1 2 3 4 5 6 7 8	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: <u>ccallahan@fclaw.com</u> Email: <u>sschuknecht@fclaw.com</u> Email: <u>eward@fclaw.com</u> Attorneys for Plaintiff Desert Mountain Club, Inc.	RECEIVED JUN 17 2015 BAIRD, WILLIAMS & GREER
9	SUPERIOR C	OURT OF ARIZONA
10	MARIC	OPA COUNTY
11	DESERT MOUNTAIN CLUB, INC.,	No. CV2014-015334
12	Plaintiff,	REPLY IN SUPPORT OF DESERT
13 14	v. THOMAS CLARK and BARBARA	MOUNTAIN'S (1) JOINDER IN ROBERT JONES'S MOTION FOR PROTECTIVE
14	CLARK, husband and wife,	ORDER, AND (2) MOTION FOR ORDER REQUIRING DEFENDANTS TO PROVIDE COMPLETE WRITINGS
15	Defendants.	UPON REQUEST;
17		And
17		<b>RESPONSE TO DEFENDANTS' MOTION TO DISQUALIFY FENNEMORE CRAIG</b>
19		(Assigned to the Hon. Dawn Bergin)
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# I. Introduction

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Plaintiff Desert Mountain Club, Inc. ("Club") joined in a motion for protective 2 order for the Club's Chief Operating Officer, Robert Jones ("Jones"), which the 3 Defendants have opposed. Notably Jones has not refused to testify and respond to 4 Defendants' questions. Rather, Jones has asked only that the Court issue an order: 5 (1) allowing disclosure of the Club's confidential and proprietary information, so that 6 Jones may comply with and avoid liability under non-disclosure clauses in his Settlement 7 Agreement with the Club's prior owner, Desert Mountain Development Corporation (the 8 "Developer") and his current Employment Agreement with the Club; and (2) restricting 9 public access to the Club's proprietary and confidential information. Defendants' 10 counsel rejected efforts by Jones and the Club to resolve these discovery issues, and acted 11 in a manner designed to escalate the dispute. See, e.g., TR at 00005:2-12:5, 84:1-12;<sup>1</sup> 12 Joinder in Robert Jones's Motion for Protective Order, Etc. (May 26, 2015) ("Joinder"), 13 Ex. 1. 14

Defendants assert that good cause does not exist to support a protective order, 15 based on conclusory statements and citing only Ariz. R. Civ. P. 26(c). Response to 16 Joinder, Etc. (June 4, 2015) ("Response") at 1-2. Defendants fail to rebut evidence that 17 Jones has contractual obligations to keep the terms of his settlement with the Developer 18 and related information confidential. Non-Party Robert Jones, II's Motion for Protective 19 Order ("Motion"), Ex. 1. As the Club's Chief Operating Officer, Jones is exposed to 20 confidential and proprietary information (e.g., financial and personal information of 21 individual Club members, personnel matters, Club financial matters, including 22 competitive pricing terms for different levels of equity membership, etc.), and his current 23 Employment Agreement requires that such information be protected. Declaration of 24 Christopher L. Callahan ("Callahan Decl.") at ¶10 (attached as Exhibit 2); Second 25

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 <sup>27 &</sup>lt;sup>1</sup> "TR" means the Videotaped Deposition of Robert Edward Jones II, Vol. I (May 20, 2015) (attached as Exhibit 1). The video is available for review at: <a href="https://fclaw.app.box.com/s/zqm2ruxkutcwfr83rz7z0r2bcv2sndzn">https://fclaw.app.box.com/s/zqm2ruxkutcwfr83rz7z0r2bcv2sndzn</a>.

1 Amendment Amending and Restating Executive Employment Agreement, § 8.2 (Jan. 1, 2013) (attached as Exhibit 3).<sup>2</sup> The incomplete Jones deposition further demonstrates 2 3 that Defendants intend to delve into these confidential and proprietary matters. TR at 24:9, 30:24-31:1, 31:6, 31:15, 57:2-5, 65:3-5, 65:9, 65:18-20, 70:16-19, 81:24. Further, 4 5 Defendants and their counsel do not deny that any and all information provided in this 6 case has been, and will continue to be, distributed to other Club members and the public. 7 Various pleadings and other case documents, including the Response at 2:15-25. 8 transcript of Jones' s deposition, have been published on a website maintained by a former 9 Club Member, Gary Moselle. See http://desertmountaingolfscam.com/page8.html.

Arizona courts have recognized that seeking a protective order under Rule 26(c) is the correct response when an opposing party tries to obtain confidential information. *See*, *e.g., Cornet Stores v. Superior Court In & For Yavapai Cnty.*, 108 Ariz. 84, 88, 492 P.2d 13 1191, 1195 (1972). Indeed, Rule 26(c)(1) itself recognizes that a court "may make any order which justice requires . . . including . . . that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way...."

17 Defendants' other arguments concerning the Club's form objections, Jones's 18 request for complete paper copies of certain documents about which he was being 19 questioned, and the signature line of the Club's pleadings are without merit. Callahan's 20 objections at the Jones deposition were appropriate, particularly given the questions 21 asked by Defendants' counsel. See Kasko v. Aetna Life Ins. Co., 33 F. Supp. 3d 782, 790 22 Moreover, Jones is entitled to review complete hard copies of (E.D. Ky. 2014). 23 documents used during his deposition, particularly given his poor eyesight. See Ariz. R. 24 Civ. P. 30(b), (f). Defendants' argument about Club counsel's placement of the name of 25 his firm above, rather than below his signature line elevates form over substance. The Pavelic case, cited by Defendants (Response at 5), does not require a different format, 26

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1 much less impose sanctions on non-signatories, as Defendants have sought here. In fact, 2 to the contrary, Pavelic holds that such sanction cannot be imposed.

3 Finally, Plaintiff's request to disqualify Fennemore Craig as counsel for the Club 4 is frivolous, lacking any evidentiary support, and contrary to the declarations of Callahan, 5 LaVoy, and Yelin. Callahan Decl. at ¶¶ 4-7; Motion to Quash Subpoena (June 10, 2015), Ex. 2, ¶ 4; Defendants' Motion to Strike and Response, Etc. (June 4, 2015), Ex. A. The 6 7 evidence shows that Fennemore Craig had no knowledge concerning any meeting or 8 communications between LaVoy and Yelin, until Defendants filed their Response.

#### 9 II.

# Good Cause Supports The Issuance Of A Protective Order.

Defendants' purpose in opposing a protective order is abundantly clear and wholly 10 11 irrelevant to their defense in this matter. Defendants' counsel admittedly seeks the 12 information at issue for the benefit of non-parties whom he has solicited or seeks as 13 clients. Response at 2:15-25. The Club and Jones have repeatedly stated that Defendants 14 are entitled to information regarding Club finances, its policies and procedures, and its 15 membership as related to the Club's claims against Defendants. Non-Party Robert Jones, II's Motion for Protective Order (May 26, 2015) ("Motion") at 7:2-5; Joinder at 16 17 What's more, Jones agreed to be deposed less than two months after 2:25-3:5. 18 Defendants filed their answer, and the Club has been willing to provide various 19 documents and other information concerning Club operations. See, e.g., Initial Disclosure Statement at 9-10 § IX (attached as Exhibit 4). The information is, however, 20 21 confidential and proprietary, and opposing counsel's desire to use the information in his 22 solicitation of potential clients further demonstrates good cause for a protective order. 23 Notably, Defendants assert no other substantive argument why such confidential and proprietary information should not be protected. 24

25 Defendants argue that the Club has not followed the procedure dictated by Rule 26 26(c)(2). Response at 2:9-11. To the contrary, under Rule 26(c)(2)(a) provides that 27 before entering an protective order barring the disclosure of information obtained in 28 discovery to a non-party, a court shall direct the parties to show why a confidentiality

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order should be granted or denied. "The court shall **then** make findings of fact concerning . . . relevant factors, including . . . (i) any party's need to maintain the confidentiality of such information . . . [and] (ii) any nonparty's . . . need to obtain access to such information." Rule 26(c)(2)(a) (emphasis added). The Club has complied with the Rule, and has shown that Jones is bound under contracts with the Developer and the Club and why the information sought by Defendants is confidential and proprietary

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A.

# The Club and Jones Have Demonstrated Their Need for Confidentiality.

8 The Club and Jones have demonstrated their need to maintain confidentiality for 9 the information at issue. First, Jones is subject to the confidentiality provisions of both 10 the Settlement Agreement with the Developer and his Employment Agreement with the 11 Club, which cover information concerning the Club's finances, its operations, and its 12 membership. For example, under the Settlement Agreement, Jones is still bound by his 13 original Employment Agreement with the Developer (Motion, Ex. 1, § 13), and is 14 therefore precluded from sharing information "regarding all aspects of [the Developer's] business . . . and information concerning the Work .... " Motion, Ex. 2, § 8. "Work" is 15 16 defined as "training and oversight of all personnel providing Club-related goods and 17 services, implementation of Club policies and procedures, development and 18 implementation of Club budgets, and maintenance of positive member relations...." Mot. 19 Ex. 2 at § 4. Jones has similar obligations under his current Employment Agreement. 20 Exhibit 3, § 8.2. Given these obligations, Defendants should have, at least, worked with 21 opposing counsel to obtain a court order allowing Jones to disclose any protected 22 information, so that Jones would not violate the contracts, thereby exposing himself to 23 potential liability.

The Club is a non-profit entity, wholly owned and run by its Members. Complaint, ¶¶ 1, 4; Answer, ¶¶ 1, 4. The Club's revenue and ability to function is derived from its Members, and it operates in a highly competitive industry in which information concerning its Membership, benefits, personnel, and Members is vital to its operations, and its ability to maintain viability by attracting new Members. Complaint,

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1	¶¶ 12-13. Information about the Club's operations, its vendor contracts and finances is
2	proprietary. Enter. Leasing Co. of Phoenix v. Ehmke, 197 Ariz. 144, 150 ¶ 18, 3 P.3d
3	1064, 1070 (App. 1999). The same is true of Club personnel matters and personal
4	information that the Club retains about its Members. Kasko, 33 F. Supp. 3d at 790;
5	Sikorsky Aircraft Corp. v. United States, 112 Fed. Cl. 313, 317 (2013). The Club treats
6	such information as confidential and proprietary, as evidenced by Jones's Settlement and
7	Employment Agreements, and by the fact that the Club also requires its members to
8	maintain this confidentiality in its bylaws and rules and regulations. See, e.g., Club's
9	2010, 2012, 2013, 2014 Bylaws, § 3.8, § 7.2 attached to the Club's Complaint as Exhibits
10	H, I, J, and M, respectively; Member Rules and Regulations, § A(14), (15) (2012)
11	(applicable portions attached as Exhibit 5); Member Rules & Regulations, A(14), (15)
12	(2014) (applicable portions attached as Exhibit 6); see also Defendants' Membership
13	Conversion Agreement, Complaint, Ex. G at 1-2.
14	Here, Defendants' counsel sought to explore proprietary and confidential
15	information early in Jones's deposition. For example, Defendants' counsel asked Jones
16	about:
17	• Circumstances surrounding the departure of a former Club Co- President (TR at 24:9);
18	• Dealings with other Club Members ( <i>id.</i> at 30:24-31:1, 31:6, 31:15);
19 20	• Information concerning past and present pricing and sales of Club
20	Membership ( <i>id.</i> at 57:2-5, 65:3-5, 65:9, 65:18-20);
21	• Specifics concerning Club turnover and the value of Club Memberships ( <i>id.</i> at 70:16-19);
22	• Details concerning other Club fees and benefits ( <i>id.</i> at 81:24).
23	The Club's and Jones's respective counsel repeatedly objected to questioning
24	concerning the Club's personnel matters, pricing structure, membership fees, and
25	questions regarding other members. See TR at 24:11-27:9; 31:16-25; 57:7-10; 65:10-
26	68:6; 71:4-11; 72:23-73:24; 75:2-9; 76:14-22; 82:3-17; 83:9-12; 84:1-12; 85:21-86:11.
27	Again, these objections were made to preserve confidentially, as Jones and the Club made
28 Craig	Again, mese objections were made to preserve confidentially, as jones and the Club made
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clear that they would provide the information if Defendants' counsel agreed to use the
 information solely in this litigation, and not disclose the information publicly. When
 Defendants' counsel refused, and it became clear that Defendants' counsel would continue
 to pursue the information at issue, Jones's counsel suspended the deposition to pursue a
 protective order.

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# B. Public Dissemination of the Information Not Necessary or Reasonable in this Case.

Defendants argue that the protection of confidential and proprietary information is 7 not the norm, and only allowed upon a showing of good cause because a lawsuit is a 8 public proceeding. Response at 2:13-14. To the contrary, although "[t]here is no doubt 9 that there exists a common law right of access to civil trials . . . no such blanket rule 10 11 exists for pretrial depositions." Lewis R. Pyle Mem'l Hosp. v. Superior Court of Arizona In & For Gila Cnty., 149 Ariz. 193, 197, 717 P.2d 872, 876 (1986). Further, Arizona 12 13 "[t]rial judges should look to federal case law to determine what factors, including [those] listed in [Rule 26(c)(2)], should be weighed in deciding whether to grant or modify a 14 confidentiality order where parties contest the need for such an order." Rule 26(c), 2002 15 16 amend. cmt.

"[A] court [may] require that 'a trade secret or other confidential research,
development, or commercial information not be revealed or be revealed only a specified
way." *Kasko*, 33 F. Supp. 3d at 790 (quoting Fed. R. Civ. P. 26(c)). "If this type of
information is found relevant, then appropriate measures should be taken concerning its
disclosure by a protective order." *Id.* (citation omitted). "Courts possess substantial
discretion in granting protective orders." *Id.* (citation omitted).

In *Kasko*, the court issued a protective order to avoid dissemination of information concerning the moving business's finances and operations as confidential. *Id.* "[T]he production of such information could be harmful to [the business] in that it could be potentially reviewed by competitors and duplicated." *Id.* In granting the order, the court further reasoned that the non-movant had not demonstrated that it would be harmed by a protective order allowing it access to the information sought, while also protecting the

FENNEMORE CRAIG PROFESSIONAL CORPORATION PHOENIX movant from its dissemination to third parties. Id.

Like the non-movant in Kasko, Defendants have shown no need by non-parties to 2 obtain access to information concerning the Club's business information, let alone that 3 the public need for such information outweighs the Club's proprietary interests. 4 Moreover, Defendants have no standing to vindicate the public interest here. See State v. 5 Garaygordobil, 89 Ariz. 161, 164, 359 P.2d 753, 755 (1961). To date, the Club has filed 6 three suits against members who have breached their contractual obligations with the 7 Club-Defendants are the target of one of these actions. Defendants' counsel may not 8 9 use this case as a means to troll for potential clients on the theory that they may "want to know what is happening in this case." Response at 2:20. An attorney's self-interest in 10 soliciting business does not outweigh the Club's proprietary interest in information 11 concerning its finances, operations and Membership. 12

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## III. Jones Was Entitled To Complete, Paper Deposition Exhibits.

Defendants' counsel takes issue with Jones's request for complete hard copies of 14 documents used during his deposition. Response at 3-4. The rules of civil procedure 15 indicate otherwise. See Ariz. R. Civ. P. 30(b), (f). For example, Rule 30(f) provides that 16 "[d]ocuments and things produced for inspection during the examination of [a deposition] 17 witness must, upon the request of a party, be marked for identification and annexed to the 18 deposition and may be inspected and copied by any party...." The rule assures that each 19 party or witness may inspect and copy documents used during a deposition. See Rule 20 30(f), 1. cmt. (1970). Similarly, Rule 30(b)(5) is intended to terminate any doubt as to 21 whether a party must produce documents at depositions and permit their copying. See 22 23 Rule 30(b)(5), cmt. (1970).

Nothing in the Rules permits a deposing party to restrict a witness to a particular format when reviewing documents produced during questioning, yet Defendants' counsel refused to provide hard copies when requested to do so. TR at 63. The applicable standard is one of reasonableness. Here, Jones testified that he had vision problems, and was having trouble reading the computer screen provided by Defendants' counsel. TR at

FENNEMORE CRAIG PROFESSIONAL CORPORATION PHOENIX 48-49, 60, 63. Defendants question the veracity of Jones' s vision problems, by claiming
 that Jones was not wearing glasses or squinting or leaning forward. Response at 3. The
 videotaped deposition demonstrates otherwise as shown on Exhibit 7.

Moreover, there were only four documents referenced during the deposition, none 4 of which were lengthy: the Desert Mountain Club Bylaws dated July 1, 2013, TR at 41:4-5 6, 49:5-7, 50:20-22 (full document is 36 pages in length); a Conversion Agreement, TR at 6 60:5-8 (full document is 3 pages); a Revised Membership Marketing Program Frequently 7 Asked Questions, TR at 62:5-7 (2 pages); and a Letter to John W. Dillon, dated November 8 11, 2004, TR at 69:3-10 (2 pages).<sup>3</sup> In total, the documents comprised approximately 43 9 pages. Jones asked to see the documents to provide accurate and complete answers to the 10 questions of Defendants' counsel. TR at 42:10-12, 49:8-11, 60:16-19; 62:8. By contrast, 11 Defendants' counsel asked questions about isolated sentences or portions of the 12 documents. Although Defendants' counsel may certainly ask these questions, the Club 13 and the deponent are entitled to object on the basis of form or foundation because the 14 question is misleading or the witness cannot answer without reviewing other portions of 15 the document at issue, as occurred here. TR at 42, 49, 60, 62. 16

Discovery is not a game of gotcha to trap a deponent; its purpose is "to avoid the element of surprise and prevent the trial of a lawsuit from being a 'guessing game.'" *Watts v. Sup. Ct. in and for Maricopa Cnty.*, 87 Ariz. 1, 5, 347 P.2d 565, 567 (1959). Under these circumstances, Jones' s request, as well as the objections offered by Jones' counsel and the Club's counsel, were reasonable. A protective order for Jones should be granted and the Court should order Defendants' counsel to provide complete hard copies of the deposition exhibits at issue, upon resumption of the deposition.

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# IV. Defendants' Request To Disqualify Fennemore Craig Is Frivolous.

Defendants' argument that the Club's counsel should be disqualified is groundless and frivolous. Defendants make conclusory accusations that Fennemore Craig and

<sup>&</sup>lt;sup>3</sup> The deposition transcript indicates that Defendants' counsel did not mark any of the documents and does not index them. TR at 2:7-9.

Callahan have engaged in unethical conduct without any evidentiary support. Response at 1 2 4:18-24 (quoting *Ex Parte E.J.M.*, 829 So.2d 105, 110 (Ala. 2001)). Unlike the Attorney General in Ex Parte E.J.M., the Callahan declaration makes 3 4 clear that neither Callahan nor anyone at Fennemore Craig: Had any knowledge that Mr. Yelin had consulted with Mr. LaVoy 5 about possible representation concerning the Club's demand letter or other 6 matters until now (Exhibit 2,  $\P$  4); Has ever spoken to Mr. LaVoy about any communications, either 7 orally or in writing, between LaVoy and Yelin (*id.*,  $\P$  5); and 8 Has never seen the documents that Yelin provided to LaVoy (id., ¶7). 9 10 Callahan's declaration is consistent with the declarations of LaVoy and even Yelin, who makes clear that his communications were only with LaVoy. The Court should deny 11 Defendants' request to disqualify Fennemore Craig. 12 The Court Should Deny Defendants' Fee Request. 13 V. Defendants conclude by demanding attorneys' fees for the "unreasonable, 14 groundless, abusive, and obstructionist conduct" by the attorneys for Jones and the Club. 15 Response at 5:2-4. Defendants identify the conduct at issue as the following: (1) the 16 name of "Fennemore Craig" appears above, and not below the signature line on Plaintiff's 17 pleadings (*id.* at 5:8-6:2); and (2) counsel acted unreasonably in requesting a protective 18 19 order and acquiescing to the suspension of Jones's deposition (*id.* at 6:3-7). 20 With regard to the signature line issue, Defendants misrepresent *Pavelic & LeFlore* v. Marvell Entertainment Group, 493 U.S. 120 (1989). In Pavelic, the United States 21 Supreme Court reversed a decision to impose Rule 11 sanctions against a law firm in the 22 manner Defendants suggest. Id. at 127. Although the Court acknowledged the preferred 23 24 practice of following an attorney's signature with the name of his or her firm beneath, it refused to sanction other forms of signature (as used here) under Rule 11, concluding that 25 such a result would effect a "strained" interpretation of the rule and not further its 26 27 purpose. Id. at 126-27. The Court made clear that the signing attorney has a personal, non-delegable responsibility, and the placement of a firm name does not affect that 28

FENNEMORE CRAIG Professional Corporation Phoenix

# Exhibit 1

## IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Desert Mountain Club, Inc.,		
Plaintiff,	) )	
vs.	) No.	CV2014-01533
Thomas Clark and Barbara Clark, husband and wife,	/ ) /	
Defendants.	) )	

# CONDENSED

TRANSCRIPT

VIDEOTAPED DEPOSITION OF ROBERT EDWARD JONES II

VOLUME 1

Phoenix, Arizona

May 20, 2015

COPY

Prepared by:

Gerard T. Coash, RPR, RMR Certified Reporter Certification No. 50503



PHOENIX DEPOSITION REPORTERS & VIDEOCONFERENCING www.coashandcoash.com 602-258-1440



LAWYER'S NOTES

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602,258.1440 f.602.258.2062 www.coashandcoash.com

1802 N. 7th Street Phoenix, AZ 85006 LAWYER'S NOTES

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1802 N. 7th Street Phoenix, AZ 85006

# Robert Edward Jones II, Volume 1

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1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 9 20 21	Page 2 INDEX WITNESS PAGE ROBERT EDWARD JONES II, VOL. 1 Examination by Mr. Williams 12 EXHIBITS MARKED EXHIBITS DESCRIPTION PAGE (None offered.) INSTRUCTIONS NOT TO ANSWER Page 24 Line 13 Page 24 Line 20 Page 24 Line 20 Page 24 Line 20 Page 24 Line 20 Page 31 Line 20 Page 31 Line 20 Page 31 Line 20 Page 30 Line 10 Page 55 Line 11 Page 65 Line 1 Page 65 Line 1 Page 65 Line 21 Page 65 Line 21 Page 65 Line 21 Page 65 Line 21 Page 77 Line 1 Page 77 Line 6 Page 79 Line 10 Page 79 Line 9 Page 79 Line 9 Page 79 Line 9	<ul> <li>09:02:32-09:04:08 Page 4</li> <li>1 TRANSCRIPT OF PROCEEDINGS</li> <li>2 THE VIDEOGRAPHER: We are on the record.</li> <li>3 The time on the video monitor is 9:02 a.m. Here begins</li> <li>4 volume 1, video number one, in the deposition of Robert</li> <li>5 Jones, in the matter of Desert Mountain Club versus Clark,</li> <li>6 in the Superior Court of the State of Arizona, in and for</li> <li>7 the County of Maricopa, case number CV2014-015334.</li> <li>8 Today's date is March 20th, 2015. Our court</li> <li>9 reporter is Gerard Coash. My name is Jerry Coash,</li> <li>10 certified videographer, representing Coash &amp; Coash. This</li> <li>11 video deposition is taking place at 6225 North 24th</li> <li>12 Street, Phoenix, Arizona.</li> <li>13 Counsel, please identify yourselves and</li> <li>14 state whom you represent.</li> <li>15 MR. CALLAHAN: Christopher Callahan, joined</li> <li>16 by Seth Schuknecht, from Fennemore Craig on behalf of</li> <li>17 plaintiff Desert Mountain Club, Inc.</li> <li>18 MR. LAVOY: Chris LaVoy on behalf of Robert</li> <li>19 Jones in his individual capacity.</li> <li>20 MR. WILLIAMS: Daryl Williams for the</li> <li>21 defendants.</li> </ul>
22 23 24 25	Page 81 Line 3 Page 82 Line 14	<ul> <li>22 THE VIDEOGRAPHER: Would the court reporter</li> <li>23 please swear in the witness.</li> <li>24 (Witness sworn.)</li> <li>25 MR. LAVOY: So, Daryl</li> </ul>
1 2 3 4 5 6 7 8 9 10 11 12 13	Page 3 VIDEOTAPED DEPOSITION OF ROBERT EDWARD JONES II, VOL. 1 was taken on May 20, 2015, commencing at 9:02 a.m., at the law offices of Baird, Williams & Greer, LLP, 6225 North 24th Street, Suite 125, Phoenix, Arizona, before Gerard T. Coash, a Certified Reporter in the State of Arizona. * * * APPEARANCES: For the Plaintiff; FENNEMORE CRAIG, PC By: Christopher L: Callahan, Esq. Solth G. Schuknocht, Esq. 2394 East: Camelback Road Suite 600 Phoenix, Arizona 85016 602-916-5000	<ul> <li>09:04:11-09:05:52</li> <li>Page 5</li> <li>MR. WILLIAMS: Mr. Williams, please.</li> <li>MR. LAVOY; Okay. Based on our discussion</li> <li>moments ago, it's my understanding that your clients, the</li> <li>defendants, are not willing to stipulate to any of the</li> <li>proposed terms of confidentiality that were communicated</li> <li>to you by plaintiff's counsel and by me in written</li> <li>communications last week. We didn't get a response from</li> <li>you. And and as we explained, given that, we're going</li> <li>to need to adjourn this deposition and take these issues</li> <li>up with the court to resolve the confidentiality issues,</li> <li>and we'll proceed upon direction from the judge.</li> <li>MR. WILLIAMS: Mr. Callahan, do you have</li> <li>something to say?</li> </ul>
14 15 16 17 18 19 20 21 22 23 24 25	602-916-5000 ccallaha@fclaw.com sschukne@fclaw.com For the Defendants: BAIRD, WILLIAMS & GREER, LLP By: Deryl M. Williams, Esq. 6225 North 24th Streat Suite 125 Phoenix, Arizona 85016 602-256-9400 darylwilliams@bwglaw.net For the Witness: TIFFANY & BOSCO, PA By: Christopher A: LaVoy, Esq. 2525 East Camelback Road Phoenix, Arizona 85016 602-255-6000 cal@tblaw.com Also present: Jerry Coash, videographer	14 MR. CALLAHAN: Absolutely. We had proposed 15 last week to you, Mr. Williams, in light of the 16 confidentiality obligations imposed upon Mr. Jones by 17 virtue of his employment with the club, Mr. LaVoy pointed 18 out by virtue of his employment with the predecessor to 19 the club, where Mr. Jones also has confidentiality 20 obligations, that we would allow this deposition to 21 proceed, we would propose that it be designated as 22 confidential, preserving fully your right to challenge 23 that designation as to some or all of the testimony taken, 24 at a later date, so that you could proceed this moming. 25 Both Mr. LaVoy and I sent letters to you

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<ol> <li>last week. We did not receive the courtesy of a response</li> <li>from your office to either of those letters. When we came</li> <li>in this morning, we asked whether you were willing to</li> <li>agree and you said, quote, Daryl Williams does never agree</li> <li>to confidentiality agreements because I've been wrapped</li> <li>around the axle before.</li> <li>It would have been nice to know that in</li> <li>advance so we could see if we could have gotten ahold of</li> <li>Judge Bergin and resolved this today. But we are standing</li> <li>on the confidentiality objection.</li> <li>MR. WILLIAMS: Well, I can imagine there's</li> <li>one thing that I'm going to ask today that would fall</li> <li>within the ambit of any confidentiality agreements here.</li> <li>I certainly would respect confidentiality. And if you</li> <li>want to make an objection during the course of this that</li> <li>you think one question or another of mine falls within the</li> <li>limits of a confidentiality agreement, that seems to be an</li> <li>appropriate way for me to proceed.</li> <li>But to simply agree that carte blanche, in</li> <li>general, these very general letters that were sent to</li> <li>you sent to me by you and Mr. LaVoy, that is very</li> <li>imprudent of me as a lawyer. And so I do not do general</li> <li>carte blanche confidentiality agreements. I'm willing to</li> </ol>	<ol> <li>website. Anybody's website.</li> <li>But please explain to me, Mr. Callahan, what</li> <li>kind of problems this could possibly cause for the club?</li> <li>MR. CALLAHAN: If you go into any club</li> <li>confidentiality issues, which includes anything regarding</li> <li>club operations, that creates a problem. Because there is</li> <li>a confidentiality agreement between the club and</li> <li>Mr. Jones. There is a confidentiality agreement between</li> <li>Desert Mountain Properties Limited Partnership, the</li> <li>developer, the predecessor, and Mr. Jones, that is similar</li> <li>in scope.</li> <li>Obviously, we are willing to waive it for</li> <li>purposes of this litigation so long as the transcript is</li> <li>kept to this litigation.</li> <li>You're out soliciting a class action or a</li> <li>mass action among the Desert Mountain members against the</li> <li>club, that is well-known. I assume that you will use this</li> <li>for it. That's the only purpose I can think of for</li> <li>accelerating this deposition the way you have. And that</li> <li>is an improper use of a deposition, that is an improper</li> <li>use of a transcript, and we will resist that.</li> <li>MR. WILLIAMS: Well, I'm trying to do a</li> </ol>
24 proceed and give you an opportunity, when you get the 25 transcript, to say, "This is confidential for these	<ul> <li>24 I'm entitled to that. I think you're entitled to say this</li> <li>25 position this part here, these questions here, they</li> </ul>
09:07:13-09:08:15 Page 7	09:09:25-09:10:18 Page 9
<ol> <li>reasons," showing me the particular confidentiality</li> <li>agreements clauses and explaining why it's</li> <li>confidential. That seems to me to be the more efficient</li> <li>way to proceed. Then we have something to fight about</li> <li>instead of just a bag of smoke.</li> <li>MR. LAVOY: Daryl</li> <li>MR. CALLAHAN: I appreciate your views,</li> <li>Mr. Williams. But the problem is you and/or your clients</li> <li>have elected to try this lawsuit through a website run by</li> <li>Mr. Gary Moselle. While you didn't send me a complete</li> <li>copy of the original notice for Mr. Jones' deposition, I</li> <li>was able to get one through the Gary Moselle</li> <li>website, your strategy letter to your clients, the Clarks,</li> <li>as to how you intend to defend this lawsuit.</li> <li>My assumption, since the videotape</li> <li>deposition notice was put up there, if this deposition</li> <li>proceeds without a confidentiality notice, we will see a</li> <li>link to the video being prepared today as soon as it is</li> <li>prepared on that website.</li> <li>That causes problems for the club. That is</li> <li>why we sent the letter we did.</li> <li>MR. WILLIAMS: What kind of problems does</li> <li>that cause for the club if that happens? And believe you</li> </ol>	<ol> <li>relate to something that is confidential. And then we can</li> <li>have something to discuss.</li> <li>MR. CALLAHAN: If it relates to club</li> <li>operations, it is confidential under the agreement and</li> <li>cannot be publicly disseminated.</li> <li>MR. WILLIAMS: Club operations as in hours</li> <li>of operations, their dealings with my client, Mr. Clark,</li> <li>his notice of resignation and Mr. Jones' reaction to that,</li> <li>those are club operations and confidential?</li> <li>MR. CALLAHAN: There are questions you can</li> <li>no doubt ask. But we're not going to let him ask anything</li> <li>that goes into club operations. Mr. LaVoy and I can</li> <li>confer on that. If you want to proceed that way, we can</li> <li>do that.</li> <li>MR. WILLIAMS: Well, let's proceed. Then if</li> <li>we</li> <li>MR. WILLIAMS: Yeah, let's proceed.</li> <li>MR. WILLIAMS: Yeah, let's proceed.</li> <li>MR. WILLIAMS: Mr. Williams, please,</li> <li>MR. LAVOY: No, no, Daryl.</li> <li>MR. LAVOY: Okay. Okay. Thank you,</li> <li>Mr. LAVOY: Okay. Okay. Thank you,</li> <li>Mr. Williams.</li> <li>So the issue is not just you and your</li> <li>clients publishing this deposition, along with the other</li> </ol>

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<ol> <li>case materials that are being disseminated. The issue is</li> <li>that is that Mr. Jones has contractural confidential</li> <li>confidentiality obligations with third parties that are</li> <li>fairly broad and continuing with the deposition could</li> <li>expose him to civil liability under those agreements.</li> <li>And we attempted to resolve this issue with</li> <li>you in advance to avoid what, frankly, is turning into a</li> <li>circus, and you didn't respond. You just ignored the</li> <li>issue, and hence we find ourselves.</li> <li>So, you know, if you're going to inquire</li> <li>into anything having to do with the policies and practices</li> <li>of this golf club, it's just going to be a non-starter</li> <li>under these confidentiality agreements.</li> <li>Now, it may very well be that the court</li> <li>narrows the scope of those obligations or releases</li> <li>Mr. Jones to some extent from them. And at that point,</li> <li>Mr. Jones will be happy to appear and answer those</li> <li>questions. But he should not have to be exposed to</li> <li>potential civil liability at this moment, and that should</li> <li>be resolved by the judge in our view.</li> <li>So if you're willing to to go ahead and</li> <li>assure us at the outset that you're not going to inquire</li> <li>into these areas that we described in our written</li> <li>communications, then, yes, let's let's proceed. But if</li> <li>you just want to take this question by question with an</li> </ol>	<ol> <li>then tell me, "Well, that's a policy or procedure. Dou't</li> <li>answer that question." What's wrong with that?</li> <li>MR. LAVOY: So let's take a short break</li> <li>and and let the attorneys confer regarding how to</li> <li>proceed.</li> <li>Let's go off the record for a moment,</li> <li>please.</li> <li>THE VIDEOGRAPHER: Off the record at</li> <li>9:13 a.m.</li> <li>(A recess ensued.)</li> <li>THE VIDEOGRAPHER: Back on the record at</li> <li>9:21 a.m.</li> <li>ROBERT EDWARD JONES II,</li> <li>the witness herein, having been first duly sworn by the</li> <li>Certified Reporter, was examined and testified as follows:</li> <li>BY MR. WILLIAMS:</li> <li>Q. Mr. Jones, would you please state your name?</li> <li>A. Robert Jones.</li> <li>Is that your full name, Mr. Jones?</li> <li>A. No, it's not.</li> <li>What is your full name?</li> <li>A. Robert Edward Jones II.</li> </ol>
25 you just want to take this question by question with an	25 A. Robert Edward Jones II.
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1 avalanche of objections each time as you try and needle	1 Q. Where did you graduate from high school?
2 your way into these practice and procedure issues, let's	2 A. Dallas, Texas.
3 save ourself some time and go resolve this with the court.	3 Q. What year?
4 MR. WILLIAMS: I propose that we proceed.	<b>4</b> A. 1976.
5 And if you desire to either of you instruct the	5 Q. Did you go to college?
6 witness not to answer, then there's nothing I can do about	6 A. Yes, I did.
7 that.	7 Q. Where?
8 MR. LAVOY: Are you saying that you're going 8 to be inquiring in the glub's practices and procedures?	8 A. I went to Florida International University, FIU,
<ul><li>9 to be inquiring in the club's practices and procedures?</li><li>10 It's a simple question, Daryl, yes or no.</li></ul>	<ul><li>9 in Miami, Florida.</li><li>10 Q. What did you study?</li></ul>
11 MR. WILLIAMS: I do not know what you mean	11 A. Hotel, restaurant, and club management.
12 by "club's practices and procedures."	12 Q. When did you graduate from there?
13 MR. LAVOY: Well, I think I think I	13 A. 1978.
14 don't think you're being candid there.	14 Q. What was your degree?
15 MR. WILLIAMS: And Mr Mr. LaVoy, please,	15 A. My degree is in hotel, restaurant, and club
16 I have not given you permission to use my given name, and	16 management.
17 I would appreciate it if you would refer to me formally.	17 Q. Associate's degree? Bachelor's degree? Master's
18 MR. LAVOY: Okay. Mr. Williams.	18 degree?
19 MR. WILLIAMS: Thank you.	19 A. Bachelor
20 MR. LAVOY: Okay. So, Mr. Williams, can you	20 Q. Doctorate?
21 give us a direct answer to our direct question?	<ul> <li>21 A. I didn't understand that question.</li> <li>22 Bachelor of science.</li> </ul>
22 MR. WILLIAMS: If I knew what was involved 23 with your what was defined by "policies and	<ul><li>Bachelor of science.</li><li>Q. You got a bachelor of science in two years?</li></ul>
	24 A. Yeah, sure did.
24 procedures," I could answer that. I do not.	
<ul> <li>25 So let's go question by question and you can</li> </ul>	25 Q. Congratulations.

