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Pro Per

**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, as President of  
the named Respondent  
  
Respondents.

**CV2016-055080**

**REPLY IN SUPPORT OF MOTION  
FOR LEAVE TO FILE FIRST  
AMENDED COMPLAINT**

(FOR THE ENFORCEMENT OF  
ADMINISTRATIVE LAW ORDER  
No. 14F-H1415004-BFS)  
  
(Assigned to the Honorable  
Cynthia Bailey)

**A. Respondents' Response Names a Non-Party to This Action**

In their response to the Petitioner's Motion for Leave to File First Amended Complaint, the Respondents' counsel states that "Continental does not oppose or take issue with the Court allowing leave" for the Petitioner to file an amended complaint. However, "Continental" is not a named party to this action, nor is there any foundation that "Continental" is an agent for the HOA. The Respondents' counsel either should file a notice of errata if naming "Continental" is a mistake or file a Rule 17 & 19 motion to make Continental a party.

1 **B. Respondents' Response Constitutes a Waiver of the Objection of Mr.**  
2 **Bengson being a Party in this Action**

3 Assuming the Respondents naming "Continental" was a mistake, then the  
4 Respondents consented to the amendment of the complaint. By not contesting or  
5 disputing the legal theories, case law and facts in Petitioner's Motion for Leave to  
6 Amend, the respondents in fact have waived their dismissal argument. See  
7 *DeElena v. S. Pac. Co.*, 121 Ariz. 563, 572, 592 P.2d 759, 768 (1979)  
8 (issues not argued are considered abandoned); *Compton v. National Metals*  
9 *Co.*, 10 Ariz.App. 366, 371, 459 P.2d 93, 98 (App. 1969); *In re Lamfrom's*  
10 *Estate*, 90 Ariz. 363, 368 P.2d 318 (1962); *Goldwaters, Inc. v. Medar*, 82 Ariz.  
11 344, 313 P.2d 410 (1957); *EFC Development Corp. v. F. F. Baugh*  
12 *Plumbing & Heating, Inc.*, 24 Ariz.App. 566, 540 P.2d 185 (1975).

13 Accordingly, the Respondent is preempted from objecting to those issues in  
14 any future motions.

15 **C. Respondents' Leave to File Another Motion to Dismiss Mr. Bengson**  
16 **Should be Denied**

17 In their previous pleadings before Judge Anderson to dismiss Mr. Bengson  
18 as a party, the Court considered the Respondents' motion and chose not to grant  
19 the motion. Accordingly, this issue has already been considered. In fact the  
20 Respondents' counsel has conceded in their response (Response p.2:18-21) that  
21 they need the Court's permission to refile a motion to dismiss Mr. Bengson as a  
22 party.

23 **D. Respondents' Counsel Lacks the Authority to File a Motion to Dismiss**  
24 **Mr. Bengson as a Party and is in a Conflict of Interest Situation**

25 ARS § 33-1248.A. allows HOA boards to close meetings to consider: 1)  
26 Legal advice from an attorney for the board or the association, or 2) Pending or  
27 contemplated litigation. However ARS § 33-1248.A. requires that HOA boards  
28 "shall permit a member or a member's designated representative to speak once

1 after the board has discussed a specific agenda item [in a closed meeting] but  
2 before the board takes formal action on that item in addition to any other  
3 opportunities to speak." While ARS §§ 33-1248.A.1 and 2 allows HOA boards to  
4 discuss issues in a closed meeting, the statute does not negate a board's  
5 statutory obligation to take "formal action" in open meetings. No such board  
6 meetings took place since the Court of Appeals' opinion.

7 Further, in their response the Respondents' counsel admitted that he needs  
8 client authorization to file a motion to dismiss Mr. Bengson as a party (Response  
9 p.2:17). Given that the HOA board did not have any board meetings since the  
10 Court of Appeals remanded this case to the trial court, Mr. Shaw is either acting  
11 on his own or under the direction of Mr. Bengson without board authorization,  
12 while Mr. Bengson's interests conflict with the HOA's interest.

13 In the administrative law proceedings before Judge Douglas, Mr. Bengson  
14 testified "that the Board was aware of the budget problems" and promised the  
15 Administrative Law Judge "to meet soon to adopt an amended budget" and get  
16 everything on the right track" (Complaint Ex. 1, p2:21-25, attached). As the HOA  
17 president, he had a duty to the tribunal and the association members but chose  
18 not to comply with the Judge's order. Because the association members have a  
19 potential claim for the legal expenses against Mr. Bengson, who caused the HOA  
20 not to abide by the Administrative Law Judge's Order, the HOA's counsel has an  
21 impermissible conflict taking any direction from Mr. Bengson.

22 **E. The Respondents' Counsel's Spurious Claim is not Supported by the**  
23 **Record.**

24 The Respondents' counsel claim that "[a]s usual the Petitioner seeks to  
25 mislead this honorable Court" is spurious and not supported by the audio  
26 recording of the October 17<sup>th</sup> status conference where Mr. Shaw objected to  
27 conferring by email or telephone with the Petitioner, to which the Petitioner  
28 offered to meet Mr. Shaw in his office. The Court reiterated the Petitioner's offer

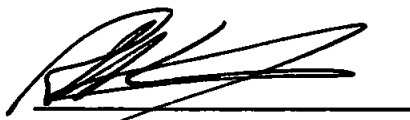
1 to meet and asked Mr. Shaw if that was acceptable to which Mr. Shaw agreed. It  
2 appears that Respondents' counsel is up to his old habit of abusing self-  
3 represented parties as well as his client's pocketbooks<sup>1</sup> by bootstrapping legal  
4 fees and causing unwarranted delay.

5 **Conclusion**

6 By not objecting to the motion for leave to file first amended complaint, the  
7 Respondents have agreed that Mr. Bengson is a proper party in this action, and  
8 filing a motion to dismiss him is frivolous and meant only for the purpose of delay.

9 Therefore, for the sake of order and clarity, the Petitioner requests for leave  
10 to amend their complaint should be granted as requested, and that the HOA's  
11 counsel's request to file a motion to dismiss Mr. Bengson as a party should be  
12 denied.

13 Dated this 24<sup>th</sup> day of October, 2018.

14 

15  
16 R. L. Whitmer

17 ORIGINAL filed this  
18 24<sup>th</sup> day of October, 2018, with the Court;  
19 and a COPY mailed this same date to:  
20 Augustus Shaw, Shaw & Lines Law Firm  
21 4523 E. Broadway Rd.  
22 Phoenix, AZ 85040

23 <sup>1</sup> As Judge Swan (now on the Court of Appeals) found in CV 2005-015360:  
24 "The Court specifically noted to Mr. Shaw at the March 10, 2006 hearing the unlikelihood  
25 of any award of fees being entered in this matter and admonished Mr. Shaw of the same  
26 in the Court's minute entry dated April 6, 2006. Although the Court recognizes its  
27 obligation to award reasonable attorney's fees when warranted in cases such as this, it  
28 is the Court's view that no award of attorney's fees would be reasonable in this matter...  
Compounding the Court's concern is Mr. Shaw's filing of a plainly frivolous motion...  
IT IS ORDERED endorsing this minute entry to the State Bar of Arizona."