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R. L. Whitmer
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602.531.2615
Pro Per

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

R. L. WHITMER,

Plaintiff.

v.

HILTON CASITAS HOMEOWNERS
ASSOCIATION, also known as
HILTON CASITAS COUNCIL OF
HOMEOWNERS, also known as
COUNCIL OF CO-OWNERS, also
known as HILTON CASITAS
COUNCIL OF CO-OWNERS; and
MICHAEL BENGSON, President of
the named Respondent;

Defendants.

CV2016-055080

**AMENDED AND RESTATED
EVIDENTIARY HEARING
MEMORANDUM**

(Assigned to the
Hon. Aimee L. Anderson)

Due to the Defendants substituting new attorneys and their requested continuance as granted by the Court, and the Court's order setting a new deadline for filing exhibits, the Plaintiff respectfully submits this amended and restated memorandum, as well as amended and restated exhibits.

I. JURISDICTIONAL STATEMENT

This Court has jurisdiction over this case pursuant to ARS §12-861 et seq and Arizona Rules of Civil Procedure 65(f) which succeeded Rule 65 (j) that was in effect at the time of filing the complaint.

The Hilton Casitas is governed by its organic contract, the Declaration of Horizontal Property Regime for Hilton Casitas ("Declaration"), as recorded on May

1 22, 1972 pursuant to ARS §33-551 et seq, the Horizontal Property Regimes Act,
2 and submitted as Plaintiff's Exhibit 1 ("PL. Ex." 1).

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

7 The Plaintiff/Petitioner "is a member of Hilton Casitas" as per ¶ 3 Findings of
8 Facts of the January 7, 2015 Administrative Law Judge Decision No. 14F-
9 H1415004-BFS Administrative Law Decision (PL. Ex. 2, P.1:23),¹ and was the
10 petitioner in that Administrative Case in whose favor the Judicial Order was
11 issued.

12 **II. STATEMENT OF POINTS AND AUTHORITIES**

13 The violations and contempt of the Administrative Law Judge Decision
14 ("Judicial Order") (PL. Ex. 2) are: (1) the failure of the board to adopt a 2017
15 budget prior to the beginning of the 2017 fiscal year; (2) the failure of the board to
16 amend the 2016 budget after a reduction in the Safeguard Security expenses
17 (which, without any authorization, the funds are being diverted into a reserve
18 account); (3) overspending the legal expenses authorization; and (4) the board's
19 failure to properly adopt the 2016 annual budget, as required by the Judicial
20 Order.
21

22 **The Administrative Law Judicial Order**

23 The Administrative Law Judge ruled: "It is further ORDERED Hilton Casitas
24 shall fully comply with the applicable provisions of A.R.S. § 33-1243(D) in the
25 future" (PL. Ex. 2, P.4:26-27).
26

27 ¹ Hilton Casitas did not dispute or contest the membership of Mr. Whitmer at the
28 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 A.R.S. § 33-1243(D) Except as provided in the
2 declaration, within thirty days after adoption of any
3 proposed budget for the condominium, the board of
4 directors shall provide a summary of the budget to all the
5 unit owners. Unless the board of directors is expressly
6 authorized in the declaration to adopt and amend budgets
7 from time to time, any budget or amendment shall be
8 ratified by the unit owners in accordance with the
9 procedures set forth in this subsection. If ratification is
10 required, the board of directors shall set a date for a
11 meeting of the unit owners to consider ratification of the
12 budget not fewer than fourteen nor more than thirty days
13 after mailing of the summary. Unless at that meeting a
14 majority of all the unit owners or any larger vote specified
15 in the declaration rejects the budget, the budget is ratified,
16 whether or not a quorum is present. If the proposed
17 budget is rejected, the periodic budget last ratified by the
18 unit owners shall be continued until such time as the unit
19 owners ratify a subsequent budget proposed by the board
20 of directors (emphasis added) (PL. Ex. 2, P.3:13-24).

