

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PATRICIA BOCCHINO,

Plaintiff-Appellee,

v.

FOUNTAIN SHADOWS
HOMEOWNERS ASSOCIATION,

Defendant-Appellant.

1 CA-CV 16-0710

Maricopa County No. CV2015-012434

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE CASE

Plaintiff-Appellee Patricia Bocchino (“**Bocchino**”) filed this action against Defendant-Appellant Fountain Shadows Homeowners Association (the “**Association**”) seeking recovery of monies she alleges were overpaid to the Association during the closing of a real estate transaction in which Bocchino sold her home.

Motions for summary judgment were filed on behalf of Bocchino and the Association. In the trial court’s view, “[t]he success of both motions turns on whether an injunction against Bocchino that the Association obtained is viable.” [APP195] The trial court held that the injunction was unconstitutionally vague and overbroad, and therefore, it was unenforceable. The trial court explained that “[b]ecause of that, the Bocchino motion must be granted, and the Association’s motion must be denied.” [APP198]

After a contested attorneys’ fee application, (*see* R. 29, 30, 31, 32, 33, 35, and 36), the trial court entered judgment against the Association for the full principal amount sought by Bocchino plus a portion of the total attorneys’ fees and costs requested by Bocchino. [APP201] The Association timely appealed the trial court’s decision by filing its Notice of Appeal on November 4, 2016. (R. 39.)

STATEMENT OF THE FACTS

The Association is a planned community association (HOA)¹ and nonprofit corporation doing business in Glendale, Arizona, and whose members are owners of lots within the planned community known as Fountain Shadows. [APP105] The Association and its members are governed by the “Declaration of Covenants, Conditions and Restrictions for Fountain Shadows” recorded in the Office of the Maricopa County Recorder at No. 1983-146154 (the “**Declaration**”). (*Id.*) The Association and its members are also subject to the Association’s Articles of Incorporation, its Bylaws, and the other rules and regulations adopted by the Association (collectively, the “**Governing Documents**”). (*Id.*)

Bocchino was an owner of a townhouse located within the Fountain Shadows community until the sale of her townhouse on or about September 24, 2015. [APP38] Incident to her ownership of property within Fountain Shadows, she was, until the sale of her townhouse, a member of the Association. [APP114]

Bocchino violated the Declaration and other Governing Documents by acting in a harassing manner constituting offensive behavior. [APP105] The

¹ While not directly relevant to the issues on appeal, the trial court erroneously characterized the community as a condominium, and therefore as a result, characterized the Association as a condominium association. [APP195] In fact, the community consists of platted lots with constructed “townhomes” situated on them. The Association owns all common areas. For these reasons, among others, the community is not a condominium, but instead is a planned community and the Association is a planned community association. [A.R.S. § 33-1802\(1\) and \(4\)](#).

Declaration specifically prohibits owners or residents in the community from carrying on any offensive activity:

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

[APP138] As a result, the Association sought and obtained an injunction against workplace harassment (the “**Injunction**”) against Bocchino on March 5, 2015, from the Manistee Justice Court (the “**Injunction Action**”) to enforce the Declaration’s prohibition against such offensive activity. [APP161] Bocchino did not participate in the Injunction Action or challenge the Injunction in any way. [APP25]

Bocchino entered into a contract for the sale of her townhouse on August 25, 2015 with a close of escrow date of September 24, 2015. (R. 11 at 4, ¶ 25.) In or around September of 2015, the Association was contacted by a title/escrow company to provide a payoff of amounts due to the Association as part of the sale transaction. [APP106] Pursuant to the Declaration, including Article IV, Section 1 and Article XVII, Section 1, the Association included in its payoff disclosure all attorneys’ fees and costs incurred as a result of Bocchino’s violations of the Governing Documents. [APP106] Article IV, Section 1 of the Declaration sets forth the personal obligation of Association members to pay assessments and other

charges authorized by the Declaration as well as establishes a lien right to secure payment of such assessments and other charges:

Creation of the Lien and Personal Obligation of Assessments. The Declarant, for each Townhouse owned within the Properties, hereby covenants, and each Owner of any Townhouse by acquiring an ownership interest therein, whether or not it shall be so expressed in the conveying document, is deemed to covenant and agree to pay to the Association: (1) annual assessments or charges; and (2) special assessments as authorized by the Association's Board of Directors. Such assessment to be established and collected as provided herein.

The annual and special assessments, together with interest, costs of collection and reasonable attorneys' fees, shall be a charge on the land and shall be a continuing lien upon the Lot against which each such assessment is made. Each such assessment, together with interest, costs of collection and reasonable attorneys' fees, shall also be the personal obligation of the person who was the Owner of such Lot at the time when the assessment fell due. The personal obligation for the delinquent assessments shall not pass to his successors in title unless expressly assumed by them.

[APP124] (Emphasis in original.) Additionally, Article XVII, Section 1 of the Declaration provides for the award of attorneys' fees, costs and expenses incurred by the Association in enforcement of the Declaration:

Attorneys' Fees. In the event the Association employs an attorney or attorneys to enforce the collection of any amounts due pursuant to this Declaration or in connection with any lien provided for herein, or the foreclosure thereof, or to 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.

[APP143] (Emphasis in original.)

In connection with the sale of her lot, Bocchino paid \$4,062.28, which was what the Association had disclosed as due in its payoff disclosure to the title/escrow company. (*See* R. 16 at 5, ¶ 25 [APP113]; *see also* R. 19 at 6 [APP165].) Of that total paid, \$175.00 was attributable to the September 2015 monthly regular assessment and \$3,887.28 was attributable to attorneys' fees, costs and expenses incurred by the Association related to the Injunction Action. (R. 19 at 6 [APP165].) Plaintiff did not contest or challenge the payoff disclosure prior to payment. (R. 23 at 2, ¶ 13 [APP184].)

ISSUES PRESENTED

The single issue presented on appeal is whether the trial court erred in holding that the Association was not the prevailing party in the Injunction Action and, as a result, granting Bocchino's motion for summary judgment.

SUMMARY OF ARGUMENT

The record on appeal reflects the following:

1. Bocchino violated the Declaration;
2. The Association took legal action to enforce the Declaration;
3. The Association incurred attorneys' fees, costs and expenses in taking legal action against Bocchino to enforce the Declaration;

4. The Declaration provides that the Association is entitled to recover all of the attorneys' fees, costs and expenses incurred in an action to enforce the Declaration if it prevails in that action;

5. The Association prevailed in that legal action by obtaining the full relief it requested—the issuance of the Injunction; and

6. Bocchino paid all of the attorneys' fees, costs and expenses incurred in an action to enforce the Declaration without protest.

Despite all of the above, the trial court granted summary judgment for Bocchino and against the Association, which is contrary to established Arizona law. The Association is respectfully requesting that this Court reverse the trial court's ruling, vacate the judgment entered, enter an order requiring the trial court to enter judgment in favor of the Association, and remand to the trial court for a determination as to an award of the Association's attorneys' fees and costs incurred in defending against Bocchino's claims. The Association also requests that this Court award it its attorneys' fees and costs on appeal.

ARGUMENT

The trial court properly recognized that in Arizona a deed containing a restrictive covenant that runs with the land is a contract. [APP198] *Powell v. Washburn*, 211 Ariz. 553, 556, 125 P.3d 373, 376 (2006); *see also* Ariz. *Biltmore*

Estates Ass'n v. Tezak, 177 Ariz. 447, 448, 868 P.2d 1030, 1031 (App.1993). The principle canon of contract law is to give effect to the plain meaning of the contract and the intent of the parties to the contract. *Taylor v. State Farm Mut. Auto Ins. Co.*, 175 Ariz. 148, 152, 854 P.2d 1134, 1138 (1993). When the language of a contract is clear and unambiguous, the court need look no further for the meaning of the contract. *Id.*; see also *Sky Mountain Ranch Subdiv. Prop. Owners Ass'n v. Williams*, 12 Ariz.App. 244, 246, 469 P.2d 478, 480 (App.1970) (“[T]he intent of the parties and the object of the deed or restriction should govern, giving the instrument a just and fair interpretation.”). Despite this, the trial court erred in granting summary judgment for Bocchino and against the Association for the reasons discussed below.

I. The Trial Court Erred in Holding That the Association Was Not the Prevailing Party in the Injunction Action and, as a Result, Granting Bocchino’s Motion for Summary Judgment.

A. Standard of appellate review.

The standard of appellate review for this issue is *de novo*. Appellate courts “review the grant of summary judgment *de novo* and view the evidence in the light most favorable to [...] the party against whom summary judgment was entered.” *Espinoza v. Schulenburg*, 212 Ariz. 215, 216–17, 129 P.3d 937, 938–39 (2006); citing *Duncan v. Scottsdale Med. Imaging, Ltd.*, 205 Ariz. 306, 308, ¶ 2, 70 P.3d 435, 437 (2003). Here, in ruling on the motions for summary judgment, the trial

court was not relying on any disputed material facts. Rather, the trial court was only interpreting a matter of law (whether the Injunction was valid) and a matter of contract interpretation (what the Declaration’s language, “prevailing party” meant).

B. In issuing the Injunction, the Justice Court held that Bocchino had acted in a manner in violation of the Declaration.

Bocchino claimed that her actions, which were the subject of the Injunction Action, did not constitute a nuisance and therefore the nuisance provision (Article XIII, Section 10) of the Declaration did not apply. [APP174] Bocchino’s assertion is wrong. While the Association believes that Bocchino’s actions did, in fact, constitute a nuisance, there is more to Article XIII, Section 10 of the Declaration than a prohibition against nuisance. The Declaration prohibits members or residents in the community from carrying on any *offensive activity*. Article XIII, Section 10 of the Declaration provides:

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

[APP138]

The Declaration does not define “offensive activity”; however, the common use of the word “offensive” is for something “causing displeasure or resentment.”

Offensive | *Definition of Offensive by Merriam-Webster*, <https://www.merriam->

[webster.com/dictionary/offensive](http://www.merriam-webster.com/dictionary/offensive) (last visited Feb. 8, 2017). “Activity” is commonly defined as “a pursuit in which a person is active.” *Activity* | *Definition of Activity* by Merriam-Webster, <https://www.merriam-webster.com/dictionary/activity> (last visited Feb. 8, 2017).

Certainly it can be said that Bocchino was in active pursuit causing displeasure or resentment given that she engaged in a series of acts that caused members of the Association’s board of directors to be both seriously harmed and annoyed. [APP189] Bocchino removed “closed” signs at the Association pool that were required by Maricopa County Health Services. (*Id.*) She used e-mail, voicemail, phone conversations and her physical presence at Association Board of Directors meetings to continuously harass the members of the Association. (*Id.*) Her actions resulted in members of Glendale Police Department, including SWAT team members, having to attend the Association’s Board of Directors meetings. (*Id.*)

Ultimately, the Association commenced the Injunction Action and a court, after finding that the Association presented evidence that satisfied the statutory threshold for issuing an injunction, issued the Injunction against Bocchino. [APP161] For an injunction against workplace harassment to issue, Arizona law requires:

[...] reasonable evidence of harassment of the plaintiff by the defendant during the year preceding the filing of the petition or that

good cause exists to believe that great or irreparable harm would result to the plaintiff if the injunction is not granted before the defendant or the defendant's attorney can be heard in opposition and the court finds specific facts attesting to the plaintiff's efforts to give notice to the defendant or reasons supporting the plaintiff's claim that notice should not be given [...]

[A.R.S. § 12-1809\(E\)](#). For purposes of [A.R.S. § 12-1809](#), “harassment” is further defined in the law as:

[...] a series of acts over any period of time that is directed at a specific person and that would cause a reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person and serves no legitimate purpose. Harassment includes unlawful picketing, trespassory assembly, unlawful mass assembly, concerted interference with lawful exercise of business activity and engaging in a secondary boycott as defined in section 23-1321 and defamation in violation of section 23-1325.

[A.R.S. § 1809\(S\)](#). Based on this definition, it is axiomatic that Bocchino was in violation of Article XIII, Section 10 of the Declaration. Bocchino violated the Declaration because her actions became an annoyance and nuisance and otherwise interfered with the quiet enjoyment of each of the Owners.

As a result of her actions, many of which occurred on her “Lot” and the “Properties” as those terms are defined in the Declaration, the Association incurred attorneys’ fees, costs and expenses to enforce Bocchino’s compliance with the terms and conditions of the contractual Declaration, including filing the Injunction Action and successfully obtaining the Injunction. [\[APP169\]](#) Therefore, by issuance of the Injunction it is conclusive that Bocchino violated the Declaration.

C. The Association was the prevailing party in the Injunction Action.

The Association employed an attorney to enforce Bocchino’s compliance with the terms of the Declaration—to require that Bocchino cease and desist her offensive behavior—and prevailed in obtaining the relief it sought: an injunction against workplace harassment against Bocchino. [APP161] As a result, the Association is the prevailing party and is contractually entitled to all legal fees and costs it incurred for Bocchino’s breach of contract.

Despite this, the trial court entered summary judgment in Bocchino’s favor holding that the Association could not have “prevailed” or be considered the “prevailing party” with respect to the Injunction Action. The trial court provided two justifications for this determination: (1) the Injunction Action was unopposed; and (2) the Injunction was unenforceable as a matter of law.

1. The Injunction Action being unopposed is irrelevant.

The trial court held that because the Injunction Action was one without notice to Bocchino and she did not oppose it, that the Association could not have prevailed. [APP198] In fact, at oral argument on the competing motions for summary judgment, the trial court used a sports analogy for illustration of the court’s point. In essence, the trial court asserted that in sports there is a winner and a loser to a game—two sides competing is required in order to prevail over another. [APP223] However, as counsel for the Association pointed out at the

hearing, there are many times in individual sports, such as wrestling, where the opposing side does not appear and compete, in which case, the athlete who did appear for the match was declared the winner and his or her record was increased on the winning side by one match. (*Id.*) The Association argues that the athlete who appeared for the match prevailed over the one who did not appear. The same is true in the Injunction Action. The Association appeared and obtained the Injunction. While it is true that Bocchino was not notified of the initial application for the injunction in order to show up and defend, she was served with the Injunction and notice of her opportunity to request a hearing and contest the Injunction.² Yet she never did. She is no different than the athlete who failed to compete. But the Association is similar to the athlete who did show up to compete. As a result, the Association is the prevailing party.

Courts around the country have addressed what the term “prevailing party” means. The United State Supreme Court addressed the issue in *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res.*, [532 U.S. 598, 603](#), 121 S. Ct. 1835, 1839, 149 L. Ed. 2d 855 (2001):

In designating those parties eligible for an award of litigation costs, Congress employed the term “prevailing party,” a legal term of art. Black's Law Dictionary 1145 (7th ed.1999) defines “prevailing party” as “[a] party in whose favor a judgment is rendered, regardless of the

² The fact that Bocchino was served with the Injunction was uncontested by Bocchino and therefore any argument to the contrary was waived.

amount of damages awarded <in certain cases, the court will award attorney's fees to the prevailing party>.—Also termed *successful party*.” This view that a “prevailing party” is one who has been awarded some relief by the court can be distilled from our prior cases.

(Emphasis in original.) (Internal footnote omitted.)

Additionally, the Ninth Circuit Court of Appeals has addressed the issue many times. In one case the Ninth Circuit held, “A party is a prevailing party for purposes of an attorneys' fee award if it ‘achieved a material alteration in the legal relationship of the parties that is judicially sanctioned.’” *Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc.*, [778 F.3d 1059, 1078](#) (9th Cir. 2015), quoting *Klamath Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgmt.*, [589 F.3d 1027, 1030](#) (9th Cir. 2009). A court order, such as an injunction, materially alters the legal relationship between the parties because the defendant is required to do something directly benefitting the plaintiff that the defendant otherwise would not have had to do. *See Carbonell v. I.N.S.*, [429 F.3d 894, 900](#) (9th Cir. 2005); *see also Fischer v. SJB–P.D. Inc.*, [214 F.3d 1115, 1118](#) (9th Cir. 2000) (“[T]he legal relationship is altered because the plaintiff can force the defendant to do something he otherwise would not have to do.”). As stated differently by the Ninth Circuit Court of Appeals, “A litigant qualifies as a prevailing party if it has obtained a ‘court-ordered chang[e] [in] the legal relationship between [the plaintiff] and the defendant.’” *Saint John's Organic Farm v. Gem Cty. Mosquito Abatement Dist.*,

574 F.3d 1054, 1058 (9th Cir. 2009) (alterations in original) (internal quotation marks omitted), quoting *Buckhannon*, 532 U.S. at 604.

The case law makes no requirement that the action be contested. Furthermore, nowhere in the Declaration does it require that the action to enforce the Declaration be contested in order to be entitled to attorneys' fees, costs and expenses. The Association was seeking an injunction against workplace harassment from the Justice Court, which is exactly what it obtained. The issuance of the Injunction materially altered the legal relationship between the Association and Bocchino as it required Bocchino to do something—stay away from the Association and its agents—that directly benefitted the Association and that Bocchino otherwise would not have had to do. As a result, the Association was the prevailing party in the Injunction Action and the trial court erred in holding otherwise.

2. *The Injunction was enforceable as a matter of law.*

As justification for its decision that the Injunction was unenforceable, the trial court provided two bases: (i) the Injunction lacked the necessary specificity; and (ii) the Injunction prohibited constitutionally protected conduct.

i. The Injunction was sufficiently specific and complied with court-mandated language.

As an example of the lack of specificity, the trial court focused on the language of the Injunction, which is a form document drafted and approved by the

Administrative Office of the Courts pursuant to [Administrative Directive 2013-03](#).

In fact, the original Administrative Directive implementing forms for use in matters concerning injunctions against workplace harassment, [Administrative Directive 2006-01](#), requires use of these forms without deviation:

IT IS FURTHER DIRECTED that use of these protective order forms is mandatory for all matters concerning injunctions against harassment, injunctions against workplace harassment, orders of protection, and emergency orders of protection effective December 31, 2007. [...] Any other proposed alterations to or deviations from the approved forms, including text changes, shall be submitted to the AOC Administrative Director for approval prior to use, as required by ACJA § 5-207.

[Administrative Directive 2006-01](#) (capitalization in original; other emphasis added).

The required use of, and prohibited deviation from, these forms is also required by the Arizona Code of Judicial Administration:

All Arizona courts must use only those forms approved by the administrative director in matters concerning domestic violence orders of protection, injunctions against harassment, and injunctions against workplace harassment. Individual court identification information (name, address, and two assigned court identification numbers) must appear at the top of each form, except for the plaintiff's guide sheet and the defendant's guide sheet. Courts may make technical formatting changes (for example, number of pages, line and margin spacing, and font size), use multi-part, carbonless paper, and develop non-English translations. Any other proposed alterations to or deviations from the approved forms, including any text changes, must be submitted to the administrative director for approval prior to use. The supreme court authorizes the administrative director to approve or modify the forms in response to changes in state or federal laws or procedures and make other necessary administrative amendments or corrections.

[A.C.J.A. § 5-207.](#)

The specific language criticized by the trial court was that the Injunction prohibited Bocchino from going “to” or “near” certain locations identified in the Injunction, to wit:

PROTECTED LOCATIONS. Defendant shall not go to or near the Plaintiff employer’s or other Protected Person’s:

Workplace:

- Fountain Shadows Homeowners Association: 14100 North 83rd Avenue Unit 200; Peoria, AZ 85381

Other:

- Fountain Shadows Homeowners Association: 5959 W. Brown, Glendale, AZ 85302
- Donald Toothman: 8626 N Fountain Dr, Peoria, AZ 85346
- Donna Toothman: 8626 N Fountain Dr, Peoria, AZ 85346
- John Gaytan: 6758 W Ruth Ave, Peoria, AZ 85346

[[APP162](#)] (Emphasis in original.)

During oral argument of the competing motions for summary judgment, the trial court and counsel for the Association discussed the “near” language in the form of injunction order provided by the courts:

THE COURT: It says the Defendant shall not go to or near the Plaintiff’s employers or other protected person’s workplace. What does near mean?

MR. MIESEN: Yeah. That language is part of the form that the courts have adopted for all injunctions against workplace harassment. So I would posit to the Court that if in fact near is not sufficient, then all injunctions that are currently written on these forms would be unenforceable.

THE COURT: Well, that may be the case, but I’m only dealing with this one.

MR. MIESEN: Understood.

THE COURT: How does -- how does -- in this case, how does the Plaintiff know whether or not she is violating the injunction when -- when the order says don't go near, and there are -- are what, five different addresses there.

* * *

THE COURT: What -- what's near?

MR. MIESEN: Well, I think the common sense approach to that, Your Honor, is that near is enough to come in contact with, and it -- to the high probability of interaction with --

* * *

MR. MIESEN: -- the protected persons.

(R. 41 at 6-7, [[APP208](#)].) Despite this explanation, the trial court determined that the form language approved by the Administrative Office of the Courts (and which the courts and parties are required to utilize) for use in cases involving injunctions against harassment was insufficient.

What the trial court failed to recognize is that Arizona courts have been enforcing similar injunctions against workplace harassment. There has been no case law declaring those forms of injunction to be unenforceable. The language used is sufficiently detailed to create an enforceable injunction order. As explained by the Administrative Office of the Courts in [Administrative Directive 2013-03](#), these forms were modified from prior versions to specifically address recent rulings and policies adopted by the Arizona Judicial Council.

Regardless, the trial court held that the Injunction—utilizing the court-mandated form—was unenforceable. Based on that determination, the trial court held that the Association could not have prevailed in the Injunction Action if what

it received was an unenforceable order. Following the trial court's analysis then, there would be no possible way for any litigant to be considered a prevailing party in an injunction against harassment or protective order case. Such a result is illogical.

ii. The Injunction did not prohibit constitutionally protected conduct.

The trial court erred when it held that the Injunction was unenforceable because its effect prohibited constitutionally protected conduct, which is not permissible under [A.R.S. § 12-1810\(L\)\(2\)](#). (R. 27 at 3, [APP196].) However, the court failed to recognize that the Injunction would not, if enforced, prohibit constitutionally protected conduct. In fact, Division Two of the Arizona Court of Appeals has addressed this issue when it held that, “[p]rohibiting harassment is not prohibiting speech, because harassment is not ... protected speech.” *State v. Brown*, [207 Ariz. 231, 234](#), 85 P.3d 109, 112 (App. 2004) (internal quotation marks omitted). It simply cannot be said that the Injunction is, on its face, a prohibition of constitutionally protected rights. Furthermore, the record in this case lacks any evidence that Bocchino's constitutionally protected rights were infringed in any way. As a result, the trial court erred in holding that the Injunction was unenforceable.

D. The contract entitles the Association, as the prevailing party, to recover all attorneys' fees, costs and expenses incurred to enforce compliance with the Declaration.

“[I]t is well-settled in Arizona that ‘[c]ontracts for payment of attorneys' fees are enforced in accordance with the terms of the contract.’ ” *McDowell Mountain Ranch Cmty. Ass'n v. Simons*, 216 Ariz. 266, 269, ¶ 14, 165 P.3d 667, 670 (App.2007); quoting *Heritage Heights Home Owners Ass'n v. Esser*, 115 Ariz. 330, 333, 565 P.2d 207, 210 (App.1977).

In this case, the Declaration, a contract under Arizona law, provides:

In the event the Association employs an attorney or attorneys to enforce the collection of any amounts due pursuant to this Declaration or in connection with any lien provided for herein, or the foreclosure thereof, or to 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 and costs and expenses thereby incurred by the Association in the event the Association prevails in any such action.**

[APP99] (Emphasis added.) Therefore, if the Association prevails in an action against an Owner to enforce compliance with or specific performance of the terms and conditions of the Declaration, the Owner must pay all attorneys' fees, costs, and expenses incurred by the Association in that action.

The relevant case law also requires that Bocchino pay all attorneys' fees, costs and expenses. *See Heritage Heights*, 115 Ariz. at 333-334, 565 P.2d at 754; *see also McDowell Mountain Ranch*, 216 Ariz. at 269, 165 P.3d at 670. “Unlike fees awarded under A.R.S. § 12-341.01(A), the court lacks discretion to refuse to award fees under [a] contractual provision.” *McDowell Mountain Ranch*, 216 Ariz. at 269, 165 P.3d at 670. Arizona courts have gone further to state that an

agreement by the parties as to the amount of attorneys' fees is not contrary to public policy and is analogous to a contract for indemnity and a contractual fee provision stipulating to a certain amount or percentage of attorneys' fees. Such an agreement "is binding only to the extent that it is reasonable; however, where the services have been rendered, and the amount stipulated is not obviously excessive, the stipulation as to the amount should govern." See *Elson Dev. Co. v. Ariz. Sav. & Loan Ass'n*, 99 Ariz. 217, 223, 407 P.2d 930, 934 (1965).

As a result, an award of all attorneys' fees can only be overcome by an evidentiary showing by Bocchino that the attorneys' fees were *obviously excessive*. See *McDowell Mountain Ranch*, 216 Ariz. at 270-271, 165 P.3d at 671-672. If such showing is not made, then the Association is entitled to receive the full amount of its attorney fees incurred in the Injunction Action. *Id.* In this case, the record does not reflect any evidentiary showing by Bocchino to support that the attorneys' fees incurred by the Association for her harassing and offensive behavior are obviously excessive. In fact, Bocchino paid in full all of the attorneys' fees incurred by the Association and did not contest the amounts prior to payment. (R. 23 at 2, ¶ 13 [APP184].) Therefore, the trial court erred by not enforcing the above provision of the Declaration and awarding the Association all of its attorneys' fees, costs and expenses incurred in the Injunction Action.

REQUEST FOR ATTORNEYS FEES

Pursuant to [Ariz. R. Civ. App. P. 21\(a\)](#), the Association hereby gives notice that it intends to claim attorneys' fees incurred on appeal. The Association respectfully requests its attorneys' fees and costs incurred on appeal as authorized by Article XVII, Section 1 of the Declaration. [[APP143](#)] Additionally, A.R.S. §§ [12-341](#), [12-341.01](#), and [12-342](#) provide for such an award.

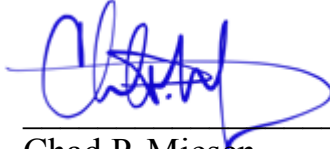
CONCLUSION

The trial court erred when it held that the Association was not the prevailing party in the Injunction Action. In fact, the Association was the prevailing party, and as a result, it was entitled to recover the attorneys' fees and costs incurred in that action. The trial court erred in entering judgment against the Association.

Therefore, the Association respectfully requests that this Court reverse the trial court's ruling, vacate the judgment entered, enter an order requiring the trial court to enter judgment in favor of the Association, and remand to the trial court for a determination as to an award of the Association's attorneys' fees and costs incurred in defending against Bocchino's claims. The Association also requests that this Court award it its attorneys' fees and costs on appeal.

RESPECTFULLY SUBMITTED this 10th day of February, 2017.

Carpenter, Hazlewood, Delgado & Bolen, PLC

A handwritten signature in blue ink, appearing to be 'Chad P. Miesen', written over a horizontal line.

Chad P. Miesen

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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.

MOTION FOR SUMMARY JUDGMENT

13 FOUNTAIN SHADOWS HOMEOWNERS
ASSOCIATION,

14 Defendant.

15 **Introduction**

16
17 Plaintiff Patricia Bocchino (“Bocchino”) moves for summary judgment on her claim that
18 Defendant Fountain Shadows Homeowners Association (the “Association”) unlawfully received
19 and refuses to return proceeds from the sale of her property to which it was not entitled under
20 Arizona law. The Association contends it incurred nearly \$4,000 in attorneys’ fees and costs
21 preparing and filing an *ex parte* Injunction Against Workplace Harassment against Bocchino.
22 Although these fees and costs were never awarded, the Association apparently billed Bocchino’s
23 account and, six months later, demanded the payment of those unadjudicated fees and costs
24 from the title company as a condition of closing when Bocchino sold her unit in 2015. The
25 Association’s forced collection of these fees out of Bocchino’s escrow is both improper and
26

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1 unlawful as a matter of law. Because the Association had no legal basis for recovering these
2 unawarded fees or costs, Bocchino is entitled to recover these proceeds as a matter of law.

3 **Factual Background**

4 The Association filed an *ex parte* Petition for Injunction Against Workplace Harassment
5 against Bocchino, a member, on March 4, 2015.¹ [Statement of Facts in Support of Plaintiff’s
6 Motion for Summary Judgment (“SOF”), ¶ 1] The Petition did not request an award of
7 attorneys’ fees or costs. [SOF, ¶ 2] The Injunction was granted on March 5, 2015, without prior
8 notice to Bocchino, and did not include an award of attorneys’ fees or costs to the Association.
9 [SOF, ¶ 3] Bocchino has not requested a hearing on the matter or challenged the Injunction in
10 any way. [SOF, ¶ 4]

11 The Association retained counsel in connection with the *ex parte* Injunction matter.
12 [SOF, ¶ 6] Between January 2015 and September 2015, it submitted six invoices to the
13 Association, totaling \$3,867.28, for its attorneys’ fees and costs related to the matter. [SOF, ¶ 6]
14 Some descriptions of charges assessed in the invoice include obtaining and serving an *ex parte*
15 Injunction Against Workplace Harassment, but others include communicating with an attorney
16 previously retained by Bocchino to inquire into particular charges on her account maintained
17 with the Association (“HOA Account”), responding to an inquiry from Bocchino regarding why
18 the Association was assessing late charges on timely payments, and sending *two attorneys* to
19 cover an *ex parte* hearing. [SOF, ¶ 5; SOF ¶ 8]

20 The Association maintained two separate ledgers in connection with Bocchino’s HOA
21 Account. [SOF, ¶ 13] It is unclear which, if either, is an official accounting record that truly
22 reflects her HOA Account. Both ledgers reflect that, between May 2015 and September 2015,

23 ¹ Although the merits of the Injunction against Workplace Harassment action are not at
24 issue in this case, it appears that the gist of the action was that board members were allegedly
25 concerned about purported interactions with Bocchino largely outside of board meetings. While
26 these individual concerns may have been grounds for obtaining an Injunction Against
Harassment pursuant to A.R.S. § 12-1809, it does not appear to be a valid Injunction under
A.R.S. § 12-1810.

1 the Association unilaterally assessed Bocchino its \$3,867.28 in attorneys' fees, plus an
2 additional, unexplained \$25.00.² [SOF, ¶ 14; SOF, ¶ 15] During the same time period, Bocchino
3 paid the Association \$55.00 to be applied towards the attorneys' fees assessed against her HOA
4 Account. [SOF, ¶ 21] One of the ledgers maintained by the Association, entitled "Accounting
5 Transactions," indicates that Bocchino was properly credited for the \$55.00 in payments to the
6 Association. [SOF, ¶ 22] The other ledger, titled "Financial Transactions," appears to show a
7 credit for \$30.00 of Bocchino's payments towards the attorneys' fees assessments, but
8 erroneously shows an additional \$25.00 attorneys' fee assessment against her HOA Account.
9 [SOF, ¶ 23] As a result, the two ledgers differ by \$50.00 as to the attorneys' fees "owed" by
10 Bocchino.³ [SOF, ¶ 24]

11 Bocchino entered into a binding contract for the sale of her condominium on August 25,
12 2015 with a close of escrow date of September 24, 2015. [SOF, ¶ 25] The title company, as part
13 of the sale, requested a payoff balance from the Association. [SOF, ¶ 26] On September 18,
14 2015, five days before the anticipated close of escrow, the Association's property manager,
15 Planned Development Services, provided a Resale Disclosure Statement that disclosed that
16 Bocchino owed \$4,062.28, \$3,887.28 of which was for the collection of the Association's
17 attorneys' fees incurred in connection with the Injunction matter.⁴ [SOF, ¶ 27] \$240.00 of the
18

19 ² Each assessment for attorneys' fees charged to Bocchino's HOA Account directly
20 correlates with one of the six invoices submitted to the Association by Association's counsel,
21 except one. [SOF, ¶ 14; SOF, ¶ 15; SOF, ¶ 16; SOF, ¶ 17; SOF, ¶ 18; SOF, ¶ 19; SOF, ¶ 20] The
22 assessment for \$1,126.50, charged on June 14, 2015, is \$25.00 greater than the correlating
23 January 31, 2015 invoice for \$1,101.50. [SOF, ¶ 15]

24 ³ Both ledgers reflect the same initial \$25.00 discrepancy. [SOF, ¶ 15] The attorneys'
25 fees ultimately collected from Bocchino, however, was based on the more inaccurate Financial
26 Transactions ledger, which calculated an amount due of \$3,887.28, based on the \$3,867.28
invoice amount, plus the unexplained \$25.00, minus the \$30.00 credit for Bocchino's payments,
plus the \$25.00 payment that the Association misapplied as an additional charge. [SOF, ¶ 15;
SOF, ¶ 21]

⁴ The \$4,062.28 was calculated by adding \$3,887.28 in attorneys' fees that Bocchino
purportedly owed the Association, per the miscalculated Financial Transactions ledger, to the
unpaid \$175.00 monthly assessment charged on September 1, 2015. [SOF, ¶ 31]

1 attorneys' fees were assessed to her HOA Account after she had entered into the real estate
2 purchase contract. [SOF, ¶ 19; SOF, ¶ 20; SOF, ¶ 25;] The Resale Disclosure Statement stated
3 that, "[a]ll fees are due at close of escrow." [SOF, ¶ 28]

4 Bocchino reasonably feared that disputing the attorneys' fee charges would result in a
5 forfeit of the sale, so on September 18, 2015 the sum of \$4,062.28 was transferred from the title
6 company to the Association. [SOF, ¶ 30] Bocchino's unit was sold on September 24, 2015.
7 [SOF, ¶ 29]

8 **Argument**

9 **I. THE ASSOCIATION WAS NOT ENTITLED TO ITS FEES AND COSTS.**

10 This case concerns the Association's decision to apply charges to Bocchino's account for
11 attorneys' fees and costs allegedly incurred in obtaining an *ex parte* Injunction Against
12 Workplace Harassment against Bocchino. Putting aside the questionable wisdom of paying
13 thousands of dollars for a lawyer to fill out self-help forms to obtain an *ex parte* order that are
14 largely granted as a matter of right based on a low showing, the Association was not entitled to
15 recoup those voluntary charges from Bocchino.

16 Arizona generally follows the American rule with respect to attorneys' fees. In essence, a
17 party is not entitled to attorneys' fees except where expressly permitted by statute or contract.⁵
18 Even then, the right to recover attorneys' fees and costs is not absolute and must be awarded by
19 a court of competent jurisdiction presiding over the dispute giving rise to the fees. The idea that
20 a homeowner's association can impose thousands of dollars for its own attorneys' fees on a
21 homeowner without any judicial oversight, or even a court case, is contrary to well-established
22 law and constitutes an abuse of an association's power to assess fees against its members.

23 The Arizona judicial system does not recognize a creditor's right to self-determine either
24 the entitlement to fees or the amount of those fees, especially where inaccurate and conflicting

25 ⁵ See *Bennett Blum, M.D., Inc. v. Cowan*, 235 Ariz. 204, 209, 330 P.3d 961, 966 (App.
26 2014).

1 accounting ledgers form the basis of those fees. The idea that a homeowner’s association can
2 simply demand or coerce payment from an owner of its legal fees, absent a court order, finds no
3 more support in the law than the assertion that it can decide for itself the reasonableness of those
4 fees.

5 **A. The Association Never Requested and Was Never Awarded its Fees or Costs.**

6 The Association claims it incurred \$3,917.28⁶ in costs and fees relating primarily to the
7 Injunction against Bocchino. By applying those fees to Bocchino’s HOA Account as
8 assessments for “Attorneys Fees”, the Association seems to ignore the fact that it was never
9 actually awarded its legal fees in that action.

10 The award of attorneys’ fees is quintessentially a function of the court and not parties.
11 Even if a party has a legal basis for requesting attorneys' fees, a court must still award the fees
12 before that party can claim any right to recover them. The timing, determination, and method
13 of all requests and awards of attorneys’ fees and costs, incurred in connection with a litigated
14 matter, are governed by Arizona law. Rule 54(g) provides that, in Arizona, claims for attorneys’
15 fees must be made in the pleading.⁷ The established method for obtaining the claimed attorneys’
16 fees involves an application to the court establishing the entitlement to fees, accompanied by an
17 affidavit and supporting documents attesting to the reasonableness of fees sought.⁸

18 The Court’s pivotal role in awarding fees exists even where a litigant asserts a mandatory
19 right to fees.⁹ Judicial determinations of entitlement and reasonableness prevent one party from

20 ⁶ \$3,917.28 is the amount charged and collected from Bocchino, but the figure attributes
21 \$75.00 more in legal fees than the Association actually incurred. [SOF, ¶32]

22 ⁷ ARCP, Rule 54(g)(1); *see also King v. Titsworth*, 221 Ariz. 597, 598, 212 P.3d 935, 936
(App. 2009) (holding that a claim for attorneys’ fees not included in the initial pleading cannot
be awarded).

23 ⁸ ARCP, Rule 54(g)(2); *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 673 183,
24 189, 673 P.2d 927, 933 (App. 1983) (describing general information to include in affidavits of
counsel and rejecting a fee application as “plainly insufficient” for failing to include this
25 information).

26 ⁹ *McDowell Mountain Ranch Com. Ass’n, Inc. v. Simons* 216 Ariz. 266, 271, 165 P.3d
667, 672 (App. 2007). (citations omitted)

1 forcing the other side to pay for a task that took its attorney an inordinate amount of time to
2 complete or that was billed at an excessive rate.¹⁰ Courts serve an indispensable gatekeeping
3 function when it comes to an award of fees that a homeowner's association is not free to bypass.

4 The Association's failure to request fees from the court presiding over the Injunction
5 matter is fatal to any possible claim or right to fees or costs incurred in connection with that
6 action.¹¹ The fact that the court hearing that matter also did not award fees is equally fatal to the
7 Association's alleged right to such fees. Assuming that the legal right existed for the
8 Association to recover its fees relating to the Injunction action, which it did not as discussed
9 below, it is unknown how much, if anything, the court in that case might have awarded to the
10 Association on a timely fee request. The Association's actions of substituting its own judgment
11 for that of the court perfectly illustrates why unilateral shifts in litigation costs are not permitted.
12 The Association decided that it was entitled to fees and independently determined it reasonable
13 to collect more fees from Bocchino than the Association actually incurred.¹² The absence of a
14 valid fee request and award barred the Association from charging and collecting from Bocchino
15 for any legal fees incurred.

16 **B. The Association's Declaration Does Not Provide a Basis for the**
17 **Association Recovering Its Fees and Costs in the Injunction Action**
18 **Against Bocchino.**

19 A homeowner's association that files a lawsuit often will rely on its Declaration of
20 Covenants, Conditions and Restrictions for Fountain Shadows ("Declaration") as the contractual
21 basis for its entitlement to fees. The Association's Declaration contains the following provision:

22 In the event the Association employs an attorney or attorneys to enforce the
23 collection of any amounts due pursuant to this Declaration or in connection with
24 any lien provided herein, or the foreclosure thereof, or to enforce compliance with
25 or specific performance of the terms and conditions of this Declaration, the

24 ¹⁰ *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. at 188, 673 P.3d at 933.

25 ¹¹ *King*, 221 Ariz. at 598, 212 P.3d at 936.

26 ¹² The Association forcibly collected attorneys' fees from Bocchino in the amount of
\$3,917.28, despite having incurred only \$3,867.28 in fees.

1 Owner, Owners and parties against whom the action is brought shall pay all
2 attorneys' fees, costs and expenses thereby incurred by the Association in the
event the Association prevails in any such action.

3 [SOF, ¶ 33]

4 Thus, the Declaration provides for an award of attorneys' fees in three circumstances:

5 (a) "to enforce the collection of any amounts due pursuant to the Declaration," (b) "in
6 connection with any lien provided [in the Declaration], or the foreclosure thereof," and (c) "to
7 enforce compliance with or specific performance of the terms and conditions of this
8 Declaration." The commencement of an *ex parte* Injunction Against Workplace Harassment
9 action does not fall into any of these categories. It is not the "collection of any amount due"; it is
10 not "in connection with any lien...or the foreclosure thereof"; and it is not "to enforce
11 compliance with or specific performance of" the Declaration. The statutory right to seek an
12 injunction against harassment does not fall within this contractual provision.

