

1 FENNEMORE CRAIG, P.C.
2 Christopher L. Callahan (No. 009635)
3 Seth G. Schuknecht (No. 030042)
4 2394 East Camelback Road, Suite 600
5 Phoenix, AZ 85016-3429
6 Telephone: (602) 916-5000
7 Email: ccallahan@fclaw.com
8 Email: sschuknecht@fclaw.com

9 Attorneys for Plaintiff
10 Desert Mountain Club, Inc.

COPY

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11 SUPERIOR COURT OF ARIZONA

12 MARICOPA COUNTY

13 DESERT MOUNTAIN CLUB, INC.,

No.

14 Plaintiff,

COMPLAINT

15 v.

**(DECLARATORY RELIEF AND
BREACH OF CONTRACT)**

16 THOMAS CLARK and BARBARA
17 CLARK, husband and wife,

18 Defendants.

19 Plaintiff Desert Mountain Club, Inc. (the "Club") alleges as follows:

20 **PARTIES, JURISDICTION AND VENUE**

21 1. The Club is an Arizona non-profit corporation, licensed to do and doing
22 business in the State of Arizona, Maricopa County.

23 2. Upon information and belief, Defendants Thomas Clark and Barbara Clark
24 (collectively "Defendants") are husband and wife and are residents of Scottsdale,
25 Arizona. Defendants caused certain events to occur in Arizona out of which this
26 complaint arises. Upon information and belief, all acts by Thomas Clark and/or Barbara
Clark, as alleged herein, were undertaken on behalf of the marital community comprised
of Thomas Clark and Barbara Clark such that the marital community is responsible for
these acts and liable for the damages resulting therefrom.

1 from time to time. *Id.* at 1, 6. Defendants further represented and warranted that they
2 had received and reviewed and that they understood the Club Bylaws and the Plan. *Id.* at
3 7.

4 9. In addition to the rights and obligations set forth in the Membership
5 Agreement, at all pertinent times, the Bylaws have also governed the procedures that
6 must be followed by a Club Member in order to terminate his Club Membership. The
7 Bylaws in effect at the time that Defendants acquired their Membership in the Club
8 provided that Memberships “may not be sold and may be transferred only through the
9 Club” and that “[t]he Club will cause Golf Memberships to be reissued under the
10 circumstances and upon the terms and conditions set forth in the Plan.” Club Bylaws,
11 July 1, 1994 (the “1994 Bylaws”), § 11.1. A true and correct copy of the 1994 Bylaws is
12 attached as Exhibit B.

13 10. In addition to the rights and obligations set forth in the Membership
14 Agreement and the Bylaws, at all pertinent times, the Plan has also governed the
15 procedures that must be followed by a Club Member in order to terminate his Club
16 Membership.

17 11. The Plan that was in effect at the time that Defendants acquired their
18 Membership in the Club provided that Memberships may not be sold and only may be
19 transferred through the Club. *See* 1994 Deferred Equity Membership Plan, July 1, 1994
20 (the “1994 Plan”), at 6. A true and correct copy of the 1994 Plan is attached as Exhibit C.
21 According to the 1994 Plan, any Member desiring to transfer his Membership must give
22 the Club written notice that his Membership is available for reissuance. *Id.* Thereafter,
23 the Membership would be placed on the waiting list to be reissued by the Club on a first-
24 resigned, first-reissued basis. *Id.* Until the Membership is reissued, the 1994 Plan
25 required a resigned member to continue paying dues and allowed a Member to continue
26 to use the Club Facilities. *Id.* at 7.

1 12. Restrictions on the ability of private golf club members to resign their
2 memberships with no further obligations to the club are common throughout the United
3 States. Private golf clubs, such as the Club, are dependent upon dues revenue derived
4 from their members to conduct their day-to-day operations, such as the maintenance of
5 the golf courses and other facilities and amenities.

6 13. Accordingly, the restrictions upon a Member's ability simply to resign the
7 Membership, the requirement that Memberships must be transferred through the Club and
8 the obligation of the surrendering Member to continue paying dues, assessments, fees,
9 and other charges attendant to Membership during the period that reissuance of the
10 Membership is pending are critically important to the ongoing economic viability of the
11 Club. Any reduction in Club revenues attributable to a decline in dues paying
12 memberships results in a proportional increase in the dues, assessments, fees and other
13 charges imposed upon the Members and threatens the ongoing viability of the Club.

