

1 Jonathan A. Dessaulles, State Bar No. 019439
Ashley C. Hill, State Bar No. 032483
2 **DESSAULES LAW GROUP**
5353 North 16th Street, Suite 110
3 Phoenix, Arizona 85016
Tel. 602.274.5400
4 Fax 602.274.5401
jdessaules@dessauleslaw.com
5 ahill@dessauleslaw.com

6 *Attorneys for Plaintiff*

7 IN THE SUPERIOR COURT OF ARIZONA
8
9 COUNTY OF MARICOPA

10 PATRICIA BOCCHINO,

11 Plaintiff,

12 vs.

13 FOUNTAIN SHADOWS HOMEOWNERS
14 ASSOCIATION,

15 Defendant.

Case No. CV2015-012434

**PLAINTIFF'S APPLICATION FOR
AWARD OF ATTORNEYS' FEES**

16
17 Plaintiff hereby requests an award of attorneys' fees incurred by bringing this action for
18 the reimbursement of funds wrongfully collected by Defendant Fountain Shadows Homeowners
19 Association (the "Association").¹

20 **ARGUMENT**

21 **I. PLAINTIFF IS THE PREVAILING PARTY IN THIS ACTION.**

22 Plaintiff is the prevailing party in this litigation. Plaintiff moved for summary judgment
23 on her claim that the Association unlawfully received and refused to return proceeds from the
24

25 ¹ In accordance with the Court's minute entry dated July 28, 2016, Plaintiff undertook
26 good faith efforts to negotiate a stipulation regarding the amounts to be awarded but was unable
to reach any agreements with opposing counsel.

1 sale of her property. The Association subsequently argued that it acted in accordance with
2 Arizona law and that Plaintiff's motion should be denied and summary judgment should instead
3 be entered in favor of the Association. In its July 27, 2016 Minute Entry, the Court denied the
4 Association's cross-motion for summary judgment and granted Plaintiff's motion. Plaintiff was
5 ultimately awarded the full \$3,887.28 that the Association wrongfully collected. Plaintiff was
6 further instructed to submit this application for an award of her attorneys' fees and a statement
7 of costs.

8 **II. PLAINTIFF SHOULD BE AWARDED REASONABLE ATTORNEYS' FEES.**

9 **A. Plaintiff is Entitled to an Award of Attorneys' Fees.**

10 As mentioned in the Court's July 27, 2016 Minute Entry, this is an action arising out of a
11 contract, so Plaintiff is eligible for an award of attorney's fees under A.R.S. § 12-341.01. In
12 *Associated Indemnity Corp. v. Warner*, the Arizona Supreme Court set out six factors to
13 consider in deciding whether to award attorneys' fees pursuant to A.R.S. § 12-341.01. They are:

- 14 1. The merits of the claim or defense presented by the unsuccessful party.
- 15 2. The litigation could have been avoided or settled and the successful party's efforts
16 were completely superfluous in achieving the result.
- 17 3. Assessing fees against the unsuccessful party would cause an extreme hardship.
- 18 4. The successful party did not prevail with respect to all of the relief sought.
- 19 5. The novelty of the legal question presented, and whether such claim or defense had
20 previously been adjudicated in this jurisdiction.
- 21 6. Whether the award in any particular case would discourage other parties with tenable
22 claims or defenses from litigating or defending legitimate contract issues for fear of
23 incurring liability for substantial amounts of attorneys' fees.²

24 The application of these factors weigh heavily in Plaintiff's favor. This litigation could
25 have been avoided if the Association had not unlawfully collected money from Plaintiff's sale
26 proceeds or if it had agreed to reimburse Plaintiff before she was forced to resort to filing this

² *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985).

1 suit. Moreover, assessing the fees against the Association would not cause it to incur extreme
2 hardship. The Association has the power to impose special assessments on its members to the
3 extent it lacks sufficient funds in its existing coffers to pay attorneys' fees and costs. Whereas
4 each individual might owe very little under that scenario, it would impose an extreme and
5 unjustified burden on Plaintiff to pay her own fees and costs that she incurred to recover what
6 was rightfully hers. Especially in light of the fact that Plaintiff prevailed with respect to all of
7 the relief she sought.

8 This is not an isolated incident. Homeowner associations are vested with a unique power
9 to essentially tax the individuals that they govern by imposing mandatory assessments. While
10 this is an important power that is mostly used in good faith, there is an inherent risk that this
11 power will be abused. Members of such associations are often put in a position of David against
12 Goliath when they want to challenge an association's actions. It is necessary for association
13 members to have the ability to recover the fees expended in order to litigate legitimate contract
14 issues if associations are to be held accountable. This is especially true in situations where an
15 Association's CC&Rs entitle the association to its attorneys' fees in the event it prevails, but
16 does not entitle the association member to its fees if the member prevails, as is the case with the
17 Fountain Shadows Homeowners Association.³

18 An award of fees is further appropriate in this case given the Association's tactics in
19 collecting the amounts it claimed was owed directly out of Plaintiff's escrow. Once the
20 Association learned Plaintiff had entered into a contract to sell her property, it simply demanded
21 payment directly from the escrow company at a point in time that prevented Plaintiff from
22

23 ³ See Exhibit 1 (Declaration of Covenants, Conditions and Restrictions for Fountain
24 Shadows, pp. 24, Art. XVII, Section 1, "In the event the Association employs an attorney or
25 attorneys to enforce the collection of any amounts due pursuant to this Declaration . . . or to
26 enforce compliance with or specific performance of the terms and conditions of this Declaration,
the Owner, Owners and parties against whom the action is brought shall pay all attorneys' fees,
costs and expenses thereby incurred by the Association in the event the Association prevails in
any such action").

