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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)
)

Motion Hearing
No. CV2014-009496

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JAMES BLOMO, JUDGE

Phoenix, Arizona
August 12th, 2015

REPORTED BY:

JEANNE A. KAPPEDAL, CRR/RMR/CR
Certified Court Reporter
Certificate No. 50900

PREPARED FOR:

Mr. Steven Cheifetz
(APPEAL)

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Plaintiff's Witnesses: Direct Cross Redirect

Colette McNally	10	37	56
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Defense Witnesses:

Rick Schwartz	64	78
Janice Cournoyer	82	94
Scott Carpenter	100	118

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1 P R O C E E D I N G S

2 **THE COURT:** This is CV2014-009496. It is
3 Colette McNally versus Sun Lakes. Counsel?

4 **MR. CHEIFETZ:** Steve Cheifetz and Jake Kubert
5 on behalf of the Plaintiff McNally.

6 **THE COURT:** Good morning.

7 **MS. WINKLER:** Good morning, Your Honor, Jenny
8 Winkler on behalf of Sun Lakes Homeowners Association.

9 **THE COURT:** All right. Good morning.
10 This is the time set for our evidentiary
11 hearing. I don't know if anybody is going to invoke the
12 rule at this point.

13 **MR. CHEIFETZ:** Your Honor, we'd like to
14 invoke the rule.

15 **THE COURT:** All right. So who all do we have
16 that are going to testify this morning?

17 **MS. WINKLER:** Your Honor, I have Rick
18 Schwartz who is the president of the association and
19 Janice Cournoyer who is the former secretary and current
20 treasurer of the association.

21 My position would be that those are the --
22 they are in effect the parties or representatives of the
23 parties and should be allowed to remain in the
24 courtroom.

25 My expert Scott Carpenter is also in the

1 room. My position concerning Mr. Carpenter is this, as
2 this is a preliminary proceeding, we don't have a
3 complete record to the extent that there is going to be
4 any new evidence that is presented today. I think
5 Mr. Carpenter should have the benefit of that before he
6 takes the stand.

7 **THE COURT:** Mr. Cheifetz?

8 **MR. CHEIFETZ:** Your Honor, as far as the
9 officers of the entity, I'm not certain whether they can
10 have two. Our biggest concern is Mr. Carpenter. We ask
11 he be excused.

12 **THE COURT:** Why?

13 **MR. CHEIFETZ:** What's that?

14 **THE COURT:** Why?

15 **MR. CHEIFETZ:** Because he is an attorney and
16 could be prejudiced by listening to the testimony and
17 may affect his testimony in an unreasonable manner.

18 **THE COURT:** Isn't he going to be testifying
19 as the investigator throughout this process?

20 **MS. WINKLER:** He will be, yes, designated as
21 our expert, Your Honor.

22 **THE COURT:** All right. So are you invoking
23 on behalf of anybody that, Mr. Cheifetz?

24 **MS. WINKLER:** Do you have anybody?

25 **MR. CHEIFETZ:** Well, the Plaintiff,

1 Your Honor, and then we have Jenny Martens who has been
2 subpoenaed. And I don't know if she's here or not. If
3 she does show up -- we told her to show up at 10. If
4 she does come, we'll have her wait outside.

5 **THE COURT:** So at this point go ahead and
6 have those that are present in the courtroom this
7 morning, go ahead and come up and be sworn. Get your
8 folks up here.

9 Sir, what is your name?

10 **MR. SCHWARTZ:** Richard Willis Schwartz.

11 **THE CLERK:** State your name.

12 **MR. SCHWARTZ:** Richard Willis Schwartz.

13 **THE COURT:** Standard spelling, sir?

14 **MR. SCHWARTZ:** S-C-H-W-A-R-T-Z.

15 **MS. COURNOYER:** I'm Janice Gail Cournoyer,
16 C-O-U-R-N-O-Y-E-R.

17 **THE COURT:** G-A-I-L?

18 **MS. COURNOYER:** G-A-I-L.

19 **THE CLERK:** Sir, what's your name?

20 **MR. CARPENTER:** Scott Carpenter.

21 **MS. MCNALLY:** Collette McNally.

22 **THE CLERK:** Okay. Please raise your right
23 hands.

24 (Witnesses Mr. Schwartz, Ms. Cournoyer,
25 Mr. Carpenter and Ms. McNally were sworn.)

1 **THE COURT:** Thank you, folks. Go ahead and
2 please be seated.

3 All right. Mr. Cheifetz?

4 **MR. CHEIFETZ:** Your Honor, are you allowing
5 Mr. Carpenter to stay?

6 **THE COURT:** Yes.

7 **MR. CHEIFETZ:** Okay. Your Honor, I'd like do
8 a brief opening. Also I have a stipulation.

9 We're stipulating that exhibits --
10 Plaintiff's Exhibit 1 through 37 and Defendant's
11 Exhibits 38 through 59 and 61 through 66 are admitted
12 without objection of either party.

13 **THE COURT:** Okay. Go through those again?
14 I'm sorry, 1 through 37, 38 through 59 and 61 through
15 66. All right.

16 **MS. WINKLER:** Counsel, would you please read
17 the rest of the stipulation into the record?

18 **MR. CHEIFETZ:** So both parties reserve the
19 right to object to the admission of these exhibits in
20 any future proceedings.

21 **THE COURT:** All right.

22 **MR. CHEIFETZ:** Your Honor, I'd like to do a
23 brief opening. Your Honor, I think in this case there
24 has been three misconceptions that have been put forth
25 by the association. First, that there was -- that

1 Ms. McNally discussed that which was discussed in
2 executive position. Our position is that we believe the
3 minutes are the best evidence of this. The minutes show
4 what was discussed in executive session. Ms. McNally
5 did not discuss what was set forth in those minutes.
6 The email itself was not discussed -- the contents of
7 the email was not discussed in executive session. Only
8 what to do about the email. We do not believe that the
9 contents of the email was executive session material.

10 Second, we do not believe that the email was
11 ever confidential. The association's president has
12 testified that if she would have been free to send that
13 email to whoever she chose and that email has been
14 disseminated throughout the community. The concern was
15 over the reading of the email and we do not believe the
16 email was confidential.

17 And third, there is misconception and
18 Ms. McNally was told not to read the email. Again, the
19 minutes are the best evidence of what was said. They
20 did indicate to her she should not discuss what was
21 discussed in executive session. She has not. And the
22 evidence will bear that out.

23 Finally, we pled to -- I believe the evidence
24 will show there was no risk of a lawsuit being brought
25 against the association. Ms. Laird, the employee of the

1 association, who the association claims to have been
2 concerned about bringing defamation claims against
3 potentially the association, indicated she was compelled
4 to hire an attorney by the association and that the
5 attorney was paid for by the association.

6 We do not believe that Ms. Laird would bite
7 the hand that feeds her and there was never any risk of
8 a lawsuit.

9 Finally there was a promise of a five-month
10 ban from executive session. That was provided in the
11 letter from Mr. Neal, the attorney for the association.
12 That time has come and gone. We are now coming on two
13 years and with no end in sight as to when this penalty
14 would ever end. Thank you.

15 **MS. WINKLER:** Your Honor, the issue that is
16 before you today is a very narrow issue. And that is
17 whether or not the association has the authority to
18 screen Ms. McNally from executive session. And if they
19 had that authority, whether or not invoking that
20 authority under these circumstances is reasonable.

21 Those issues should sound familiar to you
22 because they were the same issues that were raised in
23 Plaintiff's Motion for Summary Judgment which you've
24 already denied. Plaintiff's burden today is to
25 demonstrate that she is likely to prevail on the merits

1 on those issues. And we do not believe that you are
2 going to hear anything today that is any different than
3 what you heard in relation to Plaintiff's Motion for
4 Summary Judgment. Thank you, Your Honor.

5 **MR. CHEIFETZ:** Your Honor, I'd like to call
6 Collette McNally to the stand.

7 **THE COURT:** All right. Ms. McNally, why
8 don't you come on up and have a seat.

9 Mr. Cheifetz.

10 Whereupon

11 **COLETTE MCNALLY,**

12 called as a witness and being first duly sworn, was examined
13 and testified as follows:

14 **DIRECT EXAMINATION**

15 **By Mr. Cheifetz:**

16 **Q.** Good morning, Ms. McNally. Could you briefly
17 describe your background?

18 **A.** I was born in Wexford, Ireland, and after
19 high school I was going off to the school of languages.
20 I need a fifth language to be admitted so I went to
21 Spain to spend a year there studying Spanish. I ended
22 up joining the community as a religious nun in that --
23 in Spain and spent 20 years there teaching.

24 Then I was asked to come and help a small
25 community here in Phoenix that had joined up with our

1 international group. So I came to Phoenix, Arizona. I
2 spent a couple of years working with them in their
3 various schools and decided to remain in Arizona. I
4 then spent 10 years getting my education first. My
5 bachelors of education and getting my masters in
6 education administration at the University of San
7 Francisco. And after 10 years, I was asked to go to the
8 town of Guadalupe and help develop programs there to
9 keep kids in school. And I spent six years there
10 working with them and then I went on to the Boys and
11 Girls Club and helped develop charter schools. One of
12 the first charter schools in Arizona with the help of
13 the Mesa School District Jim Sataras (phonetic) and the
14 attorney general at the time.

15 Eventually I retired and I went to live now
16 in Sun Lakes and got involved in the community to see
17 what was going on.

18 **Q.** How did you first get involved with the Board
19 of Directors?

20 **A.** During this time I was like four years living
21 in Sun Lakes at the time and my neighbor, Bernadette
22 Halpin, kept me informed about what was going on and
23 persuaded me to get involved. The community was in
24 chaos. There was a lot of strive and a lot of -- and
25 the community at that time was in the process of

1 removing the whole board because of the problems that
2 were going on.

3 One of the first problems was they removed
4 two board members who had just been elected, Steve
5 Wolfer and Dave Emerick. Secondly, we were way over
6 budget on the project and the community kept insisting
7 these decisions had been made in secrecy and that the
8 community should be involved and should be reported to
9 on the concerns of going on. So eventually the whole
10 board was removed. We made history in Arizona at that
11 time.

12 **Q.** Not necessarily good history, but is it fair
13 to say that the problems in the community existed long
14 before you came on to the board?

15 **A.** Yes, that's why my neighbor asked me if I
16 would get involved. And I attended the community
17 meetings and listened to what the different people were
18 saying. Got to know some of the community leaders and
19 became secretary of the community group that was
20 bringing forward what they thought were solutions to the
21 problems that the community was having during this time.

22 **Q.** How did you first become a member of the
23 board?

24 **A.** When the board was removed, the community was
25 put into the hands of the HOA lawyer at the time,

1 Augustus Shaw and he, with the assistance of the
2 community, appointed community members to an advisory
3 board. At that time, Dave Emerick who had been removed
4 previously, was made the president of that advisory
5 board. Steve Wolfer, who also had been removed from the
6 2009 board was made the vice president, and I was called
7 on to be the secretary.

8 **Q.** What year were you appointed to the board?

9 **A.** Pardon?

10 **Q.** What year were you appointed not to an
11 advisory, but to an actual board?

12 **A.** To an actual board, I was appointed in 2010.

13 **Q.** Did any issues arise in 2010?

14 **A.** There was lots of issues. It was a very,
15 very traumatic time for the community with different
16 factions wanting one thing and another and there were
17 different opinions forming part of the board. And
18 Harvey Boyd and that first board was made president and
19 he lasted a month and then when he resigned, I was
20 appointed back on the board as secretary and Bernadette
21 Halpin was made president and we tried to move forward
22 and deal with the issues as they came up.

23 **Q.** Did you have any problems in 2010 while on
24 the board?

25 **A.** 2010, as I was on the board, as I said, there

1 were a number of issues going on and one of the main
2 ones was budget. We had a new plan with a -- a former
3 manager resigned and then we had three months without a
4 manager and a manager came on and he presented the first
5 budget to us. It was presented to us wrongly. That's
6 for sure. In an executive session when the bylaws said
7 it should have been presented in an open meeting. But
8 we were given this huge budget book and we were already
9 in conflict with the bylaws also because at that time
10 the bylaws said that the budget and finance committee
11 should present the budget to the board in an open
12 meeting, the first meeting in the fall. And we were now
13 in October.

14 So I took it home with me as everybody else
15 did and I looked at it and tried to figure it out and I
16 noticed something wrong. And so I called in to a former
17 board member who had been president who had just
18 resigned from the board, Steve Wolfer, and asked him to
19 go over the budget with me to see if I could discover
20 what was the problem with the budget. He had all the
21 former budgets on his computer. We were able to put in
22 the figures and figure out that there was a quarter of a
23 million dollars missing from the budget. So I thought,
24 wait, that's good news for the board. So we went back
25 to the next meeting and I told him what I had found.

1 And instead of reading it with delight that we had this
2 extra money, I was inundated with cries of horror simply
3 because Mr. Hoyt, at the time treasurer, did not like
4 Steve Wolfer and did not like the fact that Steve Wolfer
5 had been involved in the thing. He said to me and these
6 are his words: Colette, you did nothing wrong, but I
7 don't like who you did it with.

8 So it was in agreement. The minutes are
9 there. The state people said that it was not a
10 removable offense because that's what Mr. Hoyt wanted to
11 do. And so I went on and then I got a letter from
12 Bernadette, the president, saying they were going to
13 remove me and they proceeded to remove me.

14 **Q.** Okay. How did the community react to you
15 being removed by the Board of Directors?

16 **A.** The community was incensed. We had agreed to
17 open this with the community and the community did not
18 like that that decision had been made in secrecy again
19 and that they were not informed and not involved in the
20 issue. And so they -- I -- Bernadette arranged the
21 removal meeting on a day that I had to be out of town.
22 They objected.

23 **Q.** Just so we can move on --

24 **A.** Yes.

25 **Q.** -- and speed up a little bit. So what did

1 the community do as a result of you being removed?

2 **A.** What they did was they put forward a
3 resolution the following year taking away the power of
4 the board to remove a member, reserving that for the
5 community alone.

6 **Q.** So the bylaws were amended?

7 **A.** The bylaws were amended.

8 **Q.** Okay. After your removal in 2010, did you
9 ever get back on the board?

10 **A.** Yes, immediately. As I said, the first
11 president was Harvey Boyd. He lasted -- sorry, I'm
12 going back on 2011. I went up for elections, that is
13 right. And I was -- got the majority of the votes and I
14 was elected back on to the board.

15 **Q.** Did anything -- after you were elected to the
16 board, were there anymore issues that arose during 2011?

17 **A.** In 2011 we continued with a lot of issues
18 going on in the community, but one of the things that
19 really upset and divided the community again was a paper
20 that turned out attached to emails that had been
21 addressed to Ray Smith, Tom West, myself, Cindy
22 Morrison, Steve Wolfer. And these emails and the cover
23 letter, which was very derogatory, started a whole big
24 issue again in the community.

25 **Q.** What was done with these emails that started

1 the issue?

2 **A.** Pardon?

3 **Q.** What was done with the emails? How did the
4 community know about the emails?

5 **A.** They were passed out. We didn't know how
6 they were passed out. Ray thought his computer had been
7 hacked and that was what we were told. And so we
8 couldn't find out how they had gotten to the community
9 and why anybody would want to create a riot again in the
10 community.

11 **Q.** And these notes were -- what were the notes
12 that were -- regarding what?

13 **A.** We were -- as I said, we were having a lot of
14 issues. One of them was the open meeting again. We
15 were people who were on -- trying for secrecy and
16 keeping things and discussing things in executive
17 session that we shouldn't be doing and those that are
18 saying we have to be open to the community, but the
19 issue wasn't being reserved. There was another issue
20 that the board president at the time, Bernadette Halpin,
21 was not appointing people. She was losing boards
22 members right, left and center. And she would not
23 appoint new people to the board. So a member of the
24 community, Cindy Morrison, approached us. I don't think
25 I ever met Cindy before that, but she seemed to be very

1 well educated on our bylaws and our procedures, et
2 cetera. And she asked us if we would accompany her to a
3 lawyer to receive -- see if we could get a resolution to
4 these problems that were going on. So Tom West, Ray
5 Smith, Cindy, Steve Wolfer and myself, I think that was.

6 **Q.** Ms. McNally, just to speed it along a little
7 bit. What were the notes that were distributed? What
8 were those notes?

9 **A.** They were emails that were found --

10 **Q.** What were they regarding?

11 **A.** They were regarding our meeting with the
12 lawyer.

13 **Q.** Okay. And those were the notes that were
14 distributed to the community?

15 **A.** Yes.

16 **Q.** Did the community -- did the board at that
17 time express concern over the fact that these private
18 notes had been distributed around the community?

19 **A.** Not that I recall. I think we were very
20 upset and I wanted to have an investigation to see where
21 they came from. But I got no response from the
22 president at the time that I can recall now, and as I
23 say, we thought Ray's computer was hacked and so we
24 didn't do anything about it.

25 **Q.** In 2000 -- okay. I'm going to fast forward

1 to 2013. What happened with Ms. Martens in 2013?

2 **A.** In 2013, Ms. Martens resigned from her job
3 and then shortly afterwards she sent an email to us, to
4 Ray, to Tom, to Cindy, to myself, et cetera explaining
5 what had actually happened. And the email speaks for
6 itself on what actually happened. I can recount --

7 **Q.** Let me ask you this. Who was the email sent
8 to?

9 **A.** The email was sent to Ray, Tom, and Cindy,
10 myself.

11 **Q.** How many of these people were on the board at
12 the time?

13 **A.** At the time I was the only one left on the
14 board. Ray had resigned. Tom had resigned. And Steve
15 had resigned previously. I was the only one left on the
16 board.

17 **Q.** Did you view that email as board material?

18 **A.** Yes. I mean, no, no, no, the material itself
19 wasn't board material. It was communications between a
20 group of us in the community.

21 **Q.** Right. And what did you do after you
22 received the email?

23 **A.** After I received the email from Jenny
24 Martens?

25 **Q.** Yes.

1 **A.** After I received -- actually Ray knocked on
2 my door and came along with the email in his hand. I
3 hadn't opened my computer. And he showed it to me and
4 we sat down and we discussed it. And then I -- Ray told
5 me he was going to bring it up at the next open board
6 meeting. And so I communicated then with the other
7 people to see what they thought and how it felt, if it
8 was reasonable. If they had opportunity. If they had
9 motivation. Why they would do such a thing, a group of
10 staff people. And so then I thought if this is going to
11 come up at the open board meeting, I think it's only
12 fair that Mr. Schwartz, who was the president, should
13 know about it. And so I forwarded the email to
14 Mr. Schwartz so he would be prepared to address it at
15 the open meeting. And I also, with it, sent him my
16 opinion about the staff having done such a thing, they
17 merit some kind of punishment for having done such a
18 thing as to take emails that Ray had left in his board
19 book and forward them out to the community.

20 **Q.** And how did Mr. Schwartz respond to your
21 providing the email to him?

22 **A.** I got an email back from Mr. Schwartz saying,
23 you should resign. That was his solution to the
24 problem.

25 **Q.** Why did he ask you to resign?

1 **A.** I have no idea. As I put everything
2 together, I thought that this was the attitude that he
3 had that he did not want to deal with the subject that
4 came up eventually and that I was going to be blamed for
5 the whole issue.

6 **Q.** What did you want to be done about the email?

7 **A.** My expectation was that there should be an
8 investigation. That we should sit down with the people
9 who had received the email who had been subjected to
10 this abuse. Sit down with the staff people, talk about
11 the issues, see what should be done.

12 **Q.** And?

13 **A.** I suggested that over and over and over again
14 to Mr. Schwartz. I sent him even an outline of how it
15 could be done.

16 **Q.** And what happened next?

17 **A.** What happened next, we had the open meeting.
18 Mr. Schwartz forwarded me a copy of an email that he was
19 sending to the rest of the board. He sent them a copy
20 of Jeannie's email and told them he needed advice and he
21 asked them to help him with the issue. I got no more
22 emails. I did not get any emails from the board as to
23 what they thought about the issue or what they expected
24 about the issue. That was the end of the communication
25 from that end. And so the next thing we have the open

1 board meeting. And we proceeded with business as usual
2 and when it comes to the members comments portion,
3 Mr. Smith stood up and said he would like to address the
4 issue.

5 Immediately Mr. Schwartz took the gavel,
6 closed the meeting and would not allow any comments. So
7 I turned to Mr. Schwartz and I said, Rick, I give you
8 one month to resolve this issue. We can't allow
9 unresolved issues to rile up the community again.

10 **Q.** And so what happened after that?

11 **A.** What happened after that? After that, we had
12 an executive session. There was no agenda. I didn't
13 know what to expect, but I expected here we are going to
14 come up with some solutions. We are going to address
15 the issue. I went in to the board meeting and
16 Mr. Schwartz immediately said, I have been to see the
17 lawyer and we're not going to do anything. I proceeded
18 to protest and say, we can't not do anything. This is
19 going to have the community in an uproar again because
20 these emails are being passed around the community. And
21 I could get no reason whatsoever. No one would listen
22 to me.

23 **Q.** At that meeting were you ever told not to
24 share the email with the community?

25 **A.** Of course not. There wasn't a copy of the

1 email in the board room.

2 **Q.** Well, let me ask you that. Was the contents
3 of the email discussed in executive session?

4 **A.** No, it was not. The only discussion was what
5 we're going to do. And the answer to that was: We're
6 going to do nothing.

7 **Q.** All right. So after that first executive
8 session, what happened next?

9 **A.** As far as I recall, I kept on emailing
10 Mr. Schwartz and suggesting the possible solutions and
11 asking for a dialogue. First, Mr. Schwartz said to me,
12 I won't talk to you. I will only talk to your lawyer.
13 And then we had an executive session and I do not
14 remember clearly all that was said or done in that
15 executive session. But I certainly did not talk about
16 the email because it was being: We're going to do
17 nothing. That's all the answer was.

18 **Q.** And what happened after the second executive
19 session?

20 **A.** After the second executive session we had our
21 next open meeting and again when it came to the members
22 comments, Mr. Smith stood up and said, I want to address
23 this issue. Rick stopped him, told him he wasn't going
24 to speak with him. And at that point I realized that
25 this was not going to be resolved. This was an issue

1 that was on my shoulders. I had been sent the email. I
2 had the knowledge of what had happened. I knew it had
3 happened and the -- it was not going to be dealt with
4 and people were very anxious and so I proceeded to say,
5 I have an issue. I have a concern with an email that I
6 have received and I proceeded to read the email.

7 Q. Did you read the complete email?

8 A. No, I didn't read the complete email. I did
9 not mention anybody's name. I just read this is a
10 concern. This is what happened with the emails that had
11 been floated around the community a couple years
12 previously.

