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7
8 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
9 **IN AND FOR THE COUNTY OF MARICOPA**

10 JAMES D. SMITH AND SUSAN E.
11 SMITH, AS TRUSTEES OF THE
12 SMITH FAMILY TRUST DATED
13 DECEMBER 22, 1997,
14 Plaintiffs,

15 vs.

16 SAGUARO VIEW MANAGEMENT,
17 INC., an Arizona non-profit corporation;
18 JOHN DOES I-X; JANE DOES I-X;
19 BLACK CORPORATIONS I-X; WHITE
20 PARTNERSHIPS I-X AND/OR SOLE
21 PROPRIETORSHIPS; AND RED
22 LIMITED LIABILITY COMPANIES, I-
23 X,

24 Defendants.

Case No.: CV2019-005568

**JOINT EVIDENTIARY HEARING
POSITION STATEMENT**

(Assigned to the Hon. Christopher Coury)

21 Pursuant to this Court's March 28, 2019 Minute Entry, which was filed on April 2,
22 2019, the Parties hereby submit this Joint Evidentiary Hearing Position Statement.

23 **A. STIPULATED MATERIAL FACTS AND APPLICABLE LAW**

24 Plaintiffs James D. Smith and Susan E. Smith, as Trustees of the Smith Family
25 Trust dated December 22, 1997 ("Smiths") own real property located at 15970 West Dale
26 Lane, Surprise, Arizona 85387 ("Subject Property"). Defendant Saguaro View
27 Management, Inc. ("Association") is an Arizona non-profit corporation, with its principal
28 place of business in Maricopa County, Arizona.

1 On or about May 9, 1980, the original Declaration of Covenants, Conditions and
2 Restrictions (“Original Declaration”) was recorded with the Maricopa County Recorder at
3 Document No. 1980-0155297. On or about June 23, 1980, the Arizona Corporation
4 Commission approved the Articles of Incorporation for Defendant Association. On or
5 about April 5, 1997, Association enacted the Saguaro View Management, Inc. Bylaws
6 (“Bylaws”). Subsequently, on or about April 3, 2003, the Restatement of Declaration of
7 Covenants, Conditions and Restrictions for Saguaro View Management, Inc. (“Restated
8 Declaration”), was recorded with the Maricopa County Recorder at Document No. 2003-
9 0415130. Smiths and Association are contractually governed, in part, by the Restated
10 Declaration and Bylaws.

11 Smiths are a member of Association by virtue of the ownership of the Subject
12 Property. Section 3.1 of the Bylaws states “[t]he business of the Association shall be
13 managed by a Board of seven (7) directors, unless the Board shall establish a lesser
14 number which in no event shall be less than three (3) directors.” Association’s Board of
15 Directors has historically, at least since 2010, been comprised of five (5) individuals.
16 Pursuant to Section 3.2 of the Bylaws, “[t]he directors shall serve staggered terms of two
17 (2) years each in the manner set by the Board.” In this manner, prior to the March 23,
18 2019 election, Association had (again, at least since 2010) elected three (3) Board of
19 Directors during elections in each odd-numbered year (*e.g.*, 2015, 2017) and two (2)
20 Board of Directors in each even-numbered year (*e.g.*, 2016, 2018).

21 Pursuant to Section 2.1 of the Bylaws, Association must hold an annual meeting of
22 the membership and “[a]t each annual meeting, the Members entitled to vote shall elect a
23 Board and may transact such other Association business it deems appropriate.” At such
24 meeting, “[e]ach Member attending any annual or special meeting of the Members shall
25 be entitled to vote.”

26 At the May 8, 2017 annual membership meeting, the following three (3) Board of
27 Directors were elected for a two-year term: (1) Rick Molera, (2) Michael Shove, and (3)
28 Doug Villa. Subsequently, at the April 14, 2018 annual membership meeting, the

1 following two (2) Board of Directors were elected for a two-year term: (1) Newilda Sosa,
2 and (2) Martin Rankin.

3 During the April 14, 2018 membership meeting, one of the then-existing Board of
4 Directors (Mr. Molera) verbally stated that “I am resigning.” Pursuant to the April 14,
5 2018 Board Minutes, Mark Greenawalt made a motion to accept Mr. Molera’s verbal
6 resignation and Board of Director Doug Villa provided a second to that motion.

