COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

DESERT MOUNTAIN CLUB, INC., Plaintiff/Appellee, v. ERIC GRAHAM, et al., Defendants/Appellants.	Court of Appeals Division One No. 1 CA-CV 17-0100 Maricopa County Superior Court No. CV2014-015333 CV2014-015334 CV2014-015335 (Consolidated)

ANSWERING BRIEF OF PLAINTIFF/APPELLEE DESERT MOUNTAIN CLUB, INC.

FENNEMORE CRAIG, P.C. (No. 00022300)

Christopher L. Callahan (No. 009635)
Theresa Dwyer (No. 010246)
Jennifer L. Blasko (No. 031540)
2394 East Camelback, Suite 600
Phoenix, AZ 85016-3429
Telephone (602) 916-5000
Email: ccallahan@fclaw.com
Email: tdwyer@fclaw.com
Email: jblasko@fclaw.com

Attorneys for Plaintiff/Appellee Desert Mountain Club, Inc.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

RULES

OTHER

INTRODUCTION

Eric and Rhona Graham ("Grahams") and Thomas and Barbara Clark ("Clarks") (collectively, "Appellants") purchased equity memberships in a private golf and recreational club, Desert Mountain Club, Inc. ("Club"), which is owned and operated by its equity members. In so doing, Appellants expressly agreed to comply with the Club's bylaws ("Bylaw(s)"). Appellants in fact acknowledged that they had read and understood their obligations under the Bylaws.

It is undisputed that the Bylaws have always required the Club's equity members (1) to sell or otherwise transfer memberships **only** through the Club, and (2) to continue to pay Club dues, assessments, and charges until such sale or transfer is complete. Nevertheless, in 2014, Appellants unilaterally "resigned" from the Club, effectively abandoning their memberships. Appellants refused to work through the Club to resell or transfer their memberships. They further refused to pay any Club dues, assessments, and charges following their purported "resignations." In short, Appellants breached their contracts with and damaged the Club.

In the superior court, Appellants acknowledged their respective contracts with the Club. Appellants also admitted their non-compliance with the Bylaws and their refusal to pay the amounts owed thereunder. Appellants maintained,

however, that A.R.S. § 10-3620 and/or A.R.S. § 10-3610 relieve them from their contractual obligations.

Appellants' statutory defenses fail. Neither A.R.S. § 10-3620 nor A.R.S. § 10-3610 excuses Appellants' contractual breaches. Section 3620 expressly permits a nonprofit entity, like the Club, to establish the prerequisites for any divestiture of membership, provided that such requirements are set forth in the entity's bylaws or articles of incorporation. Section 3610 similarly provides that the rights and obligations need not be the same for all nonprofit members, and allows the entity to treat its members differently under corporate articles or bylaws. Here, the Club acted in accord with these statutes. Its Bylaws establish the exclusive terms for the divestiture of any Club membership and give the Club discretion to address defaulting members as it sees fit. Appellants knowingly and willingly joined the Club and agreed to these terms.

Contrary to Appellants' claim (*see* Opening Brief at 1), the Club's equity members control membership divestiture and their ability to leave the Club. As plainly stated in the Bylaws, Club membership is not a financial investment designed to provide its equity members with any return, but a joint ownership interest in the Club. Appellants purposefully chose to ignore their contractual obligations and the duties owed to other equity members, which included specific requirements for ending membership. As they did in the superior court, Appellants

ask the Court to rewrite the subject contracts for their sole benefit. The law does not countenance such a result.

Given the law and the lack of any material factual dispute, the superior court properly granted summary judgment for the Club. This Court should affirm.

COMBINED STATEMENT OF THE CASE AND THE FACTS

I. Formation of the Club and Equity Memberships

The Club is a private, nonprofit golf and recreational club that provides various facilities and services to its members. IOR 42 (CV2014-015333), ¶ 1.[1] The Club acquired the assets of a predecessor club owned by the original developer ("Developer"), was incorporated on or about December 30, 2010, and has been owned by its members ("Equity Members") ever since. *Id.*, ¶ 2.

The Club offers two types of equity memberships (collectively, "Equity Membership(s)" or "Membership(s)"): (1) an Equity Golf Membership ("Golf Membership"), which allows the member full access to all facilities; and (2) an Equity Club Membership ("Lifestyle Membership"), which allows the member use of all non-golf facilities. *Id.*, ¶ 3.[2] Equity Memberships are governed by the Bylaws, as amended from time to time. *See, e.g.*, IOR 49 (CV2014-015333), Ex. A-5 (2014 Bylaws). For example, to procure an Equity Membership, an applicant must be approved by the Club, make an initial "Membership

[1] "IOR" refers to the Indexes of Record (filed February 8, 2017, and amended May 31, 2017). Because there are three indexes (one for each case through consolidation under No. CV2014-015333), IOR citations include the specific underlying case number for ease of identification.

[2] The Club also has non-equity members, who originally acquired their memberships from the Developer. IOR 49 (CV2014-015333), Ex. A-5 (2014 Bylaws), § 3.3. The Club itself has never offered non-equity memberships. *Id.*

Contribution" (i.e., the purchase price), and pay monthly dues, as well as other charges and assessments, incurred thereafter. *E.g.*, *id.*, § 3.7.1.2.

II. Membership Divestiture

The Bylaws also contain comprehensive provisions governing the divestiture of Equity Memberships. *E.g.*, IOR 42 (CV2014-015333), ¶ 10; IOR 120 (CV2014-015333), ¶ 10; IOR 54 (CV2014-015334) at 4. The Bylaws have always required Equity Members (including Appellants) (1) to sell or transfer their Equity Memberships only through the Club, and (2) to continue to pay dues, assessments, and other charges incurred until the sale or transfer is complete.[3] *E.g.*, IOR 43 (CV2014-015333), art. 4 of Exs. A-2, A-3; IOR 49 (CV2014-015333), art. 4 of Exs. A-4, A-5. The Bylaws also grant the Club discretion to address Equity Members who refuse to comply with Bylaw requirements for divestiture or default on their contractual obligations in any ways. *E.g.*, IOR 49 (CV2014-015333), Ex. A-5, §§ 4.2, 6.1.

Moreover, the Club has always had established programs that governed the manner in which Equity Members could transfer their Memberships, through the

[3] The original Club Bylaws were adopted in 2010 by a Membership vote of its Equity Members. *See, e.g.*, IOR 120 (CV2014-015333), Ex. 1, ¶ 4 & Ex. 2. Appellants, in fact, voted for adoption of the 2010 Bylaws. IOR 118 (CV2014-015333), Ex. 1, ¶¶ 6-7, Ex. 2; IOR 120 (CV2014-015333), Ex. 1, ¶¶ 6-7, Ex. 2. The Bylaws have been amended four times since 2010, each time in accord with the operative provision governing amendments. IOR 120 (CV2014-015333), ¶ 32. The most recent amendment occurred in early 2017 after the judgment below and, therefore, the 2017 Bylaws are not in the record.

Club, to prospective new members. *E.g.*, IOR 43 (CV2014-015333), Ex. A-2, §§ 4.1, 4.2 (detailing how sales/transfers occur via the "Surrender List"); *id*. at Ex. A-3, §§ 4.1, 4.2 (similar); IOR 49 (CV2014-015333), Ex. A-4, §§ 4.1, 4.2 (similar albeit called the "Reissuance List"). Consistent with the Bylaws, the Club offered programs allowing Equity Members' input on the resale or transfer price of Memberships. *See, e.g.*, IOR 43 (CV2014-015333), Ex. A-3, § 4.7; IOR 49 (CV2014-015333), Ex. A-5, §§ 4.1, 4.2. Since 2014, the Club has offered the Membership Resale Program through which an Equity Member may both tender his/her Membership to the Club for resale, and set the price at which that Membership will be offered to prospective new members. IOR 49 (CV2014-015333), Ex. A-5, §§ 4.1, 4.2. When sold, the selling Member receives an amount equal to the purchase price (the buyer's Membership Contribution), less a transfer fee equal to the greater of 20% of the buyer's Membership Contribution or $65,000. *Id*. at § 4.7.1.

