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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

SIMONE GOLD, M.D., both in her individual capacity and as a director on behalf of Free Speech Foundation d/b/a America's Frontline Doctors, an Arizona nonprofit corporation, Plaintiff, v. JOSEPH "JOEY" GILBERT, an individual; JURGEN MATTHESIUS, an individual; RICHARD MACK, an individual; and FREE SPEECH FOUNDATION d/b/a AMERICA'S FRONTLINE DOCTORS, an Arizona nonprofit corporation, in a derivative capacity, Defendants	Case No. CV2022-015525 **RESPONSE TO DEFENDANTS' PARTIAL MOTION TO DISMISS** (Assigned to Hon. Timothy J. Thomason)
And Related Counterclaims.	
FREE SPEECH FOUNDATION d/b/a AMERICA'S FRONTLINE DOCTORS, an Arizona nonprofit corporation and JOSEPH GILBERT, Counter Plaintiffs, SIMONE GOLD, Counter Defendant.	

The Partial Motion to Dismiss (the "Motion") filed by Defendants should be denied.

I. INTRODUCTION AND FACTUAL BACKGROUND

The Motion lacks merit because it is predicated entirely on strawmen and disputed facts that are dispelled by simply reading the Verified Complaint (the "Complaint"). First, Dr. Gold has standing because she alleges that she is a Director of AFLDS. Complaint ¶¶ 26-27. Stated simply, Dr. Gold contends she is still a Director, and she is using that position to seek judicial removal of the individual Defendants. Whether or not she is a Director is a disputed fact issue that will likely turn on testimony. The Motion tries to pollute the record with counsel's averment of disputed facts (Motion pp. 2-3) surrounding Dr. Gold's resignation. Defendants' need to insert disputed facts shows why this issue is unfit for decision on a Rule 12(b) motion.

Second, though it is not necessary to establish standing, Dr. Gold has adequately pleaded that (i) her alleged resignation never took effect because a condition did not occur, and (ii) in any case, she is entitled to, and did, rescind the alleged resignation. The Motion argues otherwise and, again, this is dispelled by simply reading the Complaint. Insufficient allegations regarding a conditional resignation? Not true. Just read Complaint ¶¶ 35-43, where the conditional agreement and its contents are specified. Insufficient allegations of rescission? Not true. Just read Complaint ¶¶ 44-46, where Dr. Gold's entitlement to rescission is discussed as an alternate theory.

As a result, the Motion lacks merit and should simply be denied.

II. ARGUMENT

A. Standard to Be Applied

While this Court does not need a primer on Rule 12(b) review standards, something still must be said because of the degree to which the Motion loses sight of Arizona's relaxed notice-pleading standard, where all facts alleged in the Complaint are assumed to

be true. Replete with averments contesting facts, the Motion strays far from the standard and invites the Court to err. *See e.g. State ex rel. Brnovich v. Arizona Bd. of Regents*, 250 Ariz. 127, 134, ¶ 25 (2020) ("[Defendant] vigorously contests that assertion, but in deciding a motion to dismiss, the court should look only to the complaint and assume all well-pled allegations are true. . . . To the extent the trial court resolved this factual issue against the [Plaintiff] in dismissing the complaint before discovery that might support his claim, it did so prematurely.").

The "facts and Allegations of the Complaint" section of the Motion makes *zero* references to the Complaint and does not accurately relay the allegations at all. It is instead filled with a fictive narrative that can only be described as opposing counsel's version of events. None of that can be considered on a Rule 12 motion.

B. The Motion fails to address the requirement that resignations be in writing.

The Motion does not contest (or even address) the fact that AFLDS bylaws require Director resignations to be made in writing. Complaint ¶ 47. Arizona law is in accord. A.R.S. § 10-3807(A) (requiring non-profit director resignation to be in writing).

The Complaint alleges that Dr. Gold never resigned in writing. Complaint ¶ 47. This is dispositive as to standing—Dr. Gold remains a member of the AFLDS Board of Directors.

