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Attorneys for Defendants/Counterclaimants

SUPERIOR COURT OF ARIZONA

COUNTY OF MARICOPA

KELLY MCCOY, PLC, an Arizona professional limited liability company,
Plaintiff,
v.
DESERT PALM SURGICAL GROUP, PLC, an Arizona professional limited liability company; ALBERT E. CARLOTTI, III and MICHELLE L. CABRET-CARLOTTI, husband and wife,
Defendants.

No: CV2018-003112

ANSWER AND COUNTERCLAIM

Assigned to the Honorable Karen Mullins

DESERT PALM SURGICAL GROUP, PLC, an Arizona professional limited liability company; ALBERT E. CARLOTTI, III and MICHELLE L. CABRET-CARLOTTI, husband and wife

Counterclaimants,

v.
KELLY MCCOY, PLC, an Arizona

professional limited liability company, MATTHEW J. KELLY and JANE DOE KELLY, husband and wife, KEVIN C. MCCOY and JANE DOE MCCOY, husband and wife,

Counterdefendants.

Defendants, through counsel undersigned, in response to plaintiff's Complaint, admit, deny and allege as follows:

PARTIES AND JURISDICTION

1. Defendants admit, on information and belief, the allegations of Paragraph 1.

2. Defendants admit the allegations of Paragraph 2.

3. Defendants admit the allegations of Paragraph 3.

4. Defendants admit the allegations of Paragraph 4.

BREACH OF CONTRACT

5. In response to Paragraphs 5 – 14, defendants affirmatively allege that plaintiff has no written fee agreement with defendants and therefore has no enforceable contract with defendants. ER1.5(b), Arizona Rules of Professional Conduct.

QUANTUM MERUIT

6. In response to Paragraphs 15 – 19, defendants affirmatively allege that plaintiff has no written fee agreement with defendants and therefore has no claim for Quantum Meruit. ER1.5(b), Arizona Rules of Professional Conduct.

DEFENSES COMMON TO ALL COUNTS

7. Plaintiff's Complaint fails to state a claim upon which relief may be granted. Rule 12(b)(6), Ariz. R. Civ. P.

8. Plaintiff's Complaint was filed in violation of Rule 11(b), Ariz. R. Civ. P.

9. WHEREFORE, having fully answered plaintiff's Complaint, defendants pray for:

(a) an order dismissing plaintiff's Complaint and that plaintiff take nothing thereby,

(b) for an award of taxable costs incurred,

(c) for sanctions pursuant to Rule 11(b) and ARS §12-349; and

(d) for such other and further relief as the Court deems just.

COUNTERCLAIM

In support of their counterclaims, counterclaimants allege as follows:

10. The admissions, denials and allegations of the preceding paragraphs of this Answer are incorporated by reference.

11. Counterclaimants Albert Carlotti, MD and Michelle Carlotti, MD, husband and wife, reside in Austin, Travis County, Texas and Scottsdale, Maricopa County, Arizona.

12. Counterclaimant Desert Palm Surgical Group is an Arizona professional limited liability corporation with its principal place of business in Scottsdale, Maricopa County, Arizona.

13. Counterdefendants Matthew J. Kelly ("Kelly") and Kevin C. McCoy ("McCoy") are attorneys licensed to practice in Arizona and practicing law in Phoenix, Maricopa County, Arizona.

14. Counterdefendant Kelly McCoy, PLC ("Kelly McCoy") is an Arizona limited liability law firm with its principal place of business in Phoenix, Maricopa County, Arizona.

15. At all times material to this counterclaim, Kelly and McCoy acted on behalf of their respective marital communities.

16. At all times material to this counterclaim, Kelly and McCoy acted as agents, owners and employees of Kelly McCoy.

17. Kelly McCoy is vicariously liable for the acts and omissions of Kelly and McCoy.

COUNT ONE—PROFESSIONAL NEGLIGENCE (ALL COUNTERDEFENDANTS)

18. Counterdefendants owed counterclaimants a duty of providing legal services in a competent and professional manner, in accordance with standard of care imposed upon a reasonably prudent Arizona attorney.

19. Counterdefendants held themselves out as skilled in trials, appeals, bankruptcy, commercial litigation and defamation.

20. Counterdefendants lacked the skills required to perform in accordance with the appropriate standard of care.

21. Counterdefendants failed to comply with the appropriate standard of care in their representation of counterclaimants.

