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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 KnightBrook Insurance Company; and
10 Knight Management Insurance Services,
11 LLC,

11 Plaintiffs,

12 v.

13 Payless Car Rental System, Inc.; and
14 PCR Venture of Phoenix, LLC,

15 Defendants.

No. CV12-01671-PHX-DGC

ORDER

16
17 Defendants Payless Car Rental System, Inc. and PCR Venture of Phoenix, LLC
18 (together, “Payless”) seek to recover attorneys’ fees under A.R.S. § 12-341.01 from
19 Plaintiffs KnightBrook Insurance Company and Knight Management Insurance Services,
20 LLC (collectively, “KnightBrook”). Doc. 457. Payless seeks to recover fees for its
21 ultimately successful defense against KnightBrook’s claim for equitable indemnity. *See*
22 Doc. 444. The motion is fully briefed, and no party requests oral argument. The Court
23 will grant the motion in part.¹

24 **I. Section 12-341.01.**

25 Section 12-341.01 provides that “[i]n any contested action arising out of a
26 contract, express or implied, the court may award the successful party reasonable attorney
27 _____

28 ¹ Relevant background facts can be found in *KnightBrook Ins. Co. v. Payless Car Rental Sys., Inc.*, 356 F. Supp. 3d 856 (D. Ariz. 2018).

1 fees.” A.R.S. § 12-341.01(A). The parties disagree on whether KnightBrook’s equitable
2 indemnity claim arises out of contract. To resolve this issue, the Court must consider
3 whether the claim would exist but for a breach of a contract. *See Schwab Sales, Inc. v.*
4 *GN Constr. Co.*, 992 P.2d 1128, 1132 (Ariz. 1998); *In re Gorilla Companies LLC*, No.
5 CV10-1029-PHX-DGC, 2011 WL 5519910, at *3-4 (D. Ariz. Nov. 14, 2011). If
6 KnightBrook’s claim would not exist but for a contract, then the claim arises out of the
7 contract and § 12-341.01 applies. *Id.*

8 KnightBrook’s equitable indemnity claim arose out of contract. The Ninth Circuit
9 and Arizona Supreme Court ruled in this case that KnightBrook could obtain equitable
10 indemnity from Payless only if it discharged an “actual obligation” of Payless. *See*
11 *KnightBrook Ins. Co. v. Payless Car Rental Sys., Inc.*, 356 F. Supp. 3d 856, 858 (D.
12 Ariz. 2018). KnightBrook argued that the actual obligation of Payless arose from the SLI
13 policy – a contract of insurance created at the time of the car rental. *See, e.g.*, Docs. 433
14 at 2 (for KnightBrook to prevail, the Court “must find that . . . [Payless] and KnightBrook
15 were actually liable to Michael Bovre *on the breach of contract claim* for failing to
16 provide SLI coverage”); 441 at 8 (“KnightBrook paid to fix that mistake, thereby
17 extinguishing the parties’ coextensive *contractual liability*.”) (emphasis added). The
18 equitable indemnification claim would not have existed without the alleged SLI policy.

19 Plaintiffs’ citations to equitable indemnity law, including the Court’s order of
20 April 1, 2015, are not relevant. *See* Docs. 376 at 23, 460 at 2. Defendants seek to
21 recover attorneys’ fees under § 12-341.01, not under traditional indemnity law.

22 Nor are the parties’ and the Court’s previous assertions with respect to § 78 of the
23 Restatement First of Restitution relevant. That section required only that an
24 indemnification plaintiff discharge a “supposed obligation” of the indemnification
25 defendant. *See* Restatement (First) of Restitution § 78 (1937); *KnightBrook Ins. Co. v.*
26 *Payless Car Rental Sys., Inc.*, 100 F. Supp. 3d 817, 829 (D. Ariz. 2015), *aff’d in part,*
27 *vacated in part*, 731 F. App’x 632 (9th Cir. 2018). The Arizona Supreme Court, on
28 referral from the Ninth Circuit, declined to adopt that approach and instead required that

1 the indemnification plaintiff discharge an “actual obligation” of the indemnification
2 defendant. *KnightBrook Ins. Co. v. Payless Car Rental Sys. Inc.*, 409 P.3d 293, 295
3 (Ariz. 2018). The “actual obligation” asserted by Plaintiffs, as discussed above, is a
4 contract – the SLI policy – bringing the equitable indemnification claim within the scope
5 of § 12-341.01.