13 This provision is further inapplicable because it is clear that the Association is entitled to
14 the fees and costs only "in the event the Association prevails in any such action." In other
15 words, this provision of the Declaration only applies to fee requests and awards if the matter
16 was litigated, the Association prevailed, and fees and costs are awarded. This provision does not
17 allow the Association to self-determine its entitlement and the amount of its fees. Notably, the
18 attorneys' fees assessed to Bocchino's HOA Account are not limited to the litigation costs
19 related to the Injunction action but also includes nearly \$1,000.00 in fees incurred after the fact.

20 [SOF, ¶¶ 9-12]

21 The Declaration did not justify the Association's collection of its attorneys' fees and any
22 attempt to collect attorneys' fees pursuant to the Declaration constitutes an abuse of the
23 Association's power to assess fees on its members.

1 **C. The Injunction Against Workplace Harassment Statute Does Not Provide**
2 **for an Award of Attorneys’ Fees and Costs for Obtaining an *Ex Parte*,**
3 **Uncontested Injunction.**

4 Injunctions against Workplace Harassment are governed by A.R.S. § 12-1810. The
5 statute allows plaintiffs to obtain an injunction without providing notice to the adverse party.¹³
6 The defendant in an Injunction against Workplace Harassment matter is not entitled to a hearing
7 until after the injunction is imposed.¹⁴ At any time during the period that the injunction is in
8 effect, the defendant may request a hearing.¹⁵ Within ten days of defendant’s request, the court
9 will hold a hearing and then continue, modify or quash the injunction.¹⁶ Presumably because it
10 demarks the final decision on the merits, “the court may enter an order that requires any party to
11 pay the costs of the action, including *reasonable* attorney fees,” only after the opposing party
12 has requested and been heard at a hearing to contest the injunction.¹⁷

13 The injunction in this case was issued on an *ex parte* basis and was never challenged by
14 Bocchino. The Association, therefore, cannot rely on A.R.S. § 12-1810 as a statutory basis for
15 collecting its fees. If the Association had requested fees, which it did not, and a hearing had
16 been conducted for Bocchino to contest the injunction, which did not occur, then the next step
17 would be for the presiding court to decide whether fees are warranted in this case and, if so, in
18 what amount. The statutory language underscores the obvious fact that it is the courts, and not
19 the litigants, who decide whether and in what amount fees should be awarded. The

21 ¹³ See A.R.S. § 1810(E) (“Rule[] 65(a)(1) [Preliminary injunction; notice] . . . of the
22 Arizona rules of civil procedure do[es] not apply to injunctions requested pursuant to this
23 section”).

24 ¹⁴ See A.R.S. § 12-1810(G).

25 ¹⁵ *Id.*

26 ¹⁶ *Id.*

¹⁷ See A.R.S. § 12-1810(O) (“On notice to the affected party and after a hearing, the court
may enter an order that requires any party to pay the costs of the action, including *reasonable*
attorney fees”) (emphasis added).

1 Association’s attempt to get around this process was an abuse of the Association’s power to
2 assess charges against its members and a clear violation of the law.

3 **II. A.R.S. § 33-1255 DOES NOT ENTITLE DEFENDANTS TO UNILATERALLY**
4 **DETERMINE THE AMOUNT OF ATTORNEYS’ FEE TO BE CHARGED TO**
5 **BOCCHINO.**

6 Bocchino anticipates that the Association will argue that it was entitled to recover its
7 attorneys’ fees under A.R.S. § 33-1255(E) as a “common expense” assessed exclusively to
8 Bocchino due to alleged “misconduct.” This statute provides that: “If any common expense is
9 caused by the misconduct of any unit owner, the association may assess that expense
10 exclusively against that unit.”

11 Attorneys’ fees incurred in litigation are not “common expense assessments” within the
12 meaning of that statute. It is clear from subsection (C) that the “common expenses” in the statute
13 refer to expenses associated with maintenance, repair or replacement of common elements.¹⁸
14 According to an article written by James Hazlewood and published on a website maintained by
15 the Association’s counsel, A.R.S. § 33-1255(C) is coined the “pass through” statute that “can
16 impact *who pays for a repair.*”¹⁹ An article published by a different local firm, which also
17 advocates for homeowner associations, discusses A.R.S. § 33-1255(C), noting that the statute
18 allows homeowner associations to assess unit owners *for repairs* where the association initially
19 bore the expense.²⁰ This statute does not apply to fees incurred in a lawsuit.

20 ¹⁸ A.R.S. § 33-1255(C) (“Unless otherwise provided for in the declaration, all of the
21 following apply: (1) Any common expense associated with the maintenance, repair or
22 replacement of a [common area allocated for the exclusive use of fewer than all units] shall be
23 equally assessed against the units to which the [common area] is assigned. (2) Any common
24 expense or portion of a common expense benefitting fewer than all of the units shall be assessed
25 exclusively against the units benefited.”)

26 ¹⁹ James Hazlewood, *Condominiums: How Do We Know Who Repairs What?* (June 4,
2010), <http://www.carpenterhazlewood.com/condominiums-know-repairs/> (emphasis added).

²⁰ Charles E. Maxwell and Brian W. Morgan, *Passing on Common Expenses to
Benefitting Homeowners*, <https://hoalaw.biz/passing-on-common-expenses-to-benefiting-homeowners/> (last visited Feb. 17, 2016) (emphasis added).

1 Attorneys' fees incurred in a legal proceeding are not "common expense assessments."
2 Moreover, if A.R.S. § 33-1255 was applicable, the Association has assessed the wrong owner.
3 Under A.R.S. § 33-1255(C)(2), "Any common expense . . . benefiting fewer than all of the units
4 shall be assessed exclusively against the units benefitted." Here, the HOA sought and obtained
5 an injunction against harassment solely for the benefit of individual board members. Bocchino
6 received no benefit from the Injunction Against Workplace Harassment action. Under A.R.S. §
7 33-1255, therefore, the expenses that the Association incurred for the benefit of its board
8 members should be properly assessed against them. The fact that they happen to be board
9 members does not entitle them to use community funds to further their personal agendas.

10 A.R.S. § 33-1255 trumps neither the attorneys' fees provision in the Declaration nor the
11 Arizona Rules of Civil Procedure regarding attorneys' fees.²¹ To suggest that an association
12 could characterize the fees it incurs as "common expense assessments" and then assess them to
13 the owner against whom those fees were incurred deliberately ignores the express provisions in
14 the Declaration and Arizona law that govern when such fees are awardable and to whom.
15 Finally, absent a judicial determination of "misconduct" by Bocchino, A.R.S. § 33-1255(E) does
16 not provide a basis through which the Association can unilaterally assess attorneys' fees,
17 especially in excess of those actually incurred.

18 Conclusion

19 The Association does not have unfettered power to collect unadjudicated and unawarded
20 attorneys' fees and costs from an owner. In demanding the payment of these amounts out of
21 Bocchino's escrow, the Association has effectively conducted an improper and unlawful
22

23 ²¹ See Arizona Rules of Civil Procedure, Rule 54(g) (requiring parties to include a claim
24 for attorneys' fees in pleading and requiring a motion for attorneys' fees after a decision on
25 merits); see also *McDowell Mountain Ranch Community Ass'n, Inc. v. Simons*, 216 Ariz. 266,
26 165 P.3d 667 (App. 2007) (holding that courts retain a vital role in awarding fees, regardless of
the source of the fee provision); *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 673
P.2d 927 (App. 1983) (outlining the proper methodology for establishing a claim for attorneys'
fees so that a court can make a reasonability determination).

1 garnishment of her sale proceeds. Accordingly, Bocchino is entitled to summary judgment and
2 to her costs and attorneys' fees in bringing this action.

3 DATED this 19 day of February 2016.

4 DESSAULES LAW GROUP

5 By: /s/ Ashley C. Hill
6 Jonathan A. Dessaules
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11 IN THE SUPERIOR COURT OF ARIZONA
12 COUNTY OF MARICOPA

13 PATRICIA BOCCHINO,

14 Plaintiff,

No. Case No. CV2015-012434

15 vs.

**STATEMENT OF FACTS IN SUPPORT
OF PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

16 FOUNTAIN SHADOWS HOMEOWNERS
17 ASSOCIATION,

18 Defendant.

19 Plaintiff Patricia Bocchino ("Bocchino"), by and through undersigned counsel, hereby
20 submits the following Statement of Facts in support of her Motion for Summary Judgment filed
21 contemporaneously herewith:

22 1. On March 4, 2015, Defendant Fountain Shadows Homeowners Association (the
23 "Association") filed an *ex parte* Petition for Injunction Against Workplace Harassment against
24 Bocchino. [Exhibit 1 (Verified Petition for Injunction Against Workplace Harassment)]

25 2. The Petition did not include a request for an award of attorneys' fees in connection
26 with the Injunction Against Harassment filed against Bocchino. [Exhibit 1; Exhibit 3
(Defendant's Response to Plaintiff's First Request for Admissions), ¶ 6]

27 3. On March 5, 2015, an Injunction Against Workplace Harassment was issued
28 against Bocchino at an *ex parte* hearing in the Manistee Justice Court. [Exhibit 2 (Injunction
29 Order)]

1 4. The Injunction did not award the Association the recovery of its attorneys' fees
2 and costs. [Exhibit 2; Exhibit 3, ¶ 7]

3 5. A redacted version of a "Transactions Listing Report," provided by the
4 Association's counsel, shows that its attorneys' fees were incurred through the rendering of
5 legal services, which included obtaining and serving an *ex parte* Injunction Against Workplace
6 Harassment, communicating with an attorney Bocchino had retained to inquire about the
7 presence of charges on her account, reviewing videos, responding to inquiry from Bocchino
8 regarding why the Association was assessing late charges on timely payments made through the
9 Association's web portal, and sending two attorneys to cover an *ex parte* hearing. [Exhibit 5
10 (Transactions Listing Report)]

11 6. The counsel retained by the Association, in connection with the Injunction matter,
12 submitted six invoices to the Association, between January 2015 and September 2015, totaling
13 \$3,867.28. [Exhibit 4 (Carpenter, Hazelwood, Delgado & Bolen Invoices)]

14 7. Invoice No. 135871, dated January 31, 2015, amounted to \$1,101.50 in charges
15 for rendered legal services, including the review of emails from community manager and the
16 drafting of Verified Petition Against Workplace Harassment. [Exhibit 4, pgs. 1-2]

17 8. Invoice No. 138684, dated March 31, 2015, amounted to \$1,832.28 in charges for
18 a process server fee and rendered legal services, including the review of emails, strategizing,
19 preparing for the *ex parte* hearing, the attendance of two attorneys at the *ex parte* hearing.
20 [Exhibit 4, pgs. 3-4]

21 9. Invoice No. 142153, dated June 30, 2015, amounted to \$120.00 in charges for the
22 receipt and review of email from property manager. [Exhibit 4, pg. 5]

23 10. Invoice No. 143657, dated July 31, 2015, amounted to \$573.50 in charges for
24 legal services rendered, including a series of correspondences with the Association's community
25 manager, Bocchino, an attorney previously retained by Bocchino, and review of Transactions
26 Listing Report. [Exhibit 4, pgs. 6-7]

1 11. Invoice No. 144998, dated August 31, 2015, amounted to \$168.00 in charges for
2 legal services rendered, including a series of correspondences with Bocchino and the
3 community manager. [Exhibit 4, pgs. 8-9]

4 12. Invoice No. 146534, dated September 30, 2015, amounted to \$72.00 in charges for
5 legal services rendered, consisting solely of "Review current status of matter". [Exhibit 4, pg.
6 10]

7 13. The Association maintained two separate ledgers in connection with Bocchino's
8 HOA assessments. [Exhibit 6 (Accounting Transaction ledger); Exhibit 7 (Financial Transaction
9 ledger)]

10 14. Both ledgers reflect that, between May 2015 and September 2015, the Association
11 unilaterally assessed Bocchino its \$3,867.28 in attorneys' fees. [Exhibit 6; Exhibit 7, pgs. 4-6]

12 15. Both ledgers reflect that on June 14, 2015, Bocchino's HOA Account was
13 assessed \$1,126.50, which is \$25.00 more than Invoice No. 135871, submitted to the
14 Association from its counsel on or around January 31, 2015. [Exhibit 4, pg. 1; Exhibit 6, pg. 1;
15 Exhibit 7, pg. 4]

16 16. Both ledgers reflect that on May 12, 2015, Bocchino's HOA Account was
17 assessed \$1,832.28 for attorneys' fees, directly correlating with Invoice No. 138684, dated
18 March 31, 2015. [Exhibit 6, pg. 1; Exhibit 7, pg. 4; Exhibit 4, pgs. 3-4]

19 17. Both ledgers reflect that on July 17, 2015, Bocchino's HOA Account was assessed
20 \$120.00 for attorneys' fees, directly correlating with Invoice No. 142153, dated June 30, 2015.
21 [Exhibit 6, pg. 1; Exhibit 7, pg. 5; Exhibit 4, pg. 5]

22 18. Both ledgers reflect that on August 6, 2015, Bocchino's HOA Account was
23 assessed \$573.50 for attorneys' fees, directly correlating with Invoice No. 143657, dated July
24 31, 2015. [Exhibit 6, pg. 1, Exhibit 7, pg. 5, Exhibit 4, pgs. 6-7]

25
26

1 19. Both ledgers reflect that on September 5, 2015, Bocchino's HOA Account was
2 assessed \$168.00 for attorneys' fees, directly correlating with Invoice No. 144998, dated August
3 31, 2015. [Exhibit 6, pg. 2; Exhibit 7, pg. 5; Exhibit 4, pgs. 8-9]

4 20. Both ledgers reflect that on September 8, 2015, Bocchino's HOA Account was
5 assessed \$72.00 for attorneys' fees, directly correlating with Invoice No. 146534, dated
6 September 30, 2015. [Exhibit 6, pg. 2; Exhibit 7, pg. 5; Exhibit 4, pg. 10]

7 21. Bocchino made three payments towards the attorneys' fee assessments, the first on
8 June 11, 2015 for \$25.00; the second on July 31, 2015 for \$25.00; and the third on August 21,
9 2015 for \$5.00, totaling \$55.00. [Exhibit 6; Exhibit 7, pgs. 4-5]

10 22. The Accounting Transactions ledger shows that Bocchino was properly credited
11 for all \$55.00 in payments made. [Exhibit 6, pg. 1]

12 23. The Financial Transactions ledger shows that Bocchino was properly credited for
13 her payments made on June 11, 2015 and August 21, 2015, but the July 31, 2015 payment for
14 \$25.00 appears to have applied as an additional charge against her HOA Account. [Exhibit 7,
15 pgs. 4-5]

16 24. After all attorneys' fees charges and Bocchino's payments were applied to
17 Bocchino's HOA Account, she "owed" the Association \$3,837.28 in remaining attorneys' fees,
18 per the Accounting Transactions ledger, and \$3,887.28, per the Financial Transactions ledger.
19 [Exhibit 6; Exhibit 7, pgs. 4-6]

20 25. Bocchino entered into a binding contract for the sale of her condominium on
21 August 25, 2015 with a close of escrow date of September 24, 2015. [Exhibit 8 (Purchase
22 Contract), pgs. 1, 9]

23 26. The title company, as part of the sale, requested a payoff balance from the
24 Association. [Exhibit 9 (Resale Disclosure Statement)]

25
26

1 27. The Association’s property manager, Planned Development Services, provided a
2 Resale Disclosure Statement on September 18, 2015 that disclosed that Bocchino owed
3 \$4,062.28. [Exhibit 9]

4 28. The Resale Disclosure Statement stated that, “[a]ll fees are due at close of
5 escrow.” [Exhibit 9]

6 29. Bocchino sold her unit on September 24, 2015. [Exhibit 8]

7 30. The sum of \$4,412.28 was transferred to the Association from the title company
8 on September 18, 2015, \$4,062.28 of which was attributable to “Owners Current Balance.”
9 [Exhibit 10 (Copy of Pioneer Title Agency, Inc. Check No. 123585)]

10 31. The “Owners Current Balance” of \$4,062.28 appears to have been derived by
11 adding Bocchino’s unpaid September 1, 2015 monthly assessment of \$175.00 together with
12 Bocchino’s remaining unpaid attorneys’ fees assessments of \$3,887.28, per the miscalculations
13 contained in the Financial Transactions ledger. [Exhibit 7, pg. 6]

14 32. \$3,917.28 is the amount charged and collected from Bocchino, but the figure
15 attributes \$75.00 more in legal fees than the Association actually incurred. [Exhibit 4; Exhibit 7,
16 pgs. 4-6]

17 33. The Association’s Declaration contains the following provision:

18 In the event the Association employs an attorney or attorneys to
19 enforce the collection of any amounts due pursuant to this
20 Declaration or in connection with any lien provided herein, or the
21 foreclosure thereof, or to enforce compliance with or specific
22 performance of the terms and conditions of this Declaration, the
23 Owner, Owners and parties against whom the action is brought shall
24 pay all attorneys’ fees, costs and expenses thereby incurred by the
25 Association in the event the Association prevails in any such action.

26 [Exhibit 11 (Declaration)]

1 DATED this 19th day of February 2016.

2 DESSAULES LAW GROUP

3
4 By: /s/ Ashley C. Hill
5 Jonathan A. Dessaules
6 Douglas C. Wigley
7 Ashley C. Hill
8 *Attorneys for Plaintiff*

9 COPY of the foregoing mailed/e-mailed
10 this 19th day of February 2016 to:

11 Chad P. Miesen
12 CARPENTER, HAZLEWOOD, DELGADO & BOLEN PLC
13 1400 E. Southern Ave., Suite 400
14 Tempe, Arizona 85282
15 *Attorney for Defendant*

16 /s/ Jenna Pitchel

17
18
19
20
21
22
23
24
25
26

EXHIBIT 1

Fountain Shadows Homeowners Association Plaintiff / Plaintiff Employer (Work Injunction ONLY)	Patricia Bocchino Defendant
Birth Date: _____	8736 North 67th Lane Address
Donald Toothman Agent's Name (Work Injunction ONLY)	Glendale, AZ 85345 City, State, ZIP Code
	Case No. CC2015039699

This is not a court order.

PETITION for
 Order of Protection
 Injunction Against Harassment
 Workplace Injunction

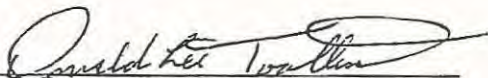
DIRECTIONS: Please read the Plaintiff's Guide Sheet before filling out this form.

1. Defendant/Plaintiff Relationship: Married now or in the past Live together now or lived together in the past,
 Child in common One of us pregnant by the other Related (parent, in-law, brother, sister or grandparent) Dating-never lived together
 Other:neighbor
2. If checked, there is a pending action involving maternity, paternity, annulment, legal separation, dissolution, custody, parenting time or support in _____ county.
Case #: _____
3. Have you or the Defendant been charged or arrested for domestic violence OR requested a Protective Order?
 Yes No Not sure
If yes or not sure, explain:
4. I need a Court Order because: (PRINT both the dates and a brief description of what happened):
Date(s) Tell the judge what happened and why you need this order. A copy of this petition is provided to the defendant when the order is served.
03/05/2015 Please see attached Petition and statements from authorized agents and officers of Fountain Shadows Homeowners Association attached as exhibits "A" through "D."


Manistee Justice Court/AZ007043J/0707 14264 W. Tierra Buena Lane Surprise, AZ 85374

5. The following persons should also be on this Order. As stated in number 4, the Defendant is a danger to them:
Donald Toothman
Vern Carrillo
John Gaytan
Donna Toothman
6. Defendant should be ordered to stay away from these locations, at all times, even when I am not present:
 Home:
 Work: (Address protected);
 School/Others: Fountain Shadows Homeowners Association : 5959 W. Brown , Glendale , AZ 85302;
7. If checked, because of the risk of harm, order the defendant NOT to possess firearms or ammunition.
8. If checked, order the Defendant to participate in domestic violence counseling or other counseling. This can be ordered only after a hearing of which Defendant had notice and an opportunity to participate.
9. Other: Plaintiff requests that the Court order Ms. Bocchino not to come near Plaintiff or any of its authorized officers while performin work duties which includdes Association meetings. ; Plaintiff further requests that the Court order Ms. Bocchino not to come on or near: Planned Development Services, Inc at 14100 North 83rd Avenue, Suite 200, Peoria, Arizona 85381; Donald and Donna Toothman (address listed); and John Gaytan (address listed) ;

Under penalty of perjury, I swear or affirm the above statements are true to the best of my knowledge, and I request an Order / Injunction granting relief as allowed by law.



Plaintiff


Attest: _____ / _____ / _____
Judicial Officer / Clerk / Notary Date **MAR 05 2015**

1 **Carpenter, Hazlewood, Delgado & Bolen, PLC**
Attorneys at Law
2 1400 E. Southern Avenue, Suite 400
Tempe, Arizona 85282
3 t 480.991.6949 | f 480.991.7040
minuteentries@carpenterhazlewood.com
4 Chad Miesen 024910
Allison Kline 031792
5 FOUNTSHAD.0025

6 Attorneys for Plaintiff

7 **MANISTEE JUSTICE COURT**
8 **14264 W. TIERRA BUENA LANE**
9 **SURPRISE, ARIZONA 85372**
10 **(602) 372-2000**

11
12 **FOUNTAIN SHADOWS**
13 **HOMEOWNERS ASSOCIATION, an**
14 **Arizona non-profit corporation,**

15 **Plaintiff,**

16 **v.**

17 **PATRICIA BOCCHINO**

18 **Defendant**
19

Case No. _____

**VERIFIED PETITION FOR
INJUNCTION AGAINST
WORKPLACE HARASSMENT**

20
21 Plaintiff, Fountain Shadows Homeowners Association (“Association”), an Arizona
22 non-profit corporation, by and through its undersigned attorneys, hereby moves the Court
23 for an injunction against workplace harassment against Defendant Patricia Bocchino
24 (“Bocchino”).
25

26 **I. INTRODUCTION AND FACTUAL BACKGROUND**
27
28

1 Plaintiff is a homeowners association whose officers and agents include members of
2 the Association's board of directors, employees of the Association's managing agent,
3 Planned Development Services, Inc., and undersigned counsel at Carpenter, Hazlewood,
4 Delgado & Bolen, PLC.
5

6 Defendant Bocchino is a female, approximately five feet six inches (5' 6") in height,
7 with a weight of approximately 170 pounds, and blonde hair.
8

9 Defendant Bocchino owns a property located within the Association, at Lot 12,
10 8736 North 67th Lane, Glendale, Arizona 85345. This property is subject to the
11 Declaration of Covenants, Conditions and Restrictions for Fountain Shadows ("CC&Rs").
12 Plaintiff's contact information is as follows:
13

14 Fountain Shadows Homeowners Association
15 c/o Planned Development Services, Inc.
16 14100 N. 83rd Avenue, Suite 200
17 Peoria, Arizona 85381
18 and
19 c/o Carpenter Hazlewood Delgado & Bolen, PLC
20 1400 East Southern Avenue, Suite 400
21 Tempe, Arizona 85282

22 Defendant Bocchino's contact information is as follows:

23 Patricia Bocchino
24 8736 North 67th Lane
25 Glendale, Arizona 85345

26 II. LEGAL ARGUMENT

27 Plaintiff requests an injunction against workplace harassment pursuant to A.R.S. §
28 12-1810 because Defendant Bocchino has harassed Plaintiff's board members and
employees of Plaintiff's managing agent, Planned Development Services, Inc.

1 Harassment is defined as a single threat or act of physical harm or damage or a
2 series of acts over any period of time [towards the employer or any person who enters the
3 employer's property or who is performing official work duties] that would cause a
4 reasonable person to be seriously alarmed or annoyed. Defendant Bocchino has engaged in
5 a series of acts that have caused Plaintiff's board members and employees of Plaintiff's
6 managing agent, Planned Development Services, Inc., to be both seriously alarmed and
7 annoyed. Ms. Bocchino has used e-mail, voice mail, phone conversations, and Association
8 Board of Directors meetings to harass the officers and agents of the Association.
9
10

11 Donald Toothman serves as the Board Treasurer of the Fountain Shadows
12 Homeowners Association. Ms. Bocchino has committed numerous acts of harassment
13 towards Mr. Toothman, as the Board Treasurer, and against his wife Donna Toothman.
14
15 *See Statement of Donna and Donald Toothman, attached hereto as Exhibit "A."*

16
17 Attached to this Petition at Exhibit "B" is a statement from John Gaytan who serves
18 as the Board Vice President of the Fountain Shadows Homeowners Association. Ms.
19 Bocchino has committed acts of harassment towards Mr. Gaytan, as the Board Vice
20 President, and has also witnessed her erratic behavior at a meeting. *See Statement of John*
21 *Gaytan, attached hereto as Exhibit "B."*

22
23 Attached to this Petition at Exhibit "C" is a statement from Vern Carrillo,
24 Community manager at Planned Development Services, Inc., the Association's managing
25 agent, detailing the acts of harassment Defendant Bocchino has committed towards him.
26
27 *See statement of Vern Carrillo, attached hereto as Exhibit "C."*
28

1 Additional to the foregoing, attached to this Petition at Exhibit "D" is the Glendale
2 Police Department Offense Report from December 10, 2014 (the "Police Report"). The
3 Police report details specific incidences of Ms. Bocchino's problematic behavior and
4 continued harassment against members of the Association's Board which occurred at the
5 Association's Annual meeting on December 10, 2014. See statement of Glendale Police
6 Department Offense Report, attached hereto as Exhibit "D."
7
8

9 III. CONCLUSION

10 Based on the foregoing reasons, Plaintiff respectfully requests that the Court order
11 Defendant Bocchino not to commit an act of harassment against Plaintiff or any of its
12 authorized agents or officers listed in this Petition and further order Defendant Bocchino
13 not to contact any of the agents or officers of Plaintiff in person, by phone, or via email.
14 Plaintiff also requests that the Court order Defendant Bocchino not to come near Plaintiff
15 while performing work duties which includes Association meetings.
16
17

18 Plaintiff further requests that the Court order Defendant Bocchino not to come on or
19 near:

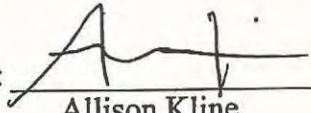
20 Planned Development Services, Inc.
21 14100 North 83rd Avenue, Suite 200
22 Peoria, Arizona 85381

23 Donald and Donna Toothman
24 8626 N. Fountain Drive
25 Peoria, Arizona 85345

26 John Gaytan
27 6758 W. Ruth Avenue
28 Peoria, Arizona 85345

1 RESPECTFULLY SUBMITTED this 4 day of March, 2015.

2
3 Carpenter, Hazlewood, Delgado & Bolen, PLC

4
5 By: 

6 Allison Kline
7 Chad Miesen
8 1400 E. Southern Avenue, Suite 400
9 Tempe, Arizona 85282
10 *Attorneys for Plaintiff*

February 5th, 2015

RE: Patricia Bocchino, Fountain Shadows

To whom it may concern:

My name is Donna Toothman I live at 8626 N. Fountain Dr. Peoria Arizona, in the Fountain Shadows HOA. I have lived here for 11 years. I am married to Donald Toothman who has lived in the community almost 30 years.

Donald has been a Board member for the last 7 years. Serving as treasurer and on site volunteer.

I serve as a volunteer handling emergencies that occur on the property, as well as contractors on site, or doing errands for the board or management company. I also handle the cabana reservations and clean up. I meet with the landscapers and generally do odds and ends for people.

I do these things because the Board members have full time jobs and it's easier for me to do these things than having a board member take a day off.

Because I do these things I have come under attack by several residents in the community. The newest and worst is the owner of lot 012 (8738 N. 67th Lane,) a Ms. Patricia Bocchino.

Listed in this letter or some of the more severe and notable encounters I have had (with or without my husband) and this individual.

EXHIBIT
A

Incidents with Ms. Patricia Bocchino

Ms. Bocchino started remodeling her home in January 2014. During this time my husband was introduced to Ms. Bocchino, we were met with an extremely angry person, she did not like us or any member of the board or how anything was being run and that she was going to fix the situation.

During the February Board of Directors meeting Bocchino announced her intention to have the current board members removed and the property management replaced. And all contractors fired immediately. At the end of this meeting as I was leaving the meeting room Bocchino asked the sheriff's deputy to arrest me for assault because I looked at her. What she failed to realize is I had left my video recorder on and that the sheriff's deputy was standing right beside me. When the deputy refused to take action Bocchino phoned 911. Bocchino then told the police that I tried to assault her with my eyeglasses.

Ms. Bocchino did not attend the next 3 board meetings. What she did do was go to many of the resident's homes and lie about the board actions. Calling my husband and pervert and embezzler. Also that the board was taking kickbacks from the tow truck company and their drivers. All proven to be false and outright lies. She continues going around to tell residents that my husband has pulled out a weapon or his badge to intimidate anyone who disagrees with him. This is also false.

She has berated anyone who likes the way the community looks or shows any support to the Board of Directors or Donald and myself. She has interjected herself in gatherings at the pool that she was uninvited and had to be asked to leave. The residents of this community are tired of Bocchino and her "ranting, ravings and threats towards the residents of this community."

In July 2014 things really escalated to a boiling point. When our newsletter came out announcing that the pool, spa and cabana would be closing for maintance and renovations to meet state requirements. Bocchino went ballistic.

The pool was closed August 4th. And Bocchino started driving by my home threatening myself and my husband. That same morning while I was talking to a resident at my front door Bocchino drove by screaming at me that we had no right to close the pool and that I would get what's coming to me. I excused myself from the other resident and closed my front door. From this she drove by the pool tearing down the pool closed sign.

Ms. Bocchino spent the remainder of the morning sitting on a park bench directly across my home. Shouting threats at my house. She also tried to arrange a hostile meeting in front of my home. This prompted Vern at PDS to arrange security for my home. Since I was home alone and terrified.

On August 30th, 2014, we encountered her at the garbage dumpsters. She once again started in on both my husband and

myself. Calling us Nazis and that our time was coming to get what we deserved. On advice from a medical professional we ignored her and went on our way home. Ms. Bocchino then followed us and tried to drive us off the road and into the retention pond. Failing this she drove her vehicle and blocked us from entering our garage. At this my husband lowered the driver's side window to ask Bocchino what her problem was. She yelled that we Nazis and need to quit harassing her.

The last few months have been the worst of all. On November 28th 2014, as I was putting up the year's holiday decorations Ms. Bocchino drove by. I was minding my own business, when she yelled out of her driver's window that I was harassing her. And because I had my phone in my hand she accused me of taking her picture. I had not said a word to her and I did not respond to her comments. Bocchino drove off in a huff.

Several weeks later as Donald and Vern were doing a property inspection of which Bocchino and Julie Chavez were supposed to join them but did not and decided to do their own inspection, which included looking into people's front door windows (of which I received three phone calls and one person to person complaint which I then passed on to Donald and Vern via my cell phone.)

I was on my balcony when Bocchino and Julie Chavez passed my garage heading towards my front door. Upon seeing me the threats and harassing verbiage began. And again the accusations of taking her picture started again. I phoned 911

for the first time against Bocchino and Julie Chavez. The police arrived and the two ladies proceeded to argue with the officer, but finally the women ceased their activities and went home. They later tried to have harassment charges filed against the police officer who responded to my call.

December 10th 2014 things came to a head before the annual Board meeting got started. Bocchino was the first resident to come into the meeting room, and started belittling the board, PDS, and Donald. This can all be seen on the December Board of Directors video.

Before the meeting started she tried to engage me by complaining about the colors chosen to paint the cabana tables, and that the work I did looked like a two year old did it. She told everyone not to eat the cookies I made because I had cats in my house. On and on Bocchino went I just ignored her. The following day we drove past each other and she started to say something to me but instead held both her hands over her face nearly running over a curb.

On January 28th while Donald and Vern were again doing a property inspection and handling a private matter with another resident Bocchino again went out of her way to harass them both. Vern caught this on tape.

Ms. Bocchino and several other residents who have aligned themselves with Ms. Bocchino are the reasons the Board decided not to have any activities involving other residents, for

fear their anger and hostility will spill over into violence. As it stands now I am a prisoner in my own home afraid of opening my front door for fear Ms. Bocchino or one of her followers will see me. I cannot enjoy the pool spa or the cabana I worked so hard at cleaning and refurbishing myself for the fear I will have a run in with these individuals.

Bocchino has been obsessed with me my house and my marriage, she has spent days stalking my house taking pictures, filing complaints against me. She cannot stop with her harassing behavior.

I live in a constant state of terror because of Bocchino and her gang of thugs. Having my home suffer criminal damage twice has made me fearful of any knock or doorbell rings at my door.

I cannot walk my dog in the community by myself for fear of personal harm from these individuals.

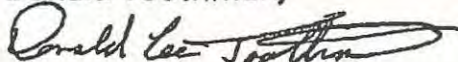
Donald and I have had many more confrontations with Bocchino that we overlooked hoping things would get better but we realize that will never happen.

Respectfully,

Donna Toothman,



Donald Toothman,



2/8/2015

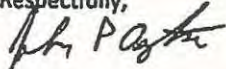
RE: Patricia Bocchino, Fountain Shadows

As the Vice president of Fountain Shadows HOA I am writing to you regarding the ongoing harassment of me, and the Board of Fountain Shadows by Ms. Bocchino.

I am the lucky one because I have only had to deal with Ms. Bocchino at our meetings, which I believe you have seen the videos. September 10, 2014 we gave her a chance to speak to the board during the executive meeting, and she finished and walked out, then came back in during the recess between meetings and got upset with me because I would not listen to her continue her complaint since I was the only board member present.

The other time I had a confrontation with her was at the annual meeting on 12/10/14. When the Sheriff officer asked me to sit next to her and not leave, because she did not want Ms. Bocchino sitting next to her gun. Ms. Bocchino then went off accusing me of stealing her seat. I explained to her that the officer wanted me there and she went off on both of us. All of this is on the video.

Respectfully,



John P Gaytan

Vice president Fountain Shadows HOA

EXHIBIT
B

APP55

March 4, 2015

To whom it may concern,

I have been the community manager for the Fountain Shadows HOA for the past seven years and have been a Community Manager for over 21 years. I have never had to deal with a person like Ms Patricia Bocchino before.

Her aggressive behavior at the Board of Directors meetings has forced the Board of Directors to not only hire off duty officers for the regular Board meetings but to also video tape the meetings to protect the HOA against her numerous false allegations.

I have been the target of several of her false allegations, one where she has called 911 and attempted to file charges against myself and the members of the Board.

I am no longer able to perform my duties as the community manager. Part of my responsibilities include conducting regular community inspections of the common areas. However, I cannot even perform these inspections as anytime I arrive at the community, Ms Bocchino will proceed to harass me and any Board member present. She has driven up and accosted me for no reason that I could discern. I have a short video on my iPad from my most recent inspection with Mr. Toothman where she tells him to "shut the f-- up" and proceeds to dial 911.

Vern Carrillo

Vern Carrillo, CAAM®, CMCA®, AMS®
Community Manager



PS561

**GLENDALE POLICE DEPARTMENT
REPORT INVENTORY COVER PAGE
FOR REPORT NO. 14 152693**

12/26/2014 11:34



REPORT TYPE	DATE	TIME	OFFICER NO.
OR OFFENSE REPORT	12/10/2014	1802	16850
SU SUPPLEMENTARY	12/10/2014	1803	13075
SU SUPPLEMENTARY	12/10/2014	1802	11177

*** END OF INVENTORY ***

EXHIBIT
 D

PS561

**GLENDALE POLICE DEPARTMENT
OFFENSE REPORT**

12/26/2014 11:34
Page 2

Report No: 14 152693 Type: OR Date/Time: 12/10/2014 1802 Ofcr#: 16850 CASTIGLIONE,AUSTIN

REPORT TITLE: SUBJ DISTURBING/HARASSING
 Reporting Officer: CASTIGLIONE,AUSTIN #16850
 Location: 5959 W BROWN ST Apt/Suite:
 Date & Time Occurred from: 12/10/2014 1800 to: 12/10/2014 1802 Grid: C114
 Associated Report No.(s):
 Total Property Taken: \$0.00 Recovered: \$0.00 Damaged: \$0.00
 Case Status: INFORMATION ONLY REPORT

WITNESS(ES) AND/OR OTHERS INVOLVED
 Person Reporting 1 :
 BOCCHINO,TRICIA

WITNESS(ES) AND/OR OTHERS INVOLVED
 Responsible Party 1 :
 DEPUTY DANIEL

WITNESS(ES) AND/OR OTHERS INVOLVED
 Witness 1 :
 TOOTHMAN,DONALD

SYNOPSIS
 ON 12/10/14 AT APPROXIMATELY 1800 HOURS PR1 WAS DISRUPTIVE DURING A LOCAL HOA MEETING HELD AT 5959 W BROWN ST. AFTER REFUSING TO LEAVE PR1 WAS PHYSICALLY ESCORTED OUT OF THE ROOM BY RPI. PR1 WAS LATER TRESPASSED FROM ALL FUTURE HOA MEETINGS. PHOTOGRAPHS WERE TAKEN OF ALL ALLEGED INJURIES OF PR1.

NARRATIVE
 14-152693
 A. CASTIGLIONE #16850
 SUBJECT DISTURBING
 OFFENSE REPORT
 DECEMBER 10, 2014 2227 HOURS

ON 12/10/14 AT APPROXIMATELY 1810 HOURS, I RESPONDED WITH MY FIELD TRAINING OFFICER, OFFICER SCHLEDER, TO A CALL REGARDING A SUBJECT DISTURBING AT 5959 W. BROWN ST. CALL INFORMATION STATED PR WAS PUSHED AND SHOVED BY AN OFF-DUTY DEPUTY AFTER BEING TOLD TO LEAVE A LOCAL HOA MEETING. PR ALSO REQUESTED MEDICAL ATTENTION DUE TO BRUISING FROM THE INCIDENT.

UPON ARRIVAL, I SPOKE WITH PR1 TRICIA BOCCHINO WHO IS A RESIDENT WITHIN THE HOA. SHE INFORMED ME SHE WAS AT THE LIBRARY FOR HER HOA MEETING, SHE STATED AT THE CONCLUSION OF THE MEETING, SHE WAS ATTEMPTING TO GET PAPERWORK FROM W1 DONALD TOOTHMAN. SHE SAID SHE WAS TOLD TO LEAVE BY RPI DEPUTY DANIEL #1822. AFTER REFUSING TO LEAVE, TRICIA SAID DEPUTY DANIEL "TWISTED" HER ARM BEHIND HER BACK AND "SHOVED" HER OUT OF THE ROOM. TRICIA STATED THAT SHE DESIRED PROSECUTION AGAINST DEPUTY DANIEL FOR ASSAULT.

P3561

**GLENDALE POLICE DEPARTMENT
OFFENSE REPORT**

12/26/2014 11:34

Page 3

Report No: 14 152693 Type: OR Date/Time: 12/10/2014 1802 Ofcr#: 16850 CASTIGLIONE,AUSTIN

I SPOKE WITH DEPUTY DANIEL AND SHE INFORMED ME THAT SHE WORKS OFF-DUTY AT THE HOA MEETINGS BECAUSE THE HOA BOARD OF DIRECTORS HAS HAD SEVERAL PRIOR INCIDENTS WITH TRICIA BEING DISORDERLY IN THE PAST. DEPUTY DANIEL TOLD ME TRICIA WAS DISRUPTIVE THROUGHOUT THAT EVENING'S MEETING AND REFUSED TO LEAVE AFTER MULTIPLE REASONABLE REQUESTS HAD BEEN MADE BY MEMBERS OF THE HOA BOARD OF DIRECTORS. DEPUTY DANIEL STATED SHE TOO TOLD TRICIA TO LEAVE BY THE REQUEST OF THE HOA BOARD OF DIRECTORS. AFTER CONTINUING TO REFUSE TO LEAVE, DEPUTY DANIEL THEN TOOK CONTROL OF TRICIA'S RIGHT ARM AND PHYSICALLY ESCORTED HER OUT OF THE ROOM.

