

EXHIBIT

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2
3 BAIRD, WILLIAMS & GREER, L.L.P.
4 6225 NORTH 24TH STREET, SUITE 125
5 PHOENIX, ARIZONA 85016
6 TELEPHONE (602) 256-9400

7 Daryl M. Williams (004631)
8 darylwilliams@bwglaw.net
9 Attorneys for Thomas and Barbara Clark

10 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
11 IN AND FOR THE COUNTY OF MARICOPA

12 Desert Mountain Club, Inc.,

13 Plaintiff,

14 vs.

15 Thomas Clark and Barbara Clark, husband
16 and wife,

17 Defendants.

No. CV2014-015334

Answers to Plaintiff's Non-Uniform
Interrogatories

(Assigned to the Honorable Dawn Bergin)

18 **Interrogatory No. 1:** With reference to your denial of paragraph ten of the complaint, which
19 states, "In addition to the rights and obligations set forth in the Membership Agreement and the
20 Bylaws, at all pertinent times, the Plan has also governed the procedures that must be followed by
21 a Club Member in order to terminate his Club Membership,"

22 A. Identify the factual allegations you deny;

23 **There are no factual allegations in paragraph ten. Paragraph ten interprets the
24 effect of various documents, a conclusion of law. The interpretation of a contract
25 is a question of law. The defendants do not agree with plaintiff's legal
26 interpretation, so this allegation was denied.**

27 B. State each and every fact that supports this assertion;

28 **Not applicable.**

C. With respect to each such fact, identify all persons who may have knowledge
regarding that fact; and

Not applicable.

D. Identify each and every document that references, supports, or establishes that fact.

Not applicable.

1 **Interrogatory No. 2:** With reference to your answer to paragraph sixteen of the complaint,
2 please

3 A. Identify with specificity the factual allegations that you deny;

4 **The only factual allegation in paragraph sixteen relates to the bylaws made**
5 **effective March 31, 2006, attached to the complaint as exhibit E. The defendants**
6 **admitted this factual allegation: the bylaws exist, they are attached as exhibit E,**
7 **and became effective March 31, 2006. The balance of paragraph sixteen of the**
8 **complaint sets forth legal conclusions as to the effect of these bylaws and the**
9 **interpretation of them. The defendants disagree with that interpretation, so**
10 **everything in the paragraph except the bylaws was denied.**

11 B. As to each such allegation, state each and every fact upon which you base your denial;

12 **Not applicable.**

13 C. With respect to each such fact, Identify all persons who may have knowledge
14 regarding that fact; and

15 **Not applicable.**

16 D. Identify each and every document that references, supports, or establishes that fact.

17 **Not applicable.**

18 **Interrogatory No. 3:** With reference to your answer to paragraph nineteen of the complaint,
19 please

20 A. Identify with specificity the factual allegations that you deny;

21 **Defendants do not believe there are any other factual allegations other than those**
22 **admitted in their answer to paragraph nineteen. The balance of the paragraph**
23 **is, again, a legal conclusion with which the defendants disagree, so the paragraph**
24 **was denied.**

25 B. As to each such allegation, state each and every fact upon which you base your denial;

26 **Not applicable.**

27 C. With respect to each such fact, identify all persons who may have knowledge
28 regarding that fact; and

Not applicable.

D. Identify each and every document that references, supports, or establishes that fact.

Not applicable.

Interrogatory No. 4: With reference to your answer to paragraph twenty of the complaint,
please

A. Identify with specificity the factual allegations that you deny;

1 **The defendants do not believe there are any other allegations of fact in**
2 **paragraph twenty other than those admitted. These defendants disagree with the**
3 **legal conclusions in this paragraph, however, so there was a denial of any facts,**
4 **if any there be.**

5 B. As to each such allegation, state each and every fact upon which you base your denial;

6 **Not applicable.**

7 C. With respect to each such fact, identify all persons who may have knowledge
8 regarding that fact; and

9 **Not applicable.**

10 D. Identify each and every document that references, supports, or establishes that fact.

11 **Not applicable.**

12 **Interrogatory No. 5:** With reference to your answer to paragraph twenty-two of the
13 complaint, please

14 A. Identify with specificity the factual allegations that you deny;

15 **The defendants cannot identify any averments other than those admitted. The**
16 **balance of paragraph twenty-two is legal conclusions with which these**
17 **defendants disagree. Therefore, the balance of the paragraph, other than what**
18 **was admitted, was denied.**

19 B. As to each such allegation, state each and every fact upon which you base your denial;

20 **Not applicable.**

21 C. With respect to each such fact, identify all persons who may have knowledge
22 regarding that fact; and

23 **Not applicable.**

24 D. Identify each and every document that references, supports, or establishes that fact.

25 **Not applicable.**

26 **Interrogatory No. 6:** With reference to your answer to paragraph twenty-three of the
27 complaint, please

28 A. Identify with specificity the factual allegations that you deny;

The defendants admitted the substance of the averments in paragraph twenty-
 three, but disagree with the legal conclusions, hence, the denial.

