ATTACHMENT 27

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Pro Se and Attorney for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

KIP M. MICUDA, a married man; **ANN HAUGEN**, a married woman;

Plaintiff,

and

DAMON BRUNS and **HOLLY E. BRUNS**, husband and wife; **DYNAMITE WATER, LLC**, an Arizona limited liability company; **GRANITE MOUNTAIN INVESTMENTS, LLC**, an Arizona limited liability company; **RICHARD BRUNS** and **CLAUDETTE BRUNS**, husband and wife; **SCOTT MUCH** and **ANGELA MUCH**, husband and wife; JANE and JOHN DOE; ABC CORPORATION; 123 COMPANY or LLC or PARTNERSHIP;

Defendants.

NO. CV2019-012879

PLAINTIFFS' SEPARATE BOND PREHEARING STATEMENT

(Assigned to the Honorable Daniel Kiley)

Plaintiffs hereby submit their Separate Bond Prehearing Statement.

I. BACKGROUND

1. Plaintiffs closed on the purchase of their current home at 16509 E. Lone Mountain Road, Scottsdale, 85262, on May 31, 2016.

2. Defendants did not obtain a building permit, including a permit for their warehouse/barn, at 31222 N. 166th Street, Scottsdale, AZ 85262; Parcel ID 219-41-045X, (hereinafter as the "LOT") until July 7, 2016.

3. The LOT is approximately 5 acres and is adjacent to Plaintiffs' residential property.

4. No building appeared on the LOT in 2016.

5. Defendants' commercial use (which Plaintiffs also refer to as industrial use) of the LOT continued and expanded from at least late 2017 to summer 2019.

6. In June, 2019, Defendants began building another structure on the LOT.

7. On June 28, 2019, Plaintiff MICUDA submitted a complaint against Defendants for their commercial activity on the LOT, which was accepted by the Maricopa County Department of Planning and Development (hereinafter "Department") as violation case V201901256.

8. The Department sent Defendants, in particular, GRANITE MOUNTAIN and DAMON BRUNS, a Notice of Complaint on June 28, 2019.

9. The Department verified the zoning complaint on July 10, 2019, finding a violation of the Zoning Code and issuing a Notice and Order to Comply.

10. Defendants, in particular DAMON BRUNS, entered a Compliance Agreement (hereinafter "Agreement') with the Department on August 7, 2019, admitting "responsibility for the Violation." The agreement suspends enforcement of the Zoning Code according to a schedule.

11. To date, Defendants have continued their commercial activity on the LOT, which includes operating water hauler trucks and storing trucks, trailers and other equipment/materials on the LOT.

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12. Plaintiffs filed the instant action on September 19, 2019. They filed an Amended Complaint on September 25, 2019. Plaintiffs complained of a public nuisance and private nuisance and requested a preliminary injunction against Defendants to enjoin their commercial activity on the LOT, focusing on enjoining the operation, maintenance and repair of water hauler trucks and storing of such trucks, other vehicles, trailers, containers, pumps, equipment, supplies, fuel, materials and the like, as well as the ingress/egress of such items. Plaintiffs specifically alleged the following, in part:

> a. 6-7 water hauler trucks operating from the LOT as early as 5:30 a.m. to as late as 10:00 p.m. each and every day, causing unreasonably obstructed views and much more noise, dust, vibration, . . . and road damage than normal use, . . . affecting Plaintiffs, ... The operation of each of these trucks from the LOT is a Zoning Code violation, each and every day;
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> b. Storage, maintenance and repair of water hauler trucks, other vehicles, other trailers, other water delivery equipment, huge pumps, containers and commercial/construction equipment and supplies. Each of these activities is a Zoning Code violation each and every day and cause unreasonably obstructed views;

13. Plaintiffs complained they suffered/continue to suffer lost use and enjoyment of their property by Defendants' commercial activity on the LOT. In particular, Plaintiffs complained Defendants' operation, maintenance and repair of water hauler trucks and storage of items from/on the LOT interfere with, and cause harm to, their use and enjoyment of their property that is substantial and offensive. Plaintiffs also complained Defendants' commercial use has caused a diminution of value of their property.

14. Defendants have continued the commercial/industrial activity on the LOT that the Department found to be in violation of the Zoning Code. Such conduct includes, but is not limited to, the following:

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a. As many as 8 water hauler trucks, by Defendant DAMON BRUNS'S own admission, operating from the LOT as early as 5:10 a.m. to as late as 10:00 p.m. each and every day, causing much more noise, dust, vibration and road damage than normal use. The operation of each of these trucks from the LOT is a Zoning Code violation, each and every day;

b. Storage, refueling and maintenance and repair of water hauler trucks, other vehicles, other trailers, other water delivery equipment, huge pumps, containers and commercial/construction equipment and supplies. Each of these activities is a Zoning Code violation each and every day.

II. ARGUMENT

A. Effective Date of the Order and a Bond.

Plaintiffs maintain the preliminary injunction was effective when entered. It is not disputed that the Court of Appeals, in *In re Matter of Wilcox Revocable Trust, 192 Ariz. 337, 965 P.2d 71 (App. 1998)*, refrained from holding the preliminary injunction ineffective until a bond hearing. Indeed, the facts and holding suggest the court intended the opposite.

B. Defendants failed to address a bond in their pre-trial statement and failed to present any evidence related to alleged damages at trial.

Notwithstanding when the preliminary injunction is enforceable, Defendants failed to request a bond in their pre-trial statement and they failed to submit evidence as to their alleged damages caused by a preliminary injunction at the trial on November 21, 2019.

Besides the holding in *Connecticut General Life Ins. Co. v. New Images of Beverly Hills, 321 F.3d 878 (9th Cir. 2003)* to support Plaintiff's contention that Defendants failures should cause no bond being ordered, Plaintiffs offer additional authority for the same proposition.

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In *Galassini v. Town of Fountain Hills, 2011 WL 5244960*,[1] the United States District Court for the District of Arizona relied, in part, on the defendants' failure to both request and prove likely damages from an improper injunction to waive a bond. *See also Halo Mgmt. LLC v. Interland, Inc., 308 F.Supp.2d 1019, 1027 n. 11 (N.D.Cal.2003)* (defendant failed to request bond or present any evidence (other than unsupported assertions of monetary risk) regarding its likely damages).

C. The Court's Discretion to Waive the Bond or Impose a Zero Bond Amount

Rule 65, Arizona Rules of Civil Procedure, states that:

> (c) Security.
> (1) Generally; On Issuance. The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in such amount as the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.[2]

The phrase "in such sum as the court deems proper":

> indicates that the District Court is vested with wide discretion in the matter of security and it has been held proper for the court to require no bond where there has been no proof of likelihood of harm, or where the injunctive order was issued "to aid and preserve the court's jurisdiction over the subject matter involved."

Ferguson v. Tabah, 288 F.2d 665, 675 (2d Cir.1961) (citations omitted); *see also Clarkson Co. v. Shaheen, 544 F.2d 624, 632 (2d Cir.1976)* ("[B]ecause, under *Fed.R.Civ.P. 65[c]*, the amount of any bond to be given upon the issuance of a preliminary injunction rests within the sound

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[1] This decision is an unpublished decision, a memorandum decision, offered for persuasive value only, under *Rule 32.1, Federal Rules of Appellate Procedure,* and *Rule 111(c), Rules of the Supreme Court of Arizona. See Decision, appended hereto as Attachment A.*

[2] The Arizona court rule and Federal court rule as to security for a bond in this matter are almost identical. Looking to federal opinions on the bond is authorized and appropriate. *Smith v. Coronado Foothills Estates Homeowners Ass'n Inc, 117 Ariz. 171, 172 (1977) (In Banc).*

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discretion of the trial court, the district court may dispense with the filing of a bond." (citations omitted)).

The Court of Appeals for the Ninth Circuit has recognized that *Rule 65(c), F.R.C.P.*, "invests the district court 'with discretion as to the amount of security required, *if any*.'" *Johnson v. Couturier, 572 F.3d 1067, 1086 (9th Cir.2009) (quoting Jorgensen v. Cassiday, 320 F.3d 906, 919 (9th Cir.2003))* (emphasis in original). A district court need not require a bond "when it concludes there is no realistic likelihood of harm to the defendant from enjoining his or her conduct." *Jorgensen v. Cassiday, 320 F.3d 906, 919 (9th Cir.2003).*

In determining whether to impose a bond, many courts have considered the likelihood of harm to the defendants from its conduct being enjoined. *Id.* Plaintiffs contend there is little to no likelihood of harm to the defendants from its illegal operation being enjoined.

In People of State of Cal. ex rel. Van De Kamp v. Tahoe Regional Planning Agency, 766 F.2d 1319, 1325-26 (9th Cir. 1985), the court cited several reasons not to impose a bond:

> The district court also properly exercised its discretion to allow the League to Save Lake Tahoe to proceed without posting a bond. The court has discretion to dispense with the security requirement, or to request mere nominal security, where requiring security would effectively deny access to judicial review. *See Natural Resources Defense Council v. Morton, 337 F. Supp. 167 (D.C.D.C.1971); cf. Friends of the Earth v. Brinegar, 518 F.2d 322, 323 (9th Cir.1975)* (injunction pending appeal). The League, a non-profit environmental group, indicates that it is unable to post a substantial bond. Moreover, special precautions to ensure access to the courts must be taken where Congress has provided for private enforcement of a statute. *See Friends of the Earth, 518 F.2d at 323; (National Environmental Policy Act); Natural Resources Defense Council, 337 F. Supp. at 168–69 (same).* The Tahoe Compact specifically provides for private enforcement. *Article VI(j)(3).* Finally, the likelihood of success on the merits, as found by the district court, tips in favor of a minimal bond or no bond at all. *Friends of the Earth, 518 F.2d at 323.*

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Here, Plaintiffs are unable to post anything more than a nominal bond. Posting more than a nominal bond will ensure that Plaintiffs lose access to this Court when all they are trying to do is enforce the Zoning Code under the statute and ordinance providing for private enforcement.

