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7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
8 **IN AND FOR THE COUNTY OF MARICOPA**

9
10 Lisa Marx
11 Plaintiff,

Case No. CV 2025-012980

12 vs.

13 Tara Condominiums Association, Inc.,
14 Mark Gottmann and Dennis Anderson
15 Defendant.

**RESPONSIVE MEMORANDUM TO
ASSOCIATION'S PARTIAL
MOTION TO DISMISS
PLAINTIFF'S CLAIMS THAT ARE
DERIVATIVE IN NATURE
PURSUANT TO RULE 12(B)(6)**

Honorable Randall H. Warner

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17
18 Plaintiff requests that the court deny the Defendant's request to dismiss any of
19 the twelve claims in the "Breach of Contract" complaint filed April 11, 2025 and served
20 by the Maricopa County Sheriff April 26, 2025 on the Defendants. An answer was due
21 from the Defendants by May 16, 2025, but Defendants failed to comply with Rules of
22 Civil Procedure 12 (a)(1)(A)(i) in a timely manner. The Defendant's attorney's attempt
23 to transform the case into a derivative suit is a tactic to avoid accountability regarding
24

1 the Defendants' actions of blatantly refusing to comply with the Arizona Revised
2 Statutes regarding condominiums, the Tara "Declaration of Restrictions, Establishment
3 of Board of Management and Lien Rights" ("Declaration") and the By-Laws in an
4 attempt to circumvent the Plaintiff's standing to sue for individual harms against her
5 and to shield the Defendants from personal liability and accountability; the result of
6 their breach of contract and operating outside their scope of authority and in bad faith.

7 MEMORANDUM OF POINTS AND AUTHORITIES

8 I. BACKGROUND

9 The Plaintiff entered into a legally binding contract with the Tara Condominium
10 Association by means of the Declaration when she purchased her unit September 10,
11 2020. The Plaintiff filed this case as a "Breach of Contract" case against the Defendants
12 for their violations of the law; specifically, the Condominium Act, the Declaration and
13 the By-Laws which govern the Tara Condominium Association. On pages 10 and 11 of
14 the Declaration it is stated,

15 "The foregoing restrictions and covenants run with the
16 land and shall be *binding on all persons owning real property*
17 *therein* for a period of (30) years following the date these
18 restrictions are recorded, after which time said covenants shall be
19 automatically extended for successive periods of ten (10) years
20 each. These restrictions and covenants may be amended, in
21 whole or in part, at any time by a majority vote of the then
22 owners of lots within the property herein contained. Deeds of
23 conveyance of said property or any part thereof may contain
24 the above restrictive covenants by reference to this document
but whether or not such reference is made in such deeds or any
thereof, each and all such restrictive covenants shall be valid
and binding upon the respective grantees. Violation of any
one or more of such covenants may be restrained by any
court of competent jurisdiction and damages awarded

1 *against such violator*, provided, however, that a violation
2 of these restrictive covenants or any one or more of them
3 shall not affect the lien of any mortgage now of record, or
4 which hereafter maybe placed of record, upon said tracts
5 or any part thereof."

6 ARS 33-440(A)(1)(2)E(1)(2) states:

7 *"A. An owner of real property may enter into a private
8 covenant regarding that real property and the private
9 covenant is valid and enforceable according to its terms
10 if all of the following apply:*

11 1. The private covenant is not prohibited by any other
12 existing private covenant or declaration affecting the real
13 property and does not violate any statute governing the subject
14 matter of the private covenant that is in effect before September
15 26, 2008.

16 2. The owner of the real property affected by the private
17 covenant and any person on whom the private covenant
18 imposes any liability or obligation have consented to the
19 private covenant.

20 E. For the purposes of this section:

21 1. "Declaration" means any instrument, however
22 denominated, that establishes restrictive covenants on the
23 development or use of real property.

24 2. "Private covenant" means any uniform or nonuniform
covenant, restriction or condition regarding real property
that is contained in any deed, contract, agreement or other
recorded instrument affecting real property."

 The terms of the law are met and therefore the Declaration/covenants are
enforceable for which the Plaintiff filed a complaint to enforce due to the breaches of
the board and Defendants named as they were operating outside of their scope of
authority and in bad faith causing damages.

