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**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

COLETTE MCNALLY,

Plaintiff/ Appellant,

-vs-

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

Defendant/ Appellees.

COURT OF APPEALS

CASE NO.: 1 CA-CV-15-0744

MARICOPA COUNTY SUPERIOR
COURT NO. CV2014-009496

JUDGE: Honorable James T. Blomo

**APPELLANT'S AMENDED
APPLICATION FOR AWARD OF
ATTORNEYS' FEES AND
COSTS ON APPEAL
PURSUANT TO ARCAP 21(a)**

Pursuant to Rule 21 of the Arizona Rules of Civil Appellate Procedure and the Opinion entered on October 16, 2016, Appellant Colette McNally, respectfully requests that this Court enter an Order awarding her

the attorneys' fees and costs she incurred as a result of the above appeal. As the Court noted in Opinion, Appellant's entitlement to an award of attorneys' fees and costs is based on A.R.S. § 12-341.01 and § 12-341, respectively. This Application, including the simultaneously submitted Affidavit of Steven W. Cheifetz, and the detailed billing records, are submitted in support of the amount the Appellant seeks to recover as follows:

Attorneys' Fees	\$54,323.00
Taxable Costs	\$1,144.23
TOTAL:	\$55,467.23

Appellant's request is supported also by the Memorandum of Points and Authorities below.

RESPECTFULLY SUBMITTED this 3rd day of November, 2016.

CHEIFETZ IANNITELLI MARCOLINI, P.C.

By: /s/ Steven W. Cheifetz
Steven W. Cheifetz
Attorneys for Appellant

MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to the Court of Appeals Opinion entered on October 13, 2016 in her favor, Appellant Colette McNally respectfully requests that this Court enter an order awarding her reasonable attorneys' fees and taxable costs incurred in her appeal, in accordance with A.R.S. § 12-341.01 and § 12-341, respectively. This Application, along with the separately filed Affidavit of Steven W. Cheifetz and the detailed billing records, are submitted in support of the amount of fees and taxable costs that Appellant seeks to recover.

I. INTRODUCTION/FACTUAL AND PROCEDURAL HISTORY.

Despite being a duly-elected member of the Board of Directors (the "Board"), in September 20, 2013, the Board voted to exclude McNally from all the executive sessions meetings for the balance of her term (which ends March 2017). On July 8, 2014, McNally filed a Verified Complaint seeking declaratory and injunctive relief to, among other things, reinstate her Board privileges and stop the Association's continuing violations of Arizona's Open Meeting Laws. Following an evidentiary hearing, the superior court denied McNally's request for preliminary injunction to restore her Board privileges. Given the approaching expiration of McNally's term on the

Board, McNally filed a Petition for Special Action, which required legal research and writing concerning the questions that would be presented to the Court of Appeals. This Court declined to accept McNally's Petition for Special Action.

In light of the Association's allegations that McNally had disclosed confidential information, McNally undertook the research and then prepared a Motion to File Under Seal. To address the time sensitive nature of the remedy sought, McNally filed the first of two Motions to Expedite Appeal. On January 19, 2016, McNally filed her Opening Brief which contained the substantive arguments that had been researched and argued in Appellant's Petition for Special Action. This Court denied the Motion to Expedite the Appeal but once the parties had fully briefed the appeal, McNally filed the second Motion to Expedite Appeal, which the Court granted. Nearly a year after first asserting her appeal, this Court finally heard oral argument on September 14, 2016, and issued its decision on October 13, 2016.

II. THE COURT OF APPEALS DECISION.

This Court concluded that the superior court erred in denying McNally's application for a preliminary injunction holding that Arizona

law nor the Association's bylaws authorized the Board to pass a motion excluding McNally from the executive sessions. On the other hand, Arizona law and the Association bylaws expressly require McNally to participate in managing the affairs of the Association. The Board's action to exclude McNally from all executive sessions prevented her from performing these duties and responsibilities. This Court concluded that the Association did not have the authority to exclude McNally from the executive sessions and that the trial court should have entered a preliminary injunction.

III. MS. MCNALLY SHOULD RECEIVE ALL HER REASONABLE ATTORNEYS' FEES INCURRED AT THE COURT OF APPEALS.

As noted by this court in its Opinion, McNally is entitled to recover her reasonable attorneys' fees. This Court said, "[a]s prevailing party on appeal, we award McNally her reasonable attorneys' fees and costs incurred on appeal." The Court's decision is made in accordance with Arizona law, which provides that "In any contested action or as the end of a contract, express or implied, the court may award the successful party reasonable attorneys' fees." A.R.S. § 12-341.01.

Examining the reasonableness of McNally's fees—significant, but all actually and necessarily incurred. The law supports McNally's request. "The prevailing party on appeal is 'entitled to recover a reasonable attorney's fee for every item of service which, at the time rendered, would have been undertaken by a reasonable and prudent lawyer to advance or protect his client's interest in the pursuit' of a successful appeal." *Schweier v. China Doll Restaurant*, 138 Ariz. 183, 673 P.2d 927 (App. 1983) citing *Twin City Sportservice v. Charles O. Finley & Co.*, 676 F.2d 1291, 1313 (9th Cir.), cert. denied, 459 U.S. 1009, 103 S. Ct. 364 (1982).