Other courts have refrained from imposing a bond in, arguably, lesser circumstances, such as when the plaintiff merely seeks to stop a defendant from violating a contract. *Candrian v. RS Industries, Inc., 2013 WL 898143*[3]; *Bank of Arizona v. Superior Court of Yavapai County, 30 Ariz. 72, 245 P. 366 (1926).*

In the end, Plaintiffs feel it unfair and inequitable to compel them to insure Defendants' costs to operate legally rather than illegally. Plaintiffs have been truthful and reasonable. Defendants have not, instead perpetuating a constant effort to bully and intimidate and then force Plaintiffs to rebut one misleading, if not false, assertion after another. Plaintiffs urge this Court to hold Defendants accountable. If not this Court, then who?

D. The Bond's Purpose

Security should be required only "to protect the party restrained or enjoined against 'costs and damages' incurred or suffered by the party wrongfully restrained or enjoined." *7 J. Moore, J. Lucas & K. Sinclair, Moore's Federal Practice ¶ 65.09 (2d ed. 1990)*. Thus, a bond should only cover "costs and damages" due directly to the injunction itself. *Northeast Airlines, Inc. v. Nationwide Charters and Conventions, Inc., 413 F.2d 335, 338 (1st Cir.1969); Medafrica Line, S.P.A. v. American West African Freight Conference, 654 F. Supp. 155, 156 (S.D.N.Y.1987).*

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[3] This decision is an unpublished decision, a memorandum decision, offered for persuasive value only, under *Rule 32.1, Federal Rules of Appellate Procedure*, and *Rule 111(c), Rules of the Supreme Court of Arizona. See Decision, appended hereto as Attachment B.*

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Here, Defendants overstate their positions.

First, *Exhibit 19* shows that the 2003 Sterling is used about 25% of its availability, yet Defendants claim they need a fourth truck and new driver. *See PLAINTIFF.000352.*

Exhibit 20 shows Defendants purchasing DEF for the two Freightliner Trucks in New River and Kingman, Arizona, two areas far from the RVFH area. Dynamite Water does business all over Arizona. *See PLAINTIFF.000354-60, -64, -66-67.* Expenses associated with its operations outside the RVFH, such as miles, tires, maintenance and repairs, are not *caused* by the court's injunction and Plaintiffs ought not be bound by a bond based on such expenses. DEF can be purchased at Walmart, as some of Defendant's invoices reveal.

Exhibit 21 includes invoices for tires; however, most of the invoices do not identify a vehicle. *See PLAINTIFF.000368, -71, -77, -81-83, -92-93.* Defendants have no other evidence that such invoices relate to the trucks in issue, but Damon Bruns's testimony. Mr. Bruns is not credible. He has misrepresented to this Court, the State, Maricopa County, Plaintiffs and to third parties. He is untethered to either the facts or the law. He includes an invoice for tires for a hand-wash station. *See PLAINTIFF.000385.* He includes an invoice for tires for a different truck, #33. *See PLAINTIFF.000388.* Plaintiffs urge that Mr. Bruns cannot be considered credible on factual disputes.

Exhibit 22 includes invoices for parts, materials and supplies from NAPA Auto Parts. Again, most include nothing indicating what was used for the truck in issue. Dynamite Water owns eight water hauling trucks that work all over Arizona, as well as in other states. Mr. Bruns's testimony will lack credibility, foundation and call for speculation. Plaintiffs submit the documents fail to evidence causation by the injunction. Many of the invoices relate to other

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vehicles: a Ford 350, *see PLAINTIFF.000412, -43, -66, -68;* a Dodge truck, *see PLAINTIFF.000449, -53, -55*; truck #33, *see PLAINTIFF.000424.* None of these expenses are caused by the court's injunction.

Exhibit 48 includes invoices alleged as to truck #32. Pages 5 -6, 8-9, 10, 12-14 reveal nothing that relates to truck 32, but a few hand-written notes for purposes of this litigation. Nine of the eleven invoices have no credible indication of the truck serviced. Given the lack of credibility of Mr. Bruns, Plaintiffs urge such invoices be rejected.

Exhibit 49 includes invoices alleged as to truck #24. Pages 5, 7-12 reveal nothing that relates to truck 24, but a few hand-written notes for purposes of this litigation. Seven of the nine invoices have no credible indication of the truck serviced. Given the lack of credibility of Mr. Bruns, Plaintiffs urge such invoices be rejected.

Exhibit 50 includes invoices alleged as to truck #26. None of the pages reveal anything that relates to truck 26, but a few hand-written notes for purposes of this litigation. Given the lack of credibility of Mr. Bruns, Plaintiffs urge such invoices be rejected.

Exhibit 51 includes invoices alleged as to truck #38. Pages 5-9 reveal nothing that relates to truck 38, but a few hand-written notes for purposes of this litigation. Five of the ten invoices have no credible indication of the truck serviced. Given the lack of credibility of Mr. Bruns, Plaintiffs urge such invoices be rejected.

Exhibit 55 includes more invoices, but none of the pages reveals anything that relates to one of the four trucks argued by Defendants. Given the lack of credibility of Mr. Bruns, Plaintiffs urge such invoices be rejected.

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Exhibits 61 and *62* relate to the fees Defendants paid Maricopa County to apply for a special use permit. By the Compliance Agreement between the County and Defendants, by December 30, 2019, Defendants either had to apply for the permit, or strictly comply with the Zoning Code. This Court's injunction did not cause Defendants to incur the costs for the application permit. This is another example of Defendants taking a position that ignores the facts and law.

Further, Defendants ignore how they conducted business for eleven years before they purchased the LOT, in an effort to inflate the bond. Prior to 2017, Defendants parked their trucks at the Bruns residence (*Exhibits 4, 32, 33*), the Rohrer residence (*Exhibits 5, 6, 7*), and other places unknown. Damon Bruns even admitted at the last trial that at least four of his trucks were not operating from the LOT. Where are those trucks parked? Damon Bruns has parked at least one truck at his home recently. Thus, Defendants can continue to park 2-3 trucks at the homes of Bruns, Rohrer or other drivers. Defendants ignore this option to artificially inflate the bond.

Further still, Defendants have other options to store equipment. The Bruns residence has 6700 square feet of space at the back of the lot already used for storage. Also, Damon Bruns is a partner of James Cantelme in National Emergency Water, LLC. Mr. Cantelme also has his own company, 310 Dust Control, LLC. Mr. Cantelme has an industrial complex on I-17 near New River. Surely, he would be receptive to helping his partner (Bruns) with storage. In addition, Damon Bruns purchased a lot from the County in 2018 in New River that is .68 acres. He can store stuff there. Notably, Defendants failed to disclose any of the foregoing.

Next, Defendants hinge the vast majority of their claimed expenses on the following, a statement in their disclosure filed with the court:

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> Driving from the Adobe Property to the LOT in the morning and back to the Adobe Property in the evenings will add more than an hour of commuting time per driver per day. As a result, Dynamite must hire another driver.

The preliminary injunction enjoins Defendants' business operations on the LOT, including no parking, no storage, no maintenance, no repairs and no refueling. Accordingly, there is no reason for any driver of Dynamite Water to drive to Defendants' residential LOT next to Plaintiffs. Defendants either misunderstand the injunction or intend not to follow it. Operating from the Adobe lot, as they propose, Defendants will actually *decrease* the costs of operating its trucks in the RVFH area because the Adobe lot is much closer to the main fill water site at Jomax and Pima in north Scottsdale. Given the savings in time and money, Dynamite Water may be able to operate with just *two* trucks, rather than three, causing additional savings. The savings may pay for renting the Adobe lot.

Finally, and perhaps most importantly, water tank alerts from Dynamite Water to Plaintiffs in 2019 reveal that Dynamite Water charges an average of $0.032 per gallon for water delivered. John Hornewer, of Rio Verde Water, will testify he operates his water delivery business in the same area for $0.04 a gallon, 25% more than Dynamite Water. Mr. Hornewer operates his business legally and shoulders the added cost. Dynamite Water operates illegally to avoid costs of business. Again, Plaintiffs should not be burdened to insure added costs for Dynamite Water being compelled to follow the law.

All those costs either not caused by the injunction or lack proof of causation, should be excluded from any consideration of the amount of a bond. Even so, Plaintiffs urge the court to order the injunction effective immediately either without a bond or setting the bond at $0.00, as posting a bond will be an undue burden on Plaintiffs and likely foreclose their access to this Court.

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E. Terms of the Injunction.

Plaintiffs urge that Defendants' proposed order fails to define key terms of the injunction, disabling effective enforcement. By their action, Plaintiffs sought Defendants' strict compliance with the Maricopa County Zoning Code. In *Coconino County v. Calkins, 2019 WL 1076238*[4], the court stated:

> Zoning laws "serve the public welfare by providing for the orderly development of the community." *City of Phoenix v. Oglesby, 112 Ariz. 64, 65 (1975)* (citation omitted). Because zoning matters fall within the purview of the legislature, courts presume that zoning ordinances are valid. *See id.* As the United States Supreme Court has explained, "judgments about the appropriate punishment for an offense belong in the first instance to the legislature." *United States v. Bajakajian, 524 U.S. 321, 336 (1998)* (citation omitted). Our supreme court has similarly acknowledged that establishing penalties is a function of the legislature, not the courts. *See State v. Wagstaff, 164 Ariz. 485, 490 (1990).* We will not declare a statutory fine "violative of the constitution unless it plainly and undoubtedly exceeds any reasonable requirements for redressing the wrong." *State v. Wise, 164 Ariz. 574, 576 (App. 1990).*

Here, the Compliance Agreement between the County and Defendants requires Defendants' strict compliance with the Code, unless they apply for and ultimately obtain a special use permit. Defendants applied for the use permit. The agreement does not address the context of an injunction being imposed. However, the Zoning Code itself provides for fines for code violations, the same as those in *Calkins*:

> The hearing officer's judgment stated that a $750 daily penalty would accrue for "each further day of noncompliance." Despite having acknowledged that daily penalty, Calkins failed to bring the Property into compliance. Six months later, the Board gave Calkins additional time to correct the violations, but he failed to do so. The daily penalty of $750 was authorized by statute and by the Ordinance. *See A.R.S. § 11-815(C), (D); Ordinance, § 16(D)(4)(a).* The record reflects that the

[4] This decision is an unpublished decision, a memorandum decision, offered for persuasive value only, under *Rule 111(c), Rules of the Supreme Court of Arizona. See Decision, appended hereto as Attachment C.*

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violations continued unabated for 307 days. Accordingly, we affirm the judgment for penalties.

