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7 IN THE SUPERIOR COURT OF ARIZONA

8 IN AND FOR THE COUNTY OF MARICOPA

9 THOMAS J. GUSICH, an individual,

10 Plaintiff,

11 vs.

12 SUN CITY GRAND COMMUNITY
13 ASSOCIATION, INC., an Arizona
14 corporation,

15 Defendant.

Case No. CV2025-002634

RESPONSE TO MOTION TO DISMISS

16 Since he was elected to the Board of Directors, Plaintiff Thomas Gusich (“Tom”) has faced very public, vague accusations that he was violating the “Grand Standards of Behavior for Board Directors.” (Am. Compl. ¶¶24-25) The Grand Standards allow the majority to impose incremental punishment (consisting of counseling, public trial, public censure, and ultimately removal or lawsuit) against any director “shown to be in violation of the governing documents or resolution adopted by the Board.” (*Id.* ¶20) Whether, how, and to whom a director is “shown to be in violation” are among the more obvious infirmities with the Grand Standards that were adopted after Tom’s election. (*Id.* ¶¶21, 22 23-24) Substantively, the Grand Standards demand directors not inform residents of Board business or express any disagreement with, and in fact requiring them to support, the majority or its decisions. (*Id.* ¶18)

1 The majority almost immediately launched enforcement action under the Grand
2 Standards against a recalcitrant Tom. (*Id.* ¶¶21, 23-24) Whether, when, how, and to
3 whom he was “shown to be in violation” remains a due process mystery. (*Id.* ¶¶21, 23-26,
4 29, 32) Tom had been a vocal critic of the majority during its past administration, openly
5 questioning a number of its decisions, ran on a platform highly critical of them, and
6 refused to commit to falling in line with the majority now that he was elected. (*Id.* ¶¶7-8,
7 17) Tom has never even been told the specific conduct he purportedly committed, such
8 as a “written list of behaviors” that the Grand Standards requires, that violated the Grand
9 Standards prompting the enforcement against him. (*Id.* ¶¶22, 25)

10 Such fundamental, existential questions over its Grand Standards did not stop the
11 majority from weaponizing it against Tom. The majority rebuked him in several executive
12 meetings, again later in several open meetings, and regularly published updates to the
13 community over “the issues” with Tom. (*Id.* ¶¶24, 26, 29-30, 32) Under the pretenses of
14 adhering to the Grand Standards’ enforcement policy, the majority subjected Tom to a
15 public trial where the other directors read from a prepared script to employ vague terms
16 for accusing Tom of violating the Grand Standards. (*Id.* ¶¶29-30) It continued to publicly
17 rebuke Tom over unspecified violations of the Grand Standards. (*Id.* ¶¶214-32) It
18 excluded him from certain meetings based on its ongoing grand inquisition, including
19 denying him the right to participate in deliberations on whether enforcement action
20 under the Grand Standards should be initiated against a *second* minority director. (*Id.*
21 ¶¶39-41)

22 When the majority’s public rebukes of Tom were insufficient to force him to
23 support the majority, the majority declared receipt of a petition bearing sufficient
24 signatures to trigger a recall election in a meeting it excluded him from attending. (*Id.*
25 ¶45) We now know there was no “petition” and that its “signatures” did not qualify as
26

1 such under Arizona law. Whether the vote is infirm for additional reasons cannot be
2 ascertained until Defendant produces all such records. So far, it has not.

3 Defendant argues there is no judicial recourse or remedy for this tyranny of the
4 majority and the recall vote, valid or not, prohibits Tom from challenging the Grand
5 Standards because he is no longer on the Board. Respectfully, the law dictates otherwise.

6 **Argument**

7 **I. LEGAL STANDARD ON A MOTION TO DISMISS.**

8 Motions to dismiss are disfavored because “they test the legal sufficiency of claims
9 without the benefit of a fully developed factual record.” *Swift Transp. Co. of Ariz. L.L.C.*
10 *v. Ariz. Dep’t of Revenue*, 249 Ariz. 382, 385, ¶16 (App. 2020). Courts reviewing a
11 complaint against a motion to dismiss accept all well-pled allegations in the complaint
12 as true, and give the non-moving party the benefit of all inferences arising from those
13 allegations. *Hammer Homes, LLC v. City of Phoenix*, 256 Ariz. 526, 528 ¶10 (App. 2023).
14 Dismissal is only appropriate if the moving party demonstrates that the plaintiff “is not
15 entitled to relief under any interpretation of the facts susceptible of proof as a matter of
16 law.” *Id.* A moving party may rely on only a small category of materials attached to a
17 motion to dismiss. Those are authenticated public record materials or a document central
18 to the complaint. *Strategic Dev. & Const., Inc. v. 7th & Roosevelt Partners, LLC*, 224
19 Ariz. 60, 64 ¶14 (App. 2010).

