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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 CV2014-015333  
(GRAHAMS)**

(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 Eric and Rhona Graham (the “Grahams”).

4 **The Grahams’ 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 Grahams  
20 were members of the Club’s predecessor, which was owned and operated by a developer,  
21 specifically Desert Mountain Properties Limited Partnership (the “Developer”). Exhibit A, ¶ 6.

22 5. The Grahams have admitted that, on or about November 22, 2010, they entered  
23 into a Membership Conversion Agreement with the Club (“Conversion Agreement”). Exhibit A-  
24 1;<sup>1</sup> Answer, ¶ 15. By executing the Conversion Agreement, the Grahams agreed to convert their  
25 prior membership with the Developer into their current Equity Golf Membership in the Club (the  
26 Grahams’ “Equity Membership”). Exhibit A-1 at 1; Exhibit A, ¶ 7. The Conversion Agreement

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

3 **The Grahams' Contract with the Club**

4 6. In the Conversion Agreement, the Grahams agreed to abide by the Desert  
5 Mountain Club Bylaws ("Bylaws") as they may be amended from time to time. Exhibit A-1 at 1.  
6 More 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 Grahams' "Contract" with the Club is comprised of the Grahams' 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 Grahams expressly acknowledged that they had received, read, and  
20 understood the Bylaws and Conversion Agreement and agreed to be subject to them when  
21 executing the 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> 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

27 <sup>2</sup> The 2014 Bylaws, which became effective on or about August 1, 2014, after the Grahams’  
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 Grahams to resign or  
8 terminate their Equity Membership unilaterally; instead, the Bylaws required the Grahams (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 Grahams' Breach of Contract**

13. On or about May 20, 2014, the Grahams attempted unilaterally to resign their Equity Membership effective May 31, 2014, through an email communication sent to the Club. Exhibit A, ¶ 12; Exhibit A-6. The email claims that the Grahams have “no further obligation” to the Club and “will not pay any charges that reflect membership in the DMC after that date.” Exhibit A-6. The Grahams admit that they resigned their Equity Membership effective May 31, 2014 through the email. *See* Complaint, ¶ 20; Answer, ¶ 20 (admitting that the Grahams “did resign their membership effective May 31, 2014, and a copy of their resignation is attached as exhibit J to plaintiff’s complaint,” which is Exhibit A-6 here); Motion to Dismiss, 2:2–11, 3:14 (6/25/15) (arguing the Grahams resigned from the Club as acknowledged in paragraph 20 of the Complaint).

14. Despite repeated communications from the Club, the Grahams have paid no dues or other charges since May 20, 2014 and admit same. Exhibit A, ¶ 13; Complaint, ¶ 21 (“Defendants have paid none of the dues or other charges against their Membership Account since May 20, 2014.”); Answer, ¶ 21 (admitting paragraph 21 of the Complaint).

15. As of December 31, 2015, the Grahams owe a total of \$37,022.09 to the Club under their Contract with the Club. Exhibit A, ¶ 14. This amount will continue to increase on a monthly basis, reflecting additional charges, dues and late fees, until such time as the Grahams’ Equity Membership is either transferred or terminated in accord with the Bylaws. *Id.*, ¶ 15.

16. In addition, a transfer fee of \$65,000 will be due from the Grahams to the Club upon the reissuance of the Grahams’ Equity Membership. Exhibit A, ¶ 16.

**The ]**

17. Defendants (the “[ ]”) are also Equity Members of the Club. Exhibit B at 2; Equity Golf Membership Agreement between the [ ] and the Club dated March 29, 2012 (the “[ ] Membership Agreement”), attached as Exhibit A-8.

18. The [ ]’ contract with the Club contains essentially the same terms as the Grahams’ Contract. For example, like the Grahams’ Contract:

1 a. The contract expressly incorporates the Bylaws and other documents as  
2 amended from time to time. Exhibit A-8 at 2.

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

5 c. The ;' contract addressed the procedures whereby an Equity Member may  
6 leave the Club:

7 I understand and acknowledge that the Equity Membership may only be  
8 transferred as set forth in the Membership Documents, and that any transfer must  
9 occur exclusively through the Club. I understand, have reviewed and agree that  
10 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.

