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6 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA** FILED
7 **IN AND FOR THE COUNTY OF MARICOPA** BY C. Young, DEPT

7 R. L. WHITMER,

8 Plaintiff.

CV2021-050888

9 v.

PLAINTIFF'S A.R.C.P.
RULE 59 MOTION TO
ALTER THE
OCTOBER 5, 2021
FINAL JUDGMENT

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.

(Assigned to the Honorable
Sara Agne)

17 Pursuant to ARCP Rule 59(a)(1)(H) the Plaintiff requests that the Court
18 alter its October 5, 2021 judgment ("Judgment") to eliminate the award of
19 attorneys' fees, as the complaint was only seeking statutory remedies and did not
20 arise out of contract. Below is the portion of the Judgment that granted attorneys'
21 fees pursuant to A.R.S. § 12-341.01:

22 **IT IS FURTHER ORDERED** granting the Association's
23 Application for Attorneys' Fees and Costs pursuant to
24 Ariz. Rev. Stat. §§ 12-341, 12-341.01 only. Plaintiff
25 brought this action under the May 22, 1972, recordation
26 of the Declaration of Horizontal Property Regime for
27 Hilton Casitas ("Declaration"), and the Declaration is a
28 contract. *Swain v. Bixby Village Golf Course, Inc.*, 247
Ariz. 405,410 (App. 2019). (Judgment, p.2:1-5).

As shown below, Arizona caselaw does not support an award of attorney
fees in this action.

1 **MEMORANDUM OF POINTS AND FACTS**

2 The Judgment cites *Swain v. Bixby Village Golf Course, Inc.*, 247 Ariz.
3 405,410 (App. 2019) as the legal authority for awarding attorneys' fees
4 pursuant to A.R.S. § 12-341.01.

5 In *Swain*, defendant Bixby, who owned the Lakes Golf Course, in May 2013
6 closed and dismantled the course, placed a barbed-wire fence around the
7 perimeter, drained the lakes, shut off all power, stripped the sod off the greens,
8 and removed hundreds of irrigation heads.

9 Homeowners Swain and Breslin sued Bixby claiming that closing the golf
10 course violated a contractual covenant in the declaration of covenants, conditions,
11 restrictions and easements ("CC&Rs") that were "established for the mutual
12 benefit of the Declarant and all present and future owners" and "any owner of
13 property located within the Ahwatukee master planned community."

14 Paragraph 2 of the CC&Rs required that the property underlying the Lakes
15 Golf Course remain a golf course:

16 "[t]he Property shall be used for no purposes other than
17 golf courses and such improvements and facilities
18 (including without limitation, clubhouses, restaurants, pro
19 shops, overnight lodging facilities, resort and connected
20 recreational facilities, bars, parking areas and golf cart
21 trails) and uses as are reasonably related to, convenient
22 for or in furtherance of golf course use or the
23 accommodation of golf course patrons and guests[.]" (Id.
24 ¶ 20).

25 Bixby subsequently sold the golf course property to TTLC Ahwatukee
26 Lakes Investors, LLC ("TTLC") a developer who intended to convert the golf
27 course into a housing development. Swain and Breslin substituted TTLC as the
28 defendant for Bixby and secured a permanent injunction enforcing the CC&Rs
that the property underlying the Lakes Golf Course remain a golf course.

TTLC appealed and the Court of Appeals affirmed the trial court granting a

1 permanent injunction and awarded Plaintiffs/Appellees Swain and Breslin
2 attorneys' fees and costs based upon a provision in the CC&Rs:

3 "In the event of any violation or breach of, or default
4 under, the provisions of this Declaration, ...any
5 Benefitted Person entitled to enforce this Declaration
6 may ... seek injunctive relief against the then owners,
7 occupants or users of the [p]roperty causing the breach,
8 default or violation ...and[] if ...such Benefitted Person
9 enforcing this Declaration prevails, ...such Benefitted
10 Person shall be entitled to reimbursement of all court
11 costs and reasonable attorneys' fees from said
12 defaulting owner, occupants or users." (Id., ¶ 40).

13 *Swain* was exclusively about the breach of contract arising out of the
14 violation of the CC&Rs, and which the CC&Rs provided for an attorneys' fees
15 award. The *Swain* plaintiffs did not seek an enforcement of statute or request
16 statutory remedies. *Swain* has no factual relevance to or lawful application in this
17 action.

18 **THIS ACTION DOES NOT ARISE OUT OF CONTRACT.**

19 The Plaintiff's complaint cited to the "Declaration of Horizontal Property
20 Regime for Hilton Casitas" ("Declaration") as the predicate to establishing that the
21 HOA, as a creature of statute, is subject to A.R.S. § 33-1201 et seq (Complaint ¶¶
22 4 and 6), which is the basis for filing the complaint seeking the enforcement of an
23 administrative law order, pursuant to A.R.S. § 32-2199.02(B)¹ that the HOA
24 comply with A.R.S § 33-1243.D and for injunctive relief regarding A.R.S § 33-
25 1255 and A.R.S § 33-1243.J. The Plaintiff's complaint clearly did not allege any

26 ¹ "Given the statutory directive that such decisions are "enforceable through
27 contempt of court proceedings," A.R.S. § 32-2199.02(B), and absent any authority
28 establishing that the administrative tribunal itself has jurisdiction to enforce such
orders by contempt or otherwise, we hold that the superior court has subject
matter jurisdiction to do so." *Whitmer v. Hilton Casitas Homeowners Ass'n*, 425
P.3d 253 ¶ 1 (Ariz. Ct. App. 2018)

1 "breach of contract" involving the Declaration.