I THEN SPOKE WITH WI DONALD TOOTHMAN WHO WORKS ON THE HOA EXECUTIVE BOARD AS A SECRETARY. AFTER THE MEETING WHEN TRICIA BECAME DISRUPTIVE, DONALD ASKED TRICIA TO LEAVE SEVERAL TIMES. HE TOLD ME HE DIRECTED DEPUTY DANIEL TO REMOVE TRICIA FROM THE MEETING. DONALD STATED IT APPEARED TO HIM TRICIA GOT AGGRESSIVE AND DEFIANT TOWARD DEPUTY DANIEL JUST PRIOR TO BEING PHYSICALLY ESCORTED OUT OF THE ROOM. HE ALSO TOLD ME THAT THE ENTIRE MEETING WAS VIDEO RECORDED SPECIFICALLY BECAUSE TRICIA HAS BECOME SO DISRUPTIVE. DONALD TOLD ME THAT HE WOULD ATTEMPT TO MAKE A COPY OF THE VIDEO FOR ME AT A LATER DATE.

UPON REVIEW OF THE VIDEO RECORDING, IT SHOWED DONALD AND DEPUTY DANIEL TELL TRICIA MULTIPLE TIMES THAT SHE NEEDED TO LEAVE THE MEETING. TRICIA REFUSED ALL VERBAL COMMANDS BY DEPUTY DANIEL AND WAS ARGUMENTATIVE. THE VIDEO THEN SHOWED DEPUTY DANIEL PLACE TRICIA'S RIGHT ARM IN AN ESCORT HOLD AND WALK HER OUT OF THE ROOM.

GLENDALE FIRE DEPARTMENT ENGINE 157 SHIFT C RESPONDED TO THE SCENE AND MEDICALLY CLEARED TRICIA (SEE THEIR INCIDENT REPORT #14-394489 FOR FURTHER DETAILS REGARDING THEIR INVOLVEMENT). I DID NOT NOTICE ANY VISIBLE BRUISING ON TRICIA WHILE ON SCENE; HOWEVER, OFFICER COBBLEY #11177 TOOK PHOTOGRAPH OF TRICIA'S REPORTED INJURIES. PLEASE REFER TO THOSE PICTURES FOR ANY FURTHER DETAILS REGARDING POSSIBLE INJURIES.

THE HOA COMMUNITY MANAGER, VERN CARRILLO, REQUESTED THAT TRICIA BE TRESPASSED FROM ALL FUTURE MEETINGS. TRICIA WAS THEN TRESPASSED AND LEFT THE AREA AFTER SEVERAL MINUTES OF ARGUING WITH OFFICERS ON SCENE.

THIS CONCLUDES MY INVOLVEMENT IN THIS MATTER AT THIS TIME.

PS561

**GLENDALE POLICE DEPARTMENT
OFFENSE REPORT**

12/26/2014 11:34
Page 4

Report No: 14 152693 Type: OR Date/Time: 12/10/2014 1802 Ofcr#: 16850 CASTIGLIONE,AUSTIN

Victims Assistance:		
Prints Attempted : NO	Prints Obtained : NO	C.S.T. Y
Supervisor Approving Report :		

CRIMINAL OFFENSE(S)		
Offense 1: NOT A UCR CRIME OR NOT IN JURISDICTION	Code: 000	
	Victim:	Suspect:

STATISTICAL INFORMATION
LOCATION TYPE:
OFFENSE 1 PUBLIC BUILDING
INSTRUMENT EMPLOYED:
HANDS/FEET

CASE DECISION REPORT:
0 UNKNOWN
0 TOTAL
NO REVIEW REGARDLESS OF TOTAL FLAG

PS561

**GLENDALE POLICE DEPARTMENT
SUPPLEMENTARY**12/26/2014 11:34
Page 5Report No: 14 152693 Type: SU Date/Time: 12/10/2014 1803 Ofcr#: 13075 BEHRENS, JAROD**REPORT TITLE: SUBJ DISTURBING/HARASSING**

Reporting Officer: BEHRENS, JAROD #13075

Location: 5959 W BROWN ST

Apt/Suite:

Date & Time Occurred from: 12/10/2014 1800 to: 12/10/2014 1802 Grid: C114

Associated Report No.(s):

Total Property Taken: \$0.00

Recovered: \$0.00

Damaged: \$0.00

Case Status: INVESTIGATION CONTINUED

NARRATIVE

14-152693

SUPPLEMENTAL REPORT

OFFICER BEHRENS #13075

ON 12/10/2014 AT APPROXIMATELY 1803 HOURS I WAS DISPATCHED TO 5959 WEST BROWN STREET IN REGARDS TO A SUBJECT DISTURBING CALL. UPON MY ARRIVAL I CONTACTED TRISHA WHO RELATED THE FOLLOWING.

TRISHA ADVISED SHE WAS LOCATED AT THE LIBRARY BECAUSE SHE WAS ATTENDING AN HOA MEETING FOR HER COMMUNITY SHE RESIDES IN. DURING THE MEETING SHE WAS ASKED TO LEAVE BY ONE OF THE BOARD MEMBERS TO WHICH SHE DID NOT WANT TO LEAVE AND BELIEVED SHE DID NOT HAVE TO LEAVE, BECAUSE SHE PAYS HER HOA DUES AND WAS DEMANDING ANSWERS FROM ONE OF THE BOARD MEMBERS.

TRISHA ADVISED THERE IS AN OFF DUTY DEPUTY THAT WAS ALSO LOCATED AT THE MEETING. TRISHA ADVISED SHE WAS ALSO PAYING FOR THE OFF DUTY DEPUTY TO BE AT THE MEETING AS WELL, BECAUSE SHE PAYS HER HOA DUES. TRISHA ALSO ADVISED SHE PAYS TAXES AND THEREFORE PAYS FOR MY JOB.

TRISHA ADVISED SHE WAS FURTHER UPSET BECAUSE THE DEPUTY ASKED HER LEAVE AND THE DEPUTY WOULD NOT ALLOW HER TO OBTAIN PAPERS THAT SHE WANTED TO GET BEFORE SHE LEFT. TRISHA STATED THE DEPUTY THEN GRABBED HER BY HER ARM AND PLACED IT UP AGAINST HER BACK FORCEFULLY AND PUSHED HER OUT OF THE MEETING ROOM.

TRISHA ADVISED SHE BELIEVED THIS FORCE WAS NOT NECESSARY.

IT SHOULD BE NOTED THAT DURING MY CONVERSATION WITH TRISHA SHE WAS ARGUMENTATIVE AND WANTED ANSWERS BUT WOULD NOT LET ME SPEAK ABOUT THE INCIDENT.

TRISHA CONTINUED TO COMPLAIN ABOUT HER BACK HURTING.

THIS CONCLUDED MY CONTACT WITH TRISHA ABOUT THIS INCIDENT.

APP61

PS561

**GLENDALE POLICE DEPARTMENT
SUPPLEMENTARY**

12/26/2014 11:34
Page 6

Report No: 14 152693 Type: SU Date/Time: 12/10/2014 1803 Ofcr#: 13075 BEHRENS, JAROD

PLEASE REFER TO THE OFFENSE REPORT AND ANY OTHER SUPPLEMENTAL REPORTS FOR FURTHER DETAILS.

INFORMATION ONLY

END NARRATIVE

SUPPLEMENTARY

Page 6

Report No: 14 152693 Type: SU Date/Time: 12/10/2014 1802 Ofcr#: 11177 COBBLEY, MICHAEL

REPORT TITLE: **DISORDERLY CONDUCT**
Reporting Officer: **COBBLEY, MICHAEL #11177**
Location: **5959 W BROWN ST** Apt/Suite:
Date & Time Occurred from: **12/10/2014 1800** to: **12/10/2014 1802** Grid: **C114**
Associated Report No.(s):
Total Property Taken: **\$0.00** Recovered: **\$0.00** Damaged: **\$0.00**
Case Status: **INFORMATION ONLY REPORT**

NARRATIVE
ON 12/10/2014 AT ABOUT 1830 HOURS I RESPONDED TO A REQUEST FOR A UNIT WITH A CAMERA AT THE BROWN LIBRARY LOCATED AT 5959 W BROWN ST IN THE CITY OF GLENDALE, AZ AND THE COUNTY OF MARICOPA. I CONTACTED THE OFFICER AT THE LOCATION AND WAS REQUESTED TO PHOTOGRAPH A FEMALE WHO WAS REPORTING AN INJURY TO HER ARMS. USING MY DEPARTMENT ISSUED CAMERA FROM MY CRIME SCENE OFFICER (CSO) KIT, I PHOTOGRAPHED THE FEMALE AS REQUESTED. WHEN I COMPLETED THE PHOTOGRAPHS SHE TOLD ME SHE WOULD GO HOME AND TAKE HER OWN PICTURES TO DOCUMENT THE INJURIES. I DOWNLOADED THE PHOTOGRAPHS I HAD TAKEN FOR THIS REPORT INTO DIMS FOR LATER USE IN REFERENCE TO THIS REPORT.
THIS ENDS MY INVOLVEMENT, NO FURTHER INFORMATION AS OF THIS REPORT.

Victims Assistance:
Prints Attempted : **NO** Prints Obtained : **NO** C.S.T. **Y**
Supervisor Approving Report :

**** END OF REPORT ****

EXHIBIT 2

TRIAL COURTS OF ARIZONA IN MARICOPA COUNTY

Manistee Justice Court/AZ007043J/0707 14264 W. Tierra Buena Lane Surprise, AZ 85374

INJUNCTION AGAINST WORKPLACE HARASSMENT

Case No. **CC2015039699000**
 Court ORI No. **AZ007043J**
 County **Maricopa** State **AZ**
 Former Case No. _____

PLAINTIFF EMPLOYER

Fountain Shadows Homeowners Association

And on behalf of Protected Person(s):
 Donald Toothman, Vern Carrillo, John Gaytan, Donna Toothman

AUTHORIZED AGENT

Donald Toothman

v.

DEFENDANT

Patricia Bocchino
 First Middle Last

Defendant/Plaintiff Relationship: neighbor
 Defendant's Address:

8736 North 67th Lane
 Glendale, AZ 85345

DEFENDANT IDENTIFIERS

SEX	RACE	DOB	HT	WT
Female	White	Unknown	5' 6"	170
EYES	HAIR	<i>Arizona Prohibits Release of Social Security Numbers</i>		
Blue	Blond			
DRIVER'S LICENSE #	STATE	EXP DATE		
	AZ			

WARNINGS TO DEFENDANT: This Injunction shall be enforced, even without registration, by the courts of any state, the District of Columbia, any U.S. Territory, and may be enforced by Tribal Lands (18 U.S.C. § 2265). Crossing state, territorial or tribal boundaries to violate this Injunction may result in federal imprisonment (18 U.S.C. § 2262). Federal law provides penalties for possessing, transporting, shipping, or receiving any firearm or ammunition (18 U.S.C § 922(g)(8)). Only the Court in writing, can change this Injunction.

This Injunction is effective for one year from date of service. **VERIFY VALIDITY (call Holder of Record):**

County Sheriff's Office — (602) 876-1061

THE COURT HEREBY FINDS:

That it has jurisdiction over the parties and subject matter.
 Additional warnings are set forth on the next page(s).

THE COURT, FINDING REASONABLE CAUSE, HEREBY ORDERS:

NO CONTACT. Defendant shall have no contact with Plaintiff employer or other person while that person is on or at the employer's property or place of business or is performing official work duties except through attorneys, legal process, court hearings and as follows: Mail / Writing,

NO CONTACT. Defendant shall have no contact with Protected Person(s) except through attorneys, legal process, court hearings and as follows: Mail / Writing,

THE COURT FURTHER ORDERS:

Effective: June 3, 2013

PROTECTED LOCATIONS. Defendant shall not go to or near the Plaintiff employer's or other Protected Person's:

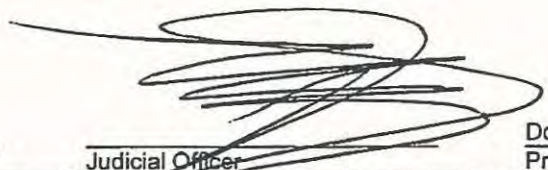
Workplace:

- Fountain Shadows Homeowners Association : 14100 North 83rd Avenue Unit 200; Peoria , AZ 85381

Other:

- Fountain Shadows Homeowners Association : 5959 W. Brown , Glendale , AZ 85302
- Donald Toothman: 8626 N Fountain Dr , Peoria, AZ 85345
- Donna Toothman: 8626 N Fountain Dr, Peoria, AZ 85345
- John Gaytan: 6758 W Ruth Ave, Peoria, AZ 85345

OTHER ORDERS.



3/5/2015

Date

Judicial Officer

Donald Watts

Printed Name

ADDITIONAL WARNINGS TO DEFENDANT:

This is an official Court Order. If you disobey this Injunction (even if the Plaintiff contacts you), you may be arrested and prosecuted for the crime of interfering with judicial proceedings and any other crime you may have committed in disobeying this Injunction. If you disagree with this Injunction, you have the right to request a hearing which will be held within 10 business days after your written request has been filed in the Court that issued this Injunction. Nothing Plaintiff does can stop, change, or undo this Injunction without the Court's written approval. You must return to Court to ask a judge to modify (change) or quash (dismiss) this Injunction. All violations of this Injunction should be reported to a law enforcement agency, not the court.

Case No. CC2015039699000 Defendant: Patricia Bocchino

Date: 3/5/2015

Defendant's Guide Sheet for Protective Orders - Please Read Carefully

The following information is provided to further explain the protective order that has been served upon you and your responsibilities as the Defendant.

1. You have been served with one of the following protective orders:

ORDER OF PROTECTION: An Order of Protection is used for a "family" relationship between you and the Plaintiff. This can include any of the following:

1) married now or in the past, 2) live together now or lived together in the past, 3) parent of a child in common, 4) one of you is pregnant by the other, 5) you are a relative (parent, in-law, brother, sister, or grandparent), or 6) current or previous romantic or sexual relationship. The Plaintiff has alleged that you have committed or may commit an act of domestic violence.

INJUNCTION AGAINST HARASSMENT: The Plaintiff has alleged that you have committed a series of acts (more than one) of harassment against the Plaintiff within the last year.

INJUNCTION AGAINST WORKPLACE HARASSMENT: This Injunction, alleging a single act or series of acts of harassment, has been filed against you by an employer or owner of a business or operation for the benefit of an employee or the business

2. **OTHER PROTECTED PERSONS:** It is possible that you will be referred to Superior Court if your children are listed as protected persons in this order. Only a Superior Court Judge can decide child custody or parenting time in a separate action.

3. **SERVICE AND EFFECT:** This protective order is valid for one year from the date it was served on you and is enforceable by law enforcement in any state or tribal nation in the United States.

4. **PROTECTIVE ORDER HEARING:** If you disagree with this protective order, you have the right to request a hearing which will be held within 5 to 10 business days after your written request has been filed in the court that issued this order. If a hearing is held and the Order remains in effect or is modified, and you and the Plaintiff 1) are married now or in the past, 2) live together now or lived together in the past, or 3) are parents of a child in common, you may be prohibited from possessing a firearm. This firearms prohibition may apply even if you fail to appear for the hearing. If you have questions as to whether your request for a hearing can result in this firearms prohibition, you should contact an attorney. The Court cannot give you legal advice.

5. **MODIFYING OR QUASHING (DISMISSING) THIS PROTECTIVE ORDER:** Only a judge can modify or quash (dismiss) this protective order. If you file an action for maternity, paternity, annulment, legal separation, or dissolution against the Plaintiff, you need to advise this court at once. **Nothing the Plaintiff does can stop, change, or undo this protective order without the Court's written approval.**

6. **PLAINTIFF CONTACT:** Even if the Plaintiff initiates contact, you could be arrested for violating this protective order. You have the right to request a protective order against the Plaintiff if you do not want the Plaintiff to contact you. However, orders are not automatically granted upon request. Legal requirements must be met.

7. **LAW ENFORCEMENT STANDBY:** If standby has been ordered by the judge on this protective order, you may return to the residence once with a law enforcement officer to obtain necessary personal belongings. Neither law enforcement nor this protective order can resolve conflicts over property, title, furniture, finances, real estate, or other ownership issues.

8. **FIREARMS:** If the judge has ordered under state law that you shall not possess, receive, or purchase firearms or ammunition, you must surrender them within 24 hours after service to the law enforcement agency named on this protective order and should request them to issue proof of that surrendering. You may also be required to provide documentation to the court that firearms were transferred to the appropriate law enforcement agency.

EXHIBIT 3

1 **Carpenter, Hazlewood, Delgado & Bolen, PLC**
Attorneys at Law
2 1400 E. Southern Avenue, Suite 400
Tempe, Arizona 85282
3 t 480.991.6949 | f 480.991.7040
minuteentries@carpenterhazlewood.com
4 Chad P. Miesen 024910
Charlene Cruz 026692
FOUNTSHAD.0025.1

5 *Attorneys for Defendant Fountain Shadows
Homeowners Association*

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 HOMEOWNERS
12 ASSOCIATION,

13 Defendant.

Case No. CV2015-012434

**DEFENDANT'S RESPONSE TO
PLAINTIFF'S FIRST REQUEST FOR
ADMISSIONS**

14 Defendant, Fountain Shadows Homeowners Association, ("the Association"), by and
15 through its attorneys undersigned, for its response to Plaintiff's First Request For Admissions to
16 Defendant Fountain Shadows Homeowners Association, states:

17 **Requests for Admissions**

18 1. Admit that the attorneys' fees assessed against Plaintiffs account were not
19 incurred enforcing the collection of amounts due under the Declaration.

20 ADMIT X DENY _____

21 2. Admit that the attorneys' fees assessed against Plaintiff's account were not
22 incurred in connection with any lien provided for in the Declaration.

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ADMIT _____ DENY X

3. Admit that the attorneys' fees assessed against Plaintiff's account were not incurred in connection with the foreclosure of any lien provided for in the Declaration.

ADMIT X DENY _____

4. Admit that the attorneys' fees assessed against Plaintiff's account were not incurred enforcing compliance with the term and conditions of the Declaration.

ADMIT _____ DENY X

5. Admit that the attorneys' fees assessed against Plaintiff's account were not incurred enforcing specific performance with the term and conditions of the Declaration.

ADMIT _____ DENY X

6. Admit that you did not request an award of attorneys' fees in connection with the Injunction Against Harassment you filed against Plaintiff.


ADMIT X DENY _____

7. Admit that you were not awarded attorneys' fees in connection with the Injunction Against Harassment you filed against Plaintiff.

ADMIT X DENY _____

DATED this 25th day of January, 2016.

CARPENTER, HAZLEWOOD, DELGADO & BOLEN, PLC

By: 
Chad P. Miesen #024910
Charlene Cruz #026692
1400 E. Southern Avenue, Suite 400
Tempe, Arizona 85282
Attorneys for Fountain Shadows Homeowners Association

1 **CERTIFICATE OF SERVICE:**

2 ORIGINAL of the foregoing mailed
3 this 25th day of January, 2016, to:

4 Jonathan A. Dessales
5 DESSAULES LAW GROUP
6 25353 North 16th Street, Suite 110
7 Phoenix, Arizona 85016
8 Email: jdessaules@dessauleslaw.com

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22
By:  _____

EXHIBIT 4

Carpenter, Hazlewood, Delgado & Bolen, PLC

1400 E Southern Ave. Suite 400 | Tempe, Arizona 85282-5691

t 480.427.2800 | f 480.427.2801

Fountain Shadows Homeowners Association

Invoice Date: January 31, 2015

Invoice No. 135871

Matter Description: Bocchino, Patricia Enforcement 12

Matter ID: FOUNTSHAD.0025

Legal Services Rendered:

DATE:	PROFESSIONAL:	DESCRIPTION:	HOURS:	RATE:	AMOUNT:
1/4/2015	CPM	[REDACTED]	0.50	305.00	152.50
1/5/2015	AAK	Review emails from community manager [REDACTED]	0.70	240.00	168.00
1/12/2015	AAK	Receipt and review emails from community manager regarding [REDACTED]	0.30	240.00	72.00
1/16/2015	AAK	[REDACTED]	0.30	240.00	72.00
1/19/2015	AAK	Continue to review [REDACTED]	0.30	240.00	72.00
1/22/2015	AAK	Begin drafting Verified Petition Against Workplace Harassment	1.30	240.00	312.00
1/23/2015	AAK	Continue drafting Verified Petition Against Workplace Harassment	0.20	240.00	48.00
1/29/2015	AAK	Receipt and review email from community manager regarding [REDACTED]	0.60	240.00	144.00
1/29/2015	CPM	Review and revise template [REDACTED]	0.20	305.00	61.00
Total Current Legal Services Rendered:					\$ 1,101.50

Rate Summary:

Allison A. Kline 3.70 hours @ \$240.00 = \$ 888.00
Chad P. Miesen 0.70 hours @ \$305.00 = \$ 213.50

Carpenter, Hazlewood, Delgado & Bolen, PLC

1400 E Southern Ave. Suite 400 | Tempe, Arizona 85282-5691

t 480.427.2800 | f 480.427.2801

Fountain Shadows Homeowners Association

Invoice Date: January 31, 2015

Invoice No. 135871

Total Fees and Costs:	\$	1,101.50
Previous Balance:	\$	0.00
Matter Total:	\$	1,101.50

Carpenter, Hazlewood, Delgado & Bolen, PLC

1400 E Southern Ave. Suite 400 | Tempe, Arizona 85282-5691

t 480.427.2800 | f 480.427.2801

Fountain Shadows Homeowners Association

Invoice Date: March 31, 2015

Invoice No. 138684

Matter Description: Bocchino, Patricia Enforcement 12

Matter ID: FOUNTSHAD.0025

Legal Services Rendered:

DATE:	PROFESSIONAL:	DESCRIPTION:	HOURS:	RATE:	AMOUNT:
3/2/2015	AAK	Receipt, review, and respond to emails [REDACTED]	0.20	240.00	48.00
3/4/2015	AAK	Draft and Finalize Expedited Petition for Injunction against Workplace Harassment	1.00	240.00	240.00
3/4/2015	CPM	Discuss and strategize regarding [REDACTED]	0.50	305.00	152.50
3/4/2015	AAK	Receipt, review, and respond to various emails from community manager [REDACTED]	0.20	240.00	48.00
3/5/2015	AAK	Prepare for and attend hearing for Injunction Against Workplace Harassment. (Split with CPM)	2.00	240.00	480.00
3/5/2015	CPM	Prepare for and attend injunction hearing. Meet with client regarding [REDACTED]	2.00	305.00	610.00
3/9/2015	VJG	Receive and review the conformed Injunction Against Workplace Harassment, and docket.	0.20	170.00	34.00
3/9/2015	VJG	Assemble documents and coordinate with process server to begin service of Injunction upon Defendant, Patricia Bocchino.	0.20	170.00	34.00
3/18/2015	VJG	Received and reviewed the conformed Certificate of Service regarding service on Patricia Bocchino, and docket.	0.20	170.00	34.00
3/31/2015	CPM	Receipt and review of email from community manager [REDACTED]	0.20	305.00	61.00

Total Current Legal Services Rendered:

\$ 1,741.50

Carpenter, Hazlewood, Delgado & Bolen, PLC

1400 E Southern Ave. Suite 400 | Tempe, Arizona 85282-5691

t 480.427.2800 | f 480.427.2801

Fountain Shadows Homeowners Association

Invoice Date: March 31, 2015

Invoice No. 138684

Rate Summary:

Vicki J. Goslin	0.60 hours @ \$170.00 = \$ 102.00
Allison A. Kline	3.40 hours @ \$240.00 = \$ 816.00
Chad P. Miesen	2.70 hours @ \$305.00 = \$ 823.50

Disbursements & Other Costs Incurred:

DATE:	DESCRIPTION:	AMOUNT:
3/9/2015	Process Server Fee	90.78
	Current Billed Disbursements & Other Services:	\$ 90.78

Total Fees and Costs:	\$ 1,832.28
Previous Balance:	\$ 0.00
Matter Total:	\$ 1,832.28

Carpenter, Hazlewood, Delgado & Bolen, PLC

1400 E Southern Ave. Suite 400 | Tempe, Arizona 85282-5691

t 480.427.2800 | f 480.427.2801

Fountain Shadows Homeowners Association

Invoice Date: June 30, 2015

Invoice No. 142153

Matter Description: Bocchino, Patricia Enforcement 12

Matter ID: FOUNTSHAD.0025

Legal Services Rendered:

DATE:	PROFESSIONAL:	DESCRIPTION:	HOURS:	RATE:	AMOUNT:
6/23/2015	AAK	Receipt and review email from property manager regarding [REDACTED]	0.50	240.00	120.00

Total Current Legal Services Rendered:

\$ 120.00

Rate Summary:

Allison A. Kline 0.50 hours @ \$ 240.00 = \$ 120.00

Total Fees and Costs: **\$ 120.00**

Previous Balance: **\$ 0.00**

Matter Total: **\$ 120.00**

Carpenter, Hazlewood, Delgado & Bolen, PLC

1400 E Southern Ave. Suite 400 | Tempe, Arizona 85282-5691

t 480.427.2800 | f 480.427.2801

Fountain Shadows Homeowners Association

Invoice Date: July 31, 2015

Invoice No. 143657

Matter Description: Bocchino, Patricia Enforcement 12

Matter ID: FOUNTSHAD.0025

Legal Services Rendered:

DATE:	PROFESSIONAL:	DESCRIPTION:	HOURS:	RATE:	AMOUNT:
7/23/2015	AAK	Receipt and review letter from homeowner's attorney regarding [REDACTED]	0.80	240.00	192.00
7/24/2015	MAH	Review and revise correspondence to homeowner [REDACTED] [REDACTED]	0.20	320.00	64.00
7/24/2015	CPM	Receipt and review of email from community manager regarding [REDACTED] [REDACTED]	0.30	305.00	91.50
7/29/2015	AAK	Receipt and review email from homeowner [REDACTED] [REDACTED]	0.30	240.00	72.00
7/29/2015	AAK	Phone conversation with community manager and board member to [REDACTED]	0.20	240.00	48.00
7/30/2015	AAK	Review and redact transaction listing report of attorneys' fees and costs in order to provide copy to homeowner	0.30	240.00	72.00
7/31/2015	VJG	Review and prepare the Transactions Listing Report for production.	0.20	170.00	34.00
Total Current Legal Services Rendered:					\$ 573.50

Rate Summary:

Vicki J. Goslin	0.20 hours @ \$170.00 = \$ 34.00
Mark A. Holmgren	0.20 hours @ \$320.00 = \$ 64.00
Allison A. Kline	1.60 hours @ \$240.00 = \$ 384.00
Chad P. Miesen	0.30 hours @ \$305.00 = \$ 91.50

Carpenter, Hazlewood, Delgado & Bolen, PLC

1400 E Southern Ave. Suite 400 | Tempe, Arizona 85282-5691

t 480.427.2800 | f 480.427.2801

Fountain Shadows Homeowners Association

Invoice Date: July 31, 2015

Invoice No. 143657

Summary of Payments and Adjustments:

DATE:	DESCRIPTION:	AMOUNT:
7/20/2015	Check 1588 Invoice 142153	120.00
	Total Payments & Adjustments:	\$ 120.00

Total Fees and Costs:	\$ 573.50
Previous Balance:	\$ 0.00
Matter Total:	\$ 573.50

Carpenter, Hazlewood, Delgado & Bolen, PLC

1400 E Southern Ave. Suite 400 | Tempe, Arizona 85282-5691

t 480.427.2800 | f 480.427.2801

Fountain Shadows Homeowners Association

Invoice Date: August 31, 2015

Invoice No. 144998

Matter Description: Bocchino, Patricia Enforcement 12

Matter ID: FOUNTSHAD.0025

Legal Services Rendered:

DATE:	PROFESSIONAL:	DESCRIPTION:	HOURS:	RATE:	AMOUNT:
8/3/2015	AAK	Email to manager regarding [REDACTED]	0.20	240.00	48.00
8/12/2015	AAK	Phone call with homeowner to discuss attorney fees on account and request for transaction report	0.20	240.00	48.00
8/26/2015	AAK	Draft email to be sent to homeowner [REDACTED]	0.30	240.00	72.00

Total Current Legal Services Rendered: \$ 168.00

Rate Summary:

Allison A. Kline 0.70 hours @ \$240.00 = \$ 168.00

Summary of Payments and Adjustments:

DATE:	DESCRIPTION:	AMOUNT:
8/12/2015	Check 001601 Invoice 143657	573.50
Total Payments & Adjustments:		\$ 573.50

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Fountain Shadows Homeowners Association

Invoice Date: August 31, 2015

Invoice No. 144998

Total Fees and Costs:	\$	168.00
Previous Balance:	\$	0.00
Matter Total:	\$	168.00

Carpenter, Hazlewood, Delgado & Bolen, PLC

1400 E Southern Ave. Suite 400 | Tempe, Arizona 85282-5691

t 480.427.2800 | f 480.427.2801

Fountain Shadows Homeowners Association

Invoice Date: September 30, 2015

Invoice No. 146534

Matter Description: Bocchino, Patricia Enforcement 12

Matter ID: FOUNTSHAD.0025

Legal Services Rendered:

DATE:	PROFESSIONAL:	DESCRIPTION:	HOURS:	RATE:	AMOUNT:
9/1/2015	AAK	Review current status of matter [REDACTED]	0.30	240.00	72.00

Total Current Legal Services Rendered: \$ 72.00

Rate Summary:

Allison A. Kline 0.30 hours @ \$ 240.00 = \$ 72.00

Summary of Payments and Adjustments:

DATE:	DESCRIPTION:	AMOUNT:
9/16/2015	Check 1622 Invoice 144998	168.00

Total Payments & Adjustments: \$ 168.00

Total Fees and Costs: \$ 72.00

Previous Balance: \$ 0.00

Matter Total: \$ 72.00

EXHIBIT 5

Carpenter Hazlewood Delgado & Bolen, PLC

Transactions Listing Report

Search Description:

Search for: FOUNTSHAD.0025 Search by: Matter ID Stage: (all) Type: (all)

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units	Price	Value
Statement Number: 0						
7/23/2015	AAK	FOUNTSHAD.0025 / Fountain Shadows Bocchino, Patricia Enforcement 12 Receipt and review letter from homeowner's attorney regarding association account and the Association's authority to charge attorneys' fees to the homeowner. Review and analyze governing documents and Arizona law regarding charging homeowner's for attorneys' fees because of misconduct. Draft letter to opposing counsel regarding the same.	H	0.8000	240.0000	192.0000
7/24/2015	MAH	FOUNTSHAD.0025 / Fountain Shadows Bocchino, Patricia Enforcement 12 Review and revise correspondence to homeowner regarding fees for injunction against harassment.	H	0.2000	320.0000	64.0000
7/24/2015	CPM	FOUNTSHAD.0025 / Fountain Shadows Bocchino, Patricia Enforcement 12 [REDACTED]	H	0.3000	305.0000	91.5000
7/29/2015	AAK	FOUNTSHAD.0025 / Fountain Shadows Bocchino, Patricia Enforcement 12 Receipt and review email from homeowner requesting a copy our firms transaction report that details all attorneys' fees and costs assessed to her account. Strategize how best to proceed. [REDACTED]	H	0.3000	240.0000	72.0000
				Statement Number: 0	1.6000	419.5000
Statement Number: 135871						
1/5/2015	AAK	FOUNTSHAD.0025 / Fountain Shadows Bocchino, Patricia Enforcement 12 [REDACTED] Research Injunctions Against Workplace Harassment statute and evidentiary standards in preparation for drafting complaint/ petition.	H	0.7000	240.0000	168.0000
1/12/2015	AAK	FOUNTSHAD.0025 / Fountain Shadows Bocchino, Patricia Enforcement 12 [REDACTED]	H	0.3000	240.0000	72.0000

Carpenter Hazlewood Delgado & Bolen, PLC
Transactions Listing Report

Search Description:

Search for: FOUNTSHAD.0025 Search by: Matter ID Stage: (all) Type: (all)

Date	Prof	MatterID/Client Sort Matter Description Narrative	Component Task Code	Units	Price	Value
		[REDACTED] Review current status of matter and strategize how best to proceed.				
1/16/2015	AAK	FOUNTSHAD.0025 / Fountain Shadows Bocchino, Patricia Enforcement 12 Review video evidence [REDACTED]	H	0.3000	240.0000	72.0000
1/19/2015	AAK	FOUNTSHAD.0025 / Fountain Shadows Bocchino, Patricia Enforcement 12 Continue to review video evidence [REDACTED]	H	0.3000	240.0000	72.0000
1/22/2015	AAK	FOUNTSHAD.0025 / Fountain Shadows Bocchino, Patricia Enforcement 12 Begin drafting Verified Petition Against Workplace Harassment.	H	1.3000	240.0000	312.0000
1/23/2015	AAK	FOUNTSHAD.0025 / Fountain Shadows Bocchino, Patricia Enforcement 12 Continue drafting Verified Petition Against Workplace Harassment.	H	0.2000	240.0000	48.0000
1/29/2015	AAK	FOUNTSHAD.0025 / Fountain Shadows Bocchino, Patricia Enforcement 12 [REDACTED]	H	0.6000	240.0000	144.0000
1/4/2015	CPM	FOUNTSHAD.0025 / Fountain Shadows Bocchino, Patricia Enforcement 12 Discuss and strategize re owner conduct and possible injunction	H	0.5000	305.0000	152.5000
1/29/2015	CPM	FOUNTSHAD.0025 / Fountain Shadows Bocchino, Patricia Enforcement 12 [REDACTED]	H	0.2000	305.0000	61.0000
		Statement Number: 135871		4.4000		1,101.5000

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(h) These covenants shall be binding upon the heirs and assigns of any Owners, but no person shall be liable for any act or omission respecting any party wall except such as took place while an Owner.

ARTICLE VII

Exterior Maintenance

Section 1. The Association shall provide exterior maintenance upon the Common Area and each Lot which is subject to assessment hereunder, as follows:

(a) The Association shall paint exterior building surfaces and masonry/block fences.

(b) The Association shall furnish maintenance, repair and replacement of all the Common Area as part of common expenses subject to the provisions of this Declaration, the Articles of Incorporation and the ByLaws. In addition thereto, the Association shall be responsible for repair, maintenance and replacement of masonry/ block walls on Lots, but shall not be responsible for any equipment thereon serving a Lot. Such equipment shall be maintained at the expense of the Owner. The Association shall not be responsible for exterior or interior glass surfaces, such being the responsibility of the Lot Owner.

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Section 2. The cost of the maintenance, repair or replacement for which the Association is responsible under Section 1 above shall be assessed uniformly to all Owners in accordance with Article IV of this Declaration, except as provided in Section 3 of this Article VII.

Section 3. To the extent an Owner is legally responsible under Arizona law, the cost of any maintenance, repair or replacement which results from the negligence or willfulness of an Owner, an Owner's guest or the occupant of an Owner's Lot, shall be added to such Owner's regular assessment and shall be an assessment, lien and obligation of such Owner and shall become due and payable in all respects as provided in Article IV of this Declaration.

Section 4. For the purpose solely of performing the maintenance, repair and replacement authorized by this Article, the Association, through its duly authorized agents or employees, shall have an easement for maintenance, repair and replacement and the right, after reasonable notice to the Owner, to enter upon any Lot at reasonable hours.

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ARTICLE VIII

Interior and Other Maintenance

Each Owner shall be responsible for the upkeep and maintenance of the interior of his Townhouse and for the maintenance, repair and replacement of the roof, the individual patio or balcony, the back yard fence, the windows, the Private Yard and all landscaping within the Private Yard and Lot lines. All fixtures and equipment installed within the Private Yard boundary, Lot line or Townhouse, including utility lines, pipes, wires, conduits, air-conditioning, heating, and other systems shall be maintained and kept in repair by the Owner thereof. All termite control shall be the responsibility of the individual Owners.

ARTICLE IX

Insurance

Insurance shall be carried by the Association on the Property and shall be governed by the following provisions:

Section 1. Authority to Purchase. The Board shall purchase and maintain certain insurance upon the Property, including but not limited to the insurance described in Section 2 below, which insurance is to be purchased by the Association for the benefit of the Association, the Owners, ^{Unofficial Document} the First Mortgagees, as their interests may appear. Provisions shall be made for the issuance of certificates of endorsement to the First Mortgagee of any First Mortgage. Such policies and endorsements thereon, or copies thereof, shall be deposited with the Association. The Board shall deliver a copy of the policies or certificate of insurance, or by and through their agent advise the Owners of the coverage of said policies to determine which particular items are included within the coverage so that the Owners may insure themselves as they see fit if certain items are not insured by the Association. Without limiting the generality of the foregoing, it shall be each Owner's responsibility to provide for himself Owner's liability insurance, theft or other insurance covering personal property damage and loss, insurance for each Owner's personal liability, and such other insurance which is not carried by the Association as the Owner desires.

Section 2. Coverage. The Association shall maintain and pay for policies of insurance as follows:

A. A multi-peril type policy covering the entire Property providing, as a minimum, fire and extended coverage, and all other coverage in kinds and amounts customarily acquired or required for projects similar in construction, location and use, including but not limited to vandalism and malicious mischief, in an amount not less than one hundred percent (100%) of the insurable value (based upon replacement cost).

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B. A comprehensive policy of public liability insurance covering all of the Common Area and public ways in the Property in a minimum amount of at least One Million Dollars (\$1,000,000.00) per occurrence, for personal injury and/or property damage. Such insurance policy shall contain a "severability of interest" endorsement which shall preclude the insurer from denying the claim of a Owner because of the negligent acts of the Association and its agents or other Owners.

C. If the Project is located in an area identified by the Secretary of Housing and Urban Development as an area having special flood hazards, a "blanket" policy of flood insurance on the Project must be maintained in the amount of the outstanding principal balances of the First Mortgage loans on the Units comprising the Project or the maximum limit of coverage available under the National Flood Insurance Act of 1968, as amended, whichever is less.

D. The Association must obtain fidelity coverage against dishonest acts on the part of directors, managers, trustees, employees or volunteers responsible for handling funds belonging to or administered by the Association. The fidelity bond or insurance must name the Association as the named insured and shall be written to provide protection which is in no event less than one and one-half times the insured's ^{Unofficial Document} estimated annual operating expenses and reserves. In connection with such coverage, an appropriate endorsement to the policy to cover any person who serves without compensation shall be added if the policy would not otherwise cover volunteers.

E. A workmen's compensation policy, if necessary to meet the requirements of law.

F. Such other insurance as the Board shall determine from time to time to be desirable.

Section 3. Provisions Required. The insurance policies purchased by the Association shall, to the extent possible, contain the following provisions:

A. The coverage afforded by such policies shall not be brought into contribution or proration with any insurance which may be purchased by Owner or First Mortgages.

B. There shall be no subrogation with respect to the Association, its employees, Owners and members of their household and their families and employees, or the Policy(ies) should name said persons as additional insureds.

C. A statement of the name of the insured shall be included in all policies, in form and substance similar to the following:

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FOUNTAIN SHADOWS HOMEOWNERS ASSOCIATION,
for the use and benefit of the individual
Owners (designated by name, if required).

D. A standard Mortgagee clause which must be endorsed to provide that any proceeds shall be paid to the Association for the use and benefit of First Mortgagees as their interest may appear, or which must be otherwise endorsed to fully protect the interest of First Mortgagees, their successors and assigns.

E. For policies of hazard insurance, a standard mortgagee clause shall provide that the insurance carrier shall notify the First Mortgagee named at least ten (10) days in advance of the effective date of any reduction in or cancellation of the policy.

F. Any "no other insurance" clause shall exclude insurance purchased by unit Owners or First Mortgagees.

Section 4. First Mortgagee Protection.

A. The Association shall provide each First Mortgagee with a letter wherein the Association agrees to give written notice to each First Mortgagee, or Servicer of a mortgage, or any entity or person designated by such First Mortgagee or Servicer Unofficial Document hereover:

- (1) Damage to a Unit covered by a First Mortgage exceeds \$10,000.00; and/or
- (2) Damage to the Common Area and related facilities exceeds \$10,000.00.

Notwithstanding any contrary provision hereof, the Association shall have no duty to give written notices provided for herein to any First Mortgagee, unless such First Mortgagee shall deliver or mail to the Association a notice stating the address of the First Mortgagee to which such written notices are to be sent.

