

EXHIBIT E

EXPERT AFFIDAVIT OF SCOTT B. CARPENTER, ESQ.

State of Arizona)
) ss.
County of Maricopa)

I, Scott B. Carpenter, Esq., give the following sworn expert opinion under penalty of perjury:

This affidavit is written to communicate my opinion on various issues that have arisen in the litigation between Colette McNally (“Plaintiff”) and Sun Lakes Homeowners Association #1, Inc. (the “Association”) in the Maricopa County Superior Court CV2014-009496 (the “Litigation”).

This affidavit will express my opinion on the following issues in this Litigation:

1. Whether Plaintiff Breached Her Fiduciary Duty as a Director by Publishing Certain Information that Could Subject the Association to Liability
2. Whether the Board of Directors has Authority to Screen Plaintiff from Executive Sessions and Whether the Decision to do so Was Reasonable

**Legal Standard for the Conduct of an Association Director
and Plaintiff’s Breach of Fiduciary Duty**

Any inquiry into the behavior of a director of a community association starts with whether the community association is incorporated as a nonprofit corporation under Arizona law. According to the public records of the Arizona Corporation Commission, it appears that the Association has been incorporated as a nonprofit corporation since October 2, 1972 and its corporate status is in good standing as of the date of this affidavit. As a nonprofit corporation, the duties of the directors of the Association are set forth in A.R.S. § 10-3830. It states as follows:

10-3830. General standards for directors

A. A director's duties, including duties as a member of a committee, shall be discharged:

- 1. In good faith.*
- 2. With the care an ordinarily prudent person in a like position would exercise under similar circumstances.*

3. In a manner the director reasonably believes to be in the best interests of the corporation.

B. In discharging duties, a director is entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, if prepared or presented by any of the following:

1. One or more officers or employees of the corporation whom the director reasonably believes are reliable and competent in the matters presented.

2. Legal counsel, public accountants or other person as to matters the director reasonably believes are within the person's professional or expert competence.

3. A committee of or appointed by the board of directors of which the director is not a member if the director reasonably believes the committee merits confidence.

4. In the case of corporations organized for religious purposes, religious authorities and ministers, priests, rabbis or other persons whose position or duties in the religious organization the director believes justify reliance and confidence and whom the director believes to be reliable and competent in the matters presented.

C. A director is not acting in good faith if the director has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection B unwarranted.

D. A director is not liable for any action taken as a director or any failure to take any action if the director's duties were performed in compliance with this section. In any proceeding commenced under this section or any other provision of this chapter, a director has all of the defenses and presumptions ordinarily available to a director. A director is presumed in all cases to have acted, failed to act or otherwise discharged such director's duties in accordance with subsection A. The burden is on the party challenging a director's action, failure to act or other discharge of duties to establish by clear and convincing evidence facts rebutting the presumption.

E. A director shall not be deemed to be a trustee with respect to the corporation or with respect to any property held or administered by the corporation, including property that may be subject to restrictions imposed by the donor or transferor of that property.

Boards of directors of Arizona nonprofit corporations are held to three cumulative standards (as set forth above). First, the directors must act in good faith. This is a subjective standard that inquires into the mindset and motivation of the director. When relevant, a director can testify to his or her mindset and whether he or she had good intentions or bad intentions in making decisions for the nonprofit corporation. Second, directors must act with the care an ordinarily prudent person in a like position would exercise under similar circumstances. This is an objective test. Objectively, a prudent person in a like position would make decisions based on the best interests of the nonprofit

corporation, not what is in the best interest of the many members who all have different circumstances. Third, all directors must act in a manner the director reasonably believes to be in the best interests of the corporation. This is a subjective test with an objective limitation. The director can act in any manner that he or she believes is in the best interest of the corporation, so long as that belief is reasonable.

