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

13 COLETTE MCNALLY, an individual,

14 Plaintiff,

15 -vs-

16 SUN LAKES HOMEOWNERS

17 ASSOCIATION #1, INC., an Arizona non-
18 profit corporation,

19 Defendant.

No. CV2014-009496

JOINT HEARING STATEMENT

(Assigned to The Hon. James T. Blomo)

Evidentiary Hearing:

August 12, 2015 – 9:00 a.m.

20
21 Pursuant to the Court's Minute Entry dated May 12, 2015, the parties hereby submit
22 their Joint Hearing Statement.

23 **I. BRIEF STATEMENT OF THE CASE**

24 Plaintiff Colette McNally is a duly-elected member of the Board of Directors
25 of Defendant Sun Lakes Homeowners Association #1, Inc. The Association began screening
26 Plaintiff from participating in executive sessions of the Board of Directors in September

1 2013 after Plaintiff read an e-mail from a former Association employee out loud to the
2 community members in attendance at an open meeting of the Board of Directors. The
3 Association alleges that Plaintiff's conduct at the open meeting violated her duties of loyalty
4 and confidentiality under A.R.S. §§ 33-1804 and -1805. Plaintiff alleges that the e-mail was
5 sent to her private e-mail account and sent to three non-board members. Plaintiff sued the
6 Association, asserting claims for (1) declaratory/injunctive relief, (2) breach of contract, (3)
7 defamation, (4) false light, and (5) punitive damages. Plaintiff asserts that the Association
8 lacks authority to screen her from executive sessions. Plaintiff filed an Application for a
9 Preliminary Injunction seeking to compel the Association to allow Plaintiff to participate in
10 executive sessions pending the final resolution of her claims against the Association.

11 II. STIPULATIONS OF MATERIAL FACT AND LAW

- 12 1. Defendant Sun Lakes Homeowners Association #1 is a non-profit Arizona
13 corporation whose primary purpose is to establish, own, operate, maintain,
14 and manage community recreational and welfare facilities for the residents
15 of Sun Lakes.
- 16 2. The Association is managed and controlled by a seven-member Board of
17 Directors.
- 18 3. Members of the Board of Directors are Sun Lakes homeowners who
19 volunteer to serve on the Board and who are elected by their fellow
20 homeowners for a three-year term.
- 21 4. The Association's Bylaws authorize the Board of Directors to exercise all
22 financial, legal, and other powers of the Board as are stated in the Bylaws,
23 the Articles of Incorporation, and any other powers granted under the laws
24 of the State of Arizona.
- 25 5. The Association employs various administrative personnel to carry out its
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1 day-to-day operations, including a General Manager and staff. The
2 Association also employs many dozens of other people in positions that
3 include golf course operations, restaurant operations, and maintenance.

4 6. Plaintiff Colette McNally is a Sun Lakes homeowner.

5 7. Plaintiff was appointed to the Board in 2009.

6 8. Plaintiff was appointed to the Board a second time in 2010.

7 9. Plaintiff was removed from the Board in 2010.

8 10. Plaintiff was elected to a three-year term on the Board of Directors in 2011.

9 11. On August 4, 2013, a former employee of the Association by the name of
10 Jeannie Martens sent Plaintiff and three non-board members an e-mail
11 where Ms. Martens accused two of her former colleagues, Clint McNally
12 and Roberta Laird, of misconduct (“the Martens e-mail”).

13 12. On August 5, 2013, Plaintiff forwarded the Martens e-mail to Rick
14 Schwartz, President of the Association’s Board of Directors, along with an
15 e-mail that Plaintiff authored.

16 13. The President forwarded Plaintiff’s e-mail and the Martens e-mail to the
17 rest of the Board of Directors.

18 14. The Board of Directors – including Plaintiff – met in a special executive
19 session on August 14, 2013, to discuss the Martens e-mail. The President
20 advised the Board that the Association should not act on the e-mail.

21 15. Plaintiff disagreed with the President’s proposed handling of the Martens e-
22 mail.

