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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

R.L. WHITMER,

Plaintiff/Plaintiff,

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,

Defendant/Respondent.¹

Case No. CV2016-055080

**REPLY IN SUPPORT OF THE
APPLICATION FOR AWARD OF
ATTORNEYS' FEES AND COSTS**

(Assigned to the Hon. Lisa Flores)

Defendant/Respondent Hilton Casitas Council Of Homeowners (referred to hereinafter as the "Association" or "Defendant HOA") hereby submits this Reply in support of its Application for Award of Attorneys' Fees and Costs ("Application").

In response to the Application, Plaintiff filed separate documents entitled: (1) "Plaintiff's Objection To Defendants' Application For An Award Of Attorney Fees And Costs" and (2) "Plaintiff's Objection To Defendant's Form Of Judgment And Motion For An Alternative From [sic] of Judgment And Request For Sanctions" (collectively referred to as "Response"). For purposes of ease, this Reply will address both filings, including Plaintiff's request for sanctions.

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

1 From the standpoint of the merits of the case, the Application should be granted as there
2 is contractual authority and procedural history to support an award of attorney fees for the
3 Association. Both public policy and the statutory provisions put forth an unqualified purpose
4 - “to mitigate the burden of the expense of litigation to establish a just claim or [] defense.”
5 A.R.S. §12-341.01(B). The fees requested by the Association are not only reasonable², but
6 also legally warranted and supported by requisite evidence.³ As such, the amount of fees
7 requested should be awarded.

8 Despite Plaintiff’s adamant Response, the dispute in this action centered on the unique
9 contractual agreement and relationship between a homeowners association and one of its
10 homeowner members. Much of the Response is based on disingenuous arguments and
11 predicated on misstatements of applicable law. Plaintiff’s efforts to argue other issues is
12 nothing more than an attempt to cloud the underlying realities and should be summarily denied
13 and disregarded by this Court. These arguments and attempts to avoid responsibility for the
14 Association’s incurred legal fees only magnify Plaintiff’s pretenses.

14 **MEMORANDUM OF POINTS AND AUTHORITIES**

15 The Court has considerable discretion in reviewing an application for attorneys’ fees
16 pursuant to *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 571, 694 P.2d 1181, 1185
17 (1985). In evaluating a request for fees, the Court should examine how and why the case
18 developed as it did. *See, SWC Baseline & Crismon Investors, L.L.C. v. Augusta Ranch Ltd.*
19 *P’ship*, 228 Ariz. 271, 285-86, ¶ 57, 265 P.3d 1070, 1084-85 (App. 2011) (party may not object
20 to amount of fees when it bears blame for having escalated the litigation by filing
21 unmeritorious claims).

22 In this case, Plaintiff engaged in extensive litigation. Review of the record alone
23 evidences the extensive litigation. Aside, it is clear there were additional dynamics and issues
24 between the parties. But, to be clear, the extensive litigation in the case was driven by Plaintiff,
25 who aggressively and needlessly ran up costs.

26 _____
27 2 Plaintiff did not object to, or even discuss, the reasonableness of the requested attorneys’ fees in his Response.

28 3 “[B]ased on the testimony and evidence presented” at the July 10TH “Trial[,] regarding Plaintiff’s First Amended Verified Complaint”, the Court “**ORDERED** denying Plaintiff’s complaint and request for finding of contempt.” *See*, Page 1 and Page 3 of the Court’s July 10TH Order, filed as a Minute Entry on July 17, 2019.

1 A key issue in a case such as this is not whether the prevailing party's fees generally
2 seem high, but whether those fees are reasonable under the circumstances. *See, Schweiger v.*
3 *China Doll Rest., Inc.*, 138 Ariz. 183, 188, 673 P.2d 927, 932 (App. 1983). Therefore, to
4 award attorney fees under A.R.S. § 12-341.01, the Court must find that this action arises out
5 of a contract, that Defendants are the successful or prevailing party, that an award of attorney
6 fees is appropriate, and that the requested fees are reasonable. *See, Lexington Ins. Co. v. Scott*
7 *Homes Multifamily Inc.*, No. CV-12-02119-PHX-JAT, 2016 WL 5118316, at *2 (D. Ariz.
8 Sept. 21, 2016).

9 **I. Eligibility for Fees under A.R.S. § 12-341.01.**

10 Defendant HOA is eligible for an award of reasonable attorneys' fees pursuant to
11 A.R.S. § 12-341.01 as Defendants were the successful party in this litigation, and this suit
12 involved a contested action arising out of contract.

