FENNEMORE CRAIG, P.C.
Christopher L. Callahan (No. 009635)
Seth G. Schuknecht (No. 030042)
Emily Ward (No. 0299663)
2394 East Camelback Road, Suite 600
Phoenix, AZ 85016-3429
Telephone: (602) 916-5000
Email: ccallahan@fclaw.com
Email: sschuknecht@fclaw.com
Email: eward@fclaw.com

Attorneys for Plaintiff
Desert Mountain Club, Inc.

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

DESERT MOUNTAIN CLUB, INC., Plaintiff, v. THOMAS CLARK and BARBARA CLARK, husband and wife, Defendants.	No. CV2014-015334 **PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS** (Assigned to the Hon. Dawn Bergin)

Plaintiff Desert Mountain Club, Inc. (the "Club") respectfully requests the Court to deny the Motion for Judgment on the Pleadings (the "Motion") filed by Defendants Thomas and Barbara Clark ("Defendants"). As set forth in the following Memorandum of Points and Authorities, the Motion fails because the Club has properly alleged cognizable claims under Arizona law arising out of the existence of a valid and binding contract, Defendants' breach of that contract, and the Club's resulting damages.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Defendants' Burden Under Ariz. R. Civ. P. 12(c).

A motion for judgment on the pleadings under Rule 12(c), Ariz. R. Civ. P., simply tests the sufficiency of the complaint at issue. *Shannon v. Butler Homes, Inc.*, 102 Ariz. 312, 315, 428

P.2d 990, 993 (1967); *Young v. Bishop*, 88 Ariz. 140, 143, 353 P.2d 1017, 1019 (1960). The allegations of the complaint must be accepted as true, and the Court should enter judgment for a defendant **only** if the complaint fails to state a claim for relief. *Giles v. Hill Lewis Marce*, 195 Ariz. 358, 359, ¶ 2, 988 P.2d 143, 144 (App. 1999); *In re One Single Family Residence and Real Property Located at 15453 N. Second Ave.*, 185 Ariz. 35, 912 P.2d 39 (App. 1996). The Court must give the plaintiff the benefit of all well-pled facts and all reasonable inferences that may be drawn from those facts. *State ex rel. Corbin v. Arizona Corp. Comm'n*, 143 Ariz. 219, 228, 693 P.2d 362, 371 (App. 1984); *Alsdorf v. Hampton*, 33 Ariz. 506, 512-13, 266 P. 16, 18 (1928) (Every reasonable intendment is made in favor of the non-movant's pleading on a motion for judgment on pleadings); *Madonna v. United States*, 878 F.2d 62, 65 (2d Cir. 1989) (where federal rule 12(c) and Arizona rule 12(c) are substantially similar court stated "[i]n evaluating a Rule 12(c) motion, the court must view the pleadings in the light most favorable to, and draw all reasonable inferences in favor of, the nonmoving party.") (citing *Falls Riverway Realty, Inc. v. City of Niagara Falls,* 754 F.2d 49, 56 (2d Cir. 1985)). Thus, Defendants bear a heavy burden in order to prevail on a motion for judgment on the pleadings. *Covert v. S. Florida Stadium Corp.*, 762 So. 2d 938, 939 (Fla. Dist. Ct. App. 2000).

II. The Complaint's Factual Allegations.

In its Complaint, the Club alleged the following material facts:

(1) Defendants attempted to resign their Club Membership on January 1, 2014, through a letter tendered to the Club. Complaint ¶ 24.

(2) As of January 1, 2014, the operative documents governing the relationship between the Club and Defendants were the Membership Conversion Agreement, dated December 21, 2010 (the "Conversion Agreement"), and the Bylaws of Desert Mountain Club, Inc., dated July 1, 2013 (the "2013 Bylaws"). Complaint ¶¶ 19, 22.

(3) Under the Conversion Agreement, the Club agreed to convert Defendants' Deferred Equity Golf Membership to an Equity Golf Membership in the Club. Complaint ¶ 19.

In exchange, Defendants expressly acknowledged that their Membership was subject to the terms of the Club Bylaws, as they may be amended from time to time:

> Member hereby agrees that Member's use of the Club and privileges under the Equity Golf Membership are subject to the terms, conditions and restrictions set forth herein and in the Club Bylaws and rules and regulations established by the Club, as amended from time to time, and Member agrees to conform to and abide by the terms set forth therein . . . .

Id. The Conversion Agreement "supersede[d] and replace[d] in their entirety the Prior Club Bylaws, membership agreements and applications for the Club, and other related agreements, however titled and as amended or revised . . . ." *Id.* Exh. G at 1.

(4) At the time Defendants executed the Conversion Agreement, the effective Bylaws were those dated March 31, 2006 (the "2006 Bylaws"). Complaint ¶ 16. The 2006 Bylaws expressly and unambiguously prohibited the sale of Memberships and required any Member to surrender the Membership to the Club for reissuance and required Members to continue payment of dues, assessments and other charges until the Membership has been reissued:

> Until such time as a surrendered Deferred Equity Membership is reissued, the Member designated in relation to such membership will continue to have the use privileges associated with such membership, subject to these Bylaws and the Rules and Regulations, and *shall remain responsible . . . for all dues, fees, other charges and assessments payable with respect to such membership.*

Id. ¶¶ 15-16 (emphasis in original).

