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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-011347 05/30/2018

HONORABLE DANIEL J. KILEY

CLERK OF THE COURT
C. Mai
Deputy

MARK D GOLDMAN

DENNIS I WILENCHIK

v.

MARK KRISTOPHER SAHL, et al.

JOHN R CUNNINGHAM

JEFFERSON T COLLINS

UNDER ADVISEMENT RULING

CopperWynd Resort (the "Resort") and a condominium community known as "The Villas at CopperWynd" are located next to each other in the Town of Fountain Hills (the "Town").[1] In 2016, the Resort applied for a Temporary Use Permit ("TUP") that would allow a higher noise level than is generally permitted between the hours of 10 p.m. and midnight on a particular date in order to accommodate a wedding reception that was to be held on that date.[2] When one of the owners of a unit at The Villas at CopperWynd objected to the proposed TUP, the Town Council scheduled a hearing on the matter.[3] The Town Council heard public comments on the proposed TUP on April 7, 2016, but deferred deciding the dispute until a Town Council meeting that was set for May 19, 2016. Prior to the May 19, 2016 meeting, Defendant Mark Sahl ("Sahl") sent a letter to the Town Council objecting to the TUP.[4] Scott Carpenter ("Carpenter"), the then-managing partner of Defendant Carpenter, Hazlewood, Delgado & Bolen, LLP (the "Law Firm"), attended the May 19, 2016 Town Council meeting, identifying himself as counsel for Defendant The Villas at CopperWynd Association (the "Association") and speaking in

[1] Plaintiff's Response to Defendants' Motion for Summary Judgment filed March 12, 2018 at pp. 3-4.
[2] *Id*. at pp. 5-6.
[3] *Id*. at p. 6.
[4] *Id*.

opposition to the proposed TUP.[5] Plaintiff Mark Goldman (the "Plaintiff") also attended the May 19, 2016 Town Council meeting, identifying himself as counsel for the Resort and speaking in support of the proposed TUP.[6] The Town Council approved the TUP, with certain stipulations.[7]

From May through December of 2016, Sahl, Carpenter, and other attorneys from the Law Firm appeared at other meetings of the Town Council and the Town's Planning and Zoning Commission advocating, on behalf of the Association, for a reduction in the allowable noise level, a position which the Resort strongly opposed.[8]

On December 15, 2016, the Plaintiff sent a letter (the "December 15th Letter") to Sahl indicating that he was writing on behalf of the owner of a condominium within the Association named Sarah Nolan ("Nolan"), and that Nolan "believes that the Association and its Board are not acting in the best interests of the unit owners/Association members."[9] The December 15th Letter states that Nolan disputes the accuracy of some of the Law Firm's representations to the Town Council, and, further, that she believes the Law Firm to be "acting to the extreme detriment of the unit owners" by taking action that might prompt the Resort "to curtail, limit or end the unit owners' ability to utilize" the Resort's amenities, which would "substantially decrease the value of the units."[10] Additionally, the December 15th Letter states, by retaining the Law Firm to conduct such advocacy, "the Association is risking lawsuits that may arise in various manners and may result in increased legal fees and damages" which may, in turn, "rais[e] the members' Association fees."[11]

The December 15th Letter states that the Law Firm is "requested to cease and desist from advocacy on behalf of the Association in connection with any proposed noise ordinances" unless all "unit owners/Association members have been...fully informed as to the serious nature and consequences" of the Law Firm's actions.[12] The December 15th Letter further states that Ms. Nolan "intends to hold" the Law Firm and the Association "accountable" for their conduct.[13] The letter also warns that, with regard to "the members of the board of directors of the Association," Nolan "intends to hold them personally liable for their conduct," and asks whether the Law Firm

[5] *Id*. at p. 7.
[6] *Id*.
[7] *Id*.
[8] Plaintiff's Response to Defendants' Motion for Summary Judgment filed March 12, 2018 at p. 8.
[9] Statement of Facts in Support of Motion for Summary Judgment filed February 8, 2018 ("DSOF"), Exhibit 7 at pp. 1, 3.
[10] *Id*. at pp. 2-3.
[11] *Id*. at p. 3.
[12] DSOF, Exhibit 7 at p. 2.
[13] *Id*.

"represents the members of the Board individually and/or will accept service of process on their behalf."[14]

On January 5, 2017, the Plaintiff wrote another letter (the "January 5th letter") in which he notes that he had "never received any response" to his December 15th Letter.[15] Reiterating that "this law firm represents Sarah Nolan[,]…a member of the Association," the Plaintiff states that Nolan had received, from the Association, correspondence regarding an "Executive Board Workshop to Review Issues of Contemplated Litigation'."[16] The Plaintiff states that the Association's scheduling of this "Executive Board Workshop" suggests that "the Association is desirous of litigation rather than an amicable resolution of issues," an "approach" that Nolan believes to be "detrimental to the Association and the unit owners/members."[17] The Plaintiff then poses a series of questions regarding the "Executive Board Workshop," including, "What is the purpose of the Workshop?", "[w]hy is the Workshop off limits to the unit owners/members?", and "[a]re any Association monies being spent in connection with it, including and especially attorneys' fees."[18]

On January 6, 2017, Sahl responded with a letter to the Plaintiff (the "January 6th Letter") acknowledging receipt of the December 15th Letter and stating the following:

> While we recognize your representation of Sarah Nolan, we further understand that you failed to disclose Ms. Nolan's relationship with William D. Hinz, II, the Managing Partner of [the Resort]. We further recognize that you have failed to disclose your representation of [the Resort]. By nature of candor, you should have disclosed both of these facts in your correspondence rather than misrepresenting yourself as counsel to a singular homeowner whose positions may not align with the majority of the member's [*sic*] concerns. *We interpret your stated representation of* [*Nolan*] *as patently misleading* in light of her relationship with [the Resort] and its owner, Mr. Hinz and your representation of these parties. As a result, *we further believe that your conduct lacks the candor and honesty required under the Rules of Professional Conduct. Please be advised that we have spoken with the ethics hotline for the Arizona Bar and believe we have an ethical obligation to*

[14] *Id*. at p. 6.
[15] DSOF, Exhibit 8 at p. 1.
[16] *Id*. at p. 2.
[17] *Id*.
[18] *Id*.

