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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Michael DiPietro,

10 Petitioner,

11 v.

12 First Allied Securities Incorporated,

13 Respondent.  
14

No. CV-14-00502-PHX-DGC

**ORDER**

15  
16 Respondent First Allied Securities, Inc. asks the Court to award attorneys' fees  
17 and costs against Petitioner Michael DiPietro pursuant to Federal Rule of Civil Procedure  
18 54(d) and Local Rule 54.2(b). Doc. 89. The motion has been fully briefed (Docs. 89, 90,  
19 92, 94), and neither party has requested oral argument. For the reasons that follow, the  
20 Court will grant First Allied's motion in part.

21 **I. Background.**

22 On October 8, 2004, the parties entered into an Independent Contractor Agreement  
23 ("ICA") which provided that DiPietro would sell securities and other services on behalf  
24 of First Allied. Doc. 24-2 at 2. The ICA also included a broad provision under which  
25 DiPietro agreed to indemnify First Allied for losses, costs, and expenses related to  
26 disputes arising out of the agreement. Doc. 92-1 at 6; Doc. 94 at 5. On September 19,  
27 2012, Martina Hutchinson filed a claim against First Allied in a FINRA arbitration  
28 related to investments purchased through DiPietro and First Allied. Doc. 24-3;

1 Doc. 90 at 5. Pursuant to FINRA rules, the arbitration was assigned to Phoenix, Arizona.  
2 Doc. 92 at 2. First Allied filed an answer and a third-party claim against DiPietro seeking  
3 indemnification under the ICA. Doc. 24-4. DiPietro filed a response and counterclaims  
4 against First Allied for abuse of process and malicious prosecution. Doc. 24-11.  
5 Hutchinson's claims against First Allied were settled. Doc. 90 at 5; Doc. 92 at 2. The  
6 arbitration between First Allied and DiPietro continued, resulting in a unanimous three-  
7 member panel decision in favor of First Allied. Doc. 24-19. The panel found that  
8 DiPietro was liable to First Allied for \$100,000 in compensatory damages, post-judgment  
9 interest at the rate of 8%, \$56,047.55 in attorneys' fees, and \$1,456.24 in witness fees.  
10 *Id.* at 3. DiPietro's counterclaims were denied. *Id.*

11 On March 12, 2014, DiPietro filed a motion with this Court to vacate or modify  
12 the arbitration award. Doc. 1. The Court denied the motion and confirmed the arbitration  
13 award. Doc. 68. First Allied filed a subsequent motion for attorneys' fees (Docs. 76, 77),  
14 which was denied without prejudice while the Ninth Circuit considered the Court's order  
15 on an appeal from DiPietro. Doc. 81. The Court instructed First Allied that a renewed  
16 motion for attorneys' fees could be filed within 30 days of the issuance of the mandate on  
17 appeal. *Id.* The Ninth Circuit affirmed the Court's decision (Doc. 88-2) and denied  
18 DiPietro's subsequent petition for panel rehearing and *en banc* review (Doc. 88-1). The  
19 Ninth Circuit also granted First Allied's motion to transfer consideration of the attorneys'  
20 fees on appeal to this Court. *Id.* The mandate affirming the Court's decision was issued,  
21 and First Allied filed this renewed motion for attorneys' fees.

## 22 **II. Analysis.**

23 First Allied seeks an award of attorneys' fees in the amount of \$157,630.33.  
24 Doc. 94 at 10. First Allied argues that it is entitled to these fees under three different  
25 sources: (1) A.R.S. § 12-1514; (2) A.R.S. § 12-341.01; and (3) the IRC. Doc. 89, ¶ 6.  
26 DiPietro argues that the Court may not award attorneys' fees because (1) California law  
27 governs the dispute under the terms of the ICA, and California law does not allow for  
28 attorneys' fees related to an appeal of an arbitration award; and (2) the Court does not

1 have power to determine attorneys' fees under the IRC, which must instead be submitted  
2 to the arbitrator. Doc. 92. DiPietro also contends that the amount of attorneys' fees  
3 sought by First Allied is unreasonable. *Id.*

4 **A. California Law and the ICA.**

5 DiPietro argues that, under the express terms of the ICA, California law governs  
6 this dispute. Doc. 92 at 9. First Allied contends that "the parties have relied on Arizona  
7 law throughout this litigation" and "DiPietro has waived his right to enforce the ICA's  
8 choice of law provision." Doc. 94 at 3. Even if the Court applies California law,  
9 however, First Allied is entitled to an award of fees related to DiPietro's challenge of the  
10 arbitration decision in this Court and the Ninth Circuit.