C. Dr. Gold has adequately alleged that her purported resignation never took effect.

Assuming *arguendo* that the Court decides to look past the resignations-in-writing requirement, Dr. Gold has fully alleged that her orally-offered resignation was conditional on terms of a Resignation Agreement that was never performed. Complaint ¶¶ 35-43.

The Court may be interested in the notion that a resignation absolutely can be conditional. A.R.S. § 10-3807(B) *specifically* allows a director's resignation to be conditional on a later event: "A resignation is effective when the notice is delivered unless the notice specifies a later effective date or event." While Arizona courts do not appear to have squarely addressed the issue, there is no question that resignations with conditions

are broadly recognized. *See, e.g., Bouchard v. Braidy Indus., Inc.*, 2020 WL 2036601, at *15 (Del. Ch. Apr. 28, 2020) (assessing a corporate director's conditional resignation in view of a voting agreement); *Martin v. Med-Dev Corp.*, 2015 WL 6472597, at *10 (Del. Ch. Oct. 27, 2015) (assessing a conditional resignation in the corporate context); *see also Vehicle/Vessel LLC v. Whitman Cnty.*, 122 Wash. App. 770, 777-78 (2004) ("The terms of the resignation indicate that it is an offer of a unilateral contract: a promise to do a certain thing (resign his appointment) in the event the other party performs a certain act (appoints Ms. Brewster as the replacement subagent). . . . Until the offeree accepts by performance, the offer of a unilateral contract may be revoked by the offeror without adverse legal consequences. . . . Ms. Brewster was not appointed. Consequently, unless [Offeror] waived or modified his offer, it was revoked due to nonperformance.").

The Motion does not contest the idea that resignations, generally, can be conditional. Rather, it contends that Dr. Gold failed to allege sufficient facts to establish the conditions. Myopically citing only Complaint ¶ 42 in this argument, the Motion fails to discuss Complaint ¶¶ 35-43, where all of the allegedly missing facts are specified.[1]

Here, Dr. Gold and Defendants made an agreement with specific conditions—the components of the Resignation Agreement. Complaint ¶¶ 35-43. The essence of the Resignation Agreement was Dr. Gold's transition into a new role at AFLDS, and control potentially being changed to Defendants *in exchange*. The conditions were specifically agreed. But because the elements of the Resignation Agreement never occurred, no offered resignation was ever effective. *Each of those things are adequately alleged, with particularity.*[2]

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[1] Ironically, the Motion discusses some of those facts in Argument Section I(B), and debates whether the specific payments were returned! Apparently sufficient facts *were* alleged for Defendants to understand the conditions of the Resignation Agreement, allowing them to argue in the Motion that the benefits were not returned.

[2] Even if the Court had concerns about the level of detail of the allegations, this could easily be resolved by amendment. The conditional Resignation Agreement did occur and Dr. Gold can testify in detail about relevant conversations and agreements.

D. Dr. Gold has adequately alleged, in the alternative, that her purported resignation was rescinded.

As an alternative pleading to the conditional resignation claim, Complaint ¶¶ 44-46 alleges that Defendants fraudulently induced Gold's resignation then failed to perform the elements of the Resignation Agreement, and that Gold rescinded the agreement (if it ever was effective) as a result. That is exactly what happened when Defendants reneged.

The Motion argues that Gold fails to allege that she gave notice of rescission[3] and offered to restore the partial benefits she received under the Resignation Agreement. But that is wrong: Complaint ¶ 45 specifically alleges that "Gold was entitled to, and did, rescind the Resignation Agreement, returning the parties to the status quo before the agreement was formed."

Defendants cite no case law holding that a party asserting that it has rescinded need plead the facts of the rescission with more detail than that—and undersigned counsel are not aware of any such heightened pleading requirement for the notice or return of benefits elements. Regardless, Defendants are on notice about Dr. Gold's contentions about when and how she gave notice of rescission, as those facts are set forth in detailed discussion and attachments with her Application for Temporary Restraining Order and Preliminary Injunction, at page 17:9-24 and exhibits cited therein.[4]

Moreover, the details of the disputed fact issues—e.g., an accounting of what AFLDS owes Dr. Gold on other matters, and the reverse[5]—are not fit for a Rule 12(b) motion.

