

1 TIMOTHY H. BARNES, P.C.
2 428 East Thunderbird Road, #150
3 Phoenix, Arizona 85022
4 (602) 492-1528 Direct
5 tim@thbpc.com

6 Timothy H. Barnes (SBN 003373)
7 Attorney for Plaintiffs

8 **SUPERIOR COURT OF MARICOPA COUNTY, ARIZONA**

9 LINDA W. SWAIN, an individual; and EILEEN
10 T. BRESLIN, an individual,

11 Plaintiffs

12 vs.

13 TTLC AHWATUKEE LAKES INVESTORS,
14 LLC, an Arizona limited liability company,

15 Defendant.

16 Case No. CV2014-051035

17 **PLAINTIFFS' REPLY IN**
18 **SUPPORT OF APPLICATION**
19 **FOR AWARD OF ATTORNEYS'**
20 **FEES AND COSTS AGAINST**
21 **TTLC AHWATUKEE LAKES**
22 **INVESTORS, LLC**

23 (Assigned Hon. John R. Hannah, Jr.)

24 **1. Plaintiffs made a prima facie showing of reasonable attorneys' fees.**

25 Defendant TTLC Ahwatukee Lakes Investors, LLC's ("Defendant") Objection to
26 Plaintiffs' Application for Attorneys' Fees and Costs ("Defendant's Objection") that
27 Plaintiffs have not met their *prima facie* showing that their attorneys' fees are reasonable
28 (Defendant's Objection, 1:25-27) incorrectly presupposes all attorneys' fees applications
filed in Arizona are mandated to break out by description and time each individual task or
individual legal service sought in an attorneys' fees application. There is no such local or
statewide requirement and Defendant's Objection does not reflect any authority
establishing such a requirement. Instead, Plaintiffs met their burden of a *prima facie*
showing that the requested attorneys' fees were reasonable by submitting all monthly
invoices with detailed descriptions of legal services provided based upon hourly rates
which are not challenged as unreasonable.¹ Defendant chose not to comment on any of
Plaintiffs' counsel's detailed description of attorneys' fees that Defendant believed may

¹ Defendant's Objection, 2:4-5 ("TTLC does not dispute the billing rate charged").

1 have been unreasonable – which would have been possible even without individually
2 described time entries for each of the legal services provided.

3 In the only Arizona decision cited by Defendant regarding *prima facie* showing of
4 reasonableness, the attorney for the prevailing party had taken a commercial promissory
5 note collection matter on a contingent fee of twenty-five percent (25%) of the total amount
6 of the judgment and had not kept any contemporaneous time records of any legal services
7 the attorney had provided on the matter. Because he had not kept time records, the
8 attorney estimated he had spent approximately 100 hours working on the case and his
9 hourly billing rate was \$300/hour. *Geller v. Lusk*, 230 Ariz. 624, 285 P.23d 972, 974
10 (App. 2012). The appeals court stated the plaintiff did not present a detailed affidavit
11 describing legal services provided from contemporaneous billing records “or present any
12 other factors to support the reasonableness of the its requested fees and on which the court
13 could base an assumption of reasonableness”. *Id.* at P.3d 977. Based on a principal
14 judgment of \$380,000.00, plus \$320,394.92 in late charges, penalties and interest on the
15 underlying promissory note, the trial court awarded \$175,098.73 in attorneys’ fees which
16 was the amount of contingent fee in the agreement.

17 On appeal, because the promissory note provided for recovery of all attorneys’ fees,
18 the Court of Appeals analyzed the reasonableness issue using the standards in *McDowell*
19 *Mountain Ranch Community v. Simons*, 216 Ariz. 266, 165 P.3d 667 (App. 2007). The
20 *Geller v. Lusk* court noted that even contingent attorneys’ fees must be analyzed for
21 reasonableness pursuant to ER 1.5(a) of Rule 42, Arizona Supreme Court Rules, by
22 showing some evidence of reasonableness of the ultimate fee.” *Geller v. Lusk*, at P.3d
23 976-77. The Arizona Court of Appeals found the successful plaintiff “failed to provide
24 any evidence to support the requested amount of fees based on their alternative of hours
25 expended by counsel.” *Id.* at P.3d 977. On that record, the Court of Appeals remanded
26 the matter back to the trial court for a determination of the amount of reasonable attorneys’
27 fees to award the successful plaintiff.
28

1 Unlike the *Geller v. Lusk* case, Plaintiffs submitted the Declaration of Timothy H.
2 Barnes (“Barnes Declaration”) and copies of each of the actual monthly invoices (which
3 the Barnes Declaration stated were based on contemporaneous time records). Barnes
4 Declaration, ¶¶ 4-5. Unlike time entries of some attorneys described in the *Arizona*
5 *Attorneys’ Fees Manual* as being written in a “haphazard, uninformative fashion”², the
6 time entries in the monthly invoices attached to the Barnes Declaration give the Court a
7 full descriptive understanding of legal services provided to Plaintiffs for each timekeeper
8 on each day a timekeeper provided legal services. Respectfully, the time entries in the
9 Plaintiffs’ monthly invoices more than meet the suggestion in *Arizona Attorneys’ Fees*
10 *Manual* § 1.6.3 that “[a]n attorney should record time with an eye towards detail and
11 possible apportionment³, but also should recognize that the recording of time and work
12 in an imperfect process.”

