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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Joshua David Mellberg, LLC, et al.,)

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Plaintiffs,)

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vs.)

No. CIV 14-2025-TUC-CKJ

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Jovan Will, et al.,)

ORDER

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Defendants.)

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Pending before the Court are the Motions for Appellate Attorneys' Fees (Doc. 615, 15 617) filed by The Impact Partnership, LLC ("Impact") and Jovan Will ("Will"), Tree Fine ("Fine"), Fernando Godinez and Carly Uretz ("Individual Defendants). Joshua David 16 Mellberg, LLC ("Mellberg, LLC") and Joshua David Mellberg ("Mellberg") (collectively "JDM") have filed a response and have incorporated their response filed with the Ninth 17 Circuit Court of Appeals (Ct.App. Nos. 20-16215 and 20-1626, Doc. 106). Additionally, 18 the Motion to Certify Question of Law Regarding Attorneys' Fees to Arizona Supreme Court 19 (Doc. 632) filed by JDM is pending before the Court. Individual Defendants and Impact 20 have filed a joint response (Doc. 636) and JDM has filed a reply (Doc. 640). The Court 21 declines to schedule this matter for oral argument. *See* LRCiv 7.2(f); 27A Fed.Proc., L. Ed. 22 § 62:361 (March 2021) ("A district court generally is not required to hold a hearing or oral 23 argument before ruling on a motion.").

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I. Recent Procedural History

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On May 21, 2020, this Court issued an Order adopting the Report and

Joshua David Mellberg LLC et al v Will et al

Doc: 643

1 Recommendation of Magistrate Judge Lynette Kimmins (Doc. 531). May 21, 2020 Order
2 (Doc. 556). The Court granted Defendants' Motion for Summary Judgment on Damages as
3 to Claims 1-5 and 7-10 (Doc. 455), Plaintiffs' Motion for Summary Judgment on Defendant
4 Impact's Counterclaim (Doc. 333), and Defendants Fine and Will's Motion for Summary
5 Judgment as to Claim 6 (Doc. 329). The Court denied as moot Defendants Fine and Will's
6 Motion for Summary Judgment as to Claims 1, 5, 7, and 8 (Doc. 329), Defendants' Motion
7 for Summary Judgment on Claims 2, 3, 9, and 10 (Doc. 332), Defendant Will's Motion for
8 Summary Judgment on Claim 6 as to Damages (Doc. 453), JDM and Defendants Fine and
9 Godinez's cross-motions for summary judgment on Claim 4 (Docs. 338, 365), Plaintiffs'
10 Motion for Spoliation Sanctions (Doc. 382), Impact's Motion to Strike (Doc. 448), and
11 Impact's Motion to Disqualify a Witness (Doc. 450). Summary Judgment was awarded in
12 favor of Defendants and against Plaintiffs as to the claims in Plaintiffs' Second Amended
13 Complaint. Summary judgment was awarded in favor of Plaintiffs and against Defendants
14 as to the Counterclaims. *Id.*

15 On March 24, 2021, the Court denied JDM's Motion for Attorneys' Fees (Doc. 565)
16 and granted Individual Defendants' Motion For Award of Attorneys' Fees And Non-Taxable
17 Expenses (Doc. 568) and Impact's Motion for Attorneys' Fees and Related Non-Taxable
18 Expenses (Doc. 570). March 24, 2021 Order (Doc. 597).

19 On September 30, 2021, the Ninth Circuit Court of Appeals affirmed the Court's
20 Order on the substantive issues; the mandate was issued on November 17, 2021. Mandate
21 (Doc. 613).

22 On January 13, 2022, the appellate court transferred Individual Defendants' and
23 Impact's Motions for Attorneys' Fees Incurred to this Court. January 13, 2022, Order (Doc.
24 614). On January 21, 2022, Impact filed a Motion for Appellate Attorneys' Fees (Doc. 615).

25 On January 25, 2022, Individual Defendants filed a Motion for Attorneys' Fees on Appeal
26 (Doc. 617). Responses (Doc. 618, 619) have been filed by JDM and Individual Defendants
27 have filed a reply (Doc. 620). Additionally, the parties have either attached, incorporated,
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1 or referenced the briefs filed with the appellate court. The Court advises the parties it accepts
2 and will consider JDM's corrected Exhibit 1 (Doc. 619-1).

3 The parties request to be notified if further briefing is requested. The Court advises
4 the parties the briefs have fully presented the issues to the Court and the Court does not find
5 further briefing is needed.

6 On May 31, 2022, JDM filed a Motion to Certify Question of Law Regarding
7 Attorneys' Fees to Arizona Supreme Court (Doc. 632). A joint response (Doc. 636) and a
8 reply (Doc. 640) have been filed.

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10 II. *Motion to Certify Question of Law Re: Attorneys's Fees to AZ Supreme Court* (Doc. 632)

11 JDM requests this Court certify the following question to the Supreme Court of
12 Arizona: May a party sued solely on tort-based claims that do not arise out of contract
13 recover its attorneys' fees under A.R.S. § 12-341.01(A) on the ground that other, separately
14 represented defendants were sued for breach of contract?" Motion (Doc. 632, p. 2). Indeed,
15 Arizona provides for a procedure to certify questions of law to the Arizona Supreme Court.
16 Ariz.R.Sup.Ct. 27. The applicable statute states:

17 The supreme court may answer questions of law certified to it by . . . a United States
18 district court . . . when requested by the certifying court if there are involved in any
19 proceedings before the certifying court questions of law of this state which may be
20 determinative of the cause then pending in the certifying court and as to which it
21 appears to the certifying court there is no controlling precedent in the decisions of the
22 supreme court and the intermediate appellate courts of this state.

