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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

THOMAS J. GUSICH, an individual, Plaintiff, v. SUN CITY GRAND COMMUNITY ASSOCIATION, INC., an Arizona nonprofit corporation, Defendant.	NO. CV2025-002634 **DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT** (Assigned to the Hon. Jennifer Ryan-Touhill) **(Oral Argument Requested)**

MEMORANDUM OF POINTS AND AUTHORITIES.

I. INTRODUCTION.

Plaintiff was removed from the Board[1] at a properly noticed Special Meeting held on February 24, 2025. An overwhelming majority of the 5,399 members who participated voted in favor of recalling and removing Plaintiff from the Board. As demonstrated in the Association's Motion and below, the Board was undeniably authorized to call the Special Meeting on its own initiative under A.R.S. § 10-3808 and the Bylaws, and the Board was required under A.R.S. § 33-1813 to call the meeting after it received the Petition. Due process was provided. The votes were cast and tallied. The members of the Association have spoken. Plaintiff has been removed from the Board. These facts are fatal to Plaintiff's claims.

[1] Capitalized terms not otherwise defined herein shall have the same meaning ascribed to them in the Motion.

Rather than concede the obvious, Plaintiff largely ignores these fatal facts, doubles down with histrionics and hyperbole, and contorts or simply ignores relevant language in statutes and the governing documents. For instance, Plaintiff accuses the Association of engaging in "tyranny" and claims that it "weaponized" the Grand Standards, which were unanimously approved by the Board – including Plaintiff.[2] And, notwithstanding the plain language of A.R.S. § 10-3808, Plaintiff erroneously suggests that the only way members of a community association may remove a director is via a recall petition under A.R.S. § 33-1813. Putting aside the histrionics, none of the arguments set forth in the Response are accurate, persuasive, or otherwise warrant denial of the Motion. The Motion should be granted and the FAC dismissed for the following reasons:

1. Plaintiff's claim for declaratory judgment regarding the recall must be dismissed because, even if there was a deficiency with respect to the Petition (there was none), the Board was empowered to call the Special Meeting and remove Plaintiff under both the Bylaws and A.R.S. § 10-3808. The Court of Appeals has recognized that A.R.S. § 10-3808 provides an independent mechanism by which a nonprofit community association may remove a member of its board of directors, without the need for a petition. *McNally v. Sun Lakes Homeowners Ass'n #1, Inc.*, 241 Ariz. 1, 5 fn. 2 (App. 2016).

Moreover, separate and independent from A.R.S. § 10-3808, the Board was *required* to call the Special Meeting after it received the Petition. Section 33-1813 does not require that a Petition contain magic language or take on a specific format – a fact which Plaintiff does not dispute in the Response. Indeed, Plaintiff's own allegations and exhibits to the FAC undercut Plaintiff's argument and reveal that the Petition and its signatures undoubtedly satisfy the requirements of A.R.S. § 33-1813.

2. Plaintiff's declaratory judgment claim regarding the Grand Standards fails because he has been duly removed as a director, and does not have standing to challenge

[2] Indeed, the fact that Plaintiff did not respond to the Association's arguments in the order in which they were presented in the Motion, instead prioritizing Plaintiff's arguments regarding his claim for breach of contract and indemnification (Count Three), speaks volumes. Plaintiff was duly removed from the Board, and his removal requires the dismissal of the FAC in its entirety and with prejudice.

those standards (which apply only to directors) as a non-director. Plaintiff's assertion that he has standing under A.R.S. § 10-3304 is simply wrong. Section 10-3304 does not apply to a claim for declaratory judgment. Plaintiff cannot rely on that statute to avoid fundamental issues of standing and mootness or otherwise gin up an ongoing, ripe, or justiciable controversy where one does not exist.

3. Plaintiff's claim for indemnification fails. Section 6.5 of the Bylaws, when read in its entirety and not cherry-picked apart, reveals that the Association did not agree to indemnify directors (a) in connection with internal issues where the director does not face personal liability from third parties, or (b) for lawsuits or claims initiated by the director against the Association. Rather, by its express terms, Section 6.5 applies only to protect directors from third-party liability that may arise as a result of the director's conduct as a board member.

