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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

**JIE CAO and HAINING “FRAZER”
XIA, a married couple; STONE XIA, an
individual,**

Plaintiffs;

vs.

**PFP DORSEY INVESTMENTS, LLC, a
Delaware limited liability company;
DORSEY PLACE CONDOMINIUM
ASSOCIATION, an Arizona nonprofit
corporation;**

Defendants.

Case No.: CV2019-055353

FIRST AMENDED COMPLAINT

(Assigned to the Honorable Daniel Martin)

(Tier II Case)

(Jury Trial Requested)

Plaintiffs Jie Cao, Haining “Frazer” Xia, and Stone Xia (collectively “Plaintiffs”) hereby file their First Amended Complaint against Defendants Lorne Polger, Matt Quinn, and Michael A. Schern (collectively “Defendants”).

PARTIES, JURISDICTION AND VENUE

1. Plaintiffs Jie Cao (“J. Cao”) and Haining “Frazer” Xia (“Xia”) are a married couple residing in Maricopa County, Arizona at all relevant times.

1 10. In or around 2007, Dorsey Place was completed at a cost of approximately twenty-
2 three million dollars (\$23,000,000). At least six condominiums were sold by the developer for
3 prices in excess of four hundred thousand dollars (\$400,000).

4 11. On or around December 15, 2006, the Board of the Condo Association adopted
5 bylaws (“Bylaws”).

6 12. The Bylaws discuss the Annual Member Meeting under Section 3.3, stating, “The
7 annual meeting of the Members shall be held in the month of March each year, beginning in
8 March, 2006, with the exact date to be determined each year by the Board, provided that the
9 Board may elect to delay the annual meeting past March in any given year (but in no event later
10 than May 31) if necessary to permit preparation of financial statements or budgets, or for such
11 other reason as may be determined by the Board, in its good faith discretion. At each annual
12 meeting the Members shall elect the Board and transact such other business as may properly be
13 brought before the meeting.”

14 13. The Bylaws discuss Special Meetings of the Members under Section 3.4, stating
15 “Unless otherwise prescribed by Arizona statute or by the Articles, special meetings of the
16 Members, for any purpose or purposes, may be called by: (a) the president; (b) a majority of the
17 directors; or (c) after the Declaration is recorded, Members having at least ten percent (10%) of
18 all votes in the Association (as determined in accordance with the Declaration).”

19 14. The Bylaws also discuss the requirements of Notice of Members Meetings under
20 Section 3.5, stating “Not less than ten (10) nor more than fifty (50) days before the date of any
21 annual or special meeting of the Members, either the secretary or any other officer of the
22 Association shall cause written notice stating the place, date and time of the meeting (and, in the
23 case of a special meeting, the items on the agenda, including, but not limited to, the general
24 nature of any proposed amended to the Declaration, Articles or Bylaws, any budget changes and
25 any proposal to remove a director or officer) to be hand-delivered or sent prepaid by United
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1 States mail to the last known mailing address of each Ember, as shown in the Association
2 records, or to the mailing address of such Member’s Unit). If mailed, such notice shall be
3 deemed to be delivered when mailed. Business transacted at any special meeting of Members
4 shall be limited to the items stated in the notice unless determined otherwise by a unanimous
5 vote of the Members present at such meeting.”

6 15. The Bylaws provide that directors are to be elected at the Annual Meeting: “The
7 business and affairs of the Association shall be managed, conducted and controlled by the
8 Board. The directors shall be appointed or elected as provided in the Declaration, and for the
9 term(s) specified therein. Except as provided in the Declaration, each director shall be elected at
10 the annual meeting of Members concurrent with the expiration of the term of the director he or
11 she is to succeed, and, except as otherwise provided in these Bylaws or in the Articles or the
12 Declaration, shall hold office until his or her successor is elected and qualified.” Section 4.1,
13 Bylaws.

14 16. On or around August 15, 2017, Dorsey Place recorded a Declaration of
15 Condominium for Dorsey Place with the Maricopa County Recorder’s Office, bearing recording
16 number 2007-0921387 (“Declaration”).

