

1       **Shaw & Lines, LLC**

2       4523 E. Broadway Road

3       Phoenix, AZ 85040

4       Phone (480) 456-1500

5       Facsimile (480) 456-1515

6       www.shawlines.com

7       Mark E. Lines - #020553

8       Augustus H. Shaw, IV - #021593

9       Patrick J. Whelan - #030994

10      *Counsel for Respondents*

11                   **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

12                   **IN AND FOR THE COUNTY OF MARICOPA**

13      R.L. WHITMER,

14                                   Petitioner,

15      v.

16      HILTON CASITAS HOMEOWNERS  
17      ASSOCIATION, also known as HILTON  
18      CASITAS COUNCIL OF  
19      HOMEOWNERS, also known as  
20      COUNCIL OF CO-OWNERS, also  
21      known as HILTON CASITAS COUNCIL  
22      OF CO-OWNERS; and MICHAEL  
23      BENGSON, solely in his capacity as  
24      President of the named Respondent, and  
25      not personally,

26                                   Respondents.

Case No.: CV2016-055080

**RESPONDENTS' RESPONSE TO  
PETITIONER'S MOTION FOR  
LEAVE TO FILE SECOND  
AMENDED COMPLAINT**

FOR THE ENFORCEMENT OF  
ADMINISTRATIVE LAW ORDER  
No. 14F-H1415004-BFS

*(Assigned to the Hon. Cynthia Bailey)*

27           Respondents hereby respond to Petitioner's Motion For Leave To File Second  
28    Amended Complaint filed on December 31, 2018. Respondents file this opposing  
29    memorandum to Petitioner's request for leave in light of the currently-pending Motion to  
30    Dismiss filed by Respondents on November 21, 2018. The request for leave is nothing more  
31    than an improper attempt to supplement Petitioner's previously-filed response to the Motion  
32    to Dismiss (filed five days earlier on December 26<sup>th</sup>). The following Memorandum of  
33    Points and Authorities will show that Petitioner's motion is untimely and improper.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 The proposed Second Amended Complaint will have no bearing on the outcome of  
3 the currently-pending request for dismissal under Rule 12(b)(6) except to cause  
4 unnecessary delay. Both logic and the law dictate that the Court should deny Petitioner’s  
5 instant motion as an untimely.

6 **I. Legal Argument.**

7 “In deciding whether justice requires granting leave to amend, factors to be  
8 considered include the presence or absence of undue delay, bad faith, dilatory motive,  
9 repeated failure to cure deficiencies by previous amendments, undue prejudice to the  
10 opposing party and futility of the proposed amendment.” *Moore v. Kayport Package Exp.,*  
11 *Inc.*, 885 F.2d 531, 538 (9<sup>th</sup> Cir. 1989). “Futility of amendment can, by itself, justify the  
12 denial of a motion for leave to amend.” *Bonin v. Calderon*, 59 F.3d 815, 845 (9<sup>th</sup> Cir.  
13 1995).

14 In this case, it would be futile to grant Petitioner leave to amend his first amended  
15 complaint because the proposed amendment(s) do not alter the factual allegations or legal  
16 theories under the complaint of contempt charge(s) and it does not assert any new facts  
17 regarding Petitioner’s pending allegations from the first amended complaint against  
18 Respondent Bengson personally. In short, the proposed amendment(s) are redundant,  
19 immaterial and impertinent to the actual contempt claim(s) before the Court.

20 **i. The Proposed Amendment is Deficient and Futile.**

21 As noted above, the Court may deny a request to amend where it would be futile to  
22 allow the amendment because the new allegation(s) are deficient and subject to dismissal.  
23 *Moore*, 885 F.2d at 538 (“Leave to amend need not be given if a complaint, as amended,  
24 is subject to dismissal.”). The proposed request and amendment offers nothing new or  
25 necessary as a separate actionable claim from the contempt claim already alleged.  
26 Petitioner offers nothing substantively different than what has already been alleged. In  
27 short, the request for leave offers no usefulness to the status and proceedings before the  
28 Court.

1 Even if were allowed, the additional allegation(s), would be subject to summary  
2 dismissal for the same legal reasons and uncontested facts as already framed before the  
3 Court. As such, the amendment would result in futility and should be denied. *See, Walls v.*  
4 *Ariz. Dep't of Pub. Safety*, 170 Ariz. 591, 597, 826 P.2d 1217, 1223 (App. 1991) (denial  
5 of leave to amend is not an abuse of discretion when the proposed amendment is subject to  
6 dismissal on summary judgment); *see also, Fidelity Sec. Life Ins. Co. v. State Dep't of*  
7 *Ins.*, 191 Ariz. 222, 954 P.2d 580 (1998) (affirming dismissal when plaintiff would not be  
8 entitled to relief under any set of facts pleaded in the complaint that are susceptible of  
9 proof). The proposed allegations and legal conclusions are wholly unnecessary for  
10 Arizona's notice pleading standards, and do not cure any defects complained of by  
11 Respondents in the Motion to Dismiss.

12 Unless Petitioner first demonstrates how any proposed amendment would avoid  
13 dismissal, the request to amend lacks support to demonstrate what new or differing  
14 allegations could avoid any dismissal the Court may order on the pending Motion to  
15 Dismiss. For this same reason, any requested leave to remedy any defects in Petitioner's  
16 first amended complaint or avoid dismissal is also premature because the Court has not  
17 ruled on the Motion to Dismiss currently-pending.