III. Unilateral "Resignations" from the Club

A. The Grahams

On or about November 22, 2010, as part of the Club's formation and transition to Equity Member ownership, the Grahams entered into a Membership Conversion Agreement with the Club ("Graham Agreement"). IOR 43 (CV2014-015333), Ex. A-1. Under the Graham Agreement, the Grahams converted their

membership with the Developer into a Golf Membership with the Club.[4] *Id*. at 1. The Grahams agreed to: (1) abide by the terms of the Graham Agreement, which incorporated the Club Bylaws as amended; and (2) pay all dues, fees, assessments, and other charges, as provided in the Bylaws. *Id*. The Grahams explicitly acknowledged that they had received, read, and understood both the Graham Agreement and the Bylaws. *Id*. The Graham Agreement expressly superseded any and all past agreements between the Grahams and the Developer. *Id*. The Graham Agreement also stated that "Equity Golf Memberships may be transferred only through the Club, subject to the terms, conditions and restrictions set forth in the Club Bylaws." *Id*.

The Grahams "resigned" from the Club by written notice dated May 20, 2014. IOR 42 (CV2014-015333), ¶ 13; IOR 115-116 (CV2014-015333), ¶ 13. Despite repeated demands from the Club, the Grahams stopped paying dues and all other charges on that same date. IOR 42 (CV2014-015333), ¶ 14; IOR 115-116 (CV2014-015333), ¶ 14. As of January 13, 2016, the Grahams owed dues totaling $37,022.09, excluding the $65,000 fee owed upon resale or transfer of their Equity Membership. *E.g.*, IOR 42 (CV2014-015333), ¶¶ 15-16; IOR 129 (CV2014-015333) at 2:12-21 & Ex. B., ¶ 6.

[4] Appellants had previously made their Membership Contribution to the Developer. IOR 43 (CV2014-015333), Ex. A-1; IOR 45 (CV2014-015333), Ex. A-1; *see also* Opening Brief at 1.

B. The Clarks

On December 21, 2010, the Clarks also entered into a Membership Conversion Agreement ("Clark Agreement") with the Club. IOR 45 (CV2014-015333), Ex. A-1. Under the Clark Agreement, the Clarks converted their membership with the Developer into a Golf Membership with the Club.[5] *Id*. In exchange, the Clarks agreed to: (1) abide by the terms of the Clark Agreement, which incorporated the Club Bylaws as amended; and (2) pay all dues, fees, assessments, and other charges, as provided in the Bylaws. *Id*. The Clarks explicitly acknowledged that they had received, read, and understood both the Clark Agreement and the Club's Bylaws. *Id*. The Clark Agreement expressly superseded any and all past agreements between the Clarks and the Developer. *Id*. The Clark Agreement also stated that, "Equity Golf Memberships may be transferred only through the Club, subject to the terms, conditions and restrictions set forth in the Club Bylaws." *Id*.

On June 26, 2013, the Clarks surrendered their Golf Membership to the Club for reissuance as provided in the Bylaws. IOR 44 (CV2014-015333), ¶ 13; IOR 115-116 (CV2014-015333), ¶ 13; IOR 50 (CV2014-015333), Ex. A-6. Clearly, the Clarks understood their Bylaws and their contractual obligations. Nevertheless, the Clarks later "resigned" their Membership on January 1, 2014 and

[5] *See* n.4 *supra*.

ceased payment of all dues and other charges. IOR 44 (CV2014-015333), ¶ 15; IOR 115-116 (CV2014-015333), ¶ 15; IOR 50 (CV2014-015333), Ex. A-7. As of January 13, 2016, the Clarks owed dues totaling $47,531.74, excluding the $65,000 fee owed upon resale or transfer of their Equity Membership. *E.g.*, IOR 44 (CV2014-015333), ¶¶ 17-18; IOR 129 (CV2014-015333) at 2:12-21 & Ex. B, ¶ 10.

C. The Fabians

Barry and Lori Fabian ("Fabians") purchased their Golf Membership through an Equity Golf Membership Agreement ("Fabian Agreement") executed on March 29, 2012. IOR 49 (CV2014-015333), Ex. A-8. In the Fabian Agreement, the Fabians agreed to pay "monthly dues and . . . all other fees, assessments and charges as the Club may establish, all of which are subject to change from time to time." *Id*. at Ex. A-8, § 2. The Fabians expressly acknowledged that they had received, read, and understood both the Fabian Agreement and the Club's Bylaws. *Id*. at Ex. A-8, unnumbered paragraphs preceding § 1 & § 4.

On January 1, 2014, the Fabians asked to downgrade from a Golf Membership to a Lifestyle Membership. IOR 15-16 (CV2014-015335), ¶ 13 & Ex. 5. They threatened to stop paying dues if the Club refused. *See id.* at Ex. 5. On February 3, 2014, the Fabians "resigned" their Golf Membership, "effective

January 1, 2014," and stopped paying their dues and all other charges. *Id*., ¶¶ 14-15 & Ex. 6.

IV. Litigation in the Superior Court

The Club sued Appellants and the Fabians (collectively, "Defendants") separately in December 2014. Each complaint alleged claims for breach of contract and declaratory relief. All of the Defendants acknowledged their Agreements[6] and the Bylaws, including the requirements set forth therein. *E.g.*, IOR 42 (CV2014-015333), ¶¶ 5-10; IOR 44 (CV2014-015333), ¶¶ 5-10; IOR 115-116 (CV2014-015333), ¶¶ 5-10; IOR 15 (CV2014-015335), ¶¶ 3-6; IOR 25 (CV2014-015335), ¶¶ 3-6. Defendants even admitted their non-compliance with the Bylaws and their refusal to pay the amounts owed thereunder. *E.g.*, IOR 42 (CV2014-015333), ¶¶ 13-14; IOR 44 (CV2014-015333), ¶¶ 13-16; IOR 115-116 (CV2014-015333), ¶¶ 13-16; IOR 15 (CV2014-015335), ¶¶ 14-15; IOR 25 (CV2014-015335), ¶¶ 14-15. Defendants argued, however, that A.R.S. § 10-3620 and/or A.R.S. § 10-3610 relieve them of their contractual obligations.

A. Initial Motion Practice

In May 2015, the Club moved for summary judgment against the Fabians. IOR 14 (CV2014-015335). In response, the Fabians argued that nothing in the Bylaws prevented them from resigning unilaterally, and that A.R.S. § 10-3620

[6] "Agreements" refers collectively to the Graham Agreement, Clark Agreement, and Fabian Agreement.

permitted such resignation without further liability. IOR 18 (CV2014-015335) at 2:6-10. The Fabians themselves moved for judgment on the pleadings raising the same defenses and arguments presented in their response to the Club's summary judgment motion. IOR 46 (CV2014-015334) at 3:7-12; IOR 49 (CV2014-015334) at 5:22-6:2. Appellants also raised the identical arguments in their own lawsuits, by filing dispositive motions under ARCP 12(b)(6) and ARCP 12(c).[7] IOR 14 (CV2014-015333); IOR 14 (CV2014-015334).[8]

B. Piecemeal Consolidation

The Fabian and Clark cases were consolidated before the Honorable Dawn Bergin (under CV2014-015334) on July 6, 2015. IOR 44 (CV2014-015334). The Grahams, however, would not initially agree to consolidation and their case continued separately before the Honorable David B. Gass. *See* IOR 27 (CV2014-015333). Nonetheless, from June 22, 2015 until November 12, 2015, the Defendants were jointly represented by the same law firm. *E.g.*, IOR 23 (CV2014-015335); IOR 38 (CV2014-015334); IOR 74 (CV2014-015334). Finally, on

[7] ARCP refers to the Arizona Rules of Civil Procedure. ARCAP refers to the Arizona Rules of Civil Appellate Procedure.