11 **1. Eligibility**

12 As DiPietro concedes, California law allows for an award of attorneys' fees when  
13 such fees are authorized by contract, statute, or law. Cal. Civ. Proc. Code § 1033.5; *see*  
14 *also* Cal. Civ. Proc. Code § 1021 (in judicial proceedings relating to arbitration, "the  
15 measure and mode of compensation of attorneys and counselors at law is left to the  
16 agreement, express or implied, of the parties"); *Carole Ring & Assocs. v. Nicastro*, 104  
17 Cal. Rptr. 2d 519, 523 (Cal. Ct. App. 2001). California courts have awarded attorneys'  
18 fees to prevailing parties in state court suits for confirmation or modification of  
19 arbitration awards if a valid contract between the parties provides for such fees. *See, e.g.,*  
20 *Corona v. Amherst Partners*, 132 Cal. Rptr. 2d 250, 254 (Cal. Ct. App. 2003) ("A court  
21 must award costs in a judicial proceeding to confirm, correct or vacate an arbitration  
22 award. Attorney fees are recoverable as costs if authorized by contract.") (citations  
23 omitted); *Carole Ring*, 104 Cal. Rptr. 2d at 523 (finding that the court was required to  
24 award the prevailing party attorneys' fees related to post-arbitration judicial proceedings  
25 confirming an arbitration award when the contract provided for such fees).

26 The parties agree that their dispute in this Court and the Ninth Circuit is "a  
27 continuation of the underlying arbitration case" and, as a result, the terms of the ICA  
28 apply to the motion for attorneys' fees related to this dispute. Doc. 90 at 9; Doc. 92 at 9

1 (citing First Allied’s brief, Doc. 90 at 9). As a result, the Court will look to the language  
2 of the ICA to determine whether First Allied is eligible for attorneys’ fees. Doc. 92-1.

3 The ICA provides that “[a]ny dispute between [DiPietro] and First Allied which  
4 cannot be settled by the parties will be arbitrated[.]” *Id.* at 7. DiPietro argues that,  
5 pursuant to this clause, the Court cannot decide the motion for attorneys’ fees; instead the  
6 motion must be submitted to the arbitrators for determination. Doc. 92 at 9. The Court  
7 does not agree. The language of the ICA does not prohibit a party from challenging an  
8 arbitration award in federal court, as DiPietro has done here. Nor does it preclude a  
9 federal court from awarding attorneys’ fees related to such a challenge. Moreover, if  
10 motions for attorneys’ fees related to district court proceedings modifying or confirming  
11 an arbitration award had to be submitted to the arbitrators, an absurd result could occur.  
12 Assuming the parties would always challenge the arbitrators’ decision in the federal  
13 courts, the parties would find themselves in an unending back-and-forth between the  
14 arbitrators and the federal courts, unable to obtain complete relief.

15 DiPietro’s position that only the arbitrators can determine a motion for attorneys’  
16 fees is further contradicted by precedent from the California state courts. In *Carole Ring*,  
17 the parties’ contract “contained an arbitration clause, requiring binding arbitration of any  
18 dispute or claim arising out of th[e] contract.” 104 Cal. Rptr. 2d at 521 (quotation marks  
19 omitted and alterations incorporated). One of the parties sought review of an arbitration  
20 decision in the California superior court, and that arbitration decision was ultimately  
21 confirmed by the California court of appeal. *Id.* The prevailing party filed a subsequent  
22 motion for attorneys’ fees with the superior court, which was denied. *Id.* The appellate  
23 court reversed, concluding that the superior court was “required to award [] the party  
24 prevailing on the contract[] reasonable attorney fees and costs for post-arbitration judicial  
25 proceedings, pursuant to the statutory scheme governing arbitration.” *Id.* at 524.

