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5 Attorneys for Plaintiff  
6 Desert Mountain Club, Inc.

7  
8 SUPERIOR COURT OF ARIZONA

9 MARICOPA COUNTY

10 DESERT MOUNTAIN CLUB, INC.,  
11 Plaintiff,  
12 v.

13 ERIC GRAHAM and RHONA GRAHAM,  
husband and wife,  
14 Defendants.

No. CV2014-015333  
No. CV2014-015334  
No. CV2014-015335  
(Consolidated)

**PLAINTIFF'S SEPARATE STATEMENT OF  
FACTS IN SUPPORT OF ITS MOTION FOR  
SUMMARY JUDGMENT IN CV2014-015334  
(CLARKS)**

(Consolidated Action: Assigned to the Hon. David  
Gass)

15 DESERT MOUNTAIN CLUB, INC.,  
16 Plaintiff,  
17 v.

18 THOMAS CLARK and BARBARA  
CLARK, husband and wife,  
19 Defendants.

**(Oral Argument Requested)**

20 DESERT MOUNTAIN CLUB, INC.,  
21 Plaintiff,  
22 v.  
23 husband and wife,  
24 Defendants.

1 Pursuant to Rule 56(c), Ariz. R. Civ. P., Plaintiff Desert Mountain Club, Inc. (the “Club”)  
2 submits the following Statement of Facts in support of its Motion for Summary Judgment on all  
3 claims asserted in the Club’s Complaint against Thomas Clark and Barbara Clark (the “Clarks”).

4 **The Clarks’ Equity Membership**

5 1. The Club is a non-profit member-owned recreational club that provides various  
6 facilities and services to its members. Declaration of Kelly Rausch, attached hereto as **Exhibit A**,  
7 ¶ 3; Under Advisement Ruling, 2 (10/19/15), attached hereto as **Exhibit B**.

8 2. At all times since December 30, 2010, the Club has been owned by its members  
9 with equity memberships (“Equity Members”). Exhibit A, ¶ 4. Equity Members in good  
10 standing are eligible to vote at official Club meetings. Exhibit A-5, § 3.7.5. Equity Members are  
11 responsible to fund any operational deficits or shortfalls encountered by the Club. *Id.*, § 5.2. In  
12 the event of dissolution or liquidation, Equity Members in good standing are entitled to a pro rata  
13 share of remaining assets. *Id.*, § 18.2.3.

14 3. Two types of equity memberships (“Equity Memberships”) are available through  
15 the Club: (i) Equity Golf Memberships, which allow Equity Members full access to all facilities;  
16 and (ii) Equity Club Memberships (Lifestyle), which allow Equity Members to use all non-golf  
17 facilities. Exhibit A, ¶ 5; Exhibit B at 2. The Club establishes the total number of both types of  
18 Equity Memberships. Exhibit A-5, §§ 3.2.1, 3.2.2.

19 4. Prior to the formation of the Club on or about December 30, 2010, the Clarks were  
20 members of the Club’s predecessor, which was owned and operated by a developer, specifically  
21 Desert Mountain Properties Limited Partnership (the “Developer”). Exhibit A, ¶ 6.

22 5. The Clarks have admitted that, on or about December 21, 2010, the Clarks entered  
23 into a Membership Conversion Agreement with the Club (“Conversion Agreement”). Exhibit A-  
24 1;<sup>1</sup> Answer, ¶ 19. By executing the Conversion Agreement, the Clarks agreed to convert their  
25 prior membership with the Developer into their current Equity Golf Membership in the Club (the  
26 Clarks’ “Equity Membership”). Exhibit A-1 at 1; Exhibit A, ¶ 7. The Conversion Agreement has

27 <sup>1</sup> The Conversion Agreement is Exhibit 1 to the Declaration of Kelly Rausch, which is  
28 Exhibit A to this Statement of Fact. Hence, the Conversion Agreement is referenced here as  
Exhibit A-1. The Statement of Fact will follow this naming convention for all other documents.