 B. As to each such allegation, state each and every fact upon which you base your denial;

Not applicable.

1 C. With respect to each such fact, Identify all persons who may have knowledge
2 regarding that fact; and

3 **Not applicable.**

4 D. Identify each and every document that references, supports, or establishes that fact.

5 **Not applicable.**

6 **Interrogatory No. 7:** With reference to your answer to paragraph twenty-six of the
complaint, please

7 A. Identify with specificity the factual allegations that you deny;

8 **Defendants admitted the substance of the averment in paragraph twenty-six, to**
9 **wit, that bylaws were amended effective August 1, 2014, and that a copy of those**
10 **bylaws is attached as exhibit M to the complaint. The balance of the allegations**
11 **in paragraph twenty-six set forth legal arguments and conclusions of law with**
12 **which these defendants disagree. Therefore, the balance of all the allegations of**
13 **paragraph twenty-six are denied.**

14 B. As to each such allegation, state each and every fact upon which you base your denial;

15 **Not applicable.**

16 C. With respect to each such fact, identify all persons who may have knowledge
17 regarding that fact; and

18 **Not applicable.**

19 D. Identify each and every document that references, supports, or establishes that fact.

20 **Not applicable.**

21 **Interrogatory No. 8:** With reference to your answer to paragraph thirty-one of the complaint,
22 which states "The Membership Agreement, the Conversion Agreement, the Bylaws, the Plan, and
23 the Rules and Regulations constitute a written contract between the Club and Defendants, under
24 which both the Club and Defendants have certain defined rights and obligations,"

25 A. Identify factual allegations that you deny;

26 **There are no averments in paragraph thirty-one, so the conclusions of law were**
27 **denied.**

28 B. As to each such allegation, state each and every fact upon which you base your denial;

Not applicable.

C. With respect to each such fact, identify all persons who may have knowledge
regarding that fact; and

Not applicable.

1 D. Identify each and every document that references, supports, or establishes that fact.

2 **Not applicable.**

3 **Interrogatory No. 9:** With reference to your answer to paragraph thirty-eight of the
4 complaint, which states "The Club has, at all times, fully performed its obligations to Defendants
5 under the Membership Agreement, the Conversion Agreement, the Bylaws, the Plan, and the Club
6 Rules and Regulations,"

7 A. Identify the factual allegations that you deny;

8 **The foregoing is a legal conclusion, so there is no averment to be admitted. These
9 defendants disagree with this legal conclusion, so the paragraph was denied.**

10 B. As to each such allegation, state each and every fact upon which you base your denial;

11 **Not applicable.**

12 C. With respect to each such fact, identify all persons who may have knowledge
13 regarding that fact; and

14 **Not applicable.**

15 D. Identify each and every document that references, supports, or establishes that fact.

16 **Not applicable.**

17 **Interrogatory No. 10:** With reference to your affirmative defense in the answer at paragraph
18 forty-two that "The fundamental assumptions underlying the relationship between the plaintiff and
19 the defendants have failed, rendering any contract between the parties unenforceable,"

20 A. state each and every fact that supports this assertion;

21 **Those acquiring an equity interest in the golf club thought they were acquiring
22 an equity interest in the golf club. Likewise, the club, itself, represented that
23 owners were acquiring a valuable interest in a valuable club. These
24 representations were both before and after the acquisition of the club by the
25 equity members as a result of the sale by the developer to the equity members.**

26 **This was supposed to be a voluntary relationship whereby members joined and
27 paid dues and fees for a *quid pro quo*. It was never supposed, in other words, that
28 this would be some sort of economic servitude that would be used by the club to
exact exorbitant penalties and fees for nothing in return.**

