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5 Pro Per

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

8 R. L. WHITMER,  
9 Petitioner.

CV2016-055080

10 v.

11 **PETITIONER'S OBJECTION TO**  
12 **RESPONDENTS' MOTION AND**  
13 **APPLICATION FOR AN AWARD OF**  
14 **ATTORNEY FEES AND COSTS AND**  
15 **TO THEIR PROPOSED FORM OF**  
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; and  
24 MICHAEL BENGSON, President of  
25 the named Respondent;

(Assigned to the  
Hon. Aimee L. Anderson)

26 Respondents.

27 The Court must deny the Respondents' request for an award of attorney  
28 fees and costs pursuant to ARS §12-349 and ARCP Rule 11 because they are  
not entitled to an award as the Respondents admit in their response to the  
Petitioner's Rule 59 motion that "[t]here was no findings of facts in this case..."  
(P3:L. 26), thus their application for fees and costs, and their form of judgment are  
both without evidence or legal foundation. There is no dispute that this matter  
does not arise out of contract.

In an attempt to mislead the Court, the Respondents' application cites only  
the beginning of ARS §12-349, and conveniently omits that the statute has four  
mandatory prerequisites that require findings, which the Respondents have  
admitted do not exist. Since the matter does not arise out of contract, the award  
is only justified if the prerequisites are present, and there no evidence whatsoever

1 for their existence.

2 Without the required findings the Respondents' attorney wrongly asks this  
3 Court to impose Rule 11 sanctions on the Petitioner. Instead the Court might  
4 consider imposing sanctions on the Respondents for filing a frivolous application.

5 Originally, in their motion to dismiss, the Respondents requested the Court  
6 to grant attorney fees and costs pursuant to ARS §12-341.01 and ARS §12-349.

7 Now, as in their previous application, the Respondents cite only ARS §12-  
8 349, ARS §12-350 and ARCP Rule 11.

9 Thus Respondents agree that it is obvious that ARS §12-341.01 does not  
10 apply in this case as the complaint does not arise from a contract. The  
11 Respondents continue to request the Court to award attorney fees and costs as  
12 an award of sanctions under ARS §12-349 and Rule 11.

13 Their request must be rejected because the Respondents have admitted  
14 that there is not any evidence and findings of fact proving any of the four  
15 prerequisites under ARS §12-349 or evidence and findings justifying sanctions  
16 under Rule 11. Because the Respondents did not bring such evidence in their  
17 application they are not permitted to bring any evidence in their reply.

### 18 ARGUMENT

19 Respondents are aware that this case concerns the enforcement of statute  
20 and does not arise out of contract, and in accordance with *Brown v. Terravita*  
21 *Cmty. Ass'n, Inc.*<sup>1</sup> (No. 1 CA-CV 14-0455, Ariz. Ct. App. Memorandum Decision  
22 Jul. 30, 2015) the Respondents are not entitled to an award under ARS §12-  
23 341.01.

24 Here, as in *Brown*, the Respondents are moving for an award of attorney  
25 fees and cost based on ARS §12-349, ARS §12-350 and Rule 11 even though  
26 there is not any evidence, nor any findings of fact supporting any of the four  
27 prerequisites as required by ARS §12-349.

28 <sup>1</sup> In accordance with A.R.S. Sup.Ct. Rule 111(c), a copy of the memorandum decision is provided herewith for the Court's consideration as per Rule 111(c)(1)(A) and (C).

1 ARS §12-349 allows a sanctionable award only if Petitioner's has engaged  
2 in one of the following prerequisites:

- 3 "1. Brings or defends a claim without substantial  
4 justification.
- 5 2. Brings or defends a claim solely or primarily for delay or  
6 harassment.
- 7 3. Unreasonably expands or delays the proceeding.
- 8 4. Engages in abuse of discovery."

9 The Respondents have admitted that there are not any findings of fact,  
10 which are needed to prove any of the four prerequisites, and therefore their  
11 application for attorney fees and costs pursuant to ARS §12-349 and ARS §12-  
12 350 must be denied.

13 It is also obvious that none of the elements of Rule 11 apply to this case  
14 and as the Respondents failed to bring any evidence and admit that there are not  
15 any findings to support an application of sanctions under Rule 11.

16 The Respondents' only reasoning for their awards is their bogus contention  
17 in their application that the Petitioner "did not investigate whether the Superior  
18 Court has jurisdiction". The Respondents fail to present any evidence or cite any  
19 findings to support their false claim.