[8] In opposing the Club's motion for summary judgment, the Fabians initially argued that they could resign based on A.R.S. § 10-3610. IOR 18 (CV2014-015335) at 2:11-14. The Fabians did not make this argument when thereafter filing their own dispositive motion with a second opposition to the Club's motion. IOR 23 (CV2014-015335). Appellants did not make this argument in their respective dispositive motions. IOR 14 (CV2014-015333); IOR 14 (CV2014-015334).

December 10, 2015, all three cases were consolidated before Judge Gass, as the Graham's case number was the lowest (CV2014-015333). IOR 27 (CV2014-015333).

C. Proceedings Before Judge Bergin

Between July and December 2015, Judge Bergin proceeded with briefing and oral argument on all pending motions in the Clark and Fabian cases. The Clarks and Fabians argued that the Bylaws did not prevent their unilateral resignations because the Bylaws did not use the word "resign." *E.g.*, IOR 14 (CV2014-015334) at 2:1-13; IOR 46 (CV2014-015334) at 2:24-3:6.

In October 2015, Judge Bergin granted summary judgment for the Club as against the Fabians, and denied the Fabians' and Clarks' motions for judgment on the pleadings. IOR 54 (CV2014-015334). (At the time of Judge Bergin's ruling, the Club had not yet moved for summary judgment against the Clarks.) Judge Bergin concluded that the Bylaws precluded Equity Members from resigning and ceasing payment and A.R.S. § 10-3620 provided no relief. *Id.* More specifically, when read as a whole, the Bylaws contained comprehensive provisions governing the divestiture of Equity Memberships. *See id.* at 3-4. Regardless of the word used (e.g., "resign," "transfer," or "surrender"), Judge Bergin found the Bylaws to be clear and unambiguous: they required a Member "to surrender or submit his membership to the Club for resale or reissuance, and to continue to pay dues until

that is accomplished." *Id*. at 4. Judge Bergin expressly declined to engraft a new provision allowing Equity Members to resign and stop paying dues, particularly "when such a provision is nowhere suggested in the bylaws and would undermine the purpose of the equity membership program." *Id*.

Final judgment was entered against the Fabians under ARCP 54(b) in April 2016; there was no appeal. IOR 109 (CV2014-015333). At the time final judgment was entered against the Fabians, all of the Defendants' cases had been consolidated. *Id*.; IOR 27 (CV2014-015333).

D. Proceedings Before Judge Gass

Judge Gass denied the Grahams' ARCP 12(b)(6) motion on July 30, 2015. IOR 19 (CV2014-015333). Upon consolidation of all three cases, the Club moved for summary judgment against Appellants. IOR 41 (CV2014-015333); IOR 48 (CV2014-015333). On November 21, 2016, Judge Gass granted summary judgment in favor of the Club against Appellants. IOR 125 (CV2014-015333). In so ruling, Judge Gass reexamined Judge Bergin's reasoning, as well as the arguments, authorities, and facts presented by Appellants, and ultimately concluded that "[t]he legal reasoning in [Judge Bergin's] order remains solid. No authority in Arizona or elsewhere suggests a different outcome unless there is new material issue of fact. There is none." *Id*. at 3.

Judge Gass entered judgment against Appellants on December 22, 2016. IOR 133 (CV2014-015333); IOR 134 (CV2014-015333). The judgment included an award of attorneys' fees and costs to the Club under A.R.S. § 12-341.01 and § 12-341, respectively. IOR 133 (CV2014-015333) at 3-4; IOR 134 (CV2014-015333) at 3-4. Appellants appealed the judgment. IOR 136 (CV2014-015333).

STATEMENT OF ISSUES

(1) A.R.S. § 10-3620(A) addresses the resignation of memberships in a nonprofit corporation, and states that "[a] member may resign at any time, **except as set forth in or authorized by the** articles of incorporation or **bylaws**." Emphasis added. Here, the Club's Bylaws clearly establish the requirements for any divestiture of Equity Memberships. Specifically, Equity Members must submit their Memberships to the Club, and continue to pay Club dues and other charges until resale or transfer is accomplished. Appellants admitted below that they did not comply with the Bylaws, abandoned their Equity Memberships, and refused to pay Club dues and other amounts owed. Given the lack of any material disputed fact and the clarity of the Bylaws, did the superior court correctly enter summary judgment for the Club?

(2) A.R.S. § 10-3610 provides, in relevant part, that members of a nonprofit corporation have the same rights and obligations unless otherwise authorized by the entity's bylaws. Here, the Bylaws expressly gave the Club the discretion to address Members differently, including those who fail to comply with requirements for divestiture or otherwise default on their contractual obligations. Moreover, despite having obtained ARCP 56(d) relief, Appellants failed to show any disparate treatment that would create a material factual dispute. Given the lack

of any material disputed fact and the clarity of the Bylaws, did the superior court correctly enter summary judgment for the Club?

STANDARD OF REVIEW

When considering a grant of summary judgment on appeal, this Court reviews de novo whether there are any genuine issues of material fact, and whether the lower court correctly applied the law. *ABCDW LLC v. Banning*, 241 Ariz. 427, --, ¶ 16 (App. 2016). The Court will affirm a grant of summary judgment if the judgment is correct for any reason. *Id*. Parties are limited to the facts contained in the record below. *See GM Dev. Corp. v. Cmty. Am. Mortg. Corp.*, 165 Ariz. 1, 4 (App. 1990).

In addition, when reviewing decisions of a corporation, courts apply the business judgment rule, which presumes that "in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the company." *United Dairymen of Ariz. v. Schugg*, 212 Ariz. 133, 140, ¶ 31 (App. 2006) (citation omitted). "Absent an abuse of discretion, business judgments will be respected by the courts." *Id*. at 140-41, ¶ 32.

ARGUMENT

The superior court's grant of summary judgment for the Club was correct and appropriate in this case. The uncontroverted evidence below showed that Appellants entered into Agreements with the Club through which they obtained Equity Memberships and agreed to abide by the Bylaws. In addition, Appellants did not dispute, as a factual matter, that they had abandoned their Equity Memberships and refused to comply thereafter with the terms and conditions for Membership divestiture, as set forth under the Bylaws and their respective Agreements. *E.g.*, IOR 42 (CV2014-015333), ¶ 13; IOR 44 (CV2014-015333), ¶ 15; IOR 115-116 (CV2014-015333), ¶¶ 13, 15.

Appellants' contractual obligations are clear. Notably, Appellants have never taken issue with the plain language of their respective Agreements and the Bylaws, under which Appellants must (1) surrender or submit their Equity Memberships to the Club for resale or transfer; and (2) pay all Club dues, assessments, and other charges until that sale or transfer is complete. *E.g.*, IOR 42 (CV2014-015333), ¶¶ 5-10; IOR 44 (CV2014-015333), ¶¶ 5-10; IOR 115-116 (CV2014-015333), ¶¶ 5-10. Given a lack of ambiguity, the superior court correctly refused Appellants' invitation to engraft a new provision that would allow Equity Members to resign and stop paying dues, in direct conflict with other express contractual requirements. This Court should do likewise.

Moreover, A.R.S. § 10-3620 does not allow Appellants to terminate their Membership obligations in a manner that conflicts with the Bylaws. Here, the Bylaws provide comprehensive procedures for the divestiture of Equity Membership. Appellants contractually agreed to comply with these procedures years before their attempted resignations. *See* A.R.S. § 10-3620(B). A.R.S § 10-3620(A) provides no right to resign under these circumstances.

There is no ambiguity about the method by which Appellants must divest themselves of Membership and no factual dispute concerning Appellants' purposeful breach of contract and the resulting damages to the Club. Accordingly, this Court should affirm the judgment below.

I. The Bylaws Clearly and Unambiguously Restrict Divestiture of Equity Memberships.

A. The Club Bylaws Cannot Be Interpreted to Permit Appellants' Unilateral Resignations.

As they did below, Appellants argue that, because the Bylaws do not use the term "resign" in addressing Equity Memberships, Appellants can unilaterally resign and terminate their obligations to the Club. *See* Opening Brief at 2, 19; IOR 73 (CV2014-015334) at 3:6-5:15. Given the plain language of the Bylaws and the parties' Agreements, Appellants are wrong as a matter of law.