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

24 **Failure to Adopt the 2017 Annual Budget Prior to the Start of the Fiscal Year**

25 1. Hilton Casitas is on a January-December fiscal year. ARS
26 §33-1255.A requires that the “assessments for common expenses” be based on a
27 budget “adopted at least annually.”

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

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

To be in compliance with ARS §33-1255.A, the board needed to
adopt a budget prior to December 31, 2016 in order to collect common expenses
assessments starting in January 2017. Although no adoption occurred, Hilton

1 Casitas has collected the January, February and March 2017 assessments.
2 Accordingly, even if Hilton Casitas were to adopt an annual budget at this late
3 date, it would still be a violation of the Judicial Order regarding adoption and
4 approval of the 2017 annual budget.

5 **The Failure to Amend the Purported 2016 Budget for Safeguard**
6 **Security Expense Reduction and Recalculation of the Assessments**

7 2. While ARS §33-1255.A requires that the unit owners'
8 assessments be based on a budget "adopted at least annually," ARS §33-1255.G
9 requires that the new reallocated Safeguard expense liabilities (which result in a
10 very substantial reduction of expenses) be recalculated and the budget amended
11 as outlined by ARS §33-1243.D and ordered by the Administrative Tribunal.

12 ARS §33-1255.G. If common expense liabilities are
13 reallocated, common expense assessments and any
14 installment on the assessments not yet due shall be
15 recalculated in accordance with the reallocated common
16 expense liabilities.

17 3. In ¶7 of their January 18, 2017 answer, the Defendants admit
18 that "the unit owners have been assessed \$125 [a month]² for services provided
19 by Safeguard Security" ... "that the Board sent out a notice on August 22, 2016
20 [PL. Ex. 3] announcing that the Safeguard Security agreement [PL. Ex. 4] had
21 been amended, and that any savings would be put in a reserve account."

22 Mr. Bengson, the board president, inappropriately and in
23 violation of the Judicial Order acted unilaterally (without any board action or
24 resolutions) to renegotiate the Safeguard Security contract and to designate the
25 savings go into Hilton Casitas' reserve account in violation of the Judicial Order.
26 There were no 2016 board meeting agendas (PL. Ex. 5) where the board

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. 6 and 7).

1 authorized such actions or resolutions prior to the August 22, 2016 notice (PL.
2 Ex. 3). Mr. Bengson decided not to initiate the budget process while he was privy
3 to the Judicial Order which required him as president to call a board meeting and
4 a unit owners meeting to amend the budget.

5 4. On February 20, 2017 Hilton Casitas' agent emailed a 2016
6 financial worksheet to the Plaintiff (PL. Ex. 7). It shows that the new annual
7 Safeguard Security expense is \$13,758.60, which will produce an estimated
8 \$30,000 saving. This information about the Safeguard savings was not shared
9 with all of the unit owners, nor did Hilton Casitas amend the budget for ratification
10 by the unit owners.

11 5. Contrary to the Hilton Casitas' president's inappropriate
12 and wrongful unilateral decision to place the Safeguard saving into a reserve
13 account, Section 8.2 of the Declaration requires that the "Council" set the annual
14 assessment which is to include an amount "as the Council shall determine to be
15 fair and prudent for the establishment and maintenance of a reserve..." (PL. Ex.
16 1, P.22-23). Section 1.4 of the Declaration defines the Council to be all the 29
17 casita owners (PL. Ex. 1, P.4).

18 6. Hilton Casitas and its president once again did not
19 comply with their statutory obligation to amend the annual budget and seek
20 ratification from the homeowners as required by ARS §33-1243.D and ARS §33-
21 1255, and violated the Judicial Order, by Mr. Bengson's choice to place the
22 Safeguard savings illegally into the reserve account. The violation of the Judicial
23 Order is caused by Mr. Bengson's own wrongful action.