B. Each hazard insurance policy shall be written by a hazard insurance carrier which has a financing rating by Best's Insurance Reports of Class VI or better, or if such rating be discontinued, by a successor thereto or a similar such rating service.

C. Each insurance carrier must be specifically licensed or authorized by law to transact business within the State of Arizona.

D. First Mortgagees may pay overdue premiums, or may secure new insurance coverage on the lapse of a policy,

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with respect to any insurance required to be maintained by the Association as provided in this part, and First Mortgagees making expenditures therefor shall be owed immediate reimbursement by the Association.

Section 5. Non-Liability of Association/Board. Notwithstanding the duty of the Association to obtain insurance coverage as stated herein, neither the Association nor any Board member shall be liable to any Owner or any other party if any risks or hazards are not covered by insurance or if the amount of insurance is not adequate, and it shall be the responsibility of each Owner to ascertain the coverage and protection afforded by the Association's insurance and to procure and pay for such additional insurance coverage and protection the said Owner may desire.

Section 6. Premiums. Premiums upon insurance policies purchased by the Association shall be paid by the Association as a Common Expense, except that the amount of increase over any annual or other premium occasioned by the use, misuse, occupancy, or abandonment of a townhouse or its appurtenances, or of the Common Elements by an Owner, shall be assessed against that particular Owner.

Section 7. Insurance Claims. The Association, acting by and through its Board, is hereby irrevocably appointed agent for each Owner and for each holder of a First Mortgage or other lien upon a Lot, and for each Owner of any other interest in the Property, subject to the provisions contained herein, to adjust all claims arising under insurance policies^{Unofficial Document} purchased by the Association and to execute and deliver releases upon the payment of claims, and the Board has full and complete power to act for the Association in this regard.

Section 8. FNMA/GNMA or FHLMC. Notwithstanding any provision of this Article IX, if at any time any of the Lots are owned by or are covered by Mortgages which are held by the Federal National Mortgage Association ("FNMA"), the Government National Mortgage Association ("GNMA") or the Federal Home Loan Mortgage Corporation ("FHLMC") (or any successor to such entities which performs their present functions), the Board shall at all times carry all casualty, flood and liability insurance and a fidelity bond in such amounts and containing all provisions as are required from time to time by such entities or such successors, unless such coverage is unavailable or waived by them in writing.

ARTICLE X

Damage and Repair

If all or any part of the Property in which the Association owns an interest is damaged or destroyed by fire or other hazard, whether or not it shall be repaired or reconstructed, shall be determined in the following manner:

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Section 1. Common Elements. If the damaged property is part of the Common Elements or any property in which the Association owns an interest, it shall be repaired or reconstructed.

Section 2. Residence Units. In the event any townhouse is totally or substantially damaged or destroyed, the repair, reconstruction or replacement thereof shall be paid from the insurance loss proceeds.

Section 3. Insurance Proceeds. An undivided share of insurance proceeds on account of damage to Common Area shall be allocated to the Owners according to their membership in the Association. Proceeds, if any, on account of damage to Townhouses shall be held for the Owners of damaged Townhouses in proportion to the cost of repairing the damage suffered by each such Owner, which cost shall be determined by the Association. In the event a mortgagee endorsement has been issued as to a Townhouse, the share of the Owner shall be held in trust for the First Mortgagee and the Owner as their interest may appear.

Section 4. Manner of Disbursements. The proceeds from assessments and insurance shall be disbursed in the following manner:

A. That portion of the insurance proceeds, if any, representing damage to a townhouse shall be used to pay for the reconstruction and repair of said townhouse by disbursements in payment of the costs of such repair and reconstruction to the ^{Official Document} Owner or, if there is a mortgagee endorsement, then to the Owner and the First Mortgagee jointly.

B. The portion of insurance proceeds representing damage, the reconstruction and repair of which is the responsibility of the Association, shall be disbursed in payment of the costs of such repair and reconstruction in the manner required by the Board and upon approval of an architect qualified to practice in Arizona and employed by the Association to supervise the work.

Section 5. If the insurance proceeds are insufficient to pay all costs of repair and rebuilding, the Board shall levy a special assessment to make up any deficiency, which assessments shall be levied equally against all Owners. If the insurance proceeds exceed the costs of repair and reconstruction, then following completion of such repair and rebuilding, the excess shall be paid over to all Owners and their holders of first Mortgages as their respective interests may appear. Each payment to an Owner and his Mortgagee shall be by joint payee check or draft. The assessment provided for herein shall be secured by the lien provided for in this Declaration.

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ARTICLE XI

Condemnation

Section 1. If a portion of the Property should be taken by exercise of the power of eminent domain, or should be transferred and conveyed to a condemning authority in anticipation of such exercise, the entire award made as compensation for such taking, including, but without limitation, any amount awarded as severance damages, or the entire amount received and paid in anticipation of such taking, after deducting therefrom, in each case, reasonable and necessary costs and expenses, including, but without limitation, attorney's fees, appraiser's fees and court costs (which new amount is hereinafter in this Article referred to as the "Award") shall be paid to the Association, as trustee for all Owners. The Association shall, as soon as practicable, cause the Award to be utilized for the purpose of repairing, replacing and restoring the affected area, including, if the Association deems it necessary or desirable, the replacement of any Common Area improvements so taken or conveyed.

Section 2. If any Townhouse or portion thereof or the Common Areas or any portion thereof is made the subject matter of any condemnation or eminent domain proceedings or is otherwise sought to be acquired by a condemning authority, the holder of any first Mortgage, with respect to any such Townhouse and the servicer of such Mortgage, will be entitled to timely written notice of such proceedings or proposed acquisition and no provision of any document establishing the project will entitle the Owner of a Townhouse or other party to priority over Unofficial Document mortgage with respect to the distribution of the proceeds of any award or settlement.

Section 3. If the cost of any repair and restoration shall exceed the amount of the Award, a special assessment shall be levied against the remaining Owners in an equal basis to the extent necessary to make up such deficiency. The special assessment provided for herein shall be secured by the lien provided for in Article IV, paragraph 1, of the Declaration.

ARTICLE XII

Annexation

Section 1. Notwithstanding any contrary provision of this Declaration, Declarant reserves the right to annex, in its sole discretion and without the consent of any other Owner or mortgagee, provided that the VA determines that the annexation is in accord with the general plan heretofore approved by them, at any time within five (5) years from the date of this Declaration, all or any portion of the following described real property to the Property pursuant to this Declaration:

See Exhibit A attached hereto and incorporated herein by this reference.

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Nothing contained in this Declaration shall obligate Declarant to annex any additional phase, land or improvements. Effectuation of any such annexation shall take place when Declarant records a plat describing such Phase, together with a Declaration of Annexation describing the property to be annexed, referring to this Declaration by reference, setting forth the number and description of the Lots included within such phase. Thereafter, the property described in such Declaration of Annexation shall be deemed a part of this property. Upon completion of any such annexation, all Owners of Lots in any such annexed phase shall have those rights and obligations set forth in this Declaration, and shall be treated as if the entire project had been developed at the same time. Upon each such annexation, a new budget shall be prepared and the assessments shall be adjusted and levied as required, in accordance with this Declaration.

ARTICLE XIII

Use Restrictions

Section 1. The Properties are hereby restricted to residential dwellings for residential use, except for improvements within the Common Area. All buildings or structures erected upon said premises shall be of new construction and no building or structures shall be moved from other locations onto said premises, and no subsequent buildings or structures other than residence units, shall be built on any Lot where the builder theretofore programmed and constructed a Townhouse. No structures of a temporary character, trailer, basement, tent, shack, garage, barn or other out-building shall be used on any portion Unofficial Document Properties at any time as a residence, either temporarily or permanently.

Section 2. Notwithstanding any provisions herein contained to the contrary, it shall be expressly permissible for the builder of a major portion of the development to maintain during the period of construction and sale of said Lots, upon such portion of the premises as such builder may choose, such facilities as in the sole opinion of said builder may be reasonably required, convenient or incidental to the construction and sale of said Lots, including but without limitation, a business office, storage area, construction yards, signs, model units and sales office.

Section 3. No animals of any kind shall be raised, bred, or kept in any townhouse or in or upon any Common Area, except that a combination of not more than two (2) dogs, cats or household pet may be kept in each townhouse, subject to uniform rules and regulations of the Association, and provided that no animal shall be kept, bred or maintained for any commercial purpose. All pets must be leashed or otherwise contained when outside the townhouse and shall not be allowed to run loose. Any Owner keeping an animal on the Property shall indemnify and hold harmless the Association for any loss, damage, cost or liability which the Association may sustain as a result of the presence of such animal, whether or not such animal's presence has been approved by the Association. Notwithstanding the generality of the foregoing, after (i) repeated violations

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of this subparagraph, (ii) ten (10) days' prior written notice to the Owner of such animal(s), and (iii) an opportunity for such Owner to have a hearing before the Board, such animal(s) may be taken from such Owner and given to any local organization whose function is to deal with stray or abandoned animals.

Section 4. No advertising signs (except one of not more than five (5) square feet "for rent" or "for sale" sign per Parcel), billboards, unsightly objects, or nuisances shall be erected, placed or permitted to remain on the premises, nor shall the premises be used in any way or for any purpose which may endanger the health or unreasonably disturb the Owner of any Townhouse or any resident thereof. Further, no business activities of any kind whatsoever shall be conducted in any building or on any portion of the premises; provided further, however, the foregoing covenants shall not apply to the business activities, signs and billboards, or the construction and maintenance of buildings, if any, of the builder, its agents and assigns during the construction and sale period, and of the Association, its successors and assigns, in the furtherance of its powers and purposes, as herein set forth.

Section 5. All clotheslines, equipment, garbage cans, service yards, woodpiles or storage piles shall be kept screened by adequate planting or fencing so as to conceal them from view of neighboring Lots and streets. All rubbish, trash or garbage shall be regularly removed from the premises, and shall not be allowed to accumulate thereon. All clotheslines shall be confined to patio or balcony areas.

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Section 6. No vehicle of any type, boat, camper, motorcycle, bicycle, tricycle or other wheeled toy shall be parked or left unattended on any Common Area or Lot except for pick-up or delivery purposes or as permitted by the Board of Directors in uniform regulations.

The Board of Directors may from time to time permit or restrict vehicular parking on the Common Areas. Vehicles parked in restricted areas may be towed away at the vehicle Owner's expense, including the storage charges.

No vehicle of any type which is abandoned or inoperable shall be stored or kept on any Lot, parking area, street or drive within this subdivision in such a manner as to be seen from any other Lot or from any streets, drives or alleyways within this subdivision.

Section 7. Except in the individual patio areas, no planting or gardening shall be done, and no hedges shall be erected or maintained upon the Lots, except such as are installed in accordance with the initial construction of the buildings located thereon or as approved in accordance with Architectural Control provisions in Article V hereof. No fences or walls shall be erected or maintained on any of the Properties without approval of the Architectural Control Committee as provided in this Declaration.

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Section 8. The Common Area shall remain undivided, it being agreed that this restriction is necessary in order to preserve the rights of the Owners with respect to the operation and management of the Common Area. No Owner shall have the right to bring an action for partition, or to subdivide or partition his own Lot or the common area.

Section 9. Except as set forth in Article V hereof, no exterior television, radio, CB or other antennas of any sort shall be erected, placed, allowed or maintained upon any portion of the improvements to be located upon the Properties, nor upon any structure situated upon said real property.

Section 10. No noxious or offensive activity shall be carried on upon any Lot or any part of the Properties, nor shall anything be done thereupon which may be, or may 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.

Section 11. The rights and duties with respect to sanitary sewer and water, cable television, electricity, gas and telephone lines and facilities shall be governed by the following:

(a) Whenever water, sanitary sewer, electricity, gas, cable television or telephone connections, lines, cables or any portion thereof, are or have been installed within the Properties, the Owner of any Lot or the Association in the case of the Common Area, served by said installation shall have the right, and are hereby granted an easement to the extent necessary therefor, to enter upon or have a utility company enter upon any portion of the Properties in which said installations lie, to repair, replace and generally maintain said installations.

(b) The right granted in subparagraph (a) above shall be only to the extent necessary to entitle the Owner or Association serviced by said installation to its full and reasonable use and enjoyment, and provided further that any one exercising said right shall be responsible for restoring the surface of the easement area so used to its condition prior to such use.

(c) In the event of a dispute between Owners with respect to the repair or rebuilding of said connections, or with respect to the sharing of the cost thereof, upon written request of one of such Owners addressed to the Association, the matter shall be submitted to its Board of Directors, who shall arbitrate and decide the dispute and the decision of the Board shall be final and conclusive on the parties.

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Section 12. All Owners and occupants shall abide by the Association's Articles of Incorporation and Bylaws and any rules and regulations adopted by the Association, as amended from time to time.

Section 13. No Lot shall be leased by an Owner, nor landlord-tenant relationship established unless such lease or landlord-tenant relationship is in writing and the lessee or tenant has agreed in writing that the lease is subject in all respects to the provisions of this Declaration, the Articles of Incorporation and the Bylaws of the Association, and all rules and regulations duly adopted by the Association, as amended from time to time. Said writing shall provide that any failure of the lessee or tenant to comply with the terms of such documents or rules and regulations shall be a default under the lease. No lease shall be permitted for transient or hotel purposes. Transient or hotel purpose shall be defined as a lease or rental of less than thirty (30) consecutive days.

ARTICLE XIV

Duties and Powers of the Association

In addition to the duties and powers enumerated in its Articles of Incorporation and Bylaws, or elsewhere provided for herein, and without limiting the generality thereof, the Association shall:

(a) Own, maintain, Unofficial Document otherwise manage all of the Common Area and all facilities, improvements and landscaping thereon, and all other property acquired by the Association.

(b) Pay any real and personal property taxes and other charges assessed against the Common Area.

(c) Have the authority to obtain, for the benefit of all of the Lots and the Common Area, all water, gas, sewer and electric service and refuse collection and to pay for such services to the extent that said services are not individually metered or otherwise directly billed to the individual Lots.

(d) Grant easements where necessary for utilities and sewer facilities over the Common Area to serve said area and the Lots.

(e) Have the authority to employ a manager or other persons and to contract with independent contractors or managing agents to perform all or any part of the duties and responsibilities of the Association. The Association, through its Board of Directors, shall have the express authorization, right and power to enter into one or more management agreements with third parties in order to facilitate efficient operation of all buildings, improvements

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and Common Area. It shall be the primary purpose of such management agreements to provide for the administration, management, repair and maintenance of said real property, all improvements thereon designated as common elements, and the exterior walls of the Townhouses; and to assess, collect and apply the management and common expenses, and to enforce the Declaration of Covenants, Conditions and Restrictions. The terms of said management agreements shall be as determined by the Board of Directors to be in the best interests of the Association, and shall be subject to the Articles of Incorporation, the Bylaws and this Declaration of Covenants, Conditions and Restrictions affecting said property. Notwithstanding the above, any and all such management agreements shall be written for a term not to exceed one year, subject to renewal by agreement of the parties for successive one year periods, and shall further provide that said management agreement may be cancelled and terminated by the Board of Directors for any reason whatsoever upon giving thirty (30) days written notice of such cancellation and termination to the managing entity. The Board of Directors shall make all necessary arrangements for continuity of management and maintenance prior to the expiration of the term of any prior management agreements or the termination of the same. Any and all management agreements shall be entered into with a responsible party or parties having considerable experience with the management of a project of this type.

Each Owner shall be bound by the terms and conditions of all management agreements entered into by the Owner's Association. A copy of all management agreements shall be available to each Owner upon request.

(f) Contract for and pay fire, casualty, liability and other insurance insuring the Association, its property and its Board of Directors and Owners.

(g) Contract for and pay maintenance, gardening, utilities, materials and supplies, and services relating to the Common Area, and to employ personnel necessary for the operation of the project, including legal and accounting services provided, however, that any such service contract shall be limited to a duration of one (1) year unless a longer term is approved by a majority of the members of the Association.

(h) Delegate its powers to its committees, officers and employees.

(i) Provide for maintenance, repair and replacement of all items as provided for in Article VII hereof.

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(j) At the request of the public body authorized to accept such and with the approval of two-thirds (2/3) of each class of members, dedicate those portions of the Common Area which are used for vehicular ingress and egress as public streets.

(k) Be a member of the Roadway Association and pay a prorata share of all costs and expenses of the Roadway Association.

ARTICLE XV

Easements

Section 1. Blanket Easement for Utilities. There is hereby created a blanket easement upon, across, over and under the Common Area for ingress, egress, installation, replacing, repairing and maintaining all utilities, including but not limited to, water, sewers, gas, telephones and electricity, irrigation facilities and a cable television system. By virtue of this easement, it shall be expressly permissible for the providing electrical, utility, cable and/or telephone company to erect and maintain the necessary poles and other necessary equipment on said property and to affix and maintain cable, electrical and/or telephone wires, circuits and conduits on, above, across and under the roofs and exterior walls of Townhouses. Notwithstanding anything to the contrary contained in this paragraph, no sewers, electrical lines, water lines or other utilities may be installed or relocated Unofficial Document on the Properties, except as initially programmed and approved by the Developer of said Properties or as approved by the Association's Board of Directors. These easements shall in no way affect any other recorded easements on the Properties.

Section 2. Easement for Encroachment Due to Construction. Each Townhouse and the Common Area shall be subject to an easement for encroachments created by construction, settling and overhangs and balconies, as designed or constructed and for the maintenance of same, so long as it stands, shall and does exist. In the event a Townhouse is partially or totally destroyed and then rebuilt, the Owners of all Lots agree that minor encroachments on parts of the adjacent Townhouse or Common Area due to construction shall be permitted and that a valid easement for said encroachment and the maintenance thereof shall exist.

Section 3. Reciprocal Easements. There shall be reciprocal beneficial easement over the Common Areas for the benefits of all Owners of Lots on the property, including additions and annexations thereto pursuant to Article XII.

ARTICLE XVI

Private Yards

Section 1. The Lots include Private Yards, which are defined as the enclosed portions of the Lot excluding the building thereon.

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Section 2. The rights of the respective parties with respect to the use of Private Yards, which may abut a wall of the dwelling unit on the adjoining Lot ("abutting dwelling unit" herein), shall be as follows:

(a) Nothing shall be erected, planted or maintained within such Private Yard area which might impede or interfere with any necessary and reasonable maintenance, repair or restoration of any structural wall located on or adjacent to the abutting dwelling unit.

(b) The Owner of the Private Yard shall not drive any nails, screws, bolts or other objects of any kind whatsoever into, nor attach any object to the wall of the abutting dwelling unit.

(c) The Owner of the abutting dwelling unit shall have the responsibility for painting and repairing any structural wall owned by him and facing onto the Private Yard (to the extent such repair and painting is not the obligation of the Association), provided, however, that in the case of damage to such a wall caused by the Owner of the Private Yard, his family, guests, servants, agents, or invitees, such repairs shall be made at the expense of the Owner of the Private Yard. If an action at law be required to enforce payment for such repairs, the prevailing party shall be entitled to recover the costs of suit, including reasonable attorneys' fees. No repairs, additions, alterations and/or restoration ^{Unofficial Document} of any such structural wall shall be commenced, erected or maintained or the paint colors therefor selected until the plans and specifications, showing the nature, kind, shape, height, materials, location, color and approximate cost thereof shall have been approved by the Architectural Control Committee.

After completion of such repairs, additions, alterations or restoration, the Owner of the abutting dwelling unit shall restore the Private Yard to the condition in which it existed immediately prior to the commencement of such work.

(d) The Owner of the abutting Lot shall have the right and an easement of drainage over, across and upon the Private Yard for water resulting from the normal usage of the adjoining Lot and the Owner of the Private Yard shall maintain the easement area in such manner as will not interfere with such drainage.

Section 3. The Owner and occupants of a Townhouse may use the Private Yard in any reasonable manner not prohibited by this Declaration, the Articles of Incorporation and Bylaws of the Association, the rules and regulations adopted by the Board of Directors of the Association, all as amended from time to time, or by law.

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Section 4. All boundaries of Private Yards, save those which are structural walls of dwelling units, will be fenced by Developer. No fence shall be moved or removed at any time, and any changes in size or color, shall be subject to review by the Architectural Control Committee pursuant to Article V hereof.

Section 5. Each Owner shall keep his Private Yard and all improvements therein or thereon, in good order and repair and free of debris, including but not limited to the seeding, watering and mowing of all lawns, and the pruning and cutting of all trees and shrubbery, all in a manner and with such frequency as is consistent with good property management. In the event an Owner shall fail to maintain his Private Yard and the improvements located thereon, as provided herein, the Association, after notice to the Owner and approval by vote of the Board of Directors, shall have the right to enter upon said Private Yard to correct drainage and to repair, maintain and restore the Private Yard, fences and any other improvements erected thereon. All costs related to such correction, repair or restoration shall become a lien upon such Owner's Lot, and such lien may be enforced in the same manner as an assessment levied in accordance with Article IV hereof.

Section 6. The Association shall have the right at all reasonable times to enter into any Private yard for the purpose of carrying out its obligations of maintenance, repair and replacement.

ARTICLE XVII

General Provisions

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Section 1. Attorneys' Fees. In the event the Association employs an attorney or attorneys to enforce the collection of any amounts due pursuant to this Declaration or in connection with any lien provided for herein, or the foreclosure thereof, or to 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.

Section 2. Enforcement. The covenants, restrictions, reservations and conditions contained herein shall run with the land and shall be binding upon all persons purchasing, leasing, subleasing, occupying, owning or otherwise having an interest in any Lot on said property, their heirs, executors, administrators, successors, grantees and assigns. After the date on which this instrument has been recorded, these covenants, restrictions, reservations and conditions may be enforced by the Association or its Board of Directors, which shall have the right and duty to enforce the same and expend Association monies in pursuance thereof, and also may be enforced by the Owner of any Lot. Any lien, liability or obligation arising as the result of a breach of said covenants, restrictions, reservations and conditions shall be binding upon and effective

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against any Owner of said premises, other than one whose title thereto is acquired by foreclosure of a mortgage or deed of trust, and sheriff's sale or equivalent proceedings, who shall take title to said premises free and clear of the lien hereof for all said charges pursuant to the provisions of this Declaration that have accrued up to the time of said foreclosure, and subject to the lien hereof for all said charges that shall accrue subsequent to the foreclosure, and provided also that the breach of any of said covenants, restrictions, reservations and conditions may be enjoined, abated or reviewed by appropriate proceedings, notwithstanding the lien or existence of any such mortgage or deed of trust. All instruments of conveyance of any interest of all or any part of said Lots shall contain reference to this instrument and shall be subject to the covenants, restrictions, reservations and conditions herein as fully as though the terms and conditions of this instrument were therein set forth in full. The terms and conditions of this instrument shall be binding upon all persons affected by its terms, whether or not express reference is made to this instrument in any such instrument of conveyance. Enforcements shall be by proceedings at law or in equity against any person or persons violating or attempting to violate any covenant either to restrain violation or to recover damages.

Section 3. Saving Clause. The invalidity of any one or more phrases, sentences, clauses, paragraphs or sections hereof shall not affect the remaining portions of this instrument or any part thereof, all of which are inserted conditionally on their being held valid in law and in the event that one or more of the phrases, sentences, clauses, paragraphs or sections contained herein should be invalid or should operate to render this agreement invalid, this agreement shall be construed as if such invalid phrase or phrases, sentence or sentences, clause or clauses, paragraph or paragraphs, section or sections had not been inserted. In the event that any provision or provisions of this instrument appear to be violative of the Rule against Perpetuities, such provision or provisions shall be construed as being void and of no effect as of twenty-one (21) years after the death of the last surviving incorporator of FOUNTAIN SHADOWS HOMEOWNERS ASSOCIATION or twenty-one (21) years after the death of the last survivor of all of said incorporators' children or grandchildren who shall be living at the time this instrument is executed, whichever is the later.

Section 4. Parking. Each Townhouse will contain a two-car garage and the Owner or occupants of the Townhouse shall park their vehicles in said garage and not in the driveway or on the Common Area, except as otherwise permitted by this Declaration or by Uniform rules and regulations promulgated from time to time by the Board of Directors of the Association.

Section 5. Gender. Wherever the context of this document requires, words used in the masculine gender include the feminine and neuter, the singular number the plural and the plural the singular.

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Section 6. Amendment. The covenants and restrictions of this Declaration shall run with and bind the land for a term of twenty (20) years from the date this Declaration is recorded, after which time they shall be automatically extended for successive periods of ten (10) years. This Declaration may be amended by an instrument signed by the Owners of not less than two-thirds (2/3) of the Townhouses. Any amendment must be recorded in the Maricopa County Recorder's Office.

As to the Federal National Mortgage Association (FNMA), the Government National Mortgage Association (GNMA), and the Federal Home Loan Mortgage Corporation (FHLMC), so long as may be required to fully amortize any mortgage owned by FNMA, GNMA and FHLMC on any of the Lots; and as to the Federal Housing Administration (FHA), Veterans Administration (VA) or the Federal Home Loan Mortgage Corporation (FHLMC), so long as there is a Class B membership outstanding, no amendment shall be made which would be deemed to be in conflict with, or contrary to, the terms of any promissory note, mortgage, regulatory agreements or document executed by the Association or any of the Owners of residence units for the purpose of obtaining insurance or financing involving FNMA, FHA, VA, GNMA or FHLMC without obtaining written approval and consent of FNMA, FHA, VA, GNMA or FHLMC.

Section 7. Annexation. Additional residential property and Common Area may be annexed to the Properties with the consent of two-thirds (2/3) of each class of members.

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Section 8. FHA/VA Approval. As long as there is a Class B membership, the following actions will require the prior approval of the Federal Housing Administration or the Veterans Administration: Annexation of additional properties, dedication of Common Area, and amendment of this Declaration of Covenants, Conditions and Restrictions.

ARTICLE XVIII

Fountain Shadows Roadway Association

Section 1. Membership in the Roadway Association shall be limited to the Association and the Fountain Place Homeowners' Association.

Section 2. Membership in the Roadway Association cannot be abandoned or terminated for any reason whatsoever.

Section 3. The Roadway Association shall insure, maintain, repair and replace Diana Avenue, a private street, which runs east-west between 67th Avenue and 69th Avenue in the City of Glendale, State of Arizona, and 68th Avenue, a private street, which runs north-south between Diana Avenue and Butler Drive, in the City of Glendale, State of Arizona. The costs and expenses incurred and to be incurred by the Roadway Association shall be billed to the members in prorata shares and shall be paid promptly.

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Section 4. The costs and expenses of the Roadway Association billed to the Association and the Fountain Place Homeowners' Association shall be considered common expenses of said associations and be a part of the regular assessments levied against their respective members.

IN WITNESS WHEREOF, the undersigned, being the Declarant herein, has hereunto set its hand and seal this 15 day of April, 1983.

NBS DEVELOPMENT CORPORATION, an
Arizona corporation

BY Mark Niles

Its President

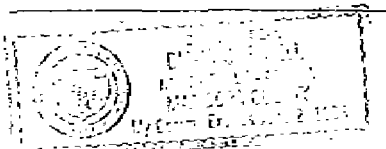
STATE OF ARIZONA)
) ss.
County of Maricopa)

On this, the _____ day of _____, 1983, before me, the undersigned Notary Public, personally appeared _____, who acknowledged himself to be the _____ of NBS DEVELOPMENT CORPORATION, an Arizona corporation, and that he, a Unofficial Document officer, being so authorized, executed the foregoing instrument for the purposes therein contained, by signing the name of the said corporation by himself as such officer.

WITNESS my hand and seal.

Sharon Sue Bell
Notary Public

My Commission Expires:



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"EXHIBIT A"

That part of the Southeast quarter of the Northeast quarter of Section 36, Township 3 North, Range 1 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, more particularly described as follows:

BEGINNING at the Northeast corner of said Southeast quarter
 thence South, along the East line of said Southeast quarter, a distance of 674.75 feet;
 thence South 88°46'24" West, a distance of 45.01 feet to a line 45.00 feet West and parallel with the East line of said Section 36, also being the TRUE POINT OF BEGINNING;
 thence South, along said parallel line, a distance of 312.50 feet;
 thence South 88°46'24" West, parallel with the North line of the South half of the North half of the Southeast quarter of the Northeast quarter of said Section 36, a distance of 614.23 feet;
 thence North, parallel with the East line of said Section 36, a distance of 660.00 feet to the North line of the South half of the North half, of the Southeast quarter of the Northeast quarter of said Section 36;
 thence North 88°46'24" East, along said North line, a distance of 302.16 feet;
 thence South, parallel with the East line of said Section 36, a distance of 240.70 feet;
 thence West, a distance of 64.00 feet;
 thence South, a distance of 108.17 feet;
 thence North 88°46'24" East, a distance of 376.09 feet to the TRUE POINT OF BEGINNING.

Said parcel contains 289,998.73 square feet or 6.6575 acres more or less.

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Charlene Cruz 026692
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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.
22

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).

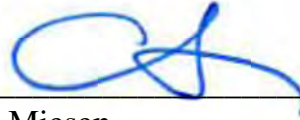
15 Plaintiff has failed to provide any evidence to support that the legal fees incurred by
16 the Association for her harassing and offensive behavior is clearly excessive. In fact,
17 Plaintiff paid in full all of the legal fees incurred by the Association and did not contest the
18 amounts prior to 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.
22

1 RESPECTFULLY SUBMITTED this 28th day of March, 2016.

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

3
4 

5 _____
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7 Charlene Cruz
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9 Tempe, Arizona 85282
10 *Attorneys for the Association*

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

13 Clerk of the Court
14 Maricopa County Superior Court
15 www.AZTurboCourt.gov

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

18 Jonathan A. Dessauls
19 Dessauls Law Group
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21 Phoenix, Arizona 85016

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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 SEPARATE
STATEMENT OF FACTS
AND
DEFENDANT’S
CONTROVERTING STATEMENT
OF FACTS**

*(Assigned to the Honorable
Douglas Gerlach)*

14
15
16 Defendant Fountain Shadows Homeowners Association (the “**Association**”), by and
17 through undersigned counsel, hereby submits its Response to Plaintiff’s Separate Statement
18 of Facts and the Association’s Controverting Statement of Facts.

19 **Response to Plaintiff’s Separate Statement of Facts**

- 20 1. Disputed. *See* Defendant’s Controverting Statement of Facts (“CSOF”) below at ¶
21 8.
22

- 1 2. Undisputed.
- 2 3. Undisputed.
- 3 4. Undisputed.
- 4 5. The Association asserts that the “Transaction Listing Report” speaks for itself.
- 5 6. The Association asserts that the invoices to the Association speak for themselves.
- 6 7. The Association asserts that Invoice 135871 speaks for itself.
- 7 8. The Association asserts that Invoice 138684 speaks for itself.
- 8 9. The Association asserts that Invoice 142153 speaks for itself.
- 9 10. The Association asserts that Invoice 143657 speaks for itself.
- 10 11. The Association asserts that Invoice 144998 speaks for itself.
- 11 12. The Association asserts that Invoice 146534 speaks for itself.
- 12 13. Disputed. *See* “CSOF” below at ¶ 11
- 13 14. Undisputed.
- 14 15. The Association asserts that the ledgers speak for themselves and are accurate. *See*
15 Exhibit D (Declaration of Vern Carillo at ¶ 7).
- 16 16. The Association asserts that the ledgers speak for themselves. *Id.*
- 17 17. The Association asserts that the ledgers speak for themselves. *Id.*
- 18 18. The Association asserts that the ledgers speak for themselves. *Id.*
- 19 19. The Association asserts that the ledgers speak for themselves. *Id.*
- 20 20. The Association asserts that the ledgers speak for themselves. *Id.*
- 21 21. Disputed. *See* “CSOF” below at ¶ 11
- 22 22. The Association asserts that the Accounting Transaction ledger speaks for itself. *Id.*

1 23. The Association asserts that the Financial Transaction ledger speaks for itself. *Id.*

2 24. The Association asserts that the ledgers speak for themselves. *Id.*

3 25. Undisputed.

4 26. Undisputed.

5 27. Undisputed.

6 28. Undisputed

7 29. Undisputed.

8 30. Undisputed.

9 31. Undisputed.

10 32. Disputed. *See* “CSOF” below at ¶ 11

11 33. Undisputed.

12 **Association’s Controverting Statement of Facts**

13 1. The Association is a planned community association and nonprofit corporation
14 located in Glendale, Arizona, whose members are owners of lots within the planned
15 community. *See* A.R.S. § 33-1802.

16 2. The Association and its members are governed by the *Declaration of Covenants,*
17 *Conditions and Restrictions for Fountain Shadows* (the “**Declaration**”), recorded in
18 the Office of the Maricopa County Recorder at No. 1983-146154. *See* Exhibit A
19 (Declaration at 1).

20 3. The Association and its members are also subject to the Articles of Incorporation,
21 Bylaws, and other Rules and Regulations adopted by the Association (referenced
22 collectively herein as the “**Governing Documents**”). *See generally* Chapters 24

1 through 40 of Title 10 of the Arizona Revised Statutes; see also Exhibit A
2 (Declaration at 20 [Art. XIII, Sec. 12]).

3 4. Plaintiff, Patricia Bocchino (the “**Plaintiff**”), was an owner of a lot located within
4 the Fountain Shadows community until the sale of her lot on or about September 24,
5 2015. *See* Plaintiff’s Complaint at ¶ 5; *see also* Plaintiff’s Statement of Facts at ¶
6 29.

7 5. Incident to her ownership of property within Fountain Shadows, she was, until the
8 sale of her lot, a member of the Association. *See* Exhibit A (Declaration at 3 [Art.
9 III, Sec. 1]).

10 6. Plaintiff violated the Declaration and other Governing Documents by acting in a
11 harassing manner constituting offensive behavior. *See* Exhibit B (Injunction against
12 Workplace Harassment); *see also* Exhibit A (Declaration at 19 [Art. XIII, Sec. 10]).

13 7. The Declaration prohibits members or residents in the community from carrying on
14 any offensive activity:

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

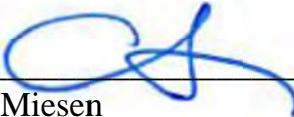
19 *See* Exhibit A (Declaration at 19 [Art. XIII, Sec. 10]).

20 8. As a result, the Association sought and obtained an *Injunction against Workplace*
21 *Harassment* on March 5, 2015 from the Manistee Justice Court. *See* Exhibit B
22 (Injunction against Workplace Harassment).

- 1 9. As a result of Plaintiff's actions, the Association incurred attorneys' fees, costs and
2 expenses to enforce Plaintiff's compliance with the terms and conditions of the
3 contractual Declaration, including but limited to filing and obtaining an Injunction
4 Against Workplace Harassment. *See* Exhibit D (Declaration of Vern Carrillo at ¶ 7).
- 5 10. In or around September of 2015, Defendant was contacted by a title/escrow
6 company to provide a payoff of amounts due to the Association. *See* Plaintiff's
7 Statement of Facts at ¶ 26.
- 8 11. Pursuant to the Declaration, including Article IV, Section 1 and Article XVII,
9 Section 1, the Association included in its payoff disclosure all attorneys' fees and
10 costs incurred as a result of Plaintiff's violations of the Governing Documents. *See*
11 Exhibit A (Declaration at 5 and 24 [Art. IV, Sec. 1, and Art. XVII, Sec. 1]).
- 12 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* Exhibit C
14 (Account Ledger for Bocchino's Lot at 2).
- 15 13. Plaintiff did not contest or challenge the payoff disclosure prior to payment. *See*
16 Exhibit D (Declaration of Vern Carrillo at ¶ 10)

17 RESPECTFULLY SUBMITTED this 28th day of March, 2016.

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

19 
20 _____
21 Chad P. Miesen
22 Charlene Cruz
1400 East Southern Avenue, Suite 400
Tempe, Arizona 85282
Attorneys for the Association

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ORIGINAL of the foregoing filed
this 28th day of March, 2016 with:

Clerk of the Court
Maricopa County Superior Court
www.AZTurboCourt.gov

Copy of the foregoing emailed and mailed
this 28th day of March, 2016, to:

Jonathan A. Dessauls
Dessaules Law Group
5353 North 16th Street, Suite 110
Phoenix, Arizona 85016

A handwritten signature in blue ink, reading "Vicki Gaslin", is written over a horizontal line.

EXHIBIT A

CC & R'S



WHEN RECORDED RETURN TO:

Recorded in official records of Maricopa County, Arizona

APR 21 1983 - 8 00

FILE 2809 PGS 28

TICOR TITLE INSURANCE CO
3033 N. Central Ave.
Phoenix, AZ 85012
ATTN: BUILDER SERVICES

DECLARATION OF COVENANTS, CONDITIONS
AND RESTRICTIONS FOR

EROP RSTR (P)

A-4-83 32

FOUNTAIN SHADOWS

83 146154

The undersigned, owner of that certain real property situated in Maricopa County, State of Arizona, to-wit:

FOUNTAIN SHADOWS UNIT 1, according to a plat thereof recorded in the Office of the Maricopa Recorder in Book 250 of Maps, at page 42:

hereby declares that all of the said property shall be held, sold and conveyed subject to the following easements, restrictions, covenants and conditions, which are for the purpose of protecting the value and desirability of, and which shall run with, the real property and be binding on all parties having any right, title or interest in the described properties or any part thereof, their heirs, successors and assigns, and shall inure to the benefit of each owner thereof.

ARTICLE I

Definitions

This instrument filed for record by TICOR TITLE INSURANCE COMPANY as an accommodation only. It has not been examined as to its execution or as to its effect upon the title.

Section 1. "Association" shall mean FOUNTAIN SHADOWS HOMEOWNERS ASSOCIATION, an Arizona non-profit corporation, its successors and assigns.

Section 2. "Common Area" shall mean all real property and improvements thereon owned by the Association for the common use and enjoyment of the Owners, as shown on the Plat.

Section 3. "Declarant" shall mean NBS DEVELOPMENT CORPORATION, an Arizona corporation, its successors, and assigns, if such successors or assigns should acquire more than one undeveloped Lot from the Declarant for the purpose of development.

Section 4. "Developer" shall mean NBS DEVELOPMENT CORPORATION, an Arizona corporation, and its successors and assigns, and to any other contractor who builds for resale a significant number of the houses on the subject property.

Section 5. "First Mortgage" shall mean a first lien deed of trust, as well as a first mortgage, on a townhouse. "First Mortgagee" means the holder of a first mortgage, as well as a beneficiary or trustee under a first deed of trust, its successors and assigns.

Section 6. "Lot" or "Townhouse" shall be synonymous and shall mean any plot of land shown upon the recorded subdivision map or plat of the Properties with the exception of the Common Area.

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Section 7. "Mortgage" includes deed of trust; "Mortgagee" includes a beneficiary under a deed of trust; and "Mortgagor" includes a Trustor under a deed of trust.

Section 8. "Occupant" means a person or persons, including an Owner, legally in possession of a townhouse.

Section 9. "Owner" shall mean and refer to the record fee simple Owner, whether one or more persons or entities, of equitable title (or legal title if equitable title has merged) of any Lot which is a part of the Properties. Owner shall not include a person or entity having an ownership interest merely as security for the performance of an obligation. In the case of Lots, the fee simple title to which is vested of record in a Trustee pursuant to Arizona Revised Statutes, Section 33-801, et seq., legal title shall be deemed to be in the Trustor.

Section 10. "Plat" means the plats of survey of the Property and of all townhouses as recorded in the office of the Maricopa County in Book 250 of Maps, at page 12, and any subsequent additions and/or amendments thereto.

Section 11. "Properties" shall mean and refer to that certain real property hereinbefore described together with any improvements thereon, and such additions thereto as may hereafter be brought within the jurisdiction of the Association.

Section 12. "Roadway Association" shall mean the FOUNTAIN SHADOWS ROADWAY ASSOCIATION, an Arizona non-profit corporation, its successors and assigns.

The aforesaid definitions shall be applicable to this Declaration and also to any Declaration of Annexation (unless the context shall prohibit), filed pursuant to Article XII hereof.

