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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

**PLAINTIFFS' RESPONSE TO
DEFENDANTS DORSEY PLACE
CONDOMINIUM ASSOCIATION'S
MOTION TO DISMISS AND PFP
DORSEY INVESTMENTS, LLC'S
MOTION TO DISMISS**

(Assigned to the Honorable Daniel Martin)

(Oral Argument Requested)

Plaintiffs Jie Cao, Haining "Frazer" Xia, and Stone Xia (collectively "Plaintiffs") hereby collectively file their response to Defendant Dorsey Place Condominium Association's Motion to Dismiss ("Dorsey Motion") and Defendant PFP Dorsey Investments, LLC's Motion to Dismiss ("PFP Motion") (Dorsey Motion and PFP Motion collectively referred to as "Motions"). This Response is supported by the following memorandum of points and authorities and the entire record before the Court. Plaintiffs request the Court deny the Motions, as the Complaint states a claim upon which relief may be granted.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 The allegations in the Second Amended Complaint (“Complaint”) are based on two causes
3 of action: (1) that the Defendants improperly terminated the condominium; and (2) after
4 terminating the condominium the Defendants acted improperly in transferring ownership of the
5 Plaintiffs’ unit. For the reason enumerated below, A.R.S. § 33-1228 does not permit a
6 condominium owner to force the sale to itself of other condominium units within the property. In
7 the event the Court rules that the statute does permit such a sale, it is a prohibited taking under the
8 Arizona Constitution and an unconstitutional statute.

9 **I. Legal Arguments**

10 **a. Motion to Dismiss Standard**

11 Dismissal under Rule 12(b)(6) “is appropriate only if as a matter of law plaintiffs would
12 not be entitled to relief under any interpretation of the facts susceptible of proof.” *Conklin v.*
13 *Medtronic, Inc.*, 245 Ariz. 501, 504, ¶ 7 (2018). Here, the Plaintiffs have outlined a clear claim,
14 in which relief is warranted and pled appropriately. Therefore, the Defendant’s claims must fail.

15 Further, “Arizona cases hold that the right of partition is an incident of common ownership
16 and is specifically authorized by statute. A.R.S. § 12-1211; *Lawson v. Ridgeway*, 72 Ariz. 253,
17 265, 233 P.2d 469, 467 (1951). A.R.S. § 12-1211(A) states: ‘The owner or claimant of real
18 property or any interest therein may compel a partition of the property between him and other
19 owners or claimants by filing a complaint in the superior court of the county in which the property,
20 or a portion thereof, is situated.’” *McCready v. McCready*, 168 Ariz. 1, 3 (App. 1991). “Statutes
21 are not to be construed as effecting any change in the common law beyond that which is clearly
22 indicated. Where a statute derogates from the common law and is also remedial in nature, the
23 remedial application should be construed to give effect to its purpose. Therefore, absent a
24 manifestation of legislative intent to repeal a common law rule, we will construe statutes as
25 consistent with the common law.” *Carrow Co. v. Lusby*, 167 Ariz. 18, 21 (1990) (internal citations
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1 omitted). In determining the legislative intent, courts “interpret the words of a statute using their
2 ordinary meanings, unless the context of the statute and the act of which it is a part require
3 otherwise.” *Id.*, at 20. “If reasonably practical, a statute should be explained in conjunction with
4 other statutes to the end that they may be harmonious and consistent. If the statutes relate to the
5 same subject or have the same general purpose – that is, statutes which are in *pari materia* –they
6 should be read in connection with, or should be construed together with other related statutes, as
7 though they constituted on law. As they must be construed as one system governed by one spirit
8 and policy, the legislative intent therefor must be ascertained not alone from the literal meaning
9 of the wording of the statutes but also from the view of the whole system of related statutes. This
10 rule of construction applies even where the statutes were enacted at different times, and contain
11 no reference one to the other, and it is immaterial that they are found in different chapters of the
12 revised statutes. In construing the statute, endeavors should be made to trace the history and
13 legislation on the subject in order to ascertain the consistent purpose of the legislation.” *State ex*
14 *rel. Larson v. Farley*, 106 Ariz. 119, 122 (1970).

15 Here, the statutes both in A.R.S. § 33-1228, those with regard to co-tenants, and those
16 dealing with the responsibilities of conflicted directors, all point to the outcome that a majority of
17 condominium owners may not vote to assume the property of minority owners. The statutes show
18 that the majority may elect to sell all of the condominium to a third party, but that it may not sell
19 the minority’s property to itself.

