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8
9 SUPERIOR COURT OF ARIZONA
10 MARICOPA COUNTY

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

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

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

**PLAINTIFF'S RESPONSE TO MOTION TO
COMPEL RESPONSES TO THE CLARKS'
NON-UNIFORM INTERROGATORIES**

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

(Oral Argument Requested)

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

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

21 DESERT MOUNTAIN CLUB, INC.,
22 Plaintiff,
23 v.

24 husband and wife,
25 Defendants.

1 Plaintiff Desert Mountain Club, Inc. (the “Club”) respectfully requests that the Court deny
2 the Motion to Compel Responses to Defendants’ [the Clarks’] Non-uniform Interrogatories (the
3 “Motion”).¹ In the seven non-uniform interrogatories (the “Interrogatories”) propounded on the
4 Club by Defendants Thomas Clark and Barbara Clark (the “Clarks”),² the Clarks seek
5 information that is neither relevant nor reasonably calculated to lead to the discovery of
6 admissible evidence. The Clarks entered into a valid, enforceable Contract,³ which clearly and
7 unambiguously provides that: (1) the Clarks can only terminate their Equity Membership by
8 transferring it through the Club; and (2) the Clarks must pay all Club dues, assessments, and other
9 charges until that transfer is complete. The Clarks have not complied with the terms of their
10 Contract. Instead, the Clarks have attempted unilaterally to resign their Equity Membership in a
11 manner contrary to the Contract, and have stopped paying Club dues and other owed charges.
12 The Clarks claim that they need the information requested in the Interrogatories to “prepare their
13 defense” by contacting “former club members to find out if they had to pay the full penalty
14 transfer fee to leave the club or if they were treated differently or what their understanding of the
15 contract with the club was.” Motion at 7:10–14. As evidenced by the Clarks’ own statement, the
16 Clarks seek to conduct a fishing expedition to look for facts in support of a claim or defense
17 against the Club, which is contrary to the discovery rules. Yet, even if the Club acted differently
18 in the past, such conduct does not provide the Clarks with any legally cognizable defense because
19 the Club, as a matter of law and under the parties’ Contract, is entitled to treat its Members
20 differently.

21 ¹ The Motion purports to attach a separate statement required by Rule 3.2(h) of the Local
22 Rules of Superior Court for Maricopa County as Exhibit B. *See* Motion at 1:25–26. Exhibit B,
however, appears to be missing its first page. Consequently, Rule 3.2(h) may not be satisfied.

23 ² Defendants Eric Graham and Rhona Graham (the “Grahams”) have not served
24 interrogatories on the Club. The Clarks served the Interrogatories before the Court consolidated
25 the Clark and Graham cases. *See* Case Consolidation (12/14/15). It is unclear whether the Clarks
26 filed the Motion on behalf of both the Grahams and the Clarks. As a result, this Response
assumes the Motion was filed solely on behalf of the Clarks, although the same arguments apply
to the Grahams.

27 ³ The “Contract” is comprised of the Clarks’ Membership Conversion Agreement with the
28 Club, the Desert Mountain Club Bylaws (“Bylaws”), and the Club’s rules and regulations. *See*
Plaintiff’s Separate Statement of Facts in Support of its Motion for Summary Judgment in
CV2014-015334 (Clarks) (1/13/16) ¶ 6.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. BACKGROUND**

3 The Clarks served the Club with the Interrogatories on July 22, 2015. The Interrogatories
4 ask the Club to disclose information regarding its Members and/or its employees. The Club
5 objected on various grounds including that the Interrogatories are overly broad, seek information
6 that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence,
7 and seek confidential and private information. *See* Plaintiff’s Responses to Defendants’ [the
8 Clarks’] Non-Uniform Interrogatories, attached as Exhibit 1 to the Motion. The Club
9 incorporates the objections to the Interrogatories set forth in its response. *See* Ariz. R. Civ. P.
10 5(g)(2)(D); Motion, Exhibit 1.

11 The Club also incorporates the facts set forth in its motion for summary judgment and
12 separate statement of facts in support thereof. *See* Ariz. R. Civ. P. 5(g)(2)(D); Plaintiff’s Motion
13 for Summary Judgment in CV2014-015334 (Clarks) (1/13/16); Plaintiff’s Separate Statement of
14 Facts in Support of Its Motion for Summary Judgment in CV2014-015334 (Clarks) (1/13/16)
15 (“SOF”).