ARTICLE II

Property Rights

Section 1. Owner's Easements of Enjoyment. Every Owner shall have a right and easement of enjoyment in and to the Common Area which shall be appurtenant to and shall pass with the title to every Lot, subject to the following provisions:

(a) The right of the Association to charge reasonable admission and other fees for the use of any recreational facility situated upon the Common Area.

(b) The right of the Association to suspend the voting rights and right to use of the recreational facilities by an Owner for any period during which any assessment against the Owner's Lot remains unpaid; and for a period not to exceed 60 days for any infraction of its published rules and regulations.

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(c) The right of the Association to dedicate or transfer all or any part of the Common Area to any public agency, authority or utility for such purposes and subject to such conditions as may be agreed to by the members. No such dedication or transfer shall be effective unless an instrument signed by two-thirds (2/3) of each class of members agreeing to such dedication or transfer has been recorded.

(d) The right of the Association to limit the number of guests of members.

~~(e)~~ The right of the Association to establish uniform rules and regulations pertaining to the use of the Common Area and the recreational facilities thereon.

(f) The right of Developer (and its sales agents and representatives) to the reasonable use of the Common Area for display, sales, leasing and exhibit purposes, which right Declarant hereby reserves to Developer. This reservation of right shall end upon conveyance of the last Lot described herein (or as annexed in accordance with Article XII hereof).

Section 2. Delegation of Use. Any Owner may delegate, in accordance with the Bylaws, his right of enjoyment of the Common Area and facilities to the members of his family, his tenants, or contract purchasers who reside on the property.

Section 3. Waiver of Use. No member may exempt himself from personal liability for assessments duly levied by the Association, nor release the Lot owned by him from the liens and charges hereof, by waiver of the use and enjoyment of the Common Area, and the facilities thereon or by abandonment of his Lot.

ARTICLE III

Membership and Voting Rights

Section 1. Membership in the Association, except for membership of the incorporators, the Declarant and the first Board of Directors, shall be limited to record owners of equitable title (or legal title if equitable title has merged) of Townhouses constructed or planned to be constructed on the property described herein or on any duly annexed property. An Owner of a Townhouse shall automatically, upon becoming the Owner of a Townhouse, become a member of the Association, and shall remain a member of the Association until such time as his ownership ceases for any reason, at which time his membership in said Association shall automatically cease. Ownership of a Townhouse shall be the sole qualification and criteria for membership. The foregoing is not intended to include persons or entities who hold an interest merely as security for the performance of an obligation.

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A membership in the Association shall not be transferred, pledged or alienated in any way, except upon the sale of such Townhouse and then only to the purchaser thereof, or by intestate succession, testamentary disposition, foreclosure of mortgage of record or other legal process. Any attempt to make a prohibited transfer is void and will not be reflected upon the books and records of the Association. The Association shall record the transfer upon the books of the Association and issue a new membership to a purchaser and thereupon the old membership outstanding in the name of the seller shall be null and void.

The record owner of equitable title (or legal title if equitable title has merged) of each Townhouse shall be entitled to one membership in the Association, for himself and his family residing in the Townhouse, which membership shall be subject to all of the provisions of the Association's Articles of Incorporation, Bylaws, Management Agreement and this Declaration, as now in effect or duly adopted or amended.

Section 2. Every Owner of a Townhouse which is subject to assessment shall be a member of the Association. Membership shall be appurtenant to and may not be separated from ownership of any Townhouse which is subject to assessment.

Section 3. The Association shall have two classes of voting membership, as follows:

Class A. Class A members shall be all Owners, with the exception of the Declarant, and shall be entitled to one vote for each Townhouse owned. When more than one person holds an interest in any Townhouse, all such persons shall be members. The vote for such Townhouse shall be exercised as they among themselves determine, but in no event shall more than one vote be cast with respect to any Townhouse.

Class B. The Class B member(s) shall be the Declarant and shall be entitled to three (3) votes for each Townhouse owned or contemplated to be created and annexed to this Declaration and to the Association pursuant to Article XII. Initially, therefore, Declarant shall be entitled to cast its vote based upon 41 Townhouses. The Class B membership shall cease and be converted to Class A membership on the happening of either of the following events, whichever occurs earlier:

(a) Within 120 days after the total votes outstanding in the Class A membership equals the total votes outstanding in the Class B membership; or

(b) January 1, 1988.

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ARTICLE IV

Covenant for Maintenance Assessments

Section 1. Creation of the Lien and Personal Obligation of Assessments. The Declarant, for each Townhouse owned within the Properties, hereby covenants, and each Owner of any Townhouse by acquiring an ownership interest therein, whether or not it shall be so expressed in the conveying document, is deemed to covenant and agree to pay to the Association: (1) annual assessments or charges; and (2) special assessments as authorized by the Association's Board of Directors. Such assessment to be established and collected as provided herein.

The annual and special assessments, together with interest, costs of collection and reasonable attorneys' fees, shall be a charge on the land and shall be a continuing lien upon the Lot against which each such assessment is made. Each such assessment, together with interest, costs of collection and reasonable attorneys' fees, shall also be the personal obligation of the person who was the Owner of such Lot at the time when the assessment fell due. The personal obligation for the delinquent assessments shall not pass to his successors in title unless expressly assumed by them.

Section 2. Purpose of Assessments. The assessments levied by the Association shall be used exclusively to promote the health, safety and general welfare of the residents in the Properties and for the improvements and maintenance of the Common Area (to the extent required by this Declaration), and of the improvements situated thereon. The assessments shall cover the cost of water and sewer for the Common Area and the Lots and all repairs, replacement and maintenance of the Common Area (to the extent required by this Declaration) and all other authorized activities and facilities, including but not limited to, common yard maintenance, sprinkler system, swimming pool, spa, recreational facilities, exterior walls and exterior painting of Townhouses, costs of additional common facilities and improvements, and taxes and insurance, as may, from time to time, be authorized by the Association's Board of Directors. The assessments shall also cover a prorata share of all the costs and expenses of the Roadway Association.

The Board of Directors shall fix the amount of the annual assessment against each Lot at least thirty (30) days in advance of each annual assessment period. Written notice of the annual assessment shall be sent to every Owner subject thereto. The due dates shall be established by the Board of Directors. The Association shall, upon demand, and for a reasonable charge, furnish a certificate signed by a representative of the Association setting forth whether the assessments on a specified Lot have been paid. A properly executed certificate of the Association as to the status of assessments on a Lot is binding upon the Association as of the date of its issuance.

Section 3. Establishment of Assessment. Declarant and each Owner of a Townhouse covenants for themselves and their heirs,

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successors and assigns, that such Townhouse shall be subject to an assessment, in an amount to be determined by the Association and as permitted by this Declaration. The amount to be paid by the members of the Association shall be established annually by the Board of Directors.

The annual assessments provided for herein shall commence as to each Lot on the first day of the month following occupancy or conveyance of the first Lot to an Owner other than the Declarant. Prior to occupancy or conveyance of the first Lot, the Declarant shall be assessed and pay for each Lot which it owns and which has been annexed an amount equal to twenty-five percent (25%) of the regular assessment. In the event funds received by the Association are inadequate to pay for current operating and maintenance expenses, Declarant shall be responsible on a current basis for any deficit, excluding delinquencies in payment of assessments by other Owners, in the budget of the Association, up to but not exceeding the amount of the regular assessment. Declarant's reduced assessment shall at least pay costs of insurance and the reserve for replacement attributable to unsold Lots as determined by cost accounting principles. The period of reduced assessments shall terminate as to each unsold Lot when it is rented, leased, occupied or conveyed, whichever first occurs. The period of reduced assessments shall terminate as to the entire Properties no later than January 1, 1988. No assessment shall be levied against Lots in phases not yet annexed.

Section 4. Maximum Annual Assessment. Until January 1 of the year immediately following the conveyance of the first Lot to an Owner, the maximum annual assessment shall be eight hundred and forty (\$840.00) per Lot.

(a) From and after January 1 of the year immediately following the conveyance of the first Lot to an Owner, the maximum annual assessment may be increased effective January 1 of each year without a vote of the membership by ten percent (10%) per annum or a percentage proportionate to the increase, if any, of the Consumer Price Index published by the Department of Labor, Washington, D.C., or any successor agency or successor index, whichever is higher.

(b) From and after January 1 of the year immediately following the conveyance of the first Lot to an Owner, the maximum annual assessment may be increased for the next succeeding year above that permitted by Subsection (a) above by a vote of the members, provided that any such increase shall have the assent of two-thirds (2/3) of the votes of each class of members who are voting in person or by proxy, at a meeting duly called for this purpose, written notice of which shall be sent to all members not less than thirty (30) days nor more than sixty (60) days in advance of the meeting setting forth the purpose of the meeting. The limitations hereof shall not apply to any

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change in the maximum and basis of the assessments undertaken as an incident to a merger or consolidation in which the Association is authorized to participate under its Articles of Incorporation.

Section 5. Special Assessments. In addition to the annual assessments authorized above, in any assessment year the Association may levy a special assessment, applicable to that year only, for the purpose of defraying, in whole or in part, the cost of any construction, reconstruction, repair or replacement of a capital improvement upon the Common Area or upon property within the jurisdiction of the Roadway Association, including fixtures and personal property related thereto, provided that any such assessment shall have the assent of two-thirds (2/3) of the votes of each class of members who are voting in person or by proxy at a meeting duly called for this purpose, or at an annual meeting.

Section 6. Uniform Rate of Assessment. Both annual and special assessments must be fixed at a uniform rate for all Lots and may be collected on a monthly basis or other reasonable basis as determined by the Board.

Section 7. Effect of Nonpayment of Assessments; Remedies of the Association. Any assessment not paid within thirty (30) days after the due date shall, at the election of the Association, pay a "late charge" in a sum to be determined by the Association, but not to exceed \$10.00 per each monthly delinquent assessment, or ten percent (10%) of the amount of such assessment, whichever is higher. The Association may bring, without electing a remedy, any and all actions and seek any and all relief against the Owner personally obligated to pay the same, and/or to foreclose the lien against the Lot in a like manner as a mortgage of real property, and such Owner hereby expressly grants to the Association the power of sale in connection with said lien. No Owner may waive or otherwise escape liability for the assessments provided for hereby by non-use of the Common Area or abandonment of his Townhouse. In any action taken against an Owner to collect delinquent assessments, whether through lien foreclosure or otherwise, the Owner shall be obligated to pay, in addition to any and all other amounts required herein, all costs and all attorneys' fees incurred by the Association in such action.

Section 8. Subordination of the Lien to Mortgages. The lien of the assessments provided for herein shall be subordinate to the lien of any first mortgage or deed of trust. Sale or transfer of any Townhouse shall not affect the assessment lien. However, the sale or transfer of any Townhouse pursuant to mortgage foreclosure, deed of trust sale, or any proceeding in lieu thereof, shall extinguish the lien of such assessments as to payments which became due prior to such sale or transfer. No sale or transfer shall relieve such Townhouse from liability for any assessments thereafter becoming due or from the lien thereon.

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Section 9. Replacement Fund. The annual maintenance assessment shall include an amount for a replacement fund, which the Board of Directors determines to be adequate for the maintenance, repair and replacement of Common Area improvements and such amount shall be set aside as a pro rata portion of each installment of the regular maintenance assessments.

ARTICLE V

Architectural Control

Section 1. Except as set forth in Section 2 below, or as planned, placed, erected or maintained by the Developer, no building, fence, wall, patio cover, awning, antenna, or other structure shall be commenced, erected or maintained upon the properties, nor shall any exterior addition to, or change or alteration therein, be made until the plans and specifications showing the nature, kind, shape, height, materials and location of the same have been submitted to and approved in writing as to harmony of external design and location in relation to surrounding structures and topography by the Board of Directors of the Association, or by an Architectural Control Committee ("the Committee") appointed by the Board. In the event the Board, or the Committee, fails to approve or disapprove such design and location within thirty (30) days after said plans and specifications have been submitted to it, approval will not be required and this Article will be deemed to have been fully complied with.

Section 2. One or more outside antennas may be erected, placed or maintained on a Lot without the approval of the Board or the Committee, provided that it complies with the Architectural Control Guidelines promulgated by the Board or the Committee and is harmonious as to design and location in relation to surrounding structures and topography. An addition may also be made to each Townhouse in accordance with plans and specifications developed by Developer and filed with the Board or the Committee without the approval of the Board or the Committee, provided that the addition and the construction thereof comply with the Architectural Control Guidelines promulgated by the Board or the Committee and meet the requirements of the Building Code of the City of Glendale.

ARTICLE VI

Party Walls

The rights and duties of the Owners of residence units with respect to party walls shall be governed by the following:

(a) Each wall, including patio or balcony walls, which is constructed as part of the original construction of a residence unit, any part of which is placed on the dividing line between separate units, shall constitute a party wall. With respect to any such wall, each of the adjoining owners shall assume the burdens and be entitled to the benefits of these restrictive covenants, and, to the extent not inconsistent herewith, the general rules of law regarding party walls shall be applied thereto.

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(b) The cost of reasonable repair and maintenance of a party wall shall be shared by the adjoining owners of such wall in proportion to the use thereof, without prejudice, however, to the right of any Owner to call for a larger contribution from the adjoining Owner under any rule of law regarding liability for negligent or willful acts or omissions.

(c) In the event any such party wall is damaged or destroyed by some cause other than the act of one of the adjoining owners, his agents, tenants, licensees, guests or family (including ordinary wear and tear and deterioration from lapse of time), then, in such event, both such adjoining owners shall proceed forthwith to rebuild or repair the same to as good condition as formerly at their joint and equal expense.

(d) Notwithstanding any other provision of this Article, an Owner who, by his negligent or willful act, causes any party wall to be exposed to the elements shall bear the whole cost of furnishing the necessary protection against such elements.

(e) The right of any Owner to contribution from any other Owner under this Article shall be appurtenant to the land and shall pass to such Owner's successors in title.

(f) In addition to meeting the other requirements of these restrictive covenants and of any building code or similar regulations or ordinances, any Owner proposing to modify, make additions to or rebuild his residence unit in any manner which requires the extension or other alteration of any party wall, shall first obtain the written consent of the adjoining Owner. However, said written consent shall not be required for an Owner to construct an addition to his Townhouse in accordance with the plans and specifications promulgated by Developer and filed with the Board or the Architectural Control Committee.

(g) In the event of a dispute between Owners with respect to the repair or rebuilding of a party wall or with respect to the sharing of the cost thereof, then, upon written request of one of such Owners addressed to the Association, the matter shall be submitted to arbitration under such rules as may from time to time be adopted by the Association. If no such rules have been adopted, then the matter shall be submitted to three arbitrators, one chosen by each of the Owners and the third by the two so chosen, or, if the arbitrator cannot agree as to the selection of the third arbitrator within five (5) days, then by any Judge of the Superior Court of Maricopa County, Arizona. A determination of the matter signed by any two of the three arbitrators shall be binding upon the Owners, who shall share the cost of arbitration equally. In the event one party fails to choose an arbitrator within ten (10) days after personal receipt of a request in writing for arbitration from the other party, then said other party shall have the right and power to choose both arbitrators.

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(h) These covenants shall be binding upon the heirs and assigns of any Owners, but no person shall be liable for any act or omission respecting any party wall except such as took place while an Owner.

ARTICLE VII

Exterior Maintenance

Section 1. The Association shall provide exterior maintenance upon the Common Area and each Lot which is subject to assessment hereunder, as follows:

(a) The Association shall paint exterior building surfaces and masonry/block fences.

(b) The Association shall furnish maintenance, repair and replacement of all the Common Area as part of common expenses subject to the provisions of this Declaration, the Articles of Incorporation and the Bylaws. In addition thereto, the Association shall be responsible for repair, maintenance and replacement of masonry/ block walls on Lots, but shall not be responsible for any equipment thereon serving a Lot. Such equipment shall be maintained at the expense of the Owner. The Association shall not be responsible for exterior or interior glass surfaces, such being the responsibility of the Lot Owner.

Section 2. The cost of the maintenance, repair or replacement for which the Association is responsible under Section 1 above shall be assessed uniformly to all Owners in accordance with Article IV of this Declaration, except as provided in Section 3 of this Article VII.

Section 3. To the extent an Owner is legally responsible under Arizona law, the cost of any maintenance, repair or replacement which results from the negligence or willfulness of an Owner, an Owner's guest or the occupant of an Owner's Lot, shall be added to such Owner's regular assessment and shall be an assessment, lien and obligation of such Owner and shall become due and payable in all respects as provided in Article IV of this Declaration.

Section 4. For the purpose solely of performing the maintenance, repair and replacement authorized by this Article, the Association, through its duly authorized agents or employees, shall have an easement for maintenance, repair and replacement and the right, after reasonable notice to the Owner, to enter upon any Lot at reasonable hours.

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ARTICLE VIII

Interior and Other Maintenance

Each Owner shall be responsible for the upkeep and maintenance of the interior of his Townhouse and for the maintenance, repair and replacement of the roof, the individual patio or balcony, the back yard fence, the windows, the Private Yard and all landscaping within the Private Yard and Lot lines. All fixtures and equipment installed within the Private Yard boundary, Lot line or Townhouse, including utility lines, pipes, wires, conduits, air-conditioning, heating, and other systems shall be maintained and kept in repair by the Owner thereof. All termite control shall be the responsibility of the individual Owners.

ARTICLE IX

Insurance

Insurance shall be carried by the Association on the Property and shall be governed by the following provisions:

Section 1. Authority to Purchase. The Board shall purchase and maintain certain insurance upon the Property, including but not limited to the insurance described in Section 2 below, which insurance is to be purchased by the Association for the benefit of the Association, the Owners, and the First Mortgagees, as their interests may appear. Provisions shall be made for the issuance of certificates of endorsement to the First Mortgagee of any First Mortgage. Such policies and endorsements thereon, or copies thereof, shall be deposited with the Association. The Board shall deliver a copy of the policies or certificate of insurance, or by and through their agent advise the Owners of the coverage of said policies to determine which particular items are included within the coverage so that the Owners may insure themselves as they see fit if certain items are not insured by the Association. Without limiting the generality of the foregoing, it shall be each Owner's responsibility to provide for himself Owner's liability insurance, theft or other insurance covering personal property damage and loss, insurance for each Owner's personal liability, and such other insurance which is not carried by the Association as the Owner desires.

Section 2. Coverage. The Association shall maintain and pay for policies of insurance as follows:

A. A multi-peril type policy covering the entire Property providing, as a minimum, fire and extended coverage, and all other coverage in kinds and amounts customarily acquired or required for projects similar in construction, location and use, including but not limited to vandalism and malicious mischief, in an amount not less than one hundred percent (100%) of the insurable value (based upon replacement cost).

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B. A comprehensive policy of public liability insurance covering all of the Common Area and public ways in the Property in a minimum amount of at least One Million Dollars (\$1,000,000.00) per occurrence, for personal injury and/or property damage. Such insurance policy shall contain a "severability of interest" endorsement which shall preclude the insurer from denying the claim of a Owner because of the negligent acts of the Association and its agents or other Owners.

C. If the Project is located in an area identified by the Secretary of Housing and Urban Development as an area having special flood hazards, a "blanket" policy of flood insurance on the Project must be maintained in the amount of the outstanding principal balances of the First Mortgage loans on the Units comprising the Project or the maximum limit of coverage available under the National Flood Insurance Act of 1968, as amended, whichever is less.

D. The Association must obtain fidelity coverage against dishonest acts on the part of directors, managers, trustees, employees or volunteers responsible for handling funds belonging to or administered by the Association. The fidelity bond or insurance must name the Association as the named insured and shall be written to provide protection which is in no event less than one and one-half times the insured's estimated annual operating expenses and reserves. In connection with such coverage, an appropriate endorsement to the policy to cover any person who serves without compensation shall be added if the policy would not otherwise cover volunteers.

E. A workmen's compensation policy, if necessary to meet the requirements of law.

F. Such other insurance as the Board shall determine from time to time to be desirable.

Section 3. Provisions Required. The insurance policies purchased by the Association shall, to the extent possible, contain the following provisions:

A. The coverage afforded by such policies shall not be brought into contribution or proration with any insurance which may be purchased by Owner or First Mortgages.

B. There shall be no subrogation with respect to the Association, its employees, Owners and members of their household and their families and employees, or the Policy(ies) should name said persons as additional insureds.

C. A statement of the name of the insured shall be included in all policies, in form and substance similar to the following:

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FOUNTAIN SHADOWS HOMEOWNERS ASSOCIATION,
for the use and benefit of the individual
Owners (designated by name, if required).

D. A standard Mortgagee clause which must be endorsed to provide that any proceeds shall be paid to the Association for the use and benefit of First Mortgagees as their interest may appear, or which must be otherwise endorsed to fully protect the interest of First Mortgagees, their successors and assigns.

E. For policies of hazard insurance, a standard mortgagee clause shall provide that the insurance carrier shall notify the First Mortgagee named at least ten (10) days in advance of the effective date of any reduction in or cancellation of the policy.

F. Any "no other insurance" clause shall exclude insurance purchased by unit Owners or First Mortgagees.

Section 4. First Mortgagee Protection.

A. The Association shall provide each First Mortgagee with a letter wherein the Association agrees to give written notice to each First Mortgagee, or Servicer of a mortgage, or any entity or person designated by such First Mortgagee or Servicer whenever:

(1) Damage to a Unit covered by a First Mortgage exceeds \$10,000.00; and/or

(2) Damage to the Common Area and related facilities exceeds \$10,000.00.

Notwithstanding any contrary provision hereof, the Association shall have no duty to give written notices provided for herein to any First Mortgagee, unless such First Mortgagee shall deliver or mail to the Association a notice stating the address of the First Mortgagee to which such written notices are to be sent.

B. Each hazard insurance policy shall be written by a hazard insurance carrier which has a financing rating by Best's Insurance Reports of Class VI or better, or if such rating be discontinued, by a successor thereto or a similar such rating service.

C. Each insurance carrier must be specifically licensed or authorized by law to transact business within the State of Arizona.

D. First Mortgagees may pay overdue premiums, or may secure new insurance coverage on the lapse of a policy.

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with respect to any insurance required to be maintained by the Association as provided in this part, and First Mortgagees making expenditures therefor shall be owed immediate reimbursement by the Association.

Section 5. Non-Liability of Association/Board. Notwithstanding the duty of the Association to obtain insurance coverage as stated herein, neither the Association nor any Board member shall be liable to any Owner or any other party if any risks or hazards are not covered by insurance or if the amount of insurance is not adequate, and it shall be the responsibility of each Owner to ascertain the coverage and protection afforded by the Association's insurance and to procure and pay for such additional insurance coverage and protection the said Owner may desire.

Section 6. Premiums. Premiums upon insurance policies purchased by the Association shall be paid by the Association as a Common Expense, except that the amount of increase over any annual or other premium occasioned by the use, misuse, occupancy, or abandonment of a townhouse or its appurtenances, or of the Common Elements by an Owner, shall be assessed against that particular Owner.

Section 7. Insurance Claims. The Association, acting by and through its Board, is hereby irrevocably appointed agent for each Owner and for each holder of a First Mortgage or other lien upon a Lot, and for each Owner of any other interest in the Property, subject to the provisions contained herein, to adjust all claims arising under insurance policies purchased by the Association and to execute and deliver releases upon the payment of claims, and the Board has full and complete power to act for the Association in this regard.

Section 8. FNMA/GNMA or FHLMC. Notwithstanding any provision of this Article IX, if at any time any of the Lots are owned by or are covered by Mortgages which are held by the Federal National Mortgage Association ("FNMA"), the Government National Mortgage Association ("GNMA") or the Federal Home Loan Mortgage Corporation ("FHLMC") (or any successor to such entities which performs their present functions), the Board shall at all times carry all casualty, flood and liability insurance and a fidelity bond in such amounts and containing all provisions as are required from time to time by such entities or such successors, unless such coverage is unavailable or waived by them in writing.

ARTICLE X

Damage and Repair

If all or any part of the Property in which the Association owns an interest is damaged or destroyed by fire or other hazard, whether or not it shall be repaired or reconstructed, shall be determined in the following manner:

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Section 1. Common Elements. If the damaged property is part of the Common Elements or any property in which the Association owns an interest, it shall be repaired or reconstructed.

Section 2. Residence Units. In the event any townhouse is totally or substantially damaged or destroyed, the repair, reconstruction or replacement thereof shall be paid from the insurance loss proceeds.

Section 3. Insurance Proceeds. An undivided share of insurance proceeds on account of damage to Common Area shall be allocated to the Owners according to their membership in the Association. Proceeds, if any, on account of damage to Townhouses shall be held for the Owners of damaged Townhouses in proportion to the cost of repairing the damage suffered by each such Owner, which cost shall be determined by the Association. In the event a mortgagee endorsement has been issued as to a Townhouse, the share of the Owner shall be held in trust for the First Mortgagee and the Owner as their interest may appear.

Section 4. Manner of Disbursements. The proceeds from assessments and insurance shall be disbursed in the following manner:

A. That portion of the insurance proceeds, if any, representing damage to a townhouse shall be used to pay for the reconstruction and repair of said townhouse by disbursements in payment of the costs of such repair and reconstruction to the Owner, or, if there is a mortgage endorsement, then to the Owner and the First Mortgagee jointly.

B. The portion of insurance proceeds representing damage, the reconstruction and repair of which is the responsibility of the Association, shall be disbursed in payment of the costs of such repair and reconstruction in the manner required by the Board and upon approval of an architect qualified to practice in Arizona and employed by the Association to supervise the work.

Section 5. If the insurance proceeds are insufficient to pay all costs of repair and rebuilding, the Board shall levy a special assessment to make up any deficiency, which assessments shall be levied equally against all Owners. If the insurance proceeds exceed the costs of repair and reconstruction, then following completion of such repair and rebuilding, the excess shall be paid over to all Owners and their holders of first Mortgages as their respective interests may appear. Each payment to an Owner and his Mortgagee shall be by joint payee check or draft. The assessment provided for herein shall be secured by the lien provided for in this Declaration.

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ARTICLE XI

Condemnation

Section 1. If a portion of the Property should be taken by exercise of the power of eminent domain, or should be transferred and conveyed to a condemning authority in anticipation of such exercise, the entire award made as compensation for such taking, including, but without limitation, any amount awarded as severance damages, or the entire amount received and paid in anticipation of such taking, after deducting therefrom, in each case, reasonable and necessary costs and expenses, including, but without limitation, attorney's fees, appraiser's fees and court costs (which new amount is hereinafter in this Article referred to as the "Award") shall be paid to the Association, as trustee for all Owners. The Association shall, as soon as practicable, cause the Award to be utilized for the purpose of repairing, replacing and restoring the affected area, including, if the Association deems it necessary or desirable, the replacement of any Common Area improvements so taken or conveyed.

Section 2. If any Townhouse or portion thereof or the Common Area or any portion thereof is made the subject matter of any condemnation or eminent domain proceedings or is otherwise sought to be acquired by a condemning authority, the holder of any first Mortgage, with respect to any such Townhouse and the servicer of such Mortgage, will be entitled to timely written notice of such proceedings or proposed acquisition and no provision of any document establishing the project will entitle the Owner of a Townhouse or other party to priority over such mortgage with respect to the distribution of the proceeds of any award or settlement.

Section 3. If the cost of any repair and restoration shall exceed the amount of the Award, a special assessment shall be levied against the remaining Owners in an equal basis to the extent necessary to make up such deficiency. The special assessment provided for herein shall be secured by the lien provided for in Article IV, paragraph 1, of the Declaration.

ARTICLE XII

Annexation

Section 1. Notwithstanding any contrary provision of this Declaration, Declarant reserves the right to annex, in its sole discretion and without the consent of any other Owner or mortgagee, provided that the VA determines that the annexation is in accord with the general plan heretofore approved by them, at any time within five (5) years from the date of this Declaration, all or any portion of the following described real property to the Property pursuant to this Declaration:

See Exhibit A attached hereto and incorporated herein by this reference.

Nothing contained in this Declaration shall obligate Declarant to annex any additional phase, land or improvements. Effectuation of any such annexation shall take place when Declarant records a plat describing such Phase, together with a Declaration of Annexation describing the property to be annexed, referring to this Declaration by reference, setting forth the number and description of the Lots included within such phase. Thereafter, the property described in such Declaration of Annexation shall be deemed a part of this property. Upon completion of any such annexation, all Owners of Lots in any such annexed phase shall have those rights and obligations set forth in this Declaration, and shall be treated as if the entire project had been developed at the same time. Upon each such annexation, a new budget shall be prepared and the assessments shall be adjusted and levied as required, in accordance with this Declaration.

ARTICLE XIII

Use Restrictions

Section 1. The Properties are hereby restricted to residential dwellings for residential use, except for improvements within the Common Area. All buildings or structures erected upon said premises shall be of new construction and no building or structures shall be moved from other locations onto said premises, and no subsequent buildings or structures other than residence units, shall be built on any Lot where the builder theretofore programmed and constructed a Townhouse. No structures of a temporary character, trailer, basement, tent, shack, garage, barn or other out-building shall be used on any portion of the Properties at any time as a residence, either temporarily or permanently.

Section 2. Notwithstanding any provisions herein contained to the contrary, it shall be expressly permissible for the builder of a major portion of the development to maintain during the period of construction and sale of said Lots, upon such portion of the premises as such builder may choose, such facilities as in the sole opinion of said builder may be reasonably required, convenient or incidental to the construction and sale of said Lots, including but without limitation, a business office, storage area, construction yards, signs, model units and sales office.

Section 3. No animals of any kind shall be raised, bred, or kept in any townhouse or in or upon any Common Area, except that a combination of not more than two (2) dogs, cats or household pet may be kept in each townhouse, subject to uniform rules and regulations of the Association, and provided that no animal shall be kept, bred or maintained for any commercial purpose. All pets must be leashed or otherwise contained when outside the townhouse and shall not be allowed to run loose. Any Owner keeping an animal on the Property shall indemnify and hold harmless the Association for any loss, damage, cost or liability which the Association may sustain as a result of the presence of such animal, whether or not such animal's presence has been approved by the Association. Notwithstanding the generality of the foregoing, after (i) repeated violations

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of this subparagraph, (ii) ten (10) days' prior written notice to the Owner of such animal(s), and (iii) an opportunity for such Owner to have a hearing before the Board, such animal(s) may be taken from such Owner and given to any local organization whose function is to deal with stray or abandoned animals.

Section 4. No advertising signs (except one of not more than five (5) square feet "for rent" or "for sale" sign per Parcel), billboards, unsightly objects, or nuisances shall be erected, placed or permitted to remain on the premises, nor shall the premises be used in any way or for any purpose which may endanger the health or unreasonably disturb the Owner of any Townhouse or any resident thereof. Further, no business activities of any kind whatsoever shall be conducted in any building or on any portion of the premises; provided further, however, the foregoing covenants shall not apply to the business activities, signs and billboards, or the construction and maintenance of buildings, if any, of the builder, its agents and assigns during the construction and sale period, and of the Association, its successors and assigns, in the furtherance of its powers and purposes, as herein set forth.

Section 5. All clotheslines, equipment, garbage cans, service yards, woodpiles or storage piles shall be kept screened by adequate planting or fencing so as to conceal them from view of neighboring Lots and streets. All rubbish, trash or garbage shall be regularly removed from the premises, and shall not be allowed to accumulate thereon. All clotheslines shall be confined to patio or balcony areas.

Section 6. No vehicle of any type, boat, camper, motorcycle, bicycle, tricycle or other wheeled toy shall be parked or left unattended on any Common Area or Lot except for pick-up or delivery purposes or as permitted by the Board of Directors in uniform regulations.

The Board of Directors may from time to time permit or restrict vehicular parking on the Common Areas. Vehicles parked in restricted areas may be towed away at the vehicle Owner's expense, including the storage charges.

No vehicle of any type which is abandoned or inoperable shall be stored or kept on any Lot, parking area, street or drive within this subdivision in such a manner as to be seen from any other Lot or from any streets, drives or alleyways within this subdivision.

Section 7. Except in the individual patio areas, no planting or gardening shall be done, and no hedges shall be erected or maintained upon the Lots, except such as are installed in accordance with the initial construction of the buildings located thereon or as approved in accordance with Architectural Control provisions in Article V hereof. No fences or walls shall be erected or maintained on any of the Properties without approval of the Architectural Control Committee as provided in this Declaration.

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Section 8. The Common Area shall remain undivided, it being agreed that this restriction is necessary in order to preserve the rights of the Owners with respect to the operation and management of the Common Area. No Owner shall have the right to bring an action for partition, or to subdivide or partition his own Lot or the common area.

Section 9. Except as set forth in Article V hereof, no exterior television, radio, CB or other antennas of any sort shall be erected, placed, allowed or maintained upon any portion of the improvements to be located upon the Properties, nor upon any structure situated upon said real property.

Section 10. No noxious or offensive activity shall be carried on upon any Lot or any part of the Properties, nor shall anything be done thereupon which may be, or may 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.

Section 11. The rights and duties with respect to sanitary sewer and water, cable television, electricity, gas and telephone lines and facilities shall be governed by the following:

(a) Whenever water, sanitary sewer, electricity, gas, cable television or telephone connections, lines, cables or any portion thereof, are or have been installed within the Properties, the Owner of any Lot or the Association in the case of the Common Area, served by said installation shall have the right, and are hereby granted an easement to the extent necessary therefor, to enter upon or have a utility company enter upon any portion of the Properties in which said installations lie, to repair, replace and generally maintain said installations.

(b) The right granted in subparagraph (a) above shall be only to the extent necessary to entitle the Owner or Association serviced by said installation to its full and reasonable use and enjoyment, and provided further that any one exercising said right shall be responsible for restoring the surface of the easement area so used to its condition prior to such use.

(c) In the event of a dispute between Owners with respect to the repair or rebuilding of said connections, or with respect to the sharing of the cost thereof, upon written request of one of such Owners addressed to the Association, the matter shall be submitted to its Board of Directors, who shall arbitrate and decide the dispute and the decision of the Board shall be final and conclusive on the parties.

Section 12. All Owners and occupants shall abide by the Association's Articles of Incorporation and Bylaws and any rules and regulations adopted by the Association, as amended from time to time.

Section 13. No Lot shall be leased by an Owner, nor landlord-tenant relationship established unless such lease or landlord-tenant relationship is in writing and the lessee or tenant has agreed in writing that the lease is subject in all respects to the provisions of this Declaration, the Articles of Incorporation and the Bylaws of the Association, and all rules and regulations duly adopted by the Association, as amended from time to time. Said writing shall provide that any failure of the lessee or tenant to comply with the terms of such documents or rules and regulations shall be a default under the lease. No lease shall be permitted for transient or hotel purposes. Transient or hotel purpose shall be defined as a lease or rental of less than thirty (30) consecutive days.

ARTICLE XIV

Duties and Powers of the Association

In addition to the duties and powers enumerated in its Articles of Incorporation and Bylaws, or elsewhere provided for herein, and without limiting the generality thereof, the Association shall:

(a) Own, maintain and otherwise manage all of the Common Area and all facilities, improvements and landscaping thereon, and all other property acquired by the Association.

(b) Pay any real and personal property taxes and other charges assessed against the Common Area.

(c) Have the authority to obtain, for the benefit of all of the Lots and the Common Area, all water, gas, sewer and electric service and refuse collection and to pay for such services to the extent that said services are not individually metered or otherwise directly billed to the individual Lots.

(d) Grant easements where necessary for utilities and sewer facilities over the Common Area to serve said area and the Lots.

(e) Have the authority to employ a manager or other persons and to contract with independent contractors or managing agents to perform all or any part of the duties and responsibilities of the Association. The Association, through its Board of Directors, shall have the express authorization, right and power to enter into one or more management agreements with third parties in order to facilitate efficient operation of all buildings, improvements

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and Common Area. It shall be the primary purpose of such management agreements to provide for the administration, management, repair and maintenance of said real property, all improvements thereon designated as common elements, and the exterior walls of the Townhouses; and to assess, collect and apply the management and common expenses, and to enforce the Declaration of Covenants, Conditions and Restrictions. The terms of said management agreements shall be as determined by the Board of Directors to be in the best interests of the Association, and shall be subject to the Articles of Incorporation, the Bylaws and this Declaration of Covenants, Conditions and Restrictions affecting said property. Notwithstanding the above, any and all such management agreements shall be written for a term not to exceed one year, subject to renewal by agreement of the parties for successive one year periods, and shall further provide that said management agreement may be cancelled and terminated by the Board of Directors for any reason whatsoever upon giving thirty (30) days written notice of such cancellation and termination to the managing entity. The Board of Directors shall make all necessary arrangements for continuity of management and maintenance prior to the expiration of the term of any prior management agreements or the termination of the same. Any and all management agreements shall be entered into with a responsible party or parties having considerable experience with the management of a project of this type.

Each Owner shall be bound by the terms and conditions of all management agreements entered into by the Owner's Association. A copy of all management agreements shall be available to each Owner upon request.

(f) Contract for and pay fire, casualty, liability and other insurance insuring the Association, its property and its Board of Directors and Owners.

(g) Contract for and pay maintenance, gardening, utilities, materials and supplies, and services relating to the Common Area, and to employ personnel necessary for the operation of the project, including legal and accounting services provided, however, that any such service contract shall be limited to a duration of one (1) year unless a longer term is approved by a majority of the members of the Association.

(h) Delegate its powers to its committees, officers and employees.

(i) Provide for maintenance, repair and replacement of all items as provided for in Article VII hereof.

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(j) At the request of the public body authorized to accept such and with the approval of two-thirds (2/3) of each class of members, dedicate those portions of the Common Area which are used for vehicular ingress and egress as public streets.

(k) Be a member of the Roadway Association and pay a prorata share of all costs and expenses of the Roadway Association.

ARTICLE XV

Easements

Section 1. Blanket Easement for Utilities. There is hereby created a blanket easement upon, across, over and under the Common Area for ingress, egress, installation, replacing, repairing and maintaining all utilities, including but not limited to, water, sewers, gas, telephones and electricity, irrigation facilities and a cable television system. By virtue of this easement, it shall be expressly permissible for the providing electrical, utility, cable and/or telephone company to erect and maintain the necessary poles and other necessary equipment on said property and to affix and maintain cable, electrical and/or telephone wires, circuits and conduits on, above, across and under the roofs and exterior walls of Townhouses. Notwithstanding anything to the contrary contained in this paragraph, no sewers, electrical lines, water lines or other utilities may be installed or relocated on the Properties, except as initially programmed and approved by the Developer of said Properties or as approved by the Association's Board of Directors. These easements shall in no way affect any other recorded easements on the Properties.

Section 2. Easement for Encroachment Due to Construction. Each Townhouse and the Common Area shall be subject to an easement for encroachments created by construction, settling and overhangs and balconies, as designed or constructed and for the maintenance of same, so long as it stands, shall and does exist. In the event a Townhouse is partially or totally destroyed and then rebuilt, the Owners of all Lots agree that minor encroachments on parts of the adjacent Townhouse or Common Area due to construction shall be permitted and that a valid easement for said encroachment and the maintenance thereof shall exist.

Section 3. Reciprocal Easements. There shall be reciprocal beneficial easement over the Common Areas for the benefits of all Owners of Lots on the property, including additions and annexations thereto pursuant to Article XII.

ARTICLE XVI

Private Yards

Section 1. The Lots include Private Yards, which are defined as the enclosed portions of the Lot excluding the building thereon.

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Section 2. The rights of the respective parties with respect to the use of Private Yards, which may abut a wall of the dwelling unit on the adjoining Lot ("abutting dwelling unit" herein), shall be as follows:

(a) Nothing shall be erected, planted or maintained within such Private Yard area which might impede or interfere with any necessary and reasonable maintenance, repair or restoration of any structural wall located on or adjacent to the abutting dwelling unit.

(b) The Owner of the Private Yard shall not drive any nails, screws, bolts or other objects of any kind whatsoever into, nor attach any object to the wall of the abutting dwelling unit.

(c) The Owner of the abutting dwelling unit shall have the responsibility for painting and repairing any structural wall owned by him and facing onto the Private Yard (to the extent such repair and painting is not the obligation of the Association), provided, however, that in the case of damage to such a wall caused by the Owner of the Private Yard, his family, guests, servants, agents, or invitees, such repairs shall be made at the expense of the Owner of the Private Yard. If an action at law be required to enforce payment for such repairs, the prevailing party shall be entitled to recover the costs of suit, including reasonable attorneys' fees. No repairs, additions, alterations and/or restoration of any such structural wall shall be commenced, erected or maintained or the paint colors therefor selected until the plans and specifications, showing the nature, kind, shape, height, materials, location, color and approximate cost thereof shall have been approved by the Architectural Control Committee.

