



1 Plaintiff made a claim for salary continuation. Defendant recommended that  
2 American Express deny Plaintiff's claim. American Express agreed with Defendant's  
3 recommendation and denied the claim.

4 Plaintiff then initiated the instant action alleging claims for breach of contract and bad  
5 faith, and sought punitive damages. She did not sue American Express.

6 After a bench trial, the District Court found in favor of Plaintiff and awarded Plaintiff  
7 \$9,128.07 for breach of a contract, \$20,000 for the tort of bad faith, and \$30,000 in punitive  
8 damages. (Doc. # 63 at 37-38.)

9 Both sides appealed. The Ninth Circuit reversed, holding that Judge Silver had  
10 improperly ruled that Defendant had waived its defense that it could not be liable for the tort  
11 of bad faith because it was just the administrator—not an insurer—of the salary-continuation  
12 plan. (Doc. # 106 at 3.)

13 Upon remand, the Court ruled as a matter of law for Defendant on Plaintiff's claims  
14 for bad faith and, further, any claim for punitive damages. (Doc. # 147.)

15 After the Court issued this order, American Express paid Plaintiff the salary-  
16 continuation benefits she was seeking, with interest—\$9,128.07. This made Plaintiff's claim  
17 for breach of contract moot. On April 14, 2009, the Court entered judgment for the  
18 Defendant. (Doc. # 157.) Defendant timely filed for attorneys' fees. (Doc. # 159.)

## 19 **II. DISCUSSION**

20 Generally, state statutes allowing for the recovery of attorneys' fees and related non-  
21 taxable expenses are substantive for *Erie* purposes. "In an action where a district court is  
22 exercising its subject matter jurisdiction over a state law claim, so long as 'state law does not  
23 run counter to a valid federal statute or rule of court, and usually it will not, state law denying  
24 the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the  
25 state, should be followed.'" *MRO Commc'ns, Inc. v. AT&T Co.*, 197 F.3d 1276, 1281 (9th  
26 Cir. 1999) (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 n.31  
27 (1975) (quoting 6 *Moore's Federal Practice* § 54.77[2] (2d ed.1974))). Accordingly, the  
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1 Court will apply state law to Defendant’s request for attorneys’ fees and related non-taxable  
2 expenses.

3 **A. Award of Attorneys’ Fees Under Arizona Law**

4 A.R.S. § 12-341.01 provides, in part: “In any contested action arising out of a  
5 contract, express or implied, the court may award the successful party reasonable attorney  
6 fees.” A.R.S. § 12-341.01(A). Therefore, to award Defendant attorneys’ fees under this  
7 statute, this Court must find that Defendant is the “successful party,” that the action arises  
8 out of a contract, that the award of attorneys’ fees is appropriate, and that the fees are  
9 reasonable.

10 **1. Successful Party**

11 Under Arizona law, to determine whether a party is a successful party, the Court  
12 considers the “totality of the litigation.” *All Am. Distrib. Co. v. Miller Brewing Co.*, 736 F.2d  
13 530, 532 (9th Cir. 1984). The Court has discretion when determining who is the successful  
14 party and “the fact that a party does not recover the full measure of relief it requests does not  
15 mean it is not the successful party.” *Sanborn v. Brooker & Wake Prop. Mgmt., Inc.*, 874 P.2d  
16 982, 987 (Ariz. Ct. App. 1994).

17 In the present case, Defendant claims to be the successful party because Defendant  
18 prevailed on the bad faith and punitive damages claims and the breach of contract claim was  
19 made moot.<sup>1</sup> Plaintiff argues that because she actually did recover the full salary-  
20 continuation amount, with interest, Defendant was not the successful party.

21 Defendant’s motion characterizes the salary-continuation payment that Plaintiff  
22 received both as “the result of a business decision by American Express” and as an  
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25 <sup>1</sup>Defendant claims that the Court should also consider Plaintiff’s claims for breach of  
26 contract, bad faith and punitive damages related to long-term disability benefits. The Court  
27 granted Defendant summary judgment on these claims. (Doc. # 32.) But as Defendant only  
28 seeks attorneys’ fees for work performed following remand, the Court will limit its analysis  
to the claims then at issue.

