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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, solely in his capacity as President of the named Respondent, and not personally,

Respondents.

Case No.: CV2016-055080

**RESPONDENTS' REPLY IN  
SUPPORT OF ITS MOTION TO  
DISMISS PETITIONER'S  
AMENDED CONTEMPT  
COMPLAINT**

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

*(The Honorable Cynthia Bailey)*

Respondents hereby submit this Reply supporting the Motion to Dismiss Petitioner's Amended Complaint and in response to Petitioner's Response to the same. No relief may be granted because Petitioner's claims are legally deficient for reasons both practical and procedural under Rule 12(b)(6), *Ariz. R. Civ. P.*

Petitioner's contentions opposing dismissal of his contempt action are not legally supportable and therefore, should be dismissed. Petitioner's misapplication of agency theory and direct liability with regard to Michael Bengson, "solely in his capacity as President of the named Respondent, and not personally" is legally and procedurally

1 deficient. Accordingly, this contempt action asserted by Petitioner against Respondents  
2 should be dismissed in its entirety and with prejudice.

3 As discussed more fully herein, even after taking all material allegations as true,  
4 Petitioner has failed to state a claim upon which relief may be granted, and therefore,  
5 Petitioner's amended complaint must be dismissed in its entirety. As an initial point,  
6 when evaluating a Rule 12(b)(6) motion to dismiss, allegations amounting to  
7 conclusions of law or unfounded allegations of fact, however, are not to be credited.  
8 *Johnson International, Inc. v. City of Phoenix*, 192 Ariz. 466, 967 P.2d 607 (App. 1998).  
9 As such, the litany of unfounded factual and legal conclusions "argued" in the Response  
10 brief must be ignored in seeking to avoid dismissal of this action.

11 Despite the irrelevant and unfounded "allegation(s)" mentioned in Petitioner's  
12 Response, the simple dispute in this action centers on the Association's compliance with  
13 the ALJ Order (and the statutory requirements of A.R.S. § 33-1243(D) contained therein).<sup>1</sup>  
14 Petitioner's attempt(s) to advance his erroneous contentions are nothing more than a  
15 systematic effort to cloud the material issues and should be summarily denied and  
16 disregarded by this Court.

17 This Reply is supported by the following Memorandum of Points and Authorities  
18 and the entire record before the Court.

19 **MEMORANDUM OF POINTS AND AUTHORITIES**

20 In his Response, Petitioner casts a wide net in a desperate attempt to allege the  
21 "kitchen sink" and avoid addressing whether dismissal is appropriate considering the  
22 Association's compliance with the terms of the ALJ Order entered pursuant to the clear  
23 directive of A.R.S. § 33-1243(D). In searching for any traction with the Court, Petitioner  
24 provides little in the way of sound legal or factual analysis and instead engages in a  
25 scorched earth campaign consisting of hyperbole and baseless accusations directed at  
26 any and all associated with the Association, including its board, property manager and  
27 general counsel, in an apparent effort to publicly smear a volunteer board member in  
28 open court.

1 Through this smoke-screen of accusations, it must be noted that the issue in front  
2 of the Court is simple and straight-forward: Has the Association reasonably and/or  
3 substantially complied with the mandatory component of the ALJ Order?

4 The issue(s) are made to appear to be somewhat complicated by Petitioner's  
5 overly-zealous and irregular procedural tactics.<sup>2</sup> Petitioner's unorthodox presentation of  
6 the issues to the Court is either (1) calculated to create an aura of complication in an  
7 effort to persuade the Court that there must be something more deceitful underlying as to  
8 the group of elected homeowners that volunteer to make up the board, or (2)  
9 demonstrative of Petitioner's misunderstanding concerning appropriate processes,  
10 applicable law and the underlying public policy to be advanced in relation to the  
11 objective relief requested.

12 Notwithstanding the foregoing, it appears undisputed that this contempt action is  
13 predicated on the *Recommended Order* of the 2015 ALJ Order that expressly directed  
14 "**Hilton Casitas** [to] fully comply with the applicable provisions of A.R.S. § 33-1243(D)  
15 in the future."<sup>3</sup> Above all, the ALJ Order required **Hilton Casitas** to prepare and deliver  
16 financial reports in accordance with A.R.S. § 33-1243(D).<sup>4</sup> By express reference,<sup>5</sup>  
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19 <sup>1</sup> See the Administrative Law Judge Decision No. 14F-H1415004-BFS (the "*ALJ Order*") at page 3: ¶1; page 4: ¶4.

