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*and the Real Estate Commissioner, Susan Nicolson*

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

12 **AZNH REVOCABLE TRUST,**  
13 by and through  
14 **JOHN and SUSAN SULLIVAN, TRUSTEES,**  
15 **REAL PARTIES IN INTEREST**  
Plaintiff  
16 v.

17 **SUSAN NICOLSON,**  
18 **COMMISSIONER,**  
19 **ARIZONA DEPARTMENT OF REAL ESTATE**

20 *and*

21 **TAMMY EIGENHEER,**  
22 **INTERIM DIRECTOR,**  
23 **ARIZONA OFFICE OF**  
24 **ADMINISTRATIVE HEARINGS,**

25 *and*

26 **SUNLAND SPRINGS VILLAGE**  
**HOMEOWNERS ASSOCIATION,**

27 Defendants.

**CASE NO. CV2026-008484**

**MOTION TO DISMISS SUSAN  
NICOLSON AS A DEFENDANT  
AND RESPONSE TO MOTION  
FOR JUDGMENT ON THE  
PLEADINGS**

(ASSIGNED TO THE HONORABLE  
ADELE PONCE)

Defendant Susan Nicolson, Commissioner of the Arizona Department of Real Estate,

1 (“Commissioner”) moves for an order dismissing her as a named party in this matter as  
2 grounds do not exist under Rule 4 of the Arizona Rules of Procedure for Special Actions  
3 (“RPSA”) to include her as a defendant, or, in the alternative, designating her as a nominal  
4 party only to this action given that there is no underlying litigation pertaining to her in which  
5 she can actively participate or advocate. Additionally, the Commissioner moves for her  
6 dismissal as the action is now moot and Plaintiffs have not exhausted their administrative  
7 remedies.

### 8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 This matter arises from a Petition for Special Action filed by AZNH Revocable Trust,  
10 by and through John and Susan Sullivan, Trustees, Real Parties in Interest (the “Plaintiffs”)   
11 related to a homeowner’s association (“HOA”) dispute case pending at the time of filing before  
12 the Office of Administrative Hearings (“OAH”). Specifically, Plaintiffs filed a petition in Case  
13 No. 25F-H115-REL challenging the 2025 election of directors conducted by Sunland Springs  
14 Village Home Owner Association (“Defendant Sunland Springs”). After filing the HOA  
15 petition and receiving a hearing date of April 6, 2026 to adjudicate the matter, Plaintiffs filed  
16 the subject Special Action alleging that Defendant Sunland Springs had disrupted the  
17 procedural process in Case No. 25F-H115-REL through perpetrating fraud upon the  
18 Department of Real Estate.

19 As it pertains to the Commissioner, Plaintiffs’ SA Petition asks for the following  
20 actions:

- 21 1. An Order requiring the Commissioner of the ADRE to recall the matter  
22 identified as Docket # 25F-H115-REL from OAH;
- 23 2. An Order requiring the Commissioner of the ADRE to proceed with the matter  
24 identified as Docket # 25F-H115-REL (previously known as file # 25F-H115) in the manner  
25 required by A.R.S. § 32-2199.01(E). Plaintiffs have subsequently filed a Motion for Judgment  
26 on the Pleadings in the SA Petition.

1           **I.           THE DEPARTMENT IS A NOMINAL PARTY.**

2           First and foremost, the Department is nothing more than a nominal party in this case.  
3           When a party does not act as an advocate or otherwise take any position on the merits of the  
4           litigation, it is considered a nominal party and exempt from liability for attorney’s fees. *See*  
5           *Cortaro Water Users’ Ass’n. v. Steiner*, 148 Ariz. 314, 318 (1986) (“... if the agency takes the  
6           role of an advocate it ceases to be a nominal party and may lose its statutory protection”).  
7           Further, a party that does not have any pecuniary or proprietary stake in the outcome of an  
8           action may qualify as a nominal party. *See Bromley Group, Ltd v. Arizona Dept. of Revenue*,  
9           170 Ariz. 532, 539 (1991). Conversely, if there is a possibility that the party could be liable  
10          for damages or other specific relief, then it cannot qualify as a nominal party. *Id.*; *see also*  
11          *Arizona Tax Research Ass’n. v. Maricopa County*, 162 Ariz. 94, 96 (1989) (Department of  
12          Revenue held to be a nominal party when the complaint alleged no wrongdoing on behalf of  
13          the Department and the Department took no active part in the proceedings), *rev’d in part on*  
14          *other grounds* 163 Ariz. 255 (1989).