1 no contractual time period or expiration date. Exhibit A-1. Thus, the Clarks are Equity Members  
2 of the Club. Exhibit A, ¶¶ 6-7; Exhibit A-1; Exhibit B at 2.

### 3 **The Clarks' Contract with the Club**

4 6. In the Conversion Agreement, the Clarks agreed to abide by the Desert Mountain  
5 Club Bylaws ("Bylaws") as they may be amended from time to time. Exhibit A-1 at 1. More  
6 specifically, the Conversion Agreement provides:

7 The Equity Golf Membership in the Club permits the undersigned to use the Club  
8 Facilities, as defined in and in accordance with the terms and conditions in this  
9 Membership Conversion Agreement and the Club Bylaws, as may be amended  
from time to time.

10 *Id.* The Conversion Agreement further provides:

11 Member hereby agrees that Member's use of the Club and privileges under the  
12 Equity Golf Membership are subject to the terms, conditions and restrictions set  
13 forth herein and in the Club Bylaws and rules and regulations established by the  
14 Club, as amended from time to time, and Member agrees to conform to and abide  
by the terms set forth therein, including the timely payment of all dues, fees,  
charges and assessments as provided in the Club Bylaws.

15 *Id.* Thus, the Clark's "Contract" with the Club is comprised of the Clarks' Conversion  
16 Agreement, the Bylaws, and the Club's rules and regulations. *Id.*

17 7. The Conversion Agreement explicitly states that the Bylaws effective December  
18 31, 2010 (the "2010 Bylaws") supersede, amend and replace prior Bylaws. *Id.*

19 8. The Clarks expressly acknowledged that they had received, read, and understood  
20 the Bylaws and Conversion Agreement and agreed to be subject to them when executing the  
21 Conversion Agreement. *Id.* Specifically, the Conversion Agreement provides that:

22 Member hereby acknowledges that Member has received, has read, and  
23 understands the Club Bylaws and this Membership Conversion Agreement,  
24 which supersede and replace in their entirety the Prior Club Bylaws, membership  
25 agreements and applications for the Club, and other related agreements, however  
titled and as amended or revised, and all rights thereunder, unless otherwise  
stated herein.

26 *Id.*

27 9. The Conversion Agreement also explicitly states (under the heading  
28 "Resignation/Transferability/Refunds") that "Equity Golf Memberships may be transferred only

1 through the Club, subject to the terms, conditions and restrictions set forth in the Club Bylaws.”  
2 *Id.*

### 3 The Bylaws

4 10. The Bylaws contain comprehensive provisions regarding the divestiture of Equity  
5 Memberships. Exhibit B at 4; Exhibit A-2 (2010 Bylaws); Exhibit A-3 (2012 Bylaws); Exhibit  
6 A-4 (2013 Bylaws); Exhibit A-5 (2014 Bylaws).

7 11. Article 4 of the Bylaws prescribes the only ways in which an Equity Member may  
8 terminate their Equity Membership and liability to the Club. *See* Exhibit A-2, § 4; Exhibit A-3,  
9 § 4; Exhibit A-4, § 4; Exhibit A-5, § 4. Article 4 allows Equity Members to transfer their Equity  
10 Memberships: (i) by surrendering or submitting their Equity Membership to the Club for resale  
11 or reissuance, (ii) transferring to subsequent purchasers of property, (iii) through legacy transfer,  
12 and (iv) upon death.<sup>2</sup> *See* Exhibit A-2, § 4; Exhibit A-3, § 4; Exhibit A-4, § 4; Exhibit A-5, § 4.

13 a. When the Equity Membership is transferred to subsequent purchasers of property,  
14 it is transferred and reissued through the Club. Exhibit A-2, § 4.3 (“Equity Members who own  
15 property in the Desert Mountain Community may transfer their Membership **through the Club** to  
16 the subsequent purchaser of the Member’s residence or lot . . . .”) (emphasis added); Exhibit A-3,  
17 § 4.3 (same); Exhibit A-4, § 4.3 (same); Exhibit A-5, § 4.4 (similar).

