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1 Richard Gayer
2 526 West Wilshire Drive
3 Phoenix, AZ 85003
4 602-229-8954
5 Plaintiff representing himself.

6 ARIZONA SUPERIOR COURT
7 MARICOPA COUNTY

8
9 RICHARD GAYER, an individual,
10 Plaintiff,
11 vs.

No. CV2008-029900
(Assigned to the Hon. A. Craig Blakey, II)

12 WILLO NEIGHBORHOOD ASSOCIATION,
13 a nonprofit corporation, and
14 BRADLEY BRAUER, President,
15 Defendants.

**Plaintiff's Memorandum
OPPOSING
Defendants'
MOTION TO DISMISS**

16 Plaintiff's Complaint seeks an order setting aside the results of the election of June 12,
17 2008 that attempted to change the Bylaws of Defendant WILLO NEIGHBORHOOD
18 ASSOCIATION ("Association") without a quorum. Defendants have moved to dismiss the
19 Complaint based, *inter alia*, on the Federal Volunteer Protection Act ("VPA") and, without
20 citing even one case, contend that Plaintiff, a member of the Association, is not entitled to
21 challenge this error in interpreting the results of that election. In the following argument,
22 Plaintiff will first show that the VPA does not apply to this lawsuit. He will then show that
23 A.R.S. section 10-3304 does not apply to this action because he does not challenge the
24 Association's power to conduct the bylaw election and that the failure of the bylaws to specify a
25 "number or percentage of members" for a quorum means that the last sentence of section 10-
26 3722 controls the quorum requirements for the bylaw election.

27 Defendants' Motion is really premature; this case should be decided on cross-motions for
28 summary judgment after minimal discovery.

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ARGUMENT

1. The Volunteer Protection Act Does Not Apply To This Action, Since Plaintiff Does Not Seek Any Monetary Relief.

The Volunteer Protection Act ("VPA"), 42 U.S.C. §§ 14501-14505, provides immunity from *tort liability* to volunteers for certain specified nonprofit corporations. 42 U.S.C. §§ 14505 (4)(A) and (B). It does not provide any immunity from *suit*. *Cf., Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) ("This withdrawal of jurisdiction [by the Eleventh Amendment] effectively confers immunity from suit"). Therefore, the VPA provides an affirmative defense which Defendants must plead (in their answer) and prove. There is no allegation in the Complaint that can be read to satisfy the requirements of the foregoing code section for the Association. (Plaintiff concedes that the individual defendant is a volunteer.)²

More importantly, the VPA protects volunteers from only from liability for tortious conduct. The statute is poorly drafted, but its language is strongly associated with the law of negligence and intentional misconduct. For example, § 14501(a)(1) mentions "liability actions" and (4) refers to "personal liability risks". In § 14503 (a)(1) we find "liable for harm caused by an act or omission", while (3) refers to "gross negligence [and] reckless misconduct ". Section 14503(e) deals with punitive damages, which are commonly available only for tortious conduct that is intentional. More to the point is § 14504 on liability for noneconomic loss. Subdivision (b)(1) provides that the volunteer "shall be liable only for the *amount* of noneconomic loss allocated to that defendant" [emp. added]. "Amount" sensibly applies only to money damages; the notion of the "amount" of injunctive relief, the only relief sought herein, is nonsense.³

² The Association may or may not qualify under § 14505(4); that is a factual issue not properly determined on a motion to dismiss. In addition, the individual defendant may not qualify under § 14503(a)(1) for acts within the scope of his responsibilities because his alleged acts are probably *ultra vires*. (This presents another factual issue.)

³ Section 14504 appears to allow damages against volunteers for noneconomic loss, independent of § 14503. This is one reason Plaintiff contends that the VPA is poorly drafted. But see *Armendarez, post* at 3, 265 F.Supp.2d 1136 at 1139 n.3.

