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Attorneys for Defendant Dorsey Place Condominium Association

**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,

v.

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

Defendants.

Case No. CV2019-055353

**DEFENDANT DORSEY PLACE
CONDOMINIUM ASSOCIATION’S
REPLY IN SUPPORT OF ITS
APPLICATION FOR
ATTORNEYS’ FEES AND COSTS**

(Assigned to: Honorable Daniel G. Martin)

Defendant Dorsey Place Condominium Association (“Association”), by and through undersigned counsel, hereby submits its Reply in Support of its Application for Attorneys’ Fees and Costs (“Application”) against Plaintiffs Jie Cao, Haining “Frazer” Xia, and Stone Xia (“Plaintiffs”). In their Opposition to the Application (the “Opposition”), Plaintiffs fail to cite persuasive authority to deny the Application. Accordingly, the Court should grant the Application as submitted.

1 purpose.” *State ex rel. Romley v. Superior Court (Stewart)*, 168 Ariz. 167, 169, 812 P.2d
2 985, 987 (1991). In *King v. Titsworth*, 221 Ariz. 597, 600, 212 P.3d 935, 938 (App. 2009)
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4 it was observed that “one of the purposes of fee-shifting statutes is to ‘promote settlement
5 of disagreements out of court’ and that ‘[u]nless each party is on notice *before* each stage
6 of the law suit that its opponent intends to ask for attorney[s’] fees, [that] purpose cannot
7 be served.”

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9 The Arizona Supreme Court has upheld parties’ right to contract with regards to
10 attorneys’ fee awards, and has recently held that any discretion afforded by A.R.S. §12-
11 341.01 is supplanted by the terms of a contract between the parties which are in conflict
12 with the same. See *American Power Products, Inc. v. CSK Auto, Inc.* 242 Ariz. 364, 368,
13 396 P.3d 600, 604 (A.R.S. §12-341.01 applies to “any contested action arising out of
14 contract” to the extent it does not conflict with the contract.”). This holding leaves intact
15 prior cases which held that parties’ contractual fee provisions remain the controlling
16 authority on the issue and only alters those decisions to the extent they exclude
17 consideration of A.R.S. §12-341.01 outright.

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20 Arizona law is clear that a provision in a contract awarding attorneys’ fees to the
21 prevailing party will be enforced according to its terms. Unlike fees awarded under A.R.S.
22 §12-341.01, a court lacks discretion to refuse to award fees when such a provision is
23 present in the contract being sued upon. *Chase Bank of Arizona v. Acosta*, 179 Ariz. 563,
24 575, 880 P.2d 1109, 1121 (holding that contractual provisions for attorneys’ fees are
25 enforced according to their terms and courts lack discretion to refuse to award fees under
26 such provisions.) See, also, *Geller v. Lesk*, 230 Ariz. 624, 627, 285 P.3d 972, 975 (App.
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1 2012); *McDowell Mountain Ranch Community Ass’n, Inc. v. Simons*, 216 Ariz. 266, 270-
2 271, 165 P.3d 667, 671-672 (App. 2007) (trial court’s discretion is more narrowly
3 circumscribed when parties contractually agree that the prevailing party shall be awarded all
4 its’ attorneys’ fees and is limited to determining only “obviously excessive” fees). “A
5 general principle of contract law is that when parties bind themselves by a lawful contract,
6 the terms of which are clear and unambiguous, a court must give effect to the contract as
7 written.” *Grubb & Ellis Mgmt. Serv., Inc. v. 407417 B.C., L.L.C.*, 213 Ariz. 83, ¶ 12, 138
8 P.3d 1210, 1213 (App. 2006).

9 Here, the fees at issue stem from a contractual agreement between the Parties, the
10 Condominium Termination Agreement, recorded on April 9, 2019 at Sequence Number
11 20190248170 in the Maricopa County Recorder’s Office¹. This agreement provides in
12 relevant part:

13 12. Attorneys’ Fees. If any action is brought by any party with
14 respect to its rights under this Agreement, the prevailing party
15 shall be entitled to reasonable attorneys’ fees, consultant fees
16 and all other court costs from the non-prevailing party, whether
17 or not taxable by statute.

18 Pursuant to *American Power Products, supra*, this provision strips all discretion from
19 the court in considering the Association’s Application aside from determining what is
20 “reasonable.” Pursuant to *American Power Products*, the right to attorneys’ fees is absolute
21 in this matter and not subject to discretion from the Court. Accordingly, the Court’s analysis

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27 ¹ In addition, the Association’s Declaration provides at Article 13.15: “In the event...any Unit
28 Owner employs an attorney or attorneys...to enforce compliance with or recover damages for any
violation of noncompliance with the Condominium Documents, the prevailing party in any such
action shall be entitled to recover from the other Party his reasonable attorneys’ fees incurred in
the action.”

1 is limited only to determining the “reasonableness” of the requested fees rather than whether
2 the Association is entitled to an award at all regardless of whether a request was made in the
3 Association’s Motion to Dismiss.
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5 While the above authority is dispositive on this issue, it should be noted that this
6 position syncs, rather than conflicts, with the holding in *Balestreri* that in order for a fee
7 award to be levied against a party, that party must have notice of the possibility of a fee
8 award if it loses the litigation. *Balestreri*, 221 Ariz. at 600, ¶ 14, 212 P.3d at 938. Here,
9 Plaintiffs concede they were on notice of the Termination Agreement at all times relevant,
10 including citing to the same in their Second Amended Complaint. Therefore, any notice
11 requirement of this non-discretionary fee provision for the purposes of settlement and risk
12 assessment is met in this matter and it should be enforced as written.
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15 **b. The Associated Indemnity Factors All Weigh in Favor of the Association**

16 While they ultimately are not relevant, as discussed above and contrary to
17 Plaintiffs’ position, to the extent they are considered, all relevant factors weigh in favor
18 of awarding the Association its requested fees and costs. Nothing in Plaintiffs’ Response
19 provides compelling arguments to the contrary. In fact, in their Response, Plaintiffs
20 concede on all but three (3) of the factors, while presenting no compelling arguments in
21 support of the other three.
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24 **i. Plaintiffs’ Claims Have No Merit**

25 As the Court has determined, this case is simple in that the Association complied
26 with its contractual and statutory requirements at every step of the proceedings, which
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1 Plaintiffs have conceded. Plaintiffs' claims have no merit and Plaintiffs' Response
2 provides no argument to the contrary.