18 It should be noted that Petitioner has already put forth the proposed  
19 allegation/argument, of this instant request for leave, in Section IV of his Response to the  
20 Motion to Dismiss. *See, Petitioner's Response* at pages 7–9. As such, for purposes of  
21 avoiding duplication of legal arguments and to promote judicial efficiency, Respondents  
22 incorporate the arguments, legal authorities referenced and legal bases set forth in the  
23 Motion to Dismiss and Reply brief supporting same.

24 **ii. The Court Should Resolve the Pending Motion to Dismiss.**

25 As a matter of judicial efficiency, the Court should resolve the Motion to Dismiss  
26 before addressing Petitioner's instant motion for leave. As stated above, Petitioner's  
27 instant motion and proposed amendment(s) have been substantially incorporated already  
28 into his response to the Motion to Dismiss filed December 26<sup>th</sup>. Notwithstanding, the  
amendment(s) do not address any of the deficiencies identified in the previous Motion to

1 Dismiss. If the Court grants any part of the Motion to Dismiss, it should either deny the  
2 Motion for Leave in its entirety or require Petitioner to re-plead the proposed complaint to  
3 conform with the Court’s ruling.

4 “A motion for leave to amend is addressed to the sound discretion of the court, and  
5 must be decided upon the facts and circumstances of each particular case.” *Caddy-Imler*  
6 *Creations, Inc. v. Caddy*, 299 F.2d 79, 84 (9<sup>th</sup> Cir. 1962). It is well-established that  
7 “[l]eave to amend need not be given if a complaint, as amended, is subject to dismissal.”  
8 *Moore*, 885 F.2d at 538. Moreover, “[t]he statement in Rule 15(a)(2) that the court ‘should  
9 freely give leave when justice so requires’ presupposes that the court may use its  
10 discretion to impose conditions on the allowance of a proposed amendment as an  
11 appropriate means of balancing the interests of the party seeking the amendment and those  
12 of the party objecting to it.” Wright & Miller, 6 Federal Practice & Procedure at §1486.

13 Judges in this District routinely apply these principles to deny amendment or  
14 impose conditions on a proposed amendment when, as here, a plaintiff seeks leave to  
15 amend its complaint while a motion to dismiss is pending. When the proposed amendment  
16 does not address the deficiencies raised in the pending motion to dismiss, courts typically  
17 resolve the motion to dismiss before deciding whether to grant leave to amend. *Sparlin v.*  
18 *Select Portfolio Servicing, Inc.*, CV 11-00240-TUC-CKJ, 2012 WL 527486 (D. Ariz. Feb.  
19 17, 2012) (granting motion to dismiss while motion for leave to amend was pending);  
20 *Berdeaux v. U.S. Dept. of Educ. Loan Discharge Unit, San Francisco CA*, CV 10-1737-  
21 PHX-JAT, 2011 WL 3876001 (D. Ariz. Sept. 2, 2011) (denying motion to amend as moot  
22 after granting motion to dismiss prior complaint).

23 If the ruling on the motion to dismiss renders any part of the proposed amendments  
24 as futile, courts regularly use their discretion under Rule 15(a) to limit the scope of the  
25 amendment. *See*, Wright & Miller, 6 Federal Practice & Procedure at §1486 (noting that  
26 courts may condition a party’s right to amend on the removal of those portions of the  
27 proposed amendment that deal with matter already subject to a final adjudication);  
28 *Sparlin*, 2012 WL 527486 at \*3 (ordering the Clerk of the Court not to docket the  
proposed amended complaint attached to the motion for leave because it did not conform  
with the Court’s ruling on the motion to dismiss); *Berdeaux*, 2011 WL 3876001 at \*10

1 (addressing deficiencies in the proposed amended claim in an effort to provide plaintiff  
2 with guidance in amending the complaint).

3 A similar result is warranted here. The proposed amendment does nothing to cure  
4 the deficiencies with the contempt charge(s) that the parties have addressed in the pending  
5 Motion to Dismiss. The proposed amendment purports to only assert superfluous  
6 allegations that have no factual connection or bearing on the elements of Petitioner's  
7 contempt grievance against either of the Respondent.

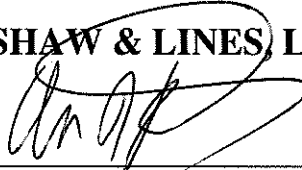
8 Respondents respectfully request that the Court first rule on the pending Motion to  
9 Dismiss and then require that any amendment of the first amended complaint conform to  
10 the Court's ruling. *See, e.g., Hughes v. Friedman, CV-12-697-PHX-GMS, 2013 WL*  
11 *1145808, \*2 (D. Ariz. Mar. 18, 2013) (holding that amendment to add an entity previously*  
12 *dismissed as an improper defendant would be futile).*

13 **II. Conclusion.**

14 For the reasons above and obvious, Respondents respectfully request that the Court  
15 deny Petitioner's instant motion for leave in its entirety or, in the alternative, require  
16 Petitioner to re-plead the proposed complaint after the Court rules on the pending Motion  
17 to Dismiss.

18 DATED this 11<sup>th</sup> day of January, 2019.

19  
20 **SHAW & LINES, LLC**

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22 \_\_\_\_\_  
23 Augustus H. Shaw, IV  
24 Patrick J. Whelan  
25 4523 E. Broadway Road  
26 Phoenix, Arizona 85040  
27 *Counsel for Respondents*  
28

1 ORIGINAL submitted for electronic filing  
2 this 11<sup>th</sup> day of January, 2019, with:

3 Clerk of the Maricopa County Superior Court

4 COPY of the foregoing mailed  
5 this 11<sup>th</sup> day of January, 2019, to:

6 R.L. Whitmer  
7 6333 North Scottsdale Road, Casita 21  
8 Scottsdale, Arizona 85250  
9 *Petitioner, Pro Per*

10 By: Taylor Beneker  
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