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

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9 DAMIAN WHITE,
10 Plaintiff,

No. CV-10-607-TUC-CKJ

11 vs.

ORDER

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13 NATIONAL CREDIT SYSTEMS, INC.
14 and MORRISON, EKRE & BART
15 MANAGEMENT SERVICES, INC.,
16 Defendants.

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Pending before the Court is Plaintiff’s Motion for Sanctions [Doc. 20] and Motion to Dismiss Defendant MEB’s Amended Counterclaim [Doc. 23].¹ On January 25, 2011, Defendant MEB filed its Response to Motion to Dismiss MEB’s Amended Counterclaim [Doc. 26]. Plaintiff has filed his reply. In its discretion, the Court finds this case suitable for decision without oral argument. *See* LRCiv. 7.2(f). The Parties have adequately presented the facts and legal arguments in their briefs and supporting documents, and the decisional process would not be significantly aided by oral argument.

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¹Plaintiff initially filed a Motion to Dismiss Counterclaim [Doc. 12]; however, Defendant MEB subsequently filed its Amended Counterclaim [Doc. 14]. This amendment was timely filed pursuant to Rule 15(a)(1), Federal Rules of Civil Procedure. As such, Plaintiff’s initial Motion to Dismiss [Doc. 12] is now moot. *Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir. 1992) (an amended complaint supersedes the original complaint and after amendment the court will treat the original complaint as nonexistent).

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1 **I. FACTUAL BACKGROUND**

2 Plaintiff's claims arise from a lease agreement at the Summit Ridge Complex located
3 at 1252 South Craycroft Road, Tucson, Arizona 85711. Pl.'s Compl., Exh. "A" to
4 Defendant's Notice of Removal [Doc. 1]. Plaintiff signed a written lease agreement
5 regarding his occupancy at the subject property. Def. MEB's Amended Counterclaim [Doc.
6 14]. Defendant MEB was the property manager for the Summit Ridge complex. Pl.'s
7 Compl. [Doc. 1] at ¶ 10.

8 On May 24, 2009 at approximately 10 p.m., a fire was started on the stove in the
9 apartment, allegedly causing \$2,007.00 in damages to the apartment. *Id.* at ¶ 11. Plaintiff
10 and Defendant MEB dispute who is responsible for the cost of repairing the apartment.
11 Plaintiff filed his Complaint in state court claiming that the debt is void and alleging a
12 defamation claim against Defendant MEB for false reporting of the debt to a collections
13 agency. *Id.* Defendant National Credit Systems, Inc. removed this cause of action based
14 upon federal question jurisdiction, 28 U.S.C. § 1331, arising from the claims brought
15 pursuant to the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*

16 Defendant MEB filed its counterclaim against Plaintiff alleging a breach of the signed
17 lease agreement. Def. MEB's Amended Counterclaim [Doc. 14]. Defendant MEB avers that
18 Plaintiff was responsible for any damages to the unit, and by failing to pay for such damage,
19 Plaintiff breached the lease agreement. Plaintiff seeks dismissal of the counterclaim, and
20 sanctions pursuant to Rule 11, Federal Rules of Civil Procedure.

21 **II. STANDARD OF REVIEW**

22 The matter currently pending before the Court is Plaintiff's motion to dismiss
23 Defendant MEB's counterclaim for failure to state a claim upon which relief can be granted.
24 A complaint is to contain a "short and plain statement of the claim showing that the pleader
25 is entitled to relief[.]" Rule 8(a), Fed. R. Civ. P. While Rule 8 does not demand detailed
26 factual allegations, "it demands more than an unadorned, the-defendant-unlawfully-harmed-
27 me accusation." *Ashcroft v. Iqbal*, – U.S. –, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009).
28 "Threadbare recitals of the elements of a cause of action, supported by mere conclusory

1 statements, do not suffice.” *Id.* Dismissal is appropriate where a plaintiff has failed to “state
2 a claim upon which relief can be granted.” Rule 12(b)(6), Fed. R. Civ. P. “To survive a
3 motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to
4 ‘state a claim to relief that is plausible on its face.’” *Ashcroft*, 129 S.Ct. at 1949 (quoting *Bell*
5 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929
6 (2007)). Further, “[a] claim has facial plausibility when the plaintiff pleads factual content
7 that allows the court to draw the reasonable inference that the defendant is liable for the
8 misconduct alleged. The plausibility standard is not akin to a ‘probability requirement,’ but
9 it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (citations
10 omitted). Additionally, the Court takes “all allegations of material fact as true and
11 construe[s] them in the light most favorable to the nonmoving party.” *Parks School of*
12 *Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995) (citations omitted).

