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9 SUPERIOR COURT OF ARIZONA

10 MARICOPA COUNTY

11 DESERT MOUNTAIN CLUB, INC.,

No. CV2014-015333

12 Plaintiff,

MOTION TO CONSOLIDATE

13 v.

(Assigned to the Hon. David Gass)

14 ERIC GRAHAM and RHONA GRAHAM,
husband and wife,

15 Defendants.

16 DESERT MOUNTAIN CLUB, INC.,

No. CV2014-015334

No. CV2014-015335

(Consolidated)

17 Plaintiff,

18 v.

19 THOMAS CLARK and BARBARA
CLARK, husband and wife,

(Assigned to the Hon. Dawn Bergin)

20 Defendants.

21 DESERT MOUNTAIN CLUB, INC.,

22 Plaintiff,

23 v.

24 husband and wife,

25 Defendants.
26

1 Plaintiff Desert Mountain Club, Inc. (the “Club”) moves the Court, pursuant to
2 Rule 42(a) of the Arizona Rules of Civil Procedure, to consolidate *Desert Mountain Club, Inc. v.*
3 *Graham, et al.* (CV2014-015333) (the “Graham lawsuit”), with *Desert Mountain Club, Inc. v.*
4 *Clark, et al.* (CV2014-015334) (the “Clark lawsuit”) and *Desert Mountain Club, Inc. v. [redacted],*
5 *et al.* (CV2014-015335) (the “[redacted] lawsuit”), which have already been consolidated. The
6 claims and issues in dispute in the Graham lawsuit are virtually identical to those raised in the
7 consolidated Clark and Fabian lawsuits. The Court should consolidate the Graham lawsuit with
8 these matters to streamline discovery, facilitate resolution of the legal and factual issues, avoid
9 any possibility of inconsistent results, and lessen the burden on the Court system.

10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **I. RELEVANT BACKGROUND**

12 **A. The Three Lawsuits.**

13 The Club is a private equity golf, social, and fitness club located in the Desert Mountain
14 community in Scottsdale, Arizona. On December 29, 2014, the Club simultaneously filed three
15 complaints asserting the same claims against certain Club members—the Grahams, the Clarks,
16 and the [redacted]. In each complaint, the Club alleges breach of contract and seeks declaratory
17 relief regarding the parties’ respective rights and obligations under their agreements. All three
18 complaints are virtually identical but-for the names of the Defendants. In each, the Club alleges
19 that the members have unilaterally and improperly attempted to resign their Club membership, in
20 breach of their contractual obligations, and that the Club has suffered damages as a result of the
21 members’ breaches. Thus, on the same day that the Club sued the Grahams, it filed two other
22 complaints against other Club members (the Clarks and [redacted]) who have engaged in similar
23 conduct, albeit under different contracts with the Club.

24 **B. The Contracts.**

25 Although the Club entered into “different” contracts with the Grahams, the Clarks, and the
26 [redacted], the contractual obligations at issue here are substantively the same. All of the

1 Defendants' membership agreements with the Club expressly incorporate and, in executing the
2 contracts, the Defendants agreed to be bound by the terms and conditions not only of their
3 respective Membership Agreements, but also of the Club Bylaws, Rules and Regulations,
4 Schedule of Dues, Fees and Charges and the Membership Guidelines. *E.g.*, Deferred Equity Golf
5 Membership Agreement dated January 6, 2006 at 2 § 4, attached as Ex. A to the Graham
6 Complaint; Membership Agreement dated March 29, 2012 at 2, attached as Ex. A to the
7 Complaint; Deferred Equity Golf Membership Agreement dated November 11, 1996 at 1 § 1,
8 attached as Ex. A to the Clark Complaint.

9 The parties' Membership Agreements and the Club's Bylaws address the methods by
10 which a Club member can terminate his or her Membership in the Club, and the nature and extent
11 of the member's obligations to pay dues, charges and other assessments imposed by the Club.
12 Although the Bylaws have been amended over time, the Bylaws have never permitted members to
13 terminate their obligations under their Memberships by resigning from the Club. Instead, a
14 Member wishing to exit the Club must tender his or her Membership to the Club for reissuance
15 and, until such time as the Membership has been reissued, continues to enjoy all rights and
16 obligations of Club Members. In other words, Members have only ever been permitted to transfer
17 their Memberships through the Club and have remained obligated to pay all Club dues,
18 assessments and other charges until their Memberships have been reissued or resold by the Club.
19 *See, e.g.*, Bylaws (2004), §§ 6.1.3, 6.1.4, attached as Ex. D to the Graham Complaint; Bylaws
20 (2006), §§ 6.1.3, 6.1.4, attached as Ex. E to the Graham Complaint; Bylaws (2012), §§ 4.1–4.3,
21 attached as Ex. B to the Clark Complaint.

