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7
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.

No. CIV 03 2353-PHX-DGC

**CENTURY 21 REAL ESTATE
CORPORATION'S REPLY IN SUPPORT
MOTION FOR ATTORNEYS' FEES**

(Assigned to the Hon. David G. Campbell)

24 Defendants/Counterclaimants Daryush and Jennifer Motlagh's Response does not
25 provide any legitimate reason for the Court to deny Century 21's Motion for Attorneys'
26

1 Fees. Instead, Motlagh uses the Response to reargue many of the same facts that he
2 alleged in the Counterclaim, which the Court has dismissed. Motlagh's continued claims
3 that Century 21 violated the bankruptcy stay and otherwise conspired against him are
4 unsupported, defy common sense and simply are not relevant here.¹

5 As set forth in Century 21's Motion for Summary Judgment, Century 21 went out
6 of its way to try to help Motlagh despite his financial difficulties from the very outset.
7 Century 21 could have simply terminated Motlagh's Franchise Agreement back in 1998
8 when he initially defaulted. But it was in Century 21's best interest to see Motlagh
9 succeed because that would reflect favorably on Century 21 and would generate revenue
10 for Motlagh and Century 21. Century 21 wanted Motlagh to succeed and was rewarded
11 with a four-year legal battle in three separate legal proceedings for its willingness to give
12 Motlagh chance after chance, which he squandered.

13 Although Century 21 disagrees with virtually all of the factual statements made in
14 the Response, it would not be productive to respond to them here because they are not
15 relevant to the issue before the Court. To the extent the Court believes that a response to
16 the factual allegations is necessary, Century 21 refers the Court to its Motion for
17 Summary Judgment which deals in detail with various factual claims made by Motlagh.

18 **I. An Award of Attorneys' Fees is Mandatory Under Both Arizona**
19 **and New Jersey Law.**

20 Motlagh is correct that the Franchise Agreement has a New Jersey choice of law
21 provision. Under New Jersey law, however, an award of attorneys' fees is a procedural
22 matter that is to be decided under the law of the forum state, i.e. Arizona law. *North*
23 *Bergen Rex Transp., Inc. v. Trailer Leasing Co.*, 730 A.2d 843, 848 (N.J. 1999). In any
24 event, the choice of law is not material because it is the same – both Arizona and New

25 ¹ Motlagh's response indicated that it was not being filed on behalf of Integrity. Century
26 21 does not seek fees against Integrity because the vast majority of fees sought were
incurred after the Court dismissed Integrity's counterclaim.

1 Jersey law require an award of attorneys' fees pursuant to a contractual provision
2 providing for such fees. *Bennett v. Appaloosa Horse Club*, 201 Ariz. 372, 378, 35 P.3d
3 426, 432 (App. 2001); *North Bergen*, 730 A.2d at 848.²

4 **A. The Franchise Agreement Requires An Award of Attorneys' Fees.**

5 Motlagh's claim that attorneys' fees are not proper under the Franchise Agreement
6 is unpersuasive. Paragraph 20 of the Franchise Agreement provides:

7 Should either party incur attorneys' fees in order to enforce the terms and
8 conditions of this Agreement, including post-term covenants, whether or not
9 legal action is instituted, the party not in default shall be entitled to
10 reimbursement of such attorneys' fees and costs. **Should any legal action
be instituted, the prevailing party shall be entitled to recover all
litigation costs and expenses, including attorneys' fees.**³

11 Motlagh's claim that he was not seeking to enforce the terms and conditions of the
12 Franchise Agreement is contradicted by even a cursory ruling of the Counterclaim.
13 Motlagh asserted a breach of contract claim that specifically alleged that Century 21
14 breached the Franchise Agreement by failing to provide technical support, telemarketing
15 advice, client referrals and related advertising meetings and products. *See* Counterclaim
16 at ¶ 73-74. The other counts in the Counterclaim also made clear that they arose out of
17 allegations that Century 21 breached the Franchise Agreement by failing to provide
18 benefits allegedly required by the Franchise Agreement. Century 21 does not know what
19 Motlagh means when he says that the claims were directed at the "spirit" and "intent" of
20 the contract. In any event, the language of the Counterclaim is clear – each of them

21 ² Century 21 recognizes that under choice of law principles, only New Jersey's local law
22 would normally be applicable and not its conflict of law rules, which would require the
23 application of New Jersey's law as it relates to attorneys' fee provisions. *See, e.g., Winer*
24 *Motors, Inc. v. Jaguar Rover Triumph, Inc.*, 506 A.2d 817, 821 (N.J. Super. 1986) (citing
25 Restatement, Conflict of Laws 2d, § 187(3)). However, New Jersey has an exception
26 when public policy dictates a different result. Here, the principle has no impact on the
result because both Arizona and New Jersey law enforces contractual attorneys' fee
provisions. However, to the extent there was a difference, it would require the application
of Arizona law because of Arizona's public policy of awarding attorneys' fees to the
prevailing party in contract litigation under A.R.S. § 12-341.02.

³ *See* Exhibit 3 to the Motion for Attorneys' Fees (emphasis added).

1 claimed Century 21 was not complying with the terms of the Franchise Agreement.

2 Motlagh claims that Century 21 has not shown that it is a party “not in default.”
3 Century 21 disagrees. Succinctly, Motlagh claimed that Century 21 breached the
4 Franchise Agreement, (i.e., was in default of its terms), and the Court entered judgment in
5 Century 21’s favor on these claims. Century 21 is clearly “the party not in default.” In
6 any event, the Franchise Agreement provides that “[s]hould any legal action be instituted,
7 the prevailing party shall be entitled to recover all litigation costs and expenses, including
8 attorneys’ fees.” The provision does not require an affirmative showing that Century 21
9 was not in default. Given the Judgment on the Counterclaim, Century 21 is the prevailing
10 party and is entitled to an award of attorneys’ fees.