"A contract should be read in light of the parties' intentions as reflected by their language and in view of all the circumstances." *Smith v. Melson, Inc.*,

135 Ariz. 119, 121 (1983). "If the intention of the parties is clear from such a reading, there is no ambiguity." *Id*.; IOR 54 (CV2014-015334) at 3. Courts should construe a contract "to give effect to all its provisions and to prevent any of the provisions from being rendered meaningless." *Scholten v. Blackhawk Partners*, 184 Ariz. 326, 329 (App. 1995), *as supplemented on reconsideration* (Oct. 3, 1995); IOR 54 (CV2014-015334) at 3.

When read as a whole, the Bylaws are clear with respect to the divestiture of Equity Memberships, and regardless of whether they use the word "resign," "transfer," or "surrender," provide that the only way Equity Members can divest themselves of their Membership under the circumstances presented in this case is through the Club.[9] *E.g.*, IOR 42 (CV2014-015333), ¶¶ 10-11 (citing the 2010, 2012, 2013, and 2014 Bylaws); IOR 54 (CV2014-015334) at 3-4; IOR 78 (CV2014-015334) at 4:14-7:19. Until a sale or transfer occurs, Equity Members must continue to pay dues and other charges. *E.g.*, IOR 42 (CV2014-015333), ¶ 11(d); IOR 54 (CV2014-015334) at 3-4. The Bylaws contain no provision allowing Equity Members to simply resign and stop paying dues. Notably, the

[9] The Bylaws also allow Equity Members to transfer Equity Memberships to subsequent purchasers of property, through legacy transfer, and upon death. *E.g.*, IOR 42 (CV2014-015333), ¶ 11. None of these Bylaw provisions apply to Appellants. Yet, even if they did, the Bylaws still require the Equity Memberships to be transferred and reissued through the Club. *Id*., ¶ 11(a)-(c).

Bylaws expressly bar any party from adding terms or conditions not expressly stated therein. *E.g.*, IOR 42 (CV2014-015333), ¶ 12.

Equity Memberships are not simply agreements to pay for the use of facilities, such as a gym membership. IOR 54 (CV2014-015334) at 4. The Graham Agreement, the Clark Agreement, and the Bylaws do not have contractual terms or expiration dates. *E.g.*, IOR 49 (CV2014-015333), Ex. A-5 (2014 Bylaws); IOR 54 (CV2014-015334) at 4. Membership Contributions procure an ownership interest in the Club. Equity Memberships may be bought and sold through the Club, and Members (like Appellants) control the price. IOR 49 (CV2014-015333), Ex. A-5, § 4.2; IOR 54 (CV2014-015334) at 4. Equity Members are entitled to vote—they can vote to amend the Bylaws. IOR 49 (CV2014-015333), Ex. A-5, § 3.7.5 & art. 15. They can vote to set Membership requirements or change the methods of Membership divestiture. *See id*., art. 15. In the event of dissolution or liquidation, they are entitled to a pro rata share of remaining assets. IOR 49 (CV2014-015333), Ex. A-5, § 18.2.3; IOR 54 (CV2014-015334) at 4.

The outcome sought by Appellants is contrary to any reasonable reading of the Bylaws. It is also antithetical to the Club's economic model, one that has been approved by the Club's Equity Members, including Appellants. *See* IOR 54 (CV2014-015334) at 4 (citing *Burkons v. Ticor Title Ins. Co. of Cal.*, 168 Ariz.

345, 351 (1991)). The Club establishes only a certain number of Equity Memberships and relies on the dues, fees, charges, and assessments paid by its Equity Members to maintain the Club. IOR 42 (CV2014-015333), ¶ 3; IOR 54 (CV2014-015334) at 4. The number of Equity Members affects the Club's budget and the amount of dues and assessments charged to Equity Members. *See* IOR 41 (CV2014-015333) at 5:3-18; IOR 42 (CV2014-015333), ¶¶ 3, 26. Any reduction in revenues attributable to a decline in dues results in a proportional increase in the dues, fees, charges, and assessments imposed upon the remaining Equity Members. IOR 41 (CV2014-015333) at 5:3-18. As owners of the Club, Equity Members are responsible to fund any operational deficits or shortfalls encountered by the Club. IOR 42 (CV2014-015333), ¶ 2; IOR 49 (CV2014-015333), Ex. A-5, § 5.2.

If Equity Members could simply "resign" and stop paying dues, as Appellants have attempted, the potential reduction in revenue would, at a minimum, unfairly increase the financial burden of Club Membership for other Members and threaten the ongoing viability of the Club. IOR 54 (CV2014-015334) at 4. Remaining Equity Members would be required to cover any shortfall in Club revenues attributable to the Club's loss of dues from the resigning Equity Members. *See* IOR 49 (CV2014-015333), Ex. A-5, § 5.2.

In sum, the Bylaws contain comprehensive provisions regarding the divestiture of Equity Memberships, and those provisions unambiguously require

Appellants (1) to surrender or submit their Memberships to the Club for resale or transfer, and (2) pay Club dues, assessments, and other charges until that transfer or sale is complete. IOR 54 (CV2014-015334) at 4. Courts must enforce clear and unambiguous contracts as written. *Goodman v. Newzona Inv. Co.*, 101 Ariz. 470, 472 (1966). Here, the superior court correctly refused to rewrite the parties' contracts based on hindsight, in a manner that would defeat the Bylaws and destabilize the Club.

B. Contractual Requirements Relating to the Resignation of the Club's Equity Members Are Enforceable.

Contracts are designed to benefit both parties. *Hernandez v. Banco De Las Americas*, 116 Ariz. 552, 556 (1977). Permitting a party to ignore its contractual obligations at will or leave at any time without liability disrupts the corporation's business practice. *Id.* In the same vein, contracting parties cannot add or subtract terms for their own purposes. *Del Rio Land, Inc. v. Haumont*, 118 Ariz. 1, 5 (App. 1977). Consequently, Appellants cannot rewrite or void the terms of their Agreements to which they agreed because they now dislike those terms. *See id.* They cannot terminate membership by non-payment of dues. *Tarsney Lakes Homes Ass'n, Inc. v. Joseph*, 620 S.W.2d 8, 10 (Mo. App. 1981) ("The non-payment of dues does not ipso facto terminate membership.").

Courts uphold restrictions on the ability of members to resign and terminate their ongoing obligations to private associations, such as the Club. *E.g., Leon v.*

Chrysler Motors Corp., 358 F. Supp. 877 (D.N.J. 1973) (upholding bylaw provision allowing withdrawal from advertising association only by consent of a majority of members); *Caley v. Glenmoor Country Club, Inc.*, 1 N.E.3d 471 (Ohio App. 2013) (upholding bylaw provision deferring refund of initiation fee until membership had been reissued even though dues continued to accrue until the time of reissuance). The rationale is simple—private clubs, such as the Club, depend on dues revenue derived from their members to conduct their day-to-day operations, including the maintenance of golf courses, other facilities and amenities.

Consequently, in considering the propriety of restrictions on the right to resign, courts look to the membership agreement as a contract not only between the particular member and the organization, but also between and among the members themselves. *Bennett v. Appaloosa Horse Club*, 201 Ariz. 372 (App. 2001). In this context, as the Arizona Court of Appeals has recognized:

> This is not a situation where the court is asked to enforce a highly prejudicial term in a contract between two parties of significantly different bargaining power, which term is to the benefit of the stronger and the detriment of the weaker. Plaintiffs have entered into a contract with their fellow members, who adopted the instant bylaw for their mutual benefit.

Id. at 375-76; *accord Post v. Belmont Country Club, Inc.*, 805 N.E.2d 63, 68-69 (Mass. App. 2004). The Arizona Court of Appeals noted that restrictions on resignation, such as those in the Bylaws, are "applicable to every member, and is a

provision adopted by the members via either a majority vote or the vote of the elected directors." *Bennett*, 201 Ariz. at 376.

