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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Medical Protective Company,

No. CV-05-02924-PHX-JAT

10 Plaintiff,

ORDER

11 v.

12 Herman Pang, et al.,

13 Defendants.
14

15 Pending before the Court is Defendant Herman Pang's motion for attorneys' fees
16 (Doc. 329), filed pursuant to the Ninth Circuit Court of Appeals mandate (Doc. 336)
17 (opinion published at *Med. Protective Co. v. Pang*, 740 F.3d 1279, 1284 (9th Cir. 2013)).

18 **I. BACKGROUND**

19 The Ninth Circuit has succinctly summarized the factual and procedural
20 background underlying this claim:

21 Pang bought medical malpractice insurance from the Medical
22 Protective Company ("Medical Protective"). In June 2002, Pang applied for
23 a substantial increase in his malpractice coverage, and disclaimed that he
24 had knowledge of any claims or potential claims against him. Medical
Protective approved the coverage increase on July 3, 2002. On July 25,
2002, Pang received notice that a patient, Kymberli Williamson, was suing
him for malpractice in Arizona state court (the "*Williamson* suit").

25 On September 21, 2005, Medical Protective filed this action in the
26 District of Arizona seeking rescission of the coverage increase on the
27 ground that Pang allegedly new of, but failed to disclose, Williamson's
pending malpractice claim when he applied for the increase. Pang filed a
28 counterclaim against Medical Protective for bad faith. Both Medical
Protective and Pang moved for summary judgment, and the district court
granted each party's motion in part. The court identified six unresolved

1 issues—relating to both Medical Protective’s rescission claim and Pang’s
2 counterclaim—that remained for trial.

3 Before the trial in the federal action, Pang obtained a favorable jury
4 verdict in the *Williamson* suit. Williamson then appealed the verdict to the
5 Arizona Court of Appeals. On March 25, 2008, while Williamson’s appeal
6 was pending, Pang and Medical Protective alerted the district court that
7 they had reached a settlement in their coverage dispute. According to the
8 terms of the settlement, both Medical Protective’s rescission claim and
9 Pang’s bad faith counterclaim would be dismissed without prejudice.
10 Depending on the outcome of Williamson’s appeal, the parties were
11 permitted either to reopen the action or to dismiss it with prejudice.

12 At the parties request, the district court entered an order on March
13 26, 2008, dismissing both claims without prejudice (the “March 26 Order”).
14 The March 26 Order specified that, no later than thirty days after the
15 Arizona Court of Appeals issued a mandate in the *Williamson* suit,

16 one of the parties herein shall file a motion in this action
17 requesting: (1) that the Court enter a final order dismissing
18 this action with prejudice; or (2) requesting that this action be
19 re-opened for final pre-trial conference and trial; or (3)
20 requesting that the non- final order of dismissal without
21 prejudice and the Court’s jurisdiction continue until after re-
22 trial of the Williamson case and termination of all appeals
23 therefrom; or (4) such other orders as may be appropriate.

24 If neither party filed such a motion, the March 26 Order would
25 “automatically become a self-executing final order of dismissal with
26 prejudice thirty-one (31) days after the filing of such mandate.”

27 Williamson eventually succeeded on her appeal. The Arizona Court
28 of Appeals overturned the jury verdict in favor of Pang and remanded the
case for a new trial.¹ The Arizona Supreme Court subsequently denied
Pang’s petition for review. As a result, on February 25, 2010, the Arizona
Court of Appeals issued its mandate in the *Williamson* suit.

Neither Pang nor Medical Protective moved to re-open the federal
action within thirty days after the issuance of the mandate. As a
consequence, the March 26 Order became final according to its terms, and
the action was dismissed with prejudice.

The parties filed four post-judgment motions following the final
order of dismissal. First, Pang moved for \$126,590.93 in attorney’s fees
pursuant to Section 12-341.01, a statute granting courts discretion to award
attorney’s fees to the “successful party” in suits arising from contract. The
district court denied Pang’s fee motion, holding that there was “no
‘successful party’ within the meaning of Section 12-341.01” because the
court had “never resolved the merits of either party’s claims.” *Med.
Protective Co. v. Pang*, 271 F.R.D. 624, 628 (D. Ariz. 2010). The court
determined that the case had been dismissed with prejudice based on a
voluntary settlement agreement, and held that “[s]uch a result does not
produce a ‘successful party’ within the meaning of Section 12-341.01.” *Id.*

¹ Medical Protective ultimately settled the *Williamson* suit on Pang’s behalf.

1 Second, Pang sought \$9,000.76 in costs. After the Clerk of the Court
2 refused to award costs because no final judgment had been issued in the
3 case, the district court denied Pang’s motion to “revise” the Clerk’s denial
4 of its Bill of Costs, reasoning that Local Rule 54.1(d) governed Pang’s
5 request, and that provision made costs unavailable in cases terminated by
6 voluntary settlement. Alternatively, the Court denied Pang’s request for
7 costs for the same reasons that it denied Pang’s request for fees.

8 Third, one week after Pang filed his first fee motion, Medical
9 Protective moved to amend the judgment under Federal Rule of Civil
10 Procedure 59(e) or to vacate the judgment under Federal Rule of Civil
11 Procedure 60(b). The district court denied Medical Protective’s motion. *Id.*
12 at 627, 628.

13 Fourth, after the district court denied Medical Protective’s motion,
14 Pang filed a second motion for attorney’s fees—this time seeking
15 compensation for legal expenses incurred in opposing Medical Protective’s
16 post-judgment motion to set aside the March 26 Order. Pang argued that, as
17 the successful party on the post-judgment motion, he was entitled to
18 attorney’s fees pursuant to Section 12-341.01. The district court denied
19 Pang’s second motion because it did not “trigger[] a new action arising out
20 of contract”; consequently, the court’s prior holding that Pang was not the
21 successful party also barred Pang from recovering attorney’s fees on his
22 second fee motion. *Med. Protective Co. v. Pang* [*“Pang I”*], 2011 WL
23 3903096, at *4 (D. Ariz. 2011).

