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

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Dudley Greer, dba Greer Farms,

No. CV-10-799-PHX-SMM

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Plaintiff,

11

vs.

**MEMORANDUM OF DECISION AND  
ORDER**

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T.F. Thompson & Sons, Inc., et al.,

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Defendants.

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T.F. Thompson & Sons, Inc., et al.,

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Counter-Claimants,

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vs.

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Dudley Greer, dba Greer Farms,

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Counter-Defendant.

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Before the Court is the Renewed Motion for Award of Attorney’s Fees and Costs by Defendants/Counter-Claimants T.F. Thompson & Sons, Inc., et al. (“Thompson”). (Doc. 132.) Plaintiff/Counter-Defendant Dudley Greer, dba Greer Farms (“Greer”) has responded, Thompson has replied, and the matter is fully briefed. (Docs. 134, 135.) The Court will grant Thompson’s motion in part, and deny in part.

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**BACKGROUND**

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Greer filed the initial complaint in this case against Thompson, alleging four claims arising out of contract, one claim for negligence, and one claim for fraudulent concealment.

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1 (Doc. 1.) The dispute centered around Greer’s assertion that Thompson sold Greer diseased  
2 seed potatoes. (Id.) Thompson filed a motion in limine to exclude Plaintiff’s expert witness,  
3 which the Court granted. (Doc. 111.) The Court then also granted Thompson’s motion for  
4 summary judgment on all six of Greer’s claims, finding that in light of the exclusion of  
5 Greer’s witness, there was no longer any genuine dispute of material facts sufficient to  
6 support those claims. (Id.)

7 Thompson subsequently filed its original motion for attorney fees and costs. (Doc.  
8 114.) Greer then filed a motion to alter or amend the judgment of the Court pursuant to  
9 FED.R.CIV.P. 59(e), arguing that the Court’s ruling excluding Greer’s witness and granting  
10 summary judgment for Thompson misapprehended the factual record, improperly resolved  
11 disputed factual issues, and was manifestly unjust. (Doc. 117.) The Court ordered  
12 Thompson to respond to Greer’s motion to amend judgment, which Thompson did. (Doc.  
13 118; Doc. 123.) Greer also filed his response to Thompson’s original motion for attorney  
14 fees and costs, and Thompson replied. (Doc. 119; Doc. 124.)

15 The Court then denied Greer’s motion to amend the judgment. (Doc. 125.) On  
16 February 21, 2012, Greer appealed the Court’s judgment to the United States Court of  
17 Appeals for the Ninth Circuit. (Doc. 127.) In light of the appeal, this Court denied  
18 Thompson’s original motion for attorney fees without prejudice to re-file pending disposition  
19 of the appeal. (Doc. 130.) On June 22, 2012, the Court of Appeals granted Greer’s motion  
20 to dismiss the appeal. (Doc. 131.) Thereupon, Thompson filed its renewed motion for  
21 attorney fees, asking once again for attorneys fees, with the additional inclusion of attorney  
22 fees incurred by Thompson in responding both to Greer’s motion to amend the judgment and  
23 Greer’s appeal to the Ninth Circuit. (Doc. 132; Doc. 133.)

#### 24 **LEGAL STANDARD**

25 An Arizona court may award reasonable attorney fees to a successful party in any  
26 contract action. ARIZ. REV. STAT. § 12-341.01(A). “In any contested action arising out of  
27 a contract, express or implied, the court may award the successful party reasonable attorney  
28 fees.” ARIZ. REV. STAT. § 12-341.01(A). However, this statutory provision does not create

1 a presumption that a successful party is entitled to attorney fees. Associated Indem. Corp.  
2 v. Warner, 694 P.2d 1181, 1182-83 (Ariz. 1985) (en banc). An award of reasonable attorney  
3 fees under § 12-341.01(A) should be made to mitigate the burden of the expense of litigation  
4 to establish a just claim or a just defense. ARIZ. REV. STAT. § 12-341.01(B). “It need not  
5 equal or relate to the attorney fees actually paid or contracted, but the award may not exceed  
6 the amount paid or agreed to be paid.” Id.

7 The trial court has discretion to award attorney fees under § 12-341.01(A) and is  
8 urged to use the following factors in making its determination: (1) the merits of the claim or  
9 defense presented by the unsuccessful party; (2) whether the litigation could have been  
10 avoided or settled and the successful party’s efforts were completely superfluous in achieving  
11 the results; (3) whether assessing fees against the unsuccessful party would cause an extreme  
12 hardship; (4) whether the successful party did not prevail with respect to all the relief sought;  
13 (5) the novelty of the legal question presented; (6) whether such claim or defense had  
14 previously been adjudicated in this jurisdiction; and (7) whether the award in any particular  
15 case would discourage other parties with tenable claims or defenses from litigating or  
16 defending legitimate contract issues for fear of incurring liability for substantial amounts of  
17 attorney fees. Warner, 694 P.2d at 1184.

