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12 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
 13 **IN AND FOR THE COUNTY OF MARICOPA**

CV2019-005568

14 JAMES D. SMITH AND SUSAN E.
 15 SMITH, AS TRUSTEES OF THE
 16 SMITH FAMILY TRUST DATED
 17 DECEMBER 22, 1997,

Case No.: _____

VERIFIED COMPLAINT

(Breach of Contract; Breach of Implied
 Covenant of Good Faith and Fair Dealing;
 Breach of Association Duty of Care; Breach
 of Statutory Planned Communities Act;
 Injunction; Declaratory Relief)

Plaintiffs,

vs.

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

Defendants.

26 Plaintiffs James D. Smith and Susan E. Smith, as Trustees of the Smith Family
 27 Trust dated December 22, 1997 ("Plaintiffs"), for their Verified Complaint against
 28 Defendant Saguario View Management, Inc. ("Defendant Association"), allege as
 follows:

///

THE BAINBRIDGE LAW FIRM

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THE PARTIES, JURISDICTION AND VENUE

- 1
- 2 1. Plaintiffs own real property located at 15970 West Dale Lane, Surprise,
- 3 Arizona 85387 (“Subject Property”). *See* Quit Claim Deed, attached hereto as Exhibit A.
- 4 2. Plaintiffs, at all relevant times, were and are residents of Maricopa County,
- 5 Arizona.
- 6 3. Defendant Association is an Arizona non-profit corporation, with its
- 7 principal place of business in Maricopa County, Arizona.
- 8 4. Jurisdiction and venue are proper with this Court, as all the events alleged
- 9 in this lawsuit took place in Maricopa County, Arizona.

FACTUAL ALLEGATIONS

- 10
- 11 5. On or about May 9, 1980, the original Declaration of Covenants,
- 12 Conditions and Restrictions (“Original Declaration”) was recorded with the Maricopa
- 13 County Recorder at Document No. 1980-0155297. *See* Original Declaration, attached
- 14 hereto as Exhibit B.
- 15 6. On or about June 23, 1980, the Arizona Corporation Commission approved
- 16 the Articles of Incorporation for Defendant Association. *See* Articles of Incorporation,
- 17 attached hereto as Exhibit C.
- 18 7. On or about April 5, 1997, Defendant Association enacted the Saguaro
- 19 View Management, Inc. Bylaws (“Bylaws”). *See* Bylaws, attached hereto as Exhibit D.
- 20 8. Subsequently, on or about April 3, 2003, the Restatement of Declaration of
- 21 Covenants, Conditions and Restrictions for Saguaro View Management, Inc. (“Restated
- 22 Declaration”), was recorded with the Maricopa County Recorder at Document No. 2003-
- 23 0415130. *See* Declaration, attached hereto as Exhibit E.
- 24 9. Plaintiffs and Defendant Association are governed by the Restated
- 25 Declaration and Bylaws.
- 26 10. Pursuant to Section 2 of the Restated Declaration, “[a]ll owners of portions
- 27 of ‘The Property’ and all owners of other properties in said Section 30 designated for
- 28

1 water use, shall be and become members of the 'Association' by virtue of ownership of
2 said property.”

3 11. The Bylaws similarly state that “[m]embership in the Association shall be
4 limited to owners of portions of the Property and all owners of other properties in
5 Section 30 designated for water use as provided in the Declaration” and “[e]ach Member
6 shall have such right and privileges, including voting rights, as provided in the
7 Declaration and Articles [of Incorporation].” *See* Exh. D, Bylaws, § 1.3.

8 12. Pursuant to Bylaws, Article II, Section 2.1, “[a]n annual meeting of the
9 Members shall be held during the month of March or April each year” and “[a]t each
10 annual meeting, the Members entitled to vote shall elect a Board and may transact such
11 other Association business it deems appropriate.”

12 13. The 2019 annual meeting of the Members is currently set for March 23,
13 2019.

14 14. Pursuant to Bylaws, Article II, Section 2.3, “[e]ach Member attending any
15 annual or special meeting of the Members shall be entitled to vote.”

16 15. Pursuant to Bylaws, Article III, Section 3.1, “[t]he business of the
17 Association shall be managed by a Board of seven (7) directors, unless the Board shall
18 establish a lesser number which in no event shall be less than three (3) directors.”

19 16. Currently, the Defendant Association Board of Directors is comprised of
20 five (5) directors.

21 17. Pursuant to Bylaws, Article III, Section 3.2, “[t]he directors shall serve
22 staggered terms of two (2) years each in the manner set by the Board.”

23 18. Accordingly, Defendant Association has consistently elected three (3)
24 Board of Directors during elections in each odd-numbered year (*e.g.*, 2015, 2017) and
25 two (2) Board of Directors in each even-numbered year (*e.g.*, 2016, 2018).

