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10 Attorneys for Defendant/Counterclaimant/Third-Party Plaintiff

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12  
13 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
14 **IN AND FOR THE COUNTY OF PIMA**

15 NT PROPERTIES, LLC, an Arizona limited  
16 liability company,

17 Plaintiff,

18 v.

19 666ISMONEY, LC, an Arizona limited liability  
20 company, and SYCAMORE VISTA LAND  
21 FOR SALE, LC, an Arizona limited liability  
22 company,

23 Defendants.

24 SYCAMORE VISTA LAND FOR SALE, LC,  
25 an Arizona limited liability company,

26 Counterclaimant,

27 v.

28 NT PROPERTIES, LLC, an Arizona limited  
29 liability company,

30 Counter-Defendant.

31 No. C20130421

32  
33 **DEFENDANT/COUNTERCLAIMANT/**  
34 **THIRD-PARTY PLAINTIFF'S**  
35 **RESPONSE TO THIRD-PARTY**  
36 **DEFENDANT SYCAMORE VISTA NO.5**  
37 **HOMEOWNER'S ASSOCIATION'S**  
38 **MOTION TO DISMISS**

39 (Assigned to The Honorable Carmine Cornelio)

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

Third-Party Plaintiff,

V.

SYCAMORE VISTA NO. 5 HOMEOWNER'S  
ASSOCIATION, an Arizona non-profit  
corporation,

### Third-Party Defendant.

Sycamore Vista No. 5 Homeowner's Association's (the Disputed Association") Motion to Dismiss is without merit. Although, the Disputed Association contends that its Motion to Dismiss should be granted because Sycamore Vista's complaint is based solely upon "conclusory allegations," as demonstrated below, the essential elements of Sycamore Vista's claims were properly pled with particularity and, for purposes of Rule 12(b)(6) must be taken as true. Therefore, the Motion to Dismiss must be denied.

The Disputed Association’s Motion to Dismiss is a mere two pages of substance, which cites boilerplate case law that does not even apply to the case at bar regarding motions to dismiss in general, but provides no law or arguments as to why Sycamore’s Vista’s Answer Counterclaim and Third Party Complaint (the “complaint”) fails to state a claim. The only specific ground for dismissal alleged in its Motion to Dismiss is as follows:

Third-Party Plaintiff's complaint is comprised almost exclusively of legal conclusions that have no factual references to Sycamore Vista HOA. Instead of pleading facts in its complaint, Third Party Plaintiff provides its interpretation of the Division One opinion in Dream Land Villa Community Club, Inc., v. Raimey....and then, without any specific factual allegations pertaining to Sycamore Vista HOA, concludes that the case at bar is similar to Dreamland.

(Motion to Dismiss, p.3, lns. 1-7).

First and foremost, the contention that Sycamore Vista's complaint is without factual references to the Disputed Association is completely baseless. In fact the Disputed Association is

1 referenced at least 29 times in the complaint and throughout the causes of action against the  
2 Disputed Association alleged therein, which are as follows: (1) declaratory judgment that the  
3 recently amended CC&Rs are invalid and unenforceable and that the special assessments charged  
4 pursuant to the disputed CC&Rs is void; (2) declaratory judgment that Section 5.4 of the disputed  
5 CC&Rs are unconscionable, void and of no force and effect; and (3) wrongful lien pursuant to  
6 A.R.S. § 33-420, entitling Sycamore Vista to removal of the disputed CC&Rs recorded against its  
7 lots. How could any of these causes of action be brought without making “factual reference” to the  
8 Disputed Association that the complaint is attempting to invalidate?

9 As discussed in detail in Sycamore Vista’s comprehensive complaint, Sycamore Vista is  
10 entitled to declaratory relief that the disputed amendment to the Declaration of Restriction, and the  
11 special assessments raised under them, were invalid and unenforceable because the Disputed  
12 Association sought to amend the Declaration of Restrictions in a fashion that was not permitted  
13 under the law without the specific consent of Sycamore Vista and that the Declaration of Restrictions  
14 could not be amended by a majority vote to require membership in a homeowner’s association or  
15 payment of assessments. As a result, the amended CC&Rs were invalid, and the special assessments  
16 levied under them were invalid and unenforceable.