22. Counterdefendants proximately caused harm to the counterclaimants through negligence in their representation.

23. Damages proximately caused by negligence of the counterdefendants includes, but is not limited to, the inability to sustain a trial verdict of $12,009,489.96 for the reasons stated by the Court of Appeals in *Desert Palm Surgical Group v. Petta,* 236 Ariz. 568, 343 P.3d 438 (Ct. App. 2015).

COUNT TWO—UNJUST ENRICHMENT (ALL COUNTERDEFENDANTS)

24. The admissions, denials and allegations of the preceding paragraphs of this Answer are incorporated by reference.

25. Fees charged and collected by counterdefendants were not earned and must be refunded to counterclainants.

26. Counterdefendants were unjustly enriched by virtue of their billing and collecting fees to which they were not entitled.

COUNT THREE—INTENTIONAL INFLICTIONOF EMOTIONAL DISTRESS

(COUNTERDEFENDANTS KELLY AND MCCOY)

27. The admissions, denials and allegations of the preceding paragraphs of this Answer are incorporated by reference.

28. Kelly and McCoy engaged in extreme and outrageous conduct.

29. Kelly and McCoy's conduct was intentional and reckless.

30. Kelly and McCoy knew that their conduct would result in emotional distress but engaged in this conduct regardless.

31. The conduct by defendant Kelly included appearing for oral argument at the Court of Appeals in what appeared to the Carlottis to be an intoxicated state.

32. The conduct by McCoy included continuing to work and to bill on the Carlottis' matter after being specifically and repeatedly instructed not to do so.

33. Kelly and McCoy acted, knowing that their conduct created a substantial risk of significant harm.

34. Kelly acted with an evil hand guided by an evil mind.

35. McCoy acted with an evil hand guided by an evil mind.

36. Counterclaimants are entitled to punitive damages in amount sufficient to deter such conduct in the future.

WHEREFORE, counterclaimants pray for judgment as follows:

(a) For compensatory damages in an amount to be proved at trial;

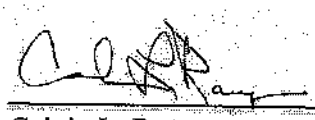
(b) For punitive damages in an amount sufficient to deter such conduct in the future;

(c) For taxable costs incurred;

(d) And for such other and further relief the Court deems just.

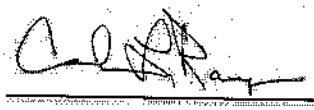
DATED this 2 day of May, 2018

CALVIN L. RAUP , PLLC



Calvin L. Raup
Attorney for Defendants/Counterclaimants

Debus, Kazan & Westerhausen, Ltd



For
Larry L. Debus
Co-counsel for Defendants/Counterclaimants

E-Filed this 2 day of May, 2018

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SUPERIOR COURT OF ARIZONA

COUNTY OF MARICOPA

KELLY MCCOY, PLC, an Arizona professional limited liability company, Plaintiff, V. DESERT PALM SURGICAL GROUP, PLC, an Arizona professional limited liability company; ALBERT E. CARLOTTI, MD and MICHELLE L. CABRET-CARLOTTI, MD, husband and wife, Defendants.	No: CV2018-003112 **MOTION TO DISMISS AND MOTION FOR SANCTIONS**
DESERT PALM SURGICAL GROUP, PLC, an Arizona professional limited liability company; ALBERT E. CARLOTTI, MD and MICHELLE L. CABRET-CARLOTTI, MD, husband and wife, Counterclaimants,	Assigned to the Honorable Karen Mullins

v.

KELLY MCCOY, PLC, an Arizona professional limited liability company, MATTHEW J. KELLY and JANE DOE KELLY, husband and wife, KEVIN C. MCCOY and JANE DOE MCCOY, husband and wife,

Counterdefendants.

Defendants, through counsel undersigned, pursuant to Rules 12(b)(6) and 11(a), Ariz. R. Civ. P. and ARS §§12-349 – 350, move to dismiss for failure to state a claim, for sanctions for the violation of Rule 11(a) and for an award of attorney's fees and costs unnecessarily incurred to defend this action.

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff's Complaint contains two counts: Breach of Contract and *Quantum Meruit*. The Complaint references multiple "retentions" and "engagement agreements." Nowhere is there any reference to the written agreement required by ER 1.5(b):

> (b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible **shall be communicated to the client in writing**, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate.

Rule 12(b)(6) Entitles Defendants to An Order Dismissing This Case.