**Moreover, the underlying basis for the transfer fees was that the club was only
getting a portion, twenty percent, of the value of the transfer, and that club
members who transferred their valuable club membership would receive a
refund of their club dues, which was the incentive for paying the membership
fees and dues. No one foresaw that either the market or the management of the
club would so devalue and depreciate the club that owning a membership would
become a liability instead of an asset and that the club would twist transfer fees
from a twenty percent interest in the value of the membership to a \$65,000.00
flat fee irrespective of the real value of the membership.**

1 **Unfortunately, times have changed, and management has lost its compass so that**
2 **membership becomes a liability rather than an asset, with the club holding**
3 **members who no longer receive a *quid pro quo* hostage, a result that was never**
4 **within the contemplation of anyone until lawsuits like this one.**

5 B. With respect to each such fact, identify all persons who may have knowledge
6 regarding that fact; and

7 **These defendants are not able to identify all persons who may have knowledge**
8 **regarding the underlying assumptions of the contract. Discovery is ongoing and**
9 **an attempt will, therefore, be made to establish the identity and contact**
10 **information for all of these people. Therefore, the answer to this interrogatory**
11 **will necessarily be supplemented in the future.**

12 **The following people, however, may have knowledge concerning the**
13 **fundamental assumptions:**

14 **The current and former members of the golf club; the plaintiff has the records**
15 **of all of these people, so these defendants serve herewith an interrogatory**
16 **requesting the names and contact information for all of these people, and when**
17 **that information is received, it will be used to supplement the answer to this**
18 **interrogatory after the interviews of these people are conducted to discern which**
19 **of them have knowledge or information, one way or another, on this point.**

20 **The various officers and employees of the club over the years. The club has the**
21 **names and contact information for these people, so, again, an interrogatory has**
22 **been propounded asking for that information, as well. This information will be**
23 **used to interview these various people and then supplement the answer to this**
24 **interrogatory.**

25 **The original developer of the golf club understands what the idea was**
26 **behind memberships as well. These people include:**

27 **Lyle Anderson, who was the president of the Desert Mountain Club and**
28 **the president of Sonora Holding Company.**

W. D. Deihl, president of D.M. Lamb Corporation, knew what the
 underlying assumptions were.

R.R. Neyrey, the then president of Desert Mountain Properties, certainly
 understood this.

Polly M. Norton, who was the Desert Mountain Properties Membership
 Director during the 1990s and early 2000s knew the underlying
 assumptions.

R.A. Sonntag became president of Desert Mountain Properties in the mid-
 1990s, and he certainly knows about this.

Gerald W. Haddock, president and CEO of Crescent Operating, Inc., and
 Crescent Equities, Ltd. certainly knew about this.

Members of the Mountain Members Association, including its board of directors
 (Pat Gallagher, Phil Briggs, Roger Breves, Jim Hogshire, Virginia Janssen, and
 Joe Sessa), knew about this.

1 **The Desert Mountain Club Advisory Board consisted of Phil Briggs, Dick Segil,**
2 **Bob DuPrec, Joe Sessa, Pat Gallagher, Dick Straine, Jim Hogshire, Shelby**
3 **Yistrow, and Virginia Janssen. The members of the Desert Mountain Club**
4 **Advisory Board were well aware of what was going on and the intent and**
5 **fundamental assumptions underlying all of these agreements.**

6 **John Underwood became president of Desert Mountain Properties by 2000 and**
7 **continued for a number of years. He certainly knew about this.**

8 **By 2004, Colette Bunch was the membership director of Desert Mountain**
9 **Properties, and she understood what the idea was.**

10 **Debbie Whelan, who was a membership administrator for Desert Mountain**
11 **understood what was going on and supposed to happen.**

12 **Thomas Nezworski, the then executive vice-president of Desert Mountain**
13 **Development Corporation, the general partner of Desert Mountain Properties**
14 **Limited Partnership was aware of what the underlying assumptions were with**
15 **regard to the Desert Mountain Club.**

16 **David White, president of Desert Mountain Club, Inc., when Desert Mountain**
17 **Properties sold the club to the equity members knew the underlying assumptions**
18 **and intent.**

19 **Addresses, phone numbers, emails, and other contact information for the**
20 **foregoing individuals are not known to the Clarks, but they anticipate getting**
21 **this information, as well as the name and contact information of other people**
22 **who will be familiar with the fundamental assumptions underlying the**
23 **relationship between the club and its members as discovery progresses.**

24 **C. Identify each and every document that references, supports, or establishes that fact.**