22 **C. Consolidation of the Clark and Fabian Lawsuits.**

23 The Clarks and Fabians are currently represented by the same counsel (Daryl M.
24 Williams) who also represents the Grahams.¹ On June 22, 2015, Mr. Williams, on behalf of the

25 _____
26 ¹ Mr. Williams has recently advised Club counsel that he has been unable to communicate with
Mr. Fabian and is moving to withdraw as counsel for the Fabians without their consent.

1 Clarks and _____, moved to consolidate the Clark and _____ lawsuits arguing that the two
2 complaints “are virtually identical but for the names of the defendants, as are the legal and factual
3 issues” and consolidation would “facilitate resolution of the issues raised by the plaintiff and
4 avoid any possibility of inconsistent results.” Motion to Consolidate filed June 22, 2015 in
5 CV2014-015334 and CV2014-015335.

6 The Club did not oppose consolidation of the Clark and _____ lawsuits for pre-trial
7 purposes. In its June 26, 2015 response, the Club simply requested that the Court defer any
8 decision to consolidate the matters for trial at a later date explaining that although the Club filed
9 complaints asserting similar claims, “those claims arise out of Defendants’ breach of *different*
10 *contracts* that Defendants allege give rise to different obligations and therefore different defenses
11 (which the Club disputes).” The Club also noted that the two cases were currently in different
12 procedural postures with different motions pending and asked the Court to ensure that any
13 consolidation would not delay decision of the pending motions, permit re-briefing of the pending
14 motions, or extend other pending deadlines.

15 The Court consolidated the Clark and _____ lawsuits on July 1, 2015. Prior to
16 consolidation, the Club had filed a Motion for Summary Judgment in the _____ lawsuit. On
17 October 16, 2015, the Court granted summary judgment against the _____ and in favor of the
18 Club in the _____ lawsuit. The Club will shortly file motions for summary judgment against the
19 Clarks and against the Grahams, similar to its prior motion against the _____.

20 Given the current procedural posture of these actions, the Graham lawsuit should now be
21 consolidated with the Clark and _____ lawsuits. The Club has asked the Clarks and _____ to
22 agree to consolidate the Graham lawsuit with their cases. The Clarks have refused to consent to
23 consolidation of the Graham lawsuit.

24 **II. CONSOLIDATION IS PROPER**

25 The Court may consolidate all actions involving a common question of law or fact
26 pending before it. Ariz. R. Civ. P. 42(a). The trial court has broad discretion to consolidate

1 actions. *Reed v. Frey*, 10 Ariz. App. 292, 296, 458 P.2d 386, 390 (1969). Consolidation turns on
2 whether the separate actions involve common questions of fact, whether there has been an
3 unnecessary delay in seeking consolidation, and whether the parties will be prejudiced by the
4 consolidation sought. *Roberto F. v. Arizona Dep't of Econ. Sec.*, 232 Ariz. 45, 52, ¶ 31 n. 9, 301
5 P.3d 211, 218 (App. 2013), *as amended* (June 20, 2013), *review denied* (Oct. 29, 2013). Courts
6 also look at whether the cases arise out of related transactions, involve the same or related
7 parties, and whether consolidation will serve the interests of judicial economy. *Cypress on*
8 *Sunland Homeowners Ass'n v. Orlandini*, 227 Ariz. 288, 295, ¶ 21, 257 P.3d 1168, 1175 (App.
9 2011); *Behrens v. O'Melia*, 206 Ariz. 309, 310, ¶ 7, 78 P.3d 278, 280 (App. 2003).

10 All factors weigh in favor of consolidation here: (1) there are common issues of law and
11 fact; (2) consolidation will serve the interests of judicial economy; (3) there has been no
12 unnecessary delay; and (4) no parties will be prejudiced.

13 **A. There are common issues of law and fact.**

14 As Mr. Williams has conceded in his prior motion to consolidate the Clark and
15 lawsuits, the complaints in these matters are virtually identical but for the names of the
16 Defendants. Each complaint alleges that the Defendants have unilaterally and improperly
17 attempted to resign their Club membership, in breach of their contractual obligations, and that the
18 Club has suffered damages as a result of the Defendants' breach. The Defendants have engaged
19 in similar conduct, albeit under different contracts with the Club.

