

1 R. L. Whitmer
2 6333 N. Scottsdale Rd.
3 Casita 21
4 Scottsdale, Arizona 85250
5 602.531.2615
6 Pro Per

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FILED BY: C. Francis

5 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
6 IN AND FOR THE COUNTY OF MARICOPA

7 R. L. WHITMER,

8 Plaintiff.

9 v.

10 HILTON CASITAS HOMEOWNERS
11 ASSOCIATION, also known as
12 HILTON CASITAS COUNCIL OF
13 HOMEOWNERS, also known as
14 COUNCIL OF CO-OWNERS, also
15 known as HILTON CASITAS
16 COUNCIL OF CO-OWNERS

Defendant.

CV2021-050888

VERIFIED MOTION FOR
RECONSIDERATION OF THE
COURT'S ORDER TO DISMISS

(Assigned to the
Honorable Sara Agne)

Accelerated Consideration
Requested

17 As acknowledged in the Court's order dismissing the Plaintiff's complaint,
18 courts are required to treat the allegations alleged in the Complaint as true. See
19 *Davis v. Aandewiel*, 16 Ariz. App. 262,263,492 P.2d 758, 759 (App. 1972).

20 Further, the Defendant's motion to dismiss should not be "granted unless it
21 appears to a certainty that plaintiff would be entitled to no relief under any state of
22 facts which could be proved in support of his claim." *In re Cassidy's Estate*, 77
23 Ariz. 288, 297 (Ariz. 1954).

24 The Plaintiff respectfully requests that the Court reconsider its order
25 dismissing the Plaintiff's complaint for the following:

26 1. The Court cites as its basis for dismissal is that the Plaintiff
27 acknowledged in the joint report that the HOA "had ratified a budget on May 19,
28 2021", that the "Motion for Leave to Amend [was filed] after the ratification

1 date of 2021 budget, and the Plaintiff did not seek to amend the portions of
2 his claims alleging that the Association failed to adopt a 2021 budget; this
3 lacks candor to the Court.”

4 Unbeknownst to the Court, it was not until a meeting with two HOA
5 directors on May 28, 2021, a day after the Motion for Leave to File First Amend
6 Complaint was filed, that the Plaintiff learned that the annual meeting had been
7 successfully held and that the 2021 budget had allegedly been ratified.

8 Additionally, the Plaintiff did contend in the joint report that the adoption of
9 the budget was five months late as “[t]he Association operates on calendar fiscal
10 year basis and as its general counsel recently admitted for the Association to
11 lawfully collect an assessment from homeowners the Association would need to
12 adopt its budget in December prior to the start of its fiscal year. Adopting a
13 budget in May and collecting assessments paying expenses starting January is
14 clearly a violation of A.R.S. § 33-1255.” (Joint report p.2:23 – p.3:1)

15 Therefore, to comply with A.R.S. § 33-1255 in order to collect assessments
16 and made expenditures, as well as obey the Administrative Law Order that the
17 HOA comply with A.R.S. § 33-1243(D), the HOA would need to adopt its annual
18 budget prior to the end of the preceding fiscal year which is December 31st.

19 Inter alia, the HOA’s claim that it ratified a budget on May 19, 2021 for a
20 budget and assessment that started January 1, 2021 is not in compliance with the
21 Administrative Law Order.

22 Especially considering that even in that attempt the HOA failed to comply
23 with the requirements of A.R.S. § 33-1243(D) and thus, violated the
24 Administrative Law Order that the HOA comply with A.R.S. § 33-1243(D).

25
26 ///

27 ///

28

1 The relief in Count one of the complaint, pursuant A.R.S. § 32-2199.02(B)¹,
2 asked for a finding of contempt that the HOA had failed to comply with the
3 Administrative Law Judge Decision No. 14F-H1415004-BFS, which ordered that
4 the Association “shall fully comply with the applicable provisions of A.R.S. § 33-
5 1243(D) in the future.” (P4:27-28)(Emphasis added).

6 The relief in Count Two is an order that the HOA comply fully with A.R.S. §
7 33-1255 in the future.

8 2. The Defendant’s motion to dismiss was received in the mail four days
9 after the Plaintiff filed the Motion for Leave to File First Amended Complaint on
10 May 27, 2020.

