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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF LA PAZ

RODNEY ELLWOOD SCHLESENER, an
unmarried man and Arizona resident
doing business as "HT4,"

Plaintiff/Counter-Defendant,

vs.

LANDARIZONA/JAK LLC, an Arizona
limited liability company,

Defendant/Counterclaimant.

Case No.: S1500CV202400045

**PLAINTIFF/COUNTER-
DEFENDANT'S RESPONSE TO
DEFENDANT/COUNTER-
CLAIMANT'S MOTION FOR
SUMMARY JUDGMENT RE
COUNTERCLAIM COUNTS ONE
AND THREE ONLY**

(Assigned to the Honorable
Marcus Kelley)

(oral argument requested)

Pursuant to Rule 56(c)(2), Ariz. R. Civ. P., Plaintiff/Counter-Defendant Rodney Ellwood Schlesener doing business as "HT4" ("HT4"), through undersigned counsel, hereby submits his Response to Defendant/Counterclaimant LandArizona/JAK LLC's ("LandArizona's") Motion for Summary Judgment Re Plaintiff's Counterclaim Counts One and Three Only. As set forth in the following Memorandum of Points and Authorities and Omnibus Controverting Separate Statement of Facts filed simultaneously herewith ("OCSO"): 1) LandArizona is not entitled to summary judgment on Count 1 for Declaratory Judgment because that claim requests that the Court make factual findings that are disputed and that it "convert" an unenforceable lien waiver into an enforceable one (among other things); 2) there are no facts to support a finding that HT4 "knew" that its valid Mechanics' Lien was groundless; and 3) there are no authorities to support LandArizona's claim that it is the prevailing party

1 on the mechanics' lien foreclosure action that HT4 voluntarily dismissed in an
2 unsuccessful effort to move toward a settlement.

3 MEMORANDUM OF POINTS AND AUTHORITIES

4 **I. Introduction**

5 The dispute before the Court involves HT4's claim for \$20,245.70 in work and
6 materials that it, as a contractor, provided by LandArizona. LandArizona does not
7 dispute that the work was performed. Instead, it argues that the unenforceable
8 California forms that HT4 signed were waivers of both HT4's right to assert a
9 mechanics' lien and its right to assert any type of claim (contract or unjust enrichment)
10 for payment.

11 Initially, HT4 sought foreclosure of the mechanics' lien that it recorded against
12 LandArizona's property (the "Property"). Aware that the California forms were
13 ineffective, under Arizona law, to waive mechanics' lien rights, HT4 claimed the right
14 to foreclose its November 21, 2023 Mechanics' Lien (the "Mechanics' Lien") and to
15 breach of contract damages, interest under the Prompt Pay Act and, alternatively,
16 restitution for unjust enrichment. Again, there is no dispute that the work was done.

17 Less than one year after the Mechanics' Lien was recorded, HT4 learned that an
18 assistant, Emma Poeling, researched the internet for a form of lien waiver because
19 LandArizona did not have one. Ms. Poeling provided Mr. Kunisch of LandArizona
20 with the form that she found. Mr. Kunisch apparently made no effort to determine,
21 for himself, if the form was an Arizona form. Instead, he used the form for the last
22 two payments that he made to HT4.

23 Intent on doing what he believed to be the right thing, regardless of HT4's right
24 to pursue the Mechanics' Lien, Mr. Schlesener of HT4 (also known as "Boomer"),
25 agreed to release the Mechanics' Lien and did so on October 30, 2024, hoping that his
26 showing of good faith could spur meaningful settlement negotiations of this modest
27 claim for work undisputedly performed.

28 Unfortunately, LandArizona continued its "scorched earth" campaign. Through

1 various personal attacks on undersigned counsel and HT4, the olive branch extension
2 has been distorted into an admission that HT4's perfectly valid Mechanics' Lien was
3 "groundless" when it was recorded. This \$20,245.70 dispute is now before the Court
4 by virtue of 17 pages of argument in one motion for summary judgment, a 108 page
5 Separate Statement of Facts and a Second Motion for Summary Judgment on all of
6 HT4's claims.

7 As explained below, the Mechanics' Lien was always valid. HT4's lien rights
8 can only be waived using the statutory forms of mechanics' lien waivers that are
9 attached as Exhibits A-D. Moreover, and as set forth in HT4's Response to
10 LandArizona's Motion for Summary Judgment on HT4's claims, California law is
11 quite different from Arizona law in many respects. Its form of lien waivers never
12 waive contract rights; they only waive mechanics' lien and payment bond rights. In
13 short, the issues before the Court center on a claim for damages resulting from a
14 voluntary release of a valid mechanics' lien that was on record for less than one (1)
15 year. LandArizona now attempts to parlay a party's decision to move toward
16 settlement into claim for punitive sanctions under § 33-420 and attorneys' fees under
17 a host of statutes inclusive of § 12-341.01.