20 **b. The Association Must Sell All or Nothing of the Condominium**

21 Essentially, a condominium association is able to dissolve itself, assuming the appropriate
22 amount of votes are made, but if the property owners are going to sell the property, importantly,
23 they are only able to sell all of the property – not individual portions of the property. The Arizona
24 Legislature amended the termination of a condominium statute in 2018. *See* A.R.S. § 33-1228
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1 (2018).¹ The statute provides, “A termination agreement may provide that all the common
2 elements and units of the condominium shall be sold following termination. If, pursuant to the
3 agreement, any real estate in the condominium is to be sold following termination, the termination
4 agreement shall set forth the minimum terms of the sale.” A.R.S. § 33-1228(C).

5 There is no language anywhere in A.R.S. § 33-1228 regarding a sale (either forced or
6 voluntary) of “less than all” the units, real property, or real estate in a condominium. Pursuant to
7 A.R.S. § 33-1228(C), “A termination agreement may provide that all the common elements and
8 units of the condominium shall be sold following termination.” And pursuant to A.R.S. § 33-
9 1228(E):

10 If the real estate constituting the condominium is not to be sold following
11 termination, title to all the real estate in the condominium vests in the unit owners
12 on termination as tenants in common in proportion to their respective interests as
provided in subsection G, and liens on the units shift accordingly.

13 Section C clearly permits that all of the units of the condominium may be sold following the
14 termination. However, it does not permit some of the units to be sold and others not to be sold.
15 This is seen because immediately after stating that all of the units may be sold, it states that “If,
16 pursuant to the agreement, any real estate in the condominium is to be sold following termination
17” A.R.S. § 33-1228(C). This “If . . . any” does not indicate that some property may be sold, it
18 is simply clarifying the procedures that must take place if all the property is sold pursuant to the
19 first sentence under Section C. *Id.* Other courts have taken similar positions, such as the Michigan
20 Supreme Court, in which a contract stated “The Company shall have, and is hereby given a first
21 lien upon *any* commissions or renewals as security for any claim due or to become due to the
22 Company from said Agent.” *Gibson v. Agricultural Life Ins. Co. of America*, 282 Mich. 282, 284,
23 276 N.W. 450, 450 (Mich. 1937) (emphasis added). The trial court held, “Giving the wording of
24 paragraph 14 of the agency contract its plain and unequivocal meaning, upon arriving at the
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26 ¹ The 2018 version of A.R.S. § 33-1228 will be referred to herein, unless explicitly noted.

1 conclusion that the sensible connotation of the word ‘any’ implies ‘all’ and not ‘some’, the legal
2 conclusion follows that the defendant is entitled to retain the earned renewal commissions arising
3 from its agency contract with Gibson and cannot be held legally liable for same in this action.”
4 *Id.* at 287, 276 N.W. at 452. The plaintiff appealed and insisted that the word “any” meant less
5 than all. *Id.* at 289, 276 N.W. at 452. The Michigan Supreme Court affirmed the trial court and
6 stated, the “clause uses the word ‘any’, which, to the ordinary understanding implies ‘of every
7 kind’.” *Id.*

8 This is made clear by the structure of the statute. For example, subsection B provides that
9 a termination agreement must be executed by the requisite number of unit owners. A.R.S. § 33-
10 1228(B). The following subsection permits the termination agreement the authority to sell *all* the
11 common elements and units of the condominium following termination. A.R.S. § 33-1228(C).
12 The agreement, thus far in the statute, has only indicated that it is permitted to do two things: (1)
13 terminating the condominium; and (2) selling all of the common elements and units of the
14 condominium. Therefore, when the termination agreement is referenced elsewhere in the statute,
15 is should be safely assumed that those are the two things that it may accomplish. Thus, there could
16 be an agreement that terminates the condominium and does not sell any units or common elements
17 following the termination, or there could be an agreement that terminates the condominium and
18 sells all the common elements and units of the condominium. Thus, when the following sentence
19 in subsection C states, “If, pursuant to the agreement . . .” it simply means under the termination
20 agreement, which can be either the selling of all the units or none of the units, “. . . any real estate
21 in the condominium is to be sold following termination, the termination agreement shall set forth
22 the minimum terms of the sale.” A.R.S. § 33-1228(C).

