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10

11 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

12 **IN AND FOR THE COUNTY OF PIMA**

13 NT PROPERTIES, LLC, an Arizona limited
14 liability company,

15 No. C20130421

16 Plaintiff,

17 **DEFENDANTS' ANSWER,
18 COUNTERCLAIM AND THIRD
19 PARTY COMPLAINT**

20 v.

21 666ISMONEY, LC, an Arizona limited liability
22 company, and SYCAMORE VISTA LAND
23 FOR SALE, LC, an Arizona limited liability
24 company,

25 (Assigned to The Honorable Carmine Cornelio)

26 Defendants.

27 SYCAMORE VISTA LAND FOR SALE, LC,
28 an Arizona limited liability company,

29 Counterclaimant,

30 v.

31 NT PROPERTIES, LLC, an Arizona limited
32 liability company,

33 Counter-Defendant.

34 SYCAMORE VISTA LAND FOR SALE, LC,
35 an Arizona limited liability company,

36 Third-Party Plaintiff,

1 v.

2 SYCAMORE VISTA MASTER
3 HOMEOWNER'S ASSOCIATION, an
4 Arizona non-profit corporation, and
5 SYCAMORE VISTA NO. 5 HOMEOWNER'S
ASSOCIATION, an Arizona non-profit
corporation,

6 Third-Party Defendants.

7 For its Answer to Plaintiff, NT Properties, LLC ("NT Properties"), Second Amended
8 Complaint, Defendants, 666ISMONEY, LC, and Sycamore Vista Land For Sale, LC
9 (collectively "Defendants"), admit, deny and allege as follows:

10 1. Defendants admit the allegations contained in paragraph 1 of the Second Amended
11 Complaint.

12 2. Defendants admit the allegations contained in paragraph 2 of the Second Amended
13 Complaint.

14 3. Defendants admit the allegations contained in paragraph 3 of the Second Amended
15 Complaint to the extent that Defendants acknowledge 666ISMONEY, LC, owned lot nos. 252,
16 277, 279, 280, 300-303 in the Sycamore Vista Unit 5 subdivision ("Unit 5") until April 2, 2012,
17 at which time the subject lots were transferred via quitclaim deed to Sycamore Vista Land For
18 Sale, LC.

19 4. Defendants deny the allegations contained in paragraph 4 of the Second Amended
20 Complaint and affirmatively allege that although Defendants are purported to be members of the
21 Sycamore Vista Master Homeowner's Association and the Sycamore Vista No. 5 Homeowner's
22 Association, Inc. (the "Disputed Associations"), as set forth in greater detail below, Defendants
23 allege that the Disputed Associations were improperly formed and that the Second Amended
24 Declaration of Covenants, Conditions, and Restrictions for New Tucson Unit 5 (the "Disputed
25 CC&Rs") are invalid and unenforceable.

1 5. Defendants deny the allegations contained in paragraph 5 of the Second Amended
2 Complaint and affirmatively allege that as indicated above, Defendants dispute the validity of the
3 Disputed Associations and the Disputed CC&Rs.

4 6. Defendants admit the allegations contained in paragraph 6 of the Second Amended
5 Complaint only to the extent that Defendants acknowledge that the Disputed Associations have
6 purported to have assessed special assessments against the lots owned by Defendants. However,
7 Defendants affirmatively allege that the special assessments are in violation of applicable law
8 and not a proper exercise of special assessments authority held by the Disputed Associations.
9 Defendants' further allege that the Disputed Associations cannot by a majority vote force lot
10 owners to be part of a homeowners association and pay outrageously expensive special
11 assessments to build infrastructure to develop the community for the benefit of the majority lot
12 owner plaintiff.

13 7. Defendants deny the allegations contained in paragraph 7 of the Second Amended
14 Complaint and affirmatively allege that they dispute that the unpaid special assessments are past
15 due or properly owed. Defendants further allege that it is improper to attempt to force lot
16 owners to pay for building on land owned by the association, as it is typically the responsibility
17 of the developer of the property to pay for amenities built on common areas and the typical
18 charge to homeowners is limited to paying for maintenance of those amenities.

19 8. Defendants are without sufficient information to respond to the allegations
20 contained in paragraph 8 of the Second Amended Complaint and therefore deny the same.
21 Defendants affirmatively allege that NT Properties has failed to pay its special assessments on
22 the lots it owns in Unit 5 yet claims that Defendants have to pay the special assessments on their
23 lots in order to pay for infrastructure for NT Properties' to develop Sycamore Vista. Defendants
24 further allege under the circumstances that it was improper under applicable law for the special
25 assessments to be assigned and therefore NT Properties is not entitled to collect on the special
26 assessments that were allegedly assigned to it.