1 **II. LEGAL ARGUMENT**

2 **A. The Board’s Source of Authority to Act on Behalf of the Association**

3 1. The only authority that the Board/ Defendants, have to act on behalf of the
4 Association derives from the legally binding contract of the Declaration, State Statutes
5 and other governing documents. At any point that the Board or Defendants are
6 operating outside of these constraints, their actions are not legitimate or enforceable,
7 they have willfully placed themselves in a position of operating outside of their scope
8 of authority and are not acting in good faith because they are violating the laws that
9 govern condominiums and the Declaration.

10 Every claim stated against the board/Defendants arises from their failure to
11 abide by the stated statutes or cited governing documents creating a breach of contract
12 in each claim with numerous examples given for each claim. Each direct claim carries a
13 different type of damage to the Plaintiff as an individual member of the association.

14 Each of the twelve individual claims as stated in the case are direct claims that
15 have been brought up in the claim by the Plaintiff personally, not on behalf of the
16 association, because the Plaintiff’s rights under the Arizona Revised Statutes, the
17 Declaration and the By-Laws have been violated repeatedly and knowingly,
18 intentionally and recklessly, even after the Plaintiff addressed the issues with the
19 board/Defendants to the best of her ability both publicly and in written e-mails or
20 letters as the evidence in the case will show. The board/Defendants continued to
21 violate the terms of the contract and state laws forcing the hand of the Plaintiff to file
22 suit to protect her rights under the contract and prevent any further damages whether
23 monetary, loss of contractual rights, the loss of peaceful enjoyment of her home due to
24 the deteriorating conditions of the landscaping and common areas and regular

1 surveillance by Defendants, emotional stress and anguish from personally being the
2 target of their intentional and reckless deprivation of Plaintiff's rights as a homeowner
3 and bearing the burden to address the Defendant's violations to protect Plaintiff's
4 rights, compensatory damages in the form of out of pocket expenses, and punitive
5 damages for the malicious actions of individual board members acting unilaterally
6 against the Plaintiff. Additionally, Injunctive Relief is being sought to prevent any
7 further actions that violate Plaintiff's rights or breach the contract in place.

8 Every one of the claims that carries monetary losses or increased expenses is a
9 direct claim, NOT a derivative claim, as the Plaintiff as an individual will be paying
10 1/50 of the increased costs and damages as a member of the association. Had the
11 board been operating within its scope of authority under the law, the damages would
12 not be an issue in the first place.

13 In every one of the claims the defendants, and at particular points Mark
14 Gottmann and Dennis Anderson failed to act in good faith, were negligent in their
15 duties, acted arbitrarily, capriciously, and practiced an abuse of discretion when they
16 violated their fiduciary Duty of Care, Duty of Loyalty and Duty to Act Within the
17 Scope of Authority by violating state statutes and the Tara Declaration of Restrictions.
18 These duties are owed to not only the Association, but to its members which Plaintiff is
19 one of 50. (See TIERRA RANCHOS HOMEOWNERS v KITCHUKOV(2007)) This is
20 not in the best interest of any member of the association.

21 In JOHNSON v. POINTE COMMUNITY ASSOCIATION INC (2003), 205 Ariz.
22 485, 73 P.3d 616 (App. 2003), Court of Appeals of Arizona, Division 1, Department E in
23 paragraph 23 - 25 the court stated,

24 ¶ 23. "In Arizona, a recorded declaration that contains restrictive

1 Covenants common to all properties in a development forms
2 a contract between “the [development's] property owners as
3 a whole and the individual lot owners.” Ariz. Biltmore Estates
4 Ass'n v. Tezak, 177 Ariz. 447, 448, 868 P.2d 1030, 1031 (App.1993)
5 (citing Divizio v. Kewin Enters.,,.,,., Inc., 136 Ariz. 476, 481, 666
6 P.2d 1085, 1090 (App.1983)).”

7 ¶ 24. “Even when a declaration authorizes the exercise of discretion
8 In complying with its provisions, the association still must
9 comply with the declaration's requirements, and association
10 members are entitled to judicial recourse to ensure such
11 compliance. Gfeller v. Scottsdale Vista N. Townhomes Ass'n,
12 193 Ariz. 52, 54, ¶ 11, 969 P.2d 658, 660 (“[W]hichever means
13 [of enforcement] it chooses, the Association may not forsake
14 its express duty to enforce the CC & R's.”).”