23 The statute makes it clear that there are only two options for the condominium – sell the
24 entire condominium or sell none of the condominium – in three additional sections: Sections D,
25 E, and F. Section D makes clear that after termination, only all of the real estate in the
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1 condominium may be sold in stating, “[i]f any real estate in the condominium is to be sold
 2 following termination, title to that real estate on termination vests in the association as trustee for
 3 the holders of *all* interest in the units.” A.R.S. § 33-1228(D) (emphasis added). Thus, when selling
 4 and after termination, the association, as trustee, holds *all* of the interest in the condominium, not
 5 just some of the units that the majority elects to sell to itself. Section E then demonstrates if the
 6 condominium is not to be sold, each of the unit owners hold the entire condominium as tenants in
 7 common in proportion to their respective interests. A.R.S. § 33-1228(E). However, while the unit
 8 owners hold the tenancy in common, only when the condominium is going to be sold does the
 9 association act as the trustee for the unit owners. A.R.S. § 33-1228(F). A trustee is “[s]omeone
 10 who stands in a fiduciary or confidential relation to another; esp., one who, having legal title to
 11 property, holds it in trust for the benefit of another and owes a fiduciary duty to that beneficiary.
 12 Generally, a trustee’s duties are to convert to cash all debts and securities that are not qualified
 13 legal investments, to reinvest the cash in proper securities, to protect and preserve the trust
 14 property, and to ensure that it is employed *solely* for the beneficiary, in accordance with the
 15 directions contained in the trust instrument. Garner, Bryan A., *Black’s Law Dictionary* (11th ed.
 16 2019), trustee. The statute further instructs that the association, as trustee, “may contract for the
 17 sale of real estate in the condominium,” and “title to that real estate on termination vests in the
 18 association as trustee for the holders of *all* interest in the units.” A.R.S. § 33-1228(D).

19 This makes sense, especially considering Section E – the statute provides that either all the
 20 real estate may be sold *or* none of the of the real estates is sold. Section E affirmatively states
 21 what happens when all of the real estate constituting the condominium is not to be sold. Under the
 22 statute, there is no proposition for selling some of the real estate to the majority owner.

23 This interpretation is supported, not only by the plain language, but also the comments to
 24 the Uniform Condominium Act (1980) (“Model Act”), which A.R.S. § 33-1228 is based upon.
 25 And although “this court is not bound by the interpretation of the Commissioners on Uniform
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1 State Laws, that interpretation is highly persuasive and should be adopted unless it is erroneous
2 or contrary to the settled policy of the state.” *Griffith v. Faltz*, 162 Ariz. 599, 600 (App. 1990).
3 For example, Comment 1 states “[a] number of problems are certain to arise upon termination of
4 a condominium which are not adequately addressed by many condominium statutes,” including
5 “the manner in which common elements and units should be disposed of following termination,
6 both in the case of sale and non-sale of *all* of the real estate.” Unif. Condo. Act. § 2-118 (1980)
7 cmt. 1 (emphasis added). The Model Act’s comments further provided that under subsection C, it
8 specifically “deals with the question of when all the real estate in the condominium, or the
9 common elements, may be sold without unanimous consent of the unit owners.” Unif. Condo.
10 Act. § 2-118 (1980) cmt. 5. If the Model Act intended for this subsection to provide for the sale
11 of *some* or “any,” as Defendants define it, this comment would have indicated as much. However,
12 it is clear that the language indicates that either all or none of the real estate constituting the
13 condominium may be sold. Lastly, Comment 7 explains A.R.S. § 33-1228(E), in that its purpose
14 is to “contemplate[] the possibility that a condominium might be terminated but the real estate not
15 sold. While this is not likely to be the usual case, it is important to provide for the possibility.”
16 Unif. Condo. Act. § 2-118 (1980) cmt. 7.

17 **c. Tenants in Common – The Association Did Not Have the Ability to Force**
18 **the Xia’s to Sell the Xia Condo to PFP**

19 “As a general rule, one co-owner may use and enjoy property owned in the form of tenancy-
20 in-common as if he were the sole owner, provided his actions do not prejudice the use and
21 enjoyment of the property by the other co-owner.” *Jackson v. Low Cost Auto Parts, Inc.*, 25
22 Ariz.App. 515, 516 (App. 1976). “It is also true that one co-owner may lease the common property
23 without consent of the other co-owners to the extent of his interest, the effect of which is to confer
24 on the lessee the right to share possession of the property with the other co-owners for the term of
25 the lease.” *Id.*, at 516-17. “Of course, his use cannot exclude other co-owners from enjoying their
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1 equal privileges, since to do so would be an ‘ouster.’ It follows then, that one co-owner may not
2 grant a lease of the whole property which will bind other co-owners.” *Id.*, at 517.

