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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

WILLIAM M. BROWN, an individual,

Plaintiff,

v.

Case No. CV2017-055475

**TERRAVITA COUNTRY CLUB,
INC., an Arizona non-profit
corporation; STERLING J. LAAVEG,
President TCC, Inc., and his spouse;
PAUL DAVID TOLK, Vice President
TCC Inc., and his spouse; WILLIAM
H. GREIG, Secretary TCC, Inc., and
his spouse; MICHAEL T.
ELLINGTON, Treasurer TCC, Inc.,
and his spouse; JOHN DOES I-X and
JANE DOES I-X and their spouses;
CARPENTER, HAZLEWOOD,
DELGADO & BOLEN, PLC; JOSHUA
M. BOLEN 024053; ANJALI J.
PATEL 028138,**

Defendants.

**MOTION TO DISMISS BOARD OF
DIRECTOR DEFENDANTS LAAVEG,
TOLK, GREIG AND ELLINGTON**

Defendants Sterling J. Laaveg and Jane Doe Laaveg, Paul David Tolk and Jane Doe Tolk, William H. Greig and Jane Doe Greig, and Michael T. Ellington and Jane Doe Ellington, (collectively, the “Director Defendants”) by and through undersigned counsel, hereby move to dismiss Plaintiff’s claims for the reason that Plaintiff has failed to state a

1 claim upon which relief may be granted against the Director Defendants pursuant to Ariz.
2 R. Civ. P. 12(b)(6). This Motion is supported by the pleadings in this matter and the
3 following Memorandum of Points and Authorities, all of which are incorporated by
4 reference.
5

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **I. INTRODUCTION**

8 William M. Brown (“Plaintiff”) is the record owner of property located at 6751
9 East Amber Sun Drive, Scottsdale, Arizona 85266-7029 (“Property”) by virtue of a Joint
10 Tenancy Deed recorded at Instrument No. 2016-0233841, records of Maricopa County,
11 State of Arizona. Plaintiff and the Property are bound members of Terravita County
12 Club, Inc. (“Association” or “TCC”) by virtue of the Club Terravita Social Membership
13 Agreement recorded at Instrument No. 1996-0386532, records of Maricopa County, State
14 of Arizona. TCC is a planned community and non-profit corporation subject to Arizona’s
15 Planned Communities Act codified at A.R.S. § 33-1801 *et seq.*
16
17

18 The Association is governed by a Board of Directors (“Board”). The Board is
19 elected by the members of the Association to enforce its governing documents and
20 administer Association business. Four of these directors, along with their spouses, are
21 each named individually in Plaintiff’s Complaint.
22
23

24 In his complaint, Plaintiff seeks a declaratory judgment finding the Director
25 Defendants in contempt of the final order of the Arizona Department of Real Estate’s
26 (“ADRE”) Case No. HO17-16/005, Docket No. 17F-H1716005-REL, for their willful
27 noncompliance with Arizona law. Plaintiff further asks the Court to sanction each Director
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1 Defendant with a penalty of ten thousand dollars (\$10,000.00) or any other amount found
2 by the Court sufficient to deter further noncompliance. Lastly, Plaintiff requests an award
3 of his taxable costs and any further relief the Court deems appropriate. For the reasons
4 addressed below, the Director Defendants should be dismissed from this matter with
5 respect to all claims.
6

7 **II. LEGAL ARGUMENT**

8 While the Director Defendants dispute Plaintiff's base allegation in his
9 Complaint, this Motion to Dismiss is focused solely on Plaintiff's allegations against
10 the individually named Director Defendants.
11

12 **A. Standard of review**

13 In evaluating a motion to dismiss for failure to state a claim, "well-pleaded material
14 allegations of the complaint are taken as admitted, but conclusions of law or unwarranted
15 deductions of fact are not." *Aldabbagh v. Arizona Dep't of Liquor Licenses & Control*, 162
16 Ariz. 415, 417, 783 P.2d 1207, 1209 (Ct. App. 1989) (citing *Folk v. City of Phoenix*, 27
17 Ariz. App. 146, 150, 551 P.2d 595, 599 (1976)). In doing so, "the court must determine
18 whether the complaint, construed in light most favorable to the plaintiff, sufficiently sets
19 forth a valid claim." *Id.* (citing *Anson v. Am. Motors Corp.*, 155 Ariz. 420, 421, 747 P.2d
20 581, 582 (Ct. App. 1987)).
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22
23

24 For purposes of this motion, Plaintiff's Complaint must be analyzed as if all "well-
25 pleaded material allegations" of the Complaint are true. At the same time, this Court should
26 ignore the Complaint's conclusions of law and unwarranted deductions. In this case,
27 Plaintiff clearly has not stated a claim upon which relief may be granted with regard to his
28

1 claims against the Director Defendants because the ADRE final order is against only the
2 Association and not the Director Defendants. See Exhibit “E” to Plaintiff’s Complaint.

