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Steven W. Cheifetz (011824) - swc@cimlaw.com
Jacob A. Kubert (027445) - jak@cimlaw.com
CHEIFETZ IANNITELLI MARCOLINI, P.C.
111 West Monroe Street, 17th Floor
Phoenix, Arizona 85003
Tel. (602) 952-6000
Fax (602) 952-7020
Attorneys for Plaintiff

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.

No. CV2014-009496

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT TO RESTORE PLAINTIFF'S RIGHT TO PARTICIPATE IN EXECUTIVE SESSIONS

(Assigned to The Hon. James T. Blomo)

ORAL ARGUMENT REQUESTED

Plaintiff, Colette McNally, through undersigned counsel, hereby replies to Defendant's Opposition to Plaintiff's Motion for Summary Judgment to Restore Plaintiff's Right to Participate in Executive Sessions ("Defendant's Response"). Defendant's Response completely misses the point of Plaintiff's motion. Plaintiff's motion argues that the Association lacks the authority to preclude Plaintiff from participating in executive sessions *regardless of Plaintiff's alleged conduct*. Under controlling law, Defendant is absolutely prohibited from banning her absent express legal authority. As discussed below, Plaintiff's motion should be granted because there is no issue of material fact. The Association's Governing Documents and Arizona law do not authorize the Association to engage in self-help and screen Plaintiff from executive sessions.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff's Motion for Summary Judgment regards a purely legal issue which the Association completely ignores – that the Association lacked authority to ban Plaintiff from executive sessions. The Association did not substantively respond to Plaintiff's argument that the Association lacked authority to sanction Plaintiff. Nor, did the Association cite a single Association rule, statute or relevant case establishing that it had the legal authority to sanction Plaintiff. Instead, the Association attempts to manufacture an issue of fact by smearing Plaintiff and persuading this Court with hyperbole and a costly/irrelevant expert affidavit that its perpetual sanction is somehow reasonable and justified. Notwithstanding the Association's failures, the Association has forced Plaintiff to clarify the parties' positions.

Plaintiff's position is that she has been punished as a whistleblower for refusing to participate in the Board's habitual violations of the Arizona Open Meeting law (A.R.S. § 33-1804) and in its cover-up of a former employee's confessed wrongdoing. That statute provides very limited exceptions of issues that a Board can discuss in executive sessions closed from the rest of the community, which is where the Association has improperly conducted much of its business. However, when Plaintiff honored the Open Meeting Law by reading the *non-privileged, previously publicized* confession, the Association banned Plaintiff from executive sessions on the grounds that once the Board discussed the *previously publicized* confession in executive session, it somehow became cloaked in executive session privilege preventing anyone, including Plaintiff, from reading it.[1] Since the Board improperly conducts significant business in executive sessions, Plaintiff now misses everything.

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[1] Not that it is relevant to this motion but Plaintiff did not reveal any strategy discussed during executive session. All she did was read a letter that was already circulated throughout the community.

On the other hand, the Association's position is that its indefinite sanction is reasonable because Plaintiff refuses to violate the Open Meeting Law with the rest of the Board by keeping all matters discussed in executive sessions a secret, even those required to be shared with the community. For this reason, the Association argues that it is simply protecting itself from liability from a potential defamation claim that may be brought by the culprits named in the confession (even though the statute of limitations on such claim ran in September 2014 – one year from the date that Plaintiff read the confession in the open meeting).

Although both parties present conflicting positions why Plaintiff was sanctioned, **NEITHER OF THEIR POSITIONS MATTER FOR PURPOSES OF THIS MOTION**.

As discussed below, the Association's perpetual sanction violates the well-established and **absolute rule** that directors cannot sanction a fellow elected director in the absence of express authority in the Association's Governing Documents or in the statutes allowing them to do so. The Association stripped Plaintiff of important directorship privileges without affording her notice, an opportunity to be heard or without allowing the owners who voted her into an office an opportunity to recall her. The Association imposed its "bill of attainder" banking on the fact that Plaintiff, an elderly woman, would likely be forced to accept the sanction, go along with the rest of the Board's habitual violations of the Open Meeting Law in order to participate in executive sessions or spend a fortune in Court to have the sanction overturned. Based on Plaintiff's convictions, the Association should have anticipated that she would choose to fight this injustice.