3 “[A] tenant-in-common cannot convey away or alienate the interest of another co-tenant
4 unless he is clearly and properly authorized to do so.” *Jolly v. Kent Realty, Inc.*, 151 Ariz. 506,
5 511 (App. 1986). The proper definition of “ouster” in the context of co-tenancy is crucial here.
6 *Morga v. Friedlander*, 140 Ariz. 206, 208 (App. 1984). The combination of “changing locks,
7 removing co-tenants’ names, and interfering with lease rights constitutes ouster.” *Id.*, at 209. Here,
8 the Plaintiffs’ co-tenants took each of these actions, to prevent their enjoyment of the Xia Condo,
9 in violation of A.R.S. § 33-1228(E), which provides that while “the tenancy in common exists,
10 each unit owner and the unit owner’s successors in interest have an exclusive right to occupancy
11 of the portion of the real estate that formerly constituted the unit owner’s unit.”

12 As co-tenants, under A.R.S. § 33-1228, the majority of co-tenants were not permitted to
13 sell the Xia Condo to themselves and perpetuate the ouster of the Plaintiffs in violation of Arizona
14 law.

15 **d. The Association’s Role as Trustee**

16 Under the Arizona statute, the association becomes the “trustee for the holders of all
17 interests in the units” upon termination of the condominium. A.R.S. § 33-1228(D). As trustee, for
18 the Xia’s and other unit owners, after the condominium termination, the Association was required
19 to act as a fiduciary.² While an unreported opinion, the Court of Appeals found that a trustee
20 selling a property to himself “clearly constitute[s] self-dealing, which create[s] a conflict between
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22 ² “A trustee owes fiduciary duties to trust beneficiaries, and breach of such a duty is a breach of trust. *See*
23 A.R.S. § 14-11011(A); *see also* A.R.S. §§ 14-7402(B), -10801 to -10814. As relevant here, these duties
24 include: the duty of loyalty, A.R.S. § 14-10802, the duty of impartiality, A.R.S. § 14-10803, the duty of
25 prudent administration, A.R.S. § 14-10804, the duty to delegate authority reasonably and responsibly,
26 A.R.S. § 14-10807, the duty to control and protect trust property, A.R.S. § 14-10809, the duty to inform
and report to the beneficiaries, A.R.S. § 14-10813, and the duty to administer the trust in good faith, in
accordance with its terms, and in the beneficiaries’ interests, A.R.S. § 14-10801.” *Matter of Oakland
Living Trust*, 2017 WL 2544836, *2, ¶ 14 (App. 2017).

1 his personal interests and his fiduciary duty of loyalty.” *Matter of Oakland Living Trust*, 2017 WL
 2 2544836, *3, ¶ 17 (citing A.R.S. § 14-10802(B) (restricting a trustee’s ability to enter a sale “for
 3 the trustee’s own personal account or that is otherwise affected by a conflict between the trustee’s
 4 fiduciary and personal interests”); *Lane Title & Tr. Co. v. Brannan*, 103 Ariz. 272, 278 (1968)
 5 (noting a trustee’s duty of “undivided loyalty” to beneficiaries); Restatement (Third) of Trusts §
 6 78(2)(2007) (“Except in discrete circumstances, the trustee is strictly prohibited from engaging in
 7 transactions that involve self-dealing or that otherwise involve or create a conflict between the
 8 trustee’s fiduciary duties and personal interests.”); *see also 1800 Ocotillo, L.L.C. v. WLB Grp.,*
 9 *Inc.*, 219 Ariz. 200, 202, ¶ 7 (2008) (“Contract provisions are unenforceable if they violate
 10 legislation or other identifiable public policy.”) (citing *Webb v. Glittlen*, 217 Ariz. 363, 366, ¶ 13
 11 (2008), and Restatement (Second) of Contracts § 178 (Am. Law Inst. 1981)); *cf* A.R.S. § 14-
 12 10802(B) (providing that a transaction involving the management of trust property “that is . . .
 13 affected by a conflict between the trustee’s fiduciary and personal interests is voidable by a
 14 beneficiary affected by the transaction”). In fact, A.R.S. § 14-10802(A) spells this out, quite
 15 clearly, in stating, “A trustee shall administer the trust *solely* in the interests of the beneficiaries.”
 16 There is no option, under the statutes, for the trustee to act in *their own* best interest and sell the
 17 property of the trust to themselves (or their majority holder). In fact, this same statute states that
 18 “A sale, encumbrance or other transaction involving the investment or management of trust
 19 property is presumed to be affected by a conflict between personal and fiduciary interests if it is
 20 entered into by the trustee with: . . . (3) An agent or attorney of the trustee [; or] (4) A corporation
 21 or other person or enterprise in which the trustee, or a person that owns a significant interest in
 22 the trustee, has an interest that might affect the trustee’s best judgment.” A.R.S. § 14-10802(C)(3)-
 23 (4).³ If the Association and PFP were merely terminating the HOA, their actions would not have