23 A.R.S. § 12-1861. However, "[c]ertification is by no means 'obligatory' merely because state
24 law is unsettled; the choice instead rests 'in the sound discretion of the federal court.'" *McKesson v. Doe*, 141 S. Ct. 48, 51, 208 L. Ed. 2d 158 (2020). As summarized by another
25 district court:

26 If the Court chooses to rule it "must predict how the highest state court would decide
27 the issue using intermediate appellate court decisions, decisions from other
28 jurisdictions, statutes, treatises, and restatements as guidance." *Arizona Elec., Power
Coop. v. Berkeley*, 59 F.3d 988, 991 (9th Cir.1995). Therefore, the Court looks to
factors such as the complexity of the issue, the availability of precedent from lower
courts or other jurisdictions, and the magnitude of disagreement on the issue to
determine whether certification is appropriate. *See id.*; *Rigden v. United States*, 795

1 F.2d 727, 735 n. 6 (9th Cir.1986).

2 *Smith v. Allstate Ins. Co.*, 202 F. Supp. 2d 1061, 1064 (D. Ariz. 2002).

3 JDM asserts the issue is raised by Impact's and Individual Defendants' Motion for
4 Attorneys' Fees and the responses thereto. The pending motions address the attorneys' fees
5 incurred on appeal. JDM further asserts that "recoverability of attorneys' fees under state
6 statutes is the kind of issue of statewide importance that merits certification to the state
7 supreme court, and in each case the state supreme court accepted and answered the certified
8 question." Motion (Doc. 632, p. 3), *citations omitted*.

9 Defendants assert, however, that this Court has already addressed the issues raised in
10 the motions, albeit not in addressing the specific motions. The Court agrees with JDM that
11 it is not necessarily bound by its previous orders addressing attorneys' fees. However, while
12 the request is not untimely as to the pending motions, the Court considers that it was only
13 after JDM received a ruling they did not like on the prior pending motions that they chose
14 to seek certification of the issue to the Supreme Court of Arizona. Moreover, the "[m]ere
15 difficulty in ascertaining local law is no excuse for remitting the parties to a state tribunal for
16 the start of another lawsuit." *Riordan v. State Farm Auto Ins. Co.*, 589 F.3d 999, 1009 (9th
17 Cir. 2009).

18 The Ninth Circuit has stated that the certification process should be invoked "only
19 after careful consideration" and should not be done so lightly. *Kremen v. Cohen*, 325 F.3d
20 1035, 1037 (9th Cir. 2003)). Indeed,

21 Certification, however, is not mandatory where state law is unclear on a particular
22 issue. *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974). Whether to certify a
23 question to the state's highest court lies within the federal district court's discretion.
24 *Id.* Some of the factors a court may consider in exercising its discretion include the
25 timing of the certification, and whether certification will save time, money, and
26 resources or promote cooperative judicial federalism. *Complaint of McLinn*, 744 F.2d
27 677, 681 (9th Cir. 1984). When a party requests certification for the first time after
28 losing on the issue, that party must show "particularly compelling reasons" for
certifying the question. *Id.* ("Ordinarily such a movant should not be allowed a
second chance at victory when . . . the district court employed a reasonable
interpretation of state law.").

27 *Rock Point Sch. Inc. v. Wells Fargo Bank NA*, No. CV-15-08057-PCT-SRB, 2015 WL

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1 13122940, at *1 (D. Ariz. Oct. 27, 2015). The Court declines to exercise its discretion to
2 certify the question to the Supreme Court of Arizona.

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4 III. *Appellate Attorneys' Fees*

5 A prevailing party on appeal is entitled to receive an award of reasonable attorneys'
6 fees. Ninth Cir. R. 39-1.6(a); Fed.R.Civ.P. 54(d)(2)(B)(I). The appellate court affirmed this
7 Court's rulings on the Motions for Summary Judgment. *Joshua David Mellberg LLC v. Will*,
8 No. 20-16215, 2021 WL 4480840, at *1 (9th Cir. Sept. 30, 2021), *unpublished*. Specifically,
9 summary judgment was granted against JDM as to the claims against Impact and Individual
10 Defendants, and summary judgment was granted against Impact as to the counterclaim.

11 While it is within the discretion of a district court to require each party to bear its own
12 costs in a mixed judgment case, *Amarel v. Connell*, 102 F.3d 1494, 1523 (9th Cir. 1996), as
13 amended (Jan. 15, 1997), JDM's claims were the significant focus of this case and JDM
14 failed to succeed on any of their claims. Under a totality of litigation review, Impact
15 achieved far greater success than JDM. *Carl Karcher Enterprises, Inc. v. Stine Enterprises,*
16 *Inc.*, No. 1 CA-CV 09-0078, 2010 WL 3571535, at *2 (Ariz.App. Sept. 14, 2010); *compare*
17 *Gen. Cable Corp. v. Citizens Utilities Co.*, 27 Ariz.App. 381, 385 (1976). The Court finds
18 Impact and Individual Defendants are the prevailing parties for purposes of consideration of
19 an award of attorneys' fees.

20 Further, "[a]ny party who is or may be eligible for attorneys fees on appeal to [the
21 appellate court] may, within the time permitted in Circuit Rule 39-1.6, file a motion to
22 transfer consideration of attorneys fees on appeal to the district court or administrative
23 agency from which the appeal was taken." Ninth Cir. R. 39-1.8. The Ninth Circuit remanded
24 this issue to this Court (Doc. 614).

25 As stated by the rule, a request for transfer of this issue was to be filed within the time
26 permitted by the rule. The appellate court's granting of the request, therefore, implicitly has
27 determined the request was timely. The Court finds the requests for appellate attorneys' fees
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1 are timely. *See* Ninth Cir. R. 39-1.6(a).

