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8 Desert Mountain Club, Inc.

9  
10 SUPERIOR COURT OF ARIZONA  
11 MARICOPA COUNTY

12 DESERT MOUNTAIN CLUB, INC.,  
13 Plaintiff,  
14 v.  
15 THOMAS CLARK and BARBARA  
CLARK, husband and wife,  
16 Defendants.

No. CV2014-015334  
No. CV2014-015335  
(Consolidated)

**JOINT STATUS REPORT AND REQUEST  
FOR RULE 16 CONFERENCE  
IN CV2014-015334**

(Assigned to the Hon. Dawn Bergin)

17  
18 DESERT MOUNTAIN CLUB, INC.,  
19 Plaintiff,  
20 v.  
21 husband and wife,  
22 Defendants.

23  
24 On October 20, 2015, the Court ordered the parties to submit a joint status report in  
25 CV2014-015334 (the "Clark Case"). The parties previously submitted a joint status report for  
26 the Clark Case on June 4, 2015 ("First Joint Status Report"), prior to its consolidation with

1 CV2014-015335 (the “ Case”).

2 The parties certified in the First Joint Status Report that this case is not subject to the  
3 mandatory arbitration provisions of Rule 72. As previously noted, there are many matters upon  
4 which the parties are not able to agree, and therefore Plaintiff Desert Mountain Club, Inc. (the  
5 “Club”) requests a pretrial conference so the Court can determine the type of scheduling order to  
6 be entered in this case, as well as to address other issues concerning this litigation, including the  
7 status of the representation of all Defendants.<sup>1</sup>

8 *1. Brief description of the case:*

9 *A. Plaintiff’s Statement:*

10 The Club asserts that its legal positions have not changed since June 4, 2015 (the filing of  
11 the First Joint Status Report). This is an action for breach of contract and declaratory relief  
12 regarding the parties’ respective rights and obligations under the Membership Agreement and  
13 Conversion Agreement between Defendants Thomas and Barbara Clark (collectively, the  
14 “Clarks”) and the Club, dated November 11, 1996 and December 21, 2010, respectively (the  
15 “Agreements”). The Club is a private equity golf, social, and fitness club located in the Desert  
16 Mountain community in Scottsdale, Arizona. The Clarks are Club Members. The Agreements  
17 expressly incorporate and, in executing the Agreements, the Clarks agreed to be bound by the  
18 terms and conditions not only of the Agreements, but also of the Club Bylaws, Rules and  
19 Regulations, Schedule of Dues, Fees and Charges and the Membership Guidelines.

20 The Agreements and the Bylaws address the methods by which a Club Member can  
21 terminate his or her Membership in the Club and the nature and extent of the Member’s  
22 obligations to pay dues, charges and other assessments imposed by the Club. In essence, the  
23 Agreements provide that a Member may not simply resign from the Club and thereby terminate  
24 his obligation for ongoing dues, charges and assessments. Instead, a Member wishing to exit the

25 <sup>1</sup> Counsel for the Clarks also currently represents Defendants \_\_\_\_\_ (the  
26 “Fabians”), although the \_\_\_\_\_ have now challenged that representation. Mr. Williams has  
filed a motion to withdraw as the \_\_\_\_\_ counsel.

1 Club must tender his Membership to the Club for reissuance and, until such time as the  
2 Membership has been reissued, continues to enjoy all rights and obligations of Club Members.  
3 These rights include usage rights for all Club Facilities previously available to the Member.  
4 These obligations include, but are not limited to, the payment of dues, charges and other  
5 assessments. Provisions such as this are common in membership agreements for private clubs  
6 throughout the Country.

7 On or about January 1, 2014, the Clarks attempted to resign their Membership and have  
8 paid none of the dues or other charges against their Membership Account since that date. By  
9 failing to pay dues and other charges, the Clarks have breached their contractual obligations to  
10 the Club. As of May 31, 2015, the Clarks owe a total of \$106,052.53 (including the \$65,000  
11 transfer fee that must be paid to the Club upon reissuance of the Membership) to the Club. This  
12 amount will continue to increase on a monthly basis, reflecting additional dues, other  
13 assessments, and late charges, until such time as the Membership is either reissued or resold by  
14 the Club.