1 “insubstantial” recovery “compared to the value of the claims” upon which Defendant  
2 prevailed. (Doc. # 165 at 5, 7.) If it were an insubstantial recovery *from Defendant*, it would  
3 be sufficient to make Plaintiff the successful party rather than Defendant. *Sanborn*, 874 P.2d  
4 at 987; *see also Drozda v. McComas*, 887 P.2d 612, 615 (Ariz. Ct. App. 1994) (party who  
5 obtains judgment for only a part of a demand or claim is “successful”). But Defendant’s  
6 former characterization is correct: it was American Express—a non-party—and not  
7 Defendant who paid Plaintiff’s salary continuation. This distinction is vital because the  
8 Arizona Court of Appeals has concluded that the wording of A.R.S. § 12-341.01 indicates  
9 that the “legislature intended to allow recovery of costs and attorney’s fees when a party  
10 succeeds in the particular proceeding, which is the ‘action,’ without regard to whether the  
11 substantive allegations presented therein were disposed of at that time.” *Mark Lighting*  
12 *Fixture Co. v. Gen. Elec. Supply Co.*, 745 P.2d 123, 129 (Ariz. Ct. App. 1986), vacated on  
13 other grounds, 745 P.2d 85 (Ariz. 1987). Here, the Court entered judgment for Defendant  
14 on all of Plaintiff’s claims. Plaintiff’s recovery from non-party American Express does not  
15 lessen Defendant’s success in *this action*. Thus, the Court finds that Defendant is a  
16 “successful party” within the meaning of A.R.S. § 12-341.01.

## 17 **2. Arising Out of a Contract**

18 Regarding the second element, this Court found that Defendant, as a mere  
19 administrator of the salary-continuation plan, was not a party to the underlying contract. Yet  
20 under Arizona law, defendants are entitled to recover attorneys’ fees when sued for breach  
21 of contract even if the court finds that the contract on which the plaintiff relied does not  
22 actually exist. *Chevron U.S.A. Inc. v. Schirmer*, 11 F.3d 1473 (9th Cir. 1993); *Berthot v.*  
23 *Sec. Pac. Bank Of Ariz.*, 823 P.2d 1326, 1332 (Ariz. Ct. App. 1991) (same). Plaintiff also  
24 brought claims for bad faith, but, because that tort requires the existence of a special  
25 contractual relationship, the entire litigation still “arises out of a contract” within the meaning  
26 of A.R.S. § 12-341.01. *See Sparks v. Republic Nat’l Life Ins. Co.*, 647 P.2d 1127, 1141-42  
27 (Ariz. 1982).

1                                   **3. Appropriateness**

2           The third element to consider is the permissive nature of the language of the statute:  
3   “the court *may* award the successful party reasonable attorney fees.” A.R.S. § 12-341.01(A)  
4   (emphasis added). There is no presumption in favor of granting attorneys’ fees in contract  
5   actions, it is a matter within the discretion of the court. *Associated Indem. Corp. v. Warner*,  
6   694 P.2d 1181, 1183 (Ariz. 1985). The amount of the award is also within the court’s  
7   discretion, provided that “such award may not exceed the amount paid or agreed to be paid.”  
8   *Id.* (quoting A.R.S. § 12-341.01(B)). When exercising this discretion, courts should  
9   consider: (i) the merits of the defense or claim presented by the unsuccessful party; (ii)  
10   whether the litigation could have been settled or avoided; (iii) whether assessing attorneys’  
11   fees will cause an extreme hardship; (iv) whether the successful party received all relief  
12   sought; (v) the novelty of the legal questions involved; (vi) whether the claims or defense  
13   have been adjudicated in Arizona; and (vii) whether the award of attorneys’ fees would  
14   discourage other parties with tenable claims from litigating contract issues for fear of  
15   incurring liability for substantial amounts of attorneys’ fees. *Id.* at 1184. “The weight given  
16   to any one factor is within the Court’s discretion.” *Moedt v. Gen. Motors Corp.*, 60 P.3d 240,  
17   246 (Ariz. Ct. App. 2000).

18                                   *I. Merits of the claim*

19           The Court notes that “[a] claim can have merit, even if it does not succeed.” *Scottsdale*  
20   *Mem’l Heath Sys., Inc. v. Clark*, 791 P.2d 1094, 1099 (Ariz. Ct. App. 1990). While the  
21   Plaintiff initially won judgment, upon remand this Court granted judgment as a matter of law  
22   to Defendant on all issues. Therefore, the Court finds that the first *Associated Indemnity*  
23   factor does not weigh against granting fees.