Plaintiffs urge that the court impose, in part, a fine of $750.00 a day for each and every day Defendants fail to strictly comply with the injunction. Plaintiffs seek Defendants' strict compliance with the Code. Plaintiffs suggest the order state the following:

1. That the Preliminary Injunction is effective as of November 21, 2019.
2. The court waives a bond.
3. That Defendants immediately strictly comply with the Maricopa County Zoning Code.
4. That Defendants' failure to strictly comply with the Maricopa County Zoning Code requires, at the very least, a fine of $750.00 per day, consistent with the Maricopa County Zoning Code.
5. The court has discretion and will likely impose other sanctions, including attorney's fees and costs, for either Defendants' failure to strictly comply with the Zoning Code or the injunction order, under the court's contempt authority.

III. LIST OF WITNESSES

1. Ann Haugen, Plaintiff
2. John Hornewer
3. Damon Bruns, Defendant
4. Any witness listed by Defendants, whether or not called by Defendants.

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IV. LIST OF EXHIBITS TO BE USED AT TRIAL

#	Document Description	By	Date	Bates No.	Admitted into evidence at 11/21/19 Trial
1	Planning & Development Department Code Compliance Division Compliance Agreement (Case #V201901256)	P	8/7/2019	PLAINTIFF.000041–PLAINTIFF.000043	Yes-Plaintiffs' Exhibit 1
2	Print-out from Ethicalcommunity.com re: Dynamite Water, LLC	P		PLAINTIFF.000183-PLAINTIFF.000184	
3	Declaration Under Penalty of Perjury – Damon Bruns	P	10/15/2019	PLAINTIFF.000254–PLAINTIFF.000256	Yes-Plaintiffs' Exhibit 49
4	Maricopa County Planning and Development Historical Aerial Photography of Defendants' Residence	P	Sep-Nov 2013; Nov 2015-Feb 2016; Sep-Dec 2018	PLAINTIFF.000288–PLAINTIFF.00290	
5	Maricopa County Planning and Development Historical Aerial Photography of Rohrer Residence	P	Sep-Oct 2011; Oct-Dec 2012; Sep-Nov 2014; Nov 2015-Feb 2016; Sep-Dec 2016; Sep-Nov 2017	PLAINTIFF.000291–PLAINTIFF.000296	
6	Maricopa County Planning and Development 2015,2016 and 2018 Aerial Photography of Rohrer Residence	P	2015; 2016; 2018	PLAINTIFF.000297–PLAINTIFF.000299	
7	Photos showing use of Rohrer Property	P	06/07/2019; 8/11/2019	PLAINTIFF.000156-PLAINTIFF.000163	Yes-Plaintiffs' Exhibit 33

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8	Email exchange between Micuda and David Cantelme	P	10/17/2019–10/28/2019	PLAINTIFF.000261-PLAINTIFF.000267	
9	Print-out from govtrie.com re: Federal Contract Award (Purchase Order N0024419P0199) to Dynamite Water, LLC	P		PLAINTIFF.000185-PLAINTIFF.000189	
10	Print-out from Procure.az.gov re: Master Blanket Purchase Order AGFD18-211769 from Arizona Game and Fish Department to Dynamite Water, LLC, and related documents	P	8/21/2018	PLAINTIFF.000190-PLAINTIFF.000212	
11	Print-out from nationalemergencywater.com	P		PLAINTIFF.000213-PLAINTIFF.000215	
12	Print-out from Bloomberg.com re: National Emergency Water, LLC	P		PLAINTIFF.000216	
13	Arizona Corporation Commission Print-out re: National Emergency Water, LLC	P		PLAINTIFF.000217-PLAINTIFF.000218	
14	Non-Government Emergency Service Vehicle Registrations	P		PLAINTIFF.000245-PLAINTIFF.000252	Yes-Plaintiffs' Exhibit 49
15	Agricultural Land Use Application	P		BRUNS 000085 – BRUNS 000087	Yes-Defendants' Exhibit 70
16	Email Correspondence between Holly Lasley (Wager) and ADOT re Volunteer Fire Substation	P		BRUNS 000199; BRUNS 000202–BRUNS 000203	Yes-Defendants' Exhibit 105
17	Emails between Holly Lasley (Wagner) and Kathryn Garcia	P	7/22/2019	BRUNS 000185	
18	Supplemental Affidavit of John Hornewer	P	11/4/2019	PLAINTIFF.000282–PLAINTIFF.000287	Yes-Plaintiffs' Exhibit 54
19	Truck MPG Printout (Defendants' Exhibit 3)	P		PLAINTIFF.000348-PLAINTIFF.000352	

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20	DEF Fluid Receipts (Defendants' Exhibit 4)	P		PLAINTIFF.000353-PLAINTIFF.000367	
21	Truck Tire Service Records (Defendants' Exhibit 9)	P		PLAINTIFF.000368-PLAINTIFF.000400	
22	NAPA Auto Parts Receipts (Defendants' Exhibit 13)	P		PLAINTIFF.000401-PLAINTIFF.000472	
23	Maricopa County Complaints – Business in Residential Area – Processing Status	P		PLAINTIFF.000080–PLAINTIFF.000081	Yes-Plaintiffs' Exhibit 2
24	Maricopa County Planning and Development Historical Aerial Photography of rental property located at 7457 E. Adobe Dr.; and Maricopa County Assessor's Office Print-out	P	Sep-Dec 2018	PLAINTIFF.000304-PLAINTIFF.000306	
25	Photos of rental property located at 7457 E. Adobe Dr.	P	1/3/2020	PLAINTIFF.000307-PLAINTIFF.000312	
26	Maricopa County Planning and Development Historical Aerial Photography of Main Fill Station on Pima Rd	P	Dep-Dec 2018	PLAINTIFF.000330	
27	Photos from Main Fill Station on Pima Rd.	P	1/3/2020	PLAINTIFF.000331-PLAINTIFF.000332	
28	Google Map Adobe Dr. rental property to Main Fill Station on Pima Rd.	P	1/7/2020	PLAINTIFF.000475	
29	First Amendment to Standpipe Water Services Agreement	P	2/20/2019	BRUNS 000206 – BRUNS 000211	
30	Articles of Organization for Dynamite Water, LLC	P	6/26/2006	PLAINTIFF.000333-PLAINTIFF.000334	
31	Cortera.com Print-out re: Dynamite Water LLC	P	1/6/2020	PLAINTIFF.000343-PLAINTIFF.000345	
32	Maricopa County Planning and Development Historical Aerial Photography of Defendants' Residence	P	Sep-Dec 2018	PLAINTIFF.000316-PLAINTIFF.000317	
33	Photos of Defendant's Residence	P	11/11/2019	PLAINTIFF.000318-PLAINTIFF.000319	

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34	Maricopa County Planning and Development Historical Aerial Photography of Rural Metro Fire Department	P	Sep-Dec 2018	PLAINTIFF.000320	
35	Maricopa County Planning and Development Historical Aerial Photography of partner's property located at 46234 N Black Canyon Hwy; and Maricopa County Assessor's Office Print-out	P	Sep-Dec 2018	PLAINTIFF.000313-PLAINTIFF.000315	
36	Quit Claim Deed; Maricopa County Assessor's Office Print-out; and Maricopa County Planning and Development Historical Aerial Photography of Defendant's lot located at 46135 N 43rd Ave.	P	06/01/2018; Sep-Dec 2018	PLAINTIFF.000300-PLAINTIFF.000303	
37	Govtribe.com Print-out re: Dynamite Water LLC	P	1/6/2020	PLAINTIFF.000335-PLAINTIFF.000342	
38	Letter from Fire Chief John Kraetz	P	10/3/2018	BRUNS 000226 – BRUNS 000227	
39	Phoenix Fire Department Volume 1 - Operations Manual Rule of Conduct	P		PLAINTIFF.000473-PLAINTIFF.000474	
40	Arizona Corporation Commission Print-out; and Articles of Incorporation – Nonprofit Corporation for Rio Verde Foothills Volunteer Fire Support and Emergency Services	P	8/7/2019	PLAINTIFF.000321-PLAINTIFF.000329	
41	OpenPayrolls.com Print-out re: Damon Bruns	P		PLAINTIFF.000346-PLAINTIFF.000347	
42	Dynamite Water Alerts in 2019; and Emails re: Volume Delta Alarm for Micuda	P	1/27/2019 - 7/7/2019	PLAINTIFF.000476-PLAINTIFF.000488	
43	Dynamite Water Invoices	P	5/31/2019; 7/8/2019	PLAINTIFF.000221-PLAINTIFF.000222	Yes-Plaintiffs' Exhibit 45

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Any exhibit listed by Defendants, whether or not offered by Defendants, but reserving any objections to the admission of such exhibits.

V. DEPOSITIONS TO BE READ AT TRIAL

None

VI. STIPULATION REGARDING FOUNDATION OF EVIDENCE

Because Defendants have failed and refused to properly respond to formal discovery Plaintiffs urge the court to draw a negative inference against Defendants that Defendants will suffer no harm or consequence for being enjoined from continuing their illegal commercial use of the LOT. Damon Bruns ought not be allowed to testify Dynamite Water will suffer or be unable to conduct business, because of the injunction, when Defendants have refused to disclose any financial information for such a statement, as well as refused to respond to the following discovery. Any such statement lacks foundation and calls for speculation:

a. Copies of titles to each and every water hauling truck in the name of Dynamite Water, LLC, and/or Damon Bruns since January 1, 2006, and other similar documents showing date of purchase, amount of purchase, seller and owner.
b. Copies of any/all contracts entered by Damon Bruns and /or Dynamite Water, LLC, for the delivery or hauling of water to any person or organization other than residences of Rio Verde Foothills since 2006.
c. Tax returns for Dynamite Water, LLC, including K-1s to Damon and Holly Bruns, as well as to Claudette and Richard Bruns, since 2006.
d. Tax returns for Damon and Holly Bruns since 2006.