16 **II. THE MOTION SHOULD BE DENIED BECAUSE THE DISCOVERY SOUGHT IS**
17 **NEITHER RELEVANT NOR REASONABLY CALCULATED TO LEAD TO THE**
18 **DISCOVERY OF ADMISSIBLE EVIDENCE.**

19 Court rules governing discovery cannot be used to discover a cause of action or *defense*.
20 *E.g., Alberta Sec. Comm’n v. Ryckman*, 200 Ariz. 540, 547, ¶¶ 24–30, 30 P.3d 121, 128 (App.
21 2001); *City of Phoenix v. Peterson*, 11 Ariz. App. 136, 141, 462 P.2d 829, 834 (1969). *See also*
22 *Collens v. City of New York*, 222 F.R.D. 249, 253 (S.D.N.Y. 2004); *Mfr.’s Advert., Inc. v.*
23 *Pancoast*, 4 Conn. Cir. Ct. 668, 670, 238 A.2d 810, 812 (1967) (“A court should not order
24 answers filed to interrogatories for the purpose of enabling a party to ferret out evidence.
25 Interrogatories should not be used to enable a person to ascertain whether he has a cause of action
26 or defense, nor to permit a party to go on a ‘fishing expedition.’”); *Yorkshire Worsted Mills v.*
27 *Nat’l Transit Co.*, 325 Pa. 427, 430–31, 190 A. 897, 899 (1937) (“[I]nterrogatories must appear to
28 have a material connection with appellant’s case and cannot be used to enable it to cast about for
possible defenses or to fish for helpful information.”). Yet, that is precisely what the Clarks try to

1 do here—discover a claim or defense against the Club that excuses their breach of Contract. The
2 Clarks state that they “need to contact former club members to find out if they had to pay the full
3 penalty transfer fee to leave the club or if they were treated differently or what their
4 understanding of the contract with the club was.” Motion at 7:10–12. The Clarks assert that the
5 Club “has allowed some of its members to abandon their equity memberships without paying a
6 transfer fee at all or allowing some to pay a significantly discounted penalty or charge to abandon
7 their membership.” *Id.* at 4:9–11. The Clarks, however, present no facts to support this
8 contention, nor have they made any such allegation based on their information and belief in their
9 Answer, *see infra* 9:19–20. Instead, the Clarks seek to rely on information secured through the
10 Interrogatories to create a defense to use in this litigation. Such discovery is not proper under the
11 Arizona Rules of Civil Procedure and must be denied. *See State Farm Mut. Auto. Ins. Co. v.*
12 *Superior Court In & For Cty. of Maricopa*, 167 Ariz. 135, 138, 804 P.2d 1323, 1326 (App. 1991)
13 (providing that “[d]iscovery in civil cases should be controlled and managed by the court from the
14 onset” to prevent “wild fishing expeditions” and holding that the trial court abused its discretion
15 when granting a motion to compel answers to interrogatories where the interrogatories sought
16 irrelevant information and were overbroad).

17 In addition, the information sought here is not discoverable because it is irrelevant and not
18 reasonably calculated to lead to discovery of admissible evidence. *See Cornet Stores v. Superior*
19 *Court In & For Yavapai Cty.*, 108 Ariz. 84, 87, 492 P.2d 1191, 1194 (1972) (“[I]rrelevant matters
20 or those not reasonably calculated to lead to discovery of admissible evidence are not
21 discoverable.”) The Clarks claim that they need the information sought in the Interrogatories in
22 support of a defense that: (1) the Club construed its contracts with Members differently in the
23 past, *see* Motion at 4:1–7; and (2) engaged in disparate treatment in violation of A.R.S. § 10-
24 3610, *id.* at 4:8–14, 6:2–4. The Clarks argue that this alleged failure to treat members equally
25 renders the transfer fee unenforceable against them. *Id.* at 6:4–6. Even if the Club had acted
26 differently in the past, the Club is entitled to treat Members differently as a matter of law, both
27 contractually and otherwise. Therefore, such conduct provides the Clarks no legally cognizable
28 defense. Furthermore, even if these were viable defenses, the Clarks waived them when they

1 failed to assert them in their Answer.

2 **A. The Club is entitled to treat Members differently as a matter of law.**

3 It is undisputed that the Club is a *private* Club. *See* Complaint, ¶ 4 (“The Club is a private
4 equity golf, social, and fitness club”); Answer, ¶ 4 (“Admit.”). As a private Club, the Club
5 can treat people differently. More specifically, the Board of a private organization may treat
6 seemingly similar members in seemingly similar circumstances differently in the exercise of its
7 discretion. *See Lynn v. Pleasant Valley Country Club*, 2012 PA Super 211, 54 A.3d 915, 920
8 (2012) (affirming judgment in favor of a club that refused to grant membership privileges to a
9 member’s granddaughter under a bylaw provision even though the club granted membership
10 privileges to individuals for other members under that bylaw provision); *Eustace v. Dickey*, 240
11 Mass. 55, 84–85, 132 N.E. 852, 863 (1921) (“The directors cannot be said to have acted
12 arbitrarily or capriciously in removing one only [sic] of the trustees, because the same grounds
13 appear to have existed for removing all the trustees. Sound judgment may have dictated the
14 removal of one, and not all.”).

