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**ARIZONA COURT OF APPEALS**

**DIVISION ONE**

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| JIE CAO, et al.,<br><br>Plaintiffs/Appellants,<br><br>v.<br><br>PFP DORSEY INVESTMENTS, LLC, et al.,<br><br>Defendants/Appellees. | Court of Appeals<br>Division One<br>No. 1 CA-CV 21-0275<br><br>Maricopa County<br>Superior Court<br>No. CV2019-055353<br><br>**REPLY IN SUPPORT OF APPLICATION FOR ATTORNEYS' FEES AND STATEMENT OF COSTS** |

## INTRODUCTION

The Xias filed this appeal to obtain reversal and remand of the superior court's order dismissing all seven of their claims in their complaint. The Xias were victorious, obtaining reinstatement of their claims, as set forth in the Court's July 7 Opinion. That Opinion also adopted their key legal theory, holding that the Condominium Association owed fiduciary duties to them in connection with the forced sale of their property. Because of the Xias appeal, the Court also declared A.R.S. § 33-1228 unconstitutional—one of the Xias' objectives. The Xias accordingly are "the prevailing party," which entitles the Xias to their reasonable attorneys' fees under the Condominium Declaration, as the Court recognized in its Opinion. (Slip Op. at 12). Notwithstanding Dorsey Investment's objections, for the reasons below, the Court should award the Xias the full amount of fees and costs requested in their application.

### I. The Xias prevailed in this appeal by obtaining complete reversal and winning a key legal issue; nothing on remand will affect that victory.

In this appeal, the Xias sought reversal of the superior court's order that dismissed their complaint. In their second amended complaint, the Xias brought seven claims against Dorsey Investments. [IR-40 at 8–13; (APP084–

APP089)]. Each of those claims was premised on the Xias' contention that the transaction forcing the sale of their condominium unit was unlawful. [*See id*.]. After briefing on motions to dismiss, the superior court dismissed all the Xias claims, finding the transaction lawful. [IR-61 at 2; (APP174)]. In its Opinion, this Court reversed the superior court's order, holding that the court applied the incorrect version of the statute. (Slip Op. at 11). That reversal revived each of the Xias claims, giving them complete relief from this Court.

As set forth in their Complaint, the Xias also sought to have a court declare the underlying statute unconstitutional. [IR-40 at 14; (APP090) (requesting a declaration that "to the extent A.R.S. § 33-1228 could be construed as giving Defendants the power to compel Plaintiffs to transfer their real property to PFP Dorsey, it is tantamount to an unconstitutional taking that lacks a public purpose and the statute is therefore invalid/unenforceable. . . .")]. At the Xias' urging, the Court found the statute unconstitutional, meaning the Xias achieved an important objective of their action. The appeal therefore "established important points of law and public policy" which supports a fee award. *Wagenseller v. Scottsdale Mem'l Hosp.*, 147 Ariz. 370, 394 (1985) *superseded by statute in other part as*

*recognized by Chaboya v. Am. Nat'l Red Cross*, 72 F. Supp. 2d 1081, 1092 (D. Ariz. 1999). Nothing on remand can take away that victory.

This Court also adopted one of the Xias' key legal theories: that the Association, in effecting a sale of condominium property, owed fiduciary duties to all the unit owners. *Compare* Opening Br. at 31 (arguing that "the association owes fiduciary duties to *all* unit owners, even if the supermajority effectively controls the association.") (emphasis in original) *with* Slip Op. at 11 ("By assuming the role of trustee, the Association owed a fiduciary duty to all unit owners."). In doing so, the Court expressly rejected Dorsey Investment's position that all the Association had to do was effectuate the sale of the units following the termination agreement. *See* Slip Op. at 11 ("The Association . . . argues that A.R.S. § 33-1228 only requires the trustee 'to carry out the sale that the members of the Association agreed to when they agreed to terminate the condominium.' We disagree."). The resolution of this key legal issue also supports a finding that the Xias were the prevailing party in this appeal. *Cf. e.g.*, *Wagenseller*, 147 Ariz. at 393-94 (holding that the "successful party" for purposes of A.R.S. § 12-341.01 includes "those who achieve reversal of an unfavorable interim order if that order is central to the case and if the appeal process finally determines an

issue of law sufficiently significant that the appeal may be considered as a separate unit."). And here too, nothing on remand will affect that victory.