The Complaint fails to state a claim upon which relief may be granted. Rule 12(b)(6), Ariz. R. Civ. P. In considering such a motion the trial court must take as true the allegations of the Complaint. *Mohave Disposal, Inc v. City of Kingman,* 186 Ariz.

343, 346 ,922 P.2d 308, 311 (S.Ct. 1996). The Court looks only to the pleading itself and considers only well-pled facts. *Cullen v. Auto-Owners Ins. Co.* 218 Ariz. 417, 189 P.3d 344, 346 (S. Ct. 2008). Conclusions unsupported by well-pled facts are not considered. *Id.; Stauffer v. Premier Service Mortgage, LLC,* 240 Ariz. 575, 382 P.3d 790, 793 (Ct. App. 2016). In order to be upheld on appeal the Court must find that the plaintiff would not be entitled to relief under any facts susceptible of proof. *Menendez v. Paddock Pool Construction Co.,* 172 Ariz. 258, 836 P.2d 968, 971 (Ct. App. 1991). It is the pleader's burden to include "a short and plain statement of the claim showing that the pleader is entitled to relief." *Rowland v. Kellog Brown and Root, Inc.,* 210 Ariz. 530, 115 P.3d 124, (Ct. App. 2005). In order to do so in this case, plaintiff must recite the existence of a written fee agreement that complies with ER 1.5(b), *supra.*

In *Levine v. Harlason, Miller, Pitt, Feldman & McAnally, PLC,* 1CA-CV-0590, (Decided 1/25/2018; Petition for Review Pending, CV-18-0068PR) plaintiff Jack Levine sued to recover contingent fees without a written fee agreement. Like plaintiff in this action, he attempted to cover his oversight by asserting a claim for *quantum meruit*. The action was dismissed under Rule 12(b)(6) and affirmed on appeal. The Court of Appeals pointed out:

> **Although "recovery under *quantum meruit* presupposes that no enforceable written or oral contract exists,"** 42 C.J.S. *Implied Contracts* § 62 (2017); *see also W. Corr. Grp., Inc. v. Tierney*, 208 Ariz. 583, 590, ¶ 27 (App. 2004) (citing *Blue Ridge Sewer Improvement Dist. v. Lowry & Assocs., Inc.*, 149 Ariz. 373, 375 (App. 1986)), this does not mean the remedy is available in every circumstance where no contract exists. **"[E]quitable relief is not available when recovery at law is forbidden because the contract is void as against**

> **public policy."** *Landi v. Arkules*, 172 Ariz. 126, 136 (App. 1992); *see also Mousa v. Saba*, 222 Ariz. 581, 587, ¶ 27 (App. 2009) (denying the plaintiff recovery in unjust enrichment for performance of illegal broker services); *Peterson v. Anderson*, 155 Ariz. 108, 113 (App. 1987) (denying recovery for a contract claim of an out-of-state attorney seeking payment pursuant to a fee-splitting arrangement that required him to practice law in a manner that was against public policy).
>
> Fastcase, p. 4, ¶8. (Emphasis added)

The Court provided the following explanation of why public policy demands a written fee agreement between lawyers and clients:

> ¶12 The Arizona Rules of Professional Conduct are designed to prevent harm and protect clients. *See In re Zang*, 154 Ariz. 134, 144, 146 (1987) (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 463-64 (1978)). An oral agreement for legal services may mislead, misinform, or confuse the
>
> Page 6
>
> client. *See* ER 1.5, cmt. 2 ("A written statement concerning the terms of the engagement reduces the possibility of misunderstanding."). Moreover, when an attorney fails to follow ER 1.5, one or both parties may later attempt to alter the terms of the representation and/or payment during the course of litigation. A client, dissatisfied with the outcome, may assert he was misled by an unscrupulous legal adviser and refuse to pay the agreed-upon amount, or an attorney may spend more time on a case than anticipated and attempt to increase his recovery to offset those additional expenditures. Such disputes devolve into self-serving recollections of how the agreement was formed and what the parties intended at the litigation's outset. As the disciplinary judge stated in the course of separate proceedings against Appellant in connection with this matter, ER 1.5 "avoids precisely the chaos in the attorney client relationship [that Appellant] brought by seeking to obtain a division of the fees contrary to the ethical rules." *See In re Levine*, PDJ 2017-9033 (State Bar of Arizona disciplinary proceeding Aug. 25, 2017) (decision and order imposing sanctions), at *22.

The Court also pointed out that the failure to document a fee agreement is a violation of the Arizona Rules Professional Conduct.

