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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Pure Wafer Incorporated,  
10 Plaintiff,  
11 v.  
12 City of Prescott, et al.,  
13 Defendants.  
14

No. CV-13-08236-PCT-JAT

**ORDER**

15 Pending before the Court is Plaintiff Pure Wafer, Inc.’s (“Pure Wafer’s”) Motion  
16 for Attorneys’ Fees. (“Motion,” Doc. 142; see also Doc. 142-1). After reviewing the City  
17 of Prescott’s (the “City’s”) Response, (Doc. 143), and Pure Wafer’s Reply, (Doc. 144),  
18 the Court now rules on the Motion.

19 **I. BACKGROUND**

20 The Court previously detailed the factual and procedural background in its  
21 Findings of Fact and Conclusions of Law and Permanent Injunction (the “Findings and  
22 Conclusions”). (See Doc. 87 at 1–13). After a bench trial, the Court found that the City  
23 violated the Contract Clause of the U.S. Constitution when it declared that its sewage  
24 treatment plant would no longer accept effluent discharged by Pure Wafer. (See *id.* at 13–  
25 29). Because the Court found in favor of Pure Wafer on its Contract Clause claims, it did  
26 not reach the merits of Pure Wafer’s alternative claims for breach of contract and the  
27 implied covenant of good faith and fair dealing resulting from the parties’ obligations  
28 under a Development Agreement. (*Id.* at 29). The Court also granted Pure Wafer’s

1 request for a permanent injunction, enjoining the City from enforcing various provisions  
2 of the City’s Ordinance No. 4856-1313 (the “Ordinance”) against Pure Wafer. (See *id.*  
3 at 29–32). The Court finally entered a final judgment in Pure Wafer’s favor.  
4 (“Judgment,” Doc. 88).

5 The City appealed the Findings and Conclusions as well as the Judgment.  
6 (Doc. 95). The Ninth Circuit Court of Appeals (the “Ninth Circuit”) affirmed-in-part and  
7 reversed-in-part and remanded for further proceedings. *Pure Wafer Inc. v. City of*  
8 *Prescott*, 845 F.3d 943, 959 (9th Cir. 2017). In particular, the Ninth Circuit held:

9 [W]hile the City prevails on its appeal of the Contract Clause  
10 issue, judgment for Pure Wafer can be sustained on the  
11 alternative ground that the City has breached its contract with  
Pure Wafer. We leave it for the district court on remand to  
decide the appropriate remedy.

12 *Id.* at 958. The Ninth Circuit also affirmed the Court’s judgment on the City’s  
13 counterclaim. *Id.* at 958 n.14.

14 After the Ninth Circuit issued its opinion, Pure Wafer filed its motion for  
15 attorneys’ fees with the Ninth Circuit. (Doc. 142-1 at 10). The Ninth Circuit subsequently  
16 filed an order remanding Pure Wafer’s motion for attorneys’ fees to this Court.<sup>1</sup>  
17 (Doc. 136). The Court then issued an order allowing the parties to refile the same  
18 pleadings regarding the motion for attorneys’ fees that they filed with the Ninth Circuit.  
19 (Doc. 140).

## 20 **II. LEGAL STANDARD**

21 Ninth Circuit Rule 39-1.6 governs the procedure for attorneys’ fees motions on  
22 appeal. This rule sets forth the required content of the memorandum in support of the  
23 motion, the necessary supporting documentation—including an itemized statement of  
24 fees, a showing that the hourly rates are legally justified, and an affidavit attesting to the  
25 accuracy of the information—and the format and description requirements of the  
26 itemized statement. 9th Cir. R. 39-1. The parties’ Development Agreement provides that

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28 <sup>1</sup> The City argues that the Ninth Circuit lacked jurisdiction over the attorneys’ fees  
motion because the Ninth Circuit had already filed its mandate. (Doc. 143-1 at 2).  
Because the Ninth Circuit remanded the Motion to this Court, this argument is moot.

1 “the prevailing party shall be entitled to reasonable attorneys’ fees and all reasonable  
2 costs, expenses, and disbursements in connection with such action.” (Doc. 1-1 at 16).

3 **III. ANALYSIS**

4 Pure Wafer seeks an award of \$87,548.12 in attorneys’ fees and an additional  
5 \$8,554.25 in other litigation costs and expenses, for a total of \$96,102.37. (Doc. 142-  
6 1 at 4). The City argues that Pure Wafer is not entitled to these fees, costs, and expenses  
7 because: (1) Pure Wafer is not the prevailing party; (2) Pure Wafer seeks costs unrelated  
8 to the appeal, improperly seeks costs, and seeks costs that are unreasonable; (3) Pure  
9 Wafer’s request is a procedurally deficient collateral attack on the Court’s determination  
10 that costs are not appropriate in this case; and (4) Pure Wafer’s requested attorneys’ fees  
11 are unreasonable and should be reduced by at least \$32,899.37, if awarded. (See  
12 Doc. 143 at 2–7).