(5) The 2013 Bylaws were fully consistent with the requirements for Membership termination contained in the 2006 Bylaws. Complaint ¶ 22. A Member seeking to depart the Club was still obligated to surrender Membership to the Club and to pay Club dues and fees until his or her Membership was reissued. *Id.*

(6) On June 26, 2013, Defendants elected to surrender their Membership and, in so doing, agreed that they would "continue to have full usage and voting rights until the Membership is reissued by the Club and that [they were] obligated to continue to pay dues, fees,

charges and assessments until reissuance . . . ." Complaint ¶ 23.

(7) Defendants have paid none of the dues, fees, or other charges against their Membership Account since January 1, 2014, and, as of the date the Complaint was filed, they owed $86,728.08. Complaint ¶¶ 25, 27.

(8) The pertinent provisions prohibiting sales of Club Memberships (*i.e.*, requiring Memberships to be surrendered through the Club for reissuance, and obligating Members to continue payment of dues, assessments and other charges until their Memberships have been reissued) have remained unchanged since Defendants first obtained their Deferred Equity Golf Membership. Complaint ¶¶ 9-11, 14-17, 20-22, 26. Defendants entered into a "Deferred Equity Golf Membership Agreement (Conversion from Non-Equity)" with the Desert Mountain Properties Limited Partnership (the "Developer") on or about November 11, 1996.[1] *Id.* ¶ 5. In addition to the previously discussed 2006 Bylaws and 2013 Bylaws, these same provisions were contained in the Club Bylaws dated July 1, 1994 and the 1994 Deferred Equity Membership Plan (*id.* ¶¶ 9, 11), the Club Bylaws dated March 31, 2004 (*id.* ¶¶ 14, 15), the Club Bylaws dated December 31, 2010 (*id.* ¶ 20), the Club Bylaws dated March 19, 2012 (*id.* ¶ 21) and the Club Bylaws dated August 1, 2014 (*id.* ¶ 26).

(9) On December 29, 2014, the Club filed the Complaint alleging two claims for relief: (a) a claim for declaratory judgment (Complaint ¶¶ 29-32), and (b) a claim for breach of contract because Defendants entered into the Conversion Agreement subject to the Bylaws and they agreed to pay dues, fees, charges and assessments until their Membership was reissued, and then left the Club refusing to comply with their contractual obligations (*id.* ¶¶ 35-40).

III. The Complaint States Proper and Sufficient Claims for Relief under Arizona Law.

On its face, the Complaint clearly alleges the existence of a valid contract between the

---

[1] The Club was initially developed, operated and maintained by the Developer, but was turned over to its Members on or about December 31, 2010. Since that time, the Club has been held by Desert Mountain Club, Inc., an Arizona non-profit corporation owned by the Members. Complaint ¶¶ 1, 3.

Club and Defendants, namely "an offer, acceptance, consideration, a sufficiently specific statement of the parties' obligations, and mutual assent." *Muchesko v. Muchesko*, 191 Ariz. 265, 268, 955 P.3d 21, 24 (App. 1997) (citing *Savoca Masonry Co., Inc. v. Homes & Son Constr. Co.*, 112 Ariz. 392, 394, 542 P.2d 817, 819 (1975)). The Club offered Defendants an Equity Club Membership based on certain conditions, and Defendants voluntarily accepted the offer and those conditions. Complaint ¶ 19. Consideration existed because in exchange for Defendants' promise to comply with the terms of Membership (e.g., pay fees, dues, and assessments), Defendants obtained an equity ownership interest in the Club and the right to use Club Facilities. *Id.*

As previously explained, the Conversion Agreement and Bylaws provide a detailed statement of the parties' obligations and mutual assent. Further the Complaint alleges that Defendants' breached the terms of their contract with the Club (*i.e.*, the Conversion Agreement and Bylaws) by "resigning" their Membership and refusing to pay dues and other charges owed to the Club in violation of their contractual obligations. Complaint ¶ 24; *see also Chartone, Inc. v. Bernini*, 207 Ariz. 162, 170, 83 P.3d 1103, 1111 (App. 2004) (citing *Thunderbird Metallurgical, Inc. v. Ariz. Testing Lab.*, 5 Ariz. App. 48, 423 P.2d 124 (1967)); *see also Gilmore v. Cohen,* 95 Ariz. 34, 36, 386 P.2d 81, 82 (1963).

IV. Defendants' Arguments Fail and Are Improper.

Defendants' Motion relies solely upon A.R.S. § 10-3620(B), asserting that under the statute, their unilateral "resignation" on January 1, 2014 relieved them from any further obligation or commitment to the Club. Defendants' application of the statute to the facts alleged in the Complaint is wrong.