Even if the Court proceeds past the face of the Complaint, the Motion still lacks merit. It overstates the rule, which was seriously softened in Arizona after *Jennings v. Lee*,

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[3] It strains credulity that Defendants contend that Dr. Gold did not give notice of rescission. Their separate counterclaims are filled with page-after-page of complaining that Dr. Gold' reasserted her role on the Board.

[4] If amendment is necessary, these detailed facts could easily be added to the Complaint.

[5] For example, if a rescission occurred, Dr. Gold and AFLDS have a significant number of offsetting debts arising from fundraising activities for Dr. Gold's legal defense fund. This right to offset has been applied in rescission cases. *See*, *e.g.*, *Puskar v. Hughes*, 179 Ill. App. 3d 522, 529 (App. Ill. 1989); *O'Connor v. Harger Const., Inc.*, 188 P.3d 846, 854 (Idaho 2008). Defendants' contention that Dr. Gold is required to return the $50,000 per month consulting fee as part of the rescission also ignores that that fee replaced Dr. Gold's salary. She is entitled to offset the amount of her salary against the return of the consulting fee.

105 Ariz. 167, 171-72 (1969). There, the Supreme Court noted that the majority of states do not require tender when equitable relief is sought. The tender rule is thus disregarded frequently by courts, and "courts have often refused to give it strict application where to do so would lead to inequitable results." *Jennings*, 105 Ariz. at 172.

Here, an inequitable result is obvious, if Dr. Gold's rescission is not given effect. First, Dr. Gold is entitled to substantial offsets (possibly of the full amounts) against the consulting fees. *See supra*, note 5. Additionally, Defendants refuse to recognize Dr. Gold's position on the Board, rendering tender completely futile. There is no obligation to return partial payments unless it accomplishes a rescission. *See, e.g.,* C.J.S. Contracts § 680 ("The law does not require a party to perform futile acts as a condition precedent to asserting its rights."); *see also Anson v. Grace*, 174 Neb. 258, 264 (1962) ("Ordinarily in rescission a formal tender of property is not required if it appears that it would have been futile."); *see also Farrow v. Sims*, 311 S.W.2d 473, 477 (App. Tex. 1957) ("It is not necessary to make or keep alive a tender which is obviously useless and futile.").

Beyond that, the Motion misses a critical point: the consulting fees are to be returned *to AFLDS*, not to Defendants. In most cases, rescission is accomplished by Party A to a contract notifying Party B to the contract that Party A is rescinding, and Party A returning to Party B what Party B had given Party A under the contract. But here, the Resignation Agreement was between Dr. Gold and Defendants as the other members of the Board of Directors of AFLDS, but the consulting fees Dr. Gold received were not from Defendants; they were *from AFLDS*. Defendants' performance under the Resignation Agreement was to *cause* AFLDS to execute the consulting agreement and pay Dr. Gold the seed money and the consulting fees, not for Defendants to *personally* pay Dr. Gold or enter a consulting agreement with her. Accordingly, pursuant to Dr. Gold's rescission of the Resignation Agreement, Dr. Gold must return the consulting fees (or nay portions thereof that remain after offset) to AFLDS, not to Defendants.

This distinction is relevant for two reasons. First, Dr. Gold was not required to give Defendants notice of the repayment or to plead that she has repaid *Defendants*—they are

not entitled to *anything* through the rescission. Second, it would be inequitable to require Dr. Gold to return the funds to any AFLDS account over which Defendants have, or seek, control. In light of Defendants' financial malfeasance, Dr. Gold cannot do so in stewardship of AFLDS. Under the circumstances, it is proper for Dr. Gold to withhold repayment until Defendants recognize the *fact and effectiveness* of the rescission and abandon their claims to control of AFLDS and its accounts.

