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9 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
10 **IN AND FOR THE COUNTY OF MARICOPA**

11 COLETTE MCNALLY, an individual,

12 Plaintiff,

13 -vs-

14 SUN LAKES HOMEOWNERS
15 ASSOCIATION #1, INC., an Arizona non-
16 profit corporation,

17 Defendant.

No. CV2014-009496

**PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT TO
RESTORE PLAINTIFF'S RIGHT TO
PARTICIPATE IN EXECUTIVE
SESSIONS**

(Assigned to The Hon. James T. Blomo)

ORAL ARGUMENT REQUESTED

19 Plaintiff, Collette McNally, through undersigned counsel, hereby moves for summary
20 judgment to restore her right to participate in executive sessions. Plaintiff's Motion is supported
21 by the Memorandum of Points and Authorities below and Statement of Material Facts ("SOF")
22 with attached exhibits filed herewith. Plaintiff incorporates her Statement of Material Facts
23 herein by reference.
24
25
26

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 Plaintiff is a duly elected director on the Board of Directors for defendant Sun Lakes
4 Homeowners Association (the "Association"). SOF ¶1. Since September 2013, the Association
5 has wrongfully precluded Plaintiff from participating in executive sessions with the rest of the
6 Board. Plaintiff's Motion should be granted because the Association lacks the authority to
7 preclude Plaintiff from participating in executive sessions. Furthermore, even if the Association
8 had the authority to preclude Plaintiff from participating in executive sessions, which Plaintiff
9 disputes, the Association's perpetual sanction is arbitrary and capricious because there is no time
10 limit placed on the Association's sanction. For these reasons and those discussed in further
11 detail below, Plaintiff's Motion should be granted.

12 **II. RELEVANT FACTUAL BACKGROUND**

13 In or about July 2013, Plaintiff received a publicly circulated e-mail from a former
14 employee of the Association's property management team where this person confessed to
15 participating in a conspiracy with other members of the Association and the Association's
16 management team of stealing another Board Member's board notes, circulating those notes
17 throughout the community and lying to this Board Member that his computer was hacked
18 resulting in this mass public disclosure. SOF ¶2. Upon receiving this confession, Plaintiff gave
19 it to the Association's president and implored him to discuss the confession with the community
20 at the next scheduled Board meeting in August 2013. SOF ¶3. After the Association refused to
21 discuss the confession at the August 2013 Board meeting, the Board met in an un-noticed
22 executive session before the next September 2013 meeting and passed a resolution where they
23 decided to take no action on the confession (presumably because the confession implicated a
24 majority of them). SOF ¶4. When the Board president stopped public discussion of the
25 confession during the open portion of the meeting, Plaintiff began reading the confession to
26

1 those community members in attendance and the Board president abruptly ended the meeting
2 altogether. SOF ¶5.

3 Since that September 2013 meeting when Plaintiff read the already publicized confession
4 to the community, the Association has prevented Plaintiff from participating in executive
5 sessions on the grounds that she violated executive meeting privilege when she read the
6 confession to the community. SOF ¶6. Even though Plaintiff was re-elected to her directorship
7 in March 2014 by the community, the Association still precludes her from participating in
8 executive sessions on the grounds she allegedly violated executive meeting privilege in her last
9 term. SOF ¶7. The only way the Board will allow Plaintiff to participate in executive sessions
10 is if she signs a false confession and admits that the prior confession by the former employee
11 was false. SOF ¶8.

12 Plaintiff read the confession to the community because she believed that she had an
13 obligation pursuant to Arizona's Open Meeting Law (i.e. A.R.S. § 33-1804) to inform the
14 community of what this former employee of the Association's management team confessed to.
15 SOF ¶9. She also believed that the Association was violating A.R.S. § 33-1804 by keeping the
16 confession secret because the confession did not fall within any of the exceptions of documents
17 that may be kept from disclosure pursuant to that statute. SOF ¶10. On the other hand, the
18 Association alleges that Plaintiff breached executive session privilege by reading the confession
19 after it had already decided to take no action on it. SOF ¶11.