24 Failure to Stay Within the 2016 Budget's Authorized Legal Expenses

25 7. Since filing the complaint on December 19, 2016, the Plaintiff
26 requested and received Mr. Anderson's billing records. Mr. Anderson's billing
27 records for 2016 (PL. Ex. 8) show that by September 27, 2016 he had billed
28 \$16,327.20, then went on to bill a total of \$19,049.20 by the middle of December

1 2016 versus the \$15,000 authorized in the 2016 budget (PL. Ex. 9).

2 8. It is undeniable that without amending the 2016 and 2015
3 budgets as required by the Judicial Order, Mr. Bengson wrongfully and illegally
4 overspent the 2016 budget (PL. Ex. 9) and the 2015 budget for "Legal Expenses"
5 just as the previous Hilton Casitas' president did in 2014 that resulted in the
6 Judicial Order (PL. Ex. 2). Mr. Bengson's wrongful action, therefore, is also a
7 violation of the same Judicial Order.

8
9 **Failure to adopt the 2016 Annual Budget according to ARS §33-1243.D**

10 9. As detailed previously, Hilton Casitas is on a January-
11 December fiscal year. Adopting an annual budget before the fiscal year end and
12 fully complying with ARS §33-1243.D is hardly difficult or burdensome for the
13 Hilton Casitas' board to implement.

14 10. In ¶5 of their January 18, 2017 answer, the Defendants admit
15 that the only board meeting prior to the March 31, 2016 annual meeting was held
16 on February 16, 2016. The notice and agenda for that meeting was emailed by
17 the HOA's agent on February 15, 2016 (PL. Ex. 10). The agenda did not list the
18 board's consideration or adoption of the annual budget as required by ARS §33-
19 1248.E:

20 ARS §33-1248.E. It is the policy of this state as reflected
21 in this section that all meetings of a condominium,
22 whether meetings of the unit owners' association or
23 meetings of the board of directors of the association, be
24 conducted openly and that notices and agendas be
25 provided for those meetings that contain the information
26 that is reasonably necessary to inform the unit owners of
27 the matters to be discussed or decided and to ensure that
28 unit owners have the ability to speak after discussion of
agenda items, but before a vote of the board of directors
is taken. Toward this end, any person or entity that is
charged with the interpretation of these provisions shall
take into account this declaration of policy and shall

1 construe any provision of this section in favor of open
2 meetings. (Emphasis added).

3 Without noticing the adoption of the budget, none of the casita
4 owners would have known to attend in order to listen to the board's deliberations
5 to know what the budget contained, and then be able to comment on the budget
6 prior to the board's vote to adopt the budget. In fact, the board could not and did
7 not adopt the 2016 budget at that meeting, nor was it discussed as proven by the
8 Hilton Casitas' own minutes.

9 11. In ¶5 of their January 18, 2017 answer, the Defendants denied
10 the Plaintiff's allegation in the complaint that Hilton Casitas did not adopt a budget
11 at the February 16, 2016 board meeting. Mr. Bengson in his January 5, 2017
12 email to the Plaintiff (PL. Ex. 11) also falsely contended that the board had
13 adopted a budget at the February 16, 2016 board meeting.

14 The Defendants' minutes/notes of the February 16, 2016 board
15 meeting (PL. Ex. 12) (which was not disclosed until February 24, 2017) show that
16 no discussion or action was taken to adopt a 2016 budget. Thus Mr. Bengson's
17 statement to the contrary is false and intended to mislead the Court in order to
18 escape the results of his decision not to comply with the Judicial Order which
19 required him to initiate the budget approval process.

20 12. ¶.6 of the Defendants' January 18, 2017 answer says that the
21 Defendants did "provide a summary of the [2016] budget to all the unit owners"
22 prior to the annual meeting. Not true. The Defendants' March 31, 2016 email
23 notice of the Annual Meeting Notice and Agenda (PL. Ex. 13, 14 and 15) did not
24 include the budget, nor was the 2016 budget received by at least four of the 29
25 casita owners (PL. Ex. 16, 17, 18, 19 and 20).