13 Q. Now, was the executive session part -- was
14 the executive session the morning of that open meeting?

15 A. That I'm not clear on. Honestly, I don't
16 remember exactly when it was.

17 Q. Okay. Did you at that executive session, did
18 anyone tell you not to read the email?

19 A. No, absolutely not. I don't think it even
20 occurred to them that I would do it.

21 Q. At that executive session did you discuss the
22 contents of the email?

23 A. No, we did not.

24 Q. All right. How did the board react to you
25 reading the email at the open meeting?

1 **A.** As soon as I started to read it, Rick again
2 banged the gavel, meeting dismissed. And I just said
3 this is what I'm going to tell you is not on the record,
4 but I feel an obligation to share with you what is going
5 on.

6 **Q.** Did everybody stay for you or did people
7 leave? What happened?

8 **A.** Honestly, I couldn't tell you if a few people
9 left or not. I wasn't watching them that much. I just
10 knew that all of the rest of the board stood up and
11 walked out.

12 **Q.** As you sit here today, do you think it was a
13 great idea to read the emails?

14 **A.** Probably. If I had been given other options,
15 I would have chosen them, but the only thing I was told,
16 Rick said, I'm not going to speak to you. I got no
17 communication from the rest of the board. I was not
18 given any options and I felt obligated to respond to the
19 community's concerns.

20 **Q.** What happened after that?

21 **A.** After that. Oh, after that I received a
22 letter from our HOA lawyer firm, Ms. Maxwell, written by
23 Mr. Neal.

24 **Q.** And what did the letter say?

25 **A.** The letter told me that I was being excluded

1 from executive session. That I would have to get a
2 court order to be included again. And he, in his
3 letter, said some things that I was totally amazed by.
4 For example, he claimed that the email was board
5 business. That it belonged to the board. It had been
6 sent to the board. And I knew he had gotten wrong
7 information on that one because it wasn't sent to the
8 board. It was information that was sent to our group.
9 So I was perplexed by the whole thing and I wrote down
10 my thoughts and my -- I want to say, my reaction to the
11 letter and sent it to the board.

12 **Q.** Let me ask you this. Prior to being removed
13 from -- were you removed from executive session?

14 **A.** Yes, I was. From that moment on, I've never
15 been in executive session.

16 **Q.** And before you were removed from executive
17 session, did they give you a hearing?

18 **A.** No, I got nothing. Absolutely not.

19 **Q.** Any form of due process?

20 **A.** Not a word. As I tell you, Rick refused to
21 speak to me and I got no communication from the rest of
22 the board and haven't gotten them since.

23 **Q.** Why did they tell you you were excluded from
24 executive session?

25 **A.** Because I had violated executive privilege.

1 **Q.** And did you ever discuss anything that was
2 discussed in executive session outside executive
3 session?

4 **A.** Never.

5 **Q.** Okay. And you never revealed the
6 deliberations that were held in executive session to
7 anyone?

8 **A.** No, I did not. The board decided to do
9 nothing. I didn't tell the community what the board was
10 going to do. Nothing.

11 **Q.** Were you ever concerned that by sharing this
12 information, you were creating risk for the community
13 about being sued?

14 **A.** No, absolutely not.

15 **Q.** Why not. These are --

16 **A.** Because I was convinced by Ms. Martens'
17 email, by the circumstances, by the tone that was --
18 what was going on in 2010, that there was opportunity
19 and that there was a desire to do harm to us and that
20 was -- Mr. Hoyt never denied it either.

21 **Q.** Okay. So why did you not feel that there was
22 risk of a lawsuit?

23 **A.** There was not a risk of a lawsuit because the
24 next thing that happened --

25 **Q.** No, I mean, did you believe the email was

1 true?

2 **A.** Yes, absolutely.

3 **Q.** Do you think the board wanted to -- did the
4 board want to know the truth, do you believe?

5 **A.** I was beginning to think that somehow or for
6 some reason, something else must be going on because
7 there is an attempt of some kind of a cover up. They
8 don't want -- I mean, I would have thought that they
9 would have asked the staff people to at least talk to me
10 and tell me that it was impossible or whatever or that
11 they should stand up before the community and say this
12 never happened. We have proof. I couldn't understand
13 why they were protecting the staff people, taking them
14 to see the HOA lawyer, et cetera, and I was being left
15 out of the whole incident. They said they met with the
16 staff people. I wasn't invited to meet with the staff
17 people, et cetera. There was so many things going on
18 that I thought somehow there is something else going on.

19 **Q.** Were you -- when you received the letter from
20 Mr. Neal, the attorney indicating that you would be
21 excluded from executive session, did he tell you how
22 long you would be excluded for?

23 **A.** Yes. In that letter it said to the end of my
24 first term.

25 **Q.** And when would have been the end of your

1 first term?

2 **A.** The end of my first term would have been the
3 following February. So this was September and I would
4 be off the board or finish my term the following
5 February.

6 **Q.** Now --

7 **THE COURT:** So did the letter say first term?

8 **THE WITNESS:** To the end of the term.

9 **THE COURT:** Big difference.

10 **Q (By Mr. Cheifetz)** Go ahead. The letter said?

11 **A.** As far as I believe the end of the term.

12 They were pushing me to resign and to get out
13 of the way. They did not expect me to run for another
14 three years.

15 **Q.** And as far as you know, was the -- is there
16 any bylaw that gives the board the authority to remove
17 you from executive session?

18 **A.** No, there is not.

19 **Q.** Is there any rule or any governing document
20 in the community that gives the board the right to
21 remove from executive?

22 **A.** I examined everything I could examine. I
23 consulted with various lawyers that I was -- HOA lawyers
24 because I give to a lot of trainings and seminars, et
25 cetera, on HOA law. And every time I had an

1 opportunity, I asked this, is this a possibility, and
2 everybody told me no.

3 **Q.** And what happened after that?

4 **A.** After that?

5 **Q.** Did you get another letter from another
6 attorney?

7 **A.** Yes, I did. So a short time later I got a
8 letter from an attorney called Mr. Frisbee and attached
9 to it was a -- what was it called, a suit, a claim.
10 Anyway, I was going to be sued by the staff people and
11 Ms. Laird and Mr. Warrell were going to sue me for
12 whatever, saying whatever I was saying. And the letter
13 asked for me to retract and to say that what I was
14 saying was untruthful, that the information in the email
15 does wrong, et cetera, et cetera, and claiming damages,
16 et cetera. And if I did not send back that letter, that
17 they would pursue and file a suit.

18 **Q.** And did you do anything to -- at that time
19 were you concerned because you received the letter?

20 **A.** Of course, I was concerned. I mean, who
21 wants to be sued? But -- so I knew at that point I knew
22 I had to get a lawyer.

23 **Q.** Did you seek to investigate whether the email
24 was true or not?

25 **A.** Which email?

1 **Q.** The email from Jeannie Martens?

2 **A.** Yes, I did, of course.

3 **Q.** How did you do that?

4 **A.** Well, I spoke to Mr. Hoyt. He contacted me
5 first of all and asked me for -- he heard the rumors
6 going around the community and asked me for a copy of
7 the email and I sent it to him and he was absolutely
8 incensed that the staff people -- yes.

9 **Q.** Did you speak with Ms. Martens?

10 **A.** Yes. I emailed her back and forth, yes. And
11 asked her to contact my lawyer to make sure -- we wanted
12 to make sure that what she had said was the truth.

13 **Q.** And did you agree to sign the retraction
14 letter?

15 **A.** No, I did not.

16 **Q.** Why not?

17 **A.** Because I felt that -- to sign the retraction
18 letter and say it was untrue would be false. I couldn't
19 do it. So I didn't do it. I just had the lawyer
20 saying, send them saying that I would not do it.

21 **Q.** And after -- when you did sign the retraction
22 letter, were you sued as promised?

23 **A.** No, I wasn't. I heard no more.

24 **Q.** What happened after that? What happened --
25 you continued to the end of your term?

1 **A.** I continued to the end of my term and after
2 consulting with a number of former board members, who I
3 respect in the community, I was receiving a lot of
4 pressure. I was being ostracized. I was being left out
5 of the loop on everything regarding the board and
6 managing the community. And I felt very depressed and
7 very down and I wanted to resign and I consulted with
8 them and they encouraged me to continue forward. That
9 it was absolutely necessary that I continue forward and
10 serve the community. So I did and I ran for reelection.

11 **Q.** And so when did you run for reelection?

12 **A.** So I ran for reelection that February 14,
13 right, when the elections were on.

14 **Q.** And after you were -- were you reelected?

15 **A.** Yes, I was reelected.

16 **Q.** After you were reelected, were you allowed to
17 attend executive session?

18 **A.** No, I was not.

19 **Q.** Did your -- did the fact that you were
20 excluded from executive section, did it affect your
21 ability to operate as a board member in open meetings?

22 **A.** It affected it very, very much. Beside --

23 **Q.** Why was that?

24 **A.** Besides not being at the executive sessions,
25 I got no communication from the board. Any emails they

1 sent back and forth talking about whatever was going on.
2 None whatsoever. I would say I got four emails in the
3 last two years. Janice gave some information about some
4 budget issues, I think. And Rick joined in and asked
5 Janice to allow me to help her with some budget issue,
6 developing a form. Nothing came of that and that was
7 about it.

8 **Q.** Prior to that, did you receive board emails?

9 **A.** Yes, yes, of course.

10 **Q.** How often would you receive emails?

11 **A.** I would say board emails went back and forth
12 on a regular basis. When any problem came up, when
13 anything happened we became aware of, they made all the
14 rest of the board members aware.

15 **Q.** What about, is there anything else you didn't
16 receive?

17 **A.** I got no manager's reports. The manager is
18 supposed to send out a report each week to the board
19 members to let them know what's going on in the
20 community. What the complaints are. How the progress
21 of the projects that are going on and incidents, et
22 cetera. And for two years, but not quite two years, and
23 the new manager came on and she started giving them to
24 me again, but during Warrell's time, I did not get any
25 manager reports.

1 **Q.** What about agendas?

2 **A.** I got the agenda to the open meeting. I got
3 the board book to the open meeting, but I got no -- that
4 was when I realized I had thought -- I mean, as I say,
5 went to a lot of trainings on HOA law and it had not
6 ever occurred to me that the agendas for the executive
7 sessions were not being sent out to the community. I
8 got them as a regular thing, but I was going to
9 executive sessions. But once they stopped sending them
10 to me, I began to realize that they were not being
11 published because I got the emails that were sent to the
12 general community and that's how the board agendas were
13 communicated to them.

14 **Q.** Was there ever a time when you had concerns
15 over the deliberations in open meetings, that they
16 weren't complete?

17 **A.** Many times. I have many times I was sitting
18 before the community asking to be -- to make decisions
19 and I did not enter any background information. There
20 was a lot issues that came up.

21 **Q.** And why would you not have any background
22 information?

23 **A.** Because I got no communication from the
24 board.

25 **Q.** Didn't the board deliberate about items at

1 the open meeting that were being voted upon?

2 **A.** The comment in the community was: Colette,
3 you are the only one who has to ask questions.
4 Everybody else seems to not be interested. I said:
5 Well, no, because they know what this issue is all
6 about.

7 **Q.** Why would they know what the issues were
8 about? When would they have a chance to discuss them?

9 **A.** The only chance they had was in the executive
10 sessions.

11 **Q.** Was there any examples that came up that they
12 admitted that they were discussing items in executive
13 session?

14 **A.** That they admitted?

15 **Q.** Yes, like on a budget or anything like that.

16 **A.** Well, every now and again when an issue would
17 come up and the community would question like the misuse
18 of the HOA credit card and what was going on way, way
19 over budget for the three years, and he would say, well,
20 we are restructuring. We have dealt with that issue.
21 He began to end it. I began to realize that all these
22 issues were being discussed and decided before they came
23 to the open meeting board. So things were really,
24 really progressing down. Back to where they were in
25 2009.

1 **Q.** How long have you been excluded from
2 executive session?

3 **A.** Nearly two years.

4 **Q.** Do you have any idea when the penalty will
5 end?

6 **A.** No, I do not.

7 **Q.** Have they told you when it would end?

8 **A.** No, they did not.

9 **Q.** Have you always sought to act with best faith
10 and good intentions?

11 **A.** That has been my -- I have dedicated my life
12 to a life of service as a member of a religious
13 community and I spent my life. Whenever I moved into
14 any different area, I made it my business to understand
15 what my responsibilities were. I served in Sun Lakes, a
16 wonderful community, since 2009 and have stuck in there
17 and done my best despite all the up and downs, which are
18 natural in board business.

19 So I believe that what I'm doing is for the
20 best of the community. It is to -- for feel what they
21 asked of me when I ran for the board, to serve with
22 openness and sincerity.

23 **Q.** Are you being guided by your personal
24 principles?

25 **A.** Yes, I am.

1 **MR. CHEIFETZ:** I've not nothing further.

2 **CROSS-EXAMINATION**

3 **By Ms. Winkler:**

4 **Q.** Good morning, Ms. McNally.

5 **A.** Good morning.

6 **Q.** You have a masters degree in school
7 administration from the University of San Francisco,
8 correct?

9 **A.** That is correct.

10 **Q.** And you have taught kindergarten through
11 college level?

12 **A.** That's right.

13 **Q.** And you've also been a school principal?

14 **A.** Correct.

15 **Q.** You also have a certificate in nonprofit
16 management from Arizona State University?

17 **A.** That is correct.

18 **Q.** You also have some experience in managing a
19 nonprofit?

20 **A.** Yes.

21 **Q.** You have some training specific to HOA
22 management through the Leadership Institute, correct?

23 **A.** That is correct. And the Mulcahy Law Firm.

24 **Q.** And you also received annual board training
25 from the association's lawyer?

1 **A.** Until last year. This year we have had no
2 training whatsoever.

3 **Q.** But on prior occasions during your service on
4 the board, you received training from the HOA's lawyer?

5 **A.** Yes, the various lawyers that we have.

6 **Q.** You are currently serving your second elected
7 three year term as a member of the Board of Directors,
8 correct?

9 **A.** That is correct.

10 **Q.** You've served on the board for the
11 association off and on since 2009?

12 **A.** Correct.

13 **Q.** So you were first appointed in 2009, correct?

14 **A.** That's right, to the advisory board.

15 **Q.** And you were appointed again in 2010?

16 **A.** Correct.

17 **Q.** And that you were removed in 2010?

18 **A.** Correct.

19 **Q.** And you were represented by counsel during
20 that removal process, correct?

21 **A.** That is correct, yes. I was out of town. I
22 couldn't be at the meeting so I had to get someone to
23 represent me.

24 **Q.** And that someone was a lawyer?

25 **A.** That's right.

1 **Q.** You were elected for a term of three years in
2 2011?

3 **A.** That is correct.

4 **Q.** And then you were reelected to the second
5 term, your current term, in 2014?

6 **A.** Correct.

7 **MS. WINKLER:** Your Honor, I'd like to show
8 the witness one of the exhibits that's been marked; is
9 that all right?

10 **THE COURT:** Yes.

11 **MS. WINKLER:** This is Plaintiff's Exhibit 8
12 and just to be clear, Your Honor, you should have
13 received notebooks that have these exhibits, correct?

14 **THE COURT:** Yes.

15 **Q (By Ms. Winkler)** I've placed before you,
16 Ms. McNally, what we have marked as Plaintiff's Exhibit 8
17 and I just would like you to confirm for me that this is an
18 email that was sent to you and to some other folks by
19 Jeannie Martens, correct?

20 **A.** That's correct.

21 **Q.** And this is the email that you read at an
22 open -- or that you at least started reading at an open
23 meeting of the Board of Directors?

24 **A.** That is correct.

25 **Q.** Okay. Before you took it upon yourself to

1 read that email, you consulted with four HOA lawyers; is
2 that correct?

3 **A.** That's right. I had the opportunity to go to
4 trainings, et cetera. I think it's not exactly in the
5 context of this. This context of other issues that were
6 happening, also.

7 **MS. WINKLER:** Your Honor, can I place the
8 witness' deposition transcript in front of her?

9 **THE COURT:** Sure.

10 **MS. WINKLER:** Is it okay for me to unseal it?

11 **THE COURT:** Yes.

12 **Q (By Ms. Winkler)** Ms. McNally, would you please
13 open the transcript of your deposition to page 43?

14 **A.** Forty-three, got it.

15 **Q.** And look at lines 10 through 13. Just read
16 those to yourself, please.

17 **A.** Uh-huh. Yes, I am familiar.

18 **Q.** All right. And so the question that I have
19 for you is: Before you decided to read Plaintiff's --
20 or to read Exhibit 8 at an open meeting of the Board of
21 Directors, you consulted with four HOA lawyers; correct?

22 **A.** You are correct, I remember now.

23 **Q.** Thank you.

24 Charles Maxwell and the firm Maxwell and
25 Morgan served as the association's lawyer at that time,

1 correct?

2 **A.** At this time?

3 **Q.** At the time that you read the Martens' email?

4 **A.** Yes.

5 **Q.** Mr. Maxwell was not one of the lawyers that
6 you consulted with; is that right?

7 **A.** No, he is not. I didn't have an opportunity.

8 **Q.** All right. But you were aware that the
9 president of the board, Mr. Schwartz, had consulted with
10 Mr. Maxwell concerning Ms. Martens' email, correct?

11 **A.** I was aware he had told us in the executive
12 session that we had after the first open board meeting.

13 **Q.** And you were aware of Mr. Maxwell's advice to
14 the Board of Directors concerning how they should handle
15 Ms. Martens' email, correct?

16 **A.** Yes. Rick Schwartz told us that the lawyer
17 said that we were going to do nothing.

18 **Q.** Did Rick Schwartz ever show you an email or
19 letter from Mr. Maxwell where he addressed how the board
20 should deal with the email?

21 **A.** No, he did not.

22 **MS. WINKLER:** Your Honor, I'd like to place
23 Exhibit 60 before the witness.

24 **THE COURT:** You don't need that.

25 **MS. WINKLER:** You don't need that?

1 **MR. CHEIFETZ:** I believe we have an objection
2 to Exhibit 60. This was an email.

3 **THE COURT:** Let her do it and then we'll
4 talk.

5 **MS. WINKLER:** I'm not moving for the
6 admission of this.

7 **Q (By Ms. Winkler)** Ms. McNally, have you ever seen
8 Exhibit 60 before?

9 **A.** Yes, I remember this now. This is one that
10 you took back from me, right?

11 **Q.** Okay. So you have seen this document before?

12 **A.** Mr. Schwartz said he sent it to me by
13 accident. I don't remember the details of it.

14 **Q.** Okay. Is that your handwriting up on the top
15 of Exhibit 60?

16 **A.** It could be.

17 **Q.** You are not sure?

18 **A.** If it is, it probably did.

19 **Q.** I'm not saying that. Do you recognize that
20 as your handwriting?

21 **A.** I do not recognize that as my handwriting,
22 but that does not say that that is not my handwriting.
23 I understand sometimes my scribble is not very legible,
24 but I don't remember what the contents were.

25 **THE COURT:** Mr. Cheifetz, have a seat.

1 **Q** **(By Ms. Winkler)** All right. Thank you. You
2 don't -- Ms. McNally --

3 **A.** I don't need to read it? Okay.

4 **Q.** Now, you were aware that the president,
5 Mr. Schwartz, refused to allow Ms. Martens' email to be
6 discussed during an open session of the board, correct?

7 **A.** Yes, he told Ray he would bang the gavel and
8 wouldn't allow him to continue.

9 **Q.** And you disagreed with Mr. Schwartz's
10 handling of the Martens' email; is that correct?

11 **A.** I suggested to Mr. Schwartz that there were a
12 number of ways to deal with the issue.

13 **Q.** Did you disagree with how he ended up dealing
14 with it?

15 **A.** I disagree absolutely with doing nothing.

16 **Q.** Now, you were aware that all of the board
17 members except yourself agreed that Exhibit 8 should not
18 be discussed during an open session the board, correct?

19 **A.** No, I am not.

20 **Q.** Ms. McNally, I've handed what's been marked
21 as Plaintiff's Exhibit 10 and if you will just take a
22 moment to look at that?

23 **A.** Yes, I remember this one.

24 **Q.** And now these are executive session minutes
25 from a meeting of the Board of Directors, September 4th,

1 2013, correct?

2 **A.** Uh-huh.

3 **Q.** And now my question to you was that: Before
4 you read Ms. Martens' email, which you did on this same
5 date, at the open meeting following this executive
6 session, correct?

7 **A.** That's what -- the minutes say it was 9/4. I
8 don't remember having it before the thing, but I will
9 not deny that it probably did take place before the open
10 meeting.

11 **Q.** Okay. So we're clear, so our record is
12 clear?

13 **A.** Yes.

14 **Q.** You read the Martens' email at the
15 September 4th, 2013, open meeting of the Board of
16 Directors, correct?

17 **A.** Correct.

18 **Q.** And these minutes are for an executive
19 session that same date that took place before the open
20 meeting?

21 **A.** That is correct. But may I add, the minutes
22 are signed in October, a month later. I believe that
23 Janice, with all good intentions, mixed up a number of
24 different sessions and comments and exchange of ideas
25 when she did the basic thing --

1 **Q.** Ms. McNally, I'm sorry, I have very limited
2 time to ask you questions so I really need to stick to
3 answering the questions.

4 **A.** I would certainly say that this involved --
5 what I remember --

6 **MS. WINKLER:** Your Honor?

7 **THE COURT:** That's fine.

8 **Q** **(By Ms. Winkler)** Would you turn to -- you see
9 there are some Bates numbers in the lower right hand corner?

10 **A.** Uh-huh.

11 **Q.** Would you turn to HOA 56?

12 **A.** HOA 56. In this pocket?

13 **Q.** It's about four pages back. Okay.

14 **A.** So you should be looking at a page that says,
15 Dear Fellow Board members?

16 **Q.** Right. And this is a statement you presented
17 to the Board of Directors in executive session, correct?

18 **A.** I sent an email to them.

19 **Q.** So you think this was sent by email?

20 **A.** Yes.

21 **Q.** All right. This is your statement however?

22 **A.** And then I brought it with me and read it to
23 them, if I remember correctly.

24 **Q.** All right. Will you turn to the next page,
25 HOA 57? Will you please read paragraph number three out

1 loud?

2 **A.** Okay. "Only after Rick's visit to Maxwell
3 with Jean" -- I thought it was Jean, it was actually
4 Janice. "With Jean, did Rick convene a special meeting
5 of this board? And we were dictated to as to how we
6 should ignore the ethical behavior of Clint and Roberta
7 and not take any action. We all agreed in my code of
8 ethics a reasonable effort should be made to rectify the
9 harm done. I don't agree with this kind of cover up of
10 unsavorily behavior and feel at least an apology is due
11 those affected by their unethical and underhanded act.
12 I was one of the ones who suffered because of what they
13 did. I recommended that they should be let go. But the
14 board's decision is what it is and I can live with it,
15 though it was made under pressure and without other
16 possible options being presented."

17 **Q.** Okay. Now, from what you just said, what you
18 first read, I think you may have misread it, there is a
19 sentence that says, "you all agreed", correct?

