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1 R. L. Whitmer  
6333 N. Scottsdale Rd.  
2 Casita 21  
Scottsdale, Arizona 85250  
3 602.531.2615

4 Pro Per

5 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
6 **IN AND FOR THE COUNTY OF MARICOPA**

8 R. L. WHITMER,

Plaintiff.

CV2016-055080

9 v.

10 HILTON CASITAS HOMEOWNERS  
11 ASSOCIATION, also known as  
12 HILTON CASITAS COUNCIL OF  
13 HOMEOWNERS, also known as  
14 COUNCIL OF CO-OWNERS, also  
15 known as HILTON CASITAS  
COUNCIL OF CO-OWNERS,

Defendants.

**PLAINTIFF'S STATEMENT OF  
FACTS AND LAW**

(Assigned to the  
Hon. Lisa Flores)

16  
17 **I. FACTUAL AND LEGAL BASIS FOR THE PLAINTIFF'S CLAIM**

18 The Hilton Casitas HOA is governed by its organic contract, the Declaration  
19 of Horizontal Property Regime for Hilton Casitas ("Declaration"), as recorded on  
20 May 22, 1972 pursuant to ARS §33-551 et seq, the Horizontal Property Regimes  
21 Act.

22 The petitioner is a member of the Hilton Casitas HOA, aka the Hilton Casita  
23 Council of Co-Owners, by acquiring a percentage ownership in Casita 21 from his  
24 wife, Colleen London, on August 21, 2014 in accordance with the Hilton Casitas  
25 Council of Co-Owners Bylaws, and the Declaration pursuant the Horizontal  
26 Property Regime Act (ARS § 33-551.3) as refenced and incorporated therein.

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1 The Hilton Casitas HOA ("HOA") is governed by ARS § 33-1201 et seq, the  
2 1985 Uniformed Condominium Act as amended, which includes A.R.S. § 33-  
3 1243(D):

4 "Except as provided in the declaration, within thirty days  
5 after adoption of any proposed budget for the  
6 condominium, the board of directors shall provide a  
7 summary of the budget to all the unit owners. Unless the  
8 board of directors is expressly authorized in the  
9 declaration to adopt and amend budgets from time to  
10 time, any budget or amendment shall be ratified by the  
11 unit owners in accordance with the procedures set forth in  
12 this subsection. If ratification is required, the board of  
13 directors shall set a date for a meeting of the unit owners  
14 to consider ratification of the budget not fewer than  
15 fourteen nor more than thirty days after mailing of the  
16 summary. Unless at that meeting a majority of all the unit  
17 owners or any larger vote specified in the declaration  
18 rejects the budget, the budget is ratified, whether or not a  
19 quorum is present. If the proposed budget is rejected, the  
20 periodic budget last ratified by the unit owners shall be  
21 continued until such time as the unit owners ratify a  
22 subsequent budget proposed by the board of directors."  
23 (emphasis added).

24 The HOA is required by A.R.S. § 33-1243(D) to obtain unit owner approval  
25 for budget adoption and amendment as there are no provisions in the Hilton  
26 Casitas' Declaration that expressly authorize the Board of Directors to adopt or  
27 amend budgets.

28 Adopting an annual budget before the start of the fiscal year and fully  
complying with A.R.S. §33-1243.D is not difficult or burdensome for the HOA  
board to implement. To comply with A.R.S. § 33-1243(D) within 30 days of the  
HOA board approving the annual budget, the HOA board is required to set a date  
for the unit owners to approve the annual budget and within 14 days but not more  
30 days after mailing a budget summary to the unit owners.

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1 In September 2014 the Plaintiff, as a member of the HOA, filed a petition  
2 with the Arizona Department of Fire, Building, and Life Safety<sup>1</sup> alleging that the  
3 then HOA president, Ms. Karatz had exceeded the amount budgeted for  
4 legal expenses. At the hearing the HOA acknowledged overspending the budget;  
5 "legal fees in 2014, substantially exceeded the amount of money that had been  
6 budgeted for legal fees in 2014." Mr. Michael Bengson, a board member at the  
7 time, testified at the hearing that the Board was aware of the budget problems  
8 and intended to meet soon to adopt an amended budget<sup>2</sup>. Mr. Bengson stated  
9 that he and the new Board wanted to "get everything on the right track".