24 Pang timely appealed.

25 *Med. Protective Co. v. Pang* (*“Pang II”*), 740 F.3d 1279, 1280–82 (9th Cir. 2013); *see*
26 *Pang I*, previous orders of the Court. (Docs. 305, 321).

27 The Ninth Circuit affirmed the Court’s denial of Pang’s motion for costs, but
28 reversed the Court’s denial of Pang’s Motion for attorneys’ fees. *Pang II*, 740 F.3d at
1284. Specifically, the Ninth Circuit held that the Court did not apply the correct legal
standard in determining the “successful party” under Ariz. Rev. Stat. § 12-341.01. *Id.* at
1280. On remand, the Court must determine “(1) whether Pang was the ‘successful party’
as defined by Arizona law, and (2) if so, whether the district court should exercise its
discretion to award attorneys’ fees.” *Id.*

24 II. LEGAL STANDARD

25 Rule 54(d) of the Federal Rules of Civil Procedure provides a procedural
26 mechanism for moving for attorneys’ fees due under state law. *See* Fed. R. Civ. P.
27 54(d)(2)(B)(ii). Arizona Revised Statute § 12-341.01 provides that “[i]n any contested
28 action arising out of a contract, express or implied, the court *may* award the *successful*

1 party reasonable attorney fees.” Ariz. Rev. Stat. § 12-341.01(A) (emphasis added).
2 Following Arizona law, the Court must decide whether there is a “successful party.” If
3 the Court finds that a party is the “successful party” as envisioned in the statute, then the
4 Court exercises its discretion on whether to award reasonable attorneys’ fees. *See*
5 *Associated Indem. Corp. v. Warner*, 694 P.2d 1181, 1184 (Ariz. 1985) (in banc).

6 **A. “Successful” Party**

7 The trial court has substantial discretion to determine who is a successful party.
8 *Fulton Homes Corp. v. BBP Concrete*, 155 P.3d 1090, 1096 (Ariz. Ct. App. 2007) (citing
9 *Pioneer Roofing Co. v. Mardian Constr. Co.*, 733 P.2d 652, 664 (Ariz. Ct. App. 1986)).
10 “The decision as to who is the successful party for purposes of awarding attorneys’ fees
11 is within the sole discretion of the trial court, and will not be disturbed on appeal if any
12 reasonable basis exists for it.” *Maleki v. Desert Palms Prof’l Properties, L.L.C.*, 214 P.3d
13 415, 422 (Ariz. Ct. App. 2009) (quoting *Sanborn v. Brooker & Wake Prop. Mgmt., Inc.*,
14 874 P.2d 982, 987 (Ariz. Ct. App. 1994); accord *Hale v. Amphitheater Sch. Dist. No. 10*,
15 961 P.2d 1059, 1065 (Ariz. Ct. App. 1998).

16 “[S]uccessful parties” are “not limited to those who have a favorable final
17 judgment at the conclusion of the” action. *Wagenseller v. Scottsdale Mem’l Hosp.*, 710
18 P.2d 1025, 1048 (Ariz. 1985) (in banc), *superseded by statute on other grounds*, Ariz.
19 Rev. Stat. § 12-341.01. As such, “[a]n adjudication on the merits is not a prerequisite to
20 recovering attorneys’ fees under [§ 12-341.01].” *Fulton Homes*, 155 P.3d at 1096.

21 **B. Discretion to Award Attorneys’ Fees**

22 If the Court finds that a party is the successful party, “there is no presumption that
23 a successful party should be awarded attorney fees under § 12–341.01.” *Motzer v.*
24 *Escalante*, 265 P.3d 1094, 1095 (Ariz. Ct. App. 2011) (citing *Warner*, 694 P.2d at 1183).

25 Additionally, when a case involves several claims based upon different facts or
26 legal theories, the court may decline to award fees “for those unsuccessful separate and
27 distinct claims.” *Schweiger v. China Doll Rest., Inc.*, 673 P.2d 927, 933 (Ariz. Ct. App.
28 1983).

1 **III. ANALYSIS**

2 **A. Whether Pang was the Successful Party**

3 Defendant Pang asserts that he is entitled to reasonable attorneys’ fees under Ariz.
4 Rev. Stat. § 12-341.01 because (1) under the “totality of the litigation” Pang is the “net
5 winner” for the case in chief (Doc. 329 at 3–7), and (2) Pang successfully defeated
6 MPC’s post-judgment Rule 59(e) and 60(b) motions (*id.* at 7–8). In response, MPC
7 argues that (1) there is no successful party within the meaning of § 12-341.01 (Doc. 330
8 at 2–5), and (2) Pang cannot be the successful party in the post-judgment motions
9 because the post-judgment motions are considered in the totality of the litigation (*id.* at
10 5–8).

11 **1. Legal Standard**

12 The Court will consider “the totality of the circumstances and the relative success
13 of the litigants” to determine whether there is a successful party. *McAlister v. Citibank*,
14 829 P.2d 1253, 1262 (Ariz. Ct. App. 1992). “In cases involving various competing
15 claims, counterclaims and setoffs all tried together, the successful party is the net
16 winner.” *Berry v. 352 E. Virginia, L.L.C.*, 261 P.3d 784, 788 (Ariz. Ct. App. 2011)
17 (quoting *Ayala v. Olaiiz*, 776 P.2d 807, 809 (Ariz. Ct. App. 1989)). Additionally, “in a
18 case involving multiple claims and varied success, the trial court may apply a ‘percentage
19 of success’ or a ‘totality of the litigation’ test.” *Berry*, 261 P.3d at 788–89 (quoting
20 *Schwartz v. Farmers Ins. Co. of Ariz.*, 800 P.2d 20, 25 (Ariz. Ct. App. 1990)).

21 **2. Analysis**

22 As a result of the self-executing March 26 Order (Doc. 262), the Court dismissed
23 with prejudice MPC’s rescission claim and Pang’s bad faith. Both parties claim the
24 March 26 Order as evidence that they are the successful party. (*See* Doc. 329 at 5–6
25 (Pang); Doc. 330 at 4 (MPC)). Pang argues that he is the successful party as the net
26 winner of the totality of the litigation. (Doc. 329 at 4). MPC argues that under the totality
27 of the litigation there is no successful party. (Doc. 330 at 2–3). Here, Pang erroneously
28 conflates these two tests. The net winner and the totality of the litigation are two separate

1 tests *infra discussion* Part III.A.2.a, and the Court may consider either in determining if
2 there is a successful party. The Court reviews both tests to determine which is applicable
3 to the current case.