11 *Id.* at 3, § 3. The “Membership Documents” include the Bylaws. *Id.* at 1.

12 d. Therefore, the ;' contract, like the Grahams' Contract, did not permit Equity  
13 Members to simply resign their Equity Memberships but required that the Equity Members follow  
14 the procedures for resignation and reissuance as set forth in the Bylaws. Exhibit A-8; Exhibit A-1  
15 at 1.

16 19. On February 3, 2014, the advised the Club that they were “resigning” their  
17 Equity Membership effective January 1, 2014, and they stopped paying dues and other charges  
18 against their Equity Membership Account as of January 1, 2014. Exhibit B at 3.

### 19 The Clarks

20 20. Defendants Thomas Clark and Barbara Clark (the “Clarks”) are also Equity  
21 Members of the Club. Exhibit B at 2; Membership Conversion Agreement between the Clarks  
22 and the Club dated December 21, 2010 (the “Clark Conversion Agreement”), attached as Exhibit  
23 A-9.

24 21. The Conversion Agreement entered by the Clarks and the Grahams is the same.  
25 *Compare* Exhibit A-1 (Graham Conversion Agreement) *with* Exhibit A-9 (Clark Conversion  
26 Agreement). The Clarks' contract, like the Grahams' Contract, did not permit Equity Members to  
27 simply resign their Equity Memberships but required that the Equity Members follow the  
28 procedures for resignation and reissuance as set forth in the Bylaws. Exhibit A-9; Exhibit A-1.

1           22.     The Clarks attempted unilaterally to resign their Equity Membership effective  
2 January 1, 2014, through a letter sent to the Club. Exhibit B at 3. The Clarks admit same. *See*  
3 Complaint, ¶ 24 (alleging the Clarks attempted to resign effective January 1, 2014 through the  
4 letter to the Club); Answer, ¶ 24 (admitting that the Clarks resigned); Motion for Judgment on the  
5 Pleadings (5/26/15) (admitting paragraph 24 of the Complaint). The Clarks have paid none of the  
6 dues or other charges against their Membership Account since January 1, 2014 and admit same.  
7 Complaint, ¶ 25 (“Defendants have paid none of the dues or other charges against their  
8 Membership Account since January 1, 2014.”); Answer, ¶ 25 (admitting paragraph 25 of the  
9 Complaint); Motion for Judgment on the Pleadings (5/26/15) (same).

10                           **The Superior Court’s Ruling Against the Fabians and Clarks**

11           23.     The Club filed a Motion for Summary Judgment against the                    on May 5,  
12 2015. In response, the                    argued that they had simply resigned, nothing in the Bylaws  
13 prevented them from simply resigning, and A.R.S. § 10-3620 permitted them to do so. Response  
14 to Motion for Summary Judgment and Motion for Judgment on the Pleadings (6/22/15).  
15 Thereafter, the                    and Clark cases were consolidated for all purposes pursuant to Defendants’  
16 request. Motion to Consolidate (6/22/15); Case Consolidation (7/6/15).

17           24.     The Clarks and the                    both filed Motions for Judgment on the Pleadings.  
18 These motions were substantively identical—both argued that the Equity Members resigned their  
19 respective memberships by notifying the Club of their respective decisions to resign, nothing in  
20 the Bylaws prevented the Equity Members from resigning in this manner, and A.R.S. § 10-3620  
21 permitted them to do so. Motion for Judgment on the Pleadings (5/26/15); Motion for Judgment  
22 on the Pleadings Re Fabian (7/9/15).

23           a.     The Grahams made these same arguments in a Motion to Dismiss. Motion to  
24 Dismiss (6/25/15). Specifically, the Grahams’ Motion to Dismiss argued that the Grahams  
25 resigned their Equity Membership, nothing in the Bylaws prevented them from resigning, and  
26 A.R.S. § 10-3620 permitted them to do so. *Id.* The Motion to Dismiss was denied. Ruling  
27 (8/5/15).