7 Pursuant to Section 3.5 of the Bylaws, any Board of Directors “resignation shall be
8 made in writing, and shall take effect at the time specified therein....” Mr. Molera never
9 provided any written notice of his purported resignation from Association Board of
10 Directors.

11 Following Mr. Molera’s verbal “resignation” statement at the same April 14, 2018
12 membership meeting, the remaining Association Board of Directors engaged in a
13 “discussion about having another election to fill the seat vacated by Rick [Molera]” and
14 “[i]t was agreed by the sitting board to have another election.”

15 Pursuant to Section 3.6 of the Bylaws, “[i]f the office of any director becomes
16 vacant, the remaining directors in office, though less than a quorum, may appoint, by a
17 majority vote, any qualified person to fill such vacancy for the unexpired term.” On or
18 about May 8, 2018, Association distributed an election ballot to the membership to
19 “choose 1 person” to replace Mr. Molera’s position on Association Board of Directors.
20 Mr. Molera sought inclusion as a candidate on the election ballot that was distributed on
21 or about May 8, 2018. As reflected in the June 2, 2018 Association Board minutes,
22 Association did not permit Mr. Molera’s inclusion on the ballot as he “submitted his bio to
23 Colby [Defendant Association’s designated management company and statutory agent]
24 instead of submitting it to the board email address as instructed.” Association thus “asked
25 Colby to remove this person’s name [Rick Molera] from the ballot.”

26 A.R.S. § 33-1812(A) states:

27 Notwithstanding any provision in the community documents, after
28 termination of the period of declarant control, votes allocated to a unit
may not be cast pursuant to a proxy. The association shall provide for

1 votes to be cast in person and by absentee ballot and, in addition, the
2 association may provide for voting by some other form of delivery,
3 including the use of e-mail and fax delivery. Notwithstanding section
4 10-3708 or the provisions of the community documents, any action
5 taken at an annual, regular or special meeting of the members shall
6 comply with all of the following if absentee ballots or ballots provided
7 by some other form of delivery are used:

- 8 1. The ballot shall set forth each proposed action.
- 9 2. The ballot shall provide an opportunity to vote for or against each
10 proposed action.
- 11 3. The ballot is valid for only one specified election or meeting of the
12 members and expires automatically after the completion of the election
13 or meeting.
- 14 4. The ballot specifies the time and date by which the ballot must be
15 delivered to the board of directors in order to be counted, which shall
16 be at least seven days after the date that the board delivers the unvoted
17 ballot to the member.
- 18 5. The ballot does not authorize another person to cast votes on behalf
19 of the member.
- 20 6. The completed ballot shall contain the name, address and signature
21 of the person voting, except that if the community documents permit
22 secret ballots, only the envelope shall contain the name, address and
23 signature of the voter.
- 24 7. Ballots, envelopes and related materials, including sign-in sheets if
25 used, shall be retained in electronic or paper format and made available
26 for member inspection for at least one year after completion of the
27 election.

28 The May 8, 2018 election ballot does not state that Association members may cast
the ballot in person at the identified election meeting date. Based on the results of the May
8, 2018 election ballot, Mark Greenawalt was placed on the Board of Directors.

In February or March 2019, Smiths received a ballot from Association relating to
the 2019 annual election of Board of Directors. This 2019 Election Ballot identified that
“two open seats” were available “on the Saguaro View Board for 2019.” The 2019
Election Ballot does not state that Association members may cast the ballot in person at
the identified election meeting date.

On February 28, 2019, Smiths sent Association a letter detailing factual and legal
allegations (later set forth in Smiths’ Verified Complaint) and requested Association to

1 notice a replacement ballot for the 2019 election to establish three (3) open Board of
2 Directors seats and permit in-person submission of the ballot. In response, Association,
3 through legal counsel, responded, in part, that the “Board has decided to keep the election
4 the way it is and will not be modifying the notice or the ballot.”