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3 IV. *Motions for Appellate Attorneys' Fees* (Docs. 615 and 617)

4 Impact asserts it is entitled to an award of fees pursuant to A.R.S. §44-404(1) and
5 A.R.S. § 12-341.01. Individual Defendants assert they are entitled to an award of attorneys'
6 fees pursuant to A.R.S. § 44-404, A.R.S. § 12-341.01, and, as to Will, A.R.S. § 29-833(B).

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8 A. *A.R.S. § 12-341.01*

9 "I]n any contested action arising out of a contract, express or implied, the court may
10 award the successful party reasonable attorney's fees"pursuant to A.R.S. § 12-341.01(A).
11 Arizona law provides that the Court may award the successful party in a contested action
12 arising out of a contract reasonable attorneys' fees. A.R.S. § 12-341.01(A). Indeed, "[t]he
13 intent of this statute is for the successful party to recover under ordinary circumstances."
14 *Velarde v. Pace Membership Warehouse, Inc.*, 105 F.3d 1313, 1318 (9th Cir. 1997), n. 5,
15 *quoting G & S Investments v. Belman*, 145 Ariz. 258, 268, 700 P.2d 1358, 1368 (App. 1984).
16 The Court has the discretion to determine the circumstances appropriate for the award of
17 fees. *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985).
18 However, "there is no presumption that a successful party should be awarded attorney fees
19 under § 12-341.01." *Motzer v. Escalante*, 265 P.3d 1094, 1095 (Ariz. Ct. App. 2011); *see*
20 *also Manicom v. CitiMortgage, Inc.*, 336 P.3d 1274, 1283 (Ariz. Ct. App. 2014) (holding that
21 an award of attorneys' fees under A.R.S. § 12-341.01(A) "is permissive" and "not
22 mandatory").

23 In this case, allegations related to (1) breach of confidentiality agreements, (2)
24 work-for-hire agreements, and (2) JDM company policies and an agreement between Impact
25 and the Individual Defendants' new venture. These allegations were all interwoven with
26 claims 1-5 and 7-10. In fact, JDM's claims against Impact and the Individual Defendants
27 were interwoven, interwove the conduct of Defendants, and were based on the same nucleus
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1 of facts.

2 JDM argues, however, that the breached duties do not depend on the existence of a
3 contract because Impact had a legal duty not to misappropriate trade secrets regardless of
4 whether it had a contract with parties in this case. However, this case does not present a
5 situation where there is simply the mere existence of a contract in the transaction as asserted
6 by JDM. *See Barbat v. John & Jane Doe Partners A-D*, 155 Ariz. 519, 523, 747 P.2d 1218,
7 1222 (1987). In this interwoven case, the contract is central to the claims and the claims
8 involve common allegations.

9 Additionally, the Court disagrees with JDM that the unclean hands doctrine bars an
10 award of attorneys' fees. Contrary to the argument of JDM, it has not been established
11 Impact intentionally destroyed "crucial evidence" in this case. In fact, the Ninth Circuit
12 Court of Appeals stated, "There was no evidence that defendants caused plaintiffs to lose
13 possession of their trade secrets, or indeed that the information was no longer contained on
14 plaintiffs' server network. Moreover, there was undisputed evidence that defendant Fine and
15 one of plaintiffs' employees uploaded the data on Fine's computer to the plaintiffs' network
16 in order to preserve it." *Mellberg LLC*, 2021 WL 4480840, at *1.

17 Therefore, as the Court has previously found, March 24, 2021 Order (Doc. 597), this
18 action arises out of contract for purposes of A.R.S. § 12-341.01. Impact and Individual
19 Defendants are entitled to an award of attorneys' fees on this basis.

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21 *B. Alternate Bases for an Award of Appellate Attorneys' Fees*

22 Even if the Court had not found Defendants are eligible for attorneys' fees under
23 A.R.S. § 12-341.01, Defendants argue alternate bases for an award of fees. Impact also
24 asserts it is entitled to an award of fees pursuant to A.R.S. §44-404(1). Individual
25 Defendants assert they are also entitled to an award of attorneys' fees pursuant to A.R.S. §
26 44-404 and, as to Will, A.R.S. § 29-833(B). The Court declined to address these alternate
27 bases for fees in addressing the fees incurred in District Court proceedings. However,
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1 because the parties again argue for an award under these alternate bases, the Court considers
2 whether, if an award is not sustained pursuant to A.R.S. § 12-341.01, a showing has been
3 made for an award of attorneys' fees under A.R.S. § 44-404(1) and/or A.R.S. § 29-833(B).

4
5 C. *A.R.S. § 44-404*

6 An award of attorneys' fees may be appropriate for an unsuccessful claim of
7 misappropriation pursuant to A.R.S. § 44-404(1). A showing that the trade secret claim was
8 made in bad faith or the opposing party was guilty of willful and malicious misappropriation
9 must be made. *True Ctr. Gate Leasing, Inc. v. Sonoran Gate, L.L.C.*, 427 F. Supp. 2d 946,
10 951 (D. Ariz. 2006). Arizona courts have not yet defined bad faith in this context. However,
11 California has a similar statute, Cal. Civ. Code § 3426.4, and its courts' interpretations may
12 inform this Court as to the application of A.R.S. § 44-404(1). *See e.g. Mid Kansas Fed. Sav.*
13 *& Loan Ass'n of Wichita v. Dynamic Dev. Corp.*, 804 P.2d 1310, 1315, n. 3 (Ariz. 1991)
14 (where California utilized same rule as Arizona, Court looked to California case law to
15 inform it). The California Court of Appeals has "developed a two-prong standard: (1)
16 objective speciousness of the claim, and (2) subjective bad faith in bringing or maintaining
17 the action, i.e., for an improper purpose." *FLIR Sys., Inc. v. Parrish*, 174 Cal. App. 4th 1270,
18 1275, 95 Cal. Rptr. 3d 307, 313 (2009), *citation omitted*.