9. Defendants deny the allegations contained in paragraph 9 of the Second Amended Complaint.

10. Defendants deny the allegations contained in paragraph 10 of the Second Amended Complaint.

11. Defendants deny the allegations contained in paragraph 11 of the Second Amended Complaint. As set forth in greater detail below, Defendants affirmatively allege that NT Properties has to do equity to get equity and it is highly inequitable to make Defendants pay for infrastructure in Unit 5 that NT Properties has not had to pay for.

12. Defendants admit the allegations contained in paragraph 12 of the Second Amended Complaint.

AFFIRMATIVE DEFENSES

13. Defendants deny each and every allegation not specifically admitted herein.

14. Defendants incorporate the claims and defenses in its Counterclaim and Third Party Complaint as affirmative defenses to NT Properties' claims.

15. The Second Amended Complaint fails to state a cause of action upon which relief can be granted.

16. The Second Amended Complaint is barred by the statute of limitations.

17. The Second Amended Complaint is barred because Defendants did not breach any legal duties owed to NT Properties.

18. The Second Amended Complaint is barred as NT Properties' damages, if any, were caused by NT Properties' own acts and omissions.

19. The Second Amended Complaint is barred as NT Properties' damages, if any, were caused by the acts and/or admissions of third parties over whom Defendants have no control.

20. The Second Amended Complaint is barred by the doctrine of estoppel.

21. The Second Amended Complaint is barred by the doctrine of waiver.

1 22. The Second Amended Complaint is barred because NT Properties has failed to
2 mitigate its damages, if any.

3 23. Defendants hereby incorporate by reference the affirmative defenses contained in
4 Rules 8(c) and 12 of the Arizona Rules of Civil Procedure.

5 24. As a further affirmative defense, Defendants allege that the Disputed CC&Rs are
6 void ab initio, as the original Declaration of Restrictions against Defendants' property did not
7 contemplate the creation of a homeowners' association, common areas, the obligation to pay
8 assessments, and rather was strictly limited to restrictions on the use of the property.

9 25. Defendants further allege they cannot be forced to become members of a non-
10 profit corporation or/and to pay assessments. Arizona Non-Profit Corporation law requires that
11 individuals may only be deemed to be members of a non-profit corporation and be obligated to
12 pay assessments upon their express or implied consent. Since the original Declaration of
13 Restrictions did not contemplate Defendants' membership in a non-profit corporation and did
14 not contemplate Defendants' obligation to pay assessments, the creation and recording of the
15 Disputed CC&Rs against Defendants' property without Defendants' express or implied consent
16 is void ab initio.

17 26. Defendants also allege as a further affirmative defense that the liens against
18 Defendants' property have expired and the statute of limitation has run on the breach of contract
19 action. Pursuant to A.R.S. § 33-1807, the liens against Defendants' property expired in
20 November of 2008, three years from the date the first installment of the special assessments
21 became due. Defendants also allege that the statute of limitations on a breach of contract action
22 is six years under A.R.S. § 12-548. Therefore the breach of contract claim expired in November
23 of 2005, six years from the date the Disputed Associations called \$6,000.00 of the special
24 assessments due.

25

26

1 27. Defendants further allege that NT Properties has failed and refused to show that it
2 has standing to bring claims on the Special Assessments and that it properly owns the right to
3 collect on them or what benefit was conferred to the Disputed Associations by NT Properties.

4 28. Finally, Defendants allege that the remaining balance of the special assessments
5 has yet to be due and payable. In a notice to the lot owners dated June 30, 2006, the Disputed
6 Associations agreed that amount due on any special assessment will become due and payable
7 upon the later of, the completion of the improvements or nine months. The improvements were
8 never completed and the promised infrastructure never provided. Assuming arguendo that the
9 special assessments were proper, they are not even due and payable because the improvements
10 have not been completed.

11 29. Defendants reserve the right to interpose additional affirmative defenses as they
12 may arise through the course of further discovery and disclosure.

13 THEREFORE, Defendants, 666ISMONEY, LC, and Sycamore Vista Land for Sale, LC,
14 hereby demand judgment in its favor against Plaintiff, NT Properties, LLC, dismissing the
15 Second Amended Complaint with prejudice, together with an award of attorney's fees and costs
16 pursuant to contract and/or pursuant to A.R.S. § 12-341 and § 12-341.01, and such other relief as
17 the Court may deem equitable and just.

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23 **COUNTERCLAIM**

24 Counterclaimant, Sycamore Vista Land for Sale, LC, by way of counterclaim against NT
25 Properties, LLC, hereby states as follows:

26 **PARTIES JURISDICTION AND VENUE**

1. Counterclaimant Sycamore Vista Land for Sale, LC ("Counterclaimant"), is an Arizona limited liability company having its principal place of business in Pima County, Arizona, and is duly authorized to transact business in the state of Arizona.

