BAIRD, WILLIAMS & GREER, L.L.P.
6225 NORTH 24TH STREET, SUITE 125
PHOENIX, ARIZONA 85016
TELEPHONE (602) 256-9400

Michael C. Blair (018994)
mblair@bwglaw.net
Attorneys for Graham and Clark defendants

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 Request for Rule 56(f) Relief and Expedited Hearing** (Assigned to the Honorable David Gass)

Plaintiff downplays the breadth of discovery allowed by the rules. As the court is well aware, discovery is allowed on any non-privileged matter "which is relevant to the subject matter involved in the pending action . . . [or] if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Rule 26(b)(1)(A) Ariz. R. Civ. P. To minimize this broad scope, plaintiff makes the simplistic argument that what defendants seek to counter plaintiff's motions for summary judgment is not relevant simply because plaintiff says so. But defendants seek what is essential to them to respond to plaintiff's motions. Defendants' request for a continuance to obtain specific discovery should be granted.

I. DEFENDANTS' REQUESTED DISCOVERY IS RELEVANT TO THEIR DEFENSE

"Relevant evidence is evidence that makes any fact more or less probable." *Brown v. United States Fid. & Guar. Co.*, 194 Ariz. 85, 90, ¶ 25, 977 P.2d 807, 812 (App. 1998); Rule 401 Ariz. R.

Evid. Part of what defendants seek in their pending motion to compel[1] is relevant to prove whether plaintiff violated Arizona's non-profit statutes by treating similarly situated members differently. A.R.S. § 10-3610. This information is essential to defendants' opposition to plaintiff's motions for summary judgment. Defendants need to contact club members to inquire what they know and understand about the penalty fee, and to find out whether former members were forced to pay the full penalty fee, a reduced amount, or given a pass and not required to pay anything at all when they left. That information is exclusively within plaintiff's control. Defendants served interrogatories to obtain this and other information. Plaintiff objected and refused to produce it, so the attorneys met and conferred to try to resolve the matter. When no resolution was reached, defendants filed a properly supported motion to compel to try to obtain information essential to their defense against plaintiff's claims.

Plaintiff asserts two arguments in its response that are easily toppled. First, plaintiff claims that defendants have not raised the statutory defense of disparate treatment. But plaintiff readily acknowledges, as it must, that defendants raised this defense in the parties' second joint status report filed on October 30, 2015. Response, page 4, lines 22-28. Thus, plaintiff has known for months that defendants' defense is based, in part, on a disparate treatment argument. Plaintiff should not have been surprised to see this defense. Furthermore, discovery is still open and no trial date has been set so plaintiff has not suffered any prejudice. If plaintiff wants defendants to formally amend their answer, they can do so under rule 15(a)(1). Alternatively, Rule 15(b) Ariz. R. Civ. P. allows for amendments to conform to the evidence presented to the court even if those issues were not raised in a pleading. *Continental Nat'l Bank v. Evans*, 107 Ariz. 378, 381, 489 P.2d 15, 18 (1971) (stating that the purpose of rule 15(b) is to allow case to be tried on its merits so parties may obtain relief in one action). Plaintiff's argument about a technical omission to include such a defense in the answer exalts form over substance and should be disregarded.

[1] Defendants are contemporaneously filing their reply to plaintiff's response to their motion to compel. Defendants hereby incorporate that reply as if set forth herein.

Plaintiff's second argument is that defendants are on a fishing expedition to try to create a defense. Not so. Defendants are not trying to figure out a defense; to the contrary, they know what their defense is, know what information they need to establish that defense, and have tailored their interrogatories to get it. Plaintiff incorrectly tries to analogize cases relating to preparatory discovery, but those cases[2] are inapposite to the case *sub judice*. This is no fishing expedition.