18 **II. Facts**

19 While HT4 is an experienced general engineering contractor and holds a
20 General Dual KA Dual Engineering contractor's license, License Number ROC 319426,
21 it is a small company consisting only of Mr. Schlesener. Emma Poeling lives in Safford
22 and assists him with some of the paperwork but, for the most part, Mr. Schlesener
23 handles most all of the construction work and communications with his customers.
24 (OCSSOF ¶ 1).

25 Mr. Schlesener has known James Kunisch for several years. Prior to July of 2023,
26 he learned from Mr. Kunisch that his company, LandArizona/JAK, owned property in
27 Quartzsite (the "Property"). He understood that Mr. Kunisch was developing an RV
28 trailer campground and planned to sell lots within that campground. (OCSSOF ¶ 2).

1 Mr. Kunisch advised HT4 that he needed 350 feet of roadway to the Property, 1500
2 lineal feet of waterline to the Property line and two (2) site pads where he planned to
3 install two (2) RVs as models for prospective purchasers to view. (OCSSOF ¶ 3).

4 Mr. Kunisch told Mr. Schlesener that he wanted to supply some of the materials
5 himself to save money. The roadway required aggregate base course ("AB") and so
6 did the site pads. Mr. Kunisch told Mr. Schlesener to exclude AB from the scope of
7 HT4's work and promised to have it available when HT4 needed it. (OCSSOF ¶ 4).
8 Mr. Kunisch also agreed to have water available at the Property. From dust control to
9 soil and aggregate compaction, the work required an available source of water. Mr.
10 Kunisch told Mr. Schlesener that he had a pumphouse at the Property that would
11 supply the water that HT4 needed. (OCSSOF ¶ 5).

12 Messrs. Kunisch and Schlesener agreed that Tom Smith, a laborer whom
13 LandArizona was using at the Property, would perform certain work for HT4. Mr.
14 Schlesener agreed to track the hours that Mr. Smith worked. Mr. Kunisch agreed to
15 pay Mr. Smith for the hours that he worked for HT4. Both men agreed that the cost of
16 Mr. Smith's labor would be deducted from amounts otherwise due HT4. (OCSSOF ¶
17 6).

18 The parties also agreed to divide the work into three (3) separate contracts and
19 treated each contract as a separate project. HT4 submitted three separate proposals
20 for three separate scopes of work: 1) roadwork to the Property (the "Roadwork
21 Contract"); 2) two (2) site pads (the "Site Pad Contract"); and 3) water line that would
22 supply water to the Property line (the "Waterline Contract"). (OCSSOF ¶ 7). Mr.
23 Kunisch signed all three proposals. They are attached to his Declaration as Exhibits
24 A, B and C. (OCSSOF ¶ 8).

25 When HT4 arrived at the Property to perform the work, HT4 learned that the
26 pump house was not complete and operational because LandArizona did not yet have
27 the pump ready. LandArizona agreed to pay for the water that HT4 transported from
28 a Quartzsite location where Mr. Kunisch had an account and HT4 agreed to provide

1 the trucks and trailers to haul the water to the Property. Beginning on July 17, 2023
2 through July 31, 2023, HT4 used its trucks and its trailers to travel to the Quartzsite
3 water source, load water and haul it to the Property. (OCSSOF ¶ 9). For 12 days, Mr.
4 Schlesener had to drive back and forth from Quartzsite to the Property to haul an
5 empty water trailer, pump it full of water and return to the site. (OCSSOF ¶ 10).

6 The absence of available water and the delays caused by the hours spent
7 pumping and hauling water from the Quartzsite water source to the Property slowed
8 HT4's progress, increased its fuel costs and increased its equipment rental costs.
9 (OCSSOF ¶ 11). In addition to asking HT4 to haul water for him, Mr. Kunisch asked
10 HT4 to supply a hose for his well site. HT4 purchased one for \$175.00 and left it at the
11 pump house. He also asked HT4 to level the ground around the pump house. It took
12 HT4 one (1) hour to do that and required that HT4 haul material from Mr. Kunisch's
13 friend's house. This work is referred to as the "Pump House Contract" work.
14 (OCSSOF ¶ 12).

15 On September 12, HT4's laborer, Alonza Zapata, and Mr. Schlesener met with
16 Mr. Kunisch and his wife. Mr. Schlesener told Mr. Kunisch that he had tracked all of
17 the additional costs that HT4 incurred hauling water for him. Both Mr. Kunisch and
18 his wife confirmed their obligation to pay for HT4's time and costs. (OCSSOF ¶ 13).

19 HT4 performed the roadwork first. Mr. Kunisch inspected its work, was aware
20 of all of the AB used for the road because he purchased it, and paid HT4 in full for the
21 work. His first payment of \$20,000 was made on August 18, 2023. It was an
22 overpayment of the \$18,523.00 owed for the roadwork. (OCSSOF ¶ 14).