11 **B. The Fees Sought Are Reasonable.**

12 Although Motlagh cited to the *Mendine v. Pantzer*⁴ case for the reasonableness
13 factors under New Jersey law, Motlagh does not dispute the reasonableness of the
14 attorneys’ fees sought. Arizona law specifically provides that a party objecting to a fee
15 application on reasonableness grounds must set forth which fees it claims are
16 unreasonable. *See Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co.*, 142 Ariz. 47, 51, 688
17 P.2d 693, 697 (App. 1984). In any event, as set forth in the Motion for Attorneys’ Fees,
18 the fees sought are reasonable.

19 **C. Century 21 Has Paid the Fees it Seeks Here.**

20 Motlagh’s final argument, that Century 21 has not demonstrated that it has paid the
21 fees it seeks ignores the affidavit of Century 21’s counsel, which verified that Century 21
22 has, in fact, paid Fennemore Craig, P.C. for all of the fees it seeks to recover here. *See*
23 *Affidavit of Kevin Bonner* at ¶ 12, attached to the Motion for Attorneys’ Fees as Exhibit
24 4.

25
26 ⁴ 141 N.J. 292, 661 A.2d 1202 (1995).

1 **II. An Award of Attorneys' Fees Is Proper Under A.R.S. § 12-341.01.**

2 The Court does not need to address the discretionary standard under A.R.S. § 12-
3 341.01 because fees are mandatory under the Franchise Agreement. However, an award
4 of fees is also appropriate under § 12-341.01. First, Century 21 is the prevailing party
5 regarding the Counterclaim. As for the affirmative claims, the Court entered judgment on
6 the Lanham Act Claim (Count I) in Century 21's favor and entered a permanent injunction
7 against Motlagh. The parties agreed to dismissal of Century 21's remaining claims
8 without prejudice with each side to bear its own attorneys' fees.

9 Motlagh's discussion of the discretionary factors misses the mark and contains
10 factual inaccuracies. First, the Counterclaim did not survive any motion for summary
11 judgment on the merits, let alone two. Century 21 filed only one motion for summary
12 judgment on the Counterclaim, which the Court granted. Century 21's first motion for
13 summary judgment dealt solely with its affirmative claims because, at the time, Motlagh
14 did not have standing to pursue the Counterclaim.

15 Second, Motlagh never proffered any evidence to demonstrate he had meritorious
16 claims. In fact, evidence which Motlagh withheld and which was produced only after a
17 court order, demonstrated that Motlagh had made virtually the same claims of damage
18 against his prior landlord.

19 Third, the avoidance of litigation was totally within Motlagh's control. Motlagh
20 refused to stop infringing Century 21's trademarks, prompting the filing of this action.
21 Motlagh also filed the Counterclaim for which Century 21 seeks its fees. Century 21
22 would not have filed this lawsuit if Motlagh had simply stopped infringing its trademarks.
23 Had Motlagh not filed the Counterclaim, this matter would have been resolved following
24 the entry on the stipulated injunction in December 2003. Motlagh claims this litigation
25 could have been avoided if Century 21 agreed to pay Motlagh \$12,500. Given Motlagh's
26 long history of failing to pay his franchise fees and refusing to stop infringing on Century

1 21 trademarks, this request was insulting at best. Indeed, the Court dismissed the
2 Counterclaim, establishing that Motlagh had no right to demand any money to stop his
3 infringing conduct.

4 Fourth, Motlagh provides no evidence that an attorneys' fees judgment would
5 provide any hardship. The arguments of counsel made in the Response are unsupported
6 and insufficient. *Woeth v. City of Flagstaff*, 167 Ariz. 412, 420, 808 P.2d 297, 305 (App.
7 1991) ("the party asserting financial hardship has the burden of coming forward with
8 *prima facie* evidence of financial hardship . . . To raise the issue of undue hardship
9 therefore, [plaintiff] was required to present specific facts by affidavit or testimony.")

10 As for isolating the Counterclaim for purposes of the Motion for Attorneys' Fees,
11 that is what the parties agreed to do. The parties agreed to bear their own attorneys' fees
12 and costs with respect to Century 21's Counts Two, Three and Four, but that Century 21
13 could seek its attorneys' fees in connection with the Counterclaim. *See* Stipulation for
14 Entry of Permanent Injunction and to Dismiss Century 21's Claims Without Prejudice.
15 There is no question that Century 21 obtained all of the relief sought on the Counterclaim
16 and it seeks only to recover the fees related to the Counterclaim.

17 Finally, Motlagh's arguments regarding the chilling effect on other parties is also
18 unsupported. The Counterclaim had no merit and denying an award of fees could send a
19 message that franchisees can harass franchisors without fear of any consequences. It is
20 unfortunate that Motlagh has never been able to see the things that Century 21 did for
21 him, to the chagrin of fellow franchisees who were not treated as favorably as Motlagh.
22 An award of fees here is appropriate to reimburse Century 21 for having to deal with a
23 meritless claim that was dismissed by the Court.

24 **III. Conclusion.**

25 For the foregoing reasons, Century 21 requests that the Court grant its Motion for
26 Attorneys' Fees.

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DATED this 20th day of February, 2007.

FENNEMORE CRAIG, P.C.

By/s/Kevin J. Bonner

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ORIGINAL of the foregoing
Filed electronically this 20th day
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COPY OF THE FOREGOING
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