13 **a. The Association, and its Board President, Were the "Successful" Party.**

14 Uncontradicted evidence at trial established the Association's current compliance with
15 the court order and statute for the current budget year (2019) and the three (3) prior years as
16 well. As the Association successfully defended each of Plaintiff's claim(s), the Court found
17 that the Association was the "successful party" within the meaning of A.R.S. § 12-341.01.
18 The Response does not dispute that the Association was the successful party.

19 **b. This Action Arises Out Of Contract.**

20 The Response is adamant that "this action as stated many times"... "is for the
21 enforcement of an administrative law order regarding the HOA complying with the statute
22 A.R.S. § 33-1243.D.", and thus, "A.R.S. § 12-341.01 does not apply here". Response at 8:3-
23 6. Although this argument is strained in itself, A.R.S. § 12-341.01 is not so limited. The
24 statute expressly authorizes fees in "any contested action arising out of a contract, express or
25 implied." *Id.* (emphasis added.)

26 To determine whether an action arises out of contract, the Court must examine the
27 nature of the action and the surrounding circumstances. *Chaurasia v. Gen. Motors Corp.*, 212
28 Ariz. 18, ¶ 43, 126 P.3d 165, 173 (App. 2006) (citing *Marcus v. Fox*, 150 Ariz. 333, 335, 723
P.2d 682, 684 (1986)). Even in the absence of an express contract claim, a statutory claim may

1 itself arise “out of a contract” so as to support an award of attorneys’ fees. *See, Sparks v.*
2 *Republic Nat’l Life Ins. Co.*, 132 Ariz. 529, 542-544, 647 P.2d 1127, 1140-1142 (1982).

3 In Arizona, various types of agreements have been held to provide a sufficient
4 contractual basis to support an award of attorneys’ fees under the statute. In addition to
5 conventional contracts, the types of “agreements” that have qualified as express contracts
6 under A.R.S. § 12-341.01(A) have included deeds.⁴ Consequently, the declarations constitute
7 a contract between Hilton Casitas property owners as a whole and individual unit owners.
8 *Ahwatukee Custom Estates Mgmt. Ass’n, Inc. v. Turner*, 196 Ariz. 631, ¶ 5, 2 P.3d 1276, 1279
(App. 2000).

9 As more fully set forth in the Application, the claim(s) alleged by Plaintiff arise from a
10 contract between the Association and each homeowner. Again, much of the Response is
11 predicated on its adamant assertion that this action did not center on the unique contractual
12 relationship between a community association and one of its homeowner members.
13 Nevertheless, Plaintiff’s labeling of the claim as a statutory action does not make it a statutory
14 action.

15 Thus, it is clear from the complaint allegations⁵ that the source of his dispute was, and
16 is, based on the contractual relationship between the parties. Without this contract there is no
17 relationship among the parties whatsoever. *But for* the contract, there would not be a causal
18 relationship in the alleged claims. But for the declaration, neither the administrative law order
19 nor A.R.S. § 33-1243(D) would be applicable... as both are specifically afforded to
20 homeowners.⁶

22 4 *See, Pinetop Lakes Ass’n v. Hatch*, 135 Ariz. 196, 659 P.2d 1341 (App. 1983); *Burke v. Voicestream Wireless Corp., II*,
23 207 Ariz. 393, 87 P.3d 81 (App. 2004) (action to enforce deed restriction arises out of contract); *Cimarron Foothills*
24 *Community Ass’n v. Kippen*, 206 Ariz. 455, 79 P.3d 1214 (App. 2003) (same); *Garden Lakes Community Ass’n, Inc. v.*
Madigan, 204 Ariz. 238, 62 P.3d 983 (App. 2003) (same); *Catalina Foothills Ass’n, Inc. v. White*, 132 Ariz. 427, 646 P.2d
312 (App. 1982) (prevailing party proved absence of deed restrictions).

25 5 “The Declaration is the organic contract between the HOA and the casita/unit owners.” Plaintiff’s First Amended
Complaint at ¶3.

26 6 *See*, A.R.S. § 41-2198.01 (“permits an owner or a planned community organization to file a petition with the Department
27 for a hearing concerning violations of planned community documents or violations of statutes that regulate planned
communities.”); A.R.S. § 32-2199.02(A) “[t]he administrative law judge may [only] order any party to abide by the statute,
condominium documents, community documents or contract provision at issue and may levy a civil penalty on the basis
28 of each violation.”).