15          The Department’s only involvement in disputes between homeowners and their  
16          associations is limited to a wholly administrative capacity as the overseer of the HOA Dispute  
17          Resolution Program pursuant to the passage of SB1530 in 2016. At this time, the legislature  
18          rehome the HOA dispute process from statutes governing the Department of Fire, Building  
19          and Life Safety to the Department of Real Estate under A.R.S. § 32-2199, *et seq.* Pursuant to  
20          these statutes, the Department does not have any regulatory or adjudicative authority over  
21          HOAs or the dispute process. *Id.* Specifically, these statutes only permit the Department to  
22          review a petition that is filed by a homeowner or an association, mail the petition with notice  
23          to the named respondent that a response is required within twenty (20) days, and refer the  
24          petition to the office of administrative hearings once a response has been received. *See* A.R.S. §  
25          32-2199.01. Once the matter has been referred to OAH, the Department does not have any  
26          further involvement except for requests for rehearing. A.R.S. § 32-2199.04. These statutes were  
27          designed to allow for a cost-effective alternative to resolve matters between homeowners and

1 the bodies that govern them with the Department acting in a neutral administrative role rather  
2 than as a party with interests in the outcome. Thus, the Department has no role in this dispute  
3 and is therefore incapable of advocating any position or having any pecuniary or proprietary  
4 stake in the outcome of the case.

5 Furthermore, Plaintiffs' Special Action Complaint does not allege any wrongdoing on  
6 behalf of the Commissioner or the Department, but rather, asserts that HOA Sunland Springs  
7 wronged the Department through providing a fraudulent response to Plaintiffs' petition filed  
8 with the Department. The Department lacks the express statutory authority to investigate  
9 fraudulent filings in the HOA dispute process. Such a lack of authority is undoubtedly  
10 intentional by the legislature as the Department is only intended to provide a conduit for such  
11 disputes rather than act as an adjudicator for disputes between private parties. Thus, any  
12 fraudulent filings made with the Department during the HOA dispute resolution process cannot  
13 be considered wrongdoing perpetrated by the Department.

14 **II. THE COMMISSIONER IS NOT A PROPER DEFENDANT.**

15 A special action in Arizona is an extraordinary form of relief that encompasses both  
16 original and appellate proceedings, serving as the modern equivalent of traditional writs such  
17 as certiorari, mandamus, and prohibition. *Rios v. Symington*, 172 Ariz. 3 (1992). Pursuant to  
18 Rule 4 of the Arizona Rules of Procedure for Special Actions, a special action may only be  
19 brought if a lower court of a body, officer, or person:

- 20
- 21 a) failed to exercise discretion that they have a duty to
  - 22 exercise; or failed to perform a duty required by law for
  - 23 which they have no discretion;
  - 24 b) proceeded, or threatened to proceed, without, or in excess
  - 25 or, jurisdiction or legal authority; or
  - 26 c) made a decision that was arbitrary and capricious or an
  - 27 abuse of discretion, which can include a legal error.