VII. EXCHANGE OF EXHIBITS

Plaintiffs hereby certify that all of the foregoing exhibits have been exchanged or made available for inspection and copying.

4900 N. Scottsdale Rd., Suite 1500
Scottsdale, AZ 85251
(480)305-8300

VIII. EVIDENCE RULE 615

Plaintiffs invoke the rule.

IX. SETTLEMENT EFFORTS TO DATE

None.

X. TRANSCRIPT

The Court's audio recording system.

RESPECTFULLY SUBMITTED this 14th day of January, 2020.

/s/Kip M. Micuda
Kip M. Micuda
Plaintiff, *Pro Se,* and Counsel for Ann Haugen

COPY of the foregoing e-filed/hand-delivered
this 14th day of January, 2020 to:

The Honorable Daniel Kiley
Maricopa County Superior Court– ECB 911
125 W. Washington Street
Phoenix, Arizona 85003
Email to: gomezr002@superiorcourt.maricopa.gov

COPY of the foregoing hand-delivered/mailed/emailed
this 14th day of January, 2020 to:

David J. Cantelme
D. Aaron Brown
CANTELME & BROWN, P.L.C.
2020 S. McClintock Drive, Suite 109
Tempe, Arizona 85252
Counsel for Defendants Damon and Holley Bruns;
Dynamite Water, LLC; Claudette and Richard Bruns;
And Granite Mountain Investments

/s/ S. Friesen

ATTACHMENT A

2011 WL 5244960
Only the Westlaw citation is currently available.
United States District Court, D. Arizona.

Dina GALASSINI, Plaintiff,
v.
TOWN OF FOUNTAIN HILLS, ARIZONA; Bevelyn Bender, in her official capacity as Town Clerk of Fountain Hills, Arizona; Andrew McGuire in his official capacity as Town Attorney of Fountain Hills, Arizona, Defendants.

No. CV–11–02097–PHX–JAT.
|
Nov. 3, 2011.

Attorneys and Law Firms

Steven M. Simpson, Arlington, VA, Paul Vincent Avelar, Timothy David Keller, Tempe, AZ, for Plaintiff.

ORDER

JAMES A. TEILBORG, District Judge.

***1** Upon consideration of Plaintiff's Motion for Preliminary Injunction (Doc. 4), and upon hearing evidence on November 3, 2011, the Court finds:

FINDINGS OF FACT

1. Plaintiff Dina Galassini is a United States citizen and a citizen of Arizona, residing in Fountain Hills, Arizona, in the County of Maricopa, within the jurisdiction of this Court.

2. Defendant Town of Fountain Hills, Arizona is a municipality and political subdivision of the State of Arizona.

3. Defendant Bevelyn Bender is the Town Clerk for the Town of Fountain Hills, Arizona, an office created by ARIZ.REV.STAT. ANN . ("A.R.S.") § 9–237 (2011). Defendant Bender is sued in her official capacity as Maricopa County Recorder.

3. Defendant Bender is the "filing officer" for the Town of Fountain Hills and is responsible for the filing of campaign finance reports and other documentation for town ballot issues. *See* A.R .S. § 16–902.01 (2011). Defendant Bender is responsible for notifying the town attorney if she has reasonable cause to believe that a person is violating the campaign finance laws. *See* A.R.S. § 16–924 (2011).

4. Defendant Andrew McGuire is the Town Attorney for the Town of Fountain Hills, Arizona. Defendant McGuire is sued in his official capacity as Town Attorney.

5. Defendant McGuire has authority to serve orders of violations on those who violate the campaign finance laws with respect to local ballot measures and to assess civil penalties for such violations. *See* A.R.S. § 16–924 (2011).

6. The State of Arizona, through its Attorney General, is an intervenor in this action.

7. Arizona Revised Statutes, Section 16.902.01(A) provides:

> Each political committee that intends to accept contributions or make expenditures of *more than five hundred dollars* shall file a statement of organization with the filing officer in the format prescribed by the filing officer before accepting contributions, making expenditures, distributing any campaign literature or circulating petitions. Each political committee that intends to accept contributions or make expenditures of *five hundred dollars or less* shall file a signed exemption statement in a form prescribed by the filing officer that states that intention before making any expenditures, accepting any contributions, distributing any campaign literature or circulating petitions. If a political committee that has filed a five hundred dollar threshold exemption statement receives contributions or makes expenditures of more than five hundred dollars, that political committee shall file a statement of organization with the filing officer

> in the format prescribed by the filing officer within five business days after exceeding the five hundred dollar limit.

A.R.S. § 16–902.01 (emphasis added).

8. Arizona Revised Statutes, Section 16–901(19) defines "political committee" as follows:

> 'Political committee' means a candidate or any association or combination of persons that is organized, conducted or combined for the purpose of influencing the result of any election or to determine whether an individual will become a candidate for election in this state or in any county, city, town, district or precinct in this state, that engages in political activity in behalf of or against a candidate for election or retention or in support of or opposition to an initiative, referendum or recall or any other measure or proposition and that applies for a serial number and circulates petitions and, in the case of a candidate for public office except those exempt pursuant to § 16–903, that receives contributions or makes expenditures in connection therewith, notwithstanding that the association or combination of persons may be part of a larger association, combination of persons or sponsoring organization not primarily organized, conducted or combined for the purpose of influencing the result of any election in this state or in any county, city, town or precinct in this state.

*2 A.R.S. § 16–901(19).

9. Arizona Revised Statutes, Section 16–901(8) defines "expenditures" as follows:

> 'Expenditures' includes any purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value made by a person for the purpose of influencing an election in this state including supporting or opposing the recall of a public officer or supporting or opposing the circulation of a petition for a ballot measure, question or proposition or the recall of a public officer and a contract, promise or agreement to make an expenditure resulting in an extension of credit and the value of any in-kind contribution received ...

A.R.S. § 16–901(8).

10. Arizona Revised Statutes, Section 16–901(3) defines "contribution" as follows:

> 'Contribution' means any gift, subscription, loan, advance or deposit of money or anything of value made for the purpose of influencing an election including supporting or opposing the recall of a public officer or supporting or opposing the circulation of a petition for a ballot measure, question or proposition or recall of a public officer ...

A.R.S. § 16–901(3).

11. Title 16 of the Arizona Revised Statutes contains the following requirements for political committees:

A. "Each political committee must have a chairman and treasurer and those positions may not be held by the same individual." A.R.S. § 16–902(A).

B. "Before a political committee accepts a contribution or makes an expenditure it shall designate ... its campaign depository" and "shall notify the filing officer of the designation ... "either at the time of filing the statement of organization pursuant to 16–902.01 or within five business days after opening an account." A.R.S. § 16–902(C).

C. Committees that have filed a five hundred dollar threshold exemption statement must, among other things, 1) maintain a record of all contributions received and expenditures made by the committee; 2) file a termination statement in conformance with § 16–914 within ninety days of the election cycle, or if it fails to file a termination statement, be fined $100; 3) preserve all records and finance reports for three years. A.R.S. § 16–904.

D. "A political committee that makes an expenditure in connection with any literature or advertisement to support or oppose a ballot proposition shall disclose and ... shall include on the literature or advertisement the words 'paid for by,' followed by the name of the committee that appears on its statement of organization or five hundred dollar threshold exemption statement ..." A.R.S. § 16–912.01(A). "For the purposes of this section, 'advertisement' means general public advertising through the print and electronic media, signs, billboards and direct mail." A.R.S. § 16–912.01(J).

12. Plaintiff Dina Galassini intended to hold two protests,[1] opposing the Fountain Hills Special Bond Election on November 8, 2011.

13. Plaintiff Dina Galassini sent an email to twenty-three residents of Fountain Hills, inviting them to join her at the two protests and to bring signs protesting the bonds.[2]

*3 14. Before the planned dates of her protests, Plaintiff received a letter from Defendant Bender, indicating that she received a copy of the email Plaintiff sent to the twenty-three residents.

15. In the letter, Defendant Bender informed Plaintiff "[a]lthough an individual acting alone is not a political committee under Arizona law and need not file a statement of organization, if any additional person or persons join the effort (as defined in A.R.S. § 16–901(19)–see below) begun by an individual, the association of persons has become a 'political committee' under Arizona law, and must file a statement of organization before accepting contributions, making expenditures, distributing literature or circulating petitions."

16. The letter further informed Plaintiff "[i]n order to comply with the law a Statement of Organization must be filed in the office of the Town Clerk prior to **any** electioneering taking place. I would strongly encourage you to cease any campaign related activities until the requirements of the law have been met." (emphasis in original).

CONCLUSIONS OF LAW*Standing and Ripeness*

The Fountain Hills Defendants argue that Plaintiff's claim is premature. To satisfy Article III's case or controversy requirement, Plaintiff must establish that she has standing to sue. To demonstrate standing, Plaintiff must show "(1) an injury-in-fact, (2) causation, and (3) a likelihood that the injury will be redressed by a decision in the plaintiff's favor." *Human Life of Washington v. Brumsickle,* 624 F.3d 990, 1000 (9th Cir.2010) (internal quotation omitted). As the Court cannot issue advisory opinions or decide hypothetical cases, the claim must also be ripe for review. *Id.* (internal citation omitted). When a plaintiff has made a pre-enforcement constitutional challenge and has not yet been penalized for violating the challenged statute, "neither the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies that 'case or controversy' requirement," but "when a challenged statute risks chilling the exercise of First Amendment rights, the Supreme Court has dispensed with rigid standing requirements and recognized 'self-censorship' as "a harm that can be realized even without an actual prosecution." *Id.* at 1000 (internal quotations and citations omitted). "In an effort to avoid the chilling effect of sweeping restrictions, the Supreme Court has endorsed what might be called a 'hold your tongue and challenge now' approach rather than requiring litigants to speak first and take their chances with the consequences." *Lopez v. Candaele,* 630 F.3d 775, 785–786 (9th Cir.2010) (internal quotation omitted). In such pre-enforcement cases, courts must consider three factors: (1) "whether pre-enforcement plaintiffs have failed to show a reasonable likelihood that the government will enforce the challenged law against them" (2) whether plaintiffs have established, with some concrete detail that they intend to violate the challenged law; and (3) "whether the challenged law is inapplicable to plaintiffs, either by its terms or as interpreted by the government." *Id.* at 786. If the government disavows an intent to enforce a law against a plaintiff, such disavowal "must be more than a mere litigation position."