20 **A.** Uh-huh.

21 **Q.** And you are talking about all of the Board of
22 Directors agreed?

23 **A.** Uh-huh.

24 **Q.** All right. So my question to you earlier
25 was: You were aware before you read Ms. Martens' email

1 at the open meeting that all of the board members except
2 yourself agreed that her email should not be excused
3 during an open session?

4 **A.** No, that is not correct.

5 **Q.** Who agreed?

6 **A.** We never discussed the email. They had no --
7 as far as I can see, we never discussed that we
8 weren't -- anything about the email. The discussion was
9 always about we're going to do nothing. We can do
10 nothing. So there was no discussion about the email
11 itself. The email was never on the board. It was never
12 on the table. It was never brought up. I tried but
13 when I went to the executive session, there was not a
14 copy of the email in the thing. The decision had been
15 made.

16 **Q.** All right. Thank you, Ms. McNally. You were
17 aware that the two employees that are -- just a minute.
18 You have Exhibit 8 in front of you?

19 **A.** Yes.

20 **Q.** And this is Ms. Martens' email, correct?

21 **A.** Correct.

22 **Q.** So you were aware that the two employees
23 discussed in Ms. Martens' email, Ms. Laird and
24 Mr. Warrell, had denied the allegations that she was
25 making. Were you aware of that?

1 **A.** I was -- Rick told me. I asked him, I talked
2 to Rick. I said, please, Rick, let's investigate this.
3 He said, well, I talked to them and they denied it.
4 That is not very satisfactory.

5 **Q.** All right. And the author of Exhibit 8,
6 Ms. Martens, she was a former employee of the
7 association, correct?

8 **A.** That's correct. Jeannie was executive until
9 she --

10 **Q.** Thank you. The two people that she is
11 accusing in her email, Ms. Laird and Mr. Warrell, they
12 were at that time current employees of the association;
13 is that correct?

14 **A.** That is correct.

15 **Q.** I'm handing you what we have marked as
16 Plaintiff's Exhibit 5. The first page of Exhibit 5 is a
17 document that was passed around at the board meeting
18 back in 2011, correct?

19 **A.** It was passed outside the board meeting as
20 the members were going out of the board --

21 **Q.** Okay.

22 **A.** -- room.

23 **Q.** And is it your belief that Bill Hoyt created
24 that document?

25 **A.** Yes, it is.

1 **Q.** The first page of Exhibit 5, the one that
2 reads: To the residents of Sun Lakes Country Club,
3 accuses you and two other board members, Tom West and
4 Ray Smith, of unethical and unprofessional behavior,
5 correct?

6 **A.** Correct.

7 **Q.** You told me during your deposition, I
8 believe, that you were one of the people who was
9 targeted when this document was circulated?

10 **A.** That is correct.

11 **Q.** If you look at the second and third pages of
12 Exhibit 5.

13 **A.** Uh-huh.

14 **Q.** These are notes that Ms. Martens' says that
15 she found in a board book, correct?

16 **A.** That is correct.

17 **Q.** And it's true that these notes concern a
18 meeting or a planned meeting between you and the lawyer?

19 **A.** Between a group of homeowners and a lawyer,
20 yes.

21 **Q.** And you were one of the homeowners?

22 **A.** I was one of the homeowners.

23 **Q.** And the lawyer was Mr. Cheifetz?

24 **A.** That's correct. And had actual gone to --
25 okay.

1 **Q.** And you believe Mr. Warrell and Ms. Laird had
2 conspired with Ms. Martens to cause these notes to be
3 circulated to the community; is that right?

4 **A.** That is correct.

5 **Q.** And you felt that you were personally harmed
6 by that conduct?

7 **A.** Yes.

8 **Q.** And you felt that you were at least owed an
9 apology?

10 **A.** Correct.

11 **Q.** And you felt that Clint and Roberta probably
12 should have been let go over this?

13 **A.** Yes. If I might say, this is not complete.

14 **Q.** Thank you. I handed you what we have marked
15 as Defendant's Exhibit 51. Would you just confirm for
16 me, is this the letter that you received from the
17 association's lawyer that you were speaking to
18 Mr. Cheifetz about?

19 **A.** That is correct.

20 **Q.** And I think during your deposition we figured
21 out that the date that he has there on the first page of
22 his letter, I think he has September 5, 2013, and during
23 your deposition we figured out that date was wrong, it
24 was September 4th, 2013?

25 **A.** No, no, no. This is September 11.

1 **Q.** No, I'm sorry. But in the first paragraph of
2 his --

3 **A.** Oh, sorry.

4 **Q.** -- letter?

5 **A.** Yes, I think it was September 4th.

6 **Q.** Okay. I have handed you what we have marked
7 as Defendant's Exhibit 52. Now, have you had a chance
8 to just look through this real quickly?

9 **A.** Yes.

10 **Q.** This is an email from you with an attached
11 letter to the board; is that correct?

12 **A.** That is correct, yes.

13 **Q.** And this was your written response to
14 Mr. Maxwell's letter of September 11th?

15 **A.** That is correct.

16 **Q.** Now, the association has screened you from
17 executive sessions since September 2013, correct?

18 **A.** That is correct.

19 **Q.** Your term ended in 2013 and then you were
20 reelected for a second term in 2014?

21 **A.** It ended in 2014 and then I was reelected
22 again in 2014.

23 **Q.** Okay. After you were reelected, the
24 association, through Mr. Maxwell's lawyer, offered to
25 allow you to return to executive sessions, correct?

1 **A.** If I denied -- or Ms. Martens' letter, if I
2 stated that I had spoken untruly -- I mean, there was a
3 lot of attachments to that. I never saw it, but it was
4 addressed to me in a training session with a bunch of
5 staff present and I was just made to feel terrible.

6 **Q.** All right. So it's fair to say that you were
7 unwilling to return on the terms that were offered by
8 Mr. Maxwell?

9 **A.** Correct. These terms were unacceptable.

10 **Q.** But one of those terms was that you would
11 agree to keep matters discussed in executive session
12 confidential, correct?

13 **A.** Which was a false allegation that I had not
14 done it.

15 **Q.** Was one of the terms that Mr. Maxwell offered
16 to you, was that you would agree to keep matters
17 discussed in executive --

18 **A.** I have to say. Sorry, excuse me.

19 **Q.** Please let me finish my question.

20 **MR. CHEIFETZ:** Your Honor, I object.

21 **THE COURT:** Mr. Cheifetz?

22 **MR. CHEIFETZ:** Settlement discussions.

23 **THE COURT:** Overruled.

24 **Q** **(By Ms. Winkler)** Was one of the terms that
25 Mr. Maxwell -- was one of the terms of the offer to allow

1 you to return to executive session, that you would agree to
2 keep matters discussed in executive session confidential?
3 Was that one of the terms?

4 **A.** It could have been. As I say, I never saw
5 what he said or what -- the only thing I was supposed to
6 sign was never given to me.

7 **Q.** All right. Would you open your deposition
8 transcript? It should still be in front of you. All
9 right. I'd like you to turn to page 83.

10 **A.** 83. 83, yep.

11 **Q.** All right. I'm going to read the question
12 that starts at line 25 and then I'm going to ask you to
13 read your answer back to me, okay?

14 I'm reading from your transcript at page 83
15 line 25. Question: "Was any portion of that statement
16 that you were asked to sign, did it ask you to promise
17 that you would maintain the content of executive
18 sessions as confidential regardless of whether you
19 agreed or not?" Answer.

20 What was your answer, Ms. McNally?

21 **A.** "I'm sure it was, yes, in it."

22 **Q.** Thank you. Now, during your deposition you
23 and I discussed whether or not you will agree to keep
24 the contents of an executive session confidential. Do
25 you remember that discussion?

1 **A.** I do, yes.

2 **Q.** And you told me that if the board was
3 discussing something in executive session, that in your
4 opinion should be discussed in an open meeting, you
5 would first bring it to their attention?

6 **A.** Right.

7 **Q.** And then if they persisted and you felt
8 like -- and you felt like it was doing harm to the
9 community, you would bring it out in the open?

10 **A.** That is correct.

11 **THE COURT:** I assume that's still your
12 position today?

13 **A.** Yes. If it was in violation of the open
14 meeting laws, it has to be dealt with in the open.
15 That's all the problems we have in the 2009 board
16 starting all over again.

17 **Q (By Ms. Winkler)** Ms. McNally, I've handed you what
18 has been marked as Defendant's Exhibit 54.

19 **A.** Yes.

20 **Q.** Just take a minute to look at it.

21 **A.** I'm quite familiar with it.

22 **Q.** And this is an email or an email chain
23 between you and Ray Smith, correct?

24 **A.** Yes. He forwarded it on to what's his name,
25 Foster. Mr. Foster.

1 Q. Okay. And --

2 A. They forwarded it back to me. Rick Schwartz.

3 Q. All right. And in the -- I'm looking at the
4 portion of Exhibit 54. That is an email from you to
5 Mr. Smith dated March 12th, 2014. Are you on the same
6 place?

7 A. Correct, yes.

8 Q. Okay. You tell Mr. Smith that not being
9 admitted into executive sessions is a minor issue,
10 correct?

11 A. It is a minor issue if they stick to what
12 they are supposed do in executive sessions.

13 Q. You characterize it in this email as a minor
14 issue, correct?

15 A. They are taking -- very well, you can
16 interpret it as you wish.

17 Q. And if you take a look at --

18 A. Where does it say that? I don't see it. It
19 must be here? Where?

20 Q. I think -- I'm in the first paragraph on the
21 first page.

22 **THE COURT:** Fourth line from the bottom.

23 **THE WITNESS:** Fourth line from the bottom.

24 Thank you, Your Honor. Okay.

25 Q (By Ms. Winkler) And if you will turn to the next

1 page. Now, I'm reading the third full sentence you say:
2 "Not having any communication from the board about what they
3 are doing gives me more opportunity to bring these items
4 before the public in open meetings and indeed it forces me
5 to act in this way as I have an obligation to the community
6 as an elected member to address these issues." That's what
7 you told Mr. Smith, right?

8 **A.** Correct.

9 **Q.** And in the next paragraph, in the first
10 sentence, you say: "I am having a good time, quote,
11 helping them to see the error of their ways." That's
12 your words, right?

13 **A.** That's right.

14 **MS. WINKLER:** Nothing further, Your Honor.

15 **REDIRECT EXAMINATION**

16 **By Mr. Cheifetz:**

17 **Q.** Ms. McNally, when you testified you consulted
18 with attorneys, did you consult with them about the
19 Jeannie Martens' email or did you consult with them
20 generally about open meeting issues?

21 **A.** Open meeting issues were generally my issue.

22 **Q.** After you received the Jeannie Martens'
23 email, did you consult an attorney prior to reading it
24 at a meeting?

25 **A.** Yes, I did.

1 **Q.** Who did you consult with?

2 **A.** I consulted with -- through the law firm.
3 What's her name, Mulcahy. They have a free service. I
4 was going to HOA trainings at the time so I consulted
5 with -- there were other issues going on at the same
6 time. I consulted -- she was training and then they
7 have a free service, phone in service on the first
8 Fridays and so I talked to a lawyer that way in general.
9 I had an opportunity to consult with various.

10 **Q.** Earlier you read a response to your -- in
11 your deposition where you asked about whether you agree
12 to the proposed proposal by Mr. Maxwell or not. And
13 basically if you could turn to page 84 of your
14 deposition.

15 **A.** Yes, I have it.

16 **Q.** And when you were asked on page 85 line five,
17 when you would agree to the proposal. Could you read
18 your response to -- from line five to page -- to line
19 21?

20 **A.** Okay. Line five: "And you would not agree
21 to that, right? No, that is not true. I would not
22 agree to signing that I did wrong. That's what I -- and
23 that's what I explained to him. I did nothing wrong and
24 there is no way I can sign a paper saying that I did."

25 **Q.** Let me read to you the next question: But

1 would you -- are you telling me that you would sign the
2 paper promising not to reveal anything that was
3 discussed in executive session even if you thought it
4 was being wrongfully kept from the community?"

5 And then if you could go ahead from there.

6 **A.** "I can't answer that. I would have to
7 discuss it with the people to see if they would change
8 their mind and not try to put it into executive session.
9 Like now everything is done in executive session.
10 Financial policy, executive session. Restructuring of
11 the budget. Everything is being discussed in executive
12 session. That's the hard fact."

13 **MR. CHEIFETZ:** Thank you. I have nothing
14 further.

15 **THE COURT:** Ma'am, you can go ahead and step
16 down.

17 (Witness excused.)

18 **THE COURT:** Just go ahead and just leave
19 those there. The attorneys will handle that.

20 **MS. WINKLER:** Your Honor, should I come up
21 and clean up that mess that I made or --

22 **THE COURT:** Both of you.

23 **MR. CHEIFETZ:** Your Honor, I'm going to see
24 if Ms. Martens has shown. She was served with a
25 subpoena and want to see if she showed up.

1 **THE COURT:** Ms. Martens, if you would come up
2 here. Right up in here, ma'am. If you would state your
3 full name.

4 **THE WITNESS:** Jeannie Marie Martens.

5 **THE COURT:** And how do you spell your last
6 name?

7 **THE WITNESS:** M-A-R-T-E-N-S.

8 **THE COURT:** If you would go ahead and raise
9 your right hand we'll get you sworn in.

10 Whereupon

11 **JEANNIE MARTENS,**

12 called as a witness and being first duly sworn, was examined
13 and testified as follows:

14 **DIRECT EXAMINATION**

15 **By Mr. Cheifetz:**

16 **THE COURT:** Walk around to the end of the
17 podium there and have a seat to my left here.

18 **Q.** Good morning, Ms. Martens.

19 **A.** Good morning.

20 **Q.** I'd like to go over what's marked as
21 Exhibit 8. I'm going to provide you a copy.

22 Your Honor, if I may approach?

23 **THE COURT:** Just give her the exhibit.

24 **Q (By Mr. Cheifetz)** Are you familiar with Exhibit 8?

25 **A.** I am.

1 **Q.** Is that an email that you prepared?

2 **A.** It is.

3 **Q.** Is that an email you sent to -- who did you
4 send it to?

5 **A.** Ray Smith, Tom West, Colette McNally and
6 Cindy Morrison.

7 **Q.** And why did you send the email?

8 **A.** I was no longer employed at Sun Lakes and
9 this had bothered me ever since it happened and I wanted
10 to apologize.

11 **Q.** Is everything in this email true and correct?

12 **A.** It is.

13 **Q.** Is it fair to say that there was a discussion
14 between you, Ms. Warrell and Ms. Laird about the notes
15 that were taken from Ray Smith's notebook?

16 **A.** We did have a discussion.

17 **Q.** And was the -- and in that discussion was it
18 agreed that the notes would be -- this would be put in
19 the mailbox of Ms. Laird anonymously and that she would
20 then take the notes to Mr. Hoyt?

21 **A.** Yes.

22 **Q.** And why is it that you discussed taking the
23 notes to Mr. Hoyt?

24 **A.** He was someone that we thought would possibly
25 take them out to the community.

1 Q. And is that --

2 A. Distribute them to the community.

3 Q. Is that what happened?

4 A. I can't say for sure because I wasn't in the
5 room, if it was given to him. I wasn't there at the
6 time.

7 Q. All right. You did not witness the email or
8 the notes being given by Ms. Laird to Mr. Hoyt?

9 A. I did not.

10 Q. Did you ever discuss with Ms. Laird whether
11 she gave the notes to Mr. Hoyt?

12 A. We had discussed it after, yes.

13 Q. And what did she tell you?

14 A. Well, I'm paraphrasing because I don't
15 exactly remember. But we talked about that it was done
16 and he had been given the notes and...

17 Q. And once he was given the notes, did he do
18 with the notes what you would expect him?

19 A. If he was -- if he was indeed given the
20 notes, they were passed out to the community.

21 Q. And do you understand that he is the one that
22 passed out the notes?

23 A. That was my understanding, but again, I
24 didn't see it happen so I don't know.

25 Q. Right. And you recognize you are under oath

1 today, correct?

2 **A.** I do.

3 **Q.** And you understand that there was some
4 controversy over your email?

5 **A.** Yes.

6 **Q.** And you understand that some people said the
7 allegations in the email were false?

8 **A.** Yes.

9 **Q.** But as you stand here today under oath and
10 before the court, you continue to assert that everything
11 in that email is true and correct?

12 **A.** Absolutely.

13 **Q.** After you sent the email, did anyone from the
14 board contact you?

15 **A.** Colette, Ray and Tom.

16 **Q.** And why did they contact you?

17 **A.** Just thank me for sending it. And I'm
18 paraphrasing again. I don't exactly recall what was
19 said.

20 **Q.** Did anyone from the board contact you other
21 than Ms. McNally to investigate whether or not the
22 allegations were true or not?

23 **A.** No.

24 **Q.** Did Ms. Laird or Mr. Warrell ever contact you
25 to complain about the email?

1 **A.** No.

2 **Q.** Did you ever receive a letter from the
3 attorney for Ms. Laird or Ms. Warrell threatening you
4 with a lawsuit?

5 **A.** No.

6 **Q.** After you sent the emails, anyone from the
7 HOA ever suggested you did something wrong?

8 **A.** No.

9 **MR. CHEIFETZ:** I have nothing further.

10 **CROSS-EXAMINATION**

11 **By Ms. Winkler:**

12 **Q.** Ms. Martens, I have handed you what we have
13 marked as Exhibit 16. Do you have Exhibit 16 in front
14 of you, ma'am?

15 **A.** Yes.

16 **Q.** This is an email that you wrote to
17 Mr. Cheifetz on October 24th, 2013, correct?

18 **A.** Yes.

19 **Q.** Would you please read the first two sentences
20 of that email out loud?

21 **A.** "I do not agree with how Colette handled the
22 situation. Because my email contained information
23 regarding association employees, this issue should have
24 been strictly addressed, discussed and resolved in board
25 executive sessions in accordance with Arizona statute,

1 state statute, 33-1804, open meeting exceptions."

2 **MS. WINKLER:** Thank you, ma'am.

3 Nothing further, Your Honor.

4 **THE COURT:** Any redirect?

5 **MR. CHEIFETZ:** Nothing further, Your Honor.

6 **THE COURT:** All right. Ms. Martens, you are
7 apparently free to go. Thank you very much. I assume
8 she is released?

9 **MR. CHEIFETZ:** She is.

10 **THE COURT:** Thank you so much. Just go ahead
11 and leave that.

12 (Witness excused.)

13 **MR. CHEIFETZ:** Your Honor, the Plaintiff
14 rests.

15 **MS. WINKLER:** Your Honor, call Rick Schwartz.

16 **THE COURT:** Mr. Schwartz, why don't you come
17 on up and have a seat.

18 Whereupon

19 **RICK SCHWARTZ,**

20 called as a witness and being first duly sworn, was examined
21 and testified as follows:

22 **DIRECT EXAMINATION**

23 **By Ms. Winkler:**

24 **Q.** Mr. Schwartz, are you a residence of Sun
25 Lakes?

1 **A.** Yes.

2 **Q.** And you are a member of the Sun Lakes
3 Homeowners Association?

4 **A.** Yes.

5 **Q.** How long have you been a resident of Sun
6 Lakes?

7 **A.** Approximately 10 years.

8 **Q.** Do you serve on the association's Board of
9 Directors?

10 **A.** Yes, I do.

11 **Q.** How long have you served on the board?

12 **A.** I've been on the board approximately
13 two-and-a-half years.

14 **Q.** All right. And are you president of the
15 board?

16 **A.** Correct.

17 **Q.** How long have you been president of the
18 board?

19 **A.** I've been president of the board for
20 two-and-a-half years.

21 **Q.** How many -- approximately how many homeowners
22 or members of the association are there?

23 **A.** Well, there is approximately 2300 lots and
24 over 2000.

25 **Q.** So there is over 2000 members of this

1 association?

2 **A.** Correct.

3 **Q.** Do you have any other experience serving on
4 Board of Directors?

5 **A.** I was on the East Valley Marine's Board of
6 Directors. The VFW Board of Directors. I was a union
7 representative when I worked and then Wounded Warrior
8 regiment, that's part of the East Valley Marines on
9 money, how we spend the Wounded Warriors.

10 **Q.** All right. Now, in your role as president of
11 the association's Board of Directors do you prepare
12 minutes for meetings of the board?

13 **A.** No, I don't. They are prepared by the staff.

14 **Q.** All right. Do you and the other board
15 members approve the minutes after the staff has prepared
16 them?

17 **A.** Yes.

18 **Q.** Now, do you set agendas for meetings of the
19 Board of Directors?

20 **A.** Yes, I set the agenda on the information from
21 the staff and what's came in during the month and then
22 we -- I approve it. I don't set the agenda. Whatever
23 different board member has to put on there or myself or
24 whatever, it gets put into the board books and then I
25 approve the agenda, but it's compiled by the staff with

1 us.

2 **Q.** Which association staff compiles it for you?

3 **A.** General manager and her assistant.

4 **Q.** And is that just the agendas for open
5 meeting? Is it also for executive session?

6 **A.** It's for executive meetings.

7 **Q.** Okay. Now, what types of things go on --
8 typically go on an agenda for an executive session?

9 **A.** Typically we have what the statute allows us
10 to have, legal, personal -- I forget all of them, but
11 there is five topics. So we discuss legal advice, legal,
12 personal, employees and members.

13 **Q.** If you have a question or a concern about
14 whether something should go on the executive agenda,
15 executive session agenda, what do you do?

16 **A.** I approach it as I send an email to the board
17 and then I will ask permission to contact the attorney.
18 I let them know I like to go to the attorney. I just
19 don't go on my own.

20 **Q.** Now, how often does the Board of Directors
21 meet?

22 **A.** We meet once a month.

23 **Q.** And does -- how often does the Board of
24 Directors meet in executive session?

25 **A.** Generally it's about once a month, if we have

1 something to discuss. If we don't, then we don't have
2 the meeting, but it's usually prior to our community
3 meeting.

4 **Q.** Okay. So your executive session would
5 normally be held right before your open session?

6 **A.** Correct.

7 **Q.** Can you give me an example of when you might
8 call what you called a special meeting of the
9 executive -- a special executive session?

10 **A.** Special executive session. We'll probably be
11 in that association -- would either be a legal issue or
12 we have had a problem with a resident and it needs to be
13 addressed right away.

14 **Q.** Okay. So it's something urgent that can't
15 wait until a regular meeting?

16 **A.** Correct.

17 **Q.** Did you call a special meeting of your Board
18 of Directors when the association's general manager
19 resigned?

20 **A.** Yes, I did.

21 **Q.** Did you invite Ms. McNally to that meeting?

22 **A.** Yes, I did. I called her personally.

23 **Q.** I've handed you what has been marked as
24 Exhibit 50. Have you seen this before?

25 **A.** Yes, I have.

