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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 REPLY IN  
SUPPORT OF ITS MOTION TO DISMISS**

(Assigned to the Honorable Daniel Martin)

**(ORAL ARGUMENT REQUESTED)**

27 Defendant PFP Dorsey Investments, LLC (“PFP”), by and through counsel  
28 undersigned, hereby files its Reply to Plaintiffs’ collective Response to Defendants Dorsey  
Place Condominium Association’s Motion to Dismiss and PFP Dorsey Investments, LLC’s  
Motion to Dismiss (hereinafter “Plaintiffs’ Response”). Although Plaintiffs attempt to allege  
a cognizable claim against PFP, the facts—as alleged by Plaintiffs—fail to allege PFP did  
anything but comply with A.R.S. § 33-1228 (2018). Further, any arguments regarding the

1 constitutional of A.R.S. § 33-1228 has no application against PFP, who is a private  
2 corporate entity. Therefore, PFP respectfully requests this Court grant its Motion to Dismiss  
3 Plaintiffs' Second Amended Complaint for failure to state a claim upon which relief may be  
4 granted.  
5

### 6 MEMORANDUM OF POINTS AND AUTHORITIES

7 Plaintiffs admit in their Response their allegations stem from two primary causes of  
8 action: (1) whether Defendants improperly terminated the condominium; and (2) after  
9 terminating the condominium, whether Defendants acted improperly in transferring  
10 ownership of Plaintiffs' unit. *See* Plaintiffs' Response, pg. 2, lines 2-5. Under either  
11 scenario, Plaintiffs have failed to allege how PFP, which is a separate and distinct entity  
12 from the Association, specifically acted improperly.  
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#### 15 **I. LEGAL ARGUMENT**

##### 16 17 **A. As a Member of the Association, PFP Complied with A.R.S. § 33-1228 in** 18 **Terminating the Condominium.**

19 Prior to the condominium termination, PFP was a Unit Owner within Dorsey Place  
20 Condominiums and as such, was a member of the Association, just like Plaintiffs. As a  
21 member of the Association, PFP voted to ratify the Condominium Termination Agreement  
22 (hereinafter "the Agreement"). Just like Plaintiffs are entitled to their vote as a Unit Owner,  
23 PFP was entitled to its vote. At the time of the vote, PFP owned 90 units; and thus, it had 90  
24 votes to cast, which PFP used all 90 votes in favor of terminating the condominium.  
25

26 The condominium termination strictly complied with A.R.S. § 33-1228 in that (1)  
27 over 90% of the unit owners agreed to terminate the condominium; (2) the agreement to  
28

1 terminate is evidenced by ratifications of the Agreement; (3) the Agreement specified a date  
2 after which the Agreement would be void unless it was recorded by that date; and (4) the  
3 Agreement was recorded. *See* A.R.S. §§ 33-1228 (2018) (A)-(B). Thus, as a Unit Owner  
4 and member of the Association, Plaintiffs have not, and cannot, allege PFP did anything  
5 improper when agreeing to terminate the condominium.  
6

7 **B. PFP Properly Bought the Condominium pursuant to A.R.S. § 33-1228.**

8  
9 Although Plaintiffs allege it was improper for PFP to purchase the condominium as  
10 part of the condominium termination, nowhere in A.R.S. § 33-1228 (2018) does it state the  
11 condominium has to be sold to a separate third-party who is not a current owner. Plaintiffs  
12 cannot in good faith make an argument that A.R.S. § 33-1228 (2018) even implicitly  
13 contemplates that. There is absolutely no legal support to allege A.R.S. § 33-1228 (2018)  
14 requires the Association to sell the condominium to someone that is not a current owner.  
15 Doing so would make the statute impractical as it is unrealistic for a third-party who has no  
16 interest in a condominium to outright purchase the property. The process of terminating a  
17 condominium under A.R.S. § 33-1228 (2018) is to prevent a minority condominium owner  
18 from inhibiting the interests of the supermajority. A.R.S. § 33-1228 (2018) provides  
19 protections and measures to properly protect the minority owner in such a sale, such as the  
20 right to contest the appraisal.  
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24 Plaintiffs attempt to convolute the issue about whether the Association must sell all or  
25 none of the Condominium by attempting to argue only a portion of the Condominium was  
26 sold. However, PFP already owned 90 units; thus, it would be **absurd** to require PFP to  
27 repurchase the units *it already owns*. By purchasing the remaining 6 units in the Agreement,  
28