20 Petitioner brought this action in good faith and following the instructions  
21 given by the Arizona Office of Administrative Hearings ("OAH") to the public, and  
22 reported to the Governor and the Legislature in 2007. As stated in Exhibit 1 of the  
23 Petitioner's response to the Respondents' motion to dismiss, OAH instructs the  
24 public:

25 "However, failure by a party to comply with a decision  
26 issued by the OAH may result in the other party seeking  
27 enforcement of the Administrative Law Judge's decision  
28 through a contempt of court proceeding in Superior  
Court."

The same instructions that the Petitioner used in filing for his administrative  
law order in September 2014. Petitioner being aware that Article 6 Section 14.1

1 of the Arizona Constitution gives the Superior Court original jurisdiction of  
2 "proceedings in which exclusive jurisdiction is not vested by law in another court,"  
3 and that there is not an Arizona statute that gives jurisdiction to an administrative  
4 court to conduct contempt proceedings, in good faith the Petitioner followed the  
5 OAH instructions and filed with this Court.

6 In contrast, the Respondents' attorney in their motion to dismiss first  
7 claimed that administrative tribunals have "contempt of court proceedings"  
8 jurisdiction. Then in their response to the Petitioner's motion for reconsideration,  
9 the Respondents' attorney alleged that administrative judges can grant  
10 themselves "contempt of court proceedings" jurisdiction through their rules of  
11 procedures.

12 In their response to the Petitioner's Rule 59 motion, the Respondents'  
13 attorney abandoned their claim that administrative tribunals have "contempt of  
14 court proceedings" jurisdiction, and now bizarrely claims that the Petitioner should  
15 file another administrative law complaint, as if the 2015 administrative law  
16 decision ordering that the HOA "shall fully comply with the applicable provisions of  
17 A.R.S. § 33-1243(D) in the future" is not res judicata. As OAH advises:

18 "If the petition item has been decided by a court or  
19 previously has been addressed in a hearing before the  
20 OAH, it cannot be revisited." (P. 2 of Ex. 5 of Rule 59  
motion)

21 Obviously, the Petitioner is precluded from filing a new complaint regarding  
22 the HOA's failure to comply with A.R.S. § 33-1243(D).

23 The Respondents' attorney have never contested that this Court has  
24 jurisdiction under the Arizona Constitution. It is clear that the Respondents'  
25 attorney's pleadings have no basis in law and are made in bad faith. The Court  
26 should not reward such behavior with an award of fees. As a deterrent to such  
27 unseemly behavior, the Court, on its own motion, should consider sanctioning the  
28 Respondents' attorney under Rule 11.

1 The Petitioner securing the 2015 administrative law order and the filing of  
2 this complaint seeking to have the HOA comply with statute is only just and  
3 appropriate, and it would not be required if the HOA had been in compliance with  
4 its binding obligation under the statute.

5 **CONCLUSION**

6 In their application for fees and cost, the Respondents' attorney attempts to  
7 mislead the Court by citing only the beginning of ARS §12-349, conveniently  
8 omitting that the statute has four mandatory prerequisites, and goes on to assert  
9 that there are undisputed facts, but fails to provide the Court with any facts, while  
10 in their response to the Rule 59 motion the Respondents admit that "[t]here was  
11 no findings of facts in this case..." (P.3:L.26). Given that the Respondents'  
12 attorney has conceded in his Rule 59 response "[t]here are no findings of facts in  
13 this case..." without such findings the Court cannot award attorney fees and costs  
14 under ARS §12-349, ARS §12-350 and Rule 11.

15 Given the Respondents' admission in their response to the Rule 59 motion  
16 it is also apparent that the Court's previous award of fees and costs was not  
17 justified, and the Court, on its own motion, should revisit its previous award, and  
18 consider imposing sanctions on the Respondent.

19 Because it is an undisputed fact that this complaint does not arise from  
20 contract, and ARS §33-1241.01 does not apply in this case, the Respondents'  
21 application for attorney fees and costs is without legal foundation.

22 Therefore, as in *Brown*, the Respondents' application for attorney fees and  
23 costs must be denied, as well as their proposed form of judgment.

24 Dated this 17<sup>th</sup> day of July, 2017.

25   
26 \_\_\_\_\_  
27 R. L. Whitmer  
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1 ORIGINAL filed this  
2 17<sup>th</sup> day of July, with the Court;  
3 and a COPY mailed this same date to:  
4 Augustus Shaw, and Nicole Payne  
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