The rescission argument is sufficiently pleaded, and Defendants have identified no basis for dismissal of it.[6]

E. The Declaratory Claim does not need to seek separate relief.

The Motion misunderstands how declaratory judgments work. When one brings a declaratory judgment claim, there is no requirement that someone seek relief against particular defendants, beyond the declaration that is sought. *See* A.R.S. § 12-1831 ("Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations **whether or not further relief is or could be claimed**." (emphasis added)). *Keggi v. Northbrook Prop. & Cas. Ins. Co.*, 199 Ariz. 43, 45, ¶ 10 (App. 2000) ("The declaratory judgments act is interpreted liberally. . . . Under the declaratory judgments act a justiciable controversy exists if there is an assertion of a right, status, or legal relation in which the plaintiff has a definite interest and a denial of it by the opposing party." (cleaned up)).

Defendants deny that Gold is a member of the AFLDS Board of Directors and argue that her resignation was effective. *See* Motion, pp. 2-3. Gold contends she remains on the Board of Directors. *See* Complaint, *passim.* Accordingly, there is a controversy between the parties about the "the makeup of the Board of Directors of AFLDS, specifically, whether Gold remains a director, as well as Gold's continuing roles as Chairman of the Board and President of AFLDS." Complaint ¶ 119.

[6] Again, if the Court is not satisfied with the pleading of any of these elements, Dr. Gold can certainly add the facts discussed herein by amendment.

So do Defendants Mack and Matthesius now agree with Gold? Removing the controversy? No. They joined the Motion, contending Gold resigned and that resignation has continuing effect. That puts them well within the rule in *Keggi*, and a justiciable controversy exists *between Gold and Mack/Matthesius*.

As far as seeking *relief* against Mack and Matthesius—Claim One seeks a declaration that binds them. Nothing more is required.

F. The Complaint adequately alleged a removal claim against Mack and Matthesius.

The Motion simply ignores the allegations against Mack and Matthesius. Complaint ¶ 98-109 describes the allegations in detail. It is more than enough. Complaint ¶ 98 describes that "Mack and Matthesius have supported, facilitated, and/or permitted Gilbert's wrongful acts and attempt to seize control." That, by itself, is enough. Supporting and facilitating Gilbert's fraudulent conduct is fraudulent conduct. Supporting and facilitating Gilbert's retaliation against Dr. Gold and AFLDS workers through mass firings is also enough.

But the allegations are more detailed—breaches of fiduciary duty and financial improprieties are also alleged in detail. Complaint ¶ 98-109. The Complaint, ¶ 99, alleges that Mack and Matthesius failed to act when notified of Gilbert's wrongdoing, or when Gilbert purported to fire the vast majority of AFLDS's directors. The Complaint, ¶ 100, alleges that Mack and Matthesius failed to investigate Gilbert's actions or otherwise conduct due diligence after being alerted to them. The Complaint, ¶ 101, alleges that these were breaches of fiduciary duties to AFLDS and that Mack and Matthesius failed to act in the best interests of the company. The Complaint, ¶¶ 102-09, also alleged specific financial improprieties by Mack, including attempting to pressure Gold into causing AFLDS to donate $2.5 million to an event he was organizing, and participating in Gilbert's improper and wrongful purported hiring of Mack as "CEO" (or similar role) of AFLDS.[7]

[7] Indeed, the fact that one Board member (Gilbert), who had just been credibly accused of theft from the nonprofit, purported to suddenly (and with no diligence or recruiting) hire another Board member (Mack) for a lucrative $20,000 per month position that Mack was not qualified for is, alone, malfeasance and constructive fraud by all Board members involved in that purported action.