4 **a. Applicability of “Net Winner” Versus “Totality of the
5 Litigation” Test**

6 Under the net judgment rule, the party that “obtains a judgment in excess of any
7 setoff or counterclaim awarded to the other party” is the successful party. *Schwartz*, 800
8 P.2d at 25. *See also Berry*, 261 P.3d at 787, 789 (affirming the party with the greater
9 monetary award as the net winner); *Ayala*, 776 P.2d at 809 (affirming the plaintiff as the
10 net winner when only the plaintiff received monetary judgment on the single claim before
11 the court); *Trollope v. Koerner*, 515 P.2d 340, 344 (Ariz. Ct. App. 1973) (affirming the
12 appellant as the net winner when appellant received \$791.75 out of \$6000 claim and
13 appellee received \$500 out of \$500 counterclaim). Here, neither party has received a
14 monetary award on any of the competing claims and counterclaims. (*See Doc. 262*)
15 (dismissing Pang’s and MPC’s claims with prejudice, and awarding neither party
16 monetary judgments). Thus, the net judgment rule is inapplicable.

17 Under the totality of the litigation rule, the Court reviews the multiple claims and
18 whether the parties succeeded on these claims to determine which party is the successful
19 party. *Berry*, 261 P.3d at 788–89. There are no strict factors, rather the trial court is
20 afforded discretion in reviewing the totality of the litigation. *See Pioneer Roofing Co. v.*
21 *Mardian Constr. Co.*, 733 P.2d 652, 664 (Ariz. Ct. App. 1986). Here, the case contains
22 multiple claims on which the parties had varied successes. Accordingly, the Court finds
23 the totality of the litigation test is the appropriate test to determine if there is a successful
24 party within the meaning of Ariz. Rev. Stat. § 12-341.01.

25 **b. Applying Totality to the Rescission and Bad Faith Claims**

26 MPC relies on *Schwartz*, 800 P.2d at 22, to argue that it is the successful party
27 under the totality of the litigation test. (*Doc. 330 at 4*). In *Schwartz*, the insured plaintiff
28 brought concurrent breach of contract and bad faith claims against the insurer defendant.
800 P.2d at 22. The court classified the bad faith claim as “a major issue” in the litigation,

1 and stated that the claim had “substantial disparity in the relief requested” in comparison
2 to the \$2000 breach of contract claim. *Id.* at 25. Under the totality of the litigation test,
3 the trial court found the defendant insurer to be the prevailing party because it prevailed
4 on the bad faith claim, the major part of the litigation. *Id.* at 24. The court of appeals
5 affirmed the award of attorneys’ fees to the defendant. *Id.* at 25.

6 MPC argues that *Schwartz* addresses the instant situation, and that a successful
7 party is the one who defends against the bad faith claim. (Doc. 330 at 4). The *Schwartz*
8 Court found that the insurer was the successful party because it defended against the
9 major part of the litigation. *Schwartz*, 800 P.2d at 25. There, the major issue of the
10 litigation was the bad faith claim because of the “substantial disparity in the relief
11 requested.” *Id.* Here, however, the major issue of the litigation was not the bad faith
12 claim, but rather the rescission claim. In making this determination, the Court compares
13 the increase in coverage Pang received as a result of the dismissal of MPC’s rescission
14 claim, to the benefit MPC received as a result of the dismissal of Pang’s bad faith claim.
15 If successful, the rescission claim would have reduced Pang’s coverage by \$4 million per
16 claim and \$2 million in the aggregate. If not for the dismissal with prejudice, Pang’s
17 lower limits, combined with the potential liability from the *Williamson* action, could have
18 exposed him to a major claim outside the uncontested coverage limits.² Although MPC
19 benefitted from the dismissal of Pang’s bad faith claim, it is not clear that MPC initially
20 faced as great a liability, particularly because the Court granted summary judgment
21 against Pang’s punitive damages claim.

22 Moreover, Pang’s bad faith claim was voluntarily dismissed, as evidenced by his
23 decision to allow the March 26 Order to self-execute. In contrast, MPC did not
24 voluntarily choose to allow the March 26 Order to execute. This is evidenced by the Rule
25 59(e) and Rule 60(b) motions MPC filed to alter the Court’s Order to a dismissal without

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27 ² Because the *Williamson* action settled for a confidential amount, the Court
28 cannot definitively determine whether Pang faced liability outside the uncontested
coverage limits. The difference in the per occurrence liability coverage was \$4 million, so
that is the potential liability the Court considers.

1 prejudice. (*See* Docs. 266, 268). Thus, Pang successfully defended against the initial
2 action brought against him. Attorneys’ fees can be awarded when a party successfully
3 defends claims brought against them. *See Fulton Homes*, 155 P.3d at 1096.

4 The Court granted in part and denied in part each Party’s motion for summary
5 judgment. (Doc 242 at 21). Successful summary judgment motions are pieces in the
6 totality of the litigation. *See Wagenseller*, 710 P.2d at 1047–48. The Court granted
7 MPC’s motion for summary judgment: “1) on the issue of materiality on its rescission
8 claim and 2) on the issue of punitive damages on the bad faith counterclaim.” (Doc. 242
9 at 20–21). The Court granted Pang’s motion for summary judgment: “1) on MPC’s claim
10 for partial rescission to the extent MPC bases its claim on Dr. Pang’s answer to the non-
11 hospital organization review question and 2) on the issue of legal fraud regarding the
12 question about peer committee review.” (Doc. 242 at 21). The Court preserved MPC’s
13 rescission claim and Pang’s bad faith claim for compensatory damages for trial. (Doc.
14 242 at 20). Viewed in the totality of the litigation, neither party was successful on the
15 partial grant of summary judgment because the rescission claim, the major issue, and the
16 bad faith counterclaim remained for trial. Accordingly, the Court finds that in the totality
17 of the litigation the partial grants of summary judgment factor evenly for the Parties.