5 On March 19, 2019, Smiths filed with this Court a Verified Complaint and
6 Application for Temporary Restraining Order and Petition for Order to Show Cause
7 Regarding Application and Preliminary Injunction. The Court was not able to set a Show
8 Cause hearing until March 26, 2019. The 2019 annual meeting of the members was
9 convened and held, as originally noticed, on March 23, 2019.

10 **B. CONTESTED ISSUES**

11 **I. Smiths’ Argument**

12 A third Board of Directors seat (originally held by Rick Molera, who was elected
13 in 2017) was open for election at the upcoming 2019 membership meeting and,
14 accordingly, should have been included within the 2019 Election Ballot. Mr. Molera’s
15 verbal statement at a membership meeting that he was “resigning” was never formally
16 acknowledged or accepted by Association. No Board vote was ever taken to approve or
17 deny a motion to accept his verbal resignation.

18 Pursuant to the Bylaws, an individual may not verbally resign from Association’s
19 Board of Directors. *See* Bylaws, § 3.5 (any Board of Directors “resignation shall be made
20 in writing, and shall take effect at the time specified therein...”); *see also* A.R.S. § 10-
21 807(A) (“A director may resign at any time by delivering written notice to the board of
22 directors, its chairman or the corporation.”). Mr. Molera never provided any written
23 notice of his purported resignation from the Board.

24 Furthermore, although the Bylaws contain a specific provision to seek “removal”
25 of a director from the Board, Association’s Board of Directors never satisfied such a
26 standard with respect to Mr. Molera. Mr. Molera thus retained his seat on Association
27 Board of Directors, which naturally expires pursuant to its two-year term in 2019.

28 Additionally, in contravention of the governing Bylaws, Association Board of

1 Directors never properly appointed a new, qualified person to fill the vacancy created by
2 Mr. Molera’s alleged (and, herein, disputed) resignation. Pursuant to Section 3.6 of the
3 Bylaws, “[i]f the office of any director becomes vacant, the remaining directors in office,
4 though less than a quorum, may appoint, by a majority vote, any qualified person to fill
5 such vacancy for the unexpired term. Instead, Association distributed an election ballot to
6 the membership to fill Mr. Molera’s purportedly open seat on the Board of Directors.
7 Association did so despite no motion ever being made by Association Board of Directors
8 to hold such an election, nor any vote having taken place on the issue. In doing so,
9 Association improperly restricted Mr. Molera from including his own name on the ballot
10 for consideration for the Board of Directors position.

11 Moreover, the failure to provide the membership, including Smiths, with the
12 opportunity to cast votes in person at a designated meeting renders the May 8, 2018
13 election ballot (and corresponding election process) *per se* invalid. Neither the May 8,
14 2018 election ballot, nor any other communication from Association, allowed for
15 Association members to cast the ballot in person at the identified meeting date. Pursuant
16 to statute, any Association ballot “shall provide for votes to be cast in person and by
17 absentee ballot and, in addition, the association may provide for voting by some other
18 form of delivery, including the use of e-mail and fax delivery.” *See* A.R.S. § 33-1812(A).
19 The failure to provide the membership, including Smiths, with the opportunity to cast
20 votes in person at the previously designated meeting renders the May 8, 2018 election
21 ballot (and corresponding election process) invalid and unenforceable.

22 Momentarily leaving aside (1) Association’s invalid resignation acceptance
23 process, (2) the improper removal of Mr. Molera’s name from the May 8, 2018 election
24 ballot, and (3) the failure of the May 8, 2018 ballot to allow for in-person voting, the
25 current 2019 Election Ballot (and, now, the corresponding election results) is still invalid
26 and unenforceable. At best (with respect to Association’s position), the election process to
27 fill Mr. Molera’s Board of Directors seat – which was purportedly won by Mark
28 Greenawalt – would simply permit an individual to “fill such vacancy for the unexpired

1 term.” *See* Bylaws, § 3.6. Thus, Mr. Greenawalt would be entitled, at most, to serve out
2 Mr. Molera’s remaining term of office, which began upon election in 2017 and is set to
3 expire upon the 2019 election cycle.