> ¶13 Reducing a fee agreement to writing ultimately protects both the attorney and the client in the event of a fee dispute and seeks to avoid unnecessary litigation. Appellant did not embrace these protections when he undertook the Clients' representation. His actions violated the Arizona Rules of Professional Conduct, and his reliance upon the asserted existence of oral contingent fee and division of fee agreements are void as against public policy. Therefore, recovery in *quantum meruit* is not available.

Levine involves an oral contingent fee agreement. Plaintiff Kelly McCoy apparently alleges the existence of an oral hourly fee agreement. That said, there is no basis to distinguish the *Levine* opinion because it does not turn on the nature of the representation. It turns on the absence of a writing in accordance with ER 1.5. Plaintiff's Complaint fails to state a claim upon which relief may be granted.

Defendants Are Entitled to Sanctions.

Attached as Exhibit "A" is a letter from undersigned counsel for defendants to attorney Walid Zarifi, the Kelly McCoy lawyer that signed the Complaint in this action. Exhibit "A" includes a request to withdraw the claim pursuant to the notice provision of ARS §12-349(C):

> C. Attorney fees shall not be assessed if after filing an action a voluntary dismissal is filed for any claim or defense within a reasonable time after the attorney or party filing the dismissal knew or reasonably should have known that the claim or defense was without substantial justification.

Mr. Zarifi responded personally and conveyed his clients' position: "Go ahead and file." Sanctions are now appropriate under Rule 11(b) and ARS §12-350:

> 12-350. Determination of award; reasons; factors
> In awarding attorney fees pursuant to section 12-349, the court shall set forth the specific reasons for the award and may include the following factors, as relevant, in its consideration:
>
> 1. The extent of any effort made to determine the validity of a claim before the claim was asserted.
>
> 2. The extent of any effort made after the commencement of an action to reduce the number of claims or defenses being asserted or to dismiss claims or defenses found not to be valid.
>
> 3. The availability of facts to assist a party in determining the validity of a claim or defense.
>
> 4. The relative financial positions of the parties involved.
>
> 5. Whether the action was prosecuted or defended, in whole or in part, in bad faith.
>
> 6. Whether issues of fact determinative of the validity of a party's claim or defense were reasonably in conflict.
>
> 7. The extent to which the party prevailed with respect to the amount and number of claims in controversy.
>
> 8. The amount and conditions of any offer of judgment or settlement as related to the amount and conditions of the ultimate relief granted by the court.

Rule 11 sanctions are to be imposed when a lawyer knew or should have known that the pleading being signed and filed was substantially lacking in merit. Although the *Levine* decision was published less than 90 days ago, Rule 11 cases against lawyers have existed for decades. E.g., *James, Cooke & Hobson, Inc. v. Lake Havasu Plumbing & Fire Protection*, 177 Ariz. 316, 868 P.2d 329 (Ct. App. 1993); *Boone v. Superior Court*, 145 Ariz. 235, 700 P.2d 1335 (S. Ct. 1985). Even applying *Boone's* rather liberal rule of, "a good faith belief, formed on the basis of that reasonable investigation, that a colorable claim exists," (Id. at 1341) signing the Complaint in this action violated

Rule 11(b) and warrants sanctions pursuant to ARS §§12-349 and 12-350, specifically, double damages of $5,000 plus attorney's fees and costs incurred to defend this action.

The Subject Of The *Levine* Decision Was Disciplined For This Conduct.

On September 28, 2017 the Presiding Disciplinary Judge published his findings in PDJ-2017-9033, styled "In The Matter Of A Suspended Member Of The State Bar Of Arizona, Jack Levine, Bar No. 001637, Respondent." One of the counts resulting in further discipline—to a lawyer well known to the State Bar Disciplinary Committee—was the subject of the *Levine v. Harlason, Miller, Pitt, Feldman & McAnally* decision. This case and the underlying disciplinary order arose from conduct virtually identical to the events leading up to the case before this Court. The Final Judgment and Order is attached as Exhibit "B." This Order states:

> In Count III, Mr. Levine argued he "totally complied with all the requirements of ER 1.5(e)," because "to date, there has been no division of any fees between Respondent and Attorney Jerry Krumwiede." (Emphasis in original). [Levine Prehearing memorandum.] His argument fails. He seeks to obtain that which the ethical rules categorically prohibit under the facts before us. Mr. Levine states he relies on the fee agreement the Erhardts signed with Mr. Krumwiede because it "expressly authorized Mr. Krumwiede to associate counsel." (Emphasis in original). [Id.] Such reliance is revealing.
>
> Exhibit "B" at 20 (Emphasis added)