II. THE COURT MAY CONSIDER EVIDENCE OUTSIDE THE PLEADINGS IN RESOLVING QUESTIONS OF STANDING AND MOOTNESS.

Plaintiff chastises the Association for including exhibits with the Motion, arguing that this Court may not consider evidence outside of the pleadings in connection with ruling on the Association's Motion. Plaintiff is wrong. While the question of standing in Arizona is not a constitutional mandate (because there is no counterpart to the case or controversy requirement of the U.S. Constitution), Arizona has "established a rigorous standing requirement." *Fernandez v. Takata Seat Belts, Inc.*, 210 Ariz. 138, 140, ¶ 6 (2005). Standing in Arizona concerns "'prudential or judicial restraint' to ensure that [courts] do not issue advisory opinions, address moot cases, or deal with issues that have not been fully developed by true adversaries." *Home Builders Ass'n of Cent. Ariz. v. Kard*, 219 Ariz. 374, 377, ¶ 9 (App. 2008). Arizona courts treat standing and mootness as jurisdictional questions under Rule 12(b)(1), and trial courts may therefore consider evidence outside of the pleadings without turning a motion to dismiss into one for summary judgment. *See Buckelew v. Town of Parker*, 188 Ariz. 446, 449 fn. 1 (App. 1996).[3]

[3] Plaintiff speciously argues that *Buckelew* is "not good law" for this point merely because it cites to *Swichtenberg v. Brimer*, 171 Ariz. 77, 82 (App.1991), which in turn addressed

The evidence submitted by the Association in support of the Motion relates to the issues of standing and mootness, which are *not* intertwined with the merits of Plaintiff's claims. Specifically, the Association put forward evidence related only to *the Special Meeting and the vote* on Plaintiff's removal from the Board, which, as Association demonstrates in the Motion and herein (*see* Part III.A, infra), was effective to remove Plaintiff regardless of the merits of Plaintiff's claims and his allegations related to the Petition, the Grand Standards, his alleged exclusion from prior executive Board sessions, and his claim for indemnification. This Court can and should consider such evidence.

Moreover, as Plaintiff concedes (*see* Resp. at 3), this Court may also consider evidence that is central to Plaintiff's claims—*including the evidence Plaintiff has attached to the Complaint*—in ruling on dismissal pursuant to Rule 12(b)(6) without converting the Motion into one for summary judgment. *See, e.g.*, *ELM Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, 289, ¶ 7 (App. 2010).

III. COUNT TWO OF THE FAC FAILS AND MUST BE DISMISSED.

A. The Association Was Empowered to Call the Special Election Under A.R.S. § 10-3808.

Plaintiff does not dispute that Arizona's nonprofit statutes (Title 10) apply to nonprofit homeowner's associations, including the Association. Plaintiff does not dispute that A.R.S. § 10-3808 sets forth the process by which a nonprofit may remove a board member, including that a board member "may be removed from office pursuant to any procedure provided in the articles of incorporation or bylaws." A.R.S. § 10-3808(A).

Instead, Plaintiff suggests that A.R.S. § 10-3808 does not apply to a nonprofit *community association*, like the Association, because it ostensibly conflicts with A.R.S. § 33-1813. According to Plaintiff, "[s]pecific statutory provisions govern over more general ones," A.R.S. § 33-1813 "applies greater protections for members than Title 10 provides," and therefore A.R.S. § 10-3808 does not apply to the Association – or so the argument goes.

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subject matter jurisdiction generally and not standing specifically. However, the court in *Buckelew* clearly understood the holding of *Switchenberg*, as evidenced by the parenthetical to its citation to that case, and made clear that a court may review extrinsic evidence related to standing just as it would for any other issue of subject matter jurisdiction.

(Resp. at 9). Plaintiff is simply wrong.

First, there is no legitimate dispute that the Arizona Legislature intended that homeowners' associations organized as nonprofit corporations are subject *both* to A.R.S. Title 33 (the Planned Community Act) *and* A.R.S. Title 10 (the Nonprofit Corporation Act). By its terms, the Planned Community Act "applies to all planned communities" in the state. A.R.S. § 33-1801(A). Further, the Planned Community Act and Nonprofit Corporation Act both expressly contemplate that planned community associations may be organized as nonprofit corporations, subject to both Acts. *See* A.R.S. § 33-1802(1); A.R.S. § 10-3304(B). As a nonprofit planned community association, the Association is therefore indisputably subject to both Acts. Indeed, Plaintiff concedes in his Response that the Nonprofit Corporation Act applies to the Association. *See* Resp. at 7, 8.