19 Indeed, (1) whether claims are objectively specious and (2) plaintiffs' subjective
20 misconduct in bringing or maintaining the claim is considered in determining "bad faith"
21 under the Uniform Trade Secrets Act. *CRST Van Expedited, Inc. v. Werner Enter., Inc.*, 479
22 F.3d 1099, 1111-12 (9th Cir. 2007). "Objective speciousness exists where the action
23 superficially appears to have merit, but there is a complete lack of evidence to support the
24 claim." *Mintz v. Mark Bartelstein & Assocs. Inc.*, No. 2:12-CV-02554-SVW-SS, 2013 WL
25 12182602, at *2 (C.D. Cal. June 14, 2013), *citations omitted; see also FLIR Sys., Inc. v.*
26 *Parrish*, 174 Cal. App. 4th 1270, 1276, 95 Cal. Rptr. 3d 307 (2009). "Subjective misconduct
27 exists where a plaintiff knows or is reckless in not knowing that its claim for trade secret
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1 misappropriation has no merit." *Computer Econ., Inc. v. Gartner Grp., Inc.*, No.
2 98-CV-0312 TW (CGA), 1999 WL 33178020, at *6 (S.D. Cal. Dec. 14, 1999). When a
3 plaintiff knowingly fails to prove a required element subjective bad faith may be inferred.
4 *Stilwell Dev. Inc. v. Chen*, No. CV86-4487-GHK, 1989 WL 418783, at *4 (C.D. Cal. Apr.
5 25, 1989).

6 "Speculation that [] individual employees must have taken trade secrets from [an
7 employer] based on their decision to change employers does not constitute evidence of
8 misappropriation." *SASCO v. Rosendin Elec., Inc.*, 207 Cal. App. 4th 837, 848-49, 143 Cal.
9 Rptr. 3d 828, 837-38 (2012), *as modified on denial of reh'g* (Aug. 7, 2012); *FLIR Sys., Inc.*,
10 174 Cal. App. 4th at 1277. Here, JDM's demand letter implicitly acknowledges they were
11 speculating trade secrets had been taken. *See* Doc. 334-5 at 4-5 ("Indeed, it seems impossible
12 that JD Mellberg Financial's trade secrets have not been disclosed."). In other words, while
13 the action may have superficially appeared to have merit, JDM was aware there was no
14 evidence to support the claim while bringing and maintaining the claim. *FLIR Syst, Inc.*, 174
15 Cal.App.4th at 1276; *CRST Van Expedited, Inc.*, 479 F.3d at 1111-12. Indeed, JDM's failure
16 to timely disclose adequate supporting expert testimony indicates JDM was aware there was
17 insufficient evidence to support the claim.

18 Additionally, although JDM argues that it identified its trade secrets in great detail,
19 the existence of trade secrets has not been established in this case. In fact, this Court
20 previously found "no evidence in the record that, since Annuity Angel ceased operation, any
21 Defendant has used or disclosed any confidential information or trade secrets of JDM. In
22 fact, there is no evidence any Defendant unfairly competed directly against JDM or solicited
23 an agent he knew to be associated with JDM." May 21, 2020 Order (Doc. 556, p. 15). The
24 Court finds the claims were objectively specious.

25 Furthermore, it appears an improper motive, rather than evidence, was the reason for
26 the claim. Although JDM contacted Impact pre-suit about the possible use and disclosure
27 of trade secrets, JDM did not provide adequate information to allow Impact to investigate the
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1 claim. Moreover, the timing of the lawsuit coincided with a launch event of Impact and JDM
2 arranged for copies of a press release to be distributed at the launch event. JDM's actions
3 show an intent to restrain legitimate competition, which leads to an inference of bad faith.
4 *See e.g., Degussa Admixtures, Inc. v. Burnett*, 277 Fed. Appx. 530, 535–36 (6th Cir. 2008)
5 (awarding fees because plaintiff's trade secret claim was filed to restrain competition and job
6 mobility). JDM points to Mellberg's reluctance to sue in support of his assertion that the suit
7 was legitimate. However, this does not outweigh the inferences raised by JDM's failure to
8 provide adequate information pre-suit and the timing of the lawsuit.

9 In other words, JDM's misappropriation claims were objectively specious from the
10 outset and were maintained with subjective misconduct. As Defendants have shown JDM's
11 claims of misappropriation were made in bad faith, the Court finds Impact and Individual
12 Defendants would be eligible for an award of attorneys' fees pursuant to the alternate basis
13 under A.R.S. §44-404.1.¹

14
15 D. *A.R.S. § 29-833*

16 Individual Defendants argue Defendant Will is also eligible for an award of attorneys'
17 fees pursuant to A.R.S. § 29-833(B), which permits an award of attorneys' fees when a
18 derivative action is brought without reasonable cause. Here, Mellberg's prosecution of his
19 derivative action against Will failed to include a computation required by Fed.R.Civ.P. 26

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22 ¹In addressing attorneys' fees for the fees incurred during the litigation before the
23 District Court, this Court declined to conclude any party litigated in bad faith for the purposes
24 of determining the prevailing party. *See e.g. Christiansburg Garment Co. v. Equal Emp't*
25 *Opportunity Comm'n*, 434 U.S. 412, 421-22 (1978) ("It is important that a district court resist
26 the understandable temptation to engage in *post hoc* reasoning by concluding that, because
27 a plaintiff did not ultimately prevail, his action must have been unreasonable or without
28 foundation. This kind of hindsight bias could discourage all but the most airtight claims, for
seldom can a prospective plaintiff be sure of ultimate success."). However, because the
Court is considering herein whether a showing warranting an award of attorneys' fees on an
alternate basis pursuant to A.R.S. § 44-404, the Court does find consideration of bad faith
is needed.

1 and at least one of Mellberg's claimed categories of damages was incompatible with
2 Mellberg's own factual representations.