15 ¶ 25. “Because of its considerable power in managing and
16 regulating a common interest development, the governing
17 board of an owner’s association must guard against the
18 potential for the abuse of that power.” Nahrstedt v. Lakeside
19 Village Condo. Ass'n, 8 Cal.4th 361, 33 Cal.Rptr.2d 63, 878
20 P.2d 1275, 1281-82 (1994). In the absence of declaration
21 provisions providing alternative means of resolving disputes
22 arising from the enforcement of restrictive covenants, both
23 homeowners and their associations are entitled to bring
24 their case before the courts without either party's position
receiving deference. The civil courts afford a neutral
interpretation of the development's declaration and “significant
protection against overreaching” by either homeowners or their
association. See Lamden, 87 Cal.Rptr.2d 237, 980 P.2d at 952.”

In TIERRA RANCHOS HOMEOWNERS v KITCHUKOV(2007), Court of
Appeals of Arizona, Division 1, Department D, 216 Ariz. 195,165 P.3d 173, paragraphs
24 – 27, the court states:

1 ¶ 24 In determining the appropriate standard to apply, we begin
2 with the proposition that Arizona courts look to the Restatement
3 for guidance in the absence of controlling authority. See *Burns v.*
4 *Davis*, 196 Ariz. 155, 159, ¶ 5, 993 P.2d 1119, 1123 (App.1999)
5 (explaining that Arizona courts “look to the Restatement for
6 guidance” in the absence of case law to the contrary); *City of*
7 *Phoenix v. Bellamy*, 153 Ariz. 363, 366, 736 P.2d 1175, 1178
8 (App.1987) (noting that “Arizona courts will follow a restatement
9 of the law in the absence of contrary authority”).

10 ¶ 25 **The Restatement (Third) of Property: Servitudes § 6.13**
11 **(2000) (Restatement) specifically addresses the duties of a**
12 **common-interest community association to its members.**
13 **Among other duties, the Restatement imposes upon the**
14 **association the duty to “treat members fairly” and the duty to**
15 **“act reasonably in the exercise of its discretionary powers**
16 **including rulemaking, enforcement, and design-control**
17 **powers[.]” Id. at § 6.13(1)(b), (c).** Under the Restatement
18 approach, a member challenging an action of the association bears
19 the burden of proving that the association breached its duty. *Id.*
20 at § 6.13(2). In addition, when the action is one within the
21 association's discretion, the member bears “the additional burden
22 of proving that the breach has caused, or threatens to cause, injury
23 to the member individually or to the interests of the common-
24 interest community.” *Id.*

¶ 26 The Restatement approach blends elements of the
reasonableness rule and the business judgment rule. The
purpose of imposing these burdens on the member is to protect
“the collective decision making processes of common-interest
communities from second-guessing by the judiciary and to
protect the community from the expenses of too-ready resort to
litigation by disgruntled community members, while at the same
time protecting individual members from improper management

1 and imposition by those in control of the association.” Id. at cmt.
2 a. As the comments indicate, “[t]he business-judgment rule
3 [was] not adopted because the fit between community
4 associations and other types of corporations is not very close, and
5 it provides too little protection against careless or risky
6 management of community property and financial affairs.” Id. at
7 cmt. b. Nonetheless, unlike jurisdictions requiring the
8 association to prove the reasonableness of its actions, the
9 Restatement approach requires the member challenging the
10 association to establish that its actions were unreasonable. Id.
11 The Restatement approach essentially “provide[s] the advantages
12 of the business-judgment rule, but at less potential cost to the
13 interests of individual members.” Id.

14 ¶ 27 We find the Restatement approach to be well-reasoned and
15 see no reason to adopt a different standard by which to review the
16 discretionary decisions of a community association. See Scott B.
17 Carpenter, *Community Association Law in Arizona* 157 (2d
18 ed.2005) (suggesting that Arizona courts should follow the
19 Restatement (Third) of Property: Servitudes absent contrary
20 authority in “cases that deal with community associations and
21 restrictive covenants”).