13 Defendant’s statement that it is “impossible to determine whether the time spent on
14 each specific task was reasonable” in the Plaintiffs’ time entries in each monthly invoice
15 overstates its inability to review and comment on the reasonableness of any described
16 legal service. Defendant’s description of Plaintiffs’ time entries as “block-billing”
17 mischaracterizes how those time entries. While some time entries are lengthy, that is
18 because the description of legal services provided gives a thorough account of the various
19 legal services provided by a timekeeper on that day. Those legal service descriptions are
20 not cryptic but provide a comprehensive explanation of legal services provided.

21 In § 1.8 (Responding to a Fee Request) of the *Arizona Attorneys’ Fees Manual*, the
22 author advises “[t]he party responding to an application should consider whether the time
23 entries are sufficiently detailed, [] accurate, [] and non-duplicative”. Without debate,
24

25
26 ² *Arizona Attorneys’ Fees Manual*, § 1.6.3 (Manner of Recording Time), pg. 1.5.

27 ³ “Apportionment occurs when a court awards fees for work related only to certain aspects of
28 different claims for relief that are based on different facts and legal theories.” *Arizona Attorneys’*
Fees Manual, § 1.7 (Apportionment).

1 Plaintiffs’ time entries are detailed, but Defendant chose not to comment on whether it
2 found any entries inaccurate or duplicative. There is no reason Defendant could not have
3 taken the time go through the nearly 120 pages of time entries and comment on what
4 appeared to Defendant to be any unreasonable or troubling time entry.

5 **2. Plaintiffs are entitled to recovery of non-taxable costs.**

6 Defendant asserts the language in paragraph 4 of the 1992 Covenants, Conditions
7 and Restrictions “was intended to mean regular taxable court costs”, not the non-taxable
8 court costs that Arizona case authority has allowed since *Ahwatukee Custom Estates*
9 *Management Association v. Bach*, 193 Ariz. 401, 404, 973 P.2d 106, 109 (1999). The
10 1992 Covenants, Conditions and Restrictions paragraph 4 states “such Benefitted Person
11 shall be entitled to reimbursement of all court costs and reasonable attorneys’ fees from
12 said defaulting owners . . .” The phrase “all court costs” is broad and gives no indication
13 it was intended to be limited.

14 Language comparable to that in paragraph 4 has been construed to allow the
15 recovery of non-taxable costs. In *American Power Products, Inc. v. CSK Auto, Inc.*, ___
16 Ariz. ___, 396 P.3d 600 (2017), the contract phrase “reasonable attorneys’ fees and costs”⁴
17 was the basis for allowing a recovery of non-taxable costs. *Id.* at P.3d 607. In *A. Miner*
18 *Contracting, Inc. v. Toho-Tolani County Improvement District*, 233 Ariz. 249, 311 P.2d
19 1062 (App. 2013), the contract phrase “All costs and charges incurred”⁵ was the basis for
20 allowing a recovery of non-taxable costs. *Id.* at P.3d 1075.

21 A.R.S. § 12-332(A)(6) allows recovery of “[o]ther disbursement that are made or
22 incurred pursuant to an order or *agreement of the parties*.” The plain language of para-
23 graph 4 – “all court costs” – constitutes an “agreement of the parties” and is not limited to
24 only those costs which are deemed “taxable” under A.R.S. § 12-332. If a limitation was
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27 ⁴ *Id.* at P.3d 603.

28 ⁵ *Id.* at P.3d 1070.

1 intended, the limitation could have been added to restrict the scope of costs as provided in
2 A.R.S. § 12-332(A)(1) - (5) and (B).

3 **3. Plaintiffs are entitled to recovery of cost of trial exhibits.**

4 Defendant's objection to Plaintiffs' recovery of the costs for copies of trial exhibits
5 (Defendant's Objection, 2:14-27) overlooks A.R.S. § 12-332(A)(6), which allows
6 recovery of "[o]ther disbursement that are made or incurred pursuant to an order". *See*
7 *also Arizona Attorneys' Fees Manual* § 9.3.2.6 (Disbursements Made or Incurred Pursuant
8 to an Order of the Court or Agreement of Parties), pg. 9-10. The Court's April 20, 2017,
9 Bench Trial Reset ordered that parties "deliver all trial exhibits along with list of exhibit
10 descriptions to the clerk of this division" and further ordered "[a]ll trial exhibits shall have
11 been exchanged prior to that time".

12 **4. Conclusion**

13 For all the reasons set forth above and in Plaintiffs' Application for Award of
14 Attorneys' Fees and Costs Against TTLC Ahwatukee Lakes Investors, LLC, Plaintiffs
15 respectfully request they be awarded the reasonable attorneys' fees, non-taxable costs and
16 taxable costs sought herein.

17 Dated this 22nd day of February 2018.

18 TIMOTHY H. BARNES, P.C.

19 By /s/ Timothy H. Barnes (SBN 003373)

20 Timothy H. Barnes

21 *Attorney for Plaintiffs*

22 Original of the foregoing e-filed and
23 emailed this 22nd day of February 2018, to:

24 Chris R. Baniszewski
25 Warner Angle Hallam Jackson Formanek PLC
26 2555 East Camelback Rd., Suite 800
27 Phoenix, Arizona 85016
28 Attorneys for TTLC Ahwatukee Lakes Investors, LLC

/s/ Carol J. Clark