23 HT4 performed the site pad work second. Mr. Kunisch inspected its work, was
24 aware of all of the AB used for the site pads because he purchased it, and paid HT4 in
25 full for the work. On September 16, 2023, he paid \$23,000 which was \$267.30 less than
26 the price for the site pad work. (OCSSOF ¶ 15).

27 HT4 performed the waterline work last. Before HT4 completed that work, HT4
28 submitted Invoice #4 which is attached as Exhibit E to Mr. Kunisch's Declaration to

1 notify him of what would be due for the Waterline work after adjusting the
2 overpayment and underpayment and adding taxes. The title of that invoice was
3 "WATERLINE." It was sent just four (4) days after Mr. Kunisch and Mr. Schlesener
4 discussed the charges that he agreed to pay for the work that he asked HT4 to perform
5 and materials that he asked HT4 to supply relating to the pump house and the need
6 to import water. (OCSOOF ¶ 16).

7 In late September, Mr. Kunisch began accusing HT4 of overcharging him and
8 talking about lien waivers that he wanted Mr. Schlesener to sign. Mr. Schlesener
9 became worried that LandArizona would not pay for the waterline work that HT4 was
10 performing and asked him to provide the form of "conditional waiver and release"
11 that he wanted Mr. Schlesener to sign. That email is attached to Mr. Kunisch's
12 Declaration as Exhibit F. (OCSOOF ¶ 17).

13 In the industry, the project owner generally provides the form of lien waiver
14 that he wants the subcontractors to sign. Mr. Schlesener is not experienced with lien
15 waiver forms, has no training in preparing them and does not have forms to use.
16 Instead, he relies on the project owner to provide the desired form. When asked to
17 sign lien waivers, Mr. Schlesener signs the conditional forms before he receives the
18 check and signs the unconditional forms after the checks clear his bank. (OCSOOF ¶
19 18). Mr. Schlesener has always understood that the lien waiver form follows the
20 contract. If HT4 has three (3) contracts with an owner, there will be separate lien
21 waivers for each contract. (OCSOOF ¶ 19).

22 In the industry, a project owner may not decide to backcharge a contractor after
23 paying the subcontractor in full. Any objections to the contractor's work must be made
24 before final payment. (OCSOOF ¶ 20).

25 On October 4, 2023, Mr. Schlesener signed the Conditional Waiver and Release
26 on Final Payment attached to Mr. Kunisch's Declaration as Exhibit G. When he signed
27 the form, Mr. Schlesener believed that Mr. Kunisch had provided the form to Ms.
28 Poeling and understood that the payment was specific to the Site Pad Contract.

1 (OCSSOF ¶ 21).

2 On October 11, 2023, Mr. Kunisch sent the letter attached to his Declaration as
3 Exhibit I. Even though he had approved and paid for the roadwork nearly two (2)
4 months prior, he accused HT4 of somehow increasing his AB costs. He never provided
5 any documentation of those increased costs and Mr. Schlesener never understood how
6 HT4 could have caused him to spend more on AB than necessary. Mr. Kunisch
7 claimed that HT4 owed him a credit of \$2,457.50 for the roadwork and \$1,497.20 for
8 the site pads that he had approved and paid for, in full, the month prior. Mr. Kunisch
9 also claimed that HT4 owed him \$2,025.00. He deducted all of these amounts from
10 what he owed HT4 for the waterline. (OCSSOF ¶ 22).

11 Mr. Schlesener believes that Mr. Kunisch miscalculated the amount of AB that
12 he needed for the work that HT4 was performing. Mr. Kunisch also believed that the
13 equipment supplier, Empire, had recorded a lien against the Property when it had not.
14 Instead, Empire had served the standard 20-Day Preliminary Notice that contractors
15 have to serve in Arizona to preserve their right to lien. The Notice is not a lien.
16 (OCSSOF ¶ 23).

17 Mr. Schlesener did not believe that the Conditional Waiver and Release form
18 released HT4's right to file a lien for: 1) the amount that Mr. Kunisch deducted from
19 the roadwork contract after he had already paid HT4 for it; 2) the amount that Mr.
20 Kunisch deducted from the site work contract after he had already paid HT4 for it; or
21 3) the additional work that HT4 had not billed for yet. Mr. Schlesener signed the
22 Conditional Waiver and Release believing that HT4 was waiving its lien rights but
23 only to the extent of the payment on the waterline work. (OCSSOF ¶ 24).

