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R. L. Whitmer  
6333 N. Scottsdale Rd.  
Casita 21  
Scottsdale, Arizona 85250  
602.531.2615  
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 Entities  
  
Respondents.

**CV2016-055080**

**SURRESPONSE TO THE  
RESPONDENTS' MOTION TO  
DISMISS**

(Assigned to the Honorable  
Cynthia Bailey)

Oral Argument Requested

The two new arguments in the Respondents' reply to their motion to dismiss require a surresponse.

First, their argument regarding the liability of Mr. Bengson is without merit and is a clear misrepresentation of the amended complaint. Michael Bengson was and is in a position of power as the chief executive officer of the HOA to take the required actions in the Administrative Law Order. Instead, as stated in the complaint, he caused the HOA not to comply with the order by his actions and inactions. Therefore, he is responsible for the violation of the Order and should be found in contempt of court.

1 Mr. Bengson declared in a sworn "Affidavit in Lieu of [a \$250] Cost Bond"  
2 as follows:

3 "As the vice president, my responsibilities include the  
4 overseeing of [HOA's] finances and I have personal  
5 knowledge as to [HOA's] financial accounts and status.  
(Ex. 13)

6 This in addition to the fact that he has all the powers pursuant to the bylaws  
7 to call a meeting of the board (Ex. 14, p. 8, Article IV, Section 8) to adopt a  
8 budget and any required amendment to the budget, and to call a meeting of the  
9 unit owners (Ex. 14, p.3, Article III, Section 4 of Ex. 1) in order to submit a budget  
10 or a budget amendment to the unit owners for ratification to comply with ARS §  
11 33-1243.D. Mr. Bengson was a witness in the Administrative Law proceeding and  
12 the ALJ's Order was known to him, in addition the Order was the subject of a  
13 February 17, 2015 memorandum from the HOA lawyer and discussed between  
14 him and the HOA lawyer on February 19, 2015 (Ex. 15). Thus his actions and  
15 inactions can only be construed as a willful violation of the Order in 2016 and  
16 2017.

17 The other new argument of the Respondents in their reply is "a budget by  
18 its definition is considered to be in continuance, if it indeed, is a forecast  
19 estimate." (p.9:13 – 15). This is completely contrary to their argument in  
20 CC20166164084-RC in opposing the HOA posting a supersedes bond where  
21 they layout the need for the HOA amending its budget:

22 "Both parties agree that the Association is subject to Ariz. Rev.  
23 Stat. §33-1243(D), which requires the Association to create an  
24 accurate budget and have that budget ratified by the Members  
of the Association. Ariz. Rev. Stat. §33-1243(D) states:

25 Any budget or amendment shall be ratified by  
26 the unit owners in accordance with the  
27 procedures set forth in this subsection. (Emphasis  
added).

28 Once the Members ratify a budget, the budget may not be  
amended unless the Members vote to amend the budget. Each

1 Membership vote is a costly and time consuming endeavor.

2 As such and pursuant to Ariz. Rev. Stat. §33-1243(0),  
3 budgeted amounts for attorney's fees may only be used for  
4 attorney's fees unless the entire Membership votes to allow  
5 said funds to be used for a different purpose. Also, reserve  
6 accounts can only be used for capital improvement items unless  
7 the entire Membership votes to allow said funds to be used for a  
8 different purpose.

9 Additionally, based on the strict requirements of Ariz. Rev.  
10 Stat. §33-1243(0), if the budgeted funds or reserve funds were  
11 used outside of their anticipated function, the Association  
12 would be left with a hole in its budget that, as stated in the  
13 Association's Affidavit in Lieu of Cost Bonds, would  
14 "cause a financial hardship to a non-profit corporation that  
15 does not generate profits and does not budget for this type of  
16 scenario."