22 **B. The Declaration must be considered in its entirety as to the Defendant’s**
23 **claim that the Declaration provides the Board discretion regarding multiple claims**
24 **asserted by Plaintiff.**

1. The Tara Condominium Declaration is a contract that establishes the rights
and obligations of unit owners and the association. A fundamental principle
of contract interpretation under Arizona law (and generally accepted legal principles)
is that when interpreting a legal document, the document should be viewed in its
entirety, with all of its provisions read together to determine the overall intent and
meaning, and responsibilities that go with those rights. Plaintiff has never overlooked

1 the terms of the Declaration and the rights and responsibilities the board carries. The
2 Plaintiff was elected to serve on the Tara board for four years in a row. Plaintiff
3 respected and followed the State Statutes, Declaration and the other governing
4 documents, always making sure to the best of her ability that the rights of homeowners
5 were protected and the governing documents enforced; a dual responsibility of all
6 board members. Plaintiff resigned from the board in the beginning of her 4th term on
7 the board in January of 2024 because the Defendants were not following the laws and
8 Plaintiff would not be a part of illegal activity.

9 2. Defendants claim the right to make decisions under point 12 of the
10 Declaration on one hand and then on the other fail to follow the restrictions and
11 responsibilities that go with those rights stated as has been stated in the claim page
12 after page. In the sequence of points in the Declaration, before any rights or
13 responsibilities of a board are stated, the Declaration in point 9 established a board.
14 Then, in point 9. E. stated, "A majority vote of the Managers shall entitle said Board to
15 carry out action on behalf of the owners of the units." Throughout the entirety of the
16 122 pages of the complaint against the Defendants, there is point after point of the
17 violations of the board in taking action without a majority vote of the board. Without
18 that vote, the board did not have a right to take action, period. Therefore, they are
19 acting outside of their scope of authority and not in good faith, breaching the contract
20 of the Declaration and violating Plaintiff's rights.

21 3. Federal and State Laws are the primary authority and take precedence over all
22 other COA documents. Therefore, in addition to the board abiding by point 9. E.
23 in having a majority vote of the Board to take action, there must be compliance with
24 ARS 33-1248 in its entirety. ARS 33-1248(A) states,

1 *Notwithstanding any provision in the declaration, bylaws or*
2 *other documents to the contrary, all meetings of the unit*
3 *owners' association and the board of directors, and any*
4 *regularly scheduled committee meetings, are open to all*
5 *members of the association or any person designated by a*
6 *member in writing as the member's representative and all*
7 *members or designated representatives so desiring shall be*
8 *allowed to attend and speak at an appropriate time during*
9 *the deliberations and proceedings. The board may place*
10 *reasonable time restrictions on those persons speaking during*
11 *the meeting but shall allow a member or a member's*
12 *designated representative to speak once after the board has*
13 *discussed a specific agenda item but before the board takes*
14 *formal action on that item in addition to any other*
15 *opportunities to speak. The board shall provide for a*
16 *reasonable number of persons to speak on each side of an*
17 *issue. Persons attending may audiotape or videotape those*
18 *portions of the meetings of the board of directors and*
19 *meetings of the members that are open. The board of directors*
20 *of the association shall not require advance notice of the*
21 *audiotaping or videotaping and may adopt reasonable rules*
22 *governing the audiotaping or videotaping of open portions of*
23 *the meetings of the board and the membership, but such rules*
24 *shall not preclude such audiotaping or videotaping by those*
attending, unless the board audiotapes or videotapes the
meeting and makes the unedited audiotapes or videotapes
available to members on request without restrictions on their
use as evidence in any dispute resolution process. Any portion
of a meeting may be closed only if that portion of the meeting is
limited to consideration of one or more of the following:
1. Legal advice from an attorney for the board or the
association. On final resolution of any matter for which the
board received legal advice or that concerned pending or
contemplated litigation, the board may disclose information
about that matter in an open meeting except for matters that

1 are required to remain confidential by the terms of a
2 settlement agreement or judgment.

3 2. Pending or contemplated litigation.

4 3. Personal, health or financial information about an
5 individual member of the association, an individual employee
6 of the association or an individual employee of a contractor
7 for the association, including records of the association
8 directly related to the personal, health or financial information
9 about an individual member of the association, an individual
10 employee of the association or an individual employee of a
11 contractor for the association.

