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SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

DESERT MOUNTAIN CLUB, INC.,

Plaintiff,

v.

THOMAS CLARK and BARBARA CLARK, husband and wife,

Defendants.

No. CV2014-015334

REPLY IN SUPPORT OF DESERT MOUNTAIN'S (1) JOINDER IN ROBERT JONES'S MOTION FOR PROTECTIVE ORDER, AND (2) MOTION FOR ORDER REQUIRING DEFENDANTS TO PROVIDE COMPLETE WRITINGS UPON REQUEST;

And

RESPONSE TO DEFENDANTS' MOTION TO DISQUALIFY FENNEMORE CRAIG

(Assigned to the Hon. Dawn Bergin)

I. Introduction

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

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

[1] "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: https://fclaw.app.box.com/s/zqm2ruxkutcwfr83rz7z0r2bcv2sndzn.

Amendment Amending and Restating Executive Employment Agreement, § 8.2 (Jan. 1, 2013) (attached as **Exhibit 3**).[2] The incomplete Jones deposition further demonstrates 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, Defendants and their counsel do not deny that any and all information provided in this case has been, and will continue to be, distributed to other Club members and the public. Response at 2:15-25. Various pleadings and other case documents, including the transcript of Jones' s deposition, have been published on a website maintained by a former 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 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…."

Defendants' other arguments concerning the Club's form objections, Jones's request for complete paper copies of certain documents about which he was being questioned, and the signature line of the Club's pleadings are without merit. Callahan's objections at the Jones deposition were appropriate, particularly given the questions asked by Defendants' counsel. *See Kasko v. Aetna Life Ins. Co.*, 33 F. Supp. 3d 782, 790 (E.D. Ky. 2014). Moreover, Jones is entitled to review complete hard copies of documents used during his deposition, particularly given his poor eyesight. *See* Ariz. R. Civ. P. 30(b), (f). Defendants' argument about Club counsel's placement of the name of 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,

[2] The Club will submit un-redacted exhibits to this reply (*e.g.*, Jones's Employment Agreement) for the Court's *in camera* review, if requested.

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

Finally, Plaintiff's request to disqualify Fennemore Craig as counsel for the Club is frivolous, lacking any evidentiary support, and contrary to the declarations of Callahan, 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 evidence shows that Fennemore Craig had no knowledge concerning any meeting or communications between LaVoy and Yelin, until Defendants filed their Response.

II. Good Cause Supports The Issuance Of A Protective Order.

Defendants' purpose in opposing a protective order is abundantly clear and wholly irrelevant to their defense in this matter. Defendants' counsel admittedly seeks the information at issue for the benefit of non-parties whom he has solicited or seeks as clients. Response at 2:15-25. The Club and Jones have repeatedly stated that Defendants are entitled to information regarding Club finances, its policies and procedures, and its 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 2:25-3:5. What's more, Jones agreed to be deposed less than two months after Defendants filed their answer, and the Club has been willing to provide various 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, confidential and proprietary, and opposing counsel's desire to use the information in his solicitation of potential clients further demonstrates good cause for a protective order. Notably, Defendants assert no other substantive argument why such confidential and proprietary information should not be protected.

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

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

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

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

¶¶ 12-13. Information about the Club's operations, its vendor contracts and finances is proprietary. *Enter. Leasing Co. of Phoenix v. Ehmke*, 197 Ariz. 144, 150 ¶ 18, 3 P.3d 1064, 1070 (App. 1999). The same is true of Club personnel matters and personal information that the Club retains about its Members. *Kasko*, 33 F. Supp. 3d at 790; *Sikorsky Aircraft Corp. v. United States*, 112 Fed. Cl. 313, 317 (2013). The Club treats such information as confidential and proprietary, as evidenced by Jones's Settlement and Employment Agreements, and by the fact that the Club also requires its members to maintain this confidentiality in its bylaws and rules and regulations. *See, e.g.*, Club's 2010, 2012, 2013, 2014 Bylaws, § 3.8, § 7.2 attached to the Club's Complaint as Exhibits H, I, J, and M, respectively; Member Rules and Regulations, § A(14), (15) (2012) (applicable portions attached as **Exhibit 5**); Member Rules & Regulations, A(14), (15) (2014) (applicable portions attached as **Exhibit 6**); *see also* Defendants' Membership Conversion Agreement, Complaint, Ex. G at 1-2.

Here, Defendants' counsel sought to explore proprietary and confidential information early in Jones's deposition. For example, Defendants' counsel asked Jones about:

- Circumstances surrounding the departure of a former Club Co-President (TR at 24:9);
- Dealings with other Club Members (*id.* at 30:24-31:1, 31:6, 31:15);
- Information concerning past and present pricing and sales of Club Membership (*id.* at 57:2-5, 65:3-5, 65:9, 65:18-20);
- Specifics concerning Club turnover and the value of Club Memberships (*id.* at 70:16-19);
- Details concerning other Club fees and benefits (*id.* at 81:24).

The Club's and Jones's respective counsel repeatedly objected to questioning concerning the Club's personnel matters, pricing structure, membership fees, and questions regarding other members. *See* TR at 24:11-27:9; 31:16-25; 57:7-10; 65:10-68:6; 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. Again, these objections were made to preserve confidentially, as Jones and the Club made

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.

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

Defendants argue that the protection of confidential and proprietary information is not the norm, and only allowed upon a showing of good cause because a lawsuit is a public proceeding. Response at 2:13-14. To the contrary, although "[t]here is no doubt that there exists a common law right of access to civil trials . . . no such blanket rule 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 "[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 confidentiality order where parties contest the need for such an order." Rule 26(c), 2002 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

movant from its dissemination to third parties. *Id.*

Like the non-movant in *Kasko*, Defendants have shown no need by non-parties to obtain access to information concerning the Club's business information, let alone that the public need for such information outweighs the Club's proprietary interests. Moreover, Defendants have no standing to vindicate the public interest here. *See State v. Garaygordobil*, 89 Ariz. 161, 164, 359 P.2d 753, 755 (1961). To date, the Club has filed three suits against members who have breached their contractual obligations with the Club—Defendants are the target of one of these actions. Defendants' counsel may not 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 soliciting business does not outweigh the Club's proprietary interest in information concerning its finances, operations and Membership.

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

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

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 of which were lengthy: the Desert Mountain Club Bylaws dated July 1, 2013, TR at 41:4-6, 49:5-7, 50:20-22 (full document is 36 pages in length); a Conversion Agreement, TR at 60:5-8 (full document is 3 pages); a Revised Membership Marketing Program Frequently Asked Questions, TR at 62:5-7 (2 pages); and a Letter to John W. Dillon, dated November 11, 2004, TR at 69:3-10 (2 pages).[3] In total, the documents comprised approximately 43 pages. Jones asked to see the documents to provide accurate and complete answers to the questions of Defendants' counsel. TR at 42:10-12, 49:8-11, 60:16-19; 62:8. By contrast, Defendants' counsel asked questions about isolated sentences or portions of the documents. Although Defendants' counsel may certainly ask these questions, the Club and the deponent are entitled to object on the basis of form or foundation because the question is misleading or the witness cannot answer without reviewing other portions of the document at issue, as occurred here. TR at 42, 49, 60, 62.

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.

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

[3] 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 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 clear that neither Callahan nor anyone at Fennemore Craig:

- Had any knowledge that Mr. Yelin had consulted with Mr. LaVoy about possible representation concerning the Club's demand letter or other matters until now (Exhibit 2, ¶ 4);
- Has ever spoken to Mr. LaVoy about any communications, either orally or in writing, between LaVoy and Yelin (*id.*, ¶ 5); and
- Has never seen the documents that Yelin provided to LaVoy (*id.*, ¶ 7).

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 Defendants' request to disqualify Fennemore Craig.

V. The Court Should Deny Defendants' Fee Request.

Defendants conclude by demanding attorneys' fees for the "unreasonable, groundless, abusive, and obstructionist conduct" by the attorneys for Jones and the Club. Response at 5:2-4. Defendants identify the conduct at issue as the following: (1) the name of "Fennemore Craig" appears above, and not below the signature line on Plaintiff's pleadings (*id.* at 5:8-6:2); and (2) counsel acted unreasonably in requesting a protective order and acquiescing to the suspension of Jones's deposition (*id.* at 6:3-7).

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 Supreme Court reversed a decision to impose Rule 11 sanctions against a law firm in the manner Defendants suggest. *Id.* at 127. Although the Court acknowledged the preferred 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 such a result would effect a "strained" interpretation of the rule and not further its 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

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

Prepared by:

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

LAWYER'S NOTES

PAGE	LINE	

LAWYER'S NOTES

PAGE	LINE	

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EXHIBITS MARKED

EXHIBIT	DESCRIPTION	PAGE
	(None offered.)	

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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.

* * *

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Also present: Jerry Coash, videographer

TRANSCRIPT OF PROCEEDINGS

THE VIDEOGRAPHER: We are on the record. The time on the video monitor is 9:02 a.m. Here begins volume 1, video number one, in the deposition of Robert Jones, in the matter of Desert Mountain Club versus Clark, in the Superior Court of the State of Arizona, in and for the County of Maricopa, case number CV2014-015334.

Today's date is March 20th, 2015. Our court reporter is Gerard Coash. My name is Jerry Coash, certified videographer, representing Coash & Coash. This video deposition is taking place at 6225 North 24th Street, Phoenix, Arizona.

Counsel, please identify yourselves and state whom you represent.

MR. CALLAHAN: Christopher Callahan, joined by Seth Schuknecht, from Fennemore Craig on behalf of plaintiff Desert Mountain Club, Inc.

MR. LAVOY: Chris LaVoy on behalf of Robert Jones in his individual capacity.

MR. WILLIAMS: Daryl Williams for the defendants.

THE VIDEOGRAPHER: Would the court reporter please swear in the witness.

(Witness sworn.)

MR. LAVOY: So, Daryl --

MR. WILLIAMS: Mr. Williams, please.

MR. LAVOY: Okay. Based on our discussion moments ago, it's my understanding that your clients, the defendants, are not willing to stipulate to any of the proposed terms of confidentiality that were communicated to you by plaintiff's counsel and by me in written communications last week. We didn't get a response from you. And -- and as we explained, given that, we're going to need to adjourn this deposition and take these issues up with the court to resolve the confidentiality issues, and we'll proceed upon direction from the judge.

MR. WILLIAMS: Mr. Callahan, do you have something to say?

MR. CALLAHAN: Absolutely. We had proposed last week to you, Mr. Williams, in light of the confidentiality obligations imposed upon Mr. Jones by virtue of his employment with the club, Mr. LaVoy pointed out by virtue of his employment with the predecessor to the club, where Mr. Jones also has confidentiality obligations, that we would allow this deposition to proceed, we would propose that it be designated as confidential, preserving fully your right to challenge that designation as to some or all of the testimony taken, at a later date, so that you could proceed this morning.

Both Mr. LaVoy and I sent letters to you

09:05:56-09:07:09 Page 6

last week. We did not receive the courtesy of a response from your office to either of those letters. When we came in this morning, we asked whether you were willing to agree and you said, quote, Daryl Williams does never agree to confidentiality agreements because I've been wrapped around the axle before.

It would have been nice to know that in advance so we could see if we could have gotten ahold of Judge Bergin and resolved this today. But we are standing on the confidentiality objection.

MR. WILLIAMS: Well, I can imagine there's one thing that I'm going to ask today that would fall within the ambit of any confidentiality agreements here. I certainly would respect confidentiality. And if you want to make an objection during the course of this that you think one question or another of mine falls within the limits of a confidentiality agreement, that seems to be an appropriate way for me to proceed.

But to simply agree that carte blanche, in general, these very general letters that were sent to you -- sent to me by you and Mr. LaVoy, that is very imprudent of me as a lawyer. And so I do not do general carte blanche confidentiality agreements. I'm willing to proceed and give you an opportunity, when you get the transcript, to say, "This is confidential for these

09:07:13-09:08:15 Page 7

reasons," showing me the particular confidentiality agreements -- clauses and explaining why it's confidential. That seems to me to be the more efficient way to proceed. Then we have something to fight about instead of just a bag of smoke.

MR. LAVOY: Daryl --

MR. CALLAHAN: I appreciate your views, Mr. Williams. But the problem is you and/or your clients have elected to try this lawsuit through a website run by Mr. Gary Moselle. While you didn't send me a complete copy of the original notice for Mr. Jones' deposition, I was able to get one through the Gary Moselle website.

I've also gotten, through the Gary Moselle website, your strategy letter to your clients, the Clarks, as to how you intend to defend this lawsuit.

My assumption, since the videotape deposition notice was put up there, if this deposition proceeds without a confidentiality notice, we will see a link to the video being prepared today as soon as it is prepared on that website.

That causes problems for the club. That is why we sent the letter we did.

MR. WILLIAMS: What kind of problems does that cause for the club if that happens? And believe you me, I am not a party to anything being posted on the

09:08:17-09:09:22 Page 8

website. Anybody's website.

But please explain to me, Mr. Callahan, what kind of problems this could possibly cause for the club?

MR. CALLAHAN: If you go into any club confidentiality issues, which includes anything regarding club operations, that creates a problem. Because there is a confidentiality agreement between the club and Mr. Jones. There is a confidentiality agreement between Desert Mountain Properties Limited Partnership, the developer, the predecessor, and Mr. Jones, that is similar in scope.

Obviously, we are willing to waive it for purposes of this litigation so long as the transcript is kept to this litigation.

You're out soliciting a class action or a mass action among the Desert Mountain members against the club, that is well-known. I assume that you will use this for it. That's the only purpose I can think of for accelerating this deposition the way you have. And that is an improper use of a deposition, that is an improper use of a transcript, and we will resist that.

MR. WILLIAMS: Well, I'm trying to do a deposition to get some discovery in the case, and I think I'm entitled to that. I think you're entitled to say this position -- this part here, these questions here, they

09:09:25-09:10:18 Page 9

relate to something that is confidential. And then we can have something to discuss.

MR. CALLAHAN: If it relates to club operations, it is confidential under the agreement and cannot be publicly disseminated.

MR. WILLIAMS: Club operations as in hours of operations, their dealings with my client, Mr. Clark, his notice of resignation and Mr. Jones' reaction to that, those are club operations and confidential?

MR. CALLAHAN: There are questions you can no doubt ask. But we're not going to let him ask anything that goes into club operations. Mr. LaVoy and I can confer on that. If you want to proceed that way, we can do that.

MR. WILLIAMS: Well, let's proceed. Then if we --

MR. LAVOY: Well, hold on a second, Daryl.

MR. WILLIAMS: Yeah, let's proceed.

MR. LAVOY: No, no, Daryl.

MR. WILLIAMS: Mr. Williams, please, Mr. LaVoy.

MR. LAVOY: Okay. Okay. Thank you, Mr. Williams.

So the issue is not just you and your clients publishing this deposition, along with the other

09:10:23-09:11:50 Page 10

case materials that are being disseminated. The issue is that -- is that Mr. Jones has contractural confidential -- confidentiality obligations with third parties that are fairly broad and continuing with the deposition could expose him to civil liability under those agreements.

And we attempted to resolve this issue with you in advance to avoid what, frankly, is turning into a circus, and you didn't respond. You just ignored the issue, and hence we find ourselves.

So, you know, if you're going to inquire into anything having to do with the policies and practices of this golf club, it's just going to be a non-starter under these confidentiality agreements.

Now, it may very well be that the court narrows the scope of those obligations or releases Mr. Jones to some extent from them. And at that point, Mr. Jones will be happy to appear and answer those questions. But he should not have to be exposed to potential civil liability at this moment, and that should be resolved by the judge in our view.

So if you're willing to -- to go ahead and assure us at the outset that you're not going to inquire into these areas that we described in our written communications, then, yes, let's -- let's proceed. But if you just want to take this question by question with an

09:11:53-09:12:54 Page 11

avalanche of objections each time as you try and needle your way into these practice and procedure issues, let's save ourself some time and go resolve this with the court.

MR. WILLIAMS: I propose that we proceed. And if you desire to -- either of you -- instruct the witness not to answer, then there's nothing I can do about that.

MR. LAVOY: Are you saying that you're going to be inquiring in the club's practices and procedures? It's a simple question, Daryl, yes or no.

MR. WILLIAMS: I do not know what you mean by "club's practices and procedures."

MR. LAVOY: Well, I think -- I think -- I don't think you're being candid there.

MR. WILLIAMS: And Mr. -- Mr. LaVoy, please, I have not given you permission to use my given name, and I would appreciate it if you would refer to me formally.

MR. LAVOY: Okay. Mr. Williams.

MR. WILLIAMS: Thank you.

MR. LAVOY: Okay. So, Mr. Williams, can you give us a direct answer to our direct question?

MR. WILLIAMS: If I knew what was involved with your -- what was defined by "policies and procedures," I could answer that. I do not.

So let's go question by question and you can

09:12:56-09:22:16 Page 12

then tell me, "Well, that's a policy or procedure. Don't answer that question." What's wrong with that?

MR. LAVOY: So let's take a short break and -- and let the attorneys confer regarding how to proceed.

Let's go off the record for a moment, please.

THE VIDEOGRAPHER: Off the record at 9:13 a.m.

(A recess ensued.)

THE VIDEOGRAPHER: Back on the record at 9:21 a.m.

ROBERT EDWARD JONES II,
the witness herein, having been first duly sworn by the Certified Reporter, was examined and testified as follows:

EXAMINATION
BY MR. WILLIAMS:

Q. Mr. Jones, would you please state your name?
A. Robert Jones.
Q. Is that your full name, Mr. Jones?
A. No, it's not.
Q. What is your full name?
A. Robert Edward Jones II.

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Q. Where did you graduate from high school?
A. Dallas, Texas.
Q. What year?
A. 1976.
Q. Did you go to college?
A. Yes, I did.
Q. Where?
A. I went to Florida International University, FIU, in Miami, Florida.
Q. What did you study?
A. Hotel, restaurant, and club management.
Q. When did you graduate from there?
A. 1978.
Q. What was your degree?
A. My degree is in hotel, restaurant, and club management.
Q. Associate's degree? Bachelor's degree? Master's degree?
A. Bachelor --
Q. Doctorate?
A. I didn't understand that question. Bachelor of science.
Q. You got a bachelor of science in two years?
A. Yeah, sure did.
Q. Congratulations.