17 Thus, in order to use the budgeted amount for attorney's fees or  
18 any reserve account funds for a superceded bond or any bond,  
19 a vote of the Members must take place and a large hole would  
20 be left in the budget or reserve account. Also, the Association  
21 would have to hold a costly election to gain Member approval to  
22 use the funds for a bond. In totality, the above actions would,  
23 as stated in the Association's Affidavit in Lieu of Cost Bonds,  
24 "cause a financial hardship to a non-profit corporation that does  
25 not generate profits and does not budget for this type of  
26 scenario."

27 The Association does not generate a budget surplus.  
28 Therefore, being required to take funds from a budgetary  
allocation would cause a budget shortfall. Since a non-profit  
corporation cannot have a budget deficit or shortfall, requiring  
the Association to use allocated funds to post a bond would  
cause a serious financial and legal hardship." (Ex. 15.p. 2:19 -  
p. 4:2).

The Respondents' argument is disingenuous and meant only to mislead the Court. As the current federal government shutdown demonstrates that a budget is an authorization to pay and incur expenditures, just as the Arizona State Government, counties, and local governments are required by law to have

1 approved budgets prior to the start of their fiscal year, condominium HOAs  
2 pursuant to ARS §§ 33-1255 and 33-1243.D are required to approve annual  
3 assessments and adopt annual budgets. And as the Respondents admitted in  
4 CC20166164084-RC, HOAs are also constrained to the authorized budget  
5 expenditure limits.

6 Accordingly, the Respondents' new arguments lack any credibility and their  
7 motion to dismiss should be denied in its entirety, and the Court hold an  
8 evidentiary hearing to determine the nature of the violation and appropriate  
9 remedy for the multiple acts of contempt.

10 Dated this 17<sup>th</sup> day of January 2019.

11 

12  
13 R. L. Whitmer

14  
15 ORIGINAL filed this  
16 17<sup>th</sup> day of January 2019,  
17 with the Clerk of the Court;

18 and a COPY hand delivered this same date to:  
19 Augustus Shaw  
20 Shaw & Lines Law Firm  
21 4523 E. Broadway Rd.  
22 Phoenix, AZ 85040  
23  
24  
25  
26  
27  
28

TABLE OF EXHIBITS

Exhibit:

1. Fraudulent ballot for casita 5
2. November 5, 2015 warranty deed for casita 5
3. Respondents' 2016 "Statement of Revenues and Expenses"
4. 2016 Clark Hill legal billings 1/1/2016 to 12/31/2016
5. 2017 income/expense statement
6. 2017 CV2016-055080 attorneys' fees affidavit exhibits
7. 2017 Shaw-Lines non-litigation legal expenses
8. 2018 budget
9. 2018 Shaw-Lines non-litigation expenses to April 30, 2018
10. 2018 Judgment – Attorney fees and costs
11. Verified statements from four casita owners regarding the 2016 budget
12. Court of Appeals opinion 1 CA CV 17-0543
13. **April 5, 2016 Affidavit in Lieu of Cost Bond in CC2016-164084RC**
14. **Bylaws of the Hilton Casitas Council of Co-Owners**
15. **April 27, 2016 HOA Objection to Supersedes Bond in CC2016-164084RC**

# Exhibit 13

# CLARK HILL P.L.C.

Hilton Casitas Council of Homeowners  
Condominium Reorganization and Whitmer Dispute  
March 20, 2015  
INVOICE # 588805  
Page 2

## DETAILED DESCRIPTION OF SERVICES

→	02/17/15	Review order from Administrative Judge.	R Anderson	1.10	NO CHARGE
	02/17/15	Review original By-laws and Amendment to By-laws; prepare Amended By-laws.	R Anderson	1.20	390.00
→	02/17/15	Memorandum to M. Bengson (.1 no charge); telephone conference with H. Textor at Department of Fire and Transportation (.2 no charge).	R Anderson	.30	NO CHARGE
	02/18/15	Review file regarding lawsuit; review original Declaration and continue work on Amended Declaration.	R Anderson	1.90	617.50
→	02/19/15	Telephone conference with M. Bengson regarding court decision, next meeting, issues for Annual Meeting, and special revisions for new Declaration (.3 no charge).	R Anderson	.30	NO CHARGE
	02/25/15	Review memorandum from M. Bengson, review Declaration regarding issues M. Bengson has raised.	R Anderson	.50	162.50
	02/27/15	Telephone conference with M. Bengson regarding Management Agreement with hotel regarding revised Declaration; review and revise Declaration.	R Anderson	2.60	845.00

