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8 IN THE SUPERIOR COURT OF ARIZONA  
9 COUNTY OF MARICOPA

10 PATRICIA BOCCHINO,

11 Plaintiff,

Case No. CV2015-012434

12 vs.

13 FOUNTAIN SHADOWS HOMEOWNERS  
ASSOCIATION,

14 Defendant.

**REPLY IN SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT AND  
RESPONSE TO CROSS-MOTION FOR  
SUMMARY JUDGMENT**

(Assigned to the Honorable Douglas Gerlach)

15  
16 **Introduction**

17 Defendant Fountain Shadows Homeowners Association (the “Association”) did not have  
18 the authority to charge Plaintiff’s account for the attorneys’ fees and costs it alleges it incurred  
19 in connection with an *ex parte* Injunction against Workplace Harassment that it obtained against  
20 her. It never requested an award of its attorneys’ fees from the court issuing the injunction,  
21 never submitted a *China Doll* affidavit to the court, and never received an award of its fees in  
22 that case. Instead, it surreptitiously applied those fees to Plaintiff’s account and demanded they  
23 be paid at the close of escrow when Plaintiff had no ability to challenge them due to the time  
24 constraints of the pending sale. Because there are no genuine issues of material fact and the law  
25 fails to support the actions taken by the Association, its cross-motion should be denied and  
26 summary judgment should be entered in favor of Bocchino.

1 **I. THE ASSOCIATION WAS NOT ENTITLED TO RECOVER ATTORNEYS’**  
2 **FEES AND COSTS INCURRED IN AN INJUNCTION AGAINST HARASSMENT**  
3 **ACTION.**

4 The Association obtained an *ex parte* Injunction Against Workplace Harassment against  
5 Bocchino. The Injunction Against Workplace Harassment statute provides that, “[o]n notice to  
6 the affected party and after a hearing, the court may enter an order that requires any party to pay  
7 the costs of the action, including reasonable attorney fees.”<sup>1</sup> In other words, the right to recover  
8 costs and attorneys’ fees in an Injunction Against Workplace Harassment come with three  
9 conditions – they can *only* be awarded after notice and a hearing, those fees and they must be  
10 awarded by the court issuing the injunction, and they must be reasonable. The Association failed  
11 to comply of these conditions and simply decided that it had the authority to unilaterally impose  
12 its fees on Bocchino.

13 Although an Injunction Against Workplace Harassment is an action of statutory origin,  
14 the Association curiously omits any discussion of the statute in its response and cross-motion.  
15 The right to fees in a statutory action, however, turns entirely on the statute and not any  
16 provision that might exist in the Declaration. The Court of Appeals recently addressed this very  
17 issue in an administrative action to enforce statutory rights in *Brown v. Terravita Community*  
18 *Ass’n, Inc.*, holding that “Brown’s action arose out of statute and was not an action to enforce  
19 any of the provisions of the CC&Rs. The attorney’s fees provision of the CC&Rs therefore did  
20 not apply.”<sup>2</sup>

21 The same is true here. The Association hangs its rights to recover fees on its Declaration,  
22 but the cause of action it asserted arose not from the Declaration but from A.R.S. § 12-1810(O).  
23 The statute is clear that the court imposing the injunction *may* award costs and reasonable fees,  
24 but only after notice and a hearing. The Association never bothered to request fees from the

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25 <sup>1</sup> A.R.S. § 12-1810(O).

26 <sup>2</sup> *Brown v. Terravita Community Ass’n, Inc.*, 2015 WL 4600032 (Ct. App. July 30, 2015).  
A copy of this memorandum decision is attached hereto as Exhibit 1 pursuant to Rule  
111(c)(1)(C) of the Rules of the Supreme Court of Arizona.

1 court and ignored the court's role in deciding whether, and in what amount, to award fees.  
2 Having failed to comply with the statutory prerequisites to obtaining an award of attorneys'  
3 fees, there is no basis for recovering its attorneys' fees from Bocchino.

4 **II. THE DECLARATION DOES NOT ENTITLE THE ASSOCIATION TO FEES.**

5 **A. The Declaration's Nuisance Prohibition Does Not Apply.**

6 The Association argues it had a statutory right to attorneys' fees because it was entitled to  
7 an Injunction Against Workplace Harassment under Article XIII, Section 10, of the Declaration.  
8 As it did not cite Article XIII, Section 10 in its Petition for Injunction Against Workplace  
9 Harassment and the first time that it mentioned the section was in its cross-motion for summary  
10 judgment, it is disingenuous for the Association to recast the Injunction Against Workplace  
11 Harassment statutory proceeding as an ordinary civil case seeking to enforce Article XIII,  
12 Section 10. The former usually consists of an *ex parte* hearing, no discovery, and no hearing  
13 unless the defendant requests one and without the usual due process protections that exist in  
14 ordinary civil cases.