23 16. On September 4, 2013, the Board of Directors – including Plaintiff – met in
24 executive session prior to the Board’s regularly-scheduled meeting to again
25 discuss the Martens e-mail. The Board of Directors adopted a resolution
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1 “disavow[ing] any approval of or responsibility for any of Colette
2 McNally’s emails maligning Clint Warrell, and to state that if legal action
3 is brought by or on behalf of Clint Warrell against the association and/or
4 any other board members, the association will make the resolution available
5 to the judicial system to reduce or eliminate liability and place it upon the
6 responsible party.” Plaintiff was the only member of the Board of
7 Directors who did not approve the resolution.

8 17. Following the executive session on September 4, 2013, the Board of
9 Directors convened in open session. During the open session, Plaintiff
10 began reading the Martens e-mail out loud to the community members in
11 attendance at the Board of Directors meeting.

12 18. On September 11, 2013, the Association’s general counsel sent Plaintiff a
13 letter informing Plaintiff that her conduct during the open portion of the
14 September 4, 2013 Board of Directors meeting violated her duties of
15 confidentiality and loyalty to the Association, and informing Plaintiff of his
16 recommendation that the Association screen Plaintiff from future executive
17 sessions.

18 19. The Association began screening Plaintiff from executive sessions in
19 September 2013.

20 20. Plaintiff’s term on the Board of Directors ended in February 2014, after
21 which Plaintiff was elected to a second term.

22 21. The Association has continued screening Plaintiff from executive sessions
23 during her second term on the Board of Directors.

24 22. Plaintiff’s second term on the Board of Directors began in March 2014, and
25 will end in February 2017.
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1 23. The Association's Bylaws prohibit a member from serving more than two
2 terms on the Board of Directors.

3 III. CONTESTED ISSUES OF FACT AND LAW THAT COUNSEL AGREE
4 ARE MATERIAL OR APPLICABLE

5 1. Whether the Association is authorized to screen Plaintiff from participating
6 in executive sessions of the Board of Directors.

7 2. Whether A.R.S. § 33-1804(A)(4) authorized the Board to discuss the
8 Martens e-mail in executive session.

9 3. Whether Plaintiff's conduct during the September 4, 2013 open meeting of
10 the Board of Directors violated her duties of loyalty and confidentiality to
11 the Association.

12 4. Whether Plaintiff has established a strong likelihood of success on the
13 merits at trial.

14 5. Whether Plaintiff has demonstrated the possibility that she will suffer
15 irreparable injury not remediable by damages if the Court does not grant
16 her injunctive relief.

17 6. Whether the balance of hardships favors Plaintiff.

18 7. Whether public policy favors the injunction Plaintiff seeks.

19 IV. PLAINTIFF'S SEPARATE STATEMENT OF MATERIAL ISSUES OF
20 FACT AND LAW

21 1. Whether the Association is violating the Open Meeting Laws.

22 2. In the alternative to demonstrating the criteria set forth in paragraphs 5
23 through 8 above, whether Plaintiff has demonstrated either "1) probable
24 success on the merits and the possibility of irreparable injury; or 2) the
25 presence of serious questions and [that] 'the balance of hardships tip[s]

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1 sharply' in favor of the moving party.'" See *Arizona Ass'n of Providers*
2 *for Persons With Disabilities v. State*, 223 Ariz. 6, 12, ¶ 12, (App.
3 2009), citing *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990).

4 V. DEFENDANT'S SEPARATE STATEMENT OF MATERIAL ISSUES OF
5 FACT AND LAW

6 1. The employees named in the Martens e-mail denied the truth of Ms.
7 Martens' allegations when questioned by the Board of Directors.

8 2. Whether the Association acted reasonably in screening Plaintiff from
9 participating in executive sessions of the Board of Directors.

10 3. Whether Plaintiff's unclean hands preclude equitable relief.