Second, Plaintiff's assertion that A.R.S. § 33-1813 irreconcilably conflicts with A.R.S. § 10-3808, to the extent it applies to nonprofit community associations, is wrong. "Statutes relating to the same subject matter should be read *in pari materia* to determine legislative intent and to maintain harmony." *In re MH 2007-000937*, 218 Ariz. 517, 522, ¶ 12 (App. 2008) (quoting *Goulder v. Ariz. Dep't of Transp., Motor Vehicle Div.*, 177 Ariz. 414, 416 (App. 1993) (internal quotation marks omitted). "The goal is to achieve consistency between the statutes." *Id.*

A.R.S. § 33-1813 imposes an affirmative obligation on the board of any community association to hold a special meeting and recall vote upon receipt of a petition that meets the statute's requirements. In other words, it sets forth the process that must be followed in the event a community association receives a petition, and includes draconian penalties should the board fail to timely comply. A.R.S. § 33-1813(4)(d). Conversely, A.R.S. § 10-3808 separately authorizes a board to call a meeting to remove a board member without the need for petition if the governing documents allow for it, as the Bylaws do here. There is no actual or implied conflict between the two statutes, and inferring such a conflict would be contrary to the applicable principles of statutory construction.

Indeed, if the Legislature designed A.R.S. § 33-1813 to supersede A.R.S. § 10-3808,

or to occupy the entire field with respect to the removal of board members from a nonprofit community association (as Plaintiff argues), it certainly could and would have made that clear. In fact, that is precisely what the Legislature did with A.R.S. § 33-1812, which governs proxies and absentee ballots in community association elections. In that statute, the Legislature included the following language to make clear that Section 33-1812 superseded a similar provision in the Nonprofit Corporations Act: "***Notwithstanding § 10-3708*** or the provisions of the community documents, any action taken at an annual, regular or special meeting of the members shall comply with all of the following . . . ." A.R.S. § 33-1812(A) (emphasis added). The Legislature did ***not*** include similar language referencing A.R.S. § 10-3808 or Title 10 in A.R.S. § 33-1813. Likewise, in A.R.S. § 10-11602, which governs the rights of members to inspect the records of non-profit corporations, subsection (g) provides: "This section does not apply to any corporation that is a condominium as defined in § 33-1202 or a planned community as defined in § 33-1802." Again, the Legislature did ***not*** include similar language referencing A.R.S. § 10-3808. The absence of any similar carve out language from Sections 10-3808 and 33-1813 reinforces that the Legislature intended that both statutes provide an avenue by which a nonprofit community association board member may be removed.

Finally, the Court need not take the Association's word on this issue. In *McNally*, the Court of Appeals recognized that A.R.S. § 10-3808 provides a mechanism by which a nonprofit community association may remove a member of its board of directors. 241 Ariz. at 5, fn. 2. There, a board member of the defendant nonprofit homeowners' association filed an application for preliminary injunction seeking to compel the association's board to allow her to attend its executive sessions. *Id.* at 2-3, ¶¶ 2-9. The association argued that excluding the plaintiff from such sessions was the only practical option because the plaintiff refused to keep the information disclosed in the sessions confidential. *Id.* at 4, ¶ 19. The *McNally* court reasoned that, rather than exclude the member, the board had the option of filing a claim for judicial removal pursuant to A.R.S. § 10-3810 or, alternatively, under A.R.S. § 10-3808, the board could have called a member meeting to remove the board

member by member vote if permitted by association's articles or bylaws. *Id.* at 4-5, ¶ 20 & fn. 2. In short, *McNally*—which was issued *after* the Legislature adopted A.R.S. § 33-1813—recognized that a nonprofit community association can remove a director pursuant to A.R.S. § 10-3808.

Accordingly, notwithstanding any alleged defects in the Petition, Plaintiff's removal by member vote at the Special Meeting was permissible under both the governing documents and A.R.S. § 10-3808. Count Two must be dismissed with prejudice.

B. Plaintiff Fails to Allege That the Petition Was Defective.

Plaintiff does not dispute the fact that A.R.S. § 33-1813 does not require a petition to contain magic language or take on a specific format. Nor does Plaintiff cite a single case, statute, or source which supports such an assertion. Instead, Plaintiff simply proclaims that "[t]here was no petition." (Resp. at 10). However, Plaintiff's own allegations and exhibits to the FAC betray Plaintiff's argument, and reveal the Petition and its signatures undoubtedly satisfy the requirements of A.R.S. § 33-1813. After all, a petition is simply a formal request. *See, e.g.*, *Petition*, Black's Law Dictionary (12th ed. 2024).

For example, Plaintiff's own exhibits to the FAC demonstrate that, in response to a notice, members sent emails to **recalltomgusich@gmail.com** with their name, address, and member number in support of the request and effort to remove Plaintiff from the Board. Plaintiff fails to articulate how such emails and identifying information could be construed as anything other than an effective signature in favor of Plaintiff's removal from the Board under Arizona law. In sum, even if A.R.S. § 33-1813 did conflict with and/or supersede A.R.S. § 10-3808 (it does not), and the Association was required to have received a petition to hold the Special Meeting and vote on Plaintiff's removal, the FAC would still fail to sufficiently allege facts that, if true, render the Petition ineffective for that purpose.

