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10 Association and Bradley Brauer

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

13 RICHARD GAYER, an individual,
14 Plaintiff,

15 vs.

16 WILLO NEIGHBORHOOD
17 ASSOCIATION, a nonprofit corporation,
18 and BRADLEY BRAUER, President,
19 Defendants.

No. CV2008-029900

**DEFENDANTS WILLO
NEIGHBORHOOD ASSOCIATION
AND BRADLEY BRAUER'S REPLY
IN SUPPORT OF THEIR RULE
12(b)(6) MOTION TO DISMISS
PLAINTIFF'S COMPLAINT**

(Assigned to the Honorable Craig A.
Blakey, II)

20 Defendants Willo Neighborhood Association (“the Association”) and
21 Bradley Brauer, by and through their undersigned counsel, hereby submit their Reply in
22 support of their Motion to Dismiss and ask this Court to dismiss Plaintiff’s Complaint in
23 its entirety on the basis that Plaintiff’s Complaint fails to state a claim upon which relief
24 can be granted.

25 **I. PLAINTIFF’S CLAIMS MUST BE BROUGHT BY A MINIMUM OF 10% OF THE**
26 **MEMBERSHIP OR 50 MEMBERS.**

Pursuant to A.R.S. §10-3304(B)(1), actions brought by members of a non-
profit corporation that challenge the corporation’s power to act in a certain manner must
be brought by a minimum of ten percent (10%) of the voting power or fifty (50)
members. Plaintiff claims this statute does not apply to his Complaint because he is not
challenging the Association’s power to act, but rather the Association’s “interpretation of

1 the results” of an election. Clearly, this is a challenge to the Association’s power to act in
2 the manner it has – by recognizing the election as valid and rejecting Plaintiff’s
3 challenge. In fact, Plaintiff is asking this Court to set aside the actions taken by the
4 Association and to restore the pre-existing By-Laws until the Association amends them
5 by conducting another election. See Complaint at ¶17. Plaintiff further complains that
6 the election was invalid because the Board conducted the vote at a Board of Directors’
7 meeting and not a membership meeting. (See Response at p. 8.)

8 Plaintiff’s allegations are nothing more than a challenge to the Board’s
9 power to act in the manner it did with regard to the membership vote to amend the By-
10 Laws. Because this action was not brought by ten percent (10%) of the voting power or
11 fifty (50) members, this Court should dismiss Plaintiff’s action in its entirety.

12 **II. PLAINTIFF HAS NO VALID CLAIM AGAINST DEFENDANT BRAUER.**

13 Plaintiff has not addressed the fact that he has no legal basis for suing
14 Defendant Brauer. Plaintiff has made no allegations or claims for relief against Mr.
15 Brauer. Accordingly, this Court should dismiss Plaintiff’s individual claim against
16 Defendant Brauer.

17 Additionally, Defendant Brauer is exempt from liability under the
18 Volunteer Protection Act, 42 U.S.C.A §§ 14501 *et seq.* Nothing in the Act states that it
19 applies only to tort claims, as Plaintiff argues. Rather, as noted in *Armendarez v.*
20 *Glendale Youth Center, Inc.*, 265 F.Supp.2d 1136, 1139 (D. Ariz. 2003), “the Act applies
21 to *any* claim for harm caused by an act or omission of a volunteer.” “Harm” includes
22 “physical, nonphysical, economic, and noneconomic losses.” §14505(2).

23 The stated purpose of the Act is to, among other things, “sustain the
24 availability of . . . nonprofit organizations . . . that depend on volunteer contributions by
25 reforming the laws to provide certain protections from liability abuses related to
26 volunteers serving nonprofit organizations” §14501(b). To do so, the Act exempts

1 the volunteers from individual liability. Mr. Gayer concedes that Defendant Brauer is a
2 volunteer. As recognized by the *Armendarez* court, “The Volunteer Protection Act
3 *immunizes* those who voluntarily provide services” as the “heart of the legislation
4 involves a *bar to liability* for individual volunteers.” (Citation omitted.) It would make
5 no sense to permit a plaintiff to maintain a lawsuit against persons who are immune from
6 liability to that plaintiff.

7 Plaintiff states in his Response that Defendant Brauer’s conduct was
8 “intentional and certainly demonstrated a ‘flagrant indifference to his [Plaintiff’s]
9 rights.’” (See Response at p. 5.) However, Plaintiff has not made any such allegations in
10 his Complaint – much less any allegation against Defendant Brauer.

11 Because Plaintiff has no legal basis to name Defendant Brauer as a
12 defendant and because Defendant Brauer cannot be separately liable to Plaintiff for any
13 harm – physical, nonphysical, economic, or noneconomic – this Court should dismiss
14 Plaintiff’s claims in their entirety against Defendant Brauer.