Dorsey Investments nevertheless argue (at 2-3) that, because the Court did not adopt every legal theory the Xias' advanced, they are not the prevailing party under the Declaration. But this argument conflates success on each legal *theory* (not required for a finding of successful or prevailing party) with obtaining the requested relief—here, reversing the superior court's order. Indeed, courts frequently decide that one party is the prevailing party and award fees when a party is not successful on all its legal theories. That is why the Court in *Schweiger* acknowledged that "where a party has accomplished the result sought in the litigation, fees should be awarded for time spent even on unsuccessful legal theories." *Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 189 (App. 1983); *see also Lee v. ING Inv. Mgmt., LLC*, 240 Ariz. 158, 161, ¶ 10 (App. 2016) ("Partial success does not preclude a party from 'prevailing' and receiving a discretionary award of attorneys' fees"). And again, here, the Xias achieved the revival of all their claims. Moreover, the Court *did* adopt the Xias' core theory that the Association owed them fiduciary duties in connection with the sale of their condominium unit. The Xias prevailed.

Dorsey Investments also tries to argue (at 4) that under the plain text of the Declaration, a fee award is premature, because the Declaration only authorizes recovery of fees to "the prevailing party in any such action." Dorsey Investments argues that to fully prevail in "any such action," the Xias must prevail on the merits and obtain a favorable final judgment. However, the Declaration does not make any reference to an adjudication on the merits as a prerequisite to a fee award. If the Declaration had intended to preclude a court from awarding fees until after one party obtained a favorable final judgment, it would have said so.

Tellingly, A.R.S. § 12-341.01 similarly authorizes recovery of fees to the successful party "in any contested action. . . ." The appellate courts have construed that virtually identical language to authorize fees to the prevailing party on appeal even if further proceedings must occur on remand. *See Wagenseller*, 147 Ariz. at 393-94; *Douglas v. Governing Bd. of Window Rock Consol. Sch. Dist. No. 8,* 206 Ariz. 344, 349, ¶ 19 (App. 2003) (although case was remanded for further proceedings, parties that secured reversal of dismissal by superior court were "the successful parties" under A.R.S. § 12-341 and entitled to costs on appeal); *Gfeller v. Scottsdale Vista N. Townhomes Ass'n*, 193 Ariz. 52, 54-55 (App. 1998) (awarding fees under *Wagenseller* after

determining Condominium Association had affirmative duty to enforce rules); *Burkons v. Ticor Title Ins. Co. of Cal.*, 168 Ariz. 345, 356-357 (1991) (affirming court of appeals determination that "by virtue of obtaining reversal of the trial court's grant of summary judgment" Appellants were "entitled to attorney's fees on appeal under the principles set forth in *Wagenseller*."); *Bartning v. State Farm Fire and Cas. Co.*, 162 Ariz. 344, 349 (1989) (awarding fees under *Wagenseller* after remanding case to superior court). There is no reason (and Dorsey has provided none) for interpreting the Declaration differently than that statute.

**II. The fee award should not be limited to the supplemental briefing.**

The fee award should include all of the briefing in this appeal. As a threshold matter, the Xias were required to prepare and provide the statement of facts, statement of the case, and other portions of the brief regardless of the issues raised. *See* ARCAP 13 ("appellant's opening brief must" contain various items). So the fee award cannot be limited to the supplemental briefing, as Dorsey Investments suggests.