18 Pang argues that he could be awarded attorneys’ fees for the post-judgment
19 motions if found to be the successful party on those motions. (Doc. 329 at 7–8). In
20 contrast, MPC argues that the post-judgment motions are not separately reviewed, but
21 rather are pieces considered in the totality of the litigation. (Doc. 330 at 5–8). The Court
22 considers these motions in the totality of the litigation to determine whether Pang was the
23 successful party.

24 MPC submitted the Rule 59(e) and Rule 60(b) motions to alter the March 26 Order
25 to a dismissal without prejudice. (Doc. 266 at 13; Doc. 268 at 5). Pang opposed these
26 motions and requested the Court uphold the dismissal with prejudice. (Doc. 272 at 5–9;
27 Doc. 275 at 7–11). The Court upheld the dismissal with prejudice. (Doc. 305 at 6–8).
28 Although MPC argues that “Medical Protective’s lack of success on a procedural motion

1 in no way can be construed as qualifying Dr. Pang as the ultimate successful party” (Doc.
2 330 at 6), these were not merely procedural motions. Pang’s defense against MPC’s
3 Fed. R. Civ. P. 59(e) and 60(b) motions effectively ensured that the rescission claim, the
4 major issue of the litigation, was permanently dismissed. Accordingly, Pang is the
5 successful party in the post judgment motions.

6 In sum, the Court finds Pang to be the successful party in the totality of the
7 litigation. First, the Court notes that the Parties were equally unsuccessful in the summary
8 judgment motions. Second, the Court finds the increase in coverage Pang received as a
9 result of the dismissal outweighed the benefit MPC received from the dismissal of Pang’s
10 bad faith claim. Through the Order of March 26, Pang reduced his future liability by \$4
11 million per occurrence and \$2 million in the aggregate. In contrast, MPC did not face as
12 large a liability from the bad faith claim for compensatory damages. Finally, by opposing
13 the Rule 59(e) and Rule 60(b) motions, Pang ensured the Court’s dismissal with prejudice
14 would remain in effect, thus ending the major issue of the litigation. Accordingly, under
15 the totality of the litigation test, the Court finds Pang to be the successful party.

16 **B. Whether the Court Should Exercise Its Discretion in Awarding**
17 **Reasonable Attorneys’ Fees**

18 Pang seeks attorneys’ fees as the successful party. Under Ariz. Rev. Stat.
19 § 12-341.01 the Court has discretion to award the successful party reasonable attorneys’
20 fees. *Warner*, 694 P.2d at 1184.

21 **1. Legal Standard**

22 If the Court finds a successful party, it has broad discretion in awarding reasonable
23 fees. In exercising its discretion, the Court considers the six factors adopted in *Warner*:

24 (1) whether the unsuccessful party’s claim or defense was
25 meritorious;

26 (2) whether the litigation could have been avoided or settled
27 and the successful party’s efforts were completely
28 superfluous in achieving the result;

(3) whether assessing fees against the unsuccessful party
would cause an extreme hardship;

1 (4) whether the successful party prevailed with respect to all
2 of the relief sought;

3 (5) whether the legal question presented was novel and
4 whether such claim or defense have previously been
5 adjudicated in this jurisdiction; and

6 (6) whether the award would discourage other parties with
7 tenable claims or defenses from litigating or defending
8 legitimate contract issues for fear of incurring liability for
9 substantial amounts of attorneys' fees.

10 *Wagenseller*, 710 P.2d at 1049 (citing *Warner*, 694 P.2d at 1184). No one factor is
11 determinative, and the Court considers all six factors in its determination. *Wilcox v.*
12 *Waldman*, 744 P.2d 444, 450 (Ariz. Ct. App. 1987).

13 **2. Analysis**

14 Following the *Warner* factors, Pang argues that (1) MPC's claim was not
15 meritorious (Doc. 329 at 9–10); (2) Pang's efforts were not superfluous in achieving the
16 result (*id.* at 10); (3) assessing fees against MPC would not cause substantial harm (*id.*);
17 (4) the dismissal with prejudice is an adjudication on the merits (*id.* at 10–11); (5) the
18 rescission claim is not novel as it has been previously adjudicated in Arizona state and
19 federal courts (*id.* at 11); and (6) an award of attorneys' fees would not discourage other
20 insurance companies from filing declaratory judgment insurance policy litigation against
21 other insureds (*id.*). Pang reiterates substantially similar arguments in his request for
22 attorneys' fees on the post-judgment motions. (Doc. 329 at 11–12). The Court addresses
23 each factor in turn.

24 Under the first factor, the Court examines the merit of MPC's rescission claim.
25 The Court notes that a claim can have merit even if it does not succeed. *Scottsdale Mem'l*
26 *Health Sys., Inc. v. Clark*, 791 P.2d 1094, 1099 (Ariz. Ct. App. 1990). Here, MPC's
27 rescission claim survived the Court's grant of partial summary judgment to Pang. (Doc.
28 242 at 21). Surviving summary judgment indicates the claim was not frivolous, and, in
the opinion of the Court, shows that the rescission claim was sufficiently meritorious to
proceed to the jury.

Nonetheless, Pang argues that MPC's motion to dismiss the rescission claim (Doc.

1 260) after the trial court ruled for Pang in the *Williamson* suit indicates that the rescission
2 claim was unnecessary and lacked merit. (Doc. 329 at 9–10). That MPC’s pursuit of the
3 rescission claim depended on the outcome of the *Williamson* action does not affect
4 whether the claim had merit. Rather, this was a strategic decision by MPC. MPC’s initial
5 claim arose out of a concern that the *Williamson* case would demand costs outside of the
6 uncontested insurance policy limit. (See Doc. 1 at 4–6). If the *Williamson* case had settled
7 within the undisputed limit or been resolved in Pang’s favor than it would not have been
8 necessary for MPC to pursue the rescission claim. This is evidenced by MPC’s
9 willingness to dismiss the rescission action after the favorable trial court verdict in the
10 underlying *Williamson* suit. (Doc. 260). However, whether Pang prevailed in the
11 *Williamson* action is not relevant to the merit of MPC’s fraud allegation against Pang.
12 Accordingly, the determination of the *Williamson* action is not indicative of the merits of
13 the rescission action.

