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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

R.L. WHITMER,

Petitioner,

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 Hilton Casitas Homeowners
Association,

Respondents.

No. CV2016-055080

**REPLY IN SUPPORT OF
RESPONDENTS'
MOTION TO
DISMISS**

Respondents Hilton Casitas Homeowners Association (the "Association") and Michael Bengson, ("Bengson" and collectively with the Association, the "Respondents") by and through counsel undersigned, hereby offer this Reply in Support of the Respondents' Motion to Dismiss Petitioners Complaint for lack of subject matter jurisdiction pursuant to Ariz. R. Civ. P. 12(b)(1); failure to state a claim upon which relief may be granted pursuant to Ariz. R. Civ. P. 12(b)(6); and failure to bring an action against a proper party.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

- 2 1. **Pursuant to the plain language of the Arizona Administrative Code and the**
3 **Arizona Revised Statutes, the Superior Court only has the jurisdiction to review**
4 **an appeal from an Order issued by an Administrative Law Judge. The Superior**
5 **Court does not have jurisdiction to hear a contempt action over an Administrative**
6 **Order.**

7 The rules governing the Office of Administrative Hearings is the Arizona
8 Administrative Code (hereafter, "AAC"). The AAC states:

9 If a procedure is not provided by statute or these rules, an administrative law
10 judge may issue an order using the Arizona Rules of Civil Procedure and
11 related local rules for guidance. Ariz. Admin. Code R2-19-102(C) 2014.

12 The Plaintiff correctly cites to the governing statute (Ariz. Rev. Stat. 32-2199.02(B)),
13 however, Plaintiff fails to explore the relative governing laws in connection with Ariz. Rev.
14 Stat. 32-2199.02(B). A brief examination of the governing laws below shows that the Superior
15 Court does not have jurisdiction to enforce a contempt order on an order issued by an
16 Administrative Law Judge.

17 Specifically, Ariz. Rev. Stat. 32-2199.02 discusses Administrative Hearing "[o]rders;
18 penalties; [and] disposition." Ariz. Rev. Stat. 32-2199.02(B) states:

19 . . . The order issued by the administrative law judge is enforceable through
20 contempt of court proceedings and is subject to judicial review as prescribed
21 by section 41-1092.08.

22 Following the direction of §32-2199.02(B), it is important to determine what §41-
23 1092.08 authorizes. Ariz. Rev. Stat. 41-1092.08(H) states:

24 A party may **appeal a final administrative decision** pursuant to title 12,
25 chapter 7, article 6, except as provided in section 41-1092.09, subsection B
26 and except that if a party has not requested a hearing upon receipt of a notice
27 of appealable agency action pursuant to section 41-1092.03, the appealable
28 agency action is not subject to judicial review. (Emphasis added).

1 Title 12, chapter 7, article 6, only addresses, (as it is titled) “Judicial Review of
2 Administrative Decisions.”

3 It is important to note that the civil contempt of court statutes are located in the same
4 title and chapter, however, are not referenced by Ariz. Rev. Stat. 32-2199.02(B). As such, the
5 plain language of the statutes specifically provides the Superior Court with appellate
6 jurisdiction over an order issued by an Administrative Law Judge. The statutes, however, **do**
7 **not** provide the Superior Court with jurisdiction to issue civil contempt orders regarding orders
8 issued by Administrative Law Judges.
9
10

11 **a. The Superior Court has the authority issue contempt orders on Superior**
12 **Court Orders, not Administrative Law Judge Orders.**

13 The Plaintiff mistakenly interprets Ariz. Rev. Stat. 12-861 as applicable in this matter.
14 Ariz. Rev. Stat. 12-861 is the criminal contempt statute. Plaintiff also failed to include the
15 pertinent language of Ariz. Rev. Stat. 12-861 in his Response. Ariz. Rev. Stat. 12-861
16 specifically states:
17

18 A person who willfully disobeys a lawful writ, process, **order or judgment**
19 **of a superior court** by doing an act or thing therein or thereby forbidden, if
20 the act or thing done also constitutes a criminal offense, shall be proceeded
against for contempt as provided in sections 12-862 and 12-863.

