Steven James Goodhue (#029288)
Law Offices of Steven James Goodhue
9375 East Shea Blvd., Suite 100
Scottsdale, AZ 85260
Telephone: (480) 214-9500
Facsimile: (480) 214-9501
E-Mail: sjg@sjgoodlaw.com

Attorney for Plaintiff
Lightspeed Media Corporation

IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

LIGHTSPEED MEDIA CORPORATION, an Arizona corporation,

Plaintiff,
v.

ADAM SEKORA,

Defendant.

CV2012-053194

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION AND APPLICATION FOR ATTORNEYS' FEES AND COSTS

(Assigned to the Hon. Alfred Frenzel)

Lightspeed Media Corporation, by and through its undersigned counsel, hereby responds to Defendant's Motion and Application for Attorney's Fees and Costs, and as grounds therefore, states as follows:

Defendant has filed an application for attorney's fees and costs against Plaintiff. (Def.'s Mot. for Fees.) Defendant seeks $34,053 in attorney's fees and costs because Plaintiff amended its complaint to remove its breach of contract claim. (*Id.*) Because Plaintiff's remaining claim—computer fraud and abuse—does not arise out of a contract dispute and Defendant has in no way prevailed on the merits of Plaintiff's breach of contract claim, Defendant is not entitled to attorney's fees and costs. For the reasons set forth below, the Court should deny Defendant's motion.

FACTUAL BACKGROUND

Plaintiff initiated this action on May 25, 2012 by filing a complaint against Defendant Adam Sekora and alleged five separate claims: 1) computer fraud and abuse; 2) conversion; 3) unjust enrichment; 4) breach of contract; and 5) negligence. (Compl.) Defendant answered Plaintiff's complaint on July 10, 2012 and denied Plaintiff's allegations. (Answer.) After initial discovery was completed, Plaintiff amended its complaint to reflect the information gained in the course of the discovery and narrowed its claims to a claim of computer fraud and abuse. (Amend. Compl.) The Court eventually dismissed the case without prejudice for lack of prosecution.

LEGAL STANDARD

A.R.S. § 12-341.01(A) provides that "[i]n any contested action arising out of a contract, express or implied, the court may award the successful party reasonable attorney fees." An award under this statute is limited to causes of action that could not exist but for the breach of contract claim. *Sparks v. Republic Nat. Life Ins. Co.*, 647 P. 2d 1127 (Ariz. 1982) ("The fact that the two legal theories are intertwined does not preclude recovery of attorney's fees under § 12-341.01(A) as long as the cause of action in tort could not exist *but for* the breach of the contract.").

A.R.S. § 12-349(A) provides that a court may assess reasonable attorney fees and expenses "if the attorney or party does any of the following: 1) Brings or defends a claim without substantial justification; 2) Brings or defends a claim solely or primarily for delay or harassment; 3) Unreasonably expands or delays the proceeding; or 4) Engages in abuse of discovery." To award sanctions under this statute "the court must determine that the party's claim: (1) constitutes harassment; (2) is groundless; and (3) is not made in good faith." *Fisher ex rel. Fisher v. Nat'l Gen. Ins. Co*., 965 P.2d 100, 104 (Ariz. App.1998). "All three elements must be shown and the trial court must make appropriate findings of fact and conclusions of law." *Id.*

ARGUMENT

Defendant seeks a windfall of $34,053 because Plaintiff acted responsibly to amend its complaint based on information it gained the course of initial discovery. (Def.'s Mot. for Fees.) Such an award would undermine the public policy that favors responsible conduct on the part of attorneys.