14 14. Effective March 31, 2004, the Club amended the Bylaws (the "2004
15 Bylaws"). A true and correct copy of the 2004 Bylaws is attached as Exhibit D. The
16 amendments reiterated and further clarified that a Club Member may terminate his
17 Membership obligations only by surrendering the Membership through the Club for
18 reissuance either to a Resale Buyer acquiring property in Desert Mountain from the
19 Member, pursuant to Section 7.6.1 of the Bylaws or to a prospective Member who is
20 neither a Resale Buyer nor a Converting Member, pursuant to Section 7.6.3 of the
21 Bylaws. Club Bylaws, March 31, 2004, § 6.1.3.

22 15. The 2004 Bylaws reaffirmed that the act of "surrendering" the Membership
23 through the Club did not terminate the Member's obligations to the Club. The 2004
24 Bylaws expressly provided that:

25 Until such time as a surrendered Deferred Equity Membership
26 is reissued, the Member designated in relation to such
 membership will continue to have the use privileges

1 associated with such membership, subject to these Bylaws and
2 the Rules and Regulations, and *shall remain responsible . . .*
3 *for all dues, fees, other charges and assessments payable with*
4 *respect to such membership.*

5 *Id.* § 6.1.4 (emphasis added).

6 16. The Club Bylaws were again amended, effective March 31, 2006 (the
7 “2006 Bylaws”). A true and correct copy of the 2006 Bylaws is attached as Exhibit E.
8 Like the 2004 Bylaws, the 2006 Bylaws did not allow a Member to resign with no further
9 obligation to the Club. Instead, the 2006 Bylaws allowed a Member to surrender the
10 Membership through the Club, either for reissuance by the Club or for transfer from the
11 Club to a subsequent purchaser of the Member’s property at Desert Mountain. 2006
12 Bylaws, § 6.1.3. And again, the 2006 Bylaws provided that the surrender of a
13 Membership through the Club for reissuance did not relieve the Member from the
14 obligation to pay dues, fees, charges, and assessments arising prior to the reissuance of
15 the Membership. *Id.* § 6.1.4.

16 17. Also on March 31, 2006, the Club amended the Deferred Equity
17 Membership Plan (the “2006 Plan”). A true and correct copy of the 2006 Deferred
18 Equity Membership Plan is attached as Exhibit F. Just as in the 1994 Plan, the 2006 Plan
19 stated that any Member desiring to transfer his Membership must give the Club written
20 notice that his Membership is available for reissuance. *See* 2006 Deferred Equity
21 Membership Plan, at 9. Thereafter, the Membership would be placed on the waiting list
22 to be reissued by the Club on a first-resigned, first-reissued basis. *Id.* Until the
23 Membership is reissued, the Plan required a resigned member to continue paying dues
24 and allowed a Member to continue to use the Club Facilities. *Id.* at 10.

25 18. On or about December 31, 2010, ownership of the Club, together with all
26 responsibilities for the operation and management of the Club, was transferred from the
Developer to the Members of the Club. The transfer was overwhelmingly approved by

1 the Club Members.

2 19. On or about December 21, 2010, in preparation for the transfer of Club
3 operations from Developer control to Member control, Defendants, like other Club
4 Members, executed a Membership Conversion Agreement (“Conversion Agreement”),
5 whereby they agreed to convert their Deferred Equity Golf Membership into an Equity
6 Golf Membership in the Club. A true and correct copy of Defendants’ Conversion
7 Agreement is attached as Exhibit G. In the Conversion Agreement, Defendants expressly
8 acknowledged that:

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

17 Conversion Agreement at 1.

18 20. At or about the time of the transfer from Developer control to Member
19 control, the Club adopted new Bylaws, effective December 31, 2010 (the “2010
20 Bylaws”). A true and correct copy of the 2010 Bylaws is attached as Exhibit H. Like the
21 1994 Bylaws, the 2004 Bylaws, and the 2006 Bylaws, the 2010 Bylaws allowed a
22 Member to surrender the Membership through the Club, either for reissuance by the Club
23 or for transfer from the Club to a subsequent purchaser of the Member’s property at
24 Desert Mountain. Club Bylaws, December 31, 2010, §§ 4.2, 4.3. Under the 2010
25 Bylaws, the surrender of a Membership through the Club for reissuance did not relieve
26 the Member from the obligation to pay dues, fees, charges, and assessments arising prior
to the reissuance of the Membership. *Id.* § 4.2. The 2010 Bylaws did not allow a
Member simply to resign the Membership with no further obligation to the Club.

