

2019 SEP -6 AM 11:39

1 R. L. Whitmer  
2 6333 N. Scottsdale Rd.  
3 Casita 21  
4 Scottsdale, Arizona 85250  
5 Pro Per

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

8 R. L. WHITMER,  
9 Petitioner/Plaintiff.

CV2016-055080

10 v.

11 **PLAINTIFF'S OBJECTION TO**  
12 **DEFENDANTS' APPLICATION FOR**  
13 **AN AWARD OF ATTORNEY FEES**  
14 **AND COSTS**

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

(Assigned to the Honorable  
Lisa Daniel Flores)

18 Defendant/Defendant.

19 The Defendant, knowing that their application is meritless, is desperately  
20 throwing everything but the kitchen sink at the Court to convince the Court that  
21 A.R.S. §12-349, A.R.S. §12-350 and Rule 11, and A.R.S. §12-341.01 somehow  
22 apply in their application for attorney's fees and costs. Their application is without  
23 fact findings and without factual and legal foundation, and therefore the Court  
24 should deny the request for an award of attorney fees and costs.

25 **MEMORANDUM OF POINTS AND FACTS**

26 **STATUTORY BACKGROUND**

27 The Hilton Casitas Condominium was created with the May 22, 1972  
28 recordation of the Declaration of Horizontal Property Regime for Hilton Casitas  
("Declaration") pursuant A.R.S. § 33-531 "the Horizontal Property Regime Act."

There is no provision in the Declaration that expressly authorizes the board

1 of directors on its own to adopt or amend budgets. Therefore, the budget  
2 approval is controlled by the provisions of A.R.S. § 33-1243(D). The board has a  
3 statutory obligation to secure ratification from the unit owners for adoption or  
4 amendment of the budget pursuant to the provisions of A.R.S. § 33-1243(D).

5 **ADMINISTRATIVE LAW ORDER BACKGROUND**

6 After securing financial expenditure records from the HOA in August and  
7 September 2014, it was apparent that the then HOA had exceeded the budgeted  
8 amount for legal expenses without seeking an amendment to the budget.

9 Accordingly, the Petitioner filed an administrative law complaint with the  
10 Arizona Department of Fire, Building and Life Safety to order compliance with  
11 A.R.S. § 33-1243(D), alleging that the HOA had overspent the authorized legal  
12 budget. The Department finding cause referred the complaint to the Arizona  
13 Office of Administrative Hearings ("OAH").

14 OAH held a hearing on December 23, 2014 and on January 7, 2015 issued  
15 an Administrative Law Decision that found that the HOA president had violated  
16 A.R.S. § 33-1243(D) by overspending the authorized budget for legal expenses  
17 and ordered the HOA to "fully comply with the applicable provision of A.R.S. § 33-  
18 1243(D) in the future."

19 **POST ADMINISTRATIVE LAW ORDER BACKGROUND**

20 On December 19, 2016, the Petitioner filed CV2016-055080 for the  
21 enforcement of the administrative law order and A.R.S. § 33-1243(D).

22 On January 27, 2017 Judge Anderson held a return hearing for the order to  
23 show cause. Finding cause, the Court scheduled an evidentiary hearing for  
24 February 28, 2017.

25 On February 21, 2017 the HOA substituted its attorney Bob Anderson of  
26 the Clark Hill law firm with Augustus Shaw of the Shaw Lines law firm. Mr. Shaw  
27 secured an ex parte motion to continue evidentiary hearing to March 3, 2017.

28 On February 28, 2017 the Defendant filed a motion to dismiss claiming that

1 the Court lacked jurisdiction and the OAH was the proper venue for contempt  
2 proceedings pursuant to A.R.S. § 32-2199.02(B).

3 After canceling the evidentiary hearing and a full briefing on the motion to  
4 dismiss, on March 20, 2017 the Court granted the motion to dismiss and granted  
5 the request for attorney's fees and costs.

6 On March 23<sup>rd</sup> the Petitioner requested reconsideration based on an email  
7 from OAH disclaiming that it had contempt of court powers.

8 After full briefing on May 16, 2017 the Court denied the reconsideration and  
9 entered Judgment and granted attorney's fees and costs request by Defendant's  
10 pursuant to A.R.S. § 12-349, 12-350 and Rule 11.

11 On May 22, 2017 the Petitioner filed a Rule 59 motion claiming:

12 "Because there is no statutory jurisdiction for an  
13 executive branch administrative law tribunal to have  
14 "contempt of court proceedings" powers, the Court erred  
15 in dismissing the Petitioner's petition for lack of  
16 jurisdiction when Article 6 Section 14.1 of the Arizona  
17 Constitution expressly states that "[t]he superior court  
18 shall have original jurisdiction of ... proceedings in which  
19 exclusive jurisdiction is not vested by law in another  
20 court."

21 After full briefing on June 21, 2017 the Court denied the Rule 59 motion  
22 and granted the Defendant's request for attorney's fees and costs, to which the  
23 Court entered judgment on July 24, 2017 denying the Rule 59 motion and granted  
24 attorney's fees and costs request by Defendant's pursuant to A.R.S. § 12-349,  
25 12-350 and Rule 11.

26 On August 18, 2017, the Petitioner filed a notice of appeal.

27 On July 10, 2018, after full briefing, the Court of Appeals issued a published  
28 opinion (**Ex. 1**) concluding; "we reverse the judgment and remand for further  
proceedings. In light of this disposition, we vacate the superior court's award of  
attorney's fees." The Court of Appeals' ruling put an end the superior court's  
award of attorneys fees and costs and the Defendant is precluded from making a

1 claim regarding past fees and costs.

2 **POST APPELLATE REMAND/PRE EVIDENTIARY HEARING BACKGROUND**

3 On October 17, 2018 Judge Bailey restarted the proceedings with a status  
4 conference which led to the Court, on October 25, 2018, granting the Petitioner's  
5 motion to amend his complaint and the Defendant's leave to file a motion to  
6 dismiss.

7 After receiving the Defendant's disclosure statements and exhibits, the  
8 Petitioner, on December 31, 2018, in good faith filed for leave to file a second  
9 amended complaint rather than file a new complaint regarding A.R.S. § 33-  
10 1243(D) violations in 2017. The Court disagreed, wanting to limit the action to the  
11 2016 issues.

12 At the oral argument on April 1, 2019 the Court dismissed the HOA  
13 president, Mr. Bengson, following the Petitioner's reluctance to add the other  
14 HOA officers and board members as defendants.

