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4 Scottsdale, Arizona 85250
5 Pro Per

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BY T. Bland, DEP

6 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

7 IN AND FOR THE COUNTY OF MARICOPA

8 R. L. WHITMER,

9 Plaintiff.

10 CV2021-050888

11 v.

12 REPLY IN SUPPORT OF
13 PLAINTIFF'S A.R.C.P. RULE
14 59 MOTION TO ALTER THE
15 OCTOBER 5, 2021 FINAL
16 JUDGMENT

17 HILTON CASITAS HOMEOWNERS
18 ASSOCIATION, also known as
19 HILTON CASITAS COUNCIL OF
20 HOMEOWNERS, also known as
21 COUNCIL OF CO-OWNERS, also
22 known as HILTON CASITAS
23 COUNCIL OF CO-OWNERS;

24 Defendant.

(Assigned to the Honorable
Sara Agne)

25 The Plaintiff's Complaint is based only on statute and does not arise out of
26 contract. The Complaint's requested relief was:

- 27 1. An order of contempt pursuant to A.R.S. § 32.2199.02(B) for the
28 enforcement of the un-appealed Administrative Law Decision No.
14F-H1415004-BFS¹ that the HOA shall fully comply with the
applicable provisions of A.R.S. § 33-1243(D) in the future;
2. Injunctive relief, ordering the HOA to comply in the future with A.R.S.
§ 33-1255; and,
3. Injunctive relief, ordering the HOA to comply in the future with A.R.S.
§ 33-1243(J).

29 The Declaration of Horizontal Property Regime for Hilton Casitas
30 ("Declaration") does not require the adoption of an annual budget and does not

31 ¹ "This Tribunal concludes that Hilton Casitas [HOA] failed to comply with applicable
32 provisions of A.R.S. § 33-1243(D)" (Ex. 1, p. 4:20-21). There was no finding or mention
33 that the matter was connected to or arose out of contract.

1 require a financial audit, review or compilation. Accordingly, the Plaintiff's
2 requested relief could not have been asserted under the Declaration, and,
3 therefore, this action did not arise out of contract.

4 The Defendant's ("HOA") Opposition to the Rule 59 Motion cites to *Hanley*,
5 *v. Pearson*, 204 Ariz. 147 (Ariz. Ct. App. 2002) asserts that because the *Hanley*
6 parties did not have contractual relationship and the Court of Appeals found that
7 A.R.S. §12-341.01 did not apply.

8 However, in *Hanley* the Court of Appeals specified the constraints of
9 applying A.R.S. §12-341.01 when a contract is only a predicate to the action or is
10 peripheral to an action for the enforcement of statute. Accordingly, ¶ 17 of *Hanley*
11 supports the Plaintiff's Rule 59 Motion: "[t]he contract fee statute "does not apply
12 to purely statutory causes of action" or "if the contract is a factual predicate to the
13 action..." (Id.)(Emphasis added). ¶ 17 in *Hanley* also cites to an Arizona
14 Supreme Court opinion: "When a cause of action is based on a statute rather than
15 a contract, the peripheral involvement of a contract does not support the
16 application of the fee statute. *A.H. By Through White v. Arizona Prop. Cas. Ins.*
17 *Guar. Fund*, 190 Ariz. 526, 529, 950 P.2d 1147, 1150 (1997) (citing *O'Keefe v.*
18 *Grenke*, 170 Ariz. 460, 472-73, 825 P.2d 985, 997-98 (App. 1992))." (Emphasis
19 added).


20 This action before the Court is exclusively based on the enforcement of
21 statute and any reference to the Declaration is purely "peripheral" to the
22 enforcement of statute.

23 CONCLUSION

24 The purpose of Rule 59(a)(1)(H) is to ask that a judgment be altered when
25 "the... judgment is not supported by the evidence or is contrary to law." The facts
26 are that there is no provision in the Declaration upon which the relief requested in
27 the complaint could not have been asserted and the Complaint was solely for the
28 enforcement of statute.

1 Accordingly, pursuant to Rule 59(a)(1)(H), and consistent with Arizona
2 caselaw the award of attorneys' fees under A.R.S. §12-341.01 is not supportable,
3 and the Court should alter its October 5, 2021 Judgment to eliminate the award of
4 attorneys' fees.

5 Respectfully submitted this 22nd day of November, 2021.

6
7
8 

R. L. Whitmer

9
10 ORIGINAL filed this
11 22nd day of November, 2021 with the Court;

12 and a COPY mailed this same date to:
13 Tim Butterfield
14 Carpenter Hazelwood
15 1400 E. Southern Ave., Ste. 400
16 Tempe, AZ 85282

Exhibit 1

1 5. Respondent's Answer to the Petition provided, in relevant part, as follows:

2 **There has been no violation of A.R.S. § 33-1243.**

3 The [Hilton Casitas] consists of twenty-nine (29) homes located
4 behind the Scottsdale Hilton. In large part, the majority of the
5 maintenance and management of the Casitas is taken care of by
6 the hotel. The Association adopts its proposed budget at the
7 annual meetings and adopted a proposed budget for 2013 at the
8 annual meeting. The proposed budget was insufficient because
9 Mr. Whitmer has made multiple legal challenges requiring the
10 Association's counsel to respond.

9 **TESTIMONY**

10 **Testimony of Michael Bengson**

11 6. Michael Bengson (hereinafter "Mr. Bengson") testified that he was elected to be a
12 member of the Board for Hilton Casitas in October 2014. Mr. Bengson stated that there
13 has been no Board meeting since October 15, 2014. Mr. Bengson testified that he
14 retained Respondent's counsel, Robert Anderson, Esq., as a friend to help Hilton
15 Casitas out. Mr. Bengson stated that he wanted to resolve the chaos that Hilton
16 Casitas was currently involved in. Mr. Bengson testified that Hilton Casitas' prior
17 counsel had resigned and that he felt it was imperative for Hilton Casitas to have legal
18 representation at the hearing.

