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13 Attorneys for Attorneys for Defendant PFP Dorsey Investments, LLC

14 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

15 IN AND FOR THE COUNTY OF MARICOPA

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

19 Plaintiffs,

20 v.

21 PFP DORSEY INVESTMENTS, LLC, a
22 Delaware limited liability company;
23 DORSEY PLACE CONDOMINIUM
24 ASSOCIATION, an Arizona nonprofit
25 corporation;

26 Defendants.

No. CV2019-055353

**DEFENDANT PFP DORSEY
INVESTMENTS, LLC’S MOTION TO
DISMISS PLAINTIFFS’ SECOND
AMENDED COMPLAINT**

(Assigned to the Honorable Daniel Martin)

27 Defendant PFP Dorsey Investments, LLC (“PFP”), by and through counsel
28 undersigned, and pursuant to Arizona Rules of Civil Procedure Rule 12(b)(6), hereby move
to dismiss Plaintiffs’ Second Amended Complaint for failure to state a claim upon which
relief may be granted.¹ Even when viewing the Second Amended Complaint in the light
most favorable to Plaintiffs, the allegations show PFP strictly complied with the statutory

¹ PFP’s Good Faith Consultation Certificate pursuant to Arizona Rules of Civil Procedure Rule 8.1(e)(4) has been filed contemporaneously with this Motion.

1 requirements under A.R.S. § 33-1228, thereby foreclosing any claims Plaintiffs allege; and
2 thus, their Second Amended Complaint should be dismissed in its entirety. This Motion is
3 supported by the following Memorandum of Points and Authorities.
4

5 MEMORANDUM OF POINTS AND AUTHORITIES

6 **I. FACTUAL AND PROCEDURAL BACKGROUND**

7 This lawsuit arises out of the termination of the condominium known as Dorsey Place
8 Condominiums, which is located in Tempe, Arizona. (*See* Plaintiffs’ Second Amended
9 Complaint, hereinafter referred to as “Plaintiffs SAC,” ¶ 7). Plaintiffs Haining Xia and Jie
10 Cao were the owners of Unit 106 at Dorsey Place Condominiums prior to the termination of
11 the condominium. (*Id.*). Defendant PFP also owned 90 of the 96 units at Dorsey Place
12 Condominiums prior to the termination of the condominium (*Id.* at ¶¶ 23-25). Pursuant to
13 the Bylaws for the Condo Association, each “Unit Owner shall be a Member of the
14 Association. The membership of the Association shall, at all times, consist exclusively of
15 the Unit Owners.” (*Id.* at ¶ 20). Thus, Plaintiffs and PFP, as Unit Owners, were members of
16 the Association.
17

18 On April 4, 2019, Defendant Dorsey Place Condominium Association (hereinafter
19 “the Association”) held a Meeting for the members of the Dorsey Place Condominium
20 Association. (*Id.* at ¶¶ 26, 34, 35). Notice of the Meeting was provided in or around March
21 2019. (*Id.* at ¶ 26). Plaintiffs were present at the Meeting. (*Id.* at ¶ 34). According to the
22 Bylaws, “Attendance of a person at a meeting shall constitute a waiver of notice of such
23 meeting, except when the person attends a meeting for the express purpose of objecting to
24 the transaction of any business because the meeting is not properly called or convened.”
25 (*See* Bylaws of Dorsey Place Condominium Association, hereinafter referred to as
26 “Bylaws,” § 3.10, attached hereto as Exhibit 1).² At the Meeting, termination of the
27

28 ² “A complaint’s exhibits, or public records regarding matter referenced in a complaint, are not
‘outside the pleading,’ and courts may consider such documents without converting a Rule 12(b)(6)

1 condominium was discussed among the Unit Owners. (Plaintiffs' SAC, ¶¶ 26, 29-32, 35).
2 Ultimately the Condominium Termination Agreement was entered into on April 9, 2019,
3 wherein the Association on behalf of the Unit Owners agreed to sell to PFP all portions of
4 and interests in Dorsey Place Condominium that were not already owned by PFP. (*Id.* at ¶
5 35; *see also* the Condominium Termination Agreement, hereinafter referred to as the
6 "Agreement," p.2, attached hereto as Exhibit 2).³ Pursuant to the Condominium
7 Association's Declaration with Amendments, under Section 13.4, "the Condominium may
8 be terminated only by the agreement of Unit Owners of Units to which at least ninety
9 percent (90%) of the votes in the Association are allocated. An agreement to terminate the
10 Condominium must be evidenced by the execution or ratifications of a termination
11 agreement, in the same manner as a deed by the requisite number of Unit Owners."
12 (Plaintiffs' SAC, ¶ 22). The Agreement was ratified by 93.75% of the Unit Owners (90 out
13 of the 96 Unit Owners). (Agreement, p. 8, Exhibit A, attached hereto as Exhibit 2).
14