10 The Administrative Law Judge Decision No. 14F-H1415004-BFS ("Judicial  
11 Order") was issued on January 7, 2015 in favor of the Petitioner. The  
12 Administrative Law Judge ruled: "It is further ORDERED Hilton Casitas shall fully  
13 comply with the applicable provisions of A.R.S. § 33-1243(D) in the future".

14 Twice in August 2016 the Petitioner accompanied by Mr. Bernie Propst, a  
15 former CPA and qualified accountant, to review the HOA's financial records at the  
16 office of the HOA's president, Mr. Bengson (who has been the HOA president  
17 since 2015). During the examination Mr. Bengson insisted on being present. The  
18 financial records were incomplete, lacked the type of financial statements as  
19 required by ARS §33-1243.J. The meeting was cut short with Mr. Bengson  
20 constantly interrupting the examination stating that with such a small budget no  
21 one really cares about complying with the law, and that the Petitioner should not  
22 care either.

23 ///

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25 \_\_\_\_\_  
26 <sup>1</sup> The relevant statutory provisions have been renumbered (and redirected from the  
27 Department of Fire, Building and Life Safety to the Department of Real Estate) since  
the time the petition was filed. See 2016 Ariz. Sess. Laws ch. 128, §§ 30–35 (52d  
Leg., 2d Reg. Sess.). Compare A.R.S. §§ 32-2199 to - 2199.05, with A.R.S. §§ 41-

28 <sup>2</sup> The HOA never adopted an amended 2014 budget as promised by Mr. Bengson to the  
Administrative Law Judge.

1           **Failure to adopt the 2016 Annual Budget according to ARS §33-1243.D**

2           While the HOA is on a January-December fiscal year, the board chose to  
3 seek unit owner approval in March of 2016. However, the only board meeting  
4 prior to the March 31, 2016 annual meeting was held on February 16, 2016. The  
5 notice and agenda for that meeting was emailed by the HOA's agent on February  
6 15, 2016. The agenda did not list the board's consideration or adoption of the  
7 annual budget as required by ARS §33-1248.E:

8                     ARS §33-1248.E. It is the policy of this state as reflected  
9 in this section that all meetings of a condominium,  
10 whether meetings of the unit owners' association or  
11 meetings of the board of directors of the association, be  
12 conducted openly and that notices and agendas be  
13 provided for those meetings that contain the information  
14 that is reasonably necessary to inform the unit owners of  
15 the matters to be discussed or decided and to ensure that  
16 unit owners have the ability to speak after discussion of  
17 agenda items, but before a vote of the board of directors  
18 is taken. Toward this end, any person or entity that is  
charged with the interpretation of these provisions shall  
take into account this declaration of policy and shall  
construe any provision of this section in favor of open  
meetings. (Emphasis added).

19           None of the casita owners could have known to attend in order to listen to  
20 the board's deliberations to know what the budget contained, and then be able to  
21 comment on the budget prior to the board's vote to adopt the budget. In fact, the  
22 board could not and did not adopt the 2016 budget at that meeting, nor was it  
23 discussed as proven by the HOA' own minutes.

24           The Defendants' minutes/notes of the February 16, 2016 board meeting  
25 show that no discussion or action was taken to adopt a 2016 budget.

26           Since the unit owners were unable to properly approve the 2016 annual  
27 budget, ARS § 33-1243.D provides:

28                     "... the periodic budget last ratified by the unit owners

1 shall be continued until such time as the unit owners  
2 ratify a subsequent budget proposed by the board of  
3 directors.”

4 Accordingly, the 2015 budget was in effect the budget for 2016. By failing  
5 to adopt the budget as required by A.R.S. § 33-1243.D the HOA violated the  
6 Judicial Order.