12 4. Matters relating to the job performance of, compensation of,
13 health records of or specific complaints against an individual
14 employee of the association or an individual employee of a
15 contractor of the association who works under the direction of
16 the association.

17 5. Discussion of a unit owner's appeal of any violation cited or
18 penalty imposed by the association except on request of the
19 affected unit owner that the meeting be held in an open
20 session.

21 Page after page of the claim there are examples of the board and the
22 Defendants individually violating the open meeting laws thus violating the
23 Plaintiff's rights under the law causing the various damages as stated. In
24 violating the laws, the Board and the Defendants named individually for
particular items are operating outside of their scope of authority and not in good
faith, often intentionally and recklessly depriving Plaintiff's rights as a
homeowner.

1 **C. Plaintiff's Claims are Not Derivative**

2 Claim 1: Defendants acknowledge that violations of the open meeting laws
3 affect all members equally. There are members that can't read or write, are
4 elderly and losing their faculties, or don't understand the Declaration to enforce
5 it. Others really don't care. This does not give a board the right to violate the
6 laws to accomplish their personal agenda. A member who understands their
7 rights under the law should not be deprived of those contractual rights because
8 they are only one member of the 50 that has spoken up and filed suit to protect
9 their rights. Whether it is one or 50, the damages are still a consequence of the
10 Defendants' violation of the law. The actions that the board takes outside of their
11 scope of authority to act while breaching the Declaration and laws creates an
12 unwanted, undesirable or illegal precedence that will be difficult to overcome if
13 an individual member does not file a claim to stop the illegal actions and have
14 the conditions of the Declaration enforced. Plaintiff NEVER made a claim in
15 Claim 1 that Gottmann took board action without a vote of the members.
16

17 Claim 3: Changing the Insurance Deductible Without Amending the By-
18 Laws is a direct claim regarding the Breach of Contract and illegal activities of
19 the board operating outside of their scope of authority and not in good faith. The
20 board denied the Plaintiff the right to vote on amending the by-laws.
21

22 Claim 4: The board's blatant, willful and reckless decision to hold a
23 budget vote refusing Plaintiff the right to turn in her ballot in person even after
24 Defendants were given a letter stating their responsibilities under the law is in

1 violation of ARS 33-1243(D) and ARS 33-1250 (C) and point 4; a breach of
2 contract and not enforceable. The board was operating outside of their scope of
3 authority and not in good faith. The actions have cost the Plaintiff a direct claim
4 of an additional \$50 a month since January 1, 2025.

5
6 Claim 5: Inequitable and Illegal Distributions of Common Expenses is a
7 direct claim against the Defendants as they have breached the contract of the
8 Declaration and violated state laws which renders their actions unenforceable.
9 They have acted outside of their scope of authority and in bad faith willfully and
10 recklessly even after being addressed about their wrongdoing and violations of
11 the open meeting laws. These actions have caused increased financial burden on
12 me personally as I pay 1/50 of the expenses of the association. The actions that
13 the board takes outside of their scope of authority to act while breaching the
14 Declaration and laws creates an unwanted, undesirable or illegal precedence that
15 will be difficult to overcome if an individual member does not file a claim to stop
16 the illegal actions and have the conditions of the Declaration enforced.

17 Claim 6: Showing Partiality / Preferential Treatment is a direct claim
18 against the board and Mark Gottmann personally as he is the one in many of the
19 points taking the actions outside of his scope of authority and in bad faith as he is
20 violating the state statutes and governing documents. The claims are in regards
21 to violations committed against Plaintiff by the Defendants thus breaching the
22 contract of the Declaration and state statutes cited. Defendants are twisting the
23 wording and meaning in each claim trying to make them look like a derivative
24

1 claim when if fact, the Plaintiff is using the wording in the state statutes to
2 describe the actions of the Defendants.

3
4 Claim 7: Failure to Enforce Violations. It does not appear that the
5 Defendants addressed the actual claim as it was inadvertently copied incorrectly
6 from the rough draft to the final draft and is a repeat of Claim 6.