19 7. Mr. Bengson testified that he had been a member of the association since May
20 2011. Mr. Bengson stated that there had not been a meeting of the Board since his
21 election to the Board on October 15, 2014. Mr. Bengson testified that the Board was
22 aware of the budget problems and intended to meet soon to adopt an amended budget.

23 8. Mr. Bengson testified that the amended budget would ratify the increased legal
24 expenses incurred by Hilton Casitas. Mr. Bengson stated that he and the new Board
25 wanted to "get everything on the right track."

26 **Testimony of Esther Sue Karatz**

27 9. Esther Sue Karatz (hereinafter "Mrs. Karatz") testified that she had previously been
28 president of the Board for Hilton Casitas. Mrs. Karatz stated that Hilton Casitas' prior
29 legal counsel was hired on January 31, 2013. Mrs. Karatz acknowledged that there
30 was no record of the Board's decision to retain legal counsel.

1 10. Mrs. Karatz testified that Hilton Casitas had suffered a computer crash and that
2 there were no records for meetings or actions of the Board for Hilton Casitas after
3 January 10, 2013, and that there were no records regarding the retention of Hilton
4 Casitas' prior legal counsel. Mrs. Karatz said that the majority of the Board approved
5 the hiring of the prior legal counsel by "a telephone vote."

6 11. Mrs. Karatz acknowledged that Hilton Casitas' legal fees in 2014, substantially
7 exceeded the amount of money that had been budgeted for legal fees in 2014. Mrs.
8 Karatz testified that the increased legal expenses were incurred because Petitioner had
9 filed two or three law suits against Hilton Casitas and that the law suits necessitated
10 increased legal fees. Mrs. Karatz stated that the increased legal fees had not been
11 anticipated by Hilton Casitas.

12 PROVISIONS OF LAW REFERENCED AT HEARING

13 1. A.R.S. § 33-1243(D) provides as follows:

14 Except as provided in the declaration, within thirty days after
15 adoption of any proposed budget for the condominium, the board
16 of directors shall provide a summary of the budget to all the unit
17 owners. Unless the board of directors is expressly authorized in
18 the declaration to adopt and amend budgets from time to time,
19 any budget or amendment shall be ratified by the unit owners in
20 accordance with the procedures set forth in this subsection. If
21 ratification is required, the board of directors shall set a date for a
22 meeting of the unit owners to consider ratification of the budget
23 not fewer than fourteen nor more than thirty days after mailing of
24 the summary. Unless at that meeting a majority of all the unit
25 owners or any larger vote specified in the declaration rejects the
26 budget, the budget is ratified, whether or not a quorum is present.
27 If the proposed budget is rejected, the periodic budget last ratified
28 by the unit owners shall be continued until such time as the unit
29 owners ratify a subsequent budget proposed by the board of
30 directors.

26 CONCLUSIONS OF LAW

27 1. A.R.S. § 41-2198.01 permits an owner or a planned community organization to
28 file a petition with the Department for a hearing concerning violations of planned
29 community documents or violations of statutes that regulate planned communities. That
30

1 statute provides that such petitions will be heard before the Office of Administrative
2 Hearings.

3 2. The burden of proof at an administrative hearing falls to the party asserting a
4 claim, right, or entitlement and the standard of proof on all issue in this matter is by a
5 preponderance of the evidence. See A.A.C. R2-19-119.

6 3. Proof by "preponderance of the evidence" means that it is sufficient to persuade
7 the finder of fact that the proposition is "more likely true than not." *In re Arnold and*
8 *Baker Farms*, 177 B.R. 648, 654 (9th Cir. BAP (Ariz.) 1994).

9 4. A.R.S. § 33-1243(D) provides that within thirty days after adoption of any
10 proposed budget for the condominium, the Board shall provide a summary of the budget
11 to all the unit owners and that unless the Board is expressly authorized in the
12 declaration to adopt and amend budgets from time to time, any budget or amendment
13 shall be ratified by the unit owners in accordance with the procedures set forth in this
14 subsection. Mrs. Karatz acknowledged that Hilton Casitas' legal fees in 2014 exceeded
15 the amount of money that had been budgeted for legal fees in 2014. Mr. Bengson
16 stated that there had not been a meeting of the Board since his election to the Board on
17 October 15, 2014. Mr. Bengson testified that the Board was aware of the budget
18 problems and intended to meet soon to adopt an amended budget. Mr. Bengson stated
19 that the amended budget would ratify the increased legal expenses incurred by Hilton
20 Casitas. Hilton Casitas has not ratified the increased expenses and adopted an
21 amended budget as required by applicable statute. This Tribunal concludes that Hilton
22 Casitas failed to comply with the applicable provisions of A.R.S. § 33-1243(D).

23 **RECOMMENDED ORDER**

24 In view of the foregoing, it is ORDERED that Petitioner be deemed the prevailing
25 party in this matter.

26 It is further ORDERED that Hilton Casitas shall fully comply with the applicable
27 provisions of A.R.S. § 33-1243(D) in the future.

28 It is further ORDERED that Hilton Casitas shall pay Petitioner his filing fee of
29 \$550.00, to be paid directly to Petitioner within thirty (30) days of this Order.

30 It is further ORDERED that no civil penalty shall be imposed in this matter.