1 **Q.** Did you receive an email from Colette McNally
2 on August 5th, 2013, where she was forwarding an email
3 from Jeannie Martens accusing Clint Warrell and Roberta
4 Laird of misconduct?

5 **A.** Yes, I did.

6 **Q.** And Jeannie was a former employee of the
7 association when she sent this email, right?

8 **A.** Yes.

9 **Q.** When did Ms. Martens leave?

10 **A.** I believe she left in July of 2013.

11 **Q.** And how did she leave?

12 **A.** Well, she walked out. I don't mean in the
13 sense she just walked out. She walked out and mad.

14 **Q.** All right. Now, what did you do with
15 Exhibit 50 when you received it?

16 **A.** I contacted the board and told them what was
17 an exhibit and let them read it and passed it on and
18 asked to consult an attorney and they all agreed. So
19 that's what I did. And then I consulted with
20 Mr. Maxwell.

21 **Q.** So you consulted with the association's
22 attorney?

23 **A.** Yes, I did.

24 **Q.** Do you remember what his advice was?

25 **A.** His advice was that he sent a letter to the

1 board and his advice, we didn't have any way of proving
2 it was more of a he said-she said. And we were worried
3 about defamation of the employees that were involved
4 because we had no -- this board had not dealt with that
5 particular part of it. This was a prior board to us.

6 **Q.** I placed in front of you what we have marked
7 as Defendant's Exhibit 60. Is this the email or letter
8 from Mr. Maxwell that you are referring to?

9 **A.** Yes, it is.

10 **Q.** And this was directed to you as president?

11 **A.** Yes, it was.

12 **MS. WINKLER:** Your Honor, I'd move the
13 admission of Exhibit 60 into evidence.

14 **MR. CHEIFETZ:** Your Honor, we have an
15 objection over Exhibit 60. Exhibit 60 was provided to
16 us during the course of the litigation and then it was
17 taken away from us because it involved attorney-client
18 privilege. And so we were instructed to destroy our
19 copies which we did. As such, Your Honor, since --
20 until just a few days ago, we were under the
21 understanding this exhibit would not be excused and we
22 did not have the benefit of using that exhibit at
23 depositions or through discovery.

24 **MS. WINKLER:** Your Honor, Exhibit 60 is
25 something that Plaintiff produced with her initial

1 disclosure statement. And then she obviously knew about
2 it and knew about its contents on the stand today and
3 they have had -- we produced -- we exchanged exhibits in
4 this matter per your order when we brought them down
5 here for marking so they have it. They have had it.

6 **MR. CHEIFETZ:** We received it a week ago,
7 Your Honor, when they provided the exhibits. But we
8 destroyed it prior to that at their instruction and did
9 not use it during the case.

10 **THE COURT:** So the objection is overruled.
11 So 60 is admitted.

12 **Q (By Ms. Winkler)** Mr. Schwartz, did you share
13 Exhibit 60 with the other board members?

14 **A.** Yes, I did.

15 **Q.** Did you share Exhibit 60 with Ms. McNally?

16 **A.** Yes, I did.

17 **Q.** Now, did you meet with your board in
18 executive session to discuss Ms. Martens' email and
19 Mr. Maxwell's advice concerning the email?

20 **A.** Yes, we did.

21 **Q.** How many times did you meet?

22 **A.** I think we met a couple times on it, but
23 first time is when the situation came up and then what I
24 was instructed to do with the board. Then what the
25 board wanted me to do, I went back to Mr. Maxwell and

1 consulted with him and that's when we decided that we
2 weren't going to pursue it anymore either.

3 **Q.** Okay. Now, did you interview the employees
4 that Ms. Martens accused in her email?

5 **A.** Yes, I did.

6 **Q.** And did Clint Warrell deny Ms. Martens'
7 accusations?

8 **A.** Yes, they did.

9 **Q.** Did Roberta Laird deny Ms. Martens'
10 accusations?

11 **A.** Yes, they did.

12 **Q.** So the board -- and did you tell the board?

13 **A.** Yes, I took that information back to the
14 board. As a matter of fact, we called -- I believe we
15 called them in and had them sit down and we asked them
16 in open -- or in executive session.

17 **Q.** I see. So you are saying that you actually
18 interviewed Mr. Warrell and Ms. Martens about this in an
19 executive session of the board?

20 **A.** Right, right.

21 **Q.** Now, what did the Board of Directors decide
22 to do about Ms. Martens' email after this?

23 **A.** Well, the Board of Directors, we all agreed
24 that we didn't have any information other than what
25 Mrs. Martens wrote and what Clint and Roberta told us.

1 We had no other way to investigate it other than asking
2 the parties involved which we did. So we called those
3 in and Mr. Smith was -- he was satisfied with the letter
4 of reprimand, if we found it to be so. And Mr. West
5 wanted no part of it. And I honestly don't remember
6 what Colette said, but they were called in and had their
7 chance to explain it to us, but we still found there was
8 no merit for anything for us to do.

9 Q. Okay. I want to sure I'm following your
10 testimony. You said that you actually invited
11 Ms. McNally, Mr. West and Mr. Smith in to talk to the
12 board in executive session as well?

13 A. Yes, we did one at a time.

14 Q. Okay.

15 AUDIENCE MEMBER: We requested he didn't
16 invite us in.

17 THE COURT: Sir, just for those folks present
18 in the courtroom, if anybody does this, speaks out, they
19 are going to be removed.

20 AUDIENCE MEMBER: Yes, sir.

21 Q (By Ms. Winkler) I have handed you what has been
22 marked as Exhibit 53. Will you just look at that? Take a
23 moment to look at that exhibit.

24 A. Yes.

25 Q. Is Exhibit 53 minutes of an executive session

1 where the board invited Mr. Smith and Mr. West and
2 Ms. McNally to come in and talk to the board in
3 executive session?

4 **A.** Yes, it is.

5 **Q.** So I want -- so the board actually met in
6 executive session about the Martens' email on three
7 occasions; is that right?

8 **A.** Yes, we did.

9 **Q.** Did Ms. McNally agree that the board should
10 take no further action on the Martens' email?

11 **A.** No, she didn't.

12 **Q.** Now, after Ms. McNally read the Martens'
13 email at an open meeting of the Board of Directors, what
14 did you do?

15 **A.** Well, when she started reading the letter, I
16 immediately asked her to stop and she didn't. She
17 continued to ignore me. So I adjourned the meeting and
18 the board and a lot of the members that were there, all
19 of us got up and left. I think that one person said
20 that she had read it in its entirety. She didn't stop,
21 but people were walking out and the board walked out.

22 **Q.** All right. So after that, did you consult
23 any further with Mr. McNally?

24 **A.** Yes, I did.

25 **Q.** And did Mr. Maxwell send Ms. McNally a letter

1 about the matter?

2 **A.** Yes, he did.

3 **Q.** And did Ms. McNally respond to his letter?

4 **A.** She didn't respond to the board. She might
5 have responded to him directly. I don't recall that --
6 that she responded through the board.

7 **Q.** I've handed you what we have marked as
8 Exhibit 52.

9 **A.** Okay.

10 **Q.** If you will just take a moment to look at it?

11 **A.** Okay.

12 **Q.** My question for you, Mr. Schwartz, is, did
13 you receive that email from Ms. McNally?

14 **A.** Yes, I did.

15 **Q.** And it had a statement attached to it?

16 **A.** Yes, it did.

17 **Q.** Was that Ms. McNally's response to
18 Mr. Maxwell's letter?

19 **A.** Yes, it was.

20 **Q.** So after you received that response from
21 Ms. McNally, what did you do?

22 **A.** After received the response, I still
23 consulted with Mr. Maxwell about it and that's when I
24 believe that Paul -- his associate took over and the
25 letter was written to -- well, I believe it had already

1 been written to have her dismissed from executive
2 sessions.

3 **Q.** All right. Did -- after you received this
4 response from Ms. McNally, did you meet with the Board
5 of Directors in executive session with Ms. McNally not
6 present?

7 **A.** You know, I don't recall. I probably did
8 unless --

9 **Q.** If I show you the minutes of an executive
10 session meeting, will that help refresh your
11 recollection?

12 **A.** Yes, it probably will.

13 **THE COURT:** Which exhibit?

14 **MR. CHEIFETZ:** It's Exhibit 12, Your Honor.

15 **Q (By Ms. Winkler)** Mr. Schwartz, did you call a
16 special meeting -- a special executive session of the Board
17 of Directors on September 20th, 2013?

18 **A.** Yes, I did.

19 **Q.** At that meeting did the Board of Directors
20 decide to ban Ms. McNally from executive sessions for
21 the rest of her term on the board?

22 **A.** Yes, we did.

23 **Q.** And was this based on the advice of the
24 association's lawyer Mr. Maxwell?

25 **A.** Yes, it was.

1 **Q.** After Ms. McNally was elected to a second
2 term in 2014, did you offer to allow her to return to
3 executive sessions if she would agree to keep matters
4 discussed in executive session confidential?

5 **A.** Yes, we did, through Mr. Maxwell.

6 **Q.** Through Mr. Maxwell?

7 **A.** Right.

8 **Q.** That was offered?

9 **A.** Right. We had a training session and we were
10 going to go into executive session, but we didn't did go
11 into it until Mr. Maxwell read the letter reaching out
12 to her. She refused and got up and walked out. So then
13 we went into executive session.

14 **Q.** So her response to Mr. Maxwell's offer was to
15 walk out of the room?

16 **A.** Yes.

17 **Q.** Has she been offered any other opportunities
18 to return to executive session?

19 **A.** I think the two new board members that came
20 on at that time did reach out to her.

21 **MR. CHEIFETZ:** Objection, hearsay,
22 Your Honor.

23 **THE WITNESS:** I'm sorry.

24 **THE COURT:** Sustained.

25 **MS. WINKLER:** All right. Your Honor, I have

1 nothing further.

2 **CROSS-EXAMINATION**

3 **By Mr. Cheifetz:**

4 **Q.** Good morning, Mr. Schwartz.

5 **A.** Good morning.

6 **Q.** Is it fair to say you've had a constant
7 dispute with Ms. McNally over open meeting issues?

8 **A.** It's fair to say, yes.

9 **Q.** And isn't it true that you acknowledge that
10 if Ms. McNally received the email from Ms. Martens and
11 simply sent it to the community that that would have
12 been okay?

13 **A.** That would have been okay, but once it was
14 turned over to the board and requested to be put in
15 executive session, that's when it became board business.

16 **Q.** So you are saying that although she could
17 have sent it to the community, prior to executive
18 session, that once she brought up the issue in executive
19 session, that the nature of the email changed?

20 **A.** That's how I felt about it. But I'm not an
21 attorney, that's why I consulted with Mr. Maxwell.

22 **Q.** And Ms. Martens' email was never read out
23 loud at executive session, was it?

24 **A.** No, I don't believe so.

25 **Q.** And the discussion in executive session was

1 not about the contents of the email, everybody had
2 already received it, correct?

3 **A.** Correct.

4 **Q.** What you were discussing was whether to do
5 something about it or not?

6 **A.** We were discussing whether to do something
7 about, yes, to do about the email and the employees
8 involved.

9 **Q.** Prior to removing Ms. McNally from executive
10 sessions, you did not offer her a hearing, did you?

11 **A.** No, we didn't.

12 **Q.** You didn't offer her an opportunity to
13 examine witnesses or any form of due process, did you?

14 **A.** She had all the opportunity that she needed,
15 if she wanted to come forward and ask us for it.

16 **Q.** You didn't schedule any type of proceeding to
17 allow her to put on evidence?

18 **A.** We did. When in the executive session, we
19 asked her to come in and tell her side of the story.

20 **Q.** Wasn't that after she had already been
21 removed?

22 **A.** Yes, I believe it was.

23 **Q.** And the only investigation you did about
24 whether the email was true or not, you asked Mr. Warrell
25 and Ms. Laird, if it was true and they denied it,

1 correct?

2 **A.** Correct.

3 **Q.** And did you not contact Bill Hoyt to ask him
4 if it was true or not, did you?

5 **A.** No, I didn't.

6 **Q.** And according to the email, Ms. Martens would
7 have placed the email in the box of Ms. Laird, Ms. Laird
8 would have taken it to Mr. Hoyt. And Ms. Laird denied
9 that she took the email to Mr. Hoyt, correct?

10 **A.** That's correct.

11 **Q.** So if Mr. Hoyt had said that, no, he received
12 an email from Ms. Laird, that would suggest that
13 Ms. Laird was lying, correct?

14 **A.** Correct.

15 **Q.** So you could have easily just have asked
16 Mr. Hoyt, did this happen or not, correct?

17 **A.** I could have, but he could have just as
18 easily contacted us because he was well aware of the
19 problem.

20 **Q.** Okay. And you never attempted to contact
21 Ms. Martens about whether the email was true or not?

22 **A.** No, I didn't.

23 **Q.** You never knew Ms. Martens to be dishonest,
24 did you?

25 **A.** I didn't know that. I didn't work that close

1 with her.

2 **Q.** You had no reason to think she was dishonest?

3 **A.** No, I wouldn't.

4 **Q.** And after the issue arose, the board decided
5 to pay for the attorneys for Mr. Warrell and Ms. Laird?

6 **A.** We did that after consulting our HR attorney,
7 another firm, and Mr. Maxwell that it was purely
8 appropriate for us to do that, otherwise we wouldn't
9 have done it.

10 **Q.** So you paid for the Attorneys Warrell and
11 Laird?

12 **A.** That's correct.

13 **Q.** And isn't it fair to say, that you've only
14 contacted the HOA attorney about executive session
15 questions twice?

16 **A.** Executive session questions?

17 **Q.** Yes.

18 **A.** Well, yes -- well, I mean, I'm not sure what
19 you are referring to because we do contact him on
20 numerous occasions about architectural in executive
21 session. Our members that are in executive session.
22 There is a constant.

23 **Q.** Didn't you testify at your deposition you
24 would have only contacted him twice?

25 **A.** Yes, probably. Yeah, for this issue.

1 **Q.** No, for any executive session issue?

2 **A.** Well, yeah.

3 **Q.** And isn't it true that you've discussed
4 things in executive session that deal with finances?

5 **A.** Yes, we have.

6 **Q.** And isn't it your position that anything
7 involving finances is to be discussed in executive
8 session?

9 **A.** I'm going by -- yes, it is.

10 **Q.** And because of that, if there was, for
11 instance, the golf shop was going to be remodeled and
12 there was change orders to be considered, that all would
13 be deliberated in executive session, correct?

14 **A.** Yes, correct.

15 **MR. CHEIFETZ:** I have nothing further.

16 **MS. WINKLER:** No redirect, Your Honor.

17 **THE COURT:** Sir, you can go ahead and step
18 down. Go ahead and leave all those.

19 (Witness excused.)

20 **MS. WINKLER:** Your Honor, call Janice
21 Cournoyer.

22 Whereupon

23 **JANICE COURNOYER,**

24 called as a witness and being first duly sworn, was examined
25 and testified as follows:

DIRECT EXAMINATION

By Ms. Winkler:

THE COURT: Now, would you go ahead. And since your name is spelled a little different, go ahead and state your full name and spell your last name.

THE WITNESS: Janice Cournoyer,
C-O-U-R-N-O-Y-E-R.

Q (By Ms. Winkler) Ms. Cournoyer, are you a resident of Sun Lakes?

A. Yes, I am.

Q. Are you a member of the association?

A. Yes, I am.

Q. How long have you lived in Sun Lakes?

A. Nine years.

Q. Do you serve on the association's Board of Directors?

A. Yes, I do.

Q. How long have you served on the association's Board of Directors?

A. Since March of 2013.

Q. What is your -- do you serve currently as an officer?

A. Yes, I am currently the treasurer. My first year I was the secretary so since 2014 I've been the treasurer.

1 **Q.** All right. Did you serve previously by
2 appointment on the Board of Directors?

3 **A.** Yes, I did. I was appointed to a vacancy on
4 the board in June of 2009 and served until November of
5 2009 when the entire board was recalled.

6 **Q.** What happened when the entire board was
7 recalled?

8 **A.** After the recall?

9 **Q.** Well, first of all, why was the entire board
10 recalled?

11 **A.** There was a lot of misinformation, a lot of
12 rumors in the community. It started with discussions
13 regarding a special assessment that would have had to go
14 to a homeowner vote, but people didn't understand that.
15 If they didn't put forth the effort to understand the
16 whole situation and there was just a lot of turmoil in
17 the community and they were successful -- the group of
18 people were successful in recalling the entire Board of
19 Directors.

20 **Q.** So then after the entire Board of Directors
21 was recalled, what happened? Who ran the association?

22 **A.** The HOA's attorney ran the association at a
23 substantial cost to the association and then I believe
24 that lasted about two months and an interim board was
25 set up until formal elections could be done to have

1 people elected to serve on the board.

2 **Q.** All right. Now, I want to talk a little bit
3 about when you served as secretary on the Board of
4 Directors which I think you told me was 2013?

5 **A.** Correct.

6 **Q.** Do you prepare minutes of the Board of
7 Directors meeting?

8 **A.** The open meeting minutes are prepared by the
9 administrative assistant and the executive session
10 meetings are prepared by the administrative assistant
11 unless we are talking about a specific employee doing an
12 annual review or something like that, then the board's
13 secretary takes the minutes.

14 **Q.** Okay. You -- I think some of these minutes
15 that we have seen have your signature on them?

16 **A.** Uh-huh.

17 **Q.** And Ms. McNally pointed out during her
18 testimony that they had been -- your signature was dated
19 a couple months after the dates of the executive
20 session. Can you explain to me why that is?

21 **A.** At the next -- at the following meeting, all
22 of the directors are given a copy of the minutes for
23 their review and they are formally approved as written
24 or with corrections. It is not until they are formally
25 approved by the board that the secretary signs them.

1 There could be a 30, 45 day lag to that happening.

2 **Q.** Okay. Now, do minutes always clearly reflect
3 the reason why something is being addressed in executive
4 session?

5 **A.** No, not always.

6 **Q.** Why not?

7 **A.** Well, sometimes we have a discussion and the
8 discussion revolves around employee performance and the
9 minutes might not reflect that. Like we mentioned the
10 lounge. There was a substantial amount of discussion
11 about the renovations to the lounge and the fact that
12 might not have been handled properly by the staff. So
13 that was an executive session discussion, but that might
14 not have been completely reflected in the minutes.

15 **Q.** Now, why would you not want -- why would you
16 not want the board's discussion of the staff's
17 performance reflected in the minutes?

18 **A.** Those minutes are handed to the
19 administrative assistant for safekeeping. So even
20 though this discussion happened in executive session,
21 they're handed to an employee to be -- you know, to be
22 kept in the files.

23 **Q.** So if the board was considering letting --
24 say letting an employee go, like letting the general
25 manager go over this golf shop remodel issue, the

1 concern is that the general manager would have access to
2 what the board was considering about his own --

3 **A.** There is that possibility, yes.

4 **Q.** -- position? Okay. Do things sometimes get
5 brought up in executive session that are more
6 appropriately addressed in open session?

7 **A.** Of course, we are a group of people. We are
8 humans. We are sitting around. We are having a
9 conversation. On occasions we may go off topic and
10 start talking about something, but our first vice
11 president Paul Bauer is always very good about saying,
12 no, this is not something we can talk about in this
13 meeting. It has to be in an open meeting and the
14 conversation ceases.

15 **Q.** Do you generally try to stick to what you
16 understand are the appropriate topics for executive
17 session?

18 **A.** Absolutely.

19 **Q.** Have you ever had a situation where you
20 discussed something in executive session and later you
21 decided that it should be discussed in open sessions?

22 **A.** Yes, we have.

23 **Q.** And what did you do when that happened?

24 **A.** We brought it to the next open meeting for
25 approval.

1 **Q.** Have you ever had a situation where the
2 association's counsel has told you or has told the Board
3 of Directors that something that it had been done in
4 executive session needed to be brought up in open
5 session?

6 **A.** Yes, on one occasion.

7 **Q.** What did you do?

8 **A.** We brought it to open meeting for final
9 approval.

10 **Q.** Did you prepare a special edition of the Sun
11 Laker in August of 2014 or September of 2014?

12 **A.** Yes, I worked with our communications manager
13 to prepare that document.

14 **Q.** Tell me what the Sun Laker is?

15 **A.** The Sun Laker is our by-monthly newsletter
16 that goes out to the community. Covers events and
17 pertinent topics in the community.

18 **Q.** I've handed you what has been marked as
19 Plaintiff's Exhibit 30. Is this a copy of the -- is
20 this a special edition of the Sun Laker that you
21 prepared?

22 **A.** Yes, it is.

23 **Q.** Those are not your notes and handwriting on
24 Exhibit 30, is that right?

25 **A.** Correct.

1 **Q.** Now, tell me why you became involved in
2 preparing this special edition of the Sun Laker?

3 **A.** President Schwartz had received an email from
4 a community member that had been forwarded to us
5 numerous times that contained a substantial amount of
6 inaccurate information. And we were aware that
7 homeowners were going to attend our meeting on, I
8 believe it was, September 4th or September 3rd to
9 discuss these topics. We knew that this was bad
10 information. Based upon what happened in 2009, we were
11 going to be proactive and felt that we should respond to
12 these with the correct information. There was financial
13 information in here that was inaccurate. So this
14 document was prepared as proactive as we could be to
15 stop a bad situation.

16 **Q.** I'm going to hand you what has been marked as
17 Exhibit 61 and 62. Is that the email that you are
18 talking about that you were responding to?

19 **A.** Yes.

20 **Q.** Exhibit 61 is an email. What is Exhibit 62?

21 **A.** Exhibit 62 is a document saying, Dear
22 Concerned Community Members. This was prepared by the
23 people who planned to speak at that board meeting.

24 **Q.** Did Ms. McNally prepare that?

25 **A.** Ms. McNally provided the majority of the

1 information to those people, yes.

2 **Q.** But she did not circulate that though?

3 **A.** I can't answer that.

4 **Q.** Okay. Does Ms. McNally send a lot of letters
5 or emails to community members?

6 **A.** She does. Yes, she does send emails on
7 occasion, yes.

8 **Q.** Why does she do that? Do you know?

9 **A.** Normally because the board is disagreeing
10 with her position on something, she will reach out to
11 the community for support.

12 **Q.** Did she send that type of letter in
13 February 2015?

14 **A.** Yes, she did.

15 **Q.** I've handed you what we have marked as
16 Exhibit 66. If you'll just take a moment to read
17 through that?

18 **A.** I'm familiar with this.

19 **Q.** Okay. Is Exhibit 66 the letter that
20 Ms. McNally sent in February 2015?

21 **A.** Yes, it is.

22 **Q.** And there is a series of emails. Are those
23 emails from community members?

24 **A.** Community members and Ms. McNally.

25 **Q.** Okay. Did Exhibit 66 cause you concern as a

1 board member?

2 **A.** Of course, it did. There were references
3 made in here to the performance of current and former
4 employees. That's not something that should be shared
5 with the community via email.