4 Additionally, in violation of both statutory regulation and the Bylaws, Association
5 has not permitted the 2019 Election Ballot to be “cast in person” at the identified meeting
6 date. The 2019 Election Ballot specifically identifies that it must be submitted by mail,
7 fax, or email. The failure to provide the membership with the opportunity to cast votes “in
8 person” at a designated meeting renders this impending election process *per se* invalid.
9 *See* A.R.S. § 33-1812(A).

10 The Court may grant injunctive relief “when it appears that the party applying for
11 the writ is entitled to the relief demanded, and such relief or any part thereof requires the
12 restraint of some act prejudicial to the application.” A.R.S. §12-1801. That discretion
13 includes the authority to issue a mandatory injunction, which is “an injunction which
14 compels some positive action by the party enjoined.” *State ex rel. Corbin v. Portland*
15 *Cement Ass’n*, 142 Ariz. 421, 690 P.2d 140, (Ct. App. 1984).

16 Smiths originally sought an injunction halting the March 23, 2019 Board of
17 Directors election subject to Association (i) amending its 2019 Election Ballot to identify
18 three (3) open seats, rather than (2) as currently identified, available to be filled, and (ii)
19 expressly affording members, including Smiths, the right to cast such 2019 Election Ballot
20 in person at the identified election meeting date/location. However, despite notice of such
21 relief sought, Association proceeded with the election and announced to its membership
22 potentially defective and unenforceable election results.

23 Thus, Smiths now seek that the 2019 election results (as announced at the March
24 23, 2019 annual meeting) be judicially invalidated. This Court should declare Association
25 to abide by its statutory and contractual obligations. Accordingly, three (3) Board of
26 Directors seats must be open for the 2019 Board of Directors election: (1) Doug Villa, (2)
27 Michael Shove, and (3) Mark Greenawalt (on behalf of Rick Molera). Association should
28 re-notice the 2019 election and provide amended election ballots to identify three (3) open

1 Board of Directors seats. Finally, the Court require Association to expressly afford
2 members, including Smiths, the right to cast such amended 2019 election ballots in person
3 at the identified election meeting date/location.

4 Arizona Courts have developed a four-prong test to apply when considering
5 requests for injunctive relief. The Court must consider the relative hardships and injustice;
6 the public interest; misconduct of the parties, if any; delay on the part of the plaintiff; and
7 the adequacy of other remedies in considering requests for injunctive relief. *Ahwatukee*
8 *Custom Estates Mgmt. Ass'n, Inc. v. Turner*, 196 Ariz. 631, 635, 2 P.3d 1276, 1280 (Ct.
9 App. 2000). To obtain a preliminary injunction, plaintiffs shall establish: 1) a strong
10 likelihood of success on the merits; 2) irreparable harm; 3) hardships in its favor; or 4)
11 public policy favoring the relief. *Cerkonsy v. TCR-Montand Ranch Joint Venture*, 175
12 Ariz. 275, 280, 860 P.2d 1328, 1333 (Ct. App. 1993).

13 **a. Smiths Have a Strong Likelihood of Success on the Merits.**

14 Association is bound by the governing documents. Such documents are contractual
15 in nature. *Duffy v. Sunburst Farms East Mutual Water & Agricultural Company Inc.*, 124
16 Ariz. 413, 604 P.2d 1124 (1979). Association indisputably breached the terms of such
17 governing documents, including the Restated Declaration and Bylaws, as well as breached
18 Arizona statutory law pertaining to association election rights.

19 As identified in detail above, Association acted in express contravention of the
20 Restated Declaration, Bylaws, and Arizona statutory law, in its improper distribution of
21 ballots (lacking the requisite in-person voting rights and identifying the incorrect number
22 of open seats) for the 2019 Board of Directors election. As a result, Smiths have a strong
23 likelihood of success on the merits of their Verified Complaint.

24 **b. Smiths Will Suffer Irreparable Harm.**

25 Association seeks to force Smiths, as members, into an ill-conceived and
26 improperly noticed 2019 Board of Directors election process. If Association is allowed to
27 enforce the March 23, 2019 Board of Directors election, which failed to properly identify
28 the number of open seats available for candidates to fill and did not afford members their

1 contractual and statutory right to cast ballots “in person,” Smiths will be subjected to
2 enforcement by an illegitimately established governance body of Association. If an
3 improper Board of Directors is allowed to reign over the membership, all actions taken by
4 such an Association Board will be veiled in potential future unenforceability and cause
5 mass disorder with Association’s governance obligations.

