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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,

Respondent.¹

Case No.: CV2016-055080

**RESPONDENT'S PROPOSED
FINDINGS OF FACT
&
CONCLUSIONS OF LAW**

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

(Assigned to the Hon. Lisa Flores)

In furtherance of the Court's June 5th Minute Entry Order, Hilton Casitas Homeowners Association (hereinafter, "Hilton Casitas" or the "Association") hereby moves this Court to make specific findings of fact and conclusions of law in connection with the Evidentiary Hearing scheduled for July 10, 2019, in accordance with this Proposed Findings of Fact and Conclusions of Law.

¹ The caption reflects the Court's Minute Entry Order, dated March 26th, filed April 1st and amended April 8, 2019, dismissing former respondent Michael Bengson from Petitioner's First Amended Verified Complaint.

1 Regime Act”). “The Declaration is the organic contract between the HOA and the
2 casita/unit owners.” (See, ¶3 of the First Amended Complaint).

3 3. Hilton Casitas is a community association that consists of twenty-nine (29)
4 privately owned condominium units (called Casitas) located adjacent to the Hilton Hotel
5 in Scottsdale, Arizona.

6 4. In this action, Petitioner does not purport to represent all or any other Casita
7 owners in the Association or community.

8 **Background Facts as per the Administrative Law Judge Order**

9 5. The underlying final order of the Administrative Law Judge (“ALJ”)
10 Decision No. 14F-H1415004-BFS was entered on January 7, 2015 and certified on
11 February 18, 2015 by the Arizona Department of Fire, Building and Life Safety
12 (hereinafter referred to as the “ALJ Decision”). (See the First Amended Complaint at ¶
13 1).

14 6. The ALJ Decision did not impose a civil penalty or sanction, but ordered
15 that Hilton Casitas [Council of Co-Owners] “shall fully comply with the applicable
16 provisions of A.R.S. § 33-1243(D) in the future.” (*Id.* at ¶ 2 and ¶ 12).

17 7. A.R.S. § 33-1243(D) provides as follows:

18 Except as provided in the declaration, within thirty days after adoption
19 of any proposed budget for the condominium, the board of directors
20 shall provide a summary of the budget to all the unit owners. Unless
21 the board of directors is expressly authorized in the declaration to
22 adopt and amend budgets from time to time, any budget or amendment
23 shall be ratified by the unit owners in accordance with the procedures
24 set forth in this subsection. If ratification is required, the board of
25 directors shall set a date for a meeting of the unit owners to consider
26 ratification of the budget not fewer than fourteen nor more than thirty
27 days after mailing of the summary. Unless at that meeting a majority
28 of all the unit owners or any larger vote specified in the declaration
rejects the budget, the budget is ratified, whether or not a quorum is
present. If the proposed budget is rejected, the periodic budget last
ratified by the unit owners shall be continued until such time as the
unit owners ratify a subsequent budget proposed by the board of
directors.

(*Id.* at ¶ 3).

1 8. There is no provision in the Association’s Declaration that expressly
2 authorizes the board of directors to, on its own, adopt or amend budgets. Accordingly,
3 the board and its officers are required to secure ratification pursuant to the statutory
4 procedures of A.R.S. § 33-1243(D). (*Id.* at ¶ 4).

5 9. Pursuant to A.R.S. § 33-1243(D), the board of directors is authorized to
6 adopt and amend budgets for the association...pursuant to the ratification of the unit
7 owners. The board must provide at least fourteen (14) days’ notice, but not more than
8 thirty (30) days after mailing the summary, to allow unit owners to consider the
9 ratification. (*Id.* at ¶ 5).

10 10. According to Petitioner, “[f]or the sake of order and clarity, it [sic]
11 expressly stated that this case and requested relief does not arise out of contract, but
12 rather is a matter of statutory compliance. Specifically, the requested relief is the
13 enforcement of the Administrative Law Judge’s order of No. 14H-F1415004-8FS through
14 contempt of court proceedings pursuant to A.R.S. § 32-2199.02(B) by finding the HOA
15 and its president in contempt for failure to comply with the Administrative Law Judge’s
16 order and sanction them as the Court finds appropriate.” (*Id.* at ¶ 14).