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How many hours were involved in that curriculum?
A. I don't recall. But I have a bachelor of science in hotel and restaurant, club management.
Q. What was your first job after you graduated in 1978?
A. My first job was in -- was running a restaurant for a company.
Q. Where?
A. In Houston, Texas.
Q. Name of the company?
A. Foley's, F-o-l-e-y-s. Owned by Federated Department Store.
Q. And is Foley's the name of the restaurant?
A. No. I think the restaurant was called -- I'm really -- I can't recall the name of the restaurant.
Q. How long did you run that restaurant in Houston?
A. I ran it until 1981.
Q. Why did you quit?
A. I didn't quit. I was --
Q. Were you terminated?
A. No, I wasn't terminated.
Q. What happened?
A. I've never been terminated.
I was recruited to get into the club field,

09:24:00-09:25:09 Page 15

and I went to work for Blue Collar Golf Club in Dallas, Texas.
Q. Isn't that quitting? You quit the restaurant to do something else?
A. I've answered your question.
Q. Did you quit the restaurant?
A. I left the restaurant's employ to take another job, yes.
Q. And where did you go to work?
A. I went to work for Blue Collar Golf Club.
Q. Where is that?
A. In Dallas, Texas.
Q. What did you do there?
A. I was the assistant club manager.
Q. What did the assistant club manager do?
A. Ran all the operations of the club, reported to the general manager of the club.
Q. Give me an idea of the things that are involved in the operations of a club.
MR. CALLAHAN: I'm sorry. Mr. Williams, are you referring to golf clubs in general or in particular for a club Mr. Jones worked for?
BY MR. WILLIAMS:
Q. I'm interested in what you did in charge of operations for Blue Collar Golf Club in Dallas?

09:25:10-09:26:19 Page 16

A. I was assistant club manager responsible for food and beverage, housekeeping, maintenance, general member satisfaction, operation of the club.
Q. How long did you work there?
A. Until approximately 1984.
Q. Why'd you leave?
A. I was recruited/promoted to a general manager of my first club as a GM called El Dorado Country Club.
Q. When you say your first club, I thought Blue Collar was your first club?
A. First club as GM, general manager. General manager is the highest position you can have in a club as an employee.
Q. So what was the name of this club where you were general manager?
A. El Dorado Country Club in McKinney, Texas.
Q. And why did you say it was your first club?
MR. LAVOY: Object to the form. Misstates testimony.
BY MR. WILLIAMS:
Q. Did I misunderstand you? Why did you say it was your first club?
A. I said it was my first general manager's job.
Q. Okay.
A. As general manager, reporting directly to the

09:26:23-09:28:09 Page 17

board.
Q. How long did you work at El Dorado?
A. I was there until, let's see, 19 -- approximately 1991. This is also on my LinkedIn page, you can find it there. It's also on the club website.
Q. Why did you leave El Dorado in 1991?
A. To take a better job called Dallas Athletic Club, a 36-hole golf experience in Dallas, Texas.
Q. How long were you at the Dallas Athletic Club?
A. I was at the Dallas Athletic Club until approximately '93, I think in that zone.
Q. What did you do at the Dallas Athletic Club?
A. I was the general manager of the club, reporting to the board of directors.
Q. Were both El Dorado and Dallas Athletic Club for profit entities?
A. El Dorado was a developer for profit entity. Dallas Athletic Club was a private member owned club, and therefore was a -- was a non-profit club.
Q. A 501(c)3?
A. Yes.
MR. CALLAHAN: Object to the form.
BY MR. WILLIAMS:
Q. Why did you leave Dallas Athletic Club in 1993?
A. I went to work for Northwood Club in Dallas,

09:28:14-09:30:07 Page 18

Texas. It was a larger club, a promotion, became general manager. And Northwood's in Dallas, Texas.
Q. How big is the Northwood Club?
A. 575 members, approximately 8 million in volume.
Q. How many holes?
A. 18 holes.
Q. How many members at Dallas Athletic Club?
A. Dallas Athletic Club had 2800 members.
Q. You just told me a minute ago that Northwood was a larger club, had 575 members as opposed to Dallas Athletic's 2800, had 18 holes as opposed to Dallas Athletic's 36 holes.
Why, in your estimation, was Northwood Club a larger club?
A. It's a higher volume, $12 million or more. It was considered one of the top clubs in Dallas, Texas in stature, brand, reputation.
Q. How long did you stay at the Northwood Club in Dallas?
A. I stayed until 1997, when I was recruited by a member to come to Desert Mountain Properties.
Q. Did you start working for Desert Mountain Properties in 1997?
A. No. I had an agreement with my club, which required me to stay until January 19th of 1998. And that

09:30:16-09:31:23 Page 19

was my first day of employment in the position of vice-president of operations.
Q. So you actually stayed with Northwood from 1993 until you began working at Desert Mountain in 1998?
A. Right. Mr. Williams, this is my 36 years of being a private club or development club manager.
Q. Your job as vice-president at Desert Mountain Properties involved what?
MR. LAVOY: Objection.
MR. WILLIAMS: Is that a form objection or are you going to direct him not to speak? You get to do one or the other.
MR. LAVOY: So can you be more specific than that so we can evaluate whether you're probing into information that would be subject to his contractural confidentiality obligations?
BY MR. WILLIAMS:
Q. What was your job as vice-president at Desert Mountain Properties starting in 1998?
A. I was responsible for all the operations of the club.
Q. And when you say "operations of the club," what do you mean?
A. That would be all the operating departments, golf, food and beverage, maintenance, membership.

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Q. Did people work under you at the time?
A. Yes.
Q. How many?
A. I don't recall the exact number.
Q. Approximately?
A. I would say approximately, you know, in the 400 range, 400 people.
At that time, we only had two clubs -- houses -- three clubhouses at Dallas -- at Desert Mountain at the time.
Q. You continued then as vice-president of operations throughout your employment by Desert Mountain Properties?
A. No. In '05, I was promoted to senior vice-president of the company. In '07, I was promoted as co-president. And at that time, the club was owned by Morgan Stanley.
Q. By whom was Desert Mountain Properties originally owned?
A. It was owned in a partnership with Crescent Real Estate REIT out of Fort Worth, Texas, Richard Rainwater's company, and Lyle Anderson of Anderson Companies based in Scottsdale.
MR. CALLAHAN: And, counsel, just for clarification, when you say "originally," you mean when

09:32:58-09:34:38 Page 21

Mr. Jones first joined their employ, correct?
MR. WILLIAMS: Well, I'm sure that he wouldn't have any information prior to that.
BY MR. WILLIAMS:
Q. After the Crescent REIT owned it, was Morgan Stanley the next owner of Desert Mountain Properties?
A. Yes. They bought Crescent, the entire REIT, in 2005. That was widely publicized in all the -- all the trade publications, news about publicly traded companies. They bought the entire asset from Crescent and took the REIT off the stock exchange.
Q. Did Morgan Stanley continue to own Desert Mountain Properties until it was sold to the members?
A. No. They owned it for approximately 18 months. And now we're approaching 2008, the financial fallout of this country -- you know, the stock market. They defaulted to Barclays. And Barclays had the note. And, therefore, I started working for Barclays Bank.
Q. Did you continue on as the co-president of Desert Mountain Properties as an employee of Barclays Bank?
A. Yes. I was a W-2 employee all the way through this employment relationship.
Q. Did you have an employment contract with Barclays Bank?
A. I've had an employment agreement ever since I

09:34:42-09:35:52 Page 22

arrived to Desert Mountain Properties.
Q. Is there a confidentiality agreement or clause in your employment agreement with Barclays Bank?
A. Barclays bought the assets of Desert Mountain Properties. Lyle Anderson Co, which is represented by Sonoran Partners, still maintained his ownership position. So my contract and my confidentiality agreement, as well as all the employees, all our -- all our personnel records stayed the same during that period of time.
MR. CALLAHAN: Mr. Williams, if I might, let me say that --
MR. WILLIAMS: Is this an objection or is this -- which you get -- you get to instruct him not to answer or say "form."
MR. CALLAHAN: What I get to do --
MR. WILLIAMS: You want to take a rest -- you want to take a recess, you may do that too.
MR. CALLAHAN: No. I'd like to make a brief statement that would be over if you would just let me make it.
So I wanted to let you know that Mr. Jones -- Mr. Jones' employment contract does include a non-disclosure provision.
BY MR. WILLIAMS:
Q. You got a W-2 from Barclays Bank?

09:35:54-09:37:07 Page 23

A. No. I got a -- they bought -- and I've been clear with you on this -- they bought Crescent REIT out. Therefore, they bought the company. Right? So I stayed an employee of Desert Mountain Properties until the members bought the club.
Q. And when did the members buy the club?
A. They bought the club in -- January 1 of 2011.
Q. At the time the members bought the club, you were still the co-president?
A. That's correct.
Q. Who was your co-president?
A. The co- -- the other co-president was our ex-CFO Richard Yehling.
Q. Would you spell Mr. Yehling's last name?
A. I may not have this right.
MR. LAVOY: Y-e-h-l-i-n-g.
THE WITNESS: Yeah, that is correct.
BY MR. WILLIAMS:
Q. Where's Mr. Yehling now?
A. I am not aware of where he's employed. Last time I knew he was with Pacific Links, but I'm not aware where he's employed today.
Q. Where is Pacific Links?
A. Pacific Links is an entity that has bought several golf clubs. They have a website. But, again, I'm

09:37:11-09:38:10 Page 24

not -- I'm not on a personal friendship basis or knowledge base as to where Mr. Yehling is. I don't know.
Q. Did he continue on with Desert Mountain, the member owned entity, that acquired the golf course in 2011?
A. He did continue on for a period of time. I think he was there approximately 90 days, but I'm not -- approximate, I'm not sure exactly.
Q. Do you know why Mr. Yehling left?
A. Yes. He -- because -- the reason --
MR. LAVOY: Well, hold.
THE WITNESS: Yeah.
MR. LAVOY: I'm going to object and instruct you not to answer regarding any personnel matters of the club.
THE WITNESS: I can't com- -- comment on that.
BY MR. WILLIAMS:
Q. Okay. Why do you think he left?
MR. LAVOY: Same.
THE WITNESS: No comment.
BY MR. WILLIAMS:
Q. Was Mr. Yehling terminated?
MR. LAVOY: Same.
THE WITNESS: No comment.

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MR. WILLIAMS: And so let me see if I understand, Mr. LaVoy. You think this is somehow in violation of a confidentiality agreement about club businesses and policy as to why Mr. Yehling left?
MR. LAVOY: Mr. Jones is subject to an employment agreement with broad confidentiality protections for the club and the question you've asked could be construed as asking him to provide confidential information regarding personnel matters and internal management of the company. And, therefore, to avoid civil liability, Mr. Jones is -- is not going to answer. But we welcome that the issue be raised with the court and --
MR. WILLIAMS: Well Mr. --
MR. LAVOY: -- we'll proceed as -- as ordered.
MR. WILLIAMS: Mr. Callahan, as the club's lawyer, are you going to sue Mr. Jones if he answers this question?
MR. CALLAHAN: Mr. Williams, you can't possibly intend that question the way you asked it. As you know, there's a predecessor entity. Mr. LaVoy and Mr. Jones have been very clear that the predecessor entity has the rights that Mr. LaVoy is here talking about. I don't represent that entity.
MR. WILLIAMS: Do you, as the representative

09:39:25-09:40:31 Page 26

of the plaintiffs in this case, have any objection if Mr. Jones says his opinion of why Mr. Yehling left after the present entity succeeded ownership?
MR. CALLAHAN: Absolutely. I join Mr. LaVoy's objection. Mr. Jones has a confidentiality obligation. We provided you with a mechanism to get this all resolved. With an order from the court, that would clarify things, would protect Mr. Jones, would allow you to take this testimony. You declined that. That's why we are where we are.
MR. WILLIAMS: And what is confidential about this question, Mr. Callahan?
MR. CALLAHAN: You would have to ask Mr. LaVoy that, Mr. Williams. There is a confidentiality obligation. Mr. LaVoy is protecting his client and his obligations under a contract.
MR. WILLIAMS: From the standpoint of the plaintiffs, is there anything obligation -- anything confidential about this question?
MR. CALLAHAN: I have no idea, Mr. Williams. And I'm not under oath here. This is counting against your four hours, so use it as you will.
MR. WILLIAMS: So you are just also instructing your client not to answer this question?
MR. CALLAHAN: Mr. LaVoy took care of that.

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I'm not instructing him to do anything on this question.
MR. WILLIAMS: Do you agree that he is permitted to answer this question?
MR. LAVOY: Mr. Williams, I think you have --
MR. CALLAHAN: I don't think --
MR. LAVOY: -- sufficient guidance --
MR. CALLAHAN: -- I'm under oath here. Proceed.
BY MR. WILLIAMS:
Q. Did you have another co-president after Mr. Yehling left in the first part of 2011?
A. No.
Q. Did you become the president?
A. No, I did not.
Q. Who became president?
A. The member -- board members elected an advisory board of the club. The president, at that time, became David White.
Q. Was he president of the board -- pres- -- president of the company that owned all the assets at Desert Mountain?
A. That's correct.
Q. Well, that was a -- that was disjunctive. Was he president of the board?

09:41:28-09:42:12 Page 28

A. He was president of the board. It was a member board.
Q. Was he president of the entity that owned all the assets?
MR. CALLAHAN: Objection. Foundation.
THE WITNESS: Can you repeat the question?
BY MR. WILLIAMS:
Q. Was he president of the entity that owned the assets?
A. He was --
MR. CALLAHAN: Same objection.
MR. WILLIAMS: You know, Mr. Callahan, I think you get to say "form." That's all.
MR. CALLAHAN: I can say "form." I can say "foundation." I'll defend this deposition as I deem appropriate without your advice. Thank you, counsel.
BY MR. WILLIAMS:
Q. Was he president of the entity that owned the assets?
A. He was --
MR. CALLAHAN: Objection. Foundation.
MR. WILLIAMS: Go ahead.
THE WITNESS: I'm not going to answer the question. Move on.
MR. CALLAHAN: Bob, you can answer that.

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The problem is it becomes a member owned club. He's president of the board.
MR. WILLIAMS: No speeches. Please, no speeches. No speeches, please.
THE WITNESS: He's -- he's the president.
MR. CALLAHAN: You're wearing on my patience, Mr. Williams, very quickly.
THE WITNESS: He's the president of the member elected board. He's the president of the club. He's the president that represents the members in all the assets that the members own, yes.
BY MR. WILLIAMS:
Q. And the members do own all the assets, correct?
A. That's correct.
Q. Have owned all the assets since turnover in -- January 1, 2011 to the present?
A. From January 1, 2011, at the closing, which happened on the 31st, yes, they do. They own all the assets.
The -- actually, the corporation owns the assets, and then they own that corporation. And that corporation is called Desert Mountain Club, Inc.
Q. Desert Mountain Club, Inc. is owned by every member of the golf club or just the equity members?
A. Just the equity members, yes.

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Q. That includes, does it not, both the golf equity and the club equity members?
A. That's -- yes.
Q. Are there any other equity members, other than golf equity and club equity members?
A. No.
Q. Has the club recently added any new equity members to the membership at Desert Mountain?
A. Yes.
Q. When was the last time an equity member was added?
A. This month.
Q. What did that --
A. By the membership committee and board approval.
Q. Was it an equity member who succeeded to interest on the surrender list?
MR. CALLAHAN: Object to the form.
THE WITNESS: Could you be more specific?
BY MR. WILLIAMS:
Q. Yeah. You've got a surrender list out there for people who want to get out, correct?
A. We have a member resale program. And that is the only way you can come in or out of the club, yes.
Q. Well, my question was the recently added equity member -- most recently one -- was it added, this new

09:44:42-09:45:38 Page 31

member, because they participated in the resale program?
A. All membership issues since turnover have come through the membership resale program. The most current one that we're talking about this month, yes, membership resale program.
Q. Who was that?
MR. CALLAHAN: Object to the form.
Can we -- can you give me any theory as to how this is relevant to the claims of Mr. Clark?
BY MR. WILLIAMS:
Q. Who was that?
A. That's confidential information.
MR. CALLAHAN: Bob --
BY MR. WILLIAMS:
Q. How much did that member pay?
MR. CALLAHAN: Objection. That's not relevant. We're not doing a fishing expedition for your mass action, Mr. Williams. Move on.
BY MR. WILLIAMS:
Q. How much did that member pay?
A. I can't answer the question.
Q. You're not answering the question?
MR. LAVOY: I'm instructing Mr. Jones not to answer the question. The -- the terms of the club with new equity members who have no involvement in this lawsuit

09:45:41-09:46:56 Page 32

is confidential information. Those terms represent the -- represent the policies of the club and how it accepts members. And so my instruction stands.
BY MR. WILLIAMS:
Q. Since January 1, 2011, what is it exactly that an equity member owns?
A. They own --
MR. CALLAHAN: Object to the form. Lack of foundation.
MR. WILLIAMS: Go ahead.
THE WITNESS: Why don't you restate the question again?
MR. WILLIAMS: Sure. Read that -- read that back.
(The record was read by the court reporter as follows:
QUESTION: Since January 1, 2011, what is it exactly that an equity member owns?)
MR. CALLAHAN: Same objection, form and foundation.
THE WITNESS: All members that have joined the club own a ownership share of the corporation that owns the club, which we've talked about, called Desert Mountain Club, Inc. That's what they own. That gives them -- they sign a membership agreement, gives them the

09:46:59-09:48:06 Page 33

right to use the club on a recreational and social basis.
BY MR. WILLIAMS:
Q. Take my clients, the Clarks, for example --
A. Uh-huh.
Q. They were equity golf members, correct?
A. Correct.
Q. They owned part of the club, correct?
MR. CALLAHAN: They own part of the club.
THE WITNESS: They -- as an equity member, they owned a share of ownership of the club.
BY MR. WILLIAMS:
Q. What was their share of ownership of the club?
A. Well, if the club dissolved, all dissolved, then they would have whatever the financial gain of that asset would be if it was sold to a secondary market. That happens in all private clubs.
If any private club was to dissolve, the equity members would own whatever was the return from that or the liability from that.
Q. So what was the Clarks' interest -- ownership interest in the club?
MR. CALLAHAN: Objection. Form and foundation.
THE WITNESS: I have no calculation. I have no bearing on that question because it's a dissolution

09:48:10-09:49:07 Page 34

question.
If the company was to dissolve -- as I explained further of all private clubs, if the club dissolved, they would have whatever the proceeds of the sales of the asset and the land, would be distributed equally per each ownership share.
BY MR. WILLIAMS:
Q. Is it your testimony, Mr. Jones, that the only equity interest that an equity member has is equity if there is a dissolution and distribution and liquidation?
A. No, sir.
MR. CALLAHAN: Objection. Form and foundation.
THE WITNESS: Didn't say that. That's not what I said.
BY MR. WILLIAMS:
Q. Well, correct me with what I said was incorrect there.
MR. CALLAHAN: Objection to the form. You're asking all sorts of legal occlusions here, counsel. It's inappropriate for this witness.
MR. WILLIAMS: Go ahead.
THE WITNESS: I'm -- really, I'm unsure where you want to go with this or what you're trying to go to this.