15 The Petitioner believed and still believes that Mr. Bengson as the HOA  
16 president and CEO is in a different position of responsibility and obligation than  
17 the other officers and board members, especially given his involvement in the  
18 2015 administrative law decision and his promise to the Judge to follow A.R.S. §  
19 33-1243(D). Therefore, on April 8, 2019 after conducting research the Petitioner  
20 in good faith file a motion for reconsideration of the dismissal of Mr. Bengson,  
21 which the Court denied.

22 **THE DEFENDANT'S APPLICATION FOR ATTORNEY'S FEES AND COSTS LACK ANY**  
23 **FINDINGS TO SUPPORT AN AWARD PURSUANT A.R.S. § 12-349, A.R.S. § 12-350 AND**  
24 **ARCP RULE 11, BECAUSE NO SUCH FINDINGS EXIST.**

25 The Defendant wrongfully claims that this action was "without substantial  
26 justification", groundless, not made in good faith and "unreasonably expanded the  
27 proceedings" without showing any findings to support their claim, nor did the  
28 Court make any. When asked by the Court after its ruling Defendant's attorney

1 said that the Defendant does not require fact findings.

2 A.R.S. § 12-349 allows a sanctionable award only if Petitioner's has  
3 engaged in one of the following prerequisites:

- 4 "1. Brings or defends a claim without substantial  
5 justification.
- 6 2. Brings or defends a claim solely or primarily for delay or  
7 harassment.
- 8 3. Unreasonably expands or delays the proceeding.
- 9 4. Engages in abuse of discovery."

10 The Defendant cannot point to any evidence or findings to prove any of the  
11 four prerequisites, and therefore their application for attorney fees and costs  
12 pursuant to A.R.S. § 12-349 and A.R.S. § 12-350 is without merit and should be  
13 denied. At the July 10, 2019 evidentiary hearing the Defendant refused the  
14 Court's offer to make fact findings and therefore it is precluded from making such  
15 allegations.

16 It is also obvious that none of the elements of Rule 11 apply to this case  
17 and as the Defendants failed to comply with the requirements of Rule 11(c) and  
18 did not present any evidence or fact findings to support an application of  
19 sanctions under Rule 11, nor filing a motion pursuant to Rule 11. Therefore, their  
20 request should be denied. Again, the Defendant did not present any evidence to  
21 satisfy A.R.S. §§ 12-349, 12-350 and Rule 11, and waived the opportunity to have  
22 fact finding.

23 Here, as in *Brown v. Terravita Cmty. Ass'n, Inc.*<sup>1</sup> (No. 1 CA-CV 14-0455,  
24 Ariz. Ct. App. Memorandum Decision Jul. 30, 2015), the Defendants are moving  
25 for an award of attorney fees and cost based on A.R.S. §12-349, A.R.S. §12-350  
26 and Rule 11 even though there is no evidence, nor any findings supporting any of  
27 the four prerequisites as required by A.R.S. § 12-349.

28 Petitioner brought this action in good faith and following the instructions

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<sup>1</sup> In accordance with A.R.S. Sup.Ct. Rule 111(c), a copy of the memorandum decision is provided herewith for the Court's consideration as per Rule 111(c)(1)(A) and (C). (**Ex. 2**)

1 given by the Arizona Office of Administrative Hearings ("OAH") to the public:

2 "However, failure by a party to comply with a decision  
3 issued by the OAH may result in the other party seeking  
4 enforcement of the Administrative Law Judge's decision  
5 through a contempt of court proceeding in Superior  
6 Court."

7 The Petitioner securing the 2015 administrative law order and the filing of  
8 this complaint seeking to have the HOA comply with statute is only just and  
9 appropriate, and while at the July 10, 2018 evidentiary hearing the Court found  
10 that the Petitioner had not proven by "clear and convincing evidence" that the  
11 HOA had violated the Administrative Law Order, the Court did not find that  
12 Petitioner had acted in bad faith, brought a groundless action, or had  
13 unreasonably expanded the proceedings.

14 **THIS CASE INVOLVES THE ENFORCEMENT OF STATUE AND DOES NOT ARISE OUT  
15 OF CONTRACT.**

16 To address the Defendant's request for fees and costs pursuant to A.R.S.  
17 §12-341.01, the Court should note that in the previous award of fees and costs in  
18 this case, and in the appeal of those awards, the Defendants abandoned their  
19 request for fees under A.R.S. § 12-341.01 and limited it to a sanction award and  
20 thereby conceded that this matter does not arise out of contract.

21 In *Brown*, a homeowner in an HOA, appealed a Superior Court's award of  
22 attorney's fees to the HOA from the superior court's judicial review of an  
23 administrative law decision regarding the HOA's violation of statute. Brown is  
24 instructive here as the Court of Appeals in ¶4 of its opinion recited Arizona case  
25 law for the enforcement of statutes:

26 "Section 12-341.01(A) provides that "[i]n any contested  
27 action arising out of a contract, express or implied, the  
28 court may award the successful party reasonable  
attorney's fees." The statute permits an award of fees  
only in actions that could not exist but for the breach of  
contract and does not apply to "purely statutory causes

1 of action," or when a contract serves as the factual  
2 predicate of an action but is not the essential basis of it.  
3 *Keystone Floor & More, LLC v. Ariz. Registrar of*  
4 *Contractors*, 223 Ariz. 27, 30, ¶11 (App. 2009) (citation  
5 omitted). To determine whether an action arose out of  
6 contract for purposes of § 12-341.01(A), we consider "the  
7 nature of the action and the surrounding circumstances"  
8 and decide if the contract is the "cause or origin of the  
9 dispute." *Id.* at ¶ 10 (citations omitted). *See also A.H.*  
10 *ex rel. White v. Ariz. Prop. & Cas. Ins. Guar. Fund*, 190  
11 Ariz. 526, 529 (1997) (stating that when an action arises  
12 from statutory obligations, "peripheral involvement of a  
13 contract does not require the application of § 12-  
14 341.01(A)"). For example, in *Keystone*, we held that an  
15 administrative proceeding before the Registrar of  
16 Contractors and the subsequent action for judicial review  
17 did not arise out of contract under § 12-341.01(A)  
18 because it focused on the contractor's statutory duties,  
19 not its contractual obligations to the homeowner, even  
20 though those duties and obligations overlapped. 223  
21 Ariz. at 31-32, ¶¶ 14-20."

