Summary of the August 19, 2015 Hearing on Pending Motions

Presiding: Judge Dawn Bergin.
Representing the Desert Mountain Club: Christopher Callahan and Seth Schuknecht.
Representing Robert Jones: Chris LaVoy.
Representing Defendants: Daryl Williams.
Also present: Robbie Ames, Desert Mountain Director of Support Services and Member Relations.
This summary includes both paraphrases and approximate quotes. A full official transcript of this hearing will be linked from this site when available from the court reporter.

Judge Bergin started by identifying what was to be resolved at this hearing:

- Clark motion for a judgment on the pleadings
- Jones motion for a protective order

The Protective Order
The Issue: Will the court prohibit defense counsel from inquiring into matters covered by the confidentiality clauses in Robert Jones' current and prior employment contracts? In the alternative, will the court order that the deposition of Robert Jones not be disseminated to third parties, such as through DesertMountainGolfScam.com?

Background: At the May 20 deposition, counsel LaVoy instructed his client, Bob Jones, not to answer any question on the policies, procedures and practices of either Mr. Jones former or present employers.

Decision by the court: Bob Jones will answer all questions at his next deposition. Presumably, this includes, for example, (1) names and contact number for members who have left the Club for any reason since turnover, (2) names and contact numbers for members on the current surrender list, (3) dates and sale prices for memberships sold since turnover. Some portion of this information may not be eligible for release to the public. Counsel for plaintiff and defendant will work out a procedure for deciding what information is to be released to the public.

Judge Bergin started the discussion by observing that confidentiality agreements are a good reason to seek guidance from the court. But confidentiality agreements will not, by themselves, make anything confidential in this lawsuit. Counsel LaVoy agreed but asked for reasonable restrictions on the dissemination of that information, for example not posting the Bob Jones deposition on a Web site.

Judge Bergin noted that the request by plaintiff for a protective order was "so general." Covered categories included member names, benefits, personnel, operations, vendor contracts and finances, past and present pricing of memberships, specifics on turnover and the value of a Club membership. A request that broad makes it difficult for the court to craft a specific and narrow protective order.

Counsel Callahan began by stating that the primary concern of the Club in the context of confidentiality is the Web site DesertMountainGolfScam.com. Everything that has been filed in this case has been posted on that site. "The reason we're here is because of the economic collapse of 2008. The market value of a membership [now] is right around $30,000 to $35,000. The transfer fee is $65,000." This collapse has made the golf club business very competitive. Desert Mountain competes with Estancia and Troon for new members. "The more that Desert Mountain's dirty laundry is aired on DesertMountainGolfScam.com, the more the club is injured in this competition. We want Mr. Williams and his clients to have all the information they need to defend this lawsuit. But there is no reason on God's green earth that information has to be posted on Mr. Moselle's Web site." Mr. Callahan asked that everything revealed in this case be limited to use in this case and not be provided to Mr. Moselle or publicly disseminated. Judge Bergin pointed out that the onus for claiming protection has to be on the party making the claim. Callahan suggested that, for example, the next Jones deposition not be published for 30 days after receipt of the transcript. During that 30 days, plaintiff could designate portions of the deposition that could not be published. If counsel could not agree, the court could decide the issue. Examples of information that could not be posted: The reason Rich Yehling was let go as co-president. Member pricing decisions. Policies and procedures for allowing members to exit the club. Mr. Callahan admitted that plaintiff can't stop discovery on that. "Just because the Club has to enforce its rights against walkaway members should not expose the Club to having its private information strewn across the north Scottsdale golfing community for its competitors to use against it. That's our concern."

Judge Bergin said she would not order defense counsel to request the right to post information. But she would issue an order allowing plaintiff to take specific objection to anything in a deposition that plaintiff did not want published. But there will be no advance restriction on testimony in a deposition. Mr. Jones shall answer all questions in a deposition. Callahan agreed to file a motion if something in that deposition should not be published.

Counsel for defendant offered examples of what plaintiff considered confidential: The asking price of a Desert Mountain membership as of a specific date. Why Rich Yehling resigned as co-president. "Maybe Yehling and Jones were at loggerheads over what they should do with an owner [who wanted out]. Those are leads I should be free to follow."

Judge Bergin ordered the parties to meet and confer and produce a stipulation on how to handle publication of the Jones deposition. Because a third party (the prior Club owner) is involved, the plaintiff has 60 days to object to publication of portions of the Jones deposition that the former owner might consider confidential. Callahan, LaVoy and Williams agreed to submit a stipulation on publication of the Jones deposition which would become the protective order.

Request for Paper Copies of Electronic Exhibits
Background: Counsel for plaintiff objected to defense counsel asking Bob Jones during his deposition to refer to electronic exhibits on a video monitor without seeing the full printed document. Counsel claimed Bob Jones had a vision problem and needed to see exhibits on paper.

Decision: The court will allow any witness full access to a paper copy of any document the witness needs to examine in full. Counsel will bring to the deposition paper copies of documents likely to be at issue during the deposition. If an additional document is needed, counsel will print a paper copy and add an equivalent amount of time to the length of the deposition. Judge Bergin instructed counsel for plaintiff not to ask the witness if a paper copy was needed.

Discussion: Mr. Callahan admitted that Mr. Williams is more tech-savvy than plaintiff counsel could ever hope to be. The monitors used by Mr. Williams are perfectly good. But Bob Jones was being asked to comment on a single page of the bylaws shown on the monitor without seeing the complete document. "Bob had no way to tell if he was looking at the 2006 bylaws, 2010, 2013 or 2014 bylaws. He is entitled to see a complete copy of the document. All we would like is for a hard copy to be available to Mr. Jones. If Mr. Williams wants to inquire about a specific page, he can show that electronically. Just have one complete set of the document available to the witness. That's all we ask." Judge Bergin volunteered that was her practice during trial. She would say, "If you feel you need to read any other part of the paper copy of that document, go ahead."