26 Furthermore, a state agency head can be sued in her official capacity in a suit seeking  
27 equitable relief, such as an injunction or mandamus. *Boruch v. State ex rel. Halikowski*, 242

1 Ariz. 611, 619, ¶ 30 (App. 2017). However, such a suit must demonstrate that the public  
2 official has exceeded her statutory authority, or has arbitrarily or unreasonably exercised her  
3 discretion. *Id.*

4 Plaintiffs' SA Petition alleges that the HOA perpetrated a "fraud" on ADRE. Plaintiffs'  
5 SA Petition infers that the Commissioner has a duty to recognize, or determine the existence  
6 of, the alleged "fraud" that, by Plaintiffs' assertion, underlies the HOA's response. Plaintiffs'  
7 special action against the Commissioner cannot survive if the Plaintiffs are asking this Court  
8 to compel the Commissioner to perform an act that she has not failed to perform or is not  
9 required by law to perform. *Yes on Prop 200 v. Napolitano*, 215 Ariz. 458, 464, ¶ 10 (App.  
10 2007).

11 It is not the duty of the Commissioner, under the law, to adjudicate any aspect of a  
12 petition against a homeowner's association, or the response that is filed thereto. ADRE acts  
13 merely as conduit to steer such petitions against homeowner associations to the Office of  
14 Administrative Hearings ("OAH"). Pursuant to A.R.S. 32-2199.01(D), ADRE, upon receipt  
15 of the response to such a petition, "shall promptly review the petition for hearing and, if  
16 justified, refer the petition to the office of administrative hearings." There is nothing in this  
17 statute that requires ADRE or the Commissioner to go beneath the face of the pleadings and  
18 determine the truth or validity thereof. Only OAH may do that. Pursuant to its only legal  
19 obligation, the Plaintiffs' petition against the HOA, along with the response filed by the HOA,  
20 was sent by ADRE to the Office of Administrative Hearings ("OAH") on need a date. After  
21 one continuance by OAH, the matter was set for hearing, by OAH, on April 6, 2026. The  
22 Commissioner and ADRE were not parties and did not fail to perform a legally required act.  
23 There is nothing in Plaintiffs' SA Petition that establishes any legal obligation on the part of  
24 the Commissioner or ADRE to do what is requested, even if "fraud" was involved, and, relative  
25 to that issue, the Commissioner and ADRE have no knowledge and take no position.

26 Plaintiffs ask that the Court order the Commissioner to enter a default judgment against  
27 the HOA. ADRE (and the Commissioner) can only take that action if no response has been

1 filed. Although Plaintiff uses a tortured analysis to devalue the response of the HOA, the fact  
2 is that it was filed and received by ADRE. The Commissioner only has authority to grant a  
3 default judgment against a home owner’s association if no response has been filed. A.R.S. §  
4 32-2199.01(E). The Commissioner has no authority to determine if a response is “defective.”  
5 ADRE (and the Commissioner) only have the power to enter a default judgment against the  
6 home owner’s association if a response is non-existent.

7 The Commissioner has no duty or authority to either “recall the matter identified as  
8 Docket # 25F-H115-REL from OAH” or to enter a default judgment against the HOA pursuant  
9 to A.R.S. § 32-2199.01(E) as requested by Plaintiffs. The SA Petition asks this Court to order  
10 the Commissioner to take action she is not required or authorized by law to take. The  
11 Commissioner has not failed to exercise her obligations. Therefore, the Commissioner is not  
12 a proper defendant in the SA Petition, and the SA Petition as it relates to the Commissioner  
13 should be dismissed.

14 **III. THE MATTER IS NOW MOOT.**

15 Plaintiffs failed to appear at the April 6, 2026, hearing and OAH Case No. 25F-H115-  
16 REL was dismissed. *See* attached and incorporate Exhibit A, order of the Administrative Law  
17 Judge (“ALJ”) dismissing OAH Case No. 25F-H115-REL. The dismissal of the lower court  
18 case due to the plaintiffs’ failure to appear should render the special action moot because there  
19 is no longer an active controversy requiring resolution. The Plaintiffs’ own conduct in failing  
20 to appear caused the dismissal, eliminating the underlying case that formed the basis for special  
21 action review. *Cardos v. Soldo*, 230 Ariz. 614, 617, ¶ 5 (App. 2012) (holding that “we will  
22 dismiss an appeal as moot when our action as a reviewing court will have no effect on the  
23 parties”). The mootness issue is compounded by the fact that Plaintiffs have failed to exhaust  
24 their administrative remedies prior to lodging the SA Petition. *See* Section IV, below.