22 As in *Brown*, the Defendant's application for fees here emphasizes A.R.S.  
23 § 12-341.01.B claiming that an award be "made to mitigate the burden of the  
24 expense of litigation..." The Court of Appeals in *Brown* made the following  
25 findings regarding A.R.S. § 12-341.01.B:

26 "¶ 7 We also reject the Association's argument that  
27 *Brown's* complaint for judicial review arises out of  
28 contract based on § 12-341.01's policy to "mitigate the  
burden of the expense of litigation to establish a just  
claim or defense." The Association correctly identifies  
the policy of the statute as set forth in § 12- 341.01(B).  
But, as discussed above, Arizona law is clear that the  
statute does not apply to all actions that tangentially  
involve a contract. Further, we observe an equally  
compelling policy argument that homeowners who  
initiate administrative actions to enforce their statutory  
rights should not confront potential liability for attorney's  
fees simply because a planned community association  
has chosen to restate its statutory obligations in its

1 governing documents. We hold that the Association was  
2 not entitled to recover fees under § 12-341.01.

3 Accordingly, this action as stated many times in the Petitioner's pleadings is  
4 for the enforcement of an administrative law order regarding the HOA complying  
5 with the statute A.R.S. § 33-1243.D. and A.R.S. § 12-341.01 does not apply here,  
6 and the Defendant's application for attorney's fees should be denied.

7 **DEFENDANT'S ATTORNEYS' MISCONDUCT**

8 **FEE REQUEST FOR VACATED PRE-REMAND AWARD OF FEES AND COSTS**

9 The Defendant's attorneys outrageously are asking the Court to reinstate  
10 the \$28,341.70 award of fees and costs vacated by the Court of Appeals. The  
11 attempt to collect fees vacated by the Court of Appeals are barred by issue  
12 preclusion. Such behavior is meant only as harassment and is sanctionable by  
13 the Court pursuant to A.R.C.P. Rule 11.

14 **PRETRIAL ABUSES**

15 The Court's minute entry of June 5, 2019 ordered the parties to file their  
16 "Proposed Finding of Fact and Conclusion of Law" by "no later than June 26,  
17 2019". The Defendant's attorneys ignored the Court's deadline and filed on June  
18 27, 2019 to which the Petitioner did not receive it by mail until July 2, 2019. Such  
19 behavior is meant only as harassment and delay and is sanctionable by the  
20 Court.

21 The Court's minute entry of June 14, 2019 set the evidentiary hearing for  
22 July 10, 2019 and ordered the parties to "hand-deliver to the clerk of this division  
23 all exhibits to be used at the hearing no later than July 3, 2019 at 5:00pm." And,  
24 "All hearing exhibits shall have been exchanged prior to that time."

25 The Petitioner sent a list of exhibits to the Defendant's attorneys on July 1,  
26 2019 and attempted to schedule a hand-delivery for July 3, 2019. Not receiving a  
27 response from the Defendant's attorney for the delivery, the Petitioner filed the  
28 exhibits with the Court and mailed the exhibits to the Defendant's attorneys. The

1 Defendant's attorney failed to make any notice or exchange of exhibits until the  
2 afternoon before the July 10, 2019 hearing (**Ex. 3**). Thus, shorting the Petitioner's  
3 ability to prepare for the hearing. Such behavior is meant only as harassment  
4 and delay, and is sanctionable by the Court.

### 5 ARGUMENT

6 Defendants are aware from the previous pleadings and fee awards in this  
7 case, that this case concerns the enforcement of statute and does not arise out of  
8 contract, and in accordance with cases cited in **Brown** the Defendants are not  
9 entitled to an award under A.R.S. §1 2-341.01.

10 As to the claim that the action was groundless, if the action was groundless  
11 the Court would have granted the Defendant's motion to dismiss instead of  
12 scheduling the evidentiary hearing. The Defendant certainly did not think so,  
13 because it did not file a dispositive motion for summary judgment.

14 Regarding the Defendant's claim that the Petitioner "unreasonably  
15 expanded the proceedings", the Court should consider the following:

16 **A.** Several attempts were made to settle this case, the first was an HOA  
17 letter in March 20, 2017 (**EX. 4**) where the HOA offered: 1) Michael Bengson will  
18 resign from the Board and not run for the Board for years; 2) You will be placed  
19 on the Board of Directors; 3) The Association will pay you \$3,500.00 to cover  
20 Court Costs and other expenses; 4) You will dismiss WHITMER V. HILTON  
21 CASITAS COUNCIL OF HOMEOWNERS CV2016-055080 and WHITMER V.  
22 HILTON CASITAS COUNCIL OF HOMEOWNERS - CC2016-164084SC and any  
23 other lawsuits or administrative law judge actions filed by you.; ...

24 However, the offer was withdrawn the same day it was made when Judge  
25 Anderson dismissed the case for lack of jurisdiction based on the Defendant's  
26 attorney's unfounded contention that administrative law judges have exclusive  
27 contempt jurisdiction.

28 The last settlement attempt was in April 2019 at a meeting with the

1 Defendant's attorney where the Petitioner offered to settle if the HOA board would  
2 simply adopt a board resolution agreeing to abide by A.R.S. § 33-1243.D.

3 B. The Defendant's attorney delayed and expanded the proceeding by  
4 over a year and a half by compelling the appeal of the unfounded contention that  
5 administrative law judges have exclusive contempt jurisdiction and not the  
6 superior court.

7 C. Because the HOA and its attorney have played and continue to play  
8 hide and seek with HOA documents, by unreasonably avoiding disclosure of HOA  
9 documents forced the Petitioner to conduct a long discovery process, including  
10 subpoenas and depositions.

11 Their request for fees under A.R.S. § 12-349 should be rejected because  
12 there is no evidence or findings proving any of the four prerequisites under A.R.S.  
13 § 12-349 or evidence and findings justifying sanctions under Rule 11 (a motion  
14 pursuant to Rule 11 was not filed anyway!). Because the Defendants did not  
15 bring such evidence in their application (which do not exist anyway!), they are not  
16 permitted to bring any evidence in their reply. The Court should consider  
17 imposing sanctions on the Defendant for filing a bad faith, frivolous and  
18 misleading application.

### 19 CONCLUSION

20 In their application for fees and cost, the Defendants' attorney attempts to  
21 mislead the Court by misrepresenting the facts and law.

22 Because this complaint does not arise from contract, and A.R.S. §33-  
23 1241.01 does not apply in this case, the Defendants' application for attorney fees  
24 and costs is without legal foundation. There are no findings of facts in this case to  
25 justify a sanction award of fees, without such findings the Court cannot award  
26 attorney fees and costs under A.R.S. §12-349, A.R.S. §12-350 and Rule 11,  
27 because none of the elements required to apply such an award exist here.

28 Therefore, as in **Brown**, the Defendants' application for attorney fees and

1 costs should be denied in its entirety.