IV. COUNT ONE MUST BE DISMISSED FOR MOOTNESS AND LACK OF STANDING.

Notwithstanding his removal from the Board, Plaintiff claims that he still has standing to challenge the Grand Standards: (1) pursuant to A.R.S. § 10-3304, which

concerns the validity of nonprofit corporation actions; (2) because he purportedly has been personally harmed by the Board's alleged enforcement of the Grand Standards when he was a member of the Board; (3) because he has an ostensible interest, as member of the Association, in the Grand Standards not being enforced against current and future members of the Board; and (4) because he conceivably could be reelected or reinstated to the Board. None of these arguments are accurate, compelling, or persuasive.

First, Plaintiff's reliance on A.R.S. § 10-3304 is misplaced. Section 10-3304(A) states: "Except as provided in subsection B of this section, validity of corporate action shall not be challenged on the ground that the corporation lacks or lacked power to act." Subsection (B)(2) states: "A corporation's power to act may be challenged . . . [i]n a proceeding by any member of . . . a planned community association against the corporation to enjoin the act pursuant to title 12, chapter 10, article 1 [i.e., an injunction]." A.R.S. § 10-3304(B)(2) (emphasis added). On its face, Section 33404(B)(2) states that Plaintiff may only challenge the Association's power to act by asserting a claim for injunctive relief enjoining specified future actions on the basis the Association lacks the necessary power to act. That is not what Plaintiff alleges here. Plaintiff asserts a claim for *declaratory relief* against the Association, which A.R.S. § 10-3304(B)(2) does not authorize. "[D]eclaratory relief raises different concerns than an injunction … 'critical distinctions make declaratory relief appropriate where injunctive relief would not be.'" *Olagues v. Russoniello*, 770 F.2d 791, 808 (9th Cir. 1985) (Nelson, J., concurring) (quoting *Steffel v. Thompson*, 415 U.S. 452, 481 (1974) (Rehnquist, J., concurring)). And here, Plaintiff does not allege any specific anticipated instance of future enforcement of the Grand Standards by the Association. He only complains of alleged prior instances of enforcement against him in his capacity as a member of the Board. Even if such allegations were proven true, there is no viable allegation of imminent risk of repetition where he is no longer a Board member.

Second, A.R.S. § 10-3304 does nothing more than explain how a member of a planned community can challenge the corporation's authority to act. It does *not* eliminate the concepts of mootness or standing, which apply to all lawsuits. Count One is still moot,

Plaintiff still lacks standing. There is also no justiciable controversy on the enforcement of the Grand Standards against Plaintiff; he is no longer a Board member, and such standards do not apply to him. As the Association demonstrated in the Motion, "[s]tanding under the Declaratory Judgment Act requires 'that there be an actual controversy ripe for adjudication and that there be parties with a real interest in the questions to be solved.'" *Republican Nat'l*, __Ariz. at __, ¶ 13, 2025 WL 719097 (quoting *Bd. Of Supervisors of Maricopa Cnty. v. Woodall*, 120 Ariz. 379, 380 (1978)). Contrary to Plaintiff's arguments in his Response, Plaintiff has not articulated any specific injury for which he has a cognizable right to recover, or that is not otherwise rendered moot, arising out of either the enforcement of the Grand Standards or his alleged exclusion from executive Board sessions.

Plaintiff cites *Armory Park Neighborhood Association v. Episcopal Community Services in Arizona*, 148 Ariz. 1, 6 (1985), for the well-established principle that a party must have an interest in the outcome of the litigation in order to have standing. (Resp. at 7). However, that principle supports the Association's argument. The *Armory* Court affirmed that Arizona courts impose the "prudential or judicial restraint" element of the standing requirement "to insure that our courts do not issue mere advisory opinions, that the case is not moot and that the issues will be fully developed by true adversaries." *Id.*; *see also Kard*, 219 Ariz. at 377, ¶ 9 (same). A case is moot if an event "ends the underlying controversy and transforms the litigation into 'an abstract question which does not arise upon existing facts or rights.'" *Workman v. Verde Wellness Ctr.*, 240 Ariz. 597, 603, ¶ 17 (App. 2016).

Here, because of Plaintiff's removal from the Board, any declaration regarding the alleged enforcement of the Grand Standards, or Plaintiff's alleged exclusion from future executive sessions, would necessarily only be advisory. Notably, Plaintiff cites no authority in support of his contention that he can stand in the shoes of some unidentified board member to bring suit on their behalf, or that he can seek advisory relief based on potential future reelection.[4] For these reasons, Count One should be dismissed with prejudice.