15 **III. THE ASSOCIATION HAS NOT VIOLATED ANY STATUTE.**

16 Pursuant to A.R.S. §10-3722, the bylaws of a non-profit corporation may
17 provide the number or percentage of members representing a quorum and entitled to vote.
18 Plaintiff is complaining that the Association’s previous By-Laws, which state that a
19 quorum consists of the “Members present” and voting is “determined by a majority vote”
20 of those Members, do not meet the requirements of §10-3722 because they do not specify
21 a number or specific percentage. As for voting, the By-Laws clearly state a specific
22 percentage – “a majority” – *i.e.*, greater than 50%. As for the quorum requirement, while
23 the number of “Members present” may not be the same number of persons for every
24 meeting, the “Members present” always consists of a number – whether that is 1 or 100
25 or 1,000 (although as a practical matter, the number voting could never have been less
26 than 3 in order to obtain a “majority”). Nothing in §10-3722 makes this improper. If the

1 legislature had meant that a non-profit corporation must specify an exact number that
2 cannot change from meeting to meeting, it would have said so.

3 There is nothing improper with the way the Association identified its
4 membership quorum and voting requirements over the past 20 years since its
5 incorporation in September 1988.

6 Plaintiff claims that this reading of the statute would produce an absurd
7 result. However, in its 20 years of existence, no one but Plaintiff has challenged the
8 Association's quorum and voting requirements. Incredibly, Plaintiff now challenges
9 these requirements after the Association's membership has amended them to specify a
10 percentage, namely, ten percent (10%) of the members.

11 Plaintiff's view that the Association consisted of 2,700 members and that a
12 quorum of 10% (or 270) of the members was required to vote is unsupported by Arizona
13 law. Further, this argument by Plaintiff is inconsistent with his argument that no one can
14 even be a member without their consent. (See Response at p. 5-6.) Under this argument,
15 only those members who showed up at meetings would likely even be deemed to have
16 given consent to being a member. *Shamrock v. Wagon Wheel Park Homeowners*
17 *Association*, 206 Ariz. 42, 45, ¶11, 75 P.3d 132, 135 (App. 2003) (Bylaws by themselves
18 do not confer membership status in a non-profit corporation; members must either
19 expressly or impliedly consent to membership). These would be the very members who
20 met the quorum and voting requirements under the Association's prior version of the By-
21 Laws.

22 Here, the Association's By-Laws – both the prior and amended versions –
23 properly designated the quorum and voting requirements under A.R.S. §10-3722.
24 Further, the vote to amend the By-Laws met the quorum and voting requirements of both
25 the prior version of the By-Laws and the proposed version, making the Board's
26 recognition of the membership vote a valid act under A.R.S. §10-11023.

1 Finally, Plaintiff’s allegation that the election was invalid because the
2 Board conducted the vote at a Board of Director’s meeting and not a membership
3 meeting is equally without merit. (See Response at p. 8.) By definition, the meeting was
4 a membership meeting since it was the members themselves – not just the Board – who
5 voted on the proposed amendments to the By-Laws. The Board properly noticed the
6 meeting, Plaintiff was likely present and presumably voted at the meeting, and no one
7 other than Plaintiff has contested the Board’s actions in noticing the meeting.

8 **IV. DEFENDANTS ARE ENTITLED TO ATTORNEYS’ FEES AND COSTS.**

9 Plaintiff has brought another unwarranted claim without substantial
10 justification. For whatever reason, Plaintiff appears to continually disapprove of the
11 Association and the work it does, and continues to file lawsuits against the Association
12 and its leadership, yet Plaintiff opts to be a member. In fact, Plaintiff says the
13 Association’s failure to yield to his demands “amounts to a bare display of power” and
14 calls the Association “a lawless neighborhood organization,” yet he continues to be a
15 member of this group. (See Response at 10.) Plaintiff’s most recent claims – that the
16 Association violated Arizona statutes in amending its By-Laws – constitutes harassment,
17 is groundless, and is not made in good faith, notwithstanding Plaintiff’s self-serving
18 statement that he has “always acted in good faith and with reasonable cause.” Plaintiff
19 previously sued the Association and some of its leadership over the Association’s
20 Streetscape project – and lost. Plaintiff previously sued one of the former Directors in his
21 individual capacity, but for statements Plaintiff alleged he made in conjunction with the
22 Association’s Streetscape project – and lost. Plaintiff said he did not serve the lawsuit he
23 filed against Jeanne Lindsay “because she is not a lawyer (she is a CPA)” and it “would
24 have been unfair to force her to retain an attorney to attempt to defend herself in court” –
25 yet, Defendant Brad Brauer is not an attorney, nor was prior defendant Robert Cannon.

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Brauer

COPY of the foregoing filed this 3rd day
of April, 2009, with e-filed copy to:

The Honorable Craig A. Blakey, II
Maricopa County Superior Court
201 W. Jefferson
Phoenix, AZ 85003-2205

COPY by email and U.S. Mail sent this
same date to:

Richard Gayer
526 W. Wilshire Drive
Phoenix, AZ 85003
Plaintiff, Pro per

By /s/ Janice Froechte