15 Moreover, the Contract allows the Club to treat people differently. As detailed in the
16 Club’s Motion for Summary Judgment, the Clarks’ Contract expressly incorporates the Bylaws,
17 as amended from time to time. The Bylaws, which constitute a contract between the Members
18 and the Club, set forth comprehensive provisions regarding the rights of the Members. *See*
19 *Samaritan Health Sys. v. Superior Court of State of Ariz.*, 194 Ariz. 284, 288, ¶ 13, 981 P.2d 584,
20 588 (App. 1998). In setting forth the rights and obligations of the Members, the Bylaws also
21 provide that the Club retains discretion to treat people differently. For example, the Bylaws
22 provide, “The Club, through the Board, may accept or reject any applicant in its sole and absolute
23 discretion, and the decision of the Club on any application shall be final.” 2014 Bylaws,
24 § 3.7.1.3. The Board may also establish a separate wait list for new applicants, charge a non-
25 refundable deposit for people placed on the wait list, and revise the wait list priority in its sole
26 discretion. *Id.* at § 3.7.1.4. The Board also retains discretion to allow a Member to upgrade
27 his/her Membership, *id.* at § 3.7.3, and to allow a Member to downgrade his/her Membership, *id.*
28 at § 3.7.4. The Board retains sole discretion to revise the Membership Resale Program. *Id.* at

1 § 4.2. It also has the sole discretion to suspend and/or terminate Members for non-payment of
2 dues, fees, charges, and assessments to the Club. *Id.* at § 6.1. The Bylaws, therefore, clearly and
3 unambiguously allow the Club to treat Members differently in its discretion, even if those
4 Members may be similarly situated. Because the Club can treat people differently as a matter of
5 law, evidence of any different treatment provides the Clarks no defense as to their breach of
6 contract.

7 **B. A.R.S § 10-3610 accords the Clarks no relief.**

8 A.R.S. § 10-3610 does not relieve the Clarks of their breach of contract. The statute
9 provides:

10 All members have the same rights and obligations with respect to voting,
11 dissolution, redemption and transfer, **unless the articles of incorporation or**
12 **bylaws establish classes of membership with different rights or obligations or**
13 **otherwise provide.** All members have the same rights and obligations with
respect to any other matters, **except as set forth in or authorized by the articles**
of incorporation or bylaws.

14 A.R.S. § 10-3610 (emphasis added). The Bylaws here do provide that Members have differing
15 rights and obligations with regard to resignation or transfer. For example, only Equity Members
16 in good standing can be a part of the Membership Resale Program. 2014 Bylaws, § 4.1. The
17 Bylaws also provide that all transfers must occur through the Club and that the Club can, in its
18 sole discretion, accept or reject a proposed transferee Member. Ruling at 2 (“To procure an
19 equity membership, an applicant, **after being approved by the Club . . .**”) (emphasis added);
20 2014 Bylaws, § 4.2 (“[A]ny prospective candidate for membership must submit to the Club for
21 the applicable Equity Membership . . . **If the candidate for membership is approved by the**
22 **Club** for membership pursuant to the terms of the Bylaws”) (emphasis added); *id.* at § 4.4
23 (“Equity Members who own property in the Desert Mountain Community are eligible to transfer
24 their Membership through the Club to the subsequent purchaser of the Member’s residence or lot,
25 **subject to the Club’s approval** of such purchaser for Membership”) (emphasis added); *id.*
26 at § 4.5 (“Equity Members are entitled, on a one time basis, to transfer their Memberships during
27 their lifetimes to a Spouse, Significant Other, an adult child, an adult grandchild or other family
28 member **authorized by the Board (in the Board’s sole discretion) who is approved by the**

1 **Club for Membership”)** (emphasis added). Thus, when a Member transfers his/her
2 Membership through the Club, the Club, under the Bylaws, retains discretion to approve or reject
3 the purchaser.