2 Dated this 6<sup>th</sup> day of September, 2019.

3  
4 

5 R. L. Whitmer

6  
7 ORIGINAL filed this  
8 6<sup>th</sup> day of September, 2019, with the Court;

9 and a COPY mailed this same date to:

10 Augustus Shaw  
11 Shaw & Lines Law Firm  
12 4523 E. Broadway Rd.  
13 Phoenix, AZ 85040

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# Exhibit 1

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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R. L. WHITMER, *Plaintiff/Appellant*,

*v.*

HILTON CASITAS HOMEOWNERS ASSOCIATION, *et al.*,  
*Defendants/Appellees.*

No. 1 CA-CV 17-0543  
FILED 7-10-2018

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Appeal from the Superior Court in Maricopa County  
No. CV2016-055080  
The Honorable Aimee L. Anderson, Judge

**REVERSED AND REMANDED**

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COUNSEL

R.L. Whitmer, Scottsdale  
*Plaintiff/Appellant*

Shaw & Lines LLC, Phoenix  
By Augustus H. Shaw IV, Patrick J. Whelan  
*Counsel for Defendants/Appellees*

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Opinion of the Court

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OPINION

Judge Kent E. Cattani delivered the opinion of the Court, in which Presiding Judge James B. Morse Jr. and Judge Lawrence F. Winthrop joined.

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C A T T A N I, Judge:

¶1 R.L. Whitmer appeals from the superior court's judgment dismissing his complaint against Hilton Casitas Homeowners Association ("Hilton Casitas") for lack of subject matter jurisdiction. Whitmer's complaint sought to enforce a final decision resulting from a prior administrative dispute resolution proceeding, part of a process to adjudicate disputes between an owner and a homeowners' association concerning compliance with condominium documents and governing statutes. *See* Ariz. Rev. Stat. ("A.R.S.") §§ 32-2199 to -2199.05. Given the statutory directive that such decisions are "enforceable through contempt of court proceedings," A.R.S. § 32-2199.02(B), and absent any authority establishing that the administrative tribunal itself has jurisdiction to enforce such orders by contempt or otherwise, we hold that the superior court has subject matter jurisdiction to do so. Accordingly, and for reasons that follow, we reverse the dismissal and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

¶2 Hilton Casitas is the homeowners' association for a property in Scottsdale subject to Arizona's laws governing condominiums. *See* A.R.S. tit. 33, ch. 9. Whitmer is a residence owner and a member of Hilton Casitas.

¶3 In 2014, Whitmer filed an administrative petition alleging that Hilton Casitas had violated statutory provisions governing procedures for adopting or amending a budget (specifically, that Hilton Casitas had overspent on legal fees without receiving owners' approval of the increase).<sup>1</sup> *See* A.R.S. § 33-1243(D). The dispute went to a hearing before an

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<sup>1</sup> As relevant here, Arizona law allows administrative adjudication of disputes between an owner and a homeowners' association concerning compliance with condominium documents or the statutes governing condominiums. *See* A.R.S. §§ 32-2199 to -2199.05; *see also* A.R.S. §§ 41-2198

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administrative law judge (“ALJ”) in the Office of Administrative Hearings (“OAH”), and the ALJ issued a decision in Whitmer’s favor concluding that Hilton Casitas had failed to comply with the statutory provision for amending its budget, and ordered Hilton Casitas to “fully comply with the [statutory requirement] in the future.” Hilton Casitas did not seek judicial review, *see* A.R.S. § 32-2199.02(B), and the ALJ’s order became final.

¶4 Two years later, Whitmer filed this complaint in superior court alleging that Hilton Casitas had failed to comply with the ALJ’s order and seeking enforcement of the decision by contempt. Hilton Casitas answered, then moved to dismiss for (as relevant here) lack of subject matter jurisdiction. *See* Ariz. R. Civ. P. 12(b)(1). Whitmer opposed the motion and included as an exhibit an informational article from OAH, which included the following statement explaining OAH’s view that the superior court was the proper forum for enforcement proceedings:

If the petition item has been decided by a court or previously has been addressed in a hearing before the OAH, it cannot be revisited. OAH has no authority for contempt proceedings or enforcement of prior decisions. However, failure by a party to comply with a decision issued by the OAH may result in the other party seeking enforcement of the Administrative Law Judge’s decision through a contempt of court proceeding in Superior Court.

After full briefing, the superior court granted the motion to dismiss, reasoning that the court’s jurisdiction was limited to judicial review of the ALJ’s ruling (not at issue here) and did not include authority to consider an action to enforce an administrative order by contempt. The court acknowledged the statutory provision stating that the ALJ’s order “is enforceable through contempt of court proceedings,” *see* A.R.S. § 32-2199.02(B), but concluded that the proper forum for such contempt proceedings “is the Administrative Courts, not the Superior Court.”

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to -2198.05 (2014). The relevant statutory provisions have been renumbered (and redirected from the Department of Fire, Building and Life Safety to the Department of Real Estate) since the time Whitmer filed his petition. *See* 2016 Ariz. Sess. Laws ch. 128, §§ 30–35 (52d Leg., 2d Reg. Sess.). We cite to the current version of the statutes because the provisions material to this decision were not substantively changed. *Compare* A.R.S. §§ 32-2199 to -2199.05, *with* A.R.S. §§ 41-2198 to -2198.05 (2014).

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¶5 Whitmer then emailed OAH, noting the court's ruling and requesting information regarding where to file his contempt complaint. In response, OAH's acting director stated that "there is nothing in OAH's enabling statutes (ARS § 41-1092 et. seq.), that would enable OAH to enforce its own decisions through contempt proceedings that it would hold." Whitmer then filed a timely motion for reconsideration in superior court, attaching as exhibits his correspondence with OAH. After the superior court denied reconsideration, Whitmer filed a motion for new trial, which the court also denied.

¶6 The superior court awarded attorney's fees to Hilton Casitas and entered a final judgment dismissing the case. Whitmer timely appealed, and we have jurisdiction under A.R.S. § 12-2101(A)(1).<sup>2</sup>

## DISCUSSION

### I. Dismissal for Lack of Subject Matter Jurisdiction.

¶7 Whitmer challenges the superior court's determination that it lacked subject matter jurisdiction to consider his complaint. As there are no jurisdictional facts in dispute, we review the court's ruling de novo. *Falcone Bros. & Assocs. v. City of Tucson*, 240 Ariz. 482, 487, ¶ 10 (App. 2016).