24 On October 16, 2023, HT4 sent its bill for the Pump House work that Mr.
25 Kunisch asked HT4 to perform. That bill is attached to Mr. Kunisch's Declaration as
26 Exhibit M and includes HT4's objection to Mr. Kunisch's belated offset to the
27 Roadwork and Site Pad Work. HT4 also objected to the amount that Mr. Kunisch
28 claims that he paid Mr. Smith. Its records show that the hours that he worked and

1 they calculated out at \$375.00 less than what Mr. Kunisch paid him. That billing shows
2 what was shown on the meters at the Quartzsite water supply, calculates the truck
3 time spent, the two (2) weeks of extra rental time on the equipment, the cost of the
4 pump hose that HT4 supplied and HT4's additional labor costs. In total and with tax,
5 Mr. Schlesener believes that LandArizona owes HT4 \$20,245.70. Mr. Schlesener
6 offered to sign an Unconditional Lien release when HT4 received payment in that
7 amount. (OCSSOF ¶ 25).).

8 Mr. Kunisch refused to pay HT4 so, on November 21, 2023, HT4 recorded a
9 \$20,245.70 Mechanics Lien against the Property. (OCSSOF ¶ 26). Mr. Kunisch objected
10 to the Mechanics' Lien, claiming that HT4 could not record it because of the
11 Conditional Waiver and Release that Mr. Schlesener had signed on October 11, 2025.
12 (OCSSOF ¶ 27).

13 Thereafter, Mr. Schlesener learned that the October 11, 2023 Conditional Waiver
14 and Release form was not the form required by Arizona law. HT4 retained an attorney
15 who wrote the May 2, 2024 letter to Mr. Kunisch that is attached to his Declaration as
16 Exhibit R. Because the form does not meet the requirements of Arizona law and
17 because Mr. Schlesener did not believe it to be a waiver of HT4's right to be paid in
18 full for the Roadwork, Site Pad and Pump Work, he refused to release the Mechanics'
19 Lien. (OCSSOF ¶ 28).

20 Mr. Kunisch insisted that HT4 provided the form of Unconditional Waiver and
21 Release. In October of 2024, Mr. Schlesener reviewed his files and worked with his
22 counsel to make a number of phone calls to find out if the lien service or someone else
23 may have given HT4 a form. Ms. Poeling recalled that she may have found the form
24 on the internet. (OCSSOF ¶ 29).

25 While Mr. Schlesener believes that LandArizona, as the owner, is responsible
26 for obtaining the required statutory waiver and release forms for the work that he and
27 other subcontractors perform on the Property, he believed that releasing the lien was
28 the right thing to do because Ms. Poeling had provided the form. Mr. Schlesener was

1 also hopeful that, given that the dispute is a small one-\$20,245.70- Mr. Kunisch may
2 agree to negotiate a settlement if the Mechanics' Lien was released. (OCSSOF ¶ 30).
3 Days later, undersigned counsel was instructed to record the Release of Mechanic's
4 and Materialman's Lien attached as Exhibit 2 to LandArizona's Statement of Facts.
5 (OCSSOF ¶ 31).

6 Unfortunately, Mr. Kunisch insists on further litigating this dispute and on
7 seeking damages from HT4 because it recorded a valid Mechanics' Lien that Mr.
8 Schlesener believed that he had every right to record at the time that he recorded it.
9 (OCSSOF ¶ 32). LandArizona repeatedly states that HT4 "knew" that the Mechanic's
10 Lien was groundless when it neither proves that the Mechanics' Lien was groundless
11 nor provides evidence of what HT4 "knew." Indeed, Mr. Schlesener testified that, at
12 all time, he believed that the Mechanics' Lien was valid because he never signed a
13 form of Arizona lien waiver that stated that he was waiving his rights to lien for any
14 of the work that he performed.

15 **III. The Declaratory Judgment Count is Plagued with Legal and Factual Issues**

16 Unsatisfied with HT4's decision to release the Mechanics' Lien, LandArizona
17 asks the Court to enter declarations that are virtually unheard of in American
18 jurisprudence. First, LandArizona requests that the Court find that the Conditional
19 Waiver and Release signed by HT4 "converted into an unconditional final waiver and
20 release." There is no explanation for how a document may be found by a court to
21 "convert" from one type of agreement into another. There are no authorities cited to
22 support LandArizona's request for the "conversion finding" either.

23 Broken down and extended outward, the request is even more ridiculous than
24 meets the eye. LandArizona acknowledges that the Conditional Waiver and Release
25 is not enforceable under Arizona law as a waiver of mechanics' lien rights. So,
26 LandArizona is requesting that the Court ignore the statutes, turn a blind eye to the
27 lack of any precedent to support the "conversion" request, and convert an
28 unenforceable lien waiver into an enforceable one.

1 And that is not all that LandArizona requests of the Court. After converting an
2 unenforceable lien waiver into an enforceable one, LandArizona asks that the Court
3 impose punitive sanctions on HT4 by holding that the “converted” unenforceable lien
4 waiver operates as actual and retroactive notice to HT4 that it recorded a groundless
5 mechanics’ lien. In other words, LandArizona wants this Court to punish HT4 for
6 recording a valid mechanics’ lien by converting an unenforceable lien waiver into an
7 enforceable one and ignoring the requirement that HT4 be aware of the
8 groundlessness of the Mechanics’ Lien at the time of its recording.

