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BY *N. Butzbach* DEP
N. BUTZBACH, FILED

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

7
8 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
9 **IN AND FOR THE COUNTY OF MARICOPA**

10 R. L. WHITMER,

11 Plaintiff.

12 CV2016-055080

13 v.

14 **EVIDENTIARY HEARING**
15 **MEMORANDUM**

16 HILTON CASITAS HOMEOWNERS
17 ASSOCIATION, also known as
18 HILTON CASITAS COUNCIL OF
19 HOMEOWNERS, also known as
20 COUNCIL OF CO-OWNERS, also
21 known as HILTON CASITAS
22 COUNCIL OF CO-OWNERS; and
23 MICHAEL BENGSON, President of
24 the named Respondent;

(Assigned to the
Hon. Aimee L. Anderson)

25 Defendants.

26 **I. JURISDICTIONAL STATEMENT**

27 This Court has jurisdiction over this case pursuant to ARS §12-861 et seq
28 and Arizona Rules of Civil Procedure 65(f).

The Hilton Casitas is governed by its organic contract, the Declaration of Horizontal Property Regime for Hilton Casitas ("Declaration"), as recorded on May 22, 1972 pursuant to ARS §33-551 et seq, the Horizontal Property Regimes Act, and submitted as Plaintiff's Exhibit 1 ("PL. Ex." 1).

The Hilton Casitas Homeowners Association ("Hilton Casitas") is subject to and governed by ARS §33-1201 et seq, the 1985 Uniformed Condominium Act as amended. The 1985 Condominium Act succeeded the 1962 Horizontal Property Regimes Act.

1 The Plaintiff/Petitioner "is a member of Hilton Casitas" as per ¶ 3 Findings of
2 Facts of the January 7, 2015 Administrative Law Judge Decision No. 14F-
3 H1415004-BFS Administrative Law Decision (PL. Ex. 2, P.1:23).¹

4
5 **II. STATEMENT OF POINTS AND AUTHORITIES**

6 The two violations and contempt of the Administrative Law Judge Decision
7 ("Judicial Order") (PL. Ex. 2) are: (1) the failure of the board to amend the budget
8 after a reduction in the Safeguard Security expenses (which, without any
9 authorization, the funds are being diverted into a reserve account); and (2) the
10 board's failure to properly adopt the 2016 annual budget.

11 **The Administrative Law Judicial Order**

12
13 "It is further ORDERED Hilton Casitas shall fully comply with the applicable
14 provisions of A.R.S. § 33-1243(D) in the future" (PL. Ex. 2, P.4:26-27).

15 A.R.S. § 33-1243(D) Except as provided in the
16 declaration, within thirty days after adoption of any
17 proposed budget for the condominium, the board of
18 directors shall provide a summary of the budget to all the
19 unit owners. Unless the board of directors is expressly
20 authorized in the declaration to adopt and amend budgets
21 from time to time, any budget or amendment shall be
22 ratified by the unit owners in accordance with the
23 procedures set forth in this subsection. If ratification is
24 required, the board of directors shall set a date for a
25 meeting of the unit owners to consider ratification of the
26 budget not fewer than fourteen nor more than thirty days
27 after mailing of the summary. Unless at that meeting a
28 majority of all the unit owners or any larger vote specified
in the declaration rejects the budget, the budget is ratified,
whether or not a quorum is present. If the proposed
budget is rejected, the periodic budget last ratified by the
unit owners shall be continued until such time as the unit

¹ Hilton Casitas did not dispute or contest the membership of Mr. Whitmer at the Administrative Law Hearing and did not appeal the decision, and therefore Hilton Casitas is barred from claiming the Plaintiff is not a member of Hilton Casitas.

1 owners ratify a subsequent budget proposed by the board
2 of directors (emphasis added) (PL. Ex. 2, P.3:13-24).

3 In ¶2 of their answer, the “Defendants admit there is no provision in the
4 Declaration expressly authorizing the Board of Directors to adopt or amend
5 budgets on its own.”

6 **The Safeguard Security Expense Reduction**

7 1. In ¶7 of their answer, the Defendants admit that “the unit
8 owners have been assessed \$125 [a month]² for services provided by Safeguard
9 Security” ... “that the Board sent out a notice on August 22, 2016 (PL. Ex. 3)
10 announcing that the Safeguard Security agreement (PL. Ex. 4) had been
11 amended, and that any savings would be put in a reserve account.”

12 Mr. Bengson, the board president, acted unilaterally (without
13 any board action or resolutions) to renegotiate the Safeguard Security contract
14 and to designate the savings go into Hilton Casitas’ reserve account. There were
15 no 2016 board meeting agendas (PL. Ex. 5) announcing such actions or
16 resolutions prior to the August 22, 2016 notice (PL. Ex. 3).