1 That the VPA applies only to tort actions (and perhaps to other actions seeking monetary
2 relief) is supported by the legislative history of the Act. In House Report (Judiciary Committee)
3 No. 105-101 (Part I, May 19, 1997), we see that “H.R. 911, as amended, immunizes a volunteer
4 from liability for harm cause by ordinary negligence”. U.S. Code Congressional and
5 Administrative News, 105th Congress, First Session, Legislative History Section, at 153. Under
6 “Dissenting Views”, we find a reference to “tortious conduct”. *Id.*, at 164. President Clinton’s
7 signing statement of June 19, 1997 also refers to a “source of tort law” and “modifications of
8 tort law”. *Id.*, at 169.

9 Entries in Volume 143 of the Congressional Record regarding the VPA contain numerous
10 references to tort law and negligence. For example, in the (House) Record for May 21, 1997
11 from page H3096 to H3101 on H.R. 911 there are 15 occurrences of “tort” and 14 of
12 “negligence”, including “[i]t protects him or her from the day-to-day ordinary, simple
13 negligence cases”. *Id.*, at H3100. In the (Senate) Record for April 29, 1997 from page S3763 to
14 S3773 on S. 543 there are three occurrences of “tort” and five of “negligence”, including “[i]t
15 restores common sense to the way our courts treat volunteers by protecting them from tort
16 liability for simple acts of negligence. *Id.*, at S3773. No negligence is alleged in the instant
17 case.

18 The individual defendants were dismissed under the VPA in *Armendarez v. Glendale*
19 *Youth Center*, 265 F.Supp.2d 1136 (D. Ariz. 2003), because plaintiff there sought damages for
20 unpaid wages. *Id.*, at 1136. The court was concerned that contract damages were not covered
21 under the VPA, *id.*, at 1140 n.5, but decided that a claim for liquidated damages under the Fair
22 Labor Standards Act was a sufficient tort claim for VPA coverage of the entire action. *Ibid.*⁴
23 Since the VPA protects volunteers only from monetary liability, it does not apply to the
24 individual defendant herein.

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27 ⁴ The citation at 1140 to the Congressional Record for 1999 is not apposite, since the topic there
28 was the proposed Small Business Liability Reform Act, not the VPA. Plaintiff there eventually
recovered \$60,308 in damages plus \$8,326.48 in attorneys’ fees (information from PACER);
Plaintiff herein seeks neither damages nor attorney’s fees.

1 Defendants argue in their Motion at note 3 on page 3:25-26 that “the expanded protection
2 found in the federal legislation applies to volunteers in the States of Arizona”, but no such
3 “expanded protection” exists. Both the state law (section 12-981 and 12-982) and federal law
4 apply only to tort claims, as argued above. Since Defendant BRAUER’s misconduct was
5 intentional and certainly demonstrated a “flagrant indifference to his [Plaintiff’s] rights”
6 (Defendants’ Motion at 3:9-10) but was not tortious, he is not protected by either volunteer
7 protection law.⁵

8 **2. Section 10-3304, Requiring a Minimum Participation of the Membership**
9 **in an Action Asserting a Lack of Corporate Power, Does Not Apply to**
10 **Plaintiff’s Complaint Because It Does Not Challenge the Association’s Power.**

11 Section 10-3304 of the Arizona Revised Statutes is limited to challenges to the *power* of
12 a corporation to act, and not the misinterpretation of the results of a corporate act (A): “the
13 validity of corporate action shall not be challenged on the ground that the corporation lacks or
14 lacked power to act”. Here, plaintiff challenges only the interpretation of the results of the
15 election that attempted to change the corporation’s bylaws and not the power to conduct the
16 election itself. Therefore, Defendants’ reliance on this statute is misplaced. (Defendants’
17 Motion at 4:7 to 5:2.)

18 Defendants may have confused Plaintiff’s claim with a challenge to the power of the
19 corporation to conduct an election or other business because at the time of the elections it had no
20 – zero – voluntary members. That is because section 10-3601 prohibits involuntary membership
21 in a corporation (“B. No person shall be admitted as a member without that person's consent.”),
22 the Association’s bylaws provide that “any person of voting age owning property of within the
23 Plan boundaries *shall* be a member of the Association” (Article II, section 1, emp. added), and
24 in addition require that “only Members of the Association may serve as an Officer or other
25 Board Member” (Article III, section 2). *Shamrock v. Wagon Wheel Park Homeowners*, 206
26 Ariz. 42 at ¶¶ 11 and 17 (Ariz. App. 2003):

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28 ⁵ Plaintiff has sued the individual defendant because he and his predecessor President, exercising
dominant power over the Board of Directors, is primarily responsible for the erroneous
interpretation of the bylaw election results complained of herein.