9 Reaching into its “bag of tricks” a third time, LandArizona then requests that
10 the Court convert the already converted unenforceable lien waiver into an accord and
11 satisfaction that denies HT4 not just the right to assert a mechanics’ lien but all rights
12 to ever be paid for the work that it performed. Finally, LandArizona requests that the
13 Court declare that LandArizona is entitled to attorneys’ fees and costs from HT4 as the
14 prevailing party on its Declaratory Judgment claims.

15 The decisions cited by LandArizona have nothing to do with the legal issues
16 before the Court and are cited for rules of law that stand in direct contravention to the
17 very holding of the case. Decision after decision is deliberately miscited. For example,
18 *Cashway Concrete & Materials v. Sanner Contracting Co.*, 158 Ariz. 81, 82 (Ct. App. 1988)
19 does **not** hold that a mechanics’ lien cannot be enforced without a valid contract claim.

20 **It holds just the opposite:**

21 On plaintiff's cross-appeal, we conclude that its action against those
22 charged with the lien does not arise out of contract. While a breach of the
23 contract between plaintiff and Willis is a factual predicate to the action, it
24 is not the essential basis of it. Both issues litigated in this case, the validity
25 of the lien and the reasonable value of the material provided, are wholly
26 separate from the contract. **They relate to a statutory remedy designed
to protect materialmen from those who do not pay their bills. That
remedy stands apart from the contract remedy.** It exists against those
who are foreign to the contract. The action, therefore, does not arise out
of the contract.

26 (emphasis added) *Id.* 158 Ariz. 83.

27 *In re Hamburger Distillery*, 115 F.2d 84, 86 (3d Cir. 1940) is a 1940 bankruptcy case
28

1 out of Pennsylvania in which the court noted that liens may be of various origins-
2 common law, statutory or contractual. Its holding was limited to the facts before it-
3 the debtor's obligation to pay accrued storage charges for whiskey: "[a]s applied to
4 the present case, whether common law or contractual, the right of retention must be
5 founded upon the existence of an indebtedness to the Debtor on account of accrued
6 storage charges respecting the whiskey. *Id.* LandArizona was well aware that
7 statutory lien rights were not before the Court in *Hamburger Distillery*.

8 LandArizona deliberately steers the Court away from the statute that imparts
9 mechanics' lien rights and the plethora of construction law decisions that discuss its
10 origin and purpose. A mechanics' lien is a "creature of statute" that is entirely
11 independent of a contract right:

12 **B.** Except for a person performing actual labor for wages, every person
13 who furnishes labor, professional services, materials, machinery, fixtures
14 or tools for which a lien otherwise may be claimed under this article shall,
15 as a necessary prerequisite to the validity of any claim of lien, serve the
16 owner or reputed owner, the original contractor or reputed contractor, the
construction lender, if any, or reputed construction lender, if any, and the
person with whom the claimant has contracted for the purchase of those
items with a written preliminary twenty day notice as prescribed by this
section.

17 § 33-992.01(B); *Morgan v. O'Malley Lumber Co.*, 39 Ariz. 400, 404 (1932). The mechanic's
18 lien statutes, A.R.S. § 33-981 *et seq.*, give those who furnish labor or materials to
19 enhance the value of another's property the right to place a lien on the property for the
20 value of the improvements. *Wahl v. Southwest Sav. & Loan Ass'n*, 106 Ariz. 381, 385
21 (1970); *S.K. Drywall, Inc. v. Devs. Fin. Grp., Inc.*, 169 Ariz. 345, 348 (1991).

22 Rather than cite to the law, LandArizona misdirects the Court to decisions like
23 *Matlow v. Matlow*, 89 Ariz. 293, 297-98 (1961), a divorce action. There, the court spoke
24 generally about lien rights, as they relate to fixed obligations such as promissory notes
25 or secured transactions. One can only wonder why LandArizona chose to misstate a
26 court's crystal clear holding, reach out to the east coast for an 80-year-old bankruptcy
27 case over whiskey storage charges and cite to an Arizona divorce case when it could
28 have reviewed § 33-981 and the scores of decisions addressing it, all of which

1 acknowledge that mechanics' lien rights are independent of contract rights.

2 To be sure, mechanics' lien remedies are statutory remedies afforded to laborers,
3 suppliers and others regardless of whether they have a contract with the property
4 owner. Even if this Court should find that there was no contract between LandArizona
5 and HT4 for the Pump House Contract work, this Court could enforce a mechanics'
6 lien for the reasonable value of that work.