> *report the extent that your correspondence misled your representation in this matter. Therefore, we will inform the Arizona State Bar of the same* (emphasis added).[19]

The January 6th Letter goes on to state that "the Association and its residents" have a constitutional right to voice their opposition to the "proposed [noise] ordinance," that they will not "permit their rights to be stifled by the threats and retaliatory practices" of the Resort, and that the Association intends to "vigorously defend its actions" and "to protect its quiet enjoyment."[20] The letter concludes with the suggestion that representatives of the Association meet with the managing partner of the Resort "without any attorneys present" in an effort to "improve[]" the "relationship between the parties."[21]

The Plaintiff replied with a letter dated January 11, 2017 (the "January 11th Letter") in which he states that, while the Resort "would very much like to have a positive relationship with the Association and the unit owners/association members, such a relationship would not be possible as long as the Resort "does not trust the current Board or believe in its sincerity and good faith."[22] The Plaintiff states that the Association should "demonstrate" its sincerity in desiring "a positive relationship" by complying with specified conditions, including that "the current Directors resign immediately from the board" and that a new election be held "as soon as reasonably possible to replace" them.[23] The Plaintiff concludes the January 11th Letter by stating that if the Association "refus[es] to comply" with the conditions set by the Resort "by 7:00 p.m. Arizona time today," then the Resort would "exercise its legal rights including but not limited to" by "establishing a moratorium" on the ability of "any purchasers, assignees, heirs and tenants of unit owners to obtain membership" in the Resort, as well as by "tak[ing] such other action as [the Resort] must do to protect itself…."[24]

Sahl replied to the Plaintiff's January 11th Letter the same day, "suggest[ing]" that the Resort "re-evaluate the legal implications of the course of action it has taken in this matter and the threats it has made."[25] While noting that "the Association would prefer to see…a mutually agreeable resolution," Sahl concludes the letter by stated that "the Association will absolutely consider moving forward with all available legal remedies," which "could potentially include

[19] DSOF, Exhibit 9 at p. 1.
[20] *Id*. at pp. 2-3.
[21] *Id*. at p. 3.
[22] DSOF, Exhibit 10 at p. 2.
[23] *Id.*
[24] *Id*. at pp. 2-3.
[25] DSOF, Exhibit 11 at p. 3.

actions for the tortious interference with the Association's business relationships and intentional infliction of emotion [*sic*] distress."[26]

Several days later, on January 16, 2017, the Plaintiff sent correspondence to individual unit owners at The Villas at CopperWynd stating that, "due to the past and continuing antagonistic conduct of" the Association, the Resort has placed "an indefinite moratorium, i.e., ban" on "new purchasers or new tenants" of units at The Villas at CopperWynd "obtaining memberships…and otherwise entering the premises of" the Resort.[27] In this letter, the Plaintiff discusses the actions of and statements by "the Association's legal counsel," including representations to the Town Council that, "in the reasonable opinion of [the Resort," are "needlessly derisive and derogatory and just plain false and deceptive."[28] Quoting from the correspondence he exchanged with Sahl, the Plaintiff concludes by stating that, although the Resort "would prefer to have a mutually beneficial relationship with" the "individual unit owners" at The Villas at CopperWynd, such a relationship is no longer possible now that the Resort "has been derogated in writing and threatened with lawsuits by" the Association.[29]

That same day, the Plaintiff sent correspondence to a particular unit owner at The Villas at CopperWynd advising him that his "membership" at the Resort has been "terminated," stating, "[Y]ou and your Family are expelled from [the Resort] and barred from entering [its] premises."[30] Additionally, the Plaintiff sent correspondence to a local real estate agent who was "the listing agent for a condominium unit" for sale in The Villas at CopperWynd, advising her of the Resort's "moratorium" on "new purchasers or new tenants" of units at The Villas at CopperWynd "obtaining memberships…and otherwise entering the premises of" the Resort.[31]

Shortly thereafter, on January 27, 2017, Sahl sent a letter (the "January 27th Letter") to Association members informing them of a "town hall meeting" scheduled on February 2, 2017 to "address all of your questions and concerns" regarding the dispute with the Resort.[32] Stating that the Association "finds it important to share the correspondence [it] received from [the Resort] and its responses to those demands to bring full transparency to the matter and explain [its] positions and its necessary actions taken," Sahl enclosed, along with the January 27th Letter, copies of correspondence sent to or from the Plaintiff, including, but not limited to, the

[26] *Id*.
[27] DSOF, Exhibit 13 at p. 1.
[28] *Id*. at p. 2.
[29] *Id*. at pp. 5-6.
[30] DSOF, Exhibit 14 at pp. 1, 2.
[31] DSOF, Exhibit 12 at p. 1.
[32] DSOF, Exhibit 15 at p. 1.

December 5th Letter, the January 5th Letter, January 6th Letter, and the January 11th Letter.[33] It is Sahl's transmission of the January 6th Letter to the Association members along with the January 27th Letter, and his filing of a complaint against the Plaintiff with the State Bar of Arizona (the "Bar Complaint"), *see* DSOF, Exhibit 16, that gives rise to this case.