26 In reaching this decision, the appellate court relied on Cal. Civ. Proc. Code  
27 § 1293.2, which “addresses the matter of *costs in judicial proceedings* relating to  
28 arbitration.” 104 Cal. Rptr. 2d at 524 (emphasis in original). The court noted that

1 § 1293.2 requires a court to award costs to the prevailing part in any judicial proceedings  
2 relating to arbitration, including proceedings to confirm, correct, or vacate an arbitration  
3 award. *Id.* Moreover, “items recoverable as costs include *attorney fees when authorized*  
4 *by contract.*” *Id.* (citing Cal. Civ. Proc. Code § 1033.5) (emphasis in original). The  
5 contract between the parties provided that “in any action, proceeding, or arbitration  
6 arising out of this agreement, involving the Seller and/or Broker(s), the prevailing party  
7 shall be entitled to reasonable attorneys’ fees and costs.” *Id.* (alterations incorporated).  
8 As a result, the court concluded that “the mandatory language of the contractual attorney  
9 fees clause and section 1293.2 entitle [the prevailing party] to reasonable attorney fees  
10 and costs incurred in post-arbitration judicial proceedings” and remanded the case to the  
11 superior court to award such fees and costs. *Id.* at 525.

12 DiPietro cites a Fifth Circuit case to support his argument that the Court’s  
13 jurisdiction is limited to confirming or vacating the arbitration award and may not include  
14 an award of attorneys’ fees. Doc. 92 at 8 (citing *Schlobohm v. Pepperidge Farm, Inc.*,  
15 806 F.2d 578 (5th Cir. 1986). This case, however, addressed whether a district court  
16 could award attorneys’ fees and costs incurred during the arbitration itself. *Id.* at 580.  
17 The issue was whether the district court had the power to modify the arbitration award to  
18 add attorneys’ fees and costs, even though the arbitrators had not addressed the issue.  
19 *Schlobohm* does not address the question at issue here.

20 Accordingly, the Court does not find that a mandatory arbitration clause precludes  
21 a district court that has confirmed an arbitration award from granting attorneys’ fees  
22 related to that confirmation. Rather, California law appears to require a district court to  
23 award such fees when they are mandated by contract.

## 24 **2. Entitlement.**

25 The ICA provides in relevant part:

26 Any and all actions of any nature whatsoever, including without limitation,  
27 a complaint, claim, regulatory action, litigation or arbitration that is  
28 threatened or initiated by or against First Allied by reason of [DiPietro’s]  
breach of this Agreement or any alleged act or omission on the part of

1 [DiPietro] shall be the responsibility of [DiPietro] and the DPR, and  
2 [DiPietro] and DPR agree, jointly and severally, to indemnify and hold  
3 First Allied and its affiliates . . . harmless from and against all losses, costs  
4 and expenses that may arise therefrom. Said losses, costs and expenses  
5 **shall include, but not be limited to reasonable attorneys’ fees and**  
6 **disbursements**, court costs and forum fees, settlements, regulatory  
reimbursements, judgments and awards. First Allied, may, in its sole  
discretion, settle any litigation without the consent of [DiPietro].

7 Doc. 92-1 at 6 (emphasis added). The proceedings in this Court and the Ninth Circuit  
8 arose directly from DiPietro’s efforts to set aside the arbitration award enforcing this  
9 indemnification provision against him. As a result, the mandatory language of the  
10 provision requires DiPietro to indemnify First Allied for all costs, including reasonable  
11 attorneys’ fees, related to these proceedings.<sup>1</sup>