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 25 ³ The exceptions provided under A.R.S. § 14-10802(B) do not apply because none of them are met. The
 26 only one that is remotely applicable is subsection (B)(1), which provides the transaction is voidable unless
 “(1) The transaction was authorized by the terms of the trust.” A.R.S. § 14-10802(B)(1). However, the

1 created a conflict of interest. However, when the action to terminate the condominium is tied to
2 selling the units that are not owned by PFP to itself, there is an inherent conflict of interest. Thus,
3 the conflict of interest statutes of a corporation, like the Association (a domestic nonprofit
4 corporation) and PFP (a foreign limited liability company), are directly triggered and required to
5 be complied with.

6 Under A.R.S. § 10-3861, a transaction by a corporation is void if the director does not
7 disclose that the director has a personal, economic, or other association in the transaction.
8 However, the statute provides for actions that may avoid this conflict of interest from enjoining
9 the transaction. *See* A.R.S. § 10-3861(B). Here, the trustee would have been permitted to move
10 forward had it, (1) disclosed to the directors voting on the transaction the existence and nature of
11 the conflicting interest and informed them of the character and limitations imposed by that duty
12 before their vote on the transaction; and (2) “Plays no part, directly or indirectly, in their
13 deliberations or vote.” A.R.S. § 10-3862(B)(1)-(2). Clearly the Defendants did not meet these
14 requirements, as they directly played a part in the deliberations and vote to terminate the
15 condominium and sell the Xia Condo to themselves.

16 The trustee may also be permitted to move forward, if the “qualified membership⁴” casts
17 its votes in favor of the transaction, after the trustee (1) provides notice to the members describing
18 the conflicting interest of the transaction; (2) providing the secretary or person responsible for
19 tabulating the votes of the transaction the number and identify of persons holding the controlling

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21 terms of the trust, assuming the Termination Agreement is the terms of the trust, does not disclose the
22 conflict of interest and did not meet the voting requirements of uninterested parties to become enforceable.
23 Here, prior to forming the Termination Agreement, the Defendants contemplated selling the condominium
24 to itself.

25 ⁴ Qualified Membership is defined as “any membership interests entitled to vote with respect to
26 the director’s conflicting interest transaction except membership interests that, to the knowledge,
before the vote, of the secretary or other officer or agent of the corporation authorized to tabulate
votes, are beneficially owned, or the voting of which is controlled, by a director who has a
conflicting interest respecting the transaction or by a related person of the director, or both.”
A.R.S. § 10-3863(E).

1 the vote of all membership interests that the trustee knows are beneficially owned by a member
2 or related person of the director, or both; and (3) provides the proper disclosure to the members
3 who voted on the transaction, to the extent the information was not known by them. A.R.S. § 10-
4 3863(A)(1)-(3). Here, the trustee did not take any steps to provide this type of information to the
5 members, or provide this information to the secretary, or make any information known to the
6 members prior to the vote. The Defendants cannot qualify under this exception.

7 The last option the trustee may have to move forward with the transaction, despite the
8 conflict of interest, is if the transaction, “judged according to the circumstances at the time of
9 commitment, is established to have been fair to the corporation.” A.R.S. § 10-3861(B)(3). Here,
10 the Xia’s disputed the transaction at the time of the April 2019 meeting because they did not
11 believe it was a fair transaction. At best for the Defendants, this is a question of fact, rather than
12 something that may be granted on a motion to dismiss or motion for summary judgment.