2. NT Properties, LLC, is an Arizona limited liability company having its principal place of business in Pima County, Arizona, and is duly authorized to transact business in the state of Arizona.

3. The acts, obligations and transactions that are the subject of this action occurred in Pima County, Arizona. The Court has jurisdiction to hear this matter.

GENERAL ALLEGATIONS

History of Sycamore Vista Prior to Formation of the Disputed Associations

4. The Sycamore Vista subdivision (formally New Tucson), located in Tucson, Arizona, was created in 1964. At the time the development was created, the original developer intended to put in roads and utilities but that work was never completed.

5. The original developer also caused to be recorded the New Tucson No. 5 Declaration of Restrictions (the “Declaration of Restrictions”), which was recorded on February 24, 1964.

6. The original Declaration of Restrictions against Sycamore Vista was strictly limited to restrictions on the use of the property and did not contemplate the creation of a homeowners' association, common areas, the obligation to pay assessments and/or special assessments, and was a mere three pages primarily restricting the types of buildings that were permitted in Sycamore Vista.

7. The original Declaration of Restrictions also contained an amendment provision, which provided that it could be amended at any time by a majority vote of the lot owners.

8. Counterclaimant is the owner of lots located in the development. Counterclaimant purchased lot nos. 252 and 300-303 in November of 1999, lot no. 279 in February of 2001 and lot no. 277 in November of 2004 (collective the “Property”).

9. Counterclaimant purchased its lots with the understanding that certain infrastructure, such as roads and utilities were to be installed by the original developer or its successor. However, the original developer of the community never completed the development, and at the time Counterclaimant purchased its first lot, Sycamore Vista had no homeowner's association, assessments or common areas.

Formation of the Disputed Associations

10. Under a series of developer run boards the majority lot owners and/or their successors (the “Majority Lot Owners”) used the amendment provision of the Declaration of Restrictions to make the other lot owners in the community pay for infrastructure Counterclaimant expected the developer to pay for.

11. In or around September of 2003, the Majority Lot Owners, sought to develop their lots for sale and provide infrastructure such as roads and utilities to further their development goals and thereafter created a homeowner's association were none existed using the majority vote provision of the original Declaration of Restrictions.

12. On September 15, 2003, the Disputed Associations executed and recorded a document entitled Second Amended Declaration of Covenants, Conditions and Restrictions for New Tucson Unit No. 5 (the "Disputed CC&Rs") using the majority vote provision of the original Declaration of Restrictions.

13. According to the Disputed CC&Rs, the Declaration of Restrictions was amended in order for the Disputed Associations to “construct, improve and maintain roadways, thoroughfares, alleys and equestrianways...install, construct and improve, utilities...drainageways, retention/detention basins, drainage control structures or devices...and landscape/drainage easements.”

1 14. In order to pay for these improvements, the Disputed Associations adopted CC&R
2 Section 5.4, which granted it authority to levy special assessments for the purpose of,
3 “engineering, construction, improvement and maintenance of roadways, utilities, drainageways,
4 equestrianways, easements and any necessary on or off site improvements to the residential Lots
5 and Common Areas.”

6 15. The Disputed Associations also took title to land they previously did not own to
7 create common areas for Sycamore Vista.

8 16. Such actions as described above were done to advance the development plans of
9 the Majority Lot Owners, or their successors, and without regard to the interest of the individual
10 lot owners.

11 *The Disputed Associations/Majority Lot Owners Implemented Special Assessments That
12 Exceed the Value of the Lots to Force Individual Lot Owners to Pay for Infrastructure in the
Community That Benefits the Majority Lot Owners*

13 17. In or around February of 2004, under disputed CC&R Section 5.4, the Majority
14 Lot Owners, who controlled the Disputed Associations, voted to impose a special assessment
15 lien on each lot in Unit 5 in the amount of \$380.00 for the purpose of constructing water and
16 sewer lines. Two weeks later, the Majority Lot Owners voted again and imposed a special
17 assessment lien in the amount of \$22,000.00 for the purpose of constructing on-site
18 improvements including utilities and roads (the “Special Assessments”).

19 18. Unit 5 would have been developed by the Majority Lot Owners, who owned
20 hundreds of lots, with or without the Special Assessments, however, the Special Assessments
21 allowed them to put the burden on the individual lot owners. The lot owners received minimal
22 benefit from the development because each lot owner only owned a few lots, whereas the
23 Majority Lot Owners owned hundreds of lots in Unit 5 and thousands of lots in Sycamore Vista.

19. In or around February of 2005 the Majority Lot Owners arbitrarily called \$1,600.00 of the Special Assessments due and approximately two weeks later arbitrarily called an additional \$6,000.00 due.

