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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 defendants

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, et al.
17 Defendants.

18) No. CV2014-015334
19) Consolidated with No. CV2014-015335

20) **Motion for Reconsideration**

21) (Assigned to the Honorable Dawn Bergin)

22 _____
23 This court denied the Clarks' motion for judgment on the pleadings. This court's *rationes*
24 *decidendi* began with the construction of the bylaws and the plaintiff's premise that the bylaws
25 contain no provision allowing an equity member to simply "resign" and stop paying dues. The court
26 accepted this premise.

27 Plaintiff's premise is wrong. Arizona statutes are automatically part of any contract affected
28 by the statute, even if the statute is not specifically mentioned in the contract. So the statute allowing
resignation by a member of a nonprofit organization, A.R.S. § 10-3620, was a part of the bylaws
every bit as much as if its language was expressly stated in the bylaws.

29 "It has long been the rule in Arizona that a valid statute is automatically
30 part of any contract affected by it, even if the statute is not specifically
31 mentioned in the contract." *Banner Health [v. Med. Sav. Ins. Co.]*, 216
32 Ariz. 146, 150, ¶ 15, 163 P.3d 1096, 1100 (App. 2007)]. Therefore,
33 **valid applicable laws existing at the time of the contract form a**
34 **part of the contract as fully as if they were expressly incorporated**
35 **in the contract.** Thus, contractual language must be interpreted in light
36 of existing law, the provisions of which are regarded as implied terms

1 of the contract, regardless of whether the agreement refers to the
2 governing law. 11 Samuel Williston & Richard A. Lord, *A Treatise on*
the Law of Contracts § 30:19, at 203-04 (4th ed. 1999).

3 *Qwest Corp. v. City of Chandler*, 222 Ariz. 474, 485, ¶ 37, 217 P.3d 424, 435 (App. 2009) (bolding
4 added).

5 The incorporation of statutes into every contract in Arizona has long been and remains the
6 law in Arizona:

7 “It has long been the rule in Arizona that a valid statute is automatically
8 part of any contract affected by it, even if the statute is not specifically
9 mentioned in the contract.” *Higginbottom v. State*, 203 Ariz. 139, 142,
10 P11, 51 P.3d 972, 975 (App. 2002) (citing *Yeazell v. Copins*, 98 Ariz.
11 109, 113,402 P.2d 541, 544 (1965), *Lee Moor Contracting Co. v.*
Hardwicke, 56 Ariz. 149, 156, 106 P.2d 32, 335 (1940), and *Havasu*
Heights Ranch and Dev. Corp. v. Desert Valley Wood Products, Inc.,
12 167 Ariz. 383, 389, 807 P.2d 1119, 1125 (App. 1990)).

13 *Banner Health v. Medical Savings Insurance Co.*, 216 Ariz. 146, 150, ¶ 15, 163 P.3d 1096, 1101
14 (App. 2007).

15 The following language must be viewed by the court as expressly set forth in the bylaws
16 because this is the established law in Arizona.

17 A. **A member may resign at any time**, except as set forth in or
18 authorized by the articles of incorporation or bylaws.

19 A.R.S. § 10-3620(A) (bolding added).

20 The unemphasized portion of the foregoing quote allows a waiver of this right to resign if
21 the bylaws or articles of incorporation so provide, but a waiver of a statutory right must be an
22 intentional relinquishment of a known right:

23 Waiver is the intentional relinquishment of a known right. *Jones v.*
Cochise Cnty., 218 Ariz. 372, ¶ 22, 187 P.3d 97, 104 (App. 2008). “It
24 is well settled that most rights may be waived.” *McClellan Mortg. Co.*
v. Storey, 146 Ariz. 185, 188, 704 P.2d 826, 829 (App. 1885). Even
25 statutes “enacted to protect individuals may nonetheless be waived by
26 those individuals.” *State ex rel. Horne v. Campos*, 226 Ariz. 424, ¶ 21,
27 250 P.3d 201, 206–07 (App. 2011), citing *Herstam v. Deloitte &*
Touche, LLP, 186 Ariz. 110, 116, 919 P.2d 1381, 1387 (App. 1996).

28 *Bennett Blum, M.D., Inc. v. Cowan*, 235 Ariz. 204, 208, ¶ 15, 330 P.3d 961, 965 (App. 2014).

1 The plaintiff has conceded and the court has accepted the fact that there is nothing in the
2 bylaws saying that this express provision of the contract allowing resignation—made express by the
3 operation of law—has an exception. No waiver.

