IN THE COURT OF APPEALS

IN AND FOR THE STATE OF ARIZONA

DIVISION ONE

COLETTE MCNALLY, Plaintiff/Appellant, v. SUN LAKES HOMEOWNERS ASSOCIATION #1, INC., an Arizona non-profit corporation, Defendant/Appellee.	)	Case No. 1 CA-CV 15-0744 Maricopa County Superior Court Case No. CV2014-009496

DEFENDANT/APPELLEE'S ANSWERING BRIEF

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INTRODUCTION

Defendant/Appellee Sun Lakes Homeowners Association #1, Inc. began screening Plaintiff/Appellant Colette McNally from participating in executive sessions of its Board of Directors following an incident in September 2013, in which Plaintiff disregarded the advice of the Association's counsel and the decision reached by a majority of her fellow Board members concerning the handling of an e-mail from a former Association employee. Since that time, Plaintiff repeatedly has affirmed her intention to reveal matters addressed during executive sessions any time that she disagrees that the matter is one that should be discussed during executive session. As a result, the Association has continued screening Plaintiff, and the trial court recently denied Plaintiff's request for a preliminary injunction requiring the Association to permit Plaintiff to attend executive sessions of the Board of Directors. Plaintiff is appealing the trial court's denial of a preliminary injunction.

STATEMENT OF THE CASE

Plaintiff is a resident of a planned community known as Sun Lakes, and a duly-elected member of the Board of Directors of the Association. (IR 14, Exh. A at ¶ 2.) The Association began screening Plaintiff from participating in executive sessions of the Board of Directors in September 2013, after Plaintiff read an e-mail from a former Association employee out loud to the community members in attendance at an open

meeting of the Board of Directors. (IR 23, Exh. D at ¶¶ 16-20.) Plaintiff's term on the Board of Directors ended in February 2014, and she was elected to another term. (IR 23, Exh. D at ¶¶ 20-21.)

Five months into her second term, and almost a year after the Association began screening her from executive sessions, Plaintiff sued the Association, alleging that the Association lacks authority to screen her from executive sessions, and asserting claims for (1) declaratory/injunctive relief, (2) breach of contract, (3) defamation, (4) false light, and (5) punitive damages. (IR 1.) Five months after filing her Complaint, Plaintiff moved for summary judgment on her claim for declaratory/injunctive relief, arguing that the Association lacks authority to screen her from executive sessions or, in the alternative, is acting in excess of its authority by continuing the screening. (IR 15.) The trial court denied summary judgment and also denied Plaintiff's Motion for Reconsideration. (IR 27, 29.)

On April 27, 2015 – nearly two years after the Association began screening her from executive sessions and almost a full year after she filed her Complaint – Plaintiff filed an Application for a Preliminary Injunction to compel the Association to permit Plaintiff to attend executive sessions, and requested an expedited evidentiary hearing. (IR 33 & 34.) The trial court held an evidentiary hearing on August 12, 2015. (IR 56.) At the conclusion of the hearing, the trial court found that Plaintiff is unlikely to

succeed on the merits of her claims for declaratory/injunctive relief, and denied Plaintiff's Application for a Preliminary Injunction. (IR 56.)

On September 29, 2015, Plaintiff lodged a Proposed Order Denying Preliminary Injunction with the trial court. (IR 61.) Meanwhile, Plaintiff filed a Petition for Special Action seeking this Court's review of the trial court's denial of a preliminary injunction. (IR 63.) This Court denied review. (*Id.*) The trial court issued a formal Order Denying Preliminary Injunction on October 27, 2015. (IR 62.) Plaintiff filed a Notice of Appeal on October 28, 2015. (IR 64.) This Court has jurisdiction under A.R.S. § 12-2101(A)(5)(b).

STATEMENT OF FACTS

Defendant Sun Lakes Homeowners Association #1 is a non-profit Arizona corporation whose primary purpose is "to establish, own, operate, maintain, and manage community recreational and welfare facilities" for the approximately 2,000 residents of a planned community known as Sun Lakes. (IR 22 at Exh. B, bates no. HOA 173; Tr. 8/12/15, at p. 65, ll. 21-24.) The Association is managed and controlled by a seven-member Board of Directors elected by Sun Lakes residents at an annual meeting. (IR 22 at Exh. C, bates nos. HOA 182 & 184.) The Association's Bylaws authorize the Board of Directors "[t]o exercise all financial, legal, and other powers of the Board as are stated in these Bylaws, the Articles of Incorporation, and any other

powers granted under the laws of the State of Arizona." (IR 22 at Exh. C, bates nos. HOA 187-88.) Arizona law governing corporations applies to the Association, including the standards of conduct for directors set forth at A.R.S. § 10-3830. (Tr. 8/12/15, at p. 105, l. 5 – p. 106, l. 9.)