09:49:09-09:50:23 Page 35

These individuals were equity members. They're owners of the club. We have clearly answered that question. So I don't -- you know, I'm not sure what else you want to know in that regard.
BY MR. WILLIAMS:
Q. Let's take the Clarks for example. They paid several hundred thousand dollars to become an equity owner, did they not?
MR. CALLAHAN: Object to the form.
THE WITNESS: No, they did not. They joined Desert Mountain Club January 1st of 2011 in a member conversion agreement that converted them to a new entity called Desert Mountain Club, Inc. The assets in that transaction came over, but the club, Desert Mountain Properties, did not. New entity. New EIN, new employer number.
In that conversion agreement that your client signed, clearly states the membership relation and ownership relation with it. If you want to show me that doc, I'll answer questions about that doc. But your client signed that doc.
BY MR. WILLIAMS:
Q. Is it your understanding that my client became a member of the new -- an owner of the new corporate entity?
A. Became a member owner, equity owner of the new

09:50:27-09:51:39 Page 36

entity, yes.
Q. That means, does it not, that he owned an interest, a proportionate interest, in all the assets of the new entity, indirectly, as his -- him being an owner of the company?
MR. CALLAHAN: Objection. Form and foundation.
THE WITNESS: The equity members elect a board to govern. This is the same in all private clubs, Mr. Williams. You may or may not have experience with private clubs, but that's how private clubs operate.
MR. WILLIAMS: Would you repeat my question, please?
MR. LAVOY: Repeat his answer.
MR. WILLIAMS: Just the question.
MR. LAVOY: Both.
MR. WILLIAMS: Just the question.
(The record was read by the court reporter as follows:
QUESTION: That means, does it not, that he owned an interest, a proportionate interest, in all the assets of the new entity, indirectly, as his -- him being an owner of the company?)
MR. CALLAHAN: And what was the answer to that question, Mr. Coash?

09:51:43-09:50:40 Page 37

MR. WILLIAMS: Don't read that. Let him answer this one first.
MR. CALLAHAN: Counsel, I want to hear the answer to the last question. That is my right.
MR. WILLIAMS: Go ahead.
(The record was read by the court reporter as follows:
ANSWER: The equity members elect a board to govern. This is the same in all private clubs, Mr. Williams. You may or may not have experience with private clubs, but that's how private clubs operate.)
MR. WILLIAMS: Now, read my question so the answer -- witness can answer my question.
MR. CALLAHAN: Mr. Williams, you're harassing this witness at this point. It's discourteous.
MR. WILLIAMS: My objection is non-responsive. I get to have an answer to my question. Please read my question so the witness can answer my question.
(The record was read by the court reporter as follows:
QUESTION: That means, does it not, that he owned an interest, a proportionate interest, in all the assets of the new entity, indirectly, as

09:50:43-09:54:06 Page 38

his -- him being an owner of the company?)
MR. CALLAHAN: And show an objection to form and foundation.
THE WITNESS: In private clubs, equity members elect a board to govern the club. They are the owners of the club, that is the same case for Desert Mountain Club, Inc.
So your client signed a membership agreement, a conversion agreement, supersedes all other agreements, and is a member, was vetted by the membership committee and approved to join the new entity, and join the new entity and became an equity owner of the club, as all private clubs, to my knowledge, are operated in that fashion.
BY MR. WILLIAMS:
Q. And as an equity owner, he owned assets of the club?
MR. CALLAHAN: Object to the form. Lack of foundation.
MR. LAVOY: Mr. Williams, you're asking this lay witness questions of law for a lawyer or a judge. It's harassing. You know better. Please stop it.
MR. WILLIAMS: Please answer the question, your opinion, not a legal opinion.
THE WITNESS: I've --

09:54:06-09:54:47 Page 39

MR. CALLAHAN: Same objection.
THE WITNESS: I've given my opinion. My opinion's on record. We can read it back if you'd like. But I've answered the question.
BY MR. WILLIAMS:
Q. So equity members do own assets or not?
MR. CALLAHAN: Object to the form. Calls for a legal conclusion.
THE WITNESS: I've answered the question, sir.
Ask your next question.
BY MR. WILLIAMS:
Q. It's a yes or no. Does an equity member own any assets at the club?
A. All --
MR. CALLAHAN: That depends on the club structure, Mr. Williams. And we're not talking about this particular club structure because that's going to violate the confidentiality provision.
MR. WILLIAMS: Are you instructing --
MR. CALLAHAN: You've asked this question. Move on.
MR. WILLIAMS: Are you instructing the witness not to answer that question?
MR. LAVOY: Mr. Williams, more fundamentally

09:54:50-09:56:26 Page 40

this is a question of law, what -- who formally owns an asset, the entity, the shareholder, directly, indirectly. You're trying to box him in on a question of law that as a layperson he's not in a position to answer. I know you're hoping for a sound byte, but it's harassing. And that's separate and apart from the confidentiality. Please be respectful of the rules and move on.
MR. WILLIAMS: Are you instructing the witness not to answer this question?
MR. LAVOY: What's your question?
MR. WILLIAMS: Please read the question back.
(The record was read by the court reporter as follows:
QUESTION: It's a yes or no. Does an equity member own any assets at the club?)
MR. CALLAHAN: Form and foundation.
MR. LAVOY: I'm instructing you not to answer.
THE WITNESS: I can't answer the question based on advice of counsel.
MR. WILLIAMS: I've placed on the screen --
THE WITNESS: Mr. Williams, can I have another bottle of water, if you'd be so kind?
MR. WILLIAMS: I've placed on the screen a

09:56:28-09:58:48 Page 41

document, which is CL008 -- Let me come back.
THE WITNESS: Thank you, sir.
BY MR. WILLIAMS:
Q. I've placed on the screen a document, has a Bates label CL triple zero 80 -- CL00080. These are the bylaws of the Desert Mountain Club dated July 1, 2013.
Are you familiar with these bylaws?
MR. CALLAHAN: Object to the form.
THE WITNESS: I am familiar with the club bylaws, yes.
BY MR. WILLIAMS:
Q. The first page in these bylaws, CL0001 -- let me state that this way -- CL00081, has bylaw keypoints. Have you seen these bylaw keypoints before?
A. Can you raise the font on this?
Q. Sure.
A. Thank you.
The page that you asked me to look -- identify has disappeared.
I'd like to see the bottom of the document, please. There's a footer on the bottom.
Okay. Yes, I've seen those.
Q. What was telling about the footer at the bottom of CL00081?
A. Nothing. That would just give me an idea was

09:58:51-10:00:29 Page 42

this a legitimate document or not.
Q. What about that footer tells you whether this is a legitimate document?
A. Shows that it came from one of the individuals that works in our company.
Q. Which individual is that?
A. C Hillis.
Q. Does that mean that this document, CL00081, was prepared by C Hillis?
A. No. You want to show me the whole document and -- So what was your question, Mr. Williams, about the document?
Q. My question initially was whether you were familiar with it. But we got off on a --
A. But I -- I said -- No, sir, I did answer the question. I am familiar with the document.
Q. Who prepared this bylaws keypoints?
A. Our club counsel.
Q. Who was that at the time?
A. It was a combination of Randy Addison -- '13 -- 2013. Randy Addison of Addison Law in Dallas, Texas. It could have been Quarles & Brady, or it was Fennemore Craig together. I'm not sure when Fennemore Craig relook over legal -- lead on our legal work.
Q. What was the reason for preparing this little

10:00:32-10:01:30 Page 43

summary at the beginning of the bylaws that kind of summarize these things here?
A. I think it's like -- this is very prevalent in all club bylaws, many club bylaws that I've seen through the years. This is just a simple summary page, like an index, for the reader of the document.
Q. Did you anticipate that people would rely upon this document?
A. I --
MR. CALLAHAN: Object to the form.
MR. LAVOY: Form. Foundation.
And when you say "this document," do you mean the entire bylaws or do you mean this segment that you've elected to put on the screen?
BY MR. WILLIAMS:
Q. Do you have any concerns about what I'm asking here? Are you confused?
A. Yes, I am.
Q. Well, I'm talking about these bylaws keypoints.
A. Okay.
MR. CALLAHAN: Just the keypoints?
THE WITNESS: And your question was?
BY MR. WILLIAMS:
Q. Did you expect members to rely upon these?
A. We expect members, by membership agreement to --

10:01:34-10:02:26 Page 44

they agree to abide by the full bylaws of the club.
These are only pages -- which I have clearly answered -- is index to the bylaws.
Q. So you wouldn't expect members to rely upon the bylaws keypoints?
A. I would expect members to rely on the full bylaws, the full set.
Q. So the answer is no, you wouldn't expect them to rely upon this?
A. Please don't answer the question for me.
I -- By membership agreement, the members agree to abide by the club bylaws.
Q. Do you --
A. The full club bylaws.
Q. You know, I appreciate that.
A. Okay.
Q. I know that they do that.
A. I'm just trying to help you, Mr. Williams.
Q. Well, you're not answering my question. So you're not helping me.
A. Yes, sir, I am.
Q. The question is did you expect -- you personally -- that members could rely upon the bylaws keypoints that were prepared?
MR. CALLAHAN: You're asking that

10:02:27-10:03:25 Page 45

independent of the bylaws?
THE WITNESS: My personal opinion --
MR. CALLAHAN: Objection. Form. Foundation.
THE WITNESS: Yes. I think everyone expected members, who sign the membership agreement, to abide by -- and who agreed to abide by the club bylaws, to abide by them as they were in force.
BY MR. WILLIAMS:
Q. Mr. Jones, we're having trouble communicating.
A. I'm not having any trouble.
Q. You're answering questions I'm not asking. So I'm objecting as non-responsive.
My question is limited to the bylaw keypoints that begin on CL00081.
Did you, in your opinion, think it was okay for members to rely upon what was stated in the bylaws keypoints?
A. And my answer is --
MR. CALLAHAN: Asked and answered.
THE WITNESS: Asked and answered. My answer -- my -- asked and answered.
MR. LAVOY: Go ahead and tell him again, Bob.
MR. WILLIAMS: Now, just limit it to the

10:03:26-10:04:10 Page 46

bylaws keypoints, because that's my only question.
MR. CALLAHAN: Mr. Williams, I'm sorry, that question makes absolutely no sense.
Are you asking him do you -- did you expect the members would rely on the bylaws keypoints, not read the by- --
MR. WILLIAMS: Would you -- would you --
MR. CALLAHAN: No. I'm trying to understand your question.
MR. WILLIAMS: Well, you don't have to. It's the witness. You get to say form or instruct him not to answer. Please be quiet. Otherwise -- if you would be so kind.
MR. LAVOY: And you get --
MR. CALLAHAN: Mr. Williams --
MR. LAVOY: -- to answer your question once and not harass him when you don't get -- harass him when you don't get the answer you want. He said, repeatedly --
MR. WILLIAMS: Listen -- listen --
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.

10:04:13-10:05:15 Page 47

BY MR. WILLIAMS:
Q. My question is limited to the bylaws keypoints.
Did you, in your opinion, think that this was something on which members could rely?
A. Members have signed a membership agreement. That membership agreement, they agree to abide by the bylaws. The club bylaws are in force, the full set. That's my answer to your question.
Q. Well, why did you do the bylaws keypoints then?
MR. LAVOY: Asked and answered.
THE WITNESS: I've -- I've already answered that question.
BY MR. WILLIAMS:
Q. That's just a table of contents?
A. Yeah -- no, it's a -- it's a table of contents, a an index guide. I've seen this, Mr. Williams, in many club bylaws. It's just a form how the bylaws were presented, as if there was a cover page with a logo on it that said "Desert Mountain Club."
Q. You know, I'm not interested in any other clubs. Thank you for that, so many times that you've said it.
A. I know. I'm trying to help you.
Q. My question is why were the bylaws keypoints prepared if you expected the members to rely only on the bylaws?

10:05:17-10:06:11 Page 48

MR. CALLAHAN: Objection. Misstates testimony.
THE WITNESS: I've already asked and answered this question. These are part of the bylaws. Therefore, the whole bylaws are in force. That's my answer to your question.
BY MR. WILLIAMS:
Q. Being part of the bylaws then, the bylaws keypoints can have the same level of credibility and ability of the members to rely upon them as the actual formal bylaws themselves?
A. No, sir.
MR. CALLAHAN: Object to the form. Foundation.
THE WITNESS: I did not say that the first time you asked.
The entire bylaws are what the members have agreed to abide by in their membership agreement. That's the full context of the bylaws from page one to ending page.
MR. CALLAHAN: Go ahead, Bob. I'm sorry.
Let me further offer an objection to the manner in which you're presenting exhibits here. You're cherry picking pages out of a document. You're not showing the witness the entire document. You're trying to

10:06:13-10:07:11 Page 49

trip him up on questions. If you want to ask him questions about a document, I would ask that he be shown the entire thing.
BY MR. WILLIAMS:
Q. Let me now show you this page from the bylaws keypoints. This is page Roman numeral III of that, CL00083.
A. I've asked you before, but would you please make the entire page bigger for me or give me the ability to scroll down or give me the ability to see the actual document?
MR. LAVOY: Mr. William, would you be willing to provide the witness with a full copy of the document, hard copy, so that we can move along here?
MR. WILLIAMS: I'm going to do the deposition the way that I wish to do it. You guys --
MR. LAVOY: Let the record reflect you won't provide the witness with a hard copy of the document in full.
BY MR. WILLIAMS:
Q. So --
A. I have vision issues, sir, that's why I'm asking the question.
Q. Well, I do, too. So --
A. I understand.

10:07:12-10:08:44 Page 50

Q. I'm going to stop at the top here -- start at the top here of this page, which is marked CL00083. And I'm just going to ask you questions here about -- well, let's go to the prior page. Let's go to the prior page, Member Benefits Highlights, refundable membership contributions.
I'm going to highlight some language here. What does that mean, "refundable membership contributions," as you understand it?
MR. CALLAHAN: Object to the form. You won't even give him the entirety of the provision you're asking him about, counsel.
BY MR. WILLIAMS:
Q. Would you like to see the next page, too? I can show you the next page if you'd like.
A. I would prefer, sir, to see whole document.
Q. Go ahead and answer my question with regard what's on the screen, please.
MR. CALLAHAN: Form and foundation.
BY MR. WILLIAMS:
Q. I'm showing you CL00082. I've highlighted refundable membership contribution. I'm asking you what -- what is your understanding of what that means?
MR. CALLAHAN: Form and foundation.
THE WITNESS: It simply means that -- you know, the membership, once it's transferred through the

10:08:49-10:10:11 Page 51

club, that the equity members would be entitled to any equity -- any refund of that number, if they sold it for more than what -- what the club established transfer rate or fee would be.
That help you?
BY MR. WILLIAMS:
Q. That's your understanding, correct?
A. That's my general understanding of this small segment of an entire document, but it does not speak for the entire document. The entire document is in force.
Q. To be eligible to receive a refund of their membership contribution, they would have to have submitted their membership to the club for reissuance, correct?
A. That's correct.
MR. LAVOY: Object to the form.
THE WITNESS: That's the -- that is what the bylaws require, that's what the membership agreement requires, that's what the conversion agreement requires, that your client signed, yes.
BY MR. WILLIAMS:
Q. So in order to get some sort of refund of membership contributions, they have to -- members have to comply with the procedures for becoming a member of the membership reissuance list?
MR. CALLAHAN: Object to the form.

10:10:13-10:10:34 Page 52

BY MR. WILLIAMS:
Q. Correct?
A. Yes. And the word -- the optimum word is "eligible." It says "eligible." That's the optimum word there, "eligible."
Q. Sure. Because under what's happening at the club now, they've got to pay a transfer fee too. And if the new member's contribution is less than the transfer fee, then to get out of this club, the member's got to pay money?
MR. CALLAHAN: Object to the form.
THE WITNESS: Is that a question?
MR. WILLIAMS: Yes.
THE WITNESS: Can you restate the question?
MR. WILLIAMS: Sure. I'll have him read it back.
MR. LAVOY: He asked for it to be restated, not reread.
(The record was read by the court reporter as follows:
QUESTION: Sure. Because under what's happening at the club now, they've got to pay a transfer fee too. And if the new member's contribution is less than the transfer fee, then to get out of this club, the member's got to pay

10:10:37-10:11:53 Page 53

money?)
MR. CALLAHAN: Those are two declaratory statements. There's not a question in there. There's no question pending, Mr. Jones.
MR. WILLIAMS: There's a question mark at the end of that. Please answer that question.
MR. CALLAHAN: Are you asking him if he agrees with your statement? Is that the question, counsel?
MR. WILLIAMS: I'm going to have you reread again.
There's a question mark at the end because the intonation went up. It's part of communicating. And so answer the question, please.
THE WITNESS: As long as it's grammatically a question, I'll do so.
MR. WILLIAMS: Okay. It is grammatically a question.
MR. CALLAHAN: It is not a grammatically a question. Are you asking for his agreement with your declaratory statement, counsel?
MR. WILLIAMS: Please read the question.
MR. CALLAHAN: There's no question what the statement was, counsel. I'm asking what you're asking him. He's entitled to a question, not a statement.