*4 With regard to the first factor, the Court finds that Defendant Bender's letter to Plaintiff is strong evidence that Plaintiff faces a credible threat of adverse action by the State. In *Culinary Workers v. Del Papa,* the Ninth Circuit Court of Appeals found injury in fact where the attorney general wrote a letter to the union which quoted the statute in full and threatened to refer the prosecution to local criminal authorities." 200 F.3d 614 (9th Cir.1999). Defendant Bender's letter to Plaintiff similarly quoted the statute and informed her that "one or more persons working to impact the results of an election are

considered to be a Political Action Committee (PAC) subject to all the requirements associated with a PAC." Although Defendant Bender's letter did not threaten to refer the matter to the City Attorney, it did "strongly encourage" Plaintiff to "cease any campaign related activities until the requirements of the law have been met." During the Preliminary Injunction hearing before this Court, Plaintiff testified that as soon as she received this letter, she decided to call off her planned protests because "I had no idea I'd be violating the law" and "I didn't know if I'd be fined or jailed or what was going to happen." The Court finds that this warning to Plaintiff was reasonably interpreted by Plaintiff as a credible threat that, if she were to continue with her proposed protests, she would be in violation of the law, unless she first registered as a political action committee. *See id.* ("We also reject the contention that the attorney general's letter was not a 'genuine threat' because it failed to 'chill' the union's exercise of First Amendment rights. There is no dispute that the union stopped distributing the contested handbill as soon as it received the attorney general's letter. This is substantially more than a subjective chilling effect."). Accordingly, Plaintiff has adequately established the first factor.

With regard to the second factor, both in her email and through testimony during the Preliminary Injunction hearing, Plaintiff established, in concrete detail, the nature of the activities she planned to engage in. During the Preliminary Injunction hearing, two witnesses testified that they planned to go to Plaintiff's protests, as proposed in her email. While there is some disagreement among the State of Arizona and the Fountain Hills Defendants as to whether those activities would actually meet the definition of "political committee," the description of a political committee urged by the Town Clerk, which the State of Arizona seems to concede is correct, suggests that if Plaintiff were to engage in her protests, she would be violating the law, unless she first registered her group as a political committee. The Court finds that there is at least a strong argument that Plaintiff's proposed activities would violate the challenged law. Such a strong argument supports Plaintiff's decision to self-censor, rather than risk violating the challenged law. Accordingly, Plaintiff has met the second element.

***5** With regard to the third factor, as the Court has previously pointed out, the State of Arizona and the Fountain Hills Defendants seemingly disagree as to the interpretation of the law. Because Defendants do not agree as to whether the law applies to Plaintiffs' actions, it is difficult for the Court to engage in a traditional analysis of this factor. However, it seems to be undisputed is that, if the Court finds that the requirements of the statutory scheme contained in Title 16 of the Arizona Revised Statutes do apply to Plaintiff, they would be enforced against her. There has certainly been no suggestion to the Court that these laws have not been enforced in the past or that there is a plan to not enforce them in the future. As pointed out above, based on Defendant Bender's letter to her and her proposed activities, Plaintiff has established a strong possibility that her planned protests would violate the statutory scheme. Because this has reasonably caused Plaintiff to self-censor, the Court finds that Plaintiff has established the third factor.

For the foregoing reasons, the Court finds that Plaintiff has satisfied Article III's case or controversy requirement.

Jurisdiction and Venue

The Court has personal jurisdiction over the parties to this action. The Court has jurisdiction under 28 U.S.C. §§ 1331, 1343(a) and 42 U.S.C. § 1983. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b).

Preliminary Injunction

To be entitled to temporary restraining order, Plaintiff must show:

> [1] he is likely to succeed on the merits,
>
> [2] he is likely to suffer irreparable harm in the absence of preliminary relief,
>
> [3] the balance of equities tips in his favor, and
>
> [4] an injunction is in the public interest.

Winter v. Natural Res. Def. Council, 555 U.S. 7, 24–25, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). Even if Plaintiff has not demonstrated that he is likely to succeed on the merits, if plaintiff establishes factors [3] and [4], a preliminary injunction is also appropriate when Plaintiff has demonstrated "serious questions going to the merits" and the "hardship balance tips sharply toward plaintiff." *Alliance for Wild Rockies v. Cottrell,* 632 F.3d 1127, 1134–35 (2011).

"Courts asked to issue preliminary injunction based on First Amendment grounds face an inherent tension: the moving party bears the burden of showing likely success on the merits-a high burden if the injunction changes the status quo before trial-and yet within that merits determination the government bears the burden of

justifying its speech-restrictive law." *Thalheimer v. City of San Diego,* 645 F.3d 1109, 1115 (9th Cir.2011) "[I]n the First Amendment context, the moving party bears the initial burden of making a colorable claim that its First Amendment rights have been infringed, or are threatened with infringement, at which point, the burden shifts the government to justify the restriction." *Id.* at 1116. "[E]xacting scrutiny applies in the campaign finance disclosure context" and the Court must "examine whether the law's requirements are substantially related to a sufficiently important government interest." *Human Life of Washington v. Randolph,* 507 F.3d 1172, 1189 (9th Cir.2007).

***6** In this case, the Court finds that Plaintiff has established serious questions going to the merits and that the hardship balance tips sharply toward Plaintiff.

In her Complaint, Plaintiff alleges that A.R.S. § 16–901(19) is an unconstitutional burden on her First Amendment rights to freedom of speech and freedom of association. Plaintiff alleges that, both on their face and as applied to Plaintiff, the registration, exemption, reporting, and disclosure requirements for political committees in the Arizona Revised Statutes impose a prior restraint on political speech and association and chill the rights to free speech and association. Plaintiff further alleges that these registration, exemption, reporting, and disclosure requirements are vague and overbroad violations of the First and Fourteenth Amendments of the United States Constitution. Following the Preliminary Injunction hearing in this matter, the Court finds that Plaintiff has established serious questions as to the constitutionality of the statutes at issue. Further, at this stage, Defendants have not met their burden of establishing that the statutes are sufficiently related to an important government interest as they apply to Plaintiff.

Likelihood of Irreparable Harm, Balance of the Equities, and the Public Interest

Factors two, three, and four of the *Winter* test—irreparable harm, balance of equities, and public interest—are met under these facts. "The loss of First Amendment ... freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *S.O. C., Inc. v. County of Clark,* 152 F.3d 1136, 1148 (9th Cir.1998). Often, in cases involving "First Amendment rights ... which must be carefully guarded against infringement ... injunctive relief is clearly appropriate." *Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). The "balancing of equities that is undertaken in a conventional equity case is out of place in dealing with rights so important as the modern Supreme Court considers the rights of expression to be." *Shondel v. McDermott,* 775 F.2d 859, 869 (7th Cir.1985). Finally, courts "have consistently recognized the significant public interest in upholding First Amendment principles." *Sammartano v. First Judicial District Court,* 303 F.3d 959, 974 (9th Cir.2002). It "is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Michigan Liquor Control Comm.,* 23 F.3d 1071, 1079 (6th Cir.1994); *see Thalheimer v. City of San Diego,* 645 F.3d 1109, 1129 (9th Cir.2011) ("the public interest in upholding free speech and association rights outweighed the interest in continued enforcement of campaign finance provisions."). Accordingly, because there are serious questions related to the merits of this case and balance of equities tips sharply toward Plaintiff, the Court finds that Plaintiff is entitled to a preliminary injunction.

Bond Requirement

***7** Federal Rule of Civil Procedure 65(c) provides that "[n]o restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Fed.R.Civ.P. 65(c). Despite this mandatory language, "Rule 65(c) invests the district court with discretion as to the amount of security required, *if any.*" *Johnson v. Couturier,* 572 F.3d 1067, 1086 (9th Cir.2009) (internal quotation omitted). In particular, the district court may dispense with the filing of a bond when it concludes there is no realistic likelihood of harm to the defendant from enjoining his or her conduct. *Id.* Even more on point, courts have waived the bond requirement in free speech cases involving no harm to the defendant. *Baca v. Moreno Valley Unified School Dist.,* 936 F.Supp. 719, 738 (C.D.Cal.1996) (waiving the bond requirement because "to require a bond would have a negative impact on plaintiff's constitutional rights, as well as the constitutional rights of other members of the public affected by the policy").

In the present case, Defendants have not requested a bond, nor have they submitted any evidence regarding their likely damages. It is also difficult to envision how Defendants would incur compensable costs or damages. Thus, the Court finds that this preliminary injunction will not likely result in any damages to Defendants and will waive the bond requirement.

Based on the foregoing findings and conclusions,

IT IS HEREBY ORDERED THAT:

1) Plaintiff's Motion for Preliminary Injunction (Doc. 4) is GRANTED.

2) Defendants, along with their officers, agents, and employees, are hereby enjoined from requiring Plaintiff and others associating with her to register as a political committee and/or file an exemption form under A.R. S. §§ 16–901(19) and 16–902.01(A), and to comply with the requirements for political committees contained in A .R.S. §§ 16–902, –904, –912.01(A) & (J), and –924, so that Plaintiff may speak and associate with others and hold her protests between now and November 8, 2011.

3) This Order will go into effect immediately and expire after the close of the November 8, 2011 Fountain Hills Special Election.

5) For good cause shown, the Court exercises its **discretion** and **waives** the requirement of a security **bond** accompanying this preliminary **injunction** Order.