14 Regarding the second factor, as a preliminary matter, the Court considers whether
15 the Parties attempted to settle the claim, whether litigation could have been avoided, and
16 whether the Parties’ efforts were entirely superfluous in achieving the result. Pang argues
17 he attempted to negotiate with MPC after the March 26 Order dismissed the rescission
18 claim with prejudice. (Doc. 329 at 11). However, the sole communication from Pang
19 does not mention negotiations, but rather demands payment of attorneys’ fees and that
20 MPC withdraw its pending Rule 59(e) and 60(b) motions. (See Exhibit O). Accordingly,
21 the Court finds that neither party attempted to enter into negotiations.

22 Additionally, the Court finds that the litigation could not have been avoided.
23 Whether the rescission claim would be pursued or voluntarily dismissed depended
24 heavily on the outcome of the *Williamson* case. The outcome of the *Williamson* case was
25 unknown until that action finally settled on May 14, 2010. At the time the *Williamson*
26 action settled, the Court had not issued its order on MPC’s post-judgment motions. Thus,
27 both parties’ efforts were not “completely superfluous” in continuing to prepare for the
28 rescission claim while the *Williamson* case remained unsettled.

1 The Court notes that “the result” on review is the dismissal with prejudice, as this
2 is the ultimate result of the rescission claim. The March 26 Order (Doc. 262) was self-
3 executing. By definition, the result of a self-executing action is contingent upon the
4 inaction of the parties, rather than their efforts. However, after the March 26 Order self-
5 executed, MPC strongly opposed the March 26 Order. Through its Rule 59(e) and 60(b)
6 motions, MPC sought to undo “the result” and amend the order to a dismissal without
7 prejudice. (Doc. 266 at 13; Doc. 268 at 9). Pang’s efforts to uphold the dismissal with
8 prejudice were not completely superfluous because this Court denied MPC’s motions and
9 the dismissal with prejudice stands. (Doc. 305 at 6–7).

10 Additionally, MPC contends that the motion for summary judgment on the
11 rescission claim had no relationship to the dismissal with prejudice because it was a self-
12 executing dismissal. (Doc. 330 at 12). However, Pang successfully defended against
13 MPC’s request for summary judgment on the rescission claim. (Doc. 242 at 7–14). Had
14 Pang not successfully done so, “the result” would not have been the dismissal with
15 prejudice of MPC’s rescission claim, but rather a judgment in MPC’s favor. Accordingly
16 the Court finds Pang’s efforts were not completely superfluous to the result.

17 Regarding the third factor, the Court finds MPC has failed to show how assessing
18 reasonable attorneys’ fees and related costs would cause an “extreme hardship.” MPC
19 argues that it has already paid significant fees during the various phases of this litigation,
20 which “adversely impact[ed]” MPC. (Doc. 330 at 12). Although further litigation fees
21 may adversely impact MPC, there is no evidence that the fees would cause an extreme
22 hardship. In contrast, as another Judge in this District has stated, “[p]laintiff is an
23 insurance company; the costs of litigating coverage claims can be considered a cost of
24 doing business.” *Interstate Fire & Cas. Co., Inc. v. Roman Catholic Church of Diocese of*
25 *Phoenix ex rel. Olmsted*, CV-09-01405-PHX-NVW, 2012 WL 4856211, at *4 (D. Ariz.
26 Oct. 11, 2012). Accordingly, assessing reasonable attorneys’ fees against MPC would not
27 cause extreme hardship.

28 Under the fourth factor, the Court reviews whether Pang succeeded in all the relief

1 he sought. In Pang’s answer to MPC’s complaint, he requested: (1) that MPC’s
2 Complaint be dismissed with prejudice; (2) for a declaration that MPC provide coverage
3 with limits of \$5,000,000 per claim and \$5,000,000 aggregate, including claims by
4 Kymberli Williamson; (3) compensatory damages; (4) punitive damages; (5) attorneys’
5 fees; and (6) costs. (Doc. 21 at 11). Here, Pang succeeded on having the rescission claim
6 dismissed with prejudice through the March 26 Order. Pang did not receive the
7 declaration of coverage limits he sought and the March 26 Order dismissed his claim for
8 compensatory damages. Additionally, the Court’s summary judgment motion denied
9 Pang the ability to seek punitive damages (Doc. 242 at 21), the Court denied Pang’s
10 motion for costs (Doc. 305 at 7–8), and Pang’s request for attorneys’ fees is currently
11 before the Court. Admittedly, Pang has not succeeded on all relief sought. However, the
12 dismissal of the rescission claim does weigh strongly in his favor, as it was the major part
13 of the litigation. Additionally, while Pang did not receive declaratory relief, the
14 *Williamson* case was entirely settled by MPC. Pang’s claim for relief requested “MPC
15 provide coverage . . . including claims by Kymberli Williamson.” (Doc. 21 at 11). By
16 settling the claim, MPC provided coverage for the claims by Williamson. On balance
17 with Pang’s failure to receive relief in his other claims, the Court finds this factor slightly
18 favors Pang.

19 Regarding the fifth factor, the Court finds that MPC’s rescission claim did not
20 involve novel legal questions. MPC asserts this is a unique factual scenario, particularly
21 due to the self-executing order. (Doc. 330 at 13). However, different factual scenarios do
22 not create per se novel legal questions. Accordingly, the Court finds this factor does not
23 weigh in either Party’s favor.

24 Concerning the sixth factor, the Court does not find an award of attorneys’ fees
25 would produce a chilling effect that dissuades other insurance companies from having
26 their legal rights determined under an insurance agreement. MPC has presented no
27 argument on why an award of attorneys’ fees to Pang would discourage insurers from
28 bringing rescission claims against an insured. Thus, this factor favors Pang.

1 In sum, the Court finds that the *Warren* factors weigh in Pang’s favor. Pang is
2 entitled to an award of attorneys’ fees. Accordingly, the Court uses its discretion to award
3 Pang reasonable attorneys’ fees.

