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10 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
11 IN AND FOR THE COUNTY OF MARICOPA

12 Desert Mountain Club, Inc.,  
13 Plaintiff,

14 vs.

15 Thomas Clark and Barbara Clark, husband  
16 and wife,  
17 Defendants.

18 ) No. CV2014-015334

19 ) **Reply in Support of Motion for**  
20 ) **Judgment on the Pleadings**

21 ) (Assigned to the Honorable Dawn Bergin)

22 \_\_\_\_\_  
23 The defendants' two-page motion provoked a seven-page response. The response goes in all  
24 different directions and even accuses undersigned counsel of making a motion "without substantial,  
25 indeed, no pertinent justification." Response at 7:23. The footnoted suggestion is that counsel be  
26 sanctioned under Rule 11. The response, however, never addresses the single, narrow point of the  
27 motion for judgment on the pleadings, to wit, the statutory right of a member of a non-profit  
28 organization to resign at any time,

A member may resign at any time, except as set forth in or authorized  
by the articles of incorporation or bylaws.

A.R.S. § 10-3620(A).

This statute is cited in defendants' motion, but the plaintiff's response attempts a little  
legerdemain by saying "defendants' Motion relies solely on A.R.S. § 10-3620(B), asserting that  
... their 'unilateral resignation' on January 1, 2014, relieved them from any further obligation or  
commitment to the club." A.R.S. § 10-3620(B) does say that a member that has resigned is not  
relieved of obligations prior to the resignation, but the thrust of the motion has nothing to do with

1 the *ipsi dixit* reality that Thomas Clark was paid up when he resigned from Desert Mountain Club  
2 on January 1, 2014, and thenceforth has had no further obligations to the club.

3 The point of the motion is simple. A member can resign at any time because there is nothing  
4 in the articles of incorporation or bylaws that says otherwise. The response does not point the court  
5 to any such restriction, and the plaintiff's lawyers should have told the court where to find any  
6 restriction on the right of a member to resign if there was one. After all, it is the lawyer's duty to  
7 point the court to that part of the record that forecloses the motion requested by the adverse party:

8 ¶ 10 In deciding a motion for summary judgment [or any motion], the  
9 trial court considers "those portions of the verified pleadings,  
10 deposition, answers to interrogatories and admissions on file *which are brought to the court's attention by the parties.*" *Choisser v. Herman*, 12  
11 Ariz. App. 259, 261, 469 P.2d 493, 495 (1970).

11 *Tilley v. Delci*, 220 Ariz. 233, 236, ¶ 10, 204 P.3d 1082, 1085 (App. 2009) (emphasis by the court).

12 The plaintiff retreats to obfuscation because it has nothing else. At page six of the response  
13 plaintiff cites a provision from a conversion agreement attached as exhibit G to the complaint that  
14 says "any transfer [as opposed to a resignation] . . . and refund" is subject to the bylaws. However,  
15 this conversion agreement does not address simply abandoning an interest by resignation and  
16 thereby forfeiting all refund rights as a seller.

17 There is a citation at page seven of the response to a provision in the 2010 bylaws that talks  
18 about a defined term in the bylaws, *Surrendering Member*. They say this same provision remained  
19 in the 2013 bylaws, but that is not quite correct. The 2013 bylaws changed the term *Surrendering*  
20 *Member* to the term *Member Pending Reissuance*. The 2010 bylaws are exhibit H to the plaintiff's  
21 complaint and the 2013 bylaws are exhibit J. The pertinent language is found in article 4.2, but this  
22 language only applies to someone who wants to sell their membership by transferring it to the club  
23 so the member can recover some equity. These provisions say nothing about someone just deciding  
24 to walk away by resignation.

25 Indeed, article four of the 2010 bylaws begins, "A Member in good standing *may* surrender  
26 his or her membership by written notice to the Club (the "Surrendering Member")." Exhibit H to  
27 Complaint, ¶ 4.1 (emphasis added). This permission language is found in the 2013 bylaws, as well,  
28

1 but the language is not mandatory and merely has the effect of placing the member on a Surrender  
2 List—a defined term—that could result in the member recouping some money as outlined in ¶ 4.6.

3 The reference to the term *Surrendering Member* and *Member Pending Reissuance* is an  
4 attempt by plaintiff to point to something in the bylaws or the articles of incorporation that restricts  
5 the right of a member to resign. But the attempt is a feint: there is nothing in the exhibits to the  
6 complaint that addresses, restricts, or limits in any fashion the statutory right of a member to resign  
7 at any time.

8 There is a lot more in plaintiff’s response that is off-point and obfuscatory. The motion for  
9 judgment on the pleadings, though, does not test whether there was a contract. Nor the validity or  
10 binding effect of any of the documents attached to the complaint. The motion does not attack the  
11 existence of a contract. Nor is there any attack on the validity of obligations under a contract. The  
12 motion is narrowly focused on the right to just resign, assuming, as the court must, that all these  
13 things formed a contract.

14 Perhaps plaintiff’s counsel is just engaged in a form of good lawyering taught in law school.

15 Consistent with our reasoning in *People v. Bell, supra*, we conclude  
16 that the prosecutor’s remarks did not exceed the bounds of permissible  
17 vigor. (*See also People v. Breaux* (1991) 1 Cal. 4th 281, 305 [3 Cal.  
18 Rptr. 2d 81, 821 P.2d 585] [no misconduct to refer to law school trial  
19 tactics class where students are taught that if they do not have either the  
20 law or the facts on their side, “try to create some sort of a confusion  
with regard to the case because any confusion at all is to the benefit of  
the defense”]; *People v. Goldberg*, (1984) 161 Cal. App. 3d 170, 190  
[207 Cal Rptr. 431] [no misconduct to argue defense counsel’s job was  
to confuse the jury on the issues and sidetrack the jury’s deliberations].)

21 *People v. Gionis*, 9 Cal. 4th 1196, 1218, 892 P.2d 1199, 1212 (1995).

### 22 **Conclusion**

23 A motion for judgment on the pleadings restricts the court to consideration of the pleadings  
24 on file. The pleadings include all of the exhibits. *Coleman v. City*, 230 Ariz. 352, 284 P.3d 863  
25 (2012). The prism of the law—the statute giving a member the absolute right to resign—separates  
26 all of the colored persiflage in the complaint and the plaintiff’s response from this simple reality:

1 the defendant had an unrestricted right to resign. The defendant did resign. Plaintiff's complaint  
2 does not, therefore, state a claim against these defendants as a matter of law .

3 Respectfully submitted this 18th day of June 2015.

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