7 Claim 8: Insurance Claim on 13601 N. Newcastle is a direct claim against
8 the board, Mark Gottmann and Dennis Anderson personally as they each
9 violated state statutes, breached the contract of the Declaration and therefore
10 were operating outside of their scope of authority and in bad faith. Their actions
11 have caused damages financially in the form of increased monthly assessments
12 to cover the increase in insurance costs which potentially could last the next 3-5
13 years. The actions that the board takes outside of their scope of authority to act
14 while breaching the Declaration and laws creates an unwanted, undesirable or
15 illegal precedence that will be difficult to overcome if an individual member does
16 not file a claim to stop the illegal actions and have the conditions of the
17 Declaration enforced.

18
19 Claim 9: Insurance Type of Coverage is a direct claim against the
20 Defendants as again they are breaching the contract of the Declaration and
21 violating state statutes and thus operating outside of their scope of authority and
22 in bad faith making their actions unenforceable. Damages are caused to the
23 Plaintiff in her portion of the increased assessments due to the over coverage of
24 insurance.

1 Claim 10: False Corporate Records is a direct claim against the Defendants as
2 they are violating the state statutes and Declaration in their record keeping, and
3 falsifying corporate records. The Defendants have denied me personally from
4 speaking at meetings to correct records and have been dismissive towards me
5 personally. This is operating outside of their scope of authority and in bad faith. As an
6 individual member of the association, I am entitled to receive accurate records from
7 meetings and financials to base my understanding of the state of the association as a
8 whole. A chairperson's actions that are outside of their scope of the authority of the
9 governing documents, and state statutes in violation of the open meeting laws in
10 placing people to serve on a board makes their actions not legal, affects the true status
11 of a quorum of a meeting or board members gathering as a quorum outside of board
12 meetings and affects one's understanding of who is truly and legitimately allowed to
13 make decisions on behalf of the association. All actions of the board become
14 questionable and can not be trusted when there is a breach of contract.

15 The damages from false records affects policy, governance and the amount
16 of money I am required to contribute to the monthly assessments. The actions
17 that the board takes outside of their scope of authority to act while breaching the
18 Declaration and laws creates an unwanted, undesirable or illegal precedence that
19 will be difficult to overcome if an individual member does not file a claim to stop
20 the illegal actions and have the conditions of the Declaration enforced.

21 Claim 11: Abuse of Position, Power and Authority of Chairperson is a
22 direct claim against the Defendants and Mark Gottmann personally as Mark
23
24

1 Gottmann was the author of the writings where the abuse of position, power
2 and authority took pace, willfully and recklessly blaming Plaintiff for the legal
3 expenses incurred by the board in the various points stated.

4
5 Claim 12: Neglecting the Common Area Landscaping is a direct claim as
6 the board has breached the Declaration and State Statutes. The costs of the
7 damages will be paid by all members of which Plaintiff is one. The damages are
8 many and they rob Plaintiff of the peaceful enjoyment of her home.

9 None of the claims would be in existence except for the fact that the
10 Defendants and at points stated in the Breach of Contract case, Mark Gottmann
11 or Dennis Anderson personally, failed to act in good faith, were negligent in their
12 duties, acted arbitrarily, capriciously, and practiced an abuse of discretion when
13 they violated their fiduciary Duty of Care, Duty of Loyalty and Duty to Act
14 Within the Scope of Authority by violating state statutes and the Tara
15 Declaration of Restrictions. These duties are owed to not only the Association,
16 but to its members which Plaintiff is one of 50. See **The Restatement (Third) of**
17 **Property: Servitudes § 6.13 (2000) (Restatement).**

18 19 III. CONCLUSION

20 Plaintiff hereby respectfully requests this Court to deny the motion to
21 dismiss any of the claims in the Breach of Contract case as they are direct claims
22 with various losses to the Plaintiff all the result of the Defendants' Breach of
23 Contract of the Declaration and State Statutes. The Plaintiff further request the
24

1 relief requested in the Amended Emergency Orders in the form of the
2 Temporary Restraining Order and Temporary Injunctive Relief. The Plaintiff
3 requests that the court deny any award of attorneys' fees or costs expended on
4 behalf of the Defendants as a Board or individually.

5 Respectfully Submitted this 4th day of June, 2025.

6 By: Lisa Marx

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