The Association employs various administrative personnel to carry out its day-to-day operations, including a General Manager and staff. (IR 23, Exh. D at ¶ 2.) The Association also employs many dozens of other people in positions that include golf course operations, restaurant operations, and maintenance. (*Id.*)

Plaintiff first began serving on the Association's Board of Directors in 2009, when she was appointed to fill a vacancy on the Board. At the conclusion of her appointed term, Plaintiff ran for election to the Board of Directors but was not elected. (IR 21, Exh. A at p. 14, ll. 7-12.) In 2010, Plaintiff was again appointed to fill a vacancy on the Board. However, Plaintiff was removed for cause before the end of her appointed term, after she disclosed confidential financial information of the Association to non-Board members. The Association incurred substantial attorneys' fees and costs associated with removing Plaintiff from the Board of Directors. (IR 21, Exh. A at p. 22, l. 13 – p. 24, l. 11; IR 23, Exh. D at ¶ 5.) After Plaintiff's removal, a former employee of the Association asserted a claim against the Association arising out of Plaintiff's breach of a confidentiality agreement between the Association and

the former employee. The Association resolved the claim by paying the former employee a sum of money to settle the claim. The Association also incurred substantial attorneys' fees and costs in defending the former employee's claim. (IR 23, Exh. D at ¶ 6.)

Plaintiff ran for election in 2011, and was elected to the Association's Board of Directors. The Board of Directors initially selected Plaintiff to serve as Secretary of the Board upon her election, however, Plaintiff served as Secretary for less than one year before the Board removed her from that position for cause. After her removal as Secretary, Plaintiff continued to serve as an elected member of the Board of Directors. (IR 21, Exh. A at p. 22, l. 13 – p. 24, l. 11; IR 23, Exh. D at ¶ 7.)

On August 4, 2013, Plaintiff received an e-mail from Jeannie Martens, a former employee of the Association, in which Ms. Martens accused two of her former colleagues (General Manager Clint Warrell and Human Resources Manager Roberta Laird) of misconduct ("the Martens e-mail"). (IR 21, Exh. A at p. 28, ll. 10-23 & Exh. 5.) According to the Martens e-mail, the misconduct occurred two years earlier and involved the circulation of notes or correspondence that Ms. Martens discovered while cleaning out a "board book" following a Board of Directors meeting. (IR 21, Exh. A at p. 28, ll. 10-23 & Exh. 5.) The notes and correspondence appeared to involve a plan by several members of the Board – including Plaintiff – to force the resignation of

another member by publicizing that member's allegedly "illegal actions." (*Id*.) Ms. Martens states in her e-mail that she brought the notes to the attention of General Manager Clint Warrell, who, together with Human Resources Manager Roberta Laird, decided to provide the notes anonymously to another Board member, Bill Hoyt, believing that Mr. Hoyt would circulate the notes throughout the community. Mr. Hoyt did in fact circulate the notes, and as a result, the actions of Plaintiff and her fellow Board members were publicized. (*Id*.) Two years later, when Ms. Martens resigned her employment with the Association, she decided to send an e-mail to Plaintiff explaining how the notes had ended up in the hands of Mr. Hoyt. (*Id*.) In addition to Plaintiff, Ms. Martens also directed her e-mail to Ray Smith and Tom West, two former Board members who had been mentioned in the notes circulated by Mr. Hoyt. (*Id*.)

On August 5, 2013, Plaintiff forwarded the Martens e-mail to Rick Schwartz, President of the Association's Board of Directors, along with an e-mail authored by Plaintiff that contained further accusations against the Association's employees and demanded that those employees resign or be dismissed. (IR 21, Exh. A at p. 28, ll. 10-23 & Exh. 5; IR 23, Exh. D at ¶¶ 8-9.) The Board of Directors met in executive session and interviewed the two employees named in the Martens e-mail, and both denied the truth of Ms. Martens' allegations. (Tr. 8/12/15, at p. 72, ll. 3-20.) The

Board of Directors also heard in executive session from Plaintiff and the two former Board members, Mr. Smith and Mr. West, who allegedly had been wronged by the conduct of Mr. Warrell and Ms. Laird. (Tr. 8/12/15, at p. 73, ll. 9-13.) Ultimately, the President of the Board consulted the Association's general counsel, Mr. Charles Maxwell, concerning the handling of the Martens e-mail. (Tr. 8/12/15, at p. 69, ll. 14-23.) Mr. Maxwell advised the Board not to take any further action on the e-mail, and to avoid any further publication of the e-mail, which if false was defamatory. (Tr. 8/12/15, at p. 69, l. 21 – p. 70, l. 13; Trial Exh. 60, Appendix for Appellant's Opening Brief – Filed Under Seal, 1/19/16, at APP 388-89.)

On September 4, 2013, the Board of Directors – including Plaintiff – met in executive session prior to the Board's regularly-scheduled meeting. During the meeting, the President shared the advice of the Association's general counsel with the rest of the Board, and informed the Board that he would not allow the Martens e-mail to be discussed at any open meeting of the Association's Board of Directors because its contents were defamatory if false. In order to mitigate any potential liability to the Association arising out of the circulation of the Martens e-mail to the Board of Directors, the Board of Directors adopted a resolution disavowing any approval of or responsibility for the Martens e-mail and any of Plaintiff's e-mails further maligning the Association's employees. With the sole exception of Plaintiff, the Board unanimously approved the resolution. (IR 23, Exh. D at ¶ 15.)