3 As stated by the Magistrate Judge, "there appears to be no factual support for
4 Mellberg's claim to future earnings of the LLC to which Will wrongfully deprived him."
5 Nov. 25, 2019, Report and Recommendation (Doc. 531, p. 32), *adopted by District Court*,
6 May 21, 2020, Order (Doc. 556). Indeed, this Court subsequently stated, "as to Count 6,
7 JDM's claim lacked evidentiary support or a sound legal basis; this claim was without merit."
8 March 24, 2021, Order (Doc. 597, p. 8). This supports a finding that this claim against Will
9 was without reasonable cause. Therefore, the Court finds Individual Defendants have shown
10 Will would be eligible for an award of appellate attorneys' fees pursuant to the alternate basis
11 under A.R.S. § 29-833(B).

12
13 *V. Individual Defendants' Motion for Attorneys' Fees on Appeal (Doc. 617)*

14 Individual Defendants assert they are entitled to attorneys' fees on appeal under A.R.S.
15 § 44-404, because JDM asserted unsuccessful claims for the misappropriation of trade secrets
16 in bad faith, and under A.R.S. § 12-341.01, because JDM's unsuccessful claims against them
17 arose from and were intertwined with contracts. Additionally, Will asserts he is entitled to
18 recover a portion of his attorneys' fees pursuant to A.R.S. § 29-833(B), because the derivative
19 claims against him were brought without first complying with the statutory requirements set
20 forth in A.R.S. § 29-831(2) and (3), and were brought without reasonable cause.

21 As the Court previously stated, Individual Defendants have shown they are entitled
22 to attorneys' fees pursuant to A.R.S. § 44-404, A.R.S. § 12-341.01, and A.R.S. § 29-833(B).
23 Factors to consider in exercising its discretion to award reasonable fees include:

- 24 (1) the merits of the unsuccessful party's defense, (2) whether "[t]he lawsuit could
25 have been avoided or settled," (3) whether a fee award would be "an extreme
26 hardship," (4) whether the successful party prevailed completely, (5) the novelty of
the legal questions, and (6) whether a fee award would discourage others with
legitimate claims.

27 *Freeport Mins. Corp. v. Corbell*, No. 2 CA-CV 2016-0226, 2017 WL 3623257, at *5 (Ariz.
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1 Ct. App. Aug. 23, 2017), *citing id.*; *see also Orfaly v. Tucson Symphony Society*, 209 Ariz.
2 260, 265-55 (App. 2004), *citing Associated Indem. Corp.*, 143 Ariz. at 570. Courts also
3 consider whether such a claim or a defense had previously been adjudicated in this
4 jurisdiction. *Harris v. Maricopa Cty. Superior Ct.*, 631 F.3d 963, 974 & n.3 (9th Cir. 2011);
5 Dist. Ariz. LRCiv54.2(c)(2).

6 As previously stated, the Court finds JDM's Count 6 lacked evidentiary support or a
7 sound legal basis and was without merit. Additionally, the actions of JDM and counsel
8 resulted in unclear theories being presented and delayed/denied discovery. Further, the
9 parties had opportunities to resolve this matter through mediation at both the district court
10 and appellate levels. Further, there is no basis for this Court to conclude an award of
11 attorneys' fees would cause an extreme hardship or discourage others with legitimate claims.
12 In fact, JDM, LLC, was acquired by AmeriLife in February 2020. AmeriLife® Expands
13 Retirement Planning Services With Acquisition of J.D. Mellberg Financial, [https://amerilife.](https://amerilife.com/blog/announcements/amerilife-expands-retirement-planning-services-with-acquisition-of-j-d-mellberg-financial/)
14 [com/blog/announcements/amerilife-expands-retirement-planning-services-with-acquisitio](https://amerilife.com/blog/announcements/amerilife-expands-retirement-planning-services-with-acquisition-of-j-d-mellberg-financial/)
15 [n-of-j-d-mellberg-financial/](https://amerilife.com/blog/announcements/amerilife-expands-retirement-planning-services-with-acquisition-of-j-d-mellberg-financial/) (last accessed Oct. 31, 2022). Indeed, the parties have been
16 willing to expend significant sums of money to litigate this case. *See* Nov. 25, 2019, Report
17 and Recommendation (Doc. 531, p. 22). Lastly, the claims were not novel and other courts
18 have considered similar claims. *See, e.g., Firetrace USA, LLC v. Jesclard*, 800 F. Supp. 2d
19 1042, 1054 n.5 (D. Ariz. 2010).

20 Factors to consider in determining whether requested attorneys' fees are reasonable
21 include:

- 22 (A) The time and labor required of counsel;
- 23 (B) The novelty and difficulty of the questions presented;
- 24 (C) The skill requisite to perform the legal service properly;
- 25 (D) The preclusion of other employment by counsel because of the acceptance of the
26 action;
- 27 (E) The customary fee charged in matters of the type involved;
- 28 (F) Whether the fee contracted between the attorney and the client is fixed or

- 1 contingent;
- 2 (G) Any time limitations imposed by the client or the circumstances;
- 3 (H) The amount of money, or the value of the rights, involved, and the results
4 obtained;
- 5 (I) The experience, reputation and ability of counsel;
- 6 (J) The "undesirability" of the case;
- 7 (K) The nature and length of the professional relationship between the attorney and
8 the client;
- 9 (L) Awards in similar actions; and
- 10 (M) Any other matters deemed appropriate under the circumstances.