21. The Club Bylaws were amended again, effective March 19, 2012 (the

1 “2012 Bylaws”). A true and correct copy of the 2012 Bylaws is attached as Exhibit I.
2 Just as in the 1994 Bylaws, the 2004 Bylaws, the 2006 Bylaws, and the 2010 Bylaws, the
3 2012 Bylaws reiterated that a Member may not simply resign his Membership and must
4 continue to pay dues until the Membership was reissued. Club Bylaws, March 19, 2012,
5 §§ 4.1–4.3.

6 22. The Club Bylaws were again amended, effective July 1, 2013 (the “2013
7 Bylaws”). A true and correct copy of the 2013 Bylaws is attached as Exhibit J. The 2013
8 Bylaws did not materially alter the relevant obligations set forth above. Rather, the 2013
9 Bylaws continued to require a Member to pay his dues until the Membership was
10 reissued. Club Bylaws, July 1, 2013, §§ 4.1–4.3.

11 23. On or about June 26, 2013, Defendants elected to surrender their
12 Membership for reissuance through the Club. A true and correct copy of Defendants’
13 Request for Reissuance Form is attached as Exhibit K. By signing the Request,
14 Defendants agreed that they “will continue to have full usage and voting rights until the
15 Membership is reissued by the Club and that [they] are *obligated to continue to pay dues,*
16 *fees, charges and assessments until reissuance*” Request at 2 (emphasis added).

17 24. On or about January 1, 2014, Defendants attempted to resign their
18 Membership, effective January 1, 2014, through an letter tendered to the Club. A true
19 and correct copy of Defendants’ January 1, 2014 letter is attached as Exhibit L. In that
20 letter, Defendants claimed that the letter “officially serve[d] as [their] resignation form
21 the Desert Mountain Club, Inc. Effective 1/1/2014.” January 1 Letter at 1. Defendants
22 averred that the letter “terminates [their] obligation to pay dues and assessments as a
23 Desert Mountain Club member.” *Id.*

24 25. Defendants have paid none of the dues or other charges against their
25 Membership Account since January 1, 2014.

26 26. Subsequent to Defendants’ attempted resignation from the Club, the

1 Bylaws were again amended, effective August 1, 2014 (the “2014 Bylaws”). A true and
2 correct copy of the 2014 Bylaws is attached as Exhibit M. The 2014 Bylaws, like the
3 1994 Bylaws, the 2004 Bylaws, the 2006 Bylaws, the 2010 Bylaws, the 2012 Bylaws,
4 and the 2013 Bylaws, did not allow Members simply to resign their Memberships, but
5 provided protocols whereby Members seeking to terminate their relationship with the
6 Club could do so by transferring the Membership through the Club for reissuance. Club
7 Bylaws, August 1, 2014, §§ 4.1–4.4.

8 27. As of December 31, 2014, Defendants will owe a total of \$86,728.08 to the
9 Club pursuant to the terms of the Membership Agreement, the Conversion Agreement
10 and the Bylaws. A true and correct copy of Defendants’ delinquent Membership Account
11 is attached as Exhibit N. This amount will continue to increase on a monthly basis,
12 reflecting additional dues and late charges, until such time as the Membership is either
13 transferred or terminated.

14 28. The 2014 Bylaws provide that, in the event of any default by a Member in
15 the payment of any dues, fees, assessments or charges, the Club is entitled to recover, in
16 addition to the amount owed, all other costs, collection costs, expenses and reasonable
17 attorneys’ fees incurred in obtaining such recovery. 2014 Bylaws, § 6.6.

18 **COUNT ONE**

19 **(DECLARATORY RELIEF)**

20 29. The Club incorporates the allegations in the preceding paragraphs as though
21 fully set forth herein.

22 30. Defendants’ attempted resignation of their Membership on or about January
23 1, 2014 was not consistent with the Membership Agreement, the Conversion Agreement,
24 or the Bylaws, was a legal nullity and was ineffective to terminate or modify in any way
25 Defendants’ ongoing obligation to pay all dues, charges, fees, and other assessments
26 imposed by the Club attendant to Defendants’ Membership in the Club.

1 31. The Membership Agreement, the Conversion Agreement, the Bylaws, the
2 Plan, and the Rules and Regulations constitute a written contract between the Club and
3 Defendants, under which both the Club and Defendants have certain defined rights and
4 obligations.