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4 **ii. Litigation Could Have Been Avoided by the Plaintiffs**

5 The Association tried to avoid litigation at every turn as demonstrated in the
6 Application. The Association did nothing but conduct itself in accordance with its
7 governing documents and Arizona law, which it made clear to Plaintiffs at several
8 junctures as noted in the Application. It is Plaintiffs who insisted on litigation and then
9 failed to produce a viable claim. Accordingly, this factor weighs in favor of Defendants.
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11 **iii. Plaintiffs Have Not Met Their Burden to Show Extreme
12 Hardship**

13 In their Response, Plaintiffs argue that a fee award against them will create
14 “unnecessary hardship” on them. However, not only is “unnecessary” not the correct
15 threshold, the Plaintiffs have not provided anything close to sufficient evidence to raise
16 this issue. To raise the issue of extreme hardship, the party asserting it must “present
17 specific facts by affidavit or testimony.” *Woerth v. City of Flagstaff*, 167 Ariz. 412, 420
18 (App. 1990); see also *Rowland v. Great States Ins. Co.*, 199 Ariz. 577, 587 n. 7, ¶ 32 (App.
19 2001) (observing that a trial court could not consider hardship as a factor for determining
20 attorney’s fees because the party asserting hardship provided no evidence of it.)
21 Therefore, Plaintiffs have failed to provide sufficient evidence in support of this factor
22 and it weighs in favor of Defendants.
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26 **iv. There Is Nothing Novel About This Matter**

27 As stated in the Application, there is nothing novel about this case. It is a simple
28 case of contract and statutory interpretation where the Association complied with both at

1 every step, as conceded by Plaintiffs in their Second Amended Complaint and confirmed
2 by the Court. Plaintiffs' distaste for the statute does not change this fact and their
3 Response provides little argument to the contrary.
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5 All the *Associated Indemnity* factors weigh in favor of the Association as stated in
6 the Application and Plaintiffs' Response provides no argument to the contrary.
7 Accordingly, to the extent this aspect of the Application is considered, the Association has
8 shown it is entitled to an award of fees and costs in this matter.
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10 **c. The Plaintiffs' Response Fails to Properly Dispute the Reasonableness**
11 **of the Association's Requested Fees**

12 As noted, the Court is required to award the Association its reasonable attorney's
13 fees. Therefore, it is incumbent upon Plaintiffs to challenge those fees they deem
14 "unreasonable" in their Response. However, Plaintiffs have failed to do so aside from one
15 set of entries which is easily addressed. Accordingly, the Court should award the Association
16 all its requested fees and costs. *In re Indenture of Tr. Dated January 13, 1964*, 235 Ariz. 40,
17 52-53, ¶ 47 (App. 2014) ("A party challenging the amount of fees requested must provide
18 specific references to the record and specify which amount or items are excessive."). "An
19 opposing party does not meet his burden merely by asserting broad challenges to the
20 application. It is not enough ... simply to state, for example, that the hours claimed are
21 excessive and the rates submitted too high." *Id.*; see also *Inspiration Consol. Copper Co. v.*
22 *Ariz. Dep't of Revenue*, 147 Ariz. 216, 234 (App. 1985) (State's assertions that amount
23 requested far exceeded its own fees without references to specified billing items
24 insufficient.).
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1 Here, Plaintiffs merely contest the Association's requested fees in large part because
2 this matter was resolved by a motion to dismiss. See Response at 6. Plaintiffs provide almost
3 no citation to the record to challenge the Association's requested fees aside from one set of
4 entries totaling \$1,115.50 which were incurred by the Association in defense of the
5 Association's former and current Board members. These fees were incurred pursuant to the
6 Association's obligation to provide indemnity and defense for its Board members pursuant
7 to Article 13.25 of its Declaration and Arizona law making them reasonable *per se*.
8 Additionally, Plaintiffs provide no specific citation to any of those amounts which are
9 unreasonable or excessive.
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12 Based on the foregoing, Plaintiffs' Response fails to properly challenge the
13 Association's requested attorney's fees and the same should be awarded as submitted.
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15 **II. CONCLUSION**

16 Plaintiffs' Response provides no counterarguments to those presented in the
17 Association's Application. The Association provided a reasonable defense in this matter,
18 was successful in its defense, and should be awarded its fees in the same. The relevant
19 contractual documents at issue mandate the award, thereby eliminating any discretion that
20 may be afforded the Court on the issue. Therefore, the Association requests the Court grant
21 its Application as submitted.
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24 The Association further respectfully requests that the Court grant it twenty (20) days
25 from its Order granting the Application within which to submit a proposed form of Judgment.
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1 RESPECTFULLY SUBMITTED this 8th day of February, 2021.

2 **CARPENTER, HAZLEWOOD, DELGADO & BOLEN, LLP**

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4 By: 
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8 **ORIGINAL** of the foregoing e-filed
9 this 8th day of February 2021, with:

10 *Maricopa County Superior Court*
11 *(via AZ TurboCourt)*

12 **COPY** of the foregoing mailed and emailed
13 this 8th day of February 2021 to:

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