20. In May of 2006 the Majority Lot Owners voted to increase the amount of the Special Assessments to \$35,000.00, despite acknowledging in November of 2005 that the lots in Unit 5 were only worth approximately \$39,000.00 to \$45,000.00 (nearly as much at the Special Assessments on each lot). Counterclaimant is informed and believes that the current market value is \$25,000.00 per lot, making the Special Assessments on each lot far exceed the value of the lot.

21. Before the original Majority Lot Owners lost their lots to foreclosure, they began unlawfully assigning the Special Assessment liens, including those on Counterclaimant's lots, to Western Recovery Services, LLC, a company owned and operated by one of the Majority Lot Owners.

22. Counterclaimant is informed and believes that the Disputed Association received no consideration for the assignment.

The Majority Lot Owners Seek to Place an Outrageous Burden on Individual Lot Owners Despite the Fact That They Have Failed to Pay Special Assessments on the Thousands of Lots They Own

23. Even though the Majority Lot Owners stand to gain the greatest benefit from the development paid for by the Special Assessments as owners of a majority of the lots in Sycamore Vista, they have incurred the least amount of burden.

24. The Majority Lot Owners own approximately 225 lots in Unit 5 (and owns approximately 1338 lots throughout the entire community).

25. The Majority Lot Owners purchased their lots from National Bank of Arizona in or around December of 2008, after the bank foreclosed on the lots in March of 2008.

1 26. Thereafter, the Majority Lot Owners purchased the Special Assessments on
2 Counterclaimant's lots in or around December of 2012 for a purported \$12,500 per lot.

3 27. Counterclaimant is informed and believes that the Majority Lot Owners purchased
4 their lots free and clear of special assessment liens, which would have been over \$7,875,000, as
5 evidenced by the Income and Expense Report for Unit 5 for 2008, which shows that the
6 Disputed Associations wrote off bad debt of approximately \$7,939,328.00 that year.

7 *Arizona Law Generally Precludes Using the Majority Vote Provision to Amend a*
8 *Declaration of Restrictions in a Way That is Unforeseeable and Unreasonable*

9 28. As described above, the Majority Lot Owners amended the Declaration of
10 Restrictions to charge the individual lot owners to "construct, improve and maintain roadways,
11 thoroughfares, alleys and equestrianways...install, construct and improve,
12 utilities...drainageways, retention/detention basins, drainage control structures or devices...and
13 landscape/drainage easements," in furtherance of their development goals.

14 29. Although deed restrictions may allow for amendment by a majority vote of lot
15 owners, Arizona law limits the types of amendments that may be done without a unanimous
16 consent of all lot owners.

17 30. Because deed restrictions are a type of contract, Arizona courts look to contract
18 law to determine whether an amendment is reasonable and foreseeable when reading the original
19 deed restriction.

20 31. Although the courts have found that it might be reasonable and foreseeable to
21 amend a declaration of restrictions to form a homeowner's association when there is already
22 common areas it has been found to be unreasonable and unforeseeable to form a homeowner's
23 association when no common areas exist.

24 32. The Court of Appeals in Dreamland Villa Community Club, Inc. v. Raimey, 224
25 Ariz. 42, 48, 226 P.3d 411, 417 (Ariz.App. 2010), held that an original declaration of restrictions
26 could not be amended by a majority vote of lot owners to require membership in a homeowner's

1 association or to require lot owners to pay assessments. “The authority to amend the original
2 Declarations did not allow 51% of the lot owners to force the other 49% into club membership
3 that latter had chosen against, nor to assess and lien the properties of such homeowners for an
4 association they did not seek.” Id at 51, 226 P.3d at 420.

5 33. According to the Court of Appeals, the homeowners in Dreamland originally
6 bought into a community with no common areas, no assessments and no homeowner’s
7 association and such amenities were beyond the original bargain of the covenanting parties,
8 making them unreasonable and unforeseeable. Id at 50-51, 226 P.3d at 419-420.

9 34. In addition to Dreamland, A.R.S. § 10-3601(B) provides that no personal shall
10 pay dues as a member of a non-profit corporation without that person’s consent. Applying this
11 provision in Dreamland, the Court of Appeals held that each homeowner needed to consent to
12 become a member of the homeowner’s association. Id at 47, 226 P.3d at 416.

13 35. Despite the rule in Dreamland, that a majority cannot use the amendment process
14 to force lot owners to join a homeowner’s association and pay assessments, the Majority Lot
15 Owners purported to amend the original Declaration of Restrictions to do just that, not to benefit
16 the individual lot owners but as a vehicle to develop their lots.