1 ¶11 To begin, the Association, a non-profit corporation, could not have imposed
2 membership on appellees absent their express or implied consent. A.R.S. § 10-
3 3601(B) (Supp 2003) ("No person shall be admitted as a member without that
4 person's consent. Consent may be express or implied."). Thus, the amended
5 bylaws recorded in 1999 did not, standing alone, confer membership status on
6 appellees.

7 ¶ 17 ... The appellees' awareness that the Association's amended bylaws purported
8 to confer membership on all Park lot owners was insufficient to confer such
9 memberships. A.R.S. § 10-3601(B).⁶

10 Thus, at the time of the bylaw election, it can be argued that the corporation had no power to act
11 on any matter whatsoever because it had no officers, directors or members in general. Had
12 Plaintiff made such a challenge, then section 10-3304 may have been applicable⁷. Since
13 Plaintiff has not done so, Defendants' argument is inapposite. (For purposes of this litigation,
14 Plaintiff has accepted his status as a member, however involuntary.)

15 **3. The Complaint Alleges Facts Showing That Defendants Have Violated**
16 **A.R.S. §§ 10-3722 and 10-11023 by Amending the Association's Bylaws**
17 **Without the Participation of a Quorum of the Membership.**

18 The crucial provision in section 10-3722 provides that "[i]n the absence of that provision
19 [for a number or percentage of members], members, present or represented by proxy, holding
20 one-tenth of the votes entitled to be cast, shall constitute a quorum". From the structure of this
21 statute it is clear that "that provision" refers only to a numerical provision (number or
22 percentage) for a quorum. That is consistent with the provisions of section 10-11604 on
23 "records" together with section 10-11601(C) which requires non-profit organizations to maintain
24 a list of members. From such a list one can select a number or specify a percentage and verify
25 that persons voting are on that list. "When two statutes appear to conflict, we will attempt to
26 harmonize their language to give effect to each." *True v. Stewart*, 199 Ariz. 707 at ¶ 12 (Ariz.
27 2001). Sections 10-3722 and 10-11601(C) are easily harmonized by requiring that "that
28 provision" refers to "a number or percentage of members". Therefore, Defendants' contention

⁶ *Shamrock* is also instructive on the general interpretation of section 10-3304, but that case
involved a homeowners association, which is not the situation here.

⁷ But not necessarily, since without any members the requisite number cannot be found.

1 that the ten percent requirement applies only in the absence of any mention of a quorum must be
2 rejected (Defendant's Motion at 5:16-18).

3 Plaintiff has searched for similar statutes in other states and has found at least 24 with
4 identical or similar language⁸ but has been unable to find even one opinion of a court anywhere
5 in the United States on this point.⁹ Some similar (but not identical) statutes use much broader
6 phrases like "in the absence of any such provision" (e.g., New Mexico section 53-8-16) and
7 others use "in the absence of any provision" (e.g., Washington section 24.06.115), but no helpful
8 court opinions appear to exist. A search for [(number w/2 percentage) and quorum] produced
9 12 court opinions (some unpublished), but nothing from Arizona and none included a discussion
10 or analysis of the relevant statute. See, e.g., *Blue Lagoon Community Assn v. Mitchell*, 55
11 Cal.App. 4th 472 (1997). Therefore, this is a case of first impression that deserves careful
12 consideration on summary judgment.

13 Defendants assertion that the ten percent requirement applies only in the absence of any
14 mention of a quorum in the bylaws must also be rejected because it would lead to absurd results.
15 "[W]e must not construe a statute to reach an absurd result.. *Jeter v. Mayo Clinic Arizona*, 211
16 Ariz. 386 at ¶ 33 (Ariz. App. 2005). Accord, *City of Tucson v. Clear Channel Outdoor*, 218
17 Ariz. 172 at ¶ 26 (Ariz. App. 2008) ("We reject this interpretation of the statute because of the
18 absurd results it would produce"). See also *Public Citizen v. U.S. Dep't of Justice*, 491 U.S.
19 440, 454 (1989) ("Where the literal reading of a statutory term would 'compel an odd result'
20 [citation], we must search for other evidence of congressional intent to lend the term its proper
21 scope").