¶8 Hilton Casitas argues, and the court agreed, that the superior court lacked subject matter jurisdiction to consider contempt of the ALJ's order, and that OAH itself was the only proper forum for a proceeding to enforce a prior OAH decision under § 32-2199.02(B). But the superior court is a court of general jurisdiction and has "original jurisdiction of . . . [c]ases and proceedings in which exclusive jurisdiction is not vested by law in another court." Ariz. Const. art. 6, § 14(1); *see also id.* § 14(11) (original jurisdiction of "[s]pecial cases and proceedings not otherwise provided for, and such other jurisdiction as may be provided by law"); A.R.S. § 12-123(A). And Hilton Casitas has presented no authority establishing that OAH has authority to enforce its ALJ's decision through contempt proceedings, much less that OAH has exclusive jurisdiction to do so.

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<sup>2</sup> Although "[t]his court lacks jurisdiction over an appeal from a civil contempt adjudication," *State ex rel. Dep't of Econ. Sec. v. Burton*, 205 Ariz. 27, 30, ¶ 18 (App. 2003), the issue here is whether the superior court properly concluded that it lacked subject matter jurisdiction to hear the request for a contempt finding. *See, e.g., Falcone Bros. & Assocs., Inc. v. City of Tucson*, 240 Ariz. 482, 487, ¶ 10 (App. 2016); *Church of Isaiah 58 Project of Ariz., Inc. v. La Paz County*, 233 Ariz. 460, 462-63, ¶ 9 (App. 2013).

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¶9 The administrative dispute resolution process at issue here—which produced the ALJ decision Whitmer seeks to enforce—refers contested cases for adjudication before OAH, pursuant to OAH’s procedures. A.R.S. §§ 32-2199, -2199.01(D). The ALJ hearing the case “may order any party to abide by the statute [or] condominium documents . . . and may levy a civil penalty on the basis of each violation.” A.R.S. § 32-2199.02(A). The ALJ’s final order is subject to judicial review if a party properly and timely appeals it. *See* A.R.S. §§ 32-2199.02(B), 41-1092.08(H), 12-901 to -914. Otherwise, the ALJ’s order binds the parties and “is enforceable through contempt of court proceedings.” A.R.S. § 32-2199.02(B).

¶10 Hilton Casitas urges that § 32-2199.02(B) grants OAH exclusive jurisdiction to enforce the ALJ’s order by contempt. Hilton Casitas suggests that because § 32-2199.02(B) references A.R.S. § 41-1092.08 (which provides for an appeal to the superior court in accordance with the provisions governing judicial review of administrative decisions, *see* A.R.S. §§ 12-901 to -914), the superior court’s jurisdiction with regard to the ALJ’s order is limited to providing judicial review in its appellate capacity. But § 32-2199.02(B) expressly allows for both judicial review *and* enforcement: “The order issued by the administrative law judge is enforceable through contempt of court proceedings *and* is subject to judicial review as prescribed by § 41-1092.08.” (Emphasis added.) And, with regard to enforcement, § 32-2199.02(B) contemplates enforcing the ALJ’s order through contempt of court proceedings; the statute does not reference contempt of “the office” or “the department.” *Compare* A.R.S. § 40-424(A) (describing penalties for “contempt of commission” based on failure to comply with Arizona Corporation Commission orders, rules, or requirements).

¶11 Unlike the courts, which have inherent contempt power, *see Owen v. City Court*, 123 Ariz. 267, 268 (1979), an agency only has the powers delegated to it by the Legislature. *Facilitec, Inc. v. Hibbs*, 206 Ariz. 486, 488, ¶ 10 (2003). OAH’s statutory authority extends to adjudicating “contested cases” (proceedings in which a party’s legal rights or duties are determined by an agency after an administrative hearing, *see* A.R.S. § 41-1001(5)) and “appealable agency actions” (actions other than contested cases in which an agency determines a party’s legal rights or duties, *see* A.R.S. § 41-1092(3)). *See* A.R.S. § 41-1092.02(A). A contempt proceeding of this nature—seeking enforcement of the parties’ legal rights or duties that were previously determined by the final decision in a prior administrative proceeding—does not fit the definition of either an appealable agency action or a contested case. *See also* A.R.S. § 32-2199.01(A) (providing for administrative dispute resolution “concerning violations of condominium documents . . .

WHITMER v. HILTON CASITAS, et al.  
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or violations of the statutes that regulate condominiums,” not violations of previously issued administrative orders).

¶12 And OAH’s mandate does not include enforcement authority generally, much less contempt powers. *See generally* A.R.S. §§ 41-1092 to -1092.12. For example, although OAH’s enabling statutes grant the ALJ authority to subpoena witnesses, the ALJ must apply to the superior court to enforce the subpoena – including by contempt – should the witness fail to comply. *See* A.R.S. §§ 41-1092.07(C), 12-2211; *see also* A.R.S. §§ 41-1062(A)(4), 12-2212(B) (noting that an officer presiding over a contested case may issue subpoenas and, should the witness subpoenaed fail to comply, the officer may apply to the superior court, which “shall thereupon proceed as though such failure had occurred in an action pending before it”). And although not dispositive, OAH’s position in documents provided by Whitmer to the superior court similarly reflects OAH’s understanding that it lacks statutory authorization or capacity to hold contempt proceedings.

¶13 Hilton Casitas argues that the regulations governing OAH’s prehearing and hearing procedures provide a mechanism for OAH to conduct contempt of court proceedings. The regulation on which Hilton Casitas relies, however, is a catch-all provision for *procedural* rules, not a substantive grant of authority to conduct enforcement proceedings. *See* A.A.C. R2-19-102(C) (“If a procedure is not provided by statute or these rules, an administrative law judge may issue an order using the Arizona Rules of Civil Procedure and related local rules of guidance.”); *see also generally* A.A.C. tit. 2, ch. 19, art. 1 (setting forth procedural rules for OAH proceedings). And even if that regulation purported to expand OAH’s statutory grant of authority, it cannot do so. *See Ariz. Health Care Cost Containment Sys. v. Bentley*, 187 Ariz. 229, 232 (App. 1996) (“The scope of an agency’s power is measured by statute and may not be expanded by agency fiat.”) (citation omitted).