7 In its feeble attempt that the 2016 annual budget adoption compliance  
8 could be achieved by having the unit owners approve the 2016 HOA expenditures  
9 in March 2017, the HOA has admitted that it failed to comply with A.R.S. § 33-  
10 1243.D in adopting the 2016 annual budget.

11 **The Failure to Amend the 2016 Budget for Safeguard Security**  
12 **Expense Reduction and Recalculation of the Assessments**

13 As the HOA has admitted that the unit owners have been assessed \$125 a  
14 month<sup>3</sup> for services provided by Safeguard Security until on August 22, 2016 the  
15 HOA sent out a notice announcing that the Safeguard Security agreement had  
16 been negotiated, and that those savings would be put into the “reserve account.”

17 The HOA did not initiate the budget process to call a board meeting to  
18 amend the budget to redirect the Safeguard savings into the reserve account, and  
19 to call a meeting of the unit owners to approve an amended budget as required by  
20 A.R.S. § 33-1243.D and the Judicial Order.

21 On February 20, 2017 the HOA’s manager emailed a 2016 financial  
22 worksheet to the Plaintiff. It showed that the new annual Safeguard Security  
23 expense is \$13,758.60, which will produce an estimated \$30,000 saving. This  
24 information about the Safeguard savings was not shared with the unit owners, nor  
25 did the HOA amend the 2016 budget for ratification by the unit owners as required  
26 by ARS § 33-1243.D.

27 <sup>3</sup> The 29 homeowners paying \$125 a month equals \$43,500 per year for Safeguard  
28 Security services, which in 2016 was 59% of the annual assessed expenses. For the  
last 10 years until Oct. 1, 2016, of the \$125 a month paid for Safeguard Security, only  
\$98.71 a month per casita was actually paid to Safeguard.

1 By not amending the budget as required by ARS § 33-1243.D the HOA  
2 violated the Judicial Order.

3 **Failure to Stay Within the 2016 Budget's Authorized Legal Expenses**

4 The HOA's previous attorney's, Mr. Anderson's. billing records for 2016  
5 show that by September 27, 2016 he had billed \$16,327.20, then went on to bill a  
6 total of \$19,049.20 by the middle of December 2016 versus the \$14,500  
7 authorized in the 2015 budget, which was in effect pursuant to ARS § 33-1243.D.

8  
9 It is undeniable that without amending the budget as required by the  
10 Judicial Order, the HOA overspent the 2016 budget for "Legal Expenses" just as  
11 the previous the HOA' president did in 2014 which resulted in the Judicial Order,  
12 and by doing so violated the Judicial Order.

13 **II. THE LEGAL BASIS FOR A FINDING OF COMTEMPT**

14 Arizona law permits an owner or an HOA to file a petition pursuant to  
15 A.R.S. § 33-1270 for an administrative law hearing concerning violations of  
16 condominium documents or violations of statutes that regulate condominiums.  
17 A.R.S. § 32-2199 et seq provides that such petitions will be heard before the  
18 Office of Administrative Hearings.

19 On January 7, 2015 the Petitioner received Administrative Law Decision  
20 No. 14F-H1415004-BFS ordering the Association to comply with A.R.S. § 33-  
21 1243(D) in the future. A.R.S §32-2199.02(B) authorizes the enforcement of the  
22 Administrative Law Judge Decision No. 14F-H1415004-BFS through contempt of  
23 court proceedings in the Superior Court, as confirmed by the Arizona Court of  
24 Appeals in *Whitmer v. Hilton Casitas*, 1 CA-CV 17-0543.

25 By noncompliance with A.R.S. § 33-1243(D) the HOA violated the Judicial  
26 Order as follows: (1) failure to adopt the 2016 annual budget; (2) failure to amend  
27 the budget after a reduction in the Safeguard Security expenses and diverting the  
28 savings into a reserve account; and (3) overspending the 2016 budgeted legal

1 expenses without amending the budget. Each of the above violations constitute a  
2 contempt of court.

3 Dated this 26<sup>th</sup> day of June, 2019.

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7 R. L. Whitmer

8 COPY mailed this same date to:  
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