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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

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John R. Quain,

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No. CV-09-2365-PHX-DGC

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Plaintiff,

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ORDER

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vs.

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Capstar d/b/a Clear Channel
Communications, Inc.,

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Defendants.

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Plaintiff owns Silk Purse Records and is the leader of the musical group Citizen Quain. He has been unable to get his music played on a local radio station. He filed suit against Defendants on November 12, 2009. Doc. 1. The second amended complaint asserts breach of contract, misrepresentation, and unjust enrichment claims. Doc. 33. On November 18, 2010, the Court granted Defendants' motion to dismiss (Doc. 35) and the Clerk entered judgment accordingly. Docs. 40, 41.

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Defendants have filed a motion for an award of attorneys' fees in the amount of \$39,047.50. Doc. 42. The motion is fully briefed. Docs. 47-52. No party has requested oral argument. For reasons stated below, the Court will grant the motion in part and award Defendants attorneys' fees in the amount of \$15,317.50.

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Defendants seek a fee award pursuant to A.R.S. § 12-341.01. Subsection (A) of that statute provides that "[i]n any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees." Subsection (C) requires a fee award "upon clear and convincing evidence that the claim or defense constitutes

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1 harassment, is groundless and is not made in good faith.”

2 With respect to subsection (C), the Court cannot find by clear and convincing
3 evidence that Plaintiff’s claims constitute harassment. Defendants, however, clearly are
4 entitled to a fee award under subsection (A) of the statute. It is well-settled that a defendant
5 ““is entitled to an award of its attorney’s fees under § 12-341.01 if the plaintiff is not entitled
6 to recover on the contract on which the action is based, or if the court finds that the contract
7 on which the action is based does not exist.”” *Chevron U.S.A., Inc. v. Schirmer*, 11 F.3d
8 1473, 1480 (9th Cir. 1993) (quoting *Berthot v. Sec. Pac. Bank of Ariz.*, 823 P.2d 1326, 1332
9 (Ariz. Ct. App. 1991)). Count one of the second amended complaint specifically asserts a
10 breach of contract claim based on Plaintiff’s alleged third-party beneficiary status to a
11 consent decree between Defendants and the FCC. Doc. 33 ¶¶ 15-21. The related
12 misrepresentation and unjust enrichment claims arise directly from Defendants’ alleged
13 refusal to comply with terms of the consent decree. *Id.* ¶¶ 22-33. Although the Court
14 ultimately determined that there is no contractual privity between Plaintiff and Defendants
15 (Doc. 40 at 2-3), this action arose “out of a contract” for purposes of § 12-341.01(A). *See*
16 *Chevron*, 11 F.3d at 1480 (defendant entitled to a fee award where the complaint alleged the
17 existence of contracts); *Berthot*, 823 P.2d at 1332 (affirming fee award where the trial court
18 ““impliedly found that there was no contract between the parties”). Defendants, as successful
19 parties, are entitled to an award of reasonable attorneys’ fees under § 12-341.01(A).

20 The Court is familiar with the facts of this case and the manner in which it was
21 litigated. Having reviewed Defendants’ supporting memorandum (Doc. 42) and counsel’s
22 declaration and statement of fees (Doc. 42-1), and having considered the record as a whole,
23 Plaintiff’s pro se status, and the relevant fee award factors, *see Associated Indemnity Corp.*
24 *v. Warner*, 694 P.2d 1181, 1184 (Ariz. 1985), the Court finds a fee award in the amount of
25 \$15,317.50 to be reasonable and appropriate. *See also* LRCiv 54.2(c)(3)(A)-(M) (listing
26 factors bearing on the reasonableness of a fee award); *Hensley v. Eckerhart*, 461 U.S. 424,
27 429-30 & n.3 (1983) (same). This amount represents the fees Defendants incurred after
28 Plaintiff filed his opposition to the motion to dismiss the first amended complaint on May 14,

1 2010. Doc. 27. Defendants' motion to dismiss made clear that Plaintiff is not a party to the
2 consent decree, that he has no right, contractual or otherwise, to enforce its terms, and that
3 Defendants have no obligation to play or promote Plaintiff's music. Doc. 25. Because the
4 pro se Plaintiff likely was not aware of the shortcomings of his claim before the motion was
5 filed, the Court will not award fees incurred before that time. After the motion identified the
6 clear flaws in Plaintiff's legal theory, however, he continued to litigate, forcing Defendants
7 to incur fees defeating his claim. The Court concludes that those fees should be recovered
8 under the Arizona statute.

9 **IT IS ORDERED:**

- 10 1. Defendants' motion for attorneys' fees (Doc. 42) is **granted in part**.
11 2. Defendants are awarded **\$15,317.50** in attorneys' fees pursuant to A.R.S. §
12 12-341.01(A).
13 3. Defendants' motion to strike sur-reply (Doc. 53) is **denied** as moot.

14 DATED this 29th day of December, 2010.

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19 David G. Campbell
20 United States District Judge
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