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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Ian Neal Ornstein,

10 Plaintiff,

11 v.

12 Bank of New York Mellon,

13 Defendant.  
14

No. CV-18-00240-TUC-RM

**ORDER**

15 Pending before the Court is Defendant's Motion for Attorney's Fees and Costs  
16 (Doc. 52). On February 27, 2019, the Court dismissed Plaintiff's First Amended  
17 Complaint in its entirety, with prejudice. (Doc. 49.) Judgment in Defendant's favor was  
18 entered the following day.<sup>1</sup> (Doc. 50.) Defendant now seeks Attorney's Fees and Costs  
19 pursuant to the terms of the loan and Arizona Revised Statutes §§ 12-341 and 12-341.01.  
20 Defendant did not file a response in opposition to the Motion, and the time for doing so  
21 has expired. The Court will grant the Motion in part.

22 **I. Entitlement to Attorney's Fees and Costs**

23 Defendant asserts two bases for its entitlement to Attorney's Fees and Costs. (*See*  
24 Doc. 52 at 1.) The first is based upon the Note, which Plaintiff attached as an exhibit to  
25 his Complaint. (*See* Doc. 1-1 at 17-21.) The clause Defendant relies on to recover  
26 attorney's fees reads:

27  
28 <sup>1</sup> Following entry of judgment, Plaintiff brought a Notice of Appeal of the Court's Order  
dismissing his case and the Clerk's judgment against him. (Doc. 51.) That appeal is now  
pending before the Ninth Circuit Court of Appeals. (Doc. 56.)

1 (E) Payment of Note Holder’s Costs and Expenses

2 If the Note Holder has required me to pay immediately in full as described  
3 above, the Note Holder will have the right to be paid back by me for all of  
4 its costs and expenses in enforcing this Note to the extent not prohibited by  
5 applicable law. These expenses include, for example, reasonable attorneys’  
6 fees.

7 (Doc. 1-1 at 20.) Defendant has not explicitly asserted that defending this lawsuit  
8 constituted “enforcing this Note” per the attorney’s fees clause of the loan document.  
9 Indeed, Defendant previously informed the Court that the real property that secured the  
10 note was sold at a trustee’s sale in 2015. (*See* Doc. 52 at 2.) In any event, because the  
11 Court finds that Defendant is entitled to costs and attorney’s fees under Arizona law, see  
12 discussion, *infra*, the Court need not decide whether defending this lawsuit is “enforcing  
13 the Note[.]”

14 Section 12-341 requires a court to award costs to a successful party in a civil  
15 action. Ariz. Rev. Stat. § 12-341. Section 12-341.01 permits a court to award attorney’s  
16 fees to a successful party in any contested action arising out of a contract. Ariz. Rev. Stat.  
17 § 12-341.01(A). “Although the award of costs is mandatory, the trial court has discretion  
18 to determine which party was successful. Arizona courts apply the same principles to  
19 determine the successful party in both the attorney fees and costs contexts.” *Tucson*  
20 *Estates Prop. Owners Ass’n, Inc. v. McGovern*, 366 P.3d 111, 116 (Ariz. App. 2016)  
21 (internal citation omitted). An action arises out of contract when “the duty breached is  
22 created by the contractual relationship, and would not exist but for the contract.” *Assyia*  
23 *v. State Farm Mut. Auto. Ins. Co.*, 273 P.3d 668, 672 (Ariz. App. 2012) (internal  
24 quotations omitted). All of Plaintiff’s claims in the FAC “would not exist but for the  
25 contract[.]”<sup>2</sup> and as to all of them judgment was entered in Defendant’s favor. (*See* Doc.  
26 50.) Thus, Defendant is entitled to costs<sup>3</sup> and reasonable attorney’s fees.

26 <sup>2</sup> Claim 1a was based upon a federal statute regulating borrow-lender relationships on  
27 certain mortgage contracts; Claim 2 was explicitly based on the loan documents, in that it  
28 alleged the loan documents were “contracts of adhesion,” among other allegations; Claim  
29 5 sought documentation of transfer of ownership of the right to enforce the loan contract.