13 As none of these exceptions are met, under the facts of the Complaint, the transaction
14 terminating the condominium is void. Further, even if the Association were to hold the vote with
15 only those Qualified Membership interests, there is no mathematically possible way for the
16 Association to receive 90% approval, as required by the Declaration. Only six-unit owners were
17 not associated or conflicted through the sale of the condominium by PFP to itself. Even if the
18 Plaintiffs were the only Qualified Membership interest to oppose the vote, the Association would
19 only have an 83.33% approval for the termination of the condominium, below the 90%
20 requirement. Therefore, any action terminating the condominium *and* selling the units that PFP
21 did not own *to itself* is void.

22 e. **The Association Failed to Follow Its Bylaws and Therefore Any Action**
23 **from the Special Meeting is Void.**

24 Even if the statute were misinterpreted to mean a majority owner had a statutory manner
25 to acquire the minority owner’s property, the Association failed to take steps consistent with its
26 bylaws and therefore any action at the Special Meeting is void. “Unquestionably the bylaws of a

1 voluntary, unincorporated association constitute a contract between the sociation and its members
2 and the rights and duties of the members as between themselves and in their relation to the
3 association in all matters affecting its internal government and the management of its affairs are
4 measured by the terms of such bylaws.” *Savoca Masonry Co., Inc. v. Homes & Son Const. Co.,*
5 *Inc.*, 112 Ariz. 392, 395 (1975).

6 Under this contract, there are terms that must be followed. For example, under Section 3.3.,
7 the Bylaws provide:

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

16 A Special Meeting, under the Bylaws § 3.4., is described as follows:

17 Unless otherwise prescribed by Arizona statute or by the Articles, special meetings
18 of the Members, for any purpose or purposes, may be called by: (a) the president;
19 (b) a majority of the directors; or (c) after the Declaration is recorded, Members
20 having at least ten percent (10%) of all votes in the Association (as determined in
21 accordance with the Declaration).”

22 There can be no dispute here, since there was no election of the Board, that the April 4, 2019
23 meeting was a Special Meeting.

24 As the meeting was a Special Meeting, Section 3.5 clearly states the terms of the contract,
25 “Business transacted at any special meeting of Members shall be limited to the items stated in the
26 notice unless determined otherwise by a unanimous vote of the Members present at such meeting.”
Here, the Association sent a “Proposed Condominium Termination Agreement,” which was
included in the special meeting notice. However, this agreement was amended without a
unanimous vote of the Members present at the meeting. Since the Members did not provide a
unanimous vote, any action taken on the amended agreement cannot be effective. *See Nelson v.*

1 *Phoenix Resort Corp.*, 181 Ariz. 188, 193-196 (App. 1994) (reversing summer judgment in favor
2 of defendants when plaintiffs argued that summary judgment could not be granted because the
3 defendants violated the bylaws and therefore the action was void and unenforceable).

4 As such, Defendants’ actions in adopting the Modified Agreement is void and
5 unenforceable. Therefore, any actions taken by the Defendants based on the Modified Agreement
6 are void and unenforceable because the actions did not comply with A.R.S. § 33-1228. A.R.S. §
7 33-1228(C) (2018) (“An agreement to terminate shall be evidenced by the execution or
8 ratifications of a termination agreement, in the same manner as a deed, by the requisite number of
9 unit owners.”); *see also* A.R.S. § 33-1228(A) (2019) (“Any termination agreement that is recorded
10 without full compliance with this subsection is invalid.”).

11 **f. A.R.S. § 33-1228 is Unconstitutional as an Improper Regulatory Taking**

12 In the alternative, in the event that A.R.S. § 33-1228 is deemed to permit a partial sale, the
13 statute should be ruled unconstitutional. In Arizona, property rights are among the most basic
14 substantive rights protected by the Arizona Constitution. And, while the government may exercise
15 its power to take property under the Arizona Constitution Art. 2, § 17, it remains one of the
16 harshest proceedings known in the United States. There are many procedural protections in Art.
17 2, § 17 to ensure that private property owners receive “just compensation” when the government
18 takes their property. Further, Art. 2, § 13 provides “No law shall be enacted granting to any
19 citizens, class of citizens, or corporation other than municipality, privileges or immunities, which,
20 upon the same term, shall not equally belong to all citizens or corporations.”