15 Regardless, Article XIII, Section 10, is not a basis for obtaining an Injunction Against  
16 Workplace Harassment. It states:

17 No noxious or offensive activity shall be carried on upon any Lot or any part of  
18 the Properties, nor shall anything be done thereupon which may be, or may  
19 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.

20 The Declaration is a contract between the Association and its members.<sup>3</sup> Therefore, the  
21 basic rules of contract interpretation apply in construing the Declaration. Contract provisions are  
22 not enforced when the terms are vague or uncertain.<sup>4</sup> Here, the nuisance provision speaks of

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24 <sup>3</sup> *Ahwatukee Custom Estates Mgmt. Ass'n v. Turner*, 196 Ariz. 631, 2 P.3d 1276, 1279, ¶  
5 (App. 2000).

25 <sup>4</sup> *Savoca Masonry Co., Inc. v. Homes & Son Const. Co., Inc.*, 112 Ariz. 392, 394, 542  
26 P.2d 817, 819 (1975) ("It is elementary that for an enforceable contract to exist there must be . .  
sufficient specification of terms so that the obligations involved can be ascertained"); *Owens v.*  
*M.E. Schepp Ltd. P'ship*, 216 Ariz. 273, 278, 165 P.3d 674, 679 (App. 2007) ("the terms of an

1 “noxious” or “offensive” activities that are an “annoyance” or “nuisance.” Such terms are too  
2 imprecise to be enforceable.<sup>5</sup> Even if they are not too vague or uncertain, they are unenforceable  
3 because they are too easily applied arbitrarily and unreasonably as the Board of Directors would  
4 have the exclusive to decide whether actions were “noxious,” “offensive,” “an annoyance,” or a  
5 “nuisance.” To the extent that the right to obtain an Injunction Against Workplace Harassment  
6 can be seen as arising from Article XIII, Section 10, such a claim fails as a matter of law

7         The nuisance provision also does not apply because Bocchino’s actions, which consist of  
8 oral and written communications, do not implicate the plain meaning of the actions prohibited  
9 by the provision. A nuisance is generally defined as the “unreasonable, unwarranted, or  
10 unlawful use by a person of his own property, which an obstruction or injury to the right of  
11 another, or to the public, and producing such material annoyance, inconvenience, and  
12 discomfort that the law will presume a resulting damage.”<sup>6</sup> “The doctrine of nuisance...has  
13 always been a restriction on land use.”<sup>7</sup> Bocchino’s verbal and written communications do not  
14 constitute a nuisance because they do not arise from her use of the property.<sup>8</sup>

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17 agreement are sufficiently certain to enforce if they provide a basis for determining the  
18 “existence of a breach and for giving an appropriate remedy”) (quoting Restatement (Second) of  
19 Contracts § 33(2) (1981)); *see also Sateriale v. R.J. Reynolds Tobacco Co.*, 697 F.3d 777, 789  
20 (9th Cir. 2012) (“a contract must be sufficiently definite for the court to ascertain the parties’  
21 obligations and to determine whether those obligations have been performed or breached”)  
22 (citations omitted).

23         <sup>5</sup> *Id.*

24         <sup>6</sup> *City of Phoenix v. Johnson*, 51 Ariz. 115, 123, 75 P.2d 30, 34 (1938).

25         <sup>7</sup> *City of Phoenix v. Fehiner*, 90 Ariz. 13, 16, 363 P.2d 607, 610 (1961); *see also Frank v.*  
26 *Environmental Sanitation Mgmt., Inc.*, 687 S.W.2d 876, 880 (Mo. 1985) (“The crux of a  
nuisance case is unreasonable land use”).

<sup>8</sup> *See, e.g., Booker v. Foose*, 613 S.E.2d 94, 97 (2005) (refusing to find a nuisance for  
making false police reports about neighbors and videotaping neighbors: “[T]he appellants have  
presented no evidence that Carolyn Foose has used her property in any way that has  
substantially and unreasonably interfered with their private use and peaceful enjoyment of their  
property”); *In re Braverman*, 463 B.R. 115, 120 (Bankr. N.D. Ill. 2011) (refusing to find  
nuisance where homeowner built a pool and fence but never entered anyone else’s land nor  
affected anyone else’s use and enjoyment of his land in building the pool and fence).