20 **II. SUMMARY OF THE CLAIMS.**

21 Tom’s Amended Complaint raises three legally distinct, but factually related
22 claims. Count 1 largely seeks a declaratory judgment the “Grand Standards” are unlawful,
23 unenforceable, and otherwise selectively and unreasonably enforced. Count 2 seeks a
24 declaratory judgment that the recall was process did not comply with Arizona law and,
25 therefore, any recall vote was invalid and Tom is still on the Board. Count 3 alleges breach
26

1 of contract for the Association’s refusal to indemnify Mr. Gusich “in connection with the
2 Board’s enforcement actions.”

3 **III. TOM STATES A CLAIM FOR CONTRACTUAL INDEMNITY IN**
4 **CONNECTION WITH THE GRAND STANDARDS’ ENFORCEMENT**
5 **ACTIONS TAKEN AGAINST HIM.**

6 Tom pleaded a claim for contractual indemnity in connection with the actions
7 because he was forced to retain counsel “in defense of the frivolous accusations made
8 against him.” (Am. Compl. ¶43) In its motion to dismiss, Defendant essentially rewrites
9 the indemnity provision in the Bylaws to fit its false narrative. Even under that self-
10 serving rewrite, Tom is still entitled to pursue a claim for contractual indemnity.

11 An association’s governing documents, including its CC&Rs and Bylaws, are a
12 contract between homeowner and association. *Ariz. Biltmore Estates Ass’n. v. Tezak*, 177
13 *Ariz.* 447, 448 (App. 1993). Contracts are interpreted according to their plain and
14 unambiguous terms. *Powell v. Washburn*, 211 *Ariz.* 553, 556 ¶9 (2006).

15 Section 6.5 states:

16 [T]he Association shall indemnify every director and committee member
17 against all expenses, including attorney fees, incurred by them in connection
18 with any action, suit, or other proceedings...to which he or she may be a
19 party by reason of being or having been a director or committee member of
20 the Association.

21 The directors and committee members shall not be liable for any mistake of
22 judgment, negligent or otherwise, except for their own individual willful
23 misfeasance, malfeasance, misconduct, or bad faith. The directors shall have
24 no personal liability with respect to any contract or other commitment made
25 or action taken in good faith on behalf of the Association. The Association
26 shall indemnify and forever hold each such director and committee member
harmless from any and all liability to others on account of any such contract
commitment or action.

(Am. Compl. Exh. 2, at 11-12)

“When there is an express indemnity provision, the extent of the duty to indemnify
must be determined from the contract, and not by reliance on implied indemnity
principles.” *INA Ins. Co. of N. Am. v. Valley Forge Ins. Co.*, 150 *Ariz.* 248, 252 (App.

1 1986); *Estes Co. v. Aztec Construction, Inc.*, 139 Ariz. 166, 168 (App.1983). Any
2 ambiguity regarding the meaning of the express terms of the indemnity provision should
3 be resolved in favor of the indemnitee who was not the drafter and had less bargaining
4 power in the creation of the contract. *INA Ins. Co. of N. Am.*, 150 Ariz. at 252.

5 Defendant offers a narrow definition of indemnity, asserting that an individual
6 may only be indemnified for losses suffered from defending against claims asserted by
7 third parties. It cites *Jim Click Ford, Inc. v. City of Tucson*, 154 Ariz. 48, 50 (App. 1987),
8 in support of its argument that the right to indemnity is limited to third-party causes of
9 action. Such an interpretation effectively rewrites the indemnification clause, ignores its
10 plain language, and materially changes its meaning. “A court may not add something to
11 the contract that is not there.” *Paulden Indus. LLC v. Big Chino Materials LLC*, 249 Ariz.
12 442, 446 ¶23 (App. 2020). Contractual indemnity turns on the language of the contract,
13 not how courts have applied other types of indemnity in other cases or defined a single
14 word.