Mr. Williams reminded the court that we're talking about a deposition, not a trial. An errata sheet is always available. Judge Bergin reminded Mr. Williams that depositions are played all the time at trial. Mr. Williams added that he has a full set of documents in electronic form but does not have a full set of relevant documents available on paper. At trial there are a set number of exhibits. Not so at a deposition. Mr. Williams asked for the latitude to turn from exhibit to exhibit as the responses required. "We blow up the exhibits extremely large on the screen. As a practical matter, I'm not able to print off thousands of pages of documents for the convenience of a witness. I was an adjunct professor of law at ASU on this. This is the way to do law in the 21st century."

The judge asked Mr. Callahan and Mr. Williams to make available to the witness the documents known to be at issue. Judge Bergin: "I agree that the witness should have full access to any document he is asked about."

"Surrender" vs. "Resign"
Background: Defense counsel has requested that the court rule in favor of the defendants in this case because nothing cited in the plaintiff's complaint prevents a member from simply resigning, which is what the defendants have done. "Surrender" is covered in detail in the bylaws. But there is almost no mention in Club documents of simple resignation.

Decision: The court will take the issue of the three motions under advisement and will render a decision at a later date. The three motions: (1) Defendant motion for a judgment on the pleadings. (2) Plaintiff motion for a summary judgment. (3) Defendant Clark's motion for a judgement on the pleadings.

Judge Bergin started the discussion by summarizing the positions of the two sides. Defendants ask that the court read the agreement as allowing resignation because Arizona Statutes 10-3620 allows member resignation from non-profit

corporations. Plaintiffs argue that the bylaws and other Club documents are unambiguous on the ways a member can leave the organization. Simple resignation is not included as an option and constitutes a breach of the membership agreement.

Question from Judge Bergin addressed to Mr. Callahan: Which by-law governs this dispute? The Clarks resigned on January 1, 2014. The applicable bylaws would seem to be the 2013 bylaws. Some defendants resigned on February 3, 2014. It seems that the January 1, 2013 bylaws would govern that resignation as well. But the March 19, 2012 bylaws article 4 talks about surrender. The only way to surrender is by notice to the Club. But the July 1, 2013 bylaws include nothing about "surrender." Instead the language covers "transfer" and "re-issuance" and a "surrender list". Those bylaws omit detail about the surrender procedure. The provision in the March 19, 2012 bylaws is clear. But the similar provision in the July 1, 2013 bylaws is not clear.

Question from Judge Bergin addressed to Mr. Williams: You've asked the court to construe Arizona law to permit resignation. Judge Bergin says she can not rule that resignation is permitted as a matter of law because she is required to construe the contract in light of all the circumstances. She can not rule as a matter of law that an agreement expresses an intent contrary to the business objective of the organization. The objective of the Club bylaws was to ensure that the Club didn't lose money. Allowing resignation would deprive the Club of fees and dues that would otherwise accrue. To interpret the bylaws to allow resignation would be contrary to the Club's business objective.

Mr. Williams: The March 19, 2012 bylaws say a member may surrender a membership. The only way to get money back on the sale of a membership is a surrender. A flat resignation eliminates the possibility of any return on the equity value of the membership. "Surrender makes sense only in the context of a member receiving money back on sale of the membership." These bylaws create economic servitude. "You can't construe a statute to violate the public policy of the state unless the parties specifically agree otherwise."

Mr. Callahan: "Resignation is the red herring in the room. We're talking about an ownership interest. This isn't a membership in 24-Hour Fitness. Club members acquire an ownership interest. You can't resign an ownership interest. You have to do something to dispose of the asset." The 2012 bylaws say a membership can be transferred only as set forth in the membership document. Any transfer must occur exclusively through the Club. There are only four ways to leave the Club. The 2014 bylaws create the membership resale program. Memberships are sold at auction. The selling member has to make up any difference between the sale price and $65,000. There have been approximately ten sales a month for the last three months. Average prices are between $30,000 and $35,000. The highest resale price was $54,000.

Mr. Callahan continued: In the case of Bennett v. Appaloosa Horse Club, 201 Ariz. 372, a member of a horse club claimed the right to resign on the grounds that the obligation was an adhesion contract to be interpreted against the party drawing the contract. The appellate court disagreed, explaining that the bylaws were enacted by a vote of the members for their mutual benefit and could be changed by the directors. "The ability to negotiate negates any finding of adhesiveness."

Mr. Callahan continued: The Membership Resale Program was implemented in August of 2014. Since that time, 101 members have exited the club. The highest resale price was $54,000. The average resale price was about $37,000. "Everyone who has exited the Club has been required to pay the difference between the resale price and the $65,000 due the Club. There are 101 members who fully understood that they can only exit the Club as specified in the bylaws and they honored that commitment."

Mr. Callahan continued: "Under the 2014 bylaws, the Club, at its sole discretion, can repurchase a membership. That means the members have no discretion to unilaterally resign."

Mr. Williams responded: Bob Jones has testified that members don't own anything. The only thing they have is this membership interest. The 2012 bylaws identify ways that members can be expelled for cause. A member expelled forfeits any right to repayment. Any ownership interest of an expelled member simply evaporates.

Mr. Callahan concluded: The agreement is clear and unambiguous and should be enforced as written.

Mr. Williams concluded: Nothing in the Desert Mountain documents supersedes Arizona law on member resignation.