1 Here, the Association’s recorded declaration served as the basis, source and origin of
2 Plaintiff’s grievance. The litigants are the same parties to the contract that forms the basis for
3 the attorneys’ fees claim, as applicable to the statute. To now assert otherwise, as Plaintiff
4 does, reflects a misunderstanding of the statutes terms and intent.

5 Contrary to his assertions, neither Arizona law, nor public policy considerations,
6 support a deviation from the plain terms of A.R.S. § 12-341.01(A). *Chaurasia*, 212 Ariz. at
7 18, 126 P.3d at 165. The statute is designed to “mitigate the burden of the expense of litigation
8 to establish a just claim or a just defense.” A.R.S. § 12-341.01(B). The legislature intended
9 that the risk of paying the opposing party’s attorneys’ fees would encourage more careful
10 analysis prior to filing suit. *All-Way Leasing, Inc. v. Kelly*, 182 Ariz. 213, 219, 895 P.2d 125,
11 131 (App. 1994). There is no indication that the legislature intended to specially exempt
12 homeowners from paying attorneys’ fees. *See, Mullins v. S. Pac. Transp. Co.*, 174 Ariz. 540,
13 543, 851 P.2d 839, 842 (App. 1992); *Catalina Foothills Ass’n v. White*, 132 Ariz. 427, 429,
646 P.2d 312, 314 (App. 1982).

14 In short, Plaintiff’s lawsuit (seeking the enforcement of an administrative law decision)
15 is predicated on the recorded declaration and the contractual relationship therein. Thus, the
16 Court should reject Plaintiff’s contention that homeowners like Plaintiff are exempt from
17 paying fees under A.R.S. § 12-341.01(A), simply by bringing lawsuits, under the guise of
18 contempt, yet seeking declaratory and/or injunctive relief.

19 **c. Plaintiff Cites Case Law that, if Analyzed in Light of the Factual and**
20 **Procedural History, Actually Supports the Association’s Request for Fees.**

21 In his Response, Plaintiffs cites and attached a copy of the Arizona Court of Appeals’
22 Memorandum Decision from *William M. Brown v. Terravita Community Ass’n*, CV2005-015360
23 [Ex. 2 to Response]. Even if referenced solely for its persuasive value⁷, the unpublished
opinion only highlights the Association’s claimed basis for an award of attorney fees.

24 In *Brown*, “the administrative proceeding and judicial review action concerned the
25 Association’s statutory obligation to produce records under A.R.S. § 33-1805(A). The fact
26
27

28 ⁷ Arizona Rules of the Supreme Court 111(c).

1 that the Association’s CC&Rs purportedly contain similar terms does not change the nature of
2 the underlying action.” *Id.* at ¶5.

3 Brown expressly analyzed and distinguished itself (and applicable statute) from the
4 holding of *A.H. By and Through White v. Arizona Property and Cas. Ins. Guar. Fund*, 190
5 Ariz. 526, 950 P.2d 1147 (App. 1997). In *A.H.*, “our supreme court held that an action arises
6 out of contract for purposes of § 12-341.01 when a statutory obligation is imputed as part of
7 the parties’ contract.” 190 Ariz. at 530.

8 The statute, analysis and determination thereof in *A.H.* is directly akin to that of this
9 case. Almost exactly analogous to the statute at issue in *A.H.*, A.R.S. § 33-1243(D) is also “a
10 legislated contractual provision [also governing fund obligations] that is statutorily imputed
11 to” and “part of the boilerplate of every” CC&Rs contract, as germane to the homeowners
12 within an association. The budgetary obligations to Plaintiff arose out of the declaration or
13 CC&Rs agreement, as a homeowner.

14 In contrast, the language of A.R.S. § 33-1805(A) - as analyzed in *Brown* - includes no
15 reference at all to any underlying contract or imputed effect thereof. It strictly dictates an
16 association’s requirement to disclose financial and other records of the association, so long as
17 disclosure does not violate any state or law. This exact distinction of *Brown* makes it clear
18 that *A.H.* is more directly on point to the facts here.