# Exhibit 14

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 Augustus H. Shaw IV - #021593

8 Mark E. Lines - #020553

9 Nicole D. Payne - #031213

**Dreamy Draw Justice Court**

18380 North 40<sup>th</sup> Street, Suite 130

Phoenix, Arizona 85032

Phone: 602-372-7000

*Attorneys for Defendant/Appellant*

8 **MARICOPA COUNTY JUSTICE COURTS, ARIZONA**

9 **DREAMY DRAW JUSTICE COURT**

10 COLLEEN LONDON/ R L WHITMER,

11 Plaintiffs/Appellees,

12 vs.

13 HILTON CASITAS HOMEOWNERS  
14 ASSOCIATION, also known as HILTON  
15 CASITAS COUNCIL OF  
16 HOMEOWNERS, also known as HILTON  
CASITAS COUNCIL OF CO-OWNERS;

17 Defendant/Appellant.

No. CC2016-164084RC

**AFFIDAVIT IN LIEU OF COST  
BOND**

18 STATE OF ARIZONA )  
19 ) SS.  
COUNTY OF MARICOPA )

20 Michael Bengson, being first duly sworn and upon oath, says that:

21  
22 1. I am the vice president of the board of directors for Defendant, Hilton  
23 Casitas Homeowners Association, also known as Hilton Casitas Council of Homeowners,  
24 also known as Hilton Casitas Council of Co-Owners (hereafter, the "Defendant"), in the  
25 above-entitled action and state that Defendant desires to take an appeal from the recent  
26  
27

1 March 29, 2017 signed ruling by the Justice of the Peace for the Dreamy Draw Justice  
2 Court;

3 2. As the vice president, my responsibilities include the overseeing of  
4 Defendant's finances and I have personal knowledge as to Defendant's financial accounts  
5 and status.  
6

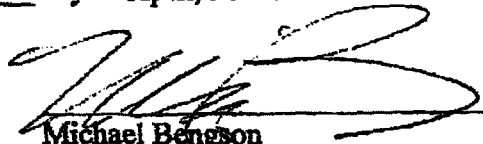
7 3. I have personal knowledge that Defendant is unable to give a bond for costs  
8 on appeal.

9 4. Defendant is a non-profit corporation made up of homeowners and existing  
10 as a homeowners association.  
11

12 5. Requiring Defendant to post a bond for costs on appeal would cause a  
13 financial hardship to a non-profit corporation that does not generate profits and does not  
14 budget for this type of scenario.  
15

16 WHEREFORE, the undersigned requests that Defendant be allowed to prosecute  
17 an appeal in this action without bond for costs.


18  
19 Dated: this 5<sup>th</sup> day of April, 2017.

20   
21 Michael Bengson  
22 Agent/Vice President for Defendant

23  
24 SUBSCRIBED AND SWORN TO before me this 5<sup>th</sup> day of April, 2017.

25 (Notary Seal)



  
Notary Public

1 ORIGINAL of the foregoing submitted for  
2 filing this 5<sup>th</sup> day of April, 2017:

3 Clerk of the Court  
4 Dreamy Draw Justice Court  
5 18380 N. 40<sup>th</sup> Street, Ste. 130  
6 Phoenix, Arizona 85032

7 COPY of the foregoing mailed  
8 this 5<sup>th</sup> day of April, 2017, to:

9 Colleen London  
10 R.L. Whitmer  
11 6333 North Scottsdale Road, Casita 21  
12 Scottsdale, Arizona 85250  
13 *Plaintiffs, Pro Per*