Following the executive session on September 4, 2013, the Board of Directors convened in open session. During the open session, a member of the Association attempted to engage the Board in discussion of the matters addressed in the Martens e-mail. Consistent with the Board's earlier resolution, the President refused to allow discussion of those matters during the Board meeting. (IR 23, Exh. D at ¶ 16.) After the President refused to allow the Board to discuss the Martens e-mail, Plaintiff began reading the Martens e-mail aloud to the members in attendance at the Board of Directors meeting. (IR 13 at ¶ 5; IR 23, Exh. D at ¶ 16.) Because Plaintiff was out of order and refused to stop reading the Martens e-mail, the President adjourned the Board of Directors meeting and all of the Directors except Plaintiff left. (IR 23, Exh. D at ¶ 16.) Plaintiff continued to read the Martens e-mail aloud after the meeting adjourned. (*Id.*)

On September 11, 2013, the Association's general counsel sent Plaintiff a letter informing Plaintiff that her conduct during the open portion of the September 4, 2013, Board of Directors meeting violated her duties of confidentiality and loyalty to the Association, and informing Plaintiff of his recommendation that the Association screen Plaintiff from future executive sessions. (IR 21, Exh. A at p. 64, ll. 5-18 & Exh. 8.) Plaintiff responded to the letter in writing, insisting that her conduct was completely appropriate and consistent with her obligations as a Board member:

> My action was to defend our legitimate right to a fair and open discussion as the First Amendment provides for, and which guides the AZ Statute 33-1804 and our governing documents, as to what can be kept secret. This issue is not one that can be discussed in Executive Session. . . . It was not dealt with appropriately. I was fulfilling my duty as an elected board member who is bound by law to deal with issues of community concern in an open and forthright manner, and not to shroud in secrecy that which violates the open meeting laws.
>
> . . .
>
> Loyalty is not without principals [sic], and sometimes needs a stick. If I perceive that the Board is acting in bad faith, or is being advised badly in how to handle the situation, and I can do anything to help them make redress, I am bound to do so, otherwise I have the appearance of lacking in the courage of my convictions . . . . My loyalty to the Board lies in assisting, pushing or dragging, whatever you like to call it, towards a proper treatment of the issues as I interpret them to the best of my ability.

(IR 21, Exh. A at p. 64, l. 20 – p. 65, l. 4 & Exh. 9 at bates nos. HOA 7-8.) After receiving Plaintiff's response, the Board of Directors accepted the recommendation of the Association's counsel that Plaintiff should be screened from future executive sessions for the remainder of her term, which ended in February 2014. (IR 23, Exh. D at ¶ 20.)

After Plaintiff was elected to a second term, the Board of Directors, through counsel, offered to allow Plaintiff to participate in executive sessions if she would agree to maintain as confidential all information discussed during executive sessions. Plaintiff refused. (IR 23, Exh. D at ¶ 21.)

Since that time and throughout this proceeding, Plaintiff steadfastly has refused to agree that she will maintain as confidential information discussed in executive session, unless she personally agrees that the information should be kept confidential.

On January 15, 2015, Plaintiff appeared for a deposition in this case and stated under oath that if allowed to participate in executive sessions she would disclose at open session any information she learned that, in her opinion, should be discussed in open session and not executive session:

> **Q.** So if I understand what you're telling me, your answer is that, no, you will not agree to keep the contents of an executive session confidential?
>
> **A.** I will not agree to do what is wrong. Okay. So if they are discussing something that should be discussed in an open meeting, it should be discussed in an open meeting. I have learned now what to do, which is to say time out. Let's consider this. But, I mean, I have gotten my education bit by bit. I wasn't born knowing everything that has to be done on a board. I've been studying year after year, taking two courses a year, to make sure that I make the right decision.
>
> **Q.** And if, in your opinion, the right decision is that what's being discussed in executive session should not be discussed in executive session but should be discussed in an open session of the board –
>
> **A.** I will bring it to their attention.
>
> **Q.** In the open session?

A. Not necessarily. I would bring it right there and then, if I were allowed to be in the executive session.

Q. And if they persisted with their wrong – in your opinion, their wrong headed view of it –

A. If it's doing harm to anybody in the community, I would have to bring it out in the open.

(IR 21, Exh. A at p. 85, l. 1 – p. 86, l. 2.)

On August 12, 2015, the Court held an evidentiary hearing on Plaintiff's Application for Preliminary Injunction. At that hearing, under direct questioning by the trial court, Plaintiff affirmed that her position had not changed – if allowed to participate in executive sessions she would disclose at open session any information that she believed should be discussed in open session and not executive session:

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

A. Right.

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

A. That is correct.

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

A. Yes. If it was in violation of the open meeting laws, it has to be dealt with in the open.

(Tr. 8/12/15, at p. 54, ll. 2-14.)