19 Here, A.R.S. § 33-1243(D) is the statute at issue. Review of its wording highlights its
20 akin intent to that of *A.H.* [in analyzing the statutory intent A.R.S. § 20-673(C)]. Both indicate
21 the Legislature’s intent to integrate a baseline language and reference the imputed effect as to
22 the parties’ contract, if the same does not provide the same. The statutes involved here and in
23 *A.H.* set a minimum floor as to be imputed in the respective contracts if they do not provide
24 for such. The statute in *Brown* does no such thing, and its holding only highlights the better
25 applied analysis and holding of *A.H.*

26 Therefore, a contempt dispute concerning budgetary obligations as resolved by
27 interpretation of § 33-1243(D) is one that arises from contract. *See, McDowell Mt. Ranch*
28 *Comnty. Ass’n v. Simons*, 216 Ariz. 266, 267, ¶ 1, 165 P.3d 667, 668 (App. 2007)

1 (homeowners' association entitled to award of attorneys' fees to enforce CC&Rs under
2 provision in declaration).

3 **II. Appropriateness in Awarding Attorney Fees.**

4 In determining whether to exercise discretion to award attorneys' fees under A.R.S. §
5 12-341.01(A), the Court should consider the following six (6) factors:

- 6 (1) the merits of the unsuccessful parties' claim or defense;
- 7 (2) whether litigation could have been avoided or settled;
- 8 (3) whether assessing fees against the unsuccessful party would cause extreme
9 hardship;
- 10 (4) whether the successful party prevailed with respect to all relief sought;
- 11 (5) the novelty of the issues; and
- 12 (6) whether the award will overly deter others from bringing meritorious suits.

13 *Associated Indem. Corp.*, 694 P.2d at 1184.

14 The Court will exercise its discretion in awarding attorneys' fees to the Association
15 under A.R.S. § 12-341.01 as each of the *Associated Indemnity* factors weigh in the Defendant
16 HOA's favor. Accordingly, the Association is entitled to its attorney fees under § 12-
17 341.01(A) as a matter of equity and basic fairness.

18 (1) Plaintiff's Claims Were Not Meritorious.

19 The first factor, the merits of the unsuccessful party's claims, weighs in favor of an
20 award of attorneys' fees. In adopting A.R.S. § 12-341.01, the "legislature intended that the
21 risk of paying the opposing party's attorneys' fees would encourage more careful analysis
22 prior to filing suit." *Chaurasia*, 212 Ariz. at 18, 126 P.3d at 176.

23 In this case, the Court denied Plaintiff's "complaint and request for finding of
24 contempt" ... "based on the testimony and evidence presented" at trial. *See*, Page 3 of the
25 Court's July 10TH Order, filed as a Minute Entry on July 17, 2019. What is more, Plaintiff
26 stipulated to such compliance for 2019, 2018 and 2017.

27 Moreover, requesting future injunctive relief (as Plaintiff did) could only be
28 characterized as an "anticipatory contempt."⁸ Requesting such not-ripe relief is unnecessary
because contempt proceedings at the time of an actual violation would suffice to achieve the

⁸ *See, United States v. Bryan*, 339 U.S. 323, 341, 70 S.Ct. 724 (1950) ("There is, in our jurisprudence, no doctrine of 'anticipatory contempt.'").

1 proper ends of a contempt judgment. The same can be said as to the converse – an order of
2 contempt is not only moot, but also unnecessary, if current compliance is shown.

3 Had Plaintiff engaged in careful analysis here, he may have discovered that there was
4 no admissible evidence that any violation, breach, and/or contempt ever existed.

5 (2) The Litigation Could Have Been Avoided or Settled.

6 The Response highlights Plaintiff’s lack of effort in attempting to pursue or otherwise
7 resolve the complaint via non-litigation solutions.

8 (3) No Evidence that Assessing Fees Would Cause Extreme Hardship.

9 The Response puts forth no evidence supporting a finding that awarding attorneys’ fees
10 would cause Plaintiff extreme hardship. For this factor to weigh against awarding fees, the
11 party asserting financial hardship “has the burden of coming forward with *prima facie*
12 evidence of financial hardship.” *Woerth v. City of Flagstaff*, 808 P.2d 297, 305 (App. 1990)
13 (finding that the party asserting financial hardship must “present specific facts by affidavit or
14 testimony”). As Plaintiff has failed to carry his burden of proof, this factor weighs in favor of
an award of attorneys’ fees.

15 (4) Defendant HOA Prevailed in Full.

16 The Court’s July 10th ruling finds that this factor weighs in favor of an award.

17 (5) Legal Issues Were Not Novel.

18 Plaintiff pursued basic, straight-forward claims, albeit not supported by evidence and
19 were not worthy of presentation for neutral decision.