24                                   *ii. Settlement or avoidance*

25           There are multiple points where this litigation could have been settled. Defendant  
26   points to offers of judgment for \$30,000 and \$20,000 served on Plaintiff before appeal. In  
27   light of the fact that Defendant’s own brief claims that the potential value of Plaintiff’s  
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1 claims could have run into the millions, these offers do not show that the litigation could  
2 have easily been settled.

3         However, the later stages of this litigation could have been avoided. Upon remand  
4 from the Ninth Circuit—with Plaintiff’s chances of success much diminished—Defendant  
5 offered mediation, but Plaintiff declined. Following this Court’s ruling on the bad faith  
6 claims and American Express’ decision to pay the full salary-continuation amount,  
7 Defendant’s counsel asked Plaintiff to stipulate that the case was moot, and a trial was not  
8 necessary. Plaintiff’s counsel agreed that the case was moot, but Plaintiff refused to stipulate  
9 to it. Thus, for the period after remand, this factor weighs in favor of granting fees.

10                                 *iii. Extreme hardship*

11         Plaintiff alleges that an award of attorneys’ fees would present an extreme hardship.  
12 (Doc. # 168 at 3.) Plaintiff has provided an affidavit regarding her limited financial situation  
13 accompanying her Motion for Permission to Appeal In Forma Pauperis. (Doc. # 169.)  
14 Although the Court recognizes Plaintiff’s financial hardship, this factor does not control.  
15 Plaintiffs without significant resources must not be free to pursue frivolous contract  
16 litigation. For this reason, the Court elects to give this factor very little weight. *See Moedt*,  
17 60 P.3d at 246 (“The weight given to any one factor is within the Court’s discretion.”).

18                                 *iv. Successful party receives all relief sought*

19         As discussed above, Defendant prevailed on all issues in this action. Therefore, this  
20 factor weighs in favor of granting fees.

21                                 *v & vi. Novel legal question; not previously adjudicated in Arizona*

22         Defendant argues that Plaintiff presentation of a novel legal question never before  
23 litigated weighs in favor of granting attorneys’ fees. (Doc. # 165 at 7.) Specifically,  
24 Defendant claims that no plaintiff in Arizona or anywhere else had made a claim of bad faith  
25 against an administrator of a salary-continuation plan. This factor weighs in favor of  
26 granting fees.



1 the parties providing otherwise. *Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v. Bach*, 973  
2 P.2d 106, 107-09 (Ariz. 1999) (en banc) (holding that expenses incurred for photocopying  
3 and long-distance telephone calls are not recoverable either as costs or as part of an award  
4 for attorneys' fees). Therefore, the Court will not award Defendant any costs.

5 **III. CONCLUSION**

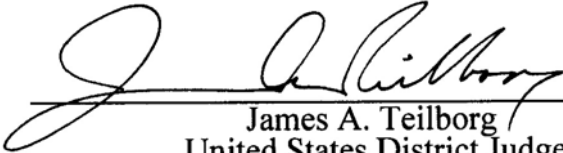
6 Defendant is a successful party in this action, and the action arose from contract  
7 within the meaning of A.R.S. § 12-341.01. Upon consideration of the *Associated Indemnity*  
8 factors, the Court will exercise its discretion to award attorneys' fees. The Court also finds  
9 the hourly rate and number of hours expended by Defendant's attorneys to be reasonable.

10 **IT IS THEREFORE ORDERED** that Defendant's Motion for Attorneys' Fees and  
11 Related Non-Taxable Expenses (Doc. # 159) is **GRANTED IN PART** and **DENIED IN**  
12 **PART**. Defendant's request for an award of attorneys' fees is **GRANTED** as follows: The  
13 Court awards Defendant \$30,928.40 in attorneys' fees.

14 **IT IS FURTHER ORDERED** that Defendant's request for an award of related non-  
15 taxable expenses is **DENIED**.

16 **IT IS FURTHER ORDERED** that the Clerk of the Court shall enter judgment on  
17 this Order.

18 DATED this 29th day of October, 2009.

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22 James A. Teilborg  
United States District Judge