All Citations

Not Reported in F.Supp.2d, 2011 WL 5244960

Footnotes

1 The protests were originally planned for October 19, 2010 from 4:00 p.m. to 6:00 p.m. at the corner of Palisades and Palomino in Fountain Hills, Arizona and October 22, 2010 from 12:00 p.m. to 3:00 p.m. at the corner of Saguaro and Avenue of the Fountains in Fountain Hills, Arizona.

2 Plaintiff suggested that the signs say: "Bonds are BONDAGE," "Keep Property Taxes Low," "No to the Ball and Chain Bond," "Vote NO on the Bond," and "Vote No on Nov 8."

End of Document

ATTACHMENT B

2013 WL 898143
Only the Westlaw citation is currently available.
United States District Court, D. Arizona.

Scott and Beverly CANDRIAN, husband and wife, and Scott and Beverly Candrian on behalf of RS Industries, Inc., an Iowa Corporation, Plaintiffs,
v.
RS INDUSTRIES, INC., an Iowa Corporation, Perry Hintze, Stanley Hintze, Tim Hintze, Jeff Hintze, Todd Hintze, Greg Hester, and Kevin Conklin, Defendants.

No. CIV 13–088–TUC–CKJ.
|
March 8, 2013.

ORDER

CINDY K. JORGENSON, District Judge.

***1** Pending before the Court is Plaintiffs' Application for Temporary Restraining Order with Notice, Preliminary Injunction, Appointment of Receiver, and Request for CourtDirected Mediation (Doc. 7) and the Motion to Dismiss TRO Application (Doc. 13) filed by Defendant RS Industries, Inc.

Factual and Procedural Background
RS Industries, Inc. ("RS") is the parent company and sole owner of The Ryan Group, Inc. ("Ryan"), in Davenport, Iowa, and Sun Mechanical Contracting, Inc. ("Sun"), in Tucson, Arizona. The retirement of the largest RS shareholder, Plaintiff Scott Candrian ("Candrian"), is scheduled for August 2013. Candrian alleges that, under the agreements between the shareholders of RS, Candrian's shares are to be purchased by RS and the shares distributed among the company and the current shareholders.

Candrian asserts that Senior Shareholder and self-proclaimed RS President Perry Hintze, and a minor, non-voting shareholder Kevin Conklin (and other defendant shareholders) are conspiring to circumvent the agreements with Candrian and fabricate justification for not compensating Candrian his fair share upon retirement, calculated to be worth approximately $7,000,000.00, and are unilaterally acting to subvert the authority of the rest of the Board of Directors and individual shareholders to further their own personal agenda.[1] Candrian alleges that the individually-named Defendants are:

1. Engaging in secret business deals through RS entities without informing Candrian or the other shareholders.

2. Barring RS Chief Financial Officer and shareholder Tom Peters from his office at the Ryan headquarters.

3. Interrupting four key shared RS employees' access to the RS network and accounting system. As a result, the Chief Financial Officer, the Director of Human Resources, the Director of Administrative Services, and the IT Manager are unable to perform their duties for RS, Ryan, and Sun. (Candrian also alleges that his access has been interrupted.)

4. Subverting the authority of the RS IT Manager, Aaron Meyers ("Meyers"), who takes directions from the board of directors. (Candrian asserts the IT Manager was threatened with being fired (by Stan Hintze) or having criminal charges brought against him if he interfered with individually-named Defendants' efforts to control the server and accounting system (by Hintze and Conklin).)

5. Intimidating Meyers and the Director of Administrative Services, Bonnie Dana ("Dana") to prevent them from accessing the RS accounting system or server, which access is necessary for Meyers and Dana to perform their work for RS, Ryan, and Sun. (Candrian alleges that Conklin told Meyers it would be illegal for Meyers to make any changes to the server without authority from Hintze, and if Meyers did anything without instructions from Hintze, Conklin would "take it to the next level." Hintze told Dana that if she tried to access the server, she would be subject to criminal and civil liability for "unauthorized computer access, misappropriation of trade secrets, copyright infringement, and/or trespass to computer systems under applicable federal and state law.")

***2** Candrian alleges that the consequences of these actions include:

1. Without access to both the Chief Financial Officer and the RS accounting system and server, the Director of Administrative Services, Bonnie Dana, is impotent to perform crucial aspects of her job including:

procuring insurance for RS, Ryan, and Sun employees; procuring workers' compensation coverage for each entity; and obtaining bonding required before the companies can begin projects.

2. Without the Chief Financial Officer in place, and Perry Hintze trying to take over his authority, the Company's bank, U.S. Bank, has asked for concerted direction from the RS Board of Directors, including Candrian, because the Defendants' actions have created confusion and uncertainty.

Candrian also alleges that a regularly-scheduled RS Board meeting was cancelled by Hintze because of Hintze's work load and a special meeting of the RS Board of Directors and Shareholders has been called by Hintze to take place in Iowa on March 11, 2013. "Based on the agenda for the special meeting, it is believed the meeting, if held, will result in significant and material changes to the way RS has operated, and will result in the termination of the RS Chief Financial Officer and an intentional deprivation of the share value Scott Candrian is due at retirement in August 2013." Appl. for TRO, p. 6. A request by Candrian to postpone the meeting because of his work load has been denied.

On February 12, 2013, Plaintiffs Scott and Beverly Candrian, as husband and wife, filed a Complaint (Doc. 1) seeking a Declaratory Judgment and an Accounting from RS. On March 1, 2013, Plaintiffs Scott and Bevery Candrian, as husband and wife and on behalf of RS Industries, Inc., filed an Amended Complaint (Doc. 5) seeking a declaratory judgment, an order for an accounting, the appointment of a receiver, and alleging claims of ultra vires acts, breach of fiduciary duty, breach of covenant of good faith and fair dealing, and defamation.

An Application re: for Temporary Restraining Order with Notice, Preliminary Injunction, Appointment of Receiver, and Request for Court Directed Mediation (Doc. 7) has been filed by Plaintiffs. Defendant RS has filed a Motion to Dismiss TRO Application (Doc. 13). Evidence and argument were presented to the Court on March 6–7, 2013.

Temporary Restraining Order Standard

Injunctive relief is an equitable remedy. "The basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies." *Weinberger v. Romero–Barcelo,* 456 U.S. 305, 312, 102 S.Ct. 1798, 1803, 72 L.Ed.2d 91 (1982). Injunctive relief is not automatic: "In each case, a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. Although particular regard should be given to the public interest ... a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Amoco Production Co. v. Village of Gambell, Alaska,* 480 U.S. 531, 107 S.Ct. 1396, 1402, 94 L.Ed.2d 542 (1987). The standard for issuing a TRO is the same as that for issuing a preliminary injunction. *See Brown Jordan Int'l, Inc. v. The Mind's Eye Interiors, Inc.,* 236 F.Supp.2d 1152, 1154 (D.Haw.2007).

***3** Because a preliminary injunction is an extraordinary remedy, the moving party must carry its burden of persuasion by a "clear showing." *Mazurek v. Armstrong,* 520 U.S. 968, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997); *City of Angoon v. Marsh,* 749 F.2d 1413 (9th Cir.1984).

To obtain injunctive relief, a moving party must show either "(a) probable success on the merits combined with the possibility of irreparable injury or (b) that [it] has raised serious questions going to the merits, and that the balance of hardships tips sharply in [its] favor." *Bernhardt v. Los Angeles County,* 339 F.3d 920, 925 (9th Cir.2003). The Ninth Circuit has explained that "these two alternatives represent 'extremes of a single continuum,' rather than two separate tests. Thus, the greater the relative hardship to the moving party, the less probability of success must be shown." *Immigrant Assistant Project of Los Angeles County Fed'n of Labor (AFLCIO) v. INS,* 306 F.3d 842, 873 (9th Cir.2002), citation omitted.

Likelihood of Success

Only a reasonable probability of success, not an overwhelming likelihood, is all that need be shown for preliminary injunctive relief. *Gilder v. PGA Tour, Inc.,* 936 F.2d 417, 422 (9th Cir.1991). In this case, Plaintiffs have alleged Defendants are seeking to avoid a contractual obligation regarding the terms of his retirement. Further, the parties have each alleged unethical conduct and actions not in the interests of RS, Ryan, and Sun committed by each opposing side. Resolution of these disputes will necessarily require a review of business records. Plaintiffs have requested an Accounting, but at this time the Court cannot ascertain which claims, if any, will be corroborated by the records. Additionally, the contradictory claims of each party justifying their actions (e.g., conduct by Candrian committed with knowledge of Tom Peters, defense claims actions were taken pursuant to an investigation of Candrian) requires not only credibility determinations but

consideration in light of any supporting documents. Plaintiffs' claims are bolstered by supporting declarations. However, during the hearing, counsel for Plaintiffs stated something had been "brewing" since the end of December. This may support Defendants' claims that they recently learned of the misappropriation of funds. The Court also considers that Candrian's expenses were documented, Defendants have not been transparent in the efforts to investigate Candrian, and that Bruce Beach ("Beach"), who has served as an advisor to the advisory board since 2003 and whose firm has viewed and audited financial statements of RS, testified that he had no knowledge that Tom Peters had participated in any financial improprieties. The Court finds that Plaintiffs have shown a likelihood of success of their claims.

As to Plaintiffs' claims regarding the modification agreement, it also appears there is a likelihood of success on this claim. Indeed, Beach testified that the difference between the advisory board and the Board of Directors is not significant. The approval of the modification plan by the advisory board supports a conclusion that there is a likelihood of success by Candrian on these claims. Further, actions were taken pursuant to that agreement (e.g., Candrian testified that he has received benefits from the agreement).

Irreparable Injury

***4** The issuance of a preliminary injunction is only appropriate "when the moving party has demonstrated a significant threat of irreparable injury, irrespective of the magnitude of the injury." *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir.1999). Additionally, Plaintiff must "demonstrate immediate threatened harm." *Caribbean Marine Serv. Co. v. Baldridge*, 844 F.2d 668, 674 (9th Cir.1988). Moreover, where requested injunctive relief is based on past wrongs, a plaintiff must show there is a real and immediate threat he or she will be wronged again. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983).