15 Plaintiffs have filed the subject Second Amended Complaint, alleging causes of
16 action for (1) declaratory judgment to determine whether the Association properly
17 terminated the condominium and transferred title of the real property to PFP; (2) quiet title
18 as to the ownership of Unit 106; (3) civil trespass/conversion for changing the locks to Unit
19

20 motion into a summary judgment motion." *Coleman v. City of Mesa*, 230 Ariz. 352, 356, ¶ 9, 284
21 P.3d 863, 867 (2012). The rationale for converting the type of motion is based upon the premise that
22 a plaintiff should have an opportunity to respond when extraneous materials are presented.
23 However, "[w]hen a complaint relied on a document, . . . the plaintiff obviously is on notice of the
24 contents of the document, and the need for a chance to refute evidence is greatly diminished."
25 *Strategic Dev. & Const., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 64, ¶ 14, 226 P.3d
26 1046, 1050 (App. 2010) (internal citation omitted). In this case, Plaintiffs specifically referred to the
27 Bylaws in their Second Amended Complaint and specifically quote it in their Complaint. As such,
28 this Court may consider this document in PFP's Motion to Dismiss.

³ In this case, the Condominium Termination Agreement is the heart of Plaintiffs' allegations, being
referenced numerous times in their Second Amended Complaint. Further, it is public record as
having been recorded with the Maricopa County Recorder's Office. As such, inclusion of the
Agreement should not convert Defendant PFP's Motion to Dismiss into a motion for summary
judgment. *See Coleman*, 230 Ariz. at 356, ¶ 9, 284 P.3d at 867.

1 106; (4) breach of fiduciary duty; (5) unjust enrichment; (6) ejectment/constructive trust; and
2 (7) wrongful recording.

3
4 **II. DISMISSAL IS APPROPRIATE AS PLAINTIFFS HAVE FAILED TO STATE
A CLAIM UPON WHICH RELIEF MAY BE GRANTED.**

5 **A. Standard of Review**

6 In deciding a motion to dismiss for failure to state a claim, all “well-pleaded material
7 allegations of the complaint are taken as admitted, but conclusions of law or unwarranted
8 deductions of fact are not.” *Aldabbagh v. Ariz. Dep’t of Liquor Licenses & Control*, 162
9 Ariz. 415, 417, 783 P.2d 1207, 1209 (App. 1989). A party is entitled to an order dismissing
10 a complaint where the facts of the complaint demonstrate that a cause of action is defective
11 as a matter of law. *See Cleckner v. Ariz. Dep’t of Health Servs.*, 246 Ariz. 40, 42, ¶ 6, 433
12 P.3d 1200, 1202 (App. 2019).

13
14 **B. Plaintiffs’ Allegations Demonstrate PFP Strictly Complied with A.R.S. § 33-
1228.**

15 The Arizona legislature enacted A.R.S. § 33-1228 in 1986, which provides specific
16 requirements that must be met for a condominium to be terminated. The statute was
17 amended in 2018, becoming effective on August 3, 2018. *See* 2018 Ariz. Legis. Serv., Ch.
18 235, § 1 (H.B. 2262). The statute was again amended in 2019 with an effective date of
19 August 27, 2019. *See* 2019 Ariz. Legis. Serv., Ch. 233, § 1 (H.B. 2687). The subject
20 Condominium Termination Agreement at issue was entered into on April 9, 2019; therefore,
21 the statute amended in 2018 was the effective statute governing the subject condominium
22 termination.⁴

23
24 A.R.S. § 33-1228 (2018) is very clear as to the procedures an Association must follow
25 when terminating a condominium. Based upon Plaintiffs’ allegations in the Second
26

27
28

⁴ A copy of A.R.S. § 33-1228 effective from August 3, 2018 to August 26, 2019 is attached as Exhibit 3.

1 Amended Complaint, PFP has complied with every element, and thus, Plaintiffs cannot state
2 a claim against PFP upon which relief may be granted.