10:11:55-10:12:52 Page 54

MR. WILLIAMS: Please read the question.
(The record was read by the court reporter as follows:
QUESTION: Sure. Because under what's happening at the club now, they've got to pay a transfer fee too. And if the new member's contribution is less than the transfer fee, then to get out of this club, the member's got to pay money?)
THE WITNESS: Doesn't sound like a question, counsel, to me. Sounds like an opinion.
MR. WILLIAMS: It is a question. Would you like me to put it in a question form for you?
THE WITNESS: Sure. I mean, you're -- you're asking --
MR. WILLIAMS: Does the question --
THE WITNESS: You're asking me questions, and I'll answer the question --
MR. WILLIAMS: Does --
THE WITNESS: -- when you answer -- ask me.
BY MR. WILLIAMS:
Q. Today and at the time --
THE WITNESS: I want to be helpful to you, counsel.
MR. WILLIAMS: What we're going to do is

10:12:53-10:14:08 Page 55

when I'm speaking you don't.
MR. LAVOY: And vice versa, Mr. Williams.
MR. WILLIAMS: And when you're speaking, I won't.
THE WITNESS: Sounds like a very professional way to handle yourself.
BY MR. WILLIAMS:
Q. At the time the Clarks decided they didn't want to be a member of this club, the club's deal was is they couldn't sell their membership, correct?
A. No. They could sell their membership. It's a market based pricing. They can set the price. The club has set the price at 65,000. If the member wants to set the price lower than 65,000, they can do that.
Mr. Clark obviously does not want to go through that process as required by his conversion agreement, by his membership agreement, and by the club bylaws.
Q. So if Mr. Clark were to agree to proceed with this procedure, and he sold the club membership for $10,000, would he have to pay money to get out?
A. Yes. The club has established that the membership transfer fee and price is 65,000. If he wants to sell it quicker, faster, control his own destiny, replace himself, he could sell it for a dollar if he wants

10:14:11-10:15:31 Page 56

to do it. But it must go through the club.
Q. So if he wants to sell the membership for a dollar, somebody's getting a real deal, aren't they?
MR. CALLAHAN: Object to the form.
THE WITNESS: I'm not sure what you mean by "real deal."
BY MR. WILLIAMS:
Q. They're getting something that's worth a whole lot more than a dollar, aren't they?
A. I'm not -- who -- who is getting more?
Q. The guy who buys Mr. Clark's membership for a buck.
A. So how do I know the buyer isn't subsidizing the price with Mr. Clark? I don't know that.
Mr. Clark sets his price under the membership resale program. He decides what the number is. The club has a transfer fee, like all private clubs has. If he sets the price lower, in order to get out of the club quicker, that's his choice. It's a market based program.
Q. So what is the market for an equity membership like Mr. Clark's right now?
MR. CALLAHAN: Object to the form.
THE WITNESS: We believe the price is 65,000 in the marketplace today.

10:15:32-10:16:27 Page 57

BY MR. WILLIAMS:
Q. Have you sold a single new equity membership in the last three years for 65,000 or more?
A. Yes, sir, we have.
Q. To whom?
MR. CALLAHAN: Objection.
MR. LAVOY: That's sort of information we believe would be fall within the confidentiality provision of Mr. Jones' employment agreement and, therefore, instruct you not to answer.
BY MR. WILLIAMS:
Q. Tell me how many.
MR. CALLAHAN: At a price of 65 or above is the question?
MR. WILLIAMS: Yes.
THE WITNESS: I'm not sure I have that on the top of my head, but -- I would be speculating as to the answer, but we sold --
MR. CALLAHAN: Don't -- don't guess.
THE WITNESS: Right.
MR. CALLAHAN: If you can give him a ballpark, he's entitled to that.
THE WITNESS: I would say, you know, 14 months ago membership was selling for 72-, 74,000. You know, might have sold 10 to 11 in that zone -- 8 to 11, I

10:16:36-10:17:45 Page 58

would say. Not sure, have to look at the numbers.
BY MR. WILLIAMS:
Q. Today what are they selling for?
A. Today they're in a marketing range between 32,000 and 54,000.
Q. Has the value of the membership gone down?
A. No, sir, not in the club's opinion. But the members have control of getting out of the club. They have certainty to set their price at a market base, which many clubs have this program today, including two in town off the top of my head. They can choose to replace themselves and sell it whatever the price they want to sell it for, as long as it comes through the club.
Q. Why do you feel compelled in your answers to always refer to other clubs when I'm only talking about Desert Mountain?
A. It's my opinion, my personal belief. I'm just expressing my belief. But if you don't like it, I'll try to restrict it going forward.
Q. Well, thank you. Because I'm only asking questions about Desert Mountain.
A. Okay.
Q. I don't really care about any other clubs.
A. I care about all clubs. I care about the club industry.

10:17:45-10:19:01 Page 59

Q. So it is your opinion that the value of a club membership remains at, let's say, $325,000 today?
MR. CALLAHAN: Object to the form.
THE WITNESS: You'll have to restate that or I'll have to have it read back to me.
BY MR. WILLIAMS:
Q. I can restate that one, I think. It's --
A. Okay.
Q. I'll try to quote myself.
A. Thank you.
Q. So it is your opinion, as you sit here today, that the value on an equity golf membership remains at $325,000?
A. The value that the club has set is 65,000, which the bylaws clearly allow the club to set and the board to set. So the value is 65,000.
A member, as I've already answered, can choose to set the price, whatever they want, but they still must come through the club and pay the 65,000.
Q. Well --
A. And that is called a market based resale program. That's -- that is the title we gave it. That is the title that's referred to out in the industry.
Q. Well, you keep talking about the industry. I'm not interested in the industry.

10:19:02-10:20:08 Page 60

A. Okay. That's our -- that's what we refer to it here.
Q. I'm interested in what happens here at Desert Mountain.
I'm going to show you this document. This is --
A. The conversion agreement.
Q. This is CL01505.
MR. CALLAHAN: It is a portion of a document. Show my prior objection to the manner in which exhibits are being presented to this witness.
BY MR. WILLIAMS:
Q. And the last page of this document is CL01506, which is now -- both of these are on the screen before you.
A. Counsel, I would request a hard copy again to help me read the -- the full package of what you're showing me. I'm not sure what, you know, these pieces are. I'm requesting again a hard copy of it.
Q. Well, this document is a page and a half long. Do you have any trouble reading this --
MR. LAVOY: Mr. Williams, he's stated that he has vision issues and that seeing a hard copy would help him read it.

10:20:09-10:22:02 Page 61

BY MR. WILLIAMS:
Q. I'm going to ask you a question here on page 2. And I'm going to help you here. I'm going to box question and answer 4. I'll blow that up for you.
Do you know who wrote this revised membership marketing program information sheet?
A. You keep overlaying multiple things here. So maybe just stop and let me look at what you've got presented. Again, would rather have a hard copy in front of me.
Okay. Could you please reread your question so I can answer appropriately?
MR. WILLIAMS: Go ahead, read that question back.
(The record was read by the court reporter as follows:
QUESTION: Do you know who wrote this revised membership marketing program information sheet?)
MR. CALLAHAN: Show an objection to the question, form, based on the manner in which the evidence is presented to this witness. I'm not sure it's possible for him to tell what he's -- from what he is able to read.
BY MR. WILLIAMS:
Q. Let me restate the question for you.

10:22:06-10:23:04 Page 62

You've seen documents called "frequently asked questions" as they relate to memberships at the golf club before, haven't you?
A. Yes.
Q. This one is called "Revised Membership Marketing Program Frequently Asked Questions." Does this look like a document familiar to you?
A. Again, I'd like to see it in the full context. But some of this looks like it is. I'd have to see the full doc.
Q. Well, this is the full doc. It's two pages.
A. Okay. I'll rely on the fact that you're telling me it's two pages.
Q. Okay.
A. Okay.
MR. CALLAHAN: Counsel, let me interpose an objection. As you pointed out, in the way you just started the question you just asked, there are a number of these documents. You're asking him who prepared this specific one.
Mr. Jones has testified he has vision problems. He needs to see the whole document. In order to understand which of the various documents you have now put in front of him, it would be helpful for him to see the entire document so we can put it into context and

10:23:06-10:24:10 Page 63

maybe answer your question. We have asked on a number of occasions for this witness to be shown hard copies of the complete document to accommodate his vision issues. You have refused to do that. And I assume you're continuing to refuse to do that.
Show a continuing objection to this manner of questioning. It's unfair to this witness in light of his vision issues.
Bob, to the extent you can answer based upon what Mr. Williams has elected to show you, you can do so. But please do not speculate. If you don't know, tell Mr. Williams that.
THE WITNESS: Counsel is correct. There were multiple documents, so I would need to see the hard copy. I'd be spec- -- I would just be guessing if, in fact, as to what this document is.
So if you want to show me a hard copy, I'll answer your question.
BY MR. WILLIAMS:
Q. Well, I'm not going to show you a hard copy.
A. Okay.
Q. Answer my question. Who do you think wrote things like these frequently asked questions things, as a matter of routine at the Desert Mountain Club?
A. Mr. Williams --

10:24:10-10:25:26 Page 64

MR. CALLAHAN: Form and foundation.
THE WITNESS: Mr. Williams, all documents, as to our -- as to our membership agreements, bylaws, any and all communication goes through counsel. Likely, this document you're showing me was assisted counsel, written by the board, provided to the membership.
BY MR. WILLIAMS:
Q. So you think this is written by counsel then?
MR. CALLAHAN: Objection to the form.
THE WITNESS: I said "likely." Likely they've reviewed it, likely they -- as -- as all our documents are.
But this is a communication piece, I believe -- again, not seeing the whole doc -- I believe from the board to the membership about the revised membership marketing program.
BY MR. WILLIAMS:
Q. Did you review it before it went out?
MR. CALLAHAN: Object to the form. Foundation.
THE WITNESS: Likely. I review all documents before they come out. I'd have to identify what document you're talking about for me to give you that answer.
But as to this, I believe I have reviewed

10:25:30-10:26:53 Page 65

this as part of the review process.
BY MR. WILLIAMS:
Q. What does it mean here when it says $140,000 is the current membership contribution amount for an equity golf membership?
A. At turnover, the board of directors set the membership price -- this was in -- January 1 of 2011 -- at $140,000.
Q. Why?
MR. CALLAHAN: There you're going to draw an objection and instruction not to answer from me. That goes clearly into club polices and procedures. And that is what the club has offered to allow him to testify to subject to your agreement, which you refused to give.
MR. LAVOY: And for that reason, I instruct the witness not to answer.
BY MR. WILLIAMS:
Q. Do you have an understanding of why the required contribution went from $375,000 for an equity golf membership to $140,000 on January 1, 2011?
MR. LAVOY: Same.
MR. CALLAHAN: The whys and wherefores draw same objection and the same instruction.
MR. WILLIAMS: This is -- are you going to tell him not to answer if he has an understanding?

10:26:56-10:27:40 Page 66

MR. LAVOY: He would have that understanding --
MR. CALLAHAN: The only basis for him to have an understanding, counsel -- you can't be serious about that question -- is based on his knowledge as the COO of the club and its policies and procedures. So asking what his understanding is no different than asking what the club policy or procedure is.
MR. WILLIAMS: If you would listen to the question, Mr. Callahan, you'll see I didn't ask him what his opinion was.
MR. CALLAHAN: You asked him what his understanding was.
MR. WILLIAMS: Please, Mr. Callahan --
MR. LAVOY: The only source --
MR. WILLIAMS: Please --
MR. LAVOY: -- of that understanding would be the company's policies and procedures.
MR. WILLIAMS: Mr. LaVoy.
MR. LAVOY: Mr. Williams, we tried to resolve this prior to the deposition. You didn't respond, for whatever reason. And so now we're confronted with this situation. It's one of your own making.
Do not answer the question.
MR. WILLIAMS: Gentlemen, please listen to

10:27:42-10:28:50 Page 67

the question. You'll see I don't ask him --
MR. LAVOY: He's been instructed not to answer. Move on.
MR. WILLIAMS: Please read the question back and see if these gentlemen are going to hang to this instruction not to answer, because I do not ask his opinion.
MR. CALLAHAN: You asked his understanding.
MR. WILLIAMS: Please read that.
THE WITNESS: Could we take a break, please?
MR. CALLAHAN: Let's -- let's get the pending question.
THE WITNESS: Okay.
MR. CALLAHAN: Let's resolve this.
(The record was read by the court reporter as follows:
QUESTION: Do you have an understanding of why the required contribution went from $375,000 for an equity golf membership to $140,000 on January 1, 2011?)
MR. CALLAHAN: Same objection. Same instruction.
MR. WILLIAMS: You're not going to let me know if he even has an understanding?
MR. LAVOY: He cannot answer that question.

10:28:53-10:30:18 Page 68

The only way that he -- he would have that information is through the confidential information he acquired through his employment.
Again, we attempted to resolve this with you in advance, Mr. Williams, and you declined to do that. So here we are. Same instruction.
BY MR. WILLIAMS:
Q. In your opinion, did the value of a golf -- equity golf membership drop from $375,000 to $140,000 on January 1, 2011?
A. Mr. Williams, the Desert Mountain Club, Inc. was formed January 1 of 2011, and the price that was released as part of those docs was $140,000 bucks. I have no opinion about what it was prior.
Q. It was $375,000?
A. No, sir. It was never 375,000. Your information is incorrect.
However, on January 1, 2011, $140,000 was presented to the membership as the initiation price under the new entity called Desert Mountain Club, Inc., which has a separate EIN number, is a separate corporation from Desert Mountain Properties.
Q. Well, I appreciate that. Let me show you just another letter and then we can take your break --
A. Thank you.

10:30:19-10:31:53 Page 69

Q. -- that you're interested in.
A. Appreciate that.
Q. I'm going to show you CL01449. It is a form letter. And the second page of this form letter is CL01450. You see both pages of this document on the screen.
My question relates to on page 1. It says, "The Desert Mountain Club Membership Contribution for Deferred Equity Golf clubs will increase to 325,000 from $275,000, effective January 1, 2005." [Quoted as read.]
A. Mr. Williams, you said --
MR. CALLAHAN: There's not -- there's not a question.
THE WITNESS: Yeah, right.
MR. CALLAHAN: He's read something to you.
THE WITNESS: Right.
BY MR. WILLIAMS:
Q. Did you just tell me that the contribution for the deferred equity golf membership was never $325,000?
MR. CALLAHAN: You asked 375,000, counsel.
THE WITNESS: You said 375.
MR. WILLIAMS: Oh, okay. I'm sorry.
THE WITNESS: Could we read that back, please?
MR. WILLIAMS: No.

10:31:54-10:33:08 Page 70

THE WITNESS: Okay.
BY MR. WILLIAMS:
Q. Was this --
A. I want to get it right, that's all.
Q. You understood --
A. Uh-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 $325,000?
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

10:33:13-10:34:08 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 your question.
MR. LAVOY: Yeah, go ahead and -- Bob, if that's your signature --
THE WITNESS: Answer it?
MR. LAVOY: Yeah, that -- that's fine.
MR. CALLAHAN: You can tell him that.
THE WITNESS: That is my signature. On

10:34:09-10:35:18 Page 72

advice of counsel, I just answered your question.
BY MR. WILLIAMS:
Q. Now, without looking at this document, don't you understand that from January 1, 2005 until the takeover, the price of a deferred equity golf membership was $325,000?
MR. LAVOY: Same instruction.
THE WITNESS: Advice of counsel, I can't answer the question.
BY MR. WILLIAMS:
Q. Well, can't or won't?
A. On advice --
MR. LAVOY: Mr. Williams, we've tried to raise this issue with -- with you in advance repeatedly, and you did not respond. It might be helpful if we adjourn the deposition and took the matter up with the court so that all parties could have guidance on what Mr. Jones can testify to. But please stop harassing him about this. You had fair notice.
MR. WILLIAMS: Please tell me, Mr. LaVoy, what's confidential about the price of a deferred equity golf membership from January 1, 2005 until the turnover?
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

10:35:23-10:36:26 Page 73

information -- or the information you're requesting could fall into. And if he were to answer your question, he would be exposing himself to civil liability to his former employer.
In fairness, you should have taken up our offer to resolve this in advance. And we ask you again to take it up with the judge so that he can confidently answer your questions without fear of civil liability to his former employer.
Will you do that?
MR. WILLIAMS: How, Mr. LaVoy, do you think telling me what the price of an equity golf membership club was during a period of time can run afoul --
MR. LAVOY: I would --
MR. WILLIAMS: -- of a membership confidentiality agreement?
MR. LAVOY: Mr. Williams --
MR. CALLAHAN: Counsel, it doesn't matter what Mr. LaVoy or I think. It matters what the former employer thinks. Mr. LaVoy is advising his client as to how to avoid civil liability to the former employer. We tried to get this resolved in advance to eliminate any concerns the former employer would have. You did not take us up on that.

10:36:27-10:37:45 Page 74

BY MR. WILLIAMS:
Q. Mr. Jones, between January 1, 2005 and the date of the turnover, was it public knowledge what the price of a deferred equity golf membership was?
MR. CALLAHAN: Foundation.
THE WITNESS: Mr. Williams, Desert Mountain Club, Inc. was formed January 1 of 2011. When that was formed, the membership price was 140.
BY MR. WILLIAMS:
Q. What was it the day before?
A. The day before at the closing it was 1 -- the new entity, Desert Mountain Club, Inc., was 140. I cannot -- as I've already gone on record here, only solely to protect myself to something I signed and agreed to from civil liability from a third party -- answer any questions about any documents prior to January 1, 2011.
Q. I'm not asking you about a document.
A. This is a document, is it not?
Q. Let me take that off the screen.
A. I don't know. I don't have it in front of me. But --
Q. Let me take it off the screen then.
My question is what was the price of a deferred equity golf membership the year before the turnover?

10:37:46-10:51:10 Page 75

A. Same issue.
MR. LAVOY: Again, Mr. Williams, it may make sense for us to take this issue up with the court so that it can decide what should be treated as confidential and alleviate Mr. Jones' concerns about potential civil liability. We're necessarily going to err on the side of breadth in our reading of the clause given that potential civil liability. And that's the reason we tried to work with you to resolve this in advance.
MR. WILLIAMS: Do you wish to take a break right now, Mr. Jones?
THE WITNESS: Yes, please. I asked for one about five, 10 minutes ago. Thank you.
MR. WILLIAMS: I'm agreeable.
THE VIDEOGRAPHER: Off the record at 10:38 a.m. This ends tape one.
(A recess ensued.)
THE VIDEOGRAPHER: We are back on the record. The time is 10:50 a.m. This begins disk two.
BY MR. WILLIAMS:
Q. Is it accurate to say, Mr. Jones, that the price of a golf equity membership increased from $75,000 to $175,000 on January 1, 1998?
A. Counsel, as you know, I've been advised by my counsel I can't answer the question because it goes to a

10:51:13-10:52:37 Page 76

separate entity.
On January 1 --
MR. LAVOY: Bob, hold on one second.
Can you read the question back?
I want to see if this falls within the scope of this confidentiality clause. So if you could read the question back.
(The record was read by the court reporter as follows:
QUESTION: Is it accurate to say, Mr. Jones, that the price of a golf equity membership increased from $75,000 to $175,000 on January 1, 1998?)
MR. LAVOY: That relates to information that may fall within the confidentiality clause of Mr. Jones' employment agreement with the prior club owner. And to answer it, he'd be putting himself at risk of civil liability. So I'm instructing you not to answer.
We encourage you to take the matter up with the judge so that he's relieved of that risk and can answer all your questions fully if the judge deems that appropriate.
BY MR. WILLIAMS:
Q. Is it accurate -- Are you going to follow your counsel's advice and not answer that question?