13 **A. Prevailing Party**

14 The City argues that Pure Wafer is not the prevailing party because the matter was  
15 remanded to this Court and some of Pure Wafer’s arguments were rejected on appeal.  
16 (Doc. 134-1 at 3). The Ninth Circuit held “judgment for Pure Wafer can be sustained on  
17 the alternative ground that the City has breached its contract with Pure Wafer.” Pure  
18 Wafer, 845 F.3d at 959. Although, the Ninth Circuit noted that the City prevailed on its  
19 Contract Clause argument, Pure Wafer is ultimately the prevailing party as the City was  
20 found to have breached the Development Agreement. *Id.* Thus, the City’s argument is  
21 rejected.

22 **B. Costs on Appeal**

23 The City advances a few arguments as to why Pure Wafer is not entitled to costs  
24 related to the appeal. First, the City argues that Pure Wafer seeks fees and costs unrelated  
25 to the appeal, improperly seeks costs, and seeks unreasonable costs. (Doc. 143-1 at 4).  
26 Second, the City argues that Pure Wafer’s request for costs is a procedurally deficient  
27 collateral attack on the Ninth Circuit’s ruling that each party shall bear its own costs on  
28 appeal. (*Id.* at 9). Pure Wafer rejoins that the expenses it seeks are “far broader than

1 ‘taxable costs.’” (Doc. 144-1 at 4). Further, Pure Wafer argues that under the language of  
2 the Development Agreement, it is entitled to “all reasonable costs, expenses, and  
3 disbursements in connection with such action.” (Id. at 3).

4 While the Development Agreement could be interpreted to include certain costs  
5 and expenses, the Ninth Circuit specifically ordered “each party shall bear its own costs  
6 on appeal.” Pure Wafer, 845 F.3d at 959. This Court is bound by the ruling of the Ninth  
7 Circuit and will not award costs. After reviewing Pure Wafer’s requested “litigation  
8 expenses,” the Court finds that the expenses are all “costs” and, thus, not recoverable  
9 under the Ninth Circuit’s mandate. (Id.). Therefore, the Court will not award the  
10 \$8,554.25 of “expenses” or costs requested by Pure Wafer. (Doc. 142-1 at 24, 32).

### 11 **C. Reasonableness of Attorneys’ Fees**

12 The City argues that some of Pure Wafer’s requested fee amounts are  
13 unreasonable. (Doc. 143-1 at 4). Specifically, the City claims that the Court should  
14 reduce Pure Wafer’s requested attorneys’ fees because: (1) certain time entries are related  
15 to prior work before this Court and not related to the appeal; (2) some items are related to  
16 a voluntarily dismissed Ninth Circuit appeal; (3) it is unreasonable to take 22 hours to  
17 update case law after filing its brief and before oral argument; (4) it is unreasonable to  
18 recover for preparation for a mediation that Pure Wafer withdrew from; and (5) it is  
19 unreasonable to recover fees for litigating the ultimately unsuccessful Contract Clause  
20 claim. (Id. at 4–7).

#### 21 **1. Attorneys’ Fees Unrelated to the Appeal**

22 The City argues that certain entries are unreasonable because they are not part of  
23 the appeal and, instead, relate to this Court’s “entry, stay, and collection of an attorneys’  
24 fees judgment.” (Id. at 4). Pure Wafer argues that under the Development Agreement, it  
25 is entitled to all reasonable attorneys’ fees related to such action, which are “not limited  
26 to attorneys’ fees and expenses incurred in briefing and arguing the Court of Appeals.”  
27 (Doc. 144-1 at 3 (quotation marks omitted)). The Court disagrees. This Motion was filed  
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1 with the Ninth Circuit, and, thus, the fees must relate to the Ninth Circuit appeal.<sup>2</sup>  
2 Therefore, the fees incurred in litigation before this Court—\$9,997.50,<sup>3</sup> (see Doc. 143-2  
3 at 2–3)—are not recoverable as part of the Ninth Circuit appeal.

## 4 **2. Attorneys’ Fees Related to a Separate Appeal**

5 The City argues that fees related to a separate appeal to the Ninth Circuit, which  
6 was voluntarily dismissed, are not recoverable. (Doc. 143-1 at 4). Pure Wafer argues that  
7 because the appeal arose out of this action, it should be recoverable. (Doc. 144-1 at 4).  
8 The Court agrees with the City—because the appeal was voluntarily dismissed, there was  
9 no prevailing party. Therefore, the Court will not award attorneys’ fees for litigating the  
10 separate appeal. These fees are entirely duplicative of the \$9,997.50 the Court deemed  
11 unrecoverable in the prior section. See *supra* Section III.C.1.