25 **Membership resale program, CL00261–CL00264;**
26 **Equity Golf Membership—senior summary, CL00281;**
27 **Bylaws of the Golf Club at Desert Mountain, GM00338–GM00349;**
28 **Membership Program Highlights, CL00120–CL00121;**
29 **Dual Membership Agreement, CL00122–CL00129;**
30 **Desert Mountain Membership notebook, CL01140–CL01439;**
31 **Desert Mountain Membership program brochure, CL02068–CL02069;**
32 **Bylaws of the Desert Mountain Club, CL00153–CL00179;**
33 **Deferred Equity Membership Plan, GM00553–GM00573;**
34 **Bylaws, CL00180–CL00212;**
35 **Announcement letter, CL00242–CL00245;**
36 **Frequently Asked Questions sheets, CL02040–CL02046;**
37 **Dear Member letter, CL01620–CL01621;**
38 **Letter to members, CL00213;**
39 **Membership Agreement, CL00214–CL00233;**
40 **Correspondence with the members, CL01634;**
41 **Letter to Desert Mountain Members, CL01635–CL01658;**
42 **Letter to member, CL01671–CL01705;**
43 **Status Report, CL01711–CL01715;**
44 **Letter to members, CL01716;**
45 **Letter to members, CL01717–CL01719;**
46 **Letter to member, CL01474–CL01475;**
47 **Letter to member, CL01471–CL01473;**

1 Membership Agreement, GM00574–GM00582;
2 Letter to Desert Mountain member, CL01464–CL01466;
3 Bylaws, DM00001–DM00060;
4 Membership Plan, GM00586–GM00605;
5 Letter to members, GM00583–GM00585;
6 Letter to member, CL01445–CL01446;
7 Letter to member, CL01447–CL01448;
8 Letter to member, CL01449–CL01450;
9 Deferred Equity Plan, GM00606–DM00629;
10 Letter, GM00646;
11 Letter, GM00647;
12 Letter, GM00069–GM00074;
13 Letter, GM00648–GM00649;
14 Letter, GM00075–GM00084;
15 Letter, GM00650;
16 Letter, GM00652–GM00653;
17 Bylaws, DM00305–DM00340;
18 Letter, CL01538–CL01539;
19 Frequently Asked Questions, CL01505–CL01506;
20 Bylaws, CL00080–CL00115;
21 Marketing newsletter, CL00016–CL00017;
22 Marketing newsletter, CL00015; and
23 Membership solicitation, CL02070–CL02074.

13 **Interrogatory No. 11:** With reference to your affirmative defense in the answer at paragraph
14 forty-three that “The plaintiff has failed to act in good faith so far as the defendants’ equity position
15 in the Desert Mountain Golf Club is concerned, diminishing its value . . . ,”

15 A. State each and every fact that supports this assertion;

16 The purchase price of a membership in 1990, independent of a home site, was
17 \$75,000.00. In 1991, the members were told that they could pass on a
18 membership with the sale of their property or get \$50,000.00 if they decided to
19 relinquish it. According to bylaws in the mid-1990s, an equity member was
20 entitled to recover eighty percent of the amount of the membership contribution
21 then charged by the club for a membership. By October of 1996 the membership
22 contribution went from \$100,000.00 to \$125,000.00, and the surrender payment
23 benefit increased from \$80,000.00 to \$100,000.00; in other words, the members
24 who transferred the membership through the club received a benefit of between
25 \$80,000.00 and \$100,000.00, which a resigning member forfeited. At the same
26 time, the membership contribution for a deferred equity membership was only
27 \$30,000.00. On January 1, 1999, the contribution for a deferred equity
28 membership increased from \$125,000.00 to \$175,000.00, but the member
continued the right to receive eighty percent of the contribution received for the
transfer of his membership.

On July 1, 2000, the membership contribution rose from \$175,000.00 to
\$225,000.00, and then to \$275,000.00 in 2002. There was a commensurate
increase in the price of a lot because the price of the membership was included.
Members were encouraged in late 2003 to convert to deferred equity status
because the price was going up, on January 1, 2004, to \$275,000.00. Members
were assured they would receive eighty percent of the membership contribution,
or \$220,000.00 when they left the club.

1 On January 1, 2005, the membership contribution went to \$325,000.00 from
2 \$275,000.00 with the result that the member got back \$260,000.00 when they
3 transferred their membership, the club keeping \$65,000.00.