<sup>3</sup> Although Defendant titles his Motion as seeking costs, the Motion makes no reference  
to costs incurred, and the Bill of Costs (Doc. 53) indicates that Defendants did not incur  
any taxable costs in this matter. As such, the Court will only address the requested

1       **II.     Calculation of Reasonable Attorney’s Fees**

2             Having determined that Defendant is entitled to an attorney’s fee award, the Court  
3 must determine the amount of the award to be granted. *See Schweiger v. China Doll*  
4 *Rest., Inc.*, 673 P.2d 927, 931 (Ariz. App. 1983) (“payment of an attorney’s fee must be  
5 reasonable and bear a direct relation to the amount involved, and the quality, kind[,] and  
6 extent of service rendered” (internal quotation marks omitted)). In total, Defendant seeks  
7 \$37,847.50 in fees for work done by attorneys and paralegals in defending against  
8 Plaintiff’s claims. (Doc. 52 at 5.)

9             In support of its Motion, Defendant submits an affidavit by attorney James Ugalde  
10 (Doc. 52-1 at 1-5), in which Mr. Ugalde explains that he is a partner at Quarles & Brady  
11 LLP and is lead counsel for Defendant. (*Id.* at 2.) Mr. Ugalde’s billing rates during  
12 Defendant’s representation were \$415.00 and \$435.00 per hour. (*Id.*) The following  
13 attorneys and paralegals also worked on this matter, and their work was billed to  
14 Defendants: S. Klundt at \$475.00 per hour; M. Kjartanson at \$270.00 per hour; K.  
15 Webster at \$210.00 and \$215.00 per hour; and S. Aytch at \$240.00.<sup>4</sup> (*Id.* at 3.) At Exhibit  
16 A (Doc. 52-1 at 7) to the affidavit is an itemized statement of tasks performed, with the  
17 corresponding hours billed for that task and the name of the attorney or paralegal who  
18 performed the task. (*See* Doc. 52-1 at 9-14.) The entries are dated and listed in  
19 chronological order. (*See id.*) Mr. Uglade avers that these hourly rates are “comparable to  
20 the rates charged by lawyers of comparable experience at comparable law firms.” (*Id.* at  
21 4.) He additionally affirms that the total sum of requested attorney’s fees is reasonable.  
22 (*Id.*) Lastly, Defendant attaches a Statement of Consultation, in compliance with LRCiv  
23 54.2(d)(1). (Doc. 54.)

24             The reasonableness of an award of attorney’s fees is determined using the  
25 “lodestar method,” in which a court first determines the lodestar figure (the number of  
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27 attorney’s fees and deny the Motion as to any request for costs.

28 <sup>4</sup> In addition to their respective rates, the affidavit provides information about each person’s educational background and their respective role in this case. (*See* Doc. 52-1 at 3.)

1 hours reasonably expended multiplied by a reasonable hourly rate) and then assesses  
2 whether an enhancement or reduction of that figure is appropriate based upon a number  
3 of factors. *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1119 (9th Cir. 2000). In determining  
4 what constitutes a reasonable hourly rate, the Court must look to the prevailing market  
5 rates in the relevant community “for similar work performed by attorneys of comparable  
6 skill, experience, and reputation.” *Schwarz v. Sec’y of Health & Human Servs.*, 73 F.3d  
7 895, 908 (9th Cir. 1995). The party seeking the award bears the burden of producing  
8 “satisfactory evidence—in addition to the attorney’s own affidavits—that the requested  
9 rates are in line with those prevailing in the community.” *Camacho v. Bridgeport Fin.,*  
10 *Inc.*, 523 F.3d 973, 980 (9th Cir. 2008). The Local Rules place additional requirements on  
11 the format and content of applications for attorney’s fees. See LRCiv 54.2. Task-based  
12 itemizations must describe the services rendered sufficiently for the court to assess the  
13 reasonableness of the charge, and the court may reduce for any inadequate descriptions.<sup>5</sup>  
14 LRCiv 54.2(e)(2).