In *Tierra Ranchos Homeowners Association v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (Div. 1 2007) the court stated that in community association disputes, the proper standard is for the association to “treat members fairly” and to “act reasonably in the exercise of its discretionary powers...” Note that the Court cited a book I wrote for the proposition that the Restatement should control. In *College Book Centers, Inc. v. Carefree Foothills Homeowners’ Association*, 225 Ariz. 533, 241 P.3d 897 (Div. 1 2010), the Court cited *Tierra Ranchos* for the proposition that “treating members fairly” and acting “reasonably” are the standards to be applied to judicial review of association decisions. A portion of the case is set forth below:

In Tierra Ranchos Homeowners Ass’n v. Kitchukov, we adopted the Restatement (Third) of Property: Servitudes § 6.13, which includes the duty of an association to “treat members fairly” and to “act reasonably in the exercise of its discretionary powers including rulemaking, enforcement, and design-control powers.” 216 Ariz. 195, 201, ¶ 25, 165 P.3d 173, 179 (App.2007).

The Board, in addition to what is required in A.R.S. § 10-3830, may be required to comply with Section 6.14 of the Restatement (Third) of Property: Servitudes. It states:

The directors and officers of an association have a duty to act in good faith, to act in compliance with the law and the governing documents, to deal fairly with the association and its members, and to use ordinary care and prudence in performing their functions.

Applying the standards set forth above, Plaintiff breached her fiduciary duty to the Association by disclosing information that exposed the Association to liability. An ordinarily prudent person would not publicly divulge the Martens email - particularly where such action would expose the Association to defamation claims. This type of risky action could not be taken in good faith, as it is obviously not in the best interest of the Association.

Based on Plaintiff’s deposition testimony, she has a skewed perception of the Arizona open meeting requirements for planned communities and admits that she will allow her personal principles to govern her actions as director; despite how the Board has been advised by counsel or otherwise. Here, the Board sought the advice of its attorney regarding how to address the Martens email. The Board then met in two separate

executive sessions to discuss the fact that the individuals identified in the Martens email as engaging in misconduct denied the allegations. As such, disclosing the Martens email exposed the Association to potential liability for defamation. A decision was made by a majority of the Board, on the advice of counsel, and memorialized by a Board resolution, not to disclose the Martens email. Plaintiff attended the executive sessions and participated in the Board vote regarding the resolution. It is clear that she knew and understood the concerns with the Martens email and was apprised of the relevant legal advice on the issue. Plaintiff was even warned that if she disclosed the Martens email she would be excluded from future executive sessions. Plaintiff then immediately disregarded the same and publicly read the Martens email. This unauthorized action, on behalf of the Association before the membership subjected the Association to potential liability. Plaintiff put her personal interests ahead of those of the Association, thereby breaching her duty of loyalty to the Association.

Authority to Screen Plaintiff from Executive Sessions and Whether the Decision to do so Was Reasonable

Considering the circumstances and analysis above regarding Plaintiff's breach of duty, the Board's action to screen Plaintiff from executive sessions was reasonable to protect the best interests of the Association. Based on Plaintiff's history that includes disclosing confidential financial information, resulting in her prior removal from the Board, and breaching a confidentiality agreement between the Association and a former employee, it is my opinion that her behavior stands to expose the Association to continued risk for the duration of her term as director.

As Plaintiff identifies, directors cannot be removed by Board action alone and the Board's removal powers are limited to removal of directors from officer positions. A director may only be removed by a majority vote of the membership at a special meeting pursuant to A.R.S. §33-1813. Therefore, the only effective way for the Association to mitigate the risks posed by Plaintiff is to prevent her from accessing confidential information. Plaintiff admits that she will not preserve the confidentiality of matters discussed in executive sessions. The Board has no choice but to screen Plaintiff from executive sessions to protect against her unauthorized disclosure of confidential information.

Furthermore, pursuant to Arizona law and the governing documents, the Association has a legal right to protect against the unauthorized disclosure of certain Association information. The content of the Martens email comprised of allegations of misconduct by employees of the Association may be withheld from disclosure pursuant to A.R.S. §33-1805(B)(5). This section states:

B. Books and records kept by or on behalf of the association and the board may be withheld from disclosure to the extent that the portion withheld relates to any of the following:

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.

Therefore, it is within the Board's authority to take reasonable measures to prevent disclosure of such information. Under the circumstances, the Board's decision to screen Plaintiff from executive sessions is reasonable and it is the only way to allow Plaintiff to continue as a director without exposing the Association to liability related to the Plaintiff's improper disclosure of confidential information.