4 Somehow and unbeknownst to the Clarks and many other members of the club,
5 things changed in late 2010, early 2011. There was a unilateral change of the
6 bylaws that gave the club the greater of twenty percent of the price paid for
7 membership, or \$65,000.00. At the same time, the members were led to believe
8 that the equity conversion was an economic windfall because the membership
9 had taken over \$220 million in assets for about \$73 million.

10 The members continued to be assured that they were entitled to a refund of
11 membership contributions, which was 100% of the contribution a golf member
12 had made less a twenty percent transfer fee. Somehow the \$65,000.00 transfer
13 fee became a minimum fee rather than reflecting what the understanding of the
14 parties had always been. Therefore, the value of the membership began and has
15 since steadily declined. Indeed, at present, marketing by the club has resulted in
16 the pricing of anywhere between \$25,000.00 and \$40,000.00 with no
17 commensurate adjustment to the transfer fees.

18 The Clarks believe one of the reasons for the depreciated value of the club is the
19 fact that it has gone from an exclusive, private club to something that is, at best,
20 a semi-private club because of all the outside activities that are being handled by
21 the club's management to merely make money. Management has opened the club
22 up to public events that close the golf course to the members. These public events
23 are often sponsored by people who are not members: weddings, the Senior PGA,
24 Charlie Schwab Cup, *etc.* Moreover, the club has more than six hundred
25 employees, and management lets employees play. The golf club is so jammed up
26 with employees and outside events and unfettered, no-limit guests that members
27 do not enjoy the benefits they were promised or expected. Management closes
28 down the courses to members so the management can do their own little
tournaments.

The idea is that the club has to raise all this money so that the chief operating
officer, Bob Jones, gets a very high salary and the staff and other employees of
the club get similarly high wages and benefits. It is as though the management
runs the club for its benefit, not for the benefit of the members. The equity value
of the membership has gone from something like \$200,000 to a negotiation of
\$30,000 to \$40,000. Memberships in the club are marketed by the management
at a market rate of some \$30,000.00 while members are required to pay
\$65,000.00 plus to get out. This is symptomatic of the far-reaching changes in the
club that have diminished the value of the club and destroyed the equity position
of the members. The board has obviously acquiesced to the leadership of the
chief operating officer who has commandeered this organization for his own
purposes and ends.

B. With respect to each such fact, identify all persons who may have knowledge
regarding that fact; and

Dowdell Brown, R.D. Stephens, Jr., R.R. Neyrey, Polly Norton, R.A. Sonntag,
Lyle Anderson, Gerald Haddock, Pat Gallagher, Phil Briggs, Dick Segal, Bob
DuPree, Joe Sessa, Dick Strain, Jim Hogshire, Shelby Yastrow, Virginia Janssen,
John Underwood, Nicole Forbes, Thomas Clark, Barbara Clark, and Bob Jones.

1 **Addresses, phone numbers, emails, and other contact information for the**
2 **foregoing individuals are not known to the Clarks, but they anticipate getting**
3 **this information, as well as the name and contact information of other people**
4 **who will be familiar with the fundamental assumptions underlying the**
5 **relationship between the club and its members as discovery progresses.**

6 C. Identify each and every document that references, supports, or establishes that fact.

7 **CL01455–CL01458;**
8 **CL02068–CL02069;**
9 **GM00553–GM00573;**
10 **CL00180–CL00212;**
11 **CL02040–CL02046;**
12 **CL00213;**
13 **CL01634;**
14 **CL01711–CL01715;**
15 **CL01717–CL01719;**
16 **CL01474–CL01475;**
17 **GM00606–GM00629;**
18 **GM00438–GM00495;**
19 **CL00016–CL00017;**
20 **CL02070–CL02074;**
21 **CL02221–CL02235.**

22 **Interrogatory No. 12:** With reference to your affirmative defense in the answer at paragraph
23 forty-three that “The plaintiff . . . has acted in a unilateral fashion that inequitably and
24 unconscionably purports to deprive defendants of their freedom to be disassociated from this
25 voluntary club,”

26 A. State each and every fact that supports this assertion;

27 **See answers to interrogatories 10A and 11A.**

28 B. With respect to each such fact, identify all persons who may have knowledge
 regarding that fact; and

See answers to interrogatories 10B and 11B.

 C. Identify each and every document that references, supports, or establishes that fact.

See answers to interrogatories 10C and 11C.

Interrogatory No. 13: With reference to your affirmative defense in the answer at paragraph
 forty-four that “The termination fees, dues, and assessments sought by the plaintiff are
 unconscionable in the context of market realities and the obligations of the plaintiff to preserve the
 defendants’ equity in the golf club,”

 A. State each and every fact that supports your assertion;

See answers to interrogatories 10A and 11A.