4 **C. Reasonableness of Requested Award**

5 The “case law construing what is a ‘reasonable’ fee applies uniformly” to all
6 federal fee-shifting statutes. *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992). In
7 determining a reasonable attorneys’ fee, the Court must begin with the “lodestar” figure
8 which is “the number of hours reasonably expended on the litigation multiplied by a
9 reasonable hourly rate.” *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). There is a
10 “strong presumption” that the lodestar is the reasonable fee. *Pennsylvania v. Del. Valley*
11 *Citizens’ Council for Clean Air*, 478 U.S. 546, 565 (1986). When deciding the reasonable
12 number of hours expended and the reasonableness of the hourly rate, a court may
13 consider: “(1) the novelty and complexity of the issues[;] (2) the special skill and
14 experience of counsel[;] (3) the quality of representation[;] and (4) the results obtained.”
15 *Cabrales v. Cnty. of Los Angeles*, 864 F.2d 1454, 1464 (9th Cir. 1988), *vacated*, 490 U.S.
16 1087 (1989), *reinstated*, 886 F.2d 235 (9th Cir. 1989). Additionally, “[i]n determining
17 reasonable hours, counsel bears the burden of submitting detailed time records justifying
18 the hours claimed to have been expended. Those hours may be reduced by the Court
19 where documentation of the hours is inadequate; if the case was overstaffed and hours are
20 duplicated; [or] if the hours expended are deemed excessive or otherwise unnecessary.”
21 *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir. 1986), *reh’g denied*,
22 *amended on other grounds*, 808 F.2d 1373 (9th Cir. 1987) (internal citations omitted).
23 The Court will adhere to these factors in reviewing the reasonableness of Pang’s Motion
24 for Attorneys’ Fees & Related Non-Taxable Expenses.

25 **1. Total Attorneys’ Fees and Non-Tax Related Expenses**

26 On behalf of Attorney Timothy Kasparek, junior partner Rae Richardson, and
27 paralegal Renee Slagter, Pang seeks \$126,590.93 in attorneys’ fees and non-tax related
28 expenses for the case in chief and \$10,120 in attorneys’ fees for the post-judgment

1 motions. In total, Pang seeks \$136,710.93.

2 **a. Total Requested Attorneys' Fees**

3 Pang points to the time records listed in Exhibits G-1, G-3, and N to support his
4 burden of justifying the hours expended. (Doc. 329). Exhibit G-1 lists the total hours as
5 444.50, claiming fees of \$85,887.00, and costs of \$1972.81. (Doc. 329, Ex. G-1 at 73).
6 Exhibit G-3 lists the total hours as 156.1, claiming fees of \$31,240, and costs of
7 \$2,728.42. (Doc. 329, Ex. G-3 at 9). Exhibit N lists the total hours at 50.6, claiming fees
8 of \$10,120, and zero costs or expenses. (Doc. 329, Ex. N at 3). The submitted records
9 account for a total of 619.1 hours for Attorney Kasparek (Doc. 329, Ex. G-1 at 6, 10, 12,
10 15, 17, 21, 26, 28, 31, 34, 37, 71; Ex. G-3 at 9; Ex. N at 3); 6.5 hours for junior partner
11 Richardson (Doc. 329, Ex. G-1 at 73); and 25.6 hours for paralegal Slagter (*id.*).
12 Although claiming \$136,710.93 in fees and non-tax related expenses, in total Pang has
13 provided documentation justifying only \$131,928.23. The Court will not award
14 unjustified fees. The Court finds that, at most, Pang has justified \$131,928.23 in
15 attorneys' fees and non-taxable related expenses.

16 **b. Fees for Junior Partner Richardson and Paralegal
17 Slagter**

18 MPC has not objected to Pang's request for \$975 in fees for junior partner
19 Richardson, nor has MPC objected to the \$2432 for paralegal Slagter. Additionally, MPC
20 has not objected to the reasonableness of junior partner Richardson's \$150 per hour rate
21 or Slagter's \$95 per hour rate. The Court reviews these fees for their reasonableness
22 under Local Rule of Civil Procedure 54.2. *See, e.g., Gametech Int'l, Inc. v. Trend*
23 *Gaming Sys.*, 380 F.Supp.2d 1084, 1100 (D. Ariz. 2005) (reviewing attorney and
24 paralegal fees for reasonableness). Pang submitted 6.5 hours for Richardson's attendance
25 at a document inspection. (Doc. 329, Ex. G-1 at 38). The Court finds this fee and rate
26 reasonable. Pang submitted 25.6 hours for Slagter's preparation and organization of legal
27 documents, as well as her research and conference call participation. (Doc. 329, Ex. G-1
28 at 27, 40, 43). The Court finds these fees and the per hour rate reasonable. Accordingly,

1 the Court awards 6.5 hours totaling \$975 for Richardson and 25.6 hours totaling \$2432
2 for Slagter's fees.

3 **c. Attorneys' Fees for Attorney Kasperek**

4 Pang seeks attorneys' fees on behalf of Attorney Kasperek. Pang has submitted
5 records accounting for 619.1 hours. MPC objects to several portions of the incurred fees.
6 MPC argues that (1) Pang's task-based itemized statement of attorneys' fees contains
7 numerous descriptions that are incomplete and inadequate (Doc. 330 at 14); (2) Pang
8 grouped numerous tasks under a total billing hour (*id.* at 15); (3) it is unreasonable to
9 award Pang fees on unsuccessful claims (*id.* at 16); and (4) the post-judgment motions
10 fees contain time entries unrelated to the post-judgment motions (*id.* at 17). The Court
11 reviews MPC's claims, along with the entire record, to determine the reasonableness of
12 the fees.

13 **i. Adequate Non-Privileged Descriptions**

14 MPC argues (Doc. 330 at 15) that the redacted entries in Pang's submitted task-
15 based itemized statement (Doc. 329, Exs. G-1, G-3, N) fail to provide an adequate non-
16 privileged description of the services rendered.