The Plaintiff asserts claims against Sahl, the Law Firm, the Association, and others for Defamation/Libel, Respondeat Superior, Tortious Interference with Business Relations, Tortious Interference with Business Expectancy, Intentional Infliction of Emotional Distress, False Light, Aiding and Abetting, Civil Conspiracy, and Abuse of Process. Complaint at ¶¶ 53-145. The Abuse of Process claim is based on the Plaintiff's allegation that the Defendants "conspired to file an ethics complaint with the Arizona State Bar Association" which was "baseless" and was "summarily dismissed by the State Bar," but which nonetheless caused him to suffer "reputational injury…, humiliation, emotional distress, and anxiety." *Id*. at ¶¶ 140-141, 144. The remaining claims are based on the Plaintiff's allegation that the January 27th Letter and the accompanying January 6th Letter (collectively, the "Letters") "contain[] false and defamatory statements" about the Plaintiff that were "intentionally sent and published" to Association members "to damage [the] Plaintiff's reputation" as a means of "gain[ing] a tactical advantage over [the] Plaintiff" in connection with the dispute between the parties' clients. *Id*. at ¶¶ 24, 29-30.

A. Motion for Judgment on the Pleadings – Partial

Sahl and the Law Firm have also moved for judgment on the pleadings on the Plaintiff's Abuse of Process claim, asserting that the Plaintiff's allegation that the Law Firm "filed a frivolous bar complaint [does] not and cannot give rise to a civil cause of action." Motion for Judgment on the Pleadings - Partial ("Motion for Judgment on the Pleadings") at p. 2. In support of their position, they cite Rule 48(l) of the Rules of the Supreme Court of Arizona, which provides in part that "[c]ommunications to the court, state bar...or state bar staff relating to lawyer misconduct [or] lack of professionalism...shall be absolutely privileged conduct, and no civil action predicated thereon may be instituted against any complainant or witness." *Id*., *citing* Ariz.Supr.Ct.R. 48(l) ("Rule 48"). In response, the Plaintiff asserts that Rule 48 does not apply here because, by its terms, the rule "protects the content of the communication with the Arizona Bar, [but] *not the act of filing a bar complaint*." Plaintiff's Response to Defendants' [Motion for] Judgment on the Pleadings - Partial ("Response to Motion for Judgment on the Pleadings") at p. 2 (emphasis in original).

The distinction the Plaintiff draws between the *content* of a bar complaint and *the act of filing* that bar complaint is not recognized in Arizona law, nor does case law support the

[33] *See id*. at p. 2.

Plaintiff's position that only the former, and not the latter, is absolutely privileged. On the contrary, Arizona case law makes clear that the filing of a bar complaint against a lawyer alleging misconduct or lack of professionalism is absolutely privileged. *See, e.g., Sobol v. Marsh*, 212 Ariz. 301, 303, 130 P.3d 1000, 1002 *amended* 2006 WL 864292 (App. Div. 1, Apr. 5, 2006) ("As a matter of public policy and legal precedent, anyone who files a complaint with the State Bar alleging unethical conduct by an attorney is entitled to a common law absolute privilege from civil suit."); *Ashton-Blair v. Merrill*, 187 Ariz. 315, 317, 928 P.2d 1244, 1246 (App. 1996) ("Because the Arizona State Bar acts in a judicial capacity in dealing with attorneys' conduct, an absolute judicial privilege protects anyone who files a complaint with the organization."); *Drummond v. Stahl*, 127 Ariz. 122, 126, 618 P.2d 616, 620 (App. 1980) ("[P]ublic policy and legal precedent compel us to adopt the position that there is an absolute privilege extended to anyone who files a complaint with the State Bar alleging unethical conduct by an attorney."). In the Court's view, the distinction the Plaintiff seeks to draw between the content of a bar complaint and the act of filing that bar complaint is a distinction without a meaningful difference and, in any event, a distinction not recognized by Arizona law.

The Plaintiff argues that interpreting Rule 48 to bar his Abuse of Process claim "would render [the rule] unconstitutional" because, so interpreted, Rule 48 would abrogate a cause of action in violation of Article 18 § 6 of the Arizona Constitution, also known as the "anti-abrogation clause." Response to Motion for Judgment on the Pleadings at pp. 5, 6.

The anti-abrogation clause prohibits the abrogation "of all common law actions for negligence, intentional torts, strict liability, defamation, and other actions in tort which trace [their] origins to the common law." *Baker v. University Physicians Healthcare*, 231 Ariz. 379, 387-88, 296 P.3d 42, 50-51 (2013) (citation and internal quotations omitted). The clause was intended "to protect rights of action in existence at the time [the Arizona constitution] was adopted[.]" *Dickey ex rel. Dickey v. City of Flagstaff*, 205 Ariz. 1, 5, 66 P.3d 44, 48 (2003). "[T]o fall within the protection of the anti-abrogation [clause]," therefore, a "right of action…must have existed at common law or have found its basis in the common law at the time the constitution was adopted." *Id.* at 3, 66 P.3d at 46.

As Sahl and the Law Firm correctly note, an absolute privilege existed at common law for the reporting of professional misconduct. *See Desert Palm Surgical Group P.L.C. v. Petta*, 236 Ariz. 568, 580, 343 P.3d 438, 450 (App. 2015) ("At common law, an absolute privilege existed for those reporting professional misconduct to administrative agencies."). Rule 48 does not, therefore, abrogate any right that existed at common law, and so does not run afoul of the anti-abrogation clause. *See, e.g., Dickey*, 205 Ariz. at 5, 66 P.3d at 48 (holding that a negligence claim against a municipality "is not protected by" the anti-abrogation clause "because a suit against a city for simple negligence could not have been maintained at the time the anti-abrogation provision was instituted"). The Court therefore rejects the Plaintiff's argument that

applying Rule 48 according to its plain meaning would somehow violate the anti-abrogation provision of the Arizona Constitution.