1 The Declaration provision further supports this conclusion – its prohibitions are limited  
2 to activities “carried on upon any Lot or any part of the Properties.”<sup>9</sup> When read in a common  
3 sense way, it is clear that Article XIII, Section 10, does not apply to written or oral  
4 communications.<sup>10</sup> Any other construction of this section would be illogical and allow an  
5 association to regulate the speech of its members as “nuisances.” As the nuisance prohibition is  
6 the only one that the Association cites, albeit now for the first time, it is clear that the Injunction  
7 Against Workplace Harassment claim did not arise out of the Declaration. Any right to the fees  
8 that, therefore, cannot arise from the Declaration.

9 **B. The Declaration’s Attorneys’ Fees Provision is Inapplicable.**

10 The Declaration’s attorneys’ fee provision provides the Association the right to recover  
11 “all attorneys’ fees, costs and expenses...incurred by the Association in the event the  
12 Association prevails in any...action...to enforce compliance with the...terms and conditions of  
13 [the] Declaration.” Because the Injunction Against Workplace Harassment action was not  
14 brought “to enforce compliance with the...terms and conditions of [the] Declaration,” this  
15 provision clearly does not apply.

16 The Association’s reliance on *McDowell Mountain Ranch Cmty. Ass’n, Inc. v. Simons* is  
17 misplaced for several reasons. The *McDowell Mountain Ranch* case relates to an association’s  
18 right to fees under a contract containing a fee provision and holds that “[c]ontracts for payment  
19 of attorneys’ fees are enforced in accordance with the terms of the contract.”<sup>11</sup> As such, the  
20 *McDowell Mountain Ranch* case actually supports granting summary judgment for Bocchino  
21 because the triggering event for an award of fees under the Declaration never occurred.

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<sup>9</sup> CSOF, ¶ 7 (emphasis added).

23 <sup>10</sup> *County of La Paz v. Yakima Compost Co., Inc.*, 224 Ariz. 590, 599, 233 P.3d 1169,  
24 1178, ¶ 16 (App. 2010) (“We construe the meaning of a contract provision from the language  
25 the parties used”). The language “upon any Lot or any part of the Properties” discusses a  
physical imposition as opposed to a person’s ability to communicate.

26 <sup>11</sup> *McDowell Mountain Ranch Cmty. Ass’n, Inc. v. Simons*, 216 Ariz. 266, 269, 165 P.3d  
667, 670, ¶ 14 (App. 2007).

1 Another key difference between the instant case and the *McDowell Mountain Ranch* case  
2 is that there was actually a fee request made in the *McDowell Mountain Ranch* case whereas in  
3 this case there was never any fee request. The Association merely took it upon itself to decide  
4 that it was entitled to fees and applied those charges to Bocchino’s account. The request for fees  
5 in the *McDowell Mountain Ranch* case complied with Rule 54(g) and related case law.<sup>12</sup>

6 Bocchino, by contrast, was never afforded any of the protections of Rule 54(g). To  
7 suggest that *McDowell Mountain Ranch* entitles a homeowner’s association to unilaterally  
8 charge all of its fees to a homeowner without requesting they be awarded by a court in a pending  
9 action twists the holding of *McDowell Mountain Ranch*. That case does not give an association  
10 the absolute right to its fees without the traditional safeguards that Arizona law imposes. *If* the  
11 Association had filed a lawsuit to enforce Article XIII, Section 10, and *if* the Association had  
12 prevailed in that action, and *if* the Association requested fees, and *if* the court had awarded those  
13 fees, *McDowell Mountain Ranch* would apply. None of these “ifs,” in fact, occurred.

14 Arizona law does not support the idea that a homeowner’s association can demand or  
15 coerce payment from an owner of its legal fees absent a court order. The absence of a valid fee  
16 request and award barred the Association from charging and collecting from Bocchino for any  
17 legal fees allegedly incurred. The Association’s utter disregard for the procedural rules a party  
18 must follow in order to recover its attorneys’ fees from another party entitles Bocchino to  
19 summary judgment.

20 **III. BOCCHINO DID NOT HAVE ANY OBLIGATION TO SHOW THAT THE**  
21 **ASSOCIATION’S FEES WERE CLEARLY EXCESSIVE IN LIGHT OF THE**  
22 **ASSOCIATION’S FAILURE TO REQUEST FEES.**

23 Perhaps recognizing that it failed to properly request and receive an award of fees in the  
24 Injunction Against Workplace Harassment, the Association overtly engages in misdirection and

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25 <sup>12</sup> See *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 673 P.2d 927 (App.  
26 1983) (describing general information to include in attorneys’ fee application affidavits and  
rejecting a fee application as “plainly insufficient” for failing to include this information).