11 3. Because the Defendant’s motion focused primarily on
12 constitutionality, the Plaintiff filed a motion to strike the motion. Subsequently, for
13 the sake of order the Plaintiff filed a request for extension to respond to the
14 Defendant’s motion to dismiss until after the Court ruled on the motion to strike.

15 Had the Court acted timely on the Plaintiff’s motion to strike and granted
16 the requested extension, the Plaintiff would have responded and requested leave
17 to file a second amended complaint to cure any defect.

18 4. Without the Court first ruling on the motion to strike and request for
19 an extension, the Plaintiff lacked an orderly means to respond to the motion to
20 dismiss and supplement his complaint. The Court mistakenly concluded that
21 Plaintiff “lacked candor to the Court” in his proposed First Amended Complaint by
22 not including that on May 19, 2021 that the HOA had ratified the 2021 budget. As
23 explained in ¶ 1, the Plaintiff did not know that the HOA had ratified the 2021
24

25 ¹ A.R.S. § 32-2199.02.B: “The order issued by the administrative law judge is binding on
26 the parties unless a rehearing is granted pursuant to section 32-2199.04 based on a
27 petition setting forth the reasons for the request for rehearing, in which case the order
28 issued at the conclusion of the rehearing is binding on the parties. The order issued by
the administrative law judge is enforceable through contempt of court proceedings and is
subject to judicial review as prescribed by section 41-1092.08.”

1 budget before the May 27, 2021 filing for leave to amend file first amended
2 complaint. Obviously, the Plaintiff's filing was in good faith at that time.

3 5. Count Three is now moot. As direct result of Plaintiff filing the
4 complaint, the HOA hired a CPA and conducted a compilation for 2018, 2019 and
5 2020 which was completed on June 2, 2021 (Ex. A), and, in response to a
6 records request, delivered to the Plaintiff on June 17, 2021.

7 Had the Court granted the requested extension until after the Court ruled
8 on the motion to strike, the Plaintiff would have responded to the motion to
9 dismiss and requested leave to file a second amended complaint which would
10 have eliminated Count Three and cured any other deficiencies.

11 While a request for leave to amend is one addressed to the discretion of
12 the Court, Rule 15(a) states that "[l]eave to amend shall be freely given when
13 justice requires." See, Rule 15(a), Ariz.R.Civ.P., See also, *Cagle v. Carr*, 101 Ariz.
14 225,418 P.2d 381 (1966).

15 **Conclusion**

16 Accordingly, justice requires that the Court should vacate its order
17 dismissing the Plaintiff's complaint, reinstate the Scheduling Order, and grant the
18 Plaintiff the opportunity to response to motion to dismiss, now that the Court has
19 denied the motion to strike.

20 Additionally, the Defendant's attorney, provided by its insurer, told the Court
21 at the April 23, 2021 Order to Show Cause Hearing that he would seek a
22 settlement to this action. In response, the Plaintiff twice agreed to settle if the
23 Defendant would agree to correct its behavior and simply comply with statute,
24 then this case would not require further proceedings. The Defendant's attorney
25 agreed in conversation (EX. B), but never responded as promised.

26 The Defendant will not suffer any prejudice from the Court granting
27 reconsideration and reinstating the scheduling order.
28

1 Dated this 3rd day of September, 2021.

2 

3

R. L. Whitmer

4 ORIGINAL filed this
5 3rd day of September, 2021,
6 with the Clerk of the Court;

7 and a COPY mailed this same date to:

8 Tim Butterfield

9 Carpenter Hazelwood

10 1400 E. Southern Ave., Ste. 400

11 Tempe, AZ 85282

12
13 **VERIFICATION**

14 Pursuant to **Rule 80(i)** of the Arizona Rules of Civil Procedure, I, R.
15 L. Whitmer, declare under the penalty of perjury that the preceding Motion is true
16 and correct to the best of my information, knowledge and belief.

17
18 Dated this 3rd day of September, 2021.

