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8

UNITED STATES DISTRICT COURT

9

DISTRICT OF ARIZONA

10 Century 21 Real Estate Corporation,

11 Plaintiff,

12 v.

13 Daryush B. Motlagh and Jane Doe
Motlagh, husband and wife; Integrity
14 Assurance, Inc. an Arizona corporation,

15 Defendants.

16 Daryush B. Motlagh and Jennifer
Motlagh, husband and wife; Integrity
17 Assurance, Inc., an Arizona
corporation,

18 Counterclaimants,

19 v.

20 Century 21 Real Estate Corporation, a
21 Delaware corporation doing business in
the State of Arizona, Does(s) 1 through
22 100,

23 Counterdefendants.

24

25 Plaintiffs/Counterdefendant Century 21 Real Estate Corporation ("Century 21")

26

No. CIV 03 2353-PHX-DGC

**CENTURY 21 REAL ESTATE
CORPORATION'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
ATTORNEYS' FEES**

(Assigned to the Hon. David G. Campbell)

1 submits the following Memorandum of Points and Authorities in Support of its Motion for
2 Attorneys Fees:

3 **MEMORANDUM OF POINTS AND AUTHORITIES**
4 **IN SUPPORT OF MOTION FOR ATTORNEYS' FEES**

5 Century 21 filed this action seeking a TRO to enjoin defendants from holding
6 themselves out as a Century 21 franchisee. On December 3, 2003, the Court issues a TRO
7 ordering defendants to cease using Century 21's trademarks in their real estate business.
8 On December 19, 2003, the Court issued a preliminary injunction enjoining defendants
9 from holding themselves out as a Century 21 franchisee and otherwise using any of
10 Century 21's trademarks.

11 Although seeking injunctive relief was the primary impetus for the lawsuit,
12 Century 21 also asserted contract and unjust enrichment claims to recover unpaid
13 franchise fees. Following entry of the preliminary injunction, defendants filed a
14 counterclaim which arose out of the Franchise Agreement, asserting the following claims:
15 (1) breach of good faith and for dealing; (2) breach of contract; (3) tortious interference
16 with prospective business advantage; and (4) unjust enrichment. Each of these claims
17 arises directly out of the Franchise Agreement, namely defendants claimed that Century
18 21 did not provide them with services required by the Franchise Agreement and
19 otherwise conspired to deprive defendants of the benefits of the Franchise Agreement.

20 On October 26, 2004, the Bankruptcy Court held that the counterclaim was
21 property of the Motlagh bankruptcy estate.¹ As a result, the parties proceeded with
22 discovery and motion practice solely on Century 21's affirmative claims pending
23 resolution of whether the Motlagh bankruptcy trustee would pursue the counterclaim or
24 whether Motlagh could obtain the right to such counterclaims. After discovery and
25 motion practice on Century 21's claims were complete, Motlagh purchased the

26 ¹ The Bankruptcy Court Minute Entry is attached as Exhibit 1.

1 counterclaim from the bankruptcy trustee and obtained standing to pursue the
2 counterclaim.² As a result, this Court reopened discovery solely on the counterclaim,
3 pursuant to the Case Management Order dated January 3, 2006. Century 21 thereafter
4 engaged in discovery concerning the counterclaim, including retaking Daryush Motlagh's
5 deposition and interviewing several nonparties who Motlagh said would support his
6 claims. Following this discovery and investigation, Century 21 filed a Motion for
7 Summary Judgment, seeking a dismissal of the counterclaim and renewing a prior Motion
8 for Summary Judgment concerning Century 21's affirmative claims. On September 19,
9 2006, the Court denied in part Century 21's motion that related to Century 21's claims and
10 granted in part the motion with respect to the counterclaim. On January 4, 2007, the
11 Court entered Judgment.

12 The amount in controversy concerning Century 21's affirmative claims is less than
13 \$60,000. Having obtained injunctive relief and a dismissal of the counterclaim, Century
14 21 does not believe it is cost efficient to continue pursuing the affirmative claims, where
15 the expense to do so would likely exceed the amount in controversy. Accordingly, the
16 parties stipulated to dismiss Century 21's remaining affirmative claims without prejudice
17 with each side to bear their attorneys' fees and costs. The parties' stipulation specifically
18 reserved Century 21's right to seek its attorney's fees and cost with respect to the
19 counterclaim, on which it is the prevailing party. As the prevailing party on the
20 counterclaim, the Court should award Century 21 its attorneys' fees pursuant to the
21 parties' Franchise Agreement and A.R.S. § 12-341.01. Century 21 addresses the items
22 required by Local Rule 54.2(c) as follows:

23 **1. Eligibility**

24 Century 21 is eligible for an award of attorneys' fees because the Franchise
25 Agreement specifically requires an award of fees. Specifically, Section 20 of the

26 ² See Exhibit 2, August 30, 2005 Bankruptcy Court Minute Entry.