10:52:39-10:53:40 Page 77

A. Yes. I'm following my counsel's advice.
Q. Good decision.
Is it accurate to say, Mr. Jones, that on January 1, 2000, the price to have an equity golf membership went from 175,000 to $225,000?
MR. LAVOY: Same.
THE WITNESS: Advice of counsel, I'm not -- cannot answer the question.
BY MR. WILLIAMS:
Q. Is it accurate to say that on January 1, 2005, the price of an equity golf membership went from $275,000 to $375,000?
MR. LAVOY: What was the time range on that one, Mr. Williams?
MR. WILLIAMS: This is -- I'll restate the question in case I flubbed that number.
MR. CALLAHAN: Well, you misstated it again. You said 375. And I think we established earlier you meant to say 325. So that at least is correctible.
MR. WILLIAMS: Oh, you know, I see the problem here. My bookmark is wrong. I'm going to change my bookmark so I don't foul this up again.
MR. CALLAHAN: Best of luck.
MR. WILLIAMS: I foul up everything, Mr. Callahan. I'm not a very smart man, as you figured

10:53:43-10:55:02 Page 78

out.
MR. CALLAHAN: I doubt that from the bottom of my heart, Mr. Williams. I think you're very smart.
BY MR. WILLIAMS:
Q. Is it accurate to say, Mr. Jones, that on January 1, 2005 -- Let's go back one more.
Is it accurate to say, Mr. Jones, that on January 1, 2004, the price of an equity golf membership went up to 275,000 from the previous price of $225,000?
MR. LAVOY: Same.
And just to give you advance warning, Mr. Williams, any questions that you have that relate to the internal policies and procedures and operations of the prior club, we're going to have the same concern and objection.
We just can't -- he could be put at civil liability. And that's the reason we tried to resolve this with you in advance and -- and, if needed, go to the court. But you didn't respond. So please don't ask those questions.
If -- if you'd like to go to the court after today and let's get this resolved, we can resume the deposition depending on the ruling of the court. And everything will go a lot smoother.

10:55:04-10:56:15 Page 79

BY MR. WILLIAMS:
Q. Is it accurate to say -- Well, you're not going to answer the last question, right?
A. I'm not sure what your question was.
MR. WILLIAMS: Read the last question back.
MR. LAVOY: I -- I heard his last question.
THE WITNESS: Okay.
MR. LAVOY: I heard your last question. And my comment was the same. He's not going to answer it because he doesn't want to be put at risk of civil liability. Frankly, shame on you for trying to put him in that pinch. And let's move on.
MR. WILLIAMS: Okay. For my purposes, Mr. Court Reporter, would you please read back the last question?
(The record was read by the court reporter as follows:
QUESTION: Is it accurate to say, Mr. Jones, that on January 1, 2004, the price of an equity golf membership went up to 275,000 from the previous price of $225,000?)
MR. WILLIAMS: Okay. We know you're not going to answer that one because you were instructed not to answer that question. So let me ask you the next one.

10:56:15-10:56:59 Page 80

BY MR. WILLIAMS:
Q. Is it accurate to say, Mr. Jones, that on January 1, 2005, the price of an equity golf membership went up to $325,000 from $275,000?
MR. LAVOY: Same.
THE WITNESS: Advice of counsel, I cannot answer the question as it goes to the prior entity, which I've instructed you multiple times that I couldn't answer it.
MR. WILLIAMS: You instructed me or just told me?
THE WITNESS: I just told you.
MR. WILLIAMS: Okay.
THE WITNESS: Same as instructed.
MR. WILLIAMS: Well, actually, it's not an instruction.
THE WITNESS: Okay. Told.
MR. LAVOY: Could we stop the bickering, Mr. Williams?
MR. WILLIAMS: It's more badinage than bickering.
MR. LAVOY: What is it?
MR. WILLIAMS: Badinage.
BY MR. WILLIAMS:
Q. Is it accurate to say, Mr. Jones, that on

10:57:02-10:58:32 Page 81

January 1, 2011, the price of an equity golf membership went from $325,000 to $140,000?
MR. LAVOY: Same.
THE WITNESS: Can't answer that question on advice of counsel. Goes to the prior entity, not Desert Mountain Club, Inc., which was started 1-1 of 2011. The purchase was approved by the members. The members approved the bylaws. And they signed the conversion agreement. They joined a new entity. The membership price approved by the members and the board of directors was 140,000 bucks.
BY MR. WILLIAMS:
Q. Prior to that, it had been 325,000, hadn't it?
A. I cannot answer that question on advice of counsel, as it goes to the prior entity.
Q. And the price today for a golf equity membership is?
A. Today the trailing rate is around 45- to 53,000.
Q. When you say the trailing rate, what do you mean?
A. It changes every month because members get to set their price, whatever they want to sell it for. If they want to sell it below the established transfer fee price and initiation price of 65,000, they can do that.
Q. What does the transfer fee cover?
MR. CALLAHAN: Object to the form.

10:58:39-10:59:52 Page 82

THE WITNESS: Transfer fee pays for debt. We have a -- a debt for the club. It pays for capital.
MR. CALLAHAN: Now, let's -- let's stop this for a minute. Because you're now going into current -- the answer you're getting -- and the reason for my 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 leeway on this.
I hadn't stood on my very reasonable request 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.
I'm going to instruct him not to answer that question in that way. If you want to clarify what you mean by what it covers, and it means something else, maybe he can answer.
BY MR. WILLIAMS:
Q. Is it accurate to say that if I ask you questions about how the club uses transfer payments, you're not going to tell me?
A. On advice of counsel --
MR. LAVOY: Well, and just for the record, Mr. Williams, I'd like to clarify that Mr. Jones is subject to an employment agreement with a confidentiality

10:59:55-11:01:10 Page 83

clause, not only with respect to the prior entity, but with respect to the current entity. And you did not seek to resolve these issues in advance of the deposition. And asking him these questions now puts him at risk of civil liability. It's unfair. And he's not going to answer.
MR. WILLIAMS: Well, Mr. Callahan, are you objecting to your chief operating officer telling me how transfer fees are used today?
MR. CALLAHAN: In light of your unwillingness to abide by the confidentiality provision that is in Mr. Jones' contract, your unwillingness to work that out with the judge, yes.
MR. WILLIAMS: You represent the entity that's got the confidentiality clause. So you're --
MR. LAVOY: Mr. Williams, he proposed --
MR. WILLIAMS: Correct?
MR. LAVOY: He made a proposal to you in writing that would have allowed you to ask questions of unlimited scope with regard to the current entity that would have given you open -- you know, open range to ask everything you wanted to ask with regard to the new entity. You did not even dignify that with a response. You did not even attempt to work that out. You snubbed everybody's efforts to try to resolve these issues in advance. And today you're feigning indignancy.

11:01:17-11:02:37 Page 84

This -- this is wrong, Mr. Williams. The lack of professionalism in you not responding to our pre-deposition communications and trying to work this out, which is what judges expect lawyers to do, it's wrong. You know better. You knew what you were doing in not responding. You wanted this controversy today.
So if you're not willing to give him the reasonable 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 answer. And that's your decision for -- for choosing not to have the discussion or not to go to the judge.
MR. WILLIAMS: Mr. LaVoy, let me disabuse you of the notion that I am feigning indignity or that I am trying to portray myself as being the least bit indignant. I'm not. I just take things as they come.
MR. LAVOY: Well, that's the problem. You take them -- you kick the can down the road and take them as they come and not deal with them in advance, as all the other attorneys in this case asked you to do last week. You chose not to respond and that's why we're here today.
MR. WILLIAMS: Isn't there only one other lawyer in this case, Mr. Callahan?
MR. LAVOY: I'm his personal counsel. And the counsel for the entity wrote you as well.

11:02:40-11:03:41 Page 85

MR. WILLIAMS: Did you --
MR. LAVOY: And you responded to neither of us.
MR. WILLIAMS: Did you ask Mr. Callahan if there was going to be a problem if the client individually answered questions like this? Or did you sort of --
MR. LAVOY: Do you recall two written communications from each of us raising these confidentiality issues with respect to the old entity and the current entity and proposing conditions that would allow you to ask and receive answers for these types of questions? Do you recall those communications that you did not respond to?
MR. WILLIAMS: Mr. Callahan, do you care if he answered these questions I'm asking him?
MR. CALLAHAN: Do I care as a --
MR. WILLIAMS: As the lawyer for the entity.
MR. CALLAHAN: Whether I care or not is about as irrelevant as most of the questions you presented this morning, Mr. Williams.
What the club has instructed is that there is a confidentiality provision, which they offered to waive so long as you were willing to agree to reasonable restrictions that allowed you full and unfettered use of this transcript in connection with the litigation

11:03:42-11:04:34 Page 86

involving the Clarks that prohibited its dissemination outside. There's no way in which you or your clients could potentially be prejudiced by that agreement, yet you not only refused to agree to it, you refused to even respond, putting us into this lovely mess we're in this morning.

I agree with Mr. LaVoy, that causes a lack of professionalism. There is an agreement between Mr. Jones and the current entity. Mr. LaVoy is here as Mr. Jones' personal counsel to advise him. You know the conditions on which the club is able to waive it. I think your question has been fully answered in this regard. If you have more questions for the witness, you might want to focus your efforts there.

MR. WILLIAMS: Who should I ask at the Desert Mountain Club about the reasons for this concern?

MR. LAVOY: Okay. We're adjourning the deposition. We're going to take this issue up with the judge. This is a waste of time.

MR. WILLIAMS: Are you adjourning this deposition, Mr. Callahan?

MR. CALLAHAN: Mr. LaVoy just did.

MR. LAVOY: I'm adjourning for --

MR. CALLAHAN: He represents Mr. Jones personally.

11:04:35-11:05:26 Page 87

MR. LAVOY: Mr. Jones in his individual capacity. The rules allow a deposition to be adjourned to address these kinds of issues. And at this point, I think that's appropriate. We've given you a fair opportunity to handle this professionally and you've declined. So we're going to go to the judge.

MR. WILLIAMS: Well, okay. I do not agree with the adjournment. I'd like to continue --

MR. LAVOY: I'm not asking for your agreement.

MR. WILLIAMS: Okay. You'll file your motion soon then?

MR. LAVOY: I'll talk with Mr. Callahan about the motion.

MR. WILLIAMS: Are you going to coordinate with Mr. Callahan about this motion? Is that what you do?

MR. CALLAHAN: How we choose to handle it is absolutely none of your concern. There will be an appropriate motion filed, whether it's filed by Mr. LaVoy or by the club.

MR. WILLIAMS: Okay. But you two will work that out, correct?

MR. CALLAHAN: Well, we tried to work it out with you, and you declined. So --

MR. LAVOY: Yeah, I guess we'll --

11:05:27-11:06:05 Page 88

MR. CALLAHAN: We'll try and work it out and then take it up with the court.

MR. WILLIAMS: Well, okay. Mr. -- Mr. LaVoy has left the room with the witness.

Are you, likewise, going to leave the room, Mr. Callahan?

MR. CALLAHAN: If there's something you'd like to discuss, I'm happy to stay and discuss it with you.

MR. LAVOY: Mr. Williams --

MR. CALLAHAN: But I don't think we're going to be having a deposition here. We don't have a witness.

MR. WILLIAMS: Well, I guess we'll -- I guess we'll have to conclude because the witness left.

MR. CALLAHAN: It makes it very hard to take a deposition.

MR. WILLIAMS: It does.

MR. CALLAHAN: Shall we go off -- shall --

MR. LAVOY: There's something we can agree on, Mr. Williams. I knew it was possible.

MR. WILLIAMS: Should we go off the record, Mr. Callahan?

MR. CALLAHAN: Probably.

MR. WILLIAMS: Okay.

THE VIDEOGRAPHER: We are off the record.

11:06:07-11:06:13 Page 89

The time is 11:05 a.m. This ends tape one.

(The deposition was adjourned at 11:05 a.m.)

STATE OF ARIZONA)
COUNTY OF MARICOPA)

BE IT KNOWN that the foregoing proceedings were taken before me; that the witness before testifying was duly sworn by me to testify 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.

I CERTIFY that I am in no way related to any of the parties hereto nor am I in any way interested in the outcome hereof.

[ ] Review and signature was requested.
[ ] Review and signature was waived.
[X] Review and signature was not required.

I CERTIFY that I have complied with the ethical obligations set forth in ACJA 7-206(F)(3) and ACJA 7-206 (J)(1)(g)(1) and (2). Dated at Phoenix, Arizona, this 20th day of May, 2015.

Gerard T. Coash, RMR
Certified Reporter
Arizona CR No. 50503

I complied with ACJA 7-206 (J)

COASH & COASH, INC.
Registered Reporting Firm
Arizona RRF No. R1036

D

E

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H

Exhibit 2

FENNEMORE CRAIG, P.C.
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Desert Mountain Club, Inc.

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

DESERT MOUNTAIN CLUB, INC., Plaintiff, v. THOMAS CLARK and BARBARA CLARK, husband and wife, Defendants.	No. CV2014-015334 **DECLARATION OF CHRISTOPHER L. CALLAHAN** (Assigned to the Hon. Dawn Bergin)

I, Christopher L. Callahan, declare as follows:

1. I have personal knowledge of the matters and facts set forth in the declaration and am competent to testify to such matters and facts as necessary.

2. I am a director at Fennemore Craig, P.C., and am the lead counsel in the representation of Desert Mountain Club, Inc. (the "Club") in the above-captioned litigation. I have been assisted in the Club's representation in this matter by Theresa Dwyer-Federhar, Seth Schucknecht, and Emily Ward.

3. In the Declaration of Ronald Yelin, attached as Exhibit A to Defendants' Motion to Strike and Response to Motion for Protective Order, Mr. Yelin states that he met with Chris LaVoy in connection with the Club's demand letter regarding Mr. Yelin's delinquent dues. Mr.

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.

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

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 www.desertmountaingolfscam.com (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.

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

12. At the beginning of the deposition, I again proposed that the deposition testimony 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 deposition so that the confidentiality issues could be resolved by the Court, but Mr. Williams indicated that he would prefer to proceed to see whether any of his proposed questions raised confidentiality concerns.

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

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

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 6/15/2015 By _____
Christopher L. Callahan

10496220.1/029730.0011

Exhibit A

CALLAHAN, CHRISTOPHER

From: CALLAHAN, CHRISTOPHER
Sent: Friday, May 15, 2015 11:14 AM
To: Daryl M. Williams
Cc: SCHUKNECHT, SETH
Subject: FW: Executive Employment Agreement between the Desert Mountain Club and Mr. 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 "Agreement") is made and entered into on FEBRUARY 2, 2015, to be effective as of January 1, 2015 ("Effective Date"), by and between **Desert Mountain Club, Inc.**, an Arizona corporation, and its subsidiaries (the "Club"), and **Robert E. Jones II** (the "Executive").

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. Employment. 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.

2. Term. [redacted]

3. No Conflicting Duties. [redacted]

4. Compensation and Benefits.

4.1. Base Salary and Total Target Compensation.

4.1.1. Base Salary.

[redacted]

4.1.2. Total Target Compensation Payable to Executive.

[redacted]

[redacted]

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

4.2.1. Annual Incentive Performance Bonus. [redacted]

[redacted]

[redacted]

4.2.2. Long Term Incentive Performance Bonus. [redacted]

[redacted]

4.2.3 2015 Retention Bonus. [redacted]

4.2.4 Incentive Performance Bonus Procedures. [redacted]

[redacted]

4.2.5. Code Section 457(b) Plan. [redacted]

4.3. Participation in Benefit Plans. [redacted]

RCB
PBW

4.4. Automobile Allowance. [redacted]

4.5. Other Allowances. [redacted]

4.6. Club Usage. [redacted]

4.7. Business Expenses. [redacted]

5. Termination.

5.1. Disability. [redacted]

[redacted]

5.2. Death of Executive. [redacted]

5.3. Termination for Cause. [redacted]

[redacted]

[redacted]

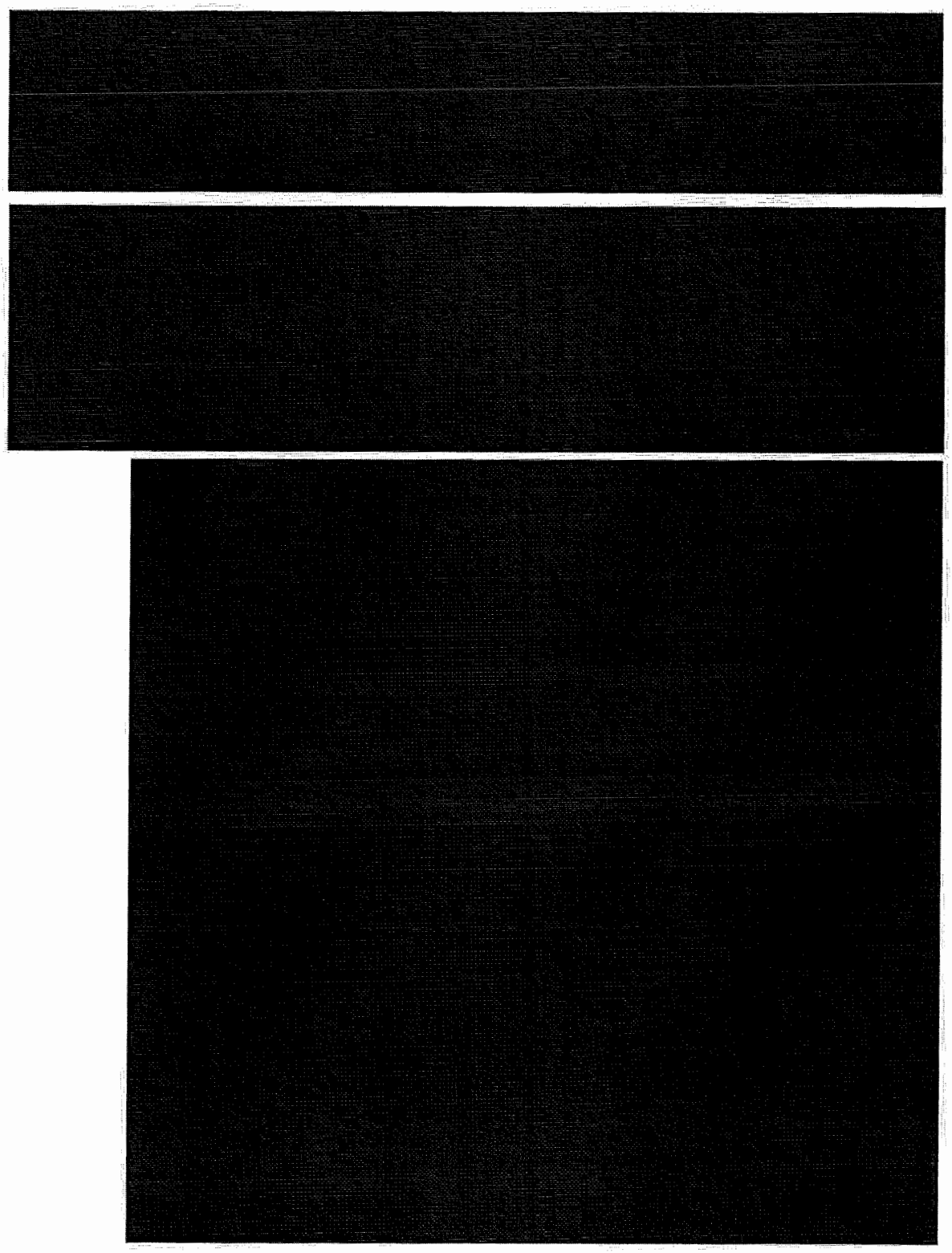
5.4. Resignation. [redacted]

5.5. (Intentionally Omitted).