14 Robert Anderson  
15 Andrew Turk  
16 CLARK HILL PLC  
17 14850 N. Scottsdale Road, Suite 500  
18 Scottsdale, Arizona 85254  
19 *Attorneys for Defendant*

20  
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25  
26  
27  
By: 

# Exhibit 15

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 Augustus H. Shaw IV - #021593

8 Mark E. Lines - #020553

9 Nicole D. Payne - #031213

**Dreamy Draw Justice Court**

18380 North 40<sup>th</sup> Street, Suite 130

Phoenix, Arizona 85032

Phone: 602-372-7000

*Attorneys for Defendant/Appellant*

**MARICOPA COUNTY JUSTICE COURTS, ARIZONA**

**DREAMY DRAW JUSTICE COURT**

10 COLLEEN LONDON/ R L WHITMER,

11 Plaintiffs/Appellees,

12 vs.

13 HILTON CASITAS HOMEOWNERS  
14 ASSOCIATION, also known as HILTON  
15 CASITAS COUNCIL OF  
16 HOMEOWNERS, also known as HILTON  
17 CASITAS COUNCIL OF CO-OWNERS;

18 Defendant/Appellant.

No. CC2016-164084RC

**DEFENDANT/APPELLANT'S  
OBJECTION TO  
PLAINTIFFS/APPELLEES'  
SUGGESTED SUPERSEDEAS BOND**

17 Defendant/Appellant, Hilton Casitas Homeowners Association (hereafter,  
18 "Association" or "Defendant"), by and through counsel undersigned, hereby objects to  
19 Plaintiffs'/Appellees' Suggested Supersedeas Bond. This objection is supported by the  
20 following Memorandum of Points and Authorities.  
21

22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 **I. A supersedeas of other bond is not required to secure a potential**  
24 **judgment.**

25 Plaintiff/Appellee, as a member of the Defendant Condominium Association, has  
26 an obligation to pay assessments to the Association pursuant to Ariz. Rev. Stat. §33-1256.  
27

1 The funds to be secured by a supersedeas or other bond are, in essence, a refund of  
2 the Plaintiff's assessments. If the Plaintiff were to ultimately prevail in this matter, the  
3 Association could simply allow the Plaintiff to not pay assessments in the amount of any  
4 judgment owed or may allow the Plaintiff to offset any judgements currently held by the  
5 Association against the Plaintiff. This would not affect the Association's requirements  
6 pursuant to Ariz. Rev. Stat. §33-1243(D).  
7

8 As such, a supersedeas or other bond is not necessary to secure the Defendant's  
9 interest in a potential judgement.  
10

11 **II. Association cannot use reserve or budgeted funds for a bond.**

12 In their recent Motion, Plaintiffs' state "[T]he 2017 Budget shows that Association  
13 has over \$100,000 in reserves and that \$40,000 of the total reserves is earmarked for legal  
14 fees" to argue that the Association is not entitled to a waiver of the bond requirement.  
15

16 What the Plaintiffs' do not mention is that the reserve accounts and budgetary line  
17 items for attorney's fees are strictly accounted for and may not be used for a bond without  
18 the express permission of the Members of the Association.

19 Both parties agree that the Association is subject to Ariz. Rev. Stat. §33-1243(D),  
20 which requires the Association to create an accurate budget and have that budget ratified  
21 by the Members of the Association. Ariz. Rev. Stat. §33-1243(D) states:  
22

23 Any budget or amendment shall be ratified by the unit owners in  
24 accordance with the procedures set forth in this subsection. (Emphasis  
25 added).  
26  
27

1           Once the Members ratify a budget, the budget may not be amended unless the  
2 Members vote to amend the budget. Each Membership vote is a costly and time consuming  
3 endeavor.