17 *The Actions of the Majority Lot Owners/Disputed Associations is More Egregious than the*
18 *Standard the Court of Appeals Set Forth in Dreamland*

19 36. The Majority Lot Owners’ amendment of the original Declaration of Restrictions
20 was far more unreasonable and unforeseeable than the Court of Appeals contemplated and far
21 exceeded the limit of amendment authority set forth in Dreamland.

22 37. In Dreamland, the issue was simply the fact that the lot owners had to pay for
23 maintenance of a clubhouse that they did not want to be a part of. There was a building owned
24 by a private club. The homeowner’s association acquired the building and made lot owners pay
25 to maintain it.

1 38. This case is similar to Dreamland in that the original Declaration of Restrictions
2 contained only restrictive covenants pertaining to each lot owner's personal residence.
3 However, what makes this situation so much worse is the fact that the lot owners in Sycamore
4 Vista are being charged to "construct, improve and maintain roadways, thoroughfares, alleys and
5 equestrianways...install, construct and improve, utilities...drainageways, retention/detention
6 basins, drainage control structures or devices...and landscape/drainage easements," and not just
7 maintain something that already exists.

8 39. In other words, Counterclaimant not only has to pay for the maintenance of newly
9 created common areas, which was the problem in Dreamland, but also has to pay to construct the
10 common areas in the first place.

11 40. This is the reason the Special Assessments are so high and exceed the value of the
12 lots.

13 41. In summary, the conditions at Sycamore Vista are significantly worse than those in
14 Dreamland. In Dreamland, the lot owners only had to pay to maintain common areas, in this
15 case the lot owners have to pay to build and maintain the common areas. As a result of needing
16 to build the common areas, the cost of the Special Assessment exceeds the value of the lots.
17 Finally, the Majority Lot Owners failed to pay the Special Assessments themselves, although
18 they stand to receive the greatest benefit from the improvements as owners of the most lots in
19 Sycamore Vista, while incurring the least amount of burden.

COUNT ONE

(Declaratory Judgment)

22 42. Counterclaimant incorporates the above allegations as though fully set forth herein.

23 43. Counterclaimant seeks declaratory relief pursuant to the Uniform Declaratory
24 Judgment Act, A.R.S. §§ 12-1831, et al. The rights, status and legal relations of the parties are
25 affected by the dispute described herein.

44. Counterclaimant alleges that the Disputed CC&Rs sought to amend the Declaration of Restrictions in a fashion that is not permitted under the law without the specific consent of Counterclaimant and that the Declaration of Restrictions could not be amended by a majority vote to require membership in a homeowner's association.

45. Counterclaimant also alleges that as a result of the Disputed CC&Rs being invalid, the Special Assessments raised under the Disputed CC&Rs are invalid and unenforceable as well.

46. A judicial declaration is necessary and appropriate at this time so that Counterclaimant may ascertain with certainty its rights and duties.

47. Pursuant to A.R.S. §§ 12-1831, et seq., Counterclaimant is entitled to a declaratory judgment that the Disputed CC&Rs are invalid and unenforceable and that the Special Assessments charged pursuant to the Disputed CC&Rs are void.

48. Counterclaimant is entitled to an award of reasonable attorney's fees pursuant to A.R.S. § 12-341.01.

WHEREFORE, Counterclaimant requests that the Court enter judgment in its favor and against NT Properties, LLC, as follows:

- a. For declaratory judgment adjudicating that the Disputed CC&Rs are invalid and unenforceable.
- b. For declaratory judgment that the Special Assessments charged pursuant to the Disputed CC&Rs are invalid and unenforceable.
- c. For an award of damages in an amount to be proven at trial.
- d. For Counterclaimant's reasonable attorney's fees and costs pursuant to A.R.S. § 12-341-01.
- e. For other and further relief as the Court deems equitable and just.

COUNT TWO

(Declaratory Judgment)

1 49. Counterclaimant incorporates the above allegations as though fully set forth herein.

2 50. Counterclaimant seeks declaratory relief pursuant to the Uniform Declaratory
3 Judgment Act, A.R.S. §§ 12-1831, et al. The rights, status and legal relations of the parties are
4 affected by the dispute described herein.

5 51. Counterclaimant alleges that the Disputed CC&Rs are an adhesion contract, and
6 Section 5.4 of the Disputed CC&Rs, allowing the Disputed Associations to charge special
7 assessments for the purpose of “engineering, construction, improvement and maintenance of
8 roadways, utilities, drainageways, equestrianways, easements and any necessary on or off site
9 improvements to the residential Lots and Common Areas” is **unconscionable and unenforceable**.