19
20 

21

R. L. Whitmer

Exhibit A



1734 E. Boston St., Suite 101 • Gilbert, AZ 85295
TEL: 480-497-1250 • FAX: 480-497-0622
www.ButlerHansen.com

To the Board of Directors of
Hilton Casitas Council of Homeowners

Management is responsible for the accompanying financial statements of Hilton Casitas Council of Homeowners (an Arizona corporation), which comprise the statement of assets, liabilities and members' equity - cash basis as of December 31, 2020, and the related statement of revenues, expenses and changes in members' equity - cash basis for the year then ended, and the related notes to the financial statements in accordance with the cash basis of accounting, and for determining that the cash basis of accounting is an acceptable financial reporting framework.

We have performed a compilation engagement in accordance with Statements on Standards for Accounting and Review Services promulgated by the Accounting and Review Services Committee of the American Institute of Certified Public Accountants.

We did not audit or review the financial statements nor were we required to perform any procedures to verify the accuracy or completeness of the information provided by management. Accordingly, we do not express an opinion, a conclusion, nor provide any form of assurance on these financial statements.

Basis of Accounting

We draw attention to Note 2 of the financial statements, which describes the basis of accounting. The financial statements are prepared in accordance with the cash financial reporting framework, which is a basis of accounting other than accounting principles generally accepted in the United States of America.

Butler Hansen, PLC

Gilbert, Arizona
June 2, 2021

HILTON CASITAS COUNCIL OF HOMEOWNERS
STATEMENT OF ASSETS, LIABILITIES AND MEMBERS' EQUITY - CASH BASIS
DECEMBER 31, 2020

	<u>OPERATING FUND</u>	<u>REPLACEMENT FUND</u>	<u>TOTAL</u>
ASSETS			
Cash and Cash Equivalents	\$ 57,784	\$ 30,453	\$ 88,237
TOTAL ASSETS	<u>\$ 57,784</u>	<u>\$ 30,453</u>	<u>\$ 88,237</u>
 LIABILITIES AND MEMBERS' EQUITY			
LIABILITIES	<u>\$ -</u>	<u>\$ -</u>	<u>\$ -</u>
MEMBERS' EQUITY	<u>57,784</u>	<u>30,453</u>	<u>88,237</u>
TOTAL LIABILITIES AND MEMBERS' EQUITY	<u>\$ 57,784</u>	<u>\$ 30,453</u>	<u>\$ 88,237</u>

See accompanying notes to the financial statements.

**HILTON CASITAS COUNCIL OF HOMEOWNERS
STATEMENT OF REVENUES, EXPENSES AND CHANGES IN
MEMBERS' EQUITY - CASH BASIS
FOR THE YEAR ENDED DECEMBER 31, 2020**

	<u>OPERATING FUND</u>	<u>REPLACEMENT FUND</u>	<u>TOTAL</u>
REVENUES			
Assessment Income	\$ 98,054	\$ -	\$ 98,054
Miscellaneous Income	144	-	144
Late Fee Income	8,608	-	8,608
Administrative Income	40	-	40
Collection Cost Reimbursement	59	-	59
Insurance Claim Revenue	25,083	-	25,083
Interest Income	126	68	194
TOTAL REVENUES	<u>132,114</u>	<u>68</u>	<u>132,182</u>
EXPENSES			
ADMINISTRATIVE			
Collections	135	-	135
Collections - Late Notices	30	-	30
Copies and Printing	291	-	291
Courier Service	341	-	341
CPA Services - Tax Return	325	-	325
Taxes and Other	10	-	10
Insurance	7,777	-	7,777
Legal Expense	44,027	-	44,027
Management Contract	7,872	-	7,872
Meeting Expenses	81	-	81
Office Supplies	289	-	289
Other Administrative Expenses	35	-	35
Postage	167	-	167
TOTAL ADMINISTRATIVE	<u>61,380</u>	<u>-</u>	<u>61,380</u>
CONTRACT SERVICES			
Gate Maintenance Contract	900	-	900
Landscape Contract	6,600	-	6,600
TOTAL CONTRACT SERVICES	<u>7,500</u>	<u>-</u>	<u>7,500</u>
LANDSCAPING			
Irrigation Maintenance and Repair	681	-	681
Landscape - Tree Maintenance	1,115	-	1,115
Overseed	825	-	825
TOTAL LANDSCAPING	<u>2,621</u>	<u>-</u>	<u>2,621</u>

(CONTINUED)

See accompanying notes to the financial statements.