The Plaintiff also argues that Rule 48 cannot mean what it says because "Article 2 Section 9 of the Arizona Constitution…on its face prohibits irrevocable (which Plaintiff submits must mean 'absolute' in the context of this discussion) immunities." Response to Motion for Judgment on the Pleadings at p. 9. Although it is not entirely clear, the Plaintiff appears to argue that Article 2 § 9 of the Arizona Constitution bars all absolute privileges from liability. *Id*. ("If the plain meaning of Article 2 Section 9 has any meaning, it must include a prohibition of the absolute privilege Defendants assert based on Rule 48(l).").

Article 2 § 9 of the Arizona Constitution provides as follows:

> No law granting irrevocably any privilege, franchise, or immunity shall be enacted.

Ariz.Const., Art. II, § 9. This constitutional provision, like its counterpart in the constitutions of other states, applies, if at all, to the grant of legislatively-sanctioned monopolies and exclusive licenses. *See, e.g., In re Dos Cabezas Power Dist*., 17 Ariz.App. 414, 419, 498 P.2d 488, 493 (1972) (considering challenge to statute that purportedly violated Article 2 § 9 of the Arizona Constitution by "grant[ing] a monopoly to existing suppliers of power"). *See also Estate of Stevenson v. Hollywood Bar and Café, Inc*., 832 P.2d 718, 722 (Colo. 1992) (provision of Colorado Constitution "prohibiting the establishment of irrevocable grants of special privileges, franchises or immunities has generally been invoked by parties asserting that particular legislation grants entities perpetual and exclusive authority to receive compensation from public funds for the provision of services or supplies"); *Blaikie v. Lindsay*, 268 N.Y.S.2d 356 (Sup. Ct. 1966) ("A statute offends the prohibition against the grant of 'any exclusive privilege, immunity or franchise' only if it precludes the granting of a similar privilege, immunity or franchise to another."). This constitutional provision has no application to the constitutionality of Rule 48.

Citing A.R.S. § 12-349 and Ariz.R.Civ.P. 11, Sahl and the Law Firm seek an award of "costs and attorney fees in obtaining the dismissal of" the Abuse of Process claim. Motion for Judgment on the Pleadings at p. 4. The Plaintiff has offered no response to this request. *See generally* Response to Motion for Judgment on the Pleadings.

A.R.S. § 12-349 requires a court to award reasonable attorney fees to the prevailing party if the prevailing party "show[s], by a preponderance of the evidence," that the unsuccessful party's claim "was groundless, in bad faith and harassing." *Phoenix Newspapers, Inc. v. Dep't of Corr*., 188 Ariz. 237, 244, 934 P.2d 801, 808 (App. 1997). *See also Fisher ex rel. Fisher v. Nat'l Gen. Ins. Co*., 192 Ariz. 366, 370, 965 P.2d 100, 104 (App. 1998) ("To award sanctions under

[A.R.S. § 12-349] the court must determine that the party's claim: (1) constitutes harassment; (2) is groundless; and (3) is not made in good faith."). All three elements must be shown. *Fisher*, 192 Ariz. at 370, 965 P.2d at 104. "An objective standard may be utilized to determine groundlessness, but a subjective standard determines 'intent to harass' and bad faith." *Phoenix Newspapers*, 188 Ariz. at 244, 934 P.2d at 808. Intent to harass "may be established by circumstantial evidence." *Id*. at 245, 934 P.2d at 809.

The Plaintiff's Abuse of Process claim is clearly groundless; the Plaintiff's position that an absolute privilege applies only to "the content of" a bar complaint and "not the act of filing a bar complaint," Response to Motion for Judgment on the Pleadings at p. 2, is directly contrary to long-standing and well-established case law. *See, e.g., Drummond*, 127 Ariz. at 125-26, 618 P.2d at 619-20 ("[P]ublic policy dictates that there must be immunity to all persons from any liability *arising from the filing of a complaint* with the State Bar which charges an attorney with unethical conduct.") (emphasis added). Even if the Plaintiff failed to understand, before he filed his Abuse of Process claim, that the claim was not well-grounded in fact and law, he certainly should have come to that realization after Sahl and the Law Firm cited binding legal authority establishing that the claim was meritless. The Plaintiff's persistence in pursuing his Abuse of Process claim even after adverse controlling authority was brought to his attention gives rise to an inference that the Plaintiff acted with the subjective intent necessary to justify an award of fees pursuant to A.R.S. § 12-349. *Cf. FLIR Systs., Inc. v. Parrish*, 174 Cal.App.4th 1270, 1278, 95 Cal.Rptr.3d 307, 315 (2009) ("[A]n inference of bad faith…may be made where the plaintiff proceeds to trial after the action's fatal shortcomings are revealed by opposing counsel.").

Moreover, the Plaintiff's own correspondence indicates his awareness that his Abuse of Process claim is not well-grounded in fact and law. In correspondence sent to the Defendants' counsel last January, the Plaintiff's counsel stated in part,

> Mr. Goldman is not suing Sahl for filing a bar complaint against him. If he were, that would likely be immune under Rule 48(l).

January 26, 2018 Letter from the Plaintiff's counsel to counsel for Sahl and the Law Firm, attached as Exhibit B to Declaration of James L. Csontos in Support of Motion for Rule 11 Sanctions filed February 8, 2018. The Plaintiff's failure to offer any explanation for his persistence in pursuing a claim against Sahl and the Law Firm for filing the Bar Complaint even though he admitted, months ago, that the claim is "likely" barred as a matter of law establishes that the Plaintiff's Abuse of Process claim is not being asserted in good faith, but instead with the subjective intent necessary to justify an award of fees pursuant to A.R.S. § 12-349. *Cf. Gillis v. Deutsche Bank Trust Co*., 2016 WL 551765 at *3 (M.D.Fla., Jan. 26, 2016) ("In cases where courts found a claim to be pursued in bad faith and for the purpose of harassment, plaintiff's knowledge that a claim was meritless was proven by plaintiff's own contradictory testimony or

other evidence.") (citing cases). Pursuant to A.R.S. § 12-349, therefore, the Court will grant the request of Sahl and the Law Firm for an award of fees and costs incurred in successfully defending the Plaintiff's Abuse of Process claim.