22 In the instant case, the Defendant's position would cause the bylaw provision that "a
23 quorum shall consist of the Members present" to produce absurd results. For example, the
24 quorum for a meeting of the Board of Directors is seven (a majority of 13, Bylaw Article III,
25 section 7), but a membership quorum of only the "Members present" at a meeting (Bylaw
26 Article II, section 7) could be as few as two or even only one. In addition, the point at which to

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28 ⁸ AL, AK, AZ, CT, DC, GA, IA, IL, KS, KY, ME, MD, MI, MT, NC, NM, NY, OR, RI, SD,
JN, TX, VA and WA.

⁹ Plaintiff has searched in Westlaw at the Maricopa County Superior Court Law Library,
VersusLaw at home, and in printed materials, all to no avail.

1 begin a membership meeting would be indeterminate and subject to unfair manipulation. If a
2 membership meeting was called to begin at 6:30 pm and only three members had arrived by that
3 time, the meeting could begin then and members who arrived (say) ten minutes late would not
4 be able to participate in a vote that occurred before 6:40 pm. To avoid such absurdities, Plaintiff
5 submits that the ten percent provision in section 10-3722 represents a legislative intent to
6 establish a minimum percentage requirement for a quorum in the absence of a numerical
7 provision in the bylaws.

8 Section 10-11023 requires that a bylaw amendment of the quorum “shall meet the same
9 quorum requirement ... then in effect or proposed to be adopted, whichever is greater.” The
10 requirement “then in effect” must be the ten percent specified in section 10-3722, since the
11 bylaw provision for “Members present” is not numerical and would lead to absurd and unfair
12 results.

13 The bylaw election was also invalid because it was conducted at a meeting of the Board
14 of Directors and not at a meeting of the members (Complaint, ¶ 4).

15
16 **4. Defendants Are Not Entitled to Attorney Fees Because Plaintiff Has Acted**
17 **in Good Faith With Well Grounded Allegations and Clearly Not to Harass**
18 **Defendants.**

19 The statutes relied upon by Defendants for attorney fees, A.R.S. § 12-341.01(C) and 12-
20 349, both require that the losing party has acted improperly. (Defendants’ Motion at 8:10-25.)
21 For example, subdivision (C) of § 12-341.01 provides in relevant part that “[t]he court shall
22 award reasonable attorney fees in any contested action upon *clear and convincing evidence* that
23 the claim or defense constitutes harassment, is groundless *and* is not made in good faith” (emp.
24 added). Note that the three requirements are in the conjunctive, so that the claims must be not
25 only groundless *and* made in bad faith, but must also constitute harassment. *Rowland v. Great*
26 *States Ins. Co.*, 199 Ariz. 577, 587 (App. 2001). In addition, there must be “clear and
27 convincing” evidence of all three requirements; a mere preponderance of the evidence will not
28 suffice.

Section 12-349(A) provides for attorney’s fees against a party who “(1) [b]rings or
defends a claim without substantial justification” or (2) [b]rings or defends a claim *solely or*

1 primarily for delay or harassment”, where subdivision (F) defines “without substantial
2 justification” as meaning “that the claim or defense constitutes harassment, is groundless *and* is
3 not made in good faith” (emp. added). This section essentially duplicates §12-341.01(C),
4 adding only the provision for delay, which clearly does not apply to the instant case.

5 Plaintiff herein has always acted in good faith and with reasonable cause; there was
6 never any harassment by him, but only a sincere and persistent effort to cause the Association to
7 conduct another bylaw election by paying \$500 for nearly all of its expenses (Complaint, ¶ 10)
8 and to obtain a complete analysis of section 10-3722 from the Association’s attorney by paying
9 a reasonable attorney fee (Complaint, ¶ 11). Plaintiff also brought this action to reverse the
10 elimination of members east of First Avenue (Complaint, ¶ 8) because this action violates the
11 Willo Neighborhood Conservation Plan (Complaint, ¶ 2) and was done in bad faith to eliminate
12 probable votes against the amendments to the bylaws. In addition, the bylaw election was
13 invalid because it was not conducted at a meeting of the members (Complaint, ¶ 4).