11 VI. WITNESSES

12 A. Plaintiff

13 1) Colette McNally

- 14 • Direct: 45 minutes; Re-direct: 15 minutes

15 2) Jeannie Martens

- 16 • Direct: 15 minutes; Re-direct: 5 minute

17 3) Cross of Defendant's witnesses: 25 minutes

18 B. Defendant

19 1) Rick Schwartz

- 20 • Direct: 15 minutes
- 21 • Re-Direct: 5 minutes

22 2) Janice Cournoyer

- 23 • Direct: 20 minutes
- 24 • Re-Direct: 5 minutes

25 3) Scott Carpenter

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- Direct: 30 minutes
- Re-Direct: 10 minutes

4) Cross of Plaintiff's Witnesses: 20 minutes

VII. EXHIBITS

A. Plaintiff

1. E-mail from William Hoyt to Colette McNally dated October 11, 2010; E-mail from Colette McNally to William Hoyt dated October 12, 2010 (HOA 000727-728)
2. 10/29/10 Minutes of Open Meeting (HOA 000729-733)
3. Letter from Bernadette Halpin, President to Jeannie Martens dated December 6, 2010 (HOA000830)
4. Homeowner Petitioned Proposed Bylaw Amendment to delete Article III, Section 15 of the Bylaws (Attached as Exhibit 3 to McNally Decl. filed in support of MSJ)
5. Letter "To the Residents of Sun Lakes Country Club" with attached documents prepared by Steve Wolfer (PL 00057, PL 00059, PL 00058)
6. E-mail from Raymond Smith to Colette McNally and others dated May 17, 2011 (HOA 000098)
7. Letter from Jeannie Martens to Rick Schwartz and Clint Warrell dated July 29, 2013 (HOA000840)
8. E-mail from Jeannie Martens to Colette McNally, rgazieraz, west_thomas and Morrcin (Marten Depo Exhibit #10)
9. 8/14/2013 Executive Session Minutes (HOA 000062-63) [Confidential]
10. 9/4/2013 Executive Session Minutes (HOA 000053-55) [Confidential]
11. Letter from Paul R. Neil, Esq. to Colette McNally dated September 11, 2013 (PL 00053-54)
12. 9/20/2013 Executive Session Minutes (HOA 000072) [Confidential]