All of the legal work expended on McNally's appeal was necessary and prudent. Because the relief sought by McNally was and continues to be time sensitive, as soon as the superior court denied her request for a preliminary injunction, she commenced the most expeditious appellate procedure to secure a solution: a Petition for Special Action. Although this Court did not accept jurisdiction, the time and effort to prepare the pleadings were not lost. The legal work completed for the Petition for Special Action was incorporated into Appellant's Opening Brief. Along with the Opening Brief, McNally filed a Motion to Expedite Appeal Pursuant to ARCAP 3(a).

Given the allegations on which the Association justified its decision to exclude McNally from the executive sessions—that she had disclosed “confidential” information—McNally also prepared and filed a Motion to Seal. This Court granted the Motion to Seal, again, a motion necessitated the Association’s allegations, which thereafter resulted in a more cumbersome process for all filings throughout the appeal.

A review of the contemporaneously-prepared time slips indicate that McNally’s legal work was not only necessary, but was the responsible and prudent means for securing McNally’s right to faithfully fulfill her duties as a Board member. All of the legal work that Appellant incurred in preparing McNally’s appeal, was actually and necessarily performed. *See* Affidavit of Steven W. Cheifetz (“Cheifetz Affidavit”), contemporaneously filed herewith.

It is long settled in Arizona that a court will consider the follows to determine with the fees sought are reasonable: (1) the ability, training, education, experience, professional standing and skill of the lawyer; (2) the character of the work to be done (i.e. difficulty, time and skill required); (3) the work the skill, time and attention given to the work actually performed

by the lawyer; and (4) whether the attorney was successful. *See China Doll*, 138 Ariz. at 188, 673 P.2d at 932.

The attorneys' fees charged by McNally's counsel are reasonable, necessary and actually incurred in the efforts to overturn the superior court's denial of preliminary injunction. The contemporaneously-prepared billing statements attached to the Cheifetz Affidavit indicate the type of legal services provided, the date of service, the attorney providing the service, and the time spent. Likewise, counsel's affidavit explains that all of the services rendered were necessary and prudent to achieve the results. *See Cheifetz Affidavit and billing statements attached thereto as Exhibit 1.*

Finally, attorneys' fee expended for preparation of post-decision pleadings, including the cost to prepare the fee application and supporting documents are properly compensable. *Klatzke v. Moran*, 140 Ariz. 492, 493, 682 P.2d 1159, 1160 (App. 1984). Accordingly, McNally's billing statements and fee application includes those attorneys' fees actually incurred in preparing the fee application.

The Arizona Supreme Court has outlined six factors that courts will consider in determining whether to grant attorneys' fees and costs:

- (1) whether the unsuccessful party's claim or defense was meritorious;
- (2) whether the litigation could have been avoided or settled and the successful party's efforts were completely superfluous in achieving that result;
- (3) whether assessing fees against the unsuccessful party would cause an extreme hardship;
- (4) whether the successful party prevailed with respect to all the relief sought;
- (5) whether the legal question was novel and whether such claim or defense has previously been adjudicated in this jurisdiction; and
- (6) whether the award would discourage other parties with tenable claims or defenses from litigating or defending legitimate contract issues for fear of incurring liability for substantial amounts of attorneys' fees.

Newbery Corp. v. Fireman's Fund Ins. Co., 95 F.3d 1392, 1405–06 (9th Cir. 1996) citing *Associated Indemnity Corp. v. Warner*, 143 Ariz. 567, 694 P.2d 1181, 1184 (1985).

First, McNally sought injunctive relief to cure an ongoing harm suffered as a result of the Association's unauthorized acts. Although the superior court rejected her Application for Preliminary Injunction, this Court recognized the superior court's error and reversed. This Court agreed that the Association did not have the discretionary power to exclude McNally from all of its executive sessions. The Association did not have a meritorious defense: rather than follow the law, the Association

resorted to an unlawful self-help remedy. This Court correctly identified lawful means the Association could have followed to protect confidential information if it thought McNally had not met her duties as a duly-elected member of the Board. Later, the Association conceived of an argument to justify its action: that it had created a “special committee” which consisted of the every member of the Board, except for the McNally. The Court rejected this defense as well and noted that the Association could have undertaken other authorized courses of action to protect allegedly confidential information. When the Association devised a new argument, that McNally was barred from obtaining equitable relief under the doctrine of unclean hands, this Court rejected this defense. This Court unequivocally concluded that even if the Association could demonstrate McNally had unclean hands, the Board did not have the lawful authority to pass a motion barring McNally from all of its executive sessions.