Later, in an attempt to rehabilitate her, Plaintiff's counsel recalled Plaintiff to the stand:

> **Q.** Ms. McNally, if you were placed back on and allowed in executive session, would you follow the law?
>
> **A.** Of course.
>
> **Q.** And did you ever indicate that you would refuse to follow the law?
>
> **A.** No, in no way.
>
> . . . .
>
> **THE COURT:** So, Ms. McNally, when I asked you the question and you answered before that you would disregard what the board said, are you changing that or are you standing by that?
>
> **THE WITNESS:** I did not mean – Your Honor –
>
> **THE COURT:** That's a direct question and you answered it pretty directly.
>
> **THE WITNESS:** I'm sorry, but my – I would retract that. That is not my position. My position is there are laws. I have spent hundreds of hours trying to understand these laws, trying to apply those laws and I really, really, really wanted to help this board keep things on the up and on the level. And if I could give you an example?
>
> **THE COURT:** No. The question that I have is, given the same set of circumstances, would you have done the same thing?

> **THE WITNESS:** I would probably in hindsight – of course, is always so much easier – I would have tried harder to get the board to understand my position and understand what was going on and maybe I would have been a little bit better in politics and have approached it in a different way. Maybe there is a hundred ways, a hundred thoughts you have afterwards, but I was ostracized. I was exiled. I got no communication. I couldn't get anyone to hear on the board that he said what was going on and I was trying to resolve an issue that the community is aware of what's going on and doing nothing is such a bad decision.

(Tr. 8/12/15, at p. 146, l. 10 – p. 148, l. 7.) Repeatedly and consistently, while she was under oath, Plaintiff was unable to commit that she would maintain the confidentiality of matters discussed in executive session if the court granted her request for a preliminary injunction compelling the Association to allow her to participate in executive sessions. The trial judge aptly described efforts to pin down Plaintiff on this point as "like nailing jello to the wall." (Tr. 8/12/15, at p. 152, ll. 9-19.)

Plaintiff also failed to present any evidence of harm arising from the screening. Plaintiff has continued to serve as a member of the Association's Board of Directors. (IR 21, Exh. A at p. 24, ll. 5-11.) She receives notices of all Board meetings and a "board packet" prior to each regular meeting. She is given the opportunity to ask questions and discuss fully in open session all non-confidential matters of the Association. (IR 21, Exh. A at p. 88, ll. 1-24.) Although she complained during the

hearing that she was forced to ask more questions during Board meetings than any other Board member, in prior statements she characterized this same fact as a *benefit* of the screening, stating that it enables her to be more effective in carrying out her obligations as a Board member:

> Not having any communication from the board about what they are doing gives me more opportunity to bring these items before the public in open meetings and indeed it forces me to act in this way as I have an obligation to the community as an elected member to address these issues.
>
> I am having a good time "helping" them to see the error of their ways.

(Tr. 8/12/15, at p. 54, l. 17 – p. 56, l. 13; IR 21, Exh. A at its Exh. 11.) Considering that she was re-elected for a second term after the screening began, Plaintiff's assessment that she is actually more effective as a screened member appears to be shared by other members of the community. (Tr. 8/12/15, at p. 32, ll. 1-15.)

Conversely, the Association presented evidence that compelling the Association to grant Plaintiff access to confidential and sensitive information of the Association, without any commitment from Plaintiff that she would maintain such information as confidential, would expose the Association to a substantial risk of irreparable harm.

Scott Carpenter, an Arizona attorney with expertise in homeowners' association law and governance, explained to the trial court the difficulty the Association faces in this situation:

. . . .

So ponder away [sic] to protect the corporation from one director who has their own notion about what's right. Ask your lawyer, I don't know how a board could be more compliant with the intent of the statute for directors to act in a way like an ordinarily prudent person would. In this case I happen to agree with the advice that Mr. Maxwell's office gave the association, that given the facts as they were, that the only thing they could do was to screen her from this information.

Q. Okay. So you are talking about the decision to screen Ms. McNally from executive sessions after she read the Martens e-mail at the open meeting, correct?

A. Right.

Q. And so it's your opinion that that decision as well was reasonable for the board?

A. I don't know what else they could have done.

Q. You heard Ms. McNally testify that she, as a board member, acts on her principles?

A. Yes.

Q. On her personal principles?

A. I did.

Q. Is that appropriate for a board member?

A. Well, in a sense I understand it, that everyone has an internal compass. The problem is that under [A.R.S. §] 10-3830, if that internal compass is different than what an ordinarily prudent person would do under the same or similar circumstances, it's absolutely inappropriate to claim that your internal compass will

guide your decision-making. To me, it's a disqualifier because every director should be able to look at A.R.S. [§] 10-3830 and either agree or disagree they are going to act in good faith using ordinary care and prudence what they reasonably [believe] to be in the best interests of the corporation. When someone says, I will be guided by something different than that, then the corporation's between a rock and hard place. They are stuck with the director because the members put the director on the board. But then they have to decide how to work [with] a director who has said, I will be guided by something other than what the law says.

. . . .