21 The order the Plaintiff is attempting to enforce via civil contempt is an order issued by
22 an Administrative Law Judge, not an order or judgment of a superior court. Moreover, nothing
23 in Plaintiff’s Verified Complaint for an Order to Show Cause alleges that either Defendant has
24 committed an act that also constitute a criminal offense. As such, Ariz. Rev. Stat. 12-861, 862,
25 and 863 are not applicable and do not grant the Superior Court jurisdiction over this matter.
26

27 Finally, Plaintiff alleges that the Superior Court is granted jurisdiction pursuant to Ariz.
28

1 Rev. Stat. 12-864. Ariz. Rev. Stat. 12-864 addresses types of contempt, not jurisdiction over
2 contempt proceedings. As such, Plaintiff misinterprets Ariz. Rev. Stat. 12-864 as conferring
3 jurisdiction to the Superior Court. Ariz. Rev. Stat. 12-864 does not confer the Superior Court
4 with jurisdiction over contempt proceedings of an order issued by an Administrative Law
5 Judge.
6

7 **b. The Superior Court has the authority to enforce Injunctions. The**
8 **Administrative Law Judge Order is not an Injunction. Therefore, the**
9 **Superior Court does not have jurisdiction to issue a contempt order on the**
10 **Administrative Law Judge Order.**

11 The Plaintiff further improperly alleges that Rule 65(f) of the Arizona Rules of Civil
12 Procedure provides the Superior Court jurisdiction to issue a contempt order regarding an order
13 issued by an Administrative Law Judge.

14 Rule 65(f)(1) of Ariz. R. Civ. P. states:

15 The court may issue sanctions for civil contempt, or for criminal contempt
16 as allowed by law, against a party or person **who violates an injunction.**
17 (Emphasis added).

18 As previously argued in the Motion to Dismiss, the Plaintiff here is seeking to enforce
19 alleged violations of an order issued by an Administrative Law Judge, not an injunction issued
20 by the Superior Court. Therefore, Rule 65(f) does not apply to this case.

21 In conclusion, it is clear that the Superior Court has jurisdiction over contempt
22 proceedings *of the Superior Court*. As such, based on R2-19-102(C), an Administrative Law
23 Judge may issue a contempt order over contempt proceedings of the Administrative Orders,
24 using the Arizona Rules of Civil Procedure and related local rules for guidance. In conclusion,
25 this matter should be dismissed for lack of jurisdiction.
26
27
28

1 **c. Petitioner, in his Response, inappropriately asserts an Office of**
2 **Administrative Hearings document as authoritative.**

3 Petitioner, in his Response to Respondents' Motion to Dismiss ("Response") quotes a
4 document entitled "Homeowner Petitions Against the Association written by Cliff J. Vanell
5 (hereafter, the OAH Document"). The quote used by the Petitioner States:

6 If the petition item has been decided by a court or previously has been
7 addressed in a hearing before the OAH, it cannot be revisited. OAH has no
8 authority for contempt proceedings or enforcement of prior decisions.
9 However, failure by a party to comply with a decision issued by the OAH
10 may result in the other party seeking enforcement of the Administrative Law
 Judge's decision through a contempt of court proceeding in Superior Court.

11 The OAH Document is not precedence setting or even persuasive. It is meant to provide
12 baseline guidance regarding Office of Administrative Hearings procedures and was published
13 in June 2007 (almost ten years ago). Office of Administrative Hearings,
14 <http://www.azoah.com/practice.html> (last visited March 16, 2017). Additionally, the article
15 cited by Plaintiff does not provide any authoritative support for the statement or the Office of
16 Administrative Hearings alleged lack of jurisdiction. *Id.*

17 Moreover, the Office of Administrative Hearings is the most proper venue to hear a
18 contempt hearing. This is because the Office of Administrative Hearings issued the order at
19 bar and is familiar with the reasoning behind the order. Based on the above, the Superior Court
20 does not have jurisdiction to hear this matter and it should be dismissed.