6 Instead, this Court should (given Association’s unwillingness to delay its March
7 23, 2019 Board of Directors election) now mandate Association to re-notice the 2019
8 Board of Directors ballot to correctly identify the number of open seats (3) and afford
9 proper ballot submission guidelines.

10 Moreover, because Smiths are requesting injunctive relief related to a deed
11 restriction, a showing of irreparable harm is not necessary. Arizona courts look to the
12 Restatement for guidance in the absence of controlling authority. *Tierra Ranchos*
13 *Homeowners Ass’n v. Kitchukov*, 216 Ariz. 195, 165 P.3d 173 (Ct. App. 2007). The
14 Restatement (Third) of Property: Servitudes § 8.3 specifically addresses enforcement of
15 restrictive covenants through injunctive relief: “Injunctive relief is normally available to
16 redress violation of easements and restrictive covenants without proof of irreparable
17 injury or a showing that a judgment for damage would be inadequate. The value of a
18 restrictive covenant or easement is often difficult to quantify and may be impossible to
19 replace.”

20 Without this Court’s immediate intervention, Smiths will be irreparably harmed
21 and subjected to improper Board of Directors governance.

22 **c. A Balancing of Hardships Weighs in Favor of Smiths.**

23 Smiths will suffer considerable hardship, as discussed above, if Association is
24 allowed to proceed with impunity to foster and enforce its improper election(s) of Board
25 of Directors. If the 2019 Board of Directors election is deemed enforceable with an
26 improper number of open seats available and without proper ability of members to cast
27 ballots in person, the entire composition of the Board of Directors will be impacted for the
28 foreseeable future and governance of the residential subdivision, in which Smiths reside,

1 will suffer.

2 On the other hand, Association created its own hardship, if any even exists, by
3 breaching the governing documents, and related statutes, and failing to abide by its own
4 rules pertaining to the election of Board of Directors. Accordingly, and consistent with
5 Arizona case law, it may not benefit from the hardship test. *See, e.g., Flying Diamond*
6 *Airpark, LLC v. Meienberg*, 215 Ariz. 44, 156 P.3d 1149 (Ct. App. 2007).

7 **d. Public Policy Favors Granting Relief.**

8 Public policy supports the enforcement of contracts. Public interests also support
9 the enforcement of restrictive covenants. Although this prong is not necessary as a result
10 of the significant hardship to Smiths, public policy indisputably favors Smiths.

11 **II. Association's Argument**

12 The Smiths' original request for a Temporary Restraining Order asked to enjoin the
13 March 23, 2019 Annual Meeting, but the Annual Meeting occurred before the Smiths
14 could obtain an initial Hearing. At the March 28, 2019 Hearing, the Smiths updated their
15 requested injunction to one that (1) Orders the results of the 2019 Annual Meeting's
16 election of Directors unenforceable, (2) freezes the composition of the Board during the
17 pendency of this lawsuit, and (3) restricts the Association's business during the pendency
18 of this lawsuit only to "essential" or "emergency" business.

19 An important new fact, set forth in detail in Subsection B(II)(C) below, is that after
20 the March 23, 2019 Annual Meeting and March 28, 2019 Return Hearing, the
21 Association's Board decided to hold an election for Mark Greenawalt's seat on the Board.
22 **The Association has not prepared any argument based on this fact outside of this**
23 **Position Statement, because this fact is occurring during its preparation.**

24 **A. The Association Complied with its Governing Documents.**

25 Article II, Section 2.1 of the Bylaws provides:

26 Annual Meeting. An annual meeting of the Members shall be
27 held during the month of March or April of each year. At
28 each annual meeting, the Members entitled to vote shall elect

1 a Board and may transact such other Association business as
2 it deems appropriate.