10 LRCiv 54.2(c). Counsel for Individual Attorneys assert they spend more than 164.9 hours
11 working on the appeal.² Further, the hourly rate of \$375 is reasonable in the community. *See*
12 *e.g., Randolph v. Pravati SPV II LLC*, No. CV-21-00713-PHX-SRB, 2022 WL 1480029, at
13 *2 (D. Ariz. Apr. 6, 2022) (shareholder who had practiced law for more than 20 years billed
14 \$567.00/hour, associate who had practiced law for seven years billed \$375.50/hour, and
15 paralegal with four years of experience billed \$265.50/hour). Additionally, the discovery and
16 motion practice in this case resulted in a 35-volume appellate record containing over 8,000
17 pages. Individual Defendants also assert JDM's mischaracterization of matters on appeal and
18 the need for appellate motion practice warrants the time counsel spent on the appeal. Time
19 spent on this matter resulted in time counsel could not spend on other matters. Further,
20 counsel viewed this case as undesirable because of the "hyperbolic and often misleading
21 arguments about the record" made by JDM. Motion for Attorneys' Fees Incurred on Appeal
22 (Doc. 617-9, p. 16). Considering these factors, the Court generally finds the requested fees
23 are reasonable, but will discuss the specific objections made by JDM.

24 The Court has reviewed the itemized objections to Individual Defendants' requested
25 fees. Response, Ex. 1 (Doc. 619-1). The Court considers that the "administrative" tasks

27 ²Individual Defendants assert many hours have been removed from the calculation to
28 eliminate any potential duplicate work.

1 delineated by Individual Defendants are substantive tasks completed by counsel, as opposed
 2 to historically clerical work and, unless otherwise stated, finds these entries to be reasonable.
 3 *Compare Helman v. Aetna Life Ins. Co.*, No. 217CV00975RGKAGR, 2018 WL 6118515,
 4 at *3 (C.D. Cal. May 21, 2018). Further, the Court also considers that a "block bill" need not
 5 necessarily be denied. *Advanced Reimbursement Sols. V. Spring Excellence Surgical Hosp.,*
 6 *LLC*, No. CV-17-01688-PHX-DWL, 2020 WL 2768699, at *6 (D. Ariz. May 28, 2020)
 7 ("Courts tend to award fees despite the presence of block-billing where the billing is for
 8 'closely related tasks, each covering no more than a few hours.>"). Additionally, many of the
 9 alleged block billed entries include time breakdowns within the entries. Lastly, the Court
 10 does not find as duplicative or unreasonable that multiple entries refer to the same task; for
 11 example, it is not unreasonable that the drafting of an appellate brief may require multiple
 12 blocks of time to complete. The Court, in its discretion, find the following entries seek
 13 unreasonable fees and sustains the objections as to these entries:

Date	Init.	Description	Time	Charge	Basis
11/5/20	MSW	Begin researching cases cited in JDM's First Brief on Cross-Appeal (1.0); communications with Impact's counsel re: briefing (0.3).	1.3	481.00	Unclear if solely appeal instead of cross-appeal.
11/13/20	MSW	Review portions of JDM First Brief on Cross-Appeal addressing spoliation, exclusion of untimely damages evidence, etc. (0.6); research re: citations to unpublished decisions and other dispositions (0.2).	.8	296.00	Unclear if solely appeal instead of cross-appeal.
12/1/20	MSW	Partial: communications with Impact's counsel re: Joint Appellees' Excerpts of Record (0.2).	.2	74.00	Unclear if solely appeal instead of cross-appeal.
12/30/20	MSW	Receipt of JDM's submission of redacted portion of "sealed" volumes of ER.	.2	74.00	Receipt, as opposed to review, is clerical.

12/31/20	MSW	Partial: review of Impact's revised draft of Second Brief on Cross-Appeal (0.8).	.8	296.00	Unclear if solely appeal instead of cross-appeal.
1/13/21	MSW	Partial: receipt and handling of FER from Impact's counsel (8 volumes) (0.3).	.3	111.00	Unclear if solely appeal instead of cross-appeal.
1/19/21	MSW	Receipt and processing of documents e-filed by Impact (Brief, Further Excerpts of Record, Motion to Transmit Physical Exhibit, and Motion to Unseal).	.3	111.00	Unclear what "processing" entails.
1/21/21	MSW	Partial: prepare brief for copying, binding, etc. (0.6).	.6	222.00	Clerical.
Date	Init.	Description RE: Will	Time	Charge	Basis
		N/A			

Individual Defendants seek \$61,013.00 in reasonable attorneys' fees incurred on appeal. The Court finds \$1,443.00 of the delineated fees are not reasonable, for a total fee amount of \$59,570.00. Additionally, an award of attorneys' fees need not equal or relate to the fees actually paid. A.R.S. § 12-341.01.B. The Court considers the Local Rule factors, along with the fact that counsel did not work well together, which contributed to the protracted litigation. Further, there was a factual and legal basis for JDM to pursue some of the claims despite the fact they ultimately did not survive summary judgment, and that this appellate litigation necessarily overlapped the cross-appeal. These factors provide a "reasonable basis" to reduce the attorneys' fees amount. *See generally Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 571 (1985); *see also Worden v. Klee Bethel, M.D., P.C.*, No. 1 CA-CV 08-0490, 2009 WL 2003321, at *5 (Ariz. App. July 9, 2009) (reduced fee award affirmed).

In light of this, the Court will reduce the amount of attorneys' fees by 30% for a reasonable attorneys' fees award of \$41,699.00. The Court finds a total award for attorneys' fees on appeal in the amount of \$41,699.00 to be appropriate and will grant in part Individual Defendants' Motion For Attorneys' Fees on Appeal (Doc. 617) to award Individual

1 Defendants this amount.

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3 VI. *Impact's Motion for Attorneys' Fees and Related Non-Taxable Expenses* (Doc. 615)

4 Impact requests this Court award it attorneys' fees because JDM's claim were made
5 in bad faith, A.R.S. § 44-404, and because the claims arose out of contract or were so
6 intertwined with the contract claims, A.R.S. § 12-341.01.

7 As the Court previously stated, Impact has shown it is eligible to attorneys' fees
8 pursuant to A.R.S. § 44-404 and A.R.S. § 12-341.01. The Court will consider the factors as
9 discussed *supra*.