Q. One of the things that has not been discussed today is the potential harm to the association if the Court were to order that the Board of Directors must allow Plaintiff to have access to executive session material. Do you have an opinion on that?

A. Well, as an abstraction. I would always be concerned about a director having accessed information when they have explicitly stated they will decide on their own what will be important to the membership or not.

If you grant the injunction on a going forward basis as opposed the actual harm would be a function of the information and what she actually does with it, her stated intent notwithstanding. And so I would consider it harmful because it's so unpredictable.

(Tr. 8/12/15, p. 111, l. 19 – p. 112, l. 11; p. 115, l. 13 – p. 117, l. 21.) After carefully weighing these competing hardships, the trial court denied Plaintiff's request for a preliminary injunction. (Tr. 8/12/15, p. 141, l. 7 – p. 145, l. 6; p. 152, l. 9 – p. 175, l. 9.)

ISSUE PRESENTED FOR REVIEW

Whether the trial court abused its discretion in denying Plaintiff's Application for a Preliminary Injunction compelling the Association to permit Plaintiff to attend executive sessions of the Association's Board of Directors where Plaintiff admitted that, prior to being excluded, she intentionally had revealed information discussed during executive session, and if permitted to return, she would do so again.

ARGUMENT

This Court reviews the denial of a preliminary injunction for an abuse of discretion. *Valley Med. Specialists v. Farber*, 194 Ariz. 363, 366, ¶ 9 (1999). A trial court may grant a preliminary injunction if the movant establishes a strong likelihood of success on the merits, the possibility of irreparable injury without the requested relief, a balance of hardships favoring the movant, and public policy favoring the injunction. *See Ariz. Ass'n of Providers for Persons with Disabilities v. State*, 223 Ariz. 6, 12, ¶ 12 (App. 2009). The trial court evaluates these factors on a "sliding scale," and may issue a preliminary injunction if the movant establishes either (1) probable success on the merits and the possibility of irreparable injury, or (2) the presence of serious questions going to the merits and that the balance of hardships tips sharply in the movant's favor. *See id.* at 12, ¶¶ 12-13.

The trial court concluded that Plaintiff failed to carry her burden to establish that she was entitled to a preliminary injunction. The record, as summarized above, amply supports this conclusion.

I. Plaintiff Failed to Establish a Strong Likelihood of Success on the Merits.

In her failed Motion for Summary Judgment, subsequent Application for Preliminary Injunction, at the evidentiary hearing, and now in her brief to this Court, Plaintiff argues that she has an absolute right to access the confidential and sensitive information of the Association and to disclose that information as she sees fit, and that the Association is powerless to do anything about it. This is not the law.

A. Arizona law authorizes the Association to take reasonable measures to protect against the unauthorized disclosure of confidential and sensitive information of the Association.

As with any other corporation, certain information maintained by the Association is not intended to be discussed publicly and in fact must be protected against disclosure. Arizona law governing community associations expressly provides that records relating to any of the following matters may be withheld from disclosure:

1. Privileged communication between an attorney for the association and the association.

2. Pending litigation.

3. Meeting minutes or other records of a session of a board meeting that is not required to be open to all members pursuant to section 33-1804.

4. Personal, health or financial records of an individual member of the association, an individual employee of the association or an individual employee of a contractor for the association, including records of the association directly related to the personal, health or financial information about an individual member of the association, an individual employee of the association or an individual employee of a contractor for the association.

5. Records relating to the job performance of, compensation of, health records of or specific complaints against an individual employee of the association or an individual employee of a contractor of the association who works under the direction of the association.

A.R.S. § 33-1805(B). In addition, Arizona law expressly authorizes an association's board of directors to meet in a closed or executive session to discuss the matters identified above. *See* A.R.S. § 33-1804(A).

The Martens e-mail, which consisted of unsubstantiated allegations of misconduct by a former employee of the Association against two current employees of the Association, was plainly within the scope of A.R.S. § 33-1805(B)(5). (IR 25, Exh. E at p. 4.) As such, it was entirely appropriate for the Board of Directors to address the e-mail in executive session. Conversely, it was entirely *in*appropriate for Plaintiff to raise the matter for discussion during the open session of the Board of Directors, particularly where she was doing so in knowing and willful disregard of the advice of the Association's general counsel, and contrary to the consensus of her fellow Board members. (IR 23, Exh. D at ¶ 15; Tr. 8/12/15, at p. 40, l. 18 – p. 44, l.

21.) Simply put, Plaintiff's conduct during the September 4, 2013 Board of Directors meeting breached her duties as a Director of the Association. (IR 25, Exh. E at pp. 1-4.) This was not the first time that Plaintiff had disclosed confidential information of the Association, and she flatly refused to agree that she would not do so in the future. (Tr. 8/12/15, at p. 144, ll. 12-20.) Under these circumstances, the Association's counsel recommended that the Board of Directors screen Plaintiff from receiving such information. (Tr. 8/12/15, at p. 115, ll. 13-21; Trial Exh. 60, Appendix for Appellant's Opening Brief – Filed Under Seal, 1/19/16, at APP 388-89.)

