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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Ameriprise Financial Services Incorporated,

No. CV-14-00935-PHX-DGC

10 Plaintiff,

ORDER

11 v.

12 Henry Ekweani, et al.,

13 Defendants.
14

15 Defendants have filed a motion for attorneys' fees pursuant to Local Rule 54.2 and
16 A.R.S. § 12-341.01. Doc. 47. The motion is fully briefed, and neither party has
17 requested oral argument. The Court will grant the motion in part.

18 **I. Background.**

19 Plaintiff Ameriprise Financial Services, Inc. ("AFSI") filed an action for
20 declaratory relief seeking a determination that it did not have a binding arbitration
21 agreement with Defendant Henry Ekweani. Doc. 1. Defendant Ekweani counterclaimed
22 that AFSI breached its contract to arbitrate employment disputes. Doc. 9. On April 16,
23 2015, the Court granted summary judgment in favor of AFSI on its claim for declaratory
24 relief and on Defendant's claim for breach of contract. Doc. 42. The Court also
25 permitted AFSI to file a memorandum on its request for an award of attorneys' fees.
26 Plaintiff filed a memorandum seeking \$49,422.00 in attorneys' fees. Doc. 47. The
27 request is limited to the fees incurred in prosecuting the declaratory action and defending
28 against Defendant's counterclaim. It does not include fees incurred by local counsel or

1 fees related to Plaintiff's unsuccessful motion to strike.

2 **II. Legal Standard.**

3 Under Arizona law, “[i]n any contested action arising out of a contract, express or
4 implied, the court may award the successful party reasonable attorney fees.” A.R.S.
5 § 12-341.01(A). The trial court has discretion regarding an award of attorneys’ fees. *See*
6 *Wilcox v. Waldman*, 744 P.2d 444, 450 (Ariz. Ct. App. 1987). To determine whether to
7 award attorneys’ fees, courts consider the merits of the unsuccessful party’s claim,
8 whether the successful party’s efforts were completely superfluous in achieving the
9 ultimate result, whether assessing fees against the unsuccessful party would cause
10 extreme hardship, whether the successful party prevailed with respect to all relief sought,
11 whether the legal question presented was novel or had been previously adjudicated, and
12 whether a fee award would discourage other parties with tenable claims from litigating.
13 *Am. Const. Corp. v. Philadelphia Indem. Ins. Co.*, 667 F. Supp. 2d 1100, 1106-07 (D.
14 Ariz. 2009) (citing *Assoc. Indem. Corp. v. Warner*, 694 P.2d 1181, 1184 (Ariz. 1985)).
15 No single factor is determinative. *See Velarde v. PACE Membership Warehouse, Inc.*,
16 105 F.3d 1313, 1319-20 (9th Cir. 1997).¹

17 **III. Analysis.**

18 Plaintiff seeks attorneys’ fees under A.R.S. § 12-341.01(A), which permits a court
19 to award fees to the prevailing party in an action “arising out of a contract, express or
20 implied[.]” The claims asserted in this case arose of contract, as the parties disputed
21 whether a contract for arbitration existed. *See Berthot v. Security Pac. Bank of AZ*, 823
22 P.2d 1326, 1332 (Ariz. Ct. App. 1991) (“A party is entitled to an award of its attorneys’
23 fees under § 12-341.01 if the plaintiff is not entitled to recover on the contract on which
24 the action is based, or if the court finds that the contract on which the action is based does
25 not exist.”) (overruled on other grounds).²

26
27 ¹ This case has been administratively closed and Defendants have appealed, but
28 the Court retains jurisdiction to issue an award of attorneys’ fees. *See Masalosaló v.*
Stonewall Ins. Co., 718 F.2d 955, 957 (9th Cir. 1983).

² Defendants assert that the Federal Arbitration Act (“FAA”) does not permit

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A. Merits of the Claims.

Defendants were unsuccessful on their counterclaim for breach of contract and in opposing Plaintiff’s claim for declaratory relief. Defendants opposed Plaintiff’s action even after Ekweani had successfully opposed Ameriprise Financial Inc.’s (the parent company of AFSI) motion to compel arbitration in his previous employment discrimination case in federal court. In that case, Ekweani swore that “I have never signed an agreement to arbitrate any employment-related disputes with Ameriprise Financial, Inc.” Doc. 47 at 7. Ekweani’s federal court lawsuit was unsuccessful, and he followed it with a demand for arbitration asserting many of the same claims that were rejected in the lawsuit. This prompted Plaintiff’s lawsuit, which was necessary to avoid relitigating the same claims asserted by Defendants in the previous action. Thus, not only did Plaintiff prevail on its claims, but Defendants’ arguments in this case were also directly contrary to those he had previously asserted in federal court. This factor favors Plaintiff’s request for attorneys’ fees.³

B. Extreme Hardship.

Plaintiff argues that assessing fees against Defendants would not cause extreme hardship because Ekweani’s wife is an attorney and they have not had to pay any of their own attorneys’ fees. Defendants assert that an imposition of fees would cause extreme hardship, but they provide no evidence of their financial situation. Doc. 49 at 10. Because “[t]he party asserting financial hardship has the burden of coming forward with *prima facie* evidence of the financial hardship,” *Woerth v. City of Flagstaff*, 808 P.2d 297, 305 (Ariz. Ct. App. 1990), and Defendants have not done so, the Court finds that this factor weighs in favor of Plaintiff’s request for fees.

attorneys’ fees for the prevailing party, but Plaintiff seeks fees under Arizona law, not the FAA. Moreover, because the Court has already found that no enforceable arbitration agreement exists in this case, Defendants cannot prevail on their argument that the arbitration agreement requires application of the FAA.