10 Ultimately, JDM's claims were not meritorious. This conclusion is supported by
11 JDM's presentation of unclear legal theories and the delay and denial of complete discovery
12 throughout the case. Indeed, JDM failed to prove any supporting damages and failed to
13 satisfy a condition precedent to suing as to Count 5. In light of this, this lawsuit could have
14 been avoided or settled. Although JDM argues the suit would have been unnecessary if
15 Impact had conducted a cursory investigation into whether Will and Fine possessed JDM's
16 information, this fails to acknowledge that Impact asserts the litigation could have been
17 avoided had JDM specifically described the trade secrets alleged to have been taken. In
18 other words, JDM was expecting Impact to search for trade secrets without providing detail
19 of those alleged trade secrets. Further, the parties had opportunities to resolve this matter
20 through mediation at both the district court and appellate levels.

21 Contrary to JDM's assertion that its expert has established damages to the tune of
22 millions of dollars, there is no basis for this Court to conclude an award of attorneys' fees
23 would cause an extreme hardship or discourage others with legitimate claims. The value of
24 JDM is not known and, In fact, JDM, LLC, was acquired by AmeriLife in February 2020.
25 AmeriLife® Expands Retirement Planning Services With Acquisition of J.D. Mellberg
26 Financial, [https://amerilife.com/blog/announcements/amerilife-expands-retirement-planning-
27 services-with-acquisition-of-j-d-mellberg-financial/](https://amerilife.com/blog/announcements/amerilife-expands-retirement-planning-services-with-acquisition-of-j-d-mellberg-financial/) (last accessed Oct. 31, 2022). Lastly,
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1 the claims were not novel and other courts have considered similar claims. *See, e.g.,*
2 *Firetrace USA, LLC v. Jesclard*, 800 F. Supp. 2d 1042, 1054 n.5 (D. Ariz. 2010).

3 The Court considers the factors discussed *supra* in determining whether the requested
4 attorneys' fees are reasonable. Impact is seeking fees for 810.5 hours working on the appeal;
5 it has removed about 100 hours from the total (related to the cross-appeal or entries involving
6 possible duplicative work). Further, the hourly rates (\$335-\$565) are reasonable in the
7 community. *See e.g., Randolph*, WL 1480029, at *2. Although the issues were not novel,
8 the protracted discovery and motion practice resulted in a vast appellate record, large parts
9 of which were relevant on appeal. Further, the commercial litigation required "sophisticated,
10 high-stakes legal work." Motion for Appellate Attorneys' Fees (Doc. 615-1, p. 13). This
11 litigation was handled by counsel who shared a relationship with Impact that preceded this
12 litigation.

13 The time spent on this appeal precluded counsel's availability to spend time on other
14 cases. Additionally, the rates charged by Impact's counsel, \$335 to \$350 per hour for
15 associates and \$435 to \$565 for partners is reasonable. *See e.g., Randolph*, 2022 WL
16 1480029, at *2 (shareholder who had practiced law for more than 20 years billed
17 \$567.00/hour, associate who had practiced law for seven years billed \$375.50/hour, and
18 paralegal with four years of experience billed \$265.50/hour). This reasonableness is
19 demonstrated by its representation of less than 1% of the \$44 million in damages that JDM
20 sought. *See e.g. Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1159 (9th Cir. 2002) (\$2.3
21 million in fees reasonable in defense of \$32 million claim); *Wyatt Tech. Corp. v. Malvern*
22 *Instruments, Inc.*, No. CV 07-8298 ABC (RZX), 2010 WL 11508372, at *9–10 (C.D. Cal.
23 Apr. 28, 2010) (\$1.78 million in fees reasonable in defense of \$25 million claim). Further,
24 counsel viewed this case as undesirable because of the "hyperbolic and often misleading
25 arguments about the record" made by JDM. Motion for Appellate Attorneys' Fees (Doc. 615-
26 1, p. 14).

27 Additionally, this case did not present novel legal issues and a fee award would not
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1 discourage others with legitimate claims. Considering these factors, the Court generally
2 finds the requested fees are reasonable, but will discuss the specific objections made by JDM.

3 The Court has reviewed the itemized objections to Impact's requested fees. Alvarado
4 Declaration, Ex. 1 (Doc. 615-10). The Court considers that many of the "administrative"
5 tasks delineated by Individual Defendants are substantive tasks completed by counsel, as
6 opposed to historically clerical work and, unless otherwise stated, finds these entries to be
7 reasonable. *Compare Helman*, 2018 WL 6118515, at *3. Further, the Court also considers
8 that a "block bill" need not necessarily be denied. *Advanced Reimbursement Sols.*, 2020 WL
9 2768699, at *6. In determining whether entries constitute block billing, the Court considers
10 whether sufficient detail has been provided to determine whether the tasks are closely related
11 and involved more than a few hours. *Id.* Lastly, the Court does not necessarily find as
12 duplicative or unreasonable that multiple entries refer to the same task; for example, it is not
13 unreasonable that the drafting of an appellate brief may require multiple blocks of time to
14 complete.

15 Impact has withdrawn its requests listed in entries 2 and 28 for work on the cross-
16 appeal. It has also halved entries 1, 2, 5, 7, 8, and 30 for those portions which refer to work
17 on the cross-appeal. However, as to entries 1, 2, 5, 7, 8, and 30, it is not clear if that
18 reduction adequately includes all fees related to the cross-appeal. The Court will sustain the
19 objections to these entries and the half-amount remaining will be reduced from the total
20 requested amount. Additionally, the Court, in its discretion, find the following entries seek
21 unreasonable fees and sustains the objections as to these entries:

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Date	Init.	Desc. - Miller & Martin	Time	Charge	Basis
6/5/20	RFP	Review standards for notice of cross-appeal; review and analyze docket and orders relating to appeal; prepare notice of cross-appeal.	2.7	1174.50	Remaining half (587.25) to be removed.