- 1 13. 10/2/2013 Executive Session Minutes (HOA 000451-453) [Confidential]
- 2 14. 10/15/2013 Executive Session Minutes (HOA 000085-89) [Confidential]
- 3 15. Letter from Robert M. Frisbee, Esq. to Colette McNally dated October 15, 2013 with
4 attached retraction letter and Complaint on behalf of Clint Warrell and Roberta Laird (PL
5 00043-49)
- 6 16. E-mail from Colette McNally to Jeannie Martens dated October 23, 2013; E-mail from
7 Steven W. Cheifetz, Esq. to Jeannie Martens dated October 24, 2013, 11:19 a.m.; E-mail
8 from Jeannie Martens to Steven W. Cheifetz, Esq. dated October 24, 2013, 10:12 p.m.; E-
9 mail from Steven W. Cheifetz, Esq. to Jeannie Martens dated October 25, 2013 (PL
10 00039-40)
- 11 17. Letter from Steven W. Cheifetz, Esq. to Robert M. Frisbee, Esq. dated October 24, 2013
12 (PL 00041-42)
- 13 18. Letter from Robert M. Frisbee, Esq. to Steven W. Cheifetz, Esq. dated October 25, 2013
14 (PL 00038)
- 15 19. 11/6/2013 Executive Session Minutes (HOA 000090-92) [Confidential]
- 16 20. 12/4/2013 Executive Session Minutes (HOA 000506-509) [Confidential]
- 17 21. 1/14/2014 Executive Session Minutes (HOA 000532) [Confidential]
- 18 22. 2/18/2014 Executive Session Minutes (HOA 000027-28) [Confidential]
- 19 23. 2/28/2014 Executive Study Session (with attachments) (HOA 000017-21) [Confidential]
- 20 24. 3/4/2014 Executive Session Minutes (HOA 000559-560) [Confidential]
- 21 25. 4/2/2014 Executive Session Minutes (HOA 000567-568) [Confidential]
- 22 26. 4/23/2014 Executive Session Minutes (HOA 000585-587) [Confidential]
- 23 27. 5/7/2014 Executive Session Minutes (HOA 000593-595) [Confidential]
- 24 28. 7/2/2014 Executive Session Minutes (HOA 000627-628) [Confidential]
- 25 29. 8/6/2014 Executive Session Minutes (HOA 000651-652) [Confidential]
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- 1 30. Sun Laker – Special Addition dated September 3, 2014 (PL 000104-107)
- 2 31. 10/1/2014 Executive Session Minutes (HOA 000675-676) [Confidential]
- 3 32. 10/27/2014 Executive Session Minutes (HOA 000684-685) [Confidential]
- 4 33. 11/5/2014 Executive Session Minutes (HOA 000691-692) [Confidential]
- 5 34. 11/18/2014 Executive Session Minutes (HOA 000706) [Confidential]
- 6 35. 12/9/2014 Executive Session Minutes (HOA 000717-718) [Confidential]
- 7 36. Restated Bylaws of Sun Lakes Homeowners Association #1, Inc. including amendments
8 through 2/21/2011 (PL 00001-20)
- 9 37. Consolidated Declaration of Covenants, Conditions and Restrictions recorded on March
10 5, 2013 (HOA 000127-172)
- 11 B. Defendant
- 12 38. Declaration of Colette McNally in Support of Plaintiff’s Motion for Summary
13 Judgment (12/11/14)
- 14 39. Declaration of Colette McNally in Support of Plaintiff’s Application for
15 Preliminary Injunction (filed 4/27/15)
- 16 40. Declaration of Richard Schwartz (1/26/15)
- 17 41. Sun Lakes Homeowners Association #1, Inc. Policies and Rules Information
18 Manual (Rev. May 1, 2013) (attached as Exh. 1 to Schwartz Declaration)
- 19 42. Expert Affidavit of Scott B. Carpenter, Esq. (1/28/15)
- 20 43. Settlement Agreement between Mark L. Wade and Sun Lakes Homeowners
21 Association #1 (3/30/10) (Bates Nos. HOA854-856) [CONFIDENTIAL]
- 22 44. Copy of Plaintiff’s Power Point Presentation to Community Members titled “A
23 Summary of the 2010 Community Survey” (Bates Nos. PL00072-PL00103)
- 24 45. E-mail correspondence from Mark Wade to Bernadette Halpin dated Oct. 20,
25 2010 (McNally Depo Exh. 3) [CONFIDENTIAL]
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1 46. Draft correspondence from Michael R. Pruitt, Esq. to Mr. Mark Wade dated
2 Oct. 26, 2010 (Bates Nos. HOA848-849) [**CONFIDENTIAL**]

3 47. Correspondence from Michael R. Pruitt, Esq. to Mr. Mark Wade dated Nov.
4 19, 2010 (Bates Nos. HOA851-852) [**CONFIDENTIAL**]

5 48. Waiver and General Release signed by Mark Wade, and related documents
6 evidencing payment by the Association (Bates Nos. HOA842-845) (redacted)
7 [**CONFIDENTIAL**]

8 49. Executive Session Minutes dated Sept. 5, 2012 (McNally Depo Exh. 4)
9 [**CONFIDENTIAL**]

10 50. E-mail correspondence dated Aug. 5, 2013, from Rick Schwartz to Board of
11 Directors forwarding e-mail correspondence from Plaintiff and attached e-mail from Jeannie
12 Martens (McNally Depo Exh. 5)

13 51. Correspondence from Paul Neil to Plaintiff dated Sept. 11, 2013 (McNally
14 Depo Exh. 8)

15 52. E-mail correspondence from Plaintiff to Rick Schwartz and others dated Sept.
16 16, 2013, with attached response from Plaintiff to Sept. 11, 2013 letter from Charles
17 Maxwell (McNally Depo Exh. 9)

18 53. Executive Session Minutes dated 10/2/13 with attachments from Plaintiff
19 (McNally Depo Exh. 10) [**CONFIDENTIAL**]

20 54. E-mail correspondence between Plaintiff and Ray Smith dated March 12, 2014
21 (McNally Depo Exh. 11)

22 55. Executive Session Minutes dated 5/15/14 (McNally Depo Exh. 14)
23 [**CONFIDENTIAL**]