Conclusion

Based on the information provided to me,¹ Plaintiff breached her fiduciary duty as a director to the Association by publishing the Martens email to the public and knowingly subjecting the Association to liability related to its contents. The Board has acted within its authority to protect confidential Association information and its action to screen Plaintiff from executive sessions is a reasonable exercise of such authority under the circumstances.


Information received subsequent to the date of this affidavit may affect my opinions. I reserve the right to modify and supplement my opinions based on such information.

My curriculum vitae detailing my qualifications and a list of publications authored in the previous 10 years is enclosed. During the previous 4 years I have not testified as an expert at trial or by deposition.

¹ I have reviewed the following Litigation pleadings and documents: Consolidated Declaration of Covenants, Conditions and Restrictions for Sun Lakes Units 1, 2, 3, 3A, 4, 5, 6, 7, 8, 9, 9A, and 41 (including golf course and common areas) recorded in the official records of the Maricopa County Recorder's Office at No. 2013-0204170, Restated Articles of Incorporation of Sun Lakes Association #1, Inc., Restated Bylaws of Sun Lakes Homeowners Association #1, Inc., Sun Lakes Homeowners Association #1, Inc. Policies and Rules Information Manual, Verified Complaint with Exhibits, Verified Answer, Defendant's Response to Plaintiff's First Request for Production, Defendant's Initial Disclosure Statement, Plaintiff's Initial Disclosure Statement, Defendant's Response to Plaintiff's First Set of Non-Uniform Interrogatories to Defendant, Plaintiff's Response to Defendant's First Set of Non-Uniform Interrogatories to Plaintiff, Plaintiff's Response to Defendant's First Request for Production, Plaintiff's Motion for Summary Judgment to Restore Plaintiff's Right to Participate in Executive Sessions, Plaintiff's Statement of Material Facts in Support of Plaintiff's Motion for Summary Judgment to Restore Plaintiff's Right to Participate in Executive Sessions, Defendant's draft Response to Plaintiff's Motion for Summary Judgment to Restore Plaintiff's Right to Participate in Executive Sessions, January 15, 2015 1:02pm Deposition of Colette McNally and Exhibits referenced therein.


This statement is made under penalty of perjury.

DATED this 28th day of January, 2015.



Scott B. Carpenter, Esq.

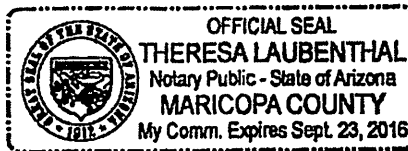
SUBSCRIBED AND SWORN TO before me this 28th day of January, 2015, by
Scott B. Carpenter, Esq.



Notary Public

My Commission Expires:

Sept. 23, 2016



SCOTT BRIAN CARPENTER, ATTORNEY AT LAW

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EDUCATION

Baylor Law School, Waco, Texas
Juris Doctor 1993

Wheaton College, Wheaton, Illinois
B.A. Political Science 1991

EMPLOYMENT

Carpenter, Hazlewood, Delgado & Bolen, PLC, Tempe, Arizona
Managing Partner Attorney 1994 to Current

AWARDS

Community Associations Institute, Falls Church, Virginia
Award of Excellence in Government and Public Affairs 2004

The Leaderships Centre, Mesa, Arizona
Brain L. Zemp Instructor of the Year 2000 and 2001

Arizona's Finest Lawyers
Sustaining Member 2014

TEACHING EXPERIENCE

Community Associations Institute
Member National Faculty for Professional Management Development Program 2005 to Current

National Business Institute, Altona, Wisconsin
Lecturer for Continuing Education Programs 2003 to 2006

The Leadership Centre
Instructor and Speaker on Community Association Issues 2000 to Current

State Bar of Arizona, Phoenix, Arizona
Presenter on Community Association Law, Continuing Legal Education 1999 and 2005

RELATED EXPERIENCE

Maricopa County Superior Court, Phoenix, Arizona
Judge Pro Tem 2004 – 2014
Conduct hearings, trials and settlement conferences for Maricopa County Superior Court civil division.