After completion of such repairs, additions, alterations or restoration, the Owner of the abutting dwelling unit shall restore the Private Yard to the condition in which it existed immediately prior to the commencement of such work.

(d) The Owner of the abutting Lot shall have the right and an easement of drainage over, across and upon the Private Yard for water resulting from the normal usage of the adjoining Lot and the Owner of the Private Yard shall maintain the easement area in such manner as will not interfere with such drainage.

Section 3. The Owner and occupants of a Townhouse may use the Private Yard in any reasonable manner not prohibited by this Declaration, the Articles of Incorporation and Bylaws of the Association, the rules and regulations adopted by the Board of Directors of the Association, all as amended from time to time, or by law.

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Section 4. All boundaries of Private Yards, save those which are structural walls of dwelling units, will be fenced by Developer. No fence shall be moved or removed at any time, and any changes in size or color, shall be subject to review by the Architectural Control Committee pursuant to Article V hereof.

Section 5. Each Owner shall keep his Private Yard and all improvements therein or thereon, in good order and repair and free of debris, including but not limited to the seeding, watering and mowing of all lawns, and the pruning and cutting of all trees and shrubbery, all in a manner and with such frequency as is consistent with good property management. In the event an Owner shall fail to maintain his Private Yard and the improvements located thereon, as provided herein, the Association, after notice to the Owner and approval by vote of the Board of Directors, shall have the right to enter upon said Private Yard to correct drainage and to repair, maintain and restore the Private Yard, fences and any other improvements erected thereon. All costs related to such correction, repair or restoration shall become a lien upon such Owner's Lot, and such lien may be enforced in the same manner as an assessment levied in accordance with Article IV hereof.

Section 6. The Association shall have the right at all reasonable times to enter into any Private yard for the purpose of carrying out its obligations of maintenance, repair and replacement.

ARTICLE XVII

General Provisions

Section 1. Attorneys' Fees. In the event the Association employs an attorney or attorneys to enforce the collection of any amounts due pursuant to this Declaration or in connection with any lien provided for herein, or the foreclosure thereof, or to 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.

Section 2. Enforcement. The covenants, restrictions, reservations and conditions contained herein shall run with the land and shall be binding upon all persons purchasing, leasing, subleasing, occupying, owning or otherwise having an interest in any Lot on said property, their heirs, executors, administrators, successors, grantees and assigns. After the date on which this instrument has been recorded, these covenants, restrictions, reservations and conditions may be enforced by the Association or its Board of Directors, which shall have the right and duty to enforce the same and expend Association monies in pursuance thereof, and also may be enforced by the Owner of any Lot. Any lien, liability or obligation arising as the result of a breach of said covenants, restrictions, reservations and conditions shall be binding upon and effective

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against any Owner of said premises, other than one whose title thereto is acquired by foreclosure of a mortgage or deed of trust, and sheriff's sale or equivalent proceedings, who shall take title to said premises free and clear of the lien hereof for all said charges pursuant to the provisions of this Declaration that have accrued up to the time of said foreclosure, and subject to the lien hereof for all said charges that shall accrue subsequent to the foreclosure, and provided also that the breach of any of said covenants, restrictions, reservations and conditions may be enjoined, abated or reviewed by appropriate proceedings, notwithstanding the lien or existence of any such mortgage or deed of trust. All instruments of conveyance of any interest of all or any part of said Lots shall contain reference to this instrument and shall be subject to the covenants, restrictions, reservations and conditions herein as fully as though the terms and conditions of this instrument were therein set forth in full. The terms and conditions of this instrument shall be binding upon all persons affected by its terms, whether or not express reference is made to this instrument in any such instrument of conveyance. Enforcements shall be by proceedings at law or in equity against any person or persons violating or attempting to violate any covenant either to restrain violation or to recover damages.

Section 3. Saving Clause. The invalidity of any one or more phrases, sentences, clauses, paragraphs or sections hereof shall not affect the remaining portions of this instrument or any part thereof, all of which are inserted conditionally on their being held valid in law and in the event that one or more of the phrases, sentences, clauses, paragraphs or sections contained herein should be invalid or should operate to render this agreement invalid, this agreement shall be construed as if such invalid phrase or phrases, sentence or sentences, clause or clauses, paragraph or paragraphs, section or sections had not been inserted. In the event that any provision or provisions of this instrument appear to be violative of the Rule against Perpetuities, such provision or provisions shall be construed as being void and of no effect as of twenty-one (21) years after the death of the last surviving incorporator of FOUNTAIN SHADOWS HOMEOWNERS ASSOCIATION or twenty-one (21) years after the death of the last survivor of all of said incorporators' children or grandchildren who shall be living at the time this instrument is executed, whichever is the later.

Section 4. Parking. Each Townhouse will contain a two-car garage and the Owner or occupants of the Townhouse shall park their vehicles in said garage and not in the driveway or on the Common Area, except as otherwise permitted by this Declaration or by Uniform rules and regulations promulgated from time to time by the Board of Directors of the Association.

Section 5. Gender. Wherever the context of this document requires, words used in the masculine gender include the feminine and neuter, the singular number the plural and the plural the singular.

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Section 6. Amendment. The covenants and restrictions of this Declaration shall run with and bind the land for a term of twenty (20) years from the date this Declaration is recorded, after which time they shall be automatically extended for successive periods of ten (10) years. This Declaration may be amended by an instrument signed by the Owners of not less than two-thirds (2/3) of the Townhouses. Any amendment must be recorded in the Maricopa County Recorder's Office.

As to the Federal National Mortgage Association (FNMA), the Government National Mortgage Association (GNMA), and the Federal Home Loan Mortgage Corporation (FHLMC), so long as may be required to fully amortize any mortgage owned by FNMA, GNMA and FHLMC on any of the Lots; and as to the Federal Housing Administration (FHA), Veterans Administration (VA) or the Federal Home Loan Mortgage Corporation (FHLMC), so long as there is a Class B membership outstanding, no amendment shall be made which would be deemed to be in conflict with, or contrary to, the terms of any promissory note, mortgage, regulatory agreements or document executed by the Association or any of the Owners of residence units for the purpose of obtaining insurance or financing involving FNMA, FHA, VA, GNMA or FHLMC without obtaining written approval and consent of FNMA, FHA, VA, GNMA or FLHMC.

Section 7. Annexation. Additional residential property and Common Area may be annexed to the Properties with the consent of two-thirds (2/3) of each class of members.

Section 8. FHA/VA Approval. As long as there is a Class B membership, the following actions will require the prior approval of the Federal Housing Administration or the Veterans Administration: Annexation of additional properties, dedication of Common Area, and amendment of this Declaration of Covenants, Conditions and Restrictions.

ARTICLE XVIII

Fountain Shadows Roadway Association

Section 1. Membership in the Roadway Association shall be limited to the Association and the Fountain Place Homeowners' Association.

Section 2. Membership in the Roadway Association cannot be abandoned or terminated for any reason whatsoever.

Section 3. The Roadway Association shall insure, maintain, repair and replace Diana Avenue, a private street, which runs east-west between 67th Avenue and 69th Avenue in the City of Glendale, State of Arizona, and 68th Avenue, a private street, which runs north-south between Diana Avenue and Butler Drive, in the City of Glendale, State of Arizona. The costs and expenses incurred and to be incurred by the Roadway Association shall be billed to the members in prorata shares and shall be paid promptly.

WHEN RECORDED MAIL TO:

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Lars O. Lagerman
PAVILACK, SPACK & MULCHAY, P.C.
6900 E. Camelback Rd.
Suite 800
Scottsdale, AZ
85251

SECOND AMENDMENT TO DECLARATION OF
COVENANTS, CONDITIONS AND RESTRICTIONS
FOR MOD RSTR

FOUNTAIN SHADOWS

RECORDED IN OFFICIAL RECORDS OF MARICOPA COUNTY, ARIZONA	
JUL 31 '84 - 11 30	
BILL HENRY, COUNTY REC'D	
FEE	5 ⁰⁰ PGS 3 P.S.

The undersigned, owner of that certain real property situated in Maricopa County, State of Arizona, to-wit:

FOUNTAIN SHADOWS UNIT I, according to a plat thereof recorded in the Office of the Maricopa County Recorder in Book 250 of Maps, at page 48.

WHEREAS, a certain Declaration of Covenants, Conditions and Restrictions has been placed on said property and has been recorded on April 21, 1983, at No. 83-146154 and an Amendment to Declaration of Covenants, Conditions and Restrictions has been recorded on December 2, 1983, at No. 83-484281, with the Maricopa County Recorder;

WHEREAS, as part of said Declaration of Covenants, Conditions and Restrictions, as amended, the right to amend is granted to the Owners of not less than three-fourths (3/4) of the Townhouses;

WHEREAS, the undersigned represents the Owners of not less than three-fourths (3/4) of the Townhouses; and

WHEREAS, the undersigned is desirous of amending said Declaration of Covenants, Conditions and Restrictions, as amended.

NOW, THEREFORE, the Declaration of Covenants, Conditions and Restrictions for Fountain Shadows recorded on April 21, 1983, at No. 83-146154 and the Amendment to Declaration of Covenants, Conditions and Restrictions recorded on December 2, 1983, at No. 83-484281, with the Maricopa County Recorder, shall be amended as follows:

1. Delete Article XVIII and substitute therefor the following:

ARTICLE XVIII

Fountain Shadows Roadway Association

Section 1. Membership in the Roadway Association shall be limited to the Association and other homeowners or condominium associations formed within the legally described areas as shown in Exhibit "B" attached hereto and incorporated herein by this reference.

Section 2. Membership in the Roadway Association cannot be abandoned or terminated for any reason whatsoever.

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Section 3. The Roadway Association shall insure, maintain, repair and replace Diana Avenue, a private street, which runs east-west between 67th Avenue and 69th Avenue in the City of Glendale, State of Arizona, and 68th Avenue, a private street, which runs north-south between Diana Avenue and Butler Drive, in the City of Glendale, State of Arizona. The costs and expenses incurred and to be incurred by the Roadway Association shall be billed to the members in prorata shares and shall be paid promptly.

Section 4. The costs and expenses of the Roadway Association billed to the Association and its other homeowners or condominium association members shall be considered common expenses of said associations and be a part of the regular assessments levied against their respective members.

2. All articles, sections and subparagraphs not expressly amended by this Amendment shall continue in full force and effect with no changes therein.

IN WITNESS WHEREOF, the undersigned, being the Declarant herein, has hereunto set its hand and seal this 24th day of July, 1984.

NBS DEVELOPMENT CORPORATION, an Arizona corporation

By Mark Nickerson
Its President

STATE OF ARIZONA)
County of Maricopa) ss.

On this, the 24th day of July, 1984, before me, the undersigned Notary Public, personally appeared Mark Nickerson, who acknowledged himself to be the President of NBS DEVELOPMENT CORPORATION, an Arizona corporation, and that he, as such officer, being so authorized, executed the foregoing instrument for the purposes therein contained, by signing the name of the said corporation by himself as such officer.

WITNESS my hand and seal.

Marjorie Smith
Notary Public

My Commission Expires:

April 4, 1985

(e) Have the authority to employ a manager or other persons and to contract with independent contractors or managing agents to perform all or any part of the duties and responsibilities of the Association. The Association, through its Board of Directors, shall have the express authorization, right and power to enter into one or more management agreements with third parties in order to facilitate efficient operation of all buildings, improvements and Common Area. It shall be the primary purpose of such management agreements to provide for the administration, management, repair and maintenance of said real property, all improvements thereon designated as Common Areas, and the exterior walls of the Townhouses; and to assess, collect and apply the management and common expenses, and to enforce the Declaration of Covenants, Conditions and Restrictions. The terms of said management agreements shall be as determined by the Board of Directors to be in the best interests of the Association, and shall be subject to the Articles of Incorporation, the Bylaws and this Declaration of Covenants, Conditions and Restrictions affecting said property. Notwithstanding the above, any and all such management agreements shall be written for a term not to exceed one year, subject to renewal by agreement of the parties for successive one year periods, and shall further provide that said management agreement may be cancelled and terminated by the Board of Directors for any reason whatsoever upon giving thirty (30) days written notice of such cancellation and termination to the managing entity. The Board of Directors shall make all necessary arrangements for continuity of management and maintenance prior to the expiration of the term of any prior management agreements or the termination of the same. Any and all management agreements shall be entered into with a responsible party or parties having considerable experience with the management of a project of this type.

Each Owner shall be bound by the terms and conditions of all management agreements entered into by the Owner's Association. A copy of all management agreements shall be available to each Owner upon request.

6. Delete section 6 of Article XVII and substitute therefor the following:

Section 6. Amendment. The covenants and restrictions of this Declaration shall run with and bind the land for a term of twenty (20) years from the date this Declaration is recorded, after which time they shall be automatically extended for successive periods of ten (10) years. This Declaration may be amended by an instrument signed by the Owners of not less than three-fourths (3/4) of the Townhouses. Any amendment must be recorded in the Maricopa County Recorder's Office.

As to the Federal National Mortgage Association (FNMA), the Government National Mortgage Association (GNMA), and the Federal Home Loan Mortgage Corporation (FHLMC), so long as may be required to fully amortize any mortgage owned by FNMA, GNMA and FHLMC on any of the Lots; and as to the Federal Housing Administration (FHA), Veterans Administration (VA) or the Federal Home Loan Mortgage Corporation (FHLMC), so long as there is a Class B membership outstanding, no amendment shall be made which would be deemed to be in conflict with, or contrary to, the terms of any promissory note, mortgage, regulatory agreements or document executed by the Association or any of the Owners of residence units for the purpose of obtaining insurance or financing involving FNMA, FHA, VA, GNMA or FHLMC without obtaining written approval and consent of FNMA, FHA, VA, GNMA or FLHMC.

7. Delete section 1 of Article XVIII and substitute therefor the following:

Section 1. Membership in the Roadway Association shall be limited to the Association, Fountain Place One Condominium Association and Fountain Place Two Homeowners' Association, its successors and assigns.

8. Delete section 4 of Article XVIII and substitute therefor the following:

Section 4. The costs and expenses of the Roadway Association billed to the Association, the Fountain Place One Condominium Association and Fountain Place Two Homeowners' Association shall be considered common expenses of said associations and be a part of the regular assessments levied against their respective members.

9. All articles, sections and subparagraphs not expressly amended by this Amendment shall continue in full force and effect with no changes therein.

IN WITNESS WHEREOF, the undersigned, being the Declarant herein, has hereunto set its hand and seal this 18th day of November, 1983.

NBS DEVELOPMENT CORPORATION, an Arizona corporation

By Mark M. Huber
Its President

83 484281

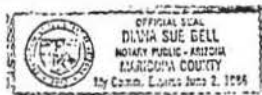
STATE OF ARIZONA }
County of Maricopa } ss.

On this, the 18th day of November, 1983, before me, the undersigned Notary Public, personally appeared Mark Tubbs, who acknowledged himself to be the President of NBS DEVELOPMENT CORPORATION, an Arizona corporation, and that he, as such officer, being so authorized, executed the foregoing instrument for the purposes therein contained, by signing the name of the said corporation by himself as such officer.

WITNESS my hand and seal.

Diana Sue Bell
Notary Public

My Commission Expires:



which right Declarant hereby reserves to Developer. This reservation of right shall end upon conveyance of the last Lot described herein (or as annexed in accordance with Article XII hereof), or April 15, 1990 whichever first occurs.

3. Delete Section 3 of Article IV and substitute therefor the following:

Section 3. Establishment of Assessment. Declarant and each Owner of a Townhouse covenants for themselves and their heirs, successors and assigns, that such successors and assigns, that such Townhouse shall be subject to an assessment, in an amount to be determined by the Association and as permitted by this Declaration. The amount to be paid by the members of the Association shall be established annually by the Board of Directors.

The annual assessments provided for herein shall commence as to each Lot on the first day of the month following occupancy or conveyance of the first Lot to an Owner other than the Declarant. Subsequent to occupancy or conveyance of the first Lot, the Declarant shall be assessed and pay for each Lot which it owns and which has been annexed an amount equal to twenty-five percent (25%) of the regular assessment. In the event funds received by the Association are inadequate to pay for current operating and maintenance expenses, Declarant shall be responsible on a current basis for any deficit, excluding delinquencies in payment of assessments by other Owners, in the budget of the Association, up to but not exceeding the amount of the regular assessment. Declarant's reduced assessment shall at least pay costs of insurance and the reserve for replacement attributable to unsold Lots as determined by cost accounting principles. The period of reduced assessments shall terminate as to each unsold Lot when it is rented, leased, occupied or conveyed, whichever first occurs. The period of reduced assessments shall terminate as to the entire Properties no later than January 1, 1988. No assessment shall be levied against Lots in phases not yet annexed.

4. Delete Section 1 of Article X and substitute therefor the following:

Section 1. Common Areas. If the damaged property is part of the Common Areas or any property in which the Association owns an interest, it shall be repaired or reconstructed.

5. Delete subparagraph (e) of Article XIV and substitute therefor the following:

TICOR TITLE INSURANCE COMPANY

AMENDMENT TO DECLARATION OF
COVENANTS, CONDITIONS AND RESTRICTIONS
FOR

83 484281

FOUNTAIN SHADOWS

MOD RSTR

The undersigned, owner of that certain real property situated in Maricopa County, State of Arizona, to-wit:

FOUNTAIN SHADOWS UNIT I, according to a plat thereof recorded in the Office of the Maricopa County Recorder in Book 250 of Maps, at page 48.

WHEREAS, a certain Declaration of Covenants, Conditions and Restrictions has been placed on said property and has been duly recorded on April 21, 1983, at No. 83-146154 with the Maricopa County Recorder's office;

WHEREAS, as part of said Declaration of Covenants, Conditions and Restrictions the right to amend is granted to the Owners of not less than two-thirds (2/3) of the Townhouses;

WHEREAS, the undersigned represents the owners of not less than two-thirds (2/3) of the Townhouses; and

WHEREAS, the undersigned is desirous of amending said Declaration of Covenants, Conditions and Restrictions.

NOW, THEREFORE, the Declaration of Covenants, Conditions and Restrictions for Fountain Shadows recorded on April 21, 1983, at No. 83-146154 with the Maricopa County Recorder's office shall be amended as follows:

1. Delete Section 2 of Article I and substitute therefor the following:

Section 2. "Common Area" within FOUNTAIN SHADOWS shall be those areas designated "Common Areas" or Tract A and B as shown on the Plat. Tract B has been or will be conveyed to the Association. Tract A has been or will be conveyed to the Roadway Association. All "Common Areas" shall be owned by the Association and the Roadway Association at the time of the conveyance of the first Townhouse.

2. Delete subparagraph (f) of Section 1 of Article II and substitute therefor the following:

(f) The right of Developer (and its sales agents and representatives) to the reasonable use of the Common Areas for display, sales, leasing and exhibit purposes,

7350A-6

RECORDED IN OFFICIAL RECORDS OF MARICOPA COUNTY, ARIZONA
DEC 2 - '83 - 2 00
BILL HENRY, COUNTY RECORDER
FEE 5.00 PGS 5

1/2
When Recorded Mail To:
Fountain Shadows HOA
16814 N. 33rd Drive
Phoenix, AZ 85023



OFFICIAL RECORDS OF
MARICOPA COUNTY RECORDER
HELEN PURCELL

96-0699328 10/01/96 03:44

ABBEY 1 OF 2

THIRD AMENDMENT TO DECLARATION OF
COVENANTS, CONDITIONS AND RESTRICTIONS
FOR
FOUNTAIN SHADOWS HOMEOWNERS ASSOCIATION

The undersigned is owner of that certain real property situated in Maricopa County, State of Arizona, to wit:

FOUNTAIN SHADOWS UNIT I AND FOUNTAIN SHADOWS UNIT II, according to a plat thereof recorded in the Office of the Maricopa County Recorder in Box 250 of Maps, at page 48.

WHEREAS, a certain Declaration of Covenants, Conditions and Restrictions has been placed on said property and has been recorded on April 21, 1983, at No. 83-146154 and an Amendment to Declaration of Covenants, Conditions and Restrictions has been recorded on December 2, 1983, at No. 83-484281, with the Maricopa County Recorder, and a Second Amendment to the Declaration of Covenants, Conditions and Restrictions has been recorded on July 31, 1984, at No. 84-332750, with the Maricopa County Recorder;

WHEREAS, as part of said Declaration of Covenants, Conditions and Restrictions, as amended, the right to amend is granted to the Owners of not less than three-fourths (3/4) of the Townhouses;

WHEREAS, the undersigned represents the Owners of not less than three-fourths (3/4) of the Townhouses; and

WHEREAS, the undersigned is desirous of amending said Declaration of Covenants, Conditions and Restrictions, as amended.

NOW, THEREFORE, the Declaration of Covenants, Conditions and Restrictions for Fountain Shadows recorded on April 21, 1983, at No. 83-146154 and the Amendment of the Declaration of Covenants, Conditions and Restrictions recorded on December 2, 1983, at No. 83-146154, with the Maricopa County Recorder, and the Second Amendment to Declaration of Covenants, Conditions and Restrictions recorded on July 31, 1984, at No. 84-332750, with the Maricopa County Recorder, shall be amended as follows:

1. In Article IV, Section 2, Paragraph 2, delete the words "the due dates shall be established by the Board of Directors.", and substitutes thereof the following: "The annual assessment shall be divided into twelve (12) equal monthly assessments which shall be due on the first day of each month.

2. Delete Article IV, Section 7, and substitute therefore the following:

Section 7. Effect of Nonpayment of Assessments; Remedies of the Association. Any assessment not paid within fifteenth (15) after the date due shall, at the election of the Association, pay a "late charge" in a sum to be determined by the Association, but not to exceed \$10.00 per each monthly delinquent assessment, or ten percent (10%) of the amount of such assessment, whichever is higher. Said assessments are due on the first day of each month and considered to be delinquent after the fifteenth day of each month. The Association may bring, without electing a remedy, any and all actions and seek any and all relief against the Owner personally obligated to pay the same, and/or to foreclose the lien against the Lot in a like manner as a mortgage of real property, and such Owner hereby expressly grants to the Association the power of sale in connection with said lien. No Owner may waive or otherwise escape liability for the assessments provided for hereby by non-use of the common area or abandonment of his townhouse. In any action taken against an Owner to collect delinquent assessments, whether through a lien foreclosure or otherwise, the Owner shall be obligated to pay, in addition to any and all other amounts required herein, all costs and all attorneys' fees incurred by the Association in such action.

IN WITNESS WHEREOF, the undersigned, being the President and Secretary of the Board of Directors of Fountain Shadows Homeowners Association, has hereunto set its hand and seal this 5 day of September, 1996.

FOUNTAIN SHADOWS HOA

Earl W. Kopta
President, Board of Directors
Dennis M. Bentley
Secretary, Board of Directors

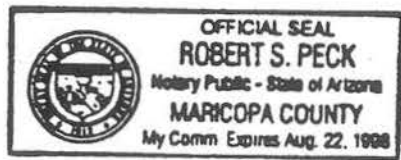
STATE OF ARIZONA)
County of Maricopa) ss.

On this, the 5 day of September, 1996, before me, the undersigned Notary Public, personally appeared Earl W. Kopta, who acknowledged himself to be the President of Fountain Shadows HOA, and Dennis M. Bentley, who acknowledged himself to be the Secretary of Fountain Shadows HOA, and that he, as such officer, being so authorized, executed the foregoing instrument for the purpose therein contained.

WITNESS my hand and seal.

[Signature]
Notary Public

My commission expires:



When Recorded Mail To:
Fountain Shadows HOA
16814 N. 33rd Drive
Phoenix, AZ 85023



OFFICIAL RECORDS OF
MARICOPA COUNTY RECORDER
HELEN PURCELL

96-0699329 10/01/96 03:44

ABBY 2 OF 2

FOURTH AMENDMENT TO DECLARATION OF
COVENANTS, CONDITIONS AND RESTRICTIONS
FOR
FOUNTAIN SHADOWS HOMEOWNERS ASSOCIATION

The undersigned is owner of that certain real property situated in Maricopa County, State of Arizona, to wit:

FOUNTAIN SHADOWS UNIT I AND FOUNTAIN SHADOWS UNIT II, according to a plat thereof recorded in the Office of the Maricopa County Recorder in Box 250 of Maps, at page 48.

WHEREAS, a certain Declaration of Covenants, Conditions and Restrictions has been placed on said property and has been recorded on April 21, 1983, at No. 83-146154 and an Amendment to Declaration of Covenants, Conditions and Restrictions has been recorded on December 2, 1983, at No. 83-484281, with the Maricopa County Recorder, and a Second Amendment to the Declaration of Covenants, Conditions and Restrictions has been recorded on July 31, 1984, at No. 84-332750, with the Maricopa County Recorder;

WHEREAS, as part of said Declaration of Covenants, Conditions and Restrictions, as amended, the right to amend is granted to the Owners of not less than three-fourths (3/4) of the Townhouses;

WHEREAS, the undersigned represents the Owners of not less than three-fourths (3/4) of the Townhouses; and

WHEREAS, the undersigned is desirous of amending said Declaration of Covenants, Conditions and Restrictions, as amended.

NOW, THEREFORE, the Declaration of Covenants, Conditions and Restrictions for Fountain Shadows recorded on April 21, 1983, at No. 83-146154 and the Amendment of the Declaration of Covenants, Conditions and Restrictions recorded on December 2, 1983, at No. 83-146154, with the Maricopa County Recorder, and the Second Amendment to Declaration of Covenants, Conditions and Restrictions recorded on July 31, 1984, at No. 84-332750, with the Maricopa County Recorder, shall be amended as follows:

1. In Article X, add Section 6, to add the words

Section 6. Insurance Deductible. The Owner of record of damaged property with respect to which one or more insurance claims are made shall be responsible party for the payment of any and all applicable insurance deductibles.

When damaged property with respect occurs within the property the owner of record will be responsible party for the applicable insurance deductibles.

When damaged property with respect occurs to any exterior portion of the property with respect to the current CC&R's and the current insurance policy holder that the Fountain Shadows Homeowners Association will be the responsible party for any and all insurance deductibles.

IN WITNESS WHEREOF, the undersigned, being the President and Secretary of the Board of Directors of Fountain Shadows Homeowners Association, has hereunto set its hand and seal this 5 day of September, 1996.

FOUNTAIN SHADOWS HOA

[Signature]
President, Board of Directors
[Signature]
Secretary, Board of Directors

STATE OF ARIZONA)
County of Maricopa) ss.

On this, the 5 day of September, 1996, before me, the undersigned Notary Public, personally appeared [Signature], who acknowledged himself to be the President of Fountain Shadows HOA, and DENNELL H. SENTRY, who acknowledged himself to be the Secretary of Fountain Shadows HOA, and that he, as such officer, being so authorized, executed the foregoing instrument for the purpose therein contained.

WITNESS my hand and seal.

[Signature]
Notary Public

My commission expires:

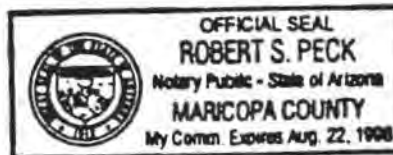


EXHIBIT B

TRIAL COURTS OF ARIZONA IN MARICOPA COUNTY

Manistee Justice Court/AZ007043J/0707 14264 W. Tierra Buena Lane Surprise, AZ 85374

INJUNCTION AGAINST WORKPLACE HARASSMENT

Case No. **CC2015039699000**
 Court ORI No. **AZ007043J**
 County **Maricopa** State **AZ**
 Former Case No. _____

PLAINTIFF EMPLOYER

Fountain Shadows Homeowners Association

And on behalf of Protected Person(s):
 Donald Toothman, Vern Carrillo, John Gaytan, Donna Toothman

AUTHORIZED AGENT

Donald Toothman

V.

DEFENDANT

Patricia Bocchino
 First Middle Last

Defendant/Plaintiff Relationship: neighbor
 Defendant's Address:

8736 North 67th Lane
 Glendale, AZ 85345

DEFENDANT IDENTIFIERS

SEX	RACE	DOB	HT	WT
Female	White	Unknown	5' 6"	170
EYES	HAIR	<i>Arizona Prohibits Release of Social Security Numbers</i>		
Blue	Blond			
DRIVER'S LICENSE #	STATE	EXP DATE		
	AZ			

WARNINGS TO DEFENDANT: This Injunction shall be enforced, even without registration, by the courts of any state, the District of Columbia, any U.S. Territory, and may be enforced by Tribal Lands (18 U.S.C. § 2265). Crossing state, territorial or tribal boundaries to violate this Injunction may result in federal imprisonment (18 U.S.C. § 2262). Federal law provides penalties for possessing, transporting, shipping, or receiving any firearm or ammunition (18 U.S.C § 922(g)(8)). Only the Court in writing, can change this Injunction.

This Injunction is effective for one year from date of service. VERIFY VALIDITY (call Holder of Record):

County Sheriff's Office — (602) 876-1061

THE COURT HEREBY FINDS:

That it has jurisdiction over the parties and subject matter.

Additional warnings are set forth on the next page(s).

THE COURT, FINDING REASONABLE CAUSE, HEREBY ORDERS:

NO CONTACT. Defendant shall have no contact with Plaintiff employer or other person while that person is on or at the employer's property or place of business or is performing official work duties except through attorneys, legal process, court hearings and as follows: Mail / Writing,

NO CONTACT. Defendant shall have no contact with Protected Person(s) except through attorneys, legal process, court hearings and as follows: Mail / Writing,

THE COURT FURTHER ORDERS:

PROTECTED LOCATIONS. Defendant shall not go to or near the Plaintiff employer's or other Protected Person's:

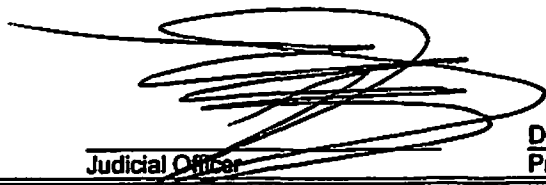
Workplace:

- Fountain Shadows Homeowners Association : 14100 North 83rd Avenue Unit 200; Peoria , AZ 85381

Other:

- Fountain Shadows Homeowners Association : 8859 W. Brown , Glendale , AZ 85302
- Donald Toothman: 8626 N Fountain Dr , Peoria, AZ 85346
- Donna Toothman: 8626 N Fountain Dr, Peoria, AZ 85346
- John Gaytan: 6758 W Ruth Ave, Peoria, AZ 85346

OTHER ORDERS.



3/5/2015

Date

Judicial Officer

Donald Watts

Printed Name

ADDITIONAL WARNINGS TO DEFENDANT:

This is an official Court Order. If you disobey this Injunction (even if the Plaintiff contacts you), you may be arrested and prosecuted for the crime of interfering with judicial proceedings and any other crime you may have committed in disobeying this Injunction. If you disagree with this Injunction, you have the right to request a hearing which will be held within 10 business days after your written request has been filed in the Court that issued this Injunction. Nothing Plaintiff does can stop, change, or undo this Injunction without the Court's written approval. You must return to Court to ask a judge to modify (change) or quash (dismiss) this Injunction. All violations of this Injunction should be reported to a law enforcement agency, not the court.

EXHIBIT C

FOUNTAIN SHADOWS HOA
FINANCIAL TRANSACTIONS - 01/14/16

8736 N 67TH LN
PATRICIA BOCCHINO

Unit ID: 012

STATUS:

PREPAID BAL: 0.00

TXN DATE	-----PAYMENTS/TRXN DESCR-----				N/A	CHARGES/PAYMENT DESCRIPTION	DISTR AMOUNT	BALANCE DUE
011914	350.00	10020707	011914	PP-A1		Credit-Prepaid	(350.00)	(350.00)
012814		EXPENSE ADJ		16		POOL KEY	25.00	(325.00)
012814	25.00	2164892913	012814	16		POOL KEY	(25.00)	(350.00)
020114		APPLY CHARGES		A1		ASSESSMENT	175.00	(175.00)
020114		APPLY PREPAYMNT		A1		ASSESSMENT	(175.00)	(175.00)
021814	175.00	9900276	021814	PP		Credit-Prepaid	(175.00)	(350.00)
030114		APPLY CHARGES		A1		ASSESSMENT	175.00	(175.00)
030114		APPLY PREPAYMNT		A1		ASSESSMENT	(175.00)	(175.00)
040114		APPLY CHARGES		A1		ASSESSMENT	175.00	0.00
040114		APPLY PREPAYMNT		A1		ASSESSMENT	(175.00)	0.00
040414	175.00	1208315	040414	PP		Credit-Prepaid	(175.00)	(175.00)
050114		APPLY CHARGES		A1		ASSESSMENT	175.00	0.00
050114		APPLY PREPAYMNT		A1		ASSESSMENT	(175.00)	0.00
050714	175.00	1229701	050714	PP		Credit-Prepaid	(175.00)	(175.00)
052814	175.00	9900446	052814	PP		Credit-Prepaid	(175.00)	(350.00)
060114		APPLY CHARGES		A1		ASSESSMENT	175.00	(175.00)
060114		APPLY PREPAYMNT		A1		ASSESSMENT	(175.00)	(175.00)
061014	175.00	9900314	061014	PP		Credit-Prepaid	(175.00)	(350.00)
062414	175.00	9900332	062414	PP		Credit-Prepaid	(175.00)	(525.00)
070114		APPLY CHARGES		A1		ASSESSMENT	175.00	(350.00)
070114		APPLY PREPAYMNT		A1		ASSESSMENT	(175.00)	(350.00)
072214	175.00	990093	072214	PP		Credit-Prepaid	(175.00)	(525.00)
080114		APPLY CHARGES		A1		ASSESSMENT	175.00	(350.00)
080114		APPLY PREPAYMNT		A1		ASSESSMENT	(175.00)	(350.00)
090114		APPLY CHARGES		A1		ASSESSMENT	175.00	(175.00)
090114		APPLY PREPAYMNT		A1		ASSESSMENT	(175.00)	(175.00)
100114		APPLY CHARGES		A1		ASSESSMENT	175.00	0.00
100114		APPLY PREPAYMNT		A1		ASSESSMENT	(175.00)	0.00
103114	175.00	346725764	103114	PP		Credit-Prepaid	(175.00)	(175.00)
110114		APPLY CHARGES		A1		ASSESSMENT	175.00	0.00
110114		APPLY PREPAYMNT		A1		ASSESSMENT	(175.00)	0.00

FOUNT000001

APP164

120114		APPLY CHARGES	A1	ASSESSMENT	175.00	175.00
121214	175.00	354192669 121214	A1	ASSESSMENT	(175.00)	0.00

010115		APPLY CHARGES	A1	ASSESSMENT	175.00	175.00
011615		APPLY LATE FEE	01	Late Fees	10.00	185.00
011615		Action taken: 01 - REMINDER				
011615		APPLY ADMIN FEE	03	Admin. Fees	15.00	200.00
012015	175.00	1426114 012015	A1	ASSESSMENT	(175.00)	25.00
013015	25.00	9151583 013015	01	Late Fees	(10.00)	0.00
013015			03	Admin. Fees	(15.00)	

020115		APPLY CHARGES	A1	ASSESSMENT	175.00	175.00
021715	175.00	1465632 021715	A1	ASSESSMENT	(175.00)	0.00

030115		APPLY CHARGES	A1	ASSESSMENT	175.00	175.00
031315	175.00	9200777 031315	A1	ASSESSMENT	(175.00)	0.00

040115		APPLY CHARGES	A1	ASSESSMENT	175.00	175.00
041515	175.00	375472844 041515	A1	ASSESSMENT	(175.00)	0.00
042715	25.00	377041914 042715	PP	Credit-Prepaid	(25.00)	(25.00)

050115		APPLY CHARGES	A1	ASSESSMENT	175.00	150.00
050115		APPLY PREPAYMNT	A1	ASSESSMENT	(25.00)	150.00
051215		EXPENSE ADJ	05	Attorney Fees	1832.28	1982.28

060115		APPLY CHARGES	A1	ASSESSMENT	175.00	2157.28
060215	175.00	1586701 060215	A1	ASSESSMENT	(175.00)	1982.28
060915	100.00	9299704 060915	A1	ASSESSMENT	(100.00)	1882.28
061115	75.00	1603006 061115	A1	ASSESSMENT	(50.00)	1807.28
061115			05	Attorney Fees	(25.00)	
061415		EXPENSE ADJ	05	Attorney Fees	1126.50	2933.78

070115		APPLY CHARGES	A1	ASSESSMENT	175.00	3108.78
070115	175.00	388733416 070115	A1	ASSESSMENT	(175.00)	2933.78
071715		EXPENSE ADJ	05	Attorney Fees	120.00	3053.78
073115	(25.00)	1603006 PA-ADJ	05	Attorney Fees	25.00	3078.78
073115		EXPENSE ADJ	02	NSF charges	10.00	3088.78

080115		APPLY CHARGES	A1	ASSESSMENT	175.00	3263.78
080615		EXPENSE ADJ	05	Attorney Fees	573.50	3837.28
082015		APPLY LATE FEE	01	Late Fees	10.00	3847.28
082115	200.00	397642444 082115	A1	ASSESSMENT	(175.00)	3647.28
082115			01	Late Fees	(10.00)	
082115			02	NSF charges	(10.00)	
082115			05	Attorney Fees	(5.00)	

090115		APPLY CHARGES	A1	ASSESSMENT	175.00	3822.28
090515		EXPENSE ADJ	05	Attorney Fees	168.00	3990.28
090815		EXPENSE ADJ	05	Attorney Fees	72.00	4062.28
092215	4062.28	123585 092215	A1	ASSESSMENT	(175.00)	0.00
092215			05	Attorney Fees	(3887.28)	

FOUNT000002

APP165

BALANCE SUMMARY

CHARGE CODE	DESCRIPTION	AMOUNT
	TOTAL:	0.00

FOUNT000003

APP166

EXHIBIT D

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

2 Attorneys at Law
1400 E. Southern Avenue, Suite 400
3 Tempe, Arizona 85282
4 t 480.427.2800 | f 480.427.2801

5 minuteentries@carpenterhazlewood.com

6 Chad Miesen 024910
7 Charlene Cruz 026692
8 LIU.FOUNTSHAD.0025.1

9 *Attorneys for Defendant*

10 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

11 **IN AND FOR THE COUNTY OF MARICOPA**

12 **PATRICIA BOCCHINO,**

13 **Plaintiff,**

14 **v.**

15 **FOUNTAIN SHADOWS**
16 **HOMEOWNERS ASSOCIATION,**

17 **Defendant.**

18 Case No.: CV2015-012434

19 **DECLARATION OF VERN**
20 **CARRILLO**

21 *(Assigned to the Honorable*
22 *Douglas Gerlach)*

Vern Carrillo, declares and states that:

1. He is an employee of Planned Development Services, Inc. (“Manager”), the managing agent for Fountain Shadows Homeowners Association (“Association”).
2. He is the community manager of the Association and makes this declaration in support of the Association’s Motion for Summary Judgment (“MSJ”) and the Association’s Statement of Facts in Support of Its Motion for Summary Judgment (“SOF”). All capitalized terms not defined herein have the same meaning as defined in the SOF.

1 3. Manager currently maintains the business and accounting records of the
2 Association as its managing agent.

3 4. The Association is a planned community association and nonprofit
4 corporation located in Glendale, Arizona, whose members are owners of lots within the
5 planned community.

6 5. Plaintiff violated the Declaration and other Governing Documents by acting
7 in a harassing manner constituting offensive behavior.

8 6. The Association sought and obtained an *Injunction against Workplace*
9 *Harassment* on March 5, 2015 from the Manistee Justice Court.

10 7. As a result of Plaintiff's actions, the Association incurred attorneys' fees,
11 costs and expenses to enforce Plaintiff's compliance with the terms and conditions of the
12 contractual Declaration, including but limited to filing and obtaining an Injunction Against
13 Workplace Harassment.