20 By precluding Plaintiff from executive sessions, the Association has ostensibly removed
21 Plaintiff as a Board Member because she is no longer able to adequately represent the interests
22 of her constituents, including those that re-elected her to the Board in March 2014, in all facets
23 of Association governance. SOF ¶12. Although the parties dispute whether Plaintiff violated
24 any executive session privilege, for purposes of this Motion, it does not matter. Whether
25 Plaintiff was allowed to read the confession or not or whether Plaintiff violated any executive
26 session privilege or not has no bearing on the ultimate issue before this Court which is that the

1 Association lacks *authority* to preclude Plaintiff from executive sessions and, moreover, cannot
2 arbitrarily sanction Plaintiff for an indeterminable period of time. As discussed below, there is
3 no genuine issue of material fact. The Association lacked authority to preclude Plaintiff from
4 executive sessions and the sanction is in fact arbitrary, capricious and unenforceable on its face.

5 **III. THE ASSOCIATION LACKS AUTHORITY TO PERMANENTLY BAN** 6 **PLAINTIFF FROM EXECUTIVE SESSIONS**

7 Ever since Plaintiff read the confession in the open portion of the Board meeting, the
8 Association has banned Plaintiff from participating in executive sessions. SOF ¶¶6,7. However,
9 as a duly elected member of the Association's Board of Directors, and having been re-elected
10 after the incident resulting in the Association's permanent sanction, the Association has violated
11 Arizona law and the Association's governing documents by banning Plaintiff from executive
12 sessions.

13 Arizona law and the Associations' governing documents are the two independent sources
14 that give directors their powers. Villas at Hidden Lakes Condos. Ass'n v. Geupel Constr. Co.,
15 174 Ariz. 72, 78, 847 P.2d 117, 123 (App. 1992). The powers of the Board contained in the
16 Association's governing documents must be followed because those documents form a contract
17 between the Association and the individual community members. Powell v. Washburn, 211
18 Ariz. 553, 554, 125 P.3d 373, 374 (App. 2006). If the Association fails to comply with Arizona
19 law or the Association's governing documents, members are entitled to judicial recourse to
20 ensure such compliance. Johnson v. Pointe Community Ass'n, Inc., 205 Ariz. 485, 490, 73 P.3d
21 616, 621 (App. 2003). Neither Arizona law nor the Association's governing documents give the
22 Association the power to ban Plaintiff from executive sessions.

23 Section 6.15 of the CC&Rs titled "Boards Power to Adopt/Enforce Rules" does not give
24 the Board of Directors power to suspend Plaintiff's directorship privileges. SOF ¶13, Exhibit A-
25 1, CC&Rs. Section C of the Association's Policies and Rules Information Manual, which is
26 titled "Boards Authority" further does not give the Board of Directors the power to arbitrarily

1 suspend Plaintiff's directorship privileges for an indeterminate period of time. SOF ¶14, Exhibit
2 A-2, Policies and Rules Information Manual.

3 The only provision contained in any of the Association's governing documents that gave
4 the Association power to remove members of the Association's Board of Directors was former
5 Article III, Section 15 of the Bylaws. SOF ¶15, Exhibit A-3, Bylaws, Article III, Section 15 (in
6 effect prior to February 21, 2011). However, that section, which the Association has relied on to
7 remove Plaintiff, was deleted by a community vote in February 2011 - - *over two years before*
8 *the Association removed Plaintiff.* SOF ¶16, Exhibit A-4, Bylaws, Article III, Section 15
9 (Including Amendments Through 2/21/11).¹ At the time the community determined to delete
10 this Bylaw provision, it circulated a statement arguing that this bylaw provision was improper.
11 The community's statement provided as follows:

12 **SUPPORTING THE PROPOSED AMENDMENT TO**
13 **DELETE ARTICLE III, SECTION 15 OF THE BYLAWS:**

14 Most HOAs don't allow one group of board members to remove
15 other board members. It violates democratic process, leaves many
16 homeowners unrepresented, becomes dictatorial, encourages
17 arrogance, generates conflict and angry feelings in the community
18 and it can't be done fairly. One group of board members make
19 themselves into judge, jury, and prosecutor and they make up the
20 rules. It is expensive and there is no appeal. Board members who
21 are a problem can always be ignored, or removed by the
22 homeowners using Recall or the elections. We don't need this bad
23 process which causes more problems than it ever solves.

24 SOF ¶15, Exhibit A-3.

25 The current Bylaws, and those in effect in September 2013, deleted former Article III,
26 Section 15 because, as the community put it, this Bylaw "violated the Democratic process and

24 ¹ In its Response to Non-Uniform Interrogatory No. 2 which asked for all legal authority contained in
25 the Association's governing documents that gave the Association authority to preclude Plaintiff from
26 executive sessions, the Association responded that it relied on Article III, Section 15 of the Bylaws. See SOF
¶17, Exhibit B. However, as discussed above, this Bylaw was deleted in February 2011, over two years

1 left homeowners unrepresented.” SOF ¶15, Exhibit A-3. Since Article III, Section 15 of the
2 Bylaws was deleted in February 2011 and not enforceable at the time the Association determined
3 to remove Plaintiff from executive sessions in September 2013, the Association lacked power to
4 do so under the Association’s governing documents.

5 Moreover, the Association lacked power to remove Plaintiff from executive sessions
6 under Arizona law. A.R.S. § 33-1813 and A.R.S. § 10-3808 establish the procedure for removal
7 of board members in planned communities and non-profit corporations. These provisions
8 provide that it is up to the community members to recall directors and do not allow directors to
9 vote out fellow directors. The relevant portions of A.R.S. § 33-1813 contained in the
10 homeowners’ association laws provide as follows:

11 A.R.S. § 33-1813. Removal of board member; special meeting.

12 A. Notwithstanding any provision of the declaration or bylaws to
13 the contrary, the members, by a majority vote of members entitled
14 to vote and voting on the matter at a meeting of the members called
15 pursuant to this section at which a quorum is present, may remove
16 any member of the board of directors with or without cause, other a
17 member appointed by the declarant. For purposes of calling for
removal of a member of the board of directors, other than a member
appointed by the declarant, the following apply:

18 2. Notwithstanding § 33-1804, subsection B, in an association with
19 more than 1,000 members, on receipt of a petition that calls for
20 removal of a member of the board of directors and that is signed by
21 the number of persons who are entitled to cast at least 10% of the
22 votes in the association or 1,000 votes in the association, whichever
of a special meeting as prescribed by § 33-1804, subsection B.

23 Likewise, the relevant portions of A.R.S. § 10-3808 (the non-profit corporation laws)
24 provide:

25 _____
26 before the Association imposed its perpetual sanction and the Bylaw was therefore unenforceable. See
Exhibit A-1, Bylaws, Art. III, Section 15 (Deleted).

1 A.R.S. § 10-3808. Removal of directors elected by members or
2 directors.

3 B. If the articles of incorporation or bylaws do not provide a
4 procedure for removal of a director from office:

5 1. The members may remove one or more directors elected by
6 them with or without cause unless the articles of incorporation
7 provide that directors may be removed only for cause.