Arizona law expressly authorizes the directors of a nonprofit corporation to create one or more committees to exercise the Board's authority in specified matters. *See* A.R.S. § 10-3825. This is exactly what the Board of Directors did when it voted to accept the recommendation of the Association's counsel to screen Plaintiff from executive sessions. (*See* Tr. 8/12/15, p. 127, l. 20 – p. 129, l. 19.)

Further, Plaintiff's argument that the Association lacks the power to limit her access to confidential and sensitive information of the Association by screening her from participating in executive sessions is without basis in law or logic. First, no member of the Association, whether elected to the Board of Directors or not, has an unfettered right to confidential and sensitive business information of the Association. (IR 25, Exh. E at p. 4.) Second, as discussed *supra*, information that falls within

A.R.S. § 33-1805(B) expressly is protected against disclosure as a matter of state law. The Association's Bylaws empower the Board of Directors to manage the affairs of the Association and "[t]o exercise all financial, legal, . . . and any other powers granted under the laws of the State of Arizona." (IR 22 at Exh. C, bates nos. HOA 187-88.) The President is charged with directing the Association according to the policies established by the Board of Directors, the Bylaws, and state law. (IR 22 at Exh. C, bates no. HOA 189.) It follows that where the law expressly protects certain information of the Association against disclosure, the President and the Board of Directors are empowered to take steps to protect against the unauthorized disclosure of such information, including creating a committee to handle such matters as a way to control the dissemination of protected information. (*See* A.R.S. § 10-3825; Tr. 8/12/15, at p. 111, l. 19 – p. 113, l. 20.)

The Association acknowledges that its Board of Directors has an obligation to act reasonably in the exercise of its powers. (*See, e.g., Tierra Ranchos Homeowners Ass'n v. Kitchukov*, 216 Ariz. 195, 201, ¶ 25 (App. 2007); *see also* Tr. 8/12/15, at p. 113, l. 21 – p. 114, l. 18.) Although on appeal Plaintiff accuses the Association's Board of Directors of various types of misconduct, it is important to note that none of Plaintiff's accusations are supported by citations to record evidence. That is because at the evidentiary hearing, Plaintiff presented no evidence demonstrating that the

Board's decision to screen Plaintiff was arbitrary and capricious, unreasonable, or in bad faith. The evidence was all to the contrary.

The Board of Directors investigated the allegations of the Martens e-mail and the President of the Board consulted with the Association's general counsel for advice concerning the handling of the e-mail. (Tr. 8/12/15, at p. 72, ll. 3-20; p. 73, ll. 9-13; p. 69, ll. 14-23.) The Board discussed that advice in executive session and a majority of the Board voted to follow it. (IR 23, Exh. D at ¶ 15.) After Plaintiff disregarded the advice of counsel and the decision of a majority of her fellow Board members, the Association's counsel sent Plaintiff a letter advising Plaintiff that her conduct during the September 4, 2013 Board meeting violated her duties as a Board member, and advising Plaintiff of his recommendation that the Board screen her from participating in executive sessions in the future. (IR 21, Exh. A at p. 64, ll. 5-18 & Exh. 18.) Plaintiff responded by insisting that her conduct was appropriate because she did not agree with counsel's advice or the Board's decision to follow that advice. (IR 21, Exh. A at p. 64, l. 20 – p. 65, l. 4 & Exh. 9 at bates nos. HOA 7-8.) Repeatedly throughout these proceedings – including during direct examination by the trial court at the evidentiary hearing – Plaintiff has made clear that she will not maintain as confidential the information that is discussed during executive sessions, unless she personally agrees that the information should not be disclosed. Plaintiff believes that

it is her right to publicly air information that she determines, in her sole and unfettered discretion, should not be kept confidential. Plaintiff has a history of violating her duties to the Association in this manner and of subjecting the Association to liability in the process. Under these circumstances, the Board's decision to screen Plaintiff from executive sessions is more than just reasonable – it is the only practical option available. (Tr. 8/12/15, at p. 115, ll. 18-21.)

B. Plaintiff's reliance on authorities from New York and elsewhere applying New York law or general laws of corporate governance is misplaced.

Plaintiff's Opening Brief fails to address controlling Arizona law, relying instead on authorities from New York and elsewhere applying general laws of corporate governance from those jurisdictions. Almost without exception, these authorities address the authority of the board of directors of a corporation to *remove* a director. *See Stroud v. Milliken Enter., Inc.*, 585 A.2d 1306, 1309 (Del. 1988) (noting that directors generally do not have the power under Delaware law to remove fellow director); *Smith v. Snowden*, 156 A.D.2d 693, 694 (N.Y. 1989) (holding that chairman of co-op's board of directors lacked authority to unilaterally remove petitioner from board); *Brevetti v. Tzougros*, 247 N.Y.S.2d 295, 296 (N.Y. App. 1964) (granting injunction restraining defendants from enforcing removal and directing defendants to reinstate plaintiff as a director); *Holmes v. United Mut. Life Ins. Co.*, 286