The Order concludes with:

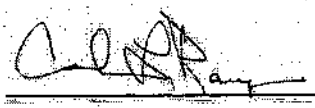
> We find there was no ER 1.5 compliant approval in writing signed by the clients. He may have had an informal relationship with Krumwiede. But the language of the rule is clear and explicit. The client must agree "in a writing signed by the client."
>
> Exhibit "B" at 23 (Emphasis added)

Defendants Are Entitled To The Remedies They Seek

Taking all allegations of plaintiff's Complain as true, it still fails to state a claim upon which relief may be granted. Lawyers that choose not to comply with ER 1.5 cannot seek judicial assistance to collect unpaid fees. In addition, lawyers filing cases in the Superior Court are held to know not only the law but also the Rules of Civil Procedure. Rule 11(b) imposes a duty to certify that a claim or defense is supported by both law and facts. The Complaint in this action was filed in violation of that rule. Defendants are entitled not only to a dismissal with prejudice but also to sanctions to include their fees, costs and double damages up to the statutory maximum of $5,000. This Court is respectfully requested to grant the relief the defendants seek.

DATED this 3 day of May, 2018

CALVIN L. RAUP, PLLC



Calvin L. Raup
Attorney for Defendants/Counterclaimants

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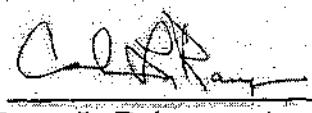

For

Larry L. Debus
Co-counsel for Defendants/Counterclaimants

E-Filed this ____ day of May, 2018

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Plaintiff/counterdefendants

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

KELLY MCCOY, PLC, an Arizona professional limited liability company,

Plaintiff,

v.

DESERT PALM SURGICAL GROUP, PLC, an Arizona professional limited liability company; *et al.*,

Defendants.

DESERT PALM SURGICAL GROUP, PLC, an Arizona professional limited liability company; *et al.*

Counterclaimants,

v.

KELLY MCCOY, PLC, an Arizona professional limited liability company; *et al.*

Counterdefendants.

No. CV2018-003112

RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND MOTION FOR SANCTIONS

(Assigned to the Hon. Karen Mullins)

Plaintiff Kelly McCoy, PLC, an Arizona professional limited liability company (the "Firm"), responds in opposition to defendants' motion to dismiss and motion for sanctions. Neither motion is well taken and must be denied. Alternatively, to the extent the Court finds that the Firm's complaint fails to state a claim upon which relief can be granted, the remedy is to allow the Firm the opportunity to amend its complaint to assert

the "magic language" defendants argue is missing, rather than the Draconian remedy of dismissal with prejudice. This response is supported by the following memorandum of points and authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

Relying upon the Ethical Rules, defendants suggest that the Firm has failed to state a claim for either breach of contract or *quantum meruit*. Defendants' arguments are without merit.

A motion to dismiss pursuant to Ariz. R. Civ. P. 12(b)(6) is designed to test the legal sufficiency of the complaint when accepting as true the allegations of the complaint. *Parks v. Macro-Dynamics, Inc.*, 121 Ariz. 517, 519, 591 P.2d 1005, 1007 (App. 1979) ("A Rule 12(b) motion to dismiss for failure to state a claim, which assumes the complaint's allegations are true, attacks the legal sufficiency of the complaint."). The salient allegations of the Firm's complaint include:

- Defendants "retained the Firm" to represent them in state court litigation. *Id.* at ¶ 5.
- Defendants "retained the Firm" to represent them in related bankruptcy proceedings. *Id.* at ¶ 6.
- Defendants "retained the Firm" to represent them in connection with an appeal to the Arizona Court of Appeals. *Id.* at ¶ 7.
- The Firm "performed legal services" on behalf of the defendants in all three matters. *Id.* at ¶ 8.
- Defendants "failed and refused to pay all amounts due and owing for services rendered." *Id.* at ¶ 9.
- Defendants' failure to pay for legal services "has resulted in a material breach of the engagement agreement between the Firm and [defendants]." *Id.* at ¶ 10.
- "As a result of defendants' breaches of the engagement agreements, the Firm has incurred damages." *Id.* at ¶¶ 11-12.