A.R.S. § 10-3620(B) expressly provides: "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.*" As alleged in the Complaint, Defendants joined the Club, executed the Conversion Agreement, and agreed to abide by the

terms and conditions of the Club Bylaws, including conditions for "resigning" Club Membership, **before** January 1, 2014.

A simple timeline reveals the fallacy of Defendants' argument:

- November 11, 1996—Defendants entered into a Deferred Equity Golf Membership. Complaint ¶ 5.
- December 21, 2010—Defendants entered into the Conversion Agreement, which superseded their Deferred Equity Golf Membership, and became equity members of the Club. *Id.* ¶ 19. Under the Conversion Agreement, Defendants agreed to be bound by the Club Bylaws as amended from time to time. *Id.*
- January 1, 2014—Defendants attempted unilaterally to resign from the Club before any reissuance of their Membership. *Id.* ¶ 24.

In short, Defendants agreed to express and unambiguous conditions for the surrender and termination of their Club Membership at least three years before their attempted "resignation."

Again, the controlling documents are the Conversion Agreement, Exhibit G to Complaint, and the July 1, 2013 Club Bylaws, Exhibit J to Complaint, both of which predate the Defendants' January 1, 2014 notice. In the Conversion Agreement, Defendants agreed:

> The Member hereby acknowledges that any transfer of the Equity Golf Membership and refund of the Membership Contribution shall be subject to terms and conditions set forth in the Club Bylaws, including, but not limited to the Transfer Fee to be paid to the Club. Equity Golf Memberships may be transferred only through the Club, subject to the terms, conditions and restrictions set forth in the Club Bylaws.

Complaint, Exh. G at 1. Defendants further acknowledged that "Member has received, has read, and understands the Club Bylaws and this Membership Conversion Agreement, which supersede and replace in their entirety the Prior Club Bylaws, membership agreements and applications for the Club, and other related agreements, however titled and as amended or revised, and all rights thereunder, unless otherwise stated herein." *Id.*

The 2010 Club Bylaws (Exhibit H to Complaint), which became effective when the Club

transitioned from the Developer to the Members, did not allow a Member to sell his Membership; instead, they required that the Membership be surrendered to the Club for reissuance. Complaint, Exh. H, Art. 4.2. The 2010 Bylaws further obligated any surrendering Members to continue the payment of dues, assessments and charges until the Membership has been reissued:

> A Surrendering Member in all events shall continue to be obligated to pay dues, fees, charges, and assessments until the Membership is reissued by the Club, except in the event of the death of the Surrendering Member . . . .

Id. These same provisions remained in the 2013 Bylaws, which were in effect when Defendants attempted to resign on January 1, 2014. Complaint, Exh. J, Art. 4.2. As set forth above, these same provisions have been in effect since Defendants initially acquired their Deferred Equity Golf Membership. Defendants simply have no credible argument or authority that their contractual commitments and obligations arose after January 1, 2014.

Finally, Defendants' counsel is an experienced practitioner. The Motion lacks any legal support other than its reliance on A.R.S. § 10-3620. It fails to address many key factual allegations of the Complaint or the parties' contract. It makes no attempt to satisfy the proper standard for a court to render judgment on the pleadings. In fact, Defendants do not even address the standard. More importantly, Defendants and their counsel certainly understand the distinction between the date that an obligation is incurred or a commitment is undertaken, as opposed to the date performance of that obligation or commitment must be made. It is pure sophistry for Defendants to suggest that, merely because dues and other charges accrued after their attempted resignation, the commitment to pay such amounts constitutes a post-resignation commitment. The Motion is brought without substantial, indeed, no pertinent justification.[2]

[2] Although the Motion is not well grounded and without substantial justification, Plaintiff has not yet requested an award of its reasonable attorneys' fees incurred in opposing the Motion. *See generally* A.R.S. § 12-349 and Ariz. R. Civ. P. 11; *see also Villa De Jardines Ass'n v. Flagstar Bank, FSB*, 227 Ariz. 91, ¶ 13, 253 P.3d 288, 293 (App. 2011); *Standage v. Jaburg & Wilk, P.C.*, 177 Ariz. 221, 230, 866 P.2d 889, 897–98 (App. 1993). If Plaintiff prevails in this

V. Conclusion.

The Club respectfully requests that the Court deny the Motion.

DATED this 12th day of June, 2015.

FENNEMORE CRAIG, P.C.

By /s/ *Seth G. Schuknecht*
Christopher L. Callahan
Seth G. Schuknecht
Emily Ward
Attorneys for Plaintiff
Desert Mountain Club, Inc.

ELECTRONICALLY FILED
on the 12th day of June, 2015, with the
Clerk of the Maricopa County Superior
Court using AZTurboCourt.

COPY transmitted via eFiling system to:

The Honorable Dawn Bergin
Maricopa County Superior Court
201 W. Jefferson Street, Room 7D
Phoenix, AZ 85003-2243

COPY mailed this 12th day of June, 2015, to:

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

/s/ *Phyllis Warren*

---

litigation, however, the Court should take note of the extent to which Defendants and their counsel increased litigation costs through the filing of groundless motion practice and other similar strategies.