15 Indeed, the very definition offered by Defendants contradicts their position. Arizona
16 law does not limit “damages” or “losses” to those that stem from liability to third parties.
17 For example, it is generally true that, “when one party’s breach of contract places the
18 other in a situation that ‘makes it necessary to incur expense to protect his interest, such
19 costs and expenses, including attorneys’ fees, should be treated as the legal consequences
20 of the original wrongful act and may be recovered as damages.” *Desert Mountain*
21 *Properties Ltd. P’ship v. Liberty Mut. Fire Ins. Co.*, 225 Ariz. 194, 209 (App. 2010)
22 (quoting *Fairway Builders, Inc. v. Malouf Towers Rental Co.*, 124 Ariz. 242, 258 (App.
23 1979)). Even beyond attorney fees, it is well-established that infringement of contractual
24 rights, interference with the political process, and reputational damage constitute
25 compensable losses in Arizona.

1 A director’s defense of the Grand Standards enforcement proceedings clearly falls
2 within the broad indemnity provision. A contract’s terms are ordinarily ascribed their
3 normal, everyday meaning. An “action” is “the process of doing something, especially
4 when dealing with a problem or difficulty” or “something that you do.”¹ That larger
5 definition includes various legal processes. *Id.* “Proceedings” are similarly broadly
6 defined as “a series of events that happen in a planned and controlled way.”² The
7 initiation of enforcement action against Tom under the pretense that he violated the
8 Grand Standards is both an “action” and “proceedings” that have been taken against him
9 solely “by reason of being or having been a director or committee member of the
10 Association.” The Grand Standards only apply to directors.

11 The Grand Standards’ enforcement policy expressly contemplates several actions
12 and “other proceedings” to be taken, which it describes as “formal process.” (Am. Compl.
13 Exh. 3) This includes a forced counseling session at which the director is presented with
14 a “written list of behaviors” (which did not happen here) “followed up with a discussion
15 on how the behavior could harm the Association and ways to positively address the
16 behavior” (which did). (*Id.*) Tom also participated in open meetings where his conduct
17 was openly scorned and rebuked, ironically in violation of the very Grand Standards the
18 majority were purporting to uphold. He has been forced to defend his name and his
19 actions as a Board member throughout the Grand Standards enforcement proceedings
20 based on nothing more than vague allegations that he violated unspecific provisions of
21 the Grand Standards.

22

23

24 ¹ Action, Cambridge Dictionary,
<https://dictionary.cambridge.org/us/dictionary/english/action>.

25

26 ² Proceedings, Cambridge Dictionary,
<https://dictionary.cambridge.org/dictionary/english/proceedings>.

1 The Grand Standards enforcement proceedings against Tom, which challenges
2 decisions he either has made or will make that the majority finds or will find offensive,
3 clearly constitute an “action...or other proceedings...to which he is a party by reason of
4 being or having been a director...of the Association.”

5 Tom states a claim for contractual indemnity (Count 3).

6 **IV. TOM HAS THE RIGHT TO CHALLENGE THE VALIDITY OF THE**
7 **GRAND STANDARDS. HIS REMOVAL AS A BOARD MEMBER, VALID**
8 **OF OTHERWISE, DOES NOT ALTER OR ELIMINATE THIS RIGHT.**

9 “Any member” may bring an action challenging an association’s power to act.
10 A.R.S. § 10-3304. Tom filed Count 1 to challenge the validity and enforceability of the
11 Grand Standards. Such claims plainly fall within the scope of A.R.S. § 10-3304. Tom has
12 also been personally harmed by the invalid and enforceable Grand Standards. This gives
13 him a separate basis for challenging the Grand Standards because they were weaponized
14 against him because they were enforced against him. *Armory Park Neighborhood Ass'n*
15 *v. Episcopal Cmty. Services in Ariz*, 148 Ariz. 1, 6 (1985) (minimum for standing is a
16 party’s interest in the outcome). In the *Armory Park* case, the Court of Appeals courts
17 acknowledged that a party has a specific injury even if that injury is also suffered by
18 others similarly situated. *Id.*

19 For-profit and non-profit corporations are both fictions that require real people to
20 operate and manage the corporation. That is designed as creation of a board of directors.
21 Each director in turn is protected by the business judgment rule for expected
22 independent judgment in exercising their duties on behalf of the corporation and its
23 members. A necessary ingredient for that governance, and the democratic process of
24 choosing board members, is independent judgment, thought, and speech in exercising
25 duties. Whether he is reinstated to the Board or not, Tom has a personal interest as
26 homeowner and member of the Association in protecting the independent judgment and

1 speech of board members and ensuring, if he is restored or reelected to the board, he will
2 not face further enforcement action of an invalid rule. Nor will anyone else.