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<ul> <li>How many hours were involved in that</li> <li>curriculum?</li> <li>A. I don't recall. But I have a bachelor of science</li> <li>in hotel and restaurant, club management.</li> <li>Q. What was your first job after you graduated in</li> <li>1978?</li> <li>A. My first job was in was running a restaurant</li> <li>for a company.</li> <li>Q. Where?</li> <li>A. In Houston, Texas.</li> <li>Q. Name of the company?</li> <li>A. Foley's, F-o-l-e-y-s. Owned by Federated</li> <li>Department Store.</li> <li>Q. And is Foley's the name of the restaurant?</li> <li>A. No. I think the restaurant was called I'm</li> <li>really I can't recall the name of the restaurant.</li> <li>Q. How long did you run that restaurant in Houston?</li> <li>A. I ran it until 1981.</li> <li>Q. Why did you quit?</li> <li>A. I didn't quit. I was</li> <li>Were you terminated?</li> </ul>	<ol> <li>A. I was assistant club manager responsible for food</li> <li>and beverage, housekeeping, maintenance, general member</li> <li>satisfaction, operation of the club.</li> <li>Q. How long did you work there?</li> <li>A. Until approximately 1984.</li> <li>Q. Why'd you leave?</li> <li>A. I was recruited/promoted to a general manager of</li> <li>my first club as a GM called El Dorado Country Club.</li> <li>Q. When you say your first club, I thought Blue</li> <li>Collar was your first club?</li> <li>A. First club as GM, general manager. General</li> <li>manager is the highest position you can have in a club as</li> <li>an employee.</li> <li>Q. So what was the name of this club where you were</li> <li>general manager?</li> <li>A. El Dorado Country Club in McKinney, Texas.</li> <li>Q. And why did you say it was your first club?</li> <li>MR. LAVOY: Object to the form. Misstates</li> <li>testimony.</li> <li>BY MR. WILLIAMS:</li> <li>Q. Did I misunderstand you? Why did you say it was</li> </ol>
21 Q. Were you terminated? 22 A. No, I wasn't terminated.	<ul><li>21 Q. Did I misunderstand you? Why did you say it was</li><li>22 your first club?</li></ul>
23 Q. What happened?	23 A. I said it was my first general manager's job.
<ul><li>24 A. I've never been terminated.</li><li>25 I was recruited to get into the club field,</li></ul>	<ul><li>24 Q. Okay.</li><li>25 A. As general manager, reporting directly to the</li></ul>
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	1 board.
<ol> <li>and I went to work for Blue Collar Golf Club in Dallas,</li> <li>Texas.</li> </ol>	2 Q. How long did you work at El Dorado?
3 Q. Isn't that quitting? You quit the restaurant to	3 A. I was there until, let's see, 19 approximately
4 do something else?	4 1991. This is also on my LinkedIn page, you can find it
5 A. I've answered your question.	5 there. It's also on the club website.
<ul><li>6 Q. Did you quit the restaurant?</li><li>7 A. I left the restaurant's employ to take another</li></ul>	<ul><li>6 Q. Why did you leave El Dorado in 1991?</li><li>7 A. To take a better job called Dallas Athletic Club,</li></ul>
8 job, yes.	B a 36-hole golf experience in Dallas, Texas.
9 Q. And where did you go to work?	9 Q. How long were you at the Dallas Athletic Club?
10 A. I went to work for Blue Collar Golf Club.	10 A. I was at the Dallas Athletic Club until
11 Q. Where is that?	11 approximately '93, I think in that zone.
12 A. In Dallas, Texas. 13 Q. What did you do there?	<ul><li>12 Q. What did you do at the Dallas Athletic Club?</li><li>13 A. I was the general manager of the club, reporting</li></ul>
14 A. I was the assistant club manager.	14 to the board of directors.
15 Q. What did the assistant club manager do?	15 Q. Were both El Dorado and Dallas Athletic Club for
16 A. Ran all the operations of the club, reported to	16 profit entities?
17 the general manager of the club.	17 A. El Dorado was a developer for profit entity.
18 Q. Give me an idea of the things that are involved	18 Dallas Athletic Club was a private member owned club, and
<ul><li>in the operations of a club.</li><li>MR. CALLAHAN: I'm sorry. Mr. Williams, are</li></ul>	<ul><li>19 therefore was a was a non-profit club.</li><li>20 Q. A 501(c)3?</li></ul>
AU INDEN AND AND AND AND AND AND AND AND AND AN	
	21 A. Yes.
you referring to golf clubs in general or in particular	<ul> <li>21 A. Yes.</li> <li>22 MR. CALLAHAN: Object to the form.</li> </ul>
	<ul> <li>21 A. Yes.</li> <li>22 MR. CALLAHAN: Object to the form.</li> <li>23 BY MR. WILLIAMS:</li> </ul>
<ul> <li>you referring to golf clubs in general or in particular</li> <li>for a club Mr. Jones worked for?</li> <li>BY MR. WILLIAMS:</li> <li>Q. I'm interested in what you did in charge of</li> </ul>	<ul> <li>MR. CALLAHAN: Object to the form.</li> <li>BY MR. WILLIAMS:</li> <li>Q. Why did you leave Dallas Athletic Club in 1993?</li> </ul>
<ul> <li>you referring to golf clubs in general or in particular</li> <li>for a club Mr. Jones worked for?</li> <li>BY MR. WILLIAMS:</li> </ul>	<ul><li>MR. CALLAHAN: Object to the form.</li><li>BY MR. WILLIAMS:</li></ul>

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1 Texas. It was a larger club, a promotion, became general	1 Q. Did people work under you at the time?
2 manager. And Northwood's in Dallas, Texas.	2 A. Yes.
3 Q. How big is the Northwood Club?	3 Q. How many?
4 A. 575 members, approximately 8 million in volume.	4 A. I don't recall the exact number.
5 Q. How many holes?	5 Q. Approximately?
6 A. 18 holes.	6 A. I would say approximately, you know, in the 400
7 Q. How many members at Dallas Athletic Club?	7 range, 400 people.
8 A. Dallas Athletic Club had 2800 members.	8 At that time, we only had two clubs
9 Q. You just told me a minute ago that Northwood was	9 houses three clubhouses at Dallas at Desert Mountain
10 a larger club, had 575 members as opposed to Dallas	10 at the time.
11 Athletic's 2800, had 18 holes as opposed to Dallas	11 Q. You continued then as vice-president of
12 Athletic's 36 holes.	12 operations throughout your employment by Desert Mountain
<ol> <li>Why, in your estimation, was Northwood Club</li> </ol>	13 Properties?
14 a larger club?	14 A. No. In '05, I was promoted to senior
15 A. It's a higher volume, \$12 million or more. It	15 vice-president of the company. In '07, I was promoted as
<ul><li>was considered one of the top clubs in Dallas, Texas in</li></ul>	16 co-president. And at that time, the club was owned by
<ul><li>17 stature, brand, reputation.</li></ul>	17 Morgan Stanley.
18 Q. How long did you stay at the Northwood Club in	18 Q. By whom was Desert Mountain Properties originally
19 Dallas?	19 owned?
20 A. I stayed until 1997, when I was recruited by a	
<ul> <li>21 member to come to Desert Mountain Properties.</li> </ul>	20 A. It was owned in a partnership with Crescent Real
22 Q. Did you start working for Desert Mountain	21 Estate REIT out of Fort Worth, Texas, Richard Rainwater's
	22 company, and Lyle Anderson of Anderson Companies based in
	23 Scottsdale.
24 A. No. I had an agreement with my club, which	24 MR. CALLAHAN: And, counsel, just for
25 required me to stay until January 19th of 1998. And that	25 clarification, when you say "originally," you mean when
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1 was my first day of employment in the position of	1 Mr. Jones first joined their employ, correct?
2 vice-president of operations.	2 MR. WILLIAMS: Well, I'm sure that he
3 Q. So you actually stayed with Northwood from 1993	3 wouldn't have any information prior to that.
4 until you began working at Desert Mountain in 1998?	4 BY MR. WILLIAMS:
5 A. Right. Mr. Williams, this is my 36 years of	5 Q. After the Crescent REIT owned it, was Morgan
6 being a private club or development club manager.	6 Stanley the next owner of Desert Mountain Properties?
<ul><li>7 Q. Your job as vice-president at Desert Mountain</li></ul>	7 A. Yes. They bought Crescent, the entire REIT, in
<ul><li>Properties involved what?</li></ul>	8 2005. That was widely publicized in all the all the
9 MR. LAVOY: Objection.	<ul> <li>trade publications, news about publicly traded companies.</li> </ul>
<ul> <li>MR. WILLIAMS: Is that a form objection or</li> </ul>	10 They bought the entire asset from Crescent and took the
11 are you going to direct him not to speak? You get to do	<ol> <li>REIT off the stock exchange.</li> </ol>
12 one or the other.	12 Q. Did Morgan Stanley continue to own Desert
<ul> <li>MR. LAVOY: So can you be more specific than</li> </ul>	<ul><li>Mountain Properties until it was sold to the members?</li></ul>
	14 A. No. They owned it for approximately 18 months.
15 information that would be subject to his contractural	15 And now we're approaching 2008, the financial fallout of
16 confidentiality obligations?	16 this country you know, the stock market. They
17 BY MR. WILLIAMS:	17 defaulted to Barclays. And Barclays had the note. And,
18 Q. What was your job as vice-president at Desert	18 therefore, I started working for Barclays Bank.
19 Mountain Properties starting in 1998?	19 Q. Did you continue on as the co-president of Desert
20 A. I was responsible for all the operations of the	20 Mountain Properties as an employee of Barclays Bank?
21 club.	21 A. Yes. I was a W-2 employee all the way through
22 Q. And when you say "operations of the club," what	22 this employment relationship.
23 do you mean?	23 Q. Did you have an employment contract with Barclays
24 A. That would be all the operating departments,	24 Bank?
25 golf, food and beverage, maintenance, membership.	25 A. I've had an employment agreement ever since I

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<ol> <li>arrived to Desert Mountain Properties.</li> <li>Q. Is there a confidentiality agreement or clause in</li> <li>your employment agreement with Barclays Bank?</li> <li>A. Barclays bought the assets of Desert Mountain</li> <li>Properties. Lyle Anderson Co, which is represented by</li> <li>Sonoran Partners, still maintained his ownership position.</li> <li>Your contract and my confidentiality agreement, as well</li> <li>as all the employees, all our all our personnel records</li> <li>stayed the same during that period of time.</li> <li>MR. CALLAHAN: Mr. Williams, if I might, let</li> <li>me say that</li> <li>MR. WILLIAMS: Is this an objection or is</li> <li>this which you get you get to instruct him not to</li> <li>answer or say "form."</li> <li>MR. CALLAHAN: What I get to do</li> <li>MR. WILLIAMS: You want to take a rest</li> <li>you want to take a recess, you may do that too.</li> <li>MR. CALLAHAN: No. I'd like to make a brief</li> <li>statement that would be over if you would just let me make</li> <li>it.</li> <li>So I wanted to let you know that</li> <li>Mr. Jones Mr. Jones' employment contract does include a</li> <li>non-disclosure provision.</li> <li>BY MR. WILLIAMS:</li> </ol>	<ol> <li>not I'm not on a personal friendship basis or knowledge</li> <li>base as to where Mr. Yehling is. I don't know.</li> <li>Q. Did he continue on with Desert Mountain, the</li> <li>member owned entity, that acquired the golf course in</li> <li>2011?</li> <li>A. He did continue on for a period of time. I think</li> <li>he was there approximately 90 days, but I'm not</li> <li>approximate, I'm not sure exactly.</li> <li>Q. Do you know why Mr. Yehling left?</li> <li>A. Yes. He because the reason</li> <li>MR. LAVOY: Well, hold.</li> <li>THE WITNESS: Yeah.</li> <li>MR. LAVOY: I'm going to object and instruct</li> <li>you not to answer regarding any personnel matters of the</li> <li>club.</li> <li>THE WITNESS: I can't com comment on</li> <li>that.</li> <li>BY MR. WILLIAMS:</li> <li>Q. Okay. Why do you think he left?</li> <li>MR. LAVOY: Same.</li> <li>THE WITNESS: No comment.</li> <li>BY MR. WILLIAMS:</li> <li>Q. Was Mr. Yehling terminated?</li> <li>MR. LAVOY: Same.</li> <li>THE WITNESS: No comment.</li> </ol>
09:35:54-09:37:07 Page 23	09:38:20-09:39:23 Page 25
<ul> <li>1 A. No. I got a they bought and I've been</li> <li>2 clear with you on this they bought Crescent REIT out.</li> <li>3 Therefore, they bought the company. Right? So I stayed</li> <li>4 an employee of Desert Mountain Properties until the</li> <li>5 members bought the club.</li> <li>6 Q. And when did the members buy the club?</li> <li>7 A. They bought the club in January 1 of 2011.</li> <li>8 Q. At the time the members bought the club, you were</li> <li>9 still the co-president?</li> <li>10 A. That's correct.</li> <li>11 Q. Who was your co-president?</li> <li>12 A. The co the other co-president was our ex-CFO</li> <li>13 Richard Yehling.</li> <li>14 Q. Would you spell Mr. Yehling's last name?</li> <li>15 A. I may not have this right.</li> <li>16 MR. LAVOY: Y-e-h-1-i-n-g.</li> <li>17 THE WITNESS: Yeah, that is correct.</li> <li>18 BY MR. WILLIAMS:</li> <li>19 Q. Where's Mr. Yehling now?</li> <li>20 A. I am not aware of where he's employed. Last time</li> <li>21 I knew he was with Pacific Links, but I'm not aware where</li> <li>21 he's employed today.</li> <li>23 Q. Where is Pacific Links?</li> <li>24 A. Pacific Links is an entity that has bought</li> <li>25 several golf clubs. They have a website. But, again, I'm</li> </ul>	<ul> <li>MR. WILLIAMS: And so let me see if 1</li> <li>understand, Mr. LaVoy. You think this is somehow in</li> <li>violation of a confidentiality agreement about club</li> <li>businesses and policy as to why Mr. Yehling left?</li> <li>MR. LAVOY: Mr. Jones is subject to an</li> <li>employment agreement with broad confidentiality</li> <li>protections for the club and the question you've asked</li> <li>could be construed as asking him to provide confidential</li> <li>information regarding personnel matters and internal</li> <li>management of the company. And, therefore, to avoid civil</li> <li>liability, Mr. Jones is is not going to answer. But we</li> <li>welcome that the issue be raised with the court and</li> <li>MR. UAVOY: we'll proceed as as</li> <li>ordered.</li> <li>MR. WILLIAMS: Mr. Callahan, as the club's</li> <li>lawyer, are you going to sue Mr. Jones if he answers this</li> <li>question?</li> <li>MR. CALLAHAN: Mr. Williams, you can't</li> <li>possibly intend that question the way you asked it. As</li> <li>you know, there's a predecessor entity. Mr. LaVoy and</li> <li>Mr. Jones have been very clear that the predecessor entity</li> <li>has the rights that Mr. LaVoy is here talking about. I</li> <li>don't represent that entity.</li> <li>MR. WILLIAMS: Do you, as the representative</li> </ul>

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1 of the plaintiffs in this case, have any objection if	1 A. He was president of the board. It was a member
2 Mr. Jones says his opinion of why Mr. Yehling left after	2 board.
3 the present entity succeeded ownership?	3 Q. Was he president of the entity that owned all the
4 MR. CALLAHAN: Absolutely. I join	4 assets?
5 Mr. LaVoy's objection. Mr. Jones has a confidentiality	5 MR. CALLAHAN: Objection. Foundation.
6 obligation. We provided you with a mechanism to get this	6 THE WITNESS: Can you repeat the question?
7 all resolved. With an order from the court, that would	7 BY MR. WILLIAMS:
8 clarify things, would protect Mr. Jones, would allow you	8 Q. Was he president of the entity that owned the
9 to take this testimony. You declined that. That's why we	9 assets?
L0 are where we are. MR. WILLIAMS: And what is confidential	10 A. He was
	11 MR. CALLAHAN: Same objection.
<ul><li>about this question, Mr. Callahan?</li><li>MR. CALLAHAN: You would have to ask</li></ul>	<ul> <li>MR. WILLIAMS: You know, Mr. Callahan, I</li> <li>think you get to say "form." That's all.</li> </ul>
	<ul> <li>1.3 think you get to say "form." That's all.</li> <li>14 MR. CALLAHAN: I can say "form." I can say</li> </ul>
.4 Mr. LaVoy that, Mr. Williams. There is a confidentiality .5 obligation. Mr. LaVoy is protecting his client and his	15 "foundation." I'll defend this deposition as I deem
<ul> <li>obligation: Wit La voy is protecting its cheft and its</li> <li>obligations under a contract.</li> </ul>	16 appropriate without your advice. Thank you, counsel.
MR. WILLIAMS: From the standpoint of the	17 BY MR. WILLIAMS:
.8 plaintiffs, is there anything obligation – anything	18 Q. Was he president of the entity that owned the
.9 confidential about this question?	19 assets?
MR. CALLAHAN: I have no idea, Mr. Williams.	20 A. He was
1 And I'm not under oath here. This is counting against	21 MR. CALLAHAN: Objection. Foundation.
2 your four hours, so use it as you will.	22 MR. WILLIAMS: Go ahead.
3 MR. WILLIAMS: So you are just also	23 THE WITNESS: I'm not going to answer the
4 instructing your client not to answer this question?	24 question. Move on.
5 MR, CALLAHAN: Mr. LaVoy took care of that,	25 MR. CALLAHAN: Bob, you can answer that.
9:40:31-09:41:26 Page 27	09:42:13-09:43:17 Page 2
	, view of the second se
1 I'm not instructing him to do anything on this question.	1 The problem is it becomes a member owned club. He's
2 MR. WILLIAMS: Do you agree that he is	2 president of the board.
3 permitted to answer this question?	3 MR. WILLIAMS: No speeches. Please, no
4 MR. LAVOY: Mr. Williams, I think	<ul> <li>4 speeches. No speeches, please.</li> <li>5 THE WITNESS: He's he's the president.</li> </ul>
<ul> <li>5 you have</li> <li>6 MR. CALLAHAN: I don't think</li> </ul>	<ul> <li>5 THE WITNESS: He's he's the president.</li> <li>6 MR. CALLAHAN: You're wearing on my</li> </ul>
<ul> <li>MR. CALLAHAN, Tubit tunik</li> <li>MR. LAVOY: sufficient guidance</li> </ul>	7 patience, Mr. Williams, very quickly.
8 MR. CALLAHAN: I'm under oath here.	<ul> <li>B THE WITNESS: He's the president of the</li> </ul>
<ul> <li>9 Proceed.</li> </ul>	<ul><li>9 member elected board. He's the president of the club.</li></ul>
0 BY MR. WILLIAMS:	10 He's the president that represents the members in all the
1 Q. Did you have another co-president after	11 assets that the members own, yes.
2 Mr. Yehling left in the first part of 2011?	12 BY MR. WILLIAMS:
3 A. No.	13 Q. And the members do own all the assets, correct?
4 Q. Did you become the president?	14 A. That's correct.
5 A. No, I did not.	15 Q. Have owned all the assets since turnover in
6 Q. Who became president?	16 January 1, 2011 to the present?
7 A. The member board members elected an advisory	17 A. From January 1, 2011, at the closing, which
8 board of the club. The president, at that time, became	18 happened on the 31st, yes, they do. They own all the
9 David White.	19 assets.
0 Q. Was he president of the board pres	20 The actually, the corporation owns the
1 president of the company that owned all the assets at	21 assets, and then they own that corporation. And that
2 Desert Mountain?	22 corporation is called Desert Mountain Club, Inc.
3 A. That's correct.	23 Q. Desert Mountain Club, Inc. is owned by every
4 Q. Well, that was a that was disjunctive.	24 member of the golf club or just the equity members?
5 Was he president of the board?	25 A. Just the equity members, yes.

(7) Pages 26 - 29

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09:43:19-09:44:37 Page 30	09:45:41-09:46:56 Page 32			
<ol> <li>Q. That includes, does it not, both the golf equity</li> <li>and the club equity members?</li> <li>A. That's yes.</li> <li>Q. Are there any other equity members, other than</li> <li>golf equity and club equity members?</li> <li>A. No.</li> <li>Q. Has the club recently added any new equity</li> <li>members to the membership at Desert Mountain?</li> <li>A. Yes.</li> <li>Q. When was the last time an equity member was</li> <li>added?</li> <li>A. This month.</li> <li>Q. What did that</li> <li>A. By the membership committee and board approval.</li> <li>Q. Was it an equity member who succeeded to interest</li> <li>on the surrender list?</li> <li>MR. CALLAHAN: Object to the form.</li> <li>THE WITNESS: Could you be more specific?</li> <li>BY MR. WILLIAMS:</li> <li>Q. Yeah. You've got a surrender list out there for</li> <li>people who want to get out, correct?</li> <li>A. We have a member resale program. And that is the</li> <li>only way you can come in or out of the club, yes.</li> <li>Q. Well, my question was the recently added equity</li> </ol>	<ol> <li>is confidential information. Those terms represent the</li> <li>represent the policies of the club and how it accepts</li> <li>members. And so my instruction stands.</li> <li>BY MR. WILLIAMS:</li> <li>Q. Since January 1, 2011, what is it exactly that an</li> <li>equity member owns?</li> <li>A. They own</li> <li>MR. CALLAHAN: Object to the form. Lack of</li> <li>foundation.</li> <li>MR. WILLIAMS: Go ahead.</li> <li>THE WITNESS: Why don't you restate the</li> <li>question again?</li> <li>MR. WILLIAMS: Sure. Read that read that</li> <li>back.</li> <li>(The record was read by the court reporter</li> <li>as follows:</li> <li>QUESTION: Since January 1, 2011, what is it</li> <li>exactly that an equity member owns?)</li> <li>MR. CALLAHAN: Same objection, form and</li> <li>foundation.</li> <li>THE WITNESS: All members that have joined</li> <li>the club own a ownership share of the corporation that</li> <li>owns the club, which we've talked about, called Desert</li> <li>Mountain Club, Inc. That's what they own. That gives</li> </ol>			
<ul> <li>09:44:42-09:45:38</li> <li>Page 31</li> <li>member, because they participated in the resale program?</li> <li>A. All membership issues since turnover have come</li> <li>through the membership resale program. The most current</li> <li>one that we're talking about this month, yes, membership</li> <li>resale program.</li> <li>Q. Who was that?</li> <li>MR. CALLAHAN: Object to the form.</li> <li>Can we can you give me any theory as to</li> <li>how this is relevant to the claims of Mr. Clark?</li> <li>BY MR. WILLIAMS:</li> <li>Q. Who was that?</li> <li>A. That's confidential information.</li> <li>MR. CALLAHAN: Bob</li> <li>BY MR. WILLIAMS:</li> <li>Q. How much did that member pay?</li> <li>MR. CALLAHAN: Objection. That's not</li> <li>relevant. We're not doing a fishing expedition for your</li> <li>mass action, Mr. Williams. Move on.</li> <li>BY MR. WILLIAMS:</li> <li>Q. How much did that member pay?</li> <li>A. I can't answer the question.</li> <li>Q. You're not answering the question?</li> <li>MR. LAVOY: I'm instructing Mr. Jones not to</li> <li>answer the question. The the terms of the club with</li> <li>new equity members who have no involvement in this lawsuit</li> </ul>	<ul> <li>1 right to use the club on a recreational and social basis.</li> <li>2 BY MR. WILLIAMS:</li> <li>3 Q. Take my clients, the Clarks, for example</li> <li>4 A. Uh-huh.</li> <li>5 Q. They were equity golf members, correct?</li> <li>6 A. Correct.</li> <li>7 Q. They owned part of the club, correct?</li> <li>8 MR. CALLAHAN: They own part of the club.</li> <li>9 THE WITNESS: They as an equity member,</li> <li>10 they owned a share of ownership of the club?</li> <li>11 BY MR. WILLIAMS:</li> <li>12 Q. What was their share of ownership of the club?</li> <li>13 A. Well, if the club dissolved, all dissolved, then</li> <li>14 they would have whatever the financial gain of that asset</li> <li>15 would be if it was sold to a secondary market. That</li> <li>16 happens in all private clubs.</li> <li>17 If any private club was to dissolve, the</li> <li>18 equity members would own whatever was the return from that</li> <li>19 or the liability from that.</li> <li>20 Q. So what was the Clarks' interest ownership</li> <li>21 interest in the club?</li> <li>22 MR. CALLAHAN: Objection. Form and</li> <li>23 foundation.</li> <li>24 THE WITNESS: I have no calculation. I have</li> <li>25 no bearing on that question because it's a dissolution</li> </ul>			

Desert Mountain	Club	vs.	Clark
No. CV2014-0153	3		

#### Robert Edward Jones II, Volume 1 May 20, 2015

	B:10-09:49:07 Page 34	00.5	50:27-09:51:39 Page 30
09.4		09.0	Ū
1	question.	1	entity, yes.
2	If the company was to dissolve as I	2	Q. That means, does it not, that he owned an
3	explained further of all private clubs, if the club	3	interest, a proportionate interest, in all the assets of
4	dissolved, they would have whatever the proceeds of the	4	the new entity, indirectly, as his him being an owner
5	sales of the asset and the land, would be distributed	5	of the company?
6	equally per each ownership share.	6	MR. CALLAHAN: Objection. Form and
7	BY MR, WILLIAMS:	7	foundation.
8	Q. Is it your testimony, Mr. Jones, that the only	8	THE WITNESS: The equity members elect a
9	equity interest that an equity member has is equity if	9	board to govern. This is the same in all private clubs,
10	there is a dissolution and distribution and liquidation?	10	Mr. Williams. You may or may not have experience with
	A. No, sir.	11	private clubs, but that's how private clubs operate.
12	MR. CALLAHAN: Objection. Form and	12	MR. WILLIAMS: Would you repeat my question,
13	foundation.	13	please?
14	THE WITNESS: Didn't say that. That's not	14	MR. LAVOY: Repeat his answer.
15	what I said.	15	MR. WILLIAMS: Just the question.
16	BY MR. WILLIAMS:	16	MR. LAVOY: Both.
17	Q. Well, correct me with what I said was incorrect	17	MR. WILLIAMS: Just the question.
18	there.	18	(The record was read by the court reporter
19	MR. CALLAHAN: Objection to the form.	19	as follows:
20	You're asking all sorts of legal occlusions here, counsel.	20	QUESTION: That means, does it not, that he
21	It's inappropriate for this witness.	21	owned an interest, a proportionate interest, in
22	MR, WILLIAMS: Go ahead.	22	all the assets of the new entity, indirectly, as
23	THE WITNESS: I'm really, I'm unsure	23	his him being an owner of the company?)
24	where you want to go with this or what you're trying to go	24	MR. CALLAHAN: And what was the answer to
25	to this.	25	that question, Mr. Coash?
23	ю шк,	25	uni queston, en cousir
09:4	9:09-09:50:23 Page 35	09:5	i1:43-09:50:40 Page 3
1	These individuals were equity members.	1	MR. WILLIAMS: Don't read that. Let him
1	They're owners of the club. We have clearly answered that	1 1	MR. WIELIAMS, Don't lead that. Let him
2		1	any up this and first
		2	answer this one first.
3	question. So I don't you know, I'm not sure what else	3	MR. CALLAHAN: Counsel, I want to hear the
4	question. So I don't you know, I'm not sure what else you want to know in that regard.	3 4	MR. CALLAHAN: Counsel, I want to hear the answer to the last question. That is my right.
4 5	question. So I don't you know, I'm not sure what else you want to know in that regard. BY MR. WILLIAMS:	3	MR. CALLAHAN: Counsel, I want to hear the answer to the last question. That is my right. MR. WILLIAMS: Go ahead.
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09:54:50-09:56:26 09:50:43-09:54:06 Page 38 Page 40 his -- him being an owner of the company?) 1 1 this is a question of law, what -- who formally owns an 2 MR. CALLAHAN: And show an objection to form asset, the entity, the shareholder, directly, indirectly. 2 3 and foundation. 3 You're trying to box him in on a question of law that as a THE WITNESS: In private clubs, equity layperson he's not in a position to answer. I know you're 4 4 members elect a board to govern the club. They are the hoping for a sound byte, but it's harassing. And that's 5 5 6 owners of the club, that is the same case for Desert 6 separate and apart from the confidentiality. Please be Mountain Club, Inc. respectful of the rules and move on. 7 7 So your client signed a membership 8 8 MR. WILLIAMS: Are you instructing the agreement, a conversion agreement, supersedes all other witness not to answer this question? 9 9 agreements, and is a member, was vetted by the membership 10 10 MR. LAVOY: What's your question? 11 committee and approved to join the new entity, and join 11 MR. WILLIAMS: Please read the question 12 the new entity and became an equity owner of the club, as 12 back. all private clubs, to my knowledge, are operated in that 13 13 (The record was read by the court reporter 14 fashion 14 as follows: BY MR. WILLIAMS: 15 15 QUESTION: It's a yes or no. Does an equity 16 Q. And as an equity owner, he owned assets of the 16 member own any assets at the club?) 17 club? 17 MR. CALLAHAN: Form and foundation. 118 MR. CALLAHAN: Object to the form. Lack of 1B MR. LAVOY: I'm instructing you not to foundation. 19 19 answer. MR. LAVOY: Mr. Williams, you're asking this 20 THE WITNESS: I can't answer the question 20 lay witness questions of law for a lawyer or a judge. 21 based on advice of counsel. 21 22 It's harassing. You know better, Please stop it. 22 MR. WILLIAMS: I've placed on the screen --23 MR. WILLIAMS: Please answer the question, 23 THE WITNESS: Mr. Williams, can I have your opinion, not a legal opinion. 24 24 another bottle of water, if you'd be so kind? THE WITNESS: I've --25 25 MR. WILLIAMS: I've placed on the screen a 09:54:06-09:54:47 09:56:28-09:58:48 Page 39 Page 41 1 MR. CALLAHAN: Same objection. 7 document, which is CL008 -- Let me come back. 2 THE WITNESS: I've given my opinion. My THE WITNESS: Thank you, sir. 2 3 opinion's on record. We can read it back if you'd like. BY MR. WILLIAMS: 3 4 But I've answered the question. 4 Q. I've placed on the screen a document, has a Bates 5 BY MR. WILLIAMS: label CL triple zero 80 -- CL00080. These are the bylaws 5 6 O. So equity members do own assets or not? 6 of the Desert Mountain Club dated July 1, 2013. 7 MR. CALLAHAN: Object to the form. Calls 7 Are you familiar with these bylaws? 8 for a legal conclusion. 8 MR. CALLAHAN: Object to the form. 9 THE WITNESS: I've answered the question, THE WITNESS: I am familiar with the club 9 10 sir. 10 bylaws, yes. 11 Ask your next question. 11 BY MR. WILLIAMS: 12 BY MR. WILLIAMS: 12 Q. The first page in these bylaws, CL0001 -- let me 13 Q. It's a yes or no. Does an equity member own any 13 state that this way -- CL00081, has bylaw keypoints. Have assets at the club? you seen these bylaw keypoints before? 14 14 15 A. All --15 A. Can you raise the font on this? 16 MR. CALLAHAN: That depends on the club 16 Q. Sure. 17 structure, Mr. Williams. And we're not talking about this 17 A. Thank you. particular club structure because that's going to violate The page that you asked me to look --18 10 19 the confidentiality provision. 19 identify has disappeared. 20 MR. WILLIAMS: Are you instructing --20 I'd like to see the bottom of the document, 21 MR. CALLAHAN: You've asked this question. 21 please. There's a footer on the bottom. 22 Move on. 22 Okay. Yes, I've seen those. 23 MR. WILLIAMS: Are you instructing the 23 Q. What was telling about the footer at the bottom 24 witness not to answer that question? 24 of CL00081? MR. LAVOY: Mr. Williams, more fundamentally 25 25 A. Nothing. That would just give me an idea was

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No. CV2014-01533	May 20, 2015
09:58:51-10:00:29 Page 42	10:01:34-10:02:26 Page 44
<ul> <li>this a legitimate document or not.</li> <li>Q. What about that footer tells you whether this is</li> <li>a legitimate document?</li> <li>A. Shows that it came from one of the individuals</li> <li>that works in our company.</li> <li>Q. Which individual is that?</li> <li>A. C Hillis.</li> <li>Q. Does that mean that this document, CL00081, was</li> <li>prepared by C Hillis?</li> <li>A. No. You want to show me the whole document</li> <li>and So what was your question, Mr. Williams, about the</li> <li>document?</li> <li>Q. My question initially was whether you were</li> <li>familiar with it. But we got off on a</li> <li>A. But I I said No, sir, I did answer the</li> <li>question. I am familiar with the document.</li> <li>Q. Who prepared this bylaws keypoints?</li> <li>A. It was a combination of Randy Addison '13</li> <li>2013. Randy Addison of Addison Law in Dallas, Texas. It</li> <li>could have been Quarles &amp; Brady, or if was Fennemore Craig</li> <li>together. I'm not sure when Fennemore Craig relook over</li> <li>legal lead on our legal work.</li> <li>Q. What was the reason for preparing this little</li> </ul>	<ol> <li>they agree to abide by the full bylaws of the club.</li> <li>These are only pages which I have clearly</li> <li>answered is index to the bylaws.</li> <li>Q. So you wouldn't expect members to rely upon the</li> <li>bylaws keypoints?</li> <li>A. I would expect members to rely on the full</li> <li>bylaws, the full set.</li> <li>Q. So the answer is no, you wouldn't expect them to</li> <li>rely upon this?</li> <li>A. Please don't answer the question for me.</li> <li>I By membership agreement, the members</li> <li>agree to abide by the club bylaws.</li> <li>Q. Do you</li> <li>A. The full club bylaws.</li> <li>Q. You know, I appreciate that.</li> <li>A. Okay.</li> <li>Q. Well, you're not answering my question. So</li> <li>you're not helping me.</li> <li>A. Yes, sir, I am.</li> <li>Q. The question is did you expect you</li> <li>personally that members could rely upon the bylaws</li> <li>MR. CALLAHAN: You're asking that</li> </ol>
10:00:32-10:01:30 Page 43	10:02:27-10:03:25 Page 45
<ul> <li>10:00:32-10:01:30 Page 43</li> <li>1 summary at the beginning of the bylaws that kind of</li> <li>2 summarize these things here?</li> <li>3 A. I think it's like this is very prevalent in</li> <li>4 all club bylaws, many club bylaws that I've seen through</li> <li>5 the years. This is just a simple summary page, like an</li> <li>6 index, for the reader of the document.</li> <li>7 Q. Did you anticipate that people would rely upon</li> <li>8 this document?</li> <li>9 A. I</li> <li>10 MR. CALLAHAN: Object to the form.</li> <li>11 MR. LAVOY: Form. Foundation.</li> <li>12 And when you say "this document," do you</li> <li>13 'mean the entire bylaws or do you mean this segment that</li> <li>14 you've elected to put on the screen?</li> <li>15 BY MR. WILLIAMS:</li> <li>16 Q. Do you have any concerns about what I'm asking</li> <li>17 here? Are you confused?</li> <li>18 A. Yes, I am.</li> <li>19 Q. Well, I'm talking about these bylaws keypoints.</li> <li>20 A. Okay.</li> <li>21 MR. CALLAHAN: Just the keypoints?</li> <li>22 THE WITNESS: And your question was?</li> <li>23 BY MR. WILLIAMS:</li> <li>24 Q. Did you expect members to rely upon these?</li> <li>25 A. We expect members, by membership agreement to</li> </ul>	<ul> <li>10:02:27-10:03:25 Page 45</li> <li>1 independent of the bylaws?</li> <li>2 THE WITNESS: My personal opinion</li> <li>3 MR. CALLAHAN: Objection. Form.</li> <li>4 Foundation.</li> <li>5 THE WITNESS: Yes. I think everyone</li> <li>6 expected members, who sign the membership agreement, to</li> <li>7 abide by and who agreed to abide by the club bylaws, to</li> <li>8 abide by them as they were in force.</li> <li>9 BY MR. WILLIAMS:</li> <li>10 Q. Mr. Jones, we're having trouble communicating.</li> <li>11 A. I'm not having any trouble.</li> <li>12 Q. You're answering questions I'm not asking. So</li> <li>13 I'm objecting as non-responsive.</li> <li>14 My question is limited to the bylaw</li> <li>15 keypoints that begin on CL00081.</li> <li>16 Did you, in your opinion, think it was okay</li> <li>17 for members to rely upon what was stated in the bylaws</li> <li>18 keypoints?</li> <li>19 A. And my answer is</li> <li>20 MR. CALLAHAN: Asked and answered.</li> <li>21 TIIE WITNESS: Asked and answered.</li> <li>22 MR. LAVOY: Go ahead and tell him again,</li> <li>24 Bob.</li> <li>25 MR. WILLIAMS: Now, just limit it to the</li> </ul>

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#### Robert Edward Jones II, Volume 1 May 20, 2015

No. CV2014-01533	May 20, 2015
10:03:26-10:04:10 Page 46	10:05:17-10:06:11 Page 48
<ul> <li>10:03:26-10:04:10 Page 46</li> <li>1 bylaws keypoints, because that's my only question.</li> <li>2 MR. CALLAHAN: Mr. Williams, I'm sorry, that</li> <li>3 question makes absolutely no sense.</li> <li>4 Are you asking him do you did you expect</li> <li>5 the members would rely on the bylaws keypoints, not read</li> <li>6 the by</li> <li>7 MR. WILLIAMS: Would you would you</li> <li>8 MR. CALLAHAN: No. I'm trying to understand</li> <li>9 your question.</li> <li>10 MR. WILLIAMS: Well, you don't have to.</li> <li>11 It's the witness. You get to say form or instruct him not</li> <li>12 to answer. Please be quiet. Otherwise if you would be</li> <li>13 so kind.</li> <li>14 MR. LAVOY: And you get</li> <li>15 MR. CALLAHAN: Mr. Williams</li> <li>16 MR. LAVOY: to answer your question once</li> <li>17 and not harass him when you don't get harass him when</li> <li>18 you don't get the answer you want. He said, repeatedly</li> <li>19 MR. WILLIAMS: Listen listen</li> </ul>	<ul> <li>10:05:17-10:06:11 Page 48</li> <li>1 MR. CALLAHAN: Objection. Misstates</li> <li>2 testimony.</li> <li>3 THE WITNESS: I've already asked and</li> <li>4 answered this question. These are part of the bylaws.</li> <li>5 Therefore, the whole bylaws are in force. That's my</li> <li>6 answer to your question.</li> <li>7 BY MR. WILLIAMS:</li> <li>8 Q. Being part of the bylaws then, the bylaws</li> <li>9 keypoints can have the same level of credibility and</li> <li>10 ability of the members to rely upon them as the actual</li> <li>11 formal bylaws themselves?</li> <li>12 A. No, sir.</li> <li>13 MR. CALLAHAN: Object to the form.</li> <li>14 Foundation.</li> <li>15 THE WITNESS: I did not say that the first</li> <li>16 time you asked.</li> <li>17 The entire bylaws are what the members have</li> <li>18 agreed to abide by in their membership agreement. That's</li> <li>19 the full context of the bylaws from page one to ending</li> </ul>
MR. LAVOY: Mr. Williams, he has repeatedly told you that a member may rely on the entirety of the bylaws, not just a select portion that you think is advantageous to your client for some reason. He's answered the question. You don't like it, move on.	<ul> <li>and fun context of the oylaws from page one to chaing</li> <li>page.</li> <li>MR. CALLAHAN: Go ahead, Bob. I'm sorry.</li> <li>Let me further offer an objection to the</li> <li>manner in which you're presenting exhibits here. You're</li> <li>cherry picking pages out of a document. You're not</li> <li>showing the witness the entire document. You're trying to</li> </ul>
10:04:13-10:05:15 Page 47	10:06:13-10:07:11 Page 49
<ul> <li>BY MR. WILLIAMS:</li> <li>Q. My question is limited to the bylaws keypoints.</li> <li>Did you, in your opinion, think that this</li> <li>was something on which members could rely?</li> <li>A. Members have signed a membership agreement. That</li> <li>membership agreement, they agree to abide by the bylaws.</li> <li>The club bylaws are in force, the full set. That's my</li> <li>answer to your question.</li> <li>Q. Well, why did you do the bylaws keypoints then?</li> <li>MR. LAVOY: Asked and answered.</li> <li>THE WITNESS: I've I've already answered</li> <li>that question.</li> <li>BY MR. WILLIAMS:</li> <li>Q. That's just a table of contents?</li> <li>A. Ycah no, it's a it's a table of contents, a</li> <li>an index guide. I've seen this, Mr. Williams, in many</li> <li>club bylaws. It's just a form how the bylaws were</li> <li>presented, as if there was a cover page with a logo on it</li> <li>that said "Desert Mountain Club."</li> <li>Q. You know, I'm not interested in any other clubs.</li> <li>Thank you for that, so many times that you've said it.</li> <li>A. I know. I'm trying to help you.</li> <li>Q. My question is why were the bylaws keypoints</li> <li>prepared if you expected the members to rely only on the</li> <li>bylaws?</li> </ul>	<ul> <li>trip him up on questions. If you want to ask him</li> <li>questions about a document, I would ask that he be shown</li> <li>the entire thing.</li> <li>BY MR. WILLIAMS:</li> <li>Q. Let me now show you this page from the bylaws</li> <li>keypoints. This is page Roman numeral III of that,</li> <li>CL00083.</li> <li>A. I've asked you before, but would you please make</li> <li>the entire page bigger for me or give me the ability to</li> <li>scroll down or give me the ability to see the actual</li> <li>document?</li> <li>MR. LAVOY: Mr. William, would you be</li> <li>willing to provide the witness with a full copy of the</li> <li>document, hard copy, so that we can move along here?</li> <li>MR. WILLIAMS: I'm going to do the</li> <li>deposition the way that I wish to do it. You guys</li> <li>MR. LAVOY: Let the record reflect you won't</li> <li>provide the witness with a hard copy of the document in</li> <li>full.</li> <li>BY MR. WILLIAMS:</li> <li>Q. So</li> <li>A. I have vision issues, sir, that's why I'm asking</li> <li>the question.</li> <li>Well, I do, too. So</li> <li>A. I understand.</li> </ul>

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le. CV20	14-01533		May 20, 20
10:07:12-1	0:08:44 Page 50	10:	10:13-10:10:34 Page 5
10.1	m going to stop at the top here start at the	1	BY MR. WILLIAMS:
	here of this page, which is marked CL00083. And I'm	1	Q. Correct?
	going to ask you questions here about well, let's	1	A. Yes. And the word the optimum word is
	o the prior page. Let's go to the prior page, Member	4	"eligible." It says "eligible." That's the optimum word
	efits Highlights, refundable membership contributions.	5	there, "eligible."
	m going to highlight some language here.	1	Q. Sure. Because under what's happening at the club
	at does that mean, "refundable membership	7	now, they've got to pay a transfer fee too. And if the
	ributions," as you understand it?	8	new member's contribution is less than the transfer fee,
	IR. CALLAHAN: Object to the form. You	9	then to get out of this club, the member's got to pay
	't even give him the entirety of the provision you're	10	money?
	ng him about, counsel.	11	MR. CALLAHAN: Object to the form.
	Y MR. WILLIAMS:	12	THE WITNESS: Is that a question?
	Vould you like to see the next page, too? I can	13	MR. WILLIAMS: Yes.
	w you the next page if you'd like.	14	THE WITNESS: Can you restate the question?
	would prefer, sir, to see whole document.	15	MR. WILLIAMS: Sure. I'll have him read it
	So ahead and answer my question with regard	16	back.
•	t's on the screen, please.	17	MR. LAVOY: He asked for it to be restated,
	IR. CALLAHAN: Form and foundation.	18	not reread.
	Y MR. WILLIAMS:		(The record was read by the court reporter
	m showing you CL00082. I've highlighted	19 20	as follows:
	ndable membership contribution. I'm asking you	1	QUESTION: Sure. Because under what's
	t what is your understanding of what that means?	21	happening at the club now, they've got to pay a
	• –	22	transfer fec too. And if the new member's
	IR. CALLAHAN: Form and foundation,	23	
	HE WITNESS: It simply means that you	24	contribution is less than the transfer fee, then
5 knov	w, the membership, once it's transferred through the	25	to get out of this club, the member's got to pay
0:08:49-1	0:10:11 Page 51	10:	10:37-10:11:53 Page 5
1 club	, that the equity members would be entitled to any	1	money?)
	ty any refund of that number, if they sold it for	2	MR. CALLAHAN: Those are two declaratory
	e than what what the club established transfer rate	3	statements. There's not a question in there. There's no
	e would be.	4	question pending, Mr. Jones.
	hat help you?	5	MR, WILLIAMS: There's a question mark at
	Y MR. WILLIAMS:	6	the end of that. Please answer that question.
	hat's your understanding, correct?	7	MR. CALLAHAN: Are you asking him if he
	hat's my general understanding of this small	8	agrees with your statement? Is that the question,
	nent of an entire document, but it does not speak for	9	counsel?
	entire document. The entire document is in force.	10	MR. WILLIAMS: I'm going to have you reread
		11	again.
	be eligible to receive a refund of their bership contribution, they would have to have submitted	1	0
		12	There's a question mark at the end because
	membership to the club for reissuance, correct?	13	the intonation went up. It's part of communicating. An
	hat's correct.	14	so answer the question, please.
	R. LAVOY: Object to the form.	15	THE WITNESS: As long as it's grammatically
	HE WITNESS: That's the that is what the	16	a question, I'll do so.
nvia	ws require, that's what the membership agreement	17	MR. WILLIAMS: Okay. It is grammatically a
	ires, that's what the conversion agreement requires,	18	question.
s requ		19	MR. CALLAHAN: It is not a grammatically a
requ that	your client signed, yes.	1	
requ that B	Y MR. WILLIAMS:	20	question. Are you asking for his agreement with your
e requ that B Q B	Y MR. WILLIAMS: o in order to get some sort of refund of	20 21	declaratory statement, counsel?
requ that B L Q. S mem	Y MR. WILLIAMS: o in order to get some sort of refund of bership contributions, they have to members have to	20 21 22	declaratory statement, counsel? MR. WILLIAMS: Please read the question.
8 requ 9 that 0 B 1 Q. S 2 mem 3 com	Y MR. WILLIAMS: o in order to get some sort of refund of bership contributions, they have to members have to ply with the procedures for becoming a member of the	20 21 22 23	declaratory statement, counsel? MR. WILLIAMS: Please read the question. / MR. CALLAHAN: There's no question what the
8 requ 9 that 0 B 1 Q, S 2 mem 3 comp 4 mem	Y MR. WILLIAMS: o in order to get some sort of refund of bership contributions, they have to members have to	20 21 22	declaratory statement, counsel? MR. WILLIAMS: Please read the question.