20 <sup>2</sup> Petitioner's pleadings and motions before the Court, thus far, are presented in a somewhat indiscernible manner,  
21 including more recent allegations of "fraudulent" activity without any supporting evidence whatsoever. See, Petitioner's  
22 Response, at page 6, Footnote No. 4 ("*The Respondents used a fraudulent ballot for casita 5 (Ex. 1) which is not signed*  
23 *by the actual owner of record (Ex. 2).*"). This is just one example of Petitioner's motion practice that amounts to nothing  
24 more than unfounded legal conclusions. By way of recent filings, Petitioner filed an improper supplement to his  
25 Response to the instant Motion to Dismiss, proposed as a "Motion For Leave To File Second Amended Complaint", with  
26 new issues and legal theories. To be brief, Petitioner's approach is unconventional. Oddly enough, Petitioner asserts that  
27 Respondents are in contempt of the ALJ Order and A.R.S. § 33-1243(D) due to the unforeseen legal fees incurred as a  
28 direct result of Petitioner's numerous filings against the Association with the Maricopa County Superior Court. Petitioner's incessant litigation against the board, especially Mr. Bengson, and the mentioned myriad of irregularities goes beyond potential confusion for process – it extends to improper and unprincipled abuse of process. Regardless, the wild accusations of "fraud" and "lies to the Court", procedural irregularities and suspect methods employed by Petitioner is brought to the Court's attention with respect to credibility and recognized judicial procedure and public policy to be fostered as the Court exercises its discretion in deciding the pending motions and protocol for ongoing litigation. As such, any arguments or evidence presented indicating alleged fraud, misrepresentation or misconduct should be precluded, ignored, denied and summarily dismissed by the Court. Respondents also request that Petitioner be expressly advised of such in these proceedings.

<sup>3</sup> See the *Recommended Order* of the ALJ Order, at page 4, lines 29-30 (**emphasis** added).

<sup>4</sup> As mentioned and discussed *ad nauseam*, both the ALJ Order and the underlying statute are **only applicable to the community association: Hilton Casitas**.

<sup>5</sup> See also, the *Provisions Of Law Referenced At Hearing* of the ALJ Order, at page 3: ¶1.

1 Subsection (D) sets forth the procedures required to properly approve a proposed budget,  
2 including:

3 ...within thirty (30) days after adoption of any proposed budget for the  
4 condominium, the board of directors shall provide a summary of the budget  
to all the unit owners...

5 [thereafter,] the board of directors shall set a date for a meeting of the unit  
6 owners to consider ratification of the budget not fewer than fourteen (14)  
7 nor more than thirty (30) days after mailing of the summary.

8 Unless at that meeting a majority of all the unit owners or any larger vote  
9 specified in the declaration rejects the budget, the budget is ratified,  
whether or not a quorum is present.

10 Petitioner now asks the Court for a finding that both the Association and Mr.  
11 Bengson (“*solely in his capacity as President of the named Respondent, and not*  
12 *personally*”<sup>6</sup>) are in contempt of court for allegedly failing to comply with the  
13 community budget ratification procedures outlined in A.R.S. § 33-1243(D).

14 All told, Petitioner is seeking to enforce an administrative decision and order that  
15 sets for the statutory provisions of A.R.S. § 33-1243(D) required to properly approve  
16 and adopt a community budget. The objective relief Petitioner seeks is based on  
17 relatively simple legal issues regarding the Association’s compliance, whether  
18 substantial or otherwise, with the ALJ Order calling for statute compliance. In accord  
19 with the above, Respondents submit that the issues presented may be resolved as an  
20 issue of law.

21 **I. Legal Standard For Contempt**

22 A court has the power to adjudge in civil contempt any person who willfully  
23 disobeys a specific and definite order of the court. *Gifford v. Heckler*, 741 F.2d 263, 265  
24 (9<sup>th</sup> Cir. 1984). Any act which is calculated to hinder, obstruct or embarrass a court in the  
25 administration of justice, or which lessens the dignity or authority of a court may be  
26 defined as contempt. *Ong Hing v. Thurston*, 101 Ariz. 92, 416 P.2d 416 (1966). A court  
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<sup>6</sup> See, Petitioner’s previous filings as to his first request for leave to amend his complaint, including amending the caption of the First Amended Verified Complaint.

1 has wide latitude in determining whether there has been contemptuous defiance of its  
2 order. *Gifford*, 741 F.2d at 266.