3 **i. PFP, as a member of the Association, complied with A.R.S. § 33-1228.**

4 Pursuant to A.R.S. § 33-1228 (A) (2018), a condominium may be terminated by
5 agreement of the unit owners when at least 80% of the votes in the association agree, or any
6 larger percentage that the declaration specifies. In this case, the Declaration requires at least
7 90% of the unit owners have to agree to terminate the condominium. (Plaintiffs' SAC, ¶ 22).
8 Each Unit Owner is allocated one vote. (*Id.* at ¶ 21). PFP is the owner of 90 units at Dorsey
9 Place Condominiums. (*Id.* at ¶¶ 23-25). As a Unit Owner for each of the 90 units it owns,
10 PFP voted to ratify the Condominium Termination Agreement. (*See* Agreement, p. 8,
11 Exhibit A, attached hereto as Exhibit 2). With 90 out of 96 votes agreeing to terminate the
12 condominium, the Condominium Termination Agreement was ratified by 93.75% of the Unit
13 Owners, meeting the requirements of the Declaration and A.R.S. § 33-1228(A) (2018).
14 Although Plaintiffs did not consent to the condominium termination, there is no dispute that
15 93.75% of the Unit Owners agreed to the termination, which is over the requisite 90%
16 needed.
17

18 A.R.S. § 33-1228 (2018) further requires that an agreement to terminate be evidenced
19 by the execution or ratification of a termination agreement by the requisite number of unit
20 owners required to terminate. A.R.S. § 33-1228(B) (2018). "The termination agreement
21 shall specify a date after which the agreement will be void unless it is recorded before that
22 date" and it "shall be recorded in each county in which a portion of the condominium is
23 situated and is effective only on recordation." *Id.* These requirements have been met.
24 Exhibit A of the Agreement is the ratification by PFP, as the Unit Owner for 90 units of
25 Dorsey Place Condominiums. (*See* Agreement, p. 8, Exhibit A, attached hereto as Exhibit
26 2). Further, the Condominium Termination Agreement has been recorded with Maricopa
27 County Recorder's Office with Recording Number 20190248170. (*See* Agreement, attached
28 hereto as Exhibit 2).

1 The requirements to terminate a condominium pursuant to A.R.S. § 33-1228 (2018) is
2 clear and simple. According to the allegations in Plaintiffs' Second Amended Complaint,
3 PFP has complied with each of the requirements, and thus, the condominium termination is
4 valid and Plaintiffs do not have a claim against PFP.

5 **ii. PFP, as the buyer of the Condominium, complied with A.R.S. § 33-1228.**

6 Upon termination of the condominium, the Association had the right to sell all of the
7 common elements and units of the condominium pursuant to A.R.S. § 33-1228 (C) (2018).
8 The Association agreed to sell to PFP all portions of and interests in Dorsey Place
9 Condominium that were not already owned by PFP. (Plaintiffs' SAC at ¶ 35; *see also*
10 Agreement, p.2, attached hereto as Exhibit 2). Upon completion of the sale, PFP would be
11 the owner of all of the common elements and units of the condominium. Thus, the sale was
12 proper under A.R.S. § 33-1228(2018). Further, pursuant to A.R.S. § 33-1228(C) (2018), if
13 any real estate in the condominium is to be sold following termination, the termination
14 agreement shall set forth the minimum terms of the sale. The Association and PFP complied
15 with the requirements as evidenced in the subject Condominium Termination Agreement.
16 (*See* Agreement, attached hereto as Exhibit 2). Plaintiffs do not allege that the
17 Condominium Termination Agreement fails to set forth the minimum terms of the sale.
18 Thus, from the perspective of a buyer of the condominium, PFP complied with A.R.S. § 33-
19 1228 (2018) and Plaintiffs cannot state a claim against PFP upon which relief can be
20 granted.
21

22 **C. PFP's Strict Compliance with A.R.S. § 33-1228 Bars Each Cause of Action**
23 **Alleged by Plaintiffs.**

24 Although Plaintiffs allege seven separate causes of action against Defendants, each
25 cause of action directly stems from Plaintiffs' allegation that the condominium termination
26 was invalid. If the condominium termination was valid, Plaintiffs cannot prove any of their
27 cause of action against PFP. As demonstrated above, PFP strictly complied with A.R.S. §
28

1 33-1228 (2018) and thus, the condominium termination and sale of the condominium to PFP
2 is valid.

3 In Count I of their Second Amended Complaint, Plaintiffs seek declaratory relief in
4 determining whether the Association validly terminated the condominium and transferred
5 title to PFP. (Plaintiffs' SAC, ¶ 44). Although Plaintiffs only mention the Association in
6 this claim, Plaintiffs do not distinguish whether this cause of action is against the
7 Association only; regardless, as established above, the condominium was properly
8 terminated pursuant to A.R.S. § 33-1228. Based strictly upon the facts alleged in Plaintiffs'
9 Second Amended Complaint, there is no dispute the requirements of A.R.S. § 33-1228
10 (2018) were followed.