15 The lodestar factors to be considered in determining the reasonableness of an  
16 attorney’s fee award have been incorporated into Local Rule of Civil Procedure  
17 54.2(c)(3), see *Maricopa Cnty. v. Office Depot, Inc.*, No. 2:14-cv-1372-HRH, 2017 WL  
18 1957882, at \*4-5 (D. Ariz. May 11, 2017), *vacated on other grounds by County of*  
19 *Maricopa v. Office Depot, Inc.*, \_\_ Fed. App’x. \_\_, 2018 WL 6584261 (9th Cir. 2018).  
20 The non-exhaustive list outlined in the local rules are the factors to be discussed by the  
21 party requesting an award, and by implication, to be considered by the Court in assessing  
22 the reasonableness of an award.

23 . . . .

24 . . . .

25 \_\_\_\_\_  
26 <sup>5</sup> The local rules set out the format and substance with which to adequately describe  
27 tasks, with particular requirements for (A) telephone conferences, (B) legal research, (C)  
28 preparation of pleadings and other papers, and (D) travel time. LRCiv 54.2(e)(2). In  
addition, if an inadequately described or otherwise unreasonable entry is blocked-billed  
with an acceptable entry, the Court may deduct the entire entry. *Med. Protective Co. v.*  
*Pang*, 25 F. Supp. 3d 1232, 1247 (D. Ariz. 2014) (eliminating all unreasonable, block-  
billed entries).

1 The factors are as follows:

- 2 (A) The time and labor required of counsel;
- 3 (B) The novelty and difficulty of the questions presented;
- 4 (C) The skill requisite to perform the legal service properly;
- 5 (D) The preclusion of other employment by counsel because of acceptance  
of the action;
- 6 (E) The customary fee charged in matters of the type involved;
- 7 (F) Whether the fee contracted between the attorney and the client is fixed  
or contingent;
- 8 (G) Any time limitations imposed by the client or the circumstances;
- 9 (H) The amount of money, or the value of the rights, involved, and the  
results obtained;
- 10 (I) The experience, reputation, and ability of counsel;
- 11 (J) The “undesirability” of the case;
- 12 (K) The nature and length of the professional relationship between the  
attorney and the client;
- 13 (L) Awards in similar actions; and
- 14 (M) Any other matters deemed appropriate under the circumstances.

15 LRCiv 54.2(c)(3).

16 The Court finds that the requested hourly rates are reasonable and comparable to  
17 that charged by attorneys of similar experience within the relevant community. With  
18 regard to the number of hours expended, the Court has reviewed the billing statements  
19 and finds that the descriptions provided are adequate, but that some of the tasks were not  
20 reasonable for Defendant to claim in this matter. Specifically, Defendant claims hours  
21 expended on issues regarding a lis pendens Plaintiff attached to the real property in issue.  
22 Although related to this case, these matters were not done in furtherance of defending  
23 against Plaintiff’s claims in this matter. Plaintiff sought leave from this Court to file the  
24 lis pendens (Doc. 33), and Defendant responded (Doc. 34), but the Court never granted  
25 the request for leave<sup>6</sup> (*see* Doc. 49 at 11). As such, only the time reasonably spent in  
26 responding to Plaintiff’s Motion for Leave may be claimed. Accordingly, the Court has  
27 excised 14.6 hours, or \$6,082.50 from the billing statement, for a lodestar of \$31,765.00.  
28 The Court, however, finds this lodestar to be unreasonable and, upon consideration of the

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<sup>6</sup> The Court denied the request as moot because Plaintiff proceeded without leave and then dismissed the lis pendens himself. (*See* Doc. 49 at 11.)

1 above factors, will exercise its discretion to reduce the lodestar by ten percent. *See*  
2 *Gonzalez v. City of Maywood*, 729 F.3d 1196, 1203 (9th Cir. 2013) (“The district court  
3 can impose a small reduction, no greater than 10 percent—a ‘haircut’—based on its  
4 exercise of discretion and without a more specific explanation.” (internal quotation marks  
5 omitted)). Defendant will be awarded \$28,588.50 in attorney’s fees.

6 **IT IS ORDERED** that Defendant’s Motion for Attorney’s Fees and Costs (Doc.  
7 52) is **granted in part**. Defendant shall be awarded \$28,588.50 in reasonable attorney’s  
8 fees from Plaintiff. Defendant shall not be awarded costs.

9 Dated this 26th day of April, 2019.

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Honorable Rosemary Márquez  
United States District Judge