10 52. The Arizona Supreme Court has defined an adhesion contract as a “standardized
11 form offered to consumers on essentially a take it or leave it basis.” *Burkons v. Ticor Title Ins.*
12 *Co. of Cal.*, 165 Ariz. 299, 311, 798 P.2d 1308, 1320 (App. 1989), *rev’d on other grounds*, 168
13 Ariz. 345, 813 P.2d 710 (1991).

14 53. There can be no dispute that the Disputed CC&Rs are a standardized form whose
15 contents and requirements are imposed upon all individual lot owners on a “take it only” basis.
16 The Disputed CC&Rs were drafted and recorded unilaterally by the Majority Lot Owners, and
17 Counterclaimant became subject to its terms automatically upon its recording.

18 54. Counterclaimant had no opportunity to participate in drafting the Disputed CC&Rs
19 and no opportunity to negotiate any of its terms and was simply informed that it was subject to
20 all of the regulations contained therein.

21 55. In order to determine whether a contract of adhesion is enforceable, courts look to
22 two factors: the reasonable expectations of the adhering party and whether the contract is
23 unconscionable. *Huff v. Bekins Moving & Storage Co.*, 145 Ariz. 496, 498, 702 P.2d 1341, 1342
24 (App. 1985). Unconscionability involves terms that “shock the conscience.” *Broemmer v.*
25 *Abortion Services of Phoenix, Ltd.*, 173 Ariz. 148, 151, 840 P.2d 1023, 1026 (1992).

26

1 56. As discussed above, when Counterclaimant purchased its lots the Property was
2 subject to an original Declaration of Restrictions which was a mere three pages of substance
3 primarily regulating the types of buildings. Moreover, Sycamore Vista had no common areas,
4 homeowner's association or assessments. It cannot possibly have been reasonably expected that
5 the Declaration of Restrictions would subsequently be amended to charge the individual lot
6 owners for constructing common areas. Therefore, Section 5.4 must be deemed unenforceable
7 for violating Counterclaimant's reasonable expectations.

8 57. Section 5.4 is likewise unenforceable for being unconscionable.

9 58. It "shocks the conscience" that the Disputed Associations would charge Special
10 Assessments that exceed the value of the lots by at least \$10,000.00 to build roads and
11 infrastructure.

12 59. It is further shocking that the Disputed Associations have failed to charge the
13 Majority Lot Owners Special Assessments on their lots, even though the Majority Lot Owners
14 receive the greatest benefit from the improvements.

15 60. A judicial declaration is necessary and appropriate at this time so that
16 Counterclaimant may ascertain with certainty its rights and duties.

17 61. Pursuant to A.R.S. §§ 12-1831, et seq., Counterclaimant is entitled to a declaratory
18 judgment that Section 5.4 of the Disputed CC&Rs is unconscionable, void and of no force and
19 effect.

20 62. Counterclaimant is entitled to an award of reasonable attorney's fees pursuant to
21 A.R.S. § 12-341.01.

22 WHEREFORE, Counterclaimant requests that the Court enter judgment in its favor and
23 against NT Properties, LLC, as follows:

24 a. For declaratory judgment adjudicating that Counterclaimant is entitled to a
25 declaratory judgment that Section 5.4 of the Disputed CC&Rs is unconscionable, void
26 and of no force and effect.

- b. For an award of damages in an amount to be proven at trial.
- c. For Counterclaimant's reasonable attorney's fees and costs pursuant to A.R.S. § 12-341-01.
- d. For other and further relief as the Court deems equitable and just.

THIRD PARTY COMPLAINT

Third Party Plaintiff, Sycamore Vista Land For Sale, LC ("Third Party Plaintiff"), for its third party complaint against Sycamore Vista No. 5 Homeowner's Association, Inc. and Sycamore Vista Master Homeowner's Association, alleges as follows:

PARTIES JURISDICTION AND VENUE

1. The Disputed Associations are Arizona nonprofit corporations authorized to transact business in the state of Arizona.

GENERAL ALLEGATIONS

2. Third Party Plaintiff incorporates by reference the allegations above as though fully set forth herein.

COUNT ONE

(Declaratory Judgment)

3. Third Party Plaintiff incorporates the above allegations as though fully set forth herein.

4. Third Party Plaintiff seeks declaratory relief pursuant to the Uniform Declaratory Judgment Act, A.R.S. §§ 12-1831, et al. The rights, status and legal relations of the parties are affected by the dispute described herein.

5. Third Party Plaintiff alleges that the Disputed CC&Rs sought to amend the Declaration of Restrictions in a fashion that is not permitted under the law without the specific consent of Third Party Plaintiff and that the Declaration of Restrictions could not be amended by a majority vote to require membership in a homeowner's association.

6. Third Party Plaintiff also alleges that as a result of the Disputed CC&Rs being invalid, the Special Assessments raised under the Disputed CC&Rs are invalid and unenforceable.