3 Article III, Section 3.2 of the Bylaws provides for Directors to "serve staggered
4 terms of two (2) years each in the manner set by the Board." The Bylaws do not discuss
5 specific election procedures or practices. The only evidence of election procedures or
6 practices before the Court the attached, and that which is available from the testimony of
7 the Directors.

8 The Association acted reasonably in the 2018-2019 election procedures. Director
9 Molera resigned, whether or not he did so in writing. He was no longer serving as a
10 Director as of April 2018. The Board acted reasonably to replace him by holding a new
11 election. Whether or not that is the procedure the Smiths would have chosen, that
12 decision did not violate the Association's governing documents. The Association
13 reasonably believed that Director Greenawalt should serve a two-year term after that
14 election, in full compliance with Section 3.2 of the Bylaws, whether or not such belief is
15 adjudicated as incorrect. The Association still has until the end of April 2019 to complete
16 the process of electing a Board, if Greenawalt submits to election in lieu of seeking to
17 continue the second half of his elected two-year term. The Association still has time to
18 conduct its business in a reasonable manner, as it has done.

19 The Court should not enter a Preliminary Injunction, simply because these facts
20 demonstrate its business is reasonable, appropriate, and ongoing. The Association will set
21 forth below the **legal** bar to the issuance of the Preliminary Injunction. As a **practical**
22 matter, issuing a Preliminary Injunction does not make sense. The Smiths' disputes
23 should be resolved through participation in the ongoing business of the Association and its
24 Board, not by enjoining that business. There is no allegation that the Smiths are unable to
25 participate.

26 **B. The Smiths Cannot Obtain Anticipatory Injunctive Relief.**

27 The Smiths cannot enjoin the Association's future actions if they cannot
28 demonstrate what those actions will be with reasonable certainty. "If seeking to enjoin

1 future conduct, the movant must also show that it is likely the defendant will engage in the
2 conduct . . ." *TP Racing, L.L.L.P. v. Simms*, 232 Ariz. 489, 495, 307 P.3d 56, 62 (Ct. App.
3 2013). The specific injunctive relief requested—reducing the Board to two Directors and
4 freezing non-essential business—is all speculative in nature. Nowhere in the Smiths'
5 argument is any anticipated specific act to be enjoined, or that should be enjoined.
6 Enjoinment of future conduct requires that a party "threatens or is about to do some act,"
7 and not that it will generally continue doing business. A.R.S. § 12-1801.

8 **C. The Request for Preliminary Injunction is Premature.**

9 The Association has until the end of April 2019 to complete its Annual Meeting.
10 The Court should not enjoin any part of the Annual Meeting or election until that
11 procedure is complete. Section 2.1 of the Bylaws allows until the end of April to seat a
12 new Board.

13 On April 4, 2019, during the time of this Position Statement's preparation, the
14 Board is preparing a Letter to all Members of the Association, which provides:

15 The Saguardo View Homeowners Association Board of Directors has been
16 made aware of a complaint and /or a dispute regarding the 2019 election.

17 To resolve this issue your Board of Directors has decided to run a
18 supplemental election to elect one board member.

19 Attached to this cover letter you will find a ballot with four (4) candidates,
20 please select one (1) name to become a member of the Saguardo View Board
21 of Directors for 2019- 2020 two-year tenure. Please return this ballot no later
than April 15th.

22 We will also reconvene our First Quarter annual meeting at the Hampton Inn
23 on April 27 at 9:00 AM to open the Ballots and announce the winner. Any
24 ballots brought to the meeting April 27, will be counted toward the vote
totals of the candidates receiving votes.

25 Director Greenawalt is one of the four on the ballot, which would constitute a
26 "reelection," if he receives the most votes. Mr. Smith is also one of the four on the ballot,
27 and may also receive the most votes. This correspondence is not complete for inclusion as
28 an Exhibit to this Position Statement due to the timing of these events. However, the

1 Association's witness Directors will testify to these facts on April 8, 2019, at the
2 Evidentiary Hearing. This is ongoing lawful, reasonable, and appropriate business of the
3 Association, that will weigh significantly on the merits of this case. That alone is a reason
4 for the Court not to grant a Preliminary Injunction. Even if the Smiths dislike the
5 Association's business decision(s), the Board has authority to make reasonable business
6 decisions without supervision of the Court.