A.D. 500, 503 (N.Y. 1955) (affirming petitioner's removal as secretary but invalidating removal as a director under state law); *Bruch v. National Guar. Credit Corp.*, 116 A. 738, 741 (Del. 1922) (holding that director of an industrial corporation cannot be removed by his fellow directors); *Raub v. Gerken*, 127 A.D. 42, 44 (N.Y. 1908) (holding that, in the absence of any specific statutory authority or provision in corporation's bylaws, board of directors lacks power to expel fellow director from the board); *Laughlin v. Geer*, 121 Ill. App. 534, 539 (1905) (invalidating under Illinois law bylaw of corporation authorizing board of directors to remove fellow director for cause). The Association has not removed or even attempted to remove Plaintiff from the Board of Directors – she has continued to serve as a Director since the Association began screening her from executive sessions in September 2013, and was even re-elected to a second term in February 2014. (IR 21, Exh. A at p. 24, ll. 5-11; Tr. 8/12/15, at p. 32, ll. 1-15.) Plaintiff continues to participate in Board meetings and to vote on matters that come before the Board. (IR 21, Exh. A at p. 88, ll. 1-24.) She is simply screened from receiving information protected against disclosure under Arizona law.

The single authority that Plaintiff cites that addresses a similar prohibition is also distinguishable. *See People ex rel. Muir v. Throop*, 12 Wend. 183, 187 (N.Y. App. 1834) (holding that a corporation could not preclude director's access to the

corporation's books where director could be held liable civilly and criminally for the improper conduct of the corporation). As the director of a non-profit community association, Plaintiff is protected against liability for the conduct of the corporation under Arizona law, as long as she herself acts in good faith. *See* A.R.S. § 10-3852(A).

Ultimately, the trial court denied Plaintiff's request for a preliminary injunction because Plaintiff would not commit under oath to maintaining the confidentiality of matters discussed in executive session unless she herself agrees that the matters should remain confidential. The trial court correctly concluded that Plaintiff could not prevail on the merits of her claims for declaratory and injunctive relief under these circumstances. (Tr. 8/12/15, at p. 174, l. 25 – p. 175, l. 9.)

II. Plaintiff Failed to Establish That the Screening is Causing Her Any Injury.

Plaintiff offered no evidence that she is suffering harm, let alone irreparable harm, as a result of being screened from executive sessions of the Board. Plaintiff has continued to serve as a member of the Association's Board of Directors. (IR 21, Exh. A at p. 24, ll. 5-11.) She receives notice of all Board meetings and a "board packet" prior to each regular meeting. (IR 21, Exh. A at p. 88, ll. 1-11.) She, along with the rest of the Board, receives weekly reports from the Association's General Manager. (Tr. 8/12/15, at p. 33, ll. 15-25.) Plaintiff is given the opportunity to ask questions and discuss fully in open session all non-confidential matters of the Association. (IR 21,

Exh. A at p. 88, ll. 13-24.) Although Plaintiff complained at the evidentiary hearing that she feels like she is not "in the loop" and that she believes the other members of the Board exchange e-mails with one another that do not include her, other Board members testified that every effort is made to engage Plaintiff in important decisions. (Tr. 8/12/15, at p. 32, l. 1 – p. 33, l. 14; p. 68, ll. 17-22.) The only limitation on Plaintiff is that she is screened from receiving confidential information protected against disclosure under A.R.S. § 33-1805. Although this restriction clearly causes Plaintiff hurt feelings and personal outrage, it does not as a practical matter impair her function as a Board member. Moreover, money damages are available to compensate Plaintiff for the personal wrongs that she claims, and Plaintiff is pursuing such damages through her claims for breach of contract, defamation, false light, and punitive damages. Plaintiff's delay – of almost two years – in seeking a preliminary injunction also supports the conclusion that she has failed to show sufficient harm not remediable by damages. *See Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v. Turner*, 196 Ariz. 631, 635, ¶ 9 (App. 2000) (noting that court sitting in equity should consider delay on the part of plaintiff seeking injunctive relief.)

The trial court properly denied Plaintiff's application for a preliminary injunction where she failed to carry her burden to establish even the possibility of irreparable injury due to the screening.

III. Public Policy and the Balance of Hardships Support the Trial Court's Denial of a Preliminary Injunction.

When weighed against the potential harm to the Association arising from the unauthorized disclosure of confidential information, Plaintiff's sense of personal outrage at being restricted from accessing that confidential information simply cannot carry the day. The trial court properly denied Plaintiff's request for a preliminary injunction.

A. Disclosure of the Martens e-mail contravened public policy.

Public policy, as embodied in A.R.S. §§ 33-1804(A) & - 1805(B), expressly favors protecting confidential and sensitive information of community associations against unauthorized disclosure. Because Plaintiff repeatedly has violated these statutes during her service on the Board, and because she has stated – repeatedly, and under oath – that she will not hesitate to do so again, the only way that the Association can prevent Plaintiff from disclosing such information is to ensure that she does not have access to it.

