

2019 SEP -6 AM 11:40

1 R. L. Whitmer  
2 6333 N. Scottsdale Rd.  
3 Casita 21  
4 Scottsdale, Arizona 85250  
5 602.531.2615

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/Plaintiff.

11 v.

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

19 Respondent/Defendant.

CV2016-055080

**PLAINTIFF'S OBJECTION TO  
DEFENDANT'S FORM OF  
JUDGMENT AND MOTION FOR AN  
ALTERNATIVE FROM OF  
JUDGMENT AND REQUEST FOR  
SANCTIONS**

(Assigned to the Honorable  
Lisa Daniel Flores)

20 Plaintiff not only object to the Defendants' form of Judgment but motions  
21 the Court to use a proper form of Judgment as submitted by the Plaintiff, and  
22 that the Court impose sanctions on the Defendant's attorneys for willful  
23 misrepresentations of law and facts.

**THE PLAINTIFFS' OBJECTIONS TO THE DEFENDANT'S FORM OF JUDGMENT ARE:**

24 **1.** Most of the body of the submitted form of Judgment is not  
25 consistent with any of the actual rulings of the Court as set forth in the minute  
26 entries. Instead of referring or reciting any supportable minute entry findings, the  
27 Defendant set out facts and conclusions as if there had been a ruling on a  
28 motion for summary judgment.

**2.** The Defendant's form of judgment relies on this action arising out of

1 contract, which is contrary to Arizona case law. Here, as in **Brown v. Terravita**  
2 **Cmty. Ass'n, Inc.**<sup>1</sup> (No. 1 CA-CV 14-0455, Ariz. Ct. App. Memorandum  
3 Decision Jul. 30, 2015), a homeowner in an HOA, appealed a Superior Court's  
4 award of attorney's fees to the HOA from the Superior Court's judicial review of  
5 an administrative law decision regarding the HOA's violation of statute. Brown is  
6 instructive here as the Court of Appeals in ¶4 of its opinion recited Arizona case  
7 law for the enforcement of statutes:

8 "Section 12-341.01(A) provides that "[i]n any contested  
9 action arising out of a contract, express or implied, the  
10 court may award the successful party reasonable  
11 attorney's fees." The statute permits an award of fees  
12 only in actions that could not exist but for the breach of  
13 contract and does not apply to "purely statutory causes  
14 of action," or when a contract serves as the factual  
15 predicate of an action but is not the essential basis of it.  
16 *Keystone Floor & More, LLC v. Ariz. Registrar of*  
17 *Contractors*, 223 Ariz. 27, 30, ¶11 (App. 2009) (citation  
18 omitted). To determine whether an action arose out of  
19 contract for purposes of § 12-341.01(A), we consider "the  
20 nature of the action and the surrounding circumstances"  
21 and decide if the contract is the "cause or origin of the  
22 dispute." *Id.* at ¶ 10 (citations omitted). *See also A.H.*  
23 *ex rel. White v. Ariz. Prop. & Cas. Ins. Guar. Fund*, 190  
24 Ariz. 526, 529 (1997) (stating that when an action arises  
25 from statutory obligations, "peripheral involvement of a  
26 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."

27 <sup>1</sup> In accordance with A.R.S. Sup.Ct. Rule 111(c), a copy of the memorandum decision is  
28 provided herewith for the Court's consideration as per Rule 111(c)(1)(A) and (C).  
(attached as **Ex. 2** of the Plaintiff's objection to the Defendant's application for attorney's  
fees and cost).