Economic damages are not traditionally considered irreparable because the injury can later be remedied by a damage award. *Cal. Pharmacists Ass'n v. Maxwell Jolly*, 563 F.3d 847, 852 (9th Cir.2009), *modified on other grounds, quoting Sampson v. Murray*, 415 U.S. 61, 90, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974). Although there may be a likelihood of success by Candrian as to his claims regarding the modification agreement, the Court finds that no *irreparable* harm will result from these claims—rather, any injuries related to these claims can be remedied by a damages award.

Although the Court has determined that Plaintiffs have shown a likelihood of success as to the misconduct claims, the Court does not find that a significant showing has been made. Therefore, a sliding scale requires a higher degree of irreparable harm be shown. *See e.g. United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 174, 175 (9th Cir.1987). The testimony established that actions of Defendants may affect the businesses (e.g., ability to acquire additional contracts, reputation of Candrian, reputation of businesses, ability to conduct business with other entities including banks). However, this case does not present a situation where, *based on the evidence,* the Court can conclude that there is a substantial danger that laws will be broken if a TRO is not issued. *See e.g. Pridgen v. Andresen*, 891 F.Supp. 733 (D.Conn.1995). Rather, it is just as likely that the failure to issue injunctive relief could result in lawful conduct as the lawful conduct that may result from the issuance of a TRO. Indeed, although Plaintiffs have submitted/discussed cases that involve maintaining the status quo and/or taking steps to stop illegal or unethical conduct, *Prudential Real Estate Affiliates, Inc. PPR Realty, Inc.*, 204 F.3d 867 (9th Cir.2000); *Shepard v. Patel*, 2012 WL 6019036 (D.Ariz.2012); *Haggiag v. Brown*, 728 F.Supp. 286 (S.D.N.Y.1990); *AHI Metnall, L.P. by AHI Kansas, Inc. v. J.C. Nichols Company*, 891 F.Supp. 1352 (W.D.Mo.1995), this case involves allegations of unethical conduct on both sides.

Nonetheless, because of the irreparable harm that may immediately result from failing to provide injunctive relief, the Court finds it appropriate to grant limited injunctive relief.

Balance of Hardships

***5** Plaintiffs argue that if an injunction is not granted, RS is subject to gross mismanagement and self-dealing by some of the directors without board approval and that Defendants have no legitimate rights to protect. However, RS argues that Candrian has misappropriated corporate funds. Defendants, however, had not demonstrated that maintaining the employment status of Candrian or the duties or access of Sun employees will in any way harm RS, Sun, or Ryan.

In light of the possibility of harm to Plaintiffs and the businesses if Candrian's employment status is modified, the Court finds Plaintiffs have shown that the balance of hardships tips in favor of a granting a TRO.

Public Interest

Plaintiffs also argue that there is public interest in issuing injunctions to maintain the status quo for claims of accounting and dissolution of partnerships. *Shepard v. Patel,* 2012 WL 6019036 at *5. Plaintiffs assert that the injunction would only affect the parties, and would simply prevent Defendants from violating the RS Articles of Incorporation, bylaws, and fiduciary duties. *See id.* (where an injunction's reach is narrow and affects only the parties, the public interest will be at most a neutral factor in the analysis rather than one that favors granting or denying the preliminary injunction). Here, the injunctive relief contemplated by the Court is narrow and will only affect the parties and their affiliates. The Court finds this factor is neutral.

Conclusion of TRO Analysis

Although Plaintiffs have shown there may be a likelihood of success as to the contractual claims, they have not shown that irreparable harm will result if a TRO is not issued as to those claims. However, Plaintiffs have shown that there is a likelihood of success as to the misconduct claims and that irreparable harm may result if injunctive relief is not granted. Further, a balancing of the hardships tips in favor of granting a TRO.

Because actions taken by Defendants may affect the day-to-day operations of RS, Ryan, and Sun, and may harm Plaintiffs and the businesses, the Court finds limited injunctive relief to be appropriate. The Court finds it appropriate to permit Defendants to conduct their business as they determine in the businesses' best interests at this time. In other words, Defendants may determine to proceed with the shareholder and/or board of director meetings, terminate any RS or Ryan employees if within bylaws, and continue to investigate any financial irregularities.[2] However, the Court will order Defendants to not modify the employment status of Candrian and will order that Candrian, Sun, and Sun's employees shall continue to have the historical access to RS and Ryan systems (including servers, networks, and information technology) that was permitted prior to the filing of the original Complaint in this case.

This injunctive relief being issued as a TRO on short notice and with little time to prepare, the Court will set this matter for further hearing on the request for a preliminary injunction.[3] It is anticipated that, at that time, not only will Plaintiffs be afforded an opportunity to present any additional evidence they choose, but Defendants will have an opportunity to present evidence. At that time, the Court will determine whether to cease, continue, or expand the injunctive relief. The Court will also schedule the pending motions for the appointment of a receiver and court-ordered mediation for additional argument. This will permit the filing of a response and a reply.

***6** If the parties mutually agree to mediation, they shall so notify the Court. In that event, the Court will continue the hearing on the aforementioned issues pending resolution of the mediation.

Setting of a Bond

Plaintiffs request that no **bond** or a minimal **bond** be required because there is no cost to Defendants in ceasing to violate the RS Articles of Incorporation and bylaws. *See Conn. General Life Ins. Co. v. New Images of Beverly Hills,* 321 F.3d 878, 882 (9th Cir.2003) (A "district court has wide **discretion** in setting the amount of a **bond**, and the **bond** amount may be zero if there is no evidence the party will suffer damages from the **injunction**."); *see also Doctor's Assocs., Inc. v. Distajo,* 107 F.3d 126, 136 (2d Cir.1997) (district court did not abuse **discretion** by issuing preliminary **injunctions** without requiring moving party to post **bonds** where there was "no proof of likelihood of harm" to the party enjoined); *Am. Fed'n & Mun. Emples., Local 3190 v. Maricopa County Bd.,* 2007 U.S. Dist. LEXIS 18356, *58–59, 2007 WL 809948 (D.Ariz. Mar. 13, 2007) (Because the "purpose of such a **bond** is to cover any costs or damages suffered by the [enjoined party] arising from a wrongful **injunction**," the district court has **discretion** to **waive** the **bond** requirement where the issuance of a preliminary **injunction** will not likely result in damages to the enjoined party).

The Court has determined that it is appropriate to only grant at this time some of the injunctive relief requested by Plaintiffs. The Court declines to set a bond at this time, but may revisit this issue with the consideration of the Preliminary Injunction.

Motion to Dismiss TRO Application

Defendant RS requests that the Court dismiss the TRO Application. The Court does not find dismissal of the application to be appropriate and will deny the request.

Accordingly, IT IS ORDERED:

1. Plaintiffs' Application for Temporary Restraining Order with Notice, Preliminary Injunction, Appointment of Receiver, and Request for Court–Directed Mediation (Doc. 7) is GRANTED IN PART. The Court will issue the Temporary Restraining Order as a separate Order.

2. Defendants' Motion to Dismiss TRO Application (Doc. 13) is DENIED.

3. This matter is set for evidentiary hearing on the Application for Preliminary Injunction and argument on the requests for an appointment of a receiver and court-ordered mediation on March 26, 2013, at 10:00 a.m.

DATED this 7th day of March, 2013.

All Citations

Not Reported in F.Supp.2d, 2013 WL 898143

Footnotes

1 The Declaration of Conklin states that he is a voting stockholder of RS. Doc. 15–1, p. 5.

2 The Court does not find it appropriate to enjoin Ryan from terminating a employee. Therefore, the Court is specifically not enjoining Ryan from terminating Peters. However, the Court also does not find it appropriate to enjoin Plaintiffs or Sun from hiring Peters if they so choose.

3 The Court will block its calendar for one day, 10:00 a.m.–5:00 p.m. If counsel anticipated the hearing lasting longer than that time, he/she shall so notify the Court's staff.

End of Document

ATTACHMENT C

2019 WL 1076238
Only the Westlaw citation is currently available.
NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.
Court of Appeals of Arizona, Division 1.

COCONINO COUNTY, et al., Plaintiffs/Appellees,
v.
Erling Stephen CALKINS, Defendant/Appellant.

No. 1 CA-CV 18-0098
|
FILED 3/7/2019

Appeal from the Superior Court in Coconino County, No. S0300CV201300751, The Honorable Mark R. Moran, Judge. **AFFIRMED**

Attorneys and Law Firms

Coconino County Attorney's Office, Flagstaff, By Brian Y. Furuya, Counsel for Plaintiffs/Appellees

Erling S.Calkins, Flagstaff, Defendant/Appellant

Judge Jennifer M. Perkins delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Michael J. Brown joined.

MEMORANDUM DECISION

PERKINS, Judge:

***1** ¶1 Erling Calkins appeals from the judgment entered in favor of Coconino County and the Coconino County Public Health Services District (collectively, the "County"). For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Calkins and his wife, Elaine, own real property in Coconino County (the "Property"). In 2012, the County cited the couple, as owners of the Property, for six violations of the County zoning ordinance ("Ordinance"). The violations included: (1) improper storage of unlicensed and inoperable vehicles; (2) improper storage of a mobile home; (3) storage of a commercial vehicle without a conditional use permit; and (4) building a structure without a permit.

¶3 After an administrative hearing, a County hearing officer entered a judgment finding that the Property was in violation of the Ordinance. *See* Ariz. Rev. Stat. ("A.R.S.") § 11-815(E), (F) (providing for an administrative hearing for a civil violation of a zoning ordinance or regulation). The judgment imposed a $ 100 initial penalty and gave Calkins thirty days to correct the violations. Calkins acknowledged receipt of the judgment on September 6, 2012. The judgment further indicated that if Calkins did not correct the violations by October 6, 2012, a $ 200 noncompliance penalty would apply and a $ 750 daily penalty would accrue "[f]or each further day of noncompliance."

¶4 On appeal to the County Board of Supervisors (the "Board"), *see* A.R.S. § 11-815(G) (authorizing review by the Board), the Board affirmed the hearing officer's judgment but gave Calkins additional time, until April 18, 2013, to correct the violations. Calkins did not appeal the Board's decision to superior court. *See* A.R.S. § 11-815(G) (authorizing judicial review of the Board's decision).