II. THE ASSOCIATION LACKED AUTHORITY TO SCREEN PLAINTIFF FROM EXECUTIVE SESSIONS

The well-settled rule is "**absolute**" that directors cannot remove their fellow directors - *even for cause* - absent a grant of such power conferred in the statutes, articles of incorporation or bylaws. 18B Am. Jur. 2d Corporations § 1251 (updated February 2015)

1 (emphasis added). In fact, the board of directors has no power to exclude a fellow board
2 member even *from taking part in their proceedings* [such as executive sessions] if the
3 statutes, articles of incorporation or bylaws do not confer that power. Raub v. Gerken, 127
4 A.D. 42, 111 N.Y.S. 319, 320 (N.Y. App. Div. 2d Dept. 1908) citing Beach on Private
5 Corporations, § 223 (emphasis added); see also Smith v. Snowden, 549 N.Y.S. 2d 450 (N.Y.
6 App. Div. 2d Dept. 1989); Horn v. Kaupp, 147 N.W. 2d 607 (South Dakota 1967)(Courts
7 holding that directors must be re-seated where fellow directors removed them without
8 authority under controlling law or the corporation's governing documents).

9 Otherwise, if a board of directors could legally remove a co-director either with or
10 without a bylaw, a power most dangerous to the minority stockholders would be lodged with
11 the majority stockholders, which would enable them, through the action of the directors
12 chosen by them, to reconstitute the entire directory of a corporation as completely as if they
13 owned every share of stock. Raub; *supra*, and see 63 A.L.R. 776, Removal of Fellow
14 Directors, generally. As such, even where such power is conferred, the board cannot remove
15 their fellow director without giving that director an opportunity to be heard and a reasonable
16 opportunity to prepare for the proceeding. 18B Am. Jur. 2d Corporations § 1251, see also
17 Navajo Nation Oil and Gas Co. v. Window Rock Dist. Ct., 2014 WL 3386935 (Navajo
18 2014)(Court holding that a director's removal must comport with due process.)

19 Arizona adheres to the well-settled law above. In Arizona, if the articles of
20 incorporation or bylaws do not provide a procedure for removal of a director, the corporation
21 must follow the law and follow the procedures set forth therein for removal of an elected
22 director. 7 Arizona Practice, Corporate Practice § 13:64. Where such actions are
23 commenced, a director is presumed in all cases to have acted in accordance with the standard
24 of good faith and acting in the best interests of the corporation and the burden is on the party
25 challenging a director's action to bring a removal action and prove by clear and convincing
26 evidence those facts rebutting the presumption. 7 Arizona Practice, Corporate Practice §

13:68; 6 Arizona Practice, Corporate Practice § 7:16 (emphasis added). As an alternative to commencing an action or sanctioning Plaintiff without due process the Board could have initiated the recall process under the Homeowners' Association laws. A.R.S. § 33-1813.

The relevant portions of A.R.S. § 10-3830(D) (the removal provision) and A.R.S. § 33-1813 (the homeowners' association recall statute) respectively state:

> A.R.S. § 10-3830. General Standards for Directors
>
> 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 [in good faith]. 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.[2]
>
> * * *
>
> A.R.S. § 33-1813. Removal of Board Member; Special Meeting
>
> A. Notwithstanding any provision of the declaration or bylaws to the contrary, the members, by a majority vote of members entitled to vote and voting on the matter at a meeting of the members called pursuant to this section at which a quorum is present, may remove any member of the board of directors with or without cause, other than a member appointed by the declarant, the following apply:
>
> 2. Notwithstanding section 33-1804, subsection B, in an association with more than one thousand members [such as this

[2] A.R.S. § 10-809 deals with for-profit corporations and is similar to A.R.S. § 10-3830(D). This statute also requires the corporation to commence an action if it intends to remove an elected director and only allows it to be done where the corporation proves that the director participated in fraudulent/criminal conduct and removal is in the best interests of the corporation.

> Association], on receipt of a petition that calls for removal of a member of the board of directors and that is signed by the number of persons who are entitled to cast at least ten percent of the votes in the association or one thousand votes in the association, whichever is less, the board shall call and provide written notice of a special meeting of the association. The board shall provide written notice of a special meeting as prescribed by section 33-1804, subsection B.
>
> 3. The special meeting shall be called, noticed and held within thirty days after receipt of the petition.