Defendant's attorney, Paul Ticen, has exhibited a pattern of questionable post-dismissal motions. In *Millennium TGA, Inc. v. Taylor Velasco,* for example, attorney Ticen advised his client not to answer the plaintiff's complaint. No. 2:12-cv-02146 (D. Ariz. Apr. 26, 2013), ECF No. 13 at 1 ("Mr. Velasco's decision to not answer the complaint, which factored in advice from undersigned counsel, was the economically rational decision...."). Five months later, the defendant changed his mind and attorney Ticen sought to set aside the entry of default, notwithstanding that the defendant had originally entered into default on attorney Ticen's advice. *Id.*

Further, in *Millennium TGA, Inc. v. Matthew Michuta*, another defendant represented by attorney Paul Ticen elected not to answer the plaintiff's Complaint. No. 2:12-cv-02143-DGC (D. Ariz. 2012). When default judgment was entered against the defendant, attorney Ticen filed a Motion to Alter or Amend the Judgment, but the court rejected his motion, stating "[Defendant] failed to respond to the complaint in any way" and "Defendant provides no explanation for why this evidence was not raised earlier." No. 2:12-cv-02143 (D. Ariz. May 3, 2013), ECF No. 18 at *3-4.

Here, attorney Ticen once again appears on a post-dismissal motion seeking dubious relief. Defendant's motion fails for three reasons. First, Defendant is not entitled to fees and costs pursuant to A.R.S. § 12-341.01 because Plaintiff's claims do not arise out of a contract dispute and Defendant in no way prevailed on Plaintiff's breach of contract claim. Second, Defendant is not entitled to fees and costs pursuant to A.R.S. § 12-349 because Plaintiff brought a legitimate cause of action against

the Defendant after he hacked into Plaintiff's Internet website. Third, even if Defendant were entitled to attorney's fees and costs, his request is grossly excessive and should be reduced substantially.

I. DEFENDANT IS NOT ENTITLED TO FEES AND COSTS PURSUANT TO A.R.S. § 12-341.01

Defendant requests attorney's fees and costs under A.R.S. § 12-341.01. (Def.'s Mot. for Fees at 2-6.) Defendant's request fails for two reasons. First, Defendant is not entitled to fees and costs under this statute because Plaintiff's claims do not arise out of a contract dispute. Second, Defendant is not entitled to cost and fees simply because Plaintiff amended its complaint.

A. The Essence of Plaintiff's Claims Was Computer Hacking

Attorney's fees and costs pursuant to A.R.S. § 12-341.01 are only recoverable in cases that arise out of a contract dispute. A.R.S. § 12-341.01(A) ("[i]n any *contested action arising out of a contract*, express or implied, the court may award the successful party reasonable attorney fees.") (emphasis added). Even though Plaintiff's original complaint contained a breach of contract dispute, Plaintiff's core claims arose out of the Computer Fraud and Abuse Act. (Compl.) Because the essence of Plaintiff's claims arose out of the Computer Fraud and Abuse Act, Defendant is not entitled to attorney's costs and fees under A.R.S. § 12-341.01:

> Appellee seeks attorney's fees on appeal under A.R.S. § 12-341.01 on the theory that her claim arose out of a contract of bailment. Her complaint contains one count in negligence and another alleging breach of the bailment contract in the negligent failure to care for her car. Regardless of the label on the second count, the essence of her claim is negligence, and the statute has no application.

Amphitheater Public Schools v. Eastman, 574 P. 2d 47 (Ariz. App. 1977).

Defendant argues that "[i]t is undeniable that this was a contested action arising under contract." (Def.'s Mot. for Fees at 3.) While there is no doubt Plaintiff originally included a breach

of contract claim in its original complaint, Defendant can only obtain attorney's fees and costs under A.R.S. § 12-341.01 if Plaintiff's action could not exist without its breach of contract claim. *Sparks v. Republic Nat. Life Ins. Co.*, 647 P. 2d 1127 (Ariz. 1982) ("The fact that the two legal theories are intertwined does not preclude recovery of attorney's fees under § 12-341.01(A) as long as the cause of action in tort could not exist *but for* the breach of the contract."). Plaintiff's breach of contract claim is clearly not essential to this action as Plaintiff amended its complaint to exclude the breach of contract claim. Further, none of Defendant's discovery requests related to Plaintiff's breach of contract claim—demonstrating even Defendant did not believe this action revolved around a breach of contract dispute. (*See, e.g.*, Pl.'s Answers to Def.'s Reqs. for Admis. and Interrogs.) (no mention of either "contract" or "breach" appears anywhere in Defendant's discovery requests or Plaintiff's answers); (Pl.'s Answers to Def.'s Reqs. for Produc. of Things) (same). Finally, Defendant even states that "[t]here is no valid and enforceable contract between Plaintiff and Defendant." (Def.'s First Supp. Disclosure Statement ¶ 13.) Because the essence of Plaintiff's claim does not arise out of a contract dispute, Defendant is not entitled to attorney's costs and fees.

