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5 *Attorneys for Defendant*

6 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
7 IN AND FOR THE COUNTY OF MARICOPA

8 PATRICIA BOCCHINO,

9 Plaintiff,

10 v.

11 FOUNTAIN SHADOWS  
12 HOMEOWNERS ASSOCIATION,

13 Defendant.

Case No.: CV2015-012434

**DEFENDANT’S RESPONSE TO  
PLAINTIFF’S MOTION FOR  
SUMMARY JUDGMENT**

**AND**

**CROSS-MOTION FOR SUMMARY  
JUDGMENT**

*(Assigned to the Honorable  
Douglas Gerlach)*

14  
15  
16  
17 Defendant, Fountain Shadows Homeowners Association (the “**Association**”), by and  
18 through undersigned counsel, hereby submits its Response to Plaintiff’s Motion for  
19 Summary Judgment (the “**Motion**”) and also moves this Court for entry of summary  
20 judgment in its favor. Because there are no genuine issues of material fact and the law  
21 supports the actions taken by the Association, Plaintiff’s Motion should be denied and  
22 summary judgment should be entered in favor of the Association.

1 This Response and Cross-Motion is supported by the following Memorandum of  
2 Points and Authorities, the Association’s separate Response to Plaintiff’s Separate  
3 Statement of Facts, the Association’s separate Controverting Statement of Facts (“CSOF”)  
4 and separate Declaration of Vern Carrillo, and all of the pleadings and matters of record  
5 filed with the Court, all of which are incorporated herein by this reference.

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **I. Introduction and Factual Background**

8 The Association is a planned community association and nonprofit corporation  
9 located in Glendale, Arizona, whose members are owners of lots within the planned  
10 community. See CSOF at ¶ 1. The Association and its members are governed by the  
11 *Declaration of Covenants, Conditions and Restrictions for Fountain Shadows* (the  
12 “**Declaration**”), recorded in the Office of the Maricopa County Recorder at No. 1983-  
13 146154. See CSOF at ¶ 2. The Association and its members are also subject to the Articles  
14 of Incorporation, Bylaws, and other Rules and Regulations adopted by the Association  
15 (referenced collectively herein as the “**Governing Documents**”). See CSOF at ¶ 3.

16 Plaintiff, Patricia Bocchino (the “**Plaintiff**”), was an owner of a lot located within  
17 the Fountain Shadows community until the sale of her lot on or about September 24, 2015.  
18 See CSOF at ¶ 4. Incident to her ownership of property within Fountain Shadows, she was,  
19 until the sale of her lot, a member of the Association. See CSOF at ¶ 5

20 Plaintiff violated the Declaration and other Governing Documents by acting in a  
21 harassing manner constituting offensive behavior. See CSOF at ¶ 6. The Declaration  
22 prohibits members or residents in the community from carrying on any offensive activity:

1 No noxious or offensive activity shall be carried on upon any Lot or any part  
2 of the Properties, nor shall anything be done thereupon which may be, or may  
3 become, an annoyance or nuisance to the neighborhood, or which shall in any  
way interfere with the quiet enjoyment of each of the Owners of his respective  
Townhouse, or which shall in any way increase the rate of insurance.

4 Declaration at 19 [Art. XIII, Sec. 10]; *see* CSOF at ¶ 7. As a result, the Association sought  
5 and obtained an *Injunction against Workplace Harassment* on March 5, 2015 from the  
6 Manistee Justice Court. *See* CSOF at ¶ 8.

7 In or around September of 2015, Defendant was contacted by a title/escrow  
8 company to provide a payoff of amounts due to the Association. *See* CSOF at ¶ 9.  
9 Pursuant to the Declaration, including Article IV, Section 1 and Article XVII, Section 1,  
10 the Association included in its payoff disclosure all attorneys' fees and costs incurred as a  
11 result of Plaintiff's violations of the Governing Documents. *See* CSOF at ¶ 10.

12 In connection with the sale of her lot, the Plaintiff paid what the Association had  
13 disclosed as due in its payoff disclosure to the title/escrow company. *See* CSOF at ¶ 11.  
14 Plaintiff did not contest or challenge the payoff disclosure prior to payment. *See* CSOF at ¶  
15 12.

## 16 **II. Legal Argument**

### 17 **A. The Contract entitles Association legal fees incurred to enforce** 18 **Compliance with the Declaration.**

19 “[I]t is well-settled in Arizona that ‘[c]ontracts for payment of attorneys' fees are  
20 enforced in accordance with the terms of the contract.’” *McDowell Mountain Ranch Cmty.*  
21 *Ass'n v. Simons*, 216 Ariz. 266, ¶ 14, 165 P.3d 667, 670 (App.2007), *quoting Heritage*  
22 *Heights Home Owners Ass'n v. Esser*, 115 Ariz. 330, 333, 565 P.2d 207, 210 (App.1977).

1 In this case, provision in the Declaration provides:

2 In the event the Association employs an attorney or attorneys to enforce the  
3 collection of any amounts due pursuant to this Declaration or in connection  
4 with any lien provided for herein, or the foreclosure thereof, or to enforce  
5 compliance with or specific performance of the terms and conditions of this  
6 Declaration, the Owner, Owners and parties against whom the action is  
7 brought shall pay all attorneys' fees and costs and expenses thereby incurred  
8 by the Association in the event the Association prevails in any such action.