Moreover, the fee award should include the briefing on the statutory issues, and the briefing on whether A.R.S. § 33-1228 authorized an unconstitutional taking of the Xias property. During the motion to dismiss

briefing, Dorsey Investments raised two distinct arguments (1) that the government was not involved, and so therefore there was no taking, and (2) that the Xias agreed to the termination and sale process under the statute. Dorsey Investments could have, but did not, concede that the statute was unconstitutional and that direct government involvement was not needed to find a taking. Their failure to do so forced the Xias to undertake that briefing. Indeed, during the briefing before the superior court, Dorsey Investments argued that the sale was not a taking because "the government [wa]s not involved and [wa]s not taking [the Xias] property." [IR-58 at 8].

Based on that argument, the Xias spent considerable legal research, drafting, and other efforts to rebut this assertion in their Opening Brief. *See, e.g.*, Opening Br. at 55 ("Formal condemnation proceedings or other government involvement is not required to find a taking of private property."). Dorsey Investments then abandoned this argument in their Answering Brief, arguing only that the Condominium Declaration independently authorized the sale of their property. (*See* Answering Br. at 22–23). The Court ultimately agreed with the Xias that direct government involvement is not necessary to find a taking, and found the statute

unconstitutional. Slip Op. at 5 ("A statute that authorizes a private party to take another party's property constitutes a taking.").

Dorsey Investments also argues that it is the Xias' fault for not briefing the correct version of the statute and claim that the lawsuit may not have occurred if they had alleged in their complaint that the 1986 version of the statute applied. But Dorsey Investments incorrectly relied upon the later version of A.R.S. § 33-1228 in carrying out the transaction in the first place, and also could have pointed out that the earlier version of statute applied. Presumably they failed to do so because it is less favorable to them. Dorsey Investments cannot now avoid the Declaration's fee-shifting provision after they forced litigation based on a later version of the statute.

**III. The fees requested are reasonable.**

In their fee application, the Xias demonstrated the reasonableness of the flat fee arrangement through the time entries, Mr. Fraser's declaration, and by analyzing several of the factors under Ethical Rule 1.5. (Fee App. at 3–6). As explained in the fee application, the Xias have already actually paid or have agreed to pay all the requested fees. Given this demonstration, the burden shifted to Dorsey Investments to dispute the reasonableness of the

requested fees. S*ee Nolan v. Starlight Pines Homeowner's Ass'n*, 216 Ariz. 482, 491, ¶ 38 (App. 2007) (discussing burden-shifting).

To meet their burden, Dorsey Investments needed to identify specific activities that would not "have been undertaken by a reasonable and prudent lawyer" in pursing their client's interests. *Schweiger*, 138 Ariz. at 188 (citation omitted). Dorsey Investments could not meet that "burden merely by asserting broad challenges to the application. It is not enough . . . simply to state, for example, that the hours claimed are excessive and the rates submitted too high." *Nolan*, 216 Ariz. at 491, ¶ 38 (quotation marks and citation omitted).

Despite the foregoing, Dorsey Investments made broad challenges to the total amount of time spent and the hourly rates of the attorneys—the exact type of objection that courts routinely reject. *See id.* at 490-91, ¶ 38 ("Although the Nolans assert that Starlight's counsel's billings are inflated and that much of counsel's work was unnecessary, these challenges are insufficient as a matter of law."); *see also State ex rel. Corbin v. Tocco*, 173 Ariz. 587, 595 (App. 1992) (rejecting objections to fees because of the "lack of factual detail to support the objections to the fee application"). These broad objections to the requested fees are insufficient as a matter of law. *See e.g.*

Obj. at 13–14 (complaining that the "amount of time" spent on the opening and reply briefs "in and of itself is excessive and an unreasonable or inordinate amount of time in preparing the briefs. . ."). Accordingly, the Court may disregard most of what Dorsey Investments says about the reasonableness of the requested fees.

In addition to their overbroad challenges, Dorsey Investments advances several specific arguments, each of which lacks merit:

**Hourly rates**: In their application for attorneys' fees, the Xias demonstrated that the flat fee portion of the attorneys' fees they are requesting was reasonable, in part by calculating what the appeal would have cost under the firm's typical hourly rates. (Fee App. at 4). Mr. Fraser's Declaration detailed the "experience, reputation, and ability of the lawyer or lawyers performing the services." *See* Fraser Decl. at ¶¶ 14–19.