17 In the District of Arizona, motions for attorneys' fees and costs are governed by
18 Local Rule of Civil Procedure 54.2. A motion for attorneys' fees "must adequately
19 describe the services rendered so that the reasonableness of the charge can be evaluated."
20 L.R. Civ. 54.2(e)(2). Although counsel should not disclose matters giving rise to issues
21 associated with attorney-client privilege and work-product doctrine, counsel must
22 "nevertheless furnish an adequate non-privileged description of the services in question."
23 *Id.* Otherwise, the court may reduce the fee for those incomplete and inadequate
24 descriptions. *Id.*

25 MPC points to descriptions such as "01/20/06 Email to Dr. Pang RE: [redacted]."
26 (Doc. 330, Exhibit 2 at 1). MPC argues that such a statement lacks an adequate non-
27 privileged description of the email. However, Pang has submitted a detailed report,
28 Exhibit G-5, with his reply to MPC's motion. (Doc. 334, Ex. G-5). Exhibit G-5 provides

1 an adequate non-privileged description of each of the entries MPC described as lacking.
2 For example, “01/20/06 Email to Dr. Pang RE: [redacted]” (Doc. 330, Ex. 2 at 1) is
3 described as “Email to Dr. Pang re [conference with counsel]; [received and reviewed
4 reply from Pang].” (Doc. 334, Ex. G-5 at 3). Exhibit G-5 provides adequate description
5 for each entry cited by MPC in Exhibit 2. Thus, the Court finds Pang has furnished an
6 adequate non-privileged description of the services in question. Accordingly, the Court
7 finds these contested fees reasonable.

8 **ii. Block-Billing**

9 MPC additionally argues that entries where Pang grouped several tasks together
10 are inadequate and incomplete because it is impossible to evaluate the reasonableness of
11 each individual task within the grouped entry.³ (Doc. 330 at 15). This type of block-
12 billing is not inappropriate *per se* when the party seeking fees meets the basic
13 requirements of “listing his hours and identifying the general subject matter of his time
14 expenditures.” *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1121 (9th Cir. 2000) (internal
15 quotations omitted); *see Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (noting that
16 although the fee applicant bears the burden of submitting “evidence supporting the hours
17 worked and rates claimed,” an applicant is “not required to record in great detail how
18 each minute of his time was expended”). While not forbidden by case law, block-billing
19 makes it nearly impossible for the Court to determine the reasonableness of the hours
20 spent on each task. Where the Court cannot distinguish between the times claimed for the
21 various tasks, the Court will reduce the award accordingly. L.R. Civ. 54.2(e)(2); *see*
22 *Chalmers*, 796 F.2d at 1210.

23 Here, there are 26 entries of block-billing. (*See* Doc. 330, Ex. 3 at 7–13). Of the 26
24 entries, 15 do not list the time breakdown for each individual task within the group (*see*,

25 _____
26 ³ MPC also argues that these block-billed entries are inadequate and incomplete
27 because they do not provide adequate non-privileged descriptions. (Doc. 330 at 15). As
28 previously explained, Pang has submitted adequate non-privileged descriptions for each
of these listed entries. (*See* Doc. 334, Ex. G-5). After reviewing these entries, the Court
finds that Pang provided adequate non-privileged descriptions for each of the contested
entries. Accordingly, the Court finds these fees reasonable.

1 e.g., Doc. 329, Ex. G-1 at 45), and 11 do list the individual time breakdowns (*see, e.g.*,
2 Doc. 329, Ex. G-1 at 39). For the 11 block-billed entries that list times for each task, the
3 Court finds the itemized statements to be adequate and complete. Of the 15 entries that
4 are block-billed without separate times listed for each task, the Court finds 13 entries
5 unreasonable. The two remaining entries are reasonable because they bill .1 hours for
6 reviewing multiple emails. (Doc. 329, Ex. 2 at 9, 13). In sum, the 13 unreasonable entries
7 total 33.7 hours. The Court therefore finds 33.7 hours unreasonable and will reduce the
8 reasonable hours of the lodestar calculation accordingly.

9 **iii. Pang’s Unsuccessful Counterclaims**

10 MPC argues that Pang is not entitled to fees incurred in relation to the
11 counterclaims, because Pang was unsuccessful on the bad faith counterclaims. (Doc. 330
12 at 16). In Arizona, when “a party has accomplished *the result* sought in the litigation, fees
13 should be awarded for time spent even on unsuccessful legal theories.” *Schweiger*, 673
14 P.2d at 933 (emphasis added). As previously discussed, the Court found “the result” to be
15 the dismissal with prejudice of the rescission claim. *See discussion supra* Part III.B.2.
16 Because Pang accomplished the result that he sought in the litigation, fees should be
17 awarded for time spent on the unsuccessful counterclaims. Accordingly, the Court finds
18 an award of the hours spent on the counterclaims reasonable and will award the time
19 spent on the counterclaims.

20 **iv. Fees Unrelated to the Post-Judgment Motions**

21 MPC argues that Pang is not entitled to certain fees claimed for the post-judgment
22 motions because “the time entries do not pertain to solely the Rule 59(e) and Rule 60(b)
23 motions.” (Doc. 330 at 17). MPC specifically references the 10.9 hours claimed for oral
24 argument preparation and attendance. (*Id.*) MPC argues that Pang cannot seek fees
25 because the “majority of the motions for consideration on that day of oral argument were
26 filed by Pang and denied by the Court.” (*Id.*)

27 The Court notes MPC does not cite any statutes, cases, or rules in support of the
28 argument that a party seeking fees for oral argument preparation cannot have brought the

1 majority of motions for consideration. The Court does not find this argument compelling,
2 particularly because MPC's Rule 59(e) and Rule 60(b) motions that sought to re-open the
3 rescission claim were also argued that day. Accordingly, the Court does not find these
4 10.9 hours unreasonable.

5 MPC further contests numerous entries in Exhibit N as unnecessary and unrelated
6 to the post-judgment motions. (Doc. 330 at 17). This includes entries such as emailing
7 Dr. Pang on the status of the motions and reviewing the Court's orders on the oral
8 argument. (Doc. 330, Ex. 5 at 23). The Court does not find it unreasonable for Attorney
9 Kasperek to keep Pang informed on the status of motions which could re-open the
10 rescission claim against him. Nor does the Court find reviewing the Court's orders
11 unreasonable. Accordingly, the Court finds the fees contested in Exhibit-5 reasonable.