26 **III. MISCONDUCT OF THE DEFENDANTS AND THEIR PREVIOUS LEGAL**
27 **COUNSEL**

1 Hilton Casitas' president, Mr. Michael Bengson, and its previous legal
2 counsel, Mr. Robert Anderson, have made blatantly false statements to this Court
3 and the Plaintiff.

4 On January 5, 2017 after attending the initial hearing before this Court,
5 Defendant Bengson emailed the Plaintiff (**PL. Ex. 11**) on "what [he] would present
6 to the court ..." to show that he and Hilton Casitas had complied with the Judicial
7 Order:

- 8 • #7 The budget was discussed in the Board meeting
9 previous to the annual meeting. It did not take very
10 much time as everything remained the same from the
11 previous year,
- 12 • #8 We hand delivered a packet before the meeting
13 that contained the results from 2015 budget and the
14 proposed new budget. I dropped yours off a packet at
15 your house myself. (**PL. Ex. 11**)

14 The Defendants' January 18, 2017 Answer to the Plaintiff's Complaint
15 incorporated the above false allegations of Mr. Bengson's email.

16 In ¶5 of the Defendants' January 18, 2017 answer, as submitted to the
17 Court by their previous legal counsel, attempts to mislead the Court to believe
18 that the Hilton Casitas board at their February 16, 2016 meeting did adopt a 2016
19 budget as required by ARS §33-1243.D and the Judicial Order. This assertion is
20 proven false by the February 16, 2016 board meeting notes/minutes (**PL. Ex. 12**)
21 as provided by the Defendants in their February 17, 2017 filing of exhibits
22 (received on February 24, 2016).

23 An aggravating factor in favor of ARCP Rule 11 sanctions against Hilton
24 Casitas' previous legal counsel, Mr. Anderson, is that he was present at the
25 February 16, 2016 board meeting (**PL. Ex. 12**) and therefore had personal
26 knowledge that the 2016 budget was not adopted at that meeting, but instead
27 chose to file a fraudulent answer to the Court that a budget had been discussed
28 and adopted.

1 In ¶6 of the Defendants' answer, as submitted to the Court by their previous
2 legal counsel, Mr. Anderson falsely alleged that the "Defendants affirmatively
3 allege that the budget was circulated to all unit owners." This is contradicted by
4 the declaration of four casita owners including the Plaintiff (PL. Ex. 16, 17, 18,
5 19 and 20), and the emailed meeting notice (PL. Ex. 14), which does not include
6 any budget or financial statements.

7 Additionally, the 2016 purported budget (PL. Ex. 9) which has been
8 received only on February, 24, 2017 includes a worksheet that shows that the
9 2015 purported budget overspent the legal expenses in violation of the Judicial
10 Order.

11 **IV. LIST OF WITNESSES**

12
13 The Plaintiff may call the following witnesses to testify regarding the facts
14 and events surrounding the complaint:

15 Michael Bengson, Hilton Casitas' purported President;

16 William Shrader, Hilton Casitas' purported Treasurer;

17 Barrie Pollack, Hilton Casitas' purported Secretary;

18 Robert Anderson, Hilton Casitas' purported former attorney;

19 Evon Potocki, Hilton Casitas' purported community manager.
20

21 **V. LIST OF EXHIBITS**

22

Exhibit	Description
PL. 1	The Declaration of Horizontal Property Regime for Hilton Casitas
PL. 2	Administrative Law Judge Decision No. 14F-H1415004-BFS
PL. 3	August 22, 2016 Hilton Casitas Board Email
PL. 4	2006 Safeguard Security Agreement
PL. 5	2016 Board Meeting Notices
PL. 6	Hilton Casitas' Financial Worksheets from 1/2007 to 6/2016
PL. 7	February 20, 2017 Potocki Email with 2016 Financial Worksheet