Dorsey Investments does not address these factors in connection with their challenge to the hourly rates of the Xias' attorneys, or argue that the lawyers involved with the appeal are unqualified. Nor could they, given the education and experience of the appellate lawyers in this case. Instead, they only rely (at 9–10) on a State Bar Survey that is more than three years old, and argue that because Osborn Maledon's hourly rates are above average,

the Court should reduce the fee award to be in line with the average rates from the State Bar Survey.[1] But averages are just that—half of the hourly rates charged will be above that amount, half will be below, and "lawyers who fetch above-average rates are presumptively entitled to them, rather than to some rate devised by the court." *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1150 (7th Cir. 1992). That is why the Arizona Supreme Court has explained that, in commercial cases, the Court starts with the rate charged, and *not* with the average rate of lawyers in the community, which only is used in public interest cases where the attorney does not have an hourly rate. *See Schweiger*, 138 Ariz. at 187—188 (explaining that "in corporate and commercial litigation between fee-paying clients, there is no need to determine the reasonable hourly rate prevailing in the community for similar work because the rate charged by the lawyer to the client is the best

[1] Appellees are also incorrect that Mr. Bullock's rate is above the market average in the State Bar Survey. As Appellees recognize (Obj. at 10), Mr. Bullock graduated law school in 2017, and has five years of legal experience. Under the 2019 State Bar Survey, a lawyer with five years of legal experience charged an average rate of $288/hr. Adjusting for inflation, Mr. Bullock's current rate of $290/hr is below that average rate.

indication of what is reasonable under the circumstances of the particular case.").

Dorsey Investments' averaging approach is simply not the accepted method of determining a reasonable fee, and does not reflect the realities of the legal market. *See Gusman*, 986 F.2d at 1150 ("Only an assumption that all lawyers are identical could support the averaging approach, under which all lawyers in a division of the court receive the same hourly fee. "). The rates charged by the appellate specialists and others who worked on this appeal are reasonable.

**Appeal assessment:** Dorsey Investments ignores the Xias' explanation for the appeal assessment provided in their initial fee application and mischaracterizes the tasks performed by the attorneys in connection with that assessment as "essentially duplicative work from Appellants' original counsel." (Obj. at 10). As explained in the fee application, the assessment involved developing new strategy on appeal, exploring the likelihood of success of an appeal, and more thoroughly analyzing the statutory and constitutional issues in this case. This was not duplicative effort from the superior court; competent counsel would have performed similar tasks in advising their client about the likelihood of success on appeal. In addition,

as a policy matter, courts should encourage attorneys and parties to take a fresh look at whether to pursue an appeal. Not awarding fees for the appeal assessment would discourage that.

**Amicus time:** The time spent related to obtaining an amicus brief from the Pacific Legal Foundation and attempting to obtain amicus briefs from other organizations is reasonable.[2] Pacific Legal Foundation is a non-profit that frequently litigates issues of unconstitutional takings before the United States Supreme Court. *See* Pacific Legal Foundation, *Supreme Court affirms property rights for California fruit growers*, (Sept. 1, 2021), https://pacificlegal.org/case/cedar-point-nursery-v-gould/. Although Dorsey

[2] Appellees claim that the Xias are improperly claiming fees for writing portions of an amicus brief. But this comes from an incorrect time entry. One of the entries they rely upon, a 7/29/2021 entry contains a typo—it should say "Revise all sections of ~~amicus~~ **opening** brief; telephone call with Thom Hudson re same." *See* Supp Fraser Decl. ¶¶ 4-6. On that day, Mr. Fraser was also working on an amicus brief in an unrelated Supreme Court case and mistakenly used the word "amicus" when he intended to write "opening." Supp. Fraser Decl. at ¶ 7. At that time, Pacific Legal Foundation had not drafted its amicus brief, or even agreed to participate in these proceedings. Supp. Fraser Decl. at ¶ 8. Indeed, later time entries demonstrate that Pacific Legal Foundation had not yet committed to writing an amicus brief. For example, on August 9, 2021, Mr. Fraser had a call with PLF about a "potential amicus brief." And weeks later, on August 30, 2021, Mr. Fraser and Mr. Bullock first reviewed the draft.