**HILTON CASITAS COUNCIL OF HOMEOWNERS
STATEMENT OF REVENUES, EXPENSES AND CHANGES IN
MEMBERS' EQUITY - CASH BASIS (CONTINUED)
FOR THE YEAR ENDED DECEMBER 31, 2020**

	<u>OPERATING FUND</u>	<u>REPLACEMENT FUND</u>	<u>TOTAL</u>
REPAIRS AND MAINTENANCE			
Gate Maintenance and Repairs	4,600	-	4,600
Repairs Under Insurance Claim	28,417	-	28,417
Street Maintenance and Repairs	900	-	900
TOTAL REPAIRS AND MAINTENANCE	<u>33,917</u>	<u>-</u>	<u>33,917</u>
UTILITIES			
Electric - Common Area	505	-	505
Refuse	6,525	-	6,525
Telephone - Gates	637	-	637
TOTAL UTILITIES	<u>7,667</u>	<u>-</u>	<u>7,667</u>
RESERVE EXPENSE			
Street Reserve Expense	-	2,672	2,672
TOTAL RESERVE EXPENSE	<u>-</u>	<u>2,672</u>	<u>2,672</u>
TOTAL EXPENSES	<u>113,085</u>	<u>2,672</u>	<u>115,757</u>
EXCESS REVENUES (EXPENSES)	19,029	(2,604)	16,425
MEMBERS' EQUITY			
BEGINNING OF YEAR	39,477	32,335	71,812
TRANSFERS BETWEEN FUNDS			
Additional Contributions to Replacement Fund	(722)	722	-
TOTAL TRANSFERS BETWEEN FUNDS	<u>(722)</u>	<u>722</u>	<u>-</u>
MEMBERS' EQUITY END OF YEAR	<u>\$ 57,784</u>	<u>\$ 30,453</u>	<u>\$ 88,237</u>

See accompanying notes to the financial statements.

**HILTON CASITAS COUNCIL OF HOMEOWNERS
NOTES TO FINANCIAL STATEMENTS
DECEMBER 31, 2020**

NOTE 1 - NATURE OF THE ORGANIZATION

Hilton Casitas Council of Homeowners (the "Association"), a non-stock condominium association, was incorporated on August 11, 1994, under the general non-profit laws of the State of Arizona. The Association was established to provide management, maintenance and preservation of the common areas and other property owned by the Association or property placed under its jurisdiction. The Association consists of twenty-nine (29) condominium units. The Association is located in Scottsdale, Arizona. There is a Board of Directors elected by the member unit owners. The Board of Directors engaged Cornerstone Properties, Inc., as the managing agent for the Association for the calendar year 2020 up through November 30, 2020. The Board of Directors then engaged Arizona Community Management Services, LLC as the managing agent for the Association effective December 1, 2020.

NOTE 2 - SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES

Method of Accounting

The Association's general records and the accompanying financial statements are prepared using the cash basis method of accounting. Consequently, revenues (assessments and other income) are recognized when received rather than when earned, and expenses are recognized when paid rather than when the obligation is incurred. Accordingly, accounts receivable due from homeowners, deferred revenues and accrued expenses are not included in the financial statements.

Fund Accounting

The Association's governing documents provide certain guidelines for governing its financial activities. To ensure observance of limitations and restrictions on the use of financial resources, the Association maintains its accounts using fund accounting. Financial resources are classified for accounting and reporting purposes using the following funds established according to their nature and purpose:

Operating Fund

The Operating Fund is used to account for financial resources available for the general operations of the Association.

Replacement Fund

The Replacement Fund is used to account for the use and accumulation of funds for future major repairs and replacements.

Cash and Cash Equivalents

The Association considers cash in operating bank accounts, money market accounts, cash on hand, and certificates of deposit, purchased with original maturity dates of three months, or less, as cash and cash equivalents. Certificates of deposit and financial instruments, with original maturities, at date of purchase, of more than three months, are classified as certificates of deposit.