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1	6/5/20	MPK	Conferring with R. Parsley and S. Odom regarding appeal and preparing cross appeal.	.4	192.00	Remaining half (96.00) to be removed.
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3	6/9/20	RFP	Work of appellate procedural matters and cross-appeal.	.3	130.50	Remaining half (65.25) to be removed.
4						
5	6/19/20	RFP	Review and revise notice of cross-appeal; work on appellate administrative matters.	1.1	478.50	Remaining half (239.25) to be removed.
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8	6/23/20	RFP	Review notices from 9th Circuit Court of Appeals concerning appeal and cross-appeal; review 9th Circuit local rules; work on appellate administrative matters and deadlines.	1.8	783.00	Remaining half (391.50) to be removed.
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12	6/24/20	RFP	Work on appellate administrative matters.	.4	174.00	Insufficient detail.
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14	6/29/20	RFP	Work on appellate administrative matters.	.2	87.00	Insufficient detail.
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16	9/15/20	RFP	Work on appellate administrative matters.	.5	217.50	Insufficient detail.
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18	10/14/20	MPK	Reviewing cross appeal and garnishment issues; reviewing JDM appeal brief and attendant documents.	1.4	672.00	Remaining half (336.00) to be removed.
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20	10/28/20	RAK	Review brief; prepare spreadsheet analyzing citations; correspondence with B. Parsley regarding best evidence rule.	5	2600.00	Block billed.
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22	10/29/20	RAK	Conference with B. Parsley regarding appeal strategy; review record citations; continue preparing analysis of same	4	2080.00	Block billed.
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24	11/13/20	RFP	Review and analyze case law concerning summary judgment procedure and standards of review for appellee brief; work on strategy for appellee brief.	5.9	2560.50	Block billed.
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1	11/15/20	RFP	Review and analyze rules and cases on standards of appellate review and sanctions standards; work on strategy for appellee brief.	6.9	3001.50	Block billed.
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5	11/16/20	RFP	Review and analyze case law for appeal; review and analyze briefing and decisions in district court for purpose of appeal; work on strategy for appellee brief.	6.5	2827.50	Block billed.
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9	8/30/21	WE	Discuss argument on counterclaim dismissal with M. Kohler; discuss arguments in primary appeal with B. Parsley; search key cases from 9th Circuit panel members and email B. Parsley; participate in mock arguments in preparation for 9/1 oral argument; review and comment on B. Parsley argument outlines.	3.0	1695.00	Block billed. Includes fees related to cross-appeal.
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15	9/2/21	RFP	Work on appellate administrative matters.	.7	318.50	Unclear if clerical.
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17	9/3/21	RFP	Work on appellate administrative matters.	.4	182.00	Unclear if clerical.
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	Date	Init.	Desc. - Fennemore Craig	Time	Charge	Basis
	4/3/21	GK	Analyze JDM's Third Brief on Cross Appeal.	1.0	535.00	Includes fees related to cross-appeal.

Impact seeks \$356,214.00 in reasonable attorneys' fees incurred on appeal. The Court finds \$17,993.75 of the delineated fees are not reasonable, for a total fee amount of \$338,220.25. Additionally, an award of attorneys' fees need not equal or relate to the fees actually paid. A.R.S. § 12-341.01.B. The Court considers the Local Rule factors, along with the facts that counsel did not work well together, which contributed to the protracted litigation, there was a factual and legal basis for JDM to pursue some of the claims despite

1 the fact they ultimately did not survive summary judgment, and that this appellate litigation
2 necessarily overlapped the cross-appeal. These factors provide a “reasonable basis” to
3 reduce the attorneys’ fees amount. *See generally Associated Indem. Corp. v. Warner*, 143
4 Ariz. 567, 571 (1985); *see also Worden v. Klee Bethel, M.D., P.C.*, No. 1 CA-CV 08-0490,
5 2009 WL 2003321, at *5 (Ariz. App. July 9, 2009) (reduced fee award affirmed).

6 In light of this, the Court will reduce the amount of attorneys’ fees by 30% for a
7 reasonable attorneys’ fees award of \$236,754.00.³ The Court finds a total award for
8 attorneys’ fees on appeal in the amount of \$236,754.00 to be appropriate and will grant in
9 part Impact's Motion For Appellate Attorneys' Fees (Doc. 615) to award Impact this amount.

10
11 *Conclusion*

12 As previously stated, the Court finds Individual Defendants are entitled to an award
13 of attorneys' fees in the amount of \$41,699.00. The Court further finds Impact is entitled to
14 an award of attorneys' fees in the amount of \$236,754.00.

15 Additionally, Mellberg and JDM, LLC, were aligned as adverse to Impact and
16 Individual Defendants, while Impact and Individual Defendants were the prevailing parties.
17 The Court finds it appropriate to award the fees jointly and severally.

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19 Accordingly, IT IS ORDERED:

20 1. The Motion to Certify Question of Law Regarding Attorneys' Fees to Arizona
21 Supreme Court (Doc. 632) is DENIED.

22 2. Impact's Motion for Appellate Attorneys' Fees (Doc. 615) is GRANTED IN
23 PART AND DENIED IN PART. Impact is awarded appellate attorneys' fees from Mellberg
24 and JDM, LLC, in the amount of \$236,754.00.


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28 ³The Court has rounded this amount down.

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3. Individual Defendants' Motion For Attorneys' Fees on Appeal (Doc. 617) is GRANTED IN PART AND DENIED IN PART. Individual Defendants are awarded appellate attorneys' fees from Mellberg and JDM, LLC, in the amount of \$41,699.00.

DATED this 7th day of November, 2022.


Cindy K. Jorgenson
United States District Judge