7. A judicial declaration is necessary and appropriate at this time so that Third Party Plaintiff may ascertain with certainty its rights and duties.

8. Pursuant to A.R.S. §§ 12-1831, et seq., Third Party Plaintiff is entitled to a declaratory judgment that the Disputed CC&Rs are invalid and unenforceable and that the Special Assessments charged pursuant to the Disputed CC&Rs is void.

9. Third Party Plaintiff is entitled to an award of reasonable attorney's fees pursuant to A.R.S. § 12-341.01.

WHEREFORE, Third Party Plaintiff requests that the Court enter judgment in its favor and against Sycamore Vista No. 5 Homeowner's Association, Inc. and Sycamore Vista Master Homeowner's Association, as follows:

- a. For declaratory judgment adjudicating that the Disputed CC&Rs are invalid and unenforceable.
- b. For declaratory judgment that the Special Assessments charged pursuant to the Disputed CC&Rs are invalid and unenforceable.
- c. For an award of damages in an amount to be proven at trial.
- d. For Third Party Plaintiff's reasonable attorney's fees and costs pursuant to A.R.S. § 12-341-01.
- e. For other and further relief as the Court deems equitable and just.

COUNT TWO

(Declaratory Judgment)

10. Third Party Plaintiff incorporates the above allegations as though fully set forth herein.

1 11. Third Party Plaintiff seeks declaratory relief pursuant to the Uniform Declaratory
2 Judgment Act, A.R.S. §§ 12-1831, et al. The rights, status and legal relations of the parties are
3 effected by the dispute described herein.

4 12. Third Party Plaintiff alleges that the Disputed CC&Rs are an adhesion contract,
5 and Section 5.4 of the Disputed CC&Rs, allowing the Disputed Associations to charge special
6 assessments for the purpose of “engineering, construction, improvement and maintenance of
7 roadways, utilities, drainageways, equestrianways, easements and any necessary on or off site
8 improvements to the residential Lots and Common Areas” is **unconscionable and unenforceable**.

9 13. The Arizona Supreme Court has defined an adhesion contract as a “standardized
10 form offered to consumers on essentially a take it or leave it basis.” *Burkons v. Ticor Title Ins.*
11 *Co. of Cal.*, 165 Ariz. 299, 311, 798 P.2d 1308, 1320 (App. 1989), *rev’d on other grounds*, 168
12 Ariz. 345, 813 P.2d 710 (1991).

13 14. There can be no dispute that the Disputed CC&Rs are a standardized form whose
14 contents and requirements are imposed upon all individual lot owners on a “take it only” basis.
15 The Disputed CC&Rs were drafted and recorded unilaterally by the Majority Lot Owners, and
16 Third Party Plaintiff became subject to its terms automatically upon its recording.

17 15. Third Party Plaintiff had no opportunity to participate in drafting the Disputed
18 CC&Rs and no opportunity to negotiate any of its terms and was simply informed that it was
19 subject to all of the regulations contained therein.

20 16. In order to determine whether a contract of adhesion is enforceable, courts look to
21 two factors: the reasonable expectations of the adhering party and whether the contract is
22 unconscionable. *Huff v. Bekins Moving & Storage Co.*, 145 Ariz. 496, 498, 702 P.2d 1341, 1342
23 (App. 1985). Unconscionability involves terms that “shock the conscience.” *Broemmer v.*
24 *Abortion Services of Phoenix, Ltd.*, 173 Ariz. 148, 151, 840 P.2d 1023, 1026 (1992).

25 17. As discussed above, when Third Party Plaintiff purchased its lots the Property was
26 subject to an original Declaration of Restrictions which was a mere three pages of substance

1 primarily regulating the types of buildings. Moreover, Sycamore Vista had no common areas,
2 homeowner's association or assessments. It cannot possibly have been reasonably expected that
3 the Declaration of Restrictions would subsequently be amended to charge the individual lot
4 owners for constructing common areas. Therefore, Section 5.4 must be deemed unenforceable
5 for violating Third Party Plaintiff's reasonable expectations.

6 18. Section 5.4 is likewise unenforceable for being unconscionable.

7 19. It "shocks the conscience" that the Disputed Associations would charge Special
8 Assessments that exceed the value of the lots by at least \$10,000.00 to build roads and
9 infrastructure.

10 20. It is further shocking that the Disputed Associations have failed to charge the
11 Majority Lot Owners Special Assessments on their lots, even though the Majority Lot Owners
12 receive the greatest benefit from the improvements.

13 21. A judicial declaration is necessary and appropriate at this time so that Third Party
14 Plaintiff may ascertain with certainty its rights and duties.