3
4 Further, the Director Defendants *do not owe Plaintiff any duties*. Even if the Court assumes
5 Plaintiff’s allegations are true, the allegations do not give rise to a cognizable cause of
6 action against the Director Defendants as a matter of law.

7
8 **B. Plaintiff fails to state a claim against the Director Defendants upon**
9 **which relief may be granted and, therefore, the Director Defendants**
10 **should be dismissed from this matter with prejudice.**

11 The Director Defendants have been named individually as a party to this action.
12 However, the ADRE final order that is the subject of this proceeding was between Plaintiff
13 and the Association. Importantly, the ADRE matter and final order did not include the
14 Director Defendants as named parties, and the Director Defendants are not individually
15 subject to the ADRE final order. Further, Plaintiff’s Complaint fails to allege that the
16 Director Defendants acted outside the scope of their corporate duties so as to warrant
17 personal liability upon them. It is clear that the Director Defendants were named
18 individually solely to harass them.

19
20 Nonprofit corporations afford protection from liability to individuals acting within
21 the scope of their duties within the corporation. A.R.S. §§ 10-3101 and 10-3830. Pursuant
22 to Arizona law, “where the corporation is shown to be the alter ego or business conduit of a
23 person, and where observing the corporate form would work an injustice, a court may
24 properly pierce the corporate veil.” *Standage v. Standage*, 147 Ariz. 473, 476, 711 P.2d
25 612, 615 (Ariz.App. 1985), citing *Dietel v. Day*, 16 Ariz.App. 206, 492 P.2d 455 (1972).
26
27 Here, no such facts have been alleged. Plaintiff fails to allege any argument that the
28

1 Director Defendants were parties to the ADRE final order Plaintiff seeks to have enforced.
2 Plaintiff fails to allege any argument that the Director Defendants acted in any way outside
3 the scope of their corporate duties or other basis for the Court to pierce the corporate veil
4 and impose sanctions against the Director Defendants in this case. It is inappropriate to
5 allow this matter to proceed against the Director Defendants individually. Plaintiffs simply
6 fail to state a claim upon which relief may be granted against an individual by virtue of the
7 individual's position within the corporation. For this reason, the Director Defendants
8 should be dismissed from this action with prejudice.
9
10

11 **C. Plaintiff's claims against the Director Defendants fail as a matter of law**
12 **because their claims are neither derivative nor do they establish basis**
13 **for a direct action against the Director Defendants.**

14 Plaintiff's Complaint insinuates that the Director Defendants breached their
15 fiduciary duties owed to Plaintiff by willfully denying the ADRE final order. Generally
16 speaking, directors owe fiduciary duties only to the Association, not the individual
17 homeowners, or members of the nonprofit corporation. *See e.g. Atkinson v. Marquart*,
18 112 Ariz. 304, 306, 541 P.2d 556, 558 (1975); *Master Records, Inc. v. Backman*, 133
19 Ariz. 494, 499, 652 P.2d 1017, 1022 (1982). As the *Master Records* Court explains:
20

21 At the outset, we recognize that [t]he fiduciary relation of the
22 corporate officers to the corporation ... imposes upon them
23 the obligation to serve the purpose of their trust with fidelity,
24 and forbids the doing of any act by them, or by any one of
25 them, by which the assets of the corporation are wrongfully
diverted from corporate purposes.

26 *Id.* (citing 3A W. Fletcher, *Cyclopedia of the Law of Private Corporations* §
27 1102 (rev.perm.ed.1975)) (internal quotations omitted).
28

1 For directors of non-profit corporations, each director is presumed to have met
2 that duty absent clear and convincing evidence to the contrary. Ariz. Rev. Stat. Ann. §
3 10-3830; see also 7 Ariz. Prac., Corporate Practice § 13:68 (“A director is presumed in
4 all cases to have acted in accordance with the standard, and the burden is on the party
5 challenging a director's action, failure to act or other discharge of duties to establish by
6 clear and convincing evidence any facts rebutting the presumption.”).
7
8

9 Because directors owe their fiduciary duties to *the corporation*, a shareholder or
10 member must pursue a derivative suit via Ariz. R. Civ. P. 23.1 for alleged injuries
11 suffered by the corporation instead of suing the individual members of the board
12 directly. *Albers v. Edelson Tech. Partners L.P.*, 201 Ariz. 47, 52, 31 P.3d 821, 826 (Ct.
13 App. 2001)) (*citing Funk v. Spalding*, 74 Ariz. 219, 223, 246 P.2d 184, 186 (1952)
14 (“Generally, a stockholder may not bring an action individually for wrongs done to a
15 corporation[...].”); *but see Dawson v. Withycombe*, 216 Ariz. 84, 101-02, 163 P.3d
16 1034, 1051-52 (Ct. App. 2007) (declining to extend liability for corporate officer or
17 director for the torts of other officers absent evidence that the individual director
18 personally participated in the tort).
19
20
21

22 Although a shareholder or member can maintain a direct action against the
23 individual board members, in order to do so they must establish the following elements:
24 (1) the relationship between the shareholders and a wrongdoer is separate from the
25 shareholders' status as shareholders or their ownership interest in the corporation, (2) the
26 wrongdoer owes a duty to the shareholders for some reason other than their status as
27 shareholders, and (3) the injuries or damages were sustained by individual shareholders
28

1 rather than by the corporation. *Albers v. Edelson Tech. Partners L.P.*, 201 Ariz. 47, 52,
2 31 P.3d 821, 826 (Ct. App. 2001) (citations omitted) (emphasis added).