12 **v. Legal Fees and Costs Associated with Pang's**
13 **Second Motion for Attorneys' Fees, Costs, and**
14 **Expenses**

15 In addition to other fees, Pang seeks to recover 5.3 hours of Attorney Kasperek's
16 time related to the preparation of the Memorandum in support of Dr. Pang's Second
17 Motion for Award of Attorneys' Fees, Costs, and Expenses. (*See* Doc. 329, Ex. N at 3).
18 Under the Local Rules, the Memorandum in Support of the Motion for Award of
19 Attorneys' Fees, Costs, and Expenses must include discussion of eligibility, entitlement,
20 and reasonableness. L.R. Civ. 54.2(c)(1)–(3). Specifically, under entitlement, “[i]f the
21 moving party claims entitlement to fees for preparing the motion and memorandum for
22 award of attorneys' fees and related non-taxable expenses, such party also must cite the
23 applicable legal authority supporting such specific request.” L.R. Civ. 54.2(c)(2).

24 While Pang has complied with Local Rule 54.2(c)(1) and (3) (Doc. 329 at 9–17),
25 he has failed to cite any applicable legal authority supporting his claim of entitlement to
26 fees for preparing the Second Motion and Memorandum for Award of Attorneys' Fees, as
27 required by Local Rule 54.2(c)(2). Accordingly, Pang has not shown that he is entitled to
28 recovery for the 5.3 hours of attorney time spent in preparing his motion for fees and
costs. The Court will reduce the reasonable hours component of the lodestar calculation

1 accordingly.

2 **vi. Hours Billed During Air Travel**

3 The Court notes Pang, on behalf of Attorney Kasperek, has claimed 19.1 hours for
4 air travel time. Under the Local Rules, “[o]rdinarily air travel time should not be charged.
5 If services were performed during such time, then describe such services rather than
6 charging for travel time.” L.R. Civ. 54.2(e)(2)(D). Of the 19.1 hours billed for air travel
7 time, only 10.4 hours describe the services performed by Attorney Kasperek. (Doc. 329,
8 Ex. G-1 at 65–66). However, for the remaining 8.7 hours, Attorney Kasperek billed for
9 air travel but failed to describe the services performed during that time. (Doc. 329, Ex. G-
10 1 at 66, 68, and 69). Consequently, Attorney Kasperek has not shown that he is entitled to
11 recover those 8.7 hours billed during air travel time. Accordingly, the Court finds the 8.7
12 hours unreasonable, and will reduce the reasonable hours component of the lodestar
13 calculation accordingly.

14 **vii. The Reasonableness of Attorney Kasperek’s**
15 **Hourly Rate**

16 MPC has not objected to the reasonableness of Attorney Kasperek’s \$200 hourly
17 rate and Attorney Kasperek has complied with Local Rule 54.2(d)(4)(B) (requiring, “as
18 appropriate,” a discussion of “the comparable prevailing rate”) (Doc. 329, Exs. G, M).
19 Accordingly, the Court finds Attorney Kasperek’s rate of \$200 per hour reasonable and
20 will use this rate in its lodestar calculation.

21 **viii. Lodestar Calculation of Attorney Kasperek’s**
22 **Reasonable Fees**

23 For the efforts of Attorney Kasperek, Pang’s motion for attorneys’ fees seeks
24 recovery of 619.1 total hours of time at the rate of \$200 per hour. As detailed above, the
25 Court has found a total of 47.7 of those hours unreasonable. Accordingly, the Court finds
26 Pang entitled to recover the remaining 571.4 hours at the rate of \$200 per hour. These
27 sums yield a final lodestar calculation of \$114,280. Because there is a “strong
28 presumption” that the lodestar is the reasonable fee, *Del. Valley Citizens’ Council for*

1 *Clean Air*, 478 U.S. 546 at 565, the Court finds \$114,280 in total attorneys’ fees,
2 expenses, and costs claimed for Attorney Kasperek reasonable.

3 **ix. Attorney Kasperek’s Related Non-Taxable**
4 **Expenses**

5 Along with attorneys’ fees, Pang has requested recovery of \$4,701.23 for certain
6 non-taxable related expenses. (*See* Doc. 329, Exs. G-1, G-3). Under the Local Rules,
7 Pang must “identify each related non-taxable expense with particularity.” L.R. Civ.
8 54.2(e)(3). Furthermore, “[c]ounsel should attach copies of applicable invoices, receipts,
9 and/or disbursement instruments. Failure to itemize *and verify costs* may result in their
10 disallowance by the court.” *Id.* (emphasis added).

11 In reviewing the record, the Court notes that Pang separately identified each
12 related non-taxable expense in its itemized statement. (Doc. 329, Ex. G-1 at 6, 10, 15, 17,
13 21, 26, 28, 31, 35, 37, 72; G-3 at 8–9). However, Pang has failed to attach copies of
14 applicable invoices, receipts, and/or disbursement instruments. Without such
15 documentation, the Court cannot verify these expenses. Accordingly, the Court does not
16 find the \$4,701.23 in related non-taxable expenses reasonable, and will not award these
17 expenses.

18 **d. Total Calculation of Award Amount**

19 *Attorneys’ Fees, Costs, and Expenses:*

20 Rae Richardson: \$975

21 Renee Slagter: \$2432

22 Timothy Kasperek: \$114,280

23 Related Non-Taxable Expenses: \$0

24 Total: \$117,687

25 //

26 //

27 //

28 //


1 **IV. CONCLUSION**

2 Accordingly,

3 **IT IS ORDERED** GRANTING in part and DENYING in part Pang's Third
4 Motion for Attorneys' Fees, Costs, and Expenses (Doc. 329), and awarding Pang a total
5 of \$117,687 in attorneys' fees, costs, and expenses, as described above.

6 Dated this 19th day of March, 2014.

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James A. Teilborg
Senior United States District Judge