8 These statutes are consistent with the well-established law that directors cannot remove
9 other directors. See e.g. 63 A.L.R. 776, Power of Directors of Private Corporation to Remove
10 Officers or Fellow Directors; Stroud v. Milliken Enterprises, Inc., 585 A.2d 1306 (Del. Ch.
11 1988)(court holding that directors do not have power to remove fellow directors.); Brevetti v.
12 Tzougros, 42 Misc.2d 171, 247 N.Y.S.2d 295 (N.Y. Sup. Ct. 1964)(court holding that plaintiff
13 was entitled to injunctive relief directing defendants to reinstate plaintiff to her directorship in a
14 corporation and restraining and enjoining defendants for interfering with plaintiff in her duties as
15 a director where plaintiff had been duly elected and her dismissal was accomplished without
16 notice or right of confrontation, and her purported dismissal caused her and would cause her
17 irreparable damage pending final determination of the action.) As stated by the New York
18 Appellate Court in Petition of Holmes, 286 A.D. 500, 145 N.Y.S.2d 26 (N.Y. App. Div. 1st Dept.
19 1955):

20 The power of directors to remove another director elected by the
21 same constituents should be granted in definite terms and should be
22 exercised only for grave derelictions; and it should be
23 circumscribed and guarded jealously against abuse.

24 A.R.S. § 33-1813, A.R.S. § 10-3808 and law above establish that a duly elected member
25 of the Board of Directors can only be removed by community vote. This did not occur here.
26 The Association has failed to comply with these statutes because the Association did not call a
special meeting and did not allow the members who voted Plaintiff into office in the first place
an opportunity to vote her off the Board of Directors. SOF ¶18. Instead, the Association held an

1 un-noticed meeting and determined for itself to ban Plaintiff from executive sessions, which is
2 tantamount to removing her as a director because she cannot represent the community in all
3 aspects of Association governance. SOF ¶19. Therefore, the Association has failed to comply
4 with A.R.S. § 33-1813 and § 10-3808.

5 Plaintiff ran for election to the Board of Directors as was her right to do so under the
6 Association's governing documents. SOF ¶1. The Association's power to sanction or
7 essentially remove Plaintiff from the Board flows from the governing documents and Arizona
8 law. As discussed above, the CC&Rs and Association's Rules and Policies do not confer this
9 power to the Board. Furthermore, Article III, Section 15 of the Bylaws, which the Association
10 has relied on to punish Plaintiff, was deleted from the Bylaws by a community vote over two
11 years before the Association sanction and was unenforceable. SOF ¶16, Exhibit A-4, Bylaws,
12 Article III, Section 15 (Including Amendments Through 2/21/11). Lastly, the Association
13 lacked statutory authority to remove Plaintiff under A.R.S. § 33-1813, A.R.S. § 10-3808 and the
14 established law against Board Members removing fellow elected members.

15 By perpetually sanctioning Plaintiff without any authority and over the community's
16 desire to prohibit such practice – and over the community's re-election of Plaintiff in March
17 2014 after the alleged incident, the Association has violated the governing documents, Arizona
18 law and the members' fundamental democratic rights. Therefore, this Court should enter an
19 order fully restoring Plaintiff's directorship privileges including her right to participate in
20 executive sessions.

21 **IV. EVEN IF THE ASSOCIATION HAD AUTHORITY TO SANCTION PLAINTIFF,**
22 **WHICH PLAINTIFF DISPUTES, THE SANCTION IS ARBITRARY AND**
23 **CAPRICIOUS BECAUSE THE SANCTION HAS NO TIME LIMIT**

24 Since September 2013, the Association has precluded Plaintiff from participating in
25 executive sessions. SOF ¶6. The Association has put no time limit on its sanction and has
26 precluded Plaintiff from participating in executive sessions even though she was re-elected in

1 March 2014 by the community after the Association sanctioned her. SOF ¶7. How long can the
2 Association continue to preclude Plaintiff? Another year? Two? Ten? Indefinitely? Since
3 there is no criteria the Board can apply to determine the length of the sanction, the sanction by
4 its nature is arbitrary and capricious. Not only is the Association's sanction improper for the
5 reasons discussed above, the Association's unending sanction is unreasonable because it is
6 completely arbitrary.

