



PROVIDENT LAW

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IN THE SUPERIOR COURT IN 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,

vs.

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

DEFENDANTS' PARTIAL MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

(Assigned to the Hon. Timothy Thomason)

1 Pursuant to Ariz. R. Civ. P. 12(b)(6), Defendants now move the Court to dismiss
2 Plaintiff Gold’s claims for: claim one - declaratory judgment, as brought derivatively, claim
3 two - judicial removal of directors and all claims against Defendants Mack and Matthesius
4 individually. Plaintiff has failed to state these claims in the Complaint and therefore, they
5 should be dismissed.

6 **INTRODUCTION**

7 Simone Gold’s filed complaint in this Court reflects yet another attempt among many
8 in the last several months to illegally wrest control of Free Speech Foundation, Inc. d/b/a
9 America’s Frontline Doctors (“AFLDS”), a Section 501(c)(3) public charity, away from its
10 nonprofit Board of Directors and to cover up her own financial misconduct.

11 **FACTS AND ALLEGATIONS IN COMPLAINT**

12 Gold founded AFLDS in 2020. She resigned from the Board on February 2, 2022. And
13 by the spring of 2022, it became clear to the AFLDS’ Board of Directors that Gold had been
14 using AFLDS as her own personal piggy bank. Accordingly, the Board sought legal counsel,
15 particularly to address Gold’s apparently extensive misuse of AFLDS’ charitable funds, and
16 therefore commenced a forensic audit. The audit is ongoing, with significant concerns raised
17 about Gold’s misuse of charitable assets in violation of applicable IRS and corresponding
18 state prohibitions. When the AFLDS Board began addressing Gold’s misuse of funds, Gold
19 was busy fighting a federal indictment for trespassing on the U.S. Capitol on January 6, 2021
20 and serving related prison time (from July to September 2022).

22 In September 2022, Gold got out of prison. To divert attention from her own illegal
23 conduct in connection with AFLDS’ charitable resources, she soon asserted allegations of
24 financial misappropriation against long-time Board member and friend Joseph Gilbert. In
25 addition, she began interfering with AFLDS’ operations, funds, donor relationships, and
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1 employee relationships, converted and improperly asserted control of AFLDS’ information
2 technology, bank accounts, money and resources. Gold also held herself out as a
3 representative, officer, and director of AFLDS to AFLDS’ staff, donors, and the public.

4 Gold now asserts that she is somehow entitled to run AFLDS, despite the passage of
5 time, her own repeated admissions that she is no longer a director or officer of AFLDS, and
6 based on specious claims that carry no legal weight within this nonprofit public charity
7 context.

8 Gold’s Complaint, her latest attempt to seize control of AFLDS, asserts two claims.¹
9 First, Gold brings an individual and derivative claim seeking a declaratory judgment that she
10 is a director, Chairman of the Board, and President of AFLDS. Second, Gold brings a
11 derivative claim seeking judicial removal of AFLDS directors Joseph Gilbert, Richard Mack,
12 and Jurgen Matthesius (the “Individual Defendants”). Gold has no standing to bring derivative
13 claims and has failed to state a viable claim against Mack and Matthesius.
14

15 ARGUMENT

16 A complaint must contain “a short and plain statement of the claim showing that the
17 pleader is entitled to relief.” Ariz. R. Civ. Proc. 8(a)(2). These statements must be based on
18 well-pled facts and not conclusory statements. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417,
19 419 (2008). When a plaintiff seeks to plead fraud or a denial that conditions precedent have
20 occurred, it must do so with particularity. Ariz. R. Civ. Pro. 9(b)-(c).
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23 ¹ Defendants note that the complaint enumerates three counts. However, the third count is for injunctive relief which is
24 a remedy rather than a cause of action. Indeed, Gold’s application for temporary restraining order states: “Gold has
25 asked this Court for a declaratory judgment that she is a member of the Board of Directors and President of AFLDS,
26 and for A.R.S. § 10-3810 judicial removal of Defendants as Board Members.” (App. for TRO at 2-3). Taking Plaintiff
at her word, Defendants recognize two pled claims. Any others should be dismissed for failure to state a claim under
Rule 12(b)(6).