B. Motion for Summary Judgment

Sahl and the Law Firm have moved for summary judgment on all of the Plaintiff's remaining claims, asserting that "[t]he communications upon which [the] Plaintiff's claims are based are absolutely privileged." Motion for Summary Judgment at p. 2. In response, the Plaintiff asserts that the absolute privilege does not apply here because the "defamatory statements" in the Letters were not "made in furtherance of the litigation," nor do they "promote the interests of justice." Plaintiff's Response to Defendants' Motion for Summary Judgment at p. 11.

In support of their position that the communications at issue in this case are absolutely privileged, Sahl and the Law Firm cite Section 586 of the Second Restatement of Torts, which provides:

> An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

Restatement (2nd) Torts § 586 ("Section 586"). The comments to Section 586 state that the privilege "is based upon a public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients," and that the privilege is therefore "absolute," protecting the attorney "from liability in an action for defamation irrespective of his purpose in publishing the defamatory matter, his belief in its truth, or even his knowledge of its falsity." Section 586, comment *a*. The comments further emphasize that "[t]he publication of defamatory matter by an attorney is protected not only when made in" the course of litigation, but "in conferences and other communications preliminary to the proceeding." *Id*. The comments make clear that, while "the privilege does not cover the attorney's publication of defamatory matter that has no connection whatsoever with the litigation," the privilege applies if "the defamatory matter has *some reference to the subject matter* of the proposed or pending litigation, *although it need not be strictly relevant to any issue involved in it*." *Id*., comment *c* (emphasis added).

Arizona courts have applied this absolute privilege "[i]n various settings," recognizing that the privilege serves to protect an attorney "in the fearless discharge of the duty which he

owes to his client, and which the successful administration of justice demands." *Green Acres Trust v. London*, 141 Ariz. 609, 613, 688 P.2d 617, 621 (1984) (citation and internal punctuation omitted). The privilege should be applied in a manner that will "promote candid and honest communication between the parties and their counsel in order to resolve disputes," *Hall v. Smith*, 214 Ariz. 309, 313, 152 P.3d 1192, 1196 (App. 2007) (citation and internal quotations omitted), and is broad enough to protect a lawyer's communications with a non-party to the proposed or pending litigation as long as the non-party recipient of the communications has "a direct interest in the litigation or possess[es] evidentiary information directly relevant to it." *Johnson v. McDonald*, 197 Ariz. 155, 160, 3 P.3d 1075, 1080 (App. 1999). *See also Hall*, 214 Ariz. at 314-15, 152 P.3d at 1197-98 (holding that absolute judicial privilege protected communication from terminated employee to president of former employer's parent company; although parent company was not a party to the litigation, parent company "had a significant interest in the litigation"). When the privilege applies, it bars not only claims for defamation, but all tort claims arising out of the allegedly defamatory statements. *Drummond*, 127 Ariz. at 125, 618 P.2d at 619 (affirming summary judgment in favor of defendant on plaintiff's claim for tortious interference with contractual relationship that was based on defendant's filing, in separate litigation, of motion to disqualify plaintiff, an attorney, from representing client in that litigation; Court held that motion to disqualify "was entitled to an absolute privilege"). *Accord Landing Comm'ty Impr. Ass'n Inc. v. Young*, 2018 WL 2305540 at *24 (Tex.App., May 22, 2018) ("To avoid the circumvention of the policy behind" absolute litigation privilege, "the privilege should be extended beyond defamation when the essence of the claim is damages that flow from communications made in the course of a judicial proceeding.") (citation and internal quotations omitted); *Johnson v. Johnson & Bell, Ltd*., 7 N.E.3d 52, 56 (Ill.App. 2014) (holding that absolute litigation privilege barred plaintiff's claims for negligence, invasion of privacy, negligent infliction of emotional distress, and breach of contract, and citing case law for the proposition that "the absolute privilege would be meaningless if a simple recasting of the cause of action could void its effect") (citations, internal quotations, and internal punctuation omitted). Moreover, Arizona courts recognize that the privilege even applies to pre-litigation communications that are not "strictly relevant" to the proposed or pending litigation, as long as they have "some reference to the subject matter" of the litigation. *Green Acres*, 141 Ariz. at 613, 688 P.2d at 621, *citing* Section 586 and comment *c* thereto.[34] *Accord Club Valencia Homeowners Ass'n, Inc. v. Valencia Assocs*., 712 P.2d 1024, 1027 (Colo.App. 1986) ("The pertinency required" between "the alleged defamatory matter" and the "subject matter of the proposed or pending litigation" is "not technical legal relevancy, but rather a general frame of

[34] The court in *Green Acres* held, however, that the absolute privilege did not apply to pre-litigation statements made by an attorney to a newspaper reporter about the case, holding that "the recipient of the communications, the newspaper reporter, had no relation to" the proposed litigation and "played no role in the actual litigation other than that of a concerned observer." 141 Ariz. at 614-15, 688 P.2d at 622-23.

reference and relation to the subject matter of the litigation. Thus, the privilege embraces anything that possibly may be relevant.").