18 b. When the Equity Membership is transferred through legacy transfer, it is also  
19 transferred and reissued through the Club. Exhibit A-2, § 4.4 (“Equity Members are entitled, on a  
20 one time basis, to transfer their Memberships during their lifetimes to a Spouse, an adult child, or  
21 an adult grandchild **who is approved by the Club for Membership . . . .**”) (emphasis added);  
22 Exhibit A-3, § 4.4 (similar); Exhibit A-4, § 4.4 (similar); Exhibit A-5, § 4.5 (similar).

23 c. When the Equity Membership is transferred upon death, it is also transferred and  
24 reissued through the Club. Exhibit A-2, § 4.5.1 (“Upon the death of an Equity Member, the  
25 Surviving Spouse, if any, may elect . . . to (i) continue the Membership . . . (ii) surrender the  
26 Membership and be placed on the applicable Surrender List, or (iii) have the Membership

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27 <sup>2</sup> The 2014 Bylaws, which became effective on or about August 1, 2014, after the Clarks’  
28 attempted resignation, also allow an Equity Member arranged transfer through the Club. Exhibit  
A-5, § 4.8.

1 reissued . . . .”); Exhibit A-3, § 4.5.1 (similar); Exhibit A-4, § 4.5.1 (similar); Exhibit A-5, § 4.6.1  
2 (providing that upon the death of an Equity Member, the surviving spouse or significant other  
3 will be deemed to continue the Equity Membership but may elect, for a period of one year  
4 following the death, to participate in the Membership Resale Program or Membership Resale List,  
5 if applicable, or (ii) have the Equity Membership reissued pursuant to Section 4.5 of the Bylaws  
6 governing legacy transfers).

7 d. Thus, at all relevant times, the Bylaws did not permit the Clarks to resign or  
8 terminate their Equity Membership unilaterally; instead, the Bylaws required the Clarks (a) to  
9 surrender or submit their Equity Membership to the Club for resale or reissuance, and (b) to  
10 continue to pay all Club dues, fees, charges, and assessments until reissuance. Exhibit B at 2;  
11 Exhibit A-2, § 4.2 (providing that a surrendering Member “in all events shall continue to be  
12 obligated to pay dues, fees, charges, and assessments until the Membership is reissued by the  
13 Club” except in the event of the surrendering Member’s death); Exhibit A-3, § 4.2 (same);  
14 Exhibit A-4, § 4.2 (same); Exhibit A-5, § 4.1 (“The Member’s rights, privileges and obligations,  
15 including the payment of dues, fees and charges in the Club shall not terminate until the resale of  
16 the Membership.”), § 4.3 (“A Member Pending Resale in all events shall continue to be obligated  
17 to pay dues, fees, charges, and assessments until the Membership is reissued by the Club” except  
18 upon the Member’s death).

19 12. At all relevant times, the Bylaws did not allow any party to add terms or  
20 conditions not expressly stated therein:

21 THE MEMBERSHIP DOCUMENTS SET FORTH ALL  
22 REPRESENTATIONS AND TERMS CONCERNING  
23 MEMBERSHIPS IN THE CLUB. NO PERSON HAS THE  
24 AUTHORITY TO MAKE ANY ADDITIONAL  
25 REPRESENTATION, MODIFICATION OR CONDITION, OR  
26 PROVIDE ADDITIONAL INFORMATION CONCERNING  
27 THE MEMBERSHIP DOCUMENTS AND, IF PROVIDED, THE  
28 INFORMATION MAY NOT BE RELIED UPON AS HAVING  
BEEN AUTHORIZED BY THE CLUB.

26 Exhibit A-2 at *Page v* (capitalization in original); Exhibit A-3 at *Page v* (same); Exhibit A-4 at  
27 *Page v* (same); Exhibit A-5 at *Page v* (same).