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1	PL. 8	2016 Billing Records for Legal Services from Robert Anderson
2	PL. 9	2016 Annual Budget for Hilton Casitas with Plaintiff's handwritten analysis
3	PL. 10	Emailed February 16, 2016 Board Meeting Notice & Agenda
4	PL. 11	January 5, 2017 M. Bengson Email to R. L. Whitmer
5	PL. 12	Minutes/notes of the February 16, 2016 board meeting
6	PL. 13	March 24, 2016 Potocki Email for March 31, 2016 Annual Meeting
7	PL. 14	March 24, 2016 Notice of Annual Meeting
8	PL. 15	March 24, 2016 Annual Meeting Agenda
9	PL. 16	Declaration of R. L. Whitmer
10	PL. 17	Declaration of Colleen London
11	PL. 18	Declaration of Zadok Eli
12	PL. 19	Declaration of Tim Shaffer
13	PL. 20	Declaration of Don Levin
14	PL. 21	2015 Annual Budget for Hilton Casitas with Plaintiff's handwritten analysis
15	PL. 22	Robert Anderson Billing Records - Oct. 22, 2014 to Dec. 31, 2014
16	PL. 23	2015 Annual Meeting Minutes
17	PL. 24	Robert Anderson Billing Record – March 20, 2015, page two
18	PL. 25	Hilton Casitas Council of Co-Owners Bylaws
19	PL. 26	2016 Annual Meeting Minutes
20	PL. 27	2015 Annual Meeting Assessment Ballot
21	PL. 28	Attorney Mark Bainbridge October 21, 2014 Resignation Letter
22	PL. 29	February 17, 2015 Bengson email to casita owners
23	PL. 30	ARS §33-551 et seq
24	PL. 31	2017 Maricopa County Parcel 174-15-022 Summary
25	PL. 32	December 2016 Larry Roberson Letter to Casita Owners
26	PL. 33	February 23, 2017 Annual Meeting Notice Letter and enclosures

VI. CONCLUSION

It is obvious that the purpose of ARS §33-1243.D is to give unit owners adequate time to object to the budget prior to collecting common expenses assessments. Hilton Casitas and its president did not obey the Judicial Order to comply with ARS §33-1243.D, and in fact Mr. Bengson by his wrongful action

1 caused the Judicial Order to be violated.

2 Because Hilton Casitas is on a calendar fiscal year the budget must be
3 approved no later than December 31st of each year. The Defendants did not make
4 any effort to adopt the 2017 budget prior to the start of the 2017 fiscal year, or
5 amend the 2016 purported budget after the Safeguard Security expenses were
6 substantially reduced, or when the legal expenses exceeded the budget
7 authorization as well as not following the statute requirements for the adoption of
8 the 2016 budget. Mr. Bengson as president is the only officer authorized to call a
9 board meeting. Mr. Bengson did not initiate the budget adoption process as well
10 as the required amendment, and illegally and wrongfully decided to use the funds
11 of Hilton Casitas without an approved budget, and divert the Safeguard savings
12 into the reserve account by his own decision and without amending the budget as
13 required by law.

14 Hilton Casitas' president, Mr. Bengson, and the board did not communicate
15 the amount of the Safeguard savings to the unit owners and give the unit owners
16 their contractual and statutory right to have input on recalculation of those savings
17 and how their assessments should be re-appropriated or reduced.

18 The 2016 purported budget (**PL. Ex. 9**) was included as Exhibit 46 in the
19 Defendants' February 17, 2017 exhibits which were recently disclosed to the
20 Plaintiff on February 24, 2017. Since filing the complaint, the Plaintiff received
21 Mr. Anderson's billing records. Mr. Anderson's billing records for 2016 (**PL. Ex. 8**)
22 show that by September 27, 2016 he had billed \$16,327.20, then went on to bill a
23 total of \$19,049.20 by the middle of December 2016 versus the \$15,000
24 authorized by the purported 2016 budget.