1 PFP became the owner of the entire Condominium, which satisfies the purpose of the statute  
2 and complies with what Plaintiffs are arguing—that all of the real estate in the condominium  
3 is owned by one person. Plaintiffs are trying to create an issue when it is a distinction  
4 without a difference. PFP is the rightful owner of all the real estate that was once Dorsey  
5 Place Condominiums.  
6

7 A.R.S. § 33-1228 (2018) specifically contemplates this type of sale—where a current  
8 owner buys all non-owned units so that all of the real estate in a condominium would be  
9 owned by a single person following the sale—under subsection (C), when it states, “If,  
10 pursuant to the agreement, **any real estate in the condominium is to be sold** following  
11 termination, the termination agreement shall set forth the minimum terms of the sale.”  
12 A.R.S. § 33-1228 (C) (2018) (emphasis added). Plaintiffs attempt to argue the term “any”  
13 means “all” by citing to a Michigan Supreme Court case. *See* Plaintiffs’ Response, pg. 4,  
14 lines 19-24. However, not only is the Michigan case not binding in Arizona, but the use of  
15 the word “any” in the Michigan case was not used in the same context as the word “any” in  
16 A.R.S. § 33-1228 (2018). In *Gibson*, the court was interpreting the use of the word “any” in  
17 the context of what type of indebtedness was subject to a lien when the contract stated “for  
18 any claim due or to become due to the company from said agent.” *Gibson v. Agricultural*  
19 *Life Ins. Co. of Am.*, 282 Mich. 282, 288 (1937). In this context, the ordinary meaning of  
20 “any” describes the type of item, hence the description “of every kind.” *Id.* However, in the  
21 context of A.R.S. § 33-1228 (2018), “any” is not meant to describe a type of item, but a  
22 quantity of something; in this case, the quantity of real estate. When describing a quantity,  
23 “any” means one or more to “indicate an undetermined number or amount.” Merriam-

1 Webster Online Dictionary, “Any,” available at <https://www.merriam->  
2 [webster.com/dictionary/any](https://www.merriam-webster.com/dictionary/any) (last visited Sept. 24, 2020); *see also In re Rowlands’ Estate*, 73 Ariz.  
3 337, 342, 241 P.2d 781, 784 (1952) (finding “the word ‘any’ means one or more of a number”).  
4 Thus, “any” in the context of A.R.S. § 33-1228 (2018) does not mean “all” as Plaintiffs  
5 allege and it absolutely does not mean that “all” of the Condominium must be sold to a third-  
6 party that has no prior ownership interest in the Condominium.  
7

8  
9 **C. The Sale of Unit 106 Was Valid Pursuant to A.R.S. § 33-1228.**

10 As both Defendants PFP and the Association strictly complied with the requirements  
11 of A.R.S. § 33-1228 (2018), Plaintiffs’ remaining arguments in their Response have no  
12 merit.<sup>1</sup> The Association contracted to sell the Condominium upon termination; thus, A.R.S.  
13 § 33-1228(E) (2018) has no application and the unit owners are not tenants in common. The  
14 Association has authority to enter into an agreement for the sale of the Condominium upon  
15 termination and upon termination of the Condominium, title of the real estate vests to the  
16 Association as trustee to effectuate the sale. *See* A.R.S. § 33-1228(D) (2018).  
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19 The Association did not act improperly in transferring ownership of Unit 106 from  
20 Plaintiffs to PFP. Plaintiffs argue the Association sold the Condominium to itself; however,  
21 that is completely false. The Association, which is made up of members who are Unit  
22 Owners, including the Plaintiffs, sold the Condominium to PFP. The Association did not  
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24  
25 <sup>1</sup> In Plaintiffs’ Response under subsections I.(c), (d), and (e), Plaintiffs inappropriately intertwine  
26 PFP and the Association; however, they are separate and distinct entities. To the extent these  
27 arguments pertain solely to the Association, this further supports PFP’s argument that Plaintiffs  
28 cannot state a claim against PFP as a separate entity (which is not to say that Plaintiffs have a claim  
against the Association either). To the extent somehow Plaintiffs’ arguments can be attributed to  
PFP, PFP hereby responds to Plaintiffs’ allegations to further support that Plaintiffs have no claim  
against PFP or the Association.