3 As such, a party should **not** be held in contempt if the “action appears to be based  
4 on a good faith and reasonable interpretation of the [court’s order].” *Id.* quoting *Vertex*  
5 *Distrib., Inc. v. Falcon Foam Plastics, Inc.*, 689 F.2d 885, 889 (9<sup>th</sup> Cir. 1982). “Substantial  
6 compliance” with the court order is a defense to civil contempt. *Id.*

7 The party alleging civil contempt must demonstrate the alleged contempt or  
8 violation of the court’s order by clear and convincing evidence, not a preponderance of the  
9 evidence. *Id.* While the set of rules the court should use is easy to articulate, they may be  
10 difficult to apply. *Id.* The court should determine (1) that the party violated the court order,  
11 (2) beyond substantial compliance, (3) not based on a good faith and reasonable  
12 interpretation of the order, (4) by clear and convincing evidence. *Id.*

## 13 **II. Discussion of Procedural and Substantive Issues Before the Court**

### 14 **The Court Should Disregard Petitioner’s Motion for Leave.**

15 As support for his Response, Petitioner surprisingly attempts to allege further  
16 conclusions of law to the allegations as contained in its already amended complaint. Said  
17 attempts do nothing more than cloud the material issues before the Court and are barred  
18 from being considered by this Court. It is important to note that *pro per* litigants are held  
19 to the same standards as attorneys regarding procedures, statutes, rules, and legal  
20 principles. *Higgins v. Higgins*, 194 Ariz. 266, 270, ¶12, 981 P.2d 134, 138 (App. 1999).

21 Accordingly, this Court should also deny Petitioner’s attempted motion for leave.  
22 The issue before the Court is not to determine the legislative intent and definition of a  
23 “budget” when it drafted A.R.S § 33-1243(D). The issue is whether the substantial  
24 compliance with the statutory provisions of the ALJ Order entitles Respondents to  
25 dismissal of the complaint as amended and presented to the Court. As such, Petitioner’s  
26 motion for leave should be treated as an improper supplemental Response and not as a  
27 request to amend.

28 The Court needn’t look any further than the opening statement of the motion to  
amend in which Petitioner admits that the request for leave was brought “*in responding*

1 *to the Respondents' motion to dismiss*". Petitioner's attempt to rely on further  
2 unfounded allegations that clearly should have been raised in his numerous earlier  
3 filings, but were not, have no legal support. In both his Response and his improper  
4 supplemental response/motion for leave, Petitioner makes numerous, salacious  
5 allegations that have no bearing on the arguments presented in the dismissal motion.

6 By way of Petitioner's recent filings, it should be noted that Petitioner has exerted  
7 an extraordinary amount of effort, procedure, argument and emphasis in this case  
8 recklessly alleging what he believes to be "unethical" conduct of Mr. Bengson, the  
9 community manager, and undersigned counsel in an attempt to persuade the Court that  
10 there must be something wrong in this case enough to justify sanctions. However, these  
11 contentions are utterly absurd.

12 In his Response alone, Petitioner makes several libelous assertions, emphatically  
13 claiming "the Respondents, with assistance from their general counsel and community  
14 manager, continued to violate the Order"<sup>7</sup> and "the Respondents' attorney was a  
15 participant in gaming the Respondent HOA's financial reports, if not the master mind."<sup>8</sup>

16 Any such assertions (aside from the fact that they are wholly unfounded and  
17 salaciously preposterous) should not be entertained by the Court under Petitioner's guise  
18 of presenting them as an appropriate argument affording relief from the Rule 12(b)(6)  
19 Motion to Dismiss. As initially stated above, allegations amounting to conclusions of  
20 law or unfounded allegations of fact, however, are not to be credited. *See, Johnson*  
21 *International, Inc., supra.*

22 Accordingly, Respondents respectfully request the Court to consider the totality  
23 of "responsibility" with respect to why we are even here in this matter and the practical  
24 ramifications of its decision with respect to all parties involved, and trusts that the Court  
25 will exercise sound discretion in its final determination.

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<sup>7</sup> See, Petitioner's Response at p. 9, lines 8-9.

<sup>8</sup> See, Petitioner's Response at p. 14, lines 9-10.

1                    **Dismissal of Petitioner’s Contempt Complaint is Warranted.**

2                    What the parties disagree on is whether the Association’s alleged disregard for  
3 the ALJ Order and A.R.S. § 33-1243(D) was knowingly willful and substantial, and  
4 whether the Association’s board president acted in bad faith. This is important because  
5 the focal point of Petitioner’s Response rests on the fact that the board president acted to  
6 intentionally harm Petitioner or engaged in fraudulent conduct against Petitioner  
7 resulting in bad faith. What Petitioner misses, however, is that even if all of the  
8 allegations of his amended complaint are correct, Petitioner does not have a cause of  
9 action against the Association or its board president.