24 56. E-mail correspondence from Jeannie Martens to Roberta Laird dated July 24,
25 2013 (Martens Depo Exh. 7)

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1 57. E-mail correspondence from Jeannie Martens to Clint Warrell dated Mar. 18,
2 2013 (Martens Depo Exh. 8)

3 58. E-mail correspondence between Roberta Laird and Rick Schwartz dated July
4 27, 2013 (Martens Depo Exh. 9)

5 59. E-mail correspondence from Jeannie Martens to Plaintiff, Ray Smith, and Tom
6 West dated Aug. 4, 2013 (Martens Depo Exh. 10)

7 60. E-mail correspondence from Charles Maxwell to Board President Rick
8 Scwhartz produced with Plaintiff's Initial Disclosure Statement (Bates Nos. PL00055-56)

9 **[NOTE: for limited purposes of this hearing, without any intent to waive the privilege,**
10 **and subject to the Protective Order] [CONFIDENTIAL]**

11 61. E-mail correspondence from Mr. Richard Bernard to JoAnn Ayers and others
12 dated Aug. 28, 2014 (Bates Nos. PL00025-27)

13 62. Statement "Dear concerned Community Members" produced with Plaintiff's
14 Response to Defendant's First Request for Production of Documents (McNally Depo Exh.
15 12 at Bates Nos. PL00068-70)

16 63. Minutes of 9/4/13 Board of Directors Meeting (Bates Nos. HOA50-52)

17 64. Email from Jeannie Martens to Janice Cournoyer dated Aug. 16, 2013 (Bates
18 No. HOA96)

19 65. Email from Ray Smith to Tom West and others dated Aug. 4, 2011 (Bates No.
20 HOA104)

21 66. Email correspondence among Plaintiff and various Community Members dated
22 February 17, 2015, with attached statement from Plaintiff (Bates Nos. HOA819-823)

23 **VIII. DEPOSITIONS**

24 The parties designate the following deposition testimony:

- 25 1. Rick Schwartz – Deposition transcript with highlighted designated testimony
26

- 1 attached per Minute Entry (Plaintiff's designations in yellow / Defendant's
2 Rule 106 additions in blue)
- 3 2. Roberta Laird – Deposition transcript with highlighted designated testimony
4 attached per Minute Entry (Plaintiff's designations in yellow / Defendant's
5 Rule 106 additions in blue)
- 6 3. Jeannie Martens - Deposition transcript with highlighted designated testimony
7 attached per Minute Entry (Defendant's designations in yellow / Plaintiff's
8 Rule 106 additions in blue)

9 DATED this 10th day of August, 2015.

10 **CHEIFETZ IANNITELLI MARCOLINI, P.C.**

11
12 By: /s/ Jacob A. Kubert
13 Steven W. Cheifetz
14 Jacob A. Kubert
15 Attorneys for Plaintiff

16 **GRASSO LAW FIRM, P.C.**

17 By: /s/ Jenny J. Winkler (w/permission)
18 Robert Grasso, Jr.
19 Jenny J. Winkler
20 Attorneys for Defendant

21 **ORIGINAL** of the foregoing electronically filed
22 this 10th day of August, 2015, with:

23 Clerk
24 MARICOPA COUNTY SUPERIOR COURT
25 201 West Jefferson Street
26 Phoenix, Arizona 85003-2243

1 **COPY** of the foregoing e-delivered
this 10th day of August, 2015, to:

2 The Honorable James T. Blomo
3 MARICOPA COUNTY SUPERIOR COURT
4 201 West Jefferson Street
Phoenix, Arizona 85003

5 **COPY** of the foregoing mailed
6 this 10th day of July, 2015, to:

7 Robert Grasso, Jr., Esq.
8 Jenny J. Winkler, Esq.
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10 2121 West Chandler Boulevard, Suite 100
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11 By: /s/ Julie E.B. Mills
12 Julie Mills

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14 N:\CLIENTS\McNally\Sun Lakes HOA 3172-4\Pleadings\Joint Hearing Statement - Final JAK-JW 08 10 15.docx