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Attorneys for Plaintiff

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

9 COLETTE MCNALLY, an individual,

10 Plaintiff,

11 -vs-

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

15 Defendant.

No. CV2014-009496

**PLAINTIFF'S MOTION FOR  
RECONSIDERATION**

(Assigned to The Hon. James T. Blomo)

17 Plaintiff's Motion for Summary Judgment was crafted in a manner to specifically  
18 avoid any factual issues. It was premised upon the applicable **law** that under no set of facts  
19 did the Defendant HOA have the authority to remove Plaintiff from participating in  
20 executive sessions. In other words, even if each and every allegation of the Defendant HOA  
21 is true, the Defendant HOA still lacked the authority under the **law** to exclude Plaintiff from  
22 executive sessions without first obtaining a prior Court order.

23 In Plaintiff's motion and particularly in her Reply Memorandum, she set forth  
24 significant case and statutory law that establishes beyond any doubt that Defendant HOA  
25 simply lacked the authority to take the actions they took, *regardless of whatever factual*  
26 *allegations they chose to assert against her.* As such, prior to determining whether any

1 factual issues precluded summary judgment, it was incumbent upon the Court to first  
2 determine under the law whether the facts alleged by Defendant were even relevant and  
3 material.

4 As set forth in Plaintiff's Reply Memorandum, the hornbook law and cases establish  
5 that the well-settled rule is "absolute" that directors cannot preclude their fellow directors  
6 from taking part in proceedings such as executive sessions - *even for cause* - unless the  
7 statutes, articles of incorporation or bylaws allow them to do so. 18B Am. Jur. 2d  
8 Corporations § 1251 (updated February 2015); Raub v. Gerken, 127 A.D. 42, 111 N.Y.S.  
9 319, 320 (N.Y. App. Div. 2d Dept. 1908) citing Beach on Private Corporations, § 223  
10 (emphasis added); see also Smith v. Snowden, 549 N.Y.S. 2d 450 (N.Y. App. Div. 2d Dept.  
11 1989); Horn v. Kaupp, 147 N.W. 2d 607 (South Dakota 1967) (emphasis added).

12 Arizona adheres to the well-settled law above. See 7 Arizona Practice, Corporate  
13 Practice § 13:64 providing that if the articles of incorporation or bylaws do not provide a  
14 procedure for removal of a director, the corporation must follow the law and follow the  
15 procedures set forth therein for removal of an elected director. See also, 7 Arizona Practice,  
16 Corporate Practice § 13:68; 6 Arizona Practice, Corporate Practice § 7:16 providing that the  
17 HOA must bring an action and prove by clear and convincing evidence that the director  
18 violated her presumed duty of good faith before taking action against her.

19 There is no dispute that the HOA's governing documents do not provide a mechanism  
20 for sanctioning an elected director. In fact, the HOA's members amended away a provision  
21 that allowed for such removal because certain directors abused it to silence minority  
22 directors. Therefore, the HOA was required to follow either A.R.S. § 33-1813 (the HOA  
23 director recall statute) or A.R.S. § 10-3830 (statute requiring HOA to initiate court action to  
24 challenge director's action). There is no dispute that the HOA did not comply with either of  
25 these statutes.

26 The Rules of Procedure are clear that only relevant and material facts are to be

1 considered when deciding whether factual issues exist under a summary judgment. If the  
2 law precludes the HOA from removing Plaintiff from executive sessions without a Court  
3 Order, it is not necessary for the Court to evaluate factual issues or make factual  
4 determinations other than determine whether Defendant obtained a Court Order, a point  
5 which Defendant cannot deny.

6 As such, Plaintiff asserts that this Court's denial of summary judgment based on  
7 factual issues, when the Court's Minute Entry does not suggest that the Court made any  
8 determination under the law whether such facts were even relevant, is inappropriate and  
9 should be subject to reconsideration. Plaintiff urges the Court to consider the controlling law  
10 set forth in detail in Plaintiff's Reply Memorandum and above that should establish beyond  
11 any doubt that the HOA lacked the authority to preclude Plaintiff from participating in  
12 executive sessions even if the Defendant's allegations against Plaintiff are true. While  
13 Plaintiff strenuously disputes the allegations asserted against her, it is not necessary for the  
14 Court to resolve those factual allegations to decide this summary judgment.

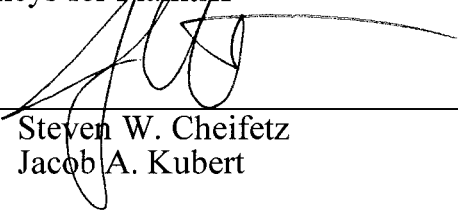
15 Plaintiff recognizes that it would be inappropriate for this Court to grant summary  
16 judgment if factual issues existed and Plaintiff has no interest wasting this Court's time  
17 seeking relief that is precluded by factual issues. That is why Plaintiff filed her Motion for  
18 Summary Judgment because she thought the law was clear and the facts were irrelevant.  
19 Now that her motion has been denied without a discussion as to what law will be applied at  
20 trial, this Court risks wasting the time and money of a trial that no one knows what law  
21 applies to the supposed issues in dispute, which is this Court's duty to establish. As it  
22 stands, the Minute Entry offers the parties no guidance on the law.

23 For these reasons, Plaintiff requests that this Court reconsider her Motion for  
24 Summary Judgment and requests that this Court especially focus on her Reply Memorandum  
25 which establishes the undisputed law. However, should this Court still feel inclined to deny  
26 Plaintiff's motion, Plaintiff respectfully requests that the Court issue an Order that

1 establishes which law applies to the supposed facts in dispute so that Plaintiff has the  
2 necessary guidance to know which facts are even relevant to discuss at trial.

3 **RESPECTFULLY SUBMITTED** this 13<sup>th</sup> day of March, 2015.

4 **CHEIFETZ IANNITELLI MARCOLINI, P.C.**  
5 Attorneys for Plaintiff

6  
7 By:   
8 Steven W. Cheifetz  
Jacob A. Kubert

9 **ORIGINAL** of the foregoing  
10 e-filed this 13<sup>th</sup> day of March 2015, with:

11 Clerk  
12 MARICOPA COUNTY SUPERIOR COURT  
13 201 West Jefferson  
Phoenix, Arizona 85003

14 **COPY** of the foregoing e-delivered  
15 this 13<sup>th</sup> day of March 2015, to:

16 The Honorable James T. Blomo  
17 MARICOPA COUNTY SUPERIOR COURT  
18 201 West Jefferson Street  
Phoenix, Arizona 85003

19 **COPY** of the foregoing mailed  
20 this 13<sup>th</sup> day of March 2015, to:

21 Robert Grasso, Jr., Esq.  
22 Jenny J. Winkler, Esq.  
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25 By:   
26 Julie Mills

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