21 **2. Michael Bengson, in his individual capacity as a director, is not a proper party**
22 **and as such, should be dismissed.**

23 As previously argued in the Motion, Rule 17(a), Ariz. R. Civ. P., specifies, "[e]very
24 action shall be prosecuted in the name of the real party in interest." Boards of directors for
25 corporations have no ability to exercise legal rights independent of the corporation which they
26 27 28

1 oversee. As such, Michael Bengson, (hereafter, “Bengson”) individually, is not a proper party
2 for purposes of the relief sought by Petitioner because Bengson, as president of the
3 Association, is not a “person” or an “entity” to which relief may be granted.
4

5 Additionally, in having named Bengson, individually, solely for his capacity as a
6 director, Petitioner’s Complaint is legally defective in seeking relief against Bengson. This is
7 because, the Petitioner has made no allegations of any independent wrongdoing by Bengson,
8 or other allegations that establish actionable claims against him separately from the
9 Association as the known principle in the Complaint.
10

11 It is a well-established principle of corporate law that the corporate entity provides a
12 liability shield for individuals and directors acting on behalf of the corporation in that capacity.
13

14 To overcome this legal protection, the corporate veil must be pierced. *Dietel v. Day*,
15 16 Ariz. App. 206, 492 P.2d 455 (1972) (“As a general rule, a corporation will be treated as a
16 legal entity until sufficient reason appears to disregard the corporate form.”) Indeed, “it must
17 be noted that a legitimate purpose of incorporation is to avoid personal liability and if the
18 corporate fiction is too easily ignored and personal liability imposed, then incorporation is
19 discouraged.” *Id.* Moreover, “[w]here the corporation is operated and maintained for the
20 purpose for which it was incorporated and not as a mere shield of the stockholders, the
21 corporate form should not be disregarded.” *Id.*
22

23 None of Petitioner’s Complaint allegations establish independent actions Bengson that
24 are beyond the scope of his duties, actions or obligations as agent acting on behalf of the
25 Association. Likewise, there are no independent allegations made of any wrongdoing by
26 Bengson that could establish an independent basis of liability or actionable claim against him.
27
28

1 Therefore, the Petitioner's Complaint should be dismissed as to Defendant Michael Bengson
2 for failure to state a claim upon which relief can be granted pursuant to Ariz. R. Civ. P.
3 12(b)(6).
4

5 **3. Conclusion.**

6 Based on the foregoing, the Respondents respectfully submit that the Court lacks
7 subject matter jurisdiction over this matter; the Petitioner has failed to present any allegations
8 establishing a claim upon which relief can be granted; and Defendant Michael Bengson is not
9 a real party in interest and should be dismissed from this lawsuit. As such, the Petitioner's
10 Complaint should be dismissed entirely. Respondents further request an award of their costs
11 and attorneys' fees incurred herein against Petitioner, including any other relief the Court may
12 deem proper, pursuant to A.R.S. §§12-341.01, 12-349, and 12-350.
13

14 DATED this 16 day of March 2017.
15

16 **SHAW & LINES, LLC**

17 
18

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21 4523 E. Broadway Rd.
22 Phoenix, Arizona 85040
23 Attorneys for Respondents
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2 ORIGINAL submitted for electronic filing
3 this 16 day of March, 2017, with:

4 Clerk of the Maricopa County Superior Court

5 ORIGINAL hand-delivered
6 this 16 day of March, 2017, to:

7 Hon. Aimee Anderson
8 Maricopa County Superior Court,
9 Northeast Regional Court Center
10 18380 North 40th Street
Phoenix, Arizona 85032

11 COPY of the foregoing mailed
12 this 16 day of March, 2017, to:

13 R.L. Whitmer
14 6333 North Scottsdale Road, Casita 21
15 Scottsdale, Arizona 85250
Petitioner, Pro Per

16 By: 