The Complaint thus sufficiently alleges that Mack and Matthesius engaged in constructive fraud that supports their removal as directors, under A.R.S. § 10-3810. "Constructive fraud is a breach of legal or equitable duty which, without regard to moral guilt or intent of the person charged, the law declares fraudulent because the breach tends to deceive others, violates public or private confidences, or injures public interests." *Dawson v. Withycombe*, 216 Ariz. 84, 107, ¶ 72 (App. 2007) (quotation marks omitted). Unlike actual fraud, constructive fraud "does not require a showing of intent to deceive or dishonesty of purpose," *id.*—so, Gold was not required to allege that Mack and Matthesius acted with such intents. Rather, constructive fraud requires a fiduciary or other confidential relationship, and that the breach induced justifiable reliance on the other party to its detriment. *Id.*

The Complaint alleges those elements as to all of the individual Defendants, including Mack and Matthesius. First, it alleged facts showing that Mack and Matthesius owed fiduciary duties to AFLDS. Complaint ¶¶ 7-8, 31, 32, and 49 alleged that Mack and Matthesius are members of AFLDS's board of directors. As such, they owe fiduciary duties to AFLDS. *See* A.R.S. § 10-3830 ("A director's duties, including duties as a member of a committee, shall be discharged: 1. In good faith. 2. With the care an ordinarily prudent person in a like position would exercise under similar circumstances. 3. In a manner the director reasonably believes to be in the best interests of the corporation.").

Second, as discussed, the Complaint alleges in detail that Mack and Matthesius supported Gilbert in his wrongdoing, failed to act when notified about his wrongdoing, and failed to act when he purported to fire the vast majority of AFLDS's directors. As alleged in Complaint ¶ 101, these acts and omissions were not in the best interests of AFLDS and were breaches of Mack's and Matthesius's fiduciary duties to the nonprofit.

Third, AFLDS relied on Mack's and Matthesius's acts and omissions to its detriment because Mack and Matthesius, in joining with Gilbert, exercise majority control over AFLDS—by permitting Gilbert to continue his misuse of the nonprofit and purport to fire its key personnel, Mack and Matthesius have caused AFLDS to suffer those

damages. Although inherent throughout the allegations in the pleading, this is also alleged specifically in Complaint ¶ 123 ("Mack and Matthesius engaged in, facilitated and/or permitted Gilbert's fraudulent conduct or intentional criminal conduct with respect to AFLDS, and may have also engaged in their own such acts. *Mack and Matthesius are, with Gilbert, responsible for the damage to AFLDS caused by that conduct*." (emphasis added)). *See also generally Complaint*.[8]

These allegations are sufficient to state a claim for judicial removal of Mack and Matthesius for constructive fraud. There is no basis for dismissal.

G. The tax consequences of the Resignation Agreement are irrelevant.

The Motion offers a red herring at footnote 3, contending essentially that the Resignation Agreement, if paid, might have had undesirable tax consequences. But that does not change the conditional nature of the Agreement—the conditions were still not performed. Maybe performing them was a bad idea. All that argument does is end with Dr. Gold still on the Board of Directors. All the more reason to recognize that the conditions of the Resignation Agreement were not performed and the resignation never took effect. There might have been tax-related reasons why it was not performed, but that does not change the conditional nature of the resignation.

Stated directly, Defendants' reasons they decided to renege on the Resignation Agreement might be understandable, but that just prevents the conditional resignation from being effective—the result Gold has pleaded.

III. Failure to meet and confer and request for amendment.

Ariz. R. Civ. P. 12(j) requires the parties to meet and confer before bringing a Rule 12(b)(6) motion. Conferral did not occur here. While the undersigned is certainly not going to throw a fit over that requirement, the fact remains that many of the Motion's gripes are easily dispelled by reading the Complaint or are otherwise extremely minor factual issues that, if necessary, could easily be resolved with amendment from known

[8] And again, if any further specificity is required in the pleading, Dr. Gold could add that by amendment.

facts. But, by filing the Motion first without conferring, this response is necessitated because an amended pleading does not moot such a motion.

Accordingly, Plaintiff requests that the Court liberally grant leave to amend if it has *any* concerns with the sufficiency of the factual content of the Complaint. While Plaintiff believes the Motion lacks merit under Arizona law, each of its concerns can be addressed by simply adding existing detail (including that detail already contained in the record, within other briefs and pleadings, some of which is discussed herein). While extensive details should be unnecessary for a pleading under Arizona law, the facts are certainly available.

IV. CONCLUSION

For the foregoing reasons, the Motion should be denied.

DATED this 18th day of January, 2023.

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