6 **Q.** How many employees does the association
7 employ approximately?

8 **A.** Approximately 90.

9 **Q.** What types of jobs do these employees do?

10 **A.** We have administrative staff. We have people
11 who work in our restaurant. People who work in our
12 lounge, the golf course. Our employees have a lot of
13 interaction with homeowners. In fact the Board of
14 Directors encourage homeowners with concerns to come to
15 our general manager and other managers. So it's
16 concerning when you have an email that goes out
17 questioning the ability of our managers.

18 **Q.** Is it concerning because Ms. McNally is a
19 board member?

20 **A.** Absolutely.

21 **Q.** Well, so isn't Ms. McNally entitled to
22 express her opinion of your employees just like anybody
23 else?

24 **A.** What a board member says carries a little bit
25 more weight in my opinion than another homeowner does.

1 And one of the topics in executive session can be just
2 discussed in executive session the performance of
3 employees.

4 **Q.** Of course, but Ms. McNally is screened from
5 executive session, isn't she?

6 **A.** Yes, she is.

7 **Q.** Could she discuss it with board members any
8 other way than executive session?

9 **A.** Well, this particular email revolves around
10 the change in general manager position. I am sure if
11 she had concerns about what we were doing, President
12 Schwartz would have called a meeting and sat down and we
13 could have talked about it. As he testified, he did
14 call and explain that Clint Warrell had resigned and we
15 were appointing an interim manager.

16 **Q.** Part of Exhibit 66 is an email from someone
17 named Bill Hoyt to Dick Bernard and Colette McNally. Do
18 you see that email?

19 **A.** Yes, I do.

20 **Q.** Is it your understanding that was sent in
21 response to Ms. McNally's letter to the community?

22 **A.** Yes.

23 **Q.** Would you please read that email out loud?

24 **A.** Just Bill Hoyt's portion?

25 **Q.** Yes.

1 **A.** Okay: You know we have had questionable
2 boards previously, but I truly believe our current board
3 is the worst on record. It is not so much that they are
4 corrupt as it is they as a group are unintelligent.
5 When you look at Rick, Neal, Paul and Joe, there isn't a
6 great deal of brain matter between them. Two are
7 drunks, one is illiterate and one is an idiot. Can't
8 expect much from a cross-section like this. However the
9 fact remains that decisions are being made that affect
10 all of us and now with a lacker of this group, as
11 general manager, I can't help but feel we are in deep
12 manure. What to do? Recall as I see is our only
13 recourse we have. Would we have the support of the
14 community? I doubt it. As for us we are looking for a
15 move perhaps Cottonwood or Talaverde.

16 We have been here 10 years except for a brief
17 time of Bob Mariani as GM, it's been chaotic the entire
18 time. I have observed as much the same scenario, but
19 Cottonwood seems quite stable. The long and short of
20 it, I don't think I can go through this any longer. It
21 should not have to be this way. I believe we are
22 cursed.

23 **Q.** Now, is that -- Mr. Hoyt's email refers to
24 the board members as drunks, illiterates and
25 incompetents, employees are incompetent, correct?

1 **A.** Yes.

2 **Q.** Does it cause you concern as a member of the
3 community and as a member of the board?

4 **A.** Absolutely.

5 **Q.** Why?

6 **A.** As I said before, our employees interact with
7 the homeowners, our employees are professional. They do
8 a good job. We need to present them to the community
9 that way. This just doesn't -- it's not right.

10 **MS. WINKLER:** Thank you.

11 **CROSS-EXAMINATION**

12 **By Mr. Cheifetz:**

13 **Q.** Good morning, Ms. Cournoyer?

14 **A.** Uh-huh.

15 **Q.** In 2009 when you were on the Board of
16 Directors before you were recalled, did you vote to
17 remove other directors from the board?

18 **A.** Yes, I did.

19 **Q.** And who were those directors?

20 **A.** Steve Wolfer and David Emerick.

21 **Q.** Why were they removed?

22 **A.** They were removed for sharing executive
23 session information.

24 **Q.** And isn't it true that one of the concerns
25 expressed by the community, when you were recalled, is

1 that you were too secretive to the executive session
2 materials?

3 **A.** That the board was?

4 **Q.** Yes.

5 **A.** Yes, that was -- yes, that was a concern.

6 **Q.** And you are currently secretary of the board,
7 correct?

8 **A.** No, I'm treasurer.

9 **Q.** You were secretary of the board during
10 August, September, October, 2013?

11 **A.** That's correct.

12 **Q.** And if something was important to be in the
13 minutes, you would have put it in the minutes, correct?

14 **A.** If something was pertinent, yes.

15 **Q.** And you believe the minutes are accurate,
16 correct?

17 **A.** All of the minutes? I -- without seeing
18 them, I can't answer them. But Jenny had just asked the
19 question, sometimes we are evasive about what is covered
20 in the minutes for a specific reason.

21 **Q.** But if you put something in the minutes, it
22 is true?

23 **A.** Yes.

24 **Q.** I think we were discussing earlier that the
25 renovation of the lounge was discussed in executive

1 session; is that accurate?

2 **A.** Yes, it is.

3 **Q.** Why would the renovation to the lounge be
4 excused in executive session?

5 **A.** We were actually talking about the employees
6 that were involved with the renovation and the job that
7 they were doing on the project. It was more of a job
8 performance issue.

9 **Q.** Do you have Exhibit 19 up there? I guess --

10 **A.** I'm sorry, I didn't hear what number?

11 **Q.** Nineteen.

12 **A.** No, I do not.

13 **Q.** I forgot it was sealed. I'd like to show you
14 what's marked as Exhibit 19.

15 **A.** Okay.

16 **Q.** Is this the -- after you've had an
17 opportunity, would this be the minutes of executive
18 session in which the pro shop was discussed?

19 **A.** The pro shop was discussed in these minutes,
20 yes.

21 **Q.** And that's over the remodel, correct?

22 **A.** Uh-huh.

23 **Q.** And in the first paragraph it says, Rick
24 Schwartz discussed with Betty Mills, the Chairman of the
25 Budget and Finance regarding the work of the pro shop

1 and golf course remodeled, budget and finance was
2 completing this project and aware of the timeline needed
3 to get the project started. Funding will come out of
4 the BCI funds and some funding coming from reserve
5 funds, the parties need the committee's consensus to
6 pass the --

7 **THE COURT:** Mr. Cheifetz, if the court
8 reporter doesn't yell at you, I'll be.

9 **MR. CHEIFETZ:** Thank you, Your Honor.

10 **Q (By Mr. Cheifetz)** Funding will come out of the BCI
11 funds with some coming from the reserve funds. What is
12 needed today is consensus to pass the pro shop, golf lounge
13 remodel for process for obtaining permits. Do you see that?

14 **A.** Yes, I do.

15 **Q.** Why was that discussed in executive session?

16 **A.** Well, as I said, this was a discussion and it
17 clearly says here that it is understood that the pro
18 shop, lounge remodel will be brought as an agenda item
19 for the community meeting on November 19, 2013.

20 **Q.** Right. And in the sentence before that it
21 says that today we'd like to reach a consensus. Did you
22 see that?

23 **A.** Uh-huh.

24 **Q.** Is that a yes?

25 **A.** Yes, I see that, yes.

1 **Q.** Was a consensus reached that day?

2 **A.** To go forward with the project?

3 **Q.** Yes?

4 **A.** No. It says that would be brought as an
5 agenda item for the community on November 19th.

6 **Q.** That says what is needed today is consensus
7 to pass the pro golf shop. Doesn't that suggest that
8 the purpose of that meeting was to have the consensus to
9 move forward before you went to the open meeting?

10 **A.** Yes, it does.

11 **Q.** And on the second page at the top, doesn't it
12 say the entire project will commence at one time. Larry
13 Brooks advised that a mobile meeting will be brought on
14 site for the pro shop to use as a starter office and
15 another moving storage unit to store the furniture and
16 other inventory from the golf lounge and pro shop.
17 Isn't that type of material that should be discussed at
18 an open meeting?

19 **A.** Well, it was all discussed in an open
20 meeting. It was discussed at the next open meeting as
21 Jenny said to me, have we ever had discussions that were
22 then brought to an open meeting and this is an example
23 of one of those.

24 **Q.** So everything that was discussed in executive
25 session, you would repeat the whole thing in open

1 meetings?

2 **A.** We did.

3 **Q.** Okay. So this would be -- why would you
4 discuss this in executive session if it was going to be
5 discussed in open meeting?

6 **A.** I don't recall. I really don't.

7 **Q.** Next, I'd like to show you the same page. If
8 you look about two-thirds down it says "other homeowner
9 issues". Do you see that?

10 **A.** Uh-huh.

11 **THE COURT:** Is that a yes? Is that a yes,
12 ma'am?

13 **THE WITNESS:** Yes, yes.

14 **Q (By Mr. Cheifetz)** It says homeowner owns a very
15 large pickup truck and wants to build an addition on to his
16 garage to accommodate parking this large pickup truck and it
17 goes on to describe this request and then it says motion,
18 Janice Cournoyer made a motion that Larry Picket be allowed
19 a three car garage 8-foot garage door. Why was this
20 discussed in executive session?

21 **A.** This was a member appeal. The process is the
22 homeowner had applied to the architectural committee to
23 do this work. It did not fit the architectural rules.
24 The committee denied it. The homeowner then has the
25 right to appeal to the Board of Directors and that

1 appeal is heard in executive session.

2 **Q.** Why is it not heard in open meeting?

3 **A.** Because the statutes say that member appeals
4 are heard in executive session unless the homeowner
5 would request them to be heard in open meeting and he
6 did not request them to be heard in open meeting.

7 **MR. CHEIFETZ:** I got nothing further.

8 (Witness excused.)

9 **MS. WINKLER:** Your Honor, call Scott
10 Carpenter.

11 Whereupon

12 **SCOTT CARPENTER,**

13 called as a witness and being first duly sworn, was examined
14 and testified as follows:

15 **DIRECT EXAMINATION**

16 **By Ms. Winkler:**

17 **Q.** Good morning, Mr. Carpenter?

18 **A.** Good morning.

19 **Q.** Will you please summarize for the Judge your
20 background and qualifications concerning the matters
21 that you've heard discussed in the courtroom today?

22 **A.** Sure. Your Honor, I have been a lawyer in
23 Arizona since 1994 and all I ever done was professional
24 representative of homeowner associations and condominium
25 associations, but for a couple of things over the years

1 here and there, that's all I've ever done.

2 I graduated from Baylor Law School in 1993.
3 Moved out here shortly thereafter. I've represented
4 hundreds if not thousands of associations. I have been
5 to countless meetings. I've been yelled at, spit on,
6 insulted and accused of many things by homeowners in
7 these kinds of situations. And I guess that's my
8 background.

9 **Q.** Have you ever been involved in a situation
10 similar to the one that's been discussed today where a
11 board member has been accused of at least violating
12 executive session privilege?

13 **A.** Yes.

14 **Q.** Okay. Can you tell us without obviously
15 disclosing any privileged information, can you just
16 generally describe that situation?

17 **A.** Well, it's one of the more perplexing
18 problems that associations face because the analogy is
19 that if an attorney represents a corporation, if one
20 director were to divulge the attorney's advice, there
21 would be a spirited argument in a courtroom such as
22 yours about whether one director could cause a waiver of
23 the attorney-client privilege. The idea being that a
24 corporation to waive the privilege has to do so
25 knowingly and when you have seven directors,

1 hypothetically, or nine or 15 or three, that one
2 director publishing to the membership saying an opinion
3 letter from an attorney on a topic facing the community,
4 that would be a really harsh result. So we deal with
5 these issues of directors on their own disclosing
6 information that might be harmful to the association and
7 although not the context here, we do worry, as lawyers,
8 who represent the associations, that when we provide
9 advice to the board, that in the hands of the adversary
10 who might be a homeowner in an enforcement case over a
11 gazebo or something like that, that the ability of the
12 association to negotiate and to play poker with their
13 cards at their chest rather than face up, could be
14 compromised by one director. So it is something that
15 comes up all the time.

16 **Q.** All right. Before we move on to some of your
17 opinions in this case. Have you or your firm ever been
18 employed by the Sun Lakes Homeowners Association?

19 **A.** Yes.

20 **Q.** And in what capacity?

21 **A.** Well, employed, I think you mean retained.
22 Of course, I'm not their employee. But a few years ago,
23 we undertook a single project undertaking to do some
24 work to assemble what are normally called in the
25 vernacular CCNRs, the declarations. And to merge them

1 into one document to modernize them and to make them
2 easier to read and easier to amend. And I believe we
3 completed that project in 2013.

4 **Q.** Okay. I see on your curriculum vitae that
5 you have some teaching experience with and also some
6 awards from the Leadership Center. Can you tell me what
7 the Leadership Center is?

8 **A.** I've actually been around long enough to have
9 been involved in the birth of that organization. The
10 Leadership Center was conceived as a cooperative effort
11 between the Central Arizona Chapters of Community
12 Associations Institute, a national nonprofit
13 organization. The chapter here in Central Arizona also
14 being an Arizona nonprofit corporation and the town of
15 Gilbert and a developer -- I believe the developer of
16 Power Ranch -- got together and said that with the town
17 of Gilbert requiring developers to put in mandatory
18 membership homeowners association. It would make sense
19 for the town of Gilbert whose mayor at the time, Cynthia
20 Dunham, to educate the homeowners with -- that are now
21 going to have to volunteer to run these associations
22 that the city was requiring.

23 So the Leadership Center was born. It did
24 and still does classes at virtually free and for a time
25 I taught many of them. Now, the teaching duties have

1 been spread out, but it's a voluntary undertaking for
2 the lawyers that teach for that organization.

3 **Q.** All right. And also you have a number of
4 publications listed on your CV and one of them is
5 something that was published by the State Bar of
6 Arizona. Can you tell us me about that?

7 **A.** Yes. I got the big idea in 1996 or 1997 that
8 someone ought to write a book about this area of the law
9 since no one had done it. It was a growing area and
10 when I started there were perhaps four or five attorneys
11 in town who devoted their practices to this area
12 exclusively. Today there might be 60 or 70, at least 25
13 in my firm alone, maybe closer to a hundred. And so I
14 worked on this project off and on for about six years
15 and then in 2003 the State Bar published the book. It's
16 been published in four editions. About three weeks ago
17 I finished the fifth edition. And I understand
18 anecdotally it is one of the best sellers that the State
19 Bar has ever had. And, of course, I did that as a
20 volunteer effort. I received no royalties from it.

21 **Q.** Now, is the reason it's a best seller is
22 because this area of the law, I think you just described
23 it as unique or different or has not been?

24 **A.** Well, the book is either a riveting read or
25 it filled a knitch in the legal market and among people

1 who wanted to know what the law was because the law is
2 derived from statutes, case law, and other things when
3 someone endeavors to pull it all together. I suppose
4 that's helpful.

5 **Q.** Okay. Can you walk us through the laws that
6 govern a homeowners association and in particular the
7 conduct of its Board of Directors?

8 **A.** Sure. The Sun Lakes Association in
9 particular is not a condominium to planned community.
10 So there are statutes, ARS 33-1800 series, that govern
11 planned communities. And those statutes contain a
12 restriction on board meetings and the restriction there,
13 which has been referenced a few times, is that the
14 board's meetings have to be held in front of the
15 homeowner so that they can attend, listen and speak at
16 an appropriate time unless the topic of the meeting is
17 what we have called an executive session.

18 Trivia, the statutes don't use the word
19 "executive session", it just says the portions of the
20 meeting that address those topics can be closed. We
21 used the vernacular, "executive session" to describe
22 those closed meetings.

23 So the planned community statute talks about
24 the meetings. So Sun Lakes is also incorporated under
25 Arizona laws nonprofit corporation. That, of course,

1 doesn't mean 501(c)(3) is not a tax exempt charity. It
2 simply means the corporation can't create a dividend.
3 But the Arizona Nonprofit Act also governs the conduct
4 of boards and it has various statutes. I consider the
5 most important one for purposes of a board's duty to be
6 ARS 10-3830 called General Standards of Directors. And
7 that statute basically tells board members how they are
8 supposed to behave and how they are supposed to make
9 decisions.

10 **Q.** Can you summarize for the Court what that
11 statute tells directors about how to behave?

12 **A.** Sure. Basically there are three
13 requirements, Your Honor. The first one is that the
14 directors behave and make decisions in good faith.
15 This, of course, is a classic subjective test that
16 inquires into the mind of the director and it is
17 possible that a director could believe, could become
18 convinced that their behavior as unusual as it might be
19 or as harmful as it might be, could be in good faith
20 because it's a subjective test. The law requires what's
21 going on in that directors's mind.

22 The second component however, the tough one,
23 that's the objective test. The ordinarily prudent
24 person under the same or similar circumstances test and
25 this would burden all directors with basically getting

1 it right. It is an objective test that measures board
2 conduct against this hypothetically ordinarily prudent
3 person's standard. When I explained this in seminars
4 that I teach or to clients, the basic point I try to
5 make is that the ordinarily prudent person is not
6 worried about getting reelected. This ordinarily
7 prudent person is not worried about what an assessment
8 increase might do to their personal finances or whether
9 they could afford it and that they are obligated to run
10 the association as a business. By running it as a
11 business, I mean, the income must exceed the expenses
12 and the owner's money has to be spent responsibly.

13 The third component is a hybrid
14 objective/subjective test because it requires all
15 directors to act in what they reasonably believed to be
16 the best interests of the corporation. Best interests
17 of the corporation subjective. The mind of the director
18 but within an objective qualifier. That belief of
19 what's best -- in the best interests of the corporation
20 must be reasonable. So when a director goes off on
21 their own, there are various terms that get used for
22 this. Perhaps going broke or something like that.
23 Prefer just going their own way. They might believe
24 that in good faith that's the thing to do and they might
25 believe it's in the best interests of the corporation.

1 We could debate its reasonableness. But one can't
2 escape that there conduct in order to comply with
3 10-3830 must comply with the subjective ordinarily
4 prudent person test.

5 **Q.** All right. So I think you've talked about
6 the laws governing corporations applying here. You've
7 talked about what we have been calling the open meeting
8 law or the executive session law. Any other laws that
9 apply to associations? I mean, what about employment
10 laws?

11 **A.** Sure. That's one of the most challenging, is
12 that when you have 90 employees -- for one thing, the
13 Affordable Care Act employer mandate applies which
14 doesn't have applicability here. But an association
15 with 90 employees has a tremendous amount to be
16 concerned about and the overtime rules. The idea that
17 the board is going to, through its directors, actually
18 supervise the staff, makes it very difficult. Because,
19 for example, and there is -- I've certainly heard
20 nothing about this here. One problem that associations
21 have when they have that many employees, is the notion
22 that someone on the board would decide to ask one of the
23 employees out on a date that would be perceived as
24 harassing or creating a hostile environment and it
25 becomes very difficult for a board of seven or nine

1 elected equals to contain the potential harm to the
2 association over a sexual harassment allegation when the
3 board members are all equal. That is a vexing problem.
4 And so the hypervigilance about making sure that the
5 association, though its directors, is not behaved in a
6 way that exposes the association to potential claims by
7 its employees is something that any prudent board would
8 really spend a lot of time making sure that they don't
9 walk into that trap.

10 **Q.** What about protecting personal and
11 confidential information that comes into the positive
12 possession of the association? Either about members or
13 employees.

14 **A.** Well, of course, we worry first and foremost
15 about employee information being stolen or taken for
16 someone's identity theft, something like that. So any
17 employer should guard that information. Social security
18 numbers, things like that, to avoid identity theft. But
19 we also owe a duty as an employer owes the employee a
20 duty to treat them fairly. It's not to defame them. So
21 when there is this information, hypothetically, that the
22 association comes in to possession of or into contact
23 with, and it cannot control the manner in which that
24 information is saved, archived, discussed, then one
25 director could end up creating a huge problem for the

1 association. And an ordinarily prudent person under the
2 same or similar circumstances would do something to
3 protect the corporation from that potential exposure.

4 **Q.** I think you heard the testimony earlier that
5 there are over -- I don't remember what the exact number
6 was, but it was over 2000 members of this particular
7 association, correct?

8 **A.** Yes.

9 **Q.** You heard that?

10 **A.** Yes.

11 **Q.** Is that a large association in your
12 experience?

13 **A.** It is. Numerically there may be 9000
14 associations in Arizona. The number of that 9000 that
15 are this size or bigger would be very, very small.

16 **Q.** I think you heard the testimony of
17 Ms. Cournoyer about the different -- or the number of
18 employees that this association actually employs and the
19 different types of jobs that they do. Is that typical
20 of associations in your experience?

21 **A.** It is. I suppose that because Sun Lakes is
22 what we in Arizona would consider be an older community.
23 Of course, to some parts of the country where something
24 built in the '70s would be considered newer. But
25 because it's older, the golf course being owned and

1 maintained by the association is according to modern
2 standards is a bit unusual. But that creates a much
3 higher employee count because golf courses are intense
4 operations, where it comes to landscaping and the golf
5 pros and golf shop and stuff like that.

6 So for an association that has that vast of
7 an operation, it is very typical. And this association
8 has decided and makes no difference one way or the other
9 not to outsource the management of the association to a
10 professional management company.

11 **Q.** All right. Let's go to some of your opinions
12 in this case. You have offered some opinions in a
13 written affidavit, correct?

14 **A.** Yes.

15 **Q.** I just want to show you what's been marked as
16 Exhibit 42 and is that an affidavit that you prepared in
17 this case?

18 **A.** Yes.

19 **Q.** Now, in your opinion did the Sun Lakes
20 Homeowners Association have authority to screen Colette
21 McNally from executive sessions?

22 **A.** Yes. The risk of the information that she on
23 her own chose to disclose, the risk that that
24 information could have created a defamation situation or
25 other assertion of liability for the association was

1 real. I don't know what happened. I don't know -- I'll
2 let you sort it out, Judge, why the employees hired
3 their own association that might have been paid for by
4 the association. But on its face there was a real risk
5 that she, by disclosing the information, was going to
6 create a legal situation. Whether they filed the suit
7 or not, I don't know. But presented with those facts
8 today, regardless of whether the content was true or
9 not, if there was still a real risk that there would be
10 some liability back to the association and the
11 association was entitled to react to that.

12 **Q.** Okay. You say they were entitled to react to
13 that. Is there any legal basis for what they did?
14 Anything in statute or otherwise?

15 **A.** Well, one of the things that seemed to
16 permeate this hearing so far is the unexpressed notion,
17 but underneath the surface that every director of a
18 homeowners association is entitled to be part of every
19 decision or that every decision has to be put in front
20 of the entire board. And that's simply not the public
21 policy of this state.