Appellants' discussion of the present-day values of Memberships, changing market conditions, and what they believe makes economic sense now is unavailing. In the Agreements, Appellants expressly acknowledged and agreed that they have acquired their Memberships "for the sole purpose of obtaining recreational use of the Club Facilities, and not as an investment or for economic gain or profit." IOR 43 (CV2014-015333), Ex. A-1 at 2; IOR 47 (CV2014-015333), Ex. A-1 at 2. The Agreements plainly state, "Equity Golf Memberships should not be viewed as an investment and no Member should expect to derive any economic benefits or profits from Equity Golf Membership in the Club." IOR 43 (CV2014-015333), Ex. A-1 at 2; IOR 47 (CV2014-015333), Ex. A-1 at 2. Consequently, Appellants could have no reasonable expectation that they would receive a return when departing the Club. Simply put, changing market conditions do not excuse Appellants' breaches of their enforceable Agreements.

The undisputed facts clearly established both the Club's entitlement to declaratory relief and Appellants' liability to the Club for breach of contract as a matter of law. The superior court properly rejected Appellants' statutory defenses and granted summary judgment against Appellants and in favor of the Club.

II. A.R.S. § 10-3620 Expressly Confirms Appellants' Contractual Obligations under the Bylaws.

A.R.S. § 10-3620 applies to member resignations from nonprofit corporations. The statute provides that:

> A. A member may resign at any time, **except as set forth in or authorized by the** articles of incorporation or **bylaws**.
>
> B. The resignation of a member does not relieve the member from any obligations the member may have to the corporation as a result of obligations incurred or commitments made prior to resignation.

Emphasis added.

Contrary to Appellants' argument, A.R.S. § 10-3620, when read as a whole, does not sanction Appellants' conduct towards the Club. *See, e.g.*, *Bell v. Indus. Comm'n of Ariz.*, 236 Ariz. 478, 482, ¶ 16 (2015) (reading statute as a whole). First, Subsection A recognizes that the Bylaws can properly restrict a Member's ability to resign. As Judge Bergin recognized, the Bylaws can only be interpreted to preclude a Member from resigning and stopping payment of dues and other amounts owed to the Club. IOR 54 (CV2014-015334).

Appellants argue that (1) the clause "except as . . . authorized by the . . . bylaws" modifies the words "at any time" and therefore, (2) the statute confers an absolute right to resign, subject only to the Bylaws' ability to regulate the timing of any such resignation. Opening Brief at 17. Appellants offer no support for their argument, either in logic or precedent. The phrase "except as" (*see also* "except")

is used as a preposition to mean "not including" or "excluding" or as a conjunction to give a reason why something is not true (similar to the word "unless"). http://www.thefreedictionary.com/except. Grammatically, it makes no sense to apply "except that" to only the phrase "at any time" in A.R.S. § 10-3620(A). Whether prepositional or conjunctive, the words "except that" explain the circumstances that must occur for a member's resignation to be effective, and does not limit those circumstance to timing alone. Appellants' argument fails even under Appellants' incorrect reading of its language. Using Appellants' nomenclature, the Bylaws do regulate the timing of a Member's departure from the Club, restricting such departure to times after the Member has complied with one of the procedures specified in Article 4.

Additionally, Appellants cannot avoid the effect of A.R.S. § 10-3620(B), which, when read with Subsection A, makes clear that the statute was not intended to relieve nonprofit members of their pre-existing contractual obligations. IOR 41 (CV2014-015333) at 12:1-12; IOR 54 (CV2014-015334) at 5. Even if the statute allowed Appellants to "resign" at any time, they would not be relieved of their prior commitments to pay dues and other charges unless and until their Memberships have been transferred to the Club and reissued. Appellants made those commitments to pay dues and other charges no later than the time that they executed their Agreements, at least three years "prior to resignation."

A.R.S. § 10-3620(B); *see also* IOR 54 (CV2014-015334) at 5; IOR 117 (CV2014-015333) at 8:22-9:5; IOR 119 (CV2014-015333) at 8:23-9:7.

Appellants argue that "a resignation contemplates no further obligations" and, therefore, a member cannot be liable for paying anything post-resignation because "liability for ongoing future obligations is inconsistent with what a resignation is." Opening Brief at 18-19. This argument fails to recognize that the statute directly addresses the date the member *made* the commitments, not the date the member *performed or would perform* those commitments. Appellants made the commitments in 2010, well before their resignations in 2014, and the statute does not relieve them from satisfying these contractual obligations.[10]

For these reasons, the superior court properly determined that A.R.S. § 10-3620 provides Appellants no relief.

III. A.R.S. § 10-3610 Does Not Relieve Appellants of their Contractual Breaches.

Appellants argue that A.R.S. § 10-3610 provides them with immunity because the Club allegedly treated other Equity Members differently. On appeal, Appellants fail to provide any facts or citation to the record to support their claim of "inequitable treatment" and, therefore, have waived this argument. *See* ARCAP 13; *Ritchie v. Krasner*, 221 Ariz. 288, 305, ¶ 62 (App. 2009).

[10] The Clarks even re-affirmed their prior commitments in 2013. IOR 46 (CV2014-015333), ¶¶ 13-14; IOR 50 (CV2014-015333), Ex. A-6.

Notwithstanding Appellants' waiver, A.R.S. § 10-3610 expressly allows the Club to exercise its discretion and discipline Members (including Members who refuse to comply with Bylaw requirements for divestiture or otherwise default on their contractual obligations) as the Club sees fit. Even still, the undisputed evidence below showed that the Club consistently rejected unilateral divestiture of Membership and required payment from non-compliant Members.

A. Appellants Have Waived their "Inequitable Treatment" Argument by Failing to Comply with ARCAP 13(a).

Although Appellants argue that the Club did not treat all Equity Members the same, they do so without **citing the record below**. Opening Brief at 19-21. In a single sentence within their argument, Appellants mention two other Club Members (Dillon-Jones and Stoffer), presumably as "evidence" of the alleged inequitable treatment. *Id*. at 20. However, Appellants fail to identify any specific facts or analysis concerning these Club Members and the termination of their Equity Memberships, much less a record citation. Appellants' argument about the Club's Exit Transfer Option ("ETO") also lacks factual support, and is based only on conjecture. *Id*. at 21. The Opening Brief's Statement of Facts and Statement of the Case make no mention of Ms. Dillon-Jones, Mr. Stoffer, or the ETO program whatsoever. Appellants have simply replicated a portion of their summary judgment opposition in their Opening Brief, out of context and without discussion or citation to the facts and evidence presented below. *Compare* IOR 115-116

(CV2014-015333) at 5:6-28 *with* Opening Brief at 20–21. As a result, the Opening Brief's "inequitable treatment" argument does not satisfy ARCAP 13(a).

ARCAP 13(a)(5) and ARCAP 13(a)(7) require that an opening brief present all facts and arguments raised on appeal with appropriate citations to authority and the record. An appellant cannot merely incorporate or refer to a previously filed memorandum of points and authorities in its opening brief. *Lake Havasu City v. Ariz. Dep't of Health Servs.*, 202 Ariz. 549, 553, ¶ 14 n.4 (App. 2002); *Ortiz v. Rappeport*, 169 Ariz. 449, 452 (App. 1991). Appellants' failure to include appropriate supporting authorities and record citations in their Opening Brief constitutes waiver of their inequitable treatment argument, and this Court should not consider it. *See Ritchie*, 221 Ariz. at 305, ¶ 62.

