Robert Grasso, Jr. – Bar No. 015087
Jenny J. Winkler – Bar No. 019032
GRASSO LAW FIRM, P.C.
2121 West Chandler Boulevard, Suite 100
Chandler, Arizona 85224
Telephone (480) 739-1200
rgrasso@grassolawfirm.com
jwinkler@grassolawfirm.com
Attorneys for Defendant

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

COLETTE MCNALLY, an individual, Plaintiff, vs. SUN LAKES HOMEOWNERS ASSOCIATION #1, INC, an Arizona non-profit corporation, Defendant.	Case No. CV2014-009496 **DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT TO RESTORE PLAINTIFF'S RIGHT TO PARTICIPATE IN EXECUTIVE SESSIONS** (Assigned to the Honorable James Blomo)

Plaintiff's Motion for Summary Judgment to Restore Plaintiff's Right to Participate in Executive Sessions argues that Defendant Sun Lakes Homeowners Association #1 ("the Association") lacks the authority to screen Plaintiff from executive sessions or, alternatively, that the Association's ongoing screening of Plaintiff is arbitrary and capricious. As discussed more fully below, genuine issues of material fact preclude the entry of summary judgment in favor of Plaintiff. The record demonstrates that the Association has screened Plaintiff from executive sessions because she refuses to uphold her duty as a Director to preserve the confidentiality of matters discussed in executive sessions. This Opposition is supported by the following Memorandum of Points and Authorities, by Defendant's Controverting Statement of Facts in Support of Defendant's Opposition to Plaintiff's Motion for Summary Judgment ("DSOF"), and by the entire record before the Court.

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MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff's Motion asserts that the Association has effectively removed Plaintiff from her position on the Association's Board of Directors by screening Plaintiff from receiving confidential and sensitive information of the Association at executive sessions of the Board. Plaintiff seeks an order declaring that she has a right, as a duly-elected member of the Association's Board of Directors, to participate in executive sessions of the Board, and further declaring that the Association lacks authority to screen Plaintiff from receiving confidential and sensitive information of the Association. Plaintiff's position is incorrect as a matter of law. The Association has the right under its governing documents and Arizona law to protect against the unauthorized disclosure of confidential and sensitive information belonging to the Association. Plaintiff has stated under oath that she will disclose information that she receives at executive sessions if she does not agree that the information should be kept confidential. Plaintiff has a history of doing just that, and of exposing the Association to liability in the process. These facts preclude the Court from concluding as a matter of law that Plaintiff has a right to participate in executive sessions of the Association's Board of Directors. Therefore, the Association respectfully requests that the Court deny Plaintiff's Motion for Summary Judgment to Restore Plaintiff's Right to Participate in Executive Sessions.[1]

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[1] Although styled as a motion for summary judgment under Rule 56, Plaintiff's Motion actually appears to seek a preliminary injunction under Rule 65(a). *See* Plaintiff's Motion at p. 8, l.19 ("this Court should enter an order fully restoring Plaintiff's directorship privileges including her right to participate in executive sessions") and p. 10, l.5 ("this Court should declare the sanction invalid as a matter of law and provide Plaintiff with judicial recourse in the form of full reinstatement of her directorship privileges"). A preliminary injunction requires the moving party to show (1) a strong likelihood of success on the merits; (2) the possibility of irreparable harm if relief is not granted; (3) a balancing of the hardships favoring the movant; and (4) in certain cases, advancement of the public interest. *See, e.g.*, *Arizona Ass'n of Providers for Persons with Disabilities v. State*, 223 Ariz. 6 (App. 2009). To the extent that Plaintiff's Motion seeks a preliminary injunction, she has failed completely to carry her burden, and the Court should deny her requested relief.

I. RELEVANT FACTS

Plaintiff Colette McNally is a resident of a planned community known as Sun Lakes. Defendant Sun Lakes Homeowners Association #1, Inc. is a non-profit Arizona corporation whose primary purpose is "to establish, own, operate, maintain, and manage community recreational and welfare facilities" for the residents of Sun Lakes. (DSOF 22.) The Association is managed and controlled by a seven-member Board of Directors elected by the residents of Sun Lakes at an annual meeting. (DSOF 23.) The Association's Bylaws authorize the Board of Directors "[t]o exercise all financial, legal, and other powers of the Board as are stated in these Bylaws, the Articles of Incorporation, and any other powers granted under the laws of the State of Arizona." (DSOF 24.) The President of the Board of Directors serves as the Chief Executive Officer of the Association. (DSOF 25.) The President's duties include directing the Association according to the policies established by the Board of Directors, the Bylaws, and state law; presiding at meetings; and exercising any and all other powers necessary or incidental to the office. (DSOF 26.) The Association employs various administrative personnel to carry out its day-to-day operations, including a General Manager and staff. The General Manager reports to the President of the Board of Directors. The Association also employs many dozens of other people in positions that include golf course operations, restaurant operations, and maintenance. (DSOF 27.)