4 *Lynn v. Pleasant Valley Country Club*, 2012 PA Super 211, 54 A.3d 915, 920 (2012) is
5 illustrative. In *Lynn*, a member requested a club to add his granddaughter onto his membership
6 pursuant to a section of the current bylaws that stated, “member shall be entitled to designate
7 someone of the opposite sex who shall be entitled to the same privileges as the member provided
8 however that before such designated person be permitted to use club facilities such designated
9 person must be approved by the Board of Governors.” *Id.* at 917. After the Board refused the
10 member’s request, the member sued seeking injunctive and/or declaratory relief. *Id.* at 916. The
11 member argued that the Board applied the bylaw provision inconsistently as it granted other
12 members’ requests to add individuals to their memberships to receive privileges under this
13 provision and that such inconsistent treatment violated Pennsylvania statutes. *Id.* at 919–20. The
14 Court explained that the Board exercised its discretion in choosing to deny the member’s request
15 to add his granddaughter. *Id.* Consequently, the Court refused to substitute its judgment for that
16 of the Board, and it found no statutory violation. *Id.*

17 Like the bylaw at issue in *Lynn*, the Bylaws here provide the Club with discretion which
18 may result in different treatment of different Members seeking to transfer their Memberships or
19 have them reissued. The exercise of such discretion cannot violate A.R.S. § 10-3610 and,
20 therefore, A.R.S. § 10-3610 provides no excuse for the Clarks’ breach of contract, and
21 information related to other members is neither relevant nor reasonably likely to lead to the
22 discovery of admissible evidence.

23 **C. Changes in the value of Equity Memberships do not excuse the Clarks’**
24 **breach of their Contract.**

25 The Clarks also argue the information requested supports their defense: that the Contract
26 is unenforceable because the “fundamental assumptions underlying” the parties’ relationship
27 failed, given changes in the Membership value and because the procedures for transferring
28 Memberships through the Club under the Bylaws are “not what defendants and many other equity

1 members had in mind when they purchased their memberships.” See Answer, ¶ 42; Motion at
2 2:17–3:9. Changes in the value of Club Memberships do not permit the Clarks to breach the
3 Contract. See Ruling at 2, 5 (holding that the Bylaws “can only be interpreted to preclude a
4 member from resigning and ceasing payment of dues” even though “[u]nfortunately, the value of
5 the equity memberships and the pool of prospective buyers have substantially declined, making it
6 difficult for an equity member seeking to divest herself of her membership to even recoup the
7 initial Membership Contribution.”). In fact, the Clarks expressly acknowledged and agreed the
8 purpose of their Equity Membership was solely recreational, not an investment:

9 **Member hereby acknowledges and agrees that Member acquired the Equity**
10 **Golf Membership for the sole purpose of obtaining recreational use of the**
11 **Club Facilities, and not as an investment or for economic gain or profit.**
12 **Equity Golf Memberships at the Club are offered exclusively for the purpose**
13 **of permitting Members the recreational use of the Club Facilities. Equity**
14 **Golf Memberships should not be viewed as an investment and no Member**
15 **should expect to derive any economic benefits or profits from Equity Golf**
16 **Membership in the Club.**

17 Membership Conversion Agreement at 2 (bold emphasis in original), attached as Exhibit A-1 to
18 SOF. Having voluntarily agreed that the Equity Membership was not an investment or for
19 economic gain or profit, the Clarks cannot now claim they expected a return of or on their
20 Membership Contribution. Moreover, even if the Clarks’ statements are true (which they are
21 not)—that a drop in Membership value and Contractual obligations barring any unilateral
22 termination of Membership were not what Equity Members had in mind—the statements do not
23 support any legally cognizable defense for the Clarks.

24 Changed economic circumstances, including a dramatic downturn in a market or a
25 decrease in the value of the bargain, is no excuse for non-performance of a contract. *E.g., Karl*
26 *Wendt Farm Equip. Co. v. Int’l Harvester Co.*, 931 F.2d 1112, 1117 (6th Cir. 1991) (holding
27 dramatic downturn in farm equipment market did not excuse a party’s unilateral termination of a
28 contract); *Measday v. Kwik-Kopy Corp.*, 713 F.2d 118, 126 (5th Cir. 1983) (“[A] party to a
contract is not excused from performance simply because it does not find the economic end of the
contract to be ideal.”); *Elavon, Inc. v. Wachovia Bank, Nat. Ass’n*, 841 F. Supp. 2d 1298 (N.D.
Ga. 2011) (holding banks breached contract by unilaterally cancelling it, and the 2008 economic

1 downtown did not excuse that breach); *Ad Two, Inc. v. City & Cty. of Denver*, 983 P.2d 128, 131
2 (Colo. App. 1999) *aff'd sub nom. Ad Two, Inc. v. City & Cty. of Denver ex rel. Manager of*
3 *Aviation*, 9 P.3d 373 (Colo. 2000) (“[A] decrease in the value of the bargain cannot provide an
4 excuse for non-performance.”) (citing *Ruff v. Yuma Cty. Transp. Co.*, 690 P.2d 1296, 1298 (Colo.
5 App. 1984)). Thus, the fact that the value of an Equity Membership has decreased is irrelevant as
6 such change in economic circumstances does not allow the Clarks to resign unilaterally and
7 terminate their Contractual obligations.