Fair Value of Financial Instruments

Unless otherwise indicated, the fair values of all reported assets and liabilities, which represent financial instruments (none of which are held for trading purposes), approximate the carrying values of such amounts.

**HILTON CASITAS COUNCIL OF HOMEOWNERS
NOTES TO FINANCIAL STATEMENTS
DECEMBER 31, 2020**

NOTE 2 - SUMMARY OF SIGNIFICANT ACCOUNTING POLICIES (CONTINUED)

Property and Equipment

Real property and common areas acquired from the developer and related improvements to such property are not recorded in the Association's financial statements because those properties are owned by the individual unit owners in common and not by the Association. The Association capitalizes personal property to which it has title at cost. Any repairs or improvements paid by the Association have not been capitalized and have been expensed for income tax purposes under special rules for condominium associations.

Common Property

Certain land areas were contributed by the developer, upon completion of the project, at no cost to the Association, which are not reflected in the financial statements. The contributed areas consist of vehicular gates, landscape, and landscape rights-of-way, which can never be sold or subdivided. The Association has not placed a value on these assets.

Date of Management's Review

Subsequent events have been evaluated through June 2, 2021, which is the date the financial statements were available to be issued.

NOTE 3 - MAINTENANCE ASSESSMENTS AND EXPENSES

Association members are subject to annual assessments to provide funds for the Association's operating expenses and future major repairs and replacements. During 2019, the combined annual assessment was \$3,600, payable in monthly installments of \$300. Excess assessments at year end are retained by the Association for use in future periods. There is no maximum annual assessment defined in the Association's governing documents.

NOTE 4 - CONCENTRATION OF CREDIT RISK

The Association's primary source of revenue is member assessments, which are earned on assessable lots or parcels located within a small geographic area. Member assessments and related receivables are subject to significant concentration of credit risk, given that they are primarily from a small geographical area, which can be impacted by similar economic conditions. Member assessments may be secured by liens upon a member's property or legal judgements. The Association monitors the collectability of these receivables and pursues collection as needed. Should the Association's collection efforts be unsuccessful, the Association could incur losses up to the full amount due. Management routinely assesses the collectability of these receivables and provides for an allowance for doubtful accounts.

The Association places its cash deposits and investments with financial institutions that have Federal Deposit Insurance Corporation (FDIC) coverage. At various times, deposits with these financial institutions, designated as cash, cash equivalents and investments, may exceed insurance coverage provided by the Federal Deposit Insurance Corporation (FDIC), or other types of insurance programs.

NOTE 5 - COMMITMENTS AND CONTINGENCIES

The Association enters into various contracts for management, landscape, and other services. Generally, all contracts are for one-year terms and can be canceled by either party with 30-to-90-day notifications, except for the Ground Lease Agreement described below in Note 8.

**HILTON CASITAS COUNCIL OF HOMEOWNERS
NOTES TO FINANCIAL STATEMENTS
DECEMBER 31, 2020**

NOTE 6 - INCOME TAXES

The Association files its income tax return as a homeowners association, in accordance with Internal Revenue Code Section 528. Under that Section, the Association is not taxed on uniform assessments to members and other income received from Association members solely as a function of their membership in the Association. The Association is taxed on its investment income and other non-exempt function income. The Association had a federal and state tax liability of \$0 and \$50, respectively, for the year ended December 31, 2020. Federal and state income taxes disbursed in the current year for the prior year were \$0 and \$0, respectively.

NOTE 7 - UNCERTAIN TAX POSITIONS

The Association accounts for uncertain tax positions, if any, in accordance with FASB Accounting Standards Codification Section 740. In accordance with these professional standards, the Association recognizes tax positions only to the extent that Management believes it is "more likely than not" that its tax positions will be sustained upon IRS examination. Management believes that it has no uncertain tax position for the year ending December 31, 2020.

The Association believes that its income tax filing positions will be sustained upon examination and does not anticipate any adjustments that would result in a material adverse effect on the Association's financial condition, net income, or cash flows. Accordingly, the Association has not recorded any reserves, or related accruals for interest and penalties for uncertain tax provisions at December 31, 2020.