17 11. A.R.S. § 32-2199.02 provides:

18 B. The order issued by the administrative law judge is binding on the
19 parties unless a rehearing is granted pursuant to section 32-2199.04
20 based on a petition setting forth the reasons for the request for
21 rehearing, in which case the order issued at the conclusion of the
22 rehearing is binding on the parties. The order issued by the
23 administrative law judge is enforceable through contempt of court
24 proceedings and is subject to judicial review as prescribed by section
25 41-1092.08.

26 **II. Applicable Legal Standards.**

27 **Civil Contempt**

28 12. Contempt may be defined as “[a]ny act which is calculated to hinder,
obstruct or embarrass a court in the administration of justice, or which lessens the dignity
or authority of a court.” *Ong Hing v. Thurston*, 101 Ariz. 92, 98, 416 P.2d 416, 422
(1966).

1 13. Civil contempt is the disobedience of a court order directing an act for the
2 benefit or disadvantage of a party to the litigation. *Id.*; *accord, Stoddard v. Donahoe*, 224
3 Ariz. 152, 154, 228 P.3d 144, 146 (App. 2010) (citing *Hirschfeld v. Superior Court*, 184
4 Ariz. 208, 215, 908 P.2d 22, 29 (App. 1995)).

5 14. A civil contempt may be brought for the purpose of compelling compliance
6 with an injunctive order previously rendered by the court. *Shilltani v. United States*, 384
7 U.S. 364, 86 S. Ct. 1531 (1966).

8 15. “[C]ontempts committed by failure to obey a lawful . . . order . . . of the
9 court, and all other contempts not specifically embraced within” A.R.S. §§ 12-861 to -
10 865 may be addressed “in conformity to the practice and usage of the common law.”
11 A.R.S. § 12-864.

12 16. “Punishment for civil contempt is usually considered to be remedial. The
13 penalty is designed to enforce compliance with a court order. For that reason civil
14 contempt punishment is conditional and must be lifted if the contemnor obeys the order
15 of the court.” *United States v. Powers*, 629 F.2d 619, 627 (9th Cir. 1980); *see also,*
16 *Stoddard*, 224 Ariz. at 157, 228 P.3d at 149 (“equally important is that the sanction
17 must fit the particular circumstances of the contempt.”).

18 17. “Elements of civil contempt usually must be proven by clear and
19 convincing evidence, and ambiguities must be resolved in favor of the party charged with
20 contempt. Once contempt is so proven, the burden shifts to the alleged contemnor to
21 demonstrate inability to comply without regard to intent.” 17 Am. Jur. 2d CONTEMPT
22 §§ 13, 180 (2017).

23 18. In imposing these ongoing obligations, the Court notes that it has the power
24 “to enforce or coerce compliance with [its] lawful orders through civil contempt and to
25 impose a penalty for contempt reasonably commensurate with the gravity of the offense,
26 the social harm caused by the [contemnor’s] actions, and the objective of deterring such
27 conduct in the future.” 17 Am. Jur. 2d CONTEMPT § 191 (2017) (citations omitted).

1 **Petitioner's Prima Facie Case**

2 19. A *prima facie* contempt case exists when (1) the order sets forth an
3 unambiguous command; (2) the defendant violated that command; (3) the violation was
4 significant, meaning the defendant did not substantially comply with the order; and (4) the
5 defendant failed to take all reasonable steps within their power to insure compliance with
6 the order. *See, Stone v. City & Cnty. of San Francisco*, 968 F.2d 850, 856 (9th Cir. 1992).

7 20. The *Recommended Order* of the ALJ Decision directs Hilton Casitas to fully
8 comply with the budget ratification procedures as outlined in A.R.S. § 33-1243(D).

9 21. Pursuant to A.R.S. § 33-1243(D), the board of directors is authorized to
10 adopt and amend budgets for the association...pursuant to the ratification of the unit
11 owners. The board must provide at least fourteen (14) days' notice, but not more than
12 thirty (30) days after mailing the summary, to allow unit owners to consider the
13 ratification.

14 22. The Association accepted the ALJ Decision and thereafter acted
15 specifically in accordance with the ALJ's findings, conclusions and direction.