20 At trial, it become clear that the crux of Plaintiff’s grievance was based on unsupported
21 contentions to re-define the term “budget” as provided for in A.R.S. §33-1243(D).
22 Additionally, Plaintiff’s requested relief was not supported in law or fact. Particularly, an
23 alleged contemnor’s obedience of the order of the court is an absolute defense to a contempt
24 claim and negates a finding and order for contempt relief. *See, United States v. Powers*, 629
25 F.2d 619. 627 (9th Cir. 1980). “Any sanction that is imposed for civil contempt must be
26 designed to coerce the person to do or to refrain from doing some act”, so if compliance is
27 currently evident and undisputed, then no relief can be granted. *Stoddard v. Donahoe*, 224
28 Ariz. 152, 157, 228 P.3d 144, 149 (App. 2010).

1 (6) An Award Would Not Discourage Tenable Claims.

2 Rather than presenting a tenable claim, Plaintiff gambled on unsupported claims which
3 were devoid of evidence. Plaintiff's claim(s) and the positions he took were not well thought
4 out, and as such, an award of fees will not deter those with *tenable* claims from pursuing them.
5 *See, 11333, Inc. v. Certain Underwriters at Lloyd's, London*, No. CV-14-02001-PHX-NVW,
6 2018 WL 1570236, at *5 (D. Ariz. Mar. 30, 2018) (“To weigh against a fee award for novelty,
7 the ultimately unmeritorious claims need to be serious in the fabric of legal doctrine, supported
8 by evidence, and worthy of presentation for neutral decision.”).

9 **III. Plaintiff's Remaining Arguments are Baseless.**

10 Plaintiff argues that the Court of Appeals' remand of the case precludes Plaintiff from
11 securing an award now for those previously-awarded, yet remanded, attorney fees. The actual
12 remand decision, however, does not support Plaintiff's contention, but rather serves to bolster the
13 Association's request for fees

14 Plaintiff decisively states in his Response the following: “The Court of Appeals' ruling
15 put an end the superior court's award of attorneys fees and costs and the Defendant is precluded
16 from making a claim regarding past fees and costs.” Response at 3:27 – 4:1. Plaintiff's broad
17 assertion is based on the Court of Appeals' conclusion in ¶19, but fails to acknowledge the
18 underlying reasoning articulated in ¶16 of the Memorandum, entitled “Attorney's Fees in
19 Superior Court” which states in its entirety:

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

29 The Court of Appeals' reasoning above makes clear and logical sense - the remand to
30 the trial court to determine the merits of the case - implicitly nullifies any previous “prevailing
31 party” determination. Neither the Court of Appeals, nor its Memorandum, take any further
32 stance as to any eventual basis or award of attorneys' fees. And, “[i]n light of this disposition

1 reversing dismissal, [the Court] vacate[d] the superior court's award and d[id] not further
2 address the issue of fees in superior court." *Id.*

3 Plaintiff's narrowed citation, yet boundless application, exemplify Plaintiff's
4 (mis)application and pleading tactics. Such sweeping contentions, coupled with conclusory
5 distortions thereof, are not proper arguments but further support and justify bad faith sanctions.

6 **V. Additionally, Defendant HOA is Entitled to An Award of its Attorneys' Fees Pursuant to A.R.S. §§12-349 and 12-350.**

7 In his Response, Plaintiff continues to misconstrue the pertinent facts related to the
8 subject fee Application. Rather than addressing viable and meritorious legal arguments, the
9 Response makes inflammatory assertions and attacks the Association's counsel.

10 Remarkably, Plaintiff complained of overspending of the Association's budgets, yet
11 now argues against the Association's right to recoup its incurred legal fees at Plaintiff's behest.
12 All legal authority supports an award of fees in the Association's favor.

13 **CONCLUSION**

14 Based on the above, alone, Defendant HOA asserts that it be entitled to a full award of
15 its incurred attorney's fees pursuant to relevant statutory law and Arizona Rules of Civil
16 Procedure. For the same reasoning, Defendant HOA also requests that Plaintiff's request for
17 sanctions be summarily denied.

18 DATED this 16th day of September 2019.

19 **SHAW & LINES, LLC**

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27
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1 ORIGINAL submitted for electronic filing
2 this 16th day of September, 2019, with:

3 Hon. Lisa Flores
4 Maricopa County Superior Court,
5 Northeast Regional Court Center
6 18380 North 40th Street
7 Phoenix, Arizona 85032

8 COPY of the foregoing mailed electronically
9 this 16th day of September 2019, to:

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