12 **B. Arizona Law.**

13 The Arizona Supreme Court has held, under A.R.S. § 12-1514, that a trial  
14 court may make an award for attorneys’ fees incurred in proceedings confirming,  
15 modifying, or vacating an arbitration award, even if the arbitration agreement does not  
16 provide for such fees. *Canon Sch. Dist. No. 50 v. W.E.S. Const. Co.*, 882 P.2d 1274,  
17 1280 (Ariz. 1994); *Smith v. Pinnamaneni*, 254 P.3d 409, 418 (Ariz. Ct. App. 2011); *Steer*  
18 *v. Eggleston*, 47 P.3d 1161, 1166 (Ariz. Ct. App. 2002). Where the parties’ contract  
19 explicitly provides for attorneys’ fees, as it does here, First Allied is entitled to an award  
20 of reasonable fees under Arizona law and the Court need not determine whether First  
21 Allied could recover fees under A.R.S. § 12-341.01.

22 **C. Is the Amount of the Requested Fee Award Reasonable?**

23 DiPietro argues that the requested fees are not reasonable because they improperly  
24 include charges beyond those related to the motion to vacate and subsequent appeal.

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26 <sup>1</sup> There is no requirement in the ICA that the party seeking attorneys’ fees be the  
27 prevailing party. Regardless, First Allied is the prevailing party as a matter of law. *See*  
28 Cal. Civ. Code § 1717(b)(2) (“the party prevailing on the contract shall be the party who  
recovered a greater relief in the action on the contract.”).

1 Doc. 92 at 10. Specifically, DiPietro contends that the invoices include “fees for  
2 research, the FINRA suspension proceeding to which [First Allied] was not a party, and  
3 judgments in California.” *Id.* DiPietro further emphasizes that First Allied’s counsel  
4 failed to attest that the fees are reasonable and necessary, and provides a marked copy of  
5 the task-based itemized statement indicating which charges he protests. DiPietro does  
6 not appear to otherwise contend that the rates charged or hours worked were  
7 unreasonable.

8 First Allied’s local counsel revised its request to remove all fees associated with  
9 DiPietro’s FINRA suspension proceeding. Doc. 94 at 8-9. The Court agrees that this  
10 suspension proceeding is separate from the motion to vacate the arbitration award and  
11 that the fees were properly removed. Winget, Spadafora & Schwartzberg, however, did  
12 not remove those fees from its request. The firm should have done so.<sup>2</sup>

13 Additionally, both Arizona and California law allow for research expenses to be  
14 included in an award of attorneys’ fees. *See Ahwatukee Custom Estates Mgmt. Ass’n,*  
15 *Inc. v. Bach*, 973 P.2d 106, 109 (Ariz. 1999) (permitting recovery of computerized  
16 research expenses as an element of an award of attorneys’ fees); *Plumbers &*  
17 *Steamfitters, Local 290 v. Duncan*, 69 Cal. Rptr. 3d 184, 197 (Cal. Ct. App. 2007)  
18 (same).

19 Finally, DiPietro does not cite any authority suggesting that fees related to the  
20 domestication of a judgment cannot be included in an award of reasonable attorneys’  
21 fees. Rather, domestication of this Court’s judgment in California appears necessary to  
22 enforce the judgment.

23 Although the Court finds that First Allied may recover fees for work related to  
24 research and domestication of the judgment, the Court will not award fees for work that it  
25 finds clearly excessive. Under both California and Arizona law, the Court retains broad  
26 discretion to determine a *reasonable* award of attorneys’ fees when the parties’ contract

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27 <sup>2</sup> Reviewing the task-based itemized statement from Winget, Spadafora &  
28 Schwartzberg, the Court finds entries related to the suspension proceedings totaling  
\$4,948.50. *See* Doc. 93-1 at 13, 14, 19, 20, 22, 25. This amount should have been  
removed from the fee request.

1 provides for such an award. *EnPalm, LLC v. Teitler Family Trust*, 75 Cal. Rptr. 3d 902,  
2 905-06 (Cal. Ct. App. 2008) (“The trial court has broad discretion to determine the  
3 amount of a reasonable fee, and the award of such fees is governed by equitable  
4 principles.”); *McDowell Mountain Ranch Cmty. Ass’n, Inc. v. Simons*, 165 P.3d 667, 672  
5 (Ariz. Ct. App. 2007) (“a trial court has discretion to determine the reasonable amount of  
6 attorneys’ fees to award when awarding fees pursuant to a contractual provision  
7 providing for reasonable attorneys’ fees”) (explaining the holding of *Chase Bank of Ariz.*  
8 *v. Acosta*, 880 P.2d 1109, 1120 (Ariz. Ct. App. 1994)).