In the Court's view, the Letters are within the scope of the absolute litigation privilege, and the Plaintiff's claims are therefore barred. Although no litigation was pending between the Association and the Resort when the Letters were sent to the Association members on January 27th, litigation was certainly contemplated by then; the Plaintiff himself observed, in the letter he sent to Association members on January 16th, that litigation had been "threatened" by the Association. The Association members would have a direct interest in any litigation between the Association and the Resort because any attorney fees and litigation costs incurred by the Association, and any judgment that might be entered against the Association, would ultimately be paid by the Association members through their monthly fees and other assessments. Indeed, by writing, in the December 15th Letter, that Nolan "believes that the Association is risking lawsuits that…may result in increased legal fees and damages with the consequence of raising the members' Association fees," DSOF, Exhibit 7 at p. 3, the Plaintiff essentially acknowledged the individual Association members' financial stake in any potential litigation between the Association and the Resort. Further, providing the Association members with all communications sent to or received from the Resort's attorney, including the Letters, in preparation for the "town hall meeting" that was set for February 2nd was in furtherance of the litigation and in the interests of justice because only by candid and uninhibited communication among the Association's lawyers and members could the members make an informed decision about whether to accept or reject the Resort's settlement conditions. *See Krouse v. Bower,* 20 P.3d 895, 899 (Utah 2001) (absolute privilege applied to letter sent by certain condominium owners to association's counsel and copied to other condominium owners threatening suit to enjoin additional development and alleging fraud and breach of fiduciary duty; "[T]he purpose of the privilege is to promote the resolution of disputes," and "is premised on the assumption that the integrity of the judicial system requires that there be free and open expression by all participants," which "will only occur if they are not inhibited by the risk of subsequent defamation suits") (citations and internal quotations omitted).

To hold that the communications Sahl and the Law Firm sent to the Association members are absolutely privileged is consistent with case law that has addressed the applicability of the privilege to communications by a homeowners association's counsel to the association's members about litigation to which the association is a party. In *Club Valencia*, for example, a homeowners association sued a vendor for alleged breaches of implied and express warranties relating to the sale of condominium units. Shortly thereafter, the attorney for the association wrote to association members "advising them of the existence of the lawsuit" and asking them to assign the individual causes of action to the association. 712 P.2d at 1025. The vendor then asserted a claim for libel against the attorney based on the contents of his letter to the association members, which, the vendor alleged, "defamed and injured its reputation for honesty and

integrity in business matters." *Id*. at 1027. After the trial court dismissed the libel claim, the Colorado Court of Appeals affirmed, holding that "a lawsuit involving the homeowners' association would undoubtedly involve the interests of the individual homeowners," who had "a real interest in the developing controversy and in the suit" against the vendor for recovery of monies owed. *Id*. at 1028. Finding that the attorney's letter "was written in preparation of the judicial proceedings, it bore a logical relationship to those proceedings, it was in furtherance of the homeowners' objectives, and it was prepared by…an attorney participating in the proceedings," the *Club Valencia* court concluded that "the letter was absolutely privileged and the libel claim was properly dismissed[.]" *Id*. *See also Seahaus La Jolla Owners Ass'n v. Superior Court*, 224 Cal.App.4th 754, 776, 169 Cal.Rptr.3d 390, 406 (2014) (holding that communications between homeowners association's counsel and its members about pending litigation to which association was a party were protected from disclosure because communications were "intended to carry out the purpose of pursuing the Association's lawsuit…in such a way that would be consistent with and not interfere with the rights of the individual homeowners"); *Krouse*, 20 P.3d at 901 (absolute privilege applied to letter sent by certain condominium owners to association's counsel and copied to other condominium owners threatening suit to enjoin additional development and alleging fraud and breach of fiduciary duty; "the members of the homeowners association had a clear legal interest in the subject matter of the letter and the threatened lawsuit").

In support of his position that the privilege does not apply here, the Plaintiff notes that "no litigation" between the Association and the Resort "was ever initiated." Plaintiff's Response to Defendants' Motion for Sanctions at p. 11. As the Plaintiff acknowledges, however, this fact is not dispositive. While it is true that "[t]he bare possibility that [litigation] might be instituted is not" enough to trigger the applicability of the privilege when litigation "is not seriously considered," *Green Acres*, 141 Ariz. at 615, 688 P.2d at 623 (citation and internal quotations omitted), the Court sees no basis on which to conclude that litigation was not being seriously considered at the time the Letters were transmitted to Association members on January 27th. On the contrary, both Sahl, on behalf of the Association, and the Plaintiff, on behalf of the Resort, had made unmistakable threats to initiate litigation before the Letters were transmitted to Association members. *See, e.g*., DSOF, Exhibit 11 at p. 3 (Sahl's letter of January 11, 2017, to the Plaintiff stating that "the Association will absolutely consider moving forward with all available legal remedies," which "could potentially include actions for the tortious interference with the Association's business relationships and intentional infliction of emotion [*sic*] distress"); DSOF, Exhibit 7 at p. 6 (December 15th Letter stating that Nolan "intends to hold" the Association's directors "personally liable for their conduct," and asks if the Law Firm "represents" them "individually and/or will accept service of process on their behalf"). Certainly, the Plaintiff himself believed that the Association was seriously considering litigation when he told unit owners, in his letter dated January 16th, of the antagonistic posture taken by the Association, including "threaten[ing]" the Resort "with lawsuits." DSOF, Exhibit 13 at pp. 5, 6.

Because litigation had been threatened between the Association and the Resort at the time the Letters were sent to the Association's members on January 27th in preparation for the "town hall meeting" scheduled on February 2nd, the Court finds that the absolute litigation privilege applies to the Letters.