¶14 We recognize a certain dissonance in the superior court conducting proceedings to consider a party’s refusal to follow an order issued by a separate administrative forum. But the statutory schemes governing several administrative bodies allow the superior court to act as a forum for such contempt proceedings. *See* A.R.S. §§ 41-1092.07(C), 12-2211 (allowing an OAH ALJ to subpoena witnesses and apply to the superior court to enforce the subpoena, including by contempt); A.R.S. §§ 41-1062(A)(4), 12-2212(B) (allowing an administrative officer conducting a contested case to apply to the superior court to remedy a witness’s noncompliance with a subpoena “as though such failure had occurred in an action pending before [the court]”); *see also* A.R.S. § 32-148 (authorizing an

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administrative board to certify a person who refuses to obey its subpoena “to the superior court in the county in which service was made for contempt proceedings”); A.R.S. § 23-677 (authorizing an administrative department to apply to the superior court in the case of “contumacy or refusal of a person to obey a subpoena,” upon which the court “shall issue” an order to comply, and failure to so comply “may be punished by the court as a contempt thereof”); A.R.S. § 44-3134(A) (same authorization for a different commission), (B) (authorizing “the superior court in Maricopa county [to] exercise its contempt powers” on application of the commission for a person’s willful noncompliance with a nondisclosure order in a subpoena).

¶15 Accordingly, the superior court erred by concluding that OAH had jurisdiction to enforce the ALJ’s order by contempt, much less *exclusive* jurisdiction (assuming OAH qualifies as “another court”) depriving the superior court of original jurisdiction to consider Whitmer’s enforcement action. *See* Ariz. Const. art. 6, § 14(1); *see also* A.R.S. § 12-864 (describing civil contempts to include failure to obey the superior court’s order as well as “all other contempts not specifically embraced within this article”). We therefore reverse the judgment of dismissal and remand for further proceedings.

**II. Attorney’s Fees in Superior Court.**

¶16 Whitmer also challenges the superior court’s award of attorney’s fees in favor of Hilton Casitas. The basis for the award is unclear. The judgment reflects an award to Hilton Casitas as the prevailing party, but Hilton Casitas’ application for fees only urged an award as a sanction under A.R.S. §§ 12-349 and -350 or under Arizona Rule of Civil Procedure 11. The superior court made no findings under § 12-350 as required to support an award under § 12-349, and the record shows no indication that Hilton Casitas complied with the procedural prerequisites for an award under Rule 11(c). Given our disposition reversing dismissal, however, we vacate the award and do not further address the issue of fees in superior court.

**III. Attorney’s Fees and/or Sanctions on Appeal.**

¶17 Hilton Casitas requests an award of attorney’s fees incurred on appeal, but cites only ARCAP 21 without stating a substantive basis for the award. For that reason, *see* ARCAP 21(a)(2), and given that Hilton Casitas did not prevail on appeal, we decline its request for attorney’s fees.

¶18 Whitmer requests that we impose sanctions on Hilton Casitas under ARCAP 25. In an exercise of our discretion, we decline to do so. As

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the prevailing party, however, Whitmer is entitled to costs on appeal upon compliance with ARCAP 21.

**CONCLUSION**

¶19 For the foregoing reasons, we reverse the judgment of dismissal and remand for further proceedings. In light of this disposition, we vacate the superior court's award of attorney's fees.



AMY M. WOOD • Clerk of the Court  
FILED: AA

# Exhibit 2

NOTICE: NOT FOR OFFICIAL PUBLICATION.  
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT  
PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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WILLIAM M. BROWN, *Plaintiff/Appellant*,

*v.*

TERRAVITA COMMUNITY ASSOCIATION, INC., an Arizona  
non-profit corporation, *Defendant/Appellee*.

No. 1 CA-CV 14-0455  
FILED 7-30-2015

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Appeal from the Superior Court in Maricopa County  
No. LC2012-000699-001  
The Honorable Crane McClennen, Judge

**VACATED**

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COUNSEL

William M. Brown, Scottsdale  
*Plaintiff/Appellant*

Ekmark & Ekmark, L.L.C., Scottsdale  
By Curtis S. Ekmark  
*Counsel for Defendant/Appellee*

BROWN v. TERRAVITA  
Decision of the Court

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MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Randall M. Howe and Judge Andrew W. Gould joined.

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S W A N N, Judge:

¶1 William M. Brown appeals the superior court's judgment granting attorney's fees to Terravita Community Association, Inc. ("the Association"). We hold that the fee award was not authorized under any of the four bases presented to the superior court. Accordingly, we vacate the award.

FACTS AND PROCEDURAL HISTORY

¶2 Brown initiated this action after the Arizona Department of Fire, Building and Life Safety rejected his complaint that the Association, which governs the planned community in which Brown is a homeowner, violated A.R.S. § 33-1805(A) by refusing to produce certain records. The superior court affirmed the administrative ruling, and the Association sought its attorney's fees. The Association moved for fees under A.R.S. § 12-341.01 and an attorney's fees provision in the community's Declaration of Covenants, Conditions, and Restrictions ("CC&Rs"). Brown opposed the motion on the grounds that his administrative complaint did not arise out of contract as required by A.R.S. § 12-341.01 and that, at the time he filed the complaint for judicial review, the governing community documents did not provide for an award of attorney's fees in an administrative action. In reply, the Association cited A.R.S. § 12-349 and Ariz. R. Civ. P. 11 as additional grounds for an award of fees. The court awarded the Association a portion of the fees it requested, but did not specify the statutory or other basis for the award. Brown timely appeals.

DISCUSSION

¶3 Brown contends that the superior court erred by granting attorney's fees to the Association under A.R.S. § 12-341.01 because his appeal of an administrative decision did not arise out of contract. The applicability of § 12-341.01 is a question of statutory interpretation that we review de novo. *Ramsey Air Meds, L.L.C. v. Cutter Aviation, Inc.*, 198 Ariz. 10, 13, ¶ 12 (App. 2000).

¶4 Section 12-341.01(A) provides that "[i]n any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney's fees." The statute permits an award of fees only in actions that could not exist but for the breach of contract and does not apply to "purely

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statutory causes of action," or when a contract serves as the factual predicate of an action but is not the essential basis of it. *Keystone Floor & More, LLC v. Ariz. Registrar of Contractors*, 223 Ariz. 27, 30, ¶ 11 (App. 2009) (citation omitted). To determine whether an action arose out of contract for purposes of § 12-341.01(A), we consider "the nature of the action and the surrounding circumstances" and decide if the contract is the "cause or origin of the dispute." *Id.* at ¶ 10 (citations omitted). See also *A.H. ex rel. White v. Ariz. Prop. & Cas. Ins. Guar. Fund*, 190 Ariz. 526, 529 (1997) (stating that when an action arises from statutory obligations, "peripheral involvement of a contract does not require the application of § 12-341.01(A)"). For example, in *Keystone*, we held that an administrative proceeding before the Registrar of Contractors and the subsequent action for judicial review did not arise out of contract under § 12-341.01(A) because it focused on the contractor's statutory duties, not its contractual obligations to the homeowner, even though those duties and obligations overlapped. 223 Ariz. at 31-32, ¶¶ 14-20.