1 sell the Condominium to the Association. Plaintiffs attempt to argue the Association  
2 breached its fiduciary obligations as trustee; however, pursuant to A.R.S. § 33-1228(D)  
3 (2018), the Association became trustee upon termination of the condominium, not before.  
4 Thus, the cases cited by Plaintiffs regarding a conflict of interest are inapplicable. The sale  
5 was never hidden from Plaintiffs and Plaintiffs participated in the entire process—although  
6 Plaintiffs voted against the termination of the condominium, their vote was accounted for in  
7 the Association’s decision. This is not a case where one person (or a Board as Plaintiffs  
8 equate by analogizing to A.R.S. § 10-3861) makes a decision on its own that affects the  
9 entire company. Every Member of the Association voted on whether to terminate and sell  
10 the condominium. Nor is there any self-dealing or lack of loyalty in the sale of the  
11 Condominium as the Association retained an independent third-party appraiser to value the  
12 real estate and sell the property at the appraised value to PFP. The Association properly  
13 noticed a meeting to all members of the Association, including Plaintiffs in which Plaintiffs  
14 participated in the meeting and casted their vote on whether to terminate and sell the  
15 Condominium. Unfortunately Plaintiffs do not agree with the majority decision; however,  
16 their disagreement does not equate to a cognizable claim.  
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22 **D. Plaintiffs’ Argument regarding Failure to Follow Bylaws is a Red**  
23 **Herring.**

24 Plaintiffs attempt to create an issue regarding whether discussion of terminating the  
25 condominium was properly noticed. As Plaintiffs admit in their Response, the Bylaws  
26 dictate the rights and duties of the members in managing its affairs. *See* Plaintiffs’  
27 Response, pg. 12, lines 1-4. The Bylaws only require that business transacted at a special  
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1 meeting be limited “to the items stated in the notice.” It is undisputed that termination of the  
2 condominium was listed as an item to be addressed at the Meeting; thus, the Notice  
3 requirements were met. Even if Plaintiffs were correct that the issue was improperly  
4 noticed, A.R.S. § 33-1228 (2018) does not require a meeting, only that the termination  
5 agreement be ratified by the requisite number of unit owners. *See* A.R.S. § 33-1228(B)  
6 (2018). This requirement was met, as evidenced in the Termination Agreement. *See* the  
7 Condominium Termination Agreement, attached as Exhibit 2 to PFP’s Motion to Dismiss,  
8 Exhibit A). Thus, the notice requirement is a red herring—Plaintiffs were aware of the issues  
9 to be addressed at the meeting, participated in the meeting, and voted on the issue.  
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12  
13 **E. Plaintiffs Constitutional Challenge Is Meritless.**

14 **i. Plaintiffs failed to comply with A.R.S. § 12-1841.**

15 Pursuant to A.R.S. § 12-1841, when a party challenges the constitutionality of a  
16 statute, the party challenging the statute—in this case Plaintiffs—has the obligation to serve  
17 the attorney general, speaker of the house of representatives, and president of the senate with  
18 the pleadings containing the allegations at the same time the other parties in the action are  
19 served. A.R.S. § 12-1841(A). The purpose of this statute is to allow the State, who has an  
20 interest in the constitutional challenge of its statute, to be heard. *DeVries v. State*, 219 Ariz.  
21 314, 316, ¶2, 198 P.3d 580, 582 (App. 2008). Upon information and belief based upon the  
22 certificate of service on Plaintiffs’ Response, Plaintiffs have failed to serve the attorney  
23 general, speaker of the house of representatives, and president of the senate. This Court  
24 should require compliance with A.R.S. § 12-1841 before addressing Plaintiffs’ arguments.  
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27  
28 *See Merrill v. Merrill*, 238 Ariz. 467, 469, 362 P.3d 1034, 1036 (2015) (vacated on other

1 grounds) (“[T]he court can require compliance before addressing the constitutionality of a  
2 statute.”).