14 Defendants rely upon a few lawsuits previously brought by Plaintiff, but only one was
15 against the Association and its officers or directors for access to ballots for the Streetscape
16 Project about which the President repeatedly refused to reveal impersonal statistics such as totals
17 and percentage in support (CV2006-009197). Plaintiff lost there because ballots that were found
18 to be “records” of a for-profit corporation in *Tucson Gas and Electric Company v. Schantz*, 428
19 P.2d 686, 687 (Ariz. App. 1967) were somehow not “records” of a non-profit corporation, the
20 Association herein, under its bylaws, Arizona statutes, or the common law.

21 The second suit was against Michael Carter as an individual and not as a director or
22 officer of the Association. At that time, he was an attorney with a major Phoenix law firm and,
23 orally and publicly, he falsely accused Plaintiff of making a written promise regarding use of
24 information on the Streetscape Project ballots without any intention of keeping that promise.
25 Plaintiff sought no damages but only a declaratory judgment to clear his name¹⁰, but lost
26 because Carter’s statement was not in writing and did not constitute slander *per se*. Plaintiff
27 later obtained a favorable confidential settlement in return for waiving his right to appeal.

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¹⁰ See Rodney A. Smolla in the *Law of Defamation*, second edition, Volume 2, section 9:93
(Thompson-West, database updated November 2006).

1 Plaintiff did not serve the suit against Jeanne Lindsay because she is not a lawyer (she is a
2 CPA), so that it would have been unfair to force her to retain an attorney or attempt to defend
3 herself in court. In writing, she had falsely accused Plaintiff of seeking access to the Streetscape
4 Project ballots in order to commit identity theft and rejected his demand for a retraction. She
5 was not an officer or director of the Association at that time.

6 Especially in view of Plaintiff's efforts to avoid litigation by paying the Association for
7 another election and for a legal opinion, he should not be required to pay attorney fees.

8
9 **CONCLUSION**

10 For the foregoing reasons, Defendants' Motion to Dismiss should be denied. Defendants'
11 refusal and failure to redo the bylaw election at Plaintiff's expense amounts to a bare display of
12 power, designed to demonstrate that a concerned member of the Association must bow to the
13 will of the officers and directors and never question their conduct. If Defendants' reasoning
14 were correct, then no Association member could ever obtain a court order against any volunteer
15 covered by the VPA. Because of the factual matters involved in this case, it should be decided
16 on summary judgment and not disposed of hastily by a motion to dismiss.

17 Since Plaintiff is acting in good faith and with substantial justification and has brought a
18 case of first impression, Defendants request for attorney fees should be denied. Responsible
19 homeowners should not be deterred from challenging wrongdoing by a lawless neighborhood
20 organization that has caused a legal morass by its indeterminate quorum and involuntary
21 membership. It is significant that the Board rejected Plaintiff's offer to pay for another bylaw
22 election after a long-term Willo member said "let's go to litigation" (Complaint, ¶ 10).

23 Respectfully submitted by,

24
25 March 23, 2009

26 
27 RICHARD GAYER,
28 Plaintiff representing himself.

29 A file-stamped copy of this Memorandum will be presented to the Hon. A. Craig Blakey, II,
30 Central Court Building, 4B, in Phoenix after being filed with the Clerk of the Court.

PROOF OF SERVICE BY MAIL

I, Charles Marquis, am over the age of 18 and not a party to this action, and am a resident of Phoenix, AZ.

On March 23, 2009, I served the following document(s) on the attorneys for Defendants in a sealed envelope with first-class postage prepaid thereon:

Plaintiff's MEMORANDUM OPPOSING DEFENDANTS' MOTION TO DISMISS

addressed to:

Luane Rosen, Esq.
SCHNEIDER & ONOFRY, P.C.
3101 North Central Avenue, Suite 600
Phoenix, AZ 85012

//

I certify under penalty of perjury under the laws of the State of Arizona that the foregoing is true and correct.

Executed on March 23, 2009
at Phoenix, AZ


CHARLES MARQUIS