3 The Grand Standards, among other requirements, require directors to “support
4 the decisions of the majority of the Board regardless of the position the Director may
5 have taken at the time of the vote” and not to “degrade” the decisions of the majority.
6 (Am. Compl. Exh. 3) They are anti-dissent provisions allowing the majority to take
7 increasingly more severe and public enforcement action against a director who disagrees
8 with or criticizes them. Based on the allegations in the complaint, the majority has
9 weaponized the Grand Standards to attack not one, but two, board members who have
10 disagreed with them. It is ridiculous to suggest anyone on the board, who wants to run
11 for the board, or wants to vote for someone should lack the power to challenge the Grand
12 Standards and its absurd enforcement procedures. Fortunately, Arizona law provides
13 that a single member can stand up the tyranny of the majority by challenging such a
14 provision. A.R.S. § 10-3304.

15 Defendant seeks to spin this as a jurisdictional challenge. It appears to do so largely
16 for the ulterior motive of justifying its introduction of extraneous evidence that is not
17 allowed on a motion to dismiss unless the motion is based on jurisdiction. But that
18 evidence relates solely to Count 2, not Count 1. Moreover, standing is not a jurisdictional
19 challenge. The Arizona Supreme Court has oft-instructed that standing is not a question
20 of jurisdiction. “Under Arizona’s Constitution, standing is not jurisdictional, but instead
21 is a prudential doctrine....” *E.g., Dobson v. State ex rel., Comm’n on Appellate Court*
22 *Appointments*, 233 Ariz. 119, 122 ¶9 (2013)

23 Tom has standing to challenge the validity and enforceability of the Grand
24 Standards, which were adopted to silence him, and the arbitrary, unreasonable, and
25 selective application of enforcement policies applied in the name of the Grand Standards.
26 *Tierra Ranchos Homeowners Ass’n v. Kitchukov*, 216 Ariz. 195, 201–02 ¶¶26-28 (App.

1 2007) (Associations must act reasonably in exercising their authority). He was faced this
2 enforcement action solely because he would not fall into line behind the majority. Tom
3 clearly has the power to challenge a rule adopted to be wielded against him, which was
4 actually wielded against him, and is now being wielded against others.

5 **V. TOM HAS THE POWER TO CHALLENGE THE RECALL PETITION.**
6 **THE BOARD HAD NO RIGHT TO CONDUCT A RECALL ELECTION IF**
7 **THE PETITION WAS INFIRM.**

8 Tom is challenging the recall election in the Amended Complaint. Specifically, Tom
9 is challenging the alleged “petition” that the majority claims was submitted to compel the
10 recall election. Tom has alleged sufficient facts, if true, showing that the recall petition
11 was infirm. (Am. Compl. ¶¶34-38) The Complaint alleges numerous flaws with this
12 process, raising questions whether those obtained emails manifest intent to sign a
13 petition, including soliciting emails with a generic “contact us” solicitation. Those bar a
14 finding on an undeveloped record that these specific emails qualify as electronic
15 signatures to a recall petition. That dispute is factual and set for hearing.

16 Arizona law does not allow the Board to schedule a vote to remove a fellow member
17 unless it receives a “petition” that is “signed by” at least 1,000 eligible members of the
18 Association. A.R.S. § 33-1813(A). If the petition was infirm, any vote fails. Otherwise, a
19 majority of the board could simply set a vote for removal of any member they do not like
20 at any time. Tom, for example.

21 Specific statutory provisions govern over more general ones. *E.g., Mercy*
22 *Healthcare Arizona, Inc. v. AHCCCS*, 181 Ariz. 95, 100 (App. 1994). Thus, Defendant’s
23 reliance on Title 10’s board member removal procedures is misplaced. That statute is
24 inapplicable. While § 10-3808 contains general procedures for removing a nonprofit
25 board member, those procedures directly conflict with express procedures in the Planned
26 Community Act at § 33-1813. The latter, which applies greater protections for members
than what Title 10 provides, governs. It also expressly trumps any contractual removal

1 provision that might exist in the Bylaws. “Notwithstanding any provision of the
2 declaration or bylaws to the contrary, all of the following apply to a meeting at which a
3 member of the board of directors [] is proposed to be removed from the board of
4 directors. A.R.S. § 33-1813. And it requires a “petition.” *Id.*(A)(4). Defendant’s argument
5 that it complied with Title 10 or the Bylaws, in other words, is a red herring.