9 *See* CSOF at ¶ 10.

10 The Declaration prohibits members or residents in the community from carrying on  
11 any offensive activity. Specifically, Article XIII, Section 10 of the Declaration provides:

12 No noxious or offensive activity shall be carried on upon any Lot or any part  
13 of the Properties, nor shall anything be done thereupon which may be, or may  
14 become, an annoyance or nuisance to the neighborhood, or which shall in any  
15 way interfere with the quiet enjoyment of each of the Owners of his respective  
16 Townhouse, or which shall in any way increase the rate of insurance.

17 *See* CSOF at ¶ 7.

18 Plaintiff breached the Declaration by harassing the Association's board members  
19 and employees of the Association's managing agent, Planned Development Services, Inc.  
20 by engaging in a series of acts that have caused the board members to be both seriously  
21 harmed and annoyed. *See* CSOF at ¶ 8. Plaintiff removed "closed" signs at the  
22 Association pool that were required by Maricopa County Health Services. *Id.* Plaintiff  
used e-mail, voice mail, phone conversations and her presence at Association Board of  
Directors meetings to continuously harass the members of the Association. *Id.* Her actions  
required members of Glendale Police Department, including SWAT team members, to  
attend the Association's Board of Directors meetings. *Id.*

1 As a result of her actions, the Association incurred attorneys' fees, costs and  
2 expenses to enforce Plaintiff's compliance with the terms and conditions of the contractual  
3 Declaration, including but limited to filing and obtaining an Injunction Against Workplace  
4 Harassment. *See* CSOF at ¶ 9.

5 In Plaintiff's Motion for Summary Judgment, she claims that the Association is not  
6 entitled to attorneys' fees and costs because they were not awarded in the judgment in favor  
7 of the Association for Injunction Against Workplace Harassment; that the Declaration does  
8 not provide for a basis for recovering attorneys' fees and costs in an injunction action; and  
9 the Injunction Against Workplace Harassment statute does not provide for an award of  
10 attorney's fees and costs in an uncontested injunction. The plain language of the  
11 Declaration's provision for attorneys' fees, costs and expenses, however, do not require that  
12 such fees and costs be litigated in a lawsuit and ultimately awarded in a judgment. The  
13 plain language of this provision specifies that if the Association prevails in an action  
14 seeking enforcement of the terms and conditions of the Declaration, then the Association is  
15 entitled to all attorneys' fees, costs, and expenses. *See* CSOF at ¶ 11.

16 Plaintiff also asserts that the legal fees incurred by the Association to enforce her  
17 compliance with the Declaration are not authorized by the Arizona Condominium Act. The  
18 Association does not claim it is entitled to legal fees under the Arizona Condominium Act.  
19 The Association relies on the contractual Declaration. The Association employed an  
20 attorney to enforce Plaintiff's compliance with the terms of the Declaration and prevailed  
21 in obtaining an Injunction Against Workplace Harassment in its favor.

1                   **B. Plaintiff Fails to Meet The Burden of Proving the Legal Fees are Clearly**  
2                   **Excessive**

3                   To establish a claim that the Association is not entitled to all of its legal fees pursuant  
4 to a provision in the Declaration awarding the Association all of its attorneys' fees, a  
5 homeowner has the burden of showing that the attorneys' fees were clearly excessive, and if  
6 such showing was not made, then association would be entitled to receive the full amount of  
7 requested attorney fees. *McDowell Mountain Ranch Community v. Simons*, 216 Ariz. 266,  
8 270, ¶ 16, 165 P.3d 667, 671 (App.2007). An agreement by the parties as to the amount of  
9 attorneys' fees is not contrary to public policy and is analogous to a contract for indemnity  
10 and a contractual fee provision stipulating to a certain amount or percentage of attorneys'  
11 fees "is binding only to the extent that it is reasonable; however, where the services have  
12 been rendered, and the amount stipulated is not obviously excessive, the stipulation as to the  
13 amount should govern." *Elson Dev. Co. v. Ariz. Sav. & Loan Ass'n*, 99 Ariz. 217, 407 P.2d  
14 930 (1965).

15                   Plaintiff has failed to provide any evidence to support that the legal fees incurred by  
16 the Association for her harassing and offensive behavior is clearly excessive. In fact,  
17 Plaintiff paid in full all of the legal fees incurred by the Association and did not contest the  
18 amounts prior to payment.

19                   **III. Conclusion**

20                   The Association respectfully requests that the Court deny Plaintiff's Motion for  
21 Summary Judgment and grant summary judgment in favor of the Association.  
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1 RESPECTFULLY SUBMITTED this 28<sup>th</sup> day of March, 2016.

2 **Carpenter, Hazlewood, Delgado & Bolen, PLC**

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11 ORIGINAL of the foregoing filed  
12 this 28<sup>th</sup> day of March, 2016 with:

13 Clerk of the Court  
14 Maricopa County Superior Court  
15 [www.AZTurboCourt.gov](http://www.AZTurboCourt.gov)

16 Copy of the foregoing emailed and mailed  
17 this 28<sup>th</sup> day of March, 2016, to:

18 Jonathan A. Dessauls  
19 Dessauls Law Group  
20 5353 North 16th Street, Suite 110  
21 Phoenix, Arizona 85016

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