 B. With respect to each such fact, identify all persons who may have knowledge
 regarding that fact; and

See answers to interrogatories 10B and 11B.

1 C. Identify each and every document that references, supports, or establishes that fact.

2 *See answers to interrogatories 10C and 11C.*

3 **Interrogatory No. 14:** With reference to your affirmative defense in the answer at paragraph
4 forty-five that “The bylaws that form the basis of the plaintiff’s complaint were not properly enacted
5 or amended to the extent that they have compromised the rights, equity, and ownership interest of
6 the defendants . . . ,”

7 A. State each and every fact that supports your assertion;

8 **The facts are set forth in the answers to interrogatories 10A and 11A.**

9 **The pertinent law applicable to the facts of this case is well known. Corporate**
10 **bylaws provide a mechanism for the conduct of corporate business in a**
11 **particular way. As such, the bylaws and the articles of incorporation set the**
12 **standards for conduct of corporate affairs and the norms of procedure for**
13 **exercising rights that reflect the purposes and intentions of the incorporators so**
14 **far as the government and operation of the corporation is concerned. This is a**
15 **principal of law. *See generally*, 18A AMJUR 2d *Corporations* § 258. In other**
16 **words, a bylaw cannot be a mechanism whereby substantive contractual rights**
17 **of an individual member are affected with out the consent of that member. Such**
18 **an idea offends the notion of what a contract is—offer, acceptance, and**
19 **consideration. There are many cases that hold that bylaws must be reasonable**
20 **under all circumstances.**

21 **It is essential to their validity that bylaws shall be reasonable**
22 **and not arbitrary or oppressive. *Selama-Dindings***
23 ***Plantations, Ltd. v. Durham*, S.D. Ohio 1963, 216 F. Supp.**
24 **104; 8 FLETCHER CYC. CORPORATIONS § 4191; Hornstein,**
25 **CORPORATION LAW AND PRACTICE § 265 at 352–53 (1959).**
26 **It is manifest that reasonableness in its nature is not a**
27 **matter for determination by an universal test or general**
28 **rule, and that the reasonableness of any particular bylaw or**
bylaws depends almost entirely upon the facts and
circumstances of each particular case. *Selama-Dindings*
***Plantations, Ltd. v. Durham, supra*. Bylaws must not only be**
reasonable in themselves, but they must not be unreasonable
in their practical application.

***Conlee Construction Co. v. Cay Construction Co.*, 221 S.2d 792, 796–797 (Fl. App. 1969).**

Certainly, the Clarks and other members of the golf club take the position that
the sort of bylaw changes that impose onerous, oppressive penalties on them for
being members is inconsistent with what the original understanding of the
parties was and is not something that can be done with a bylaw change.
Therefore, it is the contention of the Clarks and others that the bylaws are not
properly and accurately amended to the extent that they have compromised the
rights, equity, and ownership interests of the defendants because that is not
something that can be done via a bylaw change.

B. With respect to each such fact, identify all persons who may have knowledge regarding that fact; and

1 **This affirmative defense is a legal affirmative defense, not one that is factually**
2 **based. Of course, there are certain facts that a necessary predicate to this legal**
3 **defense, but these are the very facts set forth in the plaintiff's complaint having**
4 **to do with the adoption of bylaws that, in the plaintiffs' view, were effective to**
5 **impose penalties upon its members and the facts set forth in answers to**
6 **interrogatories 10A and 11A will be known by the individuals identified in**
7 **answers to interrogatories 10C and 11C.**

8 C. Identify each and every document that references, supports, or establishes that fact.

9 **The documents that support this argument are those identified as documents in**
10 **connection with interrogatory numbers 10C and 11C.**

11 **Interrogatory No. 15:** With reference to your affirmative defense in the answer at paragraph
12 forty-five that "The bylaws that form the basis of the plaintiff's complaint were not properly enacted
13 or amended to the extent that they . . . purport to do anything other than provide for the regulation
14 or management of the affairs of the plaintiff,"

15 A. State each and every fact that supports your assertion;

16 **See answer to interrogatory 14A.**

17 B. With respect to each such fact, identify all persons who may have knowledge
18 regarding that fact; and

19 **See answer to interrogatory 14B.**

20 C. Identify each and every document that references, supports, or establishes that fact.

21 **See answer to interrogatory 10C and 11C.**

22 **Interrogatory No. 16:** With reference to your affirmative defense in the answer at paragraph
23 forty-six that "The termination fees and ongoing payment of dues constitutes an unenforceable
24 penalty,"