17 17. The Declaration was amended with a first amendment on July 31, 2009, and
18 recorded with the Maricopa County Recorder’s Office, bearing recording number 2009-0825688
19 (“First Amendment to Declaration”).

20 18. The Declaration and First Amendment to Declaration were amended with a second
21 amendment on August 15, 2011, and recorded with the Maricopa County Recorder’s Office,
22 bearing recording number 2012-0168217 (“Second Amendment to Declaration”).

23 19. The Declaration, First Amended to Declaration, and Second Amendment to
24 Declaration were amended with a third amendment on February 9, 2018, and recorded with the
25 Maricopa County Recorder’s Office, bearing recording number 2018-0161234 (“Third
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1 Amendment to Declaration”) (the Declaration, First Amendment to Declaration, Second
2 Amendment to Declaration, and Third Amendment to Declaration shall be referred to herein as
3 the “Declaration with Amendments”).

4 20. Under Section 6.4 of the Declaration with Amendments, each “Unit Owner shall
5 be a Member of the Association. The membership of the Association shall, at all times, consist
6 exclusively of the Unit Owners.”

7 21. Under Section 6.7 of the Declaration with Amendments provided each Unit Owner
8 with one vote for each Unit owned by the Unit Owner on “any Association matter which is put
9 to a vote of the membership in accordance with this Declaration, the Articles and/or Bylaws.”

10 22. Under Section 13.4 of the Declaration with Amendments, “the Condominium may
11 be terminated only by the agreement of Unit Owners of Units to which at least ninety percent
12 (90%) of the votes in the Association are allocated. An agreement to terminate the
13 Condominium must be evidenced by the execution or ratifications of a termination agreement, in
14 the same manner as a deed by the requisite number of Unit Owners.”

15 23. Under Section 2.4 of the Third Amendment to Declaration, there were ninety-six
16 (96) units in the Condo Association consisting of Units 101 through 121, Units 201 through 225,
17 Units 301 through 325, and Units 401 through 425.

18 24. In or around 2011, Pathfinder Partners LLC, a California limited liability
19 company, acquired Dorsey Place from the original developer for approximately eleven million
20 three hundred thousand dollars (\$11,300,000). The six additional units stayed with their current
21 owners and were not part of this transaction by Pathfinders Partners, LLC.

22 25. On information and belief, at some time Dorsey Place was transferred from
23 Pathfinder Partners LLC, to the Condo Association, PFP Dorsey, PFP LP, and/or PFP LLC.

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1 26. In or around March 2019, a 2019 Annual Meeting Notice was noticed, to be held
2 on April 4, 2019 (“Notice”). The letter notifying the members of the meeting listed seven items
3 on the agenda, as follows:

- 4 1. Call to Order and Verification of Quorum
- 5 2. Introduction of Board Members and Management Company
6 Representatives
- 7 3. Presentation of the Affidavit of Mailing
- 8 4. Financial Review
- 9 5. Status of the Community
- 10 6. Discussion on proposed termination of condominium
 - 11 a. Motion to adopt appraisal and terminate the condominium
 - 12 i. Vote to adopt the independent appraisal* procured to determine
13 the fair market value of the Condominium;
 - 14 ii. Vote to ratify a termination agreement* whereby the
15 condominium will be terminated and sold in accordance with
16 the Arizona Condominium Act (A.R.S. § 33-1228 *et seq.*)
- 17 7. Adjournment

18 *For your convenience and in preparation of the Annual Meeting as scheduled
19 herein, the following documents are enclosed: 1) Official Ballot for matters to
20 be voted upon; 2) Appraisal of Property; and 3) Proposed Condominium
21 Termination Agreement.

22 27. This Notice did not include a notice to elect directors, consistent with the
23 requirement of Annual Meetings under Section 4.1 of the Bylaws.

24 28. Therefore, this Notice was for a Special Meeting, rather than an Annual Meeting
25 of the Members.

26 29. Along with the Notice, a draft Condominium Termination Agreement was sent to
the members (“Draft Condominium Termination Agreement”); five appraisal reports prepared
by K & T Appraisals dated February 5, 2019; and an incomplete and misleading copy of A.R.S.
§ 33-1228.