1 Courts should grant a Rule 12(b)(6) motion to dismiss for failure to state a claim if the
2 plaintiff is not entitled to relief based on their complaint. Ariz. R. Civ. Pro. 12(b)(6). While
3 the truth of the well-pled facts alleged in the complaint must be assumed, the court must not
4 accept as true (1) allegations consisting of conclusions of law, (2) inferences or deductions
5 not necessarily implied by the well-pled facts, (3) unreasonable inferences or unsupported
6 conclusions, or (4) legal conclusions alleged as facts. *Stauffer v. Premier Serv. Mortg., LLC*,
7 240 Ariz. 575, 577-78 (App. 2016) citing *Jeter v. Mayo Clinic Ariz.*, 211 Ariz. 386, 389 (App.
8 2005).

9 Gold's derivative claims for declaratory judgment and judicial removal of directors
10 should be dismissed under Rule 12(b)(6) because Gold's complaint fails to sufficiently plead
11 her status as a director to bring her claims derivatively on behalf of AFLDS. Additionally,
12 Gold does not allege any facts that state claims against the individual Defendants Richard
13 Mack and Jurgen Matthesius. Therefore, Gold's derivative claims and all claims against
14 Defendants Mack and Matthesius should be dismissed.

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16 **I. Gold Has No Standing to Bring Her Derivative Claims.**

17 To bring a derivative claim, the Arizona Nonprofit Corporation Act requires that the
18 plaintiff be a current "director or twenty-five per cent of the directors, whichever is greater."
19 A.R.S. § 10-3631(A)(2). Similarly, to bring a claim for judicial removal of directors, an
20 individual must be a current director or represent at least twenty-five percent of the voting
21 power for directors. A.R.S. § 10-3810(A).

22 Gold purports to have standing to sue derivatively on behalf of AFLDS because she
23 claims to be a director. (Cmpl. at ¶ 111). And this claim to be a director is based solely on
24 her contract-oriented theory that her February 2, 2022 resignation from the AFLDS Board
25 was conditional on entering an agreement and receiving certain payments from AFLDS. (*Id.*
26

1 at ¶¶ 34-35). She asserts that those conditions were not met and therefore she is still a director
2 of the Board. (*Id.* at ¶ 43) As part of this lawsuit, she has asserted a claim for declaratory
3 judgment, seeking a declaration that she is a director of the AFLDS Board.

4 In other words, her purported standing to bring derivative claims on behalf of AFLDS
5 is *dependent* upon her prevailing on her claims in this lawsuit. The very heart of this dispute,
6 as pled in Gold’s Complaint, is whether her February 2, 2022 resignation from the Board of
7 Directors was legally effective or not.²

8 Under these circumstances *as pled*, Gold cannot assert derivative claims. She has no
9 standing. Her only option to regain control of AFLDS, as she obviously seeks to do, is to
10 pursue and prevail on her argument that (a) she is somehow still on the Board (via contract
11 and/or fraud theories, as per below, but without any such specifically asserted counts), and
12 then (b) seek to remove in due course the directors that she claims acted improperly (i.e., they
13 were worse than her, and therefore she should stay and they must go).

14 Furthermore, Gold has failed to adequately plead either of her theories as to why she
15 is still an AFLDS director. Specifically, she asserts that she has remained a director from
16 February 2022 until the filing of the complaint under two theories: (1) she rescinded the
17 alleged “resignation agreement” after AFLDS failed to pay her \$1.5 million; and (2) the
18 payment of the \$1.5 million was a condition precedent to her resignation. (Cmplt. at ¶¶ 33-
19 47). Defendants dispute both theories, particularly as they neither accurately reflect the facts
20 or the applicable law.
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24 ² Gold only represented twenty percent of the directors prior to her resignation on February 2, 2022. (Cmplt. at ¶ 32
25 (“As of early 2022, the Board of Directors for AFLDS consisted of Gold, Gilbert, Landau, Mack, and Matthesius.”)).
26 Therefore, even if Gold could bring claims for acts that occurred during her time as a director, she does not represent
25% of the directors at that time.