25 A. State each and every fact that supports your assertion;

26 **The word *termination* in this affirmative defense should have been *transfer*, so**
27 ***termination* should be understood to mean *transfer*.**

28 **The essential facts supporting the claim of penalty is that the \$65,000.00 transfer**
 fee, in particular, and the obligation to continue to pay dues and other fees after
 a member has terminated fits the very definition of a penalty. Equity abhors
 penalties or forfeitures, and an agreement to pay some arbitrarily-fixed sum of
 money rather than an actual cost or damage is in the nature of a penalty. See
 generally, 27 AMJUR 2d *Equity* § 52. The granting of relief against a penalty is
 one of the most favored heads of equity jurisdiction. See 27 AMJUR 2d *Equity*
 § 55. Arizona has standards for determining whether something is a penalty.

If a forfeiture clause is in the nature of a penalty, rather than
 liquidated damages, it will not be enforced, in the absence of a
 showing of actual damages. *Miller Cattle Company v. Mattice*, 38
 Ariz. 180, 298 P. 640 (1931). The test for whether a contract fixes
 a penalty or liquidated damages for a breach is whether payment

1 is for a fixed sum or varies with the nature and extent of the
2 breach. *Id.*

3 In analyzing the enforceability of contract provisions such as the
4 one at issue in this case, the rule followed in Arizona and elsewhere
5 is that an agreement made in advance of a breach is a penalty,
6 unless both of two conditions are met. First, the amount fixed in the
7 contract must be a reasonable forecast of just compensation for the
8 harm that is caused by the breach. Second, the harm that is caused
9 by any breach must be one that is incapable or very difficult of
10 accurate estimation. RESTATEMENT (SECOND) OF CONTRACTS, §
11 356; RESTATEMENT (FIRST) OF CONTRACTS, § 339; *Marshall v.*
12 *Patzman*, 81 Ariz. 367, 306 P.2d 287 (1957); *Illingworth v. Bushong*,
13 297 Or. 675, 688 P.2d 379 (1984). Whether each of these
14 requirements is met must be determined in light of all the facts and
15 circumstances in any given case. *See Marshall v. Putzman, supra.*

16 *Larson-Hegstrom & Associates, Inc. v. Jeffries*, 145 Ariz. 329, 333, 701 P.2d 587,
17 591 (1985).

18 While this affirmative defense is predicated upon facts as set forth in response
19 to the answer of subparagraph A of interrogatory 9 and in answers to
20 interrogatories 10A and 11A.

21 B. With respect to each such fact, identify all persons who may have knowledge
22 regarding that fact; and

23 *See answers to interrogatory 10B and 11B.*

24 C. Identify each and every document that references, supports, or establishes that fact.

25 *See documents identified in the answer to interrogatory 10C and 11C.*

26 **Interrogatory No. 17:** With reference to your affirmative defense in the answer at paragraph
27 forty-seven that "Notices regarding termination fee were ineffective,"

28 A. State each and every fact that supports your assertion;

*The word termination in this affirmative defense should have been transfer, so
termination should be understood to mean transfer.*

See answer to interrogatory 16A.

B. With respect to each such fact, identify all persons who may have knowledge
regarding that fact; and

See answer to interrogatory 16B.

C. Identify each and every document that references, supports, or establishes that fact.

See answer to interrogatory 16C.

Interrogatory No. 18: With reference to your affirmative defense in the answer at paragraph
forty-eight that "The collection of the termination fee and dues post-resignation is contrary to the
policy and statutory authority of a non-profit corporation,"

1 A. State each and every fact that supports your assertion;

2 **The word *termination* in this affirmative defense should have been *transfer*, so**
3 ***termination* should be understood to mean *transfer*.**

4 ***See* answers to interrogatory 15A and 16A. In addition, Arizona's corporate code**
5 **reflects the policy of Arizona law with respect to non-profit corporations. This**
6 **policy is reflected in the following statutes.**

7 **A.R.S. § 10-3206 provides that bylaws are for the regulation and management**
8 **of the affairs of the corporation, not for exacting penalties or changing**
9 **agreements of parties.**

10 **A.R.S. § 10-3302 provides that bylaws can only be amended for the regulation**
11 **and management of the affairs of the corporation, not for the imposition of**
12 **penalties and exaction of unconscionable amounts of money from its members.**