8 **D. The Club is entitled to change the Bylaws.**

9 The Bylaws prohibit any unilateral resignation of Club Membership and provide for the
10 reissuance and transfer of Membership under certain conditions. Ruling at 4–5; SOF ¶¶ 10–11.
11 The Bylaws are also subject to change under the procedures set forth for amending them. 2014
12 Bylaws, § 15. In fact, the Clarks agreed to be bound by the Bylaws as they may be amended from
13 time to time. SOF ¶ 6. They even expressly acknowledged that they had received, read, and
14 understood the Bylaws and Conversion Agreement and agreed to be subject to them when
15 executing the Conversion Agreement. SOF ¶ 8.

16 The Clarks argue that the Club “amended its bylaws, without defendants’ consent”⁴
17 Motion at 2:14–15. This argument wholly ignores the fact that the Clarks agreed that the Bylaws
18 could be amended. The Club’s initial Bylaws, dated December 31, 2010, expressly provided that
19 the Bylaws “may be amended at the Annual Meeting or any special meeting of the Membership
20 provided written notice is given at least thirty (30) days prior to the regular or called meeting at
21 which the vote is taken.” 2010 Bylaws, § 15. The Bylaws further explained that amending the
22 Bylaws is a “Major Decision” and requires a quorum of 50% “of all of the Equity Members
23 eligible to vote” present and then a “majority vote of the votes cast of the quorum shall be
24 required to amend the Bylaws.” *Id.* All Bylaws subsequent to the 2010 Bylaws contain this same
25 procedure for amendments. 2012 Bylaws, § 15; 2013 Bylaws, § 15; 2014 Bylaws, § 15. Having

26 ⁴ The change of which the Clarks complain is the change in the Transfer Fee from twenty
27 percent (20%) of the amount received by the new “transferee” Member to the **greater** of this
28 twenty percent figure or \$65,000. This change was effected by the 2010 Bylaws. *Compare*
Bylaws of The Desert Mountain Club (3/31/06) (Exh. E to Complaint), § 8.1.2 *with* Desert
Mountain Club Bylaws (12/31/10) (Exh. H to Complaint), § 4.6.1.

1 voluntarily agreed to the Bylaws, which permit the Club to amend the Bylaws in accord with § 15
2 of the Bylaws, the Clarks consented to all future amendments of the Bylaws.

3 Members of a private association can change membership requirements through the
4 election of board members or otherwise following procedures as outlined in the bylaws.
5 *Nickerson v. Green Valley Recreation, Inc.*, 228 Ariz. 309, 320, ¶ 27, 265 P.3d 1108, 1119 (App.
6 2011). More specifically, a private club, like the Club, can amend its bylaws to change the terms
7 under which its members are entitled to resign or transfer their memberships. *See Hamlet*
8 *Country Club, Inc. v. Allen*, 622 So. 2d 1081, 1082 (Fla. Dist. Ct. App. 1993); *McCaffrey v.*
9 *Pittsburgh Athletic Ass'n*, 448 Pa. 151, 293 A.2d 51 (1972). “The fact that the terms of the
10 Contract were subject to change does not mean that there was no meeting of the minds.” *In re*
11 *Rappaport*, 517 B.R. 518, 530 (Bankr. D.N.J. 2014) (finding contract enforceable even where it
12 provided one party with discretion to change any membership term because the contract clearly
13 stated the party retained sole discretion to make changes). The Club is entitled, as a matter of
14 law, to change the Bylaws even if this results in Members being treated differently than prior
15 Members under past Bylaws. The Clarks’ hindsight “buyers’ remorse” is not a valid defense
16 under these circumstances.

