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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Cemex Construction Materials South,
LLC; United States for the use and benefit
of Cemex Materials South LLC,

No. CV-11-8012-PCT-FJM

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ORDER

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Plaintiffs,

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vs.

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Grady's Quality Excavating Inc.; Grady L.
Hopson; Cheryl L. Hopson; Ronald F.
Wilson; Montana Builders LLC,

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Defendants.

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Cheryl L. Hopson; Grady L. Hopson;
Grady's Quality Excavating Inc.

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Cross Claimants

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vs.

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Montana Builders LLC; Ronald F. Wilson)

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Cross Defendants

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The United States, through the Department of Agriculture, entered into a contract with
defendant Montana Builders, LLC, for a construction project at Oak Creek Complex-Pine
Flat Campground (the "Project"). Montana Builders, as the general contractor on the Project
and pursuant to the Miller Act, 40 U.S.C. § 3131(b)(2), furnished a payment bond to the
United States. Defendant Ronald Wilson is surety on the payment bond. Montana Builders

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1 contracted with defendant Grady's Quality Excavating as subcontractor on the Project.
2 Grady's in turn contracted with plaintiff Cemex Construction Materials South, LLC, for the
3 purchase of construction materials. Cemex has now filed this action against Grady and its
4 principals for their failure to pay Cemex for materials in the principal amount of \$48,465.58.
5 Pursuant to the Miller Act, Cemex also named as defendants Montana Builders and its surety
6 under the payment bond. See 40 U.S.C. § 3133(b)(2).

7 The court has before it the United States of America for the Use and Benefit of Cemex
8 Construction Materials South, LLC's ("Cemex") application for entry of default judgment
9 against Montana Builders, LLC, and Ronald F. Wilson (doc. 37). Also before us is Cemex's
10 motion for attorney's fees in the amount of \$14,213.51 (doc. 39).

11 Cemex served copies of the summons and complaint on defendant Montana Builders
12 on February 13, 2011, and on defendant Ronald F. Wilson on March 27, 2011. Both
13 Montana Builders and Wilson have failed to plead or otherwise defend within the time
14 prescribed by Rule 12(a)(1), Fed. R. Civ. P. The clerk entered default against these
15 defendants in favor of Cemex on June 8, 2011. Cemex now seeks entry of default judgment
16 and contends that its claims against Montana Builders and Ronald Wilson is for a sum certain
17 in the principal amount of \$48,465.58, plus interest at the legal rate of 10% per annum from
18 the date payment was due until paid in full (doc. 37 at 2). Cemex's claim is sufficiently
19 supported by affidavit (doc. 27, ex. A). Therefore, **IT IS ORDERED GRANTING**
20 Cemex's motion for entry of default judgment in the amount of \$48,465.58, plus interest at
21 the legal rate of 10% per annum (doc. 37).

22 Cemex also seeks attorney's fees in the amount of \$14,213.51 pursuant to A.R.S. §
23 12-341.01 and the Miller Act (doc. 39). Other than to cite the two statutes, however, Cemex
24 does not explain its eligibility for recovery of fees.

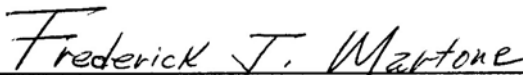
25 Attorney's fees are not available under the Miller Act unless expressly provided for
26 by the terms of the direct contract between the parties or in the Miller Act bond itself. United
27 States v. ex rel. Reed v. Callahan, 884 F.2d 1180, 1185 (9th Cir. 1989). Moreover, fees are
28 not available under A.R.S. § 12-341.01 in the absence of a contractual relationship. Ayres

1 v. Red Cloud Mills, Inc., 167 Ariz. 474, 481, 808 P.2d 1226, 1233 (Ct. App. 1990). Cemex
2 had no contractual relationship with Montana Builders or Ronald Wilson and the payment
3 bond does not provide for attorney's fees. See Complaint ex. A. Because Cemex has failed
4 to establish any theory to support its claim for attorney's fees against Montana Builders or
5 Wilson, Cemex's motion for attorney's fees is denied (doc. 39).

6 **IT IS ORDERED GRANTING** Cemex's motion for entry of default judgment in the
7 amount of \$48, 465.58, plus interest at the legal rate of 10% per annum (doc. 37).

8 **IT IS ORDERED DENYING** Cemex's motion for attorney's fees (doc. 39).

9 DATED this 22nd day of August, 2011.

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13 Frederick J. Martone
14 United States District Judge
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