18 If there is any reasonable basis for the exercise of the trial court’s discretion in  
19 awarding attorney fees under Section 12-341.01, an appellate court will not disturb the trial  
20 court’s judgment. Id. at 1184-85. L.R.Civ. 54.2(d) identifies the supporting documentation  
21 a movant must provide in support of a motion for attorney fees, including a statement of  
22 consultation from moving counsel, a copy or recitation of the fee agreement, an itemized fee  
23 and expense report, and an affidavit establishing the reasonableness of the rate, time spent,  
24 and expenses incurred.

25 In regards to attorney fees for appellate work, Ninth Circuit Rule 39-1.6(a) provides:

26 *Time Limits.* Absent a statutory provision to the contrary, a request for  
27 attorneys’ fees shall be filed no later than 14 days after the expiration of the  
28 period within which a petition for rehearing may be filed, unless a timely  
petition for rehearing is filed.

1 Ninth Circuit Rule 39-1.8 further provides that any party who may be eligible for attorney  
2 fees on appeal may “within the time permitted in Circuit Rule 39-1.6, file a motion to transfer  
3 consideration of attorneys fees on appeal to the district court . . . from which the appeal was  
4 taken.”

5 This rule authorizes the Ninth Circuit to transfer a request for appellate fees to the  
6 district court, “but the decision to permit the district court to handle the matter rests with the  
7 court of appeals,” and absent transfer a district court is not authorized to rule on a request for  
8 such fees. Cummings v. Connell, 402 F.3d 936, 947-48 (2005). However, a district court  
9 may be authorized to rule on a motion for appellate attorneys’ fees where the language of the  
10 fee-shifting statute relied on by the moving party allows the district court to award fees for  
11 all levels of litigation. See NRDC v. Winter, 543 F.3d 1152, 1164 (2008) (finding that the  
12 fee-shifting statute at issue allowed the district court to award appellate fees, because the  
13 statute stated that a court shall award fees incurred by the prevailing party in any civil action  
14 brought “*in any court* having jurisdiction of that action.” (emphasis in original)).

## 15 DISCUSSION

16 Thompson requests this Court award it \$227,744.50 in attorney fees and costs arising  
17 from its defense against Greer’s claims. (Doc. 133.) Thompson includes in this calculation  
18 additional fees and costs incurred in the time since filing its original motion for fees, which  
19 Thompson asserts were incurred responding both to Greer’s Motion to Amend and his appeal  
20 to the Ninth Circuit. (Id.)

21 Greer responds with four main arguments. (Doc. 134.) First, that this Court’s  
22 previous order denying Thompson’s original motion with leave to re-file precludes  
23 Thompson from filing this new, revised motion. (Id.) Second, that this Court should deny  
24 Thompson’s request for appellate fees because it failed to properly request such fees before  
25 the Ninth Circuit. (Id.) Third, that Thompson has failed to establish the reasonableness of  
26 its overall request for fees. (Id.) And fourth, that Thompson has failed to establish the  
27 specifics of its fee agreement with counsel, the reasonableness of its hourly rate, and the  
28 reasonableness of time spent by counsel. (Id.)

1           Additionally, Greer incorporates his previous response to Thompson’s original motion  
2 for fees (Doc. 119). (Id.) In that original response, Greer argued further that Thompson’s  
3 itemized list of charges included a number of items for which attorney fees should not be  
4 awarded, such as travel time and clerical tasks. (Doc. 119 at 13-15.) The Court will address  
5 each of Greer’s objections in turn.

6           **I.       Thompson’s Revised Motion for Fees**

7           The Court finds that Thompson is not precluded from bringing this revised motion for  
8 attorney fees. While the Court’s prior order (Doc. 130) stated that Thompson could  
9 “reinstate its motion at the proper time” by filing a motion to renew, the Court did not  
10 prohibit Thompson from updating the motion. (Id.) Moreover, after Thompson’s original  
11 motion was submitted, Greer filed a motion to reconsider the Court’s order granting summary  
12 judgment, and this Court ordered Thompson to respond. (Doc. 118.) The Court finds that  
13 there is no just reason to prohibit Thompson from updating its motion to include those fees  
14 Thompson alleges were incurred responding to Greer’s motion to reconsider.

15           **II.       Thompson’s Request for Appellate Fees**

16           As to Thompson’s claim for fees incurred as a result of Greer’s appeal, Greer argues  
17 that Thompson’s request must be denied for his failure to properly present the request before  
18 the Ninth Circuit. (Doc. 134.) Greer asserts that because Thompson filed neither a request  
19 for attorney fees before the Ninth Circuit, nor a request for transfer of the issue back to this  
20 Court, Thompson cannot be awarded these fees by this Court. (Id. at 5-6.)