The Court should also reject any attempt by Appellants to cure their non-compliance with ARCAP 13(a) in their reply brief. *E.g.*, *Coombs v. Maricopa Cty. Special Health Care Dist.*, 241 Ariz. 320, --, ¶ 11 (App. 2016); *Lake Havasu City*, 202 Ariz. at 553, ¶ 14 n.4; *Ness v. W. Sec. Life Ins. Co.*, 174 Ariz. 497, 502-03 (App. 1992). Opening briefs must contain record citations because appellate courts do not speculate about facts that might entitle appellants to relief. *See Coombs*, 241 Ariz. at --, ¶ 11. If permitted to cure such deficiencies in reply, appellees

(like the Club) would effectively be deprived of their right to respond.[11] *E.g.*, *In re Guardianship of Pacheco*, 219 Ariz. 421, 426, ¶ 18 n.6 (App. 2008). Appellants may not turn the tables in this manner, placing such burdens on the Court and the Club. The Court should therefore treat the "inequitable treatment" argument as waived for purposes of this appeal.

B. A.R.S. § 10-3610 Expressly Permits the Club to Treat Members Differently under the Bylaws.

Regardless of their waiver, Appellants misinterpret A.R.S. § 10-3610. The statute's plain language allows the Club to differentiate between the rights and obligations of its Members in its Bylaws:

> All members have the same rights and obligations with respect to voting, dissolution, redemption and transfer, **unless the** articles of incorporation or **bylaws** establish classes of membership with different rights or obligations **or 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**.

Emphasis added. "Class" refers "to a group of memberships that have the same rights with respect to voting, dissolution, redemption and transfer." A.R.S. § 10-3140(11). Consequently, the first sentence provides that the nonprofit's articles or

[11] As a protective measure, the Club will nonetheless address Appellants' "inequitable treatment" argument based on the facts and arguments presented below. In so doing, the Club does not invite Appellants to correct these deficiencies in reply, and would object to any such attempt.

bylaws can establish different classes of membership—a class can have different rights and obligations verses another class.

The creation of classes, however, is not the only way a nonprofit can treat members differently, as demonstrated by the clause "or otherwise provide." A.R.S. § 10-3610. Notably, A.R.S. § 10-3610 is based on Section 6.10 of the Model Nonprofit Corporation Act.[12] In addition, the Arizona Legislature modified its language "to clarify that the articles and bylaws can provide for different rights and obligations even if different classes are not created." Terence W. Thompson et al., 7 Ariz. Prac., *Corporate Practice* App'x D (2016). Accordingly, the first sentence of A.R.S. § 10-3610 confirms that the Club can treat its Members differently with respect to Membership transfers so long as these rights and obligations are set forth in the articles or Bylaws. This includes treating Members differently with respect to terminations and suspensions. *See* Official Comment to Section 6.10 of the Model Nonprofit Corporation Act ("The differences may relate to dues, assessments, transfers of memberships in mutual benefit corporations, use of facilities, termination or suspension of members . . . ."); *Longanecker v.*

---

[12] Section 6.10(a) of the Model Nonprofit Corporation Act provides:

> Except as otherwise provided in the articles of incorporation or bylaws, each member of a membership corporation has the same rights and obligations as every other member with respect to voting, dissolution, membership transfer, and other matters.

Diamondhead Country Club, 760 So. 2d 764, 770, ¶ 16 (Miss. 2000).[13] Accordingly, Appellants' interpretation of the statute (as requiring the same treatment for "all similarly situated members") is wrong.

A.R.S. § 10-3610, therefore, clearly provides nonprofit corporations discretion to treat Members differently through articles or bylaws. Here, the Bylaws give the Club the discretion to treat Equity Members differently. For example, the Club may choose to suspend an Equity Member who has not paid his or her dues for 60 days, or the Club may come to an alternative arrangement:

> Any Member . . . **may** be suspended by the Board as provided below for non-payment of dues, fees, charges and/or assessments to the Club for over sixty (60) days, **at the sole discretion of the Board**, or be expelled by the Board for non-payment of dues, fees, charges and/or assessments to the Club for over one hundred and twenty (120) days.

IOR 49 (CV2014-015333), Ex. A-5 (2014 Bylaws), § 6.1 (emphasis added). The Board may require even expelled Members to meet their financial obligations until the reissuance or resale of their Memberships. *Id.*, § 6.4.

In addition, "[t]he Club may, in its sole and absolute discretion, repurchase a Member's Membership under any circumstances which the Club and Member

---

[13] Because the issues here involve the redemption or transfer of memberships, the first sentence of A.R.S. § 10-3610 applies. Appellants have argued, however, that the term "resign" differs from "transfer." IOR 73 (CV2014-015334) at 3:6-13. The Club disagrees. Even assuming there was a difference, however, Appellants' arguments fail given the second sentence of A.R.S. § 10-3610.

determine appropriate." *Id*., § 4.12. Such discretion extends not only to the terms of repurchase, but also to the Club's initial determination whether to repurchase any Membership in the first place. The Club also establishes the procedures and specifics of the Membership Resale Program through which Club Members can resell Memberships. *Id*., § 4.2. It may offer additional resale or reissuance programs or create other procedures for transferring Memberships "as determined in the Board's sole discretion, on a temporary or permanent basis" to manage Memberships. *Id*. Thus, the Bylaws give the Club the authority to determine when it would be appropriate to repurchase some Memberships, but not others.

The vesting of discretion in nonprofit corporations, such as the Club, is thus consistent with A.R.S. § 10-3610 and the Bylaws. Nonprofit corporations must have such discretion to run their businesses successfully. Again, the Club is controlled by and for its Equity Members. *Supra* Section I.A. It relies on the dues, fees, charges, and assessments paid by its Equity Members to function. *Id*. If Equity Members could unilaterally resign and abandon their financial obligations, remaining Equity Members would unfairly suffer increased financial burdens. *Id*. Consequently, the Club exercises discretion in managing its Equity Members to benefit the best interests of all Equity Members and the Club as a whole. As such, Judge Bergin correctly recognized, permitting Appellants' unilateral resignations would be contrary to any reasonable business objective of

the Club. IOR 54 (CV2014-015334) at 4 (citing *Burkons*, 168 Ariz. at 351); *see also supra* Section I.A.

Even if the Court disagrees with the Club's business objectives or the way in which the Club exercised its discretion, it should affirm because courts should not substitute their business judgment for that of the Club's directors. *E.g.*, *Schugg*, 212 Ariz. at 140, ¶¶ 31-32; *Anderson v. Colonial Country Club*, 739 A.2d 1118, 1123 (Pa. Commw. 1999). The Court should look no further than necessary to confirm that the Club's exercise of its discretion was fair to avoid interfering with the Club's internal affairs. *See Original Lawrence Cty. Farm Org., Inc. v. Tenn. Farm Bureau Fed'n*, 907 S.W.2d 419, 421 (Tenn. App. 1995).

Bylaws that grant nonprofit recreational clubs the discretion to resolve disputes with their members over matters, including disagreements over membership termination, make sense. Public policy favors dispute resolution as means of encouraging settlement and reducing protracted litigation. Certainly, any dispute resolution or settlement will, by necessity, result in different terms for different individuals. *See* IOR 119 (CV2014-015333) at 6:6-7:15. Similarly, circumstances and considerations vary when a club considers whether to expel or suspend a member. *Id*. Discipline should be proportionate to the offense.

Below, Appellants did not dispute that the Club had discretion to address defaulting Members. *See, e.g.*, IOR 115-116 (CV2014-015333) at 5:13-14.[14] They did not dispute, as a factual matter, their failure to pay certain Club dues and other charges/assessments. *See, e.g.*, IOR 42 (CV2014-015333), ¶¶ 13-14; IOR 44 (CV2014-015333), ¶¶ 13-16; IOR 115-116 (CV2014-015333), ¶¶ 13-16. Because the Club has the discretion under the Bylaws to treat defaulting Members differently, A.R.S. § 10-3610 simply does not apply.