13 **A.R.S. § 10-3610 provides that there could be no difference between the rights**
14 **and the obligations of the various members of the corporation so that any**
15 **member who is expelled and therefore does not have to pay a transfer fee or have**
16 **an ongoing obligation for dues is in the same position as someone who resigns,**
17 **and cannot be treated differently. Moreover, there have been instances, the**
18 **Clarks understand, where members have been allowed to escape transfer fees**
19 **and ongoing obligations of dues so that these individuals have been treated**
20 **differently than the club is attempting to treat the Clarks and other members it**
21 **is pursuing with vitriol.**

22 **A.R.S. § 10-3611 provides that no after-the-fact changes to a restriction on**
23 **membership transfer is effective unless the very affected member agrees to it.**

24 **A.R.S. § 10-3620 provides that a member of a non-profit can resign at any time**
25 **for any reason except as set forth or authorized in the articles of incorporation**
26 **or bylaws, the bylaws being only for the regulation of the governance of the**
27 **corporation, not a mechanism to impose fines or penalties.**

28 **Finally, A.R.S. § 10-3830 provides for the general standards of directors, making**
them fiduciaries to all of the other members, and liable for anything, including penalties, assessments, and fines that are levied against members improperly.

B. With respect to each such fact, identify all persons who may have knowledge regarding that fact; and

This affirmative defense is a legal defense. It is presumed, therefore, that the lawyers for the plaintiff have knowledge of this or can get themselves up to speed so that they understand these issues. The factual predicate for the application of the law is set forth in the answers to interrogatories 10B and 11B.

C. Identify each and every document that references, supports, or establishes that fact.

***See* documents listed in answers to interrogatory 10C, and 11C.**

Interrogatory No. 19: If your response to request for admission number one is anything other than an unqualified admission

1 A. State each and every fact upon which you base your refusal and or inability to admit
2 the request.

3 **Exhibit A to the request for admission is not a copy of the document that was**
4 **signed by the Clarks because it has an interlineation on the first page on the top**
5 **right hand corner that was not there. It has pagination at the bottom like**
6 **following term, page 21 of 34, that was not present on the document, and it is**
7 **missing the exhibit that was a part of the document signed by the Clarks.**

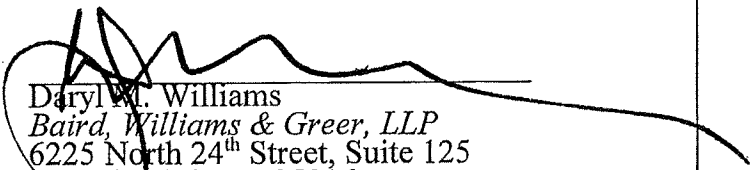
8 B. With respect to each such fact, identify all persons who may have knowledge
9 regarding that fact; and

10 **R.A. Sontagg, president Desert Mountain Properties;**
11 **Thomas M. Clark;**
12 **Barbara H. Clark;**
13 **Whoever it was that added the interlineation on the first page; and**
14 **Whoever it was that added the strange pagination at the bottom of each page.**

15 C. Identify each and every document that references, supports, or establishes that fact.

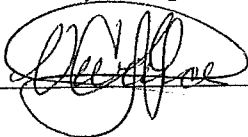
16 **The original document or an authenticated duplicate of the original document;**
17 **the word *duplicate* is used in the sense intended by ARIZ. R. EVID. 1003.**

18 Dated this 20th day of July, 2015.

19 
20 Daryl M. Williams
21 Baird, Williams & Greer, LLP
22 6225 North 24th Street, Suite 125
23 Phoenix, Arizona 85016
24 Attorneys for defendants

25 Original emailed this
26 20th day of July, 2015, to:

27 Christopher L. Callahan
28 Seth G. Schuknecht
29 *Fennemore Craig, P.C.*
30 2394 E. Camelback Rd., Suite 600
31 Phoenix, AZ 85016-3429
32 ccallahan@fclaw.com
33 sschuknecht@fclaw.com
34 Attorneys for plaintiff


35 

1
2
3
4 **VERIFICATION**

5 I, Thomas Clark, declare under penalty of perjury:

6 I have read the answers to plaintiff's non-uniform interrogatories and know the contents there
7 to be true and correct, both in substance and fact, to the best of my present information and
8 knowledge.

9 DATED this 20 day of July, 2015.

10 
11 Thomas Clark