6 **II. Warner Factors.**

7 Payless seeks an award of fees for the work of the Taylor Anderson firm in the
8 amount of \$21,066.20, for the Covington firm in the amount of \$134,408.00, and for the
9 Gust Rosenfeld firm in the amount of \$5,820.00, for a total of \$161,294.20. Doc. 457.
10 As explained in the motion, this fee request has been substantially discounted from actual
11 fees incurred in this case. *See* Doc. 457. In *Associated Indem. Corp. v. Warner*, 694.
12 P.2d 1181 (Ariz. 1985), the Arizona Supreme Court identified several factors the Court
13 should consider in deciding whether to award fees under § 12-341.01. These include:
14 (1) the merits of the claim or defense presented by the unsuccessful party; (2) whether the
15 litigation could have been avoided or settled and whether the successful party’s efforts
16 were completely superfluous in achieving the result; (3) whether assessing fees against
17 the unsuccessful party would cause an extreme hardship; (4) whether the successful party
18 prevailed with respect to all of the relief sought; (5) the novelty of the legal question
19 presented; (6) whether the claim or defense had previously been adjudicated in this
20 jurisdiction; and (7) whether the award would discourage other parties with tenable
21 claims or defenses from litigating or defending legitimate contract issues for fear of
22 incurring liability for the opposing party’s fees. *Id.* at 1183-84.

23 KnightBrook makes various arguments with respect to the *Warner* factors, but the
24 Court does not find them persuasive. Doc. 400 at 4-6. On the first factor, Payless
25 prevailed on the merits of all of KnightBrook’s claims. Although KnightBrook prevailed
26 on an interim basis with respect to its indemnification claim, it ultimately was
27 unsuccessful. This factor is neutral. Second, both parties identify settlement
28 opportunities the other side rejected. Payless notes, however, that it felt compelled to

1 litigate this case to a conclusion in order to avoid an adverse precedent with respect to its
2 many existing SLI policies. This is not a situation where the successful party's efforts
3 were completely superfluous in achieving the result. This factor favors an award of fees.
4 The third and fourth factors also favor a fee award. KnightBrook does not assert that a
5 fee recovery in this case would cause it extreme hardship and Payless prevailed entirely
6 on the equitable indemnity claim for which it seeks fees, and on all other claims asserted
7 by KnightBrook. Fifth, novel legal questions were litigated by both sides. This factor is
8 neutral. Sixth, the claims and defenses had not been previously litigated in this
9 jurisdiction, and, as noted, Payless felt compelled to litigate them fully in order to protect
10 its business interest in many other SLI policies. This factor favors a fee award. And
11 finally, this was a lawsuit between two large and sophisticated corporations, so an award
12 of fees would not discourage tenable claims or defenses. This factor also favors a fee
13 award.

14 Five of the seven factors identified by the Arizona Supreme Court in *Warner* favor
15 awarding attorneys' fees in this case. 694 P.2d at 1184. The Court will award fees.

16 **III. Discretionary Adjustments to the Fee Award.**

17 KnightBrook has not shown that attorney Nesbitt's later disciplinary problems
18 affected his billings in this case. The Court will, however, reduce the Taylor Anderson
19 fees by \$1,000 in light of the block billing by Mr. Williams.²

20 The hourly rates charged by the Covington firm are excessive for the Phoenix
21 legal market and for this case. The Court will reduce the Covington fees by 25% to bring
22 them in line with fees typically seen in this Court.

23 Finally, the Court concludes that the Gust Rosenfeld fees include some degree of
24 unnecessary duplication of work performed by Covington lawyers, and therefore will
25 reduce the Gust Rosenfeld fees by 25%.

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27 ² This represents a one-third reduction in the amount Payless seeks for
28 Mr. Williams' time ($\$15,234 \times .20$ (the discount offered by Payless) = $3,046.80 \times .33$ =
 $\$1,005.44$). See Doc. 461 at 8 n.6. The Court does not ascribe to the one-tenth reduction
suggested by the parties for block billing. *Id.*