1 As in **Brown**, the Defendant's form of judgment wrongly references A.R.S.  
2 § 12-341.01.B claiming that an award be "made to mitigate the burden of the  
3 expense of litigation..." The Court of Appeals in **Brown** made the following  
4 findings regarding A.R.S. § 12-341.01.B:

5 ¶ 7 We also reject the Association's argument that  
6 Brown's complaint for judicial review arises out of  
7 contract based on § 12-341.01's policy to "mitigate the  
8 burden of the expense of litigation to establish a just  
9 claim or defense." The Association correctly identifies  
10 the policy of the statute as set forth in § 12-341.01(B).  
11 But, as discussed above, Arizona law is clear that the  
12 statute does not apply to all actions that tangentially  
13 involve a contract. Further, we observe an equally  
14 compelling policy argument that homeowners who  
15 initiate administrative actions to enforce their statutory  
16 rights should not confront potential liability for attorney's  
17 fees simply because a planned community association  
18 has chosen to restate its statutory obligations in its  
19 governing documents. We hold that the Association was  
20 not entitled to recover fees under § 12-341.01.

21 Accordingly, this action, as stated many times in the Plaintiff's pleadings, is  
22 for the enforcement of an administrative law order regarding the HOA complying  
23 with the statute A.R.S. § 33-1243D. A.R.S. § 12-341.01 does not apply here, and  
24 the Defendant's form of judgment should be rejected.

25 **3.** The Defendant's form of judgment cannot cite any evidence or  
26 findings to prove any of the four prerequisites of A.R.S. § 12-349, and therefore  
27 their application for attorney fees and costs pursuant to A.R.S. § 12-349 and  
28 A.R.S. § 12-350 is without merit and should be rejected as well as all the  
proposed rulings in their form of judgment.

At the July 10, 2019 evidentiary hearing the Defendant waived the Court's  
offer to make fact findings and therefore the it is precluded making such  
allegations in their form of judgment.

1 It is also obvious that none of the elements of Rule 11 apply to this case  
2 and as the Defendants failed to comply with the requirements of Rule 11(c) and  
3 did not present any evidence or fact findings to support a form of judgment for  
4 sanctions under Rule 11, nor filing a motion pursuant to Rule 11, and thus, the  
5 request should be denied. Again, the Defendant did not present any evidence to  
6 satisfy A.R.S. §§ 12-349, 12-350 and Rule 11, and waived the opportunity to have  
7 fact finding.

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

13 Plaintiff brought this action in good faith and following the instructions given  
14 by the Arizona Office of Administrative Hearings (“OAH”) to the public:

15 “However, failure by a party to comply with a decision  
16 issued by the OAH may result in the other party seeking  
17 enforcement of the Administrative Law Judge's decision  
18 through a contempt of court proceeding in Superior  
19 Court.”

20 The Plaintiff securing the 2015 administrative law order and the filing of this  
21 complaint seeking to have the HOA comply with statute is only just and  
22 appropriate, and while at the July 10, 2018 evidentiary hearing the Court found  
23 that the Plaintiff had not proven by “clear and convincing evidence” that the HOA  
24 had violated the Administrative Law Order, the Court did not find that Plaintiff had  
25 acted in bad faith, brought a groundless action, or had unreasonably expanded  
26 the proceedings.

#### 27 **MOTION FOR A PROPER FORM OF JUDGMENT**

28 Because the Defendant's form of judgment is not based on actual findings  
and applicable law, the Plaintiff moves that the Court use the Plaintiff's form of

1 judgment as attached as Exhibit A, which is based on the Court's ruling.

2 **REQUEST FOR SANCTIONS**

3 The Defendant's attorneys are not only attempting to have this Court award  
4 the attorney's fees and costs vacated by the Court of Appeals, but are asking the  
5 Court to improperly rule that an award of attorney's fees and costs from this  
6 action can be classified as an assessment lien pursuant to A.R.S. § 33-1256 and  
7 therefore constitute a lien on the Plaintiff's property.