5.6. Termination Without Cause. [redacted]

5.7. Surrender of Records and Property. [redacted]

6. Compensation Upon the Termination of Executive's Employment. [redacted]



[redacted]

7. Ventures. [redacted]

8. Restrictions.

8.1. Definitions. [redacted]

8.1.1. "Restricted Field" [redacted]

8.1.2. "Non-Competition Period" [redacted]

8.1.3. "Business Territory" [redacted]

8.1.4. "Non-Solicitation Period" [redacted]

8.1.5. "Person" [redacted]

8.2. Non-Disclosure Obligations. 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.

8.3. Non-Competition Obligations. [redacted]

8.4. Agreement Not to Solicit Club Members. [redacted]

8.5. Agreement Not to Solicit Employees or Interfere with Vendors. [redacted]

[redacted]

8.6. Non-Disparagement. [redacted]

8.7. Reasonableness. [redacted]

9. Ownership of Work Product. [redacted]

10. Other Provisions.

10.1. Governing Law. [redacted]

10.2. Injunctive Relief. [redacted]

10.3. Prior Agreements. [redacted]

10.4. Assignment. [redacted]

10.5. Dispute Resolution.

10.5.1. Informal Negotiation. [redacted]

[redacted]

10.5.2. Mediation. [redacted]

10.6. Withholding Taxes and Right of Offset. [redacted]

10.7. Amendments. [redacted]

10.8. No Waiver. [redacted]

10.9. Severability. [redacted]

10.10. Survivability. [redacted]

10.11 Code Section 409A. [redacted]

10.12 Cost and Fees. [redacted]

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

"Club": **Desert Mountain Club, Inc.**

By: **Paul Wutz**
Title: **President**

"Executive":

Robert E. Jones II

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

[redacted]

Recitals

[redacted]

Agreement

[redacted]

1. **Severance Benefits:** [redacted]

2. **Release:**

2.1 **By Employee:** [redacted]

[redacted]

2.2 **By Employer.** [redacted]

[redacted]

3. **Waiver of Age Discrimination Claims:** [redacted]

[redacted]

4. **Covenant Not to Sue:** [redacted]

5. **Representations:** [redacted]

[redacted]

6. **No Future Employment:** [redacted]

7. **Wage Payment:** [redacted]

8. **Modification and Waiver:** [redacted]

9. **Attorneys' Fees and Costs:** [redacted]

10. **Entire Agreement:** [redacted]

11. **Understanding of Release Agreement:** [redacted]

12. **Choice of Law and Venue:** [redacted]

13. **Severability:** [redacted]

14. **Binding Effect:** [redacted]

ADDITIONAL CLAUSES:

1. **Termination of Employment:** [redacted]

2. **Confidentiality:** [redacted]

3. **Non-Disparagement:** [redacted]

4. **Employer Property and Documents:** [redacted]

5. **No Admission of Liability:** [redacted]

[redacted]

6. **Non-Disclosure:** [redacted]

7. **Non-Compete:** [redacted]

8. **Non-Solicitation:** [redacted]

9. **Assistance with Litigation:** [redacted]

10. **Breach of Release Agreement:** [redacted]

11. **No Construction Against Either Party:** [redacted]

[redacted]

Robert E. Jones II

February 2, 2015
Date

Desert Mountain Club, Inc.

2/2/2015
Date

By: PAUL F. WUTZ

Title: PRESIDENT

Exhibit 4

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

Attorneys for Plaintiff
Desert Mountain Club, Inc.

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

DESERT MOUNTAIN CLUB, INC., Plaintiff, v. THOMAS CLARK and BARBARA CLARK, husband and wife, Defendants.	No. CV2014-015334 **PLAINTIFF'S INITIAL DISCLOSURE STATEMENT** (Assigned to the Hon. Dawn Bergin)

Pursuant to Rule 26.1, Arizona Rules of Civil Procedure, Plaintiff Desert Mountain Club, Inc. ("Plaintiff" or the "Club") discloses the following information. Plaintiff incorporates by reference all documents, pleadings, and correspondence exchanged between the parties. The information contained herein is based on Plaintiff's investigation to date and on Plaintiff's information and belief. Discovery and investigation are continuing and Plaintiff reserves the right to rely on subsequently discovered documents and information. The contents of this disclosure statement are provisional and subject to supplementation, amendment, explanation, change, and amplification. Accordingly, if any part of this disclosure statement is read to a fact finder, fairness requires that the jury be informed of the preliminary nature of this disclosure, and this preliminary statement should be read to provide context for the portion of the disclosure statement being read.

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.

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.

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

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

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

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

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 . . . .

Id.

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

II. LEGAL THEORIES UPON WHICH CLAIMS ARE BASED.

Declaratory Relief. The Club requests that the Court declare: that the provisions of the Membership Agreement and the Bylaws regarding the manner in which Members of the Club may terminate their Memberships are enforceable; that Defendants cannot unilaterally terminate their obligation to pay dues, assessments and other charges properly imposed by the Club simply by resigning their Membership; that Defendants' attempted unilateral resignation from the Club was not effective to terminate Defendants' ongoing obligation to pay all dues, fees, assessments and other charges imposed by the Club; and that until such time as their Membership has been 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 may be amended from time to time.

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

P.2d 318, 320 (1966) (citing *Galbraith v. Johnston*, 92 Ariz. 77, 373 P.2d 587 (1962)).

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

III. THE NAMES, ADDRESSES, AND TELEPHONE NUMBERS OF ANY WITNESSES THE DISCLOSING PARTY EXPECTS TO CALL AT TRIAL.

Plaintiff has yet to make a determination concerning the identity of the witnesses it will call at trial. Plaintiff, however, may call one or more of the following individuals listed in this section. Plaintiff may also call any individual listed in Section IV, and/or any individual listed by any other party. These designations are subject to any objections Plaintiff may raise before or during trial.

1. Robert Jones
c/o Chris Callahan
Fennemore Craig P.C.
2394 East Camelback Road, Suite 600
Phoenix, AZ 85016

2. Kelly Rausch
c/o Chris Callahan
Fennemore Craig P.C.
2394 East Camelback Road, Suite 600
Phoenix, AZ 85016

3. Debbie Delcore
c/o Chris Callahan
Fennemore Craig P.C.
2394 East Camelback Road, Suite 600
Phoenix, AZ 85016

4. Thomas Clark
c/o Daryl Williams
6225 North 24th Street, Suite 125
Phoenix, AZ 85016

5. Barbara Clark
c/o Daryl Williams
6225 North 24th Street, Suite 125
Phoenix, AZ 85016

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.

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.

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.

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.

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.

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.

IX. LIST OF DOCUMENTS OR ELECTRONICALLY STORED INFORMATION OR CATEGORIES OF DOCUMENTS OR ELECTRONICALLY STORED INFORMATION WHICH THE DISCLOSING PARTY BELIEVES MAY BE RELEVANT TO THE SUBJECT MATTER OF THE ACTION.

Plaintiff is aware of the following documents that may be relevant to this case:

1. Dual Membership Agreement, dated April 27, 1988, by and among Desert Mountain Development Company, Inc., and Thomas Clark and Barbara Clark.
2. Deferred Equity Golf Membership Agreement, dated November 11, 1996, by and among Desert Mountain Properties, d/b/a The Desert Mountain Club, and Thomas Clark and Barbara Clark.
3. Bylaws of the Desert Mountain Club, as Revised Effective July 1, 1994.
4. Deferred Equity Membership Plan for the Desert Mountain Club, Effective Date: July 1, 1994.
5. Bylaws of the Desert Mountain Club, as revised effective March 31, 2004.
6. Bylaws of the Desert Mountain Club, as revised effective March 31, 2006.
7. Deferred Equity Membership Plan for the Desert Mountain Club, as revised effective March 31, 2006.
8. Membership Conversion Agreement, dated December 21, 2010, by an among Desert Mountain Club, Inc. and Thomas Clark and Barbara Clark.
9. Desert Mountain Club Bylaws, effective December 31, 2010.
10. Desert Mountain Club Bylaws, effective March 19, 2012.
11. Desert Mountain Club Bylaws, effective July 1, 2013.
12. Letter dated August 28, 2013, from Debbie Delcore to Thomas Clark, confirming that Mr. Clark's Membership was placed on the Equity Golf Membership Reissuance List on June 26, 2013.
13. Email dated July 22, 2013, from Tom Clark to Tom Clark, including Desert Mountain Golf Membership Request for Reissuance Form.

14. Letter, undated, from Thomas Clark to Desert Mountain Club, stating Mr. Clark's resignation as a member of the Club.

15. Desert Mountain Club Bylaws, effective August 1, 2014.

16. Desert Mountain Club Member Inquiry Transactional Detail Listing, dated 4/16/2015, for Thomas Clark, showing amounts owed to the Club for Membership Number 352 January 1, 2014 – April 2015.

DATED this 4th day of May, 2015.

FENNEMORE CRAIG, P.C.

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

ORIGINAL OF THE FOREGOING
mailed this 4th day of May, 2015, to:

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

_____

VERIFICATION

I, Kelly Rausch, individually and on behalf of the Desert Mountain Club, Inc. declare under penalty of perjury that the factual assertions contained in the foregoing Rule 26.1 disclosure statement, as they pertain to my actions, communications and information in my possession, are true and correct to the best of my knowledge, information and belief.

Executed this 29th day of April, 2015.

/Kelly Rausch

Kelly Rausch

Date 4/16/2015
Time 1:12 PM

DESERT MOUNTAIN CLUB
Member Inquiry Transaction Detail Listing

Member # : 352 Thomas Clark Class : 040 EQUITY GOLF Status: Suspended

Date	Reference	Dep	Code	Description	Amount	SC	Tax	Grat	Total
Period: 01-2014									
	BEGBAL			CHARGES					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	2396050		71F	S Boutique	5.00	0.00	0.40	0.00	5.40
01/07/14	909080		606	PC Golf Lessons	(80.00)	0.00	0.00	0.00	(80.00)
01/07/14	909230		606	PC Golf Lessons	(80.00)	0.00	0.00	0.00	(80.00)
01/20/14	1179		PAY	PAYMENT - THANK YOU	(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 Fee	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					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

Date 4/16/2015
Time 1:12 PM

DESERT MOUNTAIN CLUB
Member Inquiry Transaction Detail Listing

Member # : 352 Thomas Clark Class : 040 EQUITY GOLF Status: Suspended

Date	Reference	Dep	Code	Description	Amount	SC	Tax	Grat	Total
				Current	30 Days	60 Days		90+ Days	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			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

DESERT MOUNTAIN CLUB
Member Inquiry Transaction Detail Listing

Member # : 352 Thomas Clark Class : 040 EQUITY GOLF Status: Suspended

Date	Reference	Dep	Code	Description	Amount	SC	Tax	Grat	Total
	BEGBAL			Assessment Charges					0.00
	ENDBAL								0.00
	BEGBAL			Prior Year Balance					0.00
	ENDBAL								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: 06-2014									
	BEGBAL			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 # : 352 Thomas Clark Class : 040 EQUITY GOLF Status: Suspended

Date	Reference	Dep	Code	Description	Amount	SC	Tax	Grat	Total
	ENDBAL								0.00
	BEGBAL			Prior Year Balance					0.00
	ENDBAL								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 Year 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: 08-2014									
	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 Thomas Clark Class : 040 EQUITY GOLF Status: Suspended

Date	Reference	Dep	Code	Description	Amount	SC	Tax	Grat	Total
	BEGBAL			Prior Year Balance					0.00
	ENDBAL								0.00
				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 # : 352 Thomas Clark Class : 040 EQUITY GOLF Status: Suspended

Date	Reference	Dep	Code	Description	Amount	SC	Tax	Grat	Total
	ENDBAL								0.00
	BEGBAL			Prior Year Balance					0.00
	ENDBAL								0.00
				PERIOD TOTAL					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
	BEGBAL			Memo Billings					65,975.00
11/30/14			R02	Memo Bill Late Chrgs	989.63	0.00	0.00	0.00	989.63
	ENDBAL				989.63	0.00	0.00	0.00	66,964.63
	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					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: 12-2014									
	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				3,037.68	0.00	0.00	0.00	18,899.89
	BEGBAL			Memo Billings					66,964.63
12/31/14			R02	Memo Bill Late Chrgs	1,004.47	0.00	0.00	0.00	1,004.47
	ENDBAL				1,004.47	0.00	0.00	0.00	67,969.10

DESERT MOUNTAIN CLUB
Member Inquiry Transaction Detail Listing

Member # : 352 Thomas Clark Class : 040 EQUITY GOLF Status: Suspended

Date	Reference	Dep	Code	Description	Amount	SC	Tax	Grat	Total
	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					86,868.99
				Current	30 Days	60 Days		90+ Days	Total Due
				3,037.68	1,731.95	1,509.31		12,620.95	18,899.89
				1,004.47	989.63	975.00		65,000.00	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	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		I	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 Mem. 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					94,107.03
				Current	30 Days	60 Days		90+ Days	Total Due
				1,718.50	3,037.68	1,731.95		14,130.26	20,618.39
				1,019.54	1,004.47	989.63		65,975.00	68,988.64
				0.00	0.00	0.00		0.00	0.00
				4,500.00	0.00	0.00		0.00	4,500.00
				0.00	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									
	BEGBAL			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 Thomas Clark Class : 040 EQUITY GOLF Status: Suspended

Date	Reference	Dep	Code	Description	Amount	SC	Tax	Grat	Total
	BEGBAL			Memo Billings					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

Member # : 352 Thomas Clark Class : 040 EQUITY GOLF Status: Suspended

Date	Reference	Dep	Code	Description	Amount	SC	Tax	Grat	Total
	BEGBAL			Memo Billings					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

Exhibit 5

Desert Mountain Club, Inc.