21           Thompson responds by arguing that the language of ARIZ. REV. STAT. § 12-341.01(A)  
22 “does not limit an award of attorneys’ fees by this Court to only that portion of litigation  
23 before this Court, but permits the Court to properly award fees for all levels of litigation.”  
24 (Doc. 135 at 4.) In support of this assertion, Thompson cites to NRDC, 543 F.3d at 1164.  
25 (Id.) Thompson’s reliance on NRDC is misplaced. In that case, the Ninth Circuit held that  
26 the district court could award appellate fees despite the movant’s failure to satisfy Ninth  
27 Circuit Rules, because the fee-shifting statute relied upon there, 42 U.S.C. § 1988, stated  
28 explicitly that a court should award fees and other expenses incurred “*in any court having*

1 jurisdiction of that action.” NRDC, 543 F.3d at 1164 (emphasis in original) (internal  
2 citations omitted).

3 Here, Thompson offers no support for its theory that ARIZ. REV. STAT. § 12-341.01(A)  
4 contains any such permissive language. (Doc. 135.) While the Court notes that section  
5 12-341.01(A) does not explicitly limit the district courts to awarding fees incurred at that  
6 level, neither does the plain language “indicate that the district court may properly award fees  
7 for *all* levels of litigation.” NRDC, 543 F.3d at 1164. Moreover, 39-1.6 provides that the  
8 time and procedural strictures will apply “*absent a statutory provision to the contrary.*”  
9 Ninth Circuit Rule 39-1.6(a) (emphasis added). Here, there is no provision in ARIZ. REV.  
10 STAT. § 12-341.01(A) which can be fairly read to contradict the clear requirements of the  
11 Ninth Circuit rules. Thus, this Court finds that Thompson’s request for the \$6,210.00 in fees  
12 incurred at the appellate level must be denied.

### 13 **III. Reasonableness of Overall Request for Fees**

14 The Court finds that Thompson’s request for an award of attorney fees is reasonable.  
15 This Court previously found that Greer’s case depended so heavily on the unreliable and  
16 unsupported assertions of its expert that all six claims were dismissed on summary judgment  
17 once the Court excluded the expert’s testimony. (Doc. 111.) In addition, Greer’s initial  
18 demand prior to filing this suit was for \$437,897.18. (Doc. 119 at 9.) The Court finds that  
19 Defendant’s refusal of this demand was reasonable. Thereafter, the parties attempted  
20 settlement through formal mediation, but were unsuccessful. (Doc. 133 at 5.)

21 Greer contends that an award of attorney fees would constitute a significant financial  
22 hardship, and that the Court should thus deny Thompson’s motion. However, on October  
23 18, 2012, the Court granted Greer thirty days in which to file verified financial statements  
24 under seal as evidence of financial hardship. (Doc. 136.) Greer failed to file any such  
25 documents, and thus the Court has no substantiated evidence of financial hardship.

26 Thompson prevailed with respect to all relief sought, and this case did not present  
27 novel legal issues. Greer argues, however, that an award of fees to Thompson will have a  
28 chilling effect on the pursuit of other tenable claims. (Doc. 119 at 11.) Greer alleges that

1 Thompson was defended by the Fireman’s Fund under a reservation of rights, which  
2 provided unlimited funds to Thompson for litigation, but no funds to settle, which created  
3 a natural incentive for Thompson to litigate aggressively and refuse to negotiate toward  
4 settlement. (Id.) The Court disagrees that the mere fact that Thompson was defended under  
5 a reservation of rights necessarily leads to a conclusion that Thompson did not engage in  
6 good faith settlement discussions. Thus, Greer fails to show that an award of fees in this case  
7 would have a deterrent effect on the pursuit of other, meritorious claims.

8 Therefore, the Court finds that Thompson’s overall request for attorney fees in this  
9 case is reasonable.

10 **IV. Thompson’s Fee Agreement, Reasonableness of Hourly Rate, and**  
11 **Reasonableness of Time Spent.**

12 Greer next argues that Thompson has failed to comply with the requirements of  
13 L.R.Civ. 54.2(d)(2), by not submitting the proper documentation of its fee agreement with  
14 counsel. (Doc. 134 at 7.) Greer’s argument is without merit. L.R.Civ. 54.2(d)(2) provides  
15 that a copy of any written fee agreement, “or a full recitation of any oral fee agreement” must  
16 be attached to the memorandum in support of a motion for attorney fees. Here, Thompson  
17 provides a copy of the e-mail correspondence in which it established the fee agreement with  
18 counsel. (Doc. 133-2.) Moreover, Thompson’s attorney Stephen McCarron recites the fee  
19 agreement fully in his statement. (Doc. 133-5 at 7.) Thus, the Court finds that Thompson  
20 properly complied with the documentation requirements of the local rules.