A. Plaintiff's Service on the Association's Board of Directors.

Plaintiff first began serving on the Association's Board of Directors in 2009, when she was appointed to fill a vacancy on the Board. At the conclusion of her appointed term, Plaintiff ran for election to the Board of Directors but was not elected. (DSOF 28.) In 2010, Plaintiff was again appointed to fill a vacancy on the Board. However, Plaintiff was removed for cause before the end of her appointed term, after she disclosed confidential financial information of the Association to non-Board members. The Association incurred substantial attorneys' fees and costs associated with removing Plaintiff from the Board of Directors. (DSOF 29.) After Plaintiff's removal, a former employee of the Association asserted a claim

against the Association arising out of Plaintiff's breach of a confidentiality agreement between the Association and the former employee. The Association resolved the claim by paying the former employee a sum of money to settle the claim. The Association also incurred substantial attorneys' fees and costs in defending the former employee's claim. (DSOF 30.)

Plaintiff ran for election in 2011 and was elected to the Board of Directors. The Board of Directors selected Plaintiff to serve as Secretary of the Board upon her election in 2011. However, Plaintiff served as Secretary for less than one year before the Board of Directors removed her from that position for cause. After her removal as Secretary, Plaintiff continued to serve as an elected member of the Board of Directors. (DSOF 31.) Plaintiff's first term ended in 2013, after which she was elected to a second term. (DSOF 32.) Plaintiff's second term will end in 2016. The Association's Bylaws prohibit Plaintiff from serving another term. (DSOF 33.)

B. Background of the Current Dispute.

On August 4, 2013, Plaintiff received an e-mail from Jeannie Martens, a former employee of the Association, in which Ms. Martens accused two of her former colleagues of misconduct ("the Martens e-mail"). (DSOF 34.) On August 5, 2013, Plaintiff forwarded the Martens e-mail to Rick Schwartz, President of the Association's Board of Directors, along with an e-mail authored by Plaintiff that contained further accusations against the Association's employees and demanded that those employees resign or be dismissed. Plaintiff demanded a meeting of the Board of Directors. (DSOF 35.) The President forwarded Plaintiff's e-mail to the remainder of the Board of Directors and asked for their input on how to handle the situation. The President also called the Association's general counsel, Mr. Charles Maxwell, and sought legal advice concerning the handling of the Martens e-mail. (DSOF 36.) The employees named in the Martens e-mail denied the truth of Ms. Martens' allegations. (DSOF 37.)

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The Board of Directors – including Plaintiff – met in a special executive session on August 14, 2013. The President reported that he had discussed the Martens e-mail with the Association's general counsel. The President reported that the employees named in the Martens e-mail denied the allegations of the e-mail. The President advised the Board that the Association should not act on the Martens e-mail because doing so could expose the Association to liability for defamation. (DSOF 38.)

Alone among the Board members, Plaintiff disagreed with the President's handling of the Martens e-mail. Plaintiff argued that the contents of the Martens e-mail should be disclosed to the Association's members and discussed by the Board of Directors in an open meeting. Plaintiff warned the President that she would disclose the contents of the e-mail to the community and gave the President and the rest of the Board until the next regularly-scheduled meeting of the Board of Directors to deal with the e-mail in a manner that Plaintiff felt was appropriate. (DSOF 39.) The President advised Plaintiff that she could be excluded from future executive sessions if she chose to divulge information discussed during an executive session. In response, Plaintiff threatened legal action against the Board. (DSOF 40.) Following the August 14, 2013 executive session, the President sought further advice from the Association's general counsel concerning the matter. (DSOF 41.)

On September 4, 2013, the Board of Directors – including Plaintiff – met in executive session prior to the Board's regularly-scheduled meeting. During the meeting, the President informed the Board that he would not allow the Martens e-mail to be discussed at any open meeting of the Association's Board of Directors because its contents were defamatory if false. In order to mitigate any potential liability to the Association arising out of the circulation of the Martens e-mail to the Board of Directors, the Board of Directors adopted a resolution disavowing any approval of or responsibility for the Martens e-mail and any of Plaintiff's e-mails maligning the Association's employees. With the sole exception of Plaintiff, the Board unanimously approved the resolution. Plaintiff made it clear that she did not approve of the President's handling of the Martens e-mail and demanded his resignation. (DSOF 42.)