4           As such and pursuant to Ariz. Rev. Stat. §33-1243(D), budgeted amounts for  
5 attorney's fees may only be used for attorney's fees unless the entire Membership votes  
6 to allow said funds to be used for a different purpose. Also, reserve accounts can only be  
7 used for capital improvement items unless the entire Membership votes to allow said funds  
8 to be used for a different purpose.  
9

10           Additionally, based on the strict requirements of Ariz. Rev. Stat. §33-1243(D), if  
11 the budgeted funds or reserve funds were used outside of their anticipated function, the  
12 Association would be left with a hole in its budget that, as stated in the Association's  
13 Affidavit in Lieu of Cost Bonds, would "cause a financial hardship to a non-profit  
14 corporation that does not generate profits and does not budget for this type of scenario."  
15

16           Thus, in order to use the budgeted amount for attorney's fees or any reserve account  
17 funds for a superceded bond or any bond, a vote of the Members must take place and a  
18 large hole would be left in the budget or reserve account.  
19

20           Also, the Association would have to hold a costly election to gain Member approval  
21 to use the funds for a bond. In totality, the above actions would, as stated in the  
22 Association's Affidavit in Lieu of Cost Bonds, "cause a financial hardship to a non-profit  
23 corporation that does not generate profits and does not budget for this type of scenario."  
24

25           The Association does not generate a budget surplus. Therefore, being required to  
26 take funds from a budgetary allocation would cause a budget shortfall. Since a non-profit  
27

1 corporation cannot have a budget deficit or shortfall, requiring the Association to use  
2 allocated funds to post a bond would cause a serious financial and legal hardship.

3 Finally, the funds to be secured by a supersedeas or other bond are, in essence, a  
4 refund of the Plaintiff's assessments. If the Plaintiff were to ultimately prevail in this  
5 matter, the Association could simply allow the Plaintiff to not pay assessments in the  
6 amount of any judgment owed. This would not affect the Association's requirements  
7 pursuant to Ariz. Rev. Stat. §33-1243(D).  
8

9 **III. Conclusion.**

10 The Association is a nonprofit corporation with limited funds forced by Ariz. Rev.  
11 Stat. §33-1243(D) to obtain Member approval if it desires to deviate from the Member  
12 approved budget or reserve funds. Each penny of the Association's funds are accounted  
13 for and as such, the Association does not have the discretion to post bonds on its own.  
14

15 Requiring the Association to post bonds, as stated in the Association's Affidavit in  
16 Lieu of Cost Bonds, would "cause a financial hardship to a non-profit corporation that  
17 does not generate profits and does not budget for this type of scenario." The Plaintiff's do  
18 not provide any credible evidence that this statement is not correct.  
19

20 Therefore, the Defendant hereby requests that the Court waive the requirement of  
21 the Association to post a cost bond and deny the Plaintiff's request for a supersedeas bond.  
22

23 ...

24 ...

25 ...

1 DATED this 26<sup>th</sup> day of April, 2017

2 SHAW & LINES, LLC

3  
4 

5 Augustus H. Shaw IV, Esq.

6 Nicole D. Payne, Esq.

7 4523 E. Broadway Rd.

8 Phoenix, Arizona 85040

*Substituting Attorneys for Defendant*

9 ORIGINAL of the foregoing submitted for  
10 filing this 27<sup>th</sup> day of April, 2017:

11 Clerk of the Court  
12 Dreamy Draw Justice Court  
13 18380 N. 40<sup>th</sup> Street, Ste. 130  
14 Phoenix, Arizona 85032

15 COPY of the foregoing mailed  
16 this 27<sup>th</sup> day of April, 2017, to:

17 Colleen London & R.L. Whitmer  
18 6333 North Scottsdale Road, Casita 21  
19 Scottsdale, Arizona 85250  
20 *Plaintiffs*

21 Robert Anderson  
22 Andrew Turk  
23 CLARK HILL PLC  
24 14850 N. Scottsdale Road, Suite 500  
25 Scottsdale, Arizona 85254  
26 *Previous Attorneys for Defendant*

27 Lisa Borowski  
28 Scottsdale Law Group, P.C.  
29 7150 E. Camelback Road, Suite 444  
30 Scottsdale, Arizona 85251  
31 *Plaintiffs' Counsel*

By: 