22 There is a number of situations where the law
23 says that words can write themselves up into
24 decision-making groups. For example, there is a
25 statute, although I don't know I mentioned it in my

1 affidavit. In the nonprofit corporations statute
2 10-3825 and 10-3825 says that the board can, by majority
3 vote, create a committee of directors and can charter
4 that committee with board authority and that it's final.
5 That committee doesn't have to come back to the board
6 for approval. And that when the board creates this
7 committee to deal with a particular issue, that that
8 committee speaks for the board. So when I think about
9 what I've heard and sort of how this unfolded, my
10 opinion is that the board was justified to act because
11 there is no law that says every director is entitled to
12 be part of every decision or to have all of the
13 information. And I'm not just saying that because there
14 is no statute that says every director is entitled to be
15 part of every piece of information in every meeting, but
16 in fact there is a statute that strongly suggests that
17 the board is entitled to divide up the governance among
18 board members by majority vote.

19 **Q.** And that statute is ARS 10-3825?

20 **A.** Yes.

21 **Q.** In your affidavit you talk about this concept
22 of reasonableness that appears in the restatement of
23 property. Can you explain that's the application of
24 that concept in this context?

25 **A.** Sure. The Tierra Ranchos case was the Court

1 of Appeals case that really strongly bought into the
2 idea that the restatement of certitudes is what the
3 courts should follow in the absence of the topic being
4 covered elsewhere in the law which has been the law in
5 Arizona for over 50 or 60 years. And that restatement
6 provision 6.14 says that the directors and officers of
7 an association have a duty to act in good faith and
8 compliance with the law and the governing documents to
9 deal fairly with the association and its members and to
10 use ordinary care and prudence in performing their
11 functions. It's similar to the Nonprofit Act Standard.
12 And, to me, this is an even stronger standard because it
13 is not so clear that it's subjective. It's more of an
14 objective test and so I think that the restatement
15 really just amplifies what's already in the statute,
16 what's in the case law that board members have to treat
17 members fairly and act reasonably in the exercise of
18 their discretionary power.

19 **Q.** All right. So in this case, is it your
20 opinion that the Board of Directors acted reasonably in
21 how they handled the email from former employee Jeanne
22 Martens?

23 **A.** Not only was it reasonable, given the risks
24 at the time, but I don't know what else they could have
25 done if not to ask their lawyer what to do. So it is

1 also in good faith and what an ordinarily prudent person
2 would do is in a tough call where it's tricky and it
3 seems you are in kind of a no-win situation, you either
4 disclose the information on the theory that the owners
5 are entitled to all the information all of the time and
6 run a risk that you are going to create a legal scenario
7 with the people mentioned in the email or you say that
8 it's not something you are going to disclose and try to
9 do something to keep it from leaking out because the
10 directors are not all on the same page about it, but
11 that compromises the corporation's interest if one does
12 it.

13 So ponder away to protect the corporation
14 from one director who has their own notion about what's
15 right. Ask your lawyer, I don't know how a board could
16 be more compliant with the intent of the statute for
17 directors to act in a way like an ordinarily prudent
18 person would. In this case I happen to agree with the
19 advice that Mr. Maxwell's office gave the association,
20 that given the facts as they were, that the only thing
21 they could do was to screen her from this information.

22 **Q.** Okay. So you are talking about the decision
23 to screen Ms. McNally from executive sessions after she
24 read the Martens email at the open meeting, correct?

25 **A.** Right.

1 **Q.** And so it's your opinion that that decision
2 as well was reasonable for the board?

3 **A.** I don't know what else they could have done.

4 **Q.** You heard Ms. McNally testify that she, as a
5 board member, acts on her principles?

6 **A.** Yes.

7 **Q.** On her personal principles?

8 **A.** I did.

9 **Q.** Is that appropriate for a board member?

10 **A.** Well, in a sense I understand it, that
11 everyone has an internal compass. The problem is that
12 under 10-3830, if that internal compass is different
13 than what an ordinarily prudent person would do under
14 the same or similar circumstances, it's absolutely
15 inappropriate to claim that your internal compass will
16 guide your decision-making. To me, it's a disqualifier
17 because every director should be able to look at ARS
18 10-3830 and either agree or disagree they are going to
19 act in good faith using ordinary care and prudence what
20 they reasonably to be in the best interests of the
21 corporation. When someone says, I will be guided by
22 something different than that, then the corporation's
23 between a rock and hard place. They are stuck with the
24 director because the members put the director on the
25 board. But then they have to decide how to work a

1 directer who has said, I will be guided by something
2 other than what the law says.

3 **Q.** Now, you understand that the purpose of this
4 evidentiary hearing is the Plaintiff is seeking some
5 preliminary injunction extraordinary relief. One of the
6 things that has not been discussed today is the
7 potential harm to the association if the Court were to
8 order that the Board of Directors must allow Plaintiff
9 to have access to executive session material. Do you
10 have an opinion on that?

11 **A.** Well, as an abstraction. I would always be
12 concerned about a director having accessed information
13 when they have explicitly stated they will decide on
14 their own what will be important to the membership or
15 not.

16 If you grant the injunction on a going
17 forward basis as opposed the actual harm would be a
18 function of the information and what she actually does
19 with it, her stated intent notwithstanding. And so I
20 would consider it to be harmful because it's so
21 unpredictable.

22 **MS. WINKLER:** All right. Nothing further,
23 Your Honor.

24 **THE COURT:** Mr. Cheifetz.

25

CROSS-EXAMINATION

1
2 **By Mr. Cheifetz:**

3 Q. Good morning, Mr. Carpenter.

4 A. Good morning.

5 Q. You are currently the attorney for the
6 association, correct?

7 A. No.

8 Q. Aren't you representing them in the Morrison
9 v. Sun Lakes matter?

10 A. Which one?

11 Q. Morrison v. Sun Lakes?

12 A. If my firm does, I'm not aware of it.

13 Q. You've been working -- assisting the
14 association with the CCR amendment?

15 A. Yes. I believe we finished that in 2013.

16 Q. Hasn't there been questions raised about that
17 amendment?

18 A. I have a partner, Chad Miesen, who worked on
19 that project and if he is presently engaged on it, I
20 personally do not know that sitting here today.

21 Q. Okay. Now, your opinion is based -- in part
22 is based on ARS 3830, correct?

23 A. Correct.

24 Q. And 3830 applies to these proceedings,
25 correct?

1 **A.** To this lawsuit?

2 **Q.** Yes.

3 **A.** Well, it applies in the sense that it's the
4 standard that board conduct is measured against.

5 **Q.** And doesn't that statute provide that in any
6 proceeding that a director is presumed to be innocent
7 until proven guilty?

8 **A.** I don't think it says that exactly. We are
9 not talking about a crime here. There is a presumption
10 that the director is -- it says director is presumed in
11 all cases to have acted, failed to act or otherwise
12 discharge such directors duties and in accordance with
13 Subsection A which is --

14 **Q.** The section you relied upon, correct?

15 **A.** Well, the three things.

16 **Q.** And doesn't it also say that in order to
17 challenge that the directors acted appropriately, the
18 burden is on the challenger to establish that they have
19 acted inappropriately, correct?

20 **A.** Correct, if you are filing a lawsuit.

21 **Q.** And if -- well, it just says challenging the
22 director, isn't that the language?

23 **A.** Sure.

24 **Q.** And doesn't it also say that if -- when you
25 are challenging a director, you must establish that they

1 acted inappropriately by clear and convincing evidence?
2 Doesn't it say that as well?

3 **A.** Sure.

4 **Q.** Doesn't that suggest that some sort of due
5 process is required before you can challenge a director
6 or, I mean, if there is a presumption of that, they have
7 done everything appropriately, how can you suggest they
8 have done things inappropriately without offering them
9 some sort of due process?

10 **A.** Well, when someone stands up at an open
11 meeting and literally starts reciting the email that
12 gave rise to the concern about potential liability,
13 there is no need to have an investigation or to have an
14 adversarial proceeding to determine whether or not that
15 had occurred. Everyone witnessed it.

16 **Q.** But whether or not it was the truth that was
17 being shared or not, whether or not there was a cover up
18 by the association taking place, whether or not the
19 employees were conspiring with the association to
20 silence the witness, aren't these all issues that could
21 have been investigated?

22 **A.** Well, I'm looking back. I wasn't the
23 attorney who was consulted by the association. But
24 given what they knew at the time, it was not -- I don't
25 believe that it was required for them to do some kind of

1 due process hearing that tries to figure the whole thing
2 out. I'm a little surprised at the -- just sitting
3 here, the focus on whether or not the email was true or
4 not. To me, the question isn't whether the email was
5 true. The question is whether the association could
6 have been subjected to potential liability for its
7 disclosure regardless of whether it's true or false. To
8 look back on the whole thing and say, well, the content
9 was true doesn't change the fact that, to me,
10 Your Honor, respectfully, the judicial inquiry into
11 whether or not the association acted appropriately to
12 screen the Plaintiff, not whether her conduct involved
13 something that after the fact turned out to be true or
14 false.

15 **Q.** So it's your position that once Ms. McNally
16 read the email at the open session that the duty of the
17 association to -- the presumption that she acted
18 appropriately doesn't apply just because she read it? I
19 mean, basically no due process, if you read it out loud.
20 Doesn't the statute apply to all matters?

21 **A.** I don't think so, Mr. Cheifetz. I think that
22 the statute is talking about judicial challenges of
23 director conduct. That's why it talks about clear and
24 convincing evidence. It's telling you, Judge, that in
25 this somewhat interesting civil cause of action that

1 it's not preponderance of the evidence, it's clear and
2 convincing. It goes to the presumption.

3 I could equally suggest that this presumption
4 and the clear and convincing standard should apply to
5 the directors who decided to screen her.

6 **Q.** But those directors haven't been challenged?

7 **A.** You are challenging them, I believe.

8 **Q.** We are challenging the entity. We're not
9 suing any individual director or taking any action
10 against the individual director, are we?

11 **A.** I don't know what you are doing. I'll leave
12 it to you to litigate your case.

13 I'm saying when it comes to the
14 appropriateness of the directors decision to screen her,
15 they're entitled to the same presumption that you
16 suggest she was entitled to.

17 **MR. CHEIFETZ:** Your Honor, if I may approach,
18 I would like to bring Mr. Carpenter a copy of this.

19 **THE COURT:** I assume he is familiar with it?

20 **THE WITNESS:** I am. Go ahead.

21 **Q (By Mr. Cheifetz)** Let me give it to you.

22 **A.** Sure.

23 **Q.** Look at page 3-23?

24 **A.** Okay.

25 **MS. WINKLER:** Your Honor? I'm sorry, did you

1 bring a copy of this for me?

2 All right. Thank you. I'm sorry,

3 Your Honor.

4 **MR. CHEIFETZ:** Look at page 3-23, did you
5 write in your book: "That at all times a director's
6 actions are presumed to be in compliance with the
7 standards set forth above. If a director's actions are
8 challenged, the member challenging the action must prove
9 by clear and convincing evidence that the director's
10 actions were not discharged as required." Isn't that
11 what you wrote in your book?

12 **A.** It is.

13 **Q.** And didn't you say that applies at all times?

14 **A.** Yes.

15 **Q.** And you also indicated in your report on page
16 four at the top. You say, "A decision was made by a
17 majority of the board on the advice of counsel and
18 memorialized by board resolution not to disclose the
19 Martens email."

20 **A.** Yes.

21 **Q.** Have you seen that?

22 **A.** Yes.

23 **Q.** Have you ever seen that resolution?

24 **A.** Well, what I reviewed, and this has been a
25 little while back in January, what I reviewed is in the

1 footnote on page five. I'd have to go through that. It
2 was quite voluminous. And if I got that part wrong
3 about whether it was at a board resolution or
4 communicated or decided some other way, I would concede
5 the point.

6 **Q.** Don't you think the minutes would be the best
7 evidence of what was discussed in executive session?

8 **A.** Well, I've been in enough meetings and seen
9 enough minutes to always have my doubts. There are
10 different theories about minutes. I think the best
11 minutes are simply a record of action taken, less than a
12 page, motion made, seconded, carried five to four to
13 change the landscaping, budget or whatever. So I don't
14 think that the minutes are supposed to be a reflection
15 of what actually occurred start to finish at the
16 meeting. So as a general rule I tend to be a bit
17 skeptical.

18 **Q.** You would be skeptical of the minutes of the
19 association?

20 **A.** Whether, if I'm looking at the minutes, I'm
21 seeing 100 percent accuracy of what happened at a two or
22 three hour meeting in one page.

23 **Q.** But if the minutes describe a resolution
24 passed regarding this issue, those minutes are probably
25 the best description of what the resolution was

1 regarding, correct?

2 **A.** It certainly would be entitled to the benefit
3 of the doubt.

4 **Q.** And you are making any -- you are making many
5 assumptions as part of this proceeding, correct?

6 **A.** Of course.

7 **Q.** One of those presumptions is that my client
8 was told not to disclose the email, correct?

9 **A.** Correct.

10 **Q.** And you are making a presumption that there
11 was a resolution not to disclose it as well?

12 **A.** I'm assuming she knew she was not to disclose
13 it.

14 **Q.** But you have no evidence that she knew?

15 **A.** I'm opining based on the facts that were
16 presented to me.

17 **Q.** So you are basically opining what she knew or
18 didn't know?

19 **A.** I'm opining on whether it was appropriate for
20 the association to react the way that it did when she
21 did what she did on the assumption that she did it
22 knowingly.

23 **Q.** And you -- and part of that assumption was
24 that she was told not to disclose it and that was passed
25 in a resolution, correct?

1 **A.** I'll go with she knew she wasn't supposed to
2 do it.

3 **Q.** So you no longer stand by your statement in
4 your report she was told not to disclose?

5 **A.** I said sitting here eight months later I
6 can't say for certain what I looked at. Look at my
7 footnote on page five, the documents I reviewed were
8 voluminous. And if your point is that my statement that
9 it was memorialized by board resolution is incorrect,
10 I'll concede the point.

11 **Q.** Did you ever speak to the officers of the
12 corporation about what they told Ms. McNally?

13 **A.** No.

14 **Q.** Did you ever speak to my client about what
15 was she told?

16 **A.** No.

17 **Q.** You also made an assumption that the
18 information was confidential, correct?

19 **A.** I made the assumption that the information
20 was entitled to what we have referred to as executive
21 session treatment.

22 **Q.** What information is entitled to executive
23 session treatment?

24 **A.** The assertion by Ms. Martens that the
25 association employees had behaved in an inappropriate

1 way.

2 **THE COURT:** All right. So, Mr. Cheifetz,
3 it's now 12:00. We are going to a break for the
4 afternoon. We'll be back at 1:30.

5 **MR. CHEIFETZ:** Okay.

6 **THE COURT:** Thank you.

7 (Lunch recess was taken.)

8 **THE COURT:** Mr. Carpenter, why don't you come
9 on back up.

10 Mr. Cheifetz, you are up.

11 **MR. CHEIFETZ:** Thank you, Your Honor.

12 **Q (By Mr. Cheifetz)** Mr. Carpenter, in Arizona can a
13 board vote to remove a fellow board member from the board if
14 there is not a bylaw in support of that?

15 **A.** If there is not a bylaw in support of that,
16 no.

17 **Q.** So the only means by which they could remove
18 the board member is if they do a recall election?

19 **A.** Initiate a membership vote on the issue, yes.

20 **Q.** Well, if there is no basis to remove a board
21 member, upon what basis do you suggest that you can
22 limit a board member's participation in executive
23 session?

24 **A.** Well, I've suggested two things. One is that
25 the obligation of the corporation to protect itself and

1 to protect the corporate interest from a director whose
2 conduct undermines that corporation's position, vis à
3 vis, a defamation lawsuit or something else that it had
4 the inherent power to do so. But also suggested that
5 under ARS 10-3825, that the board can create a committee
6 and perhaps what happened here, although it might have
7 been inartful or not labeled as such, that what really
8 happened is that they created a de facto committee to
9 address executive session topics and that your client
10 was simply excluded from the committee.

11 **Q.** So you would -- so you are basically saying
12 it's different when you are dealing with executive
13 session, you are limiting their executive session when
14 you completely remove them from the board? Is that what
15 you are suggesting?

16 **A.** She is still on the board. She is not on the
17 committee of board members who are vested with the task
18 of dealing with employment issues, executive session
19 topics or something like that.

20 **Q.** What if someone was doing improper acts as
21 part of the open meeting, can you remove them from the
22 board because of that?

23 **A.** Well, they are still on the board. I can see
24 your point that removal from being on the board, but
25 screened from information, especially if there is a de

1 facto committee structure in place that screens
2 information only to the members of the committee, which
3 are all board members, but the board committee for those
4 issues. Certainly.

5 Q. Where is the support for your position that
6 the board has the authority to remove somebody from
7 executive sessions? Is there any statute that provides
8 for that?

9 A. 10-3825, in my view operated here. It would
10 have been perhaps a little cleaner if the board had
11 said, we're going to create a legal issues committee or
12 an employment issues committee and appoint everyone,
13 three of the seven directors, five of the seven, eight
14 of nine. It doesn't -- you know, that's what I think
15 happened here.

16 Q. But you are suggesting they appoint a
17 committee here, is that what you are testifying to?

18 A. De facto. They didn't call it as such, but
19 under 10-3825 that's what happened.

20 Q. And who's on this committee?

21 A. Everybody except your client.

22 Q. And do they have to ever discuss they are
23 going to form the committee or does it just happen on
24 its own?

25 A. I'm conceding that it's my judgment that a de

1 facto committee was created. I wasn't there. Perhaps
2 those words weren't used. That label wasn't put on it
3 and anyone could criticize the fact that they backed
4 into 10-3825 without as much formality as one would
5 expect.

6 **Q.** Could they form a committee and then bypass
7 all the board powers and just say, well, because we were
8 doing it under this statute?

9 **A.** Well, under that statute the committee
10 operates with full authority of the board on the topic
11 that's part of the charter.

12 **Q.** So couldn't they, under your belief that this
13 committee allows you a basis to get around the
14 prohibition against, for instance, precluding or
15 removing directors, could they instead of -- because
16 they can't remove a director, could they just form a
17 committee and do all of the business in the committee
18 without that director?

19 **A.** Directly, yes.

20 **Q.** So you are basically saying that somebody
21 could get around the clear prohibition against removing
22 directors by this committee argument you are raising?

23 **A.** She is still on the board and under the de
24 facto committee that appears to have been created here,
25 she was not excluded from a whole range of topics. She

1 was simply excluded from the range of topics that would
2 be executive session topic.

3 **Q.** And when you say de facto committee, you are
4 suggesting that the committee somehow forms itself
5 without them having any intent to create a committee?

6 **A.** I don't know what their intent was. Sure
7 seems to me what they did is by screening her, which I
8 believe independently was legitimate for the reason I
9 stated, that the additional justification for her not
10 being part of these discussions is that the board did a
11 de facto committee.

12 **Q.** All right. But you would acknowledge that
13 there is no statute that's on point that says, a board
14 can vote to remove a fellow board member from executive
15 session, correct?

16 **A.** I have said that 10-3830 tells the board
17 members that they have an affirmative obligation to act
18 as a reasonable and prudent person and that an
19 ordinarily prudent person would work to protect the
20 association and if the avowed intent of the director is
21 to ignore the executive session topics, that they have
22 the duty to exclude her. I have said that as clearly as
23 possible. But I've also said independent of that
24 justification, that regardless of whether the board
25 meant to or whether they used the words or even knew

1 about 10-3825, at the end of the day there is a statute
2 that clearly says that all directors of a nonprofit
3 corporation are not necessarily entitled to be involved
4 in every decision and every piece of information.

5 **Q.** But my question was, there is no statute that
6 says they have the right to remove somebody other than
7 what -- this committee concept. There is no statute
8 that says that you have a right to remove a fellow board
9 member from executive session, correct?

10 **A.** Correct.

11 **Q.** And there is no -- nothing in the governing
12 documents that allows you to remove somebody from
13 executive session, is there?

14 **A.** Not that I'm aware of.

15 **Q.** And you're not aware of any case law that
16 allows you to remove somebody from executive session,
17 are you?

18 **A.** I am not.

19 **Q.** So the basis of your decision is that there
20 is -- that the question is whether it's reasonable?

21 **A.** Well, I would -- I would suggest that the
22 inverse of what you are saying is also true, that there
23 is not statute or case or portion of the governing
24 documents that says that the board cannot act to shield
25 its critical information from a director who has avowed

1 to not keep it confidential.

2 **Q.** But there is -- just like there is no inverse
3 when it comes to removal of directors, it's recognized
4 you can't do it, if it's not provided somewhere?
5 Correct?

6 **A.** She is on the board. She is definitely on
7 the board. She is shielded from certain information
8 based on her past conduct and her avow to do it again.
9 That's the way I see it.

10 **Q.** So is it your suggestion that the board has
11 unlimited power to inhibit the rights of other board
12 members?

13 **A.** Characterize how you will, Mr. Cheifetz. I
14 read 10-3825 on its face. That the board has the
15 authority by majority vote to segment out a charter of a
16 committee of board members, that upon doing so, if the
17 person left off the committee feels slighted, that's the
18 natural consequence of the statute as it currently
19 existed.

20 **Q.** And so is it your position that -- what if
21 they wanted to take away voting rights of a fellow board
22 member, could they do so?

23 **A.** No.

24 **Q.** Is there anything saying they don't have that
25 power?

1 **A.** That they don't have the power to take
2 away --

3 **Q.** There is no law on it either way, correct?

4 **A.** She inherently has the rights.

5 **Q.** I'm asking about voting rights?

6 **A.** She has the voting rights of the director.

7 **Q.** And they can't take those away?

8 **A.** No.

9 **Q.** There is nothing saying they can or they
10 can't, it's just understood under the law that those
11 powers are abided by the community and the vote can't be
12 taken away by the board, correct?

13 **A.** Right.

14 **Q.** And they can't take away the right of the
15 board member to participate in deliberations, correct?

16 **A.** Deliberations properly before the board. Not
17 necessarily deliberations properly before a committee of
18 board members.

19 **Q.** All right. So you are saying it wouldn't be
20 appropriate to form a committee, do all the business
21 separate from this one member because you are saying
22 everything was done in that committee?

23 **A.** Consistent with the charter of that
24 committee.

25 **Q.** Now, are you still relying upon Tierra

1 Ranchos as part of your decision?

2 **A.** Sure.

3 **Q.** And that is -- the board has, you are saying
4 that the board must exercise their discretionary powers
5 reasonably, correct?

6 **A.** Correct.

7 **Q.** But in order to exercise discretionary power
8 reasonably, first you must have the discretionary power
9 to do so?

10 **A.** Sure, yes.

11 **Q.** So if they don't have the power, Tierra
12 Ranchos doesn't apply, correct?

13 **A.** Correct.

14 **Q.** And when exercising discretionary powers, if
15 a statute must establish something by -- because you
16 have the burden of proof or you have a certain standard
17 of proof, in order to be reasonable when exercising
18 those powers, doesn't that require some sort of due
19 process?