**The Clarks' Breach of Contract**

1  
2           13.     On or about June 26, 2013, Thomas Clark provided the Club with the Clarks'  
3 Membership Certificates and a signed Equity Golf Membership Request for Reissuance Form  
4 (“Request”) to surrender the Clarks’ Equity Membership for reissuance through the Club. Exhibit  
5 A, ¶ 12; Exhibit A-6.

6           14.     In signing the Request, the Clarks agreed that they “understand that [they] will  
7 continue to have full usage and voting rights until the Membership is reissued by the Club and  
8 that [they are] obligated to continue to pay dues, fees, charges and assessments until reissuance . .  
9 . .” Exhibit A-6.

10           15.     Before their Equity Membership could be reissued, however, the Clarks attempted  
11 unilaterally to resign their Equity Membership effective January 1, 2014, through a letter sent to  
12 the Club. Exhibit A, ¶ 13; Exhibit A-7. The Clarks’ letter claims that it “officially serves as  
13 [their] resignation” from the Club effective January 1, 2014. Exhibit A-7. The Clarks further  
14 averred that the letter “terminates [their] obligation to pay dues and assessments” as Equity  
15 Members. *Id.* The Clarks admit that they resigned their Equity Membership effective January 1,  
16 2014. *See* Complaint, ¶ 24 (alleging the Clarks attempted to resign effective January 1, 2014  
17 through the letter to the Club); Answer, ¶ 24 (admitting that the Clarks resigned); Motion for  
18 Judgment on the Pleadings (5/26/15) (admitting paragraph 24 of the Complaint).

19           16.     Despite repeated communications from the Club, the Clarks have paid none of the  
20 dues or other charges against their Membership Account since January 1, 2014 and admit same.  
21 Exhibit A, ¶ 14; Complaint, ¶ 25 (“Defendants have paid none of the dues or other charges  
22 against their Membership Account since January 1, 2014.”); Answer, ¶ 25 (admitting paragraph  
23 25 of the Complaint); Motion for Judgment on the Pleadings (5/26/15) (same).

24           17.     As of December 31, 2015, the Clarks owe a total of \$47,531.74 to the Club under  
25 their Contract with the Club. Exhibit A, ¶ 15. This amount will continue to increase on a  
26 monthly basis, reflecting additional charges, dues and late fees, until such time as the Clarks’  
27 Equity Membership is either transferred or terminated in accord with the Bylaws. *Id.*, ¶ 16.

28           18.     In addition, a transfer fee of \$65,000 will be due from the Clarks to the Club upon

1 the reissuance of the Clarks' Equity Membership. Exhibit A, ¶ 17.

2 **The Superior Court's Ruling Against the Clarks**

3 19. On May 26, 2015, the Clarks moved for judgment on the pleadings contending that  
4 notwithstanding the provisions of the Contract, A.R.S. § 10-3620 permitted them to resign from  
5 the Club. Motion for Judgment on the Pleadings, 2-3 (5/26/15). After the parties' briefing and  
6 oral argument, the Court denied the Clarks' Motion for Judgment on the Pleadings on October 19,  
7 2015. Exhibit B at 5.

8 **The Fabians**

9 20. Defendants (the " ") are also Equity  
10 Members of the Club. Exhibit B at 2; Equity Golf Membership Agreement between the  
11 and the Club dated March 29, 2012 (the " Membership Agreement"), attached as Exhibit  
12 A-9.

13 21. The contract with the Club contains essentially the same terms as the  
14 Clarks' Contract. For example, like the Clarks' Contract:

15 a. The contract expressly incorporates the Bylaws and other documents as  
16 amended from time to time. Exhibit A-9 at 2.

17 b. The represented that they received and read the Bylaws and agreed to be  
18 bound by them. *Id.*

19 c. The contract addressed the procedures whereby an Equity Member may  
20 leave the Club:

21 I understand and acknowledge that the Equity Membership may only be  
22 transferred as set forth in the Membership Documents, and that any transfer must  
23 occur exclusively through the Club. I understand, have reviewed and agree that  
24 the Equity Membership is subject to resignation and reissuance as set forth in the  
Membership Documents, and that no representations have been made regarding  
such process, except as set forth in the Membership Documents.