21 Greer argues further that the hourly rate of \$300.00 paid by Thompson was not  
22 reasonable. (Doc. 134 at 8.) Greer alleges that Thompson provides no evidence that this rate  
23 is reasonable for insurance defense work in the Phoenix, Arizona legal community, and that  
24 Mr. McCarron’s declaration does not establish his familiarity with the prevailing community  
25 rates. (Id.)

26 Greer’s argument here is unavailing; L.R.Civ. 54.2(d)(4)(B) requires a “brief  
27 discussion of the terms of the written or oral fee agreement,” and “the method by which the  
28 customary charges were established, the comparable prevailing community rate or other

1 indicia of value of the services rendered.” Here, attorney McCarron’s statement adequately  
2 supports the hourly rate with discussion of the value of the services rendered by him and his  
3 co-counsel, attorneys with substantial experience in agricultural litigation. (Doc. 133-5 at  
4 3-6.) Moreover, the Court is entitled to rely on its own familiarity with customary rates and  
5 the reasonableness of attorney fees. See Ingram v. Oroudjian, 647 F.3d 925, 928 (9th Cir.  
6 2011). Thus, the Court finds that Thompson’s requested hourly rate is reasonable.

7 Finally, Greer challenges the reasonableness of the time spent by Thompson’s  
8 attorneys on two grounds: (1) that the billing ledger evidences inaccurate billing by attorney  
9 McCarron; and (2) that Thompson’s claimed hours spent responding to his Motion to Amend  
10 are excessive and improper. (Doc. 134 at 8-10.)

11 Greer argues that Mr. McCarron’s billing practices are obviously inaccurate due to  
12 the fact that Mr. McCarron “never made a billing entry for less than two-tenths of an hour  
13 in over two years of litigation,” and that “all of [his] time entries over 1.3 hours are billed to  
14 the nearest half hour and usually to the nearest hour.” (Doc. 134 at 9.) Thompson responds  
15 by pointing out that this billing method reflects the division of labor between himself and his  
16 co-counsel Ms. Fassett, as evidenced by the numerous time entries of one-tenth of an hour  
17 in her billing log. (Doc. 135 at 6.) The Court finds that Thompson’s billing logs do not  
18 reflect an unreasonable accounting of time spent.

19 Greer argues also that the time spent by Thompson’s attorneys was not reasonable,  
20 alleging that Thompson claims excessive hours spent responding to Greer’s Motion to Alter  
21 or Amend Judgment. (Doc. 134 at 9-10.) According to Greer, Thompson’s attorneys could  
22 have prepared their response in less than the forty hours claimed. (Id.) Greer’s argument,  
23 however, amounts to nothing more than baseless second-guessing of the time spent by  
24 Thompson’s attorneys – time which was necessitated by Greer’s filing of the Motion to  
25 Amend. Thus, the Court finds that the time spent by Thompson’s counsel in responding to  
26 that motion was not unreasonable.

27 In its original response to Thompson’s first motion for fees, Greer argued also that  
28 Thompson’s itemized list of charges included a number of items for which attorney fees



1 should not be awarded, such as travel time and clerical tasks. (Doc. 119 at 13-15.)  
2 Thompson responded to Greer's argument by agreeing to forego its claim for those 91.90  
3 hours Greer alleged were improper. (Doc. 124 at 4.) Thus, this argument is moot.

4 **CONCLUSION**

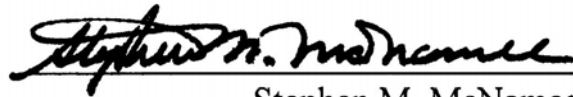
5 Therefore, after a review of the record, including the affidavit of Stephen M.  
6 McCarron and an accompanying itemized statement of fees, the Court finds that Thompson's  
7 claim for attorneys' fees in the amount of \$227,744.50 is reasonable, with the exception of  
8 the \$6,210.00 claimed in appellate fees. Thus, Thompson will be awarded fees in the amount  
9 of \$221,534.50.

10 Accordingly,

11 **IT IS ORDERED** that Defendant's Motion for Attorneys' Fees is **GRANTED** in part  
12 and **DENIED** in part. (Doc. 132)

13 **IT IS FURTHER ORDERED** directing the Clerk of Court to enter judgment in favor  
14 of Defendant Thompson for attorneys' fees in the amount of \$221,534.50.

15 DATED this 11<sup>th</sup> day of December, 2012.

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18 Stephen M. McNamee  
19 Senior United States District Judge  
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