17 **E. Even if disparate treatment or A.R.S. § 10-3610 were defenses, the Clarks**
18 **waived these defenses by not raising them in their Answer.**

19 Notably, the Clarks’ Answer does assert disparate treatment or A.R.S. § 10-3610 as
20 defenses or include any counterclaim against the Club. *See Answer (3/23/15)*. “It is well
21 established that any defense not set forth in an answer or pre-answer motion to dismiss is
22 waived.” *In re Estate of Cortez*, 226 Ariz. 207, ¶ 6, 211, 245 P.3d 892, 896 (App. 2010).
23 Moreover, the Clarks’ filings early in the litigation also fail to mention any disparate treatment or
24 A.R.S. § 10-3610. *See Motion for Judgment on the Pleadings (5/26/15)*; Joint Rule 16
25 Scheduling Conference Report (6/4/15). In addition, paragraph 38 of the Club’s Complaint
26 alleged:

27 The Club has, at all times, fully performed its obligations to Defendants under the
28 Membership Agreement, the Conversion Agreement, the Bylaws, the Plan, and
the Club Rules and Regulations.

1 Complaint, ¶ 38. After the Clarks denied paragraph 38 (Answer, ¶ 38), the Club propounded an
2 interrogatory to the Clarks requesting that they identify the factual allegations denied in paragraph
3 38. *See* Answers to Plaintiff’s Non-Uniform Interrogatories (7/20/15), Interrogatory No. 9, at
4 5:3–14, attached hereto as **Exhibit 1**. The Clarks’ answer to this interrogatory stated that
5 paragraph 38 “is a legal conclusion, so there is no averment to be admitted. These defendants
6 disagree with this legal conclusion, so the paragraph was denied.” *Id.* When asked to state each
7 fact upon which the Clarks based their denial, identify all persons who may have knowledge
8 regarding the fact, and identify all documents that references, supports, or establishes that fact,
9 the Clarks responded “Not applicable.” *Id.* If the Clarks were asserting a factually-based defense
10 that the Club failed to perform its obligations to the Clarks by engaging in some disparate
11 treatment or by violating A.R.S. § 10-3610, the Clarks should have raised this defense in their
12 Answer and explained the basis of this defense in response to Interrogatory No. 9.

13 The Clarks did not mention disparate treatment or A.R.S. § 10-3610 until after the Court’s
14 Ruling in this matter. The Ruling (which followed consolidation of the Clark and Fabian cases)
15 addressed three separate motions: (1) the Club’s Motion for Summary Judgment against the
16 Fabians; (2) the Fabians’ Motion for Judgment on the Pleadings; and (3) the Clarks’ Motion for
17 Judgment on the Pleadings.⁵ In the Ruling, the Court rejected the Clarks’ arguments that: (1)
18 nothing in the Bylaws precluded them from unilaterally resigning and terminating their dues; and
19 (2) A.R.S. § 10-3620 permits them to do so. Ruling at 3–5. After the Court rejected these
20 defenses, the Clarks then stated, for the first time in the parties’ Second Joint Status Report, that
21 A.R.S. § 10-3610 provides a defense as it requires the Club to treat Members the same, and the
22 Club “has allowed some members to leave without payment of the claims that are being asserted
23 against the Clarks, so the Clarks are entitled to the same treatment.” *See* Second Joint Status
24 Report and Request for Rule 16 Conference in CV2014-015334 (10/30/15) at 4:9–12. The
25 Clarks, however, did not make this argument when it moved for reconsideration of the Court’s
26 Ruling. *See* Motion for Reconsideration (11/6/15).

27 ⁵ This Court has previously denied a Motion to Dismiss filed by the Grahams, which raised
28 substantially the same issues as those addressed by the Court in rejecting the Motions for
Judgment on Pleadings filed by the Clarks and the Fabians.

1 The Clarks' arguments based on disparate treatment and A.R.S. § 10-3610 are last ditch
2 efforts to avoid the writing on the wall as to the defenses that they did raise in their Answer. The
3 Clarks have failed to properly raise disparate treatment and A.R.S. § 10-3610 as defenses and,
4 therefore, such defenses have been waived.

5 **III. THE MOTION SHOULD BE DENIED BECAUSE THE INTERROGATORIES**
6 **ARE OVERBROAD.**

7 All of the Interrogatories are overbroad in time period and scope. Interrogatory No. 1
8 seeks identification and contact information for all current and former Club Members. Similarly,
9 Interrogatories Nos. 3, 4, 5, 6, and 7 seek identification and information pertaining to current and
10 former Club Members. The Club has had more than 3,000 Members over the course of its
11 existence and has approximately 2,000 Members at any given point in time. The dispute here
12 involves the failure of the Clarks to honor their Contractual obligations since January 1, 2014.
13 The Clarks have not shown that other current or former Members have discoverable information
14 as to the Clarks' Contractual default. The Clarks have also failed to take any steps appropriately
15 to limit the Interrogatories.