The cases plaintiff cites regarding materiality are easily distinguishable. In *Alberta Securities Commission v. Ryckman*, 200 Ariz. 540, 30 P.3d 121 (App. 2001), the discovery sought was intended to be used by the judgment debtor to collaterally attack a judgment obtained by the Canadian securities commission; the requested discovery was not material to the issue pending before the Arizona appellate court relating to the domestication of a judgment from another country. *Id*. at 548, ¶¶ 29-30, 30 P.3d at 129. Likewise, in *Birth Hope Adoption Agency v. Doe*, 190 Ariz. 285, 947 P.2d 859 (App. 1997), the plaintiff "expressly acknowledged that defendants' statements were immaterial as a matter of law." *Id.* at 288, 947 P.2d at 862. In the case at bar, though, the information defendants seek is material to their defense and they have never acknowledged anything to the contrary. In *Maricopa County v. Kinko's, Inc.*, 203 Ariz. 496, 56 P.3d 70 (App. 2002), the court found a property tax valuation statute to be unconstitutional so any requested discovery was immaterial because it could not suddenly make the offending statute constitutional. *Id.* at 501, ¶ 21, 56 P.3d at 75.

II. DEFENDANT'S AFFIDAVIT IN SUPPORT OF ITS RULE 56(f) REQUEST IS SUFFICIENT

Grand v. Nacchio, 214 Ariz. 9, 147 P.3d 763 (App. 2006), requires defendants to submit an affidavit describing with particularity what they need to prepare their defense. *Id*. at 29, ¶ 72, 147 P.3d at 783. Defendants complied. Defendants' affidavit includes what information is sought, where it is, what defendants believe the information will reveal, how defendants are trying to get it, and the amount of time this additional discovery will require. Rule 56(f) does not require anything more

[2] Plaintiff's attempt to bootstrap a rule 11 case is improper. *Boone v. Superior Court*, 145 Ariz. 235, 700 P.2d 1335 (1985), dealt with the 1984 changes to rule 11 and how the old rule and new rule were to be applied in Arizona. *Id*. at 241, 700 P.2d at 1341. Rule 11 is not at issue here.

despite plaintiff's protestations to the contrary. *Simon v. Safeway, Inc.*, 217 Ariz. 330, 335, ¶ 11, 173 P.3d 1031, 1036 (App. 2007).

III. CONCLUSION

The information defendants seek is essential to their defense against plaintiff's motions for summary judgment. It is narrowly tailored and specific so there is no question what is wanted. This is not a fishing trip hoping to find something to create a defense. Moreover, the information is exclusively in plaintiff's custody and control so defendants have no other way to obtain it but through discovery. They tried to get it through proper interrogatories, but plaintiff refused to respond with anything other than objections. Now a motion to compel is pending which requires this court's intervention to order plaintiff to comply with the rules.

Assuming this court grants defendants' pending motion to compel and orders plaintiff to provide complete responses to defendants' interrogatories within ten days of the order, defendants will proceed as efficiently as possible to conduct the necessary discovery through depositions or otherwise to prepare their responses to plaintiff's motions for summary judgment. This court should grant defendants their requested rule 56(f) extension so they can obtain information essential to their defense against plaintiff's pending motions.

Respectfully submitted this 29th day of February 2016.

/s/ Michael C. Blair
Michael C. Blair
Baird, Williams & Greer, LLP
6225 North 24th Street, Suite 125
Phoenix, Arizona 85016
Attorneys for Graham and Clark defendants

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Copy mailed this same day to:

The Honorable David Gass
Maricopa County Superior Court
101 W. Jefferson (ECB #514)
Phoenix, AZ 85003-2243

Copies emailed/mailed this same day to:

Christopher L. Callahan
Theresa Dwyer-Federhar
Jennifer L. Blasko
Fennemore Craig, P.C.
2394 E. Camelback Rd., Suite 600
Phoenix, AZ 85016-3429
ccallahan@fclaw.com
tdwyer@fclaw.com
jblasko@fclaw.com
Attorneys for plaintiff

/s/ Marcy McAlister