¶5 In the summer and fall of 2013, the County visited the Property twice and determined that the initial violations had not been corrected and that additional health and building code violations existed. Accordingly, the County filed a complaint in superior court seeking to enjoin "further human occupancy" of the Property and to compel Calkins and his wife to bring the Property into compliance. Calkins answered with a single sentence denying the allegations of the complaint.

¶6 Thereafter, the County moved for judgment on the pleadings. The superior court granted judgment in favor of the County. Following an evidentiary hearing, the court assessed penalties of $ 230,550, which included a $ 100 initial penalty, a $ 200 noncompliance penalty, and a $ 750 daily penalty for 307 days. The court enjoined Calkins from occupying the Property but granted him another opportunity to remedy the violations.

¶7 Two months later, the superior court held a compliance hearing and concluded that Calkins had come "nowhere close to remediating or coming into compliance with the Court's Order." The court invited the County to submit proposals for the remediation of the Property, and subsequently ordered the County remediate the Property.

¶8 After the County completed the remediation, the superior court held a hearing to establish restitution. Thereafter, the court entered a final judgment. Following an unsuccessful motion for new trial, Calkins timely appealed.

DISCUSSION

*2 ¶9 On appeal, Calkins challenges the superior court's entry of judgment on the pleadings and the penalty imposed against him.

I. Jurisdiction

¶10 As an initial matter, the County argues that Calkins' appeal should be denied because he challenges "the facts, procedures, and legal conclusions of an underlying administrative judgment that he failed to timely appeal," thereby depriving this Court of subject matter jurisdiction.

¶11 Calkins had thirty-five days to appeal to the superior court from when the Board served its decision. *See* A.R.S. §§ 11-815(G), 12-904(A). He did not file an appeal. Thereafter, the County filed an enforcement action. The court's final judgment in that case is the subject of this appeal. Our review is limited to the issues raised by the enforcement action; we will not revisit the Board's decision affirming the Hearing Officer's judgment.

II. Judgment on the Pleadings

¶12 On appeal, Calkins argues that the superior court erred in granting judgment on the pleadings. Arizona Rule of Civil Procedure ("Rule") 12(c) allows either party to move for judgment on the pleadings. Ariz. R. Civ. P. 12(c) (2014). A plaintiff is entitled to judgment on the pleadings if the allegations of the complaint "set forth a claim for relief and the answer fails to assert a legally sufficient defense." *Pac. Fire Rating Bureau v. Ins. Co. of N. Am.*, 83 Ariz. 369, 376 (1958). In reviewing an order granting judgment on the pleadings, we view the facts in favor of the non-moving party but review all legal conclusions *de novo*. *See Napier v. Bertram*, 191 Ariz. 238, 239, ¶ 1 (1998); *Shaw v. CTVT Motors, Inc.*, 232 Ariz. 30, 31, ¶ 8 (App. 2013) (citation omitted).

¶13 The County's motion for judgment on the pleadings tested whether Calkins' answer stated a defense to the County's claims. *See Walker v. Estavillo*, 73 Ariz. 211, 215 (1952). In *Walker*, our supreme court explained that the superior court erred in denying a motion for judgment on the pleadings, explaining that "[t]he complaint of plaintiffs having set forth a claim for relief, and defendants' answer and more definite statement failing to show any defense thereto, it was error for the trial court not to have granted plaintiffs' motion for judgment on the pleadings." *Id.*

¶14 Here, the County's complaint set forth specific allegations regarding Calkins' violation of the zoning ordinance, building code, and health code. The complaint was verified by the County's environmental services inspector, zoning code enforcement officer, and building inspector. Calkins' answer contained a single sentence categorically denying the allegations: "Defendants ... for their answer to plaintiff's complaint deny the allegations of this complaint." The answer did not even admit or deny that Calkins and his wife were residents of the County or that they owned the Property.

¶15 Pursuant to Rule 8(b), a party answering a complaint is required to "state in short and plain terms the party's defenses to each claim asserted" and to "admit or deny the averments upon which the adverse party relies." Ariz. R. Civ. P. 8(b) (2014). The rule also requires that denials "fairly meet the substance of the averments denied." *Id.* More specifically,

> *3 When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs, or may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits, but when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11(a).
>
> *Id.*

¶16 "A general denial is good only if the pleader intends to controvert all averments of the preceding pleading." *Colboch v. Aviation Credit Corp.*, 64 Ariz. 88, 93 (1946). Rule 12(b) requires that "[e]very defense, in law or fact, to a claim for relief in any pleading ... shall be asserted in the responsive pleading thereto." Ariz. R. Civ. P. 12(b) (2014). Rule 11 requires that a party signing a pleading do so based on his "knowledge, information, and belief formed after reasonable inquiry." Ariz. R. Civ. P. 11(a) (2014).

¶17 The County's complaint adequately set forth a claim that the Property was in violation of the County codes and that Calkins and his wife had failed to correct the violations. Pursuant to Rules 8(b) and 11(a), Calkins could not have denied, after reasonable inquiry, all the averments in the complaint. Moreover, Rule 12(b) required Calkins to assert every defense to the County's claims, but his answer failed to assert any defenses.

¶18 On appeal, Calkins argues that the superior court abused its discretion by denying him "the opportunity to amend his answer." Calkins, however, did not seek permission to amend his answer as required by Rule 15. *See* Ariz. R. Civ. P. 15(a)(1) (2014) (requiring a defendant to obtain leave of court or consent of adverse party for an amendment if more than twenty-one days have passed since service of the answer).

¶19 Calkins also argues that the superior court should have applied "less stringent standards" in reviewing his answer because he represented himself. In Arizona, however, it is well established that a *pro per* litigant "is entitled to no more consideration than if he had been represented by counsel, and he is held to the same familiarity with required procedures and the same notice of statutes and local rules as would be attributed to a qualified member of the bar." *Copper State Bank v. Saggio*, 139 Ariz. 438, 441 (App. 1983).

¶20 Because Calkins' answer failed to assert a legally sufficient defense to the County's claims, we affirm the superior court's entry of judgment on the pleadings.

III. Penalties

¶21 Calkins also argues we should vacate the judgment for penalties or, in the alternative, remand to superior court for a proportionality review. He contends that "constitutional proportionality principles prohibit imposition of fines when such fines would constitute an unduly harsh penalty under the circumstance[s] of the case."

¶22 The Board has authority to adopt a zoning ordinance "to conserve and promote the public health, safety, convenience and general welfare." A.R.S. § 11-811(A). In granting that authority, the legislature authorized the County to establish civil penalties for a violation of the zoning ordinance not to exceed the amount of the maximum fine for a class 2 misdemeanor, or $ 750. *See* A.R.S. §§ 11-815(D), 13-802(B). The legislature also specified that "[e]ach day of continuance of the violation constitutes a separate violation." A.R.S. § 11-815(D).

¶23 The Board exercised this statutory authority in adopting the Ordinance. Pursuant to the Ordinance, an enforcement action begins with the filing of a zoning violation citation. Ordinance, § 16(D)(1)(a). If the property owner denies the violation, the case proceeds to a hearing. Ordinance, § 16(D)(2)(a). If the hearing officer determines that a violation exists, he or she may impose civil penalties not to exceed $ 750 per violation, per day. Ordinance, § 16(D)(4)(a). The Ordinance also provides for a $ 100 initial penalty and a $ 200 non-compliance penalty. Ordinance, § 16(D)(4)(e).

***4** ¶24 Here, the County followed the procedure in the Ordinance. The County first issued a zoning violation citation. Thereafter, the hearing officer held a hearing and determined that the Property violated the Ordinance in multiple ways. The hearing officer imposed a $ 750 daily penalty as authorized by the Ordinance.

¶25 Calkins does not challenge the constitutionality of A.R.S. § 11-815 or the Ordinance. Rather, he bases his challenge on the Eighth Amendment to the United States Constitution, which prohibits the imposition of excessive fines. *See* U.S. Const. amend. VIII. He argues that "[d]ue process considerations compel proportionality review of the fines herein."

¶26 Zoning laws "serve the public welfare by providing for the orderly development of the community." *City of Phoenix v. Oglesby*, 112 Ariz. 64, 65 (1975) (citation omitted). Because zoning matters fall within the purview of the legislature, courts presume that zoning ordinances are valid. *See id.* As the United States Supreme Court has explained, "judgments about the appropriate punishment for an offense belong in the first instance to the legislature." *United States v. Bajakajian*, 524 U.S. 321, 336 (1998) (citation omitted). Our supreme court has similarly acknowledged that establishing penalties is a function of the legislature, not the courts. *See State v. Wagstaff*, 164 Ariz. 485, 490 (1990). We will not declare a statutory fine "violative of the constitution unless it plainly and undoubtedly exceeds any reasonable

requirements for redressing the wrong." *State v. Wise*, 164 Ariz. 574, 576 (App. 1990).

¶27 The hearing officer's judgment stated that a $ 750 daily penalty would accrue for "each further day of noncompliance." Despite having acknowledged that daily penalty, Calkins failed to bring the Property into compliance. Six months later, the Board gave Calkins additional time to correct the violations, but he failed to do so.

¶28 The daily penalty of $ 750 was authorized by statute and by the Ordinance. *See* A.R.S. § 11-815(C), (D); Ordinance, § 16(D)(4)(a). The record reflects that the violations continued unabated for 307 days. Accordingly, we affirm the judgment for penalties.

IV. Remaining Allegations

¶29 On appeal, Calkins also refers to the alleged introduction of "ex-parte evidence" and argues that the superior court judge violated the rules of court, demonstrating "conduct unbecoming a judge." Calkins also accuses the County of having "unclean hands" and of committing fraud. We find nothing in the record to support these allegations.

CONCLUSION

¶30 For the foregoing reasons, we affirm the judgment of the superior court. We award costs to the County upon compliance with Arizona Rule of Civil Appellate Procedure 21.

All Citations

Not Reported in Pac. Rptr., 2019 WL 1076238

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