³ Defendants dedicate several pages of their brief to rearguing the merits of their claims. This is not the proper method to seek reconsideration of their claims, and the Court declines to rethink its decision.

1 **C. Extent of Victory and Difficulty of the Case.**

2 Plaintiff prevailed on all the claims at the summary judgment stage. Contrary to
3 Defendants’ argument, the legal issues were not particularly difficult or novel, and
4 Plaintiff was forced to litigate the case through discovery to the summary judgment stage.
5 This factor favors an award of fees.

6 **D. Whether an Award Would Discourage Litigation.**

7 Plaintiff argues that an award will not chill litigation because Defendants in this
8 case had no legitimate claims or defenses. Defendants argue that an award would
9 discourage parties from litigating employment matters. This case arose, however, only
10 because Defendants sought two bites at the apple. After Ekweani lost his employment
11 discrimination case in this Court, he sought to assert the same claims against essentially
12 the same defendants through arbitration. Awarding fees in such a situation may
13 discourage duplicative litigation, but the Court does not find that it would discourage pro
14 se litigants from asserting their claims initially. Given the unusual facts of this case, this
15 factor weighs in favor of an award.

16 **E. Reasonableness.**

17 In analyzing whether attorneys’ fees are reasonable, the Court looks to whether the
18 hourly rate is reasonable and whether the hours expended on the case are reasonable.
19 *Schweiger v. China Doll Rest., Inc.*, 673 P.2d 927, 931-32 (Ariz. Ct. App. 1983).
20 Generally, the prevailing party is “entitled to recover a reasonable attorneys’ fee for every
21 item of service which, at the time rendered, would have been undertaken by a reasonable
22 and prudent lawyer to advance or protect his client’s interest[.]” *Id.* at 932. “Once a
23 party establishes its entitlement to fees and meets the minimum requirements in its
24 application and affidavit for fees, the burden shifts to the party opposing the fee award to
25 demonstrate the impropriety or unreasonableness of the requested fees.” *Nolan v.*
26 *Starlight Pines Homeowners Ass’n*, 167 P.3d 1277, 1286 (Ariz. Ct. App. 2007).

27 Plaintiff submitted a declaration regarding counsel’s experience and expertise as a
28 trial attorney since 1987. Doc. 47-1, ¶¶ 2-7. It states that counsel charged \$230 per hour

1 in this case, which counsel attests is below the normal market rate. *Id.*, ¶ 8. The
2 declaration includes a spreadsheet detailing the time spent on each specific task. *Id.*,
3 Ex. 1 at 7-10. In total, counsel spent nearly 214 hours on this case over an eleven-month
4 period, which amounts more than \$49,000 in attorneys' fees.

5 Because Plaintiff submitted an itemized list of the work done and fees incurred in
6 this case, the burden shifts to Defendants to show that the fees are unreasonable.
7 Defendants, however, do not dispute the reasonableness of the fees. Nor do they
8 challenge any of the tasks performed by Plaintiff's counsel. Rather, they assert it would
9 be a "gross miscarriage of justice" to award attorneys' fees to a "multi-billion dollar
10 company against ordinary citizens." Doc. 49 at 12. Standing alone, this is not a reason to
11 deny an award of fees, especially when Defendants have provided no evidence relating to
12 their financial situation.

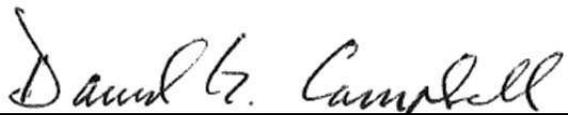
13 **F. Conclusion.**

14 The Court finds, based on its knowledge of the Arizona market, that an hourly rate
15 of \$230 is reasonable. After reviewing the itemized statement, the Court also concludes
16 that the time spent in this matter was reasonable given the nature of the issues involved.

17 Exercising its discretion, the Court will award Plaintiff \$25,000 in attorneys' fees.
18 The Court awards less than the full amount of the fees incurred because Defendants are
19 individuals appearing pro se, and the Court elects to err on the side of avoiding any
20 unnecessary hardship.

21 **IT IS ORDERED** that Plaintiff's motion for attorneys' fees (Doc. 47) is **granted**
22 **in part**. Plaintiff is awarded \$25,000 in attorneys' fees against Defendants.

23 Dated this 18th day of June, 2015.

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26 
27 Honorable David G. Campbell
28 United States District Judge