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10:11:55-10:12:52 Page 54	10:14:11-10:15:31 Page 56
<ol> <li>MR. WILLIAMS: Please read the question.</li> <li>(The record was read by the court reporter</li> <li>as follows:</li> <li>QUESTION: Sure. Because under what's</li> <li>happening at the club now, they've got to pay a</li> <li>transfer fee too. And if the new member's</li> <li>contribution is less than the transfer fee, then</li> <li>to get out of this club, the member's got to pay</li> <li>money?)</li> <li>THE WITNESS: Doesn't sound like a question,</li> <li>counsel, to me. Sounds like an opinion.</li> <li>MR. WILLIAMS: It is a question. Would you</li> <li>like me to put it in a question form for you?</li> <li>THE WITNESS: Sure. I mean, you're</li> <li>you're asking</li> <li>MR. WILLIAMS: Does the question</li> <li>THE WITNESS: You're asking me questions,</li> <li>and I'll answer the question</li> <li>MR. WILLIAMS: Does</li> <li>THE WITNESS: when you answer ask me.</li> <li>BY MR, WILLIAMS:</li> <li>WITNESS: I want to be helpful to you,</li> <li>counsel.</li> <li>MR. WILLIAMS: What we're going to do is</li> </ol>	<ul> <li>to do it. But it must go through the club.</li> <li>Q. So if he wants to sell the membership for a</li> <li>dollar, somebody's getting a real deal, aren't they?</li> <li>MR. CALLAHAN: Object to the form.</li> <li>THE WITNESS: I'm not sure what you mean by</li> <li>"real deal."</li> <li>BY MR. WILLIAMS:</li> <li>Q. They're getting something that's worth a whole</li> <li>lot more than a dollar, aren't they?</li> <li>A. I'm not who who is getting more?</li> <li>Q. The guy who buys Mr. Clark's membership for a</li> <li>buck.</li> <li>A. So how do I know the buyer isn't subsidizing the</li> <li>price with Mr. Clark? I don't know that.</li> <li>Mr. Clark sets his price under the</li> <li>membership resale program. He decides what the number is.</li> <li>The club has a transfer fee, like all private clubs has.</li> <li>If he sets the price lower, in order to get out of the</li> <li>club quicker, that's his choice. It's a market based</li> <li>program.</li> <li>Q. So what is the market for an equity membership</li> <li>MR. CALLAHAN: Object to the form.</li> <li>THE WITNESS: We believe the price is 65,000</li> <li>in the marketplace today.</li> </ul>
<ul> <li>10:12:53-10:14:08 Page 55</li> <li>1 when I'm speaking you don't.</li> <li>2 MR. LAVOY: And vice versa, Mr. Williams.</li> <li>3 MR. WILLIAMS: And when you're speaking, I</li> <li>4 won't.</li> <li>5 TIHE WITNESS: Sounds like a very</li> <li>6 professional way to handle yourself.</li> <li>7 BY MR. WILLIAMS:</li> <li>8 Q. At the time the Clarks decided they didn't want</li> <li>9 to be a member of this club, the club's deal was is they</li> <li>10 couldn't sell their membership, correct?</li> <li>11 A. No. They could sell their membership. It's a</li> <li>12 market based pricing. They can set the price. The club</li> <li>13 has set the price at 65,000. If the member wants to set</li> <li>14 the price lower than 65,000, they can do that.</li> <li>15 Mr. Clark obviously does not want to go</li> <li>16 through that process as required by his conversion</li> <li>17 agreement, by his membership agreement, and by the club</li> <li>18 bylaws.</li> <li>19 Q. So if Mr. Clark were to agree to proceed with</li> <li>10 this procedure, and he sold the club membership for</li> <li>11 \$10,000, would he have to pay money to get out?</li> <li>12 A. Yes. The club has established that the</li> <li>23 membership transfer fee and price is 65,000. If he wants</li> </ul>	<ul> <li>10:15:32-10:16:27 Page 57</li> <li>1 BY MR. WILLIAMS:</li> <li>2 Q. Have you sold a single new equity membership in</li> <li>3 the last three years for 65,000 or more?</li> <li>4 A. Yes, sir, we have.</li> <li>5 Q. To whom?</li> <li>6 MR. CALLAHAN: Objection.</li> <li>7 MR. LAVOY: That's sort of information we</li> <li>8 believe would be fall within the confidentiality provision</li> <li>9 of Mr. Jones' employment agreement and, therefore,</li> <li>10 instruct you not to answer.</li> <li>11 BY MR. WILLIAMS:</li> <li>12 Q. Tell me how many.</li> <li>13 MR. CALLAHAN: At a price of 65 or above is</li> <li>14 the question?</li> <li>15 MR. WILLIAMS: Yes.</li> <li>16 THE WITNESS: I'm not sure I have that on</li> <li>17 the top of my head, but I would be speculating as to</li> <li>18 the answer, but we sold</li> <li>19 MR. CALLAHAN: If you can give him a</li> <li>20 ballpark, he's entitled to that.</li> <li>23 THE WITNESS: I would say, you know, 14</li> <li>24 months ago membership was selling for 72-, 74,000. You</li> </ul>

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10:16:36-10:17:45 Page 58	10:19:02-10:20:08 Page 60
<ol> <li>would say. Not sure, have to look at the numbers.</li> <li>BY MR. WILLIAMS:</li> <li>Q. Today what are they selling for?</li> <li>A. Today they're in a marketing range between 32,000</li> <li>and 54,000.</li> <li>Q. Has the value of the membership gone down?</li> <li>A. No, sir, not in the club's opinion. But the</li> <li>members have control of getting out of the club. They</li> <li>have certainty to set their price at a market base, which</li> <li>many clubs have this program today, including two in town</li> <li>off the top of my head. They can choose to replace</li> <li>themselves and sell it whatever the price they want to</li> <li>sell it for, as long as it comes through the club.</li> <li>Q. Why do you feel compelled in your answers to</li> <li>always refer to other clubs when I'm only talking about</li> <li>Desert Mountain?</li> <li>A. It's my opinion, my personal belief. I'm just</li> <li>expressing my belief. But if you don't like it, I'll try</li> <li>to restrict it going forward.</li> <li>Q. Well, thank you. Because I'm only asking</li> <li>questions about Desert Mountain.</li> <li>A. I care about all clubs. I care about the club.</li> </ol>	<ul> <li>1 A. Okay. That's our that's what we refer to it</li> <li>2 here.</li> <li>3 Q. I'm interested in what happens here at Desert</li> <li>4 Mountain.</li> <li>5 I'm going to show you this document. This</li> <li>6 is</li> <li>7 A. The conversion agreement.</li> <li>8 Q. This is CL01505.</li> <li>9 MR. CALLAHAN: It is a portion of a</li> <li>10 document. Show my prior objection to the manner in which</li> <li>11 exhibits are being presented to this witness.</li> <li>12 BY MR. WILLIAMS:</li> <li>13 Q. And the last page of this document is CL01506,</li> <li>14 which is now both of these are on the screen before</li> <li>15 you.</li> <li>16 A. Counsel, I would request a hard copy again to</li> <li>17 help me read the the full package of what you're</li> <li>18 showing me. I'm not sure what, you know, these pieces</li> <li>19 are. I'm requesting again a hard copy of it.</li> <li>20 Q. Well, this document is a page and a half long.</li> <li>21 Do you have any trouble reading this</li> <li>22 MR. LAVOY: Mr. Williams, he's stated that</li> <li>23 he has vision issues and that seeing a hard copy would</li> <li>24 help him read it.</li> </ul>
	<ul> <li>10:20:09-10:22:02 Page 61</li> <li>1 BY MR. WILLIAMS:</li> <li>2 Q. I'm going to ask you a question here on page 2.</li> <li>3 And I'm going to help you here. I'm going to box question</li> <li>4 and answer 4. I'll blow that up for you.</li> <li>5 Do you know who wrote this revised</li> <li>6 membership marketing program information sheet?</li> <li>7 A. You keep overlaying multiple things here. So</li> <li>8 maybe just stop and let me look at what you've got</li> <li>9 presented. Again, would rather have a hard copy in front</li> <li>10 of me.</li> <li>11 Okay. Could you please reread your question</li> <li>12 so I can answer appropriately?</li> <li>13 MR. WILLIAMS: Go ahead, read that question</li> <li>14 back.</li> <li>15 (The record was read by the court reporter</li> <li>16 as follows:</li> <li>17 QUESTION: Do you know who wrote this</li> <li>18 revised membership marketing program information</li> <li>19 sheet?)</li> <li>20 MR. CALLAHAN: Show an objection to the</li> <li>21 question, form, based on the manner in which the evidence</li> <li>22 is presented to this witness. I'm not sure it's possible</li> <li>23 for him to tell what he's from what he is able to read.</li> <li>24 BY MR. WILLIAMS:</li> <li>25 Q. Let me restate the question for you.</li> </ul>

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10:22:06-10:23:04 Page 62	10:24:10-10:25:26 Page 64
<ol> <li>You've seen documents called "frequently</li> <li>asked questions" as they relate to memberships at the golf</li> <li>club before, haven't you?</li> <li>A. Yes.</li> <li>Q. This one is called "Revised Membership Marketing</li> <li>Program Frequently Asked Questions." Does this look like</li> <li>a document familiar to you?</li> <li>A. Again, I'd like to see it in the full context.</li> <li>But some of this looks like it is. I'd have to see the</li> <li>full doc.</li> <li>Q. Well, this is the full doc. It's two pages.</li> <li>A. Okay. I'll rely on the fact that you're telling</li> <li>me it's two pages.</li> <li>Q. Okay.</li> <li>M. Okay.</li> <li>M. CALLAHAN: Counsel, let me interpose an</li> </ol>	<ol> <li>MR. CALLAHAN: Form and foundation.</li> <li>THE WITNESS: Mr. Williams, all documents,</li> <li>as to our as to our membership agreements, bylaws, any</li> <li>and all communication goes through counsel. Likely, this</li> <li>document you're showing me was assisted counsel, written</li> <li>by the board, provided to the membership.</li> <li>BY MR. WILLIAMS:</li> <li>Q. So you think this is written by counsel then?</li> <li>MR. CALLAHAN: Objection to the form.</li> <li>THE WITNESS: I said "likely." Likely</li> <li>they've reviewed it, likely they as as all our</li> <li>documents are.</li> <li>But this is a communication piece, I</li> <li>believe again, not seeing the whole doc I believe</li> <li>from the board to the membership about the revised</li> <li>membership marketing program.</li> </ol>
17 objection. As you pointed out, in the way you just	17 BY MR. WILLIAMS:
18 started the question you just asked, there are a number of	18 Q. Did you review it before it went out?
19 these documents. You're asking him who prepared this	19 MR. CALLAHAN: Object to the form.
20 specific one.	20 Foundation.
21 Mr. Jones has testified he has vision	21 THE WITNESS: Likely. I review all
problems. He needs to see the whole document. In order	<ul><li>documents before they come out. I'd have to identify what</li><li>document you're talking about for me to give you that</li></ul>
<ul> <li>to understand which of the various documents you have now</li> <li>put in front of him, it would be helpful for him to see</li> </ul>	<ul><li>23 document you're talking about for me to give you that</li><li>24 answer.</li></ul>
the entire document so we can put it into context and	25 But as to this, I believe I have reviewed
10:23:06-10:24:10Page 631 maybe answer your question. We have asked on a number of	10:25:30-10:26:53     Page 68       1     this as part of the review process.
2 occasions for this witness to be shown hard copies of the	2 BY MR. WILLIAMS:
3 complete document to accommodate his vision issues. You	3 Q. What does it mean here when it says \$140,000 is
<ul> <li>4 have refused to do that. And I assume you're continuing</li> <li>5 to refuse to do that.</li> </ul>	4 the current membership contribution amount for an equity 5 golf membership?
<ul> <li>Show a continuing objection to this manner</li> <li>of questioning. It's unfair to this witness in light of</li> <li>his vision issues.</li> </ul>	<ul> <li>6 A. At turnover, the board of directors set the</li> <li>7 membership price this was in January 1 of 2011 at</li> <li>8 \$140,000.</li> </ul>
<ul><li>Bob, to the extent you can answer based upon</li></ul>	9 O. Why?
what Mr. Williams has elected to show you, you can do so.	10 MR. CALLAHAN: There you're going to draw an
But please do not speculate. If you don't know, tell	11 objection and instruction not to answer from me. That
L2 Mr. Williams that.	12 goes clearly into club polices and procedures. And that
THE WITNESS: Counsel is correct. There	13 is what the club has offered to allow him to testify to
4 were multiple documents, so I would need to see the hard 5 copy. I'd be spec 1 would just be guessing if, in	<ul> <li>subject to your agreement, which you refused to give.</li> <li>MR. LAVOY: And for that reason, l instruct</li> </ul>
L6 fact, as to what this document is.	16 the witness not to answer.
So if you want to show me a hard copy, J'll	17 BY MR. WILLIAMS:
L8 answer your question.	18 Q. Do you have an understanding of why the required
9 BY MR. WILLIAMS:	19 contribution went from \$375,000 for an equity golf
20 Q. Well, I'm not going to show you a hard copy.	20 membership to \$140,000 on January 1, 2011?
21 A. Okay.	21 MR. LAVOY: Same.
22 Q. Answer my question. Who do you think wrote	22 MR. CALLAIIAN: The whys and wherefores draw
<ul> <li>things like these frequently asked questions things, as a</li> <li>matter of routine at the Desert Mountain Club?</li> </ul>	<ul> <li>23 same objection and the same instruction.</li> <li>24 MR. WILLIAMS: This is are you going to</li> </ul>
25 A. Mr. Williams	<ul><li>tell him not to answer if he has an understanding?</li></ul>

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10:26:56-10:27:40 Page 66 10:28:53-10:30:18 Page 68 MR. LAVOY: He would have that 1 The only way that he -- he would have that information is 1 2 understanding --2 through the confidential information he acquired through MR. CALLAHAN: The only basis for him to 3 3 his employment. have an understanding, counsel -- you can't be serious 4 Again, we attempted to resolve this with you 4 5 about that question -- is based on his knowledge as the 5 in advance, Mr. Williams, and you declined to do that. So COO of the club and its policies and procedures. So б 6 here we are. Same instruction. asking what his understanding is no different than asking 7 7 BY MR. WILLIAMS: я what the club policy or procedure is. 8 Q. In your opinion, did the value of a golf --MR. WILLIAMS: If you would listen to the 9 9 equity golf membership drop from \$375,000 to \$140,000 on 10 question, Mr. Callahan, you'll see I didn't ask him what January 1, 2011? 10 11 A. Mr. Williams, the Desert Mountain Club, Inc. was 11 his opinion was. 12 MR. CALLAHAN: You asked him what his formed January 1 of 2011, and the price that was released 12 13 understanding was. as part of those docs was \$140,000 bucks. I have no 13 14 MR. WILLIAMS: Please, Mr. Callahan -opinion about what it was prior. 14 MR. LAVOY: The only source --15 15 O. It was \$375,000? 16 MR. WILLIAMS: Please --16 A. No, sir. It was never 375,000. Your information 17 MR. LAVOY: -- of that understanding would is incorrect. 17 be the company's policies and procedures, 18 18 However, on January 1, 2011, \$140,000 was 19 MR. WILLIAMS: Mr. LaVoy, 19 presented to the membership as the initiation price under 20 MR. LAVOY: Mr. Williams, we tried to the new entity called Desen Mountain Club, Inc., which 20 21 resolve this prior to the deposition. You didn't respond, 21 has a separate EIN number, is a separate corporation from 22 for whatever reason. And so now we're confronted with 22 Desert Mountain Properties. 23 this situation. It's one of your own making, Q. Well, I appreciate that. Let me show you just 23 24 Do not answer the question. another letter and then we can take your break --24 25 MR. WILLIAMS: Gentlemen, please listen to 25 A. Thank you. 10:27:42-10:28:50 10:30:19-10:31:53 Page 67 Page 69 the question. You'll see I don't ask him --1 Q. -- that you're interested in. 1 MR. LAVOY: He's been instructed not to 2 A. Appreciate that, 2 3 answer. Move on. 3 Q. I'm going to show you CL01449. It is a form MR. WILLIAMS: Please read the question back letter. And the second page of this form letter is 4 4 5 and see if these gentlemen are going to hang to this 5 CL01450. You see both pages of this document on the 6 instruction not to answer, because I do not ask his 6 screen 7 opinion, My question relates to on page 1. It says. 7 8 MR. CALLAHAN: You asked his understanding. "The Desert Mountain Club Membership Contribution for 8 9 MR, WILLIAMS: Please read that. Deferred Equity Golf clubs will increase to 325,000 from 9 10 THE WITNESS: Could we take a break, please? \$275,000, effective January 1, 2005." [Quoted as read.] 10 11 MR. CALLAHAN: Let's -- let's get the 11 A. Mr. Williams, you said -12 pending question. 12 MR. CALLAIIAN: There's not -- there's not a 13 THE WITNESS: Okay. 13 question. 14 MR. CALLAHAN: Let's resolve this. THE WITNESS: Yeah, right. 14 15 (The record was read by the court reporter MR. CALLAHAN: He's read something to you. 15 as follows: THE WITNESS: Right. 16 16 QUESTION: Do you have an understanding of BY MR. WILLIAMS: 17 17 18 why the required contribution went from \$375,000 18 Q. Did you just tell me that the contribution for 19 for an equity golf membership to \$140,000 on the deferred equity golf membership was never \$325,000? 19 20 January 1, 2011?) MR. CALLAHAN: You asked 375,000, counsel. 20 21 MR. CALLAHAN: Same objection. Same THE WITNESS: You said 375. 21 22 instruction. 22 MR. WILLIAMS: Oh, okay. I'm sorry. MR. WILLIAMS: You're not going to let me 23 THE WITNESS: Could we read that back, 23 24 know if he even has an understanding? 24 please? 25 MR. LAVOY: He cannot answer that question. 25 MR. WILLIAMS: No.

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1:54-10:33:08 Page 70	10:3	34:09-10:35:18 Page 72
THE WITNESS: Okay.	1	advice of counsel, I just answered your question.
BY MR. WILLIAMS:	2	BY MR. WILLIAMS:
Q. Was this	3	Q. Now, without looking at this document, don't you
A. I want to get it right, that's all.	4	understand that from January 1, 2005 until the takeover,
	5	the price of a deferred equity golf membership was
A. Uh-huh.	6	\$325,000?
Q that at one point in time the deferred equity	7	MR. LAVOY: Same instruction.
	8	THE WITNESS: Advice of counsel, I can't
	9	answer the question.
	1	BY MR. WILLIAMS:
	1	Q. Well, can't or won't?
	1	A. On advice
	1	MR. LAVOY: Mr. Williams, we've tried to
		raise this issue with with you in advance repeatedly,
	1	and you did not respond. It might be helpful if we
	1	adjourn the deposition and took the matter up with the
		court so that all parties could have guidance on what
	1	Mr. Jones can testify to. But please stop harassing him
	1.	about this. You had fair notice.
-		MR. WILLIAMS: Please tell me, Mr. LaVoy,
	1	what's confidential about the price of a defeired equity
		golf membership from January 1, 2005 until the turnover?
	1	MR. LAVOY: What I have told you and will
		repeat is that Mr. Jones is subject to an employment
	+	agreement with a confidentiality clause, that this
your onone, raid the date is - happened when Desert		agreement with a connuentianty clause, that this
and the second		
3:13-10;34:08 Page 71	10:3	5:23-10:36:26 Page 73
Mountain Properties owned the deal, which I have a	1	information or the information you're requesting could
	2	fall into. And if he were to answer your question, he
	з	would be exposing himself to civil liability to his former
MR. LAVOY: Mr Mr. Williams, Mr. Jones'	4	employer.
concern is that this document and your questions may fall	5	In fairness, you should have taken up our
within the scope of his confidentiality obligation under	6	offer to resolve this in advance. And we ask you again to
his prior employment agreement and expose him to civil	7	take it up with the judge so that he can confidently
liability were he to answer your question. That's the	8	answer your questions without fear of civil liability to
reason we raised the issue with you in advance, but you	9	his former employer.
did not respond.	10	Will you do that?
So don't answer the question.	11	MR. WILLIAMS: How, Mr. LaVoy, do you think
BY MR. WILLIAMS:	12	telling me what the price of an equity golf membership
	13	club was during a period of time can run afoul
ends on CL01450, didn't you?	14	MR. LAVOY: I would
	15	MR. WILLIAMS: of a membership
	16	confidentiality agreement?
	17	MR, LAVOY: Mr. Williams
	18	MR. CALLAHAN: Counsel, it doesn't matter
question.	19	what Mr. LaVoy or I think. It matters what the former
	20	employer thinks. Mr. LaVoy is advising his client as to
	21	how to avoid civil liability to the former employer. We
		tried to get this resolved in advance to eliminate any
MR. LAVOY: Yeah, that that's fine.	23	concerns the former employer would have. You did not take
		us up on that.
MR. CALLAHAN: You can fell him that.	24	
MR. CALLAHAN: You can tell him that. THE WITNESS: That is my signature. On	24 25	us up on mat.
	THE WITNESS: Okay. BY MR. WILLIAMS: Q. Was this A. I want to get it right, that's all. Q. You understood A. Ub-huh. Q that at one point in time the deferred equity golf membership sold for \$325,000, did you not? A. Mr. Williams, this document that you're showing me is for another member, which is a confidential matter unrelated to your case here. And, therefore, it also is in a time frame of November 11th, '04, which was the club was owned by Desert Mountain Club, Inc I mean, Desert Mountain Properties. I cannot speak about those documents at that time at this time. Q. My question is you understood, do you not, Mr. Jones, that between January 1, 2005 and the turnover of the club, the deferred equity golf membership price was \$325,0007 A. Mr. Williams, all I can speak to is January 1st, 2011. The Desert Mountain Club, Inc. started their membership at \$140,000. Sir, as I've already answered, I can't talk about this is another person, John W. Dillon. It's not your client. And the date is happened when Desert 3:13-10:34:08 Page 71 Mountain Properties owned the deal, which I have a confidentiality agreement that I can't talk about those documents or those policies and procedures at that time. MR. LAVOY: Mr Mr. Williams, Mr. Jones' concern is that this document and your questions may fall within the scope of his confidentiality obligation under his prior employment agreement and expose him to civil liability were he to answer your question. That's the reason we raised the issue with you in advance, but you did not respond. So don't answer the question. BY MR. WILLIAMS: Q. You signed this letter that begins on CL01449 and ends on CL01450, didn't you? A. On advice of counsel, I can't answer the question. Q. Is that your signature on CL01450? A. On advice of counsel, I can't answer the question. MR. LAVOY: Yeah, go ahead and Bob, if that's your signature THE WITNESS: Answer it?	THE WITNESS: Okay.       1         BY MR. WILLIAMS:       2         Q. Was this       3         A. I want to get it right, that's all.       4         Q. You understood       5         A. Uh-huh.       6         Q that at one point in time the deferred equity       7         golf membership sold for \$325,000, did you not?       8         A. Mr. Williams, this document that you're showing       9         me is for another member, which is a confidential matter       10         unrelated to your case here. And, therefore, it also is       11         in a time frame of November 111h, '04, which was the       12         club was owned by Desert Mountain Club, Inc I mean,       13         Desert Mountain Properties. I cannot speak about those       14         documents at that time at this time.       15         Q. My question is you understood, do yon not,       17         Mr. Jones, that between January 1, 2005 and the turnover       16         of the club, the deferred equity golf membership price was       \$325,000?         A. Mr. Williams, all I can speak to is January 1st,       20         2011. The Desert Mountain Club, Inc. started their       17         membership at S140,000.       22         Sita-10:34:08       Page 71

10:36:27-10:37:45 Page 74	10:51:13-10:52:37 Page 7
1 BY MR. WILLIAMS:	1 separate entity.
2 Q. Mr. Jones, between January 1, 2005 and the date	2 On January 1
3 of the turnover, was it public knowledge what the price of	3 MR. LAVOY: Bob, hold on one second.
4 a deferred equity golf membership was?	4 Can you read the question back?
5 MR. CALLAHAN: Foundation.	5 I want to see if this falls within the scope
6 THE WITNESS: Mr. Williams, Desert Mountain	6 of this confidentiality clause. So if you could read the
7 Club, Inc. was formed January 1 of 2011. When that was	7 question back.
8 formed, the membership price was 140.	8 (The record was read by the court reporter
9 BY MR. WILLIAMS:	9 as follows:
10 Q. What was it the day before?	10 QUESTION: Is it accurate to say, Mr. Jones,
11 A. The day before at the closing it was 1 the new	11 that the price of a golf equity membership
12 entity, Desert Mountain Club, Inc., was 140. I cannot	12 increased from \$75,000 to \$175,000 on January 1,
13 as I've already gone on record here, only solely to	13 1998?)
14 protect myself to something I signed and agreed to from	14 MR. LAVOY: That relates to information that
civil liability from a third party answer any questions	15 may fall within the confidentiality clause of Mr. Jones'
<ul> <li>about any documents prior to January 1, 2011.</li> </ul>	16 employment agreement with the prior club owner. And t
17 Q. I'm not asking you about a document.	17 answer it, he'd be putting himself at risk of civil
L8 A. This is a document, is it not?	<ol> <li>liability. So I'm instructing you not to answer.</li> </ol>
L9 Q. Let me take that off the screen.	19 We encourage you to take the matter up with
20 A. I don't know. I don't have it in front of me.	20 the judge so that he's relieved of that risk and can
21 But	21 answer all your questions fully if the judge deems that
22 Q. Let me take it off the screen then.	22 appropriate.
My question is what was the price of a	23 BY MR. WILLIAMS:
deferred equity golf membership the year before the	24 Q. Is it accurate Are you going to follow your
25 turnover?	<ul><li>25 counsel's advice and not answer that question?</li></ul>
10:37:46-10:51:10 Page 75	10:52:39-10:53:40 Page
1 A. Same issue.	1 A. Yes. I'm following my counsel's advice.
2 MR. LAVOY: Again, Mr. Williams, it may make	2 Q. Good decision.
<ul><li>3 sense for us to take this issue up with the court so that</li></ul>	3 Is it accurate to say, Mr. Jones, that on
4 it can decide what should be treated as confidential and	4 January 1, 2000, the price to have an equity golf
<ul> <li>alleviate Mr. Jones' concerns about potential civil</li> </ul>	5 membership went from 175,000 to \$225,000?
<ul> <li>6 liability. We're necessarily going to err on the side of</li> </ul>	6 MR. LAVOY: Same.
<ul> <li>breadth in our reading of the clause given that potential</li> </ul>	7 THE WITNESS: Advice of counsel, I'm not
<ul> <li>B civil liability. And that's the reason we tried to work</li> </ul>	8 cannot answer the question.
<ul><li>9 with you to resolve this in advance.</li></ul>	9 BY MR, WILLIAMS:
MR. WILLIAMS: Do you wish to take a break	10 Q. Is it accurate to say that on January 1, 2005,
10 MR, WILLIAMS. Do you wish to take a break	11 the price of an equity golf membership went from \$275,00
12 THE WITNESS: Yes, please. I asked for one	12 to \$375,000?
L3 about five, 10 minutes ago. Thank you.	13 MR. LAVOY: What was the time range on that
	14 one, Mr. Williams?
10:38 a.m. This ends tape one.	1 · ·
(A recess ensued.)	17 MR. CALLAHAN: Well, you misstated it again.
THE VIDEOGRAPHER: We are back on the	<b>18</b> You said 375. And I think we established earlier you
L9 record. The time is 10:50 a.m. This begins disk two.	19 meant to say 325. So that at least is correctible.
BY MR. WILLIAMS:	20 MR. WILLIAMS: Oh, you know, I see the
	21 problem here. My bookmark is wrong. I'm going to chang
21 Q. Is it accurate to say, Mr. Jones, that the price	22 my bookmark so I don't foul this up again.
of a golf equity membership increased from \$75,000 to	
of a golf equity membership increased from \$75,000 to \$175,000 on January 1, 1998?	23 MR. CALLAHAN: Best of luck.
of a golf equity membership increased from \$75,000 to	

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10:	53:43-10:55:02 Page 78	10:	56:15-10:56:59 Page 80
1	out.	1	BY MR. WILLIAMS:
2	MR. CALLAHAN: I doubt that from the bottom	2	Q. Is it accurate to say, Mr. Jones, that on
3	of my heart, Mr. Williams. I think you're very smart.	3	January 1, 2005, the price of an equity golf membership
4	BY MR. WILLIAMS:	4	went up to \$325,000 from \$275,000?
5	Q. Is it accurate to say, Mr. Jones, that on	5	MR. LAVOY: Same.
6	January 1, 2005 Let's go back one more,	6	THE WITNESS: Advice of counsel, I cannot
7	Is it accurate to say, Mr. Jones, that on	7	answer the question as it goes to the prior entity, which
8	January 1, 2004, the price of an equity golf membership	8	I've instructed you multiple times that I couldn't answer
9	went up to 275,000 from the previous price of \$225,000?	9	it.
10	MR. LAVOY: Same.	10	MR, WILLIAMS: You instructed me or just
11	And just to give you advance warning,	11	told me?
12	Mr. Williams, any questions that you have that relate to	12	THE WITNESS: I just told you.
13	the internal policies and procedures and operations of the	13	MR. WILLIAMS: Okay.
14	prior club, we're going to have the same concern and	14	THE WITNESS: Same as instructed.
15	objection.	15	MR. WILLIAMS: Well, actually, it's not an
16		16	instruction.
17	liability. And that's the reason we tried to resolve this	17	TILE WITNESS: Okay, Told,
18	with you in advance and and, if needed, go to the	18	MR. LAVOY: Could we stop the bickering,
19	court. But you didn't respond. So please don't ask those	19	Mr. Williams?
20	questions.	20	MR. WILLIAMS: It's more badinage than
20 21	If if you'd like to go to the court after	21	bickering.
22	today and let's get this resolved, we can resume the	22	MR. LAVOY: What is it?
23	deposition depending on the ruling of the court. And	23	MR. WILLIAMS: Badinage.
	everything will go a lot smoother.	24	BY MR. WILLIAMS:
24	everything will go a lot smoother.	1	Q. Is it accurate to say, Mr. Jones, that on
25		2,7	Q. Is it accurate to say, bit, joiles, that on
10:5	5:04-10:56:15 Page 79	10:	57:02-10:58:32 Page 81
1	BY MR. WILLIAMS:	1	January 1, 2011, the price of an equity golf membership
	Q. Is it accurate to say Well, you're not going	2	went from \$325,000 to \$140,000?
ŝ	to answer the last question, right?	3	MR. LAVOY: Same.
	A. I'm not sure what your question was.	4	THE WITNESS: Can't answer that question on
* 5	MR. WILLIAMS: Read the last question back.	5	advice of counsel. Goes to the prior entity, not Desert
	MR. LAVOY: I I heard his last question back.	6	Mountain Club, Inc., which was started 1-1 of 2011. The
6			purchase was approved by the members. The members
7	THE WITNESS: Okay.	7	
8	MR. LAVOY: I heard your last question. And	8	approved the bylaws. And they signed the conversion
9	my comment was the same. He's not going to answer it	9	agreement. They joined a new entity. The membership
10	because he doesn't want to be put at risk of civil	10	price approved by the members and the board of directors
1	liability. Frankly, shame on you for trying to put him in	11	was 140,000 bucks.
12	that pinch. And let's move on.	12	BY MR. WILLIAMS:
.3	MR. WILLIAMS: Okay. For my purposes,		Q. Prior to that, it had been 325,000, hadn't it?
L4	Mr. Court Reporter, would you please read back the last	1	A. I cannot answer that question on advice of
5	question?	15	counsel, as it goes to the prior entity.
6	(The record was read by the court reporter	16	Q. And the price today for a golf equity membership
.7	as follows:	17	is?
8	QUESTION: Is it accurate to say, Mr. Jones,	1	
9	that on January 1, 2004, the price of an equity	19	
20	golf membership went up to 275,000 from the	20	
21	previous price of \$225,000?)	21	their price, whatever they want to sell it for. If they
22	MR, WILLIAMS: Okay. We know you're not	22	want to sell it below the established transfer fee price
23	going to answer that one because you were instructed not	23	and initiation price of 65,000, they can do that.
24	to answer that question. So let me ask you the next one.	24	Q. What does the transfer fee cover?
25		25	MR. CALLAHAN: Object to the form.

