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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9 Preston Collection Inc.,

10 Plaintiff,

11 v.

12 Steven Youtsey,

13 Defendant.

No. CV-15-00607-PHX-NVW

ORDER

14 Before the Court is Preston Collection Inc.'s Motion for an Award of Attorneys'
15 Fees and Non-Taxable Costs (Doc. 66).

16 **I. BACKGROUND**

17 This case arises out of an agreement dated December 29, 2009 by which Steven
18 Youtsey acknowledged his personal debt to Kun-Te Yang in the amount of
19 \$1,142,500.00 ("Youtsey Personal Loan"). On March 19, 2015, Yang transferred to
20 Preston Collection Inc. all of his rights, title, and interest in and to the Youtsey Personal
21 Loan, including all rights to enforce the loan and to recover and collect all amounts due
22 thereunder.

23 On April 3, 2015, Preston sued Youtsey for breach of contract to recover and
24 collect all amounts due under or arising from enforcement of the Youtsey Personal Loan.
25 On September 5, 2017, the Court granted summary judgment in Preston's favor. On
26 October 4, 2017, judgment was entered in favor of Preston and against Youtsey in the
27 amount of: (1) the principal amount of \$1,142,500.00, plus (2) pre-judgment interest to
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1 October 4, 2017, in the amount of \$866,108.77 at the rate of 10% per annum simple
2 interest, plus (3) post-judgment interest on \$2,008,608.77 (the sum of amounts (1) and
3 (2)) at the federal rate of 1.31% per annum from the date of entry of judgment (October
4 4, 2017) until paid. The October 4, 2017 judgment awarded Preston all of the relief it
5 sought.

6 Preston seeks award of attorney fees under A.R.S. § 12-341.01(A).

7 **II. ANALYSIS**

8 **A. Whether to Award Attorney Fees**

9 A.R.S. § 12-341.01(A) provides: “In any contested action arising out of a
10 contract, express or implied, the court may award the successful party reasonable attorney
11 fees.” An award of fees under § 12-341.01 is discretionary. *Fulton Homes Corp. v. BBP*
12 *Concrete*, 214 Ariz. 566, 569, 155 P.3d 1090, 1093 (Ct. App. 2007). The statute does not
13 establish a presumption that attorney fees be awarded in contract actions. *Associated*
14 *Indem. Corp. v. Warner*, 143 Ariz. 567, 569, 694 P.2d 1181, 1183 (1985). In determining
15 whether attorney fees should be granted under § 12-341.01, trial courts may consider the
16 following factors: the merits of the unsuccessful party’s case, whether the litigation
17 could have been avoided or settled, whether assessing fees against the unsuccessful
18 would cause an extreme hardship, the degree of success by the successful party, any
19 chilling effect the award might have on other parties with tenable claims or defenses, the
20 novelty of the legal questions presented, and whether such claim had previously been
21 adjudicated in this jurisdiction. *Id.* at 570, 694 P.2d at 1184.

22 Youtsey does not contend that Preston should be awarded no attorney fees.
23 Preston was entirely successful. The legal questions were not novel, and many breach of
24 contract claims had previously been adjudicated in this jurisdiction. Youtsey admitted
25 that he signed a document acknowledging that he owed Kun-Te Yang a balance of
26 \$1,142,500.00 on a personal loan. He did not assert that he had made any subsequent
27 payments on his debt to Yang. Youtsey could have avoided the litigation by paying his
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1 debt. Yang does not explicitly assert that a fee award would cause him an extreme
2 hardship, and he provides no evidence regarding his financial condition. These factors
3 weigh in favor of awarding Preston attorney fees under A.R.S. § 12-341.01(A).

4 **B. What Constitutes Reasonable Attorney Fees**

5 “Once a litigant establishes entitlement to a fee award, the touchstone under
6 § 12-341.01 is the reasonableness of the fees.” *Assyia v. State Farm Mut. Auto. Ins. Co.*,
7 229 Ariz. 216, 222, 273 P.3d 668, 674 (Ct. App. 2012). “The award of reasonable
8 attorney fees pursuant to [§ 12-341.01] should be made to mitigate the burden of the
9 expense of litigation to establish a just claim or a just defense. It need not equal or relate
10 to the attorney fees actually paid or contracted, but the award may not exceed the amount
11 paid or agreed to be paid.” A.R.S. § 12-341.01(B).

12 To determine reasonable attorney’s fees in commercial litigation, courts begin by
13 determining the actual billing rate that the lawyer charged in the particular matter.
14 *Schweiger v. China Doll Rest., Inc.*, 138 Ariz. 183, 187, 673 P.2d 927, 931 (Ct. App.
15 1983). If persuaded that the contracted hourly rates are unreasonable, courts may use a
16 lesser rate. *Id.* at 188, 673 P.2d at 931.