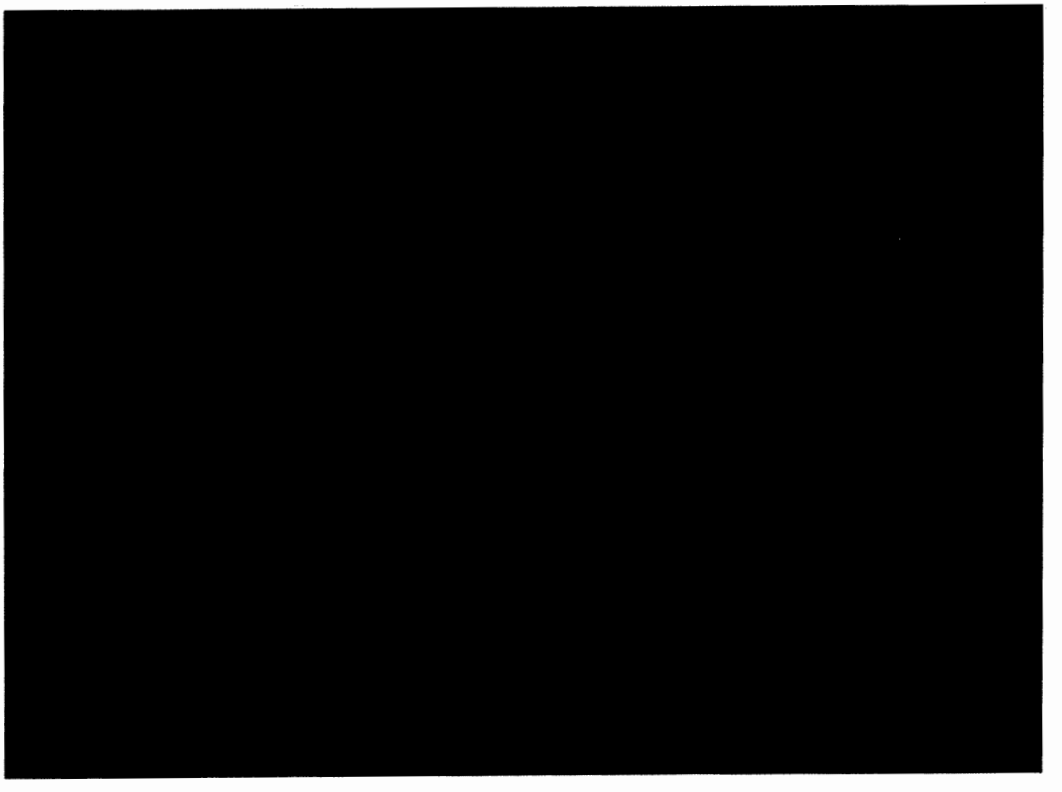
MEMBER
RULES AND REGULATIONS

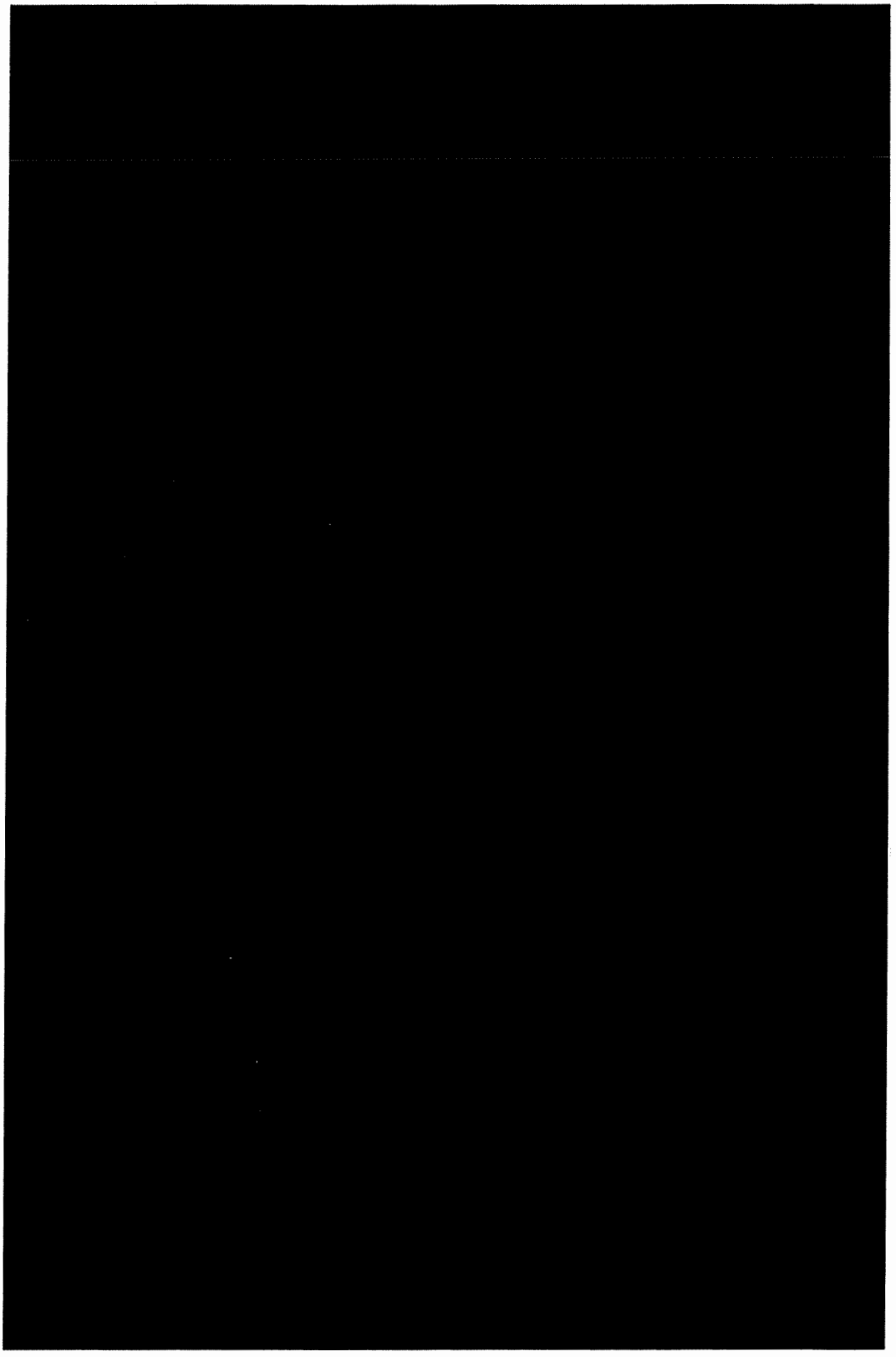
Effective January 1, 2012

INDEX

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 e-mail 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.

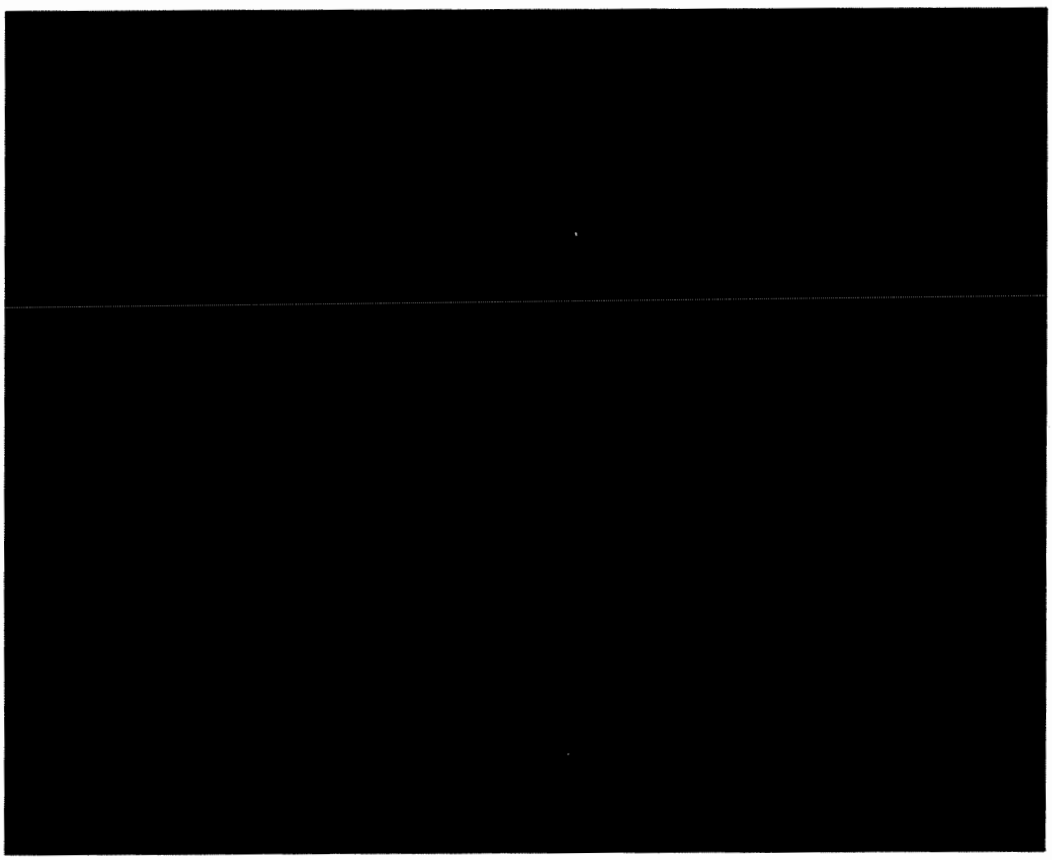
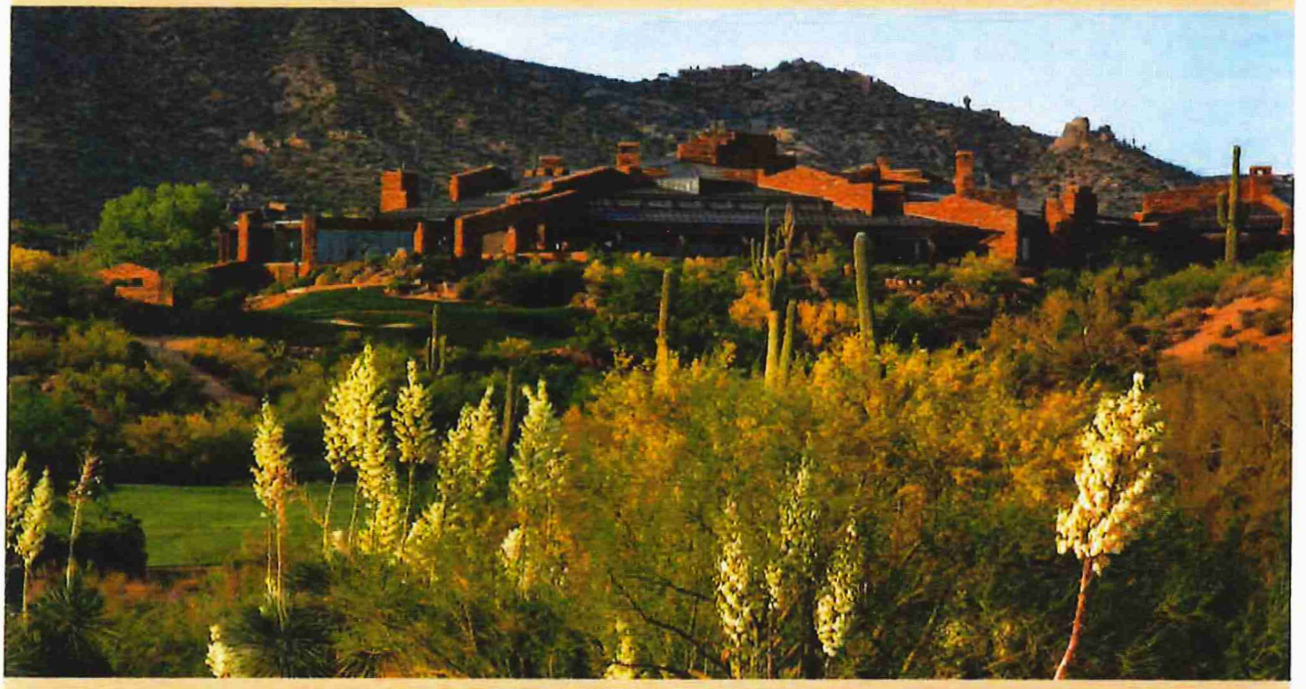


Exhibit 6



DESERT MOUNTAIN

Member Rules & Regulations

DESERT MOUNTAIN CLUB, INC. | SCOTTSDALE, AZ

EFFECTIVE JANUARY 1, 2014

— INDEX —

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

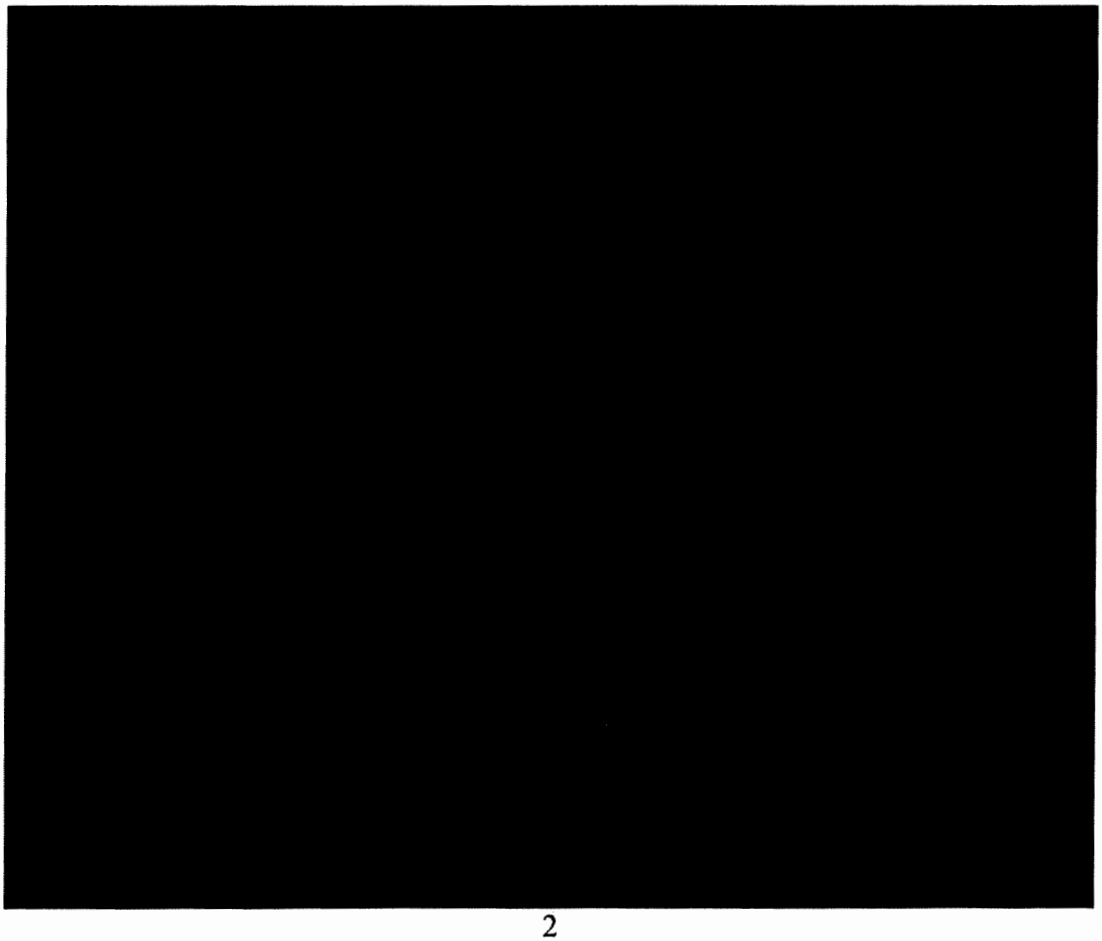


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Exhibit 7


MAY 20 2015 9:42:30
MAY 20 2015 10:07:02
MAY 20 2015 9:58:16

Exhibit 8

William D. Holm, Bar #007412
JONES, SKELTON & HOCHULI, P.L.C.
2901 North Central Avenue, Suite 800
Phoenix, Arizona 85012
Telephone: (602) 263-1749
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Attorneys for Defendant Jason Clemett

SUPERIOR COURT OF THE STATE OF ARIZONA

COUNTY OF MARICOPA

MARK WILLIAM FRANKLIN, an individual, Plaintiff, v. JASON JOHN CLEMETT and DANIEL BLANCHARD, Defendants.	NO. CV2010-033437 **DEFENDANT JASON CLEMETT'S RESPONSE TO PLAINTIFF'S MOTION FOR NEW TRIAL** (Assigned to the Honorable Dawn Bergin)

Defendant, Jason Clemett ("Defendant"), respectfully submits his Response to Plaintiff's Motion for New Trial. Defendant's Response is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

1. THE FACTS DID NOT PROVE LIABILITY

Plaintiff first argues that the evidence elicited at trial "proved" liability against Jason Clemett and Daniel Blanchard (collectively, "Defendants") because they both admitted to hitting Plaintiff. Plaintiff contends that although Plaintiff was not "physically combative," the jury improperly found for Defendants. To begin, the overwhelming evidence supported the position that Plaintiff instigated the incident and was, in fact, "physically combative." Several witnesses testified that Plaintiff was

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.

2. LEGAL STANDARD – THE TRIAL COURT SHOULD NOT VACATE THE 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).

3. **THE COURT PROPERLY GAVE AN INSTRUCTION CONSISTENT WITH A.R.S. § 12-711**

Under Arizona law:

> 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 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.

A.R.S. § 12-711 (2009) (emphasis added). With this statute in mind, the Court provided the following jury instruction:

> If Jason Clemett or Daniel Blanchard proves that Plaintiff Mark Franklin was under the influence of an intoxicating 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 **may** find Defendant Jason Clemett and Defendant Daniel Blanchard not liable to Mark Franklin.

(Emphasis added.) Plaintiff claims that the Court committed error by giving a jury instruction based on A.R.S. § 12-711 because: (1) it violates Article 18, § 5 of the Arizona Constitution by placing constraints on the jury's discretion; (2) it violates Article 2, § 31 of the Arizona Constitution by placing an unconstitutional limit on damages; (3) it is unconstitutionally vague; (4) it violates Article 18, § 6 of the Arizona Constitution because it abrogates the right to constitutionally-protected recovery; (5) it violates 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 address each of those arguments in turn.

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 contributory negligence or of assumption of risk, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury." Plaintiff argues that the Court's jury instruction on intoxicating liquor violated this requirement by unconstitutionally removing the jury's discretion.

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

Here, the plain language of A.R.S. § 12-711 is viewed as permissive because it provides the jury ***may*** find for the defendant based on plaintiff's intoxication. 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 language; it never removed the question of liability from the jury, nor required the jury to take any particular action. *Romero v. Southwest Ambulance*, 211 Ariz. 200, 205, 119 P.3d 467, 472 ("Section 12-711 neither removes the question of liability from the jury nor 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.

B. A.R.S. § 12-711 does not violate Article 2, § 31 of the Arizona Constitution

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

> 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. A.R.S. § 12-711 is not unconstitutionally vague

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.

Furthermore, "[a] statute is not unconstitutionally vague because one of its terms is not explicitly defined." *State v. Takacs*, 169 Ariz. 392, 395, 819 P.2d 978, 981 (App. 1991). "Nor is a statute unconstitutionally vague simply because it is susceptible to more than one interpretation." *Id.* "Whether a statute is unconstitutionally vague is 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 Legislature fails to define a phrase contained in a statute, courts will simply consider the phrase's definitions in respected dictionaries. *DeVries v. State*, 221 Ariz. 201, 207, ¶ 21, 211 P.3d 1185, 1191 (App. 2009); *see also* A.R.S. § 1-213 ("Words and phrases shall be construed according to the common and approved use of the language."). Black's Law Dictionary defines "under the influence" as "deprived of clearness of mind and self-control because of drugs or alcohol."

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. 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." The responding officer, Officer Justin Meyers (also trained to identify intoxication), testified that he detected a strong to moderate odor of an intoxicating beverage emanating from Plaintiff that Plaintiff appeared to be under the influence of alcohol. Consistent with that testimony, both Jason and Dawn Clemett testified that they saw Plaintiff was drinking and that he appeared drunk. Both Matthew and Dior Tidwell testified that Plaintiff always had a drink in his hand, and that he was drunk. Examining the phrase "under the influence" in the context of this case, there is simply no support for Plaintiff's argument; A.R.S. § 12-711 is not unconstitutionally vague.

D. A.R.S. § 12-711 does not violate Article 18, § 6 of the Arizona Constitution

Plaintiff next argues A.R.S. § 12-711 violates Article 18, § 6 of the Arizona Constitution because it "unconstitutionally instructs the jury to determine that a negligent

plaintiff was the sole cause of injury and deny a recovery." This Section of the Arizona 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.

In making this argument, Plaintiff fails to acknowledge that this issue has been analyzed by the Arizona Court of Appeals in *Romero*, 211 Ariz. 200, 119 P.3d 467. The *Romero* court explicitly held that A.R.S. § 12-711 does not violate Article 18, § 6 of the Arizona Constitution. In that case, the Court of Appeals recognized that "the legislature may permissibly regulate a cause of action without abrogating it, as along as reasonable 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 liability from the jury nor requires a jury to take a particular action." As such, the statute does not abrogate a cause of action.

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

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

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

Uniform Contribution Among Tortfeasors Act, A.R.S. §§ 12–2501 through 12–2509. This argument, on its face, appears to lack merit given the permissive language of § 12–711." *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.

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.

4. THERE WAS NO ERROR IN INSTRUCTING ON ASSUMPTION OF RISK

Plaintiff next argues the Court erred by instructing the jury on Plaintiff's assumption of risk. In this case, the Court's instruction on assumption of risk was taken directly from RAJI (Civil) 3d Fault 10. There was nothing improper about the instruction. 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, 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.