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24 everybody's efforts to try to resolve these issues in 24 restrictions that allowed you full and unfettered use of		No. CV2014-01533 May 20, 2015				
2         We have a - a deht for the club. It pays for capital.         2         1 Mc. ACLLAHAN: No. No., let's - let's top this           4         for a minute. Because you're now going into current         5         the answer you're getting         and the casson for my           5         the answer you're getting	10:58:39-10:59:52 Page 82			11:01:17-11:02:37 Page 84		
2         We have a - a deht for the club. It pays for capital.         2         1 Mc. ACLLAHAN: No. No., let's - let's top this           4         for a minute. Because you're now going into current         5         the answer you're getting         and the casson for my           5         the answer you're getting	1	THE WITNESS: Transfer fee pays for debt	Т	This this is wrong Mr Williams. The		
3         MR. CALLAHAN: Now, lets - lets stop this         3         pre-deposition communications and trying to work this out.           4         for a minute. Because you're now Qinging to work this out.         which is what lydge scepcel lawyers to do, it's wrong.           5         you know better. You knew what you were doing in not         responding. You wanted this controvery today.           6         procedures of the current club. We've given you a lot of         seasonable reasurances that were requested in writing,           10         Ibadh's tood on my very reasonable request         with respect to the current entity so that you could have           11         in adminy course with the judge.         10         open questionin on not to go to the judge.           11         in minute in diverse with the judge.         11         in adver.         10           12         you a chance to raise the proprietary. We could read this         10         open questioning on all these sissue, he hos to going to that J           13         in ordinary course with the judge.         11         any methe discussion or not to go to the judge.           14         In going to instruct him not to answer.         10         We the discussion or not to go to the judge.           14         In going to instruct him not to answer.         11         Mr. LAVOY: Well, that's the problem. You           15         gease to an employment ag	1		1			
4         for a minute. Because you're now going into current	1.					
<ul> <li>the answer you're getting and the reason for my objects and procedures. The answer you're getting is policies and procedures of the current club. We've given you a lot of leewayo mis.</li> <li>Thadn't stood on my very reasonable request</li> <li>Tho chance to mise the proprietary. We could read this</li> <li>in ordinary course with the judge.</li> <li>The can answer.</li> <li>BY MK WILLIAMS:</li> <li>To chance to any that if 1 ask you questions</li> <li>about how the club uses transfer payments, you're not</li> <li>MR. LAVOY: Well, and just for the record,</li> <li>MR. VILLIAMS: Mr. Callahan?</li> <li>Clause, not only with respect to the prior entity, but</li> <li>that we guestions now puts him at risk of civil</li> <li>liability. I's unfair. And he's not going for any any of dia post of the entity mote you as well.</li> <li>Clause, not only with respect to the prior entity, but</li> <li>that sing him these questions now puts him at risk of civil</li> <li>liability. I's unfair. And he's not going to answer.</li> <li>MR. LAVOY: Hell, MC. Callahan, are you</li> <li>that sing him these questions now puts him at risk of civil</li> <li>that well MANS: Well, Mr. Callahan, are you</li> <li>that will have allowed you to a sk questions of the entity.</li> <li>that will have allowed you to you cask and receive answers for these types of</li> <li>questions link ensot of the quuestions with regred to the entity.</li></ul>		· · ·				
<ul> <li>c objection was it potentially called for policies and procedures. The answer you're getting is policies and procedures of the current club. We've given you a lot of plexway on this.</li> <li>The some very reasonable request</li> <li>11 that we get a temporary confidentiality designation, give you a chance to raise the proprietary. We could read this in ordinary course with the judge.</li> <li>14 The going to instruct him not to answer that</li> <li>15 question in that way. If you want to clarity five Mary out the can answer.</li> <li>16 mean by what it overs, and it means something clss, maybe 3 about how the club uses transfer payments, you're ond</li> <li>17 MR, WILLIAMS:</li> <li>18 WR, WILLIAMS:</li> <li>19 Q. Is it accurate to say that if a sky ou questions 30 about how the club uses transfer payments, you're not 32 about how the club uses transfer payments, you're not 35 subject to an employment agreement with a confidentiality</li> <li>10:59:55-11:01:0</li> <li>10:59:55-11:01:10</li> <li>10:59:55-11:01:0</li> <li>11:02:40-11:03:41</li> <li>12:01:02:02:02:02:02:02:02:02:02:02:02:02:02:</li></ul>	1		1			
7         So if yourn out willing to give him the a procedures of the current club. We've given you a lot of leeway on this.         7         So if yourn out willing to give him the easonable reassurances that were requested in writing, with respect to the current entity so that you could have open questioning on all these issues, he's not going to in anordinary course with the judge.           10         I hadn't stood on my very reasonable request         10           11         So if yourn out willing to give him the easonable reassurances that were requested in writing, open questioning on all these issues, he's not going to in answer.         11           12         you a chance to raise the proprietary. We could read this in ordinary course with the judge.         12           13         mean by what if owers, and it means something cles, may a about how the club uses transfer payments, you're not a bout how the club uses transfer payments, you're not a bout how the club uses transfer payments, you're not a subject to an employment agreement with a confidentiality         11         11           10:58:55:11:01:10         Page 83         11:02:40:11:03:41         Page 85           1         clause, not only with respect to the prior entity, but stransfer fees are used today?         11         MR. WILLIAMS: Did you MR. WILLIAMS: Weth confidentiality clause. So your entity clauses in advance of the deposition. And stransfer fees are used today?         11         11         11:02:40:11:03:41         Page 85           1         0.00 ering have feas the confidentiality rousion transfer fees are used t	1					
<ul> <li>procedures of the current club. We've given you a lot of leavay on this.</li> <li>leavay on this.</li> <li>leavay on this.</li> <li>leavay on this.</li> <li>I hadn't stood on my very reasonable request</li> <li>I hadn't stood on my very reasonable request</li> <li>open questioning on all these issues. he's not going to 1</li> <li>an ordinary course with the judge.</li> <li>an ordinary course with the judge.</li> <li>I' man ordinary course with the judge.</li> <li>I' man big to instruct on answer.</li> <li>BY MR. WILLIAMS: You accurate to say that if 1 as you questions</li> <li>about how the club uses transfer payments, you're not</li> <li>going to lill ne?</li> <li>A. On advice of coursel</li> <li>MR. LAVOY: Well, and just for the record,</li> <li>subject to an employment agreement with a confidentiality</li> <li>to resolve these issues in advance of the deposition. And</li> <li>asking him these questions now puts him at risk of civit</li> <li>liability. It's unfair. And he's not going to answer.</li> <li>MR. WILLIAMS: Woll, MAT. Callahan, are you</li> <li>d. Ha. JAVOY: Mr. Williams, he proposed</li> <li>MR. CALLAHAN: In light of your</li> <li>MR. WILLIAMS: You represent the entity</li> <li>ath at with the judge, yes.</li> <li>MR. WILLIAMS: You real those communications that you</li> <li>ath at with the judge, yes.</li> <li>MR. WILLIAMS: You recall to as yourte</li> <li>MR. WILLIAMS: You represent the entity</li> <li>allow you to ask and receive answers for the entity.</li> <li>allow you to ask and receive answers for the entity.</li> <li>allow you to ask and receive answers for the entity.</li> <li>MR. WILLIAMS: You represent the entity</li> <li>answered questions like his?</li> <li>d. MR. WILLIAMS: You represent the entity</li> <li>answered questions like his?</li> <li>d. MR. WILLIAMS: You represent the entity</li> <li>answered questions lik</li></ul>	1		1			
<ul> <li>Jecway on this.</li> <li>I badn't stood on my very reasonable request</li> <li>I hadn't stood on my very reasonable request</li> <li>I chaves the discussion or not the stop of the record,</li> <li>I chaves, not only with respect to the prior entity, but</li> <li>I chaves, not only with respect to the prior entity, but</li> <li>I chaves, not only with respect to the current entity. And you did not seek</li> <li>I chaves, not only with respect to the confidentiality provision</li> <li>I chaves, not only with respect to the confidentiality reasonable a proposal - my my region the state with region on the state three</li> <li>I chaves, not only with respect to the confidentiality reasonable a proposal - my my region the state work flaws</li> <li>I hadn't stat with high deg, yes.</li> <li>I my chaves a stop of the state work flaws and than the stop of the state work flaws and thad state work fla</li></ul>			1			
10       I hadn't stood on my very reasonable request         11       that we get a temporary confidentiality designation, give         12       you a chance to raise the proprietary. We could read this         13       in ordinary course with the judge.         14       I'm going to instruct him not to answer that         15       question in that way. If you want to clarify what you         16       mean by what it covers, and it means something else, maybe         17       he can answer.         18       BY MR. WILLIAMS:         19       Q. Is it accurate to say that if 1 ask you questions         20       a dorice of counsel -         23       A. On advice of counsel -         24       MR. LAVOY: Well, that's the problem. You         25       subject to an employment agreement with a confidentiality         26       nor advice of counsel -         27       MR. LAVOY: Well, that's ther problem of the record,         28       nor advice of the evortent on thy a vol of danot seek         29       nor advice of the epositon. And         25       subject to an employment agreement with a confidentiality         24       MR. LAVOY: Well, that's more advice of the secondidentiality. And you did not seek         29       MR. CALLAHAN: MILLIAMS: Well, MN, Callahan, are you	9		9			
11         that we get a temporary confidentiality designation, give         11         answer. And that's your decision for for choosing not           12         you a chance to raise the proprietary. We could read this         12         to have the discussion or not to go to the judge.           13         in ordinary course with the judge.         13         answer.         14         It have yet a temporary course with the judge.           14         I'm going to instruct him not to answer that         14         you of the notion that I an rigging indignity or that I           15         mean by what it covers, and it means something clsc, maybe         16         indignant. Trm not. I just take them go to do last week.           16         basub to whe chu buses transfer payments, you're not         20         indignant. Trm not. I just take them as they come and not deal with them in advance, as all the           21         A. N. LAVOY: Well, and just for the record,         13         M. W. WILLIAMS: Sim three only one office           22         A. On advice of counsel         23         Iff. W. WILLIAMS: Well, and just for the record,           24         Mr. Williams, for like to larify that Mr. Jones is         110:52:46-11:03:41         Page 85           1         clause, not only with respect to the prior cntity, but         asking him these questions now puts him a trisk of civil           15         inability. It's unfair. And h	10		10			
12       you a chance to raise the proprietary. We could read this         13       in ordinary course with the judge.         14       I'm going to instruct him not to answer that         15       question in that way. If you want to clarify what you         16       mean by what it covers, and it means something cles, maybe         17       he can answer.         18       BY MR. WILLIAMS:         19       Q. Is it accurate to say that if 1 ask you questions         10       about how the club uses transfer payments, you're not         21       A. On advice of counsel         22       A. On advice of counsel         23       MR. LAVOY: Well, and just for the record,         24       Mr. Willimms, Id like to clarify that Mr. Jones is         25       subject to an employment agreement with a confidentiality         24       Mr. Willimms, Id like to clarify that Mr. Jones is         25       to resolve these issues in advance of the deposition. And         3       tasking him these questions now puts him at risk of civil         3       liability. I's unfar. And he's not going to answer.         3       MR. WILLIAMS: Well, Mr. Callahan, are you         4       MR. WILLIAMS: Well, Mr. Callahan, are you         5       indigues to abide by the confidentiality provision <td>11</td> <td></td> <th>11</th> <td></td>	11		11			
13       in ordinary course with the judge.       13       MR. WILLIAMS: M. LaVoy, Ict me disabuse         14       I'm going to instruct him not to answer that       14       you of the notion that I am feigning indignity or that I         15       question in that way. If you want to clarify what you       am trying to portray myself as being the least bit         16       mean by what it covers, and it means something else, maybe       indignant. I'm not. I just take things as they come.         17       he can answer.       10       indignant. I'm not. I just take things as they come.         18       BY MR. WILLIAMS:       indignant. I'm not. I just take things as they come.         19       Js it accurate to say that if 1 ask you questions       as they come and not deal with them in advance, as all the         20       about how the club uses transfer payments, you're not       as they come and not deal with them in advance, as all the week.         21       going to tell me?       23       IAWY in thits case, Mr. Callaham?         24       Mr. WILLIAMS: The coll point they or they out do do last week.       24       MR. LAVOY: Mr his personal counsel. And         25       subject to an employment agreement with a confidentiality       Page 83       11.02:40-11.03:41       Page 85         1       clause, not only with respect to the prior entity, but       WR. LLIAMS: Did you       MR. LLIAMS: Did you <td>12</td> <td></td> <th>12</th> <td></td>	12		12			
<ul> <li>question in that way. If you want to clarify what you</li> <li>mean by what it covers, and it means something else, maybe</li> <li>mean by what it covers, and it means something else, maybe</li> <li>mean by what it covers, and it means something else, maybe</li> <li>BY MR. WILLIAMS:</li> <li>BY MR. WILLIAMS:</li> <li>G about how the club uses transfer payments, you're not</li> <li>going to lell me?</li> <li>A. On advice of counsel</li> <li>MR. LAVOY: Well, and just for the record,</li> <li>subject to an employment agreement with a confidentiality</li> <li>clause, not only with respect to the prior entity, but</li> <li>clause, not only with respect to the prior entity, but</li> <li>tasking him these questions now puts him at risk of civil</li> <li>tiability. It's unfair. And he's not going to answer.</li> <li>MR. WILLIAMS: Well, Mr. Callahan, are you</li> <li>objecting to your chief operating officer telling me how</li> <li>transfer fees are used today?</li> <li>MR. WILLIAMS: You represent the entity</li> <li>MR. WILLIAMS: Correct?</li> <li>MR. WILLIAMS: So the caprobase to you no is a some of the questions you presented the entity.</li> <li>MR. WILLIAMS: You represent the entity motion at a respond to?</li> <li>MR. WILLIAMS: Wolt as a proposal to you in</li> <li>writing that would have allowed you to as k questions of the anybox of the entity.&lt;</li></ul>	13	in ordinary course with the judge.	13	MR. WILLIAMS: Mr. LaVoy, let me disabuse		
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1	involving the Clarks that prohibited its dissemination	1	MR. CALLAHAN: We'll try and work it out and
2	outside. There's no way in which you or your clients	2	then take it up with the court.
3	could potentially be prejudiced by that agreement, yet you	3	MR. WILLIAMS: Well, okay. Mr Mr. LaVoy
4	not only refused to agree to it, you refused to even	4	has left the room with the witness.
5	respond, putting us into this lovely mess we're in this	5	Are you, likewise, going to leave the room,
6	morning.	6	Mr. Callahan?
7	I agree with Mr. LaVoy, that causes a lack	7	MR. CALLAHAN: If there's something you'd
8	of professionalism. There is an agreement between	8	like to discuss, I'm happy to stay and discuss it with
9	Mr. Jones and the current entity. Mr. LaVoy is here as	9	you.
10	Mr. Jones' personal counsel to advise him. You know the	10	MR. LAVOY: Mr. Williams
11	conditions on which the club is able to waive it. I think	11	MR. CALLAHAN: But I don't think we're going
12	your question has been fully answered in this regard. If	12	to be having a deposition here. We don't have a witness.
13	you have more questions for the witness, you might want to	13	MR. WILLIAMS: Well, I guess we'll I
14	focus your efforts there.	14	guess we'll have to conclude because the witness left.
15	MR. WILLIAMS: Who should I ask at the	15	MR. CALLAHAN: It makes it very hard to take
16	Desert Mountain Club about the reasons for this concern?	16	a deposition.
17	MR. LAVOY: Okay, We're adjourning the	17	MR. WILLIAMS: It does.
18	deposition. We're going to take this issue up with the	18	MR. CALLAHAN: Shall we go off shall
19	judge. This is a waste of time.	19	MR. LAVOY: There's something we can agree
20	MR. WILLIAMS: Are you adjourning this	20	on, Mr. Williams. I knew it was possible.
21	deposition, Mr. Callahan?	21	MR. WILLIAMS: Should we go off the record,
22	MR. CALLAHAN: Mr. LaVoy just did.	22	Mr. Callahan?
23	MR. LAVOY: I'm adjourning for	23	MR. CALLAHAN: Probably.
24	MR. CALLAHAN: He represents Mr. Jones	24	MR. WILLIAMS: Okay.
25	personally.	25	THE VIDEOGRAPHER: We are off the record.
	E/-		
11.04	4:35-11:05:26 Page 87	11.0	6:07-11:06:13 Page 89
11.04	-	11:0	0
1	MR. LAVOY: Mr. Jones in his individual	1	The time is 11:05 a.m. This ends tape one.
2	capacity. The rules allow a deposition to be adjourned to	2	(The deposition was adjourned at 11:05 a.m.)
3	address these kinds of issues. And at this point, I think	З	
4	that's appropriate. We've given you a fair opportunity to	4	
5	handle this professionally and you've declined. So we're	5	
б.	going to go to the judge.	6	
7	MR. WILLIAMS: Well, okay. 1 do not agree	7	
8	with the adjournment. I'd like to continue	8	
9	MR. LAVOY: I'm not asking for your	9	
10	agreement.	10	
11	MR. WILLIAMS: Okay. You'll file your	11	
12	motion soon then?	12	
13	MR. LAVOY: I'll talk with Mr. Callahan	13	
14	about the motion.	14	
15	MR. WILLIAMS: Are you going to coordinate	15	
	with Mr. Callahan about this motion? Is that what you do?	16	
17	MR. CALLAHAN: How we choose to handle it is	17	
18	absolutely none of your concern. There will be an	18	
19	appropriate motion filed, whether it's filed by Mr. LaVoy	19	
	or by the club.	20	
	MR. WILLIAMS: Okay. But you two will work		
21	that out, correct?	21	
22		22	
23	MR. CALLAHAN: Well, we tried to work it out	23	
	with you, and you declined. So	24	
25	MR. LAVOY: Yeah, I guess we'll	25	

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1	Page 90	
2	STATE OF ARIZONA ) County of Maricopa )	-
3	BE IT KNOWN that the foregoing proceedings were taken before me; that the witness before testifying wes duly sworn by me to thetify to the whole truth; that the foregoing pages are a full; true; and accurate record of the proceedings all done to the best of my skill and ability; that the proceedings were taken down by me in shorthand and thereafter reduced to print under my direction.	
4	the foregoing pages are a full, true, and accurate record of the proceedings all done to the best of my skill and	
5	ability; that the proceedings were taken down by me in shorthand and thereafter reduced to print under my direction.	
7		
8	I CRRITPY that I am in no way related to any of the parties hereof.	
10 11	<ul> <li>Review and signature was requested.</li> <li>Review and signature was waived.</li> <li>Review and signature was not required.</li> </ul>	
12	I CERTIFY that I have complied with the othical obligations set forth in AGUA 7-206 (F) (3) and AGUA 7-206 (J) (1) (g) (1) and (2). Dated at Phoenix, Arizona, this 20th day of May, 2015.	
13 14	Arizona, this 20th day of May, 2015.	
15	Spin Math	
16	Gerard T. Coash, KMR	
17	Certified Reporter Arizona CR No. 50503	
18	complied with L ACJA 7-206 (J)	
20		
21		
22	Sound J County	
23 24		
25	COASH & COASH, INC. Registered Reporting Firm Arizona RRF No. R1036	
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# Exhibit 2

1	FENNEMORE CRAIG, P.C.	
2	Christopher L. Callahan (No. 009635) Seth G. Schuknecht (No. 030042)	
3	Emily Ward (No. 0299663) 2394 East Camelback Road, Suite 600	
4	Phoenix, AZ 85016-3429 Telephone: (602) 916-5000	
5	Email: <u>ccallahan@fclaw.com</u> Email: <u>sschuknecht@fclaw.com</u>	
6	Email: eward@fclaw.com	
7	Attorneys for Plaintiff Desert Mountain Club, Inc.	
8		
9	SUPERIOR C	OURT OF ARIZONA
10	MARIC	OPA COUNTY
11	DESERT MOUNTAIN CLUB, INC.,	No. CV2014-015334
12	Plaintiff,	DECLARATION OF CHRISTOPHER L.
13	<b>V.</b>	DECLARATION OF CHRISTOPHER L. CALLAHAN
14	THOMAS CLARK and BARBARA CLARK, husband and wife,	(Assigned to the Hon. Dawn Bergin)
15	Defendants.	(Assigned to the rion. Dawn Dergin)
16		
17	I, Christopher L. Callahan, declare as	follows:
18	1. I have personal knowledge of	the matters and facts set forth in the declaration and
19	am competent to testify to such matters and fa	acts as necessary.
20	2. I am a director at Fennemo	ore Craig, P.C., and am the lead counsel in the
21	representation of Desert Mountain Club, Inc	c. (the "Club") in the above-captioned litigation. I
22	have been assisted in the Club's representativ	on in this matter by Theresa Dwyer-Federhar, Seth
23	Schucknecht, and Emily Ward.	
24	3. In the Declaration of Ronald	Yelin, attached as Exhibit A to Defendants' Motion
25	to Strike and Response to Motion for Protec	tive Order, Mr. Yelin states that he met with Chris
26	LaVoy in connection with the Club's demand	d letter regarding Mr. Yelin's delinquent dues. Mr.
Fennemore Craig, P.C. Phoenix		

Yelin also states that he provided Mr. LaVoy with certain documents, including a document entitled "Points Favoring the Defendants—Desert Mountain Club, Inc. v. Thomas Clark and Barbara Clark."

4. Until I read Mr. Yelin's declaration, I was unaware that he had consulted with Mr.LaVoy about possible representation concerning the Club's demand letter or any other matter.

5. I have never spoken to Mr. LaVoy about any communications, either orally or in
writing, that he had with Mr. Yelin.

8 6. To the best of my knowledge, the other attorneys at Fennemore Craig who are
9 assisting me in this matter (Ms. Dwyer-Federhar, Mr. Schuknecht and Ms. Ward) were unaware
10 of Mr. Yelin's consultation with Mr. LaVoy (until reading Mr. Yelin's declaration), HAVE
11 never seen any documents provided to Mr. LaVoy by Mr. Yelin, and have never spoken with Mr.
12 LaVoy about any communications he may have had with Mr. Yelin.

- 7. I have never seen the documents that Mr. Yelin provided to Mr. LaVoy, including
  but not limited to a document entitled "Points Favoring the Defendants—Desert Mountain Club,
  Inc. v. Thomas Clark and Barbara Clark." In conjunction with their initial Rule 26.1 Disclosure
  Statement in this matter, Defendants produced multiple copies of an e-mail from Gary Moselle to
  Tom Clark, Eric Graham and Barry Fabian that sets forth "Points Favoring the Defendants –
  Desert Mountain Club, Inc. v. Thomas Clark and Barbara Clark" (CL00001-CL00011). I do not
  know whether this is the same document that Mr. Yelin provided to Mr. LaVoy.
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8. I have seen a letter that Daryl Williams sent to the Clarks, dated February 10, 2015, but I viewed this information on a website that is available to the public. That website, which I understand is maintained by a former Club member, Gary Moselle, is <u>www.desertmountaingolfscam.com</u> (the "Moselle Website").

9. I am aware that Mr. Williams is actively soliciting members of the Club to join in
some sort of mass or class legal action against the Club.

10. Mr. Jones is the Club's Chief Operating Officer. Mr. Jones has an Executive

Employment Agreement with the Club, which contains a Non-Disclosure Clause, prohibiting Mr. Jones from disclosing any confidential information of the Club.

3 11. On May 15, 2015, five days before the date scheduled for Mr. Jones' deposition, I 4 sent an e-mail to Mr. Williams advising him of the Non-Disclosure clause. A true and correct 5 copy of this e-mail is attached as **Exhibit A**. In that e-mail, I advised Mr. Williams that the Club 6 would waive the confidentiality clause for purposes of this action "on the condition that the 7 transcript is designated as confidential and is not disseminated outside of the parties, the attorneys and their consultants in this matter." I was concerned that the transcript might be 8 9 disseminated outside of the context of this litigation because either Mr. Williams or Defendants 10 have published a number of pleadings and other documents from this litigation on the Moselle 11 Website. In the e-mail, I advised Mr. Williams that his agreement to treat the transcript as 12 confidential would be without prejudice to his ability to challenge the confidentiality designation 13 at a later date. I asked Mr. Williams to let me know if he was amenable to this proposal because, 14 if he was not, then the issue could be brought to the Court's attention. Mr. Williams did not 15 respond to my email prior to the deposition.

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12. At the beginning of the deposition, I again proposed that the deposition testimony 17 be kept confidential until the Court could rule on the issue of confidentiality. Mr. Williams would not agree to this proposal. During the deposition, Mr. LaVoy and I proposed deferring the 18 19 deposition so that the confidentiality issues could be resolved by the Court, but Mr. Williams 20 indicated that he would prefer to proceed to see whether any of his proposed questions raised confidentiality concerns. 21

22 13. I believe that Mr. Williams will not agree to confidentiality because of his selfinterest in using information from this lawsuit to solicit other Club members to participate in his 23 proposed mass/class action. 24

A copy of Mr. Jones's deposition already has been posted on the Moselle 25 14. Website. 26

FENNEMORE CRAIG, P.C. PHOENIN

- 1	I declare under penalty of perjury that the foregoing is true and correct.
2	
3	Executed on 6/15/2015 By Christopher L. Callahan
4	Charlestophier D. Sandhan
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FENNEMORE CRAIG, P.C. Phoenix	- 4 -
	- + -

# **Exhibit** A

# **CALLAHAN, CHRISTOPHER**

From:CALLAHAN, CHRISTOPHERSent:Friday, May 15, 2015 11:14 AMTo:Daryl M. WilliamsCc:SCHUKNECHT, SETHSubject:FW: Executive Employment Agreement between the Desert Mountain Club and Mr.<br/>Jones [FC-Email.FID6446486]

#### Mr. Williams:

At the request of the President of Desert Mountain Club, Inc., I am forwarding to you an email that I received from him this morning. As you can tell from the email, Bob Jones has a Non-Disclosure Clause in his Employment Agreement with the Club. The Club is willing to waive this clause for purposes of Mr. Jones' deposition in the instant litigation on the condition that the transcript is designated as confidential and is not disseminated outside of the parties, the attorneys and their consultants in this matter.

We would propose that, so as not to disrupt the previously agreed-to deposition schedule, we agree that: (1) the transcript shall be designated as confidential; (2) neither the transcript nor the video recording of the deposition may be provided to anyone other than your clients, your firm, our firm and any consultants retained by either your firm or ours in connection with this matter; (3) the attorneys, their firms and their consultants would be advised that the transcript is confidential and that it may not be further disseminated; and (4) this agreement shall be made without prejudice to your clients' ability to challenge the confidentiality designation at a later date should you feel the need to do so.

Please let me know at your earliest convenience whether you are amenable to this proposal. If you are, please confirm. If not, please let me know as well so that we can make an attempt to bring this matter to the Court's attention. I look forward to hearing from you.

From: Maslick, Joseph [mailto:jmaslick@griffithlaboratories.com]
Sent: Friday, May 15, 2015 6:14 AM
To: CALLAHAN, CHRISTOPHER
Subject: Executive Employment Agreement between the Desert Mountain Club and Mr. Jones

Dear Chris:

I understand that the attorney for Tom and Barbara Clark intends to take the deposition of Bob Jones on May 20, 2015 in connection with the Club's lawsuit to collect from the Clarks the amounts that they owe to the Club.

There is an Executive Employment Agreement between the Club and Mr. Jones that contains a Non-Disclosure Clause. That clause provides, in part, as follows:

In performing work for the Club, Executive will be exposed to confidential information of the Club and others. Executive will not at any time, during or after Executive's employment with the Club, without the express written consent of an officer of the Club, publish, disclose, or divulge to any Person . . . any confidential information of the Club.

Executive Employment Agreement, § 8.

The Club regards its executive compensation, internal policies and procedures, disciplinary practices and personnel matters as confidential and subject to Mr. Jones' non-disclosure obligations under the Employment Agreement.

The Club consents to Mr. Jones providing testimony regarding his activities as the General Manager/Chief Operating Officer of Desert Mountain Club, Inc. pertinent to the Club's dealings with Mr. and Mrs. Clark in the deposition so long as the deposition transcript is marked confidential, is used only in connection with the pending lawsuit between the Club and the Clarks and is not disseminated to any individuals who are not parties to the suit or their attorneys.

Please provide a copy of this communication to the Clarks' attorney. Since this consent will allow Mr. Jones to testify fully regarding all matters at issue since the inception of Desert Mountain Club, Inc. and will allow the Clarks' full and complete use of his testimony in the pending action, we trust that he will have no objection to this position. Please let us know his position as soon as he responds to this notification.

Joseph Maslick President Desert Mountain Club, Inc.

# Exhibit 3

# SECOND AMENDMENT AMENDING AND RESTATING EXECUTIVE EMPLOYMENT AGREEMENT

This Second Amendment (the "<u>Agreement</u>") is made and entered into on <u>FERMAL</u>, 2, 2015, to be effective as of January 1, 2015 ("<u>Effective Date</u>"), by and between **Desert Mountain Club**, **Inc.**, an Arizona corporation, and its subsidiaries (the "<u>Club</u>"), and **Robert E. Jones II** (the "<u>Executive</u>").

#### WITNESSETH:

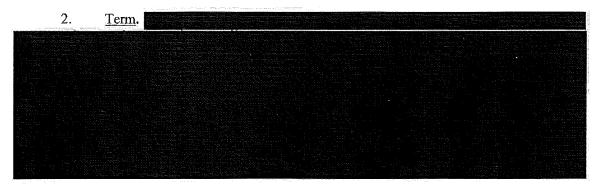
WHEREAS, on January 1, 2012, the Club and Executive entered into an executive employment agreement (the "2012 Agreement");

WHEREAS, on January 23, 2015, the Club and Executive entered into a First Amendment to the 2012 Agreement (the "First Amendment") to be effective as of January 1, 2015 (the "Amendment Effective Date");

WHEREAS, Club and Executive desire that this Agreement amend and restate the 2012 Agreement to include the terms of the First Amendment.

NOW, THEREFORE, in consideration of the premises and the mutual covenants and agreements set forth herein, the Club and Executive, intending to be legally bound, hereby agree as follows:

1. <u>Employment</u>. The Club agrees to employ Executive as the Chief Operating Officer/General Manager of the Club, and Executive accepts such employment and agrees to perform full-time employment services for the Club, subject always to the direction of the Club's Board of Directors (the "Board"), for the period and upon the other terms and conditions set forth in this Agreement.



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### 3. No Conflicting Duties.

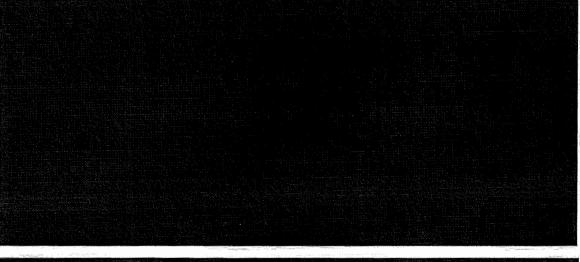
2<sup>nd</sup> Am Bob Jones Exec Agr

# 4. Compensation and Benefits.



4.1. Base Salary and Total Target Compensation.

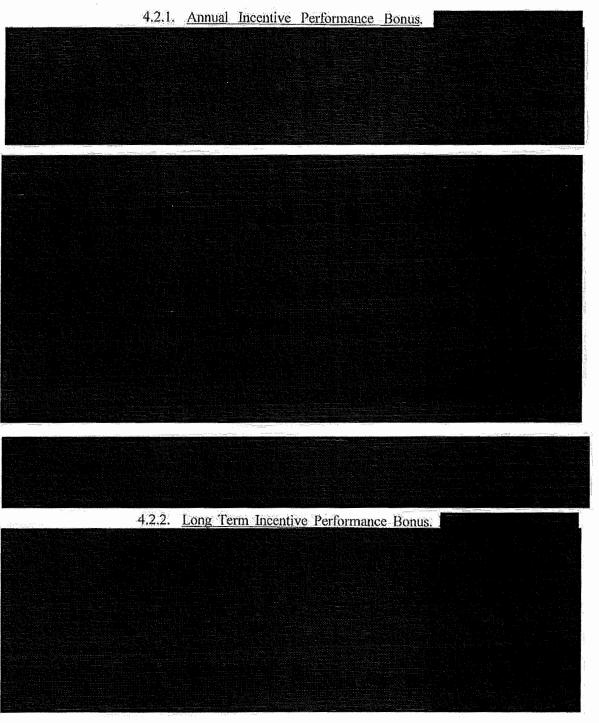
4.1.2. Total Target Compensation Payable to Executive.



2nd Am Bob Jones Exec Agr

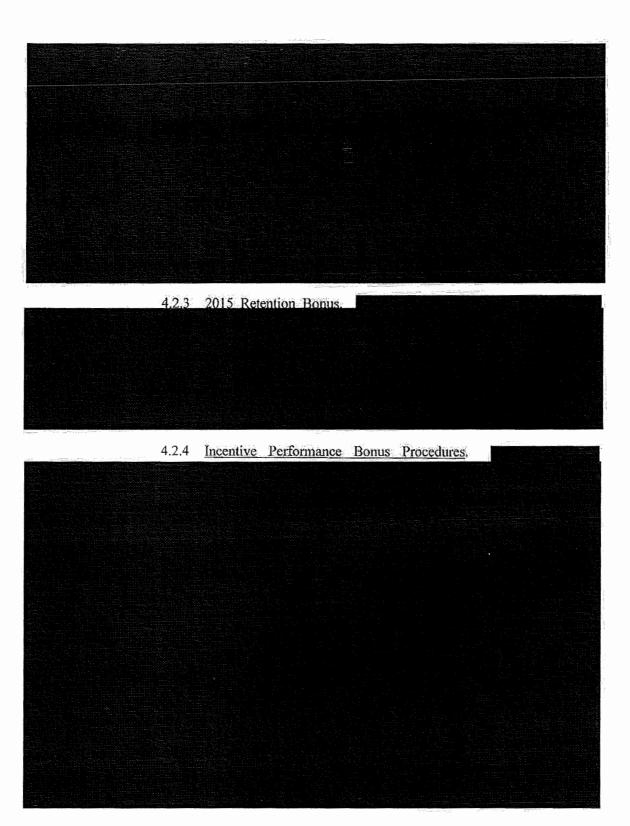
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4.2. <u>Annual Incentive Performance Bonus, Long Term Incentive Performance</u> Bonus, and Internal Revenue Code Section 457(b) Plan.



2<sup>nd</sup> Am Bob Jones Excc Agr

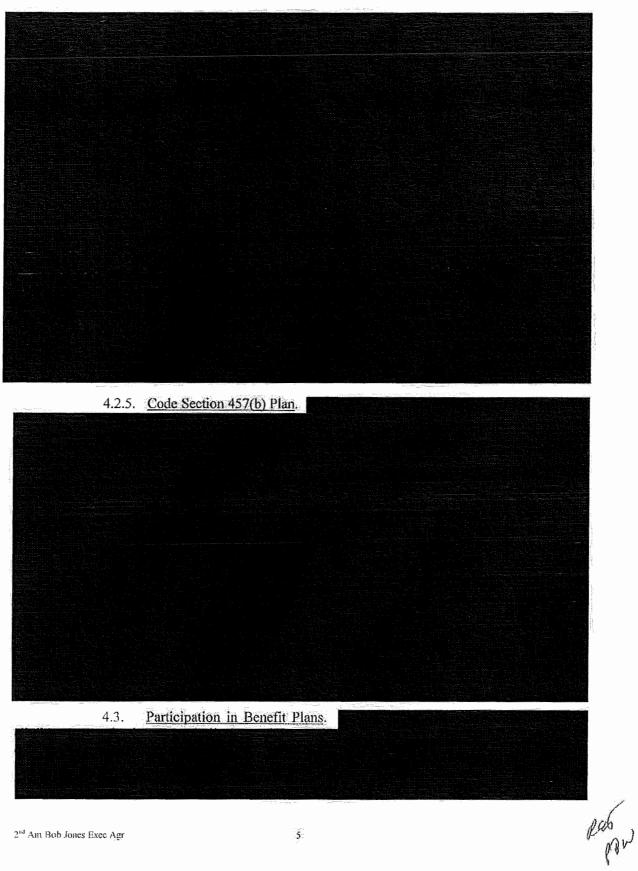
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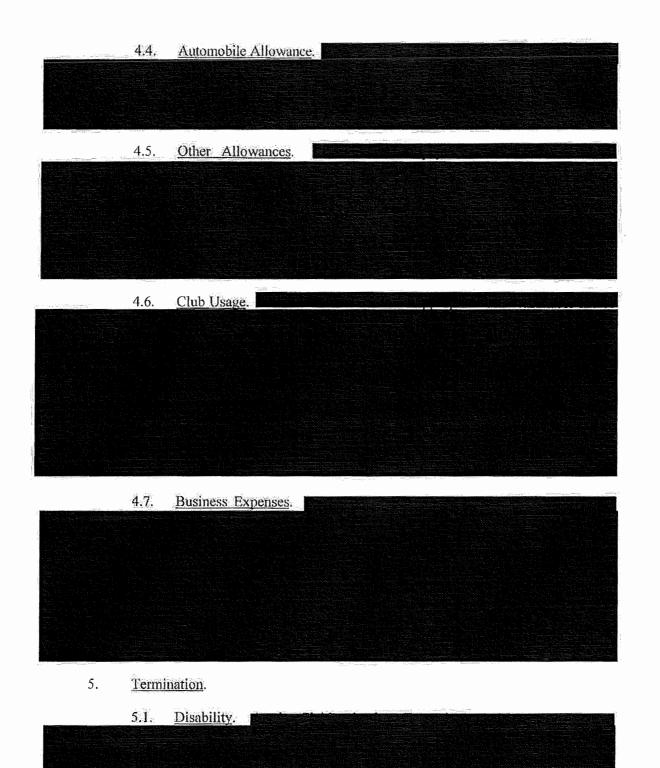


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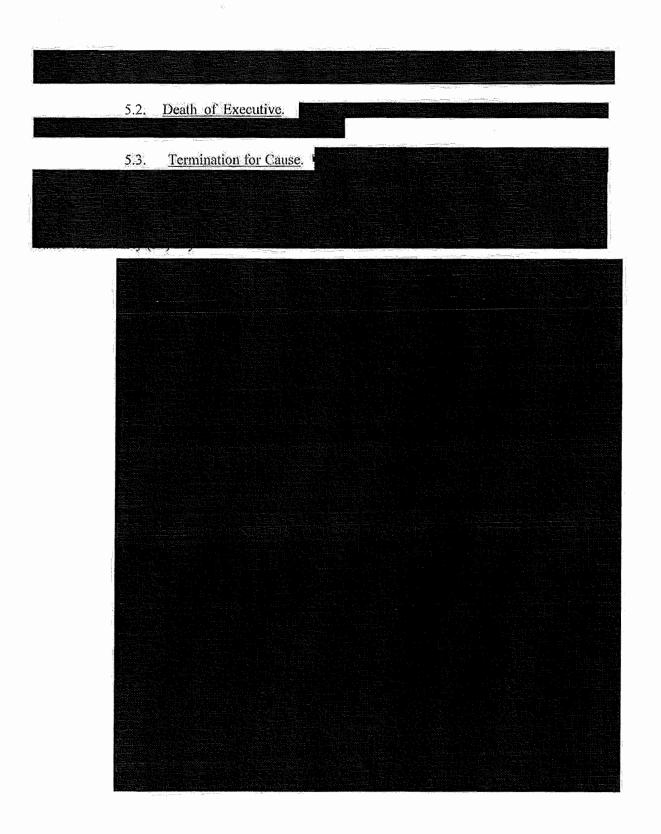
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2<sup>nd</sup> Am Bob Jones Exec Agr

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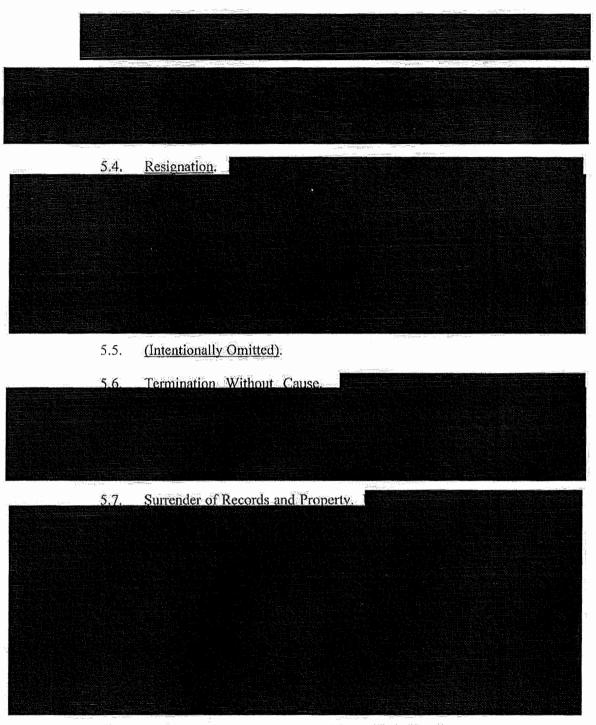


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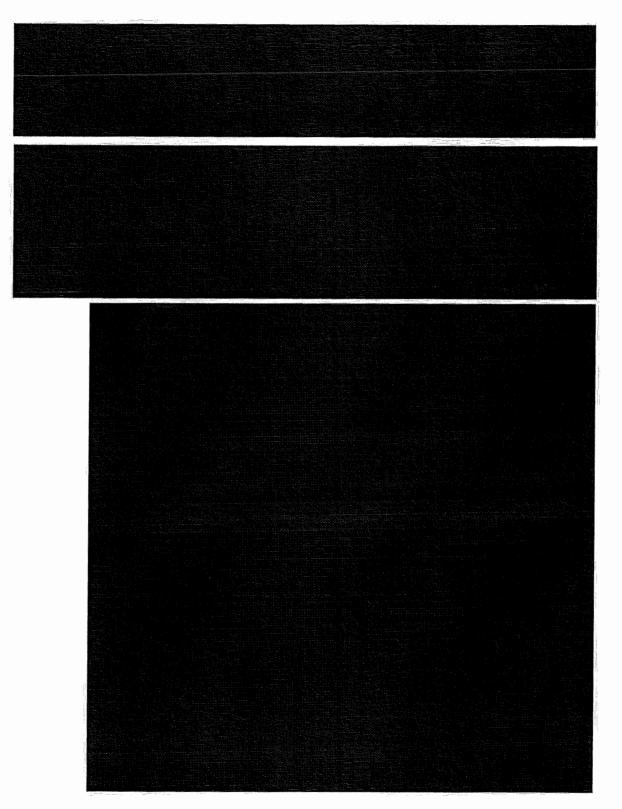
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6. <u>Compensation Upon the Termination of Executive's Employment.</u>

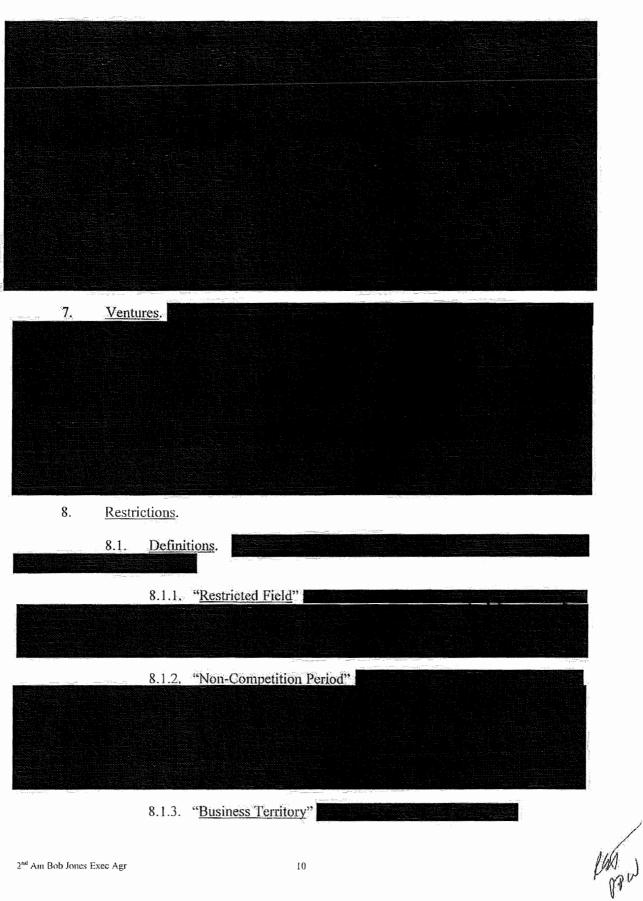
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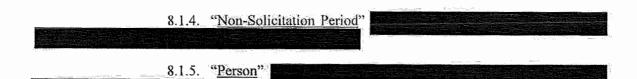
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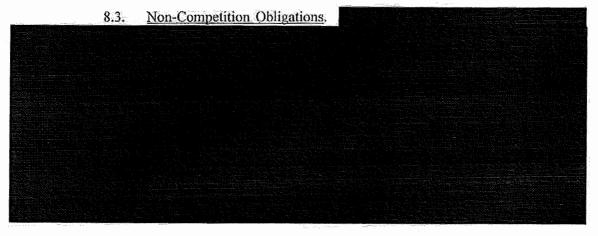


2nd Am Bob Jones Exec Agr

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8.2. <u>Non-Disclosure Obligations</u>. In performing work for the Club, Executive will be exposed to confidential information of the Club and others. Executive will not at any time, during or after Executive's employment with the Club, without the express written consent of an officer of the Club, publish, disclose, or divulge to any Person, or use directly or indirectly for the Executive's own benefit or for the benefit of any Person, other than the Club, any confidential information of the Club. Executive also agrees that he will not disclose to the Club any information he holds subject to any obligation of confidence to any third parties. If Executive receives a subpoena requesting production or disclosure of the Club's confidential information, Executive will promptly notify the Club of the subpoena and reasonably cooperate with the Club in resisting and/or responding to the subpoena.