Following the executive session on September 4, 2013, the Board of Directors convened in open session. During the open session, a member of the Association attempted to address the matters addressed in the Martens e-mail. Consistent with the Board's earlier resolution, the President refused to allow discussion of those matters during the Board meeting. (DSOF 43.) After the President refused to allow the Board to discuss the Martens e-mail, Plaintiff began reading the Martens e-mail aloud to the members in attendance at the Board of Directors meeting. (DSOF 44.) Because Plaintiff was out of order and refused to stop reading the Martens e-mail, the President adjourned the Board of Directors meeting and all of the Directors except Plaintiff left. (DSOF 45.) Plaintiff continued to read the Martens e-mail aloud after the meeting adjourned. (DSOF 46.) Plaintiff agrees that if the Martens e-mail was false, this conduct was a problem for her and for the Association.[2] (DSOF 47.) Plaintiff claims to have sought the advice of four "HOA lawyers" before deciding to take it upon herself to publicize the Martens e-mail during the Board of Directors meeting. (DSOF 48.) Plaintiff has no first-hand knowledge concerning the allegations in the Martens e-mail; however, based on her own assessment of the "evidence," she believes the allegations to be true. (DSOF 51.)

C. The Decision to Screen Plaintiff from Executive Sessions.

On September 11, 2013, the Association's general counsel sent Plaintiff a letter informing Plaintiff that her conduct during the open portion of the September 4, 2013 Board of Directors meeting violated her duties of confidentiality and loyalty to the Association, and informing Plaintiff of his recommendation that the Association screen Plaintiff from future

[2] The Association employees identified in the e-mail complained to the President that Plaintiff's conduct was creating a hostile work environment for them. (DSOF 49.) The employees eventually retained separate legal counsel, who sent a letter to Plaintiff demanding that she stop defaming the Association's employees. (DSOF 50.) The Association incurred substantial attorneys' fees and costs in addressing Plaintiff's conduct during the September 4, 2013 Board of Directors meeting. (DSOF 55.)

executive sessions. (DSOF 52.) Plaintiff responded to the letter in writing, insisting that her conduct was completely appropriate and consistent with her obligations as a Board member:

> My action was to defend our legitimate right to a fair and open discussion as the First Amendment provides for, and which guides the AZ Statute 33-1804 and our governing documents, as to what can be kept secret. This issue is not one that can be discussed in Executive Session. . . . It was not dealt with appropriately. I was fulfilling my duty as an elected board member who is bound by law to deal with issues of community concern in an open and forthright manner, and not to shroud in secrecy that which violates the open meeting laws.
> . . .
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> Loyalty is not without principals, [sic] and sometimes needs a stick. If I perceive that the Board is acting in bad faith, or is being advised badly in how to handle the situation, and I can do anything to help them make redress, I am bound to do so, otherwise I have the appearance of lacking in the courage of my convictions . . . . My loyalty to the Board lies in assisting, pushing or dragging, whatever you like to call it, towards a proper treatment of the issues as I interpret them to the best of my ability.

(DSOF 53.) After receiving Plaintiff's response, the Board of Directors accepted the recommendation of the Association's counsel that Plaintiff should be screened from future executive sessions for the remainder of her term, which ended in February 2014. (DSOF 54.)

After Plaintiff was elected to a second term, the Board of Directors, through counsel, offered to allow Plaintiff to participate in executive sessions if she would agree to maintain as confidential all information that is discussed during executive sessions. Plaintiff refused. (DSOF 56.) Plaintiff continues to refuse to maintain as confidential all information discussed in executive session, unless she personally agrees that the information should be kept confidential. On January 15, 2015, Plaintiff appeared for a deposition in this case and stated under oath that if allowed to participate in executive sessions she would disclose at open session any information she learned that, in her opinion, should be discussed in open session and not executive session:

> **Q.** So if I understand what you're telling me, your answer is that, no, you will not agree to keep the contents of an executive session confidential?
>
> **A.** I will not agree to do what is wrong. Okay. So if they are discussing something that should be discussed in an open meeting, it should be discussed in an open meeting. I have learned now what to do, which is to say time out. Let's consider this. But, I mean, I have gotten my education bit by bit. I wasn't born knowing everything that has to be

done on a board. I've been studying year after year, taking two courses a year, to make sure that I make the right decision.