7 But HT4 voluntarily released the Mechanics' Lien hoping that this matter could
8 settle if it did so. Unsatisfied and thirsting for battle, LandArizona asks this Court to
9 now punish HT4 and order it to file an amended release of the Mechanics' Lien
10 because it "suggest[s] that moneys were owed" and "create[s] an impression that the
11 lien was 'satisfied'." (Motion at 13:20-26). Once again, LandArizona fails to describe
12 how those who must read through the LaPaz County Recorders records on a daily
13 basis could misinterpret a Mechanics' Lien Release as anything but what it is. To the
14 extent that LandArizona is asking the Court to declare that the Mechanics' Lien was
15 invalid when it was recorded, HT4 provides the analysis, below.

16 **IV. The Mechanics' Lien was Valid When Recorded and When Released Because**
17 **the Conditional Waiver and Release on Final Payment Was Not Enforceable**
18 **under Arizona Law**

19 To begin, Arizona law, specifically § 33-1008, requires that statutory forms be
20 used to waive mechanics' lien rights (See Exhibits A-D). It is undisputed that the forms
21 signed by HT4 were not Arizona's statutory forms. Accordingly, there can be no doubt
22 that, because HT4 never signed a statutory mechanics' lien waiver, its Mechanics' Lien
23 was valid both when it was recorded and when it was released.

24 As to both progress payments and final payments, § 33-1008 provides forms to
25 use both before payment has been received and after, making it abundantly clear that
26 only those forms sanctioned by the legislature are to be used to waive mechanics' lien
27 rights:

28 D. The waiver and release given by any claimant is unenforceable unless

1 it follows substantially the following forms in the following circumstances:

2 **1. Where the claimant is required to execute a waiver and release in**
3 **exchange for or in order to induce the payment of a progress payment**
4 **and the claimant is not in fact paid in exchange for the waiver and**
5 **release or a single payee check or joint payee check is given in exchange**
6 **for the waiver and release, the waiver and release shall follow**
7 **substantially the following form:**

8 Conditional waiver and release on progress payment

9 See Exhibit A hereto)

10 **2. Where the claimant is required to execute a waiver and release in**
11 **exchange for or in order to induce the payment of a progress payment**
12 **and the claimant asserts in the waiver that it has been paid the progress**
13 **payment, the waiver and release shall follow substantially the following**
14 **form:**

15 Unconditional waiver and release on progress payment

16 (See Exhibit B hereto)

17 **3. Where the claimant is required to execute a waiver and release in**
18 **exchange for or in order to induce payment of a final payment and the**
19 **claimant is not paid in exchange for the waiver and release or a single**
20 **payee check or joint payee check is given in exchange for the waiver**
21 **and release, the waiver and release shall follow substantially the**
22 **following form:**

23 Conditional waiver and release on final payment

24 (See Exhibit C hereto)

25 **4. Where the claimant is required to execute a waiver and release in**
26 **exchange for or in order to induce payment of a final payment and the**
27 **claimant asserts in the waiver that it has been paid the final payment,**
28 **the waiver and release shall follow substantially the following form:**

Unconditional waiver and release on final payment

(See Exhibit D hereto)

§ 33-1008. The forms signed by HT4 look **nothing** like these forms. The project was not identified. There was no way to know whether the form referred to payment for the Roadwork Contract, the Site Pad Contract, the Waterline Contract or the Pump House Contract. The date that the work was performed is missing. There was no way to know whether the form referred to work performed and billed prior to October 11, 2023. And, of course, the form refers only to lien and payment bond rights, not to all

1 claims for payment.

2 The courts routinely uphold the statutory mandate that a “waiver and release
3 given by any claimant is **unenforceable**” if it does not substantially follow the attached
4 form. Although Arizona’s lien statutes afford materialmen financial security for their
5 investment, a lien may be waived if the materialman executes a waiver and release **as**
6 **provided in A.R.S. § 33–1008.** *United Metro Materials, Inc. v. Pena Blanca Props., L.L.C.*,
7 197 Ariz. 479, 484 (Ct. App. 2000). A.R.S. § 33–1008(D)(2) provides that an
8 unconditional release **must contain the required statutory language.** *Id.*

9 LandArizona claims that it was making progress payments to HT4. But, it used
10 a Final Payment form for the Site Pad work. The facts before the Court prove that each
11 of the contracts was treated separately from the other; final payment on one contract
12 was not final payment on all of the contracts.

13 In addition to treating each payment on each contract as a “final payment,”
14 LandArizona never claimed that HT4 waived its right to be paid for the Waterline
15 Contract even though HT4 signed the form of final payment waiver for the Site Pad
16 Contract. If, as LandArizona claims, the California lien waiver forms were effective to
17 waive all of HT4’s rights, there was no need to pay HT4 for any work after HT4 signed
18 the first of the two (2) California lien waiver forms. Obviously, LandArizona was well
19 aware that HT4’s rights on any one of the contracts were unaffected by payments made
20 on the others.