 30. The Draft Condominium Termination Agreement stated that the Condo
Association was agreeing to sell all ninety units to PFP Dorsey for twenty-two million six
hundred forty-six thousand dollars (\$22,646,000).

1 31. The Draft Condominium Termination Agreement stated that at least ninety (90%)
2 percent of the Unit Owners voted to approve the Draft Condominium Termination Agreement.

3 32. Further, the Draft Condominium Termination Agreement provided that the
4 distribution of the sale shall be allocated to unit owners of five different types of property:
5 Owners of a Type A Unit will receive \$234,000 and their proportional interest in the Common
6 Elements; Owners of a Type B Unit will receive \$236,000 and their proportional interests in the
7 Common Elements; Owners of a Type C Unit will receive \$224,000 and their proportional
8 interests in the Common Elements; Owners of a Type D Unit will receive \$244,000 and their
9 proportional interests in the Common Elements; and Owners of a Type E Unit will receive
10 \$244,000 and their proportional interests in the Common Elements.

11 33. The Xia Condo was determined to be a Type A Unit.

12 34. Plaintiffs were present at the April 4, 2019 Special Meeting (“Special Meeting”).

13 35. At the Special Meeting, the members were provided with a modified
14 Condominium Termination Agreement (“Modified Condominium Termination Agreement”).
15 The Modified Condominium Termination Agreement provided that the Condo Association were
16 agreeing to sell all interests of Dorsey Place that were not already owned by PFP Dorsey.

17 36. Under Section 3.5 of the Condo Association’s bylaws, “business transacted at any
18 special meeting of Members shall be limited to the items stated in the notice unless determined
19 otherwise by a unanimous vote of the Members present at such meeting.”

20 37. The members of the Condo Association did not take a vote at the Special Meeting
21 to introduce the Modified Condominium Termination Agreement.

22 38. Had a vote of the Members been taken at the Special Meeting, the Plaintiffs would
23 have objected to introducing the Modified Condominium Termination Agreement, thereby
24 preventing the business to be transacted as indicated in Section 3.5 of the Bylaws.

1 39. Plaintiffs informed the Defendants that they were only obligated to sell the Xia
2 Condo if following the termination of the condominium, the entire project would be sold,
3 similar to a drag-along clause by the super majority.

4 40. On or around January 2, 2020, Plaintiffs learned that the Defendants changed the
5 locks on the Xia Condo; and destroyed and/or disposed of personal property in the Xia Condo.

6 **COUNT I**

7 **Declaratory Judgment**

8 41. Plaintiffs incorporate all preceding paragraphs as if fully set forth herein.

9 42. There exists a real and justiciable controversy regarding whether Defendant
10 Dorsey Condo Association validly terminated the condominium and validly transferred title of
11 the Plaintiffs' real property to PFP Dorsey.

12 43. Under A.R.S. § 33-1228(A), "a condominium may be terminated only by
13 agreement of unit owners of units to which at least eighty percent of the votes in the association
14 are allocated, or any larger percentage the declaration specifies."

15 44. The statute further requires that at "least thirty days before recording a termination
16 agreement, the board of directors of the association shall convene a regular or special meeting of
17 the board of directors at which a person or entity that purports to have the agreement of at least
18 eighty percent of the votes in the association, or any larger percentage if required, shall produce
19 and make available to the unit owners copies of a signed notarized statement that the owner of a
20 unit has executed a termination agreement." A.R.S. § 33-1228(A).

21 45. "Any termination agreement that is recorded without full compliance with this
22 subsection is invalid." A.R.S. § 33-1228(A).

23 46. Under the Condo Association bylaws, a special meeting may only be held to
24 conduct business as demonstrated in the notice for special meeting.

1 47. The special meeting may conduct business that is outside of the special meeting
2 notice only if the members present at the special meeting unanimously vote to amend the special
3 meeting notice.

4 48. The Condo Association called for a special meeting to be held on April 4, 2019.

5 49. The Condo Association stated that the members would vote on the Draft
6 Condominium Termination Agreement.

7 50. On April 4, 2019, at the Special Meeting (“Special Meeting”), the members voted
8 on the Condominium Termination Agreement.

9 51. At the Special Meeting, the members did not unanimously vote to amend the
10 special meeting notice.