Q. And if, in your opinion, the right decision is that what's being discussed in executive session should not be discussed in executive session but should be discussed in an open session of the board –

A. I will bring it to their attention.

Q. In the open session?

A. Not necessarily. I would bring it right there and then, if I were allowed to be in the executive session.

Q. And if they persisted with their wrong – in your opinion, their wrong headed view of it --

A. If it's doing harm to anybody in the community, I would have to bring it out in the open.

(DSOF 57.) Accordingly, the Association has little choice but to continue screening Plaintiff from executive sessions until Plaintiff's current term ends in 2016. Under the circumstances, this restriction is reasonable and strikes a balance between Plaintiff's right to serve as an elected member of the Board of Directors and the Association's right and obligation to protect the confidential and sensitive business matters of the Association against unauthorized disclosure. (DSOF 69.) Plaintiff herself has characterized this restriction as "minor," and has stated that it enables her to be more effective in carrying out her obligation to the community as an elected member of the Board of Directors. (DSOF 67.)

II. ARGUMENT

Plaintiff argues that the Association lacks authority to screen her from executive sessions of the Board of Directors or, in the alternative, that the Association is acting arbitrarily and capriciously in the exercise of its authority. The law does not support Plaintiff's first argument, and the facts do not support her second.

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A. The Association is Authorized to Take Reasonable Measures to Protect Against the Unauthorized Disclosure of Confidential and Sensitive Information Belonging to the Association.

As with any other corporation, certain information maintained by the Association is not intended to be discussed publicly and in fact must be protected against disclosure. Both the Association's governing documents and Arizona's planned community statutes reflect this reality. (DSOF 59.) Arizona law expressly provides that records relating to any of the following matters may be withheld from disclosure:

> 1. Privileged communication between an attorney for the association and the association.
>
> 2. Pending litigation.
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> 3. Meeting minutes or other records of a session of a board meeting that is not required to be open to all members pursuant to section 33-1804.
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> 4. Personal, health or financial records of an individual member of the association, an individual employee of the association or an individual employee of a contractor for the association, including records of the association directly related to the personal, health or financial information about an individual member of the association, an individual employee of the association or an individual employee of a contractor for the association.
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> 5. Records relating to **the job performance of**, compensation of, health records of **or specific complaints against an individual employee of the association** or an individual employee of a contractor of the association who works under the direction of the association.

A.R.S. § 33-1805(B) (emphasis added). In addition, Arizona law expressly authorizes an association's board of directors to meet in a closed or executive session to discuss the matters identified above. *See* A.R.S. § 33-1804(A). The Martens e-mail, which consisted of unsubstantiated allegations of misconduct by a former employee of the Association against two current employees of the Association, was plainly within the scope of A.R.S § 33-1805(B)(5). (DSOF 60.) As such, it was entirely appropriate for the Board of Directors to meet in executive session to address the matter and to discuss the advice of the Association's general counsel concerning the matter. *See* A.R.S. § 33-1804(A)(1) & (4). Conversely, it was entirely *in*appropriate for Plaintiff to raise the matter for discussion during the open session of the Board of Directors, particularly where she was doing so in knowing and willful

disregard of the advice of the Association's general counsel, and contrary to the consensus of her fellow Board members.[3] Plaintiff's conduct during the September 4, 2013 Board of Directors meeting breached her duties as a Director to the Association. (*See* Expert Affidavit of Scott B. Carpenter, 1/28/15 ("Carpenter Affidavit"), DSOF Exh. E, at pp. 1-4.)

Plaintiff's argument that the Association lacks the power to limit her access to confidential and sensitive information of the Association by screening her from participating in executive sessions is without basis in law or logic. First, no member of the Association, whether elected to the Board of Directors or not, has an unfettered right to confidential and sensitive business information of the Association. (DSOF 59.) Second, information that falls within A.R.S. § 33-1805(B) is protected by law. The Association's Bylaws empower the Board of Directors to manage the affairs of the Association, and "[t]o exercise all financial, legal, . . . and any other powers granted under the laws of the State of Arizona." (DSOF 24.) The President is charged with directing the Association according to the policies established by the Board of Directors, the Bylaws, and state law. (DSOF 26.) It follows that where the law protects certain information of the Association against disclosure, then the President and the Board of Directors are empowered to take reasonable steps to protect against the unauthorized disclosure of such information. (DSOF 65.) However tacitly, Plaintiff appears to concede this when she argues that the Board of Directors does not have the power to "arbitrarily" screen her from executive sessions "for an indeterminate period of time." (Plaintiff's Motion at pp. 4-5.)