See also A.R.S. § 10-3808.[3]

The Association admits that its governing documents did not give it authority to remove or sanction Plaintiff. SOF ¶¶13-15; DSOF ¶¶13-15. Therefore, its power to sanction Plaintiff comes directly from A.R.S. § 10-3830 and § 33-1813 which require the Association to commence an action and prove by clear and convincing evidence that Plaintiff violated her duty of good faith or initiate the recall procedure. Here, the Association did neither. The Association did not commence an action and prove by clear and convincing evidence that Plaintiff violated her duty of good faith. Furthermore, no members of the Board initiated the recall procedure set forth in A.R.S. § 33-1813 and give those members who voted Plaintiff onto the Board in the first place an opportunity to recall her.

Instead of commencing the action required by statute or initiating a recall, the Association punished Plaintiff indefinitely for being a whistleblower, deprived Plaintiff of due process, chose amongst themselves to screen Plaintiff and then banned her from executive sessions since September 2013 with no end in sight. Raub; Navajo Nation; *supra*. In so doing, the Association fails to cite a single Association rule, provision, statute or

[3] A.R.S. § 10-3808 is the non-profit corporation law for removal of elected directors and is substantially similar in form to A.R.S. § 33-1813 (which is the homeowners' association law directly on point) inasmuch as both establish the procedure for removing an elected director and both require the members to vote out the elected director.

relevant case demonstrating that it had authority to screen her. Rather, the Association submits an irrelevant expert opinion stating that the Association was justified.

Since the Association failed to comply with A.R.S. §§ 10-3830 and 33-1813 (or any of the other parallel laws on point), its attempt to justify its sanction is irrelevant. The Association violated the "absolute" rule of hornbook law that elected directors cannot be removed or banned from proceedings such as executive sessions in the absence of legal authority. Raub; Smith; Horn; 18B Am. Jur. 2d Corporations § 1251; *supra*. Therefore, Plaintiff's full directorship privileges must be reinstated.[4] Id.

III. THE ASSOCIATION'S SANCTION IS UNREASONABLE ON ITS FACE

Not only is the Association's sanction invalid for the reasons discussed above, the Association's perpetual sanction is also unreasonable per se.

Plaintiff was removed from executive sessions in September 2013. It is now **2015** and the Association still screens her from executive sessions. Although the Association continues to argue that it screens Plaintiff from executive sessions to protect the Association from some alleged defamation claim from those implicated in the Martens' e-mail, that argument is a red herring. No claim was ever brought and the statute of limitations on such a claim would have run in August 2014 - one (1) year from the date that Plaintiff read the non-privileged e-mail to the community. When should the sanction end? Plaintiff was re-elected in March 2014 after she read the e-mail. SOF ¶12. Clearly, the community was pleased

[4] The Association repeats in its Response that Plaintiff felt that being screened from executive sessions was "minor." Its characterization of Plaintiff's feelings is contradicted by the fact that Plaintiff has incurred significant fees bringing this action and litigating against the Association's heavy-handed defense tactics (i.e., hiring experts, taking her deposition, providing evasive discovery responses, denying allegations that should be readily admitted, etc.). The Association conducts significant business in executive sessions. As a result, the Association has severely compromised Plaintiff's ability to fully carry out her directorship duties that she was repeatedly elected to perform. Clearly, the Association's indefinite screening of Plaintiff from executive sessions can hardly be considered "minor." See e.g. People ex rel. Muir v. Throop, 12 Wend. 183 (N.Y. 1834)(although an older case, the New York Supreme Court held that Board could not screen its fellow director from the corporation's books on grounds the Board thought the director was hostile to the

with her decision to honor the Open Meeting law. Since the sanction has no definitive end, it is unreasonable on its face.

Last, the sanction fails because it is completely arbitrary. When decisions are made that are not based on specific criteria, those decisions are arbitrary by their very nature. See e.g. Ceran v. New York State Educ. Dept., 192 Misc.2d 61, 65, 745 N.Y.S.2d, 643, 646 (N.Y. Sup. Ct. 2002). Typically, homeowners' associations have specific rules and specific penalties that will be enforced if rules are broken. These give the homeowners a clear understanding of what is approved and what is forbidden. If homeowners' associations can make up rules and enforce penalties on the fly, as the case here, the entire system of association governance becomes at risk. Therefore, since the Association created an arbitrary sanction based on no known specific criteria, the sanction is unenforceable.

The basis of the Association's sanction is flawed for several reasons - not the least of which that the sanction **has no time limit** and is not based on rules or criteria. Therefore, the sanction is unreasonable, arbitrary and capricious on its face.