17 2. ARS §33-1255.A requires that the HOA assessments be based
18 on a budget “adopted at least annually.” ARS §33-1255.G requires that the new
19 reallocated “Safeguard” expense liabilities be “recalculated,” which also would
20 require that the HOA amend its budget as outlined by ARS §33-1243.D and
21 ordered by the Administrative Tribunal.

22 **ARS §33-1255 Assessments for common expenses; applicability:**

23 ARS §33-1255.A ... After any assessment has been
24 made by the association, assessments shall be made at
25 least annually, based on a budget adopted at least
26 annually by the association.

27 ² 29 homeowners paying \$125 a month equals \$43,500 per year for Safeguard Security
28 services, which is 59% of the annual assessed expenses. For the last 10 years until
Oct. 1, 2016, of the \$125 a month paid for Safeguard Security, only \$98.71 a month per
casita has actually been paid to Safeguard (PL. Ex. 5 and 6).

1 ARS §33-1255.G. If common expense liabilities are
2 reallocated, common expense assessments and any
3 installment on the assessments not yet due shall be
4 recalculated in accordance with the reallocated common
5 expense liabilities.

6 3. The amount of the Safeguard savings has yet to be shared
7 with all of the homeowners. According to the notes on the Safeguard contract as
8 provided to the Plaintiff by the HOA president (PL. Ex. 3), the new annual
9 Safeguard expense is assumed to be \$13,579, which produces an estimated
10 \$30,000 saving.

11 4. Section 8.2 of the Declaration requires that the "Council" and
12 not the board set the annual assessment, and a reserve "as the Council shall
13 determine to be fair and prudent" (PL. Ex. 1, P.22-23). Section 1.4 of the
14 Declaration defines the Council to be all the 29 casita owners (PL. Ex. 1, P.4).

15 Hilton Casitas' board has ignored their statutory obligation to
16 amend the annual budget and seek ratification from the homeowners as required
17 by the Judicial Order to comply with ARS §33-1243.D and ARS §33-1255.

18 **Failure to adopt the 2016 Annual Budget according to ARS §33-1243.D**

19 5. Fully complying with ARS §33-1243.D is hardly difficult or
20 burdensome for the Hilton Casitas' board to implement:

- 21 i. The board holds a board meeting to adopt a budget;
- 22 ii. Then, within 30 days, they circulate the adopted budget;
- 23 iii. Then, within not less than 14 days nor more than 30 days
24 after circulating the budget, the board holds an unit owners
25 meeting to ratify the budget;
- 26 iv. At the unit owners meeting, unless a majority of all the unit
27 owners rejects the budget, the budget is ratified, whether or
28 not a quorum is present;

1 v. If the proposed budget is rejected, the periodic budget last
2 ratified by the unit owners shall be continued until such time
3 as the unit owners ratify a subsequent budget proposed by
4 the board of directors.

5 6. In ¶10 of their answer, the Defendants admit that the only
6 board meeting prior to the March 31, 2016 annual meeting was held on February
7 16, 2016. The notice and agenda for that meeting was emailed by the HOA's
8 agent on February 15, 2016 (PL. Ex. 7). The agenda did not list the board's
9 consideration or adoption of the annual budget as required by ARS §33-1248.E:

10 ARS §33-1248.E. It is the policy of this state as reflected
11 in this section that all meetings of a condominium,
12 whether meetings of the unit owners' association or
13 meetings of the board of directors of the association, be
14 conducted openly and that notices and agendas be
15 provided for those meetings that contain the information
16 that is reasonably necessary to inform the unit owners of
17 the matters to be discussed or decided and to ensure that
18 unit owners have the ability to speak after discussion of
19 agenda items, but before a vote of the board of directors
20 is taken. Toward this end, any person or entity that is
21 charged with the interpretation of these provisions shall
22 take into account this declaration of policy and shall
23 construe any provision of this section in favor of open
24 meetings. (Emphasis added).

25 Without the board noticing the adoption of the budget, none of the
26 casita owners would have known to attend in order to listen to the board's
27 deliberations to know what the budget contained, and then be able to comment
28 on the budget prior to the board's vote to adopt the budget. Accordingly, the
board could not and did not adopt the 2016 budget at that meeting.

7. The Defendants defense is that they adopted a budget at their
February 16, 2016 board meeting. If their defense was valid and the board had
adopted the 2016 annual budget at their February 16th meeting, they still did not

1 obey the Judicial Order to fully comply with ARS §33-1243.D statutory deadlines
2 as demonstrated below:

3 **Timeline of statutory deadlines**

**Hilton Casitas' 2016 alleged
budget events**

4
5 **Day 1.** Board meeting held to adopt
6 budget for unit owners' ratification.