College of Community Association Lawyers, Falls Church, Virginia
Member 2005 – Current
Members of the College of Community Association Lawyers, affiliated with the Community Associations Institute, distinguish themselves through contributions to the development of community association law.

College of Community Association Lawyers
Board of Governors 2008 – 2014

College of Community Association Lawyers
President 2013

Community Associations Institute
Board of Trustees 2012 – 2014

Business Partners Council, Community Associations Institute
Member 2013 – 2014

Central Arizona Chapter, Community Associations Institute Board Member	2000 – 2005
Central Arizona Chapter, Community Associations Institute President	2002
Central Arizona Chapter, Community Associations Institute Legislative Action Committee Member, Chair, or Co-Chair	1995 – 2013

PUBLICATIONS AND PAPERS

<i>Community Association Law in Arizona, First, Second, Third and Fourth Editions</i> Published by the Arizona State Bar	2003
<i>Legal Aspects of Condominium Development and Homeowners' Associations in Arizona</i> National Business Institute Continuing Legal Education	2004
<i>Tragedy of the Common Elements: Distribution of Risk and Resources in Condominiums and Planned Communities</i> Carpenter, Hazlewood, Delgado & Bolen, PLC	2009

MEMBERSHIPS

College of Community Association Lawyers
Community Associations Institute
State Bar of Arizona
State Bar of Texas
State Bar of Colorado
State Bar of Utah
State Bar of Oregon

EXHIBIT F

Steve Cheifetz

From: Steve Cheifetz
Sent: Friday, October 25, 2013 9:52 AM
To: 'JeannieMartens@aol.com'
Subject: RE: Follow-up

Thank you for your response. I understand your concerns. However, if Colette signed a retraction letter she would be required to say that your representations were false. You have clearly stated repeatedly they are true. Whether Colette addressed this issue in the best manner is open to debate, but I think the last thing anyone needs in the community is more lying. As far as I know, Colette has always sought to proceed openly and honestly and I think those are traits that this community needs more of.

If anyone threatens you please let us know. I think they will leave you alone, as I think the threats against Colette are meant to shut her up rather than to truly file a lawsuit. We hope to avoid any further disputes over this issue and will do what we can to keep you out of this mess. Thanks.

Confidential/Privileged e Mail
 From Steven W. Cheifetz
 Cheifetz Iannitelli Marcolini P.C.
 111 West Monroe 17th Floor
 Phoenix, Arizona 85003
 Phone: (602) 952-6000
 Fax: (602) 952-7020
www.cimlaw.com

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From: JeannieMartens@aol.com [mailto:JeannieMartens@aol.com]
Sent: Thursday, October 24, 2013 10:12 PM
To: Steve Cheifetz
Subject: Re: Follow-up

I do not agree with how Colette handled this situation. Because my email contained information regarding association employees, this issue should have been strictly addressed, discussed, and resolved in Board Executive Session in accordance with AZ State Statute 33-1804, open meeting exceptions. As a board member, she should not have showed my email to others in the community nor should she have tried to read my email in an open board meeting. I understand if the Board, Clint, and Roberta were upset with her actions. Maybe Colette should sign a retraction letter just to keep peace and harmony. That would not affect me as I know what I wrote was the truth and to me that is all that matters. However, that being said, I have an issue with Clint Warrell and Roberta Laird stating that the representations in my email are false. I have an issue with people who lie to me which is the reason I resigned my position from Sun Lakes in the first place. I find it peculiar that they are demanding Colette to sign a retraction letter acknowledging that the statements in my email were false in order to avoid the lawsuit. I am the person who wrote the statements in my email and yet I have not received anything from their attorney requesting me to retract my statements. Of course, I would assume that could still happen. Personally I feel that the Sun Lakes community should stop all their drama, act like adults and agree to disagree to keep harmony in their community.

Jeannie Martens

In a message dated 10/24/2013 11:19:08 A.M. US Mountain Standard Tim, swc@cimlaw.com writes:

10/25/2013

PL 00039