¶5 Similarly, in this case the administrative proceeding and judicial review action concerned the Association's statutory obligation to produce records under A.R.S. § 33-1805(A). The fact that the Association's CC&Rs purportedly contain similar terms<sup>1</sup> does not change the nature of the underlying action. Neither the administrative proceeding nor the action for judicial review constituted an action "arising out of a contract" for purposes of applying § 12-341.01(A).

¶6 We reject the Association's contention that such a ruling is contrary to *A.H.*, in which our supreme court held that an action arises out of contract for purposes of § 12-341.01 when a statutory obligation is imputed as part of the parties' contract. 190 Ariz. at 530. The court in *A.H.* noted that it had previously examined the relevant statute (A.R.S. § 20-673(C)) and determined that it was "the functional equivalent of an 'other insurance' clause typical in insurance contracts," and, therefore, it was designed to be statutorily imputed to an insolvent insurer's contract when a statutory fund assumed its rights and obligations. 190 Ariz. at 530. Here, by contrast, we have found no authority -- including the plain language of the statute -- to support the notion that the Legislature intended to integrate A.R.S. § 33-1805 as part of the declarations, bylaws, articles of incorporation, and rules of all planned communities.

¶7 We also reject the Association's argument that Brown's complaint for judicial review arises out of contract based on § 12-341.01's policy to "mitigate

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<sup>1</sup> The relevant portions of the CC&Rs are not part of the record on appeal.

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the burden of the expense of litigation to establish a just claim or defense.” The Association correctly identifies the policy of the statute as set forth in § 12-341.01(B). But, as discussed above, Arizona law is clear that the statute does not apply to all actions that tangentially involve a contract. Further, we observe an equally compelling policy argument that homeowners who initiate administrative actions to enforce their statutory rights should not confront potential liability for attorney’s fees simply because a planned community association has chosen to restate its statutory obligations in its governing documents. We hold that the Association was not entitled to recover fees under § 12-341.01.

¶8 We further hold that the Association was not entitled to an award of fees based on the attorney’s fees provision of the CC&Rs. That provision authorized fee awards to prevailing parties in actions instituted to enforce the CC&Rs.<sup>2</sup> As we have already discussed, Brown’s action arose out of statute and was not an action to enforce any of the provisions of the CC&Rs.<sup>3</sup> The attorney’s fees provision of the CC&Rs therefore did not apply. Further, because the superior court did not make the findings required for an award of sanctions, we reject the Association’s contention that we may affirm the fee award as appropriate under A.R.S. § 12-349 or Rule 11.<sup>4</sup> See A.R.S. § 12-350 (“In awarding attorney fees pursuant to § 12-349, the court shall set forth the specific reasons for the award . . . .”); *Rogone v. Correia*, 236 Ariz. 43, 50, ¶ 22 (App. 2014) (holding that statutory findings for an award of fees under § 12-349 must be sufficiently specific to allow a reviewing court to test the validity of the judgment); *Wells*

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<sup>2</sup> The CC&Rs were amended during the pendency of Brown’s action to allow the Association to recover fees incurred defending administrative claims and related appeals. We reject the Association’s argument that it was entitled to recover the fees it incurred in the already-pending action after the effective date of the amendment. Cf. *Bouldin v. Turek*, 125 Ariz. 77, 78 (1979) (holding that A.R.S. § 12-341.01 does not apply to actions commenced before its effective date because it is similar to a statute changing the measure of damages, a substantive provision that cannot be applied retroactively).

<sup>3</sup> The Association claims in its answering brief that the CC&Rs also provide for an award of attorney’s fees to the prevailing party in an action “arising out of . . . the operations of the Association,” citing, for the first time, Article XVII, Section 17.05(iii) of the CC&Rs. That provision does not, however, appear in the record on appeal.

<sup>4</sup> We decline the Association’s invitation to find that Brown has waived the issue of the award’s propriety under § 12-349 and Rule 11.

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*Fargo Credit Corp. v. Smith*, 166 Ariz. 489, 497 (App. 1990) (vacating Rule 11 sanctions because, *inter alia*, trial court failed to "make specific findings to justify its conclusion").

CONCLUSION

¶9 We determine that the Association was not entitled to an award of attorney's fees on any of the four bases it cited in the superior court. We vacate the award.

¶10 Because this action does not arise out of contract, we deny the Association's request for an award of attorney's fees on appeal under § 12-341.01. In addition, we determine that the prerequisites to an award of fees under § 12-349 are not present, and therefore deny the Association's request for fees under that statute. As the prevailing party on appeal, Brown is entitled to an award of his appellate costs upon his compliance with ARCAP 21.



Ruth A. Willingham - Clerk of the Court  
FILED:RT

# Exhibit 3

**rlw@fulcrumgroup.biz**

---

**From:** Patrick Whelan <pwhelan@shawlines.com>  
**Sent:** Tuesday, July 9, 2019 12:57 PM  
**To:** rlw@fulcrumgroup.biz  
**Cc:** Mary  
**Subject:** FW: Exhibits list  
**Attachments:** Hilton Exhibit List.pdf; Hilton Exhibits 38-62.pdf; Hilton Exhibits 63-73.pdf

Lamar,

We received your CD (electronic copy of your Exhibits) yesterday. For purposes of ease, please see the attached for an electronic copy of our List of Exhibits and corresponding documents in preparation for the Evidentiary Hearing set for tomorrow.

Let me know if you have any problems or issues opening any of the attached. I will make sure to remedy it and/or personally provide you the documents at your place.

Thanks very much!

Patrick J. Whelan\*

**SHAW & LINES, LLC**

4523 E. Broadway Road

Phoenix, Arizona 85040

Office: 480-456-1500

Mobile: 480-635-2449

*\*Licensed to practice law in Arizona & Florida*

**From:** Patrick Whelan [<mailto:pwhelan@shawlines.com>]

**Sent:** Wednesday, July 03, 2019 9:12 AM

**To:** 'rlw@fulcrumgroup.biz' <[rlw@fulcrumgroup.biz](mailto:rlw@fulcrumgroup.biz)>

**Subject:** RE: Exhibits list

Perfect. Thank you sir.

And I wish... I was here at the office all day Monday while AHS was vacationing in California.

But, I will get back to you later today with regard to our side's additional exhibits (although I don't anticipate adding too many exhibits – maybe just meeting docs concerning the last two years).

And to say the least, Scotch might not be the all-cure, but it might make you feel like it is...ha.