10                   **1. Respondent Michael Bengson’s Inability to Effectuate Corporate**  
11                   **Compliance Warrants His Dismissal.**

12                   Rule 17(a), *Ariz. R. Civ. P.*, specifies, “[e]very action shall be prosecuted in the  
13 name of the real party in interest.” As stated in the Motion to Dismiss, only the  
14 Association has the ability to comply with the requirements of the ALJ Order and/or the  
15 statutory provisions of the Arizona Condominium Act. Mr. Bengson is unable to  
16 effectuate compliance in his individual capacity as a corporate director, pursuant to the  
17 community documents and undisputed Arizona law. To be frank, undersigned counsel is  
18 confused as to why Petitioner has chosen to name Mr. Bengson in the caption to this  
19 action as there is a clear disclosure of the agent/principal relationship with the  
20 Association.<sup>9</sup>

21                   The ALJ Order is a court order against the non-profit corporation known as the  
22 Association. And, A.R.S. § 33-1243(D) subjects and regulates the activities of the non-  
23 profit corporation known as the Association. Mr. Bengson is neither subject to, nor  
24 capable of, individually complying with either the ALJ Order or A.R.S. § 33-1243(D).

25 \_\_\_\_\_  
26 <sup>9</sup> Petitioner’s amended caption (and apparent reasoning) is in direct contradiction to Arizona law. Petitioner’s previous  
27 request for leave to amend to “clarify” the allegations against Mr. Bengson is redundant in substance and procedure, as  
28 Mr. Bengson is not a party to either the ALJ Order, nor is he personally subject to, or capable individually as to, the  
requirements of A.R.S. § 33-1243(D) or the provisions of the Arizona Non-Profit Corporations Act. *See, United States v. Rylander*, 460 U.S. 752, 757, 103 S.Ct. 1548, 75 L.Ed.2d 521 (1983) (“where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action.”); A.R.S. § 10-801(B) (a corporate entity may only act “under the direction of its board of directors” and boards of directors have no ability to exercise legal rights independent of the corporation).

1           The Response does not dispute this. Petitioner simply relies on limited and non-  
2 binding authority that is distinguishable by noting that Petitioner has made no allegations  
3 of any independent wrongdoing by Mr. Bengson, or other allegations that establish  
4 actionable claims against him separately from the Association as the known principal.  
5 *Ultra vires* acts are always imputed against a corporation. The Response provides no  
6 reasoning why this should not be the case.

7           Accordingly, having named Mr. Bengson – a volunteer individual board member  
8 – solely in his capacity as board president, Petitioner’s entire complaint is legally  
9 defective in seeking relief against Mr. Bengson in addition to his claims against the real  
10 party in interest (*i.e.*, the Association).

11           **2. The Association Did Not Violate the ALJ Order or A.R.S. § 33-1243(D).**

12           The ALJ Order requires the Association to adopt its annual budget in accordance  
13 with the well-established and clear procedures outlined in A.R.S. § 33-1243(D). The  
14 Association, however, did not violate either because Respondents consider a budget to  
15 be a reasonable forecast of expected finances to be incurred. This consideration is  
16 important because the crux of Petitioner’s complaint rests on his mis(understanding) of  
17 what it means *to budget*, in accord with the required procedures of A.R.S. § 33-1243(D).

18           Petitioner appears to broadly assert in his Response that a budget ceases to be a  
19 budget if any deviation occurs. Regardless of its practical effect, such a broad  
20 generalization is a misnomer in reasoning and application.

21           Where the language of a statute is plain and unambiguous, courts find no need to  
22 apply other rules of construction and courts can then only construe the language to mean  
23 what it says. *Long v. Dick*, 87 Ariz. 25, 347 P.2d 581 (1959), citing *Automatic*  
24 *Registering Mach. Co. v. Pima County*, 36 Ariz. 367, 285 P. 1034 (1930), *Gustafson v.*  
25 *Rajkovich*, 76 Ariz. 280, 263 P.2d 540 (1953)). Even where a term is undefined by the  
26 legislature, courts strive to apply the plain and ordinary meaning of the words used  
27 unless a contrary intent is expressed by the legislature. *SFPP, L.P. v. Ariz. Dep’t. of*  
28 *Revenue*, 210 Ariz. 151, 155, ¶19, 108 P.3d 930 (App. 2005), citing *State v. Hoggatt*,  
199 Ariz. 440, 443, ¶8, 18 P.3d 1239 (App. 2001).