25 **IV. PLAINTIFFS’ HAVE FAILED TO EXHAUST ADMINISTRATIVE**  
26 **REMEDIES.**

27 Plaintiffs wanted the Court to issue a stay of the OAH hearing, but the Court has not

1 ordered a stay, and rightly so. A stay would have short-circuited the administrative process.  
2 It is required that administrative remedies be exhausted before collateral legal action can be  
3 taken by Plaintiffs. Even if the Court decides that the Commissioner is a proper party  
4 defendant in Plaintiffs' case, the SA Petition is also subject to a Motion to Dismiss by the  
5 Commissioner, because there is nothing in this case that would have precluded the issues from  
6 being addressed and determined in the OAH hearing set on April 6, 2026. *Stapert v. Arizona*  
7 *Bd. of Psychologist Examiners*, 210 Ariz. 177, 182, ¶ 24 (App. 2005). Plaintiffs provide no  
8 explanation why the issues raised in the SA Petition could not have been raised in OAH Case  
9 # 25F-H115-REL. *Pima Cnty. Human Rights Comm. v. Arizona Dept. of Health Services*,  
10 232 Ariz. 177, 182, ¶ 16 (App. 2013). Further, Plaintiffs abandoned (and thereby waived) the  
11 opportunity to address its allegations of fraud by failing to appear at the OAH hearing.

12 **V. THE COMMISSIONER HAS NOT WAIVED NOMINAL STATUS.**

13 The arguments presented by the Commissioner in response to the SA Petition and the  
14 Plaintiffs Motion for Judgment on the Pleadings are jurisdictional, and not based upon the  
15 merits of the SA Petition. In Arizona, a superior court generally lacks jurisdiction to order an  
16 agency head to perform acts that exceed the agency head's statutory authority. The power of  
17 administrative agencies is limited to the authority granted by the legislature, and courts cannot  
18 compel actions beyond those statutory boundaries. *Facilitec, Inc. v. Hibbs*, 206 Ariz. 486, 488  
19 – 489 (2003); *State v. Stocks*, 227 Ariz. 390, 397 (2011) (holding that a "court cannot order an  
20 agency to take action in excess of its statutory authority").

21 The distinction between asserting jurisdictional defenses and becoming an advocate is  
22 critical in Arizona law. Asserting affirmative defenses in this Motion to Dismiss and this  
23 Response to Plaintiffs' Motion for Judgment on the Pleadings does not cause the  
24 Commissioner to lose nominal party status. *MVC Const., Inc. v. Treadway*, 182 Ariz. 615,  
25 620 (App. 1995). Assertion of jurisdictional defects, mootness, nominal party status, or the  
26 failure to exhaust administrative remedies are affirmative defenses, which the Commissioner  
27 is not waiving at this time, but which do not defeat nominal party status. *Mills v. Arizona Bd.*

1 *of Tech. Registration*, 253 Ariz. 415, 420, ¶ 12 (2022). This case is Plaintiffs’ fourth instance  
2 of dragging ADRE and/or the Commissioner into appellate or special action cases, in which  
3 there is no substantive rationale to justify including ADRE and the Commissioner as  
4 defendants.

5 **VI. CONCLUSION**

6 The Commissioner should be dismissed as defendant in the SA Petition, and there is  
7 nothing in the pleadings that would justify a judgment of any kind against the Commissioner.

8 **RESPECTFULLY SUBMITTED** this 21st day of April, 2026

9 **KRIS MAYES**  
10 Attorney General

11 */s/ Deanie Reh*  
12 Deanie Reh  
13 Assistant Attorney General  
14 *Attorney for AZ Dept. of Real Estate*

1 **ORIGINAL** of the foregoing filed  
2 this 21st day of April, 2026, with:

3 Clerk of the Court  
4 Maricopa County Superior Court  
5 201 W. Jefferson St.  
6 Phoenix, AZ 85003

7 **COPY** of the foregoing e-mailed this same date to:

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