Investments may disagree with the strategy, they have not demonstrated that obtaining an expert amicus brief from a party that frequently litigates these types of issues before the Supreme Court would not have been "undertaken by a reasonable and prudent lawyer to advance or protect his client's interest in the pursuit" of a successful appeal. *Schweiger*, 138 Ariz. at 188.

**Excessive, Duplicative Time Entries:** As explained above, Appellees object generally to the number of hours spent during the preparation of the briefs in this case and say it is excessive. But they only identify a handful of entries, totaling 17.7 hours that they object to as particularly duplicative.

Of the specific billing entries, all but one involve Mr. Hudson, who billed 16 hours while providing significant revisions to the Opening Brief and Reply Brief. Mr. Hudson has substantial appellate experience and his review provided valuable input and improved the briefing, including with respect to its overall organization, themes, and structure. He is one of five band one Chambers appellate attorneys in Arizona. https://chambers.com/legal-rankings/litigation-appellate-arizona-5:401:11933:1. Mr. Hudson also assisted Mr. Fraser with revising the reply brief while Mr. Bullock was out of the office in November 2021. In sum, Mr. Hudson

provided valuable input that changed the direction of the overall strategy for the briefing, and his work was not duplicative or excessive.

**Success Fee:** Again, Dorsey Investments ignores and mischaracterizes the arguments made in the Xias' initial Application for Fees. As explained in the Application (at 7), the success fee was a risk-shifting mechanism, which required Osborn Maledon to undertake substantial risk that the firm would under-recover if it was not successful in reviving the Xias' claims. This type of arrangement is common in contingency matters, where a law firm will reduce its rates in exchange for a percentage of the recovery that exceeds what it would have recovered under its hourly rates. *See, e.g.*, *Toshiba Mach. Co. Am. v. SPM Flow Control, Inc.*, 180 S.W.3d 761, 782-784 (Tex. App. 2005).

Dorsey Investments cite no authority for their assertion that this success fee should be unrecoverable, and the Court should reject their argument.

## IV. Additional fees.

The Xias have incurred an additional $5,3975.50 in attorneys' fees since Osborn Maledon prepared the fee application in this matter. (Supp. Fraser Decl. ¶ 3). Fees incurred in connection with an application for attorneys'

fees are recoverable. *Gametech Int'l, Inc. v. Trend Gaming Sys., L.L.C.*, 380 F.Supp.2d 1084, 1101 (D. Ariz. 2005) ("Arizona law supports the recovery of attorneys' fees incurred in preparing a fee application.").

## V. As the prevailing party, the Xias are entitled to costs.

The Court *must* award all costs to the successful party on appeal, even if no party has yet "prevailed on the merits." *Henry v. Cook*, 189 Ariz. 42, 44 (App. 1996) ("the settled rule is that 'successful party' on appeal is not limited to those who have a favorable final judgment at the conclusion of the process"); *Trollope v. Koerner*, 21 Ariz. App. 43, 47 (1973) ("A.R.S. § 12-341 makes the award of costs to the successful party in a civil action mandatory"). The Court accordingly correctly awarded the Xias costs. Moreover, Dorsey Investments has made no objection to the costs claimed other than its mistaken "prevailing party" argument. The Court should award the full amount of the costs requested.

## VI. Conclusion

The Court should award the Xias the entire amount of their fees they have agreed to pay, including the fees incurred in submitting this fee application, for a total of $285,049.50 and grant its request for costs, for an amount of $394.50.

RESPECTFULLY SUBMITTED this 25th day of August, 2022.

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