3
4 Here, Plaintiff has not filed a derivative action pursuant to Ariz. R. Civ. P. 23.1
5 nor does Plaintiff's Complaint allege that the Director Defendants owe a duty to Plaintiff
6 for any reason other than their status as homeowners within the Association. Therefore,
7 Plaintiff's attempt to pursue direct action against the Director Defendants fails to state a
8 claim upon which relief can be granted.

10 **D. The Association's Bylaws expressly insulate the Director Defendants**
11 **from any liability alleged by Plaintiff.**

12 The Association's Bylaws expressly insulate the Director Defendants from any
13 personal liability. Article XVI, Section 2 of the Bylaws states:

14 Limitation of Director Liability. In accordance with the
15 provision of the Nonprofit Corporation Act (as set forth at
16 A.R.S. § 10-3101 et seq., as may be amended from time to
17 time), *each Director shall be immune from civil liability and*
18 *shall not be subject to suit indirectly or by way of contribution*
19 *for any act or omission resulting in damage or injury if said*
20 *Director was acting in good faith and within the scope of his*
21 *official capacity (which is any decision, act, or event*
22 *undertaken by the County Club in furtherance of the purpose*
23 *or purposes for which it is organized) unless such damage or*
injury was caused by the willful and wanton or grossly
negligent conduct of the Director. This provision intends to
give all Directors the full extent of immunity available under
the Nonprofit Corporation Act.

24 (emphasis added).

25 The complaint includes only bare, meritless, conclusory allegations in support of
26 Plaintiff's claims for director liability, including statements that the Director Defendants
27 willfully failed to comply with the ADRE final order, are defiant of the ADRE final order,
28

1 and disrespect the administration of justice. However, Plaintiff pleads no specific factual
2 allegations to support these contentions. In order to establish that the Director Defendants
3 acted willfully, Plaintiff must show that the Director Defendants intended to cause the
4 result that actually comes to pass or that they intended to specifically harm Plaintiff.
5 Plaintiff fails to even allege such a state of mind. This lawsuit is pure harassment.
6

7
8 Because Plaintiff has provided no evidence in support of his conclusory allegations
9 of reckless, wrongful, or negligent action on the part of the Director Defendants, and the
10 Association's Bylaws expressly insulate the Director Defendants, Plaintiff's claims against
11 the Director Defendants should be dismissed.
12

13 **III. CONCLUSION**

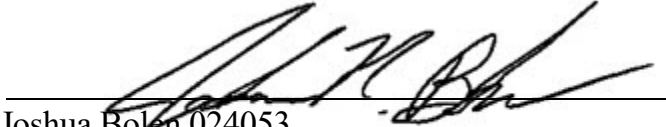
14 For the reasons stated above, Plaintiff has failed to state a claim upon which
15 relief can be granted against the Director Defendants. Most importantly, the ADRE
16 petition and decision at issue in no way binds the Director Defendants. Additionally,
17 the claims alleged in the Plaintiff's Complaint fail as a matter of law because Arizona
18 law and the Association's Bylaws protect volunteer board members' decisions and
19 actions. Furthermore, there is no basis to name the Director's spouses where they have
20 not had *any* involvement in the actions alleged by Plaintiff to form the basis of its
21 Complaint. This lawsuit is meritless and filed only to further harass the Association, its
22 Directors, and this law firm.
23
24

25 Therefore, the Association respectfully requests that the Court dismiss all of
26 Plaintiff's claims with prejudice against the individually named Director Defendants
27
28

1 and requests that the Court award attorneys' fees and costs expended in defending
2 against these frivolous claims.

3
4 RESPECTFULLY SUBMITTED this 13th day of October 2017.

5 Carpenter, Hazlewood, Delgado & Bolen, PLC

6
7
8 By: /S/ 

9 Joshua Bolen 024053

Allison Preston 029346

10 1400 E. Southern Ave., Suite 400

11 Tempe, Arizona 85282

Attorneys for Defendants

12 **CERTIFICATE OF SERVICE**

13 ORIGINAL of the foregoing electronically
14 filed this 12th day of October, 2017, with:
15 Clerk of the Court
16 Maricopa County Superior Court
www.AZTurboCourt.gov

17
18 COPY of the foregoing mailed
19 this 12th day of October, 2017, to:

20 William M. Brown
21 6751 East Amber Sun Drive
22 Scottsdale, AZ 85266
Plaintiff

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