15 22. Pursuant to A.R.S. §§ 12-1831, et seq., Third Party Plaintiff is entitled to a
16 declaratory judgment that Section 5.4 of the Disputed CC&Rs is unconscionable, void and of no
17 force and effect.

18 23. Third Party Plaintiff is entitled to an award of reasonable attorney's fees pursuant
19 to A.R.S. § 12-341.01.

20 WHEREFORE, Third Party Plaintiff requests that the Court enter judgment in its favor
21 and against NT Properties, LLC, as follows:

22 a. For declaratory judgment adjudicating that Third Party Plaintiff is entitled to a
23 declaratory judgment that Section 5.4 of the Disputed CC&Rs is unconscionable, void
24 and of no force and effect.

25 b. For an award of damages in an amount to be proven at trial.

- c. For Third Party Plaintiff's reasonable attorney's fees and costs pursuant to A.R.S. § 12-341-01.
- d. For other and further relief as the Court deems equitable and just.

COUNT THREE

(Wrongful Lien – A.R.S. § 33-420)

24. Third Party Plaintiff incorporates the above allegations as though fully set forth herein.

8 25. The Disputed Associations have caused to be recorded against Third Party
9 Plaintiff's Property a Second Amended Declaration of Covenants, Conditions, and Restrictions
10 for New Tucson Unit 5. (Attached hereto as Exhibit "A").

11 26. Pursuant to A.R.S. § 33-1807, the Second Amended Declaration of Covenants,
12 Conditions, and Restrictions for New Tucson Unit 5 is a lien against Third Party Plaintiff's
13 Property.

14 27. For the reasons specified above, Disputed Associations recordation of the Second
15 Amended Declaration of Covenants, Conditions, and Restrictions for New Tucson Unit 5 was
16 contrary to Arizona law and is therefore a wrongful encumbrance against Third Party Plaintiff's
17 Property.

18 28. In addition to recording the Disputed CC&Rs, the Disputed Associations has
19 caused to be recorded a Notice of Special Assessment lien, in the form attached hereto as Exhibit
20 "B", against 48 of Third Party Plaintiff's 50 lots.

21 29. Finally, the assignment of the Special Assessments to NT Properties was recorded
22 against Third Party Plaintiff's Property, in the form attached hereto as Exhibit "C". As
23 discussed above, NT Properties was assigned the Special Assessment liens but never explained
24 the benefit it conferred on the Disputed Associations for receiving the assignment. This is
25 further evidence of the wrongfulness of the Special Assessments.

30. The recordation of the above reference documents created uncertainty and caused Third Party Plaintiff's Property to be unmarketable, and has otherwise interfered with Third Party Plaintiff's free use and enjoyment of its Property.

31. Pursuant to A.R.S. § 33-420, Third Party Plaintiff is entitled to the removal of the wrongful Second Amended Declaration of Covenants, Conditions, and Restrictions for New Tucson Unit 5, and is entitled to an award for \$300,000.00 or for treble its damages, whichever is greater, as well as for its attorneys' fees and costs.

WHEREFORE, Third Party Plaintiff requests that the Court enter judgment in its favor and against Sycamore Vista No. 5 Homeowner's Association, Inc. and Sycamore Vista Master Homeowner's Association, as follows:

- a. For an order clearing the title of the Property of the disputed Second Amended Declaration of Covenants, Conditions, and Restrictions for New Tucson Unit 5.
- b. For an award of damages and treble damages in an amount to be proven at trial.
- c. For prejudgment interest on all liquidated damages.
- d. For other and further relief as the Court deems equitable and just.

DATED this day of April, 2013.

CHEIFETZ IANNITELLI MARCOLINI, P.C.

By: _____

Steven W. Cheifetz
Rachel B. Eisenstadt
Attorneys for Defendants

ORIGINAL of the foregoing electronically filed this ____ day of April, 2013, with:

**Clerk
PIMA COUNTY SUPERIOR COURT**

1 201 West Jefferson Street
1 Phoenix, Arizona 85003-2243

2 **COPY** of the foregoing electronically delivered
3 this ____ day of April, 2013, to:

4 The Honorable Carmine Cornelio, J.S.C.
5 PIMA COUNTY SUPERIOR COURT

6 East Court Building - 6
7 101 West Jefferson Street
8 Phoenix, Arizona 85003-2243

9 COPY of the foregoing mailed
10 this ____ day of April, 2013 to:

11 Gerald Maltz, Esq.
12 HARALSON, MILLER, Pitt, FELDMAN & MCNALLY P.L.C.
13 One South Church Avenue, Suite 900
14 Tucson, Arizona 85701-1620

15 By: /s/ Julie Mills

16 N:\CLIENTS\Baranow\Sycamore Vista HOA 3570-3\Pleadings\Answer Counterclaim and 3rd Party Complaint 04 02 13 REV.doc