14 8. In or around September of 2015, the Association was contacted by a
15 title/escrow company to provide a payoff of amounts due to the Association.

16 9. Pursuant to the Declaration, including Article IV, Section 1 and Article XVII,
17 Section 1, the Association included in its payoff disclosure all attorneys' fees and costs
18 incurred as a result of Plaintiff's violations of the Governing Documents.

19 10. In connection with the sale of her lot, the Plaintiff paid what the Association
20 had disclosed as due in its payoff disclosure to the title/escrow company.

21 11. Plaintiff did not contest or challenge the payoff disclosure prior to payment.
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12. Pursuant to Rule 80(i), Ariz. R. Civ. P., the undersigned hereby declares under penalty of perjury that the foregoing is true and correct.

EXECUTED this 28th day of March, 2016.



Vern Carrillo

ORIGINAL of the foregoing **EFILED** this 28th day of March, 2016 with:

Clerk of the Court
Maricopa County Superior Court

COPY of the foregoing delivered **EFILED** service this 28th day of March, 2016 to:

Honorable Douglas Gerlach

Copy of the foregoing email and mailed this 28th day of March, 2016, to:

Jonathan A. Dessales
Dessaules Law Group
5353 North 16th Street, Suite 110
Phoenix, Arizona 85016



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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

**DECLARATION OF VERN
CARRILLO**

*(Assigned to the Honorable
Douglas Gerlach)*

14
15 Vern Carrillo, declares and states that:

16 1. He is an employee of Planned Development Services, Inc. (“Manager”), the
17 managing agent for Fountain Shadows Homeowners Association (“Association”).

18 2. He is the community manager of the Association and makes this declaration in
19 support of the Association’s Motion for Summary Judgment (“MSJ”) and the Association’s
20 Statement of Facts in Support of Its Motion for Summary Judgment (“SOF”). All
21 capitalized terms not defined herein have the same meaning as defined in the SOF.
22

1 3. Manager currently maintains the business and accounting records of the
2 Association as its managing agent.

3 4. The Association is a planned community association and nonprofit
4 corporation located in Glendale, Arizona, whose members are owners of lots within the
5 planned community.

6 5. Plaintiff violated the Declaration and other Governing Documents by acting
7 in a harassing manner constituting offensive behavior.

8 6. The Association sought and obtained an *Injunction against Workplace*
9 *Harassment* on March 5, 2015 from the Manistee Justice Court.

10 7. As a result of Plaintiff's actions, the Association incurred attorneys' fees,
11 costs and expenses to enforce Plaintiff's compliance with the terms and conditions of the
12 contractual Declaration, including but limited to filing and obtaining an Injunction Against
13 Workplace Harassment.

14 8. In or around September of 2015, the Association was contacted by a
15 title/escrow company to provide a payoff of amounts due to the Association.

16 9. Pursuant to the Declaration, including Article IV, Section 1 and Article XVII,
17 Section 1, the Association included in its payoff disclosure all attorneys' fees and costs
18 incurred as a result of Plaintiff's violations of the Governing Documents.

19 10. In connection with the sale of her lot, the Plaintiff paid what the Association
20 had disclosed as due in its payoff disclosure to the title/escrow company.

21 11. Plaintiff did not contest or challenge the payoff disclosure prior to payment.
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EXECUTED this 28th day of March, 2016.



Vern Carrillo

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7 *Attorneys for Plaintiff*

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.”¹ 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.”²

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

25 ¹ A.R.S. § 12-1810(O).

26 ² *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.³ 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.⁴ Here, the nuisance provision speaks of

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

25 ⁴ *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.⁵ 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.”⁶ “The doctrine of nuisance...has
13 always been a restriction on land use.”⁷ Bocchino’s verbal and written communications do not
14 constitute a nuisance because they do not arise from her use of the property.⁸

15
16
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 ⁵ *Id.*

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

25 ⁷ *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”).

⁸ *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.”⁹ 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.¹⁰ 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.”¹¹ 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.

22 _____
⁹ CSOF, ¶ 7 (emphasis added).

23 ¹⁰ *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
26 physical imposition as opposed to a person’s ability to communicate.

¹¹ *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.¹²

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

25 ¹² 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.*¹³ 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.¹⁴ 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 ¹³ *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 187-89, 673 P.2d 927, 931-33
22 (App. 1983).

23 ¹⁴ 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.

DESSAULES LAW GROUP

By: /s/ Jonathan A. Dessauls
Jonathan A. Dessauls
Douglas C. Wigley
Ashley C. Hill
Attorneys for Plaintiff

COPY of the foregoing mailed
and emailed this 18th day of April to:

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/s/ Jenna Pitchel

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7 *Attorneys for Plaintiff*

8 IN THE SUPERIOR COURT OF ARIZONA

9 COUNTY OF MARICOPA

10 PATRICIA BOCCHINO,

11 Plaintiff,

12 vs.

13 FOUNTAIN SHADOWS HOMEOWNERS
ASSOCIATION,

14 Defendant.

Case No. CV2015-012434

**PLAINTIFF'S RESPONSE TO
DEFENDANT'S CONTROVERTING
STATEMENT OF FACTS**

15
16 Plaintiff Patricia Bocchino ("Bocchino") hereby responds to Defendant Fountain
17 Shadows Homeowners Association's (the "Association") Controverting Statement of Facts and
18 incorporates by reference her Statement of Facts in support of her Motion for Summary
19 Judgment ("PSOF"), as follows:

- 20 1. Undisputed.
21 2. Undisputed.
22 3. Undisputed.
23 4. Undisputed.
24 5. Undisputed.
25
26

1 COPY of the foregoing emailed
this 18th day of April 2016 to:

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

5 /s/ Jenna Pitchel _____

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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 REPLY IN SUPPORT
OF DEFENDANT’S CROSS-MOTION
FOR SUMMARY JUDGMENT**

*(Assigned to the Honorable
Douglas Gerlach)*

14 Defendant Fountain Shadows Homeowners Association (the “**Association**”), by and
15 through undersigned counsel, hereby submits its Reply in support of the Association’s
16 Cross Motion for Summary Judgment (the “**Cross Motion**”). Because there are no genuine
17 issues of material fact and the law supports the actions taken by the Association,
18 Defendant’s Cross Motion should be granted in favor of the Association.

19 **I. The Contract entitles Association Legal Fees to Enforce Plaintiff’s Compliance
with the Declaration.**

20 Plaintiff continues to emphasize that the Association obtained an *ex parte* Injunction
21 against Workplace Harassment against Plaintiff. Procedurally, hearings for Injunction
22

1 Against Workplace Harassment are generally held without the Defendant. The Association
2 does not dispute this. It is also undisputed that the Association did not request attorney's
3 fees in its petition for the Injunction Against Work Place Harassment filed against Plaintiff
4 for her violation of the Declaration and other Governing Documents by acting in a
5 harassing manner constituting offensive behavior. *See* CSOF at ¶ 6.

6 The fact that Plaintiff was not present at the injunction hearing (which generally
7 occurs without the Defendant) or that the legal fees were not reduced to a judgment do not
8 support Plaintiff's claim that the Association is not contractually entitled to legal fees and
9 costs incurred for Plaintiff's breach of contract. Plaintiff could have requested a hearing to
10 contest the injunction, but did not. Therefore, she waived her right to do so and, by her
11 refusal to do so, effectively admitted to harassing the Association, its directors and
12 managing agents.

13 Plaintiff breached Article XIII, Section 10 of the Declaration by harassing the
14 Association's board members and employees of the Association's managing agent, Planned
15 Development Services, Inc. by engaging in a series of acts that have caused the board
16 members to be both seriously harmed and annoyed. *See* CSOF at ¶ 8. As a result of her
17 actions, the Association incurred attorneys' fees, costs and expenses to enforce Plaintiff's
18 compliance with the terms and conditions of the contractual Declaration, including but
19 limited to filing and obtaining an Injunction Against Workplace Harassment. *See* CSOF at
20 ¶ 9.

21 **II. The Declaration entitles the Association to Legal Fees**

1 In Plaintiff's Response to the Association's Cross-Motion for Summary Judgment,
2 she incorrectly asserts that the Association claims it has a statutory right to attorneys' fees
3 because it was entitled to an Injunction Against Workplace Harassment. *Pl. Resp. 3:6-8.*
4 The Association's claim for legal fees is based on contract not based on statute. The
5 Declaration entitles the Association to its legal fees incurred to enforce Plaintiff's
6 compliance with the contractual Declaration.

7 The plain language of the Declaration's provision for attorneys' fees, costs and
8 expenses does not require that such fees and costs be litigated in a lawsuit and ultimately
9 awarded in a judgment as a prerequisite to reimbursement. The plain language of this
10 provision specifies that if the Association prevails in an action seeking enforcement of the
11 terms and conditions of the Declaration, then the Association is entitled to all attorneys'
12 fees, costs, and expenses. *See CSOF at ¶ 11.* The Association had different options in
13 enforcing compliance with the Declaration. It chose to proceed with obtaining an
14 injunction against harassment because that was the most likely option to effect compliance
15 with the Declaration. Making this choice did not eliminate its right to reimbursement of
16 expenses pursuant to the Declaration.

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

21 In this case, provision in the Declaration provides:
22

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

9 See CSOF at ¶ 10 (emphasis added).

10 The Association employed an attorney to enforce Plaintiff's compliance with the
11 terms of the Declaration—to require that Plaintiff cease and desist her offensive behavior—
12 and prevailed in obtaining an Injunction Against Workplace Harassment in its favor. The
13 Association is contractually entitled to the legal fees and costs it incurred for Plaintiff's
14 breach of contract.

15 **III. The Declaration's Attorneys' Fees Provision is Applicable**

16 Plaintiff also claims that her actions did not constitute a nuisance and therefore the
17 nuisance provision of the Declaration does not apply. Specifically, the Declaration
18 prohibits members or residents in the community from carrying on any offensive activity:

19 No noxious or offensive activity shall be carried on upon any Lot or any part
20 of the Properties, nor shall anything be done thereupon which may be, or may
21 become, an annoyance or nuisance to the neighborhood, or which shall in any
22 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.

Plaintiff engaged in a series of acts that have caused the board members to be both
seriously harmed and annoyed. See CSOF at ¶ 8. Plaintiff removed "closed" signs at the
Association pool that were required by Maricopa County Health Services. *Id.* Plaintiff
used e-mail, voice mail, phone conversations and her physical presence at Association

1 Board of Directors meetings to continuously harass the members of the Association. *Id.*
2 Her actions required members of Glendale Police Department, including SWAT team
3 members, to attend the Association's Board of Directors meetings. *Id.* As a result of her
4 actions, many of which occurred on her Lot or the "Properties" as those terms are defined
5 in the Declaration, the Association incurred attorneys' fees, costs and expenses to enforce
6 Plaintiff's compliance with the terms and conditions of the contractual Declaration,
7 including but limited to filing and obtaining an Injunction Against Workplace Harassment.
8 *See CSOF at ¶ 9.*

9 Therefore, Art. XIII, Sec. 10 of the Declaration applies. Plaintiff's violated the
10 Declaration because her actions became an annoyance and nuisance and otherwise
11 interfered with the quiet enjoyment of each of the Owners.

12 **IV. Arizona Rules of Civil Procedure 54(g) Does not Apply**

13 Plaintiff claims she was not afforded protections of Rule 54(g), ARIZ. R. CIV. P. It is
14 undisputed that the Association did not request attorney's fees in its petition for the
15 Injunction Against Work Place Harassment filed against Plaintiff for her violation of the
16 Declaration and other Governing Documents by acting in a harassing manner constituting
17 offensive behavior. However, the plain language of the Declaration's provision for
18 attorneys' fees, costs and expenses do not require that such fees and costs be litigated in a
19 lawsuit and ultimately awarded in a judgment. The plain language of this provision
20 specifies that if the Association prevails in an action seeking enforcement of the terms and
21 conditions of the Declaration, then the Association is entitled to all attorneys' fees, costs,
22 and expenses. *See CSOF at ¶ 11.*

1 Therefore, Rule 54(g), ARIZ. R. CIV. P. does not apply.

2 **V. Plaintiff Failed to Preserve her Breach of Contract Claim**

3 All that is required to waive a breach of contract claim is knowledge of the essential
4 facts that give rise to the claim, not the legal effect of those facts. *Restatement (Second) of*
5 *Contracts* § 84 cmt. b. (1981) (“The common definition of waiver may lead to the incorrect
6 inference that the promisor must know his legal rights ... it is sufficient if he has reason to
7 know the essential facts.”)⁴; see also *Sw. Cotton Co. v. Valley Bank*, 26 Ariz. 559, 563, 227
8 P. 986, 988 (1924) (holding that waiver occurs when one who is in possession of a right
9 and is “with full information of the material facts” acts inconsistently with that right
10 (citation omitted)) *In re Estate of Cortez*, 226 Ariz. 207, 212, ¶ 8, 245 P.3d 892, 897
11 (App.2010) (holding that the type of knowledge a party must have to intentionally waive a
12 known right is knowledge that “one using reasonable care or diligence should have”).

13 Here, Plaintiff was aware she was being charged for attorneys’ fees and costs. See
14 Pl. SOF at ¶ ¶18-20; 24-25. Attorneys’ Fees have been on her account since May 2015.
15 See Pl. SOF ¶ 14. Plaintiff entered into a binding contract for the sale of her Unit in
16 August 2015. On September 18, 2015, a check was tendered to the Association for
17 “Owners Current Balance.” See Pl. SOF at ¶ 30. Prior to the sale of her Unit, Plaintiff did
18 not restrictively endorse the check or otherwise communicate to the Association that she
19 disputed the amounts sought by the Association for her breach of the Declaration. Plaintiff
20 chose not to take the opportunity to contest or otherwise negotiate the legal fees prior to
21 close of escrow. Plaintiff chose to pay the legal fees and costs in full.

1 **VI. 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
4 pursuant to a provision in the Declaration awarding the Association all of its attorneys'
5 fees, a homeowner has the burden of showing that the attorneys' fees were clearly
6 excessive, and if such showing was not made, then association would be entitled to receive
7 the full amount of requested attorney fees. *McDowell Mountain Ranch Community v.*
8 *Simons*, 216 Ariz. 266, 270, ¶ 16, 165 P.3d 667, 671 (App.2007).

9 An agreement by the parties as to the amount of attorneys' fees is not contrary to
10 public policy and is analogous to a contract for indemnity and a contractual fee provision
11 stipulating to a certain amount or percentage of attorneys' fees "is binding only to the
12 extent that it is reasonable; however, where the services have been rendered, and the
13 amount stipulated is not obviously excessive, the stipulation as to the amount should
14 govern." *Elson Dev. Co. v. Ariz. Sav. & Loan Ass'n*, 99 Ariz. 217, 407 P.2d 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 **VII. Conclusion**

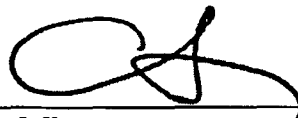
20 It is important to keep in mind the reason the parties are in this Court. Plaintiff was
21 acting in such a manner as to justify a court to issue an injunction against harassment. The
22 court that issued the injunction against harassment, which was never disputed by Plaintiff,

1 clearly determined that harassment was occurring. Harassment is inherently offensive and
2 violative of the Declaration. The Declaration imposes a duty upon the Association to
3 enforce its terms. See Declaration at 24 [Art. XVII, Sec. 2]. As a result, the Association
4 was obligated by law to enforce the Declaration, which it did. See *Johnson v. Pointe Cmty.*
5 *Ass'n, Inc.*, 205 Ariz. 485, 490, 73 P.3d 616, 621 (Ct. App. 2003). The Association is
6 entitled to be reimbursed for expenses incurred in taking action required of it by law. The
7 party that must be held responsible for reimbursement is appropriately and fairly the party
8 that acted in violation of the Declaration and that necessitated the incurrence of those
9 expenses.

10 For the reasons stated herein and in the Association's Cross Motion, along with the
11 matters of record in this case, the Association respectfully requests that the Court grant its
12 Cross-Motion for Summary Judgment in favor of the Association.

13 RESPECTFULLY SUBMITTED this 9th day of May, 2016.

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

15 

16 Chad P. Miesen
17 Charlene Cruz
18 1400 East Southern Avenue, Suite 400
19 Tempe, Arizona 85282
20 *Attorneys for the Association*

21 ORIGINAL of the foregoing filed
22 this 9th day of May, 2016 with:

Clerk of the Court
Maricopa County Superior Court
www.AZTurboCourt.gov

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Copy of the foregoing emailed and mailed
this 9th day of May, 2016, to:

Jonathan A. Dessauls
Dessaules Law Group
5353 North 16th Street, Suite 110
Phoenix, Arizona 85016



SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-012434

07/27/2016

HONORABLE DOUGLAS GERLACH

CLERK OF THE COURT
D Arrieta
Deputy

PATRICIA BOCCHINO

JONATHAN A DESSAULES

v.

FOUNTAIN SHADOWS HOMEOWNERS
ASSOCIATION

CHAD PHILIP MIESEN

DEBORA L VERDIER

MINUTE ENTRY

Motions for summary judgment were filed on behalf of plaintiff Patricia Bocchino and defendant Fountain Shadows Homeowners Association. The success of both motions turns on whether an injunction against Bocchino that the Association obtained is viable. For reasons explained below, that injunction is unconstitutionally vague and overbroad, and therefore, it is unenforceable. Because of that, the Bocchino motion must be granted, and the Association's motion must be denied.

Relevant Facts.

At an ex parte proceeding without notice, the Association persuaded the Manistee Justice Court (Surprise, Arizona) to issue an Injunction Against Workplace Harassment against Bocchino, who at the time owned and resided in a condominium unit located in a community that was governed by the Association and subject to a set of recorded covenants, conditions, and restrictions. [Def's. Fact State. (3/28/16) at 3-4, paras. 1-5, 8 and Ex. B] In support of the injunction, the Association maintained that Bocchino had violated those CC&Rs by engaging in "harassing" and "offensive behavior." [*Id.* at 4, para. 6] The injunction, among other things, prohibits Bocchino from "go[ing] . . . near" three named persons and four separate addresses, one of which is the address for the Association that is on file with the Arizona Corporation

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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Commission, and another of which is the address for the main branch of the City of Glendale library (at which, the court was told at a hearing, the Association conducts meetings from time to time). [*Id.*, Ex. B]

The Association assessed Bocchino \$3,887.28 unilaterally for the attorney's fees it claims to have expended to obtain the ex parte injunction and then imposed a lien on her property in that amount. [Pltf's. Fact State, (2/9/16) at 5, para. 31; Def's. Fact State. (3/28/16) at 3/31] In doing so, the Association relied on a provision of the CC&Rs that permits the recovery of attorney's fees when the Association "prevails" in any legal proceeding that requires the Association to "employ[] an attorney or attorneys" in an effort "to enforce compliance with or specific performance of the terms and conditions of [the CC&Rs]." [Def's. Fact State. at 5, para. 33]¹

Bocchino later sold her condominium unit. Because of the lien recorded by the Association, at the closing of the sale, the assessed attorney's fees were deducted from the proceeds that she otherwise would have received. [Pltf's. Fact State. (2/9/16) at 5, paras. 29, 31; Def's. Fact State. (3/28/16) at 3, paras. 29, 31] Bocchino then filed the complaint in this action, seeking to recover the attorney's fees that the Association had assessed.²

Applicable Law.

To survive constitutional scrutiny, an injunction must be specific enough so that "uncertainty and confusion on the part of those faced with injunctive orders" is prevented, so that "the possible founding of a contempt citation on a decree too vague to be understood" is avoided, and so that a reviewing court can "know precisely what it is reviewing." *Schmidt v. Lessard*, 414 U.S. 473, 475-76 (1974); *see also Granny Goose Foods, Inc. v. Brotherhood of Teamsters, Local No. 70*, 415 U.S. 423, 444 (1974) ("[T]hose against whom an injunction is issued should receive fair and precisely drawn notice of what the injunction actually prohibits"). "The judicial contempt power" that is available when injunctions are violated "is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one." *International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967). After all,

¹ Each week day that courts are open throughout Arizona, many citizens obtain injunctions against harassment and similar orders without the assistance of an attorney. The three individuals named as protected persons in the injunction faced no impediment to proceeding in the same way. The record fails to establish why, therefore, it was reasonable to retain attorneys given the nature of the conduct alleged, including why it was reasonable to send two attorneys to an uncontested, ex parte hearing and then assess Bocchino for both attorneys' time charges. Whether the attorneys' fees assessed against Bocchino were reasonable in the circumstances presented is not, however, an issue that the court must decide before reaching the result here.

² Although the amount of Bocchino's claimed damages subjects this action to compulsory arbitration, because the Bocchino motion seeks "dispos[ition] of the entire case," the motion is for the assigned judge and not the court-appointed arbitrator. Ariz. Rs. Civ. P. 72, 74(c)(1)(E).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-012434

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violation of an injunction can lead to arrest and incarceration. *E.g.*, A.R.S. §12-1810(N); *Alderwoods Group, Inc. v. Garcia*, 682 F.2d 958, 966 (11th Cir. 2012) (referring to incarceration as a “traditional sanction[] for coercing compliance with an injunction”). Thus, before a court may find one in contempt, “the underlying decree [must] set forth the terms of compliance in clear, specific and unambiguous terms so that the person charged with obeying the decree will readily know exactly what duties and obligations are imposed upon him.” *Munari v. Hotham*, 217 Ariz. 599, 604, ¶22, 177 P.3d 860, 865 (App. 2008) (*quoting with approval Ex parte Chambers*, 898 S.W.2d 257, 260 (Tex. 1995) (alteration in original)); *see also BMO Harris Bank Nat’l Ass’n v. Bluff*, 229 Ariz. 511, 514, ¶7, 277 P.3d 216, 219 (App. 2012) (contempt requires a finding that a party “violated a specific and definite order of the court”).

Independent of that, an injunction also fails to pass constitutional muster when it proscribes activities in which people have a right to engage. *See* A.R.S. §12-1810(L)(2) (injunction against workplace enforcement may not enjoin “activities that are constitutionally protected or otherwise protected by law”); *see also Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753, 765 (1994); *United States v. Jones*, 677 F.Supp. 238, 240 n.2 (S.D.N.Y. 1988); *LaFaro v. Cahill*, 203 Ariz. 482, 487, ¶17, 56 P.3d 56, 61 (App. 2002).

Prohibiting Bocchino from going “near” a location fails to provide her (or anyone else, including a reviewing court) with fair, precise, definite notice about where she is and is not permitted to travel. Indeed, public records establish that the condominium unit in which she resided might reasonably be considered “near” at least one, and perhaps two, of the addresses identified in the injunction, meaning that she would have violated the terms of the injunction whenever she ate a meal, talked on the telephone, or went to sleep in her unit.

Apart from that, even if one were to assume that Bocchino engaged in conduct that violated the CC&Rs sufficient to permit the Association to seek injunctive relief, the injunction issued by the justice court goes far beyond enjoining harassing and offensive behavior. For example, the injunction prohibits Bocchino from visiting a public library, even at times when the individuals named as protected persons in the injunction are not present (as if that should matter). The injunction also prohibits Bocchino from walking back and forth in front of the Association’s office while, without impeding anyone’s ability to enter or leave, handing out leaflets that are critical of actions taken by the Association’s directors or asking passersby to join efforts to remove one of the directors. In that way, the injunction, as it is written, operates as an impermissible restriction on First Amendment rights. *See e.g., Madsen*, 512 U.S. at 765-66.

The assessment of attorney’s fees assumes that the Association was the “prevailing party” in the justice court action. [Def’s. Fact State. at 5, para. 33] In normal English usage, “prevail” contemplates some sort of resistance or opposition, which the Association did not experience when obtaining the injunction. *See e.g., Webster’s New International Dictionary of the English*

SUPERIOR COURT OF ARIZONA
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Language (Unabridged) 1797 (3d ed. 2002) (defining “prevail” to mean “to gain victory . . . triumph – use with *over* or *against*” (italics in original)); *The American Heritage Dictionary of the English Language* 1391 (4th ed. 2000) (defining “prevail” to mean “triumph” as in “prevail[ing] against the enemy”).³ Under no relevant authority provided by the Association, nor any that the court’s own research uncovered, does success in an uncontested, ex parte proceeding for which the would-be opponent is, as here, not given notice make one a prevailing party. Second, and in any event, as a matter of mere common sense, one “prevails” only when one achieves success.⁴ The Association, however, obtained an injunction that is unenforceable. That surely was not the result that the Association was intent on achieving when it initiated the action against Bocchino, but in any event, by no recognized standard does the Association’s failure to obtain an injunction that complies with constitutional requirements transform the Association into a successful, and thus, prevailing party in that action.

In short, no sound reason permits recognizing the Association as the prevailing party for purposes of the injunction. And, if the Association is not a prevailing party, then by the express terms of the CC&Rs on which the Association relies, it has no basis for recovering any attorney’s fees incurred in connection with the injunction.

IT IS ORDERED:

1. The motion for summary judgment filed on behalf of plaintiff Patricia Bocchino is granted, and the motion for summary judgment filed on behalf of defendant Fountain Shadows Homeowners Association is denied.

2. Bocchino is entitled to judgment in her favor and against the Association in the amount of \$3,887.28.

³ The CC&Rs constitute a contract. *E.g., Ahwatukee Custom Estates Mgt. Ass’n v. Turner*, 196 Ariz. 631, 634, ¶5, 2 P.3d 1276, 1279 (App. 2000). The interpretation of a contract is a question of law. *E.g., Chandler Medical Bldg. Partners v. Chandler Dental Group*, 175 Ariz. 273, 277, 855 P.2d 787, 791 (App. 1993). Words of a contract are given “their normal, ordinary meaning.” *Bekins Van Lines Co. v. Hartford Ins. Group*, 27 Ariz. App. 655, 659, 557 P.2d 1087, 1091 (App. 1976). When determining the ordinary meaning of contract terms, courts may rely on reputable dictionaries. *See e.g., Horton v. Mitchell*, 200 Ariz. 523, 527, ¶18, 29 P.3d 870, 875 (App. 2001) (using dictionary to assist in determination of ordinary meaning of contract terms). *Webster’s (Unabridged) New International*, cited above, is the dictionary cited most often in opinions of the United States Supreme Court. Jeffrey L. Kirchmeier and Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court’s Use of Dictionaries in the Twenty-First Century*, 94 Marq. L. Rev. 77, 94 (2010).

⁴ “Common sense is as much a part of contract interpretation as is the dictionary or the arsenal of canons.” *UIP Ltd., L.L.C. v. Lincoln Nat’l Life Ins. Co.*, No. CV 09-0006-PHX-NVW, 2009 WL 4497233, at *9 (D. Ariz. Nov. 30, 2009) (citation, internal quotation marks, and alteration omitted).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

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3. This is an action arising out of a contract. Therefore, Bocchino may, within 30 days of the entry of this order, submit an application for an award of attorney's fees and a statement of costs. If either an application or statement is submitted that the Association wishes to oppose, its response must be filed not later than 25 calendar days after service of Bocchino's papers. Bocchino may not file a reply unless requested to do so by the court.

Before submitting an application or statement, Bocchino must undertake good faith efforts to negotiate a stipulation with the Association regarding the amounts to be awarded. Such a stipulation will NOT preclude the Association from raising any issue or asserting any argument on appeal other than the reasonableness of the amounts awarded.

4. Not later than 30 days after the entry of this order, Bocchino must submit a proposed form of judgment, leaving blank spaces for attorney's fees and taxable costs. That form of judgment may incorporate by reference what is said here, but otherwise it should be confined to the amounts being awarded along with Rule 54(c) language

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

10/7/2016 8:00am.

CV 2015-012434

10/05/2016

HONORABLE DOUGLAS GERLACH

CLERK OF THE COURT
D Arrieta
Deputy

PATRICIA BOCCHINO

JONATHAN A DESSAULES

v.

FOUNTAIN SHADOWS HOMEOWNERS
ASSOCIATION

CHAD PHILIP MIESEN

DEBORA L VERDIER

FINAL JUDGMENT

The court previously granted summary judgment in favor of plaintiff Patricia Bocchino. [Minute Entry (7/27/16)] As permitted by A.R.S. §12-341.01(A), an application for awards of attorney's fees was filed on plaintiff's behalf. The court has considered the application and the response filed on behalf of defendant Fountain Shadows Homeowners Association.

This was not a complex case. The relevant issues were well-settled, uncomplicated questions of law for which little, if any, discovery was required.

An award of attorney's fees in a case such as this is intended to mitigate the expense of litigation and "need not equal or relate to the attorney's fees actually paid or contracted." A.R.S. §12-341.01(B). Further, a trial judge is permitted to rely on his personal knowledge and experience when deciding an award that is appropriate in the circumstances. *See Baum v. Baum*, 120 Ariz. 140, 146, 584 P.2d 604, 610 (App. 1978) (when determining reasonable attorney's fees, the "trial judge can draw upon his knowledge of the case and upon his personal experience"); *see generally Walker v. Kendig*, 107 Ariz. 510, 513, 489 P.2d 849, 852 (1971) (when making a discretionary determination, the trial court may rely on "personal wisdom and experience" (citation and internal quotation marks omitted)). Given the foregoing principles, the court has concluded that an attorney's fee award of \$13,625.00 is appropriate here.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-012434

10/05/2016

Plaintiff is also entitled to an award of taxable costs. A.R.S. §12-341. The amount requested (\$450.10) appears in order and is uncontested.

IT IS ORDERED:

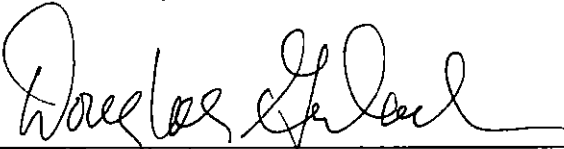
1. Judgment is granted in favor of plaintiff Patricia Bocchino and against defendant Fountain Shadows Homeowners Association in the following amounts:

- a. \$3,887.28 as compensatory damages.
- b. \$13,625.00 as attorney's fees.
- c. \$450.10 as taxable costs.

2. Interest accrues on the amounts stated in the preceding paragraph at the rate of 4.5 percent annually (not compounded).

No matters remain pending in this case. This is a final judgment under Ariz. R. Civ. P. 54(c).

Date: October 6, 2016



HONORABLE DOUGLAS GERLACH
JUDGE OF THE SUPERIOR COURT

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

PATRICIA BOCCHINO,)
)
Plaintiff,)
) CASE NO. CV2015-012434
v.)
)
FOUNTAIN SHADOWS HOMEOWNERS,)
ASSOCIATION,)
)
Defendant.)
_____)

Phoenix, Arizona
June 7, 2016
10:25 a.m.

BEFORE THE HONORABLE DOUGLAS GERLACH
SUPERIOR COURT JUDGE

TRANSCRIPT: ORAL ARGUMENT

Transcript prepared by:
VERBATIM REPORTING & TRANSCRIPTION, LLC

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A P P E A R A N C E S

On Behalf of the Plaintiff:

Jonathan Dessaules, Esq.
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5353 North 16th Street, Suite 110
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On Behalf of the Defendant:

Chad Phillip Miesen, Esq.
Charlene Cruz, Esq.
Carpenter Hazlewood Delgado and Bolen PLC
1400 East Southern Avenue, Suite 400
Tempe, Arizona 85282

1 apply. That -- that was the authority cited by the Plaintiff
2 -- because 12-1810 section (O) says that the remedies there
3 are in addition to other civil remedies. Well, another civil
4 remedy would be the association's attempt to enforce a
5 contract, which is how I view their position here.

6 The cases cited by the association don't assist me
7 because the prevailing party in each case was a prevailing
8 party in a case where that party experienced opposition. They
9 had to overcome some sort of obstacle. That is not what
10 happened, according to the record in this case. That is not
11 what happened when the association obtained its injunction.

12 What we're dealing with here is an issue of contract
13 interpretation. Nobody disputes that the CC&Rs are contracts.
14 What does prevail mean? We go back to the rules of -- of
15 contract construction. We give the words their meaning as
16 they were understood at the time. What were the -- what --
17 what is the commonly understood meaning of prevail? And what
18 courts often do in such circumstances is look at dictionaries.
19 Both the American Heritage and Webster's New Collegiate
20 dictionaries, in the first definition, they're -- prevail is a
21 word that has multiple definitions.

22 But in the first, the primary definition, they at
23 least imply that prevail means triumphing over an opponent, or
24 overcoming opposition. In fact, the American Heritage dic --
25 Dictionary says, prevailed against the enemy, to illustrate

1 what the meaning is. Well, if we don't have -- if we don't
2 have opposition here that was incurred in the effort to get
3 the injunction, then it doesn't seem that we have -- that the
4 association can claim that it prevailed. But I'll certainly
5 with -- lit -- listen to that. However, we may not have to
6 get there.

7 The purpose of filing the petition, at the risk of
8 stating the obvious, was to enjoin the Plaintiff from engaging
9 in certain conduct. If the injunction was not enforceable as
10 written, if the injunction did not comply with due process
11 requirements, then the effort to obtain that injunction did
12 not succeed. And one can hardly be a prevailing party in an
13 effort that -- that failed. So let's begin with a discussion
14 about whether the injunction was enforceable as written. And
15 for that, I would like to turn to the association. Tell me
16 why you think the injunction as written was enforceable.

17 MR. MIESEN: Well, Your Honor, the -- the due
18 process as required for obtaining the injunction offers the
19 other party an opportunity to be heard.

20 THE COURT: No, that's not the due process I'm
21 talking about. I'm talking about the due process notion that
22 must be met before an injunction becomes enforceable.

23 MR. MIESEN: Yes. That it's --

24 THE COURT: The words of the injunction.

25 MR. MIESEN: It -- forgive me. The -- my -- what

1 I'm getting at is that the -- and -- and if I'm not answering
2 your question, I apologize, and you can help me, but is that
3 the injunction's enforceable once it's entered by the court
4 and served upon the party.

5 THE COURT: No. It's not enforceable if it's
6 written in a way that violates due process of it, and -- and
7 permit me, I'll tell you what I'm getting at.

8 MR. MIESEN: Sure.

9 THE COURT: Among other cases, Munari v. Hotham, in
10 order to support a judgment of contempt, the underlying decree
11 -- which would here be the injunction -- must set forth the
12 terms of compliance in clear, specific and unambiguous terms
13 so that the person charged with obeying the decree will re --
14 readily know exactly what duties and obligations are imposed
15 upon him, or in this case, her. Looking at the injunction,
16 what specifically, what exactly does near mean?

17 MR. MIESEN: If you give me just a moment, I'll pull
18 up the injunction.

19 THE COURT: It says the Defendant shall not go to or
20 near the Plaintiff's employers or other protected person's
21 workplace. What does near mean?

22 MR. MIESEN: Yeah. That language is part of the
23 form that the courts have adopted for all injunctions against
24 workplace harassment. So I would posit to the Court that if
25 in fact near is not sufficient, then all injunctions that are

1 currently written on these forms would be unenforceable.

2 THE COURT: Well, that may be the case, but I'm only
3 dealing with this one.

4 MR. MIESEN: Understood.

5 THE COURT: How does -- how does -- in this case,
6 how does the Plaintiff know whether or not she is violating
7 the injunction when -- when the order says don't go near, and
8 there are -- are what, five different addresses there.

9 MR. MIESEN: Uh-huh.

10 THE COURT: What -- what's near?

11 MR. MIESEN: Well, I think the common sense approach
12 to that, Your Honor, is that near is enough to come in contact
13 with, and it -- to the high probability of interaction with --

14 THE COURT: Well, that's -- that's your --

15 MR. MIESEN: -- the protected persons.

16 THE COURT: -- interpretation. But she is not -- no
17 plaintiff is supposed -- is required to call up the other
18 side's lawyer and say, now, here's where I'm going to go, is
19 that near?

20 MR. MIESEN: I think we come back to what you had
21 indicated at the beginning of this, which is we have to use
22 common definitions for terms, as the -- as they're used in the
23 world. And dictionaries provide certainly one -- one
24 authority to help assist --

25 THE COURT: Sure.

1 MR. MIESEN: -- in these types of words.

2 THE COURT: But they won't help on -- they won't
3 help on near. Does near mean 10 feet, 50 feet, 100 yards, 200
4 yards?

5 MR. MIESEN: I -- I -- I --

6 THE COURT: And is that -- is -- is that a subject
7 that could be -- could result in some disagreement?

8 MR. MIESEN: Yeah. I don't think that that renders
9 the injunction unenforceable, however, because --

10 THE COURT: It does if it -- if the Plaintiff
11 cannot, by looking at the injunction, know in the terms of the
12 cases exactly what she is prohibited from doing.

13 MR. MIESEN: Well, I think that she -- I think, Your
14 Honor, that certainly she cannot go to those addresses.

15 THE COURT: What is going to those addresses mean?

16 MR. MIESEN: Well, I mean, I don't know how to be
17 more specific with to. I mean, it -- to is you're -- you're
18 there. You're -- you're physically --

19 THE COURT: Like right in front? Right in front of
20 the -- right in front of the residence?

21 MR. MIESEN: Yes.

22 THE COURT: Okay. I looked up on goggle maps this
23 development. If the Plaintiff wanted to go over to the --
24 Grand Avenue, because she wanted to go to Wickenburg, the
25 shortest, most convenient route for her to take would require

1 her to drive past either the Toothman's residence or the
2 Gaytan residence. Which of those two routes does not violate
3 the injunction?

4 MR. MIESEN: Well, again, Your Honor, I think what's
5 required here is to understand the intent of the injunction,
6 and the language that is included here is intended to avoid
7 conflict, it's intended to avoid interaction with and
8 harassment by the Defendant in the injunction.

9 THE COURT: If -- if she drives past either of those
10 two residences, would you agree she is near those two
11 residence?

12 MR. MIESEN: I -- I -- I don't know if -- if driving
13 past meets the standards, the intentions of the language.

14 THE COURT: You don't know?

15 MR. MIESEN: I don't believe that it does.

16 THE COURT: Well, but how would the Plaintiff know?
17 How does the Plaintiff know when she's given a pay -- a piece
18 of paper that says don't go near?

19 MR. MIESEN: Take the most conservative approach and
20 don't go near.

21 THE COURT: Okay. So --

22 MR. MIESEN: If there's a question of whether --

23 THE COURT: So she has to --

24 MR. MIESEN: -- it's near --

25 THE COURT: So if she wants to go to Wickenburg --

1 MR. MIESEN: Yeah.

2 THE COURT: -- because of this injunction, she is
3 going to have to go out of her way, take a -- a round about
4 way to get there?

5 MR. MIESEN: Well, Your Honor, forgive me, I'm not
6 as familiar with that area. I haven't looked at the maps to
7 know if that --

8 THE COURT: Why didn't you look at it before you got
9 the injunction?

10 MR. MIESEN: At the maps?

11 THE COURT: Yeah.

12 MR. MIESEN: Why --

13 THE COURT: So you knew exactly what you were asking
14 for.

15 MR. MIESEN: Well, we knew what we were asking for,
16 and we were relying on the forms, because we believed that the
17 -- the common sense interpretation of the -- of the language
18 that's on those forms --

19 THE COURT: It's not.

20 MR. MIESEN: -- would have been --

21 THE COURT: It's not. And if you read the cases on
22 injunctions and the specific -- specificity that's required,
23 and I don't mean to be talking down to you, it's --
24 injunctions are not written to be interpreted. Injunctions
25 are to be written specifically so nobody has any doubt about

1 what is or is not permitted, so that you don't go into court
2 and say to a judge, okay, now interpret this injunction one
3 way or the other, so you don't have to go to a police officer
4 and explain what it means. It is there in black and white.

5 And I'll tell you, this comes up in Family Court all
6 the time, and -- and, again, forgive me if -- if you've been
7 in Family Court, where you have to put restrictions on how --
8 on people contacting other people. And you know what happens
9 all the time? We don't use words like near or far or
10 reasonable distance. It's 50 feet. It's 100 yards.

11 I can remember one time in an extreme case involving
12 violence that I prohibited the one ex-spouse from coming
13 within a one-mile radius of the other spouse. That's how you
14 get precision to these things. But to say near, I -- I -- I
15 think is just too inherently ambiguous to be enforceable.