25 Additionally, while on January 5, 2017 the Plaintiff received an email from
26 Mr. Bengson (**PL. Ex. 11**) stating that the 2016 budget "remained the same as the
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1 previous year [2015 Budget]" (PL. Ex. 21)³. In the 2015 purported budget the line
2 item for "Legal Expenses" was \$14,500 versus \$15,000 in the 2016 budget. A
3 worksheet attached to the 2016 budget (PL. Ex. 9) shows that the actual legal
4 expenses in 2015 purported budget were also exceeded.

5 It is blatantly apparent that Mr. Bengson wrongfully and illegally overspent
6 the 2016 purported budget and 2015 budget for "Legal Expenses" without
7 amending the budget just as the previous Hilton Casitas' president did in 2014
8 that resulted in the Judicial Order (PL. Ex. 2).

9 The Defendants falsely claim that they obeyed the Judicial Order to "fully"
10 comply with ARS §33-1243.D by holding a February 16, 2016 board meeting and
11 adopting an un-agendized budget, but their minutes/notes of the meeting (PL. Ex.
12 12) show that there were no discussions or actions on the budget whatsoever.

13 The current HOA president Mr. Bengson has exhibited complete
14 indifference to the Judicial Order and the Hilton Casitas' statutory and judicial
15 obligations. He obviously never intended to keep his promise to the
16 Administrative Tribunal to "get everything on the right track" (PL. Ex. 2, P2:25).

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

22 Plaintiff/Petitioner intends to initiate the required process under the newly

23 ³ The 2015 budget (PL. Ex. 21) and the 2016 budget (PL. Ex. 9) cannot be considered
24 budgets as they do not balance due to unaccounted for variances of \$80,506 in the 2015
25 budget and a \$93,937.63 in the 2016 budget, nor do they list any Safeguard expenses.

26 ⁴ As noted in the Administrative Law Judge Decision No. 14F-H1415004-BFS, even
27 though Mr. Bengson was not an officer of the HOA at the time of the hearing and lacked
28 any authority to engage Mr. Anderson for the administrative hearing, "Mr. Bengson
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. 22).

1 amended ARCP Rule 11 against Hilton Casitas' attorneys if they fail to remedy
2 their misconduct.

3 **VII. REQUESTED RELIEF**

4 The Defendants continue to violate the Judicial Order, and continue not to
5 comply with State law at the same time they continue to wrongfully collect and
6 divert the homeowners' assessments into a reserve account in violation of the
7 Judicial Order. Their contempt is further compounded by the aggravating factor
8 that the Defendant Bengson and Hilton Casitas' attorneys attempted to deceive
9 the Court alleging that a budget was adopted at the February 16, 2016 board
10 meeting when their own meeting minutes/notes do not support their averment.
11 The Plaintiff requests pursuant to ARS §12-861 et seq and Arizona Rules of Civil
12 Procedure 65(f) that the Court:

- 13 1. Find the Defendants Hilton Casitas and Mr. Michael Bengson in
14 contempt of Judicial Order per the Administrative Law Judge
15 Decision No. 14F-H1415004-BFS;
- 16 2. Order contempt sanctions on the HOA's president Mr. Michael
17 Bengson in the amount of \$15,000;
- 18 3. Order Mr. Bengson to pay the Mr. Anderson's and Mr. Shaw's legal
19 expenses incurred by Hilton Casitas;
- 20 4. Order Mr. Bengson to be removed from the Hilton Casitas board and
21 barred from being a board member or officer for five years;
- 22 5. Order Hilton Casitas to approve an amended budget or be subjected
23 to a \$5,000 fine, and additional fine of \$250 per day until compliance
24 is attained.

25 Dated this 3rd day of March, 2017.

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27 R. L. Whitmer
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ORIGINAL filed this
3rd day of March, 2017, with the Court;
and a COPY mailed this same date to:
Augustus Shaw, and Nicole Payne
Shaw & Lines Law Firm
4523 E. Broadway Rd.
Phoenix, AZ 85040