26 19. Pursuant to the staggered-term elections, at the May 8, 2017 annual
27 membership meeting, the following three (3) Board of Directors were elected for a two-
28 year term: (1) Rick Molera, (2) Michael Shove, and (3) Doug Villa.

1 20. Thus, the two-year terms of office for Board of Directors Molera, Shove,
2 and Villa expire subject to the 2019 annual election.

3 21. Subsequently, at the April 14, 2018 annual membership meeting, the
4 following two (2) Board of Directors were purportedly elected for a two-year term: (1)
5 Newilda Sosa, and (2) Martin Rankin.

6 22. The two-year terms of office for Board of Directors Sosa and Rankin
7 expire subject to the 2020 annual election.

8 23. Plaintiffs received a ballot from Defendant Association relating to the 2019
9 annual election of Board of Directors. *See* 2019 Election Ballot, attached hereto as
10 Exhibit F.

11 24. The 2019 election ballot incorrectly identifies that only “two open seats”
12 are available “on the “Saguaro View Board for 2019.” *See* Exh. F, 2019 Election Ballot.

13 25. The two identified seats available for the Board of Directors (on the 2019
14 election ballot) are to replace the expiring terms of Board of Directors Shove and Villa.

15 26. However, a third Board of Directors seat (originally held by Rick Molera,
16 who was elected in 2017) should also be open for election at the upcoming 2019
17 membership meeting.

18 27. During the April 14, 2018 membership meeting, one of the then-existing
19 Board of Directors (Mr. Molera) verbally stated that “I am resigning.” *See* April 14,
20 2018 Board Minutes, attached hereto as Exhibit G.

21 28. Pursuant to the April 14, 2018 Board Minutes, Mark Greenawalt made a
22 motion to accept Mr. Molera’s verbal resignation and Board of Director Doug Villa
23 provided a second to that motion. *See* Exh. G, April 14, 2018 Board Minutes.

24 29. No vote was ever taken to approve or deny such motion.

25 30. Accordingly, Mr. Molera’s resignation was never formally acknowledged
26 or accepted by the Association.

27 31. Additionally, an individual may not verbally resign from Defendant
28 Association’s Board of Directors.

1 32. Pursuant to Bylaws, Article III, Section 3.5, any Board of Directors
2 “resignation shall be made in writing, and shall take effect at the time specified
3 therein....”

4 33. Mr. Molera never provided any written notice of his purported resignation
5 from Defendant Association Board of Directors.

6 34. Mr. Molera thus retained his seat on Defendant Association Board of
7 Directors, which shall naturally expire pursuant to its two-year term (in 2019).

8 35. The current election ballot must therefore provide for this additional (third)
9 Board of Directors seat to be filled at the 2019 annual election.

10 36. Following Mr. Molera’s verbal declaration of resignation, the remaining
11 Defendant Association Board of Directors engaged in a “discussion about having
12 another election to fill the seat vacated by Rick [Molera]” and “[i]t was agreed by the
13 sitting board to have another election.” *See* Exh. G, April 14, 2018 Board Minutes.

14 37. No motion was ever made by Defendant Association Board of Directors,
15 nor was any vote taken on the issue.

16 38. The process implemented by Defendant Association Board of Directors
17 was in contravention with the established Bylaws procedure.

18 39. Pursuant to Bylaws, Article III, Section 3.6, “[i]f the office of any director
19 becomes vacant, the remaining directors in office, though less than a quorum, may
20 appoint, by a majority vote, any qualified person to fill such vacancy for the unexpired
21 term.”

22 40. Defendant Association Board of Directors never appointed a new,
23 qualified person to fill the vacancy created by Mr. Molera’s alleged (and, herein,
24 disputed) resignation.

25 41. Instead, on or about May 8, 2018, Defendant Association distributed a new
26 election ballot to the membership to “choose 1 person” to replace Mr. Molera’s position
27 on Defendant Association Board of Directors. *See* May 8, 2018 Election Ballot, attached
28 hereto as Exhibit H.

1 42. Mr. Molera sought inclusion as a candidate on the election ballot that was
2 distributed on or about May 8, 2018.

3 43. Defendant Association did not permit Mr. Molera's inclusion on the ballot
4 as he "submitted his bio to Colby [Defendant Association's designated management
5 company and statutory agent] instead of submitting it to the board email address as
6 instructed." See June 2, 2018 Board Minutes, as attached hereto as Exhibit I.

7 44. Although no instructions or other written procedures were ever distributed
8 to the membership regarding where to submit candidate biographies, Defendant
9 Association "asked Colby to remove this person's name [Rick Molera] from the ballot."
10 See Exh. I, June 2, 2018 Board Minutes.

11 45. Additionally, the May 8, 2018 election ballot does not allow for Defendant
12 Association members to cast the ballot in person at the identified meeting date.