11 52. The Condo Association did not notice a separate board meeting or special meeting
12 to vote on the Condominium Termination Agreement.

13 53. On November 15, 2019, the Condo Association recorded a Warranty Deed with
14 the Maricopa County Recorder’s Office, bearing recording number 2019-0923560, granting the
15 Xia Condo to PFP Dorsey.

16 54. Plaintiffs contend that this conduct violated the bylaws, rendering the proceedings
17 of the Condo Association board, and the subsequent purported transfer of title, invalid.

18 55. Under A.R.S. § 33-1228(D), “If any real estate in the condominium is to be sold
19 following termination, title to that real estate on termination vests in the association as trustee
20 for the holders of all interest in the units.” “If the real estate constituting the condominium is not
21 to be sold following termination, title to all the real estate in the condominium vests in the unit
22 owners on termination as tenants in common in proportion to their respective interests...”

23 56. A.R.S. § 33-1228 provides only for the sale of “all the common elements and units
24 of the condominium,” together; and as trustee, the condo association’s fiduciary duties require
25 that the entire real estate be sold for the highest possible price.

1 57. Plaintiffs contend that the Defendant Condo Association violated
2 A.R.S. § 33-1228, and breached its fiduciary duties to Plaintiffs, by forcibly selling the
3 Plaintiffs’ unit to PFP Dorsey, at a price determined by the Condo Association; rather than
4 offering the entire “real estate constituting the condominium” for sale, and selling for the highest
5 price.

6 58. To the extent that A.R.S. § 33-1228 could be construed as giving Defendants the
7 power to compel Plaintiffs to transfer their real property to PFP Dorsey, it is tantamount to an
8 unconstitutional taking that lacks a public purpose and the statute is therefore
9 invalid/unenforceable. Because Plaintiffs do not allege a facial challenge to the statute, but
10 rather an “as-applied” challenge, A.R.S. § 12-1841 does not apply.

11 **COUNT II**

12 **Quiet Title**

13 59. Plaintiffs incorporate all preceding paragraphs as if fully set forth herein.

14 60. The Plaintiffs are credibly informed and believe Defendants have made claims
15 adverse to the Plaintiffs’ interests in the Xia Condo.

16 61. The Plaintiffs requests that the Court order that Plaintiffs are the lawful owners of
17 the Xia Condo (and/or, of an undivided interest in the real estate formerly constituting the
18 condominium).

19 62. The Plaintiffs request that the Defendant be barred and forever estopped from
20 having or claiming any right or title to the Xia Condo adverse to Plaintiffs.

21 63. The Plaintiffs request an award of their attorneys’ fees and costs pursuant to
22 A.R.S. § 12-1103.

23 **COUNT III**

24 **Civil Trespass, Conversion**

25 64. Plaintiffs incorporate all preceding paragraphs as if fully set forth herein.
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1 65. On January 30, 2018, Plaintiffs acquired title to the Xia Condo.

2 66. On April 9, 2019, the Defendants recorded the Condominium Termination
3 Agreement with the Maricopa County Recorder's Office, bearing recording number 2019-
4 0248170.

5 67. The Condominium Termination Agreement was not adopted by the Condo
6 Association consistent with the Declaration with Amendments or the Bylaws and Arizona
7 statute, and therefore invalid.

8 68. As of April 9, 2019, the Plaintiffs still held title to the Xia Condo.

9 69. On or before January 2, 2020, Defendants caused the locks on the Xia Condo to be
10 changed.

11 70. On or before January 2, 2020, Defendants destroyed personal property and
12 belongings, which were in the Xia Condo and belonged to Plaintiffs.

13 71. According to a representative of PFP Dorsey, the personal property and
14 belongings were either thrown away or donated.

15 72. The Defendants took these actions, because they knew that the Plaintiffs were
16 disputing the Condominium Termination Agreement, and because a Complaint had been filed in
17 this action in November 2019.

18 73. The Defendants took these actions with malice, fraud, oppression, and with a
19 conscious and wanton disregard for the rights and interests of Plaintiffs because they disputed
20 the Condominium Termination Agreement and because the Complaint had been filed in this
21 Action. Therefore, Plaintiffs are entitled to an award of punitive and exemplary damages.