Day 1 - February 16. Board
meeting and alleged budget
adoption in spite of no agenda item
for the budget adoption (PL. Ex. 7).

7
8 **Day 2.** First day to distribute summary
9 budget to unit owners.

Day 2 - February 17. No action.

10
11 **Day 15.** First day available to hold a
12 budget meeting if the summary budget
was distributed one day after adoption.

Day 15 - March 3. No action.

13
14 **Day 31.** Last day to distribute the
summary budget.

Day 31 - March 17. No action.

15
16 **Day 37 - March 24.** Budget
allegedly distributed 7 days after the
17 March 17 deadline (¶ 6 of
Defendants' answer).

18
19 **Day 45.** First day available to hold a
20 budget meeting if the summary budget
21 was distributed on Day 31.

Day 45 - April 1. No action.

22 8. ¶ 6 of the answer, says that the Defendants did "provide a
23 summary of the [2016] budget to all the unit owners" prior to the annual meeting.
24 Not true. The Defendants' March 31, 2016 email notice of the Annual Meeting
25 Notice and Agenda (PL. Ex. 8, 9 and 10) did not include the budget, nor was the
26 2016 budget received by at least four of the 29 casita owners (PL. Ex. 11, 12, 13,
27 14 and 15).
28

1 **III. LIST OF WITNESSES**

2 The Plaintiff may call the following witnesses to testify regarding the facts
3 and events surrounding the complaint:

4 Michael Bengson, Hilton Casitas' purported President;

5 William Shrader, Hilton Casitas' purported Treasurer;

6 Barrie Pollack, Hilton Casitas' purported Secretary;

7 Robert Anderson, Hilton Casitas' purported attorney;

8 Evon Potocki, Hilton Casitas' purported community manager.

9
10
11 **IV. LIST OF EXHIBITS**

Exhibit	Description
12 PL. 1	The Declaration of Horizontal Property Regime for Hilton Casitas
13 PL. 2	Administrative Law Judge Decision No. 14F-H1415004-BFS
14 PL. 3	August 22, 2016 Hilton Casitas Board Email
15 PL. 4	2006 Safeguard Security Agreement
16 PL. 5	2016 Board Meeting Notices
17 PL. 6	February 16, 2016 Email for Board Meeting Notice & Agenda
18 PL. 7	Hilton Casitas' Financial Worksheets from 1/2007 to 6/2016
19 PL. 8	March 24, 2016 Potocki Email for March 31, 2016 Annual Meeting
20 PL. 9	March 24, 2016 Notice of Annual Meeting
21 PL. 10	March 24, 2016 Annual Meeting Agenda
22 PL. 11	Declaration of R. L. Whitmer
23 PL. 12	Declaration of Colleen London
24 PL. 13	Declaration of Zadok Eli
25 PL. 14	Declaration of Tim Shaffer
26 PL. 15	Declaration of Don Levin
27 PL. 16	January 5, 2017 M. Bengson Email to R. L. Whitmer
28 PL. 17	2015 Annual Budget for Hilton Casitas
PL. 18	2016 Billing Records for Legal Services from Robert Anderson
PL. 19	2015 Annual Meeting Minutes
PL. 20	Robert Anderson Billing Records - Oct. 22, 2014 to Dec. 31, 2014

1	PL. 21	Robert Anderson Billing Record – March 20, 2015, page two
2	PL. 22	Hilton Casitas Council of Co-Owners Bylaws
3	PL. 23	2016 Annual Meeting Minutes
4	PL. 24	2015 Annual Meeting Assessment Ballot
5	PL. 25	Attorney Mark Bainbridge October 21, 2014 Resignation Letter
6	PL. 26	August 18, 2016 R. L. Whitmer Letter to HOA Board
7	PL. 27	ARS §33-551 et seq
8	PL. 28	2017 Maricopa County Parcel 174-15-022 Summary
9	PL. 29	December 2016 Larry Roberson Letter to Casita Owners

9 **V. CONCLUSION**

10 The Defendant cannot show that they made any effort to amend the 2016
 11 budget after the Safeguard Security expenses were substantially reduced. Hilton
 12 Casitas' president, Mr. Bengson, and the board have failed to communicate the
 13 amount of the Safeguard savings to the unit owners and give the unit owners their
 14 contractual and statutory right to have input on recalculation of those savings and
 15 how their assessments should be re-appropriated or reduced.

16 In addition to the need for an amended budget made in the complaint, on
 17 January 5, 2017 the Plaintiff received an email from Mr. Bengson (**PL. Ex. 16**)
 18 stating that the 2016 budget "remained the same as the previous year [2015
 19 Budget]" (**PL. Ex. 17**)³. In the 2015 Budget, the line item for "Legal Expenses"
 20 was \$14,500.