8.4. Agreement Not to Solicit Club Members.

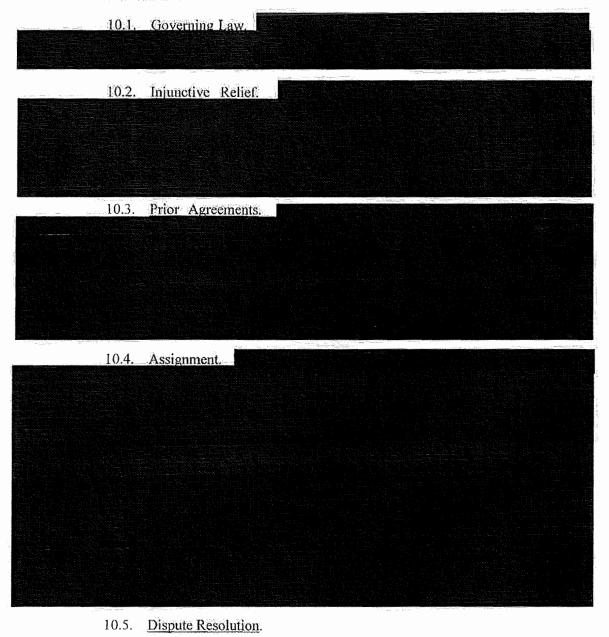
8.5. Agreement Not to Solicit Employees or Interfere with Vendors.

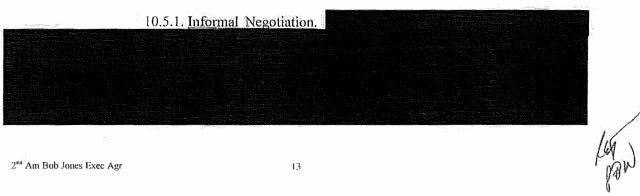
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2<sup>rd</sup> Am Bob Jones Exec Agr

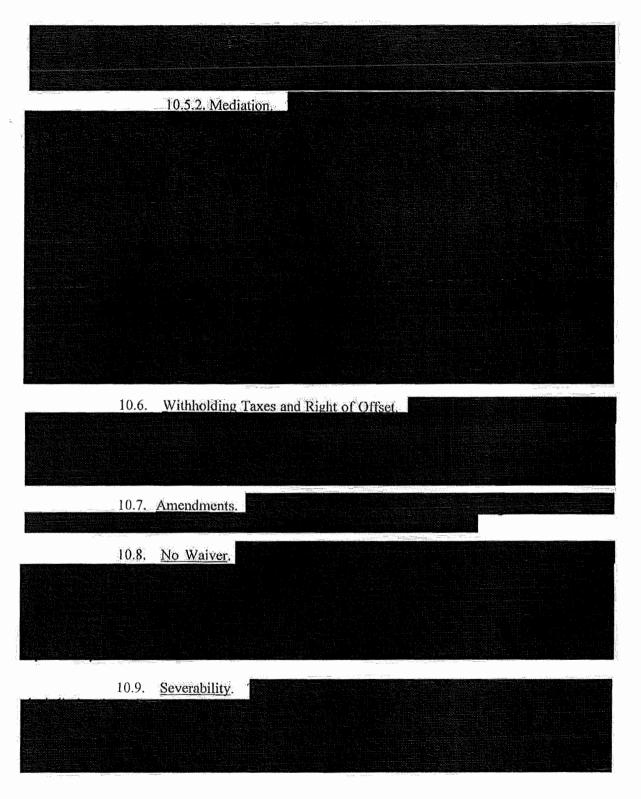
8.6. Non-Disparagement. 8.7. Reasonableness 9, Ownership of Work Product.

#### 10. Other Provisions.





2nd Am Bob Jones Exec Agr



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2<sup>nd</sup> Am Bob Jones Exec Agr

10.10. Su	vivability	
<u>10.11 Co</u>	de Section 409A.	
		No 13N
2 <sup>nd</sup> Am Bob Jones Exec Agr	15	r <sub>B</sub> r

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IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and year set forth above.

"Club":

Desert Mountain Club, Inc. laul 7 Wuty

By: Paul Wutz Title: President

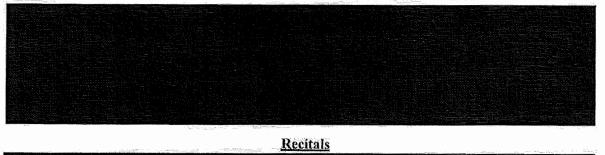
"Executive":

E Vien &

Robert E. Jones II

2"d Am Bob Jones Exec Agr

# EXHIBIT A CONFIDENTIAL MUTUAL GENERAL WAIVER & RELEASE OF LEGAL CLAIMS AGREEMENT



Agreement

Number of	100 million -	· · · · · · · · · · · · · · · · · · ·
		동물 방법에 가격해 통령이 가격하는 것 같은 것을 위해 가격을 얻을 것을 하는 것을 수 있다. 지수는 것을 가격하는 것을 가지 않는 것을 하는 것을 수 있다. 것을 하는 것을 수 있다. 것을 하는 것을 하는 것을 수 있다. 것을 하는 것을 하는 것을 수 있다. 것을 하는 것을 수 있다. 것을 수 있는 것을 수 있다. 것을 수 있는 것을 수 있는 것을 수 있다. 것을 수 있는 것을 수 있는 것을 하는 것을 수 있다. 것을 수 있는 것을 수 있는 것을 수 있다. 것을 수 있는 것을 수 있는 것을 수 있는 것을 수 있다. 것을 수 있는 것을 수 있는 것을 수 있는 것을 수 있다. 것을 수 있는 것을 수 있는 것을 수 있다. 것을 수 있는 것을 수 있는 것을 수 있다. 것을 수 있는 것을 수 있는 것을 수 있다. 것을 수 있는 것을 수 있는 것을 수 있는 것을 수 있다. 것을 수 있는 것을 수 있는 것을 수 있는 것을 수 있는 것을 수 있다. 것을 수 있는 것을 수 있다. 것을 수 있는 것을 수 있다. 것을 수 있는 것을 수 있다. 것을 수 있는 것을
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		이번에 가지 사람이 지수요? 이 것 이 가지 않는 것을 하는 것 이 것 않아요? 이 나는 바람이 가지 않는 것 같이 가지 않는 것 같이 나라 나라 나라 나라 나라 가지 않는 것 같이 나라
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		정말 다 한 것 같아요~ 승리가 다 아니다. 그는 것 같아요. 감소를 가지만 다 가 가 못 두두수 귀찮았다. 방법 가방적 물로 소리는 것 가방을 것 못했다. 것 같은 것 같은 것 같아.
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		2.1 By Employee:
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		建築 문화에 가장 가장 것 같아. 가장 이 사장이 있는 것 같아. 소문가 요구하는 것 같아. 유가 가장

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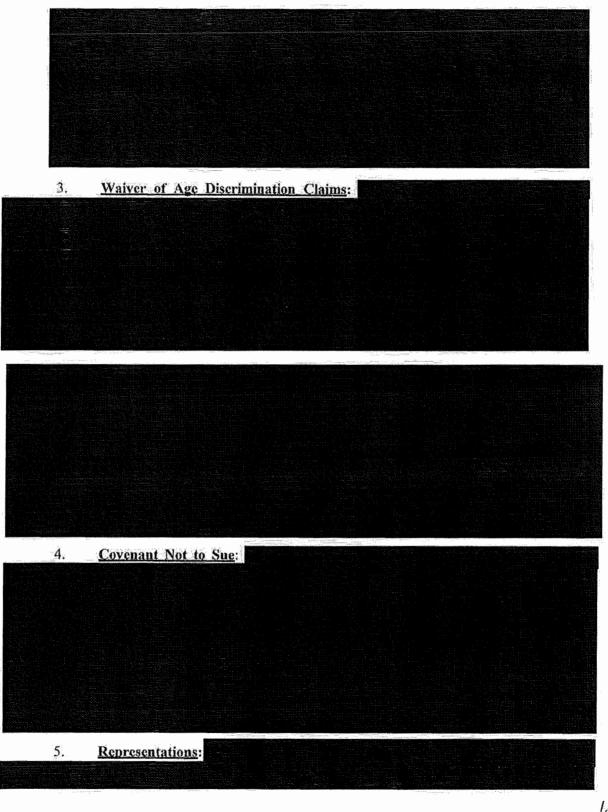
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2.2 By Employer. lan y

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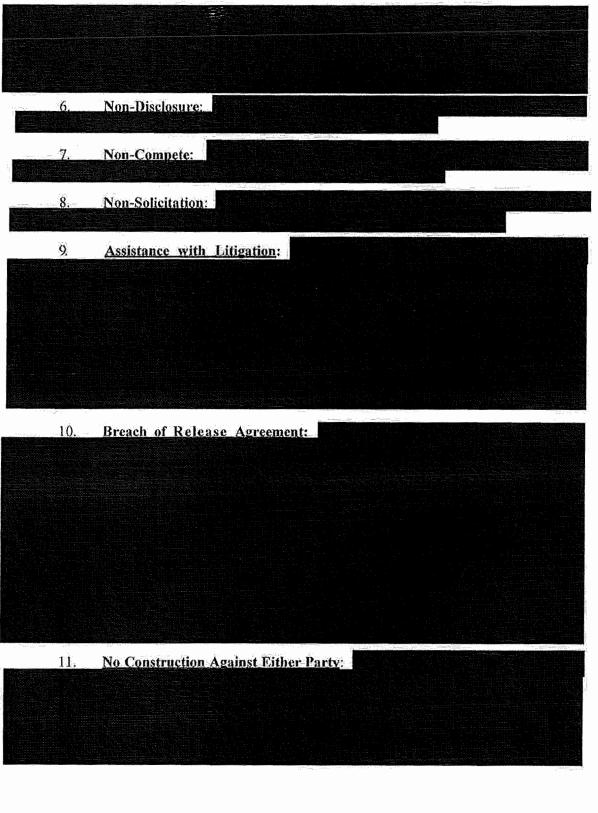
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<u>6.</u>	<u>No Future Employment:</u>
7.	Wage Payment:
8.	Modification and Waiver:
9.	Attorneys' Fees and Costs:
10.	Entire Agreement:
11.	Understanding of Release Agreement:
	Choice of Law and Venue:
13.	Severability:

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14.	Binding Effect:
ADDITION	AL CLAUSES:
1	Termination of Employment:
2.	Confidentiality:
3.	Non-Disparagement:
4,	Employer Property and Documents:
	No. Administra of Linkifica
5.	<u>No. Admission of Liability:</u>

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LOUFEVIcenso Robert E. Jones II

Caul 7 Wuty

Desert Mountain Club, Inc.

By: PRUL F. WUTZ

Title: PRESIACNT

<u>EEMUMay</u> 2, 2015 Date <u>2/2/2015</u> Date

## Exhibit 4

1 2 3 4 5 6 7	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: <u>ccallahan@fclaw.com</u> Email: <u>sschuknecht@fclaw.com</u> Email: <u>eward@fclaw.com</u> Attorneys for Plaintiff Desert Mountain Club, Inc.	
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9	SUPERIOR C	OURT OF ARIZONA
10	MARIC	OPA COUNTY
11	DESERT MOUNTAIN CLUB, INC.,	No. CV2014-015334
12	Plaintiff,	PLAINTIFF'S INITIAL DISCLOSURE
13	ν.	STATEMENT
14	THOMAS CLARK and BARBARA CLARK, husband and wife,	(Assigned to the Hon. Dawn Bergin)
15	Defendants.	
16	nan nyaéta tahun kana panganan pangana kana kana kana pangan kana manakakan menanga kana kana di kana kana kan Tahun	
17	Pursuant to Rule 26.1, Arizona Rules	of Civil Procedure, Plaintiff Desert Mountain Club,
18	Inc. ("Plaintiff" or the "Club") discloses the	he following information. Plaintiff incorporates by
19	reference all documents, pleadings, and co	prrespondence exchanged between the parties. The
20	information contained herein is based on	Plaintiff's investigation to date and on Plaintiff's
21	information and belief. Discovery and invest	igation are continuing and Plaintiff reserves the right
22	to rely on subsequently discovered document	nts and information. The contents of this disclosure
23	statement are provisional and subject to sup	plementation, amendment, explanation, change, and
24	amplification. Accordingly, if any part of this	s disclosure statement is read to a fact finder, fairness
25	requires that the jury be informed of the preli	minary nature of this disclosure, and this preliminary
26	statement should be read to provide context f	or the portion of the disclosure statement being read.
FENNEMORE CRAIG, P.C.		

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Plaintiff makes these initial disclosures solely for the purpose of discovery in this action
 and no other. Further, Plaintiff makes these disclosures without waiving any protection available
 under the law, including the attorney-client privilege and the work-product doctrine. These
 disclosures also are made without waiving any objection Plaintiff may assert concerning the
 relevance and/or admissibility of any fact, document, or evidence.

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I.

#### FACTUAL BASIS OF CLAIMS.

The Club is a private equity golf, social, and fitness club located in the Desert Mountain
community, in Scottsdale, Arizona. The Club was initially developed, operated and maintained
by Desert Mountain Development Company, Inc., and subsequently by Desert Mountain
Properties Limited Partnership (the "Developer") but, at all times since December 31, 2010, the
Club has been owned by its Members.

12 On or about April 27, 1988, Defendants Thomas Clark and Barbara Clark entered into a 13 Dual Membership Agreement with Desert Mountain Development Company. On or about 14 November 11, 1996, Defendants entered into a "Deferred Equity Golf Membership Agreement 15 (Conversion from Non-Equity)" (the "Membership Agreement") with the Developer. Through 16 the Membership Agreement, Defendants converted their existing non-equity membership in the 17 Club to a Deferred Equity Golf Membership in the Club pursuant to the Club's conversion 18 program and subject to the terms and conditions of the Membership Agreement. Under the 19 Membership Agreement, the Clarks agreed to pay all dues, assessments, and charges owed to the 20 Club. The Membership Agreement conspicuously bound Defendants to the terms and conditions 21 of the Club Bylaws, the Membership Plan (the "Plan"), and the Rules and Regulations of the 22 Club, as they may be amended from time to time. Membership Agreement at 1 § 1. Defendants 23 represented and warranted that they had received and reviewed, and that they understood the 24 Club Bylaws and the Plan. Id. at 7 § 13.

Although the 1994 Club Bylaws allowed a Member to "resign" his Membership, this "resignation" did not prevent the "resigning" Member from continuing to use the Club Facilities

FENNEMORE CRAIG, P.C. Phoenix and did not abrogate the Member's obligation to pay all dues, charges and other assessments
 owing to the Club as they fell due. These obligations on the part of the "resigning" Member
 terminated only when the "resigned" Membership had been reissued by the Club. 1994
 Membership Plan at p. 7.

In 2004, the Bylaws were amended to incorporate expressly this requirement contained in
the 1994 Membership Plan. Specifically, the 2004 Bylaws prohibited the sale of Memberships
and required any Member seeking to exit the Club to surrender the Membership to the Club for
reissuance. Bylaws (2004), § 6.1.3. With regard to the continuing obligation to pay dues, the
Bylaws provided that:

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 (together with the owner of such membership, if the membership is owned by an entity) for all dues, fees, other charges and assessments payable with respect to such membership.

Id., § 6.1.4. These same restrictions were continued in the Bylaws, as amended on March 31, 2006 (the "2006 Bylaws"). Bylaws (2006), §§ 6.13, 6.1.4.

Restrictions on the ability of private golf club members to terminate their financial 17 obligations to the Club through resignation are common throughout the United States. The 18 rationale for this restriction is simple and straight forward—private golf clubs, such as the Club, 19 are dependent upon dues revenue derived from their members to conduct their day-to-day 20 operations, such as the maintenance of the golf courses and other facilities and amenities. Club 21 budgets (and the amount of dues charged to members) are based upon the number of members at 22 the club. Any reduction in revenues attributable to a decline in dues paying memberships results 23 in a proportional increase in the dues, assessments, fees, and other charges imposed upon the 24 members and threatens the ongoing viability of a club. Accordingly, restrictions upon a 25 member's ability simply to resign the Membership, the requirement that Memberships must be 26

FENNEMORE CRAIG, P.C. PHOENIX

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transferred through the Club, and the obligation of the surrendering Member to continue paying 1 2 dues, assessments, fees, and other charges attendant to Membership during the period that 3 reissuance of the Membership is pending are critically important to the ongoing economic 4 viability of the Club.

5 On or about December 21, 2010, as part of the Club's transition from Developer control 6 to Member control, Defendants signed a Membership Conversion Agreement (the "Conversion 7 Agreement"). Under the Conversion Agreement, the Club agreed to convert Members' Deferred 8 Equity Golf Memberships to Equity Golf Memberships in the Club. Conversion Agreement at 1. 9 In exchange, Members reaffirmed their agreement to abide by the terms of the Club Bylaws and 10 Rules and Regulations of the Club, as amended from time to time, and to pay all dues, fees, 11 charges, and assessments as provided by the Club Bylaws. Id. Specifically, the Conversion 12 Agreement provides:

> Member hereby acknowledges 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 right thereunder, unless otherwise stated herein. 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, including the timely payment of all dues, fees, charges and assessments as provided in the Club Bylaws.

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Id. In addition to this statement, Defendants further acknowledged that:

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 ....

26 Id.

FENNEMORE CRAIG, P.C. PHOENIN

Subsequent to the transition to Member control, the Club Bylaws were amended again in 2 2012, 2013, and 2014. Like their predecessors, these amendments did not permit Members to 3 simply resign their Memberships and walk away from their obligations to the Club. From the 4 outset, members have only been permitted to transfer their Memberships through the Club and 5 have remained obligated to pay all Club dues, assessments and other charges until such time as 6 their Memberships have been reissued by the Club.

On or about June 26, 2013, Defendants elected to surrender their Membership for reissuance through the Club in accordance with the Bylaws. By signing the Request for Reissuance Form (the "Request"), Defendants explicitly agreed that they "will continue to have full usage and voting rights until the Membership is reissued by the Club and that [they] are obligated to continue to pay dues, fees, charges and assessments until reissuance . . . ." Request at 2.

Before their Membership could be reissued, however, on or about January 1, 2014, Defendants attempted to resign their Membership, effective January 1, 2014, through a letter tendered to the Club. In that letter, Defendants claimed that the letter "officially serve[d] as [their] resignation form the Desert Mountain Club, Inc. Effective 1/1/2014." January 1 Letter at p. 1. Despite repeated communications from the Club, Defendants have paid none of the dues or other charges against their Membership Account since sending this letter on January 1, 2014.

As of May 31, 2015, Defendants owe a total of \$106,052.53 (including the \$65,000 transfer fee) to the Club pursuant to the terms of the Membership Agreement, the Conversion Agreement, and the Bylaws. This amount will continue to increase on a monthly basis, reflecting additional dues and late charges, until such time as the Membership is either transferred or terminated.

Accordingly, Defendants remain Members of the Club. Under the terms of the Conversion Agreement and the Bylaws, Defendants are still obligated to pay all dues, fees, assessments, and other charges properly posted to their Club account.

FENNEMORE CRAIG, P.C. PROENTS

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#### LEGAL THEORIES UPON WHICH CLAIMS ARE BASED.

Declaratory Relief. The Club requests that the Court declare: that the provisions of the 2 Membership Agreement and the Bylaws regarding the manner in which Members of the Club 3 may terminate their Memberships are enforceable; that Defendants cannot unilaterally terminate 4 their obligation to pay dues, assessments and other charges properly imposed by the Club simply 5 by resigning their Membership; that Defendants' attempted unilateral resignation from the Club 6 was not effective to terminate Defendants' ongoing obligation to pay all dues, fees, assessments 7 and other charges imposed by the Club; and that until such time as their Membership has been 8 9 terminated in one of the methods specifically authorized in the Bylaws, Defendants remain Members of the Club, subject to the Bylaws, and the Rules and Regulations of the Club, as they 10 may be amended from time to time. 11

Breach of Contract. Defendants entered into a Membership Agreement with the Club. 12 The Membership Agreement validly incorporated the Club Bylaws as it conspicuously stated that 13 Defendants would be bound by the terms and conditions of the Club Bylaws. See Weatherguard 14 Roofing Co. v. D.R. Ward Constr., 214 Ariz. 344, ¶ 8, 152 P.3d 1227, 1229 (App. 2007) 15 (document may be incorporated by reference into contract when reference clear and unequivocal 16 and called to attention of other party, other party consents, terms of incorporated document 17 known or easily available to contracting parties, and context of reference makes clear writing part 18 of contract). The Membership Agreement and the Club Bylaws clearly and conspicuously 19 foreclose a Member from terminating his obligation to pay dues, fees, assessments, and charges 20 owed to the Club simply by resigning from the Club. Instead, a Member wishing to exit the Club 21 and end his payment obligations must tender his Membership to the Club for reissuance. Once the 22 Membership has been reissued, the duty to pay dues, fees, assessments, and other charges 23 terminates. "Where parties bind themselves by a lawful contract, in the absence of fraud a court 24 must give effect to the contract as it is written, and the terms or provisions of the contract, where 25 clear and unambiguous, are conclusive." Goodman v. Newzona Inv. Co., 101 Ariz. 470, 472, 421 26

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1	P.2d 318, 320 (1966) (citing Galbraith v. Johnston, 92 Ariz. 77, 373 P.2d 587 (1962)).
2	Defendants have breached the Membership Agreement by attempting to unilaterally
3	resign their Membership without complying with the procedures set forth in the Bylaws for
4	surrendering and/or terminating Memberships and by failing and refusing to pay dues and charges
5	properly imposed against their account since the date of the attempted resignation.
б	III. THE NAMES, ADDRESSES, AND TELEPHONE NUMBERS OF ANY
7	WITNESSES THE DISCLOSING PARTY EXPECTS TO CALL AT TRIAL.
8	Plaintiff has yet to make a determination concerning the identity of the witnesses it will
9	call at trial. Plaintiff, however, may call one or more of the following individuals listed in this
10	section. Plaintiff may also call any individual listed in Section IV, and/or any individual listed by
11	any other party. These designations are subject to any objections Plaintiff may raise before or
12	during trial.
13	1. Robert Jones
14	c/o Chris Callahan Fennemore Craig P.C. 2204 Fast Camelhack Based Switz 600
15	2394 East Camelback Road, Suite 600 Phoenix, AZ 85016
16	2. Kelly Rausch c/o Chris Callahan
17	Fennemore Craig P.C. 2394 East Camelback Road, Suite 600
18	Phoenix, AZ 85016
19	3. Debbie Delcore c/o Chris Callahan
20	Fennemore Craig P.C. 2394 Bast Camelback Road, Suite 600
21	Phoenix, AZ 85016
22	4. Thomas Clark c/o Daryl Williams
23	c/o Daryl Williams 6225 North 24 <sup>th</sup> Street, Suite 125 Phoenix, AZ 85016
24	5. Barbara Clark
25	c/o Daryl Williams 6225 North 24 <sup>th</sup> Street, Suite 125
26	Phoenix, AZ 85016
FUNNEMORE CRAIG, P.C. PROENIX	- 7 -
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#### IV. THE NAMES AND ADDRESSES OF ALL PERSONS THE DISCLOSING PARTY BELIEVES MAY HAVE RELEVANT KNOWLEDGE OR INFORMATION.

- Plaintiff incorporates the individuals identified in Section III. Plaintiff reserves the right
  to add other individuals to this section at a later date.
- 5 V. THE NAMES AND ADDRESSES OF ALL PERSONS WHO HAVE GIVEN STATEMENTS AND THE CUSTODIAN OF COPIES OF THOSE STATEMENTS.
  - Plaintiff is not aware of any statements.

#### 8 VI. EXPERT WITNESSES.

Plaintiff has not yet made any determination regarding the identity of expert witnesses in
connection with this matter but anticipates that expert testimony may be necessary if this case
proceeds to trial. Plaintiff, therefore, reserves the right to identify expert witnesses at a later time
and in accordance with both the applicable rules and any scheduling order issued by the Court.

#### 13 VII. MEASURE OF DAMAGES.

Plaintiff seeks to recover from Defendants the amount owed by the Clarks on their Membership Account. As of May 1, 2015, the amount owed is \$106,052.53. This amount will increase over time as dues, assessments, late fees, interest and other charges continue to accrue. Plaintiff will also seek to recover fees and costs pursuant to A.R.S. §§ 12-341, 12-341.01, and 12-349.

#### 19 VIII. THE EXISTENCE, LOCATION, CUSTODIAN, AND GENERAL DESCRIPTION OF ANY TANGIBLE EVIDENCE, RELEVANT DOCUMENTS, OR ELECTRONICALLY STORED INFORMATION THAT DISCLOSING PARTY PLANS TO USE AT TRIAL AND RELEVANT INSURANCE AGREEMENTS. 21

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Plaintiff has not yet decided what documents or other materials that it may use as trial exhibits. At present, Plaintiff may use any and all of the documents it produced in its disclosure statements as well as all documents, information, and related materials disclosed by any other party to this litigation or in response to a subpoena. Plaintiff reserves the right to supplement this

section as discovery progresses.

FENNEMORE CRAIG, P.C. Proents

IX. LIST OF DOCUMENTS OR ELECTRONICALLY STORED INFORMATION OR 1 CATEGORIES DOCUMENTS OF OR **ELECTRONICALLY** STORED 2 INFORMATION WHICH THE DISCLOSING PARTY BELIEVES MAY BE RELEVANT TO THE SUBJECT MATTER OF THE ACTION. 3 Plaintiff is aware of the following documents that may be relevant to this case: 4 1. Dual Membership Agreement, dated April 27, 1988, by and among Desert 5 Mountain Development Company, Inc., and Thomas Clark and Barbara Clark. 6 2. Deferred Equity Golf Membership Agreement, dated November 11, 1996, by and 7 among Desert Mountain Properties, d/b/a The Desert Mountain Club, and Thomas 8 Clark and Barbara Clark. 9 3. Bylaws of the Desert Mountain Club, as Revised Effective July 1, 1994. 10 4. Deferred Equity Membership Plan for the Desert Mountain Club, Effective Date: 11 July 1, 1994. 12 5. Bylaws of the Desert Mountain Club, as revised effective March 31, 2004. 13 6, Bylaws of the Desert Mountain Club, as revised effective March 31, 2006. 14 7. Deferred Equity Membership Plan for the Desert Mountain Club, as revised 15 effective March 31, 2006. 16 Membership Conversion Agreement, dated December 21, 2010, by an among 8. 17 Desert Mountain Club, Inc. and Thomas Clark and Barbara Clark. 18 9. Desert Mountain Club Bylaws, effective December 31, 2010. 19 10. Desert Mountain Club Bylaws, effective March 19, 2012. 20 11. Desert Mountain Club Bylaws, effective July 1, 2013. 21 12. Letter dated August 28, 2013, from Debbie Delcore to Thomas Clark, confirming 22 that Mr. Clark's Membership was placed on the Equity Golf Membership 23 Reissuance List on June 26, 2013. 24 13. Email dated July 22, 2013, from Tom Clark to Tom Clark, including Desert 25 Mountain Golf Membership Request for Reissuance Form. 26 FENNEMORE CRAIG, P.C. PHDERCS - 9 -

1	14. Letter, undated, from Thomas Clark to Desert Mountain Club, stating Mr. Clark's
2	resignation as a member of the Club.
3	15. Desert Mountain Club Bylaws, effective August 1, 2014.
4	16. Desert Mountain Club Member Inquiry Transactional Detail Listing, dated
5	4/16/2015, for Thomas Clark, showing amounts owed to the Club for Membership
6	Number 352 January 1, 2014 – April 2015.
7	DATED this $4^{tn}$ day of May, 2015.
8	FENNEMORE CRAIG, P.C.
9	
10	By
11	Christopher L. Callahan Seth G. Schuknecht
12	Emily Ward Attorneys for Plaintiff Desert Mountain Club, Inc.
13	Desert Mountain Club, inc.
14	ORIGINAL OF THE FOREGOING mailed this 4 day of May, 2015, to:
15	Daryl M. Williams
16	Baird, Williams and Greer, LLP 6225 N. 24 <sup>th</sup> Street, Suite 125 Phoenix, AZ 85016
17 18	Email: <u>darylwilliams(@bwglaw.net</u>
18	Attorneys for Defendants
20	2) 00 11 2
21	I rugen a dance
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Fennemore Craig, P.C. Phoenix	- 10 -

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1 :	VERIFICATION	
2	I, Kelly Rausch, individually and on behalf of the Desert Mountain Club, Inc. declare	
3	under penalty of perjury that the factual assertions contained in the foregoing Rule 26.1 disclosure	
4	statement, as they pertain to my actions, communications and information in my possession, are	
5	true and correct to the best of my knowledge, information and belief.	
6	Executed this $\frac{29t}{200}$ day of April, 2015.	
7	10 million	
8	Reglausch	
9	Kelly Rausch	
10		
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FUNNEMORE CRAIG, P.C Phoenix	- 11 -	

#### DESERT MOUNTAIN CLUB

#### Member Inquiry Transaction Detail Listing

Member	#: 352	Thoma	s Clark	Class	040 EQUITY GOLF	Statu	us: Su	spended	
Date	Reference	Dep	Code	Description	Amount	SC	Tax	Grat	Total
Period:									
01/01/11	BEGBAL			CHARGES	<b>5</b> 00	0.00		0.00	1,728.99
01/01/14	2395490		71F	S Boutique	5.00	0.00	0.40	0.00	5.40
01/01/14	2395490		900	POS Cash	(5.40)	0.00	0.00	0.00	(5.40)
01/02/14	2396050		900	POS Cash	(5.40)	0.00	0.00	0.00	(5.40)
01/02/14 01/07/14	2396050		71F	S Boutique	5.00	0.00	0.40	0.00	5.40
01/07/14	909080		606 606	PC Golf Lessons	(80.00)	0.00	0.00	0.00	(80.00)
01/20/14	909230			PC Golf Lessons PAYMENT - THANK YOU	(80.00)	0.00	0.00	0.00	(80.00)
	1179		PAY		(1,648.99)	0.00	0.00	0.00	(1,648.99)
01/31/14			040	EQUITY GOLF	1,320.00	0.00	0.00	0.00	1,320.00
01/31/14			HAN	CG Handicap Fee	35.00	0.00	0.00	0.00	35.00
01/31/14		1	HAN	CG Handicap Fce	35.00	0.00	0.00	0.00	35.00
	ENDBAL				(419.79)	0.00	0.80	0.00	1,310.00
	BEGBAL			Memo Billings					0.00
	ENDBAL								0.00
	BEGBAL			Collection Agency					0.00
	ENDBAL								0.00
	BEGBAL			Assessment Charges					0.00
	ENDBAL								0.00
	BEGBAL			Prior Year Balance					0.00
	ENDBAL								0.00
				PERIOD TOTAL		60 B .			1,310.00
				Current	30 Days	60 Days		90+ Days	Total Due
				1,310.00	0.00	0.00		0.00	1,310.00
				0.00	0.00	0.00		0.00	0.00
				0.00	0.00	0.00		0.00	0.00
				0.00	0.00	0.00		0.00	0.00
				0.00	0.00	0.00		0.00	0.00
		Total:		\$1,310.00	\$0.00	\$0.00		\$0.00	\$1,310.00
Period:	02-2014								
	BEGBAL			CHARGES					1,310.00
02/08/14	7814830		201	C Guest Fees	0.00	0.00	0.00	0.00	0.00
02/28/14			M07	Late Charges	19.65	0.00	0.00	0.00	19.65
02/28/14			040	EQUITY GOLF	1,320.00	0.00	0.00	0.00	1,320.00
	ENDBAL				1,339.65	0.00	0.00	0.00	2,649.65
	BEGBAL			Memo Billings					0.00
	ENDBAL								0.00
	BEGBAL			Collection Agency					0.00
	ENDBAL								0.00
	BEGBAL			Assessment Charges					0.00
	ENDBAL			-					0.00
	BEGBAL			Prior Year Balance					0.00
	ENDBAL								0.00
				PERIOD TOTAL					2,649.65

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#### DESERT MOUNTAIN CLUB

#### Member Inquiry Transaction Detail Listing

Member	#: 352	Thoma	s Clark	Class :	040 EQUITY GOLF	Stati	ıs: Su	spended	
Date	Reference	Dep	Code	Description Current	Amount 30 Days	SC 60 Days	Tax	Grat 90+ Days	Total Total Due
				1,339.65	1,310.00	0.00		0.00	2,649.65
				0.00	0.00	0.00		0.00	0.00
				0.00	0.00	0.00		0.00	0.00
				0.00	0.00	0.00		0.00	0.00
				0.00	0.00	0.00		0.00	0.00
		Total		\$1,339.65	\$1,310.00	\$0.00		\$0.00	\$2,649.65
Period:	03-2014								
	BEGBAL			CHARGES					2,649.65
03/15/14	1794610		O03	O Cart Fees	25.00	0.00	1.99	0.00	26.99
03/15/14	1794610		O01	O Guest Fees	160.00	0.00	2.64	0.00	162.64
03/15/14	1794610		901	POS MC/Visa/DS	(189.63)	0.00	0.00	0.00	(189.63)
03/31/14			M07	Late Charges	39.74	0.00	0.00	0.00	39.74
03/31/14			040	EQUITY GOLF	1,320.00	0.00	0.00	0.00	1,320.00
	ENDBAL				1,355.11	0.00	4.63	0.00	4,009.39
	BEGBAL			Memo Billings					0.00
	ENDBAL								0.00
	BEGBAL			Collection Agency					0.00
	ENDBAL								0.00
	BEGBAL			Assessment Charges					0.00
	ENDBAL								0.00
	BEGBAL			Prior Year Balance					0.00
	ENDBAL								0.00
				PERIOD TOTAL					4,009.39
				Current	30 Days	60 Days		90+ Days	Total Due
				1,359.74	1,339.65	1,310.00		0.00	4,009.39
				0.00	0.00	0.00		0.00	0.00
				0.00	0.00	0.00		0.00	0.00
				0.00	0.00	0.00		0.00	0.00
				0.00	0.00	0.00		0.00	0.00
		Total:		\$1,359.74	\$1,339.65	\$1,310.00		\$0.00	\$4,009.39
Period:	04-2014								
	BEGBAL			CHARGES					4,009.39
04/06/14	3459610		410	A Merchandise	79.00	0.00	6.28	0.00	85.28
04/06/14	3459610		902	POS American Express	(85.28)	0.00	0.00	0.00	(85.28)
04/24/14	22402		717	CG Mens Grill Food	10.25	1.85	0.81	0.00	12.91
04/30/14			M07	Late Charges	60.14	0.00	0.00	0.00	60.14
04/30/14	101 1 1 1 1 1 1 1		040	EQUITY GOLF	1,320.00	0.00	0.00	0.00	1,320.00
	ENDBAL				1,384.11	1.85	7.09	0.00	5,402.44
	BEGBAL			Memo Billings					0.00
	ENDBAL								0.00
	BEGBAL			Collection Agency					0.00
	ENDBAL								0.00

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#### DESERT MOUNTAIN CLUB

#### Member Inquiry Transaction Detail Listing

Member	# 352	Thoma	s Clark	Class :	040 EQUITY GOLF	Statu	as: Su	ispended	
Date	<b>Reference</b> BEGBAL ENDBAL	Dep	Code	Description Assessment Charges	Amount	SC	Tax	· Grat	<b>Total</b> 0.00 0.00
	BEGBAL			Prior Year Balance					0.00
				PERIOD TOTAL					5,402.44
				Current	30 Days	60 Days		90+ Days	Total Due
				1,393.05	1,359.74	1,339.65		1,310.00	5,402.44
				0.00	0.00	0.00		0.00	0.00
				0.00	0.00	0.00		0.00	0.00
				0.00	0.00	0.00		0.00	0.00
				0.00	0.00	0.00		0.00	0.00
		Total:		\$1,393.05	\$1,359.74	\$1,339.65		\$1,310.00	\$5,402.44
Period:	05-2014								
	BEGBAL			CHARGES					5,402.44
05/31/14			M07	Late Charges	81.04	0.00	0.00	0.00	81.04
05/31/14			040	EQUITY GOLF	1,320.00	0.00	0.00	0.00	1,320.00
	ENDBAL				1,401.04	0.00	0.00	0.00	6,803.48
	BEGBAL			Memo Billings					0.00
	ENDBAL								0.00
	BEGBAL			Collection Agency					0.00
	ENDBAL								0.00
	BEGBAL			Assessment Charges					0.00
	ENDBAL								0.00
	BEGBAL			Prior Year Balance					0.00
	ENDBAL								0.00
				PERIOD TOTAL					6,803.48
				Current	30 Days	60 Days		90+ Days	Total Due
				1,401.04	1,393.05	1,359.74		2,649.65	6,803,48
				0.00	0.00	0.00		0.00	0.00
				0.00	0.00	0.00		0.00	0.00
				0.00	0.00	0.00		0.00	0.00
				0.00	0.00	0.00		0.00	0.00
		Total:		\$1,401.04	\$1,393.05	\$1,359.74		\$2,649.65	\$6,803.48
Period: (									
	BEGBAL	2		CHARGES					6,803.48
06/30/14			M07	Late Charges	102.05	0.00	0.00	0.00	102.05
06/30/14			040	EQUITY GOLF	1,320.00	0,00	0.00	0.00	1,320.00
	ENDBAL				1,422.05	0.00	0.00	0.00	8,225.53
	BEGBAL			Memo Billings					0.00
	ENDBAL								0.00
	BEGBAL			Collection Agency					0.00
	ENDBAL								0.00
	BEGBAL			Assessment Charges					0.00

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#### DESERT MOUNTAIN CLUB Member Inquiry Transaction Detail Listing