6 The statute is clear:

7 **[O]n receipt of a petition that calls for removal** of a member of the
8 board of directors **and that is signed** by the number of persons who are
9 eligible to vote in the association at the time the person signs the petition
10 equal to at least twenty-five percent of the votes in the association or by the
11 number of persons who are eligible to vote in the association at the time the
person signs the petition equal to at least one thousand votes in the
association, whichever is less, the board shall call and provide written notice
of a special meeting of the association as prescribed by § 33-1804, subsection
B.

12 A.R.S. § 33-1813(A)(4)(b) (emphases added).

13 Tom alleges omissions of each of these essential elements. There was no petition.
14 Although Defendant offered a number of exhibits offering improper extrinsic evidence,
15 it is notable that it did not submit a petition or a series of documents that, collectively,
16 constitute a “petition.” Defendant essentially suggests a “petition” can exist purely in the
17 minds of the board members reading emails and offers improper extrinsic evidence in
18 furtherance of this position. Such evidence, however, is inadmissible on a motion to
19 dismiss and should not be considered. Ariz. R. Civ. Pro. 12(d). Nor can such a
20 determination be made based on the undeveloped record before the court at this juncture
21 of the case.

22 The Amended Complaint alleges that the majority published web links with email
23 addresses such as recalltomgusich@gmail.com and a website, recalltomgusichnow.com
24 soliciting emails without reference to treating those emails as signatures to an alleged
25 petition. The Amended Complaint further alleges that everyone who sent an email,
26

1 regardless of content, or who clicked on a “Contact Us” link on the website received the
2 same response:

3 Thanks for your adding your name to the virtual petition. We have counted
4 your email as your signature (one per lot). Please DO NOT also sign a paper
5 copy, to avoid double counting. Please tell your neighbors and friends to join
6 the campaign to SAVE GRAND! Just have them send an email to
recalltomgusich@gmail.com with their address and CAM# and they will be
counted also. Every day we are closer to returning Grand to a cohesive,
community-oriented HOA, thanks to neighbors like you.

7 (Am. Compl., exhibits 5-7) This included any emails including those, like in Exhibit 6,
8 where the member expressly rejected the idea of a recall election but “got an auto reply
9 saying I jointed in the recall which I don’t” (*Id.*, exhibit 6) as well as where members
10 wrote they “do not agree with the recall please remove me. There is no petition attached”
11 (*Id.*, exhibit 7).

12 To overcome the absence of the initiating petition in this case, Defendant suggests
13 that the emails should collectively be considered a “petition” under § 33-1813. However,
14 statutes, like contracts, are ordinarily interpreted according to their plain language.
15 *Janson v. Christensen*, 167 Ariz. 470, 471 (1991); *Bilke v. State*, 206 Ariz. 269, 271–72
16 (2003) (courts apply “usual and commonly understood meaning unless the legislature
17 clearly intended a different meaning”). Defendant’s suggestion that a petition can be
18 whatever the majority wants it to be is inconsistent with the plain language of the statute
19 and the Electronic Transactions statutes.

20 In effect, the majority sent out vague solicitations to have a discussion and then
21 declared the responses to collectively be “the petition” that allowed them to initiate a
22 removal vote. The purpose of a petition is to have a record that clearly and
23 unambiguously states the intent of the individuals who have signed it. The majority does
24 not get to cobble one together one after the fact based on emails. That is not a “petition.”
25 The Amended Complaint sufficiently pleads these infirmities.

26

1 Whether emails qualify as electronic signatures is factual and requires separate
2 scrutiny of each email. It is not the proper subject of a motion to dismiss. Defendant
3 argues that an email may qualify as an electronic signature. This is not a dispute about
4 whether electronic signatures are allowed or whether an email can ever qualify as an
5 electronic signature. The specific dispute in this case is whether all of the Association’s
6 emails that the majority treated as electronic signatures qualify as “electronic signatures”
7 under Arizona law. A.R.S. § 44-7002(8).