16 The Interrogatories are not limited by Membership type. The Club currently offers two
17 types of Equity Memberships: (1) Equity Golf Memberships; and (2) Equity Club Memberships
18 (Lifestyle). Ruling at 2; 2014 Bylaws, § 3.2. The Club also offers certain categories of non-
19 equity Memberships. 2014 Bylaws, § 3.3. The Club can even issue "Honorary Memberships."
20 *Id.* at § 3.4. At all relevant times, the Clarks were Equity Golf Members of the Club. Ruling at 2.
21 Yet, the Interrogatories are not limited to only those current or former Members with the same
22 type of Membership as the Clarks.

23 The Interrogatories are not limited to circumstances similar to the Clarks. More
24 specifically, the Interrogatories seek information about former Members who were expelled.
25 Article 6 of the Bylaws governs Member expulsions. The Clarks remain Equity Members of the
26 Club and have not been expelled. This case involves whether the Clarks as Equity Members can
27 unilaterally terminate their obligations under their Contract. Article 4 of the Bylaws provides the
28 only ways in which Equity Members can terminate their Equity Membership and liability to the

1 Club. SOF ¶ 11. As a result, information regarding former Members who were expelled or
2 removed under Article 6 of the Bylaws will not lead to discoverable information as to the Clarks’
3 Contractual default, which involves whether the Clarks terminated their Equity Membership and
4 liability to the Club in accord with Article 4 of the Bylaws.

5 Interrogatory No. 2, which seeks identification and information pertaining to all Club
6 officers and employees since its inception, is also overbroad in time period and scope. During
7 peak season, the Club employs over 600 individuals, and it has employed about 2,000 people
8 since inception. The Club employs individuals in a wide range of areas including food service,
9 agronomy, golf course maintenance, fitness and others. The vast majority of Club employees
10 have no knowledge of the terms of the Club’s agreements, the Bylaws, the identities of the
11 Clarks, or the nature of the Clarks’ conduct that has given rise to this litigation. In response to the
12 Club’s objections, the Clarks revised Interrogatory No. 2 (*see* Exhibit C to Motion), yet the
13 attempted revision fails to narrow Interrogatory No. 2 by time period or scope. The revised
14 Interrogatory No. 2 seeks identification and information for “all administrative and managerial
15 officers and employees” of the Club since its inception who have had any responsibility
16 interacting with Club Members. *Id.* “All administrative and managerial officers and employees”
17 includes a vast number of people who play no role in the Membership issues present in this
18 litigation. Despite its objections, the Club responded to Interrogatory No. 2 with names and
19 information pertaining to seven individuals employed by the Club who have knowledge of the
20 pertinent provisions of the Club’s Membership Agreements, Bylaws, other Club documents, and
21 the facts surrounding the Clarks’ attempted resignation from the Club. Motion, Exhibit 1 at 7:24–
22 8:13. The Clarks fail to show how they need to contact any Club employees beyond the ones
23 with pertinent knowledge.

24 Interrogatory No. 3 requests contact information for individuals listed in answer number
25 11(b) to plaintiff’s non-uniform interrogatories, which includes current and former Club
26 Members, officers, and employees as well as employees of a developer, Desert Mountain
27 Properties Limited Partnership, which owned and operated the Club’s predecessor (SOF ¶ 4).
28 Employees of the developer which owned and operated the Club’s predecessor (which operated

1 prior to December 31, 2010) likely have no knowledge of the terms of the Club's agreements, the
2 Club Bylaws, the identities of the Clarks, or the nature of the Clarks' conduct from 2013 on that
3 has given rise to this litigation.

4 For these reasons, all of the Interrogatories are overly broad, and the Court should deny
5 the Motion to Compel.

6 **IV. THE MOTION SHOULD ALSO BE DENIED BECAUSE ANY NEED FOR THE**
7 **INFORMATION SOUGHT BY THE CLARKS IS FAR OUTWEIGHED BY THE**
8 **CONFIDENTIALITY AND PRIVACY INTERESTS OF THE NON-PARTIES TO**
9 **WHICH THE DISCOVERY RELATES.**

10 The Clarks seek to compel the Club to identify all persons who have been Members of the
11 Club at any point in time. The Members, however, are high net worth individuals who joined an
12 exclusive private Club expecting that the Club will keep their information confidential. The Club
13 has taken measures to maintain Member confidentiality. *See* Motion, Exhibit 1 at 4:14–6:20. For
14 the reasons previously discussed, the Clarks have no need for this information in order to defend
15 against the Club's claims. Moreover, even if they had a need for this information, it is already in
16 their possession. The Clarks have been Members of both the Club and its predecessor since at
17 least 1996. They have access to the Club Membership Directory (and have had access to its prior
18 iterations) that sets forth the identities of most Club Members. The Clarks, therefore, have no
19 need to obtain this information from the Club.