B. Defendant Is Not Entitled to Attorney's Fees and Costs Simply Because Plaintiff Amended Its Complaint

Defendant claims he is entitled to an award of attorney's fees simply because Plaintiff amended its complaint and excluded its breach of contract claim. (Def.'s Mot. for Fees at 2-6.) Defendant does not cite to a single case for the proposition that a party prevailed on the merits of a breach of contract claim or is entitled to fees and costs under A.R.S. § 12-341.01 because a plaintiff amended its complaint. (*See generally id.*) Indeed, the cases cited by Defendant stand for the proposition that an award of attorney's fees is appropriate when the actual breach of contract is expressly dismissed by the court. *Britt v. Steffen*, 205 P.3d 357, 360 (Ariz. App., 2008) ("a defendant against whom *a contract action is dismissed* without prejudice for lack of prosecution is

the 'successful party' in that action and qualifies for a possible award of attorneys' fees pursuant to A.R.S. § 12-341.01(A).") (emphasis added); *Vicari v. Lake Havasu City*, 213 P.3d 367 (Ariz. App. 2009) (the court expressly dismissed the breach of contract claim); *Pelletier v. Johnson*, 937 P. 2d 668 (Ariz. App. 1996) (same). The Court did not dismiss Plaintiff's breach of contract claim for lack of prosecution; only Plaintiff's Computer Fraud and Abuse claim—the lone claim in Plaintiff's amended complaint—was dismissed for lack of prosecution. (Amend. Compl.) As a result, Defendant did not prevail on the merits of Plaintiff's breach of contract claim and he is not entitled to attorney's fees and costs. A.R.S. § 12-341.01(A) (permitting a court to award fees and costs if a party is *successful* on a *contract claim*).

If this Court were to follow the line of reasoning for which Defendant advocates, no plaintiff who asserts breach of contract as one of its claims could ever dismiss the breach of contract claim or amend its complaint to remove the breach of contact claim without the fear of facing a motion for costs and fees. This would discourage plaintiffs from even bringing claims for breach of contract or amending a complaint if it meant excluding the breach of contact claim. This is not an equitable result. Plaintiff should not be punished for simply amending its complaint to incorporate the information it gained during the course of discovery. Defendant is not entitled to attorney's fees and costs simply because Plaintiff amended its complaint.

II. DEFENDANT IS NOT ENTITLED TO FEES AND COSTS PURSUANT TO A.R.S. § 12-349

Defendant also requests attorney's fees and costs under A.R.S. § 12-349. (Def.'s Mot. for Fees at 6-11.) To award sanctions under this statute "the court must determine that the party's claim: (1) constitutes harassment; (2) is groundless; and (3) is not made in good faith." *Fisher ex rel. Fisher v. Nat'l Gen. Ins. Co.*, 965 P.2d 100, 104 (Ariz. App.1998). "All three elements must be shown and the trial court must make appropriate findings of fact and conclusions of law." *Id.* Defendant fails to

meet any of these elements. Plaintiff brought a legitimate cause of action against the Defendant after he hacked into Plaintiff's Internet website. As a result, Defendant's request for attorney's fees and costs pursuant to A.R.S. § 12-349 should be denied.