4 The right to resign, then, is an express part of the bylaws. This court erred when it denied the
5 motion for judgment on the pleadings.

6 The next step in this court’s *rationes decidendi* involved the court making the words *resign*,
7 *transfer*, and *surrender* synonymous.

8 **resign:** to give up deliberately; renounce by a considered or formal act.

9 MIRIAM WEBSTER ELECTRONIC DICTIONARY, version 6.3, s.v. *resign*.

10 The word *transfer* has an altogether different meaning:

11 **transfer:** 1.a): the conveyance of right, title, or interest in either real or
12 personal property from one person to another by sale, gift, or other
process.

13 *Id.*, s.v. *transfer*.

14 The word *surrender* is used in the bylaws only in that section dealing with a transfer of a
15 membership interest. It, therefore, has the specialized meaning given it by the bylaws. The
16 membership is surrendered to the club for resale. The court recognizes this in its conclusion at page
17 four of the minute entry order immediately preceding its discussion of A.R.S. § 10-3620. The court
18 says:

19 In short, the bylaws contain comprehensive provisions regarding the
20 **divestiture** of memberships, and those provisions unambiguously
21 **require** the member to surrender or submit his membership to the Club
for resale or reissuance, and to continue to pay dues until that is
accomplished.

22 *Minute Entry Order* at 4 (Oct. 16, 2015) (bolding added).

23 This first sentence of the foregoing paragraph is correct, except for the use of the words
24 *divestiture* and *require*. Divestiture is the noun form of the verb divest, which means:

25 **divest:** 1. a): to undress or strip especially of clothing, ornament, or
26 equipment <~him of his clothes> <trees ~ed of summer finery>
27 b): to dispossess or deprive especially of possessions, qualities, rights
<compelled to ~himself of his holdings>

1 MIRIAM WEBSTER ELECTRONIC DICTIONARY, version 6.3, s.v. *divest*. The word *divestiture* carries
2 forward this compulsory, involuntary removal of right or interest:

3 **divestiture**: 2.: the compulsory transfer of title or disposal of interests
4 (as stock in a corporation) upon government order.

5 *Id.*, s.v. *divestiture*.

6 The word *divestiture* is a gloss by the court: no one is taking anything from a member. It
7 ignores the express provision allowing a resignation, made express by operation of law, “A member
8 may resign at any time” A.R.S. § 10-3620. This permissive right to resign, however, is not the
9 only permissive right. There is also a permissive right to transfer a membership to the club for
10 resale.

11 The permissive—optional—language of article four is substantially the same in all three of
12 these versions of the bylaws. The article in the 2012 bylaws is titled “Surrender, Reissuance and
13 Refund” and provides:

14 4.1 ***Surrender of Membership*** A Member in good
15 standing may surrender his or her membership . . . to the
16 Club (the “Surrendering Member”).

17 Complaint, exhibit B at 5, ¶ 4.1 (2012 bylaws) (Arial typeface added for emphasis).

18 The 2013 bylaws title this article of the bylaws “Reissuance and Refund,” but this permissive
19 language is substantially the same.

20 4.1 ***Reissuance of Membership***. An Equity Member in
21 good standing may submit his or her Membership for
22 reissuance . . . to the Club (the “Member Pending
23 Reissuance”).

24 Complaint, exhibit C at 6, ¶ 4.1 (2013 bylaws) (Arial typeface added for emphasis).

25 The 2014 bylaws title this article “Resale and Refund” and provides:

26 4.1 ***Resale of Membership***. An Equity Member in good
27 standing may submit their Membership for resale by the
28 Club pursuant to the Membership Resale Program . . .

Complaint, exhibit F at 6, ¶ 4.1 (2014 bylaws) (Arial typeface added for emphasis).

The bylaws permit a member to either resign or transfer through the club, so the court’s
conclusion (which ignore the permissive language of the bylaws) that the bylaws “unambiguously

1 **require** the member to surrender or submit his membership to the club for resale” (bolding added)
2 is in error.

3 A transfer through the club was, perhaps, more desirable from an economic standpoint when
4 the value of the club membership was going up. Now that the value of the membership has become
5 essentially worthless, however, resigning may be preferable. But the option to choose one or the
6 other remains.

7 The second sentence of the court’s conclusion on page four of its minute entry order was not
8 quoted above. This part of the court’s language is particularly in error:

9 The Court declines to engraft a new provision allowing equity members
10 to resign and stop paying dues, when such a provision is nowhere
11 suggested in the bylaws and would undermine the purpose of the equity
12 membership program.