20 The Clarks argue that the Club's objection based on confidentiality fails because the Club
21 should have sought and obtained a protective order. The Clarks' argument wholly ignores the
22 fact that confidentiality was only one of the Club's objections. As detailed above, the Club
23 objected on additional grounds including that the Interrogatories were not relevant, likely to lead
24 to discovery of admissible evidence, and overly broad. Given these objections, the Club was not
25 obligated to seek a protective order as a protective order would not have resolved the Club's other
26 objections. The confidentiality and privacy interests held by these current and former Members,
27 who are non-parties to this litigation, far outweigh the Clarks' need for this information,
28 especially where the information sought is neither relevant nor reasonably calculated to lead to
the discovery of admissible evidence.

1 **V. THE COURT SHOULD NOT AWARD ATTORNEYS' FEES AND COSTS**
2 **INCURRED IN BRINGING THE MOTION TO THE CLARKS.**

3 An award of attorneys' fees and costs is not mandatory under Arizona Rule of Civil
4 Procedure 37(a) if "the court finds that the motion was filed without the movant's first making a
5 good faith effort to obtain the disclosure or discovery without court action, or that the opposing
6 party's nondisclosure, response, or objection was substantially justified or that other
7 circumstances make an award of expenses unjust." Ariz. R. Civ. P. 37(a).

8 The Club's nondisclosure, response, and objections were substantially justified. The Club
9 has raised valid objections to the Interrogatories as detailed herein. Six of the seven
10 Interrogatories sought confidential and private information of current and former Members. The
11 Club has expressly committed that it will keep such information regarding its Members and
12 prospective Members confidential. When joining the Club, Members expect the Club to maintain
13 their privacy and the confidentiality of their personal information. The Application for
14 Membership in the Club is conspicuously marked "CONFIDENTIAL" on its cover. The Club
15 also advises applicants that it will conduct a background investigation, and they must sign an
16 authorization in which they agree that all information gathered by or on behalf of the Club with
17 regard to the applicant's Application for Membership will be "privileged, confidential and not
18 subject to disclosure to myself or any other person other than authorized Company personnel and
19 Palm Beach Security, Inc. and its employees and agents" In addition, the Club's rules and
20 regulations provide that the names, addresses, email addresses, and telephone numbers of the
21 Members as set forth in the Club's Membership Directory are to be treated as confidential.
22 Consistent with its obligation to preserve the confidentiality of its Members' personal
23 information, the Club could not respond to the Interrogatories absent a court order. Disclosing
24 such personal, private, and confidential information of the Club's employees and Members absent
25 a court order would subject the Club to potential liability to such individuals.

1 In addition, upon conferring with the Clarks in an attempt to limit the overbroad
2 Interrogatories Nos. 5 and 6, the Club offered to provide, upon the entry of an appropriate
3 protective order, aggregate information regarding the number of Members who have departed
4 since December 31, 2010 broken down by categories as well as the circumstances under which
5 they departed the Club. See Email (1/15/16) in Exhibit C to Motion. The Club asked the Clarks
6 if such production would suffice and stated that the Club would be willing to entertain further
7 interrogatories if after review of such information, the Clarks believed something further is
8 warranted. Instead of working out a protective order with the Club, the Clarks refused to engage
9 in further discussions with the Club and filed the subject Motion. The Clarks have failed to act in
10 good faith with regard to negotiating an appropriate protective order.

11 **VI. CONCLUSION**

12 The Motion should be denied as it seeks information that cannot provide the Clarks with a
13 defense as a matter of law and, therefore, is neither relevant nor reasonably calculated to lead to
14 the discovery of admissible evidence. The Interrogatories are also overly broad and seek the
15 personal, private, confidential information of non-parties. The Clarks' need for such information
16 is clearly outweighed by the interests of the non-parties. The Court should also deny the Clarks'
17 request for attorneys' fees and costs under Arizona Rule of Civil Procedure 37(a) as the Club's
18 nondisclosure, response, and objections were substantially justified; instead, the Court should
19 award the Club the attorneys' fees and costs it has incurred in defending against the Motion under
20 the same Rule.

21 DATED this 12th day of February, 2016.

22 FENNEMORE CRAIG, P.C.

23
24 By /s/ Jennifer Blasko

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