A. Plaintiff's Lawsuit Does Not Constitute Harassment

Defendant provides no evidence of harassment in this case or in any other case involving Plaintiff. (*See generally* Def.'s Mot. for Fees.) Instead, Defendant claims he was harassed by two telephone calls on June 15, 2012 and July 20, 2012 and that "[i]f the Court is inclined to listen to the June 15th automated message, [Defendant's] counsel has an electronic recording in his possession." (*Id.* at 10.) Defendant does not explain how either of these telephone calls constitutes harassment. (*See generally id.*) Plaintiff provided Defendant with a courtesy call notifying of this action. Further, Plaintiff's offers of settlement are favored by the court system. *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910) ("Compromises of disputed claims are favored by the courts."); *TBK Partners, Ltd. v. W. Union Corp.*, 675 F.2d 456, 461 (2d Cir. 1982) (noting "the paramount policy of encouraging settlements"). Defendant cannot credibly claim that listening to two automated voice calls constitute harassment, especially when they provided him with valuable information and he could simply hang up.

B. Plaintiff's Lawsuit is Not Groundless

Defendant does not attempt to argue that no one hacked into Plaintiff's protected websites—Defendant simply denies that it was him. (*See generally* Def.'s Mot. for Fees.) Defendant's denial of liability, however, does not mean that Plaintiff's lawsuit is groundless. Indeed, Plaintiff did not pull Defendant's name out of a hat. Plaintiff retained Arcadia Data Security Consultants, LLC ("Arcadia") to identify individuals that hacked into its protected websites. (Amend. Compl. ¶ 21.) Arcadia used Trader Hacker and Intruder Evidence Finder 2.0 (T.H.I.E.F.) to detect the hacking, unauthorized access and password sharing activity on Plaintiff's websites. (*Id.* ¶ 22.) Using the

T.H.I.E.F. software, Arcadia identified Defendant as one of those hackers.

Defendant challenges the evidence that Plaintiff has identifying him as the hacker, claiming "Plaintiff's only basis linking Mr. Sekora to such serious allegations was an IP address . . . ." (Def.'s Mot. for Fees at 7.) Defendant bases this claim on Plaintiff's statement that it "disclosed the entire basis for its case and claims against Mr. Sekora." (*Id.*) (quoting Pl.'s Resp. to Def.'s Mot. to Compel at 2). This statement is out of context—in the very next sentence Plaintiff explains that additional expert testimony will be used to prove Plaintiff's case against Defendant. (*Id.*) Defendant's claim that Plaintiff lacks sufficient evidence against him is erroneously based on his desire for Plaintiff to prove its case against at a premature stage of the litigation. This is not how the litigation process works. Plaintiff has ample evidence that Defendant hacked Plaintiff's websites, and Plaintiff's lawsuit against Defendant is not groundless.

C. Plaintiff's Lawsuit was Brought in Good Faith

Again, Defendant does not attempt to argue that Plaintiff's lawsuit was not made in good faith. (*See generally* Def.'s Mot. for Fees.) I nstead, Defendant cites *Ingenuity13, LLC v. John Doe*, No. 2:12-cv-08333 (C.D. Cal. 2012) for the proposition that a completely unrelated order in a different case prevents Plaintiff from litigating its meritorious claims in this case. (Def.'s Mot. for Fees at 7-9.) Defendant's citation and reliance on an unrelated case is simply Defendant's attempts to smear the reputation of plaintiffs that attempt to protect themselves from individuals that commit unlawful activities over the Internet. This Central District of California proceeding was in regards to very specific issues not relevant here. Further, the Central District of California proceeding does not pertain to Plaintiff or the undersigned counsel. The *Ingenuity13* order has little to no applicability to the instant action and is not a basis for an award of fees and costs for Defendant.

Plaintiff respectfully disagrees with idea that it is unable to protect from individuals such as Defendant. The *Ingenuity13* court took the bold stance that "[i]t is simply not economically viable

to properly prosecute the illegal download of a single copyrighted video." (Ex. 6 to Def.'s Mot. for Fees at 6.); The vast majority of courts nationwide, however, nearly universally recognize that plaintiffs must be given the opportunity to avail themselves to the court system and protect themselves against the epidemic level of online infringement and hacking.