These allegations, which are assumed to be true, set forth the *prima facie* elements for breach of contract. *Chartone, Inc. v. Bernini*, 207 Ariz. 162, 170, ¶ 30, 83 P.3d 1103, 1111 (App. 2004) (breach of contract claim requires existence of contract, breach of the contract, and resulting damages).

Defendants further conflate the marked distinction between contingent fee agreements and other engagement agreements between lawyer and client. The case upon which defendants rely—*Levine v. Haralson, Miller, Pitt, Feldman & McAnnaly, PLC*, 783 Ariz. Adv. Rep. 6, ___ P.3d ___ (App. 2018)—is simply inapplicable to this matter. *Levine* involved a lawyer's effort to recover a contingent fee in *quantum meruit* in a situation in which he did not have a written fee agreement signed by the clients. *Id.* at *1, ¶ 1. The Court of Appeals held that, "in the absence of a written fee agreement, an attorney may not recover the *quantum meruit* value of his services **because unwritten contingent fee agreements** are void as against public policy." *Id.* (emphasis added).

According to defendants, no distinction exists between the unwritten contingent fee agreement in *Levine* and what defendants characterize as an oral hourly fee agreement. Motion at 5:10-14.[1] Defendants are incorrect. Contingent fee agreements are treated uniquely from other engagement agreements. Under ER 1.5(c), a contingent fee agreement "shall be in a writing **signed by the client** and shall state the method by which the fee is to be determined . . ." (emphasis added). Pursuant to ER 1.5(b), however, non-contingent fee agreements do not require a client's signature—rather, the lawyer need only provide to the client in writing "[t]he scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. . ." This is precisely what the Firm did prior to undertaking defendants' representation. Notwithstanding, the Firm did receive its engagement agreement signed by defendants.

Attached hereto as Exhibit "A," "B," and "C" are the writings evidencing the fact that defendants retained the firm to represent them in the state court litigation, the

[1] The Firm did not allege that the engagement agreements with the defendants were oral.

bankruptcy proceedings, and the appeal, respectively. Moreover, attaching these documents to this response does not transform defendants' Motion into a motion for summary judgment under Rule 12(b)(6), Ariz. R. Civ. P. Matters outside the pleadings "do not include matters that, although not appended to the complaint, are central to the complaint." *Workman v. Verde Wellness Ctr., Inc.*, 240 Ariz. 597, 602, ¶ 13, 382 P.3d 812, 817 (App. 2016) (citation omitted), review denied (May 24, 2017). The engagement agreements referenced in the Complaint are central to the complaint.

The Firm also asserted a claim for *quantum meruit* together with a breach of contract claim because, although it received a signed engagement agreement from defendants, the Firm is unable to locate the signed engagement agreement. The inability to locate the signed engagement agreement, however, is not fatal to a claim for *quantum meruit* where the scope of the representation and basis for the fee was provided in writing to defendants, the legal services were actually performed, defendants received the benefit of those services, and defendants at least partially performed their payment obligation for those services.

Finally, defendants' claim for sanctions is spurious. Neither Rule 11, Ariz. R. Civ. P., nor A.R.S. § 12-349 provide a basis to award sanctions. The complaint filed against defendants for recovery of unpaid fees was not brought for an improper purpose, has evidentiary support, and was not brought without substantial justification—i.e., groundless and not made in good faith. Defendants have simply failed to honor their payment obligations and the Firm is entitled to recover the value of the services it provided over a several year time span.

CONCLUSION

The Firm has stated a claim for both breach of contract and *quantum meruit*. Defendants' efforts to avoid their obligations to the firm are without merit. Nevertheless, to the extent the Court believes that the Firm has failed to state a claim for either cause of action, the Firm requests leave of court to file an amended complaint to remedy any perceived error in original pleading. *Dube v. Likins*, 216 Ariz. 406, 415, ¶ 24, 167 P.3d

93, 102 (App. 2007) ("Before the trial court grants a Rule 12(b)(6) motion to dismiss, the non-moving party should be given an opportunity to amend the complaint if such an amendment cures its defects." (citation omitted)). Finally, defendants have failed to demonstrate with even a modicum of evidence or argument that any sanctions are appropriate. Defendants' motion must be denied in its entirety.

RESPECTFULLY SUBMITTED this 22nd day of May 2018.

KELLY McCOY, PLC

By /s/ Walid A. Zarifi
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Original e-filed and a copy
mailed this 22nd day of May 2018 to:

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-and-

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/s/ Walid A. Zarifi