16 23. Thereafter, the board of directors prepared annual budgets and reports for
17 2016 and 2017 to be eventually ratified by the unit owners in February of 2017.

18 24. Despite the board's reasonable and diligent efforts to comply with A.R.S. §
19 33-1243(D), Petitioner now argues that Hilton Casitas did not properly amend its
20 approved budget to account for itemized savings and caused overtures in certain line
21 items.

22 25. In particular, Petitioner complains of the savings – from the renegotiating of
23 the Safeguard security agreement – that were put into the reserve account; and (ii) the lack
24 of wherewithal and budgeting – of legal expenses – for Petitioner's propensity for
25 initiating legal action against the Association and its board of directors.

26 26. To meet his initial burden though, Petitioner must do more than simply
27 assert his nuanced understanding and interpretation of what constitutes a budget and/or
28 what type of budgeting (static or flexible) is required as per to the ALJ Decision or
applicable statute.

1 27. Notwithstanding, Petitioner has failed to establish that (i) the alleged
2 violation(s) were considerable or substantial to the membership; and/or (ii) that Hilton
3 Casitas failed to take all reasonable steps within its power to insure compliance as
4 required.

5 28. Accordingly, Petitioner has not satisfied his initial burden of production, and
6 in doing so, has not established the *prima facie* showing sufficient for a finding of
7 contempt.

8 29. Moreover, because a civil contempt action is an equitable proceeding,
9 subject to equitable defenses, Petitioner's own unclean hands and actions establish a valid
10 justification to a finding of contempt. *See, Leman v. Krentler-Arnold Hinge Last Co.*, 284
11 U.S. 448, 457 (1932); *see also, Herzog v. Reinhardt*, 2 Ariz. 103, 105, 406 P.2d 738, 740
12 (App. 1965) (Civil contempt is always a discretionary remedy requiring consideration of
13 the surrounding facts and circumstances.).

14 30. To the extent the Association was not thwarted by Petitioner's own actions
15 (the frequent filing of lawsuits), Hilton Casitas took all efforts to comply and, in fact, is in
16 compliance with, the ALJ Decision by undertaking the appropriate measures and
17 procedures to properly propose, notify and ratify its annual budgets from 2016 to present,
18 in accordance with the provisions of A.R.S. § 33-1243(D).

19 **III. Contested Issues of Law and Fact Deemed Material.**

- 20 1. Whether the Association should be held in contempt of court with regard to
21 the Recommended Order of the ALJ Decision.
22 2. Whether the Association failed to reasonably comply with the provisions of
23 the statute found in the ALJ Decision – A.R.S. § 33-1243(D).
24 3. Whether all owners in the Association should be joined to the current suit.

25 **IV. Additional Issues of Fact and Law Believed to be Material.**

- 26 1. The definition and meaning of “budget” [noun].²
27 2. The understanding and type of “budgeting” [verb] to be static or flexible.

28

² Black's law dictionary (8th edition, p. 582) defines “budget” to mean:

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

1 **CONCLUSION**

2 Based on the foregoing, summary dismissal of Petitioner’s First Amended
3 Complaint should be granted. The Respondents (the Association and Michael Bengson)
4 seek recovery of its fees and legal expenses incurred in connection with defending this
5 action. Petitioner has pursued this action without substantial justification; the facts are
6 clear, the law is clear, and there is no viable claim here. Respondents would file an
7 appropriate motion for fees and statement of costs upon an order dismissing this action.

8 RESPECTFULLY SUBMITTED this 27th day of June 2019.

9
10 **SHAW & LINES, LLC**

11 /s/ Augustus H. Shaw IV
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15 *Counsel for Respondent*

16 ORIGINAL submitted for electronic filing
17 and hand-delivered this 27th day of June, 2019, with:

18 Clerk of the Maricopa County Superior Court
19 Northeast Regional Center
20 18380 North 40th Street, Courtroom 108
21 Phoenix, Arizona 85032

22 COPY of the foregoing mailed
23 this 27th day of June 2019, to:

24 R.L. Whitmer
25 6333 North Scottsdale Road, Casita 21
26 Scottsdale, Arizona 85250
27 *Petitioner, Pro Per*

28 By: /s/ Elizabeth Mundall