B. The balance of hardships tips in favor of the Association.

Aside from screening, the only alternative available to the Association would be to undertake the expense of a removal election to actually remove Plaintiff from the Board. The Association has already gone down that path and incurred that expense once, only to have Plaintiff successfully run for office the following year. (IR

21, Exh. A at p. 22, l. 13 – p. 24, l. 11; IR 23, Exh. D at ¶¶ 5, 7.) As the trial court noted, Plaintiff's argument that the Association somehow deprived Plaintiff of due process by excluding her from executive sessions without first suing her and obtaining an injunction to that effect is wholly unsupported by any citation to authority. (Tr. 8/12/15, at p. 141, l. 7 – p. 142, l. 9.) Both Arizona law and the Association's bylaws contravene Plaintiff's argument that she has an absolute right to participate in executive sessions or otherwise access confidential information of the Association.

C. Mandatory preliminary injunctions are disfavored under the law.

Preliminary injunctions are primarily issued to preserve the status quo. Mandatory preliminary injunctions, such as the one Plaintiff is seeking in this case, are particularly disfavored under the law, and should be denied unless the facts and law clearly favor the moving party. *See, e.g., Transwestern Pipeline Co., LLC v. 17.19 Acres of Property Located in Maricopa Cnty.*, 550 F.3d 770, 776 (9th Cir. 2008).

Here, the facts and the law clearly do not favor Plaintiff. The Martens e-mail, which consisted of unsubstantiated allegations of misconduct by a former employee of the Association against two current employees of the Association, was plainly within the scope of A.R.S. § 33-1805(B)(5). Plaintiff freely admits that she disregarded the advice of the Association's general counsel, the direction of the President, and the consensus reached by a majority of her fellow Board members that

the Martens e-mail should not be shared with the community or discussed at an open meeting of the Board of Directors, and that she did so to serve her own interests. (Tr. 8/12/15, at p. 40, l. 18 – p. 44, l. 21; p. 50, ll. 1-13.)

D. Plaintiff's unclean hands preclude equitable relief.

Plaintiff, in her capacity as a Director at a public meeting of the Association's Board of Directors, published the Martens e-mail with the knowledge that the employees named in the Martens e-mail denied its allegations, and that by circulating the Martens e-mail she could be exposing the Association to claims by those employees. She proceeded because she believed that she was entitled to have the Martens e-mail circulated as vindication for the incident described in that e-mail, which involved the public outing in 2011 of "ethically questionable" conduct of Plaintiff and two other Board members. (Tr. 8/12/15, at p. 46, l. 24 – p. 50, l. 13.) Whether or not the Board and the Association's general counsel were right or wrong in their assessment and handling of the Martens e-mail, it clearly was wrong for Plaintiff to raise the matter for discussion during the open session of the Board of Directors, particularly where she was doing so in knowing and willful disregard of the advice of the Association's general counsel, contrary to the consensus of her fellow Board members, and to serve her own personal interests. Under these facts, Plaintiff's unclean hands precluded the trial court from granting her equitable relief as a matter

of law. *See Gibson v. Duncan*, 17 Ariz. 329, 332 (1915) (holding that party seeking equitable relief must demonstrate that he is "free from fault; that his own hands are clean").

IV. The Trial Court Properly Limited the Issues at the Evidentiary Hearing.

Plaintiff argues that the trial court erred by refusing at the evidentiary hearing to consider the merits of Plaintiff's allegations that the Association's Board of Directors "habitually violates the Open Meeting Law" by discussing in executive session matters that should be discussed in open session. (Opening Brief at p. 48.) For the reasons just discussed, the Board's alleged errors in determining what may and may not be discussed in executive session do not justify or vindicate Plaintiff's conduct, nor do they have any relevance whatsoever to the limited issues that were before the trial court at the evidentiary hearing. Moreover, the only evidence of these alleged "habitual violations" by the Association's Board of Directors was the minutes of various executive sessions of the Board, and those minutes are hearsay when offered for that purpose. Janice Cournoyer, who served as the Secretary of the Board of Directors, testified that the minutes of executive sessions may not accurately reflect what was discussed in executive session or why a topic was discussed in executive session. (Tr. 8/12/15, at p. 85, l. 6 – p. 86, l. 14.) It would have been necessary for the trial court to hear testimony from these witnesses on each and every executive session reflected in the 22 sets of minutes to try to determine whether the matters

reflected in those minutes were properly discussed in executive session or not, and that evidence was not relevant to the trial court's consideration of whether or not to grant a preliminary injunction requiring the Association to permit Plaintiff to participate in executive sessions.

CONCLUSION

The record demonstrates that Plaintiff knowingly and intentionally revealed information discussed during executive session, and if permitted to return, there is a substantial likelihood that she will do so again. On these facts, the trial court did not abuse its discretion in denying Plaintiff's Application for a Preliminary Injunction compelling the Association to permit Plaintiff to attend executive sessions. The Association respectfully requests that this Court affirm.

RESPECTFULLY SUBMITTED this 4th day of March, 2016.

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