1 distraction. The Association actually tries to blame Bocchino for its failure to properly obtain an  
2 award of fees, arguing that Bocchino “fails to meet the burden of proving the legal fees are  
3 clearly excessive.”

4 This argument might have some sway if this case was the one in which the Association  
5 was seeking fees and if the Association had filed an application for attorneys’ fees and the  
6 accompanying *China Doll* affidavit. Although the *McDowell Mountain Ranch* case states that,  
7 where an attorneys’ fees provision entitles a party to “all fees,” the burden shifts to the opposing  
8 party to show that the requested fees were “clearly excessive,” the burden does not shift until  
9 after a party first establishes a prima facie entitlement to fees in the amount requested by  
10 submitting a fee application consistent with the requirements set forth in *Schweiger v. China*  
11 *Doll Restaurant, Inc.*<sup>13</sup> Because the Association in this case never submitted a fee request to the  
12 court that heard the *ex parte* Injunction Against Workplace Harassment action establishing the  
13 entitlement to its fees, the burden never shifted to Bocchino.

14 It is ridiculous to suggest, let alone argue, that Bocchino must show that the fees incurred  
15 were “clearly excessive” when the Association failed in every respect to preserve, request, or  
16 receive an award of attorneys’ fees.<sup>14</sup> Bocchino cannot be charged with failing to satisfy a  
17 burden that she never had. The Association cannot remedy its failure to follow the proper  
18 procedures for obtaining an award of attorneys’ fees by blaming Bocchino.

19 **IV. BOCCHINO DID NOT HAVE THE TIME TO CHALLENGE THE FEES AND**  
20 **THE COMPELLED PAYMENT OF THOSE FEES DOES NOT WAIVE THE**  
**RIGHT TO RECOVER THE IMPROPERLY CHARGED FEES.**

21 <sup>13</sup> *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 187-89, 673 P.2d 927, 931-33  
22 (App. 1983).

23 <sup>14</sup> Had the Association followed the proper channels in pursuit of its attorneys’ fees,  
24 Bocchino would have contested the reasonableness of the fees. A significant portion of the fees  
25 assessed against her account were “clearly excessive,” including fees allegedly incurred in,  
26 among other things, communicating with an attorney she had retained to inquire about the  
presence of charges on her account unrelated to the Injunction Against Harassment action,  
responding to an inquiry from Bocchino regarding why the Association was assessing late  
charges on timely payments made via the Association’s web portal, and sending two attorneys  
to cover an *ex parte* hearing.

1 In support of its argument that Bocchino failed to satisfy her burden, the Association  
2 points to the fact that Bocchino paid the full amount imposed by the Association without first  
3 contesting it, as if she had a choice. After being served with the *ex parte* injunction, Bocchino  
4 focused her efforts on removing herself from the community, where she would no longer be  
5 subject to the whims of the Association and their arbitrary enforcement actions.

6 Bocchino entered into a binding purchase contract in order to secure a buyer for her  
7 property, on August 25, 2015, more than four months after she was served with the injunction.  
8 [SOF, ¶ 25] At that time, attorneys' fees were still being actively assessed to her account. [SOF,  
9 ¶¶ 18 - 20] It was not until September 18, 2015 that the Association provided a Resale  
10 Disclosure Statement to her title company through which Bocchino became aware of the  
11 \$4,062.28 balance she allegedly owed by close of escrow six days later. [SOF, ¶ 27; SOF, ¶ 28]  
12 Bocchino reasonably feared that disputing the charges would result in a forfeit of the sale, and  
13 subsequent civil liability for the breach of the purchase contract she entered a month earlier.  
14 Stuck between a rock and a hard place, Bocchino moved forward with the sale. Accordingly, the  
15 title company transferred the sum of the amount owed to the Association from Bocchino's  
16 escrow account. [SOF, ¶ 30] Her payment did not constitute a waiver of her claim or agreement  
17 as to the amount she should be required to pay. Rather, it was a testament to her motivation to  
18 create distance between herself and the Association.

### 19 **Conclusion**

20 The Association does not have unfettered power to collect unadjudicated and unawarded  
21 attorneys' fees and costs from an owner. In demanding the payment of these amounts out of  
22 Bocchino's escrow, the Association has effectively conducted an improper and unlawful  
23 garnishment of her sale proceeds. Accordingly, Bocchino is entitled to summary judgment and  
24 to her costs and attorneys' fees in bringing this action.

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DATED this 18 day of April 2016.

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COPY of the foregoing mailed  
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