20 **A.** I think I see suggested before lunch that
21 when behavior is patently obvious and the stated intent
22 to do it again is obvious, there is no factual dispute.
23 Her behavior spoke for itself and her words spoke for
24 themselves and one can fairly judge that based on the
25 behavior.

1 **Q.** But isn't that contemporary to the assumption
2 that they done everything right? Aren't you doing the
3 opposite, assuming they have done everything wrong just
4 by quick witnessing of their behavior? I mean, doesn't
5 the burden when the statute provides that there is
6 assumed to have done everything right, doesn't that mean
7 you can't do exactly what you are saying you can do and
8 just merely conclude that they are guilty?

9 **A.** Well, I think the statute is directed to the
10 Judge here, not to the Board of Directors. But
11 indulging in your version that the statute does burden
12 the board's determination of what to do under the clear
13 and convincing evidence standard. Based on what I see,
14 I see no dispute.

15 **Q.** So you are saying it's obvious to you that
16 she is guilty by clear and convincing evidence? And
17 we --

18 **A.** She did what she did. She said she would do
19 what she said she would do and to the board to have to
20 engage in a due process procedure or something like that
21 to establish the very thing that everyone knows is true,
22 seems like an inefficiency. Seems like a waste of time.

23 **Q.** Doesn't that happen every day in our court
24 system? Aren't we always having cases on matters where
25 somebody may think it's obvious, but they are still

1 allowed their due process?

2 **A.** That's correct.

3 **Q.** Isn't that the whole point of due process,
4 hear both sides of the story even if one side thinks
5 it's obvious that there has been a violation, the other
6 side gets an opportunity to tell their side?

7 **A.** Well, I reject the analogy. I reject the
8 analogy that this Court --

9 **Q.** Let me ask you differently.

10 **A.** Analogous to the Board of Directors.

11 **Q.** Let me ask you a different analogy. Isn't it
12 true that if you wish to penalize a homeowner, the board
13 must do so in a reasonable fashion, correct?

14 **A.** I did say that, yes.

15 **Q.** And in fact boards oftentimes will exercise
16 their discretionary powers by fining members, correct?

17 **A.** Yes.

18 **Q.** Isn't it true before you fine a member, you
19 have to give some sort of due process?

20 **A.** By statute, yes.

21 **Q.** And if the member is so obviously guilty,
22 don't you still have to offer them that due process?

23 **A.** Yes, by statute.

24 **Q.** And the Tierra Ranchos case you rely upon,
25 isn't Tierra Ranchos about design and review powers?

1 **A.** Yes.

2 **Q.** And did it deal with a board's treatment of a
3 homeowner?

4 **A.** Yes.

5 **Q.** And it didn't involve a dispute amongst
6 directors, correct?

7 **A.** No.

8 **Q.** It wasn't about director duties, correct?

9 **A.** Well, it was. It was about the association's
10 obligation to treat members fairly, reasonably.

11 **Q.** The association?

12 **A.** Sure, through its board.

13 **Q.** And it does not provide -- doesn't deal in
14 any way with executive session or limiting board members
15 powers, correct?

16 **A.** Correct.

17 **Q.** Isn't it true that executive session --
18 whether to go into executive session, the HOA could do
19 all business openly if they chose, correct?

20 **A.** Correct.

21 **Q.** There is no obligation to do anything in
22 executive session, correct?

23 **A.** Correct. It's optional.

24 **Q.** It's optional. And -- but you discussed with
25 this great fear that all kinds of bad things could

1 happen if things that are discussed in executive session
2 are discussed outside of executive session, but you do
3 something legally that requires it be done in executive
4 session, correct?

5 **A.** Correct.

6 **Q.** In fact isn't fair to say that the open
7 meeting laws, the presumption is on openness?

8 **A.** I don't think there is a presumption of
9 openness on the executive session topics.

10 **Q.** In evaluating open meeting laws and if there
11 is a question as to whether something should be done
12 openly or in secrecy, doesn't the statute provide that
13 the -- they should error on the side of openness?

14 **A.** A few years ago the legislature did add a
15 somewhat unusual statement of intent to the statute
16 which is not actually part of the statute, but it's part
17 of the statute, I find it is actually sort of strange.
18 But, yes, there was that legislative statement that
19 there is a public policy in favor of openness.

20 **Q.** You find the public policy in favor of
21 openness to be strange?

22 **A.** Just as a lawyer it seems a little unusual
23 for the statute itself to have an interpretive guidance
24 inside the statute. I usually don't see that very often
25 in Arizona.

1 **Q.** But the guidance that is provided is clear
2 that you should error on the side the openness, correct?

3 **A.** I'll let it speak for itself.

4 **Q.** You acknowledge that's what it says, correct?

5 **A.** I'll acknowledge that there is a statement
6 there. I don't have it in front of me.

7 **Q.** You see Subsection E, is that the section you
8 are referring to?

9 **A.** Yes.

10 **Q.** Doesn't it read that it is the policy of
11 the -- state, as reflected in the section, that all
12 meetings or planned committee meetings, the meetings of
13 the members association or meetings of the Board of
14 Directors of the association be conducted openly and
15 that notices and agendas be provided for those meetings
16 which contain information as reasonably necessary,
17 provided for those members of the contained information
18 as reasonably necessary to inform the members of the
19 matters to be discussed or decided and to ensure the
20 members have the ability to speak after discussion of
21 agenda items, but before a vote of the Board of
22 Directors was taken.

23 Towards this end, any person or entity that
24 is charged with interpretation of these provisions shall
25 take into account this declaration of policy and shall

1 construe any provision of this section in favor of open
2 meetings.

3 That's what it provides?

4 **A.** You did read it accurately.

5 **MR. CHEIFETZ:** Thank you. I have got nothing
6 further. Thank you.

7 **THE COURT:** Mr. Cheifetz, I guess before you
8 sit down, following up on the question that you were
9 asking Mr. Carpenter.

10 What is your authority that you are relying
11 on regarding that Ms. McNally is entitled to some type
12 of due process when she's stated in the past and stated
13 again here today, when I asked her a direct question,
14 that if she doesn't agree with what the board's doing in
15 executive session, she's going to do the exact same
16 thing?

17 **MR. CHEIFETZ:** Your Honor, my understanding
18 is what she said and this is -- we put this in writing
19 with the other side when addressing efforts of
20 settlement, is that she will always abide by the law.
21 But if she believes the board is not abiding by the law,
22 that her duty is to the corporation not to the other
23 board members.

24 **THE COURT:** So where is the due process?
25 What are you relying on that says she is entitled to due

1 process? You asked him the question. I'll ask it of
2 you.

3 **MR. CHEIFETZ:** Your Honor, I think the
4 statute that says they have a burden of proof and that
5 she's assumed to have done things correctly. It says it
6 must be proven by clear and convincing evidence suggests
7 that there must be some due process.

8 **THE COURT:** I'm asking you, what's the
9 authority other than that? What about Mr. Carpenter's
10 position that the board that is doing the screening at
11 this point in time is entitled to that same deference
12 that they are doing everything that they do in
13 accordance with the law and they're entitled to the
14 deference?

15 **MR. CHEIFETZ:** And the board is receiving due
16 process today. My client -- if the board hasn't been
17 penalized in any way, nothing has been taken from the
18 board. They will receive due process before anything
19 happens to the board. As with my client, my client was
20 penalized --

21 **THE COURT:** Well, this is for preliminary
22 injunction. There is things I have to look at before I
23 would be able to grant that. So your client has to --
24 has a pretty stiff burden to me.

25 **MR. CHEIFETZ:** Your Honor, I disagree, I

1 think the burden on preliminary injunction, the purpose
2 is less than the burden would be otherwise at trial
3 because it's a preliminary matter and it's earlier on in
4 the case. But our position has always been that there
5 simply is not legal authority to remove her from
6 executive session.

7 As Mr. Carpenter is acknowledging, you can't
8 do it to board members generally. We don't think you
9 can do it partially. There is no authority for that and
10 we think it's simply the rule regarding you can't take
11 away board members from the board.

12 **THE COURT:** So let's take it another step.
13 Let's say I agree with you and that she's entitled to
14 participate in executive sessions and then the board
15 says, you know, what we are gonna do, we are gonna go
16 back to --

17 **MR. CHEIFETZ:** It's 3825.

18 **THE COURT:** 3825. We are going set up 14
19 committees and it's going to be six or seven that are on
20 those 14 committees or five or seven and Ms. McNally is
21 not on any of those committees. Then what?

22 **MR. CHEIFETZ:** Well, Your Honor, I think that
23 would be appropriate. I'm not familiar with the
24 statutes. This is the first time it's been raised. But
25 I think any time you try to find an end run around the

1 law and --

2 **THE COURT:** Well, but your client is a
3 participant in executive session. The board has
4 voted -- agreed that this is how we are going to handle
5 it. She doesn't agree with it, so she's gonna go her
6 own way. How is that not an end run to the duties of
7 the board and the other members of the board?

8 **MR. CHEIFETZ:** Because the law is clear that
9 her duty is not to the other board members. Her duty is
10 to the corporation and the law. The question is did she
11 act lawfully.

12 **THE COURT:** So what you are saying, every
13 time a board takes an action and she disagrees with it,
14 she is entitled to run -- I'm sorry, I assume you are
15 not shaking your head at me?

16 **UNIDENTIFIED ATTORNEY:** No, I'm not.

17 **THE COURT:** That she's entitled to step out
18 and say the board is doing this, I disagree with it.
19 And gets to basically air the discussions of executive
20 session.

21 **MR. CHEIFETZ:** Not air the discussions of
22 executive session, Your Honor. She's entitled -- if
23 something is discussed. For instance, if a budget is
24 discussed in executive session and it's not privileged,
25 then she is entitled to discuss it outside of executive

1 session and the fact it was brought into executive
2 session doesn't change it into a privileged document.

3 That's the nuance, Your Honor. That's the
4 issue. It's not that she can just discuss whatever is
5 discussed in executive session. What she has always
6 said, she will follow the law.

7 **THE COURT:** Do you have followup with
8 Mr. Carpenter based on what I said?

9 **MR. CHEIFETZ:** No, Your Honor.

10 **THE COURT:** Ms. Winkler?

11 **MS. WINKLER:** I don't have any redirect,
12 Your Honor.

13 **THE COURT:** Thank you, sir.

14 (Witness excused.)

15 **THE COURT:** Go ahead and leave what's there.

16 **THE WITNESS:** Okay.

17 **THE COURT:** Any other witnesses?

18 **MS. WINKLER:** No, Your Honor.

19 **THE COURT:** Any rebuttal?

20 **MR. CHEIFETZ:** One moment, Your Honor.

21 Your Honor, maybe my client could simply explain to the
22 Court.

23 **THE COURT:** There is no explaining. She
24 either testifies or she doesn't.

25 **MR. CHEIFETZ:** Why don't you take the stand

1 and explain your position.

2 **THE COURT:** Ms. McNally, why don't you come
3 back up and have a seat.

4 Whereupon

5 **COLETTE MCNALLY,**

6 called as a witness and being first duly sworn, was examined
7 and testified as follows:

8 **DIRECT EXAMINATION**

9 **By Mr. Cheifetz:**

10 **Q.** Ms. McNally, if you were placed back on and
11 allowed in executive session, would you follow the law?

12 **A.** Of course.

13 **Q.** And did you ever indicate that you would
14 refuse to follow the law?

15 **A.** No, in no way.

16 **Q.** What was your position when they asked if
17 they allowed you back into executive session?

18 **A.** My position, and I said it in my testimony,
19 that if something came up that I believed was not
20 appropriate to the executive session, I would speak to
21 the board members there and then ask them to reconsider.
22 And as this -- this email that I disclosed was not
23 privileged, was not executive session, I did not see how
24 it could be affected by a -- get a punishment of being
25 excluded from executive session. It has nothing to do

1 with executive session.

2 **MR. CHEIFETZ:** I have got nothing further.

3 **MS. WINKLER:** Nothing, Your Honor.

4 **THE COURT:** So, Ms. McNally, when I asked you
5 the question and you answered before that you would
6 disregard what the board said, are you changing that or
7 are you standing by that?

8 **THE WITNESS:** I did not mean -- Your Honor --

9 **THE COURT:** That's a direct question and you
10 answered it pretty directly.

11 **THE WITNESS:** I'm sorry, but my -- I would
12 retract that. That is not my position. My position is
13 there are laws. I have spent hundreds of hours trying
14 to understand these laws, trying to apply those laws and
15 I really, really, really wanted to help this board keep
16 things on the up and on the level. And if I could give
17 you an example?

18 **THE COURT:** No. The question that I have is,
19 given the same set of circumstances, would you have done
20 the same thing?

21 **THE WITNESS:** I would probably in
22 hindsight -- of course, is always so much easier -- I
23 would have tried harder to get the board to understand
24 my position and understand what was going on and maybe I
25 would have been a little bit better in politics and have

1 approached it in a different way. Maybe there is a
2 hundred ways, a hundred thoughts you have afterwards,
3 but I was ostracized. I was exiled. I got no
4 communication. I couldn't get anyone to hear on the
5 board that he said what was going on and I was trying to
6 resolve an issue that the community is aware of what's
7 going on and doing nothing is such a bad decision.

8 But if the board had, of course, responded,
9 if Rick had said, let's sit down and talk about it.
10 Just simply because I appreciated that you are targeted,
11 that you were, et cetera, et cetera, but let's deal.
12 That's all I asked him all the time. Let's get
13 together. Let's listen to what the people are saying.
14 That was my feeling that the board had closed the door.
15 They were determined to make me resign and that's what
16 they did all year. Just that we are going to get rid of
17 her because she doesn't want to do what we want to do.
18 It's a little clique and they are great people. I love
19 every one of them. Don't get me wrong, they are really
20 good people, but they are determined to go back to where
21 we were in 2009 and they are doing everything in
22 executive session. Honestly. That pro shop --

23 **THE COURT:** Mr. Cheifetz, I assume you have
24 some follow up or probably to --

25 **MR. CHEIFETZ:** Nothing further. I don't have

1 anything further, Your Honor.

2 **THE COURT:** All right. Ma'am, you can go
3 ahead and step down. Thank you.

4 (Witness excused.)

5 **THE COURT:** Anything else, Mr. Cheifetz?

6 **MR. CHEIFETZ:** No, Your Honor.

7 **THE COURT:** All right. Any argument?

8 **MR. CHEIFETZ:** Yes. I would like to do
9 closing, Your Honor. I'm sorry, Your Honor, I misplaced
10 my outline for the closing.

11 Thank you, Your Honor. Your Honor, there has
12 been -- there is going to be issues that we think as we
13 discussed in the beginning that were not accurate at the
14 time Ms. Colette received the letter from the attorney
15 saying that she was to be removed from executive
16 session. At that time she had not discussed executive
17 session materials. And the minutes themselves are the
18 best evidence of that, Your Honor. The minutes talk
19 about the fact that they were discussing what to do
20 about it not the contents of the email.

21 The -- the minutes also do not have any
22 indication in them that she was told not to discuss it
23 outside of the meeting. There was a resolution that was
24 passed and the resolution almost suggesting the
25 opposite. The resolution suggests we are going to

1 disallow anything that Ms. McNally does and indicating
2 that by passing this resolution, they thought they were
3 insulating themselves from any potential liability.

4 In the letter from the attorney, Mr. Neal,
5 that was sent to Ms. McNally explaining why she was
6 removed, there was no indication she was told not to say
7 it. That was the first communication provided. It
8 simply indicates that there was a resolution, but the
9 resolution doesn't say she can't say it.

10 It's not fair to suggest that the email was
11 confidential. As you heard Mr. Schwartz testify, he
12 said that email could be shared with the complete
13 community, but once she brought it into executive
14 session, its nature of change.

15 We dispute that legally. That, for instance,
16 if you take a budget, which is a public document, you
17 discuss it in executive session, the discussions may be
18 privileged, but the budget itself, which is always open,
19 still remains open. It's just the discussions about it
20 that remain privileged and we believe that's the
21 difference in this matter today, is that those
22 discussions were about what to do about it.

23 We don't not believe there is any significant
24 risk of liability. The association has offered only the
25 deposition testimony of Ms. Laird. No witness to

1 challenge Ms. Martens and we think it's evidence that
2 Ms. Martens is telling the truth. And we find it odd
3 that the association would hire an attorney. In fact,
4 the testimony of Ms. Laird, that's been cited for the
5 court, was that she was compelled by the association to
6 hire an attorney. The association would not compel
7 their own employee to hire an attorney if they were at
8 risk of being sued by that employee and then they paid
9 for that attorney. You know, perhaps there was a cover
10 up. Perhaps there was something more going on.

11 There was this issue over the dissemination
12 of attorney notes around the community. Notes for
13 meeting with an attorney and the board did not seem to
14 have any concern other the sharing of those notes
15 although that's a confidentiality issue and something
16 that the board truly could be upset about secrecy. The
17 board would have been upset with the fact that these
18 notes were being distributed around the community.

19 Unfortunately, Your Honor, what's really
20 going on here, what's been going on since the beginning
21 of the -- at least from Ms. McNally's involvement, as
22 Mr. Cournoyer testified, she voted to remove two
23 previous board members because they violated executive
24 sessions. The community then goes up and voted to
25 remove Ms. Cournoyer and other board members because

1 they said this all through the testimony, that they were
2 too secretive. That was in 2008, 2009 and here we are
3 in 2015, the fight continues.

4 **THE COURT:** The dysfunctions have been there
5 for awhile, it isn't just Ms. McNally's behavior
6 creating more dysfunction.

7 **MR. CHEIFETZ:** I would admit she is
8 contributing it to, Your Honor, I certainly would.

9 **THE COURT:** So what efforts have been made to
10 resolve this case short of an inevitable trial that
11 Ms. McNally can participate in executive sessions with
12 the, I guess, better answers than she provided me today
13 on how she's going to conduct herself in regards to the
14 executive session material.

15 **MR. CHEIFETZ:** Well, certainly, Your Honor,
16 what Ms. McNally has offered in regard to honor the law
17 regarding executive session.

18 **THE COURT:** But that was like nailing jello
19 to the wall. That didn't really mean much.

20 **MR. CHEIFETZ:** Ms. McNally will follow the
21 law. I think, that's always been her intent. I think
22 there is a lot of emotion on the part of this
23 unfortunate proceeding, on both sides, and unfortunately
24 I think the betterment of the committee has been lost
25 between a fight between two factions that has been going

1 on.

2 Your Honor, that kind of plays into our whole
3 concern here, is that politics in this country is very
4 divided. Politics in this community is very divided.
5 The issue becomes, you know, from a policy standpoint,
6 what power do you wish to give the majority that
7 exercise over the minority? If the -- in Congress or
8 the legislature, if the majority can simply vote out
9 members of the minority or start limiting their roles,
10 we would have all kinds of abuse because unfortunately,
11 as we witness often, our politicians go to great lengths
12 to limit the influence of others.

13 **THE COURT:** Well, I think you would have a
14 hard time finding, you know, you mentioned politicians.
15 The city councils all operated under an executive
16 session for whatever. And if somebody -- you know, they
17 are not a hundred percent lock step agreement, but when
18 they come out, they don't go on record and throw out all
19 the discussions that took place that they disagreed
20 with. They all abide by what their duties are and
21 that's the issue that I'm having here. And I asked
22 Ms. McNally directly and she said she would do it again.

23 **MR. CHEIFETZ:** I think what she said is she
24 would do what she thought was lawful. So if they
25 discuss something in executive session --

1 **THE COURT:** Again, it's what she thinks and
2 what the statute says that a reasonably prudent person
3 would do.

4 **MR. CHEIFETZ:** And whether it's reasonable or
5 not, I think depends on whether or not she is correct on
6 the law or the association is correct on the law.

7 **THE COURT:** I'll tell you what, Mr. Cheifetz,
8 I had no interest of being a member of this Sun Lakes
9 Country Club board and micromanaging every time
10 something comes up, having you all, as much as I enjoyed
11 you today, coming down and having me decide every week
12 whether this is an appropriate executive session item or
13 not. So that's not likely to happen.

14 **MR. CHEIFETZ:** Nor do we wish to trouble the
15 Court with such a task. Certainly the Court can rule.

16 **THE COURT:** How do we assure that this moves
17 forward peacefully?

18 **MR. CHEIFETZ:** Obviously the Court has
19 discretion to issue orders. The Court could order both
20 sides to perhaps behave more reasonably. In that
21 regard, the Court can simply reaffirm the duty of
22 Ms. McNally to maintain whatever is discussed in
23 executive session remain in executive session. And to
24 ask the board to make sure whatever they discuss in
25 executive session is appropriately discussed in

1 executive session. And that's the power that the Court
2 has in addressing injunctive relief and in equity the
3 Court is to formulate a remedy. And I think the Court
4 is correct in pointing out that there is some difficult
5 situations here and a lot of emotions driving it. But
6 if we can leave today with some solution in the best
7 interests of the community, I know my client would be
8 happy with that and I'm sure the board would be happy
9 because, as Ms. McNally said, this is to a certain
10 extent a fight amongst friends, it's gotten out of hand.
11 And it's been going on long before she got there. I
12 mean, she didn't start this dysfunction. And this
13 bloodletting or majority -- whoever gets the majority,
14 starts to attack the minority. I mean, that's the
15 concern we have as to why we believe that's why the law
16 doesn't allow it.

17 **THE COURT:** But the only issue that I can
18 decide is whether I can grant the preliminary injunction
19 and I'm very limited in what I can grant. I can't, as
20 we excused on the telephonic the other day, we're not
21 dealing with going back and having me determine whether
22 the open meeting laws were violated or anything like
23 that. We are dealing with the one very distinct issue.

24 **MR. CHEIFETZ:** The Court in equity does have
25 the power to formulate a remedy, Your Honor. Now, we

1 are not asking the Court and we understand the Court has
2 indicated we cannot revisit that issue at this time and
3 we are not asking the Court to find that they did
4 anything wrong. But the Court can still say in the
5 future they will abide by the statute. The Court can
6 instruct Ms. McNally to abide by the statute. The Court
7 could give direction as to what that means. We think
8 that's the proper role of the Court in an equitable
9 proceeding and injunction proceeding to formulate a
10 remedy that fixes the problem. And that is why the
11 Court is provided with a significant discretion in
12 injunctive matters is to fix things that are broken of
13 this nature. And, you know, we came here proposing a
14 remedy, but we're open to any remedy that helps
15 alleviate this ongoing issue at the community.

16 You know, our legal position is that they
17 just don't have the right to enter this type of
18 restriction. There is a -- there is a provision in Am
19 Jur regarding the removal of directors and admittedly
20 it's not directly on point, it's about removing them not
21 about limiting their ability to participate in executive
22 session. But it's the concept that we think is
23 important for the Court to consider is that it provides
24 its directors to drive their right to serve the
25 shareholders of a corporation. The right to serve from

1 the shareholders of the corporation. The Board of
2 Directors has no inherent power to remove one of its
3 number. Absent a grant of the directors removal powers
4 by statutes, articles of incorporation or bylaws this
5 rule is absolute and cause is not recognized as a
6 grounds for the removal of a fellow director.