8 A.R.S. § 33-1256. Lien for assessments; priority;  
9 mechanics' and materialmen's liens; notice; applicability

10 A. The association has a lien on a unit for any  
11 assessment levied against that unit from the time the  
12 assessment becomes due. The association's lien for  
13 assessments, for charges for late payment of those  
14 assessments, for reasonable collection fees and for  
15 reasonable attorney fees and costs incurred with respect  
16 to those assessments may be foreclosed in the same  
17 manner as a mortgage on real estate but may be  
18 foreclosed only if the owner has been delinquent in the  
19 payment of monies secured by the lien, excluding  
reasonable collection fees, reasonable attorney fees and  
charges for late payment of and costs incurred with  
respect to those assessments, for a period of one year  
or in the amount of \$1,200 or more, whichever occurs  
first, as determined on the date the action is filed.

20 Such a request is reprehensible, as the Defendant's attorneys have an  
21 obligation under A.R.S. Sup. Ct. Rules, Rule 42, Rules of Prof. Conduct, ER 3.1  
22 not to "bring or defend a proceeding, or assert or controvert an issue therein,  
23 unless there is a good faith basis in law and fact for doing so that is not frivolous,  
24 which may include a good faith and nonfrivolous argument for an extension,  
25 modification or reversal of existing law." Accordingly, the Court should consider  
26 imposing sanctions on the Defendant's attorneys and referring the matter to the  
27 State Bar for disciplinary review.

28 *///*



# Exhibit A

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9 R. L. WHITMER,

10 Petitioner/Plaintiff.

11 **CV2016-055080**

12 v.

13 **JUDGMENT**

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

21 Respondents/Defendant.

22 On July 10, 2019 the court held an evidentiary hearing regarding Plaintiff's  
23 First Amended Verified Complaint for the Enforcement of an Administrative Law  
24 Order No. 14F-H1415004-BFS (filed November 5, 2018). Based on the testimony  
25 and evidence presented, the court found that Plaintiff failed to prove by clear and  
26 convincing evidence that Defendant, Hilton Casitas Homeowners Association,  
27 violated the Administrative Law Judge Decision dated January 7, 2015.

28 **IT IS ORDERED** denying the Plaintiff's complaint and request for finding of  
contempt.

To determine whether an action arose out of contract for purposes of § 12-  
341.01(A), the Court must consider "the nature of the action and the surrounding  
circumstances" and decide if the contract is the "cause or origin of the dispute."

1 *Keystone Floor & More, LLC v. Ariz. Registrar of Contractors*, 223 Ariz. 27, 30, ¶  
2 ¶ 10 and 11 (App. 2009) (citation omitted). The Plaintiff's action was based on  
3 the enforcement of statute A.R.S. § 33-1243.D and A.R.S. 32-2199.02.B, and  
4 does not arise out of contract, Therefore the Court finds that A.R.S. 12-341 does  
5 not apply here.

6 The Defendant did not show any findings of facts to support an award of  
7 attorney's fees and costs under A.R.S. §§ 12-349, 12-350 and Rule 11 and  
8 therefore there is no foundation for their application for an award of attorney's  
9 fees and costs. None of the prerequisites of A.R.S. § 12-349 are present here.  
10 Defendant did not request the court to make findings of facts regarding the award  
11 of attorney's fees and costs pursuant to A.R.S. §§ 12-349, 12-350 and Rule 11  
12 sanctions. When asked by the court at the evidentiary hearing if the parties  
13 desired findings of facts, the Defendant's attorney clearly refused the court's offer.  
14 Accordingly, the Defendant's application for attorney's fees and costs are without  
15 legal and factual foundation.  
16

17 **IT IS FURTHER ORDERED** denying the Defendant's application for  
18 attorney's fees and costs.

19 **IT IS FURTHER ORDERED** that no further matters remaining pending and  
20 that this final judgment is entered herein pursuant to Ariz. R. Civ. P. Rule 54(c).

21 DONE IN OPEN COURT this \_\_\_\_ day of September 2019.  
22  
23

24 \_\_\_\_\_  
25 The Honorable Lisa Daniel Flores  
26 MARICOPA COUNTY SUPERIOR COURT  
27  
28