21 C. **There is an Issue of Fact as to Whether Schlesener Knew that the**
22 **Mechanics’ Lien was Groundless**

23 Of course, the Mechanics’ Lien is not groundless. But, should the Court
24 somehow find reason to hold otherwise, there is an issue of fact that precludes
25 summary judgment because Mr. Schlesener testified that he always believed that the
26 Mechanics’ Lien was valid. For example, in *Coventry Homes, Inc. v. Scottscom P’ship*,
27 155 Ariz. 215, 215–16 (Ct. App. 1987), the court concluded that although, Scottscom
28 established that the *lis pendens* was groundless, there were genuine issues of material

1 fact concerning whether Coventry “knew” or “should have known” that the *lis pendens*
2 was groundless. The court held that the existence of these issues precludes summary
3 judgment and reversed and remand the matter for further proceedings.

4 The damages available under § 33–420 are punitive in nature. *Wyatt v.*
5 *Wehmueller*, 167 Ariz. 281, 286 (1991). The language of a statute that allows for a
6 monetary award over and above actual damages incurred, specifically treble damages,
7 removes it from the realm of common law analysis and necessitates interpreting the
8 words “knowing or having reason to know” as requiring scienter on the part of the
9 wrongdoer. *Id.* Accordingly, there is no liability under § 33-420 if the claimant did not
10 know and had no reason to know that their attorney filed an invalid document. *Id.*

11 In *Wyatt*, the attorney had filed an invalid *lis pendens*. The clients were unaware
12 of his actions. The court noted that the purpose of § 33–420 is to protect property
13 owners from actions clouding title to their property. *Id.* The statute seeks to achieve
14 this purpose by deterring individuals from knowingly filing groundless *lis pendens*
15 claims. *Id.* If the underlying rationale is deterrence rather than compensation of actual
16 loss, there is no deterrent value in a rule that punishes an unknowing, innocent client.
17 *Id.*

18 In summary, when there is no evidence on the record that a party knew or
19 should have known that a claim against real property is groundless, there is no liability
20 under § 33-420. Because LandArizona failed to prove that the Mechanics’ Lien was
21 groundless or that HT4 should have known that it was groundless, its Motion for
22 Summary Judgment should be denied.

23 **D. LandArizona is Not the Successful Party on Any of its Claims**

24 A prevailing party is one who obtains a judgment in his favor. *McEvoy v.*
25 *Aerotek, Inc.*, 201 Ariz. 300, 302 (Ct. App. 2001). A plaintiff has a legitimate cause of
26 action only if he prevails on it. *Id.* A plaintiff who successfully prosecutes an action,
27 gaining a decision or verdict in her favor, is the prevailing party and may recover costs
28 even if “the ultimate judgment is zero after deductions for settlements.” *Id.* There is

1 not one decision anywhere that supports LandArizona's claim that, because HT4
2 voluntarily released a valid mechanics' lien claim, LandArizona should be deemed a
3 "prevailing party."

4 **V. Conclusion**

5 There are genuine issues of material fact and a host of legal issues with
6 LandArizona's Declaratory Judgment claim. Under Arizona law, an unenforceable
7 lien waiver may not be "converted" into an enforceable one. LandArizona ignores
8 § 33-992.01, misstates the holdings of controlling precedent and cites to outlying
9 bankruptcy decisions in an effort to misguide the Court into believing that a
10 mechanics' lien claimant must have a binding contract with the property owner to
11 record a lien.

12 Under Arizona law, a party may be penalized for recording a mechanics' lien
13 only if it was groundless and if the party knew that it was groundless when it was
14 recorded. HT4's lien was valid. It has been released. There is no showing that HT4
15 believed that the Mechanics' Lien was groundless when it was recorded. Instead, the
16 facts before the Court, inclusive of Mr. Schlesener's testimony, make clear HT4's belief
17 that the Mechanics' Lien was valid when recorded and while recorded and that it was
18 released only because HT4 believed it best to release the Mechanics' Lien, hoping that
19 settlement negotiations would ensue.

20 Because LandArizona chose, instead, to force HT4 to incur attorneys' fees
21 defending over 100 pages of alleged facts and miscited and mischaracterized
22 authorities, HT4 respectfully requests that the Court exercise its discretion under § 12-
23 341.01 to award HT4 is reasonable attorneys' fees and costs responding to an entirely
24 unnecessary motion.