Member	r#: 352	Thoma	s Clark	Class	040 EQUITY GOLF	Stat	us: Si	uspended	
Date	<b>Reference</b> ENDBAL	Dep	Code	Description	Amount	SC	Tax	Grat	Total 0.00
	BEGBAL			Prior Year Balance					0.00
~	ENDBAL					. 4			0.00
				PERIOD TOTAL					8,225.53
				Current	30 Days	60 Days		90+ Days	Total Due
				1,422.05	1,401.04	1,393.05		4,009.39	8,225.53
				0.00	0.00	0.00		0.00	0.00
				0.00	0.00	0.00		0.00	0.00
				0.00	0.00	0.00		0.00	0.00
				0.00	0.00	0.00		0.00	0.00
		Total:		\$1,422.05	\$1,401.04	\$1,393.05		\$4,009.39	\$8,225.53
Period:	07-2014								
	BEGBAL			CHARGES					8,225.53
07/31/14			M07	Late Charges	123.38	0.00	0.00	0.00	123.38
07/31/14			040	EQUITY GOLF	1,320.00	0.00	0.00	0.00	1,320.00
	ENDBAL				1,443.38	0.00	0.00	0.00	9,668.91
	BEGBAL			Memo Billings					0.00
	ENDBAL								0.00
	BEGBAL			Collection Agency					0.00
	ENDBAL								0.00
	BEGBAL			Assessment Charges					0.00
	ENDBAL								0.00
	BEGBAL			Prior Ycar Balance					0.00
	ENDBAL								0.00
				PERIOD TOTAL					9,668.91
				Current	30 Days	60 Days		90+ Days	Total Due
				1,443.38	1,422.05	1,401.04		5,402.44	9,668.91
				0.00	0.00	0.00		0.00	0.00
				0.00	0.00	0.00		0.00	0.00
				0.00	0.00	0.00		0.00	0.00
				0.00	0.00	0.00		0.00	0.00
		Total:	,	\$1,443.38	\$1,422.05	\$1,401.04		\$5,402.44	\$9,668.91
Period: (									
	BEGBAL			CHARGES					9,668.91
08/31/14			M07	Late Charges	145.03	0.00	0.00	0.00	145.03
08/31/14			040	EQUITY GOLF	1,320.00	0.00	0.00	0.00	1,320.00
	ENDBAL				1,465.03	0.00	0.00	0.00	11,133.94
	BEGBAL			Memo Billings					0.00
	ENDBAL								0.00
	BEGBAL			Collection Agency					0.00
	ENDBAL								0.00
	BEGBAL			Assessment Charges	¢				0.00
	ENDBAL								0.00

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#### DESERT MOUNTAIN CLUB

#### Member Inquiry Transaction Detail Listing

Member	#: 352	Thoma	s Clark	Class (	040 EQUITY GOLF	Statu	us: Si	uspended	
Date	<b>Reference</b> BEGBAL ENDBAL	Dep	Code	Description Prior Ycar Balance	Amount	SC	Tax	Grat	<b>Total</b> 0.00 0.00
	BROOME			PERIOD TOTAL					11,133.94
				Current	30 Days	60 Days		90+ Days	Total Due
				1,465.03	1,443.38	1,422.05		6,803.48	11,133.94
				0.00	0.00	0.00		0.00	0.00
				0.00	0.00	0.00		0.00	0.00
				0.00	0.00	0.00		0.00	0.00
				0.00	0.00	0.00		0.00	0.00
		Total:		\$1,465.03	\$1,443.38	\$1,422.05		\$6,803.48	\$11,133.94
Period:	09-2014								
	BEGBAL			CHARGES					11,133.94
09/30/14			M07	Late Charges	167.01	0.00	0.00	0.00	167.01
09/30/14			040	EQUITY GOLF	1,320.00	0.00	0.00	0.00	1,320.00
	ENDBAL				1,487.01	0.00	0.00	0.00	12,620.95
	BEGBAL			Memo Billings					0.00
09/22/14			R06	Memo Transfer Fee	65,000.00	0.00	0,00	0.00	65,000.00
	ENDBAL				65,000.00	0.00	0.00	0.00	65,000.00
	BEGBAL			Collection Agency					0.00
	ENDBAL								0.00
	BEGBAL			Assessment Charges					0.00
	ENDBAL								0.00
	BEGBAL			Prior Year Balance					0.00
	ENDBAL								0.00
				PERIOD TOTAL					77,620.95
				Current	30 Days	60 Days		90+ Days	Total Due
				1,487.01	1,465.03	1,443.38		8,225.53	12,620.95
				65,000.00	0.00	0.00		0.00	65,000.00
				0.00	0.00	0.00		0.00	0.00
				0.00	0.00	0.00		0.00	0.00
				0.00	0.00	0.00		0.00	0.00
		Total:		\$66,487.01	\$1,465.03	\$1,443.38		\$8,225.53	\$77,620.95
Period:	10-2014								
	BEGBAL			CHARGES					12,620.95
10/31/14			M07	Late Charges	189.31	0.00	0.00	0.00	189.31
10/31/14			040	EQUITY GOLF	1,320.00	0,00	0.00	0.00	1,320.00
	ENDBAL				1,509.31	0.00	0.00	0.00	14,130.26
	BEGBAL			Memo Billings					65,000.00
10/31/14			R02	Memo Bill Late Chrgs	975.00	0.00	0.00	0.00	975.00
	ENDBAL				975.00	0.00	0.00	0.00	65,975.00
	BEGBAL			Collection Agency					0.00
	ENDBAL								0.00
	BEGBAL			Assessment Charges					0.00

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### DESERT MOUNTAIN CLUB Member Inquiry Transaction Detail Listing

Member	r#; 352	Thoma	s Clark	Class ;	040 EQUITY GOLF	Statu	is: S	uspended	
Date	<b>Reference</b> ENDBAL	Dep	Code	Description	Amount	SC	Tax	Grat	Total 0.00
	BEGBAL ENDBAL			Prior Year Balance					0.00
	ENDBAL			PERIOD TOTAL					0.00 80,105,26
				Current	30 Days	60 Days		90+ Days	Total Due
				1,509.31	1,487.01	1,465.03		9,668.91	14,130.26
				975.00	65,000.00	0.00		0.00	65,975.00
				0.00	0.00	0.00		0.00	0.00
				0.00	0.00	0.00		0.00	0.00
				0.00	0.00	0.00		0.00	0.00
		Total	:	\$2,484.31	\$66,487.01	\$1,465.03		\$9,668.91	\$80,105.26
Period:	11-2014								
	BEGBAL			CHARGES					14,130.26
11/01/14			M10	Holiday Fund	200.00	0,00	0.00	0.00	200.00
11/30/14			M07	Late Charges	211.95	0.00	0.00	0.00	211.95
11/30/14			040	EQUITY GOLF	1,320.00	0,00	0.00	0.00	1,320.00
	ENDBAL				1,731.95	0.00	0.00	0.00	15,862.21
1120004	BEGBAL		D.00	Memo Billings	680 <b>(</b> 0	B 00		0.00	65,975.00
11/30/14			R02	Memo Bill Late Chrgs	989.63	0.00	0.00	0.00	989.63
	ENDBAL BEGBAL			Collection Agency	989.63	0.00	0.00	0.00	66,964.63 0.00
	ENDBAL			Concetion Agency					0.00
	BEGBAL			Assessment Charges					0.00
	ENDBAL			Charles and Charles					0.00
	BEGBAL			Prior Year Balance					0.00
	ENDBAL								0.00
				PERIOD TOTAL					82,826.84
				Current	30 Days	60 Days		90+ Days	Total Due
				1,731.95	1,509.31	1,487.01		11,133.94	15,862.21
				989.63	975.00	65,000.00	,	0.00	66,964.63
				0.00	0.00	0.00		0.00	0.00
				0.00	0.00	0.00		0.00	0.00
				0.00	0.00	0.00		0.00	0.00
		Total:		\$2,721.58	\$2,484.31	\$66,487.01		\$11,133.94	\$82,826.84
Period: 1									
	BEGBAL			CHARGES					15,862.21
12/31/14			FBM	Food and Bev Minimum	1,479.75	0.00	0.00	0.00	1,479.75
12/31/14			M07	Late Charges	237.93	0.00	0.00	0.00	237.93
12/31/14			040	EQUITY GOLF	1,320.00	0.00	0.00	0.00	1,320.00
	ENDBAL			Memo Billings	3,037,68	0.00	0.00	0.00	18,899.89
12/31/14	BEGBAL		R02	Memo Bill Late Chrgs	1 004 47	0.00	0.00	0.00	66,964.63 1,004.47
12/31/14	ENDBAL		1.02	Monto Dia Pare Cuiga	1,004.47 1,004.47	0.00	0.00	0.00	67,969.10
	CNUDAL				1,004.47	0.00	0.00	0.00	07,909.10

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#### DESERT MOUNTAIN CLUB

#### Member Inquiry Transaction Detail Listing

Member	r#: 352	Thoma	s Clark	Class :	040 EQUITY GOLF	Statu	s: S	Suspended	
Date	<b>Reference</b> BEGBAL	Dep	Code	Description Collection Agency	Amount	SC	Tax	Grat	Total 0.00
	ENDBAL								0.00
	BEGBAL			Assessment Charges					0.00
	ENDBAL								0.00
	BEGBAL			Prior Year Balance					0.00
	ENDBAL								0.00
				PERIOD TOTAL		60 Davis			86,868.99
				Current	30 Days	60 Days		90+ Days	Total Due
				3,037.68 1,004.47	1,731,95 989.63	1,509.31 975.00		12,620.95	18,899.89
				0.00	0.00	0.00		65,000.00 0.00	67,969.10 0.00
				0.00	0.00	0.00		0.00	0.00
				0.00	0.00	0.00		0.00	0.00
		Total:	:	\$4,042.15	\$2,721.58	\$2,484.31		\$77,620.95	\$86,868.99
Period:	01-2015								
	BEGBAL			CHARGES					18,899.89
01/31/15			M07	Late Charges	283.50	0.00	0.00	0.00	283.50
01/31/15		1	HAN	CG Handicap Fee	35.00	0.00	0.00	0.00	35.00
01/31/15			040	EQUITY GOLF	1,400.00	0.00	0.00	0.00	1,400.00
	ENDBAL				1,718.50	0.00	0.00	0.00	20,618.39
	BEGBAL			Memo Billings					67,969.10
01/31/15			R02	Memo Bill Late Chrgs	1,019.54	0.00	0.00	0.00	1,019.54
	ENDBAL				1,019.54	0.00	0,00	0.00	68,988.64
	BEGBAL			Collection Agency					0.00
	ENDBAL								0.00
	BEGBAL			Assessment Charges					0.00
01/31/15			X03	Golf Mcm. Assessment	4,500.00	0.00	0.00	0.00	4,500.00
	ENDBAL				4,500.00	0.00	0.00	0.00	4,500.00
	BEGBAL			Prior Year Balance					0.00
	ENDBAL								0.00
				PERIOD TOTAL Current	60 Davia	60 Dava			94,107.03 Total Due
					30 Days	60 Days		90+ Days	
				1,718.50 1,019.54	3,037.68 1,004.47	1,731.95 989.63		14,130.26 65,975.00	20,618.39 68,988.64
				0.00	0.00	0.00		0.00	08,988.04
				4,500.00	0.00	0.00		0.00	4,500.00
				4,500.00	0.00	0.00		0.00	0.00
		Total:		\$7,238.04	\$4,042.15	\$2,721.58		\$80,105.26	\$94,107.03
Period: (	02-2015								
I CHOU: U	BEGBAL		4	CHARGES					20,618.39
02/28/15			M07	Late Charges	309.28	0.00	0.00	0.00	309.28
02/28/15			040	EQUITY GOLF	1,400.00	0.00	0.00	0.00	1,400.00
	ENDBAL				1,709.28	0.00	0.00	0.00	22,327.67

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#### DESERT MOUNTAIN CLUB

#### Member Inquiry Transaction Detail Listing

Member	#: 352	Thoma	s Clark	Class ;	040 EQUITY GOLF	State	as: S	uspended	
Date	<b>Reference</b> BEGBAL	Dep	Code	Description Memo Billings	Amount	SC	Tax	Grat	<b>Total</b> 68,988.64
02/28/15			R02	Memo Bill Late Chrgs	1,034.83	0.00	0.00	0.00	1,034.83
	ENDBAL				1,034.83	0.00	0.00	0.00	70,023.47
	BEGBAL			Collection Agency					0.00
	ENDBAL								0.00
	BEGBAL			Assessment Charges					4,500.00
02/28/15			X17	Assessment Late Chg	67.50	0.00	0.00	0.00	67.50
	ENDBAL				67.50	0.00	0.00	0.00	4,567.50
	BEGBAL			Prior Year Balance					0.00
	ENDBAL								0.00
				PERIOD TOTAL					96,918.64
				Current	30 Days	60 Days		90+ Days	Total Due
				1,709.28	1,718.50	3,037.68		15,862.21	22,327.67
				1,034.83	1,019.54	1,004.47		66,964.63	70,023,47
				0.00	0.00	0.00		0.00	0.00
				67.50	4,500.00	0.00		0.00	4,567.50
				0.00	0.00	0.00		0.00	0.00
		Total	;	\$2,811.61	\$7,238.04	\$4,042.15		\$82,826.84	\$96,918.64
Period:	03-2015								
	BEGBAL			CHARGES					22,327.67
03/31/15			M07	Late Charges	334.92	0.00	0.00	0.00	334.92
03/31/15			040	EQUITY GOLF	1,400.00	0.00	0.00	0.00	1,400.00
	ENDBAL				1,734.92	0.00	0.00	0.00	24,062.59
	BEGBAL			Memo Billings					70,023.47
	ENDBAL								70,023.47
	BEGBAL			Collection Agency					0.00
	ENDBAL								0.00
	BEGBAL			Assessment Charges					4,567.50
03/31/15			X17	Assessment Late Chg	68.51	0.00	0.00	0.00	68.51
	ENDBAL				68,51	0.00	0.00	0.00	4,636.01
	BEGBAL			Prior Year Balance					0.00
	ENDBAL								0.00
				PERIOD TOTAL					98,722.07
				Current	30 Days	60 Days		90+ Days	Total Due
				1,734.92	1,709.28	1,718.50		18,899.89	24,062.59
				0.00	1,034.83	1,019.54		67,969.10	70,023.47
				0.00	0.00	0.00		0.00	0.00
				68.51	67.50	4,500.00		0.00	4,636.01
				0.00	0.00	0.00		0.00	0.00
		Total:		\$1,803.43	\$2,811.61	\$7,238.04		\$86,868.99	\$98,722.07
Period; (	04-2015								
	BEGBAL			CHARGES					24,062.59
	ENDBAL								24,062.59

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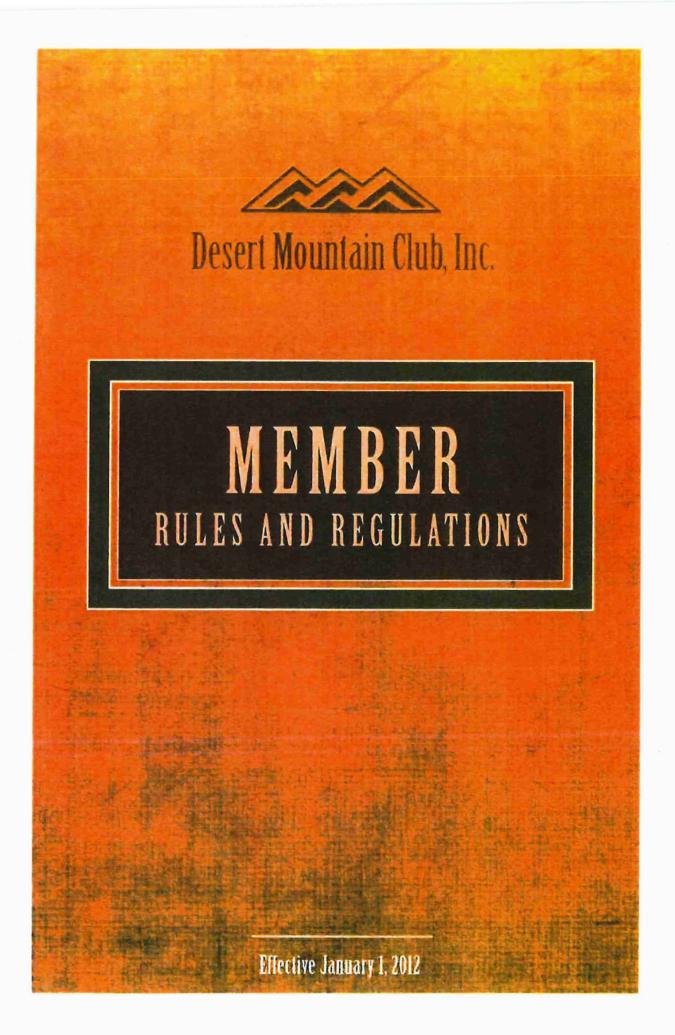
#### DESERT MOUNTAIN CLUB

#### Member Inquiry Transaction Detail Listing

Membe	er#: 352	Thoma	ıs Clark	Class 1	040 EQUITY GOLF	Statu	is: Su	spended	
Date	<b>Reference</b> BEGBAL	e Dep	Code	Description Memo Billings	Amount	SC	Tax	Grat	<b>Total</b> 70,023.47
	ENDBAL								70,023.47
	BEGBAL			Collection Agency					0.00
	ENDBAL								0.00
	BEGBAL			Assessment Charges					4,636.01
	ENDBAL								4,636.01
	BEGBAL			Prior Year Balance					0.00
	ENDBAL								0.00
				PERIOD TOTAL					98,722.07
				Current	30 Days	60 Days		90+ Days	Total Due
				0.00	1,734.92	1,709.28		20,618.39	24,062.59
				0.00	0.00	1,034.83		68,988.64	70,023.47
				0.00	0.00	0.00		0.00	0.00
				0.00	68.51	67.50		4,500.00	4,636.01
				0.00	0.00	0.00		0.00	0.00
		Total	:	\$0.00	\$1,803.43	\$2,811.61	:	\$94,107.03	\$98,722.07

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# Exhibit 5

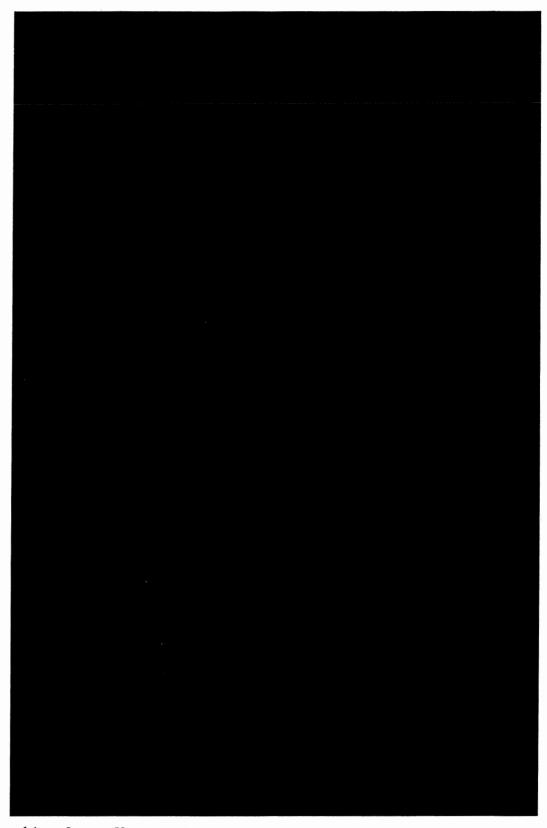


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These "Member Rules and Regulations" of the Desert Mountain Club, Inc. (the "Club") have been compiled and are provided on the Club's Members Only Website and herein for your convenience and ease of reference. These Rules and Regulations are mandatory in nature and binding upon all members. Failure to follow them may result in disciplinary action(s) taken by the Club pursuant to the Bylaws of The Desert Mountain Club, Inc. (the "Bylaws"). Please also refer to your copy of the Bylaws and any other additional guidelines, rules and regulations implemented by the Club from time to time (some of which may be physically posted or otherwise distributed at the specific Club facility to which they may pertain). These Rules and Regulations are not intended to supersede or contradict the Bylaws which take precedence over these Rules and Regulations in the event of a conflict. Although there is only one designated member under each membership agreement, the terms "member" or "members," as used in these Rules and Regulations, sometimes includes the designated members legal spouse or significant other, unmarried children under the age of twenty-five (25) living at home or who are full-time students or serving in the U.S. Armed Forces (immediate family members) as the context may require. These Rules and Regulations were created for the collective interests of the members and for our members' enjoyment of the facilities of the Club.

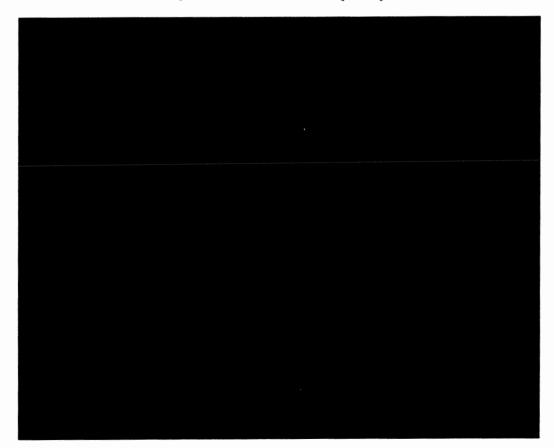
#### A. GENERAL



14. In an effort to address misuse of the Club's Membership Directory, members are reminded that it is the Club's long-standing policy that the

Directory shall only be used for official communications from the Club and for the exclusive personal use and convenience of the members for non-business purposes. All names and addresses are to be treated as confidential and may not be used as a general mailing list, for any business solicitations or for personal e-mail 'blasts' to all or a portion of the general membership for any reason by any member. Any electronic inputting, scanning (or other forms of capturing), copying, distribution or other dissemination of all or part of the Directory, or any business-related use, is strictly prohibited and will result in disciplinary action for the offending member. Unless otherwise indicated, members are presumed to have opted into inclusion in the Membership Directory and receipt of email communication from the Club to the member.

15. Any information relating to administrative, financial or operational policies, procedures, reports, statistics or other private material that is shared by the Club with members in the form of e-mails, hard-copy mailings, Town Hall audio/visual presentations or other types of communication is proprietary and confidential. Disclosing such information to non-members or enabling non-member access to Club information by sharing member log-in information (i.e. user name and password) to the Club member-only private website is prohibited and such actions shall subject the member to disciplinary action.



# Exhibit 6







Member Rules & Regulations

DESERT MOUNTAIN CLUB, INC. | SCOTTSDALE, AZ

EFFECTIVE JANUARY 1, 2014

### — INDEX —

A.	General
B.	Golf
C.	Pace of Play
D.	Golf Guest Policy
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K.	Tennis Dress Code
L.	Basketball, Volleyball & Barbecue Area
M.	Spa/Fitness
N.	Pools & Playground
0.	Youth Activities at Sonoran Clubhouse
P.	Dog Park
Q.	The Trails
R.	Member Code of Conduct

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The "Member Rules and Regulations" of the Desert Mountain Club, Inc. (the "Club") are provided herein for your convenience and ease of reference. They also appear on the Members Only section of the Desert Mountain Club website. Please take the time to familiarize yourself with them as they are mandatory in nature and binding upon all members, families and guests. Members should also be knowledgeable of the Club Bylaws and any other additional guidelines, rules and regulations implemented and publicized by the Club from time to time.

These Rules and Regulations are not intended to supersede or contradict the Bylaws which take precedence in the event of a conflict. Although there is only one designated member under each membership agreement, the terms "member" or "members," as used herein, includes the designated member's legal spouse or significant other, unmarried children under the age of twenty-five (25) living at home or who are full-time students or serving in the U.S. Armed Forces (immediate family members) as the context may require.

These Rules and Regulations have been created for the collective interests of our members, their families, guests and employees of the Club. They are intended to assist you in understanding how to properly utilize Club facilities, explain your responsibilities as a member and provide you with guidance in order to maintain the peaceful enjoyment of the Club by all. Violations of these Rules and Regulations, whether unintentional or deliberate, may result in disciplinary action(s) taken by the Club pursuant to the Club Bylaws

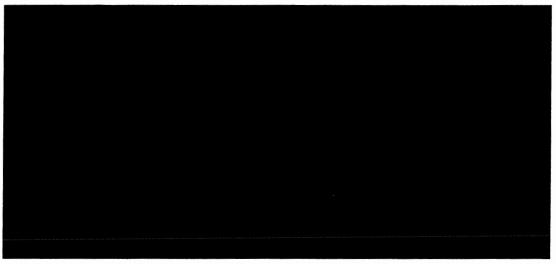


A. GENERAL

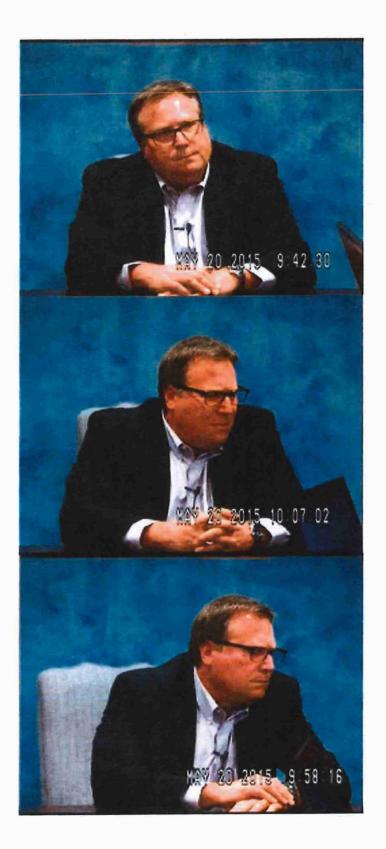
# 14. In an effort to address misuse of the Club's Membership Directory, members are reminded that it is the Club's long-standing policy that the Directory shall only be used for official communications from the Club and for the exclusive personal use and convenience of the members for non-business purposes. All names and addresses are to be treated as confidential and may not be used as a general mailing list, for any business solicitations or for personal e-mail "blasts" to all or a portion of the general membership for any reason by any member. Any electronic inputting, scanning (or other forms of capturing), copying, distribution or other dissemination of all or part of the Directory, or any business-related use, is strictly prohibited and will result in disciplinary action for the offending member. Unless otherwise indicated, members are presumed to have opted into inclusion in the Membership Directory

15. Any information relating to administrative, financial or operational policies, procedures, reports, statistics or other private material that is shared by the Club with members in the form of e-mails, hard-copy mailings, Town Hall audio/visual presentations or other types of communication is proprietary and confidential. Disclosing such information to non-members or enabling non-member access to Club information by sharing member log-in information (i.e. user name and password) to the Club member-only private website is prohibited and such actions shall subject the member to disciplinary action.

and receipt of e-mail communication from the Club to the member.



# Exhibit 7



# Exhibit 8

		Michael K Jeanes, Clerk of Cour *** Electronically Filed *** K. Dyer, Deputy 12/1/2014 6:49:00 PM Filing ID 6263163	t
1	William D. Holm, Bar #007412	r lung 1D 6265165	
2	JONES, SKELTON & HOCHULI, P.L.C. 2901 North Central Avenue, Suite 800		
2	Phoenix, Arizona 85012 Telephone: (602) 263-1749		
4	Fax: (602) 200-7804		the transfer of the
4 5	wholm@jshfirm.com minuteentries@jshfirm.com		
	Attorneys for Defendant Jason Clemett		in the second
6 7	SUPERIOR COURT OF THE STATE OF ARIZONA		
8	COUNTY OF M	ARICOPA	
9	MARK WILLIAM FRANKLIN, an	NO. CV2010-033437	
10	individual,	DEFENDANT JASON CLEMETT'S	
11	Plaintiff, v.	RESPONSE TO PLAINTIFF'S MOTION FOR NEW TRIAL	
12	JASON JOHN CLEMETT and DANIEL	(Assigned to the Honorable Dawn	
13	BLANCHARD,	Bergin)	
14	Defendants.		
15			
16	Defendant, Jason Clemett ("Defendant"), respectfully submits his Response		
17	to Plaintiff's Motion for New Trial. Defendant'	s Response is supported by the following	
18	Memorandum of Points and Authorities.		
19	MEMORANDUM OF POINT	S AND AUTHORITIES	
20	1. THE FACTS DID NOT PROVE LIABILITY		
21	Plaintiff first argues that the evidence elicited at trial "proved" liability		
22	against Jason Clemett and Daniel Blanchard (collectively, "Defendants") because they		
23	both admitted to hitting Plaintiff. Plaintiff contends that although Plaintiff was not		
24	"physically combative," the jury improperly found for Defendants. To begin, the		
25	overwhelming evidence supported the position that Plaintiff instigated the incident and		
26	was, in fact, "physically combative." Several witnesses testified that Plaintiff was		
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	e.		

threatening, hostile, and aggressive leading up to the incident. Plaintiff directed his
 violent behavior toward Defendants and their guests (wife and friend).

Furthermore, Plaintiff did not bring an assault claim; the only claim against Defendants was for negligence. Based on Plaintiff's behavior, Defendants acted "reasonably" under the circumstances. Contrary to Plaintiff's assertion, the evidence in this case did not "prove" liability; rather, the evidence fully supported the verdict entered in favor of Defendants.

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#### <u>LEGAL STANDARD – THE TRIAL COURT SHOULD NOT VACATE THE</u> VERDICT OR GRANT A NEW TRIAL

The power to grant a new trial is largely within the trial court's discretion, but this power is not unlimited. *King v. Superior Court*, 138 Ariz. 147, 151, 673 P.2d 787, 791 (1983). "[I]f it appears clearly from the record that there was no error in the matters presented in the motion for new trial, it is an abuse of discretion for the court to grant a new trial." *Helena Chem. Co. v. Coury Bros. Ranches*, 126 Ariz. 448, 450, 616 P.2d 908, 910 (App. 1980).

When ruling on a motion for new trial, a trial court must "pass on the weight of the evidence" to determine if "substantial justice has not been done between the parties." *Smith v. Moroney*, 79 Ariz. 35, 38, 282 P.2d 470, 472 (1955) (internal quotation marks omitted). In that role, the trial judge sits as a "thirteenth juror (the ninth juror in a civil case)," *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 55 ¶ 23, 961 P.2d 449, 453 (1998) (internal quotation marks omitted). Furthermore, "[a] party cannot urge in a motion for new trial that evidence was erroneously admitted unless a proper objection, stating the specific ground of the objection, was made at the time the evidence was offered, unless the error is fundamental." *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 496, 733 P.2d 1073, 1079 (1987).

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1 3. THE COURT PROPERLY GAVE AN INSTRUCTION CONSISTENT WITH A.R.S. § 12-711 2 Under Arizona law: 3 In any civil action, the finder of fact may find the defendant not liable if the defendant proves that the claimant . . . was under the influence of an intoxicating liquor or a drug and as a 4 5 result of that influence the claimant or decedent was at least fifty per cent responsible for the accident or event that caused the claimant's ... harm. 6 7 A.R.S. § 12-711 (2009) (emphasis added). With this statute in mind, the Court provided 8 the following jury instruction: 9 If Jason Clemett or Daniel Blanchard proves that Plaintiff Mark Franklin was under the influence of an intoxicating 10 liquor, and as a result of that influence, Mark Franklin was at least fifty percent (50%) responsible for the incident or event that caused his injuries, you <u>may</u> find Defendant Jason Clemett and Defendant Daniel Blanchard not liable to Mark 11 12 Franklin. (Emphasis added.) Plaintiff claims that the Court committed error by giving a jury 13 instruction based on A.R.S. § 12-711 because: (1) it violates Article 18, § 5 of the Arizona 14 Constitution by placing constraints on the jury's discretion; (2) it violates Article 2, § 31 15 of the Arizona Constitution by placing an unconstitutional limit on damages; (3) it is 16 unconstitutionally vague; (4) it violates Article 18, § 6 of the Arizona Constitution 17 because it abrogates the right to constitutionally-protected recovery; (5) it violates 18 19 Arizona's comparative fault principles by ignoring the parties' relative degrees of fault; and (6) no competent evidence proved that Plaintiff was "under the influence." We 20 address each of those arguments in turn. 21 22 A. A.R.S. § 12-711 does not violate Article 18, § 5 of the Arizona Constitution. Article 18, § 5 of the Arizona Constitution requires "[t]he defense of 23 contributory negligence or of assumption of risk, in all cases whatsoever, be a question of 24 fact and shall, at all times, be left to the jury." Plaintiff argues that the Court's jury 25 instruction on intoxicating liquor violated this requirement by unconstitutionally removing 26 the jury's discretion. 27 28 39458151 3

1 It is well known that the issues of negligence and contributory negligence 2 are solely a question for the jury; the trial court may not establish negligence or 3 contributory negligence. See Tobel v. State of Arizona Dept. of Public Safety, 189 Ariz. 4 168, 172, 939 P.2d 801, 805 (App. 1997). However, a violation of Article 18, § 5 occurs 5 only when the trial court provides a *mandatory* instruction that *requires* the jury to find 6 for a defendant if it finds the plaintiff was negligent. See Deering v. Carter, 92 Ariz, 329. 7 331, 376 P.2d 857, 859 (1962) (remanding a case where the jury was instructed that its 8 verdict "must be for the Defendant" (emphasis added)). Conversely, it is not a violation 9 of Article XVIII, § 5 to provide an instruction to the jury that is permissive and leaves a 10 plaintiff's recovery to the discretion of the jury if it finds plaintiff was negligent. See Layton v. Rocha, 90 Ariz. 369, 369, 368 P.2d 444, 445 (1962) (holding that an instruction 11 was constitutional because it stated "plaintiff may not be entitled to recover and your 12 13 verdict *may* be for the defendant" (emphases added)).

14 Here, the plain language of A.R.S. § 12-711 is viewed as permissive 15 because it provides the jury may find for the defendant based on plaintiff's intoxication. 16 The statute does not remove the issue of contributory negligence from the jury. The Court's intoxicating liquor instruction in this case was also consistent with that permissive 17 18 language; it never removed the question of liability from the jury, nor required the jury to 19 take any particular action. Romero v. Southwest Ambulance, 211 Ariz. 200, 205, 119 P.3d 20 467, 472 ("Section 12-711 neither removes the question of liability from the jury nor 21 requires the jury to take a particular action.").

Therefore, Plaintiff's argument that A.R.S. § 12-711 is incorrect and the Court should deny Plaintiff's motion for a new trial on this ground.

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B. <u>A.R.S. § 12-711 does not violate Article 2, § 31 of the Arizona Constitution</u> Article 2, § 31 of the Arizona Constitution provides that:

No law shall be enacted in this state limiting the amount of damages to be recovered for causing the death or injury of any person, except that a crime victim is not subject to a claim for damages by a person who is harmed while the person is attempting to engage in, engaging in or fleeing after having

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engaged in or attempted to engage in conduct that is classified as a felony offense.

Here, Plaintiff argues A.R.S. § 12-711 "encourages jurors to find the victim's actions have created an absolute defense for the defendant," and thus is "an unconstitutional limit on damages." Plaintiff's position is incorrect. As discussed above, A.R.S. § 12-711 does not curtail a jury's power to make a finding, and it certainly does not impose a limit on damages. *See Romero*, 211 Ariz. at 205, 119 P.3d at 472. Instead, it merely allows a jury to find for a defendant if it finds plaintiff was intoxicated and that, as a result of his intoxication, he was at least 50% responsible for the incident. In this case, the Court's instruction on intoxicating liquor was consistent with A.R.S. § 12-711 and therefore it did not create an unconstitutional limit on Plaintiff's damages.

#### C. <u>A.R.S. § 12-711 is not unconstitutionally vague</u>

Next, Plaintiff argues that A.R.S. § 12-711 is unconstitutionally vague because it fails to define "under the influence" or "explain what level of influence should trigger a defense verdict."

First, Plaintiff's argument fails because the statute is not unconstitutionally vague. A cursory review of the applicable case reveals that the phrase "under the influence" has been upheld multiple times based on the same argument Plaintiff offers. It is not surprising that Plaintiff ignored the abundance of case law because all of the case law on point undermines Plaintiff's argument:

The appellant's vagueness claim is directed to the words "under the influence". This language was interpreted over 50 years ago in *Hasten v. State*, 35 Ariz. 427, 280 P. 670 (1929) to mean "in the slightest degree". This meaning has been used in our courts ever since. Neither the statute nor this judicial definition is vague.

State v. Parker, 136 Ariz. 474, 666 P.2d 1083 (App. 1983); see also State v. Martin, 174
Ariz. 118, 121, 847 P.2d 619, 622 (App. 1992); Weston v. State, 49 Ariz. 183, 187–88, 65
P.2d 652, 654–55 (1937). Plaintiff's vagueness argument is contrary to well-settled
Arizona case law and should be dismissed outright.

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1 Furthermore, "[a] statute is not unconstitutionally vague because one of its 2 terms is not explicitly defined." State v. Takacs, 169 Ariz. 392, 395, 819 P.2d 978, 981 3 (App. 1991). "Nor is a statute unconstitutionally vague simply because it is susceptible to 4 more than one interpretation." Id. "Whether a statute is unconstitutionally vague is 5 generally determined by examining its application to the facts of the particular case." In re Moises L., 199 Ariz. 432, 434, 18 P.3d 1231, 1233 (App. 2000). In addition, when the 6 7 Legislature fails to define a phrase contained in a statute, courts will simply consider the 8 phrase's definitions in respected dictionaries. DeVries v. State, 221 Ariz. 201, 207, ¶ 21, 9 211 P.3d 1185, 1191 (App. 2009); see also A.R.S. § 1-213 ("Words and phrases shall be 10 construed according to the common and approved use of the language."). Black's Law 11 Dictionary defines "under the influence" as "deprived of clearness of mind and selfcontrol because of drugs or alcohol." 12

13 In this case, the jury had an abundance of evidence to conclude that Plaintiff was "under the influence" of alcohol based on the ordinary meaning of that phrase. 14 15 Security guard, Nick Bosnak (who was trained to identify intoxicated fans), testified that Plaintiff was drunk, hostile, loud and obnoxious, and that when he drinks, he gets "crazy." 16 17 The responding officer, Officer Justin Meyers (also trained to identify intoxication), 18 testified that he detected a strong to moderate odor of an intoxicating beverage emanating 19 from Plaintiff that Plaintiff appeared to be under the influence of alcohol. Consistent with 20 that testimony, both Jason and Dawn Clemett testified that they saw Plaintiff was drinking 21 and that he appeared drunk. Both Matthew and Dior Tidwell testified that Plaintiff always 22 had a drink in his hand, and that he was drunk. Examining the phrase "under the 23 influence" in the context of this case, there is simply no support for Plaintiff's argument; 24 A.R.S. § 12-711 is not unconstitutionally vague.

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D. <u>A.R.S. § 12-711 does not violate Article 18, § 6 of the Arizona Constitution</u> Plaintiff next argues A.R.S. § 12-711 violates Article 18, § 6 of the Arizona

27 Constitution because it "unconstitutionally instructs the jury to determine that a negligent

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plaintiff was the sole cause of injury and deny a recovery." This Section of the Arizona 1 2 Constitution states:

> The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation, except that a crime victim is not subject to a claim for damages by a person who is harmed while the person is attempting to engage in, engaging in or fleeing after having engaged in or attempted to engage in conduct that is classified as a felony offense.

7 In making this argument, Plaintiff fails to acknowledge that this issue has been analyzed 8 by the Arizona Court of Appeals in Romero, 211 Ariz. 200, 119 P.3d 467. The Romero 9 court explicitly held that A.R.S. § 12-711 does not violate Article 18, § 6 of the Arizona 10 Constitution. In that case, the Court of Appeals recognized that "the legislature may 11 permissibly regulate a cause of action without abrogating it, as along as reasonable 12 alternatives permit a claimant to bring an action." Id. at 205, 119 P.3d at 472. In that case, the court went on to explain that A.R.S. § 12-711 "neither removes the question of 13 14 liability from the jury nor requires a jury to take a particular action." As such, the statute 15 does not abrogate a cause of action.

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#### E. A.R.S. § 12-711 does not violate comparative fault principles.

17 Plaintiff also claims that Section 12-711 violates Arizona's comparativefault principles under the Uniform Contribution Among Tortfeasors Act ("UCATA"), 18 19 A.R.S. § 12-2501, et. seq. But this argument also fails. UCATA refers only to the 20 defenses of contributory negligence and assumption of the risk. Section 12-711, on the 21 other hand, provides a separate and distinct defense related to fault arising out of the 22 consumption of alcohol. Contrary to Plaintiff's argument, these two statutes do not 23 conflict each other. Applying Section 12-711 does not trigger UCATA, or vice versa.