20 There are no material differences between the Defendants' contracts that raise different
21 issues of law or warrant different results. The contracts are substantively the same in that Club
22 members have never been permitted to simply resign and walk away from their obligations before
23 the Club has reissued the Membership. Members have only ever been permitted to transfer their
24 Memberships through the Club and have remained obligated to pay all Club dues, assessments
25 and other charges until such time as their Memberships have been reissued by the Club.
26 Nevertheless, the Grahams, like the Clarks and _____, attempted to resign their memberships

1 and walk away from their obligations before their memberships could be reissued. By failing to
2 pay dues and other charges, the Defendants have breached the same contractual obligations to the
3 Club notwithstanding that the Defendants breached different contracts. The differences in the
4 Defendants' Membership Agreements do not give rise to different defenses. In fact, the Clarks
5 and the Grahams have pled the same affirmative defenses in their respective answers. *Compare*
6 *Graham Answer ¶¶ 39-45 with Clark Answer ¶¶ 42-48.* Simply, the legal and factual issues
7 relating to the parties' contractual obligations are the same. Consolidation would facilitate
8 resolution of these common issues and avoid any possibility of inconsistent results.

9 **B. Judicial economy favors consolidation.**

10 Consolidation will serve the interests of judicial economy for several reasons. First, the
11 same legal issues will be considered in both actions. For example, interpretation of the Club's
12 Bylaws will impact all proceedings. Second, the Club will call the same witnesses to testify.
13 The Club has disclosed Robert Jones, Kelly Rausch, and Debbie Declore as witnesses in its
14 disclosure statements to each of the Defendants. Therefore, discovery and depositions will
15 significantly overlap and would be streamlined by consolidation. Third, consolidation will avoid
16 the possibility of inconsistent results. For instance, the parties are currently scheduled to advise
17 this Court, in writing, on their respective positions concerning whether Judge Bergin's
18 determination has any preclusive effect on these proceedings in a joint Rule 38.1 report by
19 December 11, 2015. The Club will shortly file motions for summary judgment against the
20 Clarks and against the Grahams, similar to its prior motion against the . Judicial
21 economy would be favored if Judge Bergin rules on both of the anticipated motions for summary
22 judgment given the common issues of law and fact that will be presented.² For these reasons,

23 ² Although Maricopa County Superior Court Local Rule 3.1(c)(1) provides for this Motion
24 to be heard by Judge Gass as he has been assigned to the Graham case (which has the lowest case
25 number), it does not require that the cases necessarily be consolidated before Judge Gass. The
26 factors governing the assignment of consolidated cases are set forth in Local Rule 3.1(c)(3) and
include whether substantive matters have been considered in a case and which judge has the
greater familiarity with the issues presented (among other factors, none of which are pertinent
here). While Judge Gass has ruled on the Club's motion to dismiss the Graham's counterclaim,

1 consolidation would streamline discovery, facilitate resolution of the legal and factual issues, and
2 avoid any possibility of inconsistent results.

3 **C. There has been no unnecessary delay.**

4 The Grahams did not answer the Club's complaint until August 18, 2015. Judge Bergin
5 just recently granted summary judgment against the [redacted] and in favor of the Club in the
6 [redacted] lawsuit on October 16, 2015. Given the Court's October 16 Order, there are no longer
7 any material distinguishing facts between the Graham and [redacted] memberships that would
8 warrant a different result, and the Club has filed this Motion within two weeks of that Order.
9 Further, the parties are engaged in ongoing discovery, and no trial dates have been set.
10 Consolidation at this juncture is timely.

11 **D. No defendants will be prejudiced by consolidation.**

12 All of the Defendants are currently represented by the same counsel (Daryl M. Williams).
13 Notably, the Clarks and [redacted] moved to consolidate their individual lawsuits for some of the
14 same reasons discussed herein. The Clarks' willingness to consolidate their case with the
15 [redacted] lawsuit dispels any claim of prejudice the Clarks may now raise by additionally consolidating the
16 Graham lawsuit given the common issues of law and fact discussed herein. Again, the Grahams
17 did not file an answer until August 18, 2015, and therefore that case is still in its preliminary
18 stages and there is no prejudice to them.

19 **III. CONCLUSION**

20 For the reasons stated above, the Club respectfully requests that the Court consolidate the
21 Graham lawsuit with the already consolidated Clark and [redacted] lawsuits.
22
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24 Judge Bergin has ruled on a similar motion in the Fabian case. In addition, Judge Bergin has
25 reviewed extensive briefing regarding the respective legal positions of the parties, has conducted
26 an extended hearing, and has rendered a decision on the Club's Motion for Summary Judgment.
That Motion is substantially similar to motions that the Club anticipates filing in both the Graham
and Clark lawsuits. Hence, the Club respectfully submits that the factors set forth in Local
Rule 3.1(c)(3) support the assignment of all three cases, if consolidated, to Judge Bergin.

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DATED this 29th day of October, 2015.

FENNEMORE CRAIG, P.C.

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