15 *B. The Clarks' Statement:*

16 The Clarks assert that their legal positions have not changed since June 4, 2015 (the filing  
17 of the First Joint Status Report). This is a breach of contract action where the Club wants  
18 damages for breach and a judgment declaring that the Clarks must continue to perform under the  
19 terms of what it claims are the contract documents. The contract is for membership in a golf  
20 club. The Clarks say they have resigned or quit the Club, so they claim they have no further  
21 obligations to the Club. The Clarks also claim they are not liable for the claims being asserted  
22 by the Club because of the nature and effect of the bylaws and contract law. There is no liability  
23 under the agreements signed by the Clarks, and the bylaws only address the methods by which a  
24 member can transfer his or her membership and the nature and extent of a member's obligations  
25 to pay dues, charges, and other assessments imposed by the club if the member elects to proceed  
26 by the permissive but not mandatory transfer procedures set forth in the various club documents.

1 No agreement addresses resignation of a member, and it is the Clarks' position that bylaws of a  
2 non-profit organization are only for the regulation and management of corporate affairs, not the  
3 establishment and enforcement of substantive rights. Moreover, because A.R.S. § 10-3620 is  
4 part of any and every contract, the Clarks and other members have the legal right to resign at any  
5 time; after all, no agreement addresses resignation. The Clarks also take the position that the  
6 court may not change the terms of any agreement or the bylaws by saying that the transfer  
7 process, which includes surrender of a member's membership, is equivalent to or synonymous  
8 with a resignation to thereby avoid the effects of the statute. The words *transfer* and *resign* are  
9 not synonymous. In addition, the Clarks claim that Arizona law, A.R.S. § 10-3610 requires that  
10 all members be treated the same and that the club has not done so over the years. The Club has  
11 allowed some members to leave without payment of the claims that are being asserted against the  
12 Clarks, so the Clarks are entitled to the same treatment. The Clarks also assert that the rights and  
13 obligations under its agreements with the club are to be determined based upon the intention of  
14 the parties at the time the Clarks became members and that the club cannot thereafter change its  
15 terms and conditions by unilateral action. In addition, the Clarks claim the club has breached its  
16 obligations under the terms of the agreement between the Clarks and the club because the Club's  
17 actions have destroyed the value of club membership rather than enhancing it, as was promised  
18 would happen. Being in breach, therefore, the club may not assert breach of contract claims  
19 against the Clarks.

20           2.       *Current case status:* The Clark and Fabian Cases were consolidated on July 1,  
21 2015. The Club has since asked all Defendants to agree to consolidate this case with *Desert*  
22 *Mountain Club, Inc. v. Eric Graham et al.*, Case No. CV2014-01533 (the "Graham Case"). The  
23 Clarks do not consent to consolidation of the Graham Case.

24  
25  
26

1 On May 26, 2015, the Clarks filed a Motion for Judgment on the Pleadings, which the  
2 Court denied on October 16, 2015. In the Case, the Club had filed a Motion for  
3 Summary Judgment prior to consolidation.

4 Also on October 16, 2015, the Court granted summary judgment against the and  
5 in favor of the Club in the Case. The have advised the Club that they intend to  
6 appeal the Order.

7 The Club will shortly file a motion for summary judgment against the Clarks, similar to  
8 its prior motion against the . The Clarks will shortly file a motion asking the Court to  
9 reconsider its ruling denying their motion for judgment on the pleadings. The Club believes that  
10 given the Court's October 16 Order, there are no longer any material distinguishing facts  
11 between the Clark and Memberships that would warrant a different result, and that the  
12 same is true for the Graham Case. The Clarks disagree that the summary judgment in the  
13 Case mandates summary judgment against the Grahams and the Clarks.

14 The Club will also file a timely motion/application seeking an award of its attorneys' fees  
15 and costs in the Case.

16 The Clarks assert that discovery issues remain unresolved, having been held in abeyance  
17 pending the Court's ruling on dispositive motions.