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Section 12-2505 of UCATA also provides for certain instances in which 25 comparative negligence is not applicable -i.e. when the plaintiff intentionally, wilfully or 26 wantonly causes or contributes to the injury. Moreover, the *Romero* Court also briefly 27 addressed this argument and indicated that it would also fail if properly raised: "[the 28 plaintiff] also argues that § 12-711 is unconstitutional because it conflicts with Arizona's 3945815/1 7

1 Uniform Contribution Among Tortfeasors Act, A.R.S. §§ 12-2501 through 12-2509. 2 This argument, on its face, appears to lack merit given the permissive language of § 12-3 711." Romero, 211 Ariz. at 204, 119 P.3d at 471. To be sure, Section 12-711 and Section 12-2505 can coexist without contradicting each other. 4

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#### F. Defendants produced sufficient evidence from which the jury could conclude Plaintiff was under the influence

Last, Plaintiff argues "no competent evidence proved Plaintiff was under the influence of intoxicating liquor when assaulted." As explained above, several witnesses testified that Plaintiff was either drinking, drunk, intoxicated, smelled of alcohol, or somehow under the influence of alcohol.

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#### THERE WAS NO ERROR IN INSTRUCTING ON ASSUMPTION OF RISK

Plaintiff next argues the Court erred by instructing the jury on Plaintiff's 12 assumption of risk. In this case, the Court's instruction on assumption of risk was taken 13 directly from RAJI (Civil) 3d Fault 10. There was nothing improper about the instruction. 14 Furthermore, contrary to Plaintiff's contention, the evidence produce during trial fully supported an assumption of risk instruction. Hildebrand v. Minyard, 16 Ariz. App. 583, 16 585, 494 P.2d 1328, 1330 (App. 1972). Here, ample evidence shows Plaintiff assumed the risk of potential harm arising from a physical altercation. Among other things, Plaintiff verbally harassed the Clemetts and signaled for Jason Clemett to come over to him. The jury saw the video of the incident in which Plaintiff was gesturing to Mr. Clemett. Witnesses testified that Plaintiff was asking for a fight and telling Mr. Clemett that he was going to "f\*\*\* him up." Plaintiff knew that by engaging in such conduct, he was risking potential injury arising from a physical altercation. Thus, the Court did not err in providing the assumption of risk instruction.

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#### 5. THERE WAS NO ERROR IN ALLOWING DR. BORGARO'S EXPERT TESTIMONY

Next, Plaintiff argues the Court erred when it allowed Defendants' expert, 26 27 Dr. Borgaro, "to testify Plaintiff was malingering and making symptom reports that were 28 not credible." In making this argument, Plaintiff mischaracterizes Dr. Borgaro's expert 3945815.1 8

1 medical opinion as the equivalent of lay testimony that Plaintiff was not telling the truth. 2 Defendant cites to State v. Reimer, 189 Ariz. 239, 941 P.2d 912 (App. 1997) to support his 3 position; however, *Reimer* is inapplicable to this case. In *Reimer*, the trial court permitted 4 an investigating officer to testify as to his belief that a criminal defendant was lying 5 during an interview. In reversing the case, the court of appeals explained that "neither 6 expert nor lay witnesses assist the trier of fact to understand the evidence or to determine a 7 fact in issue when they *merely* opine on the truthfulness of a statement by another 8 witness." Id. at 241, 941 P.2d at 914 (emphasis added).

9 Plaintiff also cites to a non-binding Eight Circuit case and misstates the facts
10 of that case to suggest that "malingering" is an improper medical diagnosis. In *Nichols v.*11 *Am. Nat. Ins. Co.*, 154 F.3d 875, 882 (8th Cir. 1998), the plaintiff objected when the
12 defendant's expert psychologist:

began to discuss **psychiatric credibility**, on the grounds that this was not a proper subject for expert testimony, that the term did not refer to a medical diagnosis, that there had been no foundation establishing that [the expert]'s opinion was the kind an expert should give, and that much of her testimony invaded the jury's province to determine credibility."

In *Nichols*, the Eight Circuit was concerned with the expert's use of the term "psychiatric credibility" – which was not a medical diagnosis – and found that it did not meet the *Daubert* criteria. *Id.* at 883. The *Nichols* case is inapplicable here, because Dr. Borgaro did not testify as to "psychiatric credibility." Rather, Dr. Borgaro concluded that Plaintiff met the criteria for the well-accepted medical diagnosis of "malingering."

Defendants hired Dr. Borgaro to perform an independent 22 neuropsychological exam on Plaintiff. Dr. Borgaro administered sixteen tests on Plaintiff. 23 interviewed him over two days, and reviewed his medical records. Dr. Borgaro's 24 testimony was based on her expert medical opinion that Plaintiff was malingering, 25 according to generally accepted medical criteria. Plaintiff simply ignores the fact that 26 "malingering" is a valid medical diagnosis that requires expert training and is not simply 27 an unfounded lay opinion. 28

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#### DEFENSE COUNSEL DID NOT ENGAGE IN ANY MISCONDUCT

Plaintiff next argues that Defendants' counsel engaged in misconduct 2 requiring a new trial. In Arizona, a new trial should be granted due to alleged attorney 3 misconduct "in only the most serious cases in order to prevent a miscarriage of justice." 4 Richie v. Krasner, 221 Ariz. 288, 303, 211 P.3d 1272, 1287 (App. 2009). Most cases 5 requiring a new trial "dealt with evasive and misleading comments to the tribunal and the 6 jury, sham trials, and the improper introduction of evidence. Id. (citing In re Alcorn, 202 7 Ariz. 62, 41 P.3d 600 (2002), Leavy v. Parsell, 188 Ariz. 69, 932 P.2d 1340 (1997), and 8 Taylor v. S. Pac. Transp. Co., 130 Ariz. 516, 637 P.2d 726 (1981)). There is simply no 9 10 attorney misconduct in this case on behalf of Defendants' counsel.

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#### A. Defense counsel properly cross-examined Dr. Wu

Plaintiff first claims Defendants' counsel improperly cross-examined Dr. 12 Wu with respect to the fact that Plaintiff's counsel only provided Dr. Wu with "select" 13 medical records. First, that would be proper cross-examination of an expert witness. But 14 more importantly, it was absolutely true in this case. Plaintiff's counsel provided Dr. Wu 15 only select medical records for him to review. The jury is entitled to know what records 16 were withheld, and what records Dr. Wu relied on to reach his opinions. Second, 17 Plaintiff's allegations are not supported by the record. Reviewing the cross-examination 18 19 of Dr. Wu, Defendants' counsel never insinuated that Plaintiff's counsel withheld specific medical records. At best, Defendants' counsel simply went through all of the records 20 21 (whether medical or otherwise) that Plaintiff's counsel chose not to provide Dr. Wu. [Exhibit A - Dr. Wu's Trial Testimony at 47:3-52:18] The only portion of Dr. Wu's 22 cross-examination that somewhat resembles Plaintiff's allegation is an innocuous question 23 that Plaintiff's counsel did not even object to: 24

Q. Okay. Let's go to Exhibit 13. Let me show you Exhibit No. 13. You reviewed, in part, at least some of Dr. Paul Sarmiento's records; is that correct?

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A. Yes.

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1 [Exhibit A at 65:3-6] Even if Plaintiff had a valid argument with respect to questioning 2 Dr. Wu on what records he reviewed, Plaintiff never objected during trial and has thus 3 waived any right to object here. Hawkins, 152 Ariz. at 496, 733 P.2d at 1079 ("A party 4 cannot urge in a motion for new trial that evidence was erroneously admitted unless a 5 proper objection, stating the specific ground of the objection, was made at the time the 6 evidence was offered, unless the error is fundamental.").

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#### Defendants' counsel properly referred to "ROS" as "review of symptoms" because that is what his provided referred to it as Β.

Next, Plaintiff argues that Defendants' counsel improperly referred to 9 "ROS" as "review of symptoms" during Dr. Robb's cross-examination. Plaintiff's 10 counsel incorrectly mischaracterizes that testimony. During that questioning, Defendants' 11 counsel was referring to Dr. Sarmiento's records, and Dr. Sarmiento's interpretation of 12 "ROS" found in his records. During the course of Dr. Sarmiento's trial deposition, he 13 referred to "ROS" as both review of "systems" and "symptoms." He used those terms 14 interchangeably. [Exhibit B – Dr. Sarmiento's Trial Testimony at 143:3-6] There was no 15 misconduct here and the jury was not mislead. Even if there was confusion, the Court 16 issued an instruction to the jury clarifying what "ROS" meant. In addition, Plaintiff did 17 not object to this questioning during Dr. Robb's cross-examination. Hawkins, 152 Ariz. at 18 496, 733 P.2d at 1079 (an objection to evidence not made at trial is waived for purposes of a motion for new trial).

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#### С. Defendants' Counsel properly questioned Dr. Bouzoukis regarding altered medical records

22 Plaintiff also objects, for the first time, regarding Defendants' counsel 23 questioning Dr. Bouzoukis about his medical records being altered. At the very end of Dr. 24 Bouzoukis' cross-examination, Defendants' counsel asked Dr. Bouzoukis why the records 25 he produced were different from the records that Plaintiff's counsel disclosed earlier in the 26 case (a "female" notation was changed to "male"). Plaintiff's counsel did not object. Dr. 27 Bouzoukis responded that his office did not do that, nor is his staff instructed to do so. 28 Without asking, Dr. Bouzoukis stated that it was most likely someone from Plaintiff's 3945815.1 11

counsel's office that altered it. Plaintiff never objected. Not only was the questioning
 proper, but Plaintiff did not object. *Hawkins*, 152 Ariz. at 496, 733 P.2d at 1079 (an
 objection to evidence not made at trial is waived for purposes of a motion for new trial).

#### D. <u>Defendants' counsel properly questioned witness. Michael Cartwright,</u> regarding him changing his testimony

Plaintiff also complains regarding the fact that witness Michael Cartwright changed his story after he met with Plaintiff and/or his attorneys. There was no misconduct here. Mr. Cartwright admitted that he changed his story. There was nothing improper about eliciting the truth regarding Mr. Cartwright changing his testimony. Plaintiff did not call Mr. Cartwright live to follow-up on this questioning. The truth is that Mr. Cartwright told the responding officers one version, and then later changed his story after he met with Plaintiff and his attorneys.<sup>1</sup>

#### E. <u>Defendants' counsel properly questioned Dr. Lobatz regarding the improper</u> <u>disclosure of Dr. Lobatz's opinions before Dr. Lobatz actually drafted his</u> <u>Report</u>

Once again, Plaintiff complains about Defendants' counsel eliciting something that is true. In this case, Plaintiff disclosed Dr. Lobatz's anticipated opinion in a disclosure statement dated August 31, 2012. [Exhibit C – Plaintiff's 36<sup>th</sup> Supplemental Disclosure Statement Dated 8/31/12] Four and a half months later, Plaintiff then disclosed Dr. Lobatz's Report dated January 9, 2013. [Exhibit D – Plaintiff's 41<sup>st</sup> Supplemental Disclosure Statement Dated 1/14/13] There was nothing improper about asking Dr. Lobatz about the four-month discrepancy between Plaintiff's initial disclosure of his "anticipated" opinions and when Dr. Lobatz actually provided his opinions to Plaintiff's counsel through his Report. If there was any misconduct, it was Plaintiff's counsel disclosing expert opinions prior to them actually being given. In addition, Plaintiff never object to this questioning at trial, thus waiving it now in a motion for new trial. Hawkins, 152 Ariz. at 496, 733 P.2d at 1079 (an objection to evidence not made at trial is waived for purposes of a motion for new trial).

Contrary to Plaintiff's claim, Defendants never raised this issue in closings.

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#### THE DEFENSE DID NOT VIOLATE THE COURT'S RULING ON MOTION IN LIMINE NO. 6

Plaintiff claims that Defendants' counsel somehow violated the Court's ruling on Motion in Limine No. 6 regarding Plaintiff's consumption of alcohol at prior hockey games. However, Defendants' counsel never elicited testimony regarding prior alcohol use at hockey games. The only testimony elicited was regarding Plaintiff's intoxication on the night in question. Such evidence is relevant to Plaintiff's behavior on the night in question. There is nothing improper about that evidence. In addition, Plaintiff's own neuropsychological expert, Dr. Baker, opined that Plaintiff should reduce (or eliminate) his alcohol consumption due to his alleged brain injuries. That opinion is relevant to Plaintiff's claimed damages and whether Plaintiff failed to mitigate his brain injuries due to alcohol consumption, which Dr. Baker agreed could be the case. There was no violation.

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#### THE DEFENSE NEVER INSINUATED THAT JASON CLEMETT WAS BROKE

Plaintiff complains that Defendants' counsel improperly suggested Mr. Clemett was "broke" to create sympathy. That is not true. In Plaintiff's Opening, Plaintiff's counsel suggested that Mr. Clemett was a big-time professional football player. Defendants' counsel simply put Plaintiff's counsel's statements into context - Mr. Clemett played football part-time, made very little money doing it, and had to maintain another job to make ends meet. That was also over a decade ago. Regarding Dr. Clemett's testimony about her husband "quitting" his job to spend more time with his family, that is not improper. There was nothing inappropriate about it, and regardless, Plaintiff never objected to this line of questioning. Hawkins, 152 Ariz. at 496, 733 P.2d at 1079 (an objection to evidence not made at trial is waived for purposes of a motion for new trial). 

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#### THE DEFENSE PROPERLY USED PLAINTIFF'S PRIOR CONDUCT AT HOCKEY GAMES AS PERMITTED BY THE COURT

2 Plaintiff also argues that Defendants' counsel improperly used Plaintiff's 3 prior conduct at hockey games during closing argument. The Court, however, specifically 4 ruled that Defendants could use Plaintiff's prior conduct at hockey games as a basis for 5 his "state of mind" with respect to whether he believed he would be ejected for 6 misconduct at future games (including the game in this case). Defendants' counsel was 7 attempting to do just that - offer evidence of prior misconduct to suggest Plaintiff was 8 emboldened by that prior incident because he was not punished for it. Before Defendants' 9 counsel could finish making that argument, Plaintiff's counsel objected. [Exhibit E -10 Defendants' Closing Argument at 32:8-35:111 This was exactly what the Court ruled Defendants could use this evidence for. Nevertheless, the Court then provided a curative 12 instruction in case the jury may have used that evidence to find fault on the part of the Arena. But even this entire argument is a red herring. The jury never even allocated fault to the Arena – so how could there be error for something that never happened?

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10. DEFENSE COUNSEL IMPROPERLY STATE DID NOT THAT AINTIFF HAS SUED DEFENDANT'S SPOUSES

Plaintiff also complains that Defendants improperly argued during closing 17 arguments that Plaintiff sued Defendants' spouses to paint Plaintiff in a poor light. This is 18 also a red herring. To begin, at no point during the 3-week trial did Defendants' counsel 19 even suggest Plaintiff wrongfully sued Defendants' spouses. The portion of the closing 20 argument identified by Plaintiff is innocuous and appears to be a poorly phrased sentence 21 - likely the result of poor grammar. [Exhibit E at 36:15-17] Regardless, Plaintiff did not 22 object to this statement, and it is too late to do so now. Hawkins, 152 Ariz. at 496, 733 23 P.2d at 1079 (an objection to evidence not made at trial is waived for purposes of a motion 24 for new trial). But more importantly, there is no indication that this harmless line affected 25 the jury in any way. Without a timely objection, Plaintiff cannot raise it here. 26

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#### THE TRIAL COURT DID NOT ERR IN ALLOWING EVIDENCE RELATED TO PRIOR GAMES

Plaintiff next argues that the Court erred in allowing evidence related to Plaintiff's prior misconduct at other hockey games. Plaintiff forgets, however, that he opened the door to this evidence. During direct examination, Plaintiff testified that he never cursed at hockey games and knew the rules and never broke them. His mother also testified about how nice of a man he was before the incident. In fact, Plaintiff designated the following portion of Charles Henry's deposition<sup>2</sup>:

Q. BY MR. POWERS: Have you ever seen Mark try to pick a fight with anybody at the hockey games?

A. No.

Q. Have you ever seen Mark threaten anyone at the hockey games?

A. No.

Based on the above, Plaintiff opened the door to his conduct at other hockey games.

In addition, as the Court ruled, this evidence was relevant and admissible with respect to Plaintiff's "state of mind." Indeed, Plaintiff knew he could misbehave at the hockey games because he had done so many times before without consequence. This evidence was not used as "character evidence," although Defendants should have been permitted to use it as substantive evidence to rebut Plaintiff's evidence that he was "wellbehaved" at other hockey games. Once again, there was no error in permitting this evidence.

#### 12. <u>THE COURT DID NOT ERR IN ALLOWING CERTAIN FINANCIAL-</u> <u>RELATED EVIDENCE</u>

Plaintiff next complains that the Court erred by allowing certain evidence
related to Plaintiff's financial condition before and after the incident. Although Plaintiff
claims he never made a wage loss claim, that is untrue. In Plaintiff's Initial Disclosure
Statement (verified), he made a claim for lost wages and loss of earning potential due to

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This was designated by Plaintiff and played to the jury at trial.

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his alleged injuries. [Exhibit F – Plaintiff's Initial Disclosure Statement] Even though
 Plaintiff did not seek recovery of those alleged damages at trial, his financial condition
 was still highly relevant to this case.

4 First, Plaintiff's alleged inability to work directly correlates to his alleged 5 physical injuries – i.e., when he was physically able to return to work. Although he 6 testified during direct examination that it took him over 10 months to go back to work, his 7 financial documents showed otherwise. The restitution document Plaintiff complains of 8 suggests he only missed 10 days of work. But Plaintiff also ignores the fact that the 9 restitution document correlates with a letter from Plaintiff's employer, Kre8tive, which 10 stated that Plaintiff only lost 10 days of work (dated May of 2009). When Plaintiff 11 verified his Initial Disclosure Statement 2 years later, he was still claiming only 10 days of 12 missed work. When Plaintiff testified at trial that he missed 10 months of work following 13 the incident, Defendants used Plaintiff's financial documents to impeach him. In short, 14 Plaintiff was caught lying on the stand. Thus, the jury was entitled to hear evidence 15 regarding Plaintiff's employment, time away from work, and how that corresponded to 16 Plaintiff's alleged injuries.

17 Second, Plaintiff also claimed that he was suffering from severe depression 18 and anxiety, all of which was allegedly caused by this incident. However, Plaintiff's 19 medical records contained several references to depression and anxiety arising out of 20 Plaintiff's poor financial condition, including the loss of his home and his failing 21 businesses. Plaintiff's income both before and after the alleged incident was thus relevant 22 to show that the true cause of Plaintiff's depression and anxiety stemmed from his own 23 financial stress, not this incident. Regardless, the jury never even reached the issue of 24 damages because they returned a defense verdict. Mather v. Caterpillar Tractor Corp., 23 25 Ariz. 409, 533 P.2d 717 (App. 1975) (claimed errors on damages evidence irrelevant 26 where jury returns defense verdict). There was no error here.

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#### 13. <u>THE COURT DID NOT ERR IN PRECLUDING DEFENDANT'S</u> <u>YOUTUBE POSTS</u>

Plaintiff also argues that the Court erred by precluding the admission of Defendant Clemett's YouTube comments. This issue was fully briefed by the parties and the Court already ruled on this. The Court correctly ruled that the YouTube comments were incomplete, misleading, would cause confusion, and were therefore irrelevant. Plaintiff also destroyed all other YouTube comments and posts, saving only self-serving comments made by Defendant Clemett (although anonymously). As the Court already determined, the YouTube comments were correctly precluded because their admission would violate Rule 403(b).

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#### 14. <u>THE COURT PROPERLY SANCTIONED PLAINTIFF BY CUTTING 30</u> <u>MINUTES OF PLAINTIFF'S TIME</u>

Once again, Plaintiff attempts to question the Court's decision to sanction 12 Plaintiff 30 minutes of time for Plaintiff's misconduct during trial. The Court has very 13 broad discretion in managing the flow of the trial and imposing time limits, and the 14 Court's decisions in that regard will not be disturbed absent a clear abuse of discretion. 15 See Brown v. U.S. Fid. and Guar. Co., 194 Ariz. 85, 91, ¶ 30, 977 P.2d 807, 813 (App. 16 1998) (recognizing that trial judges are in the best position to determine how much 17 hearing time is appropriate in a given case and noting that the court of appeals reviews 18 imposition of time limits for abuse of discretion); O'Rielly Motor Co. v. Rich, 3 Ariz.App. 19 21, 27, 411 P.2d 194, 200 (1966) ("We will not interfere in matters within [the trial 20 court's] discretion unless we are persuaded that the exercise of such discretion resulted in 21 a miscarriage of justice or deprived one of the litigants of a fair trial"). Here, Plaintiff 22 committed several acts of misconduct relating to deposition designations, which resulted 23 in wasted time, resources, and energy, including the Court's time and resources.<sup>3</sup> The 24 Court properly exercised its discretion in this case to sanction Plaintiff for his misconduct. 25

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- $\frac{27}{28} \xrightarrow{3} \text{This issue has been heard by the Court numerous times. Defendant will not recite those facts here again.}$ 
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#### 15. <u>THERE WAS NO ERROR IN LETTING A FORMER GIRLFRIEND</u> <u>TESTIFY</u>

Plaintiff next objects to the Court allowing a former girlfriend testify. However, Plaintiff never objected to this. *Hawkins*, 152 Ariz. at 496, 733 P.2d at 1079 (an objection to evidence not made at trial is waived for purposes of a motion for new trial). But even if Plaintiff had objected, Julie Erickson was present at the subject hockey game and witnessed Plaintiff on the night in question. Plaintiff even tried to "coach" Ms. Erickson into testifying in a way that he wanted her to. There was, and is, no basis to keep Ms. Erickson from testifying.

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#### 16. <u>THERE WAS NO ERROR CONCERNING EVIDENCE OF SEXUAL</u> <u>MATTERS</u>

Next, Plaintiff argues that the Court should not have permitted any evidence 11 of Plaintiff's sexual life at trial. As the Court is aware, Plaintiff claimed sexual 12 dysfunction as one of the many items of damages in this case. He frequently raised his 13 sexual problems with his treating providers – even claiming that his emotional suffering 14 was a result of his alleged sexual dysfunction. Moreover, Plaintiff's counsel elicited 15 testimony regarding Plaintiff's sexual dysfunction from Dr. Sarmiento. Although the 16 Court precluded any reference to sexually transmitted disease, the Court correctly 17 permitted evidence of Plaintiff's sexual behavior to rebut Plaintiff's claim that he was not 18 sexually active. There was no error in permitting this limited evidence. 19

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#### 17. <u>THERE WAS NO ERROR IN LETTING THE JURY CONSIDER</u> JOBING.COM'S FAULT

This argument is another red herring. Plaintiff claims the jury should not have been able to consider Jobing.com's fault. But the jury never actually considered Jobing.com's fault. The jury rendered a complete defense verdict and never allocated any fault to Jobing.com. There was no error because it did not impact the jury's verdict. Notwithstanding, the Court already ruled on this issue prior to closing argument – holding that the applicable standard of care was established though Jobing.com's NHL Fan Code of Conduct. There was also sufficient evidence to establish a breach of that standard of

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care. Plaintiff was intoxicated, loud and obnoxious, using foul and obscene language, and
 was in violation of the Code of Conduct. Despite that, the security guards on duty failed
 to enforce their own rules. Ultimately, the Court correctly permitted this issue to go to the
 jury, even if the jury never allocated any fault to Jobing.com.

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## 18. <u>THERE WAS NO ERROR IN PRECLUDING THE SOUND ON THE VIDEOS</u>

Plaintiff next complains that the Court should have permitted Plaintiff to play the sound attached to the subject videos. As the Court may recall, the parties <u>stipulated</u> before trial that the sound on the videos was not to be played before the jury. Plaintiff cannot now claim "prejudice" where he previously stipulated to the exclusion of the sound at trial.

Even if the parties had not reached that stipulation, the sound was properly excluded. Plaintiff argues that the videos, if played with sound, would have refuted Defendants' testimony that they could hear Plaintiff's vulgarities and obscenities – and supported Plaintiff's contention that he moved closer to hear what Defendants were saying. However, none of the videos were taken from where any of the parties were seated. The jury would therefore need to speculate as to what the parties heard, if anything, based on videos taken elsewhere. Without admissible evidence to establish that the sound on the videos was a reliable indicator of what the parties could or could not hear, the sound was properly excluded.

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#### **19. THE WEIGHT OF THE EVIDENCE SUPPORTED A DEFENSE VERDICT**

In reviewing the sufficiency of the evidence, "[t]he basic question ... is whether the jury verdict is so manifestly unfair, unreasonable and outrageous as to shock the conscience." *Hutcherson*, 192 Ariz. at 55, ¶ 23, 961 P.2d at 453. In this case, the overwhelming weight of the evidence fully supported a defense verdict. As explained in prior sections, Plaintiff was hostile, aggressive, and posed a very real threat to Defendants and their wife and guest. Plaintiff's conduct alone (even before the physical altercation), caused security guard Nick Bosnak to call for a Roam Team to eject Plaintiff because he

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"knew there was going to be a fight." That was before any punches were thrown. Plaintiff also waived Defendant Clemett up to him, telling them he was going "f\*\*\* him up."

In addition to Plaintiff's obscene, outrageous, and threatening behavior, the jurors also heard Plaintiff lie to them time and again. This case rested heavily on credibility - and by the end of trial, Plaintiff had none. He gave multiple conflicting versions of the incident. There was evidence that Plaintiff attempted to suborn perjury from Julie Erickson. Plaintiff also made threatening phone calls to security guard Nick Bosnak demanding that he change his story to police. There was more than enough evidence presented to find that Plaintiff was the aggressor and that Defendants acted reasonably to stop Plaintiff from harming them or their wife and guest. Plaintiff was a bully - he does not deserve another trial.

#### 20.

3945815:1

#### CONCLUSION

For the reasons stated above, Plaintiff's Motion for New Trial should be denied. 

1	
RESPECTFULLY SUBMI	TTED this 1 <sup>st</sup> day of December, 2014.
	JONES, SKELTON & HOCHULI, P.L.C.
	By <u>/s/ William D. Holm</u>
	William D. Holm 2901 North Central Avenue, Suite 800
	Phoenix, Arizona 85012 Attorneys for Defendant Jason Clemett
ORIGINAL of the foregoing e-filed this 1 <sup>st</sup> day of December, 2014.	
COPY of the foregoing e-mailed this 1 <sup>st</sup> day of December, 2014, to:	
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R. Corey Hill Ginette M. Hill	
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Thomas for Detendant Dianonard	
/s/ Erik J. Stone	
3945815,1	21
	ORIGINAL of the foregoing e-filed this 1 <sup>st</sup> day of December, 2014. COPY of the foregoing e-mailed this 1 <sup>st</sup> day of December, 2014, to: Karen L. Lugosi PC 361 East Coronado Road, Suite 101 Phoenix, Arizona 85004-1525 Attorney for Plaintiff Frank I. Powers & Cunningham, PLLC 361 East Coronado Road, Suite 101 Phoenix, Arizona 85004-1525 Attorney for Plaintiff R. Corey Hill Ginette M. Hill Hill & Hill, PLC 3131 East Clarendon Avenue, Suite 107 Phoenix, Arizona 85016 Attorney for Defendant Blanchard /s/ Erik J. Stone

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_	12	Attorneys for Defendants American Express Co		
3	13	Related Services Company, Inc., AMEX Card S Hopkins	ervices Company, and Pamela S.	
AT LAW	14			
1105454541	14	NUTUE OFFENIOR COURT OF		
		IN THE SUPERIOR COURT OF THE STATE OF ARIZONA		
	16	IN AND FOR THE COUN	I Y OF MARICOPA	
	17	KOSS CORPORATION, a Delaware	Case No. CV2010-006631	
	18	corporation,	DEFENDANCE ODDOGITION TO	
	19	Plaintiff,	DEFENDANTS' OPPOSITION TO THIRD PARTY DEFENDANT	
	20		GRANT THORNTON LLP'S	
	21	VS.	MOTION TO DISMISS THIRD- PARTY COMPLAINT	
	22	AMERICAN EXPRESS COMPANY, a New		
	23	York corporation; AMERICAN EXPRESS TRAVEL RELATED SERVICES		
	24	COMPANY, INC., a New York corporation;	(Assigned to the Honorable	
	25	AMEX CARD SERVICES COMPANY, a Delaware corporation; DECISION SCIENCE,	Sally Duncan)	
		a business entity, form unknown; PAMELA		
	26	S. HOPKINS, an individual; and DOES 1 through 50, inclusive,		
	27			
	28	Defendants.		

O S B O R N M A L E D O N

11					
11	ICAN EXPRESS COMPANY, a New				
<sup>2</sup> TRAVE	orporation; AMERICAN EXPRESS EL RELATED SERVICES				
11	ANY, INC., a New York corporation; CARD SERVICES COMPANY, a				
4 Delawar	re corporation; PAMELA S.				
through	NS, an individual; and DOES 1 50, inclusive,				
6 7	Third-Party Plaintiffs,				
8 vs.					
GACID	EL J. KOSS, an individual, SUJATA				
THORN	DEVA, an individual, GRANT NTON LLP, an Illinois Limited				
	V Partnership, and ROES 1 JGH 50, inclusive,				
13	Third Party Defendants.				
14					
15	Defendants/Third Party Plaintiffs AMERICAN EXPRESS COMPANY;				
10	CAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.; AMEX				
17	SERVICES COMPANY and PAMELA S. HOPKINS (collectively, "AMEX")				
10	oppose Third Party Defendant Grant Thornton LLP's ("Grant Thornton") Motion				
19	to Dismiss the Third-Party Complaint ("TPC").				
20	I. <u>INTRODUCTION</u> With substandard outside and its and an edge state in the Control				
21	With substandard outside audits and no adequate controls in place, Grant				
	Thornton allowed former Vice President of Finance Sujata Sachdeva ("Sachdeva") to				
23	embezzle \$34 million dollars from Koss Corporation ("Koss") over more than ten years.				
24    AMEX -	Sachdeva's fraud would have continued indefinitely, were it not for the acts of AMEX.				
25 superviso	AMEX – not Grant Thornton, Koss' auditors, nor any of Koss' officers, directors, or supervisors – uncovered Sachdeva's misdeeds, reported her activity to Koss, and offered				
to put it i	to put it in touch with law enforcement on December 18, 2009.				
21					
28					
	1				

Grant Thornton served as Koss' outside financial auditor from at least 2004 1 through 2009. Had it provided even a modicum of its professed expertise - or paid the 2 3 slightest attention – Grant Thornton would have noticed that over \$20 million of company profits went missing. Indeed, through Sachdeva's simple scheme, many 4 multiples more than the profits Grant Thornton was reporting were stolen under its 5 "experts" noses. Put simply, Grant Thornton had the ability – and professional 6 7 responsibility - to put an end to Sachdeva's embezzlement, but failed to do so. Had 8 Grant Thornton responsibly performed its financial audits, Sachdeva's crimes would 9 have ceased years earlier. The TPC, therefore, properly asserts claims for equitable indemnity and declaratory relief against Grant Thornton and its Motion to Dismiss is 10 without legal support or merit. 11

First, contrary to Grant Thornton's assertions and given that Koss sued AMEX in Arizona, there is no requirement that any relationship – let alone any particular relationship – must exist to bring a claim for equitable indemnity. In fact, Arizona case law suggests just the opposite. Even if a relationship were required – which it is not – there is more than a sufficient nexus between AMEX and Grant Thornton to trigger the equitable principles of indemnity.

18 Second, Grant Thornton's motion misinterprets and misconstrues the TPC. In it,
19 AMEX does not seek to allocate fault. Rather, AMEX seeks to shift the entirety of any
20 loss it might experience as a result of Koss' underlying litigation to a party who more
21 justly deserves it – Grant Thornton. Since Arizona law permits parties to pursue
22 equitable indemnity claims under the circumstances presented here, Grant Thornton's
23 motion should, therefore, be denied in its entirety.<sup>1</sup>

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- 25 26

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<sup>&</sup>lt;sup>1</sup> As Grant Thornton acknowledges, AMEX filed and served its certification regarding the use of expert testimony as required by A.R.S. § 12-2602 (A). *See* Motion, at 4, n. 1.

#### 1 2

II.

#### BACKGROUND FACTS

#### Koss' Underlying Lawsuit Against AMEX. Α.

Koss' Complaint (the "Complaint") against AMEX focuses on a small 3 (approximately two-year) portion of a ten-plus year crime spree during which the former 4 Vice President of Finance at Koss, Sachdeva, allegedly stole well over \$20 million 5 dollars (approximately \$34 million dollars in total) from Koss and "fraudulently 6 concealed and failed to disclose her conduct to the officers and directors of the 7 Company." Koss' Complaint ("Compl.") ¶ 9, 14, 22. Sachdeva used the money she 8 stole to pay for a lavish lifestyle that included, among other things, countless clothing 9 and jewelry purchases from high-end retailers, some of which were charged to her 10 American Express credit cards. Id. ¶ 19. To cover up her embezzlement, Sachdeva also 11 engaged in massive accounting fraud. See id. ¶¶ 14-15, 32-33. 12

Koss claims that – somehow – none of its officers or directors did or should have 13 noticed this massive embezzlement. See id. Instead, Koss' mismanagement allowed the 14 crimes to continue unchecked until AMEX (the only one to put a stop to Sachdeva's 15 crimes) contacted Michael J. Koss, Chief Executive Officer and, at the time, Chief 16 Financial Officer of Koss, on December 18, 2009 to alert him to some of Sachdeva's credit card activity and offered to put him in touch with law enforcement. TPC, ¶ 2. 18

Even though no one at Koss or any of Koss' financial auditors discovered 19 Sachdeva's massive embezzlement, Koss claims that AMEX (connected to Sachdeva 20solely because, at times, she used American Express credit cards to make purchases) 21 should have detected it sooner. Koss alleges that, by accepting wire transfers and 22 cashier's checks from Sachdeva to pay her account balances, AMEX somehow aided 23 and abetted her breach of her fiduciary duty to Koss and her fraud. Compl., ¶ 27-28; 24 34-35. Koss also asserts a conversion claim. Id. ¶¶ 38-40. 25

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В. AMEX's Complaint Against Grant Thornton LLP and Others. AMEX did not know of Sachdeva's embezzlement and it did not cause any

damage to Koss; quite the opposite. To the extent anyone is responsible for the financial

loss to Koss, other than Sachdeva, it is others, including Koss' former auditor, Grant
 Thornton, which should be held responsible.

3 Grant Thornton served as Koss' auditor for, at least, fiscal years 2004 through 4 2009. TPC, ¶ 40. During this time, Grant Thornton prepared financial audit statements 5 for Koss. Id. Equally important, however, is what Grant Thornton failed to do for all of these years. Grant Thornton failed in its most basic duty to perform adequate financial 6 7 statement audits and simple analysis that should have easily identified significant and 8 fundamental discrepancies and misstatements created and caused by Sachdeva's massive 9 theft. TPC, ¶ 42. Under the circumstances revealed by Sachdeva's criminal prosecution 10 and other litigation involving Koss, it is remarkable how badly Grant Thornton missed 11 (or ignored) standard cautionary red flags and ignored cautionary and proper audit 12 procedure. Id. For example, Grant Thornton failed to question entries in the general 13 ledger or journal entries, failed to adequately inquire about the large sums of money sent 14 by cashier's checks and wire transfer, and repeatedly used new auditors – rather than 15 experienced ones – on Koss accounts for training purposes. Id. If Grant Thornton had 16 performed the job it was paid by Koss to do, as a function of its critical role to any 17 company, it would have caught Sachdeva's preventable and easily detectable 18 embezzlement. The TPC seeks equitable indemnity and declaratory relief to shift the 19 entire loss – if any – to Grant Thornton and/or others.

20 21

#### III. <u>AMEX'S THIRD-PARTY COMPLAINT AGAINST GRANT THORNTON</u> <u>SUFFICIENTLY STATES CLAIMS FOR RELIEF</u>

In its Motion, Grant Thornton contends that the TPC should be dismissed because AMEX fails to allege a particular type of relationship with Grant Thornton. Given that Koss has sued AMEX in Arizona, that Motion misinterprets the law. As an initial matter, nowhere does Arizona law specify that any relationship, let alone any particular relationship, must exist between an equitable indemnitee and indemnitor. Moreover, even if such a relationship were required under Arizona law, where Koss chose to sue

AMEX, AMEX has alleged a sufficient nexus to Grant Thornton and its actions – or
 lack thereof – to trigger and utilize the equitable principles of equitable indemnity.

3

4

A. Arizona Law Does Not Require AMEX To Allege A Relationship with Grant Thornton To Bring Its Claims.

Grant Thornton cites to no Arizona statutory or common law authority requiring a
relationship between an equitable indemnitee and indemnitor because no such
requirement exists. Confusing the issue, and because it is the most it could find, Grant
Thornton relies on *Schweber Electronics v. National Semiconductor Corp.*, 174 Ariz.
406, 410, 850 P.2d 119, 123 (1992), for the proposition that, "the cornerstone of implied
indemnity is the relationship of the parties." *See* Motion at 6.

11 Grant Thornton's citation, which is taken out of context, does not support its Motion. First, the quoted language is nothing more than *dicta* in a case that actually 12 13 holds, in part and with respect to implied contractual indemnity, that, "implied indemnity should [not] be limited to tort cases involving dangerously defective 14 15 products." Schweber Elecs., 174 Ariz. at 410, 850 P.2d at 123. Second, to the extent there is anything more to glean from this decision related to the issue of indemnity, the 16 17 Schweber court draws a clear distinction between: (1) contractual indemnity; (2) 18 implied contractual indemnity (at issue in the Schweber case); and (3) equitable 19 indemnity. The Schweber court notes that, "pursuant to the Restatement and equitable principles of restitution, 'in the absence of [1] an express indemnity agreement, a party 20 21 has a right to indemnity when there is [2] an implied contract for indemnity or [3] when justice demands there be the right." Id. (emphasis added). To the extent there is any 22 23 relationship requirement at all, it is only with respect to contractual and/or implied 24 contractual indemnity. Thus, the availability of indemnity "when justice demands there 25 be the right" cannot, as a matter of principle and logic, require a defined relationship.

Grant Thornton likewise cites to and overstates the importance of *INA Insurance Company of North America v. Valley Forge Insurance Company*, 150 Ariz. 248, 722
P.2d 975 (1986). *INA Insurance* holds only that the existence of an indemnity contract

or indemnity provision in a contract precludes the application of <u>implied</u> indemnity
 principles. 150 Ariz. at 252, 722 P.2d at 979. The idea that, "absent such a relationship,
 there is simply no basis for implying a right to indemnity" cannot be found in *Schweber*,
 *INA Insurance* or any other Arizona case. *See* Motion at 6.

Equitable indemnity claims in Arizona require only that an obligation has arisen 5 6 such that one party should indemnify the other. See, e.g., A.I.D. Insurance Services v. Riley, 25 Ariz. App. 132, 136, 541 P.2d 595, 599 (1976) (the right of indemnity exists 7 8 when, "either in law or equity there is an obligation on one party to indemnify the other."). Likewise, the court in Evans Withycombe, Inc. v. Western Innovations, Inc., 9 215 Ariz. 237, 242, 159 P.3d 547, 552 (2006) affirmed that, "both common-law and 10 contractual indemnity 'share the same basis' – that is an 'obligation resting on one party 11 to make good a loss or damage another party has incurred." (emphasis added). As such, 12 13 AMEX properly and sufficiently alleges that Grant Thornton is obligated to indemnify 14 AMEX for any loss related to the underlying litigation. See, e.g., TPC, ¶ 40, 41, 43 ("Grant Thornton also caused Koss' loss" because it "served as Koss' auditor" and 15 "prepared financial audit statements for Koss" during the relevant time period; "Grant 16 Thornton performed these services negligently, recklessly and inappropriately. Grant 17 18 Thornton did not perform in a manner that met the standard for due professional care. 19 As a result, Grant Thornton failed to detect Sachdeva's large-scale and obvious 20embezzlement."). AMEX's allegations that Grant Thornton's failure to perform its 21 professional financial auditing services resulted in the meritless lawsuit brought by Koss 22 against AMEX is more than sufficient to maintain its claim for equitable indemnity.