1 Franchise Agreement states:

2 Should either party incur attorneys' fees in order to enforce
3 the terms and conditions of this Agreement, including post-
4 term covenants, whether or not a legal action is instituted, the
5 party in default shall be entitled to reimbursement of such
6 attorneys' and costs, in addition to any other remedies either
7 party may have at law or in equity. Should any legal action
8 be instituted, the prevailing party shall be entitled to recover
9 all litigation costs and expenses, including attorneys' fees.³

7 Arizona law is clear that "[a] contractual provision for attorneys' fees will be enforced
8 according to its terms." *F.D.I.C. v. Adams*, 187 Ariz. 585, 595, 931 P.2d 1095, 1105
9 (App. 1996) (holding FDIC was entitled to fees pursuant to contract provision). Century
10 21 is also entitled to attorneys' fees pursuant to A.R.S. § 12-341.01, which provides that
11 "[in] any contested action arising out of a contract, express or implied, the court may
12 award the successful party reasonable attorney fees."

13 As noted above, Century 21 is the prevailing party with respect to the
14 counterclaim. Century 21, therefore, entitled to attorney's fee expended solely related to
15 the counterclaim,

16 **2. Entitlement**

17 As noted above, the Franchise Agreement specifically entitles Century 21 to
18 attorney's fees. "The awarding of attorneys' fees to a prevailing party pursuant to a
19 contract between the parties is mandatory." *Bennett v. Appaloosa Horse Club*, 201 Ariz.
20 372, 378, 35 P.3d 426, 432 (App. 2001).

21 Here, the entire counterclaim arose out of Franchise Agreement. Although there
22 were non-contractual claims, a review of the allegations makes clear that all of the claims
23 all arose out of the Franchise Agreement. For example:

24 _____
25 ³ A copy of Section 20 of the Franchise Agreement is attached as Exhibit 3. The entire
26 Franchise Agreement is attached as Exhibits 2 and 3 to Century 21's Statement of Facts in
Support of Its: 1) Renewed Motion for Summary Judgment; and 2) Motion for Summary
Judgment on the Counterclaims, (Docket Entry #78).

- 1 • Count I (Breach of Implied Covenant of Good Faith and Fair
2 Dealing) alleged that “Century 21 . . . has prevented [defendants]
3 from receiving the benefits and entitlement of the agreement”⁴ and
4 “[a]s a resulted of such actions, Counterdefendant Century 21 has
5 denied to Counterclaimants the benefits of the Franchise Agreement .
6 . . .”
- 7 • Count II (Breach of Contract) alleged Century 21 breached the
8 Franchise Agreement.
- 9 • Count III (Tortious Interference) alleges that Century 21’s actions
10 caused “Counterclaimants to become in breach of contract”⁶ and
11 “[a]s direct consequence of the malicious and unconscionable acts
12 of Century 21 . . . Counterclaimants suffered grievous harm to their
13 ability to grow the real estate agency and meet the sales goals
14 required by the Franchise Agreement.”⁷
- 15 • Count IV (Unjust Enrichment) alleges that Century 21 failed to
16 provide defendants with “technical, marketing, referral, or other
17 service . . . due them as benefits of the Franchise Agreement.”⁸

18 Further, when contract and tort claims are interrelated, the matter arises out of
19 contract for the purposes of awarding attorneys’ fees. See *Ponderosa Plaza v. Siplast*,
20 181 Ariz. 128, 133, 888 P.2d 1315, 1320 (App. 1993) (holding that the full amount of
21 attorneys’ fees was recoverable where a negligence claim arose out of a contractual
22 warranty claim); *Sparks v. Republic Nat. Lafins. Co.*, 132 Ariz. 529, 543, 647 P.2d 1127,
23 1141 (1992). Here, there is no question that the claim arises out of the Franchise
24 Agreement.

25 Although attorneys’ fees are mandatory under the Franchise Agreement, they are
26 also awardable under the discretionary standard of A.R.S. § 12-341.01. Under § 12-
341.01, a prevailing party is normally “entitled to recover a reasonable attorney’s fee for
every item of service which, at the time rendered, would have been undertaken by a
reasonable and prudent lawyer to advance or protect his client’s interest . . .” *Schweiger v.*

24 ⁴ Counterclaim at ¶ 69.
25 ⁵ Counterclaim at ¶ 71.
26 ⁶ Counterclaim at ¶ 77.
⁷ Counterclaim at ¶ 78.
⁸ Counterclaim at ¶ 83.

1 *China Doll Restaurant*, 138 Ariz. 183, 188, 673 P.2d 927, 932 (App. 1983).