7 **D. The Smiths Cannot Pass the *Shoen v. Shoen* Test for Preliminary Injunctions**

8 The parties agree that the Smiths are obligated to establish four traditional
9 equitable criteria to obtain a preliminary injunction:

- 10 1) A strong likelihood that [they] will succeed at trial on the merits;
- 11 2) The possibility of irreparable injury to him not remediable by damages if
12 the requested relief is not granted;
- 13 3) A balance of hardships favors himself; and
- 14 4) Public policy favors the injunction.

14 *Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (Ct. App. 1990).

15 **1. Likelihood of Success on the Merits**

16 **a. Derivative Action**

17 The Association filed a Motion to Dismiss on April 2, 2019. The Association will
18 not further argue the Motion to Dismiss herein, but incorporates it into this argument,
19 because it demonstrates the Plaintiff is unlikely to succeed on the merits.

20 **b. Ongoing Business**

21 Because of the ongoing Annual Meeting and election of another Director to replace
22 Director Greenawalt in April 2019, the Court should decline to order a Preliminary
23 Injunction. The Smiths have not demonstrated some fundamental and proscribed flaw in
24 the ongoing election. There is no ability for the Court to assess the Smiths' likelihood of
25 success on the merits when the election is lawfully ongoing.

26 ///

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28 ///

1 **2. Irreparable Harm**

2 **a. Money**

3 Any harm that can be redressed with money is not irreparable harm. *Shoen* at 63,
4 792. Here, the Smiths are caught in a self-defeating position. Either the harm that might
5 come from the ongoing elections is remedial by money, or the harm is a derivative action.
6 See the Association's Motion to Dismiss.

7 **b. Time**

8 The request for Preliminary Injunction requires the finding that Director
9 Greenawalt's election was flawed. If that is the case, then the Smiths should be able to
10 show some irreparable harm occurred from April 2018 to April 2019. They have
11 provided no such evidence or argument thereof.

12 **c. Board Business**

13 The Smiths have failed or refused to identify a future action, event, or fact that the
14 Preliminary Injunction would prevent. The Association's day-to-day business is
15 maintenance of common areas, collection of assessments, issuance of A.R.S. § 33-1806
16 Disclosures, responding to records requests pursuant to A.R.S. § 33-1805 (including those
17 requested by the Smiths during this case), water service, enforcement of restrictions, and
18 listening to homeowner concerns. None of this business is referenced in the Complaint.
19 Enjoinment of this business would not prevent any irreparable harm.

20 **3. Balance of the Hardships**

21 The Court should balance what the Association is doing to replace Director
22 Greenawalt, against an end to the Association business described directly above in
23 Subsection B(II)(c) of its Irreparable Harm argument. *Shoen* leaves this balancing to the
24 Court. The Association urges the Court to weigh the homeowners association business as
25 usual, against stopping the Association's day-to-day business so that the Smiths can begin
26 litigation that they appear to intend to advance for a great deal of time.

27 ///

28 ///

1 **4. Public Policy**

2 The Motion to Dismiss sets forth argument relevant to public policy concerns.
3 Beyond that Motion, the Court should consider that Association business does not just
4 affect the parties to this case. Any prospective real estate buyer or seller of an Association
5 Lot is affected, and the Court should consider third parties. See *Stormans, Inc. v. Selecky*,
6 586 F.3d 1109, 1139 (9th Cir. 2009) (Court may consider third party interest in
7 preliminary injunction if it would affect third parties). The only public policy advanced
8 by the Smiths is generalized harm of a possible future action of the Board being "undone."

9 **E. Laches**

10 Although affirmative defenses are not yet pending via Answer, the doctrine of
11 laches provides that the Court should deny the Preliminary Injunction. Laches may not be
12 relevant to the immediate 2019 Annual Meeting, but it is relevant to the April 2018
13 proceedings that the Smiths must prove flawed to prevail now.

14 We emphasize that laches may not be imputed to a party for mere delay in
15 the assertion of a claim. Rather, the delay must be unreasonable under the
16 circumstances, including the party's knowledge of his or her right, and it
17 must be shown that any change in the circumstances caused by the delay has
18 resulted in prejudice to the other party sufficient to justify denial of relief.