11 In Counts II and III of Plaintiffs' Second Amended Complaint, Plaintiffs allege
12 causes of action for quiet title and civil trespass/conversion, respectively, based upon PFP's
13 current ownership of Unit 106. Although an action to determine and quiet title to real
14 property may be brought by anyone having or claiming an interest in real property which is
15 adverse to the party bringing the action, *see* A.R.S. § 12-1101, by strictly complying with the
16 statutory requirements for the sale of the condominium, there is no relief upon which
17 Plaintiffs can obtain pursuant to this statute. The same is true for a civil trespass claim. If
18 Plaintiffs cannot show they are the true possessor of the land, there cannot be a claim for
19 civil trespass. *See* Restatement (2d) of Torts § 158 (1965).

20 In Count IV of Plaintiffs' Second Amended Complaint, Plaintiffs allege a cause of
21 action for breach of fiduciary duty. As PFP strictly complied with the requirements of
22 A.R.S. § 33-1228 (2018), there cannot be a breach. To the extent Plaintiffs are arguing the
23 value of their unit was worth more than the agreed upon sale price, A.R.S. § 33-1228 (2018)
24 specifically provides a remedy for this issue of which Plaintiffs failed to avail themselves.
25 A.R.S. § 33-1228 (G) (2018) specifically states how each unit owner's interest is to be
26 determined. The process essentially entails the Association obtaining an independent
27 appraisal; a unit owner may then obtain a second independent appraisal; and if the second
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1 independent appraisal is five percent or less, the higher appraisal is final or if the second
2 appraisal is five percent or more, “the unit owner shall submit to arbitration” and “the
3 arbitration amount is the final sale amount.” A.R.S. § 33-1228(G) (2018). Plaintiffs have
4 not availed themselves of this remedy in seeking arbitration. Further, it is important to note
5 that the statute does not invalidate the termination of the condominium or sale of the
6 condominium when there is a dispute as to the value of the unit owner’s interest.

7 In Count V of Plaintiffs’ Second Amended Complaint, Plaintiffs make a one-sentence
8 conclusory allegation that PFP has been unjustly enriched. *See Cullen v. Auto-Owners Ins.*
9 *Co.*, 218 Ariz. 417, 419, 189 P.3d 344, 346 (2008) (holding mere conclusory recitations of
10 alleged unlawful acts are insufficient to survive a motion to dismiss). It is unclear under
11 what basis PFP has been unjustly enriched as it followed the requirements of A.R.S. § 33-
12 1228 (2018) when purchasing the condominium.

13 In Count VI of Plaintiffs’ Second Amended Complaint, Plaintiffs allege a cause of
14 action for ejectment. Absent the right to possess the property, one cannot sue for ejectment.
15 A.R.S. § 12-1251; *Ziggy’s Opportunities, Inc. v. I-10 Indus. Park Developers*, 152 Ariz. 104,
16 107, 730 P.2d 281, 284 (App. 1986). As PFP complied with the requirements for
17 termination and sale of the condominium, Plaintiffs do not have the right to possess the
18 property; thus, dismissal of this cause of action is warranted.

19 Lastly, in Count VII of Plaintiffs’ Second Amended Complaint, Plaintiffs allege PFP
20 wrongfully recorded the warranty deed transferring ownership of Unit 106 to PFP. In
21 addition to other requirements under A.R.S. § 33-420, a warranty deed is not wrongfully
22 recorded if it is a valid deed. Again, the termination and sale of the condominium strictly
23 complied with A.R.S. § 33-1228 (2018), thereby making the transfer of the subject unit
24 valid.

25 All of Plaintiffs’ allegations arise from the Association’s termination of Dorsey Place
26 Condominiums. Although Plaintiffs attempt to create issues by making conclusory
27 allegations in their Second Amended Complaint, taking the allegations alleged as true, the
28

1 condominium termination was completed pursuant to the statutory requirements of A.R.S. §
2 33-1228 (2018). Thus, Plaintiffs cannot state a cause of action upon which relief can be
3 granted and dismissal of the Second Amended Complaint is warranted.

4 **III. CONCLUSION**

5 For the foregoing reasons, Defendant PFP respectfully requests that this Court grant
6 its Motion to Dismiss Plaintiffs' Second Amended Complaint for failure to state a cause of
7 action upon which relief can be granted.

8
9 RESPECTFULLY submitted this 13th day of August, 2020.

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12 GARREY, WONER, HOFFMASTER & PESHEK, P.C.

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14
15 By /s/ Stephanie K. Gintert
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23 ORIGINAL of the foregoing
24 e-filed this 13th day of
25 August, 2020, with the
26 Clerk of Maricopa County
27 Superior Court.

28 COPIES of the foregoing
e-mailed this 13th day of
August, 2020, to:

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