3  
4 **ii. The sale of Plaintiffs’ Unit is not an unconstitutional taking.**

5 A statute is presumed constitutional and the challenging party “bears the burden of  
6 establishing its invalidity.” *State v. Brock*, 248 Ariz. 583, 588 ¶ 10, 463 P.3d 207, 212 (App.  
7 2020). In this case, Plaintiffs fail to meet their burden as their constitutional arguments fail  
8 for numerous reasons. First, the government is not involved and is not taking their property.  
9 The protections of the Takings Clause of the Fifth Amendment, applicable to the States by  
10 the Fourteenth Amendment, prohibit **the government** from taking private property without  
11 just compensation. Plaintiffs’ citation to *Bailey v. Myers*, 206 Ariz. 224, 76 P.3d 898 (App.  
12 2003) is distinguishable in that the Court was evaluating whether a government entity  
13 improperly condemned private property. The Association and PFP are not the government,  
14 but rather are private entities effectuating a sale pursuant to the private parties’ agreement in  
15 conformance with a state statute.  
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19 When Plaintiffs purchased their Unit, they agreed to the terms and conditions of the  
20 Bylaws and Declarations. As admitted in their Second Amended Complaint, the  
21 Association’s Declaration specifically stated the Condominium may be terminated by  
22 agreement of at least 90% of the Unit Owners. Plaintiffs further agreed in the Declaration  
23 that, “The Association shall have such rights, powers, and duties as are prescribed by the  
24 Condominium Act.” Thus, not only were Plaintiffs fully aware that the Condominium could  
25 be terminated, but they contractually agreed to the procedures that the Association and PFP  
26 followed for termination and sale of the Condominium. There was a proper ratification of  
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1 the Agreement by over 90% of the Unit Owners; the terms of the sale were delineated in the  
2 Agreement; and the property was sold to PFP for the appraised fair market value.

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4 Further, Plaintiffs' only citation to support its argument that A.R.S. § 33-1228 is an  
5 unconstitutional taking is from a law journal article, which has no precedential value and is  
6 merely an opinion of one author. *See* Plaintiffs' Response, pg. 14, lines 7-21.

7  
8 All condominiums are statutorily created and such statutes recognize the  
9 condominium form of property ownership. *See* A.R.S. § 33-1211. As condominiums are  
10 statutorily created, it would only make sense that the statute also dictates its termination.  
11 Although Plaintiffs perceive A.R.S. § 33-1228 (2018) to be unfair, it is not unconstitutional  
12 and Plaintiffs' arguments against it are better suited for the Legislature, not this Court.

13  
14 **II. CONCLUSION**

15 Although Plaintiffs voted against the termination and sale of the Condominium, it was  
16 properly effectuated pursuant to A.R.S. § 33-1228 (2018). The facts, as alleged in Plaintiffs'  
17 Second Amended Complaint, do not state a cause of action upon which relief can be granted.

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1 As Plaintiffs cannot prove a cause of action against PFP, they attempt to challenge the  
2 constitutionality of the statute. However, their constitutional arguments are inapplicable and  
3 better suited for the Legislature. As such, PFP respectfully requests this Court grant its  
4 Motion to Dismiss Plaintiffs' Second Amended Complaint.  
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8 RESPECTFULLY submitted this 5<sup>th</sup> day of October, 2020.  
9

10  
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13  
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18 ORIGINAL of the foregoing  
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20 October, 2020, with the  
Clerk of Maricopa County  
Superior Court.

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By /s/ Isabelle Gutierrez