7 Basically what Am Jur says at 18B Am Jur 2d,
8 Corporation Section 1251, is that because the power to
9 serve is provided by the voters, that they will not
10 allow the majority of the board to remove a director for
11 cause. Even if whatever they have done is wrong. And I
12 think the fear is that they have what these type of
13 situations that's arisen in this community, where you
14 have members constantly attacking members and no end in
15 sight, and the fear is that if the majority gets on the
16 board that favors Ms. McNally, are they gonna start
17 attacking the other ones. And unfortunately this is
18 sometimes a problem with HOAs, even though people with
19 good intentions may lack understanding and pursue things
20 of vindictively and it's not in the best interests of
21 anyone. Unfortunately, Ms. McNally could have handled
22 some of these issues better. I think to a certain
23 extent she felt she was reacting to the fact that she
24 was attacked and others may have felt that they were
25 reacting to the fact that they were attacked and

1 oftentimes when due process is not considered as an
2 option, it's because people wish to rush to judgment
3 because they're angry.

4 And, you know, but from a legal standpoint
5 due process is a necessary element and we think that we
6 had to offer some sort of due process before doing this.
7 But, Your Honor, we would be quite happy to discuss a
8 remedy rather than a win or loss. Because a win or
9 loss, all one way or all another way in this case, I
10 don't think will fix the problems in the community and I
11 think it just will continue to prolong them. And I
12 think in equity the Court does have the discretion to
13 try to find some sort of solution that hopefully limits
14 or ends this type of ongoing bickering because I don't
15 see it ending any time soon.

16 Anyway, Your Honor, we think it's important
17 for the Court to consider that there is no statutory
18 support allowing them to do this. There is no case law.
19 There is nothing in the governing documents.
20 Mr. Carpenter has now come up with a theory that wasn't
21 provided in the original opinion about the formulation
22 of a committee and that you can use the committee to
23 bypass Ms. McNally. I haven't researched that issue,
24 Your Honor, but I believe the law would provide a remedy
25 that you can't use that as a means to limit somebody's

1 behavior for other reasons. I mean, it's just more of
2 the same type of issue where the majority uses their
3 power to try to manipulate the minority or attack the
4 minority. The community in this association, after
5 Ms. McNally was removed the first time in 2010, because
6 they said she violated a secrecy at that time. The
7 community was concerned about it and they passed a
8 resolution that basically said you cannot remove
9 directors. And that's because, as we had testimony
10 before, they removed two directors prior to Ms. McNally.
11 The majority voted to remove. And then they removed
12 Ms. McNally. The community rose up and they have the
13 power to pass their own bylaws of this community. And
14 they passed a bylaw that says the board can't do that.

15 And I think the concern today is that the
16 board is trying to do an end run around what the
17 community said it was which was stop doing this. And,
18 you know, unfortunately sometimes the community knows
19 better than the board and I think they like to see the
20 bickering stopped and I think they thought that changing
21 that bylaw amendment was a way to do so. But now the
22 board comes up with another means to try to get around
23 it. And they say, well, they're not going to have to
24 take her off the board, we'll limit her ability to
25 participate in executive session. And then when we

1 object and say there is no law to support that. Well,
2 it's really just a committee issue. We are just going
3 to appoint a de facto committee when nobody has ever
4 discussed a committee, nobody ever formulated a
5 committee. But in a desperate effort to try to
6 establish some basis to do what they have done, they
7 have come up with this committee. And again I think it
8 just gets back to the whole situation discussed in Am
9 Jur, when you vote somebody in, you cannot allow cause
10 to be an issue to remove each other or attack each other
11 because you are gonna have this type of shenanigans
12 going on by clearly of the majority. In other words,
13 the majority just simply exercises its control and
14 unfortunately that's a common issue when new people are
15 elected, they often fire everybody else and get in new
16 people and they have that power. But, you know, the
17 boards they have determined that it's not in the
18 interests of the board. Also there is a hard and fast
19 rule that you can't do it. And under this situation,
20 where there is no case law to support it, no statute to
21 support it, and nothing in the governing documents to
22 support it, it simply can't do it even with cause.

23 And so it's our position that although
24 Ms. McNally could have certainly handled this issue in a
25 better fashion and she would acknowledge that,

1 Your Honor. She is not happy. This has been a terrible
2 ordeal for her and -- but even though she could have
3 handled it better, they simply do not have the authority
4 to take these steps against her and that's why
5 ultimately the powers to remove are left with the same
6 people that have the power to elect and Arizona is clear
7 that there is a statute that you can recall directors
8 and the community has always had the right to recall
9 Ms. McNally. But as you heard Ms. McNally, after she
10 was recalled the first time her -- voted off the first
11 time, she got the most votes in the community after
12 that.

13 Is that a proper exercise of the community or
14 not? We leave that to the Court's judgment. Obviously
15 there is different opinions in this community what's
16 appropriate, Your Honor.

17 And, you know, in closing I just simply like
18 to say that based on the case law and our motion for
19 summary judgment and the Am Jur section I've quoted,
20 that we think there is a real limit on the Court's
21 ability to -- not the Court's ability -- the Court can
22 do what the Court deems appropriate on the association's
23 ability to preclude her from executive session without
24 due process regardless of what they think the cause was
25 and that they certainly should have offered her due

1 process at that time. And at this point we would
2 welcome the Court exercising its discretion in
3 fashioning a remedy that protected both sides and
4 limited both sides and maybe brought some sort of
5 semblance of peace to the community. Thank you.

6 **THE COURT:** Thank you.

7 Ms. Winkler?

8 **MS. WINKLER:** Your Honor, with all due
9 respected to the Court, there is not enough power in
10 this courtroom to bring peace to this community. The
11 issue that we're here on today is a preliminary
12 injunction that the Plaintiff is seeking. It's an
13 extraordinary remedy. It must be -- she has to make a
14 clear showing that she's entitled to relief. There is a
15 four part test. She has to clearly establish all of the
16 elements of that four part test. The very narrow issue
17 before you today is: Has she made the clear showing
18 necessary to demonstrate that she is entitled to relief?
19 She hasn't.

20 In particular, I think this goes to what
21 Plaintiff's counsel is arguing, where someone is seeking
22 a mandatory injunction -- a mandatory preliminary
23 injunction like Plaintiff is doing here. Those are
24 extremely disfavored and they must be denied unless you
25 can conclude on the basis not of Mr. Cheifetz's

1 argument, but on the basis of the evidence that you
2 heard here today, that the facts and the law clearly
3 favors the moving party. That's the issue that you need
4 to decide today.

5 You have heard -- Ms. McNally has not been
6 removed from the Board of Directors so all these
7 citations about you can't remove a director for cause
8 without a recall election, et cetera, that has -- that's
9 irrelevant.

10 Claims about due process. This board did,
11 and you heard the testimony, this board did absolutely
12 everything in its power that it could do short of
13 subjecting the association to a defamation claim by
14 these -- by Mr. Warrell and Ms. Laird. And in terms of
15 giving Plaintiff her say, they held three separate
16 executive sessions where they discussed this issue.
17 They went to the association's lawyer. They got advice
18 from him on -- repeatedly through the process. And she
19 had that advice. Okay.

20 And you heard from her very clearly. She
21 understood that the rest the board didn't agree with
22 her. She understood what the advice was. She clearly
23 understands the statutes. She has, I think she has told
24 you, hundreds of hours of training on this. And she was
25 honest with you and told you that if she finds herself

1 in this circumstance again, where she believes that you
2 know the board is wrong and she is right, then she will
3 do what she believes is the right thing to do. That is
4 not something that -- that is not how a Board of
5 Directors of any corporation should operate. And it's
6 not a way -- it's not functional. They can't function
7 like that.

8 In terms of what the Board of Directors did
9 in response to her conduct, you have heard ample
10 evidence about the reasonableness of the board's
11 actions. You have heard zero evidence that there was
12 some sort of effort to, you know, tamper her down, to
13 get control of her, to get her to resign. To do any of
14 those things.

15 You heard evidence that Mr. Schwartz
16 testified that even with the ban in place, they are
17 making efforts to keep her in the loop on things that
18 she needs to know about as a board member. And the
19 example of that is when the general manager resigned, he
20 was on the phone with her saying this happened. He is
21 resigning. We're going to have to put in an interim
22 general manager in place. He was in Indiana at the
23 time, but he is calling her and saying that the board is
24 meeting with the association management level employees
25 right now to put an interim general manager in place and

1 can you get down there?

2 So you've heard -- other than the arguments
3 of Mr. Cheifetz, you have heard no evidence of any bad
4 faith conduct or unreasonable behavior on the part of
5 the board. They have done everything that they can and
6 they have done it with the advice of the association's
7 lawyer.

8 I don't -- this is not a mediation and so
9 this idea of that we will somehow sit here and hammer
10 out an injunction in front you, Your Honor. I
11 understand that we all like it when things can resolve.

12 But any injunction that is issued by this
13 court you are required to issue -- you are required to
14 order security. And any injunction that you issue, you
15 are gonna be enforcing and talk about nailing jello to
16 the wall.

17 Unless you have any specific questions for
18 me, Your Honor, that's all I have.

19 **THE COURT:** Well, I guess -- well, I guess a
20 logical question would be is what language do you think
21 would have to be inserted into any type of forward
22 action that would make it clear to all members of the
23 board that that information cannot be disseminated? And
24 that would be, at last on the short term basis, a way to
25 get the board back functioning.

1 **MS. WINKLER:** What type of language could be
2 inserted into a Board of Directors action?

3 **THE COURT:** Right. So when -- every action
4 that they take, this is not to be discussed outside of
5 executive session. I mean, what type of language could
6 be put in place? And I know it's onerous.

7 **MS. WINKLER:** Yeah. It's very onerous and
8 here's the problem with it. Who's going to make the
9 decision about that? Fundamentally, that's the problem
10 here. Okay. Fundamentally the decision is who makes --
11 who is going to decide that that language should be put
12 in as to a particular issue?

13 I mean, there is no question, Your Honor,
14 that the Jeannie Martens email was an appropriate
15 subject for discussion in executive session under the
16 statute. It is covered as plain as day under the
17 statute.

18 And if I may, it is 33-1804(a)(4). Matters
19 relating to the job performance of compensation of
20 health records over specific complaints against an
21 individual employee of the association. Okay. So let's
22 be clear. There is no factual dispute that the Jeannie
23 Martens email was a proper subject of discussion in an
24 executive session.

25 **THE COURT:** Just for the ease of your

1 argument, I'm not -- and I should have told Mr. Cheifetz
2 this as well. I'm not even gonna get to the issue of
3 whether somehow this backed into a de facto committee.
4 I understand what Mr. Carpenter is saying, but I'm not
5 even going to deal with it in that way. Also, there was
6 no question this was executive session material in my
7 mind, pursuant to 33-1804(a)(4) whether the email was
8 read verbatim in executive session or not. Everybody
9 understood what was being discussed. Everybody
10 understood it's within the four corners of the document
11 and the statutes. So just for your argument and for
12 Mr. Cheifetz's rebuttal.

13 **MS. WINKLER:** All right. So I guess my
14 answer to that is, that you are not going to have
15 agreement on the part of these parties that something
16 should be appropriately put in executive session. And
17 so I don't believe that there is any way that you can
18 fashion an injunction that would -- that would do what
19 you are -- I think you are trying to suggest,
20 Your Honor. Thank you.

21 **THE COURT:** All right. Thank you.

22 I'll give you the last word, Mr. Cheifetz.

23 **MR. CHEIFETZ:** Thank you, Your Honor.

24 We don't deny that the email was properly
25 addressed in executive session. The email admittedly

1 dealt with and in fact Ms. McNally wanted to address
2 issues concerning the employees, that's why she
3 brought -- that's why she communicated it to the
4 president and wanted to address it because she wanted to
5 discuss if any action against those employees was
6 appropriate and whether there should be an
7 investigation. So we certainly acknowledge that the
8 discussions in executive session were probably done in
9 executive session.

10 What the nuances that we disagree with, is
11 just that it doesn't make the email itself that was
12 shared publicly and is not a privileged document, it
13 does not change the nature of that document into somehow
14 privileged and subject only being discussed in executive
15 session. If somebody has something that's a public
16 document, the fact that they discuss it in executive
17 session, for instance, the budget is an example I gave.
18 The fact that you discussed the budget in executive
19 session doesn't mean that the budget cannot now be ever
20 shared with the community. The budget -- first, it was
21 sent to the whole community. Everybody already has it.
22 You can't then make it confidential. There is no
23 confidentiality. This had already been disseminated
24 amongst the community. The president even indicated
25 that it could be sent to all the members.

1 It was his position that once they discussed
2 it in executive session, she can no longer discuss with
3 the members, but we don't think that's the law. The
4 more important issue is the email itself was not
5 excused. These contents what the email said was not
6 discussed in executive session. The concern was over
7 the contents of the email and whether it was defamatory.

8 The testimony wasn't they didn't even have
9 email at the executive session. They didn't read the
10 email at the executive session. Everybody received it
11 away from executive session and the discussion was what
12 do we do about it, if anything. And consensus amongst
13 boards, other than Ms. McNally, we do nothing.
14 Ms. McNally was not satisfied with that. She thought
15 the issue should be investigated. I leave it to the
16 Court's discretion to whether they think it would be
17 appropriate for the board to investigate such a thing
18 because we think it's questionable but when these
19 allegations arise, that they don't even do an
20 investigation other than ask the people that were
21 implicated, did you do it and they said no.

22 As we indicated, if they had simply asked
23 Mr. Hoyt, Mr. Hoyt was in a position to acknowledge
24 whether he got the document from Ms. Laird or not.
25 Ms. Laird said, I have nothing to do with it. He said,

1 I got the document from Ms. Laird. It was obvious
2 Ms. Laird was not being truthful and so we think an
3 investigation would have been simply done to establish
4 whether it's true or not and obviously if it's true,
5 there is no risk to defamation. There is no need to
6 spend money hiring attorneys and threatening her and as
7 he indicated could have been disseminated amongst the
8 community. So I think we just want to point out that
9 distinction because I think the issues have been thrown
10 around a little fast and loose as to what was discussed
11 in executive session. And I think the minutes
12 themselves demonstrate that the contents of the email
13 was never discussed in executive session. It was always
14 what to do with the email.

15 But, Your Honor, I think it's also important
16 to consider the law regarding injunctions. There is --
17 actually there is three tests. And we all meant to get
18 to the same place. And the one test is as the defense
19 has set forth and we agree it's the law so we put it in
20 the contested law, that we agree are materials.
21 Basically we have to show a strong likelihood of success
22 on the merits. Not that you are gonna be successful.
23 That you have a strong likelihood you will be and
24 whether the Plaintiff has demonstrated possibly she will
25 suffer irreparable injury.

1 Well, the injury in this matter is every time
2 executive session happens, she never gets it back and
3 this position she was elected for she doesn't get to
4 participate fully. And that's where the law and equity
5 recognizes that damages can't satisfy the issue because
6 you can't -- what are your damages if you don't attend
7 executive session? It's not like she is suffering
8 financial harm, but she is suffering. And the only way
9 it's unique in its character, you can either participate
10 in executive session or you can't. So the law provides
11 for this type of equitable relief. Those situations
12 where the type of harm to something that damages
13 wouldn't compensate and rather the claimant can
14 demonstrate that they are losing out on something they
15 are never gonna get back and that's what's happening
16 here. And we think that the harm and the prejudice is
17 extenuated by the fact that the board is taking steps to
18 address things in executive session that should be
19 addressed in open meetings. And we gave an example with
20 some of the testimony about the fact that they said they
21 wanted to reach a consensus in executive session and
22 then they will take it to the board, that's highly
23 inappropriate. You are not to do consensus. That's
24 what Ms. McNally testified she was concerned about is by
25 the time they came to executive session, she felt like

1 the decision had already been made. They admitted in
2 those minutes they reached a consensus and then they go
3 to the open meetings, okay, we'll vote on it. The fix
4 is already in. They have already indicated they all
5 agree on it. You are not having true deliberations.
6 That's contrary to the intent of the open meeting law.

7 So we would assert that although we are not
8 seeking relief on that issue, is to stop it as much as
9 we wish to demonstrate by the fact that it's occurring,
10 that she's missing out more than on executive sessions,
11 she's also missing out on her ability to function as a
12 normal board member. As she testified, she wasn't for a
13 long time getting the manager's report. She is still
14 not getting emails from the board members and they do a
15 lot of discussion by email. So for all affected
16 purposes, they basically really eliminated her from
17 having any influence in the community and that was their
18 goal. And we think that just demonstrates the
19 significant harm she is being suffered that she will
20 never recover.

21 But, Your Honor, there is two other tests
22 that are cited by the same case -- line of cases on how
23 the Court can view this and it's a lower standard of
24 proving -- it says you have to have a strong likelihood
25 of success. The one standard is probable success on the

1 merits and the possibility of irreparable injury or the
2 presence of serious questions. Just serious questions.
3 And that the balance of hardships tips sharply in favor
4 of the moving party. And we would assert that the
5 balance of hardships due tip sharply in their favor, if
6 she was allowed to participate in executive session,
7 there would not be any hardships especially if the Court
8 exercises its discretion to do so and to ensure that
9 everybody did what they were supposed to do, and we
10 would think that's fully appropriate.

11 And whereas on the other side, the balance of
12 hardships, it's strongly against her because she's
13 losing meetings. She's losing her ability to compete as
14 a general board member. Now, this is -- general case
15 law is well accepted in Arizona, but a couple of the
16 cites we have, Your Honor, are Arizona Association of
17 Providers for Persons with Disabilities. We cite 223
18 Arizona 6 and it's a 2009 appellate case, Schoen v.
19 Schoen 167 Arizona 58 Appeal 1990. And, Your Honor, we
20 would be happy to provide the Court with the case law
21 that -- very quickly that shows that the Court has the
22 discretion to fashion an remedy where appropriate.

23 That's the nature of equity. That's the
24 nature of injunctive proceedings is you are dealing with
25 situations that aren't just -- there is not a quick and

1 easy solution so the Court has discretion to issue an
2 order that defines a solution. If we can come up with a
3 solution today, that maybe we can't, as Ms. Winkler
4 indicated, bring peace to the community, because at
5 least eliminate some of the discord. I think that would
6 be in everybody's interests and we think although they
7 certainly, the board could easily pass a resolution that
8 reaffirmed the duties of both sides, we think it would
9 be appropriate for the Court to do so because we think
10 the Court of any injunction, that the Court could take
11 steps and firm steps that would assure that the parties
12 behave and we would welcome that, Your Honor, because
13 unfortunately we think that something of that nature may
14 be in the best interests of this community.

15 And as far as a bond goes, it is within this
16 Court's discretion to set a bond and we would be happy
17 to address that with the Court if the Court believed
18 that some sort of injunctive relief was appropriate. We
19 would be happy to explore some sort of reasonable
20 posting of a bond which is to address their potential
21 damages although as we indicated we do not believe the
22 damages that would -- there would be risk of damages
23 from such relief. In fact, it would probably be for the
24 best interests of the community. Thank you.

25 **THE COURT:** The issue that I have is, for the

1 preliminary injunction, first the four prongs is what
2 I'm having difficulty with. Unless I find that, I can't
3 even get to the other three. My issue is Ms. McNally
4 testified that she wouldn't follow the law as she sees
5 it and that's the problem. So I can't find under the
6 first prong that Plaintiff has established a strong
7 likelihood of success on the merits at trial. So I'm
8 going to deny the request for the preliminary
9 injunction.

10 I'm going to encourage the parties to get
11 this case resolved. I don't think it's in the best
12 interests of anybody that this case continue as it is.
13 Do we have a settlement conference set up or anything
14 set up at this point?

15 **MS. WINKLER:** Your Honor, I don't think we
16 have a pretrial order in place because we got into this
17 proceeding. So, no.

18 **THE COURT:** So the simple answer is no?

19 **MS. WINKLER:** Correct.

20 **THE COURT:** How soon is that going to be
21 fixed?

22 **MS. WINKLER:** Well, I have --

23 **THE COURT:** I'm sure Mr. Carpenter is not
24 out -- or not available to help. I don't know who else
25 would be. There has got to be other folks that can sit

1 down and get this case resolved.

2 **MS. WINKLER:** Your Honor, it would be my
3 suggestion that we submit, now that we have gotten
4 through this proceeding, we go ahead and submit to you a
5 pretrial order that includes such things as a deadline
6 for the parties to participate in settlement conference,
7 et cetera.

8 **THE COURT:** Well, that's fine.
9 Unfortunately, usually those are probably nine months
10 down the road when you get to the litigation. So I
11 would rather see something happen sooner. And I can
12 refer you to ADR today and at least get you going in
13 that direction and get it on the books.

14 **MS. WINKLER:** I wouldn't have any -- the
15 Defendant would not have any objection to being referred
16 to ADR for a settlement conference with a pro tem.

17 **MR. CHEIFETZ:** We have no objection either,
18 Your Honor.

19 **THE COURT:** So we'll do that. We'll order a
20 ADR and then a scheduling order three weeks. Would that
21 give you enough time?

22 **MS. WINKLER:** That's fine with me.

23 **MR. CHEIFETZ:** That's good.

24 **THE COURT:** All right. Thank you.

25 **MS. WINKLER:** Oh, Your Honor, I apologize.

1 We do need to make a motion on the record to seal the
2 exhibits that are marked confidential under the
3 protective order, I'm sorry.

4 **THE COURT:** And I assume you have no
5 objections to that?

6 **MR. CHEIFETZ:** We have no objections.

7 **THE COURT:** So what we are going to do, the
8 clerk brought it up with me yesterday. What we'll do,
9 we can do it one of two ways. If you want, we can
10 release those back to you. We'll just make a note they
11 were released back. Obviously that's not the preferred
12 way. We can go ahead and put them in there. We'll just
13 seal them up again and put something on there saying not
14 to be -- do we have the exhibit numbers? I think we are
15 pretty clear on what they are.

16 **THE CLERK:** Yes.

17 **THE COURT:** And these exhibits are not to be
18 opened unless ordered by the Court.

19 **MS. WINKLER:** Yes.

20 **THE COURT:** Is that the preference?

21 **MS. WINKLER:** I think so, Your Honor, yes.

22 **THE COURT:** Okay. All right.

23 (Proceedings concluded.)
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C E R T I F I C A T E

I, JEANNE A. KAPPEDAL, Certified Court Reporter in the State of Arizona, do hereby certify that the foregoing pages constitute a full, true, and accurate transcript of the proceedings had in the foregoing matter, all done to the best of my skill and ability.

WITNESS my hand this 21st day of November 2015.

/s/ Jeanne A Kappedal

JEANNE A. KAPPEDAL, RMR/CRR/CR
Arizona CR No. 50900

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