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A. Gold Has Not Sufficiently Pled That She Properly Rescinded the “Resignation Agreement.”

There are two elements required to rescind a contract without the assistance of the courts: (1) prompt notice to the defendant of the plaintiff’s intent to rescind, and (2) restoration of all the benefits received as part of the transaction. *Dewey v. Arnold*, 159 Ariz. 65, 69 (1988); quoting D. Dobbs, *Law of Remedies* § 4.8 (1973). Gold’s complaint fails to sufficiently allege either element. First, Gold makes no attempt to plead facts showing she provided *prompt notice* to the Defendants of her intent to rescind. Second, Gold has not (and cannot) plead that she has returned the benefit received under her alleged contract. Gold alleges that she was to obtain three “major components” in return for her resignation: monthly compensation of \$50,000, an ongoing consulting agreement, and a \$1.5 million dollar payment.³ (Cmplt. at ¶¶ 34-38). Gold was paid \$50,000 a month *for eight months*, but she was not paid the \$1.5 million payment. (Cmplt. at ¶ 40).⁴ To rescind the alleged resignation agreement, Gold was required to return the \$50,000 monthly compensation she claims was part of the deal. Having failed to allege that she did in fact return this money, and since she cannot make such an allegation because she has not repaid that money, Gold’s claim that she rescinded the so-called resignation agreement fails. Her director and officer resignation stands as legally conclusive.

B. Gold Has Failed to Plead Facts Indicating That Conditions Precedent to Her Resignation Existed.

³ Gold also fails to explain how getting paid \$1.5 million would be justifiable in terms of a legitimate expenditure of Section 501(c)(3) public charity funds. Nor does she explain how she was sufficiently removed from any related Board evaluation of such payment, consistent with applicable conflict of interest principles as reflected in AFLDS bylaws. Both matters are separately quite important and significant under applicable tax law, such as Section 4958 of the Internal Revenue code that prohibits insiders from improperly benefitting financially – known as “inurement,” and potentially subjecting the bad actor to punitive sanctions and risking the organization’s own Section 501(c)(3) tax-exempt status.

⁴ Defendants paid this monthly compensation to Gold for the marketing work she did for AFLDS after she resigned from the Board in anticipation that the Independent Consulting Agreement the parties were negotiating would be signed.

1 Gold has also failed to plead facts indicating that the payments and the consulting
2 agreement were conditions precedent to her resignation. Her pleadings contain only legal
3 conclusions: “The seed payment and consulting agreement were both conditions precedent to
4 Gold’s resignation taking effect.” (Cmplt. at ¶ 42). Not only is the Court barred from assuming
5 the truth of this conclusory statement, this statement fails to meet the heightened pleading
6 standards for conditions precedent. Ariz. R. Civ. P. 9(c) (“[W]hen denying that a condition
7 precedent has occurred or been performed, a party must do so with particularity.”) “[A]
8 contractual provision is not a condition precedent unless it appears from the contract itself
9 that the parties intended the provision to so operate.” *Realty Assocs. V. Valley Nat’l Bank*,
10 153 Ariz. 514, 519 (Ariz. App. Ct. 1986) citing *Angle v. Marco Builders, Inc*, 128 Ariz. 396,
11 399-400 (1981). Arizona courts do not favor conditions precedent and “will not construe
12 stipulations to be such unless required to do so by the plain, unambiguous language or by
13 necessary implication.” *Angle*, 128 Ariz. at 400.

14 Gold has not plead *any* facts, let alone met the particularity standard under Rule 9(c),
15 demonstrating anything close to the plain, unambiguous language or the intent of the parties
16 required to make these alleged terms a condition precedent. Without pleading facts
17 demonstrating these provisions were not conditions precedent, Gold’s resignation should be
18 deemed effective when offered and accepted by the AFLDS board of directors on February
19 2, 2022. (Cmplt. at ¶ 37).