Second, although the parties discussed settlement of the dispute, McNally would not accept the Association’s conditions for settlement. The Association demanded that McNally admit that the contents of the email she read in the open session, were false. McNally did not prepare the email and indeed, the subject of the email was the concern that McNally sought

to raise in the open session. At all times during settlement discussions, McNally unequivocally stated that she would follow the law so as to satisfy fully the duties and responsibilities of a Board member, recognizing that her duties were owed to the members of the Association, not to the Board. McNally made clear that if the Board discussed items in the executive session that should be done in open sessions, she could not and would not promise to keep such matters confidential.

Importantly, A.R.S. § 33-1804, makes clear that executive sessions are voluntary, not mandatory. In other words, all Board meetings and discussions concerning Association business can be carried out in open session. There is no requirement that the Board adjourn to a closed session. Section 33-1804 provides that “Any portion of a meeting may be closed only if that closed portion of the meeting is limited to consideration of” specifically defined topics. A.R.S. § 33-1804(A)(1)–(4) (emphasis added). McNally agreed to perform her duties faithfully, but the Association refused to discuss any settlement unless McNally made a blanket promise that she would not disclose anything discussed in executive session. Moreover, at no time did the Association offer to pay McNally’s attorneys’ fees she was forced to incur to secure her position as a member of the

Board. In light of the strong policy in favor of open meetings, this entire case could have been avoided had the Association simply followed both the spirit and the letter of Arizona law and the Association bylaws. *See* A.R.S. § 33-1804(E) (“[A]ny person or entity that is charged with the interpretation of these provisions shall take into account this declaration of policy and shall construe any provision of this section in favor of open meetings.”).

Third, the Association is a large home owner association for a “resort vacation lifestyle and country club living” community with thousands of dues-paying members, from which the Association can finance its defense.¹ On the other hand, McNally is a retired school teacher and single homeowner. As a result of the unlawful acts by Association, McNally was forced to hire a lawyer to pursue and ultimately secure the preliminary injunction restraining the Association from its unlawful exclusion of McNally from so-called executive sessions, effectively preventing her from performing her duties.

¹ Moreover, the Association Bylaws specifically empower the Association to indemnify any person who is a party to an action, suit or proceeding by reason of the fact that he is or was a member, director, officer of the Association.

If this Court does not award McNally all of her attorneys' fees, it will be McNally who will suffer an extreme hardship. To be clear, the Association excluded McNally from executive sessions and effectively prevented her from performing her duties as a director. As a result, McNally is left with two options: ignore *her* duties as a director and responsibilities to the members of the Association, or file a lawsuit to force the Association to allow her to her rights as a duly elected director. This case is a classic example of David vs. Goliath: a single senior citizen attempting to enforce her rights.

Fourth, McNally has prevailed on the most important issue presented on appeal: the superior court's denial of McNally's application for preliminary injunction—a remedy that McNally needed immediately due to the time-sensitive nature of her term as a member of the Board.

Next, the legal issue presented on appeal was somewhat novel. There are no reported decisions in Arizona on point, perhaps because no other homeowner association so blatantly violated the law or because no single member could finance the legal battle and defense mounted by the wealthy Association. In the absence of the reported decisions on point, but with a clear example of unauthorized actions by a recalcitrant Association,

McNally bore the financial burden of bringing the Board and Association back in line with Arizona law and the Association Bylaws.

Finally, an award of McNally's attorneys' fees will not discourage other parties with tenable claims or defenses from litigating or defending *legitimate* contract issues for fear of incurring liability for attorneys' fees. However, if this Court does not award McNally her attorneys' fees, that decision could have the unintended consequence of encouraging a homeowner associations to draw out and delay litigation with the goal of outspending a single homeowner seeking to reign in its unauthorized acts.

More than two years into a three year term, and more than a year after filing her Petition for Special Action, McNally has finally secured a decision from this Court finding that the Association did not have the authority to exclude her from executive sessions. Having already concluded in its Opinion that McNally is entitled to an award of her reasonable attorneys' fees, and after considering the factors above, McNally requests that this Court conclude that the fees outlined in the Cheifetz Affidavit that she incurred in her successful appeal are reasonable and enter an award for the same.

In accordance with Rule 21(b)(3), and this Court's decision, McNally also seeks her taxable costs in the amount of **\$1,144.23**. The taxable expenses are detailed in **Exhibit 1** to the separately filed Cheifetz Affidavit.

VI. CONCLUSION.

As noted in this Court's Opinion, McNally is entitled to an award of her attorneys' fees and costs incurred in the appeal. The fees are reasonable, were necessarily incurred and should be awarded.

RESPECTFULLY SUBMITTED this 3rd day of November, 2016.

CHEIFETZ IANNITELLI MARCOLINI, P.C.

By: /s/ Steven W. Cheifetz
Steven W. Cheifetz
Attorneys for Appellant

ORIGINAL of the foregoing e-filed
with the Court of Appeals and a **COPY**
mailed and e-mailed this 3rd day of November, 2016, to:

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