Patrick J. Whelan\*

**SHAW & LINES, LLC**

4523 E. Broadway Road

Phoenix, Arizona 85040

Office: 480-456-1500

Mobile: 480-635-2449

*\*Licensed to practice law in Arizona & Florida*

**From:** [rlw@fulcrumgroup.biz](mailto:rlw@fulcrumgroup.biz) [mailto:[rlw@fulcrumgroup.biz](mailto:rlw@fulcrumgroup.biz)]

**Sent:** Tuesday, July 02, 2019 8:22 PM

**To:** 'Patrick Whelan' <[pwhelan@shawlines.com](mailto:pwhelan@shawlines.com)>

**Subject:** RE: Exhibits list

Thanks Patrick,

Your delay is completely understandable, given that you were out celebrating Dominion Day. Attached is your request. I intend to file them in the morning and will hand deliver a disk with all them on it to you, if your office is open.

I had a fungus/bacteria bronchial infection and I am still not 100%, but getting better with wonders of antibiotics and scotch.

**From:** Patrick Whelan <[pwhelan@shawlines.com](mailto:pwhelan@shawlines.com)>

**Sent:** Tuesday, July 2, 2019 6:44 PM

**To:** [rlw@fulcrumgroup.biz](mailto:rlw@fulcrumgroup.biz)

**Cc:** Mary <[mary@shawlines.com](mailto:mary@shawlines.com)>

**Subject:** RE: Exhibits list

Mr. Whitmer,

First off, I apologize for my delayed response/appreciations for sending over your preliminary List of Exhibits on Monday. In preparation of us finalizing the same tomorrow, can you please provide the actual documents as you intend to submit to the Court in **Exhibit Nos. 29 – 36** please?

I will reach out to your tomorrow morning with regard to the Exhibits [**No. 9 & 16**] that include "Plaintiff's handwritten analysis" just to confirm mutual understanding.

Thanks very much and hope you are doing and feeling better [with your upper respiratory infection].

Have a good rest of your night,

Patrick J. Whelan\*

**SHAW & LINES, LLC**

4523 E. Broadway Road

Phoenix, Arizona 85040

Office: 480-456-1500

Mobile: 480-635-2449

*\*Licensed to practice law in Arizona & Florida*

**From:** [rlw@fulcrumgroup.biz](mailto:rlw@fulcrumgroup.biz) [mailto:[rlw@fulcrumgroup.biz](mailto:rlw@fulcrumgroup.biz)]  
**Sent:** Monday, July 01, 2019 10:36 AM  
**To:** 'Patrick Whelan' <[pwhelan@shawlines.com](mailto:pwhelan@shawlines.com)>  
**Subject:** FW: Exhibits list

Per Augustus' vacation email auto-response.

**From:** [rlw@fulcrumgroup.biz](mailto:rlw@fulcrumgroup.biz) <[rlw@fulcrumgroup.biz](mailto:rlw@fulcrumgroup.biz)>  
**Sent:** Monday, July 1, 2019 10:27 AM  
**To:** [ashaw@SHAWLINES.com](mailto:ashaw@SHAWLINES.com)  
**Subject:** Exhibits list

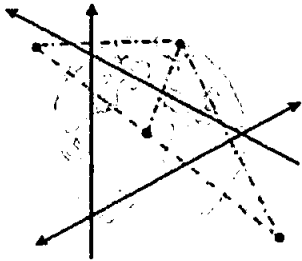
Augustus,

Attached is my list of exhibits. I look forward to receiving your list.

R. L. Whitmer

Fulcrum Group

*FORTUNA PREPARATIS - AUDACES FORTUNA IUVAT*



Scottsdale, Arizona  
602.531.2615

# Exhibit 4



# SHAW & LINES, LLC

## HOA & CONDO LAWYERS

**Attorneys**

Augustus H. Shaw IV\*†

Mark E. Lines†

Nicole D. Payne

\*Also licensed in Nebraska

† Member, College of Community Association Lawyers

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Phoenix, Arizona 85040

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p 480-456-1500

f 480-456-1515

[www.shawlines.com](http://www.shawlines.com)

March 20, 2017

**VIA U.S. MAIL AND  
E-MAIL TO [RLW@FULCRUMGROUP.BIZ](mailto:RLW@FULCRUMGROUP.BIZ)**

Colleen London  
R.L. Whitmer  
6333 North Scottsdale Road, Casita 21  
Scottsdale, Arizona 85250

**RE: RULE 408 SETTLEMENT NEGOTIATIONS**

Dear Colleen London and R.L. Whitmer:

Our firm represents the HILTON CASITAS COUNCIL OF HOMEOWNERS (the "Association"). The Association has reviewed your recent posting. In response, the Association offers the following settlement offer.

It is the sincere desire of the Association to resolve all matters with you and give you a voice on the Board of Directors and in the Association. The current and past conflicts have taken a toll on you and the Association. The Association believes that the below settlement offer will allow everyone to have a fresh new start and hopefully create a new dialog. The Association believes that the below settlement offer is a fair way to resolve the pending issues between you and the Board of Directors:

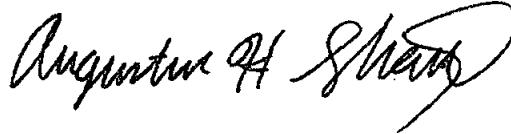
Therefore, the Association proposes the following settlement:

1. Michael Bengson will resign from the Board and not run for the Board for two years;
2. You will be placed on the Board of Directors;
3. The Association will pay you \$3,500.00 to cover Court Costs and other expenses;
4. You will dismiss WHITMER V. HILTON CASITAS COUNCIL OF HOMEOWNERS CV2016-055080 and WHITMER V. HILTON CASITAS COUNCIL OF HOMEOWNERS - CC2016-164084SC and any other lawsuits or administrative law judge actions filed by you.;
5. You will dismiss all complaints against any of the Association's attorneys;

6. You will completely come into compliance (remove yard art and repaint your Casitas);
7. You will delete the current website;
8. You will agree that you will not file any lawsuits or administrative law actions against the Association or the Board. Any disputes you may have with the Association or Board will be resolved as follows:
  - a. The dispute will be brought before the Board for resolution.
  - b. If a Board resolution is not reached, the dispute will be brought before the Members;
  - c. If a Member resolution is not reached, then all sides will submit to binding arbitration to be paid for by the Association. Both sides must agree on an arbitrator. If both sides cannot agree on an arbitrator, then each side will select an arbitrator and then the selected arbitrators will then select a third arbitrator.

This counter-offer expires at 5:00pm on March 25, 2017. If you have any questions, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read "Augustus H. Shaw IV". The signature is fluid and cursive, with a large loop at the end.

Augustus H. Shaw IV, Esq.  
For the Firm

cc: HILTON CASITAS COUNCIL OF HOMEOWNERS