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

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

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

Plaintiff also cites to a non-binding Eight Circuit case and misstates the facts of that case to suggest that "malingering" is an improper medical diagnosis. In *Nichols v. Am. Nat. Ins. Co.*, 154 F.3d 875, 882 (8th Cir. 1998), the plaintiff objected when the 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 neuropsychological exam on Plaintiff. Dr. Borgaro administered sixteen tests on Plaintiff, interviewed him over two days, and reviewed his medical records. Dr. Borgaro's testimony was based on her **expert medical opinion** that Plaintiff was malingering, according to generally accepted medical criteria. Plaintiff simply ignores the fact that "malingering" is a valid medical diagnosis that requires expert training and is not simply an unfounded lay opinion.

6. DEFENSE COUNSEL DID NOT ENGAGE IN ANY MISCONDUCT

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

A. Defense counsel properly cross-examined Dr. Wu

Plaintiff first claims Defendants' counsel improperly cross-examined Dr. Wu with respect to the fact that Plaintiff's counsel only provided Dr. Wu with "select" medical records. First, that would be proper cross-examination of an expert witness. But more importantly, it was absolutely true in this case. Plaintiff's counsel provided Dr. Wu only select medical records for him to review. The jury is entitled to know what records were withheld, and what records Dr. Wu relied on to reach his opinions. Second, Plaintiff's allegations are not supported by the record. Reviewing the cross-examination 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 (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 cross-examination that somewhat resembles Plaintiff's allegation is an innocuous question that Plaintiff's counsel did not even object to:

> 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?
>
> A. Yes.

[Exhibit A at 65:3-6] Even if Plaintiff had a valid argument with respect to questioning Dr. Wu on what records he reviewed, Plaintiff never objected during trial and has thus waived any right to object here. *Hawkins*, 152 Ariz. at 496, 733 P.2d at 1079 ("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.").

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

Next, Plaintiff argues that Defendants' counsel improperly referred to "ROS" as "review of symptoms" during Dr. Robb's cross-examination. Plaintiff's counsel incorrectly mischaracterizes that testimony. During that questioning, Defendants' counsel was referring to Dr. Sarmiento's records, and Dr. Sarmiento's interpretation of "ROS" found in his records. During the course of Dr. Sarmiento's trial deposition, he referred to "ROS" as both review of "systems" and "symptoms." He used those terms interchangeably. *[Exhibit B – Dr. Sarmiento's Trial Testimony at 143:3-6]* There was no misconduct here and the jury was not mislead. Even if there was confusion, the Court issued an instruction to the jury clarifying what "ROS" meant. In addition, Plaintiff did not object to this questioning during Dr. Robb's cross-examination. *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).

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

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

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. Defendants' counsel properly questioned witness, Michael Cartwright, 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.[1]

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

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 36th 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 41st 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).

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

7. 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.

8. 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).

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

Plaintiff also argues that Defendants' counsel improperly used Plaintiff's prior conduct at hockey games during closing argument. The Court, however, specifically ruled that Defendants could use Plaintiff's prior conduct at hockey games as a basis for his "state of mind" with respect to whether he believed he would be ejected for misconduct at future games (including the game in this case). Defendants' counsel was attempting to do just that – offer evidence of prior misconduct to suggest Plaintiff was emboldened by that prior incident because he was not punished for it. Before Defendants' counsel could finish making that argument, Plaintiff's counsel objected. *[Exhibit E – Defendants' Closing Argument at 32:8-35:11]* This was exactly what the Court ruled Defendants could use this evidence for. Nevertheless, the Court then provided a curative 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?

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

Plaintiff also complains that Defendants improperly argued during closing arguments that Plaintiff sued Defendants' spouses to paint Plaintiff in a poor light. This is also a red herring. To begin, at no point during the 3-week trial did Defendants' counsel even suggest Plaintiff wrongfully sued Defendants' spouses. The portion of the closing argument identified by Plaintiff is innocuous and appears to be a poorly phrased sentence – likely the result of poor grammar. *[Exhibit E at 36:15-17]* Regardless, Plaintiff did not object to this statement, and it is too late to do so now. *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 more importantly, there is no indication that this harmless line affected the jury in any way. Without a timely objection, Plaintiff cannot raise it here.

11. 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[2]:

> 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 "well-behaved" at other hockey games. Once again, there was no error in permitting this evidence.

12. THE COURT DID NOT ERR IN ALLOWING CERTAIN FINANCIAL-RELATED EVIDENCE

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

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

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.

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

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

13. THE COURT DID NOT ERR IN PRECLUDING DEFENDANT'S YOUTUBE POSTS

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).

14. THE COURT PROPERLY SANCTIONED PLAINTIFF BY CUTTING 30 MINUTES OF PLAINTIFF'S TIME

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

[3] This issue has been heard by the Court numerous times. Defendant will not recite those facts here again.

15. THERE WAS NO ERROR IN LETTING A FORMER GIRLFRIEND TESTIFY

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.

16. THERE WAS NO ERROR CONCERNING EVIDENCE OF SEXUAL MATTERS

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

17. THERE WAS NO ERROR IN LETTING THE JURY CONSIDER 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

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.

18. THERE WAS NO ERROR IN PRECLUDING THE SOUND ON THE VIDEOS

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 **stipulated** 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.

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

"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. CONCLUSION

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

RESPECTFULLY SUBMITTED this 1st day of December, 2014.

JONES, SKELTON & HOCHULI, P.L.C.

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OSBORN MALEDON
A PROFESSIONAL ASSOCIATION ATTORNEYS AT LAW

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

KOSS CORPORATION, a Delaware corporation,

Plaintiff,

vs.

AMERICAN EXPRESS COMPANY, a New York corporation; AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC., a New York corporation; AMEX CARD SERVICES COMPANY, a Delaware corporation; DECISION SCIENCE, a business entity, form unknown; PAMELA S. HOPKINS, an individual; and DOES 1 through 50, inclusive,

Defendants.

Case No. CV2010-006631

DEFENDANTS' OPPOSITION TO THIRD PARTY DEFENDANT GRANT THORNTON LLP'S MOTION TO DISMISS THIRD-PARTY COMPLAINT

(Assigned to the Honorable Sally Duncan)

AMERICAN EXPRESS COMPANY, a New York corporation; AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC., a New York corporation; AMEX CARD SERVICES COMPANY, a Delaware corporation; PAMELA S. HOPKINS, an individual; and DOES 1 through 50, inclusive,

Third-Party Plaintiffs,

vs.

MICHAEL J. KOSS, an individual, SUJATA SACHDEVA, an individual, GRANT THORNTON LLP, an Illinois Limited Liability Partnership, and ROES 1 THROUGH 50, inclusive,

Third Party Defendants.

Defendants/Third Party Plaintiffs AMERICAN EXPRESS COMPANY; AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.; AMEX CARD SERVICES COMPANY and PAMELA S. HOPKINS (collectively, "AMEX") hereby oppose Third Party Defendant Grant Thornton LLP's ("Grant Thornton") Motion to Dismiss the Third-Party Complaint ("TPC").

I. INTRODUCTION

With substandard outside audits and no adequate controls in place, Grant Thornton allowed former Vice President of Finance Sujata Sachdeva ("Sachdeva") to embezzle $34 million dollars from Koss Corporation ("Koss") over more than ten years. Sachdeva's fraud would have continued indefinitely, were it not for the acts of AMEX. 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 in touch with law enforcement on December 18, 2009.

Grant Thornton served as Koss' outside financial auditor from at least 2004 through 2009. Had it provided even a modicum of its professed expertise – or paid the slightest attention – Grant Thornton would have noticed that over $20 million of company profits went missing. Indeed, through Sachdeva's simple scheme, many multiples more than the profits Grant Thornton was reporting were stolen under its "experts'" noses. Put simply, Grant Thornton had the ability – and professional responsibility – to put an end to Sachdeva's embezzlement, but failed to do so. Had Grant Thornton responsibly performed its financial audits, Sachdeva's crimes would 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 without legal support or merit.

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.

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

[1] 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.

II. BACKGROUND FACTS

A. Koss' Underlying Lawsuit Against AMEX.

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

Koss claims that – somehow – none of its officers or directors did or should have noticed this massive embezzlement. *See id.* Instead, Koss' mismanagement allowed the crimes to continue unchecked until AMEX (the only one to put a stop to Sachdeva's crimes) contacted Michael J. Koss, Chief Executive Officer and, at the time, Chief 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.

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

B. 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.

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

III. AMEX'S THIRD-PARTY COMPLAINT AGAINST GRANT THORNTON SUFFICIENTLY STATES CLAIMS FOR RELIEF

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.

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.

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 holds, in part and with respect to implied contractual indemnity, that, "implied indemnity should [not] be limited to tort cases involving dangerously defective 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 *Schweber* court draws a clear distinction between: (1) contractual indemnity; (2) implied contractual indemnity (at issue in the *Schweber* case); and (3) equitable 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 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 relationship requirement at all, it is only with respect to contractual and/or implied contractual indemnity. Thus, the availability of indemnity "when justice demands there 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 implied 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 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 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.*, 215 Ariz. 237, 242, 159 P.3d 547, 552 (2006) affirmed that, "both common-law and contractual indemnity 'share the same basis' – that is an '*obligation* resting on one party to make good a loss or damage another party has incurred.'" (emphasis added). As such, AMEX properly and sufficiently alleges that Grant Thornton is obligated to indemnify 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 "prepared financial audit statements for Koss" during the relevant time period; "Grant Thornton performed these services negligently, recklessly and inappropriately. Grant Thornton did not perform in a manner that met the standard for due professional care. As a result, Grant Thornton failed to detect Sachdeva's large-scale and obvious embezzlement."). AMEX's allegations that Grant Thornton's failure to perform its professional financial auditing services resulted in the meritless lawsuit brought by Koss against AMEX is more than sufficient to maintain its claim for equitable indemnity.

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.

The reason for this is simple – there is no such requirement that any particular type of relationship exist to bring a claim for implied contractual indemnity, let alone equitable indemnity. In fact, Arizona case law (like other states) is replete with examples of implied contractual indemnity cases (some including equitable indemnity claims as well) where the connection between the parties varies greatly depending on the factual circumstances. *See, e.g., Evans Withycombe*, 215 Ariz. 237, 159 P.3d 547 (2006) (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. 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 970 (1999) (employer/employee); *Schweber Elecs.*, 174 Ariz. 406, 850 P.2d 119 (1992) (distributor/manufacturer); *INA Insurance*, 150 Ariz. 248, 722 P.2d 975 (1986) (insurer/insured).

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

The Ninth Circuit focused on fairness and explained that the finder of fact must "examine 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 connection between appellant-successor-in-interest and respondent-manufacturer was sufficient to maintain a claim for equitable indemnity because the appellant "may be held liable for product defects caused by [respondent]." *Id.* The court explained that, "[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 to prohibit one from profiting by his own wrong at the expense of one who is either free from fault or negligent to a lesser degree." *Id.* Here, AMEX's equitable indemnity and 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 required.

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.

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

AMEX does not rely on principles of equitable indemnity nor any of its third-party 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.

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 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 "den[ies] Koss' allegations that [it is] somehow liable to Koss and den[ies] that [it] ha[s] caused Koss any damage." TPC, ¶¶ 4, 27; *see also id.* ¶ 45. The very purpose of the TPC is to shift the entire loss – if any – to those more justly liable, including Grant Thornton.

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.

In *Herstam*, the receiver for an insolvent insurance company brought lawsuits 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. 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 some of the defendants, the injured party waived its right to seek joint liability from both the settling and nonsettling defendants and specifically held the nonsettling defendants only severally liable. *Id.* at 113. The nonsettling defendants appealed, challenging the 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 decide whether a party allegedly injured by concerted action that normally would subject 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 indemnity from the settling parties." *Id.* at 114.

Importantly, the *Herstam* court specifically examined ***only*** whether a particular settlement agreement which imposed a "mutual ban and permanent injunction on all 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 114. While the court held that the nonsettling parties had no implied rights of contribution or indemnity under the circumstances presented in *Herstam*, the court based its decision on: (1) the fact that courts routinely "permit[] the waiver of advantageous statutory provisions by the intended beneficiaries" (the settlement agreements in *Herstam* waived the injured parties' legal right to hold nonsettling parties jointly liable); (2) the tendency for "the law [to] favor compromise and settlement" (*Herstam* involved "numerous parties," a "complaint that exceed[ed] 500 pages" and the court stressed that "even a partial compromise without the necessity of trial benefits both the parties and 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 undoubtedly a substantial inducement to the settlement."); and (3) the lack of any inequity to the nonsettling parties. *Id.* at 115-16.

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

held that although the statute of repose barred the contractor's contractual indemnity claim, it did not bar plaintiff's common law indemnity claim. *Evans Withycombe*, 215 Ariz. at 241; *see also Grubb & Ellis Mgmt. Servs.*, 213 Ariz. 83, 138 P.3d 1210 (2006) (landlord cross-complained against property manager for implied indemnity for all litigation costs and any judgment for which it may be liable.); *Heatec*, 219 Ariz. 293, 197 P.3d 754 (2008) (seller of product brought action against manufacturer based on statutory and common law indemnity.). AMEX's claims against Grant Thornton for equitable indemnity are likewise proper.

IV. CONCLUSION

For these reasons, AMEX respectfully request that the Court deny Third Party Defendant Grant Thornton's Motion to Dismiss the Third-Party Complaint.

Dated this 24th day of March, 2014.

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

STARR PASS RESORT DEVELOPMENTS LLC, Plaintiff, vs. WILLOWBEND/STARR PASS INVESTMENTS LLC, Defendant.	NO. C20061196 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY DECLARATORY JUDGMENT** (Assigned to Hon. John Davis)

Starr Pass Resort Developments LLC ("Developments"), by its attorneys, Solomon Pearl Blum Heymann & Stich LLP and Snell and Wilmer LLP, submits the following Memorandum of Points and Authorities in support of its motion for a summary declaratory judgment:

I. STATEMENT OF FACTS

A. Corporate Structure

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.)

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

(1) 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").

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

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

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

B. The Financing and Refinancing of the Resort

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

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 ¶ 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 ¶ 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 ¶ 20.) Unless the Term Sheet was signed and the Fee was paid, Credit Suisse would not proceed. (SOF ¶ 21.)

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

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 ¶ 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

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";

- "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], supersedes all prior agreements relating to the subject matter thereof and may not be changed, altered, or amended, except by a written instrument signed by [Resort Holdings]."**
- The Developments Agreement provides that Delaware law governs and controls 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.)

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

The Developments Agreement gives Developments, itself, without the authorization of Holdings (or Signature or Willowbend), the right and power to obtain refinancing. (SOF ¶ 44.) On the one hand, the Holdings Agreement does not address the Developments Agreement or the Resort Holdings Agreement but, once again, the Developments Agreement, on the other hand, specifically provides that it "supersedes all 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.)

II. CHOICE OF LAW

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

B. The Delaware Parol Evidence Rule Applies

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

III. THE COURT SHOULD GRANT DEVELOPMENTS' REQUEST FOR SUMMARY DECLARATORY RELIEF

A. 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 merits 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.

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

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).

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 fraud a court must give effect to the contract **as it is written,** and the terms or provisions of the contract, where clear and unambiguous, are conclusive. The intent of the parties, as ascertained by the language used, must control the interpretation of the contract. It is not within the province 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 one which the parties have made for themselves. Where the intent of the parties is expressed in clear and unambiguous language, there is no need or room for construction or interpretation and a court may not resort 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 the same rules of interpretation and enforcement as any other contract. *Mordka v. Mordka Enterprises*, 143 Ariz. 298, 693 P.2d 953 (App. 1984) (where the court held that a resolution signed by the shareholders of a corporation was a contract and enforced it); *Swanson v. The Image Bank*, 206 Ariz. 264, 77 P.3d 439 (2003). The law is the same in Delaware. *Hibbert v. Hollywood Park, Inc.*, 457 A.2d 339 (Del. 1983); *Gentile v. Singlepoint Fm., Inc.*, 788 A.2d 111 (Del. 2001) (*citing Hibbert* with approval); *Harrah's Entertainment, Inc. v. JCC Holding Co.*, 802 A.2d 294 (Del. Ch. 2002); *In Re Explorer Pipeline Co.*, 781 A.2d 705 (Del. Ch. 2001). For example, in *Harrah's*, the Court reasoned:

> 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).

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

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

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.

F. This Court Should Not Consider The Terms Of The Holdings Agreement

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.

Second, the Developments Agreement contains an integration clause providing that the "Agreement contains the entire agreement of [Resort Holdings] with respect to the subject matter [thereof], supersedes all prior agreements relating to the subject matter thereof and may not be changed, altered, or amended, except by a written instrument signed by [Resort Holdings]." (SOF ¶ 36.) Willowbend has admitted that, in order for it to prevail on its argument that the language of the Holdings Agreement controls, the Court would have to ignore the Integration Clause contained in the Developments Agreement. (SOF ¶ 39.) That clause is clear, unambiguous and not contradicted by any other language contained in the Developments Agreement. Consequently, this Court should not 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 incorporates that document explicitly. *See Skouras v. Admiralty Enterprises, Inc.*, 386 A.2d 674, 678 (Del.Ch. 1978) ("The strict requirements for incorporating by reference an otherwise independent document are that such document be in existence when the incorporating document is executed and that the document to be incorporated is referred to so as to reasonably identify it."). The Developments Agreement does not explicitly, or even implicitly, incorporate by reference the Holdings Agreement. (SOF ¶ 47.) Nor does the Holdings Agreement incorporate by reference the Developments Agreement, which was not even in existence at the time that the Holdings Agreement was drafted. (SOF ¶¶ 41-42, 46.) If the parties had truly intended that the instruments be read together, or that the Holdings Agreement controlled, it could easily have indicated that intent in the terms of the Developments Agreement. It did not.

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

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.

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.

IV. CONCLUSION

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

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

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 refinancing of the Senior Debt and/or the Mezzanine Debt and entering into appropriate contracts on behalf of Developments with lenders and prospective lenders in this regard, until he dies, is removed or replaced, or resigns.

DATED this 30th day of March, 2006.

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Attorneys for Plaintiff Starr Pass Resort Developments LLC

ORIGINAL of the foregoing hand delivered on this ___ day of March, 2006, to:

The Honorable John Davis
Pima County Superior Court
111 W. Congress Street
Tucson, AZ 85701

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