2 Arizona courts have enunciated six factors to guide the exercise of their discretion
3 in awarding fees under A.R.S. § 12-341.01. Those factors are:

- 4 (1) whether the unsuccessful party's claim or defense was
5 meritorious;
- 6 (2) whether the litigation could have been avoided or
7 settled and the successful party's efforts were
8 completely superfluous in achieving that result;
- 9 (3) whether assessing fees against the unsuccessful party
10 would cause an extreme hardship;
- 11 (4) whether the successful party prevailed with respect to
12 all the relief sought;
- 13 (5) whether the legal question was novel and whether such
14 claim or defense has previously been adjudicated in this
jurisdiction; and
- 15 (6) whether the award would discourage other parties with
16 tenable claims or defenses from litigating or defending
17 legitimate contract issues for fear of incurring liability
18 for substantial amounts of attorneys' fees.

19 *Newberry Corp.*, 95 F.3d at 1406; *Warner*, 143 Ariz. at 570, 694 P.2d 1184. The
20 application of those factors demonstrates Century 21's entitlement to an award of fees
21 under the statute.

22 As demonstrated by the granting of summary judgment, the counterclaim was not
23 meritorious. The crux of the counterclaim was that Century 21 failed to support
24 defendants and otherwise interfered with defendants' real estate business, causing
25 defendants' real estate agents to leave and otherwise caused defendants' financial ruin.
26 However, as set forth in Century 21's motion for summary judgment, defendants
previously alleged the same damage was caused by defendants' prior landlord, Suncor,
who had locked defendants out of their building within months of their opening their real
estate business. It is important to note that defendants vigorously objected to producing
any documents related to the Suncor litigation claiming, among other things, they were

1 irrelevant to this action. After the documents were produced following an order
2 compelling their production, it became apparent that defendants were simply trying to
3 withhold highly relevant, albeit highly damaging, documents. Incredibly, the withheld
4 documents showed that defendants were paid for the alleged damages sought here in a
5 settlement with Suncor.

6 There was simply no merit to the counterclaim, which was a reactionary response
7 to Century 21's claims and the Court's entry of a TRO. Accordingly, the extensive
8 litigation and discovery on the counterclaims could have easily been avoided had it not
9 been asserted. As for the other factors, Century 21 obtained all the relief it sought
10 concerning the counterclaim, there were no novel legal questions and an award would not
11 discourage a party with a tenable claim from asserting it. Finally, there is no reason to
12 believe an award of fees would cause an "extreme" hardship or that it would discourage
13 other parties with tenable claims from asserting them. In fact, were the Court to consider
14 the impact of the fee award in this proceeding another litigation, it could properly
15 conclude that such an award might dissuade litigants from clogging the courts with claims
16 on which there is insufficient evidence to present to a jury.

17 **3. Reasonableness of the Award.**

18 As set forth in the attached itemized statement of fees, Century 21 requests fees in
19 the amount of \$65,411. *See* Affidavit of Kevin Bonner, Exhibit 4 and Exhibit A thereto.
20 These fees are solely related to the counterclaim. In fact, Century 21 is not even seeking
21 all fees related to the counterclaim. In particular, Century 21 is only seeking those fees
22 incurred after Motlagh purchased the counterclaim to obtain standing to pursue them.
23 There were other fees incurred in connection with the counterclaim for, among other
24 things, replying to the counterclaim and filing a motion to dismiss. However, in the
25 interest of avoiding any dispute about whether items were solely related to the
26 counterclaim, Century 21 only seeks fees after the court reopened discovery solely to deal

1 with the counterclaim issues, during a time which the discovery and motion practice
2 concerning the affirmative claims had been completed.

3 The hourly rates charged by Century 21's counsel are customary for matters of the
4 type involved in this case and Century 21 has agreed to pay and has paid the fees charged.
5 See Affidavit of Kevin Bonner. This matter was handled primarily by Kevin Bonner, a
6 director and shareholder with 13 years of commercial litigation experience and Sherida
7 Colvin, an associate, with 3 years of experience. Janet Weinstein, a senior director and
8 shareholder with more than 20 years of experience (who provides oversight and
9 consultation for all Century 21 matters) and Donna Horwitz, a paralegal, also provided
10 limited work in this matter.

11 The hourly rates of counsel are reasonable in light of their experience and
12 expertise. The amount of effort expended is reasonable in light of the magnitude of the
13 allegations and the manner in which it was defended by Century 21.

14 **CONCLUSION**

15 For the foregoing reasons, the Court should award Century 21 its reasonable
16 attorneys' fees related to the defense of the counterclaim in this matter. The Statement of
17 Consultation required by C.R. 54(d)(1) is attached as Exhibit 5.

18 DATED this 17th day of January, 2007.

19 FENNEMORE CRAIG, P.C.

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21 By/s/ Kevin J. Bonner

22 Janet Weinstein
23 Kevin J. Bonner
24 Sherida Colvin
25 Attorneys for Plaintiff
26 Century 21 Real Estate Corporation

25 ORIGINAL of the foregoing
26 Filed electronically this 17th day

1 of January, 2007, with:
2 United States District Court
3 District of Arizona
4 401 West Washington Street
5 Phoenix, AZ 85003

6 COPY OF THE FOREGOING
7 mailed the same day to:

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13 /s/Amberlyn S. Murray

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