13 **III. ANALYSIS**

14 *A. Motion to Dismiss*

15 Plaintiff avers that Defendant MEB has failed to state a claim for breach of contract
16 based upon the doctrine of impossibility.² In Arizona, “to state a claim in contract, the
17 complaint must disclose an agreement, a right thereunder in the party seeking relief and a
18 breach by the defendant.” *City of Tucson v. Superior Court of Pima County*, 116 Ariz. 322,
19 324, 569 P.2d 264, 266 (Ct. App. 1977). “Ordinarily, a court may only look at the face of
20 the complaint to decide a motion to dismiss.” *Van Buskirk v. Cable News Network, Inc.*, 284
21 F.3d 977, 980 (9th Cir. 2002). Although the doctrine of “incorporation by reference” allows
22 the Court to look beyond the pleadings, *e.g.*, those documents either attached to the
23 complaint or public record, without converting the motion to dismiss to one for summary
24 judgment; the referenced documents must be accepted by all parties as authentic. *Id.*

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26 ²In his reply brief, Plaintiff also asserts that the lease agreement is a contract of adhesion and
27 therefore unenforceable as to him. The Court declines to address this argument, but notes that it fails
28 for the same reason as Plaintiff’s other arguments. *Graves v. Arpaio*, 623 F.3d 1043,1048
(arguments raised for the first time in reply are deemed waived).

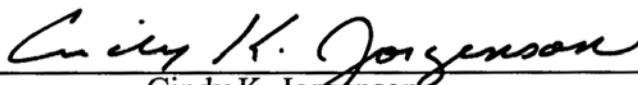
1 Here, Defendant MEB's counterclaim alleges a lease agreement, a breach of one of
2 the provisions of that agreement by Plaintiff and subsequent damage to MEB. Plaintiff's
3 reliance on the police report to allege that Plaintiff had nothing to do with the fire and
4 therefore could not have breached the lease agreement is inadequate for purposes of a motion
5 to dismiss. Although entries in a police report based on an officer's personal observations
6 may be admissible, other statements are inadmissible hearsay. *Colvin v. U.S.*, 479 F.2d 998,
7 1003 (9th Cir. 1993). Plaintiff's argument that he did not breach the lease agreement due to
8 impossibility is premised upon the fact that he had nothing to do with starting the fire, but
9 Defendant MEB disputes this fact. Additionally, discovery has not yet begun in this case.
10 The Court finds that because Defendant MEB has stated a claim, and there are disputed facts
11 surrounding that counterclaim, dismissal is inappropriate at this time. Accordingly,
12 Plaintiff's Motion to Dismiss is denied.

13 *B. Motion for Sanctions*

14 Plaintiff seeks sanctions pursuant to Rule 11, Fed. R. Civ. P., against Defendant MEB
15 for the filing of its counterclaim. As with his motion to dismiss, Plaintiff relies on the
16 doctrine of impossibility and the police and fire reports to assert that Defendant MEB's claim
17 is baseless. As discussed previously, although Defendant MEB's claims may be
18 unsustainable upon further discovery, at this juncture it has stated a valid cause of action.
19 As such, sanctions are unwarranted and Plaintiff's motion for sanctions is denied.

20 Accordingly, IT IS HEREBY ORDERED that Plaintiff's Motion for Sanctions [Doc.
21 20] is DENIED. IT IS FURTHER ORDERED that Plaintiff's Motion to Dismiss Defendant
22 MEB's Amended Counterclaim [Doc. 23] is DENIED.

23 DATED this 14th day of September, 2011.

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27 Cindy K. Jorgenson
28 United States District Judge