17 Arizona law precludes using the majority vote provision to amend a declaration of restrictions in  
18 a way that is unforeseeable and unreasonable. Although deed restrictions may allow for amendment by a  
19 majority vote of lot owners, Arizona law limits the types of amendments that may be done without a  
20 unanimous consent of all lot owners. As set forth in Dreamland, an original declaration of restrictions  
21 can not be amended by a majority vote of lot owners to require membership in a homeowner’s  
22 association or to require lot owners to pay assessments. In addition to Dreamland, A.R.S. § 10-  
23 3601(B) provides that no person shall pay dues as a member of a non-profit corporation without that  
24 person’s consent. Applying this provision in Dreamland, the Court of Appeals held that each  
25 homeowner needed to consent to become a member of the homeowner’s association. Id at 47, 226 P.3d  
26 at 416.

1       In this case, the Disputed Association amended the Declaration of Restrictions to charge  
2 individual lot owners to “construct, improve and maintain roadways, thoroughfares, alleys and  
3 equestrianways...install, construct and improve, utilities...drainageways, retention/detention basins,  
4 drainage control structures or devices...and landscape/drainage easements,” in furtherance of the  
5 majority lot owners’ development goals. Despite the rule in Dreamland that a majority cannot use the  
6 amendment process to force lot owners to join a homeowner’s association and pay assessments, the  
7 Disputed Association purported to amend the original Declaration of Restrictions to do just that, not to  
8 benefit the individual lot owners but as a vehicle to develop the majority lot owners’ lots.

9       The Disputed Association cites Aldabbagh v. Arizona Dept. of Liquor Licenses and Control,  
10 162 Ariz. 415, 783 P.2d 1207 (Ariz.App. 1989) for the proposition that, “allegations that represent  
11 merely conclusions of law or unwarranted deductions are not credited.” (Motion to Dismiss, p.2,  
12 lns. 22-25). However, nothing in Aldabbagh provides grounds for dismissal in this case. Sycamore  
13 Vista recognizes that it is up to the court to determine the law. Although the complaint makes  
14 inferences as to what the law is, it does not mean that the complaint has failed to allege a cause of  
15 action because Sycamore Vista has alleged both law and facts. As determined by the court in  
16 Aldabbagh, the court must determine whether the complaint, construed in the light most favorable to  
17 the plaintiff, sufficiently sets forth a valid claim. Id. at 417, 783 P.2d 1209. Sycamore Vista’s 20  
18 page complaint, telling the story of why the disputed amendment to the Declaration of Restrictions  
19 was invalid, provides more than sufficient facts to support Sycamore Vista’s claims for declaratory  
20 relief and therefore the Motion to Dismiss should be denied.

21       Furthermore, the Disputed Association’s Motion to Dismiss should be denied because  
22 motions to dismiss are not favored. Motions to dismiss must be denied unless it appears *beyond*  
23 *doubt* that complainant cannot prove any set of facts in support of the claim which would entitle it to  
24 relief. New Minute v. Maricopa County, 167 Ariz. 501, 503, 808 P.2d 1253 (App. 1991). The  
25 motion should be denied unless it appears that complainant would not be entitled to relief under any  
26

1 facts acceptable as proof under the pleadings. Doe ex rel. Doe v. State of Arizona, 200 Ariz. 174, 24  
2 P.3d 1250 (2001); Veach v. City of Phoenix, 102 Ariz. 195, 427 P.2d 335 (1967).

3 In its Motion to Dismiss, the Disputed Association argues that Sycamore Vista's complaint is  
4 based solely upon conclusory allegations and relies on Dube v. Likins, 216 Ariz. 406, 424, 167 P.3d  
5 93, 111 (Ariz.App. 2007), for the proposition that "labels and conclusions, and formulaic recitation of  
6 the elements of a cause of action," are insufficient to provide the grounds for entitlement to relief.  
7 Clearly, the Disputed Association has ignored the extremely detailed 20 pages contained in the  
8 complaint. Sycamore Vista has provided more than "labels and conclusions, and formulaic recitation of  
9 the elements of a cause of action."