9 This case was not complicated or protracted. First Allied filed a 20-page response  
10 to DiPietro’s petition (Doc. 24), a 12-page motion to strike an amended complaint, and a  
11 few shorter documents (Docs. 58, 59, 75). Counsel for First Allied participated in a case  
12 management conference where the parties agreed that the Court should treat DiPietro’s  
13 petition and First Allied’s response as cross-motions for summary judgment (Doc. 65),  
14 and in oral argument on the petition (Doc. 67). No discovery occurred. The Court ruled  
15 in First Allied’s favor on the petition, and DiPietro appealed. The Court cannot conclude  
16 this amount of work, plus filing a response brief in the Court of Appeals and appearing  
17 (presumably) at the appellate hearing, justifies an attorneys’ fee award of more than  
18 \$150,000. The hours billed by First Allied’s counsel are not reasonable in relation to the  
19 work done in this case, and the Court will exercise its discretion to reduce the award to a  
20 reasonable amount: \$75,000.

21 **D. Compliance with Local Rules.**

22 DiPietro argues that First Allied’s fee request should be denied for failure to  
23 comply with local rule 54.2(d)(4)(C):

24 Reasonableness of Time Spent and Expenses Incurred. In this section the  
25 affiant must state that the affiant has reviewed and has approved the time  
26 and charges set forth in the task-based itemized statement and that the time  
27 spent and expenses incurred were reasonable and necessary under the  
28 circumstances. This section also must demonstrate that the affiant  
exercised “billing judgment.” The affiant should identify all adjustments, if  
any, which may have been made, and specifically, should state whether the

1 affiant has eliminated unnecessary, duplicative and excessive time, deleted  
2 certain categories of time or expense entries and/or reduced the amount  
3 charged for a particular type of expense such as facsimile or photocopy  
charges.

4 LRCiv 54.2(d)(4)(C).

5 There is some question as to whether counsel from both firms complied with this  
6 provision in the attachments to their original motion. *See* Doc. 90-1 at 27-29, 104-06  
7 (attesting to the accuracy of the invoices, but not explicitly to the reasonableness or  
8 billing judgment exercised). Counsel from both firms, however, attached amended  
9 declarations to First Allied's reply brief which correct any deficiencies. *See* Doc 94-1 at  
10 2-7; Doc.94-2 at 2-5. The Court will not deny First Allied's motion on this basis.

11 DiPietro objects to multiple specific entries in First Allied's task-based itemized  
12 statement as incomplete, duplicative, unrelated to the motion to vacate or appeal, or  
13 unnecessary. Doc. 93-1. In light of the Court's overall determination of a reasonable fee  
14 amount above, the Court will not separately deduct these items.

15 DiPietro's contention that a number of entries are deficient under local rule  
16 54.2(e)(2)(A), (B) and (C) is without merit. These sections require invoice entries, when  
17 relevant, to identify the pleading or paper prepared and the activities associated with its  
18 preparation, identify all participants in a telephone call and the reason for the call, and  
19 identify the specific legal issues researched. LRCiv 54.2(e)(2)(A), (B), (C). The local  
20 rules explicitly provide that the party seeking an award of fees must adequately describe  
21 the services rendered "so that the reasonableness of the charge can be evaluated. In  
22 describing such services, however, counsel should be sensitive to matters giving rise to  
23 issues associated with the attorney-client privilege and attorney-work product doctrine,  
24 but must nevertheless furnish an adequate nonprivileged description of the services in  
25 question." LRCiv 54.2(e)(2). The Court finds that it can adequately assess the itemized  
26 statement entries. The fact that redactions have been made in multiple entries to protect  
27 privilege and attorney-work product does not impede the Court from assessing the overall  
28 reasonableness of the award.