22 **Count IV**

23 **Breach of Fiduciary Duty**

24 74. Plaintiffs incorporate all preceding paragraphs as if fully set forth herein.
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1 75. Plaintiffs were minority members of the Condo Association, a nonprofit
2 corporation.

3 76. As a majority member of the Condo Association, PFP Dorsey owed fiduciary
4 duties to the Plaintiffs.

5 77. If the condominium were validly terminated, and any real estate in the
6 condominium were to be legally sold following termination, then the Condo Association became
7 a “trustee for the holders of all interest in the units,” including Plaintiffs, by which it owed them
8 a fiduciary duty.

9 78. Defendants breached their fiduciary duties by forcing Plaintiffs to involuntarily
10 sell their condo to PFP Dorsey, at a price that it determined, and without publicly offering the
11 entire real estate constituting the condominium for sale, in order to obtain the best price.

12 79. Defendants breached their fiduciary duties by deliberately conducting invalid
13 condo association meeting(s) over Plaintiffs’ objection.

14 80. Defendants breached their fiduciary duties by destroying and/or otherwise
15 disposing of the Plaintiffs’ personal property.

16 81. Plaintiffs are therefore entitled to a constructive trust over the Xia Condo (and/or
17 the real estate formerly constituting the condominium), and damages in an amount to be
18 determined at trial.

19 82. The Defendants took these actions with malice, fraud, oppression, and with a
20 conscious and wanton disregard for the rights and interests of Plaintiffs because they disputed
21 the Condominium Termination Agreement and because the Complaint had been filed in this
22 Action. Therefore, Plaintiffs are entitled to an award of punitive and exemplary damages.

23 **COUNT V**

24 **Unjust Enrichment**

25 83. Plaintiffs incorporate all preceding paragraphs as if fully set forth herein.
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1 84. Defendant PFP Dorsey, by its actions, has been unjustly enriched.

2 **COUNT VI**

3 **Ejectment, Constructive Trust**

4 85. Plaintiffs incorporate all preceding paragraphs as if fully set forth herein.

5 86. Plaintiffs have a valid subsisting interest in the Xia Condo and a right to
6 immediate possession thereof. They are therefore entitled to recover possession from
7 Defendants.

8 87. Defendants have obtained, or sought to obtain title to the Xia Condo through
9 actual fraud, misrepresentation, concealment, undue influence, duress and other means which
10 render it unconscionable for Defendants to continue to retain and enjoy its beneficial interest.

11 88. Plaintiffs therefore seek an order of ejectment and the imposition of a constructive
12 trust over the Xia Condo.

13 **GENERAL PRAYER FOR RELIEF**

14 WHEREFORE, Plaintiffs respectfully seek a judgment against Defendants that:

- 15 A. Quiets title to the Xia Condo in their favor (and/or their undivided interest
16 of the real estate formerly constituting the condominium); declares that the
17 termination of the condominium was invalid; and/or imposes a constructive
18 trust over the Xia Condo (or real estate formerly constituting the same);
- 19 B. Declares that, to the extent A.R.S. § 33-1228 could be construed as giving
20 Defendants the power to compel Plaintiffs to transfer their real property to
21 PFP Dorsey, it is tantamount to an unconstitutional taking that lacks a
22 public purpose and the statute is therefore invalid/unenforceable;
- 23 C. Provides that Plaintiffs are entitled to recover possession of the Xia Condo,
24 and/or imposes a constructive trust over the Xia Condo;
- 25
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- 1 D. For damages in an amount to be determined at trial, including punitive
- 2 damages;
- 3 E. For attorneys' fees and costs under any applicable authority, including
- 4 A.R.S. §§ 12-1103, 12-341, and 12-341.01;
- 5 F. For such other relief as the Court deems appropriate.

6 **RESPECTFULLY SUBMITTED** March 27, 2020.

7 **WILENCHIK & BARTNESS, P.C.**

8 */s/ John D. Wilenchik* _____
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16 **COPY** electronically transmitted by the Clerk
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18 to the Honorable Daniel Martin

18 **COPY E-SERVED** March 27, 2020,
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