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6 Pro Per

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

9 R. L. WHITMER,

10 Petitioner.

11 **CV2016-055080**

12 v.

13 **REPLY IN SUPPORT OF MOTION**  
14 **FOR LEAVE TO FILE SECOND**  
15 **AMENDED COMPLAINT**

16 HILTON CASITAS HOMEOWNERS  
17 ASSOCIATION, also known as  
18 HILTON CASITAS COUNCIL OF  
19 HOMEOWNERS, also known as  
20 COUNCIL OF CO-OWNERS, also  
21 known as HILTON CASITAS  
22 COUNCIL OF CO-OWNERS; and  
23 MICHAEL BENGSON, as President of  
24 the named Respondent

25 Respondents.

26 (FOR THE ENFORCEMENT OF  
27 ADMINISTRATIVE LAW ORDER  
28 No. 14F-H1415004-BFS)

(Assigned to the Honorable  
Cynthia Bailey)

18 The Respondents argue that the motion for leave to amend contains no  
19 new facts, is redundant and therefore is futile, and should be denied. However,  
20 their objection lacks any factual or legal basis and should be rejected.

21 The Petitioner found during the review of the motion to dismiss, the  
22 complaint and disclosure statements, that the HOA had also violated the Order in  
23 2017 by overspending the authorized legal expenses in the 2017 budget.

24 The 2014 complaint before the Administrative Law Judge ("ALJ") was that  
25 the then HOA president had violated ARS § 33-1243.D by overspending the 2014  
26 authorized legal expenses without amending the budget. The ALJ found that the  
27 HOA president had violated ARS § 33-1243.D by not amending the budget and  
28 ordered the HOA to abide by ARS § 33-1243.D in the future. ARS § 33-1243.D

1 requires the HOA board to adopt an annual budget by following a specific  
2 ratification process and to amend the budget from time to time following the same  
3 process for adoption.

4 The Respondents are, in effect, asking the Court to reverse the ALJ's un-  
5 appealed Order by finding that ARS § 33-1243.D budgets are nothing more than  
6 estimates and forecasts and thus not requiring any amendments, which the  
7 opposite to the HOA's position in In CC20166164084-RC <sup>1</sup>. (Attached, p.2:19 – p.  
8 3:2).

9 As the amendment adds an additional violation of the Order in 2017, which  
10 could stand on its own in a new complaint, it is clearly not futile. Only if the Court  
11 accepts the Respondents' absurd claim that an ARS § 33-1243.D budget is  
12 nothing more than estimates can the current complaint, as amended, be  
13 dismissed.

14 Accordingly, the Respondents' contention that "Leave to amend need not  
15 be given if a complaint, as amended, is subject to dismissal." *Moore v. Kayport*  
16 *Package Exp., Inc.*, 885 F.2d 531, 538 (9th Cir. 1989) does not apply.

17 To avoid the need to file another complaint the Petitioner is asking the  
18 Court for leave to add that violation, which will save time, money and judicial  
19 resources. As ARCP Rule 15(a)(2) states: "[l]eave to amend must be freely given  
20 when justice requires," just as the Federal Rule of Civil Procedure 15(a) provides  
21 that a trial court should grant leave to amend "freely when justice so requires."

22 <sup>1</sup> "Both parties agree that the Association is subject to Ariz. Rev. Stat. §33-  
23 1243(D), which requires the Association to create an accurate budget and have  
24 that budget ratified by the Members of the Association. Ariz. Rev. Stat. §33-  
25 1243(D) states:

26 Any budget or amendment shall be ratified by the unit owners in accordance with  
27 the 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." (Ex. 15, p.2:19 – p. 3:2, in Petitioner's  
January 17, 2019 surresponse).

1 **Moore v. Kayport Package Exp., Inc.**, 885 F.2d 531, 537 (9th Cir. 1989).

2 The Respondents' request to consider the motion for leave to amend the  
3 complaint only after resolving their motion to dismiss is only meant to delay the  
4 proceedings and should also be rejected.

5 Therefore, the motion for leave to amend the complaint should be  
6 considered together with the motion to dismiss the complaint. The dismissal  
7 request should be examined based on the amended complaint, and because the  
8 amended complaint clearly shows a cause of action the motion to dismiss should  
9 also be denied.

10 Dated this 22<sup>nd</sup> day of January 2019.

11 

12  
13 R. L. Whitmer

14  
15 ORIGINAL filed this  
16 22<sup>nd</sup> day of January 2019, with the Court;

17  
18 And a COPY handed directly to Mr. Shaw  
19 on this 22<sup>nd</sup> day of January 2019:

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*Attorneys for Defendant/Appellant*

**MARICOPA COUNTY JUSTICE COURTS, ARIZONA**  
**DREAMY DRAW JUSTICE COURT**

COLLEEN LONDON/ R L WHITMER,  
  
Plaintiffs/Appellees,  
  
vs.  
  
HILTON CASITAS HOMEOWNERS  
ASSOCIATION, also known as HILTON  
CASITAS COUNCIL OF  
HOMEOWNERS, also known as HILTON  
CASITAS COUNCIL OF CO-OWNERS;  
  
Defendant/Appellant.

No. CC2016-164084RC  
  
**DEFENDANT/APPELLANT'S  
OBJECTION TO  
PLAINTIFFS/APPELLEES'  
SUGGESTED SUPERSEDEAS BOND**

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

**MEMORANDUM OF POINTS AND AUTHORITIES**

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

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

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

20  
21           Also, the Association would have to hold a costly election to gain Member approval  
22 to use the funds for a bond. In totality, the above actions would, as stated in the  
23 Association's Affidavit in Lieu of Cost Bonds, "cause a financial hardship to a non-profit  
24 corporation that does not generate profits and does not budget for this type of scenario."  
25

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

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 ...  
26

27 ...

1 DATED this 14<sup>th</sup> day of April, 2017

2 **SHAW & LINES, LLC**

3 

4 Augustus H. Shaw IV, Esq.

5 Nicole D. Payne, Esq.

6 4523 E. Broadway Rd.

7 Phoenix, Arizona 85040

8 *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  
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14 Phoenix, Arizona 85032

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

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