C. Appellants Failed To Show Any Violation of A.R.S. § 10-3610.

Appellants' argument that the Club has not treated all Equity Members the same is vague and conclusory. On appeal, Appellants fail to specify any particular Club actions that constitute inequitable treatment. Instead, they conclude, without facts, explanation or analysis, that "[s]ettling with Ms. Dillon-Jones or letting Mr. Stoffer simply walk away are clear examples of disparate treatment in violation of the statute" and that the ETO is "[m]ore egregious." Opening Brief at 20-21. Again, Appellants provide no further identification or details regarding Ms. Dillon-Jones or Mr. Stoffer, and do not discuss how any Club actions related to Ms. Dillon-Jones, Mr. Stoffer, or the ETO violate the statute or the Club's Bylaws. *See* discussion at Section III.A *supra*.

[14] Nor do they do so now. *See* Opening Brief at 20.

Similarly, in a single sentence without factual support or analysis, Appellants claim that the Club cannot exercise its discretion arbitrarily. Opening Brief at 20. Appellant's unsupported argument fails. *See* ARCAP 13(a)(7); *Ritchie*, 221 Ariz. at 305, ¶ 62. To establish arbitrary conduct, Appellants had to show that the Club acted without any reasonable basis when "allowing some members to leave without paying the transfer fee" or satisfying their obligations in full. *See, e.g.*, *Maricopa Cty. Sheriff's Office v. Maricopa Cty. Emp. Merit Sys. Comm'n*, 211 Ariz. 219, 224, ¶ 22 (2005). The undisputed facts presented to the trial court demonstrate more than a reasonable basis for the Club's action.

Like Appellants, Ms. Dillon-Jones sought to terminate her financial obligations by resigning from the Club. Consistent with its position in this case, the Club did not let Ms. Dillon-Jones "leave without full payment obligations" as Appellants imply. *See* Opening Brief at 20-21. The Club collected payment from Ms. Dillon-Jones and entered into a settlement agreement to terminate her Membership. *See* IOR 115-116 (CV2014-015333), ¶ 38 & Ex. D. Under the settlement agreement, Ms. Dillon-Jones paid the Club the amount of Club dues and charges that she had owed plus a premium to compensate the Club for its transactional costs. *Id*. The Club's settlement with Ms. Dillon-Jones was consistent with the Bylaws and showed no inequitable treatment. Unlike

Ms. Dillon-Jones, Appellants declined to work with the Club regarding settlement. IOR 126 (CV2014-015333) at 4:8-5:2.

The Bylaws expressly authorized the Club's treatment of Mr. Stoffer. The Club expelled Stoffer on the basis of financial defaults persisting for more than 120 days under Article 6.1 of the Bylaws. *See, e.g.*, IOR 45 (CV2014-015333), Ex. A-2, § 6.1; IOR 120 (CV2014-015333), ¶ 39.

Finally, the Bylaws authorize the Club to create programs like the ETO. *See* IOR 120 (CV2014-015333), ¶ 41. Article 4.2 expressly provides that the Club may "offer other resale reissuance programs or procedures for the sale, redemption or transfer of Memberships on the Membership Resale List, as determined in the Board's *sole discretion*, on a temporary or permanent basis to manage the Membership roster and to reduce the number of Members on the Membership Resale List." IOR 49 (CV2014-015333), Ex. A-5 at 6-7, § 4.2 (emphasis added). As discussed previously, Article 4.12 of the Bylaws allows the Club to repurchase Memberships under circumstances, when it deems such repurchase appropriate. Articles 4.7.1, 5.1 and 9.1.1 also give the Board discretion to set the price for participation in the ETO. The ETO falls squarely within the discretion provided by Articles 4.2, 4.7.1, 4.12, 5.1 and 9.1.1. Appellants chose not to participate in the ETO.

In short, Appellants failed to demonstrate that the Club acted inequitably and in a manner inconsistent with its Bylaws when addressing the divestiture of its Equity Members. Because the Bylaws expressly authorized the Club's actions, it did not violate A.R.S. § 10-3610.

IV. The Club's Bylaws May Establish the Terms of Equity Membership, Including Such Matters as Expulsion, Discipline, and Resignation.

Appellants argue that under A.R.S. § 10-3206, the Bylaws can govern only "procedural matters" and cannot establish contractual terms for Equity Membership, including Membership resignations. *See* Opening Brief at 21-22. Appellants failed to make this argument below. Regardless of Appellants' waiver, the argument fails–bylaws for nonprofit entities are not narrowly limited to only procedural matters. Such bylaws may contain provisions that regulate and manage the corporation's affairs. A.R.S. § 10-3206(B); *see also* A.R.S. § 10-3610.

A. Appellants Have Waived their Argument that Nonprofit Bylaws May Govern Only "Procedural Matters."

In responding to the Club's summary judgment motions, Appellants never cited A.R.S. § 10-3206; nor did they argue that nonprofit bylaws, such as the ones at issue, may govern only procedural matters, and not membership divestiture.

Instead, in seeking to compel additional discovery regarding how the Club treated various departing Equity Members, the Clarks incorrectly cited another

statute, A.R.S. § 10-206, and argued that the Bylaws could only be changed by a majority vote, as follows:

> There are legal questions about the ability of a nonprofit to impose substantive changes on a membership agreement without the affected member's consent via a bylaw; a bylaw change can be made by a majority vote of the members or a board of directors. Bylaws, after all, are the mechanisms "for managing the business and regulating the affairs of the corporation," A.R.S. § 10-206, not forcing a member into an agreement imposing different obligations on the member. A bylaw is analogous to the rules of civil procedure in litigation, which can affect the how and when and procedure of litigation but not the substantive law applicable to a case.

IOR 60 (CV2014-015333) at 2:17-23. Notably, A.R.S. § 10-206 addresses **for-profit** entities.

In addition, Appellants focus solely on changes made through the 2010 Bylaws.[15] *See* Opening Brief at 3. Below, Appellants claimed that the Bylaw amendments occurred without their consent, and were not adopted by a majority of the Club's Equity Members. IOR 115-116 (CV2014-015333), ¶ 6, Ex. A, ¶ 4.

Appellants were mistaken. The 2010 Bylaw amendments occurred through a Membership vote, passing because a majority of Members voted in favor of them. IOR 118 (CV2014-015333), Ex. 1, ¶ 4. In fact, Appellants were among the

---

[15] Specifically, Appellants complain that the transfer fee originally was 20% of the resale price, but changed to the greater of 20% of the resale price or $65,000. Opening Brief at 3, 12. This change occurred with the Member's adoption of the 2010 Bylaws with Appellants' express consent. IOR 43 (CV2014-015333), Ex. A-2 (2010 Bylaws); *see also* n.3 *supra*.

Members who voted for the 2010 amendments. IOR 118 (CV2014-015333), ¶ 32; *id*. at Ex. 1, ¶¶ 4, 6-7; *id*. at Ex. 2 (the Clarks' vote in favor of the 2010 Bylaws); IOR 120 (CV2014-015333), ¶ 32 & Ex. 2 (the Grahams' vote in favor of the 2010 Bylaws).

Because Appellants approved the Bylaws, they have no valid ground to challenge them. *Dynan v. Fritz*, 508 N.E.2d 1371, 1380 (Mass. 1987). The passing of Bylaw amendments in 2012, 2013, and 2014 also complied with the then-governing Bylaws, and Appellants presented no evidence to the contrary. IOR 120 (CV2014-015333), Ex. 1, ¶ 3.

Thus, in the superior court, Appellants effectively conceded that the Bylaws could be amended and impose substantive changes with majority consent. *See, e.g.*, IOR 115-116 (CV2014-015333). Instead, they argued that the Bylaws could not change absent Member consent and that they did not consent or agree with the amendments. *Id*.

Now, on appeal, Appellants argue something entirely different—that irrespective of the Member vote, Bylaws are procedural in nature, not binding, and cannot bar their resignations at issue. Not only is the argument wrong (*see* Section IV.B *infra*), but Appellants may not raise it now. *See* authority discussing waiver at Section III.A *supra*; *see also Stuart v. Ins. Co. of N. Am.*, 152 Ariz. 78, 84

(App. 1986) (holding allegations raised in complaint abandoned when not advanced in response to a motion for summary judgment).