13 *Minute Entry Order* at 4 (Oct. 16, 2015).

14 The court says, in other words, it would be required to engraft a resignation provision in the
15 bylaws if it were to accept the Clarks’ position. The court is in error. The resignation provision is
16 expressly present in the bylaws by operation of law. The court is not required to add anything into
17 these bylaws.

18 The last phrase in the foregoing quote of the court’s order is pregnant with problems. The
19 first among them is that it reflects a finding of fact: the court concludes that permitting resignations
20 would mean that “the viability of the Club would be jeopardized [and] [p]ermitting such resignations
21 would therefore be contrary to any reasonable business objective of the Club.” It is not the office
22 of the court to conclude that members must continue to pay dues and transfer fees to keep a club in
23 business any more than it is the province of the court to conclude that customers of any business
24 must continue to be customers to keep that business from going out of business. The essence of a
25 free market economy is a mutual *quid pro quo*. Consumers or club members are not required to
26 continue an indentured servitude simply for the benefit of the club. Indeed, this court’s order
27 sanctions involuntary servitude in violation of U.S. CONST. amend. XIII, § 1. Staying a member of
28 the club so the club will survive is the same as saying a slave must continue in the employ of the
master so the plantation will survive.

1 Whether a resignation effects the viability of the club is a question of fact because that issue
2 runs to the materiality of a breach. *Foundation Development Corp. v. Loehmann's, Inc.*, 163 Ariz.
3 438, 788 P.2d 1189 (1990).

4 This court's order runs afoul of two more legal principles. First, the court has no jurisdiction
5 to enter an order requiring compliance with a contract.

6 An injunction shall not be granted:

7

8 5. To prevent breach of a contract, the performance of which
9 would not be specifically enforced.

10 A.R.S. § 12-1802(5).

11 The second legal principle is the remedy for a breach of contract. Damages is the remedy, not
12 ongoing performance. REVISED ARIZONA JURY INSTRUCTIONS (CIVIL), 5th, Contract 17. The
13 damages are measured at the time of the breach. Damages is a factual issue.

14 The final portion of the court's minute entry order addressed the applicability of A.R.S. § 10-
15 3620. The reasoning is circular. The court concludes that it cannot make this statute a part of the
16 contract because it has already concluded that it is not a part of the contract even though the law
17 makes it a part of the contract. The logical fallacy is *circulus in probando*, circular reasoning. The
18 reasoner begins with the conclusion.

19 First, there is no right to resign. This premise is the conclusion to be
20 reached.

21 Second, there is no right to resign if there is none. This step accepts the
22 faulty premise.

23 Third, the conclusion restates the premise: There is no right to resign.

24 CONCLUSION

25 The court's *rationes decidendi* in this case is turned on its head. The beginning place is the
26 statute giving a member of a nonprofit organization a right to resign unless that right has been
27 modified by an agreement. Such a modification or waiver of a statutory right must be express. There
28 is no such express waiver in these bylaws, so the except-as language in the statute is of no effect.

1 The court may not change the meaning of words from their ordinary definition. *See Chopin*
2 *v. Chopin* 224 Ariz. 425, 232 P.2d 99 (App. 2010). *Resign* and *transfer* do not mean the same thing,
3 so the fact that the court makes them synonymous is error.

4 Wherefore, it is respectfully requested that the court reconsider its motion denying judgment
5 on the pleadings. Members of the club are expressly allowed to resign because the law makes the
6 right to resign an express portion of the bylaws. The bylaws do not change that.

7 Respectfully submitted this 6th day of November 2015.

8
9 /s/ Daryl M. Williams
Daryl M. Williams
Baird, Williams & Greer, LLP
10 6225 North 24th Street, Suite 125
11 Phoenix, Arizona 85016
Attorneys for defendants

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14 Copy mailed this same day to:

15 The Honorable Dawn Bergin
16 Maricopa County Superior Court
201 W. Jefferson (CCB #7D)
Phoenix, AZ 85003-2243

17 Copy emailed/mailed this same day to:
18
19
20

21 Copy emailed this same day to:

22 Christopher L. Callahan
23 Theresa Dwyer-Federhar
Seth G. Schuknecht
24 *Fennemore Craig, P.C.*
2394 E. Camelback Rd., Suite 600
Phoenix, AZ 85016-3429
25 ccallahan@fclaw.com
26 tdwyer@fclaw.com
sschukne@fclaw.com
Attorneys for plaintiff

27 /s/ Diana L. Clark
28