8 That statute defines an “electronic signature” as an “electronic sound, symbol or
9 process that is attached to or logically associated with [the recall petition] and that is
10 executed or adopted by an individual with the intent to sign the record.” *Id.* The three
11 email exhibits attached to the Amended Complaint show neither of these elements have
12 been met. Tom does not need to prove his case on a motion to dismiss; he merely must
13 show that his pleading pleads sufficient facts to support the cause of action. The
14 complaint alleges that Defendant counted improperly as signatures emails that do not
15 meet this definition. These are sufficient facts to survive a motion to dismiss and allow
16 Tom to conduct discovery with respect to this issue.

17 There are also questions regarding the “context and surrounding circumstances at
18 the time the record or signature was created, executed or adopted.” A.R.S. § 44-7009(B).
19 Those are the factual considerations for a court or jury to determine the effect of an
20 alleged electronic record or signature, not to decide on the basis of improperly offered
21 extrinsic evidence. *Id.* On the current record, the Association solicited and obtained
22 emails from unknown sources, without providing a recall petition to those it solicited,
23 including a website that solicited emails with a general “contact us” solicitation. (Am.
24 Compl. ¶¶36-38). That is sufficient to state a claim under Rule 8.

25 Examination of whether an electronic symbol or message qualifies as or contains
26 an electronic signature raises several factual issues, not the sufficiency of the allegations

1 in the complaint. The flaw in the Association’s argument is evidenced in the cases cited
2 in footnote 5 of the Motion to Dismiss for the Association’s assertion that signature
3 blocks and sender identifications within emails may qualify as signatures. The issue for
4 whether an email qualifies as an electronic signature of a record is whether the
5 surrounding circumstances for the Association’s gathered emails demonstrate for each
6 and every account user the “intent to do a legally significant act.” In this instance, they
7 must manifest an unqualified intent of a homeowner to sign a specific record, here a
8 recall petition. The Association cites cases for the proposition that an email signature
9 block or header qualifies as the sender’s signature. But, those cases examined two issues,
10 not just what within an email qualifies as the sender’s signature. The substantive issues
11 were whether the contents of the email evidenced the intent to sign an identified
12 substantive document within those same messages. This is demonstrated in *Int’l Casings*
13 *Group, Inc. v. Premium Standard Farms, Inc.*, 358 F. Supp. 2d 863, 873 (W.D. Mo.
14 2005). There, the trial court examined both whether a signature block evidenced an
15 intent to sign, and whether the contents of the emails evidenced a finalized substantive
16 writing for the intended signature. Similarly, in *Williamson v. Delsener*, 59 A.D.3d 291
17 (N.Y. Supr. App. Div. 2009), the panel examined whether printed names evidenced a
18 signature for the contract terms contained in the corresponding emails, evidencing an
19 intent to enter that identified contract.

20 **V. DEFENDANT’S INTRODUCTION OF EXTRINSIC EVIDENCE IS**
21 **IMPROPER ON A MOTION TO DISMISS. THE EVIDENCE SHOULD BE**
22 **IGNORED.**

23 Defendant has attached extrinsic evidence to its motion to dismiss. As a basis for
24 doing so, it cites at page 6 only part of the rule that courts can consider extrinsic evidence
25 in reviewing a challenge to “jurisdiction.” As noted above, Defendant has not challenged
26 jurisdiction for its standing argument. Nor has it challenged jurisdiction to address

1 Defendants' failure to follow the express requirements of A.R.S. § 33-1813. It simply
2 submits a hodge podge of admissible documents, including declarations, and urges the
3 Court to grant its dismissal based on this extrinsic evidence at the same time that it seeks
4 to limit Tom to the confines of his complaint. This is improper. Ariz. R. Civ. Pro. 12(d);
5 *Blanchard v. Show Low Planning & Zoning Comm'n*, 196 Ariz. 114, 117, ¶11 (App. 1999)
6 (holding that providing extrinsic evidence to a motion to dismiss converted the motion
7 into a motion for summary judgment).