19 *Flynn v. Rogers*, 172 Ariz. 62, 66, 834 P.2d 148, 152 (1992)

20 Laches applies to the Smiths' dispute of the 2018 resignation of Director Molera.
21 The Smiths now argue that the resignation of Director Molera was improper, or
22 ineffective. The Smiths had one year to contest Director Greenawalt's replacement of
23 Director Molera, and failed or declined to do so. By their conduct, the Smiths consented
24 to Director Greenawalt's service on the Board of Directors. Given the laches issue,
25 coupled with Director Greenawalt's imminent termination (or possible reelection) as a
26 Director, the Smiths should not be granted a Preliminary Injunction.

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1 **C. LIST OF WITNESSES.**

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	WITNESS NAME
4 1	James D. Smith
5 2	Rick Molera
6 3	Michael Shove
7 4	Doug Villa
8 5	Newilda Sosa
9 6	Martin Rankin
10 7	Mark Greenawalt

11 Each of the above-identified witnesses may be called either by the Smiths or
 12 Association. The Parties stipulate that they will each limit their respective direct, cross,
 13 and/or redirect examinations to no more than ninety (90) minutes.

14

15 **III. Smiths' Objections to Witnesses.**

16 None.

17 **IV. Association's Objections to Witnesses.**

18 None.

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20 **D. LIST OF EXHIBITS.**

21 The following is a list of Plaintiffs' and Defendant's stipulated exhibits:

22

No.	Exhibit Description
23 1.	Smith Property Deed
24 2.	SVHOA Original Recorded Declaration
25 3.	SVHOA Articles of Incorporation
26 4.	SVHOA Bylaws
27 5.	SVHOA Restated Recorded Declaration
28 6.	SVHOA Recorded Notice of Community Association
7.	April 3, 2010 SVHOA Draft Minutes

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No.	Exhibit Description
8.	April 14, 2018 SVHOA Minutes
9.	May 8, 2018 SVHOA Ballot
10.	June 2, 2018 SVHOA Minutes
11.	July 8, 2018 SVHOA (Shove) Letter
12.	March 23, 2019 SVHOA Ballot
13.	February 28, 2019 Letter to Association with Exhs
14.	March 8, 2019 Carpenter Email
15.	March 23, 2019 SVHOA Meeting Agenda
16.	SVHOA Posted Meeting Notice (taken March 21, 2019)
17.	March 23, 2019 Annual Meeting Video

Additionally, Association has included (in Subsection B(II)(C) above) that an April 4, 2019 “Letter to all Members of the Association” is being prepared by Association. Such letter has not been finalized as of the preparation of this Joint Statement. The Parties stipulate to supplement the Exhibit list above with such document. If such document is not finalized and supplemented as an Exhibit prior to the April 8, 2019 hearing, Association shall not rely on the contents of such document at the hearing.

E. TECHNICAL EQUIPMENT NEEDED.

1. Any electronic means of displaying the March 23, 2019 Annual Meeting Video, as necessary.

DATED this 4th day of April, 2019.

THE BAINBRIDGE LAW FIRM, L.L.C.

/s/ Mitchell W. Fleischmann
 Mark J. Bainbridge, Esq.
 Mitchell W. Fleischmann, Esq.
 2122 E. Highland Ave., Ste. 260
 Phoenix, AZ 85016
Attorneys for Plaintiffs

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**CARPENTER, HAZLEWOOD, DELGADO &
BOLEN, LLP**

/s/ Edward D. O'Brien (with permission)
Edward D. O'Brien, Esq.
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Tempe, Arizona 85282-5691
*Attorneys for Defendant Saguaro View
Management, Inc.*

Efiled this 4th day of April, 2019, with:

Clerk of the Court
Maricopa County Superior Court
<http://www.azturbocourt.gov>

COPY delivered via efilng system
and emailed to:
Honorable Christopher Coury
Hon. Coury's JA: gauanl@superiorcourt.maricopa.gov

COPY of the foregoing emailed
this 4th day of April, 2019, to:
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By: /s/ Suzan Oxley