13 46. Pursuant to Bylaws, Article II, Section 2.3, "[e]ach Member attending any
14 annual or special meeting of the Members shall be entitled to vote."

15 47. Moreover, pursuant to statute, Defendant Association ballot "shall provide
16 for votes to be cast in person and by absentee ballot and, in addition, the association may
17 provide for voting by some other form of delivery, including the use of e-mail and fax
18 delivery." See A.R.S. § 33-1812(A).

19 48. The failure to provide the membership, including Plaintiffs, with the
20 opportunity to cast votes in person at a designated meeting renders the May 8, 2018
21 election ballot (and corresponding election process) *per se* invalid.

22 49. Based on the results of the aforementioned May 8, 2018 election ballot,
23 Defendant Association appointed Mark Greenawalt to the Board of Directors.

24 50. Pursuant to the Bylaws, at best for Defendant Association (leaving aside
25 Defendant Association's invalid resignation acceptance process, the improper removal of
26 Mr. Molera's name from the May 8, 2018 ballot, and the failure of the May 8, 2018
27 ballot to permit in-person voting at the corresponding membership meeting), the votes in
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1 favor of Mr. Greenawalt's appointment to the Board of Directors would permit such
2 "qualified person to fill such vacancy for the unexpired term." *See* Bylaws, § 3.6.

3 51. Thus, Mr. Greenawalt (to the extent he maintains any legitimate role on the
4 Board of Directors) is entitled to serve out the remainder of Mr. Molera's term of office,
5 which began upon election in 2017 and expires upon the 2019 election cycle.

6 52. In sum, three (3) Board of Directors seats must be open for election at the
7 upcoming annual membership meeting (and election), which is currently set for March
8 23, 2019: those three (3) seats are currently held by (1) Doug Villa, (2) Michael Shove,
9 and (3) Mark Greenawalt (on behalf of Rick Molera).

10 53. Proper notice must be given to all members to permit such persons to cast
11 an in-person or absentee ballot, if they so choose.

12 54. Again, in violation of both Bylaws, Article II, Section 2.3 and A.R.S. § 33-
13 1812(A), Defendant Association's distributed ballot for the March 23, 2019 annual
14 membership meeting and Board of Directors election does not allow for members to cast
15 the ballot in-person at the identified meeting date. *See* Exh. F, 2019 Election Ballot.

16 55. On February 28, 2019, Plaintiffs sent Defendant Association a letter
17 detailing the allegations set forth in this Verified Complaint and requested Defendant
18 Association to comply with the remedial ballot request (to establish three (3) open Board
19 of Directors seats and permit in-person submission of the ballot). *See* February 28, 2019
20 Letter from Mitchell W. Fleischmann to Saguaro View Management, Inc., attached
21 hereto as Exhibit J.

22 56. In response, Defendant Association responded, in part, that the "Board has
23 decided to keep the election the way it is and will not be modifying the notice or the
24 ballot." *See* March 8, 2019 Email from Scott B. Carpenter to Mark Bainbridge, attached
25 hereto as Exhibit K.

26 57. Defendant Association has thus refused to permit the voting for three (3)
27 Board of Directors seats at the upcoming March 23, 2019 annual membership meeting.
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1 58. Defendant Association also has refused to correct the improperly
2 established and circulated ballots that do not permit in-person voting at the annual
3 membership meeting.

4 **COUNT I**

5 **Breach of Contract**

6 59. All allegations in the previous paragraphs are incorporated as if fully set
7 forth herein.

8 60. The Restated Declaration, together with the other governing documents,
9 including the Bylaws, constitute a contract between Plaintiffs and Defendant
10 Association.

11 61. Defendant Association has breached the contractual documents as
12 described herein.

13 62. Defendant Association's breach has caused damage to Plaintiffs.

14 **COUNT II**

15 **Breach of Implied Covenant of Good Faith and Fair Dealing**

16 63. All allegations in the previous paragraphs are incorporated as if fully set
17 forth herein.

18 64. Arizona law implies into every contract a covenant of good faith and fair
19 dealing which prohibits a party to the contract from preventing other parties to the
20 contract from receiving the benefits of the contract.

21 65. By virtue of the above-alleged acts and omissions, Defendant Association
22 prevented Plaintiffs from receiving the benefit of their contractual relationship with
23 Defendant Association.

24 66. Defendant Association's breach has caused damage to Plaintiffs.

25 **COUNT III**

26 **Breach of Association Duty of Care**

27 67. All allegations in the previous paragraphs are incorporated as if fully set
28 forth herein.

1 68. Arizona has adopted standards that govern the duty of a homeowners'
2 association, such as Defendant Association, to treat members fairly and to act reasonably
3 in the exercise of its discretionary powers including rulemaking, enforcement, and
4 design-control powers.