23

24

## B. Arizona Law Does Not Require a Specific *Type* of Relationship for AMEX To Bring Its Claims.

Even if Arizona law required some sort of relationship between the parties to bring a claim for equitable indemnity – which it does not – Grant Thornton has not and cannot cite to a single case or statute with respect to the *type* of relationship supposedly required.

1 The reason for this is simple – there is no such requirement that any particular 2 type of relationship exist to bring a claim for implied contractual indemnity, let alone 3 equitable indemnity. In fact, Arizona case law (like other states) is replete with 4 examples of implied contractual indemnity cases (some including equitable indemnity 5 claims as well) where the connection between the parties varies greatly depending on the 6 factual circumstances. See, e.g., Evans Withycombe, 215 Ariz. 237, 159 P.3d 547 (2006) 7 (contractor/subcontractor); Grubb & Ellis Mgmt. Servs., Inc. v. 407417 B.C., L.L.C., 213 Ariz. 83, 138 P.3d 1210 (2006) (landlord/property manager); Heatec, Inc. v. R.W. 8 9 Beckett Corp., 219 Ariz. 293, 197 P.3d 754 (2008) (product seller/manufacturer); Unique Equipment Co., Inc. v. TRW Vehicle Safety Systems, Inc., 197 Ariz. 50, 3 P.3d 10 970 (1999) (employer/employee); Schweber Elecs., 174 Ariz. 406, 850 P.2d 119 (1992) 11 12 (distributor/manufacturer); INA Insurance, 150 Ariz. 248, 722 P.2d 975 (1986) (insurer/insured). 13

14 While the issue has not squarely been addressed in any Arizona appellate 15 decision, the U.S. Court of Appeals for the Ninth Circuit has been asked to decide 16 whether "implied *equitable indemnity* should be available only in certain well-defined 17 situations involving joint tortfeasors, principal and agent, or employer and employee." 18 Hydro-Air Equipment, Inc. v. Hyatt Corp., 852 F.2d 403, 406 (9th Cir. 1988) (emphasis 19 added). In rejecting the notion, the Ninth Circuit held that, "[t]he equitable policies 20 underlying implied equitable indemnity *would often be frustrated if*, as [respondent] 21 suggests, the parties were required to be in one of a limited number of narrow 22 *relationships* to qualify for indemnity. *Id.* at 407 (emphasis added).

The Ninth Circuit focused on fairness and explained that the finder of fact must wexamine the relationship or nexus between the parties when evaluating whether it is fair to require the indemnitor to pay the losses incurred." *Id.* at 406. Specifically, "[i]n evaluating a claim for implied indemnity, courts must carefully examine both parties' conduct on a case-by-case basis, *with the ultimate goal of doing what is fair or just. Id.* (emphasis added). The Ninth Circuit acknowledged that, "[w]hile it is true that the obligation to indemnify clearly arises in certain situations, for example, when a master servant relationship exists, implied *equitable indemnity may be entirely proper if it is simply fairer to shift the burden of loss*. Hydro-Air, 852 F.2d at 406.

Accordingly, with this in mind, the Ninth Circuit held in Hydro-Air that the 4 5 connection between appellant-successor-in-interest and respondent-manufacturer was sufficient to maintain a claim for equitable indemnity because the appellant "may be 6 7 held liable for product defects caused by [respondent]." Id. The court explained that, 8 "[t]he equitable nature of implied indemnity ... precludes the use of the strict standards urged by [respondent]," and that the principle of implied equitable indemnity is designed 9 to prohibit one from profiting by his own wrong at the expense of one who is either free 10 11 from fault or negligent to a lesser degree." Id. Here, AMEX's equitable indemnity and 12 declaratory relief claims against Grant Thornton are likewise designed to prevent Grant Thornton from profiting by its own wrong at the expense of AMEX. No more is 13 required. 14

15 16

## C. A Sufficient Nexus Exists Between AMEX and Grant Thornton To Support AMEX's Claims.

The TPC alleges a significant nexus between AMEX and Grant Thornton sufficient to trigger the equitable principles of indemnity. Koss alleges that AMEX converted Koss' funds and aided and abetted Sachdeva's breach of fiduciary duty and fraud. *See* Compl., ¶¶ 24-41. To the extent AMEX pays anything to Koss, the TPC ensures that a party with real responsibility for Koss' allegations (i.e. harms resulting from Sachdeva's embezzlement not being identified earlier) is held accountable and does not benefit and escape liability for its own wrongdoing.

24

#### D. AMEX Does Not Seek To Allocate Fault Through Its Claims.

AMEX does not rely on principles of equitable indemnity nor any of its thirdparty claims to allocate fault. The Uniform Contribution Among Tortfeasors Act
("UCATA") was enacted for that very purpose and its existence does not displace
equitable indemnity nor does it prohibit its use or application. A.R.S. § 12-2501(F)(1)

(preserving right to indemnity under UCATA); see also A.R.S. § 12-2506; A.R.S. § 12-2504.

3 The purpose of equitable indemnity is to "shift the entire loss to one who more justly deserves it," and to, "give full restitution to one who pays damages but is without 4 5 personal fault." Herstam v. Deloitte & Touche, LLP, 186 Ariz. 110, 118, 919 P.2d 1381, 1389 (1996). As such, AMEX alleges that it "did not cause Koss' damages" and that it 6 7 "den[ies] Koss' allegations that [it is] somehow liable to Koss and den[ies] that [it] ha[s] 8 caused Koss any damage." TPC, ¶¶ 4, 27; see also id. ¶ 45. The very purpose of the 9 TPC is to shift the entire loss - if any - to those more justly liable, including GrantThornton. 10

Grant Thornton misplaces reliance on *Herstam* for the far-reaching proposition that "any allocation of fault to a putative indemnitee forecloses the right to common law indemnity." *See* Motion at 8. The *Herstam* court, however, does not so hold.

14 In Herstam, the receiver for an insolvent insurance company brought lawsuits 15 against the company's former directors, officers, accountants and attorneys claiming that they acted in concert to injure the company. 186 Ariz. at 113, 919 P.2d at 1385. 16 17 Following resolution by some defendants, the court approved settlement agreements and entered dismissal and bar orders. Id. at 114. By signing the settlement agreements with 18 19 some of the defendants, the injured party waived its right to seek joint liability from both 20 the settling and nonsettling defendants and specifically held the nonsettling defendants 21 only severally liable. Id. at 113. The nonsettling defendants appealed, challenging the 22 settlement agreements, in part, on the grounds that the agreements eliminated their right to seek contribution and indemnity from others. Id. On appeal, the court was asked to 23 decide whether a party allegedly injured by concerted action that normally would subject 24 25 all parties to joint and several liability can "waive the right to hold the nonsettling parties jointly liable and thereby bar the nonsettling parties from seeking contribution and 26indemnity from the settling parties." Id. at 114. 27

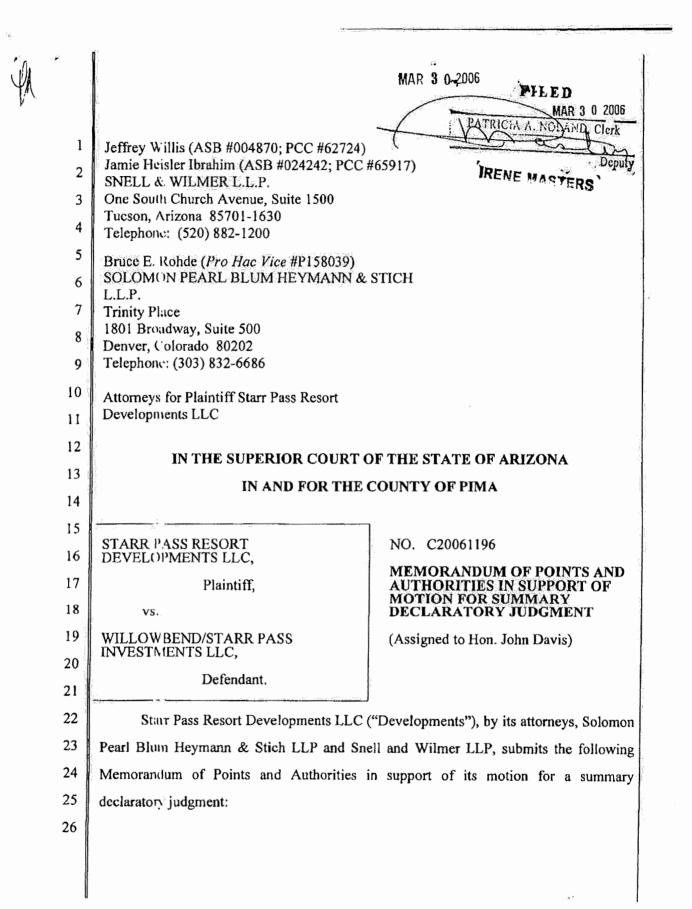
1 Importantly, the Herstam court specifically examined only whether a particular 2 settlement agreement which imposed a "mutual ban and permanent injunction on all 3 contribution claims between any nonsettling and settling party and on indemnity claims. ... deprived a party of its due process right or property interest in those claims. Id. at 4 114. While the court held that the nonsettling parties had no implied rights of 5 contribution or indemnity under the circumstances presented in *Herstam*, the court based 6 7 its decision on: (1) the fact that courts routinely "permit[] the waiver of advantageous 8 statutory provisions by the intended beneficiaries" (the settlement agreements in *Herstam* waived the injured parties' legal right to hold nonsettling parties jointly liable); 9 (2) the tendency for "the law [to] favor compromise and settlement" (Herstam involved 10 "numerous parties," a "complaint that exceed[ed] 500 pages" and the court stressed that 11 12 "even a partial compromise without the necessity of trial benefits both the parties and 13 the court and should be encouraged" and that the receiver's "promise to protect the settling parties from contribution or indemnity by eliminating joint liability claims was 14 undoubtedly a substantial inducement to the settlement."); and (3) the lack of any 15 inequity to the nonsettling parties. Id. at 115-16. 16

*Herstam* is inapposite. Unlike *Herstam*, the TPC does not involve any waiver of
an advantageous statutory provision by the intended beneficiary, nor does it involve any
settlement agreement, or partial resolution of a case, concerning joint tortfeasors. The
holding in *Herstam* case cannot be stretched and generalized to touch on entirely
different facts, circumstances and issues.

Neither *Herstam* nor the UCATA foreclose the opportunity for recovery under
equitable indemnity principles. Indeed, Arizona courts have heard and issued rulings in
equitable and implied contractual indemnity cases post-*Herstam* and post-UCATA
enactment to more justly shift liability. In *Evans Withycombe*, for example, a contractor
sued for defective construction brought a claim for indemnity against its sub-contractors.
215 Ariz. at 238, 159 P.3d at 548. The trial court granted the sub-contractor's motion
for summary judgment based on a statute of repose. *Id.* On appeal, the appellate court

1	held that although the statute of repose barred the contractor's contractual indemnity
2	claim, it did not bar plaintiff's common law indemnity claim. Evans Withycombe, 215
3	Ariz. at 241; see also Grubb & Ellis Mgmt. Servs., 213 Ariz. 83, 138 P.3d 1210 (2006)
4	(landlord cross-complained against property manager for implied indemnity for all
5	litigation costs and any judgment for which it may be liable.); <i>Heatec</i> , 219 Ariz. 293,
6	197 P.3d 754 (2008) (seller of product brought action against manufacturer based on
7	statutory and common law indemnity.). AMEX's claims against Grant Thornton for
8	equitable indemnity are likewise proper.
9	IV. <u>CONCLUSION</u>
10	For these reasons, AMEX respectfully request that the Court deny Third Party
11	Defendant Grant Thornton's Motion to Dismiss the Third-Party Complaint.
12	
13	Dated this 24 <sup>th</sup> day of March, 2014.
14	
15	OSBORN MALEDON, P.A.
16	By /s/ William J. Maledon
17	William J. Maledon
18	Maureen Beyers 2929 North Central Avenue, 21st Floor
19	Phoenix, Arizona 85012-2793
20	David L. Schrader (pro hac vice)
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24	Attorneys for American Express Company, American Express Travel Belated Services
25	American Express Travel Related Services Company, Inc., AMEX Card Services Company,
26	and Pamela S. Hopkins
27	
28	
	11
100 B	

1	THE FOREGOING DOCUMENT was
2	electronically filed and a copy e-delivered this 24 <sup>th</sup> day of March, 2013, to:
3	24 day of March, 2015, to.
4	Honorable Sally Schneider Duncan Maricopa County Superior Court
5	201 West Jefferson, CCB-7B
6	Phoenix, Arizona 85003
7	COPY mailed to:
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9	Eagan Avenatti, LLP
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24	Attorneys for Grant Thornton LLP
25	
26	
27	/s/ Jessica A. Lopez 5391656
28	
	12
1	1



i

### I. STATEMENT OF FACTS

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### A. <u>Corporate Structure</u>

Starr Pass Resort Developments LLC ("Developments") is a Delaware limited
liability company which owns certain real property and improvements in Tucson,
Arizona, known as the J.W. Marriott Starr Pass Resort and Spa (the "Resort"). (Plaintiff's
Statement of Facts ("SOF") ¶ 1.)

Starr Pass Resort Holdings LLC ("Resort Holdings") is a separate Delaware
limited company which is the sole member of Developments. (SOF § 2.)

9 Starr Pass Holdings LLC ("Holdings") is another separate Delaware limited
10 company which is sole member of Resort Holdings. (SOF ¶ 3.) Holdings is owned by its
11 two Members:

- 73.5% by Signature Properties LLC, a Delaware limited liability company ("Signature"); and
- (2) 26.5% by Defendant Willowbend/Starr Pass Investments LLC, a Delaware limited liability company ("Willowbend").

16 (SOF ¶ 4.) However, Holdings is controlled equally by Signature and Willowbend. (SOF
17 ¶ 5.)

18 Mr. F. Christopher Ansley is the Chief Executive Officer and President of 19 Developments and is Chairman of the Board of Directors of Developments. (SOF ¶ 6.) 20 Mr. Anslev is also the Chief Executive Officer and President of Resort Holdings. (SOF ¶ 21 7.) Mr. Ansley is also the Chief Executive Officer and President of Holdings and the 22 Chairman of the Board of Directors of Holdings. (SOF ¶ 8.) He represents Signature. 23 (SOF ¶ 9.) Further, at the hearing on Developments' request for injunctive relief, the 24 parties stipulated that F. Christopher Ansley is the President and Chief Executive Officer 25 of Developments, Resort Holdings and Holdings. (SOF ¶ 10.)

The Board of Directors of Developments has not removed or replaced Mr. Ansley 1 and is not likely to do so because its Board of Directors is composed of three members: 2 one who represents Willowbend, one who represents Signature and a third who is 3 independent but who does not have authority to vote to replace Mr. Ansley. (SOF ¶ 11,) 4 Nor is the sole member of Developments, Resort Holdings, likely to replace Mr. Ansley, 5 or reconstitute the Board of Directors of Developments so it can replace Mr. Ansley, 6 because Resort Holdings is managed by its sole member, Holdings, and Holdings is 7 controlled equally by Signature and Willowbend. (SOF ¶ 12.) 8

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# B. The Financing and Refinancing of the Resort

Developments obtained senior financing from a syndicate of banks led by 10 Scotiabank ("Senior Lenders") to fund the construction of the Resort (the "Senior Debt"). 11 (SOF ¶ 13.) Developments also obtained financing from Marriott International Capital 12 Corporation ("Marriott") to help fund the Resort (the "Mezzanine Debt"). (SOF ¶ 14.) 13 The Senior Debt is secured by a first priority deed of trust on the Resort. (SOF  $\P$  15.) 14 Under the terms of the Agreements between Developments and the Senior Lenders 15 regarding the Senior Debt, the Senior Debt matured and became due and payable on 16 March 28, 2006. (SOF ¶ 16.) 17

Under the terms of Developments' agreement with Marriott, Developments' failure to pay the Senior Debt in full when it is due constitutes a default on the Mezzanine Debt.  $(SOF \P 17.)$  Accordingly, Developments is in the process of trying to obtain refinancing of both the Senior Debt and the Mezzanine Debt with the assistance of Jones Lang Lasalle, an investment banker and loan broker, pursuant to an agreement with Jones Lang Lasalle.  $(SOF \P 18.)$ 

Jones Lang Lasalle solicited and obtained Credit Suisse as a prospective lender to provide refinancing of both the Senior Debt and the Mezzanine Debt of at least \$120 million. (SOF ¶ 19.) However, before Credit Suisse would proceed to consider providing such refinancing, it insisted that a Term Sheet be signed by someone who apparently has the power and authority to close such refinancing on behalf of Developments and that it be paid a fee in excess of \$200,000. (SOF  $\P$  20.) Unless the Term Sheet was signed and the Fee was paid, Credit Suisse would not proceed. (SOF  $\P$  21.)

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# C. The Disputes Between Developments and Willowbend

Disputes arose between Developments and Willowbend regarding Mr. Ansley's
power and authority to negotiate and set the terms of the refinancing, sign the Term Sheet,
pay the Fee and close the refinancing. (SOF ¶ 22.) As a result, Willowbend contacted
Scotiabank, Marriott, Credit Suisse and Jones Lang Lasalle regarding Developments'
refinancing efforts. (SOF ¶ 23.)

After the Hearing on Developments' request for injunctive relief with respect to 11 Willowbend's communications with third parties concerning the refinancing, Mr. Ansley 12 signed the Term Sheet as C.E.O. and President of Developments and the fee was paid to 13 Credit Suisse. (SOF ¶ 24.) Even though the Term Sheet has been signed and the Fee has 14 been paid. Credit Suisse will require at least 30 days to complete its due diligence and 15 close the refinancing. (SOF ¶ 25.) If Credit Suisse does not elect to provide the 16 refinancing, then Jones Lang Lasalle will have to find a new potential lender, which will 17 be difficult or impossible unless the issue of who has the power and authority to close the 18 refinancing on behalf of Developments is resolved. (SOF  $\P 26$ .) 19

Willowbend still denies that Mr. Ansley has the power and authority to negotiate the ultimate terms of the refinancing and close the refinancing, and Willowbend will not close the refinancing unless its representatives play an equal role in the negotiations and approve the ultimate terms. (SOF  $\P$  27.)

Meanwhile, Scotiabank will not extend the Senior Loan unless Willowbend reaffirms its existing guarantee of the Senior Loan during the extension period, and Willowbend will not do that unless Developments acquiesces and agrees that its affairs be governed by the Holdings' operating agreement instead of the Developments' operating
 agreement. (SOF ¶ 28.) Thus, Developments' and Willowbend's rights, status and other
 legal relations are in dispute.

### D. The Terms of The Development Agreement

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Pursuant to A.R.S. § 12-1832, et. seq., and Rule 57, Ariz.R.Civ.P., Developments
has requested the Court to declare and adjudge the Parties' rights, status, and other legal
relations including, *inter alia*, those arising under the terms of the operating agreements of
Developments, Resort Holdings and Holdings.

The Developments Agreement is clear and unambiguous and provides, inter alia:

"[Resort Holdings] agrees that its rights, powers, duties and obligations as the Member of [Developments] shall be governed by the terms and provisions of this Agreement";

"Except as otherwise expressly provided in [Developments'] Certificate of Formation or this Agreement, the rights and obligations of [Resort Holdings] with respect to [Developments] will be governed by the [Delaware Limited Liability Company] Act";

Resort Holdings] is authorized and empowered:

- (a) "to appoint . . . one or more persons . . . to act on behalf of [Developments] as directors or officers of [Developments] with such titles as may be appropriate including the titles of Chairman, President, Vice-President, Treasurer, Secretary, and Assistant Secretary, and
- (b) to delegate any and all power and authority with respect to the business and affairs of [Developments] to any individual or entity, including any directors or officers and employees of [Developments]";

> "Any person appointed as the director or an officer of [Developments] with the title customarily held by a director or officer of a corporation shall have the same power and authority to act on behalf of [Developments] as a director or an officer holding the same title would customarily have in a corporation organized under the laws of Delaware";

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"Each director or officer of [Developments] shall serve at the convenience of [Resort Holdings] and shall hold such office until he or she dies, is removed by [Resort Holdings] or until a successor is appointed by [Resort Holdings]";

> "Any person or entity dealing with [Developments] may rely upon the certificates signed by [Resort Holdings], any officer of [Resort Holdings], or the President, Treasurer or Secretary of [Developments] as to:

(a) the persons or entities which are authorized to execute and deliver any instrument or document of or on behalf of [Developments], and

(b) The persons who or entities which are authorized to take any action or refrain from taking any action as to any matter whatsoever involving [Developments]"; and

> "[The] Agreement contains the entire agreement of [Resort Holdings] with respect to the subject matter [thereof], <u>supersedes all prior agreements</u> <u>relating to the subject matter thereof</u> and may not be changed, altered, or amended, except by a written instrument signed by [Resort Holdings]."

19> The Developments Agreement provides that Delaware law governs and20controls Developments, Resort Holdings, and Holdings. (SOF ¶¶ 29-36.)

Even though Willowbend claims that Developments' affairs are actually governed by the Holdings Agreement instead of the Developments Agreement, and that, under the Holdings Agreement, the refinancing of the Senior Debt and Mezzanine Debt by Developments requires the approval of Holdings Board of Directors (SOF ¶ 37), Willowbend admits that, in order for the Court to rule that Developments' affairs are governed by the Holdings Agreement instead of the Developments Agreement, the Court

would be required to ignore the clear and unambiguous terms of the several provisions of
 the Developments operating agreement, specifically including the Intergration Clause.
 (SOF ¶ 39.)

Developments is not a party to the Holdings Agreement. (SOF ¶ 40.) Further, Developments did not even exist when the Holdings Agreement was made and entered into. (SOF ¶ 41.) Instead, the Developments Agreement was made and entered into, with Willowbend's knowledge, approval and consent, a full year after the Holdings Agreement was made and entered into. (SOF ¶ 42.)

9 The Holdings Agreement requires the approval of the Holdings Board of Directors
10 before a number of Holdings (Signature or Willowbend) can "authorize" Developments'
11 refinancing of the Senior Debt or Mezzanine Debt. It does not require Holdings' Board of
12 Directors to authorize Developments own refinancing. (SOF ¶ 43.)

13 The Developments Agreement gives Developments, itself, without the 14 authorization of Holdings (or Signature or Willowbend), the right and power to obtain 15 refinancing. (SOF ¶ 44.) On the one hand, the Holdings Agreement does not address the 16 Developments Agreement or the Resort Holdings Agreement but, once again, the 17 Developments Agreement, on the other hand, specifically provides that it "supersedes all 18 prior agreements relating to the subject matter hereof." (SOF ¶¶ 46-47.)

Even if the authorization of the Holdings Board of Directors were necessary,
Holdings did, in fact, authorize the engagement of Jones Lang Lasalle to obtain
refinancing of the Senior Debt and Mezzanine Debt. (SOF ¶ 48.)

### 22 II. <u>CHOICE OF LAW</u>

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### A. Delaware Law Applies.

When analyzing conflict of laws problems, Arizona courts look to the Restatement (Second) of Conflict of Laws for guidance. See Gemstar Ltd. v. Ernst and Young, 185 Ariz. 493, 500, 917 P.2d 222, 229 (1996). Section 302(2) and the comments to that

Section explain that the place of incorporation governs issues regarding an entity's 1 "internal affairs," including governance. Id at 501, 917 P.2d at 230. Here, Developments 2 was formed in Delaware. Further, the Developments Agreement has a choice of law 3 provision which states that Delaware law applies. Arizona courts defer to such provisions 4 unless the chosen state has no substantial relationship to the parties or the transaction and 5 there is no reasonable basis for the parties' choice or the application of the law of the 6 chosen state would be contrary to a fundamental policy of the state of Arizona. See 7 Swanson v. The Image Bank, Inc., 206 Ariz. 264, 77 P.3d 439 (2003) (citing Restatement) 8 (Second) of Conflict of Laws Section 187(1) and (2)). 9

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#### В. The Delaware Parol Evidence Rule Applies

Procedural matters are governed by Arizona law, See Ross v. Ross, 96 Ariz. 249, 11 393 P.2d 933 (1964); Taylor v. Security National Bank, 20 Ariz.App. 504, 514 P.2d 257 12 (1973); Cardon v. Cotton Lane Holdings, Inc., 173 Ariz. 203, 841 P.2d 198 (1992); 13 Restatement (Second) of Conflict of Laws, Sections 122 and 135 (1971). However, the 14 parol evidence rule is not a procedural matter. Instead, it is a substantive rule of law. See 15 Gulutta v. Triano, 125 Ariz. 144, 145, 608 P2d 81, 82 (Ariz. App. 1980) ("the parol 16 evidence rule is a doctrine of substantive law and not merely an exclusionary role of 17 evidence): Brandywine Shoppe, Inc. v. State Farm Fire & Cas. Co., 307 A.2d 806, 809 18 (Del. Supp. 1973) ("the parol evidence rule is a rule of substantive law and not a rule of 19 evidence."). 20

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III.

# THE COURT SHOULD GRANT DEVELOPMENTS' REQUEST FOR SUMMARY DECLARATORY RELIEF

# Summary Judgment Standard

A motion for summary judgment may be granted where the record demonstrates that there are no material questions of fact, and that, based upon the undisputed material facts, the moving party is entitled to judgment as a matter of law. See Ferree v. City of Yuma, 124 Ariz. 225, 226, 603 P.2d 117, 118 (App. 1979). The purpose of Ariz.R.Civ.P.

56 is "to resolve whether material issues of fact exist, and if none do, then to enter
judgment for the moving party if he is entitled to it as a matter of law." Union Bank v.
Pfeffer, 18 Ariz.App. 386, 502 P.2d 535 (1972). Rule 56 was not intended "to grant a trial
on the morits when there is no genuine fact issue." Id. Here, there is no genuine fact
issue, and judgment for Developments is proper as a matter of law.

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# B. Declaratory Relief is Appropriate

The Court has the power to declare the rights, status and other legal relations of the
parties. See A.R.S. § 12-1831 et. seq. (the "Act"); see also 10 Del. C. § 6501 et. seq.
(Delaware's Declaratory Judgment Act). The Act should be liberally construed to
accomplish the purposes for which it was designed. See A.R.S. § 12-1842; Connolly v.
Great Basin Insurance Co., 6 Ariz.App. 280, 431 P.2d 921 (1967); see also Phillips
Petroleum Company v. Arco Alaska, Inc., 1985 Del. Ch. Lexis 414 (1985).

The parties to a contract may seek a declaration of their rights and obligations to 13 one another under the contract. See A.R.S. § 12-1832; Bowen v. Watz, 5 Ariz.App. 519, 14 428 P.2d 694 (1967); see also Phillips Petroleum, supra. For example, in Podol v. 15 Jacobs, 65 Ariz. 50, 173 P.2d 758 (1946), a tenant obtained a declaratory judgment 16 regarding its right to specific performance of an option to purchase the leased premises 17 and his right to possession of the premises so that he could prevent the landlord from 18 pursuing a forceable entry and detainer proceeding. Here, like the tenant in Podol, 19 Developments requires a declaratory judgment regarding its rights so it can obtain and 20 close the refinancing and prevent the Senior Lenders from foreclosing. 21

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### C. The Court Can Grant Declaratory Relief as a Matter of Law

Under the Act, when a proceeding involves the determination of issues of fact, the issues may be tried and determined by a jury just as they are in any other civil action. However, where the questions involved are strictly ones of law, the court should decide them (and the court may order speedy hearing). Ariz.R.Civ.P. 57; Del.R.Civ.P. 57. The interpretation of the plain and unambiguous terms of the Developments Agreement presents a question of law for the Court to decide. See Hadley v. Southwest Properties, Inc., 116 Ariz. 503, 570 P.2d 190 (1977); Klair v. Reese, 531 A.2d 219 (Del. 1987); In re Walt Disney Co. Derivative Litigation, 2005 WL 2056651, \*28 (Del.Ch. 2005) ("Interpretation of [a company's] internal governing documents is a matter exclusively for the Court.").

The issue of whether the Developments Agreement is ambiguous in the first place
also presents a question of the law for the Court to decide. *Pasco Indus., Inc. v. Talco Recycling. Inc.,* 195 Ariz. 50, 62, 985 P.2d 535, 547 (App. 1998); NBC Universal, Inc. v. *Paxson Comm. Corp.,* 2005 Del. Ch. Lexis 56 (2005).

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### D. Contracts Should Be Enforced According To Their Terms

One of the most fundamental duties of the Courts is to enforce contracts according to the laws of their terms. See Shattuck v. Precision-Toyota, Inc., 115 Ariz. 586, 588, 566 P.2d 1332. 1334 (1977); Citadel Holding Corp. v. Roven, 603 A.2d 818, 822 (Del. 1992). In Shattuck, the Arizona Supreme Court held that:

Where parties bind themselves by a lawful contract, in the absence of 16 fraud a court must give effect to the contract as it is written, and the 17 terms or provisions of the contract, where clear and unambiguous, are conclusive. The intent of the parties, as ascertained by the language used, 18 must control the interpretation of the contract. It is not within the province 19 or power of the court to alter, revise, modify, extend, rewrite or remake an agreement. Its duty is confined to the construction or interpretation of the 20 one which the parties have made for themselves. Where the intent of the 21 parties is expressed in clear and unambiguous language, there is no need or room for construction or interpretation and a court may not resort 22 thereto.

Id. (emphasis added). Similarly, in *Citadel Holding*, the Delaware Supreme Court held
that "[i]t is an elementary canon of contract construction that the intent of the parties must
be ascertained from the language of the contract...The language of the Agreement must
therefore be the starting point." *Citadel Holding*, 603 A.2d at 822.

The Developments Agreement is, of course, a contract and therefore it is subject to 1 the same rules of interpretation and enforcement as any other contract. Mordka v. Mordka 2 Enterprises, 143 Ariz. 298, 693 P.2d 953 (App. 1984) (where the court held that a 3 resolution signed by the shareholders of a corporation was a contract and enforced it); 4 Swanson v. The Image Bank, 206 Ariz. 264, 77 P.3d 439 (2003). The law is the same in 5 Delaware, Hibbert v. Hollywood Park, Inc., 457 A.2d 339 (Del. 1983); Gentile v. 6 Singlepoint Fm., Inc., 788 A.2d 111 (Del. 2001) (citing Hibbert with approval); Harrah's 7 Entertainment, Inc. v. JCC Holding Co., 802 A.2d 294 (Del. Ch. 2002); In Re Explorer 8 Pipeline Co., 781 A.2d 705 (Del. Ch. 2001). For example, in Harrah's, the Court 9 reasoned: 10

I begin my resolution of this case with the discussion of the applicable contract principles. In general terms, corporate instruments . . . are interpreted in the same manner as other contracts (citing *Hibbert*). Absent ambiguity, their meaning is determined solely by reference to their language. (Citations omitted). To demonstrate ambiguity, a party must show that the instruments in question can be reasonably read to have two or more meanings. (Footnotes omitted). And "merely because the thoughts of party litigants may differ relating to the meaning of stated language does not in itself establish in a legal sense that the language is ambiguous." (Citations omitted).

19 *Id.* at pp. 41-42. (Emphasis added).

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E. The Developments Operating Agreement Should Be Enforced

According to its Terms

The Court must look first to the language of the Developments Agreement. See Section 10, supra. Further, because the Developments Agreement is plain and unambiguous, the Delaware parol evidence rule prevents this Court from looking beyond the language of the Developments Agreement. See Section F, infra.

The Developments Agreement permits Mr. Ansley to perform the functions customarily performed by a chief executive officer and president of a corporation under the laws of the state of Delaware. (SOF ¶¶ 31-32.) Mr. Ansley's actions with respect to the refinancing comport with those permitted of a president and chief executive officer under Delaware law. See In re Walt Disney Co. Derivative Litigation, 2005 WL 2056651 (Del. Ch. 2005) (holding that the C.E.O. of Walt Disney Co. violated no fiduciary duties in <u>unilaterally</u> terminating the president of Walt Disney Co., even though the termination resulted in the payment of a severance package totaling \$140 million).

Further, under general principles of corporate law, where a Board of Directors is 7 deadlocked, a chief executive officer's inherent powers to act are expanded. A corporate 8 officer's authority may be extended or varied implicitly "if by reason of emergency or 9 necessity it becomes impossible for [the officer] to protect his or her principal's property 10 or interests by a strict compliance with the [officer's] usual or regular authority." 2 11 FLETCHUR CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 443 12 (1998); see also Management Technologies, Inc. v. Morris, 961 F.Supp. 640, 648 13 (S.D.N.Y. 1997) ("[T]he law of agency teaches that corporate officers, acting in good 14 faith and with reasonable discretion, implicitly are empowered to protect the corporation 15 where emergency or necessity requires action beyond their usual or regular authority."); 16 Stengel v. Rotman, 2001 WL 221512 (Del. Ch. 2001) (noting the possibility that an action 17 taken by a CEO without board approval may have been justified given that the board of 18 directors was deadlocked and that the action was taken to prevent "further imminent harm 19 to the company"). 20

Here, the Developments Agreement authorizes Mr. Ansley to continue as president and chief executive officer of Developments until he dies, is removed or replaced, or resigns. (SOF ¶ 33.) The Board of Directors of Developments is not likely to replace Mr. Ansley because it will probably be deadlocked. (SOF ¶ 11.) Resort Holdings, the sole member of Developments, is not likely to reconstitute the Board of Directors to replace Mr. Ansley because the Board of Directors of Holdings (the sole member of Resort

Holdings) is deadlocked, too. (SOF ¶ 12.) Therefore, until he dies, is removed or
 replaced. or resigns, Mr. Ansley has the right – indeed the duty – to act in the best
 interests of Developments by obtaining refinancing of the Senior Debt and the Mezzanine
 Debt.

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## F. <u>This Court Should Not Consider The Terms Of The Holdings</u> <u>Agreement</u>

Willowbend has taken the position that the business affairs of Developments are governed, not by the Developments Agreement, but instead by the Holdings Agreement.
(SOF ¶ 37.) This argument is unavailing and violates the following fundamental principles of contract law.

First, where the terms of an agreement are clear and unambiguous, the parol
 evidence rule "bars the admission or consideration of extrinsic evidence to modify or
 amend" an agreement. Carlson v. Hallinan, 2006 WL 771722, \*7 (Del.Ch. 2006). Here,
 Willowbend seeks to modify the terms of the Developments Agreement. Because the
 Developments Agreement is clear and unambiguous, the parol evidence rule bars any
 reference to the Holdings Agreement.

16 Second, the Developments Agreement contains an integration clause providing that 17 the "Agreement contains the entire agreement of [Resort Holdings] with respect to the 18 subject matter [thereof], supersedes all prior agreements relating to the subject matter 19 thereof and may not be changed, altered, or amended, except by a written instrument 20 signed by [Resort Holdings]." (SOF  $\P$  36.) Willowbend has admitted that, in order for it 21 to prevail on its argument that the language of the Holdings Agreement controls, the Court 22 would have to ignore the Integration Clause contained in the Developments Agreement. 23 (SOF ¶ 39.) That clause is clear, unambiguous and not contradicted by any other 24 language contained in the Developments Agreement. Consequently, this Court should not 25 ignore the importance and relevance of that provision.

Third, a contract may not incorporate another document by reference unless the

document is in existence at the time of the execution of the contract and unless it 1 incorporates that document explicitly. See Skouras v. Admiralty Enterprises, Inc., 386 2 A.2d 674, 678 (Del.Ch. 1978) ("The strict requirements for incorporating by reference and 3 otherwise independent document are that such document be in existence when the 4 incorporating document is executed and that the document to be incorporated is referred 5 to so as to reasonably identify it."). The Developments Agreement does not explicitly, or 6 even implicitly, incorporate by reference the Holdings Agreement. (SOF ¶ 47.) Nor does 7 the Holdings Agreement incorporate by reference the Developments Agreement, which 8 was not even in existence at the time that the Holdings Agreement was drafted. (SOF ¶ 9 41-42, 46.) If the parties had truly intended that the instruments be read together, or that 10 the Holdings Agreement controlled, it could easily have indicated that intent in the terms 11 of the Developments Agreement. It did not. 12

Fourth, contract interpretation may not add a limitation "not found in the plain 13 language of the document." See Emmons v. Hartford Underwriters Ins. Co., 697 A.2d 14 742 (1997), 746-747 (Del. Supr. 1997). Willowbend's requested incorporation of the 15 Holdings Agreement into the Developments Agreement would add a limitation to the 16 authority of Mr. Ansley granted by the Developments Agreement, a limitation not present 17 in the four corners of the Developments Agreement. Consequently, an interpretation of 18 the Developments Agreement that limits Mr. Ansley's authority on the basis of provisions 19 contained in the Holdings Agreement would controvene general principles of contract 20 law. 21

Fifth, Willowbend's contention that the Developments Agreement is merely a "boilerplate agreement" or "placeholder" asks this Court to ignore the very existence of a contract. (SOF ¶ 49.) This violates the essence of contract law. See Bond Purchase, *L.L.C. v. Patriot Tax Credit Properties, L.P.*, 1999 WL 669358, \*4 (Del. Ch. 1999) (holding that the Court's interpretation of boilerplate partnership provisions "will not be

dictated by the purported but indiscernible intent of the drafters of those provisions, especially when that intent is inconsistent with the rights the partnership agreement creates on its face."). The Court in *Bond Purchase* explained the rationale for its holding as follows:

[T]he drafters of Delaware limited partnership agreements draft the agreements in the way they think best articulates the rules that the partnerships and their investors want to govern their respective partnerships. Then, in the event of litigation over those provisions, this Court interprets the provisions. If the parties dispute the partnership agreement's meaning, this Court will apply the settled rules of contract construction to interpret the partnership agreement. If this Court interprets the provision in a way that is consistent with the provision on its face, but inconsistent with the drafters' indiscernible intent, the drafters must reconsider their drafting techniques so that the provisions in the partnership agreement effectively communicate the terms they purportedly intended them to convey.

*Id.* Here, the Court must not ignore the provisions of the Developments Agreement
 merely because Willowbend contends that it is a meaningless boilerplate agreement.
 Willowbend is bound by the contractual language that it chooses. For these reasons,
 Developments requests this Court to decline to interpret the provisions of the
 Developments Agreement through reference to the Holdings Agreement.

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### G. Developments Should be Awarded Costs and Attorneys' Fees

Ordinarily, in a declaratory judgment action concerning the proper interpretation of
 a contract, the prevailing party can seek an award of attorney fees and recover its costs.
 A.R.S. § 12-341.01.

22 IV. <u>CONCLUSION</u>

The Court should find, pursuant to Ariz.R.Civ.P. 52(a), that:

The Developments operating agreement is clear and unambiguous and is the
 one and only agreement that governs and controls Developments; and

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2. F. Christopher Ansley has sole power and authority to act on behalf of

Developments, including with respect to its obtaining and setting the terms of the 1 refinancing of the Senior Debt and/or the Mezzanine Debt and entering into appropriate 2 contracts on behalf of Developments with lenders and prospective lenders in this regard, 3 until he dies, is removed or replaced, or resigns. 4 DATED this  $30^{\circ}$  day of March, 2006. 5 6 SNELL & WILMER, LLP 7 8 By: Jeffrey Willis 9 Jamie Heisler Ibrahim Ohe South Church Avenue, Suite 1500 10 Tucson, Arizona 85701-1620 11 Telephone: (520) 882-1200 12 Bruce E. Rohde, Esq. 13 Solomon Pearl Blum Heymann & Stich LLP Trinity Place 14 1801 Broadway, Suite 500 Denver, Colorado 80202 15 Telephone: (303) 832-6686 16 Admitted Pro Hac Vice 17 Attorneys for Plaintiff Starr Pass Resort 18 **Developments LLC** 19 20 21 ORIGINAL of the foregoing hand delivered on this \_\_\_\_\_ day of March, 2006, to: 22 The Honorable John Davis 23 Pima County Superior Court 24 111 W. Congress Street Tucson, AZ 85701 25 31.3 26