18 3. *Amendments:* The Club does not presently anticipate amending its complaint, but  
19 the Clarks believe that discovery may give rise to claims for fraud in the inducement or other  
20 misrepresentations that may give rise to additional legal and equitable defenses, so an  
21 amendment may be requested by the Clarks.

22 4. *Special case management:* Special case management is not appropriate for this  
23 case.

24 5. *Settlement:* The Clarks do not agree to participate in settlement because there is  
25 no middle ground for settlement purposes. The Club is willing to engage in settlement  
26 negotiations on remaining issues.

1           6.     *Readiness*: The Club does not anticipate the need for trial in the Clark Case;  
2 however, in that event, the case will be ready for trial by June 1, 2016. The Clarks have  
3 previously stated in the First Joint Report that this case could be tried any time after  
4 September 1, 2015.

5           7.     *Jury*: The Club does not believe a jury trial is necessary. The Clarks want a jury  
6 trial.

7           8.     *Length of trial*: The Club estimates that a trial will require three days, while the  
8 Clarks believe their case will require eight trial days.

9           9.     *Summary jury*: The parties do not agree to a summary jury trial.

10          10.    *Preference*: This case is not entitled to a preference for trial.

11          11.    *Special requirements*: None

12          12.    *Scheduling conference*: The Club requests a scheduling conference in order to:  
13 (1) address the effect of the Court's October 16, 2015 rulings in the Clark and           Cases;  
14 (2) consolidation of similar cases; and (3) resolution of differences that prevent agreement on a  
15 scheduling order at this time.

16          13.    *Other matters*: The Club's fee application in the           Case is due November 9,  
17 2015 under Rule 54(g)(2), Ariz. R. Civ. P. The Club has proposed to the Clarks,           , and  
18 Grahams a means that would allow all three cases to be presented in a single appeal, given the  
19 Court's October 16, 2015 Ruling. Specifically, the Club is willing to stipulate to the entry of a  
20 Rule 54(b) judgment in favor of the Club and as against all Defendants (Clarks,           , and  
21 Grahams) based on the Court's October 16, 2015 Ruling. The Clarks believe Rule 54(b)  
22 language is inappropriate. The Club believes Rule 54(b) certification is appropriate, and that a  
23 stipulation for entry of a Rule 54(b) judgment would leave the Club's entitlement to prevailing  
24 party fees under both the Bylaws and A.R.S. § 12-341.01 as the only remaining issue to be  
25 determined. The Club has also indicated a willingness to consider deferral of all fee applications  
26 pending the outcome of the appellate process. Any such stipulation (to which the Clarks do not

1 agree) would be structured in a manner to preserve the Defendants' appellate rights and their  
2 ability to assert their legal and factual arguments in the superior court if they are successful on  
3 appeal. The Club is willing to stay superior court proceedings concerning attorneys' fees while  
4 Defendants' appeal is pending, but the Clarks are not willing to stipulate to such a stay.  
5 Alternatively, the Club will file separate motions for summary judgment against the Clarks and  
6 in the Graham Case.

7 Finally, the Club Manager and Club counsel have received direct unsolicited emails  
8 communication from Barry Fabian in which he expressly stated that Mr. Williams has not and  
9 does not represent him. See **Exhibit A**. While Club counsel has no doubt that Mr. Williams  
10 was, in fact, engaged by Mr. [redacted], the parties should discuss with the Court the steps, if any,  
11 that should be taken to address this issue. Mr. Williams communicated with Mr. [redacted] and is  
12 moving to withdraw as counsel.

13 DATED this 30th day of October, 2015.

14  
15 /s/ Seth G. Schuknecht  
16 Christopher L. Callahan  
17 Seth G. Schuknecht  
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on the 30th day of October, 2015, with the  
2 Clerk of the Maricopa County Superior  
Court using AZTurboCourt.  
3

4 COPY transmitted via eFiling system to:

5 The Honorable Dawn Bergin  
Maricopa County Superior Court  
6 201 W. Jefferson Street, Room 7D  
Phoenix, AZ 85003-2243  
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8 COPY mailed this 30th day of October, 2015, to:

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