25
26
27 ///

28 ///

1 RESPECTFULLY SUBMITTED this 5th day of May, 2025.

2 **WHEELER LAW GROUP, PLLC**

3 */s/ Julianne C. Wheeler*

4 Julianne C. Wheeler

5 Attorneys for Plaintiff/Counter-Defendant

6 **ORIGINAL** of the foregoing **e-filed**

7 This 5th day of May, 2025,
8 via TurboCourt with:

9 The Clerk of the Court

10 **LA PAZ COUNTY SUPERIOR COURT**

11 1316 Kofa Ave., Suite 607

12 Parker, Arizona 85344

13 **COPY** of the foregoing **e-mailed**

14 this same day, to:

15 Roger C. Decker

16 James B. Reed

17 **UDALL SHUMWAY PLC**

18 118 N. Alma School Road, Ste. 101

19 Mesa, AZ 85201

20 rcd@udallshumway.com

21 jbr@udallshumway.com

22 docket@udallshumway.com

23 Attorneys for Defendant/Counterclaimant

24 */s/ Skylee L. Chikuni*

25 Paralegal

Exhibit A

CONDITIONAL WAIVER AND RELEASE ON PROGRESS PAYMENT

Project: _____

Job No.: _____

On receipt by the undersigned of a check from _____ in the sum of \$_____ payable to _____, and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release any mechanic's lien, any state or federal statutory bond right, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to claim or payment rights for persons in the undersigned's position that the undersigned has on the job of _____ (owner), located at _____ (job description) to the following extent. This Release covers a progress payment for all labor, services, equipment or materials furnished to the jobsite or to _____ (person with whom undersigned contracted), through _____ (date) only and does not cover any retention, pending modifications and changes or items furnished after that date. Before any recipient of this document relies on it, that person should verify evidence of payment to the undersigned.

The undersigned warrants that he either has already paid or will use the monies he receives from this progress payment to promptly pay in full all of his laborers, subcontractors, materialmen and suppliers for all work, materials, equipment or services provided for or to the above-referenced project up to the date of this Waiver.

Dated: _____

>NAME OF COMPANY

By _____

>Name

>Title

Exhibit B

**UNCONDITIONAL WAIVER AND RELEASE
ON PROGRESS PAYMENT PURSUANT TO § 33-1008**

Project: _____

Job No.: _____

The undersigned has been paid and has received a progress payment in the sum of \$_____ for all labor, services, equipment or material furnished to the jobsite or to _____ (person with whom undersigned contracted) on the job of _____ (owner) located at _____ (job description) and does hereby release any mechanic's lien, any state or federal statutory bond right, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to claim or payment rights for persons in the undersigned's position that the undersigned has on the above-referenced project to the following extent. This Release covers a progress payment for all labor, services, equipment or materials furnished to the jobsite or to _____ (person with whom undersigned contracted) through _____ (date) only and does not cover any retention, pending modifications and changes or items furnished after that date.

The undersigned warrants that he either has already paid or will use the monies he receives from this progress payment to promptly pay in full all of his laborers, subcontractors, materialmen and suppliers for all work, materials, equipment or services provided for or to the above-referenced project up to the date of this Waiver.

Dated:_____

>NAME OF COMPANY

By_____

>Name

>Title

NOTICE: This document waives rights unconditionally and states that you have been paid for giving up those rights. This document is enforceable against you if you sign it, even if you have not been paid. If you have not been paid, use a conditional release form.

Exhibit C

CONDITIONAL WAIVER AND RELEASE ON FINAL PAYMENT

Project: _____

Job No.: _____

On receipt by the undersigned of a check from _____ in the sum of \$_____ payable to _____, and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release any mechanic's lien, any state or federal statutory bond right, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to claim or payment rights for persons in the undersigned's position, the undersigned has on the job of _____ (owner), located at _____ (job description). This Release covers the final payment to the undersigned for all labor, services, equipment or materials furnished to the jobsite or to _____ (person with whom undersigned contracted), except for disputed claims in the amount of \$_____. Before any recipient of this document relies on it, the person should verify evidence of payment to the undersigned.

The undersigned warrants that he either has already paid or will use the monies he receives from this final payment to promptly pay in full all of his laborers, subcontractors, materialmen and suppliers for all work, materials, equipment or services provided for or to the above-referenced project up to the date of this Waiver.

Dated: _____

>NAME OF COMPANY

By _____

>Name

>Title

Exhibit D

**UNCONDITIONAL WAIVER AND RELEASE ON FINAL PAYMENT
PURSUANT TO A.R.S. § 33-1008**

Project: _____

Job No.: _____

The undersigned has been paid in full for all labor, services, equipment or material furnished to the jobsite or to _____ (person with whom undersigned contracted) on the job of _____ (owner) located at _____ (job description) and does hereby waive and release any right to mechanic's lien, any state or federal statutory bond right, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to claim or payment rights for persons in the undersigned's position, except for disputed claims for extra work in the amount of \$ 0_____.

The undersigned warrants that he either has already paid or will use the monies he receives from this final payment to promptly pay in full all of his laborers, subcontractors, materialmen and suppliers for all work, materials, equipment or services provided for or to the above-referenced project.

Dated:_____

>NAME OF COMPANY

By_____

>Name

>Title

NOTICE: This document waives rights unconditionally and states that you have been paid for giving up those rights. This document is enforceable against you if you sign it, even if you have not been paid. If you have not been paid, use a conditional release form.