B. A.R.S. § 10-3206 Does Not Bar the Club's Claims.

A.R.S. § 10-3206 provides:

> A. The board of directors of a corporation shall adopt initial bylaws for the corporation.
>
> B. The bylaws of a corporation may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation.

The plain language of the statute does not place any limitation on bylaws that a nonprofit corporation deems necessary and adopts for the regulation and management of its business. Bylaws can govern the rights and obligations between and among members in *all* matters affecting internal affairs. *Savoca Masonry Co., Inc. v. Homes & Son Const. Co., Inc.*, 112 Ariz. 392, 395 (1975). Consistent with Arizona precedent, Arizona practice treatises discussing A.R.S. § 10-3206 make clear that "[t]here are no prohibitions as to what the bylaws may contain." Lisa C. Thompson et al., 9 Ariz. Prac., *Business Law Deskbook* § 2:5 (2016-2017); *see also* Terence W. Thompson et al., 7 Ariz. Prac., *Corporate Practice* § 13.20 (2017).

Appellants cite only Section 258 of the 2014 American Jurisprudence (Second) to support their argument. Opening Brief at 21 n.81 (citing 18A Am. Jur. 2d *Corporations* § 258 (2014)). However, neither the 2014 or 2017 edition of that

treatise discuss any such prohibition. Instead, the treatise merely explains that bylaws can define the process and procedures for making substantive business decisions and for exercising rights. 18A Am. Jur. 2d *Corporations* § 252 (2017); 18A Am. Jur. 2d *Corporations* § 258 (2014).[16] This in no way prevents bylaws from setting forth substantive rights and obligations. In fact, the treatise begins by broadly defining a bylaw as a contract, "A bylaw is a self-imposed rule, resulting from an agreement or contract between the corporation and its members to conduct the corporate business in a particular way." 18A Am. Jur. 2d *Corporations* § 252 (2017); 18A Am. Jur. 2d *Corporations* § 258 (2014) (citing *Schraft v. Leis*, 686 P.2d 865 (Kan. 1984)). Even the case the treatise cites for this proposition makes clear that bylaws prescribe substantive rights and obligations. *Schraft*, 686 P.2d at 872 ("The term 'bylaw' may be further defined according to its function, **which is to prescribe the rights and duties of the members** with reference to the internal government of the corporation, the management of its affairs, and the rights and duties existing among the members.") (emphasis added).

Although the Club has not located any Arizona case directly interpreting A.R.S. § 10-3206, it is commonplace for corporate bylaws to address resignation requirements for its members. *See, e.g.*, *In re M.K.T.*, 368 P.3d 771, 797-78, ¶¶ 80-81 (Ok. 2016), as corrected (Feb. 1, 2016); *Hamlet Country Club, Inc. v.*

[16] Section 258 in the 2014 edition became Section 252 in the 2017 edition.

Allen, 622 So. 2d 1081, 1083 (Fla. Dist. App. 1993); *Leon*, 358 F. Supp. at 883-84; *Caley*, 1 N.E.3d at 477-78, 483, ¶¶ 23, 26, 79. Unlike procedural court rules, corporate bylaws form part of the substantive contract between the organization and its members, establishing, in part, rights, obligations, and remedies thereunder. *E.g.*, *Savoca Masonry Co., Inc.*, 112 Ariz. at 395; *Bennett*, 201 Ariz. at 375-76; *Schraft*, 686 P.2d at 872; 18A Am. Jur. 2d *Corporations* § 252 (2017).

REQUEST FOR ATTORNEYS' FEES

The Club requests that the Court award it the attorneys' fees and costs it has incurred in defending this appeal under A.R.S. § 12-341.01 and § 12-341, respectively, upon compliance with Rule 21(a), Arizona Rules of Civil Appellate Procedure.

CONCLUSION

The Court should affirm the judgement below and award the Club its reasonable attorneys' fees and costs.

RESPECTFULLY SUBMITTED this 16th day of June, 2017.

FENNEMORE CRAIG, P.C.

By */s/ Theresa Dwyer*
Theresa Dwyer (No. 010246)
Christopher L. Callahan (No. 009635)
Jennifer L. Blasko (No. 031540)
Attorneys for Defendant/Appellee

12825467

COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

DESERT MOUNTAIN CLUB, INC., Plaintiff/Appellee, v. ERIC GRAHAM, et al., Defendants/Appellants.	Court of Appeals Division One No. 1 CA-CV 17-0100 Maricopa County Superior Court No. CV2014-015333 CV2014-015334 CV2014-015335 (Consolidated)

CERTIFICATE OF COMPLIANCE TO ANSWERING BRIEF OF PLAINTIFF/APPELLEE DESERT MOUNTAIN CLUB, INC.

FENNEMORE CRAIG, P.C. (No. 00022300)

Christopher L. Callahan (No. 009635)
Theresa Dwyer (No. 010246)
Jennifer L. Blasko (No. 031540)
2394 East Camelback, Suite 600
Phoenix, AZ 85016-3429
Telephone (602) 916-5000
Email: ccallahan@fclaw.com
Email: tdwyer@fclaw.com
Email: jblasko@fclaw.com

Attorneys for Plaintiff/Appellee Desert Mountain Club, Inc.

Pursuant to Rule 14, Ariz. R. Civ. App. P., undersigned counsel hereby certifies that the Answering Brief of Plaintiff/Appellee Desert Mountain Club, Inc. uses a proportionately spaced typeface of 14 points or more, and is double-spaced using a Times New Roman font. According to the Microsoft Word word count function, the Answering Brief contains 9,394 words excluding the Tables of Contents, Table of Authorities, Certificate of Service, this Certificate of Compliance, and any addendum.

RESPECTFULLY SUBMITTED this 16th day of June, 2017.

FENNEMORE CRAIG, P.C.

By */s/ Theresa Dwyer*
Theresa Dwyer (No. 010246)
Christopher L. Callahan (No. 009635)
Jennifer L. Blasko (No. 031540)
Attorneys for Defendant/Appellee

12926419.1

COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

DESERT MOUNTAIN CLUB, INC., Plaintiff/Appellee, v. ERIC GRAHAM, et al., Defendants/Appellants.	Court of Appeals Division One No. 1 CA-CV 17-0100 Maricopa County Superior Court No. CV2014-015333 CV2014-015334 CV2014-015335 (Consolidated)

CERTIFICATE OF SERVICE TO ANSWERING BRIEF OF PLAINTIFF/APPELLEE DESERT MOUNTAIN CLUB, INC.

FENNEMORE CRAIG, P.C. (No. 00022300)

Christopher L. Callahan (No. 009635)
Theresa Dwyer (No. 010246)
Jennifer L. Blasko (No. 031540)
2394 East Camelback, Suite 600
Phoenix, AZ 85016-3429
Telephone (602) 916-5000
Email: ccallahan@fclaw.com
Email: tdwyer@fclaw.com
Email: jblasko@fclaw.com

Attorneys for Plaintiff/Appellee Desert Mountain Club, Inc.

The undersigned hereby certifies that on June 16, 2017, the Answering Brief of Plaintiff/Appellee Desert Mountain Club, Inc. was electronically filed with the Clerk of the Arizona Court of Appeals, Division One.

The undersigned further certifies that on June 16, 2017, a copy of the Answering Brief of Plaintiff/Appellee Desert Mountain Club, Inc. was served on Counsel by e-mail and by first-class mail, postage prepaid, addressed to:

Daryl M. Williams
Annelise M. Dominguez
Baird, Williams and Greer, LLP
6225 N. 24th Street, Suite 125
Phoenix, AZ 85016
Email: darylwilliams@bwglaw.net
Attorneys for Defendants/Appellants

RESPECTFULLY SUBMITTED this 16th day of June, 2017.

FENNEMORE CRAIG, P.C.

By */s/ Theresa Dwyer*
Theresa Dwyer (No. 010246)
Christopher L. Callahan (No. 009635)
Jennifer L. Blasko (No. 031540)
Attorneys for Defendant/Appellee

12926357.1