17 Under the Arizona Supreme Court’s Rules of Professional Conduct, factors to be
18 considered in determining the reasonableness of an attorney fee include the following:

- 19 (1) the time and labor required, the novelty and difficulty of the questions
involved, and the skill requisite to perform the legal service properly;
 - 20 (2) the likelihood, if apparent to the client, that the acceptance of the
21 particular employment will preclude other employment by the lawyer;
 - 22 (3) the fee customarily charged in the locality for similar legal services;
 - 23 (4) the amount involved and the results obtained;
 - 24 (5) the time limitations imposed by the client or by the circumstances;
 - 25 (6) the nature and length of the professional relationship with the client;
 - 26 (7) the experience, reputation, and ability of the lawyer or lawyers
performing the services; and
 - 27 (8) the degree of risk assumed by the lawyer.
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1 A.R.S. Sup. Ct. Rules, Rule 42, Rules of Prof. Conduct, ER 1.5. In addition, Local Rules
2 require consideration of whether the fee contracted between the attorney and the client is
3 fixed or contingent, the “undesirability” of the case, and awards in similar actions.
4 LRCiv 54.2(c).

5 Preston entered into engagement agreements with its counsel through which it
6 agreed to pay 70% of counsel’s standard hourly rates upon receipt of monthly invoices
7 and to pay all out-of-pocket costs and expenses. Preston agreed to pay a contingent fee
8 consisting of the remaining 30% of counsel’s standard hourly rates if Preston’s claim was
9 resolved, plus 20% of the net amount recovered as a result of resolution of Preston’s
10 claim.

11 Preston’s counsel billed Preston at 70% of usual rates for a total of 296.3 hours
12 from March 19, 2015, through October 17, 2017, which totaled \$111,128.50. Under its
13 engagement agreements, Preston must also pay contingent hourly fees at 30% of the
14 usual rates for those hours, which is \$47,626.50. Thus, the total amount of attorney fees
15 incurred through October 17, 2017, at the usual hourly rates is \$158,755.00. Youtsey
16 contends that the discounted rates are more than reasonable in the Phoenix market, but
17 does not contend that either the usual hourly rates or the number of hours expended is
18 unreasonable. In its reply brief, Preston seeks an additional \$8,484.00 for post-judgment
19 discovery and preparing the reply brief for 20.2 hours at 70% of the usual rates.
20 Therefore, the total fees requested based on hourly rates is \$167,239.00.

21 Youtsey objects to the amount Preston seeks based on 20% of the net amount of
22 recovery because it results in an hourly rate much greater than Preston’s counsel’s
23 standard hourly rates. Preston seeks reimbursement for the contingency fee of 20% of
24 the net amount recovered that it agreed to pay its counsel, which Preston calculates to be
25 \$368,981.06. Preston’s engagement agreements define “net recovery” as “gross
26 recovery” minus fees actually paid based on hourly rates and costs and expenses actually
27 paid. They define “gross recovery” as “anything of value obtained or received directly or
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1 indirectly by [Preston] from any of the Claims,” including money, reduction of debt, etc.
2 Although Preston obtained a judgment of more than \$2 million against Youtsey, Preston
3 does not assert that it has received anything of value yet from Preston to satisfy the
4 judgment. Therefore, an award of attorney fees based on any amount Preston hopes to
5 recover from Youtsey would be speculative.

6 Moreover, an additional contingency fee of nearly \$370,000 may be reasonable for
7 Preston to pay its counsel because EZconn and eGtran spent hundreds of thousands of
8 dollars to defeat Andes’ claims in other cases, which negated purported offsets to
9 Preston’s claim, and because Preston’s counsel risked receiving fees based on rates
10 discounted by 30%. But neither reason justifies shifting the additional contingency fee to
11 Youtsey. Therefore, Preston will be awarded attorney fees based on its counsel’s usual
12 hourly rates.

13 IT IS THEREFORE ORDERED that Preston Collection Inc.’s Motion for an
14 Award of Attorneys’ Fees and Non-Taxable Costs (Doc. 66) is granted.

15 IT IS FURTHER ORDERED directing the Clerk to enter judgment in favor of
16 Plaintiff Preston Collection Inc. and against Defendant Steven Youtsey in the amount of
17 \$167,239.00 for attorney fees, plus post-judgment interest at the federal rate of 1.78%
18 from the date of this judgment until paid.

19 Dated this 3rd day of January, 2018.

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23 Neil V. Wake
24 Senior United States District Judge
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