1 In his Response, Petitioner actually cites to Black’s law dictionary (8<sup>th</sup> edition, p.  
2 582)<sup>10</sup>, but such reference confirms the Association’s general understanding by defining  
3 a “budget” as:

- 4 1. A Statement of an organization’s estimated revenue and expenses for a  
5 specified period, usu. a year.
- 6 2. A sum of money allocated to a particular purpose or project.

7 By way of practical reasoning, *to budget* includes a forecast forward rather than  
8 past review. To hold or reason otherwise would, for all intents and purposes, undercut  
9 the very basis and intent of what it means to budget. That is exactly what Petitioner  
10 appears to argue in asserting that Respondents are in contempt of the ALJ Order because  
11 their actual expenses deviated from their forecasted expenses of their adopted budget.  
12 Such a view is counter intuitive to the well-established understanding of what a budget  
13 is, and what it means to budget.

14 It appears that Petitioner fails to understand that a budget by its definition is  
15 considered to be “in continuance”, if it indeed, is a forecasted estimate. The very  
16 purpose of a budget is to forecast an estimate to allocate money. If it was certain, it  
17 would cease to be an estimate. Stated another way, a budget by its very nature, requires  
18 continuance of the estimated budget not modification.

19 Additionally, Petitioner complains that Respondents have violated the ALJ Order  
20 by overspending on certain line items of the adopted budgets. Remarkably, Petitioner  
21 criticizes the legal fees incurred by the Association in defending numerous previous  
22 lawsuits, which he himself initiated against the Association, as evidence of the  
23 Respondents’ bad faith.

24 Petitioner even doubles down by proclaiming that “[i]t is undeniable that the  
25 Respondents have cost the Petitioner at least 500 hours in attempting to have the  
26 Respondents comply with the Order and state law.”<sup>11</sup> Even more baffling, Petitioner  
27 unbelievably claims that such cost “equates to \$97,500.00” based on his “more than 30

28 <sup>10</sup> See, Petitioner’s Response at page 7, lines 3-6.

<sup>11</sup> See, Petitioner’s Response at page 3, line 28 – page 4, lines 1-2.

1 years of business consultancy experience, the Petitioner’s hourly billing rate is \$195 per  
2 hour... [“the 500 hours at \$195 per hour equates to \$97,500.00.”].<sup>12</sup>

3 Consequently, Petitioner’s Response argument is not only circular, but contrary to  
4 generally accepted accounting principles and Arizona law. More importantly,  
5 Petitioner’s logic falls far short of surviving the Motion to Dismiss. Without any  
6 allegations and permitted inferences establishing an actionable claim against them, the  
7 contempt action asserted against Respondents should be dismissed.

8 To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain sufficient  
9 factual matter, accepted as true, to state a claim to relief that is plausible on its face.  
10 Petitioner has twice sought the Court’s permission to amend its complaint so that the  
11 case may be decided on the merits. Respondents take no issue with that view to ensure  
12 full opportunity and adjudication. But, the fact that Petitioner has (twice-) amended his  
13 complaint does not suggest deficient pleading, but rather demonstrates that his contempt  
14 claim(s) are simply defective on their faces.

15 Courts cannot accept as true, allegations consisting of legal conclusions,  
16 inferences or deductions not necessarily implied by well-pleaded facts, unreasonable  
17 inferences or unsupported conclusions of law clothed in the factual garb. *Jeter v. Mayo*  
18 *Clinic Ariz.*, 211 Ariz. 386, 389, 121 P.3d 1256, 1259 (App. 2005); *see also Owen v.*  
19 *Superior Court of State of Ariz., In & For Maricopa Cnty.*, 133 Ariz. 75, 79, 649 P.2d  
20 278, 282 (1982)(“repeated failures to cure deficiencies by previous amendments” may  
21 justify a denial of a motion to amend a complaint.).

22 In conclusion, Petitioner is incorrect in its understanding and application of the  
23 clear-cut requirements of A.R.S. § 33-1243(D). Accordingly, Petitioner’s entire  
24 complaint as asserted against the Association should be dismissed as a matter of law, as  
25 it is evident the deficiencies in its claims cannot be cured by further amending his  
26 complaint.

### 27 **III. Conclusion**

28 \_\_\_\_\_  
<sup>12</sup> See, Petitioner’s Response at Footnote No. 3 on page 4.