10 The complaint specifically alleges how the Disputed Association amended the original  
11 Declaration of Restrictions in order to create a homeowner's association, create common areas and  
12 levy assessment in order to charge the individual lot owners to build infrastructure in the community  
13 to further the development goals of the directors/majority lot owners:

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

17 \*\*\*

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

21 \*\*\*

22 In order to pay for these improvements, the Disputed Association adopted  
23 CC&R Section 5.4, which granted it authority to levy special assessments for  
24 the purpose of, "engineering, construction, improvement and maintenance of  
25 roadways, utilities, drainageways, equestrianways, easements and any  
necessary on or off site improvements to the residential Lots and Common  
Areas."

26 \*\*\*

The Disputed Association also took title to land it previously did not own to create common areas for Sycamore Vista.

\* \* \*

Such actions as described above were done to advance the development plans of the Majority Lot Owners, or their successors, and without equal regard to the interests of the individual lot owners.

(complaint, p.8, ¶¶ 13-16).

The complaint also alleges how the Disputed Association implemented special assessments that exceeded the value of the lots to force the individual lot owners to pay for infrastructure in the community to benefit the directors/majority lot owners, while the majority lot owners failed to pay special assessments on the lots they owned:

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 believe that the current market value is \$25,000.00 per lot, making the Special Assessments on each lot far exceed the value of each lot.

(complaint, p.10, ¶ 27).

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

(complaint, p.9, ¶ 20).

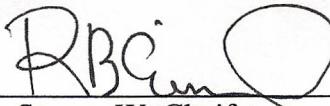
In considering the Disputed Association's Motions to Dismiss, the Court must accept all allegations in the complaint as true and resolve all inferences in favor of Sycamore Vista. Southwestern Paint and Varnish Co. v. Arizona Dept. of Env. Quality, 191 Ariz. 40, 41, 951 P.2d 1232 (App. 1997); Fidelity Sec. Life Ins. Co. v. State of Arizona, 191 Ariz. 222, 954 P.2d 580 (1998); Mohave Disposal, Inc. v. City of Kingman, 186 Ariz. 343, 922 P.2d 308 (1996). Based upon these widely accepted principles, the facts known to Sycamore Vista as set forth in its detailed

1 complaint must be considered true for purposes of the Motions to Dismiss.

2 Assuming the facts, as alleged in Sycamore Vista's 20 page complaint, to be true, Sycamore  
3 Vista has clearly plead cognizable claims under Arizona law to redress the Disputed Association's  
4 unlawful conduct. For all of the foregoing reasons, it is respectfully submitted that the Motion to  
5 Dismiss be denied in all respects.

6 DATED this 20<sup>th</sup> day of May, 2013.

7 **CHEIFETZ IANNITELLI MARCOLINI, P.C.**

8 By: 

9 Steven W. Cheifetz  
10 Rachael B. Eisenstadt  
11 Attorneys for Defendant/Counterclaimant

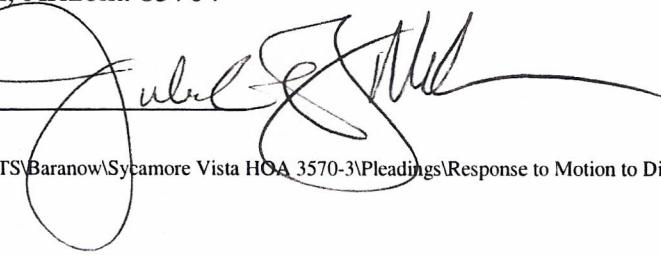
12 **ORIGINAL** of the foregoing filed  
13 this 21<sup>st</sup> day of May, 2013 to:

14 Clerk  
15 PIMA COUNTY SUPERIOR COURT  
16 110 West Congress Street  
17 Tucson, Arizona 85701

18 **COPY** of the foregoing mailed  
19 this 20<sup>th</sup> day of May, 2013 to:

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27 By: 

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