The Plaintiff argues that, even if Sahl and the Law Firm believed it proper to forward to the Association's members the correspondence exchanged with the Plaintiff, they "could have redacted the defamatory portion" of the January 6th Letter, *i.e.*, the portion of the letter accusing the Plaintiff of ethical misconduct. Plaintiff's Response to Defendants' Motion for Sanctions at p. 6. The Plaintiff asserts that "the defamatory portion" of the January 6th Letter "was extraneous" to the dispute between the Association and the Resort, and therefore is not protected by the privilege. *Id.*

Allegedly defamatory statements that have "no connection whatever" to proposed or pending litigation are not within the scope of the privilege. Section 586, comment *c*. In order to be within the scope of the privilege, however, an allegedly defamatory statement "need not be strictly relevant to any issue involved in" the litigation. *Id*. Instead, all that is required for the privilege to apply is that the statement have "some reference to the subject matter of the proposed or pending litigation." *Id*. This standard - - "some reference to the subject matter" - - is applied broadly, in keeping with the privilege's goal of protecting an attorney's fearless discharge of the duties owed to his or her client. As the Second Circuit has held, while "defamatory statements…must be pertinent to the matter before the Court" in order "to be privileged,"

> this is the broadest of possible privileges and any matter which, by any possibility, under any circumstances, at any stage of the proceeding, may be or may become material or pertinent is protected by an absolute privilege even though such matter may be ineffectual as a defense.

Kelly v. Albarino, 485 F.3d 664, 666 (2nd Cir. 2007) (citation and internal quotations omitted). *See also Pearson Educ., Inc. v. Ishayev*, 963 F.Supp.2d 239, 255 (S.D.N.Y. 2013) ("Pertinence is an extremely broad test: 'The absolute privilege embraces anything that may possibly or plausibly be relevant or pertinent, with the barest rationality, divorced from any palpable or pragmatic degree of probability'.") (citation omitted); *Williams v. Kenney*, 877 A.2d 277, 288 (N.J.Super.,App.Div. 2005) ("Relevancy usually is interpreted liberally so that the speaker does not act at his peril."; for privilege not to apply, the statement must be "so wanting in relation to the subject matter of [the] controversy…that no reasonable man can doubt its irrelevancy and impropriety") (citations and internal quotations omitted); *Krouse*, 20 P.3d at 900 ("[B]ecause of the important purpose of the privilege, doubts are resolved in favor of the statement having

reference to the subject matter of the proceeding."); *Sacramento Brewing Co. v. Desmond, Miller & Desmond*, 75 Cal.App.4th 1082, 1089, 89 Cal.Rptr.2d 760, 765-66 (1999) ("The privilege should be denied only where it is so palpably irrelevant to the subject matter of the action that no reasonable person can doubt its irrelevancy."); *Wollam v. Brandt*, 961 P.2d 219, 222 (Or.App. 1998) ("[T]he privilege embraces anything that may possibly be pertinent. All doubts should be resolved in favor of its relevancy and pertinency.") (citation, internal quotations, and internal punctuation omitted); *Chrysler Motors Corp. v. Graham*, 631 N.E.2d 7, 10 (Ind.App. 1994) ("An allegation to which privilege does not extend must be so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy and impropriety."; "Irrelevancy is not shown by the fact that it was unnecessary to plead the offending allegation and the fact that the alleged libelous matter was stricken from the pleading as irrelevant has been held not to destroy the privilege.") (citation, internal quotations, internal punctuation, and emphasis omitted). "[W]hether a particular communication is relevant and pertinent to the litigation is purely a legal determination for the court." *Graham*, 631 N.E.2d at 9.

In the December 15th Letter, the Plaintiff stated that Nolan "believes that the Association and its Board are not acting in the best interests of the unit owners/Association members," and that "positions and actions" taken by the Association and the Law Firm risked "forcing" the Resort to take actions that would be detrimental to the interests of Association members and unit owners. DSOF, Exhibit 7 at p. 3. In the disputed portion of the January 6th Letter, Sahl stated, in effect, that the December 15th Letter was actually sent at the behest of the Resort and/or in pursuit of the Resort's interests, and that the Plaintiff had acted in a deceitful manner by representing that he was acting on behalf of an Association member when he was really acting for the Resort. The Plaintiff subsequently wrote to Sahl setting forth the conditions under which the Resort would agree to settle its dispute with the Association. DSOF, Exhibit 10 at p. 2. The Court finds that, under these circumstances, Sahl's statements regarding the Plaintiff in the January 6th Letter bore "some relation to" the dispute between the Association and the Resort. In the Court's view, Sahl's belief that the Resort, and not an Association member, was actually behind the December 15th Letter was information that Association members may well have considered relevant to their assessment of the merits of the allegations made against the Association in the December 15th Letter. Moreover, whenever a client facing potential litigation is considering whether and how to settle the dispute, its counsel's assessment of the honesty and good faith of the adverse party and/or the adverse party's lawyer is relevant. Because the disputed portion of the January 6th Letter has at least "some reference to the subject matter" of the dispute between the Association and the Resort, *see* Section 586, comment *c*, it is therefore protected by the absolute litigation privilege. *See Dealertrack, Inc. v. Huber*, 460 F.Supp.2d 1177, 1181-82 (C.D.Cal. 2006) (defendant in patent infringement case brought libel claim based on plaintiff's allegation about defendant's past conduct; holding that libel claim was barred by the absolute litigation privilege, the Court found that allegation about defendant's "reputation"

was "not so palpably irrelevant to the subject matter of the action that no reasonable person could doubt its irrelevancy") (citation and internal quotations omitted).

The parties also raise other arguments, including whether the attorney-client privilege applies to the Letters and whether the statements in the January 6th Letter regarding the Plaintiff's allegedly unethical conduct are actionable statements of fact or non-actionable statements of belief and/or opinion. *Compare* Motion for Summary Judgment at pp. 12-14 *with* Plaintiff's Response to Defendants' Motion for Summary Judgment at pp. 15-17. Based on the Court's determination that the content of the Letters is protected by the absolute litigation privilege, the Court finds it unnecessary to address these alternative arguments.