8 Defendant has violated the applicable rule. A defendant's right to provide
9 materials outside of the Complaint is limited to questions of subject matter jurisdiction
10 that are not tied to the merits of the claims in the Complaint:

11 *Where jurisdictional fact issues are not intertwined with fact issues raised*
12 *by a plaintiff's claim on the merits*, the resolution of those jurisdictional fact
13 issues is for the trial court. In resolving such issues the trial court may
consider affidavits, depositions and exhibits, and does not thereby convert a
motion to dismiss for lack of jurisdiction to one for summary judgment.

14 *Swichtenberg v. Brimer*, 171 Ariz. 77, 82 (App. 1991) (emphasis added). As an example
15 of that limitation, in *Swichtenberg*, the court examined whether the superior court had
16 subject matter jurisdiction of an employee injury claim. Because the claims related to the
17 conduct of the named defendant, the court held that it was proper to consider outside
18 materials to determine whether the named defendant qualified as an employer as
19 relevant to "subject matter jurisdiction." *Id.*

20 In violation of that limitation, Defendant has provided declarations and selective
21 records to claim a lack of standing for Tom to challenge his removal because it argues (at
22 7) that the provided materials demonstrate it conducted all necessary board member
23 removal procedures factually and legally correctly. Again, wrong standard of review and
24 Defendant cannot in that Motion provide extrinsic materials to argue its position on the
25 merits. While this may be an argument appropriately considered on a fully developed
26 factual record on summary judgment, the question here is the sufficiency of the

1 pleadings. The attachments cannot be used to negate allegations by injecting some
2 contrary facts into the record unless Tom is afforded disclosure and discovery to address
3 those arguments. Ariz. R. Civ. Pro. 12(d).

4 The Association argues that relying on emails is fine for required signatures to a
5 petition, with no factual issues. However, whether an email or other electronic message
6 qualifies as an electronic signature for a petition requires examination of each email and
7 the surrounding circumstances to find that the purported signature demonstrates an
8 intent to sign a specific record that can be produced as the intended record for signature.
9 A.R.S. § 44-7002; -7009. For instance, what were all of the solicitations used to obtain
10 emails counted as signatures? Who made those? What did they say? What record did
11 each and every solicitation refer to for the intended target? All of those questions related
12 to the factual merits of Count 2, require disclosure and discovery, and may not be argued
13 on an incomplete record with matters outside of the pleadings.³

14 **V. IN THE EVENT THE COURT FINDS ANY DEFICIENCIES IN THE**
15 **AMENDED COMPLAINT, TOM REQUESTS LEAVE OF COURT TO**
16 **AMEND TO ADDRESS THEM IN AN AMENDED PLEADING.**

17 To the extent the Court finds any infirmities in the Amended Complaint, Tom
18 respectfully requests leave of court to include additional allegations to shore up his
19 claims. Arizona law and Defendant's governing documents recognize a board member's
20 right to indemnity. Arizona law further provides that a single member can challenge his
21 or her homeowners' association's power to act. It also provides that recall is a process
22 that can only be initiated by the members upon meeting the statutory requirements. If

23 ³ Defendant relies on stray language in a Court of Appeals' Opinion that is not good
24 law. The Association cites *Buckelew v. Town of Parker*, 188 Ariz. 446, 449 (App. 1996),
25 which did state a proposition that a trial court may consider extrinsic materials to
26 examine standing raised in a motion to dismiss if not tied to the factual merits of the
claim. But the *Buckelow* panel cited *Switchenberg v. Briner*, which limits that exception
to a question of subject matter jurisdiction for the court to hear the claim. *Buckelow*, 188
Ariz. at 449 n.1.

1 the Court finds that the Amended Complaint does not allege sufficient facts on any of
2 these claims, Tom requests leave of court to add more meat to the healthy bones already
3 in the pleading.

4 **Conclusion**

5 Tom adequately pleads an abuse of power by the Board’s majority to adopt Grand
6 Standards, declare Tom to be in violation and subject to “enforcement action” to correct
7 his behavior, and engage in enforcement proceedings against him for violating
8 unspecified provisions to defend himself against the vaguest of allegations that he
9 violated Grand Standards as a board member. Tom adequately pleaded that there is no
10 identifiable petition signed by the required number of homeowners and that the emails
11 do not qualify as electronic signatures to an identifiable record. These facts alleged in the
12 Amended Complaint fully support the claims in Counts 1, 2, and 3.

13 The motion to dismiss must be denied

14 DATED this 25th day of April 2025.

15 **DESSAULES LAW GROUP**

16
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/s/ Hilary Narveson _____