.

B. Plaintiff's Substantive Legal Arguments Regarding Breach of Contract and Changing the Bylaws Are Irrelevant to the Motion to Compel

Plaintiff spends almost three full pages making substantive legal arguments regarding bylaws and breach of contract that have no bearing on defendants' motion to compel. Response, pp. 6-9. Indeed, plaintiff cites cases from the 6th Circuit, the 5th Circuit, the Northern District of Georgia, the bankruptcy court in New Jersey, and state courts in Colorado, Florida, and Pennsylvania to try to support its legal theories. This analysis is interesting, but irrelevant to the motion at issue. The one Arizona case plaintiff cites, *Nickerson v. Danielson*, 228 Ariz. 309, 265 P.3d 1108 (App. 2011), relates to the validity of bylaws; it has nothing to do with a motion to compel. Plaintiff's irrelevant legal discussion should be disregarded.

C. Plaintiff Has Not Been Surprised or Prejudiced by Any Technical Pleading Issue

Plaintiff argues that defendants' defense of disparate treatment under A.R.S. § 10-3610 was not pled in their answer. Yet plaintiff admits that defendants raised this defense on October 30, 2015, in the parties' second joint status report to the court. Thus, plaintiff has known about this defense for months and clearly has not suffered any prejudice since discovery is still ongoing and there is no trial date set. If the court deems it necessary, defendants will ask for leave to amend to

under rule 15(a)(1) to assert this affirmative defense. Alternatively, rule 15(b) allows for amendments to conform to the evidence if tried by the parties. Since this issue is before the court, it is clearly being tried by the parties so an amendment to conform to the evidence is warranted. Either way, such a technical issue is certainly not grounds to justify plaintiff's refusal to produce discoverable information, nor is it a valid defense to a motion to compel.

III. THE INTERROGATORIES ARE NOT OVERBROAD

Defendants seek information relating to equity golf members who were, are, and will be subject to the penalty transfer fee. Those members that do not have to pay the penalty fee, i.e., honorary members or non-equity members, are not at issue. Plaintiff's attempt to lump members who do not pay the penalty fee with equity golf members is just a not-so-subtle attempt to inflate the number of members of the club. It is plaintiff's expansive and unwarranted interpretation of the interrogatories that creates an over breadth problem, not defendants' interrogatories themselves.

Similarly, defendants are not interested in the names of seasonal landscape workers or waiters in a restaurant. At the January 14 meet and confer, defendants limited the scope of interrogatory number 2, but plaintiff did not like that limitation. As modified, interrogatory number 2 seeks information related to plaintiff's employees and officers that have knowledge or information about how the club interacts with its members with respect to the penalty fee. Although plaintiff agreed to supplement its prior responses by January 29, that date came and went without plaintiff producing anything. Thus, the information defendants seek in interrogatories numbers 2 and 3 also needs to be included in this court's order requiring plaintiff to provide complete responses to all of defendants' interrogatories.

IV. PLAINTIFF NEVER SOUGHT A PROTECTIVE ORDER

Plaintiff continues to confuse confidentiality with privilege. Confidential information can be guarded by a protective order, but it still must be produced; privileged information does not get produced. *McKellips v. Kumho Tire Co.*, F.R.D. 655, 661 (D. Kan. 2015). It does not matter that the club is full of "high net worth individuals who joined an exclusive private Club expecting that the Club will keep their information confidential." Plaintiff should have sought a protective order, but failed to do so. This court should order plaintiff to produce the information defendants seek

regardless of confidentiality concerns because plaintiff has not taken the steps necessary to show the court that sufficient good cause exists to support a protective order under Rule 26(c) Ariz. R. Civ. P.

V. ATTORNEY FEES AND COSTS MUST BE AWARDED

Rule 37(a)(4)(A) Ariz. R. Civ. P. requires an award of attorney fees to the moving party unless the non-moving party was substantially justified in refusing to produce discoverable information. Plaintiff has failed to show any substantial justification for its unequivocal statement in response to interrogatories number 1, 4, and 7 that it would not produce any information unless ordered to do so by the court. Plaintiff also clearly stated it would not produce information in response to interrogatories 5 and 6 without a protective order in place, but then never made a request to the court for such an order. Plaintiff claims its confidentiality concerns constituted substantial justification for refusing to comply with defendants' discovery requests. However, confidentiality is not a valid ground to refuse to produce. Plaintiff had no substantial justification for its actions. This court should award defendants their attorney fees and costs incurred trying to get plaintiff to comply with the rules of discovery.

VI. CONCLUSION

Plaintiff failed and refused to respond to valid discovery requests. This court should order plaintiff to provide complete responses to **all** of defendants' interrogatories within ten days. This court should also award defendants their attorney fees and costs because plaintiff was not substantially justified in its refusal to produce relevant information.

Respectfully submitted this 29th day of February 2016.

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