C. Motion for Rule 11 Sanctions

The Defendants seek the imposition of sanctions pursuant to Rule 11 of the Arizona Rules of Civil Procedure ("Rule 11") against the Plaintiffs, asserting that this entire lawsuit is "clearly" a "retaliatory action" that was filed "in bad faith" and "for the purpose of harassment." Motion for Rule 11 Sanctions ("Rule 11 Motion") at pp. 1-2. In support of this assertion, the Defendants argue that the Plaintiff's claims are barred as a matter of law, *id*. at pp. 4-6, and that the Plaintiff's own disclosures demonstrate his lack of seriousness about pursuing his claims. *Id*. at pp. 3-4. They note that the Plaintiff's disclosure statement neither lists the Plaintiff as a witness nor provides a computation of damages, which, they assert, demonstrates that the Plaintiff never intended to even try to establish the elements of his claims, and therefore that he has no good-faith motivation for pursuing those claims. *Id*.[35]

In his response, the Plaintiff argues that his claims are indeed meritorious, discussing and distinguishing the adverse authorities on which Sahl and the Law Firm rely. Plaintiff's Response to Defendants' Motion for Sanctions ("Response to Rule 11 Motion") at pp. 11-17. He reiterates that his claims are based on Sahl's conduct in including extraneous and defamatory information in his communications to the Association's members. *Id*. at p. 17 ("If when publishing" the Letters to the Association's members, Sahl and the Law Firm "had merely redacted the paragraphs…containing the false claims of unethical conduct by [the] Plaintiff…Counts 1-9 would not have been filed."). Finally, he argues that no bad faith motivation can be inferred from "the alleged inadequacies of Plaintiff's initial disclosures" and that any such shortcomings could be cured by supplemental disclosures. *Id*. at pp. 8, 9.

[35] Sahl and the Law Firm also argue that the sanctions are warranted by the Plaintiff's assertion of the Abuse of Process claim. Rule 11 Motion at p. 6. For the reasons already discussed, the Court agrees that the Abuse of Process claim was clearly barred by controlling legal authority, and that an award of attorney fees and costs incurred in defending against that claim is therefore appropriate.

An attorney violates Rule 11 "by filing a document that he or she knows or should know asserts a position that is insubstantial, frivolous, groundless or otherwise unjustified." *Cal X-Tra v. W.V.S.V. Holdings, L.L.C.*, 229 Ariz. 377, 410, 276 P.3d 11, 44 (App. 2012) (citation and internal quotations omitted). Rule 11 sanctions must not be imposed lightly, *Compassionate Care Dispensary, Inc. v. Ariz. Dep't of Health Services*, __ Ariz. __, __ P.3d __, 2018 WL 414940 at *8 (Ct.App., Div. 1, Jan. 16, 2018), and are certainly not warranted merely because the pleader is incorrect "in his view of the law." *Sallomi v. Phoenix Newspapers, Inc*., 160 Ariz. 144, 149, 771 P.2d 469, 474 (App. 1989) (citation and internal quotations omitted). Moreover, when determining whether to impose Rule 11 sanctions, a court must be mindful of the importance of "avoid[ing] chilling zealous advocacy." *Hudson v. Moore Business Forms, Inc*., 836 F.2d 1156, 1159-60 (9th Cir. 1987). *See also Gilbert v. Bd. of Med. Exam'rs*, 155 Ariz. 169, 185, 745 P.2d 617, 633 (App. 1987) *superceded on other grounds by statute* ("We recognize that Rule 11 is not intended to chill an attorney's enthusiasm or creativity in pursuing legal theories.").

Although the Court finds that the Plaintiff's claims arising out of the Letters the Defendants sent to the Association members to be barred by the absolute litigation privilege, the Court does not find that the Plaintiff's position - - that the disputed portion of the January 6th Letter was extraneous to the potential litigation between the Association and the Resort and therefore should have been redacted before that letter was sent to the Association members - - to be so "insubstantial, frivolous, groundless or otherwise unjustified" as to warrant the imposition of Rule 11 sanctions. On the contrary, the Plaintiff's position on this point was consistent with the principle that an allegedly defamatory statement is not protected by the absolute litigation privilege unless it "has some reference to the subject matter of the proposed or pending litigation[.]" Section 586, comment *c*. While the Court finds that the allegedly defamatory portion of the January 6th Letter does, in fact, have the requisite connection to the potential litigation between the Association and the Resort, the Plaintiff's contrary position is not frivolous and does not warrant the imposition of sanctions.

The parties dispute whether the Plaintiff should be permitted to take the depositions of Carpenter and another of the Law Firm's attorneys. *See* Motion to Compel Deposition Testimony of Scott Carpenter and Jonathan Ebertshauser; Minute Entry of May 8, 2018 at p. 3. Based on the Court's rulings as set forth herein, the Court sees no purpose that would be served by those depositions, and so will not grant the Plaintiff's request for an order permitting those depositions to go forward.

In accordance with the foregoing,

IT IS ORDERED granting the Motion for Judgment on the Pleadings – Partial.

IT IS FURTHER ORDERED granting the request of Defendants Mark Sahl and Carpenter, Hazlewood, Delgado & Bolen, LLP, for an award of attorney fees and costs incurred in their successful defense of the Abuse of Process claim asserted in Count Ten of the Complaint.

IT IS FURTHER ORDERED granting the Motion for Summary Judgment.

IT IS FURTHER ORDERED denying the Motion for Rule 11 Sanctions.

IT IS FURTHER ORDERED denying all relief requested in the Motion to Compel Deposition Testimony of Scott Carpenter and Jonathan Ebertshauser.