20 Gold has failed to properly plead either of her theories that she is currently a director
21 of AFLDS. Thus, she cannot meet the statutory requirements to bring derivative claims.
22 Accordingly, this Court should dismiss her derivative claims for declaratory judgment and
23 for judicial removal of directors.
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1 **II. Gold’s Declaratory Judgment Claim Against the Individual Defendants Should**
2 **Be Dismissed.**

3 Gold’s declaratory judgment claim seeks a declaration as to the AFLDS Board’s
4 makeup. If Gold were to prevail on this claim, the relief she would obtain would require
5 AFLDS, the entity, to take action. But this claim seeks no relief as against the Individual
6 Defendants. Accordingly, to the extent that Claim One of the Complaint has been asserted
7 against the Individual Defendants, it should be dismissed.

8 **III. Gold’s Claim for Judicial Removal of Directors Should Be Dismissed as Against**
9 **Defendants Mack and Matthesius.**

10 The claim for judicial removal of directors requires that: (1) the plaintiff be a director
11 of the nonprofit corporation; (2) the “defendant director has engaged in fraudulent conduct or
12 intentional criminal conduct with respect to the corporation; and (3) removal be in the best
13 interest of the corporation.” A.R.S. § 10-3810. As explained above, Gold has failed to
14 adequately plead that she is a current AFLDS director and accordingly, this claim fails against
15 all defendants.
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17 To the extent the Court does not dismiss Gold’s derivative claims in their entirety,
18 however, the judicial removal claim should be dismissed as to Mack and Matthesius because
19 Gold’s allegations are fatally deficient. Indeed, she fails to allege any wrongdoing by
20 Defendants Mack and Matthesius other than with nonspecific conclusory allegations. For
21 example, Gold claims “Mack and Matthesius have supported, facilitated, and/or permitted
22 Gilbert’s malfeasance and ultra vires power grab, and Mack has engaged in his own financial
23 misuse of the company.” (Cmplt. at ¶ 3; *see also* ¶ 98). She also alleges these directors failed
24 to act in the best interests of AFLDS, but she does not include any facts about how they failed.
25 Further, her assertions that Mack asked Gold to cause AFLDS to donate money to an event
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1 Mack was organizing do not include any factual allegations as to why this was improper. She
2 only concludes that it was.

3 Gold includes no *facts* to support her allegations, only including statements like Mack
4 and Matthesius “may have also engaged in their own such acts.” (Cmplt. at ¶ 123). None of
5 Gold’s allegations meet the particularity requirements for pleading fraud under Civ. R. 9(b)
6 or even hint at intentional criminal conduct. Gold’s claim against Mack and Matthesius should
7 be dismissed.

8 **CONCLUSION**

9 Gold’s complaint fails to adequately allege facts that she meets the statutory
10 requirements to bring derivative claims on behalf of AFLDS in A.R.S. § 10-3631 and A.R.S.
11 § 10-3810. Additionally, Gold fails to allege any facts that would permit her declaratory
12 judgment claim to stand against the Individual Defendants. Finally, Gold has failed to plead
13 what is required to assert a claim for judicial removal of directors against Mack and
14 Matthesius. For these reasons, Defendants respectfully request that Gold’s derivative claims
15 (claim one for declaratory judgment, as brought derivatively, and claim two for judicial
16 removal of directors) be dismissed under Rule 12(b)(6) for failure to state a claim. Defendants
17 also request that to the extent Gold purports to assert her declaratory judgment claim against
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1 the Individual Defendants, that claim be dismissed. Defendants request further that all claims
2 against Defendants Mack and Matthesius be dismissed under Rule 12(b)(6) for failure to state
3 a claim.

4 **RESPECTFULLY SUBMITTED** this 28th day of December 2022.

5 **PROVIDENT LAW®**

6 */s/ Timothy J. Watson*

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12 **COPY** efiled with AZTurboCourt
13 this 28th day of December 2022.

14 **COPIES** served as indicated below
15 this 28th day of December 2022, to:

16 Honorable Timothy Thomason
17 Maricopa County Superior Court

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