## 12 **3. Attorneys’ Fees Related to Updating Case Law**

13 The City next argues that Pure Wafer’s requested fees for updating case law are  
14 unreasonable. (Doc. 143-1 at 5). Pure Wafer claims that these expenses were necessary  
15 for counsel to determine “whether any of the previously cited authorities have been  
16 overruled, criticized, or questioned; or . . . whether new cases have been decided that are  
17 pertinent to the issues briefed.” (Doc. 144-1 at 5). While the Court agrees with Pure  
18 Wafer that some updating of research is necessary, the Court finds that the total amount  
19 of attorneys’ fees—which accrued from work completed after Pure Wafer’s brief was  
20 filed—relating to this research are unreasonable. See *Cabrales v. Cty. of L.A.*, 875 F.2d  
21 740, 741 (9th Cir. 1989) (reducing attorneys’ fees for duplicative research of cited cases).  
22 Beyond the entries contested by the City, Pure Wafer’s counsel updated case law on other  
23 occasions in preparation for the Ninth Circuit oral argument and the Court will not reduce  
24 the uncontested, non-duplicative updating research fees. (See, e.g., Doc. 142-1 at 31–32).

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26 <sup>2</sup> While Pure Wafer may be correct that it might be able to recover attorneys’ fees  
27 pursuant to the Development Agreement, these attorneys’ fees are not procedurally  
recoverable as part of this Motion filed as part of the appeal.

28 <sup>3</sup> Although the City’s calculation of these fees is \$9,998.00, the Court’s own  
calculation of these fees is \$9,997.50.

1 However, because Pure Wafer had already filed its appellate brief, the Court finds it  
2 unreasonable that Pure Wafer spent over 22.9 hours<sup>4</sup> updating case law. Therefore, the  
3 Court will reduce some of the fees<sup>5</sup> related to Pure Wafer’s updating of case law; this  
4 reduces Pure Wafer’s requested fee amount by \$8,015.00, (see Doc. 143-2 at 5).

5 **4. Attorneys’ Fees Related to the Ninth Circuit Mediation Program**

6 The City additionally argues that the Court should reduce Pure Wafer’s requested  
7 fees related to the Ninth Circuit’s mediation program because “Pure Wafer refused to  
8 participate in [the mediation] and actually withdrew from it.” (Doc. 143-1 at 6). Pure  
9 Wafer argues that it did not refuse to participate in the mediation, and the fees regarding  
10 mediation were incurred in connection with the appeal. (Doc. 144-1 at 4). Fees related to  
11 the Ninth Circuit’s mediation program are reasonable. *See Seven Signatures Gen. P’ship*  
12 *v. Irongate Azrep BW LLC*, Civil No. 11-00500 JMS-RLP, 2014 WL 4129522, at \*3  
13 (D. Haw. Aug. 18, 2014). Despite the fact that the mediation did not occur, it is  
14 reasonable for an attorney to prepare for the mediation. Further, these fees relate to the  
15 appeal. Therefore, the Court will not reduce the amount of fees relating to preparation for  
16 the mediation.

17 **5. Attorneys’ Fees Related to Contract Clause Argument**

18 Finally, the City argues that, because Pure Wafer’s Contract Clause argument was  
19 unsuccessful, any fees related to the Contract Clause claim are presumptively  
20 unreasonable. (Doc. 143-1 at 6–7). Pure Wafer does not clearly address this argument in  
21 its Reply. Nonetheless, the Court rejects this argument. Pure Wafer remains the  
22 prevailing party on appeal despite losing on some of its arguments. Therefore, the Court  
23 declines to reduce Pure Wafer’s fees related to the Contract Clause argument.

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26 <sup>4</sup> Although the City’s Itemized Objection #2 purportedly objects to only 18.5  
27 hours, the City lists 22.9 hours. (Doc. 143-2 at 4). This oversight is confirmed by the  
28 City’s correct calculation of the contested \$8,015.00 fee amount.

<sup>5</sup> As the Court noted, the City does not object to all entries related to Pure Wafer’s  
updating of case law in preparation for oral argument. (See, e.g., Doc. 142-1 at 31–32).

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**D. Summary**

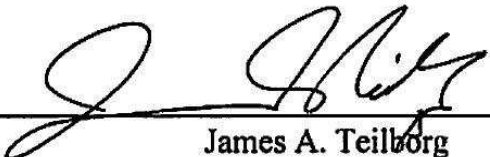
Pure Wafer requests a total of \$96,102.37 in attorneys’ fees, costs, and expenses. (Doc. 142-1 at 4). Consistent with the Ninth Circuit’s mandate, the Court will subtract \$8,554.25, representing Pure Wafer’s costs, from Pure Wafer’s requested amount. The Court will also subtract \$9,997.50, representing work related to a voluntarily dismissed Ninth Circuit appeal and unrelated to the appeal-at-issue, from Pure Wafer’s requested amount. Finally, the Court will reduce Pure Wafer’s requested amount by \$8,015.00, representing the unreasonable time spent updating case law after Pure Wafer’s appellate brief was filed. In sum, the Court reduces Pure Wafer’s requested amount by \$26,566.75, for a total award of \$69,535.62.

**IV. CONCLUSION**

Based on the foregoing,

**IT IS ORDERED** that Pure Wafer’s Motion for Attorneys’ Fees, (Doc. 142), is **GRANTED** in the amount of \$69,535.62.

Dated this 31st day of July, 2017.

  
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James A. Teilborg  
Senior United States District Judge