21 There are two forms of takings that may take place: regulatory taking and physical taking.
22 A regulatory can occur where government’s regulation of private property becomes “so onerous
23 that its effect is tantamount to adirect appropriation or ouster.” *Scheehle v. Justice of Supreme*
24 *Court of Arizo.*, 508 F.3d 887, 891 (9th Cir. 2007). Courts look at several factors to determine
25 whether a regulatory taking exists, primarily “[t]he economic impact of the regulation on the
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1 claimant and, particularly, the extent to which the regulation has interfered with distinct
 2 investment-backed expectations.” *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124,
 3 98 S. Ct. 2646, 2646, 57 L. Ed. 2d 631 (1978). Courts will also look to the “character of the
 4 governmental action,” i.e., whether it amounts to a physical invasion or instead merely affects
 5 property interests through “some public program.” *Id.* Each of these tests focuses directly upon
 6 the severity of the burden that government imposes upon private property rights.

7 Here, A.R.S § 33-1228 acts as a regulatory taking because the Legislature has enacted the
 8 statute that permits the termination for absolutely no reason. Marlene Brito, *Terminating A*
 9 *Condominium or Terminating Property Rights: A Distinction Without A Difference*, 45 Real Est.
 10 L.J. 200, 216-21 (2016). The termination deprives the unit owners of their right to use the unit
 11 along with any of the common elements the unit owners are normally entitled to use. *Id.* The
 12 statute allows complete interference with private property rights. Therefore, it is likely a
 13 regulatory taking.

14 However, because the unit owners completely lose their rights to ownership, the taking
 15 could also be considered a physical one. *Id.*

16 Although the government is not physically taking ownership of the land, the statute
 17 allows for someone else to take ownership. Therefore, because the unit owner is
 18 losing title to his property along with all possible uses, this is more comparable to a
 19 physical taking. . . .

19 Essentially, the government delegates its eminent domain power through the statute.
 20 The only difference is that it is skipping the step of the government holding title to
 21 the property. However, a private individual holding title, rather than the
 22 government, should not be an exception to the Takings Clause and should still be
 23 subject to the same analysis as if it were the government taking the property.

24 *Id.* Arizona recognizes that a taking must be for a public use to be constitutional. In *Bailey v.*
 25 *Myers*, 206 Ariz. 224, 226, ¶ 7 (App. 2003), the City of Mesa filed a condemnation action against
 26 a private property owner so that it could then convey the private property to a developer to build
 a retail center with stores, offices, and restaurants. The Arizona Supreme Court held that because
 the redevelopment project would result in the property “becoming part of a privately owned retail

1 center with stores, restaurants, and office space,” and was unconstitutional because it was not a
2 “public use.” *Id.* at 230, ¶ 25.

3 In Arizona, the legislature, through enactment of A.R.S. § 33-1228, delegated its eminent
4 domain power to crafty developers who could purchase 80% of a condominium complex. It just
5 skipped the steps of taking the Plaintiffs’ private property itself. The developer in this case, PFP,
6 does not have any public purpose for taking Plaintiffs’ condominium other than to create
7 apartments. “The unit owner’s right to possess, use, and enjoy their residence and homestead is a
8 far greater public purpose than any conceivable purpose that would justify converting the very
9 same units into rental apartments; after all, home ownership is considered fundamental to the
10 American Dream.” Brito, 45 Real Est. L.J. at 221. Therefore, Plaintiffs respectfully request, in the
11 alternative if A.R.S. § 33-1228 is deemed to permit a partial purchase of the condominium units,
12 the Court rule that A.R.S. § 33-1228 is an unconstitutional taking under the Arizona Constitution.

13 **II. Conclusion**

14 The Defendants took actions in attempting to terminate the condominium that violated
15 A.R.S. § 33-1228 and the Bylaws of the Association. Therefore, the Second Amended Complaint
16 states a claim upon which relief may be granted. The Plaintiffs respectfully request this Court
17 deny the Motions to Dismiss.

18 **RESPECTFULLY SUBMITTED** September 16, 2020.

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

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ELECTRONICALLY filed September 16, 2020, via AZTurboCourt.com.

COPY electronically transmitted by the Clerk of the Court via AZTurboCourt.com to the Honorable Daniel Martin

COPY electronically transmitted September 16, 2020, via AZTurboCourt.com upon:

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