21 The Defendants claim that they obeyed the Judicial Order to "fully" comply
 22 with ARS §33-1243.D by holding a February 16, 2016 board meeting and
 23 adopting an un-agendized budget, and then waiting 37 days before supposedly
 24 sending the budget to the unit owners giving them only 7 days to consider the
 25 budget before the March 31, 2016 annual meeting. As the budget was not
 26 included with the notice, this claim is bogus and without merit or foundation.

27 ³ The 2015 budget (**PL. Ex. 17**) cannot be considered a budget as it does not balance
 28 due to an \$80,506 variance that is unaccounted for, nor does it list any Safeguard
 expense.

1 It is obvious that the intent of ARS §33-1243.D is to give unit owners
2 adequate time to object to the budget, but not hinder the operation of the
3 condominium.

4 As demonstrated herein, Hilton Casitas has not obeyed the Judicial Order
5 to comply with ARS §33-1243.D.

6 Since filing the complaint, the Plaintiff received Mr. Anderson's billing
7 records. Mr. Anderson's billing records for 2016 (PL. Ex. 18) show that by
8 September 27, 2016 he had billed \$16,327.20, then went on to bill a total of
9 \$19,049.20 by the middle of December 2016 versus the \$14,500 authorized.

10 It is blatantly apparent that Mr. Bengson overspent the 2016 budget for
11 "Legal Expenses" just as the previous Hilton Casitas' president did in 2014 that
12 resulted in the January 7, 2015 Administrative Law Decision.

13 Because Hilton Casitas is on a December/January fiscal year, to wait until
14 the March annual meeting, three months into the fiscal year, to adopt the annual
15 budget amounts to a fait accompli, blunting the purpose of ARS §33-1243.D. The
16 current HOA president Mr. Bengson has exhibited complete indifference to the
17 Judicial Order and the Hilton Casitas' statutory and judicial obligations, he
18 obviously never intended to keep his promise to the Administrative Tribunal to
19 "get everything on the right track" (PL. Ex. 2, P2:25).

20 Mr. Bengson has complete disregard for his neighbors paying excessive
21 assessments to Hilton Casitas as a way to pay his friend and attorney, Mr.
22 Anderson⁴, to defend the indefensible. Mr. Anderson billed for and was
23 eventually paid to represent Hilton Casitas before the Administrative Law Judge,
24 and has continued to provide legal services to Hilton Casitas.

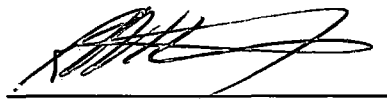
25 ⁴ As noted in the Administrative Law Judge Decision No. 14F-H1415004-BFS, even
26 though Mr. Bengson was not an officer of the HOA at the time of the hearing and lacked
27 any authority to engage Mr. Anderson for the administrative hearing, "Mr. Bengson
28 testified that he retained Respondent's counsel, Robert Anderson, Esq., as a friend to
help Hilton Casitas out." (PL. Ex.2, P.1:L13-15). On March 31 and 27, 2015, Mr.
Bengson's "friend," Mr. Anderson, billed the HOA a total of \$6,727.00 for his friendly
help. (PL. Ex. 18).

1 **VI. REQUESTED RELIEF**

2 Given the undisputed evidence that the Defendants continue to disregard
3 the Judicial Order, and continue not to comply with State law at the same time
4 they continue to collect and divert the homeowners' assessments into a reserve
5 account, the Plaintiff requests pursuant to ARS §12-861 et seq and Arizona Rules
6 of Civil Procedure 65(f) that the Court:

- 7 1. Find the Defendants in contempt of the Administrative Law Judge
8 Decision No. 14F-H1415004-BFS.
- 9 2. Order contempt sanctions on the HOA's president Mr. Michael
10 Bengson and ARCP Rule 11 sanctions on the HOA's paid General
11 Counsel⁵ Mr. Robert Anderson in the amount of \$15,000 each as the
12 means of detouring further misconduct.
- 13 3. Order Mr. Bengson removed from the Hilton Casitas board and
14 barred from being a board member or officer for five years.
- 15 4. Order Hilton Casitas to become compliant within 45 days with the
16 Administrative Law Judge Decision No. 14F-H1415004-BFS., or be
17 subjected to a \$5,000 fine, and additional fine of \$250 per day until
18 compliance is attained.

19 Dated this 17th day of February, 2017.

20 

21 _____
22 R. L. Whitmer

23 ORIGINAL filed this
24 17th day of February, 2017, with the Court;
25 and a COPY mailed this same date to:

26 Robert Anderson
27 14580 N. Scottsdale Road, Suite 500
28 Scottsdale, Arizona 85254

⁵ The March 2015 Annual Meeting Minutes reference Mr. Anderson as Hilton Casitas' General Counsel (PL. Ex. 19).