B. The Board of Directors' Decision to Screen Plaintiff From Executive Sessions Was Not Arbitrary or Capricious.

Plaintiff argues that the Association's decision to screen her from executive sessions was "arbitrary and capricious" because the screening has "no time limit" and is therefore an "unending sanction." (Plaintiff's Motion at 9.) In general, the Association's Board of

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[3] It is worth noting that even the author of the e-mail, former employee Jeannie Martens, is of the opinion that Plaintiff should not have disclosed the e-mail outside of executive session. (DSOF 64.)

Directors has an obligation to act reasonably in the exercise of its powers. *See Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, ¶ 25 (App. 2007); *see also* Carpenter Affidavit, DSOF Exh. E, at p. 3. In disciplinary matters, a board's exercise of its authority is "arbitrary and capricious" if it indulges in "unreasoning action, without consideration and in disregard for facts and circumstances." *Maricopa County Sheriff's Office v. Maricopa County Emp. Merit Sys. Comm'n.*, 211 Ariz. 219, ¶ 17 (2005) (internal quotation and citation omitted).

Here, the decision of the Board of Directors to screen Plaintiff from executive sessions was both reasoned and reasonable. The President warned Plaintiff that she could be excluded from executive sessions if she carried through on her threat to publicize the Martens e-mail and what she believed was the Board's inappropriate handling of the e-mail. (DSOF 40.) Then the Association's general counsel sent Plaintiff a letter advising Plaintiff that her conduct during the September 4, 2013 Board meeting violated her duties as a Board member, and again warning Plaintiff that she could be screened. (DSOF 52.) Plaintiff responded by insisting that her conduct was appropriate because she did not agree with the Board's decision to address the matter in executive session and felt it was "being advised badly in how to handle the situation." (DSOF 53.) Again and again, Plaintiff has made clear that she will not maintain as confidential the information that is discussed during executive sessions, unless she personally agrees that the information should not be disclosed. Plaintiff believes that it is her duty as a member of the Association's Board of Directors to publicly air information that Plaintiff determines, in her sole and unfettered discretion, should not be kept confidential. (*See id*.) Plaintiff has a history of violating her duties to the Association in this manner and of subjecting the Association to liability in the process. (DSOF 29-31.) Under these circumstances, the Board's decision to screen Plaintiff from executive sessions is more than reasonable. (*See* Carpenter Affidavit, DSOF Exh. E, at pp. 4-5.)

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Plaintiff's argument that the screening is arbitrary because it has continued into her second elected term ignores the fact that upon her re-election in 2014, the Board of Directors offered to allow Plaintiff to attend executive sessions if she would agree in writing to preserve the confidentiality of the matters discussed in those executive sessions, but Plaintiff refused. (DSOF 56.) While under oath during her recent deposition, Plaintiff again confirmed that she will publicly disclose any matter discussed in executive session that she does not agree should be kept confidential. (DSOF 57.) Under these circumstances, the Association has little choice but to continue to limit Plaintiff's access to confidential and sensitive information. (*See* Carpenter Affidavit, DSOF Exh. E, at pp. 4-5.)

Plaintiff's assertion that the Association has effectively removed Plaintiff from her position as a Director is not supported by the record. Plaintiff confirmed that she receives a board packet prior to each Board meeting and has the opportunity to address matters in the board packet during the open session. (DSOF 68.) Plaintiff herself has characterized the restriction from executive sessions as "minor" and has boasted that it actually makes her a more effective Board member by forcing her to raise issues in open session. (DSOF 67.) By screening Plaintiff from executive sessions, the Board of Directors has enabled Plaintiff to continue her service as a Board member without exposing the Association to liability arising out of Plaintiff's inappropriate handling of confidential and sensitive Association business. Screening Plaintiff from such information strikes a balance between Plaintiff's right to serve as an elected member of the Board of Directors and the Association's right to protect the confidential and sensitive business of the Association against unauthorized disclosure. (DSOF 69.)

III. CONCLUSION

For all the foregoing reasons, the Association respectfully requests that the Court deny Plaintiff's Motion for Summary Judgment to Restore Plaintiff's Right to Participate in Executive Sessions.

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RESPECTFULLY SUBMITTED this 30th day of January, 2015.

GRASSO LAW FIRM, P.C.

By /s/ Jenny J. Winkler
Robert Grasso, Jr.
Jenny J. Winkler
2121 West Chandler Boulevard, Suite 100
Chandler, Arizona 85224
Attorneys for Defendant

COPY mailed this 30th day
of January, 2015 to:

Steven W. Cheifetz, Esq.
Jacob A. Kubert, Esq.
CHEIFETZ IANNITELLI MARCOLINI, P.C.
111 West Monroe Street, 17th Floor
Phoenix, Arizona 85003
Attorneys for Plaintiff

By /s/R. Nelson