16 But let me give you another example. If the
17 Plaintiff wished -- and I realize the injunction is no longer
18 in effect, or at least that's -- it -- or is it? It -- it's
19 been more than a year.

20 MR. MIESEN: I think it was in effect for a year,
21 Your Honor.

22 THE COURT: Yeah. It -- the -- the one year I --
23 and I assume that one year has passed, because it was issued
24 in March of 2015.

25 MR. MIESEN: That's my understanding.

1 THE COURT: But let's assume that it's still in
2 effect. Okay? If the Plaintiff wished to visit the main
3 branch of the Glendale Public Library, does she violate the
4 injunction?

5 MR. MIESEN: Yes, I believe she would.

6 THE COURT: So she can't go to the Glendale Public
7 Library to check out a book --

8 MR. MIESEN: That is what --

9 THE COURT: -- under the terms of this injunction?

10 MR. MIESEN: Yes, sir.

11 THE COURT: Doesn't that fit within the definition
12 of over broad?

13 MR. MIESEN: Well, when the association conducts
14 business at that branch, it's to protect those that are at
15 those meetings.

16 THE COURT: She's not going -- she's going to get a
17 book, and she is prohibited -- and -- and the other thing, the
18 other thing is there is no time restriction in this
19 injunction. Agreed?

20 MR. MIESEN: Agreed.

21 THE COURT: So the association may not be doing --
22 is -- the association, I assume, or maybe I'm wrong, they
23 don't do business there every day of the week, do they?

24 MR. MIESEN: No.

25 THE COURT: The way this injunction is written, if

1 she goes to the library to check out a book on some day when
2 the association has nothing going on there, she violates the
3 injunction?

4 MR. MIESEN: Well, and these matters were addressed
5 before a Justice of the Peace who believed, apparently, by
6 signing this order, that that wasn't overly broad.

7 THE COURT: Well, was he told that the address that
8 -- that she was prohibited from -- from visiting was the --
9 was a public library, and that she would be -- be prohibited
10 from entering that library at any time, on --

11 MR. MIESEN: I --

12 THE COURT: -- any day of the week?

13 MR. MIESEN: -- I certainly can't recall today what
14 was discussed at that hearing, Your Honor.

15 THE COURT: My guess is that if he'd been told that
16 he would have said, wait a minute. Because it seems on its
17 face rather -- rather unreasonable. Let me ask you another
18 question. Let's assume -- because on this injunction, what we
19 have here is we have the residences of -- well, one couple,
20 and -- and an individual. We have two residences within this
21 -- within this development. And as I read the statute, the
22 only way those residents are entitled to protection by the
23 injunction is if there's association business going on there,
24 because this is an injunction against workplace harassment.

25 These individuals could have gone to court on their

1 own and obtained injunctions against harassment. That,
2 however, would not have entitled the association to attorney's
3 fees if they had simply done it on their own. But we have,
4 you know, we have the facts as they are. And I'm assuming
5 that the reason that these two individual residences are on
6 the injunction is because association business goes on at
7 these residences. Otherwise, they don't even belong on the
8 injunction under the statute.

9 MR. MIESEN: Well, these individuals are officers of
10 the association.

11 THE COURT: Right.

12 MR. MIESEN: And as such, they were listed as
13 protected persons.

14 THE COURT: Right. So I'm --

15 MR. MIESEN: Because --

16 THE COURT: -- so I'm -- I'm going to give you the
17 benefit of the doubt, even though I think an argument can be
18 made that unless there is business going on there, at least
19 throughout the day, every day of the week, that these
20 residences would have more properly the subject of an
21 individual injunction rather than -- than -- than an
22 injunction against workplace harassment. But let's assu --
23 let's concede that for the point -- for the moment, that the
24 injunct -- that there is association business going on at
25 these two residences, and they are entitled to be protected as

1 part of the association's workplace.

2 If the Plaintiff went in front of either residence,
3 carrying a sign that said, whoever it -- Mr. Toothman, Mr.
4 Gaytan, whatever, should be -- or both, should be removed from
5 the board of directors, and walked back and forth in front of
6 those residences, not disrupting traffic, not disrupting any
7 passersby in any way, simply walked back and forth in front of
8 either of the -- or both of those residences carrying the
9 sign, would that violate the injunction?

10 MR. MIESEN: I think it would.

11 THE COURT: Okay. So what you are saying then,
12 because surely you do not disagree that urging the removal of
13 a member of the board of directors is constitutionally
14 protected speech, correct?

15 MR. MIESEN: I believe that -- well, whether the
16 association is restricted by the constitution as to its rules
17 and regulations for its association --

18 THE COURT: That's not the question.

19 MR. MIESEN: -- is a whole other issue.

20 THE COURT: The question, urging the removal of a
21 member of the board of tech -- protectors is -- board of
22 directors is constitutionally protected speech; do you
23 disagree with that?

24 MR. MIESEN: No. I agree with that.

25 THE COURT: So if she's violating the injunction,

1 then she is -- what you are doing is -- urging is that the
2 injunction should be interpreted in a way that limits
3 constitutionally protected speech?

4 MR. MIESEN: Only its location.

5 THE COURT: She -- she would have -- if -- if there
6 were no injunction in place -- some other homeowner could do
7 the same thing --

8 MR. MIESEN: Uh-huh.

9 THE COURT: -- right?

10 MR. MIESEN: Uh-huh.

11 THE COURT: So what you're doing is saying, the one
12 homeowner, you're free to -- to do this activity. But you,
13 Plaintiff, are not. You are limiting her ability to engage in
14 constitutionally protected speech.

15 MR. MIESEN: In front of their home, yes.

16 THE COURT: Right.

17 MR. MIESEN: Uh-huh.

18 THE COURT: Even though the statute says that the
19 injunction is not permitted to do that. ARS 12-1810
20 subsection (L)(2) says that the injunction cannot prohibit
21 constitutionally protected activity.

22 MR. MIESEN: I don't --

23 THE COURT: Picketing is a constitutionally
24 protected activity.

25 MR. MIESEN: Well, prohibit and limit I think are

1 two different things. You -- they're not prohibiting --

2 THE COURT: Well --

3 MR. MIESEN: -- her from --

4 THE COURT: -- it's the same thing here. If she's
5 not permitted to picket -- you know what, let's -- let's --
6 let's change it. Let's say that there's a homeowner's
7 association meeting going on, and she wants to picket in front
8 of the association meeting, you would say she's violating the
9 injunction?

10 MR. MIESEN: I think based on the language of the
11 injunction --

12 THE COURT: Uh-huh.

13 MR. MIESEN: -- there's a high probability that
14 she's in -- that she is.

15 THE COURT: Right. Even though that act -- that
16 activity, leaving aside who's doing it, that activity is
17 constitutionally protected.

18 MR. MIESEN: I think that it can be limited based on
19 location.

20 THE COURT: So you can limit somebody's ability to
21 engage in constitutionally protected speech by prohibiting
22 them from engaging in that speech in certain locations?

23 MR. MIESEN: Yes.

24 THE COURT: And the location that you have
25 identified is not a location where others are prohibited from

1 engaging in that activity?

2 MR. MIESEN: Correct.

3 THE COURT: Okay. I think if you read the cases,
4 that that doesn't work, but in any event. Okay. Anything
5 else you want to say? I've asked all my questions.

6 MR. MIESEN: Well, I believe that ob -- it's very
7 clear that the Court's read the papers, I'm not going to
8 restate everything. We believe that -- that -- to sum it up,
9 that Ms. Bocchino violated the governing documents, the CC&Rs.
10 The association had a right to enforce that. It chose this
11 particular avenue to do so, and was provided an injunction
12 order that was served. I -- I believe that that means the --
13 that the association was the prevailing party. I understand
14 the Court's concerns about enforceability, but --

15 THE COURT: What about -- what -- do -- do you have
16 anything more to add? I read all of your cases on -- on the
17 -- on the issue of prevailing party. And the distinction I
18 draw, as a I said, is those are cases in which there was
19 opposition that was overcome. This is not that case. So --

20 MR. MIESEN: I think the Court, though, and you --
21 you even read something from the dictionaries. I mean, the
22 dictionaries provide overcome opposition. There's a standard
23 of proof that's required. The Justice of the Peace doesn't
24 just say, well, thank you for coming in, I'll sign your order,
25 there -- there are standards that are required. There's

1 evidence that must be shown that there is harassing behavior.

2 THE COURT: Right.

3 MR. MIESEN: I think that's the opposition that --
4 that --

5 THE COURT: Who -- who --

6 MR. MIESEN: -- exists.

7 THE COURT: -- who -- how -- how was your request
8 for an injunction opposed? The law created the opposition by
9 imposing standards --

10 MR. MIESEN: Sure.

11 THE COURT: -- that you had to meet? That's
12 opposition?

13 MR. MIESEN: I believe that would be opposition,
14 Your Honor --

15 THE COURT: Okay.

16 MR. MIESEN: -- absolutely.

17 THE COURT: All right.

18 MR. MIESEN: But aside from that, I think that that
19 was one dictionary's definition. Black's Law Dictionary was
20 cited by one of the cases that I provided to the Court, or a
21 few of the cases that I provided to the Court, and that
22 actually stated prevailing party is the party in whose favor a
23 judgment is rendered --

24 THE COURT: Uh-huh.

25 MR. MIESEN: -- regarding damage -- the amount of

1 damages --

2 THE COURT: Uh-huh.

3 MR. MIESEN: -- awarded.

4 THE COURT: Uh-huh.

5 MR. MIESEN: So --

6 THE COURT: And a --

7 MR. MIESEN: -- in this --

8 THE COURT: And what we find is a judgment in whose
9 favor the -- the party in whose favor the judgment was
10 rendered over opposition from somebody else who was trying to
11 prevent that judgment. That's not an uncon -- that's not a
12 definition that support -- finds that a judgment in an
13 uncontested case --

14 MR. MIESEN: Well, the way I'm reading the Black's
15 Law Dictionary definition is that there's a judgment rendered.
16 There is certainly -- there are standards in -- even in
17 default cases that must be satisfied in order to have a
18 judgment rendered. But the point is that we requested certain
19 relief, we received certain relief --

20 THE COURT: Right.

21 MR. MIESEN: -- that was requested.

22 THE COURT: Right.

23 MR. MIESEN: Judgment was entered.

24 THE COURT: But -- but you know -- you -- you know
25 that if this were a case in which we were dealing with a

1 contract that did not have an attorney's fee provision in it,
2 you would not be able to get attorney's fees.

3 MR. MIESEN: In a -- in a default situation,
4 correct.

5 THE COURT: Right. Or in any situation. Because
6 the stat -- but -- it's a statute that says that it must be a
7 contested matter.

8 MR. MIESEN: Correct.

9 THE COURT: What we're dealing here is with
10 enforcing a contract that chose to use the word prevail.

11 MR. MIESEN: Uh-huh.

12 THE COURT: And as I read the principals of contract
13 construction, prevail means what is commonly understood.

14 MR. MIESEN: Yes.

15 THE COURT: And I haven't found anything that says
16 prevail -- one prevails in a situation where one experiences
17 no opposition. I mean --

18 MR. MIESEN: Well --

19 THE COURT: -- to me, it strikes me as, you know,
20 Arizona State, like every major college, if not every college,
21 football program in the country conducts spring practice 21 --
22 at least it used to be 21 days, at the con -- the conclusion
23 of which, there is a spring game. And they invite the
24 boosters out. I mean, you know, Alabama had over 70,000 at
25 theirs. I think Ohio State had -- had a -- maybe even 100,000

1 at their spring game. And there is a spring game, and there
2 is a winner and a loser. But the winner and the loser are not
3 Ohio State or Arizona State or anybody. The -- the team did
4 not prevail, because they were competing against one another,
5 not against an opponent. The offense may have prevailed over
6 the defense, the defense may have prevailed over the offense.
7 But you don't have a winner. You don't have these schools
8 claiming, we enter the next season with a record of one and 0
9 because we prevailed in this game.

10 MR. MIESEN: Well, Your Honor --

11 THE COURT: It seems to me to be the same thing.

12 MR. MIESEN: -- to tab another analogy here, you
13 know, I was in sports, individual sports, as well as team
14 sports growing up, and even with the individual sports, if
15 someone didn't show up, you know, at wrestling, someone
16 doesn't show up --

17 THE COURT: Right.

18 MR. MIESEN: -- you know, they -- they're
19 disqualified and that person is deemed the -- the winner --

20 THE COURT: Right.

21 MR. MIESEN: -- in that match.

22 THE COURT: Right.

23 MR. MIESEN: They prevailed. They receive a --
24 maybe even a medal, or some kind of trophy, or they have their
25 record --

1 THE COURT: Right.

2 MR. MIESEN: -- as one and zero. If someone doesn't
3 show up --

4 THE COURT: The --

5 MR. MIESEN: -- there's still a prevailing party.

6 THE COURT: Okay. Well, you're making the argument
7 you need to make. I'm not --

8 MR. MIESEN: I --

9 THE COURT: I -- and I will tell you, I -- I will
10 tell you, before I sent the email out, I went on Westlaw and
11 probably spent at least an hour trying to find a case anywhere
12 that dealt with the notions of prevail in whatever form, and
13 uncontested, unopposed, whatever, and I found nothing.

14 MR. MIESEN: Well, the cases that I provided the
15 Court, while perhaps there -- there was an opposing party,
16 because it was on appeal that these cases were coming out,
17 however. So I'm not surprised that the Court doesn't find
18 cases that -- and I certainly didn't find cases, either, where
19 it was an uncontested action, because who's --

20 THE COURT: Right.

21 MR. MIESEN: -- who's appealing that? But --

22 THE COURT: Well, but there could be district court
23 opinions.

24 MR. MIESEN: Yes. However, the standards that were
25 provided, and even the U.S. Supreme Court's definition of what

1 prevailing party is does not have the requirement that it be
2 opposed. And so I think it's --

3 THE COURT: Well, it -- I would suggest to you the
4 reason you don't find that in any of the cases is because it
5 was not an issue.

6 MR. MIESEN: Perhaps so.

7 THE COURT: So the -- so the --

8 MR. MIESEN: We don't have those --

9 THE COURT: They didn't decide one way or the other.

10 MR. MIESEN: Right.

11 THE COURT: So I think what we do is then we fall
12 back on -- on what is the commonly understood definition of
13 prevail.

14 MR. MIESEN: And I'll give you -- and I'll leave you
15 with the analogy that even in sports, you have --

16 THE COURT: Okay.

17 MR. MIESEN: -- prevailers --

18 THE COURT: Okay.

19 MR. MIESEN: -- when people don't show up.

20 THE COURT: Do you -- if -- if, in fact, the
21 injunction as written could not have been enforced, and we
22 don't need to -- to go through that discussion again, can the
23 association nevertheless be deemed the prevailing party? You
24 know, and let me -- and let me state it another way. If -- if
25 -- and I don't say this to be critical or talk down or

1 anything like that, if -- if the -- if, as I said at the
2 beginning, the goal was to obtain an injunction that could be
3 forced against the Plaintiff, and the injunction as written by
4 the judge down there, as written, could not be enforced, is it
5 not fair to say then that the effort did not succeed?

6 MR. MIESEN: I suppose if it caused a change in --
7 in action, it did succeed. Regardless of whether we had to
8 call the police out there to enforce the injunction, it caused
9 a change in action.

10 THE COURT: Yeah. But you don't get -- you don't
11 get attorney's fees under that -- under the provision on which
12 the association is relying unless the association prevailed in
13 the litigation. And if the result was a meaningless
14 injunction, how does the association still prevail?

15 MR. MIESEN: Well, I -- I believe that while the --
16 there's been no determination by the courts that it was --
17 that the form provided by the justice courts is unenforceable.
18 I -- I understand your position, Judge, on that issue. But I
19 believe that even in the entry of the order, a judgment, that
20 the party who received the judgment that's in line with the
21 relief sought in their complaint has prevailed --

22 THE COURT: Are --

23 MR. MIESEN: -- because it obtained the relief it
24 sought.

25 THE COURT: Are you -- are you suggesting or even

1 just coming right out and saying that in -- in trying to
2 resolve the issues that are presented to me, I am not
3 permitted to decide whether or not that injunction was
4 enforceable?

5 MR. MIESEN: No.

6 THE COURT: Okay. I mean, I wouldn't be offended if
7 you did. I'd just like to know -- I would just like to know
8 the reason --

9 MR. MIESEN: Sure.

10 THE COURT: -- so.

11 MR. MIESEN: No, but I -- I believe that even if the
12 injunction is un -- is ultimately unenforceable --

13 THE COURT: Uh-huh.

14 MR. MIESEN: -- I mean, let's even take the
15 situation now. It's been over a year. It's not currently
16 enforceable. Does that mean that the association was not the
17 prevailing party because the injunction expired?

18 THE COURT: No. I think it would mean that if the
19 injunction was unenforceable, it was unenforceable the day
20 that it was -- it was issued. It -- meaning it never had any
21 effect. So that --

22 MR. MIESEN: It caused a change in action.

23 THE COURT: Well, but where in the CC&Rs do you get
24 attorney's fees if you cause a change in action?

25 MR. MIESEN: Well, again, we're getting back to the

1 definition of prevail.

2 THE COURT: Yeah. Okay. All right. Fair enough.

3 MR. MIESEN: They got what they wanted.

4 THE COURT: Okay. All right.

5 MR. MIESEN: I have nothing further.

6 THE COURT: Okay. Anything else? Okay.

7 MR. MIESEN: Thank you.

8 THE COURT: Mr. Dessaulles?

9 MR. DESSAULES: Thank you, Your Honor. I -- I think
10 what -- what we're struggling with here is the con -- is the
11 change -- the difference between prevail and succeed. I think
12 that if the CC&Rs -- by the way, I disagree that the CC&Rs are
13 applicable, and I'll go through that analysis for you shortly.
14 But if the CC&Rs said that the association succeeds, then
15 there might be a different analysis here.

16 I myself spent far more than an hour in response to
17 your email looking for a case. I found nothing. The closest
18 thing I found was the rule. I understand Your Honor says it's
19 not applicable, and I'll tell you why it is in -- in a second,
20 as well. But let me just -- let -- let me focus more on the
21 -- the injunction here. If the Plaintiff walks in a common
22 area, she's violating the injunction.

23 THE COURT: Well, it depends on where the common
24 area is.

25 MR. DESSAULES: Well, actually --

1 THE COURT: Is it -- is it near or far?
2 MR. DESSAULES: Well, if she goes over to her --
3 THE COURT: Or somewhere --
4 MR. DESSAULES: -- friend Nancy's --
5 THE COURT: Or somewhere in between?
6 MR. DESSAULES: If she goes over to her friend Nancy
7 Fisher's house, which is across the street from Donald
8 Toothman's off -- from Donald Toothman's house, does she
9 violate that injunction?
10 THE COURT: I -- that was my --
11 MR. DESSAULES: And --
12 THE COURT: -- that was my question. I'll -- I'll
13 give you another example, and then maybe we can move on.
14 MR. DESSAULES: Yeah.
15 THE COURT: There appears to be a swimming pool and
16 what is I suppose a -- a community clubhouse of some sort --
17 MR. DESSAULES: Yes.
18 THE COURT: -- that is almost directly across the
19 street from the Toothman residence.
20 MR. DESSAULES: That is correct.
21 THE COURT: If the Plaintiff goes and uses the pool
22 or goes in it, does she -- is she near the Toothman residence
23 and does she violate the injunction?
24 MR. DESSAULES: Now --
25 THE COURT: And -- and -- and, you know, we can --

1 I'll -- will certainly allow rebuttal, but my concern there
2 again is the target of an injunction is supposed to be able to
3 look at it and know precisely what is and is not permitted,
4 without having to guess, and without having to ask anyone. I
5 don't know whether using the swimming pool would violate the
6 injunction.

7 MR. DESSAULES: Taking that a step further, Your
8 Honor, in addition to that, they're also -- and the case law
9 on this is very clear, courts can't impose prior restraints on
10 speech. The association, by getting the injunction that
11 prohibits the -- the -- the Plaintiff from carrying the picket
12 sign, as -- as Your Honor suggested, that's a prior -- that's
13 a prior restraint that has a chilling effect on speech. And
14 under the case law that -- that the Defendant cited, one of
15 the requirements of being a prevailing party is that the
16 judicial sanction must be an enforceable entitlement to
17 relief. And that's the Klamath Siskiyou Wildlands Center
18 case. I'm not making any representations in terms of
19 pronouncement, 589 F.3d 1027.

20 Now -- but let me -- let -- let me just take a step
21 back here for examp -- for -- for a second. Because we're
22 operating under the assumption that the -- that the CC&Rs
23 apply, that the Article 17, Section 1, attorney's fee language
24 provides. And I don't think you can divorce the question of
25 what relief are they seeking and in what context from -- from

1 that. There's three bases arguably for the association to get
2 their fees. The first would be ARS 12-341.01. Doesn't apply,
3 it wasn't a contested action.

4 The second would be the attorney's fees provision
5 arising out of the pr -- arising out of the injunction against
6 harassment. And that actually, Your Honor, of all of the --
7 that's the one that's most closely applicable. If you look at
8 Rule 39, it talks about that this is a provision for getting
9 attorney's fees under 12-1810(0).

10 THE COURT: Right. But that's -- but the same
11 statute, Mr. Dessaulles, says it's not to the exclusion of
12 other remedies.

13 MR. DESSAULES: I understand that, Your Honor. But
14 -- now, then you -- you look at the -- the attorney's fees
15 provision. And let me take a step back even further. If you
16 look at -- we cited one case. There's two other cases, one of
17 which is Berry v. 352 E. Virginia, the other of which is
18 Robert Mann Construction v. Liebert Corporation, in order to
19 be the prevailing party in -- in a -- in a lawsuit, you have
20 to ask for an award of fees in the complaint. Both of those
21 case -- Berry says, a fee request based on a contractual
22 provision requires pleading and proof. And -- and in Berry,
23 the Court disregarded the -- because there wasn't a -- a
24 request for fees made based on the contract, Berry said we
25 can't award fees based on the contract.

1 Same thing in Robert Mann. Robert Mann case says
2 you can't get attorney's fees by only generally referring to
3 attorney's fees in -- in a complaint.

4 THE COURT: The --

5 MR. DESSAULES: They didn't even do that.

6 THE COURT: This is your argument that if they
7 wanted to preserve a claim for attorney's fees, it must have
8 been submitted with their petition?

9 MR. DESSAULES: That -- that is -- yes.

10 THE COURT: Okay. I understand the argument. Okay.

11 MR. DESSAULES: Okay. Now, so then we turn to the
12 provision. And, I mean, that leaves us with the contract
13 provision.

14 THE COURT: Uh-huh.

15 MR. DESSAULES: Well, what does the contract
16 provision says (sic)? There's three ways you get fees under
17 the CC&Rs. The first way, to enforce collection of amounts
18 due. Not applicable. Secondly, in connection with any lien.
19 Not applicable. Third way, to enforce compliance with, or
20 specific performance of the terms and conditions of this
21 declaration. The only provision they've cited that implicates
22 the CC&Rs at all is the nuisance provision. And if you look
23 at the nuisance provision it talks about activities taking
24 place upon any lot. It doesn't -- I mean, I -- under the
25 plain language of -- of the nuisance provision, this isn't a

1 nuisance. You can't violate a nuisance statute by sending
2 letters, by sending emails. And I -- I know Your Honor's
3 familiar with -- with the case law regarding that issue. This
4 is -- you don't get --

5 THE COURT: Wasn't though -- and -- and I will tell
6 you that, although my memory is a -- a -- a bit clouded, I
7 read through the supporting -- the materials that were
8 submitted in support of the petition, and it struck me that
9 some of the incidents on which the petition was predicated
10 should not have supported the requested injunction. You know,
11 getting an injunction because somebody makes me feel bad
12 because they called me bad names doesn't work.

13 However, I think there was some activity in that --
14 in there that would have supported the injunction, and I
15 thought that -- and I'm not saying whether this -- it's
16 truthful or not, I'm not going to make that judgment about
17 anybody, because I don't have to, for starters -- but I
18 thought that there was at least some allegation that one of
19 the three protected people, at least one of the three, was
20 threatened by the Plaintiff, physically threatened.

21 MR. DESSAULES: That's not an injunction against
22 workplace harassment. That would be an injunction against
23 harassment. What we have here --

24 THE COURT: Right.

25 MR. DESSAULES: -- is an association stepping in in

1 loco parentis to -- to vindicate --

2 THE COURT: Well, but this person -- the -- the --
3 this was Mrs. Toothman. And she said that she does work for
4 the association in her -- in -- in her papers, that she -- she
5 was in a -- I -- I don't think any of these people are paid
6 employees, but they are people who work for the -- who do work
7 for the association. So here we have somebody who does work
8 for the association, and I believe she said she was being
9 threatened, and the threats pertained to activities that the
10 association had taken.

11 MR. DESSAULES: Well, Your Honor, I'm not sure -- it
12 -- well, that may be a basis for an injunction against
13 harassment. It may also be a basis for an injunction against
14 workplace harassment.

15 THE COURT: Right.

16 MR. DESSAULES: I don't believe it's a basis to
17 implicate the nuisance provision which, by the way, was never
18 alleged in that complaint anyway. What we're doing here is --
19 is after the fact, we're piecing together bits and pieces of
20 the declaration that we think, well, maybe she was violating
21 this, or -- or she could have violated this provision.

22 THE COURT: What --

23 MR. DESSAULES: They proceeded under a statutory
24 provision --

25 THE COURT: -- what --

1 MR. DESSAULES: -- and the law is clear that when
2 you proceed under a statutory provision, you don't get -- that
3 -- that the statutory provision defines the -- the -- the
4 entitlement to relief.

5 THE COURT: What --

6 MR. DESSAULES: And --

7 THE COURT: I think I understand your argument.
8 What I have, I guess it's your exhibit, what page of the CC&Rs
9 are you referring to when you talk about nuisance?

10 MR. DESSAULES: 19.

11 THE COURT: Page 19.

12 MR. DESSAULES: And it talks about a noxious or
13 offensive activity carried on upon any lot, or any part of any
14 -- of the -- of the properties.

15 THE COURT: What section? Oh, 10.

16 MR. DESSAULES: Section 10.

17 (Pause)

18 THE COURT: Okay.

19 MR. DESSAULES: Homeowners associations, the lawyers
20 who represent homeowners associations, Carpenter Hazlewood,
21 are very adept at going to court and getting an injunction to
22 stop someone from committing a nuisance. You don't do it by
23 the statutory provision, which is very narrow, very confined,
24 very restrictive. And you don't certainly get to go after the
25 fact and say, well, this is really what -- our -- our -- our

1 fact pattern kind of fits into section 10 here, so just give
2 it to us. That -- that's in -- in my opinion, that's --
3 that's improper. They don't get fees for that.

4 It -- also, when you talk -- talking about
5 prevailing parties, the -- I -- as I said, I found no case
6 saying that whether -- whether in an uncontested action you
7 can be the prevailing party. I -- I agree that based on the
8 definitions, there has to be some opposition. That being
9 said, you also can't divorce the definition of prevailing
10 party from the context in which it arises. Courts make a
11 determination who the prevailing party is. People don't get
12 to self determine whether they're the prevailing party or not.

13 In -- even in the scenario that -- that Mr. Miesen
14 gave, in the -- the sports scenario where the other team
15 doesn't show up, I would submit to you that when you don't
16 show up, you're deemed to be there, you forfeit. But there's
17 still a -- there's an independent third party that says,
18 you're the winner, you're the loser. And that didn't happen
19 here. If they wanted a request for fees, they should have
20 asked for fees. They shouldn't -- not just simply add
21 something to someone's ledger.

22 And we can talk about the actual entries, as well,
23 in terms of whether they're reasonable, in terms of whether it
24 all relates to this. It -- they don't, and they're not
25 reasonable. I'm happy to go into that analysis, if you'd

1 like. But I -- of -- of -- but I have nothing else to add
2 otherwise.

3 THE COURT: Okay. Don't read anything into this,
4 I'm just -- a question has just occurred to me, but if I were
5 to conclude -- let me put it this way, it -- to get to the
6 point quickly, if I were to accept all of the association's
7 arguments except that the fees to some extent are clearly
8 excessive, what is the ruling on these motions? Do they both
9 get denied, and I send you off to the arbitrator to decide --

10 MR. DESSAULES: No.

11 THE COURT: -- or --

12 MR. DESSAULES: No, Your Honor.

13 THE COURT: Why?

14 MR. DESSAULES: This -- because --

15 THE COURT: Do I go through the --

16 MR. DESSAULES: No --

17 THE COURT: -- the billing statements and cut --

18 MR. DESSAULES: No. The Plaintiff still prevails
19 because in this case, what -- because the process that's
20 followed, it's the original judge that makes a determination.

21 THE COURT: The -- the -- I -- I'm -- I guess I
22 didn't ask my question clearly enough.

23 MR. DESSAULES: Okay.

24 THE COURT: Let's assume, despite your objection, I
25 reach a conclusion that they in fact were the prevailing

1 party, that they can do what they did here. My only concern
2 is with the fee amount itself, that in some instances, it's
3 clearly excessive. Given that, and again, don't read anything
4 into that, I'm not saying I'm going in that direction, but if
5 I were, what is the ruling on these motions?

6 MR. DESSAULES: I have no idea. We're sort of
7 entering on uncharted ter -- uncharted --

8 THE COURT: I mean, do I --

9 MR. DESSAULES: -- territory here.

10 THE COURT: Do -- do I -- do I -- hang on -- do I
11 make a -- do I go through the -- as I said, do I go through
12 the billing statements and say, this is excessive, this
13 wasn't?

14 MR. DESSAULES: That -- that isn't --

15 THE COURT: Or -- or do I send you off to see the
16 arbitrator and ask him to make a call in the first instance?

17 MR. DESSAULES: Well, arbit -- well, I would say
18 that it's -- ordinarily the Court makes the determination to
19 determine reasonableness of fees or -- although, I don't need
20 to --

21 THE COURT: Well --

22 MR. DESSAULES: -- keep hitting this point --

23 THE COURT: -- except that this -- except that this
24 is a compulsory arbitration case, and I -- the only reason
25 I've got it -- I can't tell you how many colleagues I -- that

1 have asked me, why do you have this case? It a \$4,000 case,
2 why do you have it? Because the rule says I have to rule on
3 motions for summary judgment. But on anything less than that,
4 I don't. The arbitrator rules. And I -- I -- quite frankly,
5 I'm -- the reason I'm asking the question is I don't know. I
6 hadn't thought about it until just now.

7 MR. DESSAULES: I -- I hadn't thought about it until
8 just now --

9 THE COURT: Okay.

10 MR. DESSAULES: -- either, Your Honor. I -- I --

11 THE COURT: Okay.

12 MR. DESSAULES: -- believe that if -- if you find in
13 favor of the -- that they -- that they are the prevailing
14 party, that they're entitled to an award of some kind of fees,
15 but that the fees are in some way excessive, I think that --
16 that to then punt that to the arbitrator, I think is probably
17 in -- within Your Honor's scope of deciding the motion for
18 summary judgment to say the amount of those fees that are
19 unreasonable or excessive, and I would ask for additional
20 briefing. If that --

21 THE COURT: Yeah.

22 MR. DESSAULES: -- if that's the path we go down,
23 I'd like to explain why those fees are excessive --

24 THE COURT: Okay.

25 MR. DESSAULES: -- and -- and not applicable.

1 THE COURT: Okay. All right.

2 MR. DESSAULES: But I don't believe we should go
3 down that path for the reasons I have already said.

4 THE COURT: Right. Okay. Very good. Thank you.
5 Rebuttal?

6 MR. MIESEN: Very short, Your Honor.

7 THE COURT: Why don't -- did -- it -- I -- I'm sure
8 you're going to get to it, but I -- I would really like to
9 know your response to the contention that section 10 -- you
10 seem to be relying on section 10, and it doesn't get you where
11 you got.

12 MR. MIESEN: Well, section 10 uses language like
13 offensive activity --

14 THE COURT: Right.

15 MR. MIESEN: -- annoyance. I mean, even in a --
16 even in the definition of harassment, the standard for the
17 injunction is that they are harassed and annoyed. So I think
18 that right there we've got a connection. And it's certainly
19 by proving up the -- the injunction to the judge in that case,
20 the standard we proved was harassed and annoyed. I think
21 anybody who's got an -- if the Court determines that an
22 injunction should be entered, then they have made the
23 determination that there's been some offensive behavior,
24 because harassment is by definition -- it's axiomatic, it is
25 offensive.

1 THE COURT: Yeah, but let -- and I'm sorry I
2 overlooked it, but let's talk about it now, section 10 refers
3 to an annoyance or nuisance to the neighborhood.

4 MR. MIESEN: Uh-huh.

5 THE COURT: Interference with the quiet enjoyment of
6 each owner's respective townhouse, or which in any way
7 increases the rate of insurance. I haven't seen anything
8 about rates -- insurance rates increasing, so let's focus on
9 the first two, nuisance to the neighborhood and interference
10 with each owner's enjoyment. What we've got here, do we not,
11 is a case where -- where a couple of owners have been annoyed,
12 but we don't have anything about the entire neighborhood being
13 frustrated or annoyed or subject to noxious activity. Doesn't
14 section 10 pertain to activity that would affect everyone and
15 not just a couple of people? And if it -- and if the activity
16 affects a couple of people, isn't Mr. Dessaulles correct that
17 the remedy then is for those people to get their own
18 injunctions, rather than the association?

19 MR. MIESEN: Well, I think there was a two part
20 question.

21 THE COURT: Okay.

22 MR. MIESEN: So --

23 THE COURT: The -- there may be more than that, but
24 go ahead.

25 MR. MIESEN: Yeah. I'll try to piece this out.

1 Offend -- no offensive activity shall be carried up -- on --
2 upon any lot or any part of the properties. That's one.
3 Harassing is offensive. That's what I suggest to this Court.
4 In addition, nuisance to the neighborhood, Mr. Dessaulles is
5 relying on this nuisance idea, but there's also this, which
6 shall in any way interfere with the quiet enjoyment of each of
7 the owners of his respective townhouse. I don't -- I -- the
8 way I read that is not that all of the owners are losing their
9 -- their right to quiet enjoyment, but any one of the owners
10 could be losing his right to quiet enjoyment. But in either
11 case, you still have this offensive activity. And I go back
12 to if harassment is not offensive, what is -- what is it? I
13 mean --

14 THE COURT: Okay.

15 MR. MIESEN: -- it is by definition.

16 THE COURT: Okay.

17 MR. MIESEN: Your other point, let's see if I can
18 remember it, now that I went through that, was -- well, since
19 I went all through that, I lost the second part of the
20 question. But the other thing I wanted to say was, to your
21 question regarding whether or not you would rule, assuming in
22 the -- in the hypothetical that you said, you know what, the
23 -- the association's entitled to fees as the prevailing party,
24 but how much is that going to be? I think you're correct. I
25 think to show clearly excessive, it's an evidentiary showing.

1 THE COURT: Okay.

2 MR. MIESEN: And -- and so I think the arbitrator
3 would be the appropriate --

4 THE COURT: Could I -- could I do it? Could I do it
5 in the context, as -- as -- as Mr. Dessaulles at least sort of
6 suggested, if not expressly suggested, in the context of
7 deciding these motions could I ask for evidence to be
8 presented on that -- on that point, and save you the trouble
9 of going back to the arbitrator?

10 MR. MIESEN: Certainly, if you would like to go
11 through that. I -- we -- I think you're right. I --

12 THE COURT: I -- I'm just wondering if there's --

13 MR. MIESEN: -- but I -- my point is --

14 THE COURT: -- any jurisdictional problem. That's
15 --

16 MR. MIESEN: Oh.

17 THE COURT: -- that's my concern is that -- that we
18 do that --

19 MR. MIESEN: I see.

20 THE COURT: -- and then the loser says, wait a
21 minute, you didn't have jurisdiction to decide that issue,
22 and --

23 MR. MIESEN: Because of the compulsory arbitration
24 --

25 THE COURT: Yeah.

1 MR. MIESEN: -- rule?

2 THE COURT: Yeah. And -- and -- and I -- I'm asking
3 you folks to think of the -- off the top of your head and
4 that's --

5 MR. MIESEN: Yeah. I don't --

6 THE COURT: -- not fair, to -- understand that it --
7 it's -- you know, it just may be an interesting discussion,
8 and it won't get any further than that.

9 MR. MIESEN: I don't know about the jurisdictional
10 issue, Your Honor --

11 THE COURT: Yeah.

12 MR. MIESEN: -- without having to dig into it a
13 little bit more.

14 THE COURT: Yeah. Yeah. Okay.

15 MR. MIESEN: But I think that -- I think that it
16 does require a showing. And so there would need to be some
17 evidence to -- by the Plaintiff in this case to show that the
18 fees were clearly excessive. And I think that could be done
19 by the arbitrator, in a -- in a compulsory arbitration case,
20 but I don't know if this Court were to do it, if that creates
21 jurisdiction --

22 THE COURT: Yeah.

23 MR. MIESEN: -- issues to answer that.

24 THE COURT: Okay. Okay. All right. Anything else?

25 MR. MIESEN: That's all I have, Your Honor.

1 THE COURT: Okay. Thank you. Thank you for your
2 briefing and your presentation. I appreciate it.

3 And now I'm going to do something that I don't do --
4 well, I used to do it all the time in Family Court, but I
5 seldom have the opportunity to do it here. And I -- please
6 don't take anything I say to be critical, or to be insulting,
7 it is a heartfelt suggestion. This case needs to settle.
8 There isn't -- it -- it in one sense it's a lot of money, in
9 another sense it isn't. But here's -- here's what I'm
10 thinking.

11 I think the association has a serious risk that it
12 -- it's going to wind up being the losing party in this case,
13 and that in addition to refunding the \$3800 or whatever it is,
14 they're going to be liable to some attorney's fees. The
15 Plaintiff runs the risk of losing this case by winning,
16 because the Plaintiff's claim for attorney's fees in this case
17 arises under 12-341.01(a), not under the terms of the CC&Rs.
18 But even if it did, even if it did arise under the CC&Rs, the
19 standard for deciding what is a reasonable amount of
20 attorney's fees is the same.

21 And I don't know what the Plaintiff's attorney's
22 fees are now, but if this goes on, there is a chance that the
23 Plaintiff will wind up having to eat more in attorney's fees
24 than the Plaintiff gets back from the association. I --
25 again, I don't know what the fees are, they might be quite

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C E R T I F I C A T E

I, KIMBERLY C. McCRIGHT, CET, certified electronic transcriber, do hereby certify that the foregoing pages 1 through 45 constitute a full, true, and accurate transcript from electronic recording of the proceedings had in the foregoing matter.

DATED this 28th day of November, 2016.

/s/ Kimberly C. McCright
Kimberly C. McCright, CET
Certified Electronic Transcriber

CERTIFICATE OF COMPLIANCE

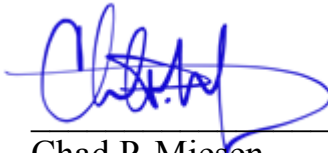
1. This certificate of compliance concerns:
 - A brief, and is submitted under Rule 14(a)(5)
 - An accelerated brief, and is submitted under Rule 29(a)
 - A motion for reconsideration, or a response to a motion for reconsideration, and is submitted under Rule 22(e)
 - A petition or cross-petition for review, a response to a petition or cross-petition, or a combined response and cross-petition, and is submitted under Rule 23(h)
 - An amicus curiae brief, and is submitted under Rule 16(b)(4)

2. The undersigned certifies that the brief to which this Certificate is attached uses type of at least 14 points, is double-spaced, and contains _____ words.

3. The document to which this Certificate is attached does not exceed the word limit that is set by Rule 14, Rule 22, Rule 23, or Rule 29, as applicable.

DATED this 10th day of February, 2017.

Carpenter, Hazlewood, Delgado & Bolen, PLC



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CERTIFICATE OF SERVICE

The undersigned counsel for Appellant on the 10th day of February, 2017, electronically filed Appellant's Opening Brief in the Court of Appeals Division One; and served a copy to the following parties in compliance with Rule 5(c) of the Arizona Rules of Civil Procedure as follows:

Via first-class U.S. Mail and via email this 10th day of February, 2017 to:

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