1 challenging it altogether, leaving Plaintiff with a Hobson's choice of challenging the demand
2 and losing the sale.

3 **B. The Requested Fees Are Reasonable.**

4 Arizona courts look first to a calculation of multiplying a reasonable hourly rate by the
5 number of hours reasonably expended for determining the reasonableness of a requested award
6 of attorneys' fees.⁴ Relevant factors in determining the reasonableness of the actual billing rates
7 and number of hours expended include:

- 8 (1) The qualities of the advocate: his ability, his training, education,
9 experience, professional standing and skill;
- 10 (2) The character of the work to be done: its difficulty, its intricacy, its
11 importance, time and skill required, the responsibility imposed and the
12 prominence and character of the parties where they affect the importance of
13 the litigation;
- 14 (3) The work actually performed by the lawyer: the skill, time and attention
15 given to the work;
- 16 (4) The result: whether the attorney was successful and what benefits were
17 derived.⁵

18 As explained in the Dessauls Declaration and Itemized Statement of Fees, Plaintiff
19 seeks an award of \$22,937.50 for attorneys' fees incurred in this litigation. This amount was
20 determined by multiplying the hourly rates of Plaintiff's attorneys by the number of hours
21 reasonably spent by those professionals on this case. The reasonableness of this amount is
22 underscored by application of the *China Doll* factors.

24 ⁴ See *Burke v. Arizona State Retirement System*, 206 Ariz. 269, 275, 77 P.3d 444, 450
25 (App. 2003); *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 187-189, 673 P.2d 931-
26 933 (App. 1983).

⁵ *China Doll*, 138 Ariz. at 187, 673 P.2d at 931.

1 **1. Qualities of the Advocates.**

2 The hourly rates claimed in this application are the same rates that Plaintiff has agreed to
3 pay.⁶ Those rates are commensurate with the rates charged by other attorneys in this community
4 with similar levels of experience, training, and responsibility. Jonathan Dessaulles was the
5 primary attorney responsible for this case. A second lawyer, Ashley Hill, and a paralegal, Jenna
6 Pitchel, also worked on the case. The qualifications of each professional who worked on this
7 case are detailed in the Dessaulles Declaration.

8 The fees sought have been refined to eliminate any conceivable duplication of effort or
9 excessive time spent on tasks. As the Court can see from the itemized billing entries, a number
10 of charges have been written off and zeroed out (“\$0.00”). In all, Plaintiff’s attorneys wrote off
11 and did not bill some hours of time to ensure that the total amount of attorneys’ fees remained
12 reasonable and necessary, and did not constitute a duplication of efforts. In addition, a majority
13 of tasks were assigned to non-attorneys or associates billing at a lower hourly rate for the
14 purpose of keeping the attorneys’ fees reasonable.

15 **2. The Character of the Work.**

16 This case presented a legal question that falls within the four corners of the Association’s
17 Declaration of CC&Rs: Can an Association unilaterally assess its members for fees if it was not
18 the prevailing party? The answer is no.

19 The question was surprisingly complex in light of the fact it had to be determined
20 whether a party can prevail in an ex parte action. The work was of crucial significance to
21 Plaintiff, who was essentially run out of town by the Association only to have thousands of
22 dollars poached from her on the way out. Plaintiff could have challenged the Injunction Against
23 Harassment but chose instead to merely cut her losses and disassociate from the Association.
24 Instead of providing a basis for each side to incur excessive attorneys’ fees, Plaintiff chose to

25 _____
26 ⁶ *See id.* (“the rates charged by the lawyer to the client is the best indication of what is reasonable”).

1 take the high road and simply walk away, only to be pulled back into the Association's over
2 exertion of power when it syphoned unwarranted funds from her escrow sale.

3 **3. The Work Actually Performed.**

4 Plaintiff incurred attorneys' fees in preparing and filing the complaint, a motion for
5 summary judgment, and related documents. Plaintiff's counsel also had to prepare for and attend
6 the oral argument hearing on the Motion for Summary Judgment and Defendant's Cross-Motion
7 for Summary Judgment. Plaintiff also incurred substantial fees preparing this fee application.
8 All of the work for which fees are claimed in this application was directly relevant, necessary,
9 and reasonable for this litigation. These are fees that Plaintiff has agreed to pay.

10 **4. The Result Achieved.**

11 Plaintiff was successful in achieving the primary objective of this litigation – an order
12 entitling her to judgment in her favor and against the Association in the amount of \$3,887.28.

13 **5. Plaintiff Undertook Good Faith Efforts to Negotiate a Stipulation with the
14 Association Regarding the Amounts to be Awarded.**

15 In accordance with the Court's July 27, 2016 Minute Entry, Plaintiff attempted in good
16 faith to stipulate with the Association regarding the amounts to be awarded. Nevertheless, the
17 parties were unable to reach an agreement as to the amount of Plaintiff's fee award.

18 DATED this 26 day of August 2016.

19 DESSAULES LAW GROUP

20 By: /s/ Jonathan A. Dessauls

21 Jonathan A. Dessauls

22 Ashley C. Hill

23 *Attorneys for Plaintiff*

1 COPY of the foregoing mailed
2 and emailed this 26th day of August to:

3 Chad P. Miesen
4 CARPENTER HAZLEWOOD, DELGADO & BOLEN, PC
5 1400 E. Southern Avenue, Suite 400
6 Tempe, AZ 85282

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