Further, the *Ingenuity13* decision is being appealed because the court:

> failed to provide Prenda Law the opportunity to cross-examine witnesses who had provided testimony at the March 11, 2013 OSC [order to show cause] hearing; accepted into evidence and drew inferences from, documents that were improperly authenticated or certified and for which there was no foundation; by way of threatened criminal sanctions, invited key witnesses to invoke their Fifth Amendment rights, only to wrongfully take negative inferences from those invocations; failed to employ a disinterested prosecutor; and failed to apply the "beyond a reasonable doubt" standard for imposition of the punitive sanctions.

Ingenuity13, No. 2:12-cv-08333 (C.D. Cal. May 6, 2013), ECF No. 157-1. Plaintiff does not believe that this Court would rush to judgment regarding a single order that flies in the face of overwhelming case law nationwide. Plaintiff brought its claims against Defendant in good faith in an attempt to protect itself from ongoing and continuous hacking of its websites. Because Defendant fails to meet any of the elements required for an award under A.R.S. § 12-349 the Court should deny his motion.

III. DEFENDANT'S FEE REQUEST IS EXCESSIVE

Defendant seeks attorney's fees and costs in the amount $34,053. (Def.'s Mot. for Fees.) Even if Defendant was entitled to fees and costs—which he is not—Defendant's request is excessive. Defendant requests the entire amount of fees and costs he incurred litigating this action and not simply the amount he incurred litigating Plaintiff's breach of contract claim. Defendant claims that the fees cannot be parsed because "an attorneys' time is 'devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis.'" (*Id.* at 4)

(quoting *Schweiger v. China Doll Rest., Inc*., 673 P.2d 927, 933 (App. 1983)). This reasoning is only applicable when the claims are completely interwoven and inseparable. *Modular Min. Systems v. Jigsaw Technologies*, 212 P. 3d 854, 860 (Ariz. App. 2009) (Combining fees for interwoven claims because "[i]t is undisputed that the central claims in this litigation were the trade secrets claim and the breach of employment contract claims."). As explained above, Plaintiff's breach of contract claim was not interwoven with Plaintiff's other claims. *See supra* Part I(A).

Defendant seeks a windfall even though he basically never litigated Plaintiff's breach of contract claim. Indeed, Defendant astonishingly requests nearly $7,000 in fees *after* Plaintiff amended its complaint and excluded its breach of contract claim. (Ex. 1 to Def.'s Mot. for Fees at 10-13.) Defendant cannot credibly argue that these fees were somehow incurred as interwoven with a claim that had been excluded from the action. Defendant is not entitled to a windfall; if the Court were to award any attorney's fees and costs it should substantially reduce the amount in order to actually reflect the limited time Defendant actually litigated Plaintiff's breach of contract claim.

CONCLUSION

The Court should deny Defendant's motion for attorney's fees and costs. Defendant is not entitled to fees and costs pursuant to A.R.S. § 12-341.01 because Plaintiff's claims do not arise out of a contract dispute and Defendant in no way prevailed on Plaintiff's breach of contract claim. Defendant is not entitled to fees and costs pursuant to A.R.S. § 12-349 because Plaintiff brought a legitimate cause of action against the Defendant after he hacked into Plaintiff's Internet website. Even if Defendant were entitled to attorney's fees and costs, his request is excessive and should be reduce to a more reasonable amount.

Dated this 11th day of June, 2013

The Law Offices of Steven James Goodhue

By: _/s/ Steven James Goodhue_____
Steven James Goodhue (#029288)
9375 East Shea Blvd., Suite 100
Scottsdale, AZ 85260
Attorney for Plaintiff,
Lightspeed Media Corporation

ORIGINAL filed though AZ Turbo Court
this 11th day of June, 2013, with:

Clerk of the Superior Court
Maricopa County Superior Court

COPY emailed this 11th day
of June, 2013, to:

Paul Ticen, Esq. (paul@kellywarnerlaw.com)
Kelly/Warner, PLLC
404 S. Mill Ave, Suite C-201
Tempe, Arizona 85281

By: /s/ Steven James Goodhue