28           b.     The                    ’ Response to the Motion for Summary Judgment consists of three



1 paragraphs and is substantively identical to motions filed by the Grahams and Clarks under Rules  
2 12(b)(6) and 12(c), Ariz. R. Civ. P. *Compare* Response to Motion for Summary Judgment and  
3 Motion for Judgment on the Pleadings (6/22/15) *with* Motion for Judgment on the Pleadings Re  
4 sponse to Motion for Judgment on the Pleadings (7/9/15); Motion for Judgment on the Pleadings (5/26/15); Motion to Dismiss (6/25/15).

5 25. After the parties' briefing and oral argument, the Court granted the Club's Motion  
6 for Summary Judgment against the Club on October 19, 2015. Exhibit B at 5. At the same  
7 time, the Court denied the Grahams' and Clarks' motions for judgment on the pleadings. *Id.*

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

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

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

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

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

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

27 The Court agrees with Plaintiff that A.R.S. § 10-3620 accords  
28 Defendants no relief. Subsection (A) limits the entitlement to  
resign "as set forth in or authorized by the . . . bylaws." As

1 explained above, the bylaws can only be interpreted to preclude a  
2 member from resigning and ceasing payment of dues. Second,  
3 even if the statute allowed Defendants to “resign,” they would not  
4 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).

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

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

10 29. There was, in fact, a joint representation agreement between and among those  
11 Members who were represented by Mr. Williams. Mr. Williams represented to his various clients  
12 that he had “agreed to represent a group of members of the club who take issue with the club’s  
13 position and enough interested parties have joined together to fund the legal work necessary to  
14 fight the position being taken by the club.” *See* Letter from D. Williams to W. Pearson (7/1/15),  
15 p. 1, attached to the Affidavit of William Pearson as Exhibit 1. Mr. Pearson’s Affidavit is  
16 attached as Exhibit C-1.<sup>3</sup> Through this common representation, the Members represented by Mr.  
17 Williams agreed to (i) “stand firm” against any sort of “divide-and-conquer” strategy pursued by  
18 the Club in which it offered settlements to some, but not all of those represented by Mr. Williams,  
19 and (ii) waive confidentiality vis-à-vis the other Members in the common representation. *See*  
20 Exhibit C-1, p. 2.

21 30. The Grahams’ participation in this common representation is documented by the e-  
22 mail communication to, among others, the Grahams in the context of pending settlement  
23 discussions between the Club and one of the Members represented by Mr. Williams, William  
24 Pearson. In the litigation with Mr. Pearson, the Club made a settlement proposal through Mr.  
25 Williams that provided for the settlement to be kept confidential. *See* Letter from S. Bonfiglio to  
26 D. Williams (9/17/15), attached as Exhibit C-2. Mr. Williams responded that Mr. Pearson could  
27 not agree to the proposed confidentiality because he was part of a joint representation whereby he

28 <sup>3</sup> **Exhibit C** to this Statement of Fact is the Declaration of Christopher L. Callahan.

1 consented to share information with others jointly represented by Mr. Williams:

2 My client, however, is constrained. He is part of a joint  
3 representation, so he cannot keep his dealings with respect to this  
4 litigation secret from the others I am representing. Your  
5 suggestion, therefore, that there be a confidentiality agreement is a  
6 non-starter because my client has waived confidentiality *inter se*.  
7 There can be no deal if that is a deal point. Let me know if it is.

8 *See* Email from D. Williams to S. Bonfiglio (9/17/15 at 2:59 p.m.), attached as Exhibit C-3. Mr.  
9 Williams included the Grahams in his communication to those Members who were parties to the  
10 joint defense agreement. *See* Email from D. Williams to, *inter alia*, E. Graham and T.  
11 Clark (9/17/15 at 3:05 p.m.), attached as Exhibit C-4.

12 31. On December 10, 2015, the Court consolidated the Graham case with the  
13 and Clark cases, which had already been consolidated. Case Consolidation (12/14/15).

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

15 FENNEMORE CRAIG, P.C.

16 By /s/ Christopher L. Callahan  
17 Christopher L. Callahan  
18 Theresa Dwyer-Federhar  
19 Attorneys for Plaintiff  
20 Desert Mountain Club, Inc.

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

4 COPY transmitted via eFiling system to:

5 The Honorable David Gass  
Maricopa County Superior Court  
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8 COPIES both mailed via regular mail and emailed this 13<sup>th</sup> day of January, 2016, to:

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