5 32. Upon information and belief, the Club and Defendants have differing views
6 as to their respective rights and obligations under the Membership Agreement, the
7 Conversion Agreement, the Bylaws, the Plan, and the Rules and Regulations.
8 Specifically, the Club and Defendants disagree regarding:

- 9 A. The enforceability of the provisions in the Bylaws regarding the manner in
10 which Members of the Club may terminate their Memberships;
11 B. Defendants' claimed right unilaterally to resign their Membership without
12 complying with the procedures set forth in and mandated by the Bylaws;
13 C. Whether Defendants' attempted unilateral resignation from the Club was
14 effective to terminate Defendants' ongoing obligation to pay all dues, fees,
15 assessments, and other charges imposed by the Club until such time as
16 Defendants have properly terminated their Membership in compliance with
17 the Bylaws; and
18 D. Whether, until such time as their Membership has been terminated in one of
19 the methods specifically authorized in the Bylaws, Defendants remain
20 Members of the Club, subject to the Bylaws, the Plan, and the Rules and
21 Regulations of the Club, as they may be amended from time to time.

22 33. The Court's delineation of the respective rights and obligations of the Club
23 and Defendants with regard to the foregoing particulars would provide certain guidance
24 to the parties and would terminate the controversy out of which this proceeding arises.

25 34. This claim arises out of contract within the meaning of A.R.S. § 12-341.01.
26

COUNT TWO
(BREACH OF CONTRACT)

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3 35. The Club incorporates the allegations in the preceding paragraphs as though
4 fully set forth herein.

5 36. Defendants have breached the Membership Agreement and the Conversion
6 Agreement by attempting unilaterally to resign their Membership without complying with
7 the procedures set forth in the Bylaws for surrendering and/or terminating Memberships
8 and by failing and refusing to pay dues and other charges properly imposed against their
9 account since the date of the attempted resignation.

10 37. As a direct and proximate result of the foregoing breaches, Defendants have
11 deprived the Club of the amounts owed by Defendants for which the Club has provided
12 substantial benefits under the parties' agreement.

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

16 39. As a proximate and legal result of Defendants' breaches of contract, the
17 Club has sustained substantial damages in an amount to be proven at the time of trial,
18 including but not limited to unpaid dues, fees charges, assessments, attorneys' fees, loss
19 of use of sums expended, and other ancillary expenditures.

20 40. The amount sought by the Club is a liquidated sum as it is capable of
21 determination without resort to opinion or conjecture.

22 41. This claim arises out of contract within the meaning of A.R.S. § 12-341.01.

23 WHEREFORE, the Club requests entry of Judgment against Defendants as
24 follows:

25 A. For declaratory relief that:

26 1. The provisions of the 2014 Bylaws regarding the manner in

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which Members of the Club may terminate their Memberships, including but not necessarily limited to those set forth in Article 4, are valid, binding, and enforceable;

2. Defendants' attempted unilateral resignation of their Membership on or about January 1, 2014, was contrary to the provisions of the 2013 Bylaws and was, therefore, a nullity and of no effect; and

3. Defendants remain Members of the Club and, as such, remain obligated for all dues, fees, assessments and other charges properly posted to their Club account until such time as Defendants have terminated their Membership and their attendant obligations in one of the methods specified in the Bylaws.

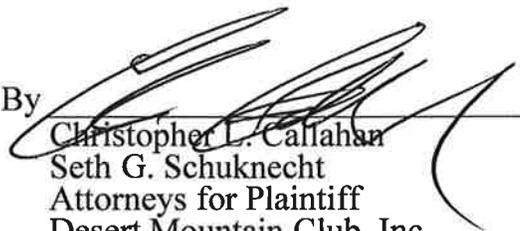
- B. For compensatory damages in an amount to be proven at trial;
- C. For prejudgment interest;
- D. For an award of taxable costs pursuant to both the express provisions of the Bylaws and A.R.S. § 12-341;
- E. For an award of reasonable attorneys' fees pursuant to both the express provisions of the Bylaws and A.R.S. § 12-341.01; and
- F. For such additional relief as the Court deems appropriate.

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DATED this 29th day of December, 2014.

FENNEMORE CRAIG, P.C.

By



Christopher L. Callahan
Seth G. Schuknecht
Attorneys for Plaintiff
Desert Mountain Club, Inc.