[4] Plaintiff's melodramatic (and inaccurate) characterization of the Grand Standards as "anti-dissent provisions" in his Response is a non sequitur; it does not change the fact that Plaintiff lacks standing to pursue the declaratory relief he seeks in the FAC.

V. COUNT THREE FAILS BECAUSE PLAINTIFF IS NOT ENTITLED TO INDEMNITY UNDER THE BYLAWS.

Count Three of the FAC is premised on Plaintiff's assertion that the Association breached Section 6.5 of the Bylaws by refusing to indemnify him for legal expenses he incurred in connection with his disagreements with the Board. A simple reading of the Bylaws demonstrates that Plaintiff is not entitled to indemnification.

Where there is an express indemnity contract, the extent of the duty to indemnify must be determined from the contract. *INA Ins. Co. of N. Am. v. Valley Forge Ins. Co.*, 150 Ariz. 248, 252 (App. 1986). Such contracts are construed to cover those losses or liabilities which ***reasonably appear to have been intended by the parties***. *Skousen v. W.C. Olsen Inv. Co.*, 149 Ariz. 251, 253 (App. 1986) (emphasis added); *see also Estes Co. v. Aztec Const., Inc.*, 139 Ariz. 166, 169 (App. 1983) (stating "the test in construing indemnity contracts is: whether or not, considering all of the relational circumstances, the indemnitee reasonably expected as part of his bargain with the indemnitor that the duty he failed to perform and on which his liability to plaintiff is predicated would be performed by the indemnitor.").

A plain reading of Section 6.5—in its entirety— makes clear the Association did *not* intend to indemnify Board members for fees incurred in connection with *internal disputes* between the Association and a Board member. *See, e.g.*, *Myers Bldg. Indus., Ltd. v. Interface Tech., Inc.*, 13 Cal. App. 4th 949, 969, 17 Cal. Rptr. 2d 242 (1993), *as modified on denial of reh'g* (Mar. 26, 1993) ("A clause which contains the words 'indemnify' and 'hold harmless' is an indemnity clause which generally obligates the indemnitor to reimburse the indemnitee for any damages the indemnitee becomes obligated ***to pay third persons***." (emphasis added)). Not surprisingly, in his Response, Plaintiff emphasizes only the first paragraph of Section 6.5, providing the Court with Cambridge dictionary definitions for words like "action" and "proceeding," but Plaintiff ignores the second paragraph of that same Section 6.5 because it is impossible to shoehorn in his claim for indemnification when the provision is read in its entirety and as a whole.

The second paragraph states "directors . . . shall not be liable for any mistake of

judgment" and that "directors shall have no personal liability with respect to any contract or other commitment made or action taken in good faith on behalf of the Association." Read in its entirety, it is obvious that the Association did not intend to indemnify Board members for internal disputes, like the one at issue here. Rather, Section 6.5 provides directors with indemnity for contracts made on behalf of the Association, and provides assurance that directors will not face liability *to third parties* for potential errors in judgment when acting on behalf of same: "The Association shall indemnify and forever hold each such director … harmless from ***any such contract commitment or action***." *Id*. (emphasis added).

Conversely, Plaintiff's proposed reading of Section 6.5 would allow a member of the Board to retain an attorney and fight any miniscule perceived challenge leveled at him or her in internal Association matters and bill the Association for such legal services, regardless of whether the Board member faced any potential liability. It would also mean that a Board member could file any affirmative action it wants against the Association for such perceived unfair actions and claim indemnity for the same. Taken to its logical conclusion, Plaintiff's advocated reading of Section 6.5 is simply absurd.

Further, Plaintiff's argument that any ambiguity in Section 6.5 should be construed against the Association is incorrect because the Court need not look beyond the plain language of the provision. *See MT Builders, L.L.C. v. Fisher Roofing, Inc*., 219 Ariz. 297, 302 (App. 2008) ("[A]s with all contracts, if the meaning of an indemnity provision remains uncertain after consideration of the parties' intentions, as reflected by their language in view of surrounding circumstances, *a secondary rule of construction requires* the provision to be construed against the drafter."). Accordingly, Plaintiff's Complaint fails to adequately state a claim for contractual indemnity and must be dismissed.

VI. CONCLUSION.

The Court should grant the Motion, dismiss the FAC in its entirety and with prejudice, and award the Association its attorneys' fees and costs.

RESPECTFULLY SUBMITTED this 8th day of May, 2025.

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EFILED with the Clerk of the Court this 8th day of May, 2025, and

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