2 Arizona caselaw is that awards under A.R.S. § 12-341.01 are not
3 applicable in "purely statutory causes of action", even when those actions could
4 have included or did include breach of contract claims.

5 In *Keystone Floor & More, LLC v. Ariz. Registrar of Contractors*, 223 Ariz.
6 27, 30, ¶11 (App. 2009) the Court of Appeals found: "[A.R.S. § 12.341.01(A)]
7 does not apply, however, to "purely statutory causes of action." *Hanley v.*
8 *Pearson*, 204 Ariz. 147, 151, ¶ 17, 61 P.3d 29, 33 (App. 2003). Nor does it apply
9 "if the contract is a factual predicate to the action but not the essential basis of it."
10 *Id.* That is, when the action arises out of a statutory obligation and is "based on a
11 statute rather than a contract, the peripheral involvement of a contract does not
12 support the application of the fee statute. *Id.*; see also *O'Keefe v. Grenke*, 170
13 Ariz. 460, 472-73, 825 P.2d 985, 997-98 (App. 1992)." (Emphasis added).

14 In another example, the Court of Appeals found in *Kennedy v.*
15 *Linda Brock Automotive Plaza*, 175 Ariz. 323, 325-26 (Ariz. Ct. App. 1993):
16 "Pursuant to A.R.S. section 12-341.01(A), attorney's fees may be awarded only
17 in an action "arising out of contract." If a cause of action is purely statutory,
18 section 12-341.01(A) does not apply. *O'Keefe v. Grenke*, 170 Ariz. 460,
19 472, 825 P.2d 985, 997 (App. 1992). [Emphasis added.] Kennedy argues that
20 his cause of action against Brock was purely statutory. We agree. []. [A.R.S. §
21 12.341.01(A)] does not apply if the contract is only a factual predicate to the
22 action but not the essential basis of it. *Cashway Concrete Materials v. Sanner*
23 *Contracting Co.*, 158 Ariz. 81, 83, 761 P.2d 155, 157 (App. 1988). [Emphasis
24 added.] In that case, Cashway supplied concrete to a subcontractor of Sanner.
25 When the subcontractor failed to pay for the concrete, Cashway sued Sanner,
26 seeking the statutory remedy of a materialman's lien. The court found that
27 although a breach of contract between Cashway and the subcontractor was a
28 factual predicate to the action, it was not the essential basis of it. Rather, the

1 lien issues related to a statutory remedy designed to protect materialmen from
2 nonpayers, a remedy which was wholly separate from the contract. The Court
3 of Appeals held that the action sought a statutory remedy, did not arise out of
4 the contract, and therefore did not arise out of the contract. See also *S.K.*
5 *Drywall v. Developers Fin. Group*, 165 Ariz. 588, 601, 799 P.2d 1362, 1375
6 (App. 1990), vacated in part on other grounds, 169 Ariz. 345, 819 P.2d 931
7 (1991).”

8 ARGUMENT

9 This case does not involve a breach of contract like in *Cashway*, but it is
10 like *Cashway* in that the Plaintiff sought statutory remedies and like in *Cashway*
11 an award of attorneys’ fees under A.R.S. §12-341.01 is simply unsupported.

12 The Judgment uses *Swain* as the legal authority to claim that this action
13 was brought under the “Declaration,” but it fails to explain the contractual
14 relevance of the “Declaration” in the Plaintiff seeking statutory remedies. In
15 *Swain*, the award of attorneys’ fees was made through a provision in the CC&Rs
16 for the enforcement of the CC&Rs.

17 The Plaintiff’s complaint exclusively sought the enforcement of statute, and
18 the only mention of the Declaration was as a predicate to establish that the HOA,
19 as a creature of statute, is subject to A.R.S. § 33-1201 et seq for requesting the
20 statutory relief sought in the complaint.

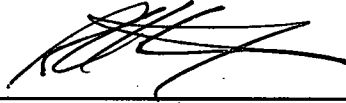
21 Additionally, because the Declaration lacks any provision for an award of
22 attorneys’ fees for the enforcement of statute, this action cannot be construed as
23 arising out of contract from the Declaration.

24 CONCLUSION

25 The law and facts in this action clearly do not support an award of
26 attorneys’ fees. Accordingly, pursuant to Rule 59(a)(1)(H), and consistent with
27 Arizona caselaw the award of attorneys’ fees under A.R.S. §12-341.01 is not
28 supportable, and to save the judicial resources of the Court of Appeals the Court

1 should alter its October 5, 2021 Judgment to eliminate the award of attorneys'
2 fees.

3 Respectfully submitted this 20th day of October, 2021.

4
5 

6 R. L. Whitmer

7
8 ORIGINAL filed this
9 20th day of October, 2021 with the Court;

10 and a COPY mailed this same date to:

11 Tim Butterfield

12 Carpenter Hazelwood

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14 Tempe, AZ 85282

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