IV. THE CARPENTER AFFIDAVIT SHOULD BE IGNORED

As stated above, Plaintiff's motion turns on the legal issue of whether or not the Association had the authority to screen Plaintiff from executive sessions. That legal issue is not a proper one for expert testimony.

Arizona Rules of Evidence 702(a) discusses when an expert may testify. That Rule states:

> Rule 702. Testimony by Expert Witnesses
>
> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

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interests of the corporation [which screening could be considered "minor" compared to the rest of the director's duties he can still participate in], because the Board lacked authority to do so.)

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

Emphasis added.

Pursuant to A.R.E. 702(a), the function of an expert is to help the trier of fact "understand the evidence" or "determine a fact in issue." Here, the facts upon which the Association's expert belabors are irrelevant. Plaintiff's motion does not turn on the "facts" of whether or not the Association was justified to screen Plaintiff. Instead, Plaintiff's motion strictly concerns whether the Association has the *authority* to screen Plaintiff, which is purely a legal issue. If the Court answers that question "no" based on the significant law discussed above, the Carpenter Affidavit is futile. Since Plaintiff's motion regards a pure legal issue, there is no need for the Association's expert to help this Court "understand evidence" or "determine a fact in issue." ARE 702(a). Again, those facts are completely irrelevant.

Trial judges, rather than witnesses, must explain to juries the meaning of statutes and regulations because statutory interpretation is not a matter to which an expert witness may testify. 31A Am. Jur. 2d, Expert and Opinion Evidence § 97 – Explanation of Statutes; Determination of Applicable Law; People v. Patel, 366 Ill. App. 3d 255, 851 N.E. 2d (Ill. App. 1st Dist. 2006). When an expert's opinion amounts to nothing more than a lecture on the law, it usurps the duty of the trial court to instruct the jury on the law; it is the trial court that determines the law to be applied to the facts of the case, and the jury is bound to receive as law what is laid down as such by the court. People v. Reynolds, 42 Cal. Rptr. 3d 761 (Cal. App. 4th Dist. 2006).

Whether or not the Association's action was justified or reasonable is not the standard and not before this Court. It is this Court's duty to determine what law applies, not the expert. Reynolds; *supra*. As established above, if the Association wanted to screen Plaintiff

from executive sessions, the law required the Association to file the appropriate application in court and rebut the presumption that Plaintiff acted in good faith by clear and convincing evidence or initiate a recall. A.R.S. § 10-3830(D); A.R.S. § 33-1813. That is the legal issue before this Court, not the self-serving "facts" contained in the Association's costly expert report.

If the Association wanted to use Mr. Carpenter as an expert, it should have filed a suit against Plaintiff as required by A.R.S. § 10-3830(D) and use him to overcome the presumption that Plaintiff acted in good faith by clear and convincing evidence and then use him to convince this Court that the Association was justified - - not sanction her first without due process and force her to spend a fortune suing the Association for reinstatement of her privileges.[5]

Based upon the foregoing, this Court should ignore the Carpenter Affidavit.

V. CONCLUSION

Based upon the foregoing, Plaintiff submits that there is no genuine issue of material fact. The Association lacked authority to screen her and violated the "absolute" rule against doing so. Plain and simple. 18B Am. Jur. 2d Corporations § 1251; Raub; *supra,* and see Orme School v. Reeves, 166 Ariz. 301, 802 P.2d 1000 (1990). Therefore, Plaintiff respectfully requests that her Motion for Summary Judgment be granted.

DATED this 12th day of February, 2015.

CHEIFETZ IANNITELLI MARCOLINI, P.C.
Attorneys for Plaintiff

By:
Steven W. Cheifetz
Jacob A. Kubert

[5] For the record, Plaintiff would argue that Mr. Carpenter would not be allowed to testify as an expert even if the Association followed the law and sued Plaintiff first because the issue of whether Plaintiff acted in good faith does not require "specialized knowledge." A.R.E. 702(a).

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Clerk
MARICOPA COUNTY SUPERIOR COURT
201 West Jefferson
Phoenix, Arizona 85003

COPY of the foregoing e-delivered
this 12th day of February 2015, to:

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

COPY of the foregoing mailed
this 12th day of February 2015, to:

Robert Grasso, Jr., Esq.
Jenny J. Winkler, Esq.
GRASSO LAW FIRM, P.C.
2121 West Chandler Boulevard, Suite 100
Chandler, Arizona 85224
Attorneys for Defendant

By:
Julie Mills

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