The Association is subject to routine audits by taxing jurisdictions; however, there are no audits currently in progress for any tax periods. At the time of this report, the Association believes it is no longer subject to income tax examinations by U.S. federal tax authorities for years before 2018, or by Arizona state tax authorities for years before 2017.

NOTE 8 - GROUND LEASE AGREEMENT AND CONDOMINIUM ARRANGEMENT

The Association has twenty-nine units on Tracts 1 to 29, inclusive, which are located on approximately eight (8) of twenty (20) acres of land under a "Ground Lease" Agreement, dated April 10, 1970, recorded on June 19, 1970. The Agreement is between the landowners and Lincscott Hotel Corporation. The Ground Lease Agreement was amended on September 21, 1979, which increased the original lease period from ninety-nine (99) years expiring on September 30, 2069 to one hundred five (105) years expiring on September 30, 2075.

The twenty-nine Hilton Casitas are subject to a horizontal property regime (a condominium arrangement) under Arizona Revised Statutes. The General Common Elements consist of Tracts 1 to 29 inclusive, the concrete foundation and concrete slab of the Building and patio slabs, and Tracts A through G and their related improvements, landscaping, and other amenities. Each owner of a Unit has a subleasehold of the space in which the Unit is located, together with an undivided subleasehold interest in and to the General Common Elements.

**HILTON CASITAS COUNCIL OF HOMEOWNERS
NOTES TO FINANCIAL STATEMENTS
DECEMBER 31, 2020**

NOTE 9 - REPLACEMENT FUND

The Association accumulates funds for future major repairs and replacements. On December 31, 2020, these funds were \$30,453 and are held in a separate account and are generally not available for operating purposes.

The Association's Board of Directors has not engaged a firm to conduct a study to estimate the remaining useful lives and replacement costs of the common property components. The Association is funding future major repairs and replacements based on the Board of Directors' estimates. Funding considerations include amounts previously designated for future major repairs and replacements. Actual expenditures, when incurred, may vary from the estimated amounts and the variations may be material. Accordingly, amounts designated for future major repairs and replacements may not be adequate to meet future needs. If additional funds are needed, however, the Association may increase regular assessments or may delay major repairs and replacements until funds are available.

NOTE 10 - LITIGATION

During the year ended December 31, 2020, the Association was in litigation over multiple actions that could result in a loss to the Association. The Association incurred \$44,207 in legal expenses for the year ended December 31, 2020, which included costs for settled and ongoing litigation. Although some matters were settled, litigation over other related issues has not yet been resolved.

NOTE 11 - INSURANCE CLAIM AND RELATED EXPENSES

During the year ended December 31, 2020, the Association incurred repair expenses in the amount of \$28,417. After recovering \$25,083 in insurance claims, the Association had a \$3,334 loss.

NOTE 12 - COVID-19 PANDEMIC

During the year ended December 31, 2020, a pandemic caused by the coronavirus (COVID-19) had a significant detrimental impact on the United States economy. As a result, economic uncertainties have arisen which could negatively impact revenue for the Association. Other financial impacts such as bad debt losses, contract modifications, inadequate reserve funding, or other unforeseen circumstances could occur.

Exhibit B

From: R. L. Whitmer
To: Timothy Butterfield
Subject: 408 settlement discussions
Date: Friday, April 23, 2021 3:25:30 PM
Attachments: image002.png

Tim,

It was nice chatting with you and I look forward to hearing back from after you speak with your client.

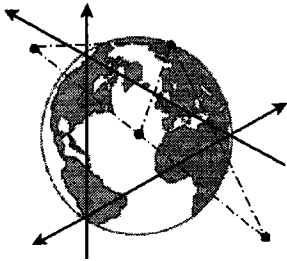
Please send me the court's findings from your case regarding ARS § 33-1243.J.

Regards,

R. L. Whitmer

Fulcrum Group

FORTUNA PREPARATIS - AUDACES FORTUNA IUVAT



Scottsdale, Arizona
602.531.2615