5 69. These standards, in part, serve to protect individual members from
6 improper management and imposition by those in control of the association.

7 70. By virtue of the above-alleged acts and omissions, Defendant Association
8 has not treated members, including Plaintiffs, fairly and has not acted reasonably in the
9 exercise of its discretionary powers.

10 71. Defendant Association's breach of its duty of care has caused damage to
11 Plaintiffs.

12 **COUNT IV**

13 **Breach of Statutory Planned Communities Act**

14 72. All allegations in the previous paragraphs are incorporated as if fully set
15 forth herein.

16 73. A.R.S. § 33-1812(A) requires that "[t]he association shall provide for votes
17 to be cast in person and by absentee ballot and, in addition, the association may provide
18 for voting by some other form of delivery, including the use of e-mail and fax delivery."

19 74. By virtue of the above-alleged acts and omissions, Defendant Association
20 has failed to afford members, including Plaintiffs, the right to vote "in person" for Board
21 of Directors candidates at the annual (or special) membership meetings.

22 75. Defendant Association's breach of its statutory duty has caused damage to
23 Plaintiffs.

24 **COUNT V**

25 **Declaratory Judgment – Injunctive Relief**

26 76. All allegations in the previous paragraphs are incorporated as if fully set
27 forth herein.

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1 77. This claim is brought, in part, pursuant to the Uniform Declaratory
2 Judgment Act, A.R.S. § 12-1831, *et seq.*, and Rule 57 of the Arizona Rules of Civil
3 Procedure.

4 78. Defendant Association violated the provisions of the governing documents,
5 including the Declaration and Bylaws, by virtue of the reasons set forth above.

6 79. Defendant Association continues to violate the governing documents,
7 including the Restated Declaration and Bylaws, by improperly proceeding with the 2019
8 Board of Directors election with a statutorily and contractually flawed ballot.

9 80. Enforcement of the restrictions is reasonable and necessary to protect the
10 interest of Plaintiffs, as members of Defendant Association, and preserve the intent of
11 the Restated Declaration and Bylaws.

12 81. Plaintiffs have no adequate remedy at law for the violation of the governing
13 documents, including the Restated Declaration and Bylaws, and will suffer irreparable
14 injury and damage by virtue of Defendant Association's past and continuing breaches.

15 82. Plaintiffs seek a temporary restraining order, preliminary injunction, and
16 permanent injunction enjoining Defendant Association from breaching the governing
17 documents, including the Restated Declaration and Bylaws, and ordering Defendant
18 Association to immediately cure all violations.

19 83. Plaintiffs seek a declaratory judgment establishing the validity of the
20 governing documents, including the Restated Declaration and Bylaws, and the
21 restrictions imposed thereby.

22 **WHEREFORE**, Plaintiffs respectfully request that this Court:

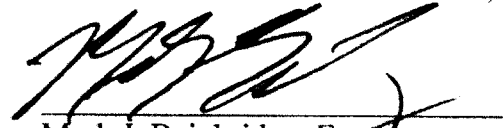
- 23 A. Enter judgment in favor of Plaintiffs of each count;
- 24 B. Award Plaintiffs their attorneys' fees and costs pursuant to A.R.S. §§ 12-
25 341 and 12-341.01;
- 26 C. Issue a temporary restraining order, and preliminary and permanent
27 injunction, barring election of 2019 Board of Directors until Defendant
28 Association provides three (3) open seats on the election ballot;

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- D. Issue a temporary restraining order, and preliminary and permanent injunction, barring election of 2019 Board of Directors until Defendant Association modifies the election ballot to permit in-person voting at the membership meeting;
- E. Enter Declaratory Judgment establishing the enforceability of the Restated Declaration and Bylaws; and,
- F. Award such other and further relief as the Court deems just under the circumstances.

DATED this 19th day of March, 2019.

THE BAINBRIDGE LAW FIRM, L.L.C.



Mark J. Bainbridge, Esq.
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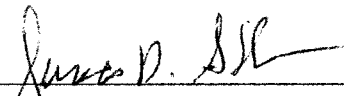
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VERIFICATION

I, James D. Smith, hereby state:

That I am a Plaintiff in the above-captioned matter; that I have read the foregoing Verified Complaint and know the contents thereof; and that I verify under penalty of perjury that the statements therein are true and correct to the best of my knowledge, information, and belief.

DATED this 18 day of March, 2019.

By: 
James D. Smith


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VERIFICATION

I, Susan E. Smith, hereby state:

That I am a Plaintiff in the above-captioned matter; that I have read the foregoing Verified Complaint and know the contents thereof; and that I verify under penalty of perjury that the statements therein are true and correct to the best of my knowledge, information, and belief.

DATED this 18 day of March, 2019.

By: 
Susan E. Smith