7 The Arizona Supreme Court and Court of Appeals has adopted the Restatement approach
8 for interpreting deed restrictions and for reviewing discretionary decisions of community
9 associations. See e.g. Powell v. Washburn, 211 Ariz. 553, 557, 125 P.3d 373, 377 (App. 2006);
10 Tierra Ranchos Homeowners Ass'n v. Kitchukov, 216 Ariz. 195, 201, 165 P.3d 173, 179 (App.
11 2007). Restatement of the Law – Property (Servitudes) (the “Restatement”) § 6.7 cmt. b. states
12 that “Rules are not valid unless they are also reasonable.” If a rule is “arbitrary or capricious”,
13 the court may declare the rule invalid as a matter of law and provide the community member
14 with judicial recourse. Restatement § 6.13 cmt. B; Villas at Hidden Lakes Condo. Ass'n v.
15 Geupel Constr. Co., Inc., 174 Ariz. 72, 80, 847 P.2d 117, 125 (App. 1992) citing Worthinglen
16 Condominium Unit Owners Ass'n v. Brown, 57 Ohio App. 3d 73, 566 N.E. 2d 1275, 1277 (Ohio
17 1989); City of Oceanside v. McKenna, 215 Cal. App. 3d 1420, 1428 (Cal. App. 1989); see also
18 Cambridge Eng'g v. Mercury Partners 90 Bl., Inc., 378 Ill. App. 3d 437, 447, 879 N.E.2d 512,
19 522 (Ill. 2007).

20 The Association has put no time limit on the sanction and the Association has precluded
21 Plaintiff from participating in executive sessions for over a year now. SOF ¶6. During that
22 time, Plaintiff was re-elected by the community and the community expected that by re-electing
23 Plaintiff, she would represent their interests in all aspects of Association governance including in
24 executive sessions. SOF ¶7. However, since September 2013, the Association has portrayed
25 Plaintiff as an untrustworthy Board Member and has essentially removed her as a Director by
26 forcing her to miss important issues discussed during executive sessions. SOF ¶20. The

1 Association's removal of Plaintiff as a member of the Board of Directors for an arbitrary length
2 of time has severely compromised her ability to adequately represent the interests of those
3 members who voted her onto the Board. SOF ¶21. Therefore, the Association's interminable
4 sanction is arbitrary and violates Restatement §§ 6.7, 6.13 and Arizona law. Based upon the
5 foregoing, this Court should declare the sanction invalid as a matter of law and provide Plaintiff
6 with judicial recourse in the form of full reinstatement of her directorship privileges.
7 Restatement § 6.13 cmt. B; Villas at Hidden Lakes Condo. Ass'n; Worthinglen Condominium
8 Unit Owners Ass'n; City of Oceanside; Cambridge Eng'g; *supra*.

9 **V. CONCLUSION**

10 There is no genuine issue of material fact that the Association lacked authority to
11 permanently ban Plaintiff from executive sessions and that the sanction is invalid on its face
12 because it is arbitrary and capricious. As such, Plaintiff submits that her Motion for Summary
13 Judgment should be granted and that she should be awarded her attorneys' fees and costs as the
14 prevailing party. See A.R.S. § 33-1813(A)(5).

15 **RESPECTFULLY SUBMITTED** this 12th day of December, 2014.

16 **CHEIFETZ IANNITELLI MARCOLINI, P.C.**
17 Attorneys for Plaintiff

18 By: 

19 Steven W. Cheifetz
20 Jacob A. Kubert

1 **ORIGINAL** of the foregoing
2 e-filed this 12th day of December,
3 2014, with:

4 Clerk
5 MARICOPA COUNTY SUPERIOR COURT
6 201 West Jefferson
7 Phoenix, Arizona 85003

8 **COPY** of the foregoing e-delivered
9 this 12th day of December 2014, to:

10 The Honorable James T. Blomo
11 MARICOPA COUNTY SUPERIOR COURT
12 201 West Jefferson Street
13 Phoenix, Arizona 85003

14 **COPY** of the foregoing mailed
15 this 12th day of December, 2014, to:

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