25 *Id.* at 3, § 3. The "Membership Documents" include the Bylaws. *Id.* at 1.

26 d. Therefore, the contract, like the Clarks' Contract, did not permit Equity  
27 Members to simply resign their Equity Memberships but required that the Equity Members follow  
28 the procedures for resignation and reissuance as set forth in the Bylaws. Exhibit A-9; Exhibit A-1

1 at 1.

2 22. On February 3, 2014, the [REDACTED] advised the Club that they were “resigning” their  
3 Equity Membership effective January 1, 2014, and they stopped paying dues and other charges as  
4 of January 1, 2014. Exhibit B at 3.

5 **The Superior Court’s Ruling Against the Fabians**

6 23. The Club filed a Motion for Summary Judgment against the [REDACTED] on May 5,  
7 2015. Thereafter, the [REDACTED] and Clark cases were consolidated for all purposes pursuant to  
8 Defendants’ request. Motion to Consolidate (6/22/15); Case Consolidation, 1 (7/6/15).

9 24. After the parties’ briefing and oral argument, the Court granted the Club’s Motion  
10 for Summary Judgment against the [REDACTED] on October 19, 2015. Exhibit B at 5.

11 25. In its October 19 ruling, the Court held:

12 In short, the bylaws contain comprehensive provisions regarding  
13 the divestiture of memberships, and those provisions  
14 unambiguously require the member to surrender or submit his  
15 membership to the Club for resale or reissuance, and to continue  
16 to pay dues until that is accomplished. The Court declines to engraft  
17 a new provision allowing equity members to resign and stop  
18 paying dues, when such a provision is nowhere suggested in the  
19 bylaws and would undermine the purpose of the equity  
20 membership program.

21 *Id.* at 4. The Court continued:

22 As explained above, the bylaws can only be interpreted to preclude  
23 a member from resigning and ceasing payment of dues.

24 *Id.* at 5. The Court reasoned that the purpose of the Equity Membership program would be  
25 undermined because Equity Memberships in the Club procure the Equity Member an ownership  
26 interest in the Club, which the Court distinguished from other agreements whereby a person  
27 simply pays for the use of facilities, such as a gym. *Id.* at 4. The Court explained that, if Equity  
28 Members were permitted to simply resign and stop paying dues, the viability of the Club would  
be jeopardized as the Club establishes a certain number of Equity Memberships and relies on the  
dues, fees and assessments paid by its Equity Members to maintain the Club. *Id.* Permitting  
Equity Members to simply resign and stop paying dues “would therefore be contrary to any  
reasonable business objective of the Club.” *Id.*



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26. In its October 19 ruling, the Court also held:

The Court agrees with Plaintiff that A.R.S. § 10-3620 accords Defendants no relief. Subsection (A) limits the entitlement to resign “as set forth in or authorized by the . . . bylaws.” As explained above, the bylaws can only be interpreted to preclude a member from resigning and ceasing payment of dues. Second, even if the statute allowed Defendants to “resign,” they would not be relieved of their prior commitment to pay dues pending reissuance or resale of their membership, a “commitment made prior to resignation.” § 10-3620(B).

*Id.* at 5. Therefore, the Court held that A.R.S. § 10-3620 does not permit Equity Members to simply resign and stop paying dues. *Id.* at 4–5.

27. From June 22, 2015 when Daryl M. Williams filed a Notice of Appearance on behalf of the through the Court’s October 19, 2015 ruling, the Clarks and the were jointly represented by Mr. Williams.

DATED this 13<sup>th</sup> day of January, 2016.

FENNEMORE CRAIG, P.C.

By /s/ Christopher